

24 December 2020

Our ref: LP-MC

Ms Julie Steel
Executive Director
Supreme District and Land Courts
PO Box 15167
CITY EAST QLD 4002

By email: [REDACTED]

Dear Ms Steel

COVID-19 measures in State Courts

The Queensland Law Society (QLS) acknowledges and thanks you for the considerable work undertaken by the Queensland Courts to quickly adapt processes during the COVID-19 pandemic and the Courts extensive consultation with QLS and other affected stakeholders. The Courts and registries have been understanding, pro-active, responsive, and consultative in implementing measures for which QLS and its members are very appreciative. As you are aware QLS is very strongly of the view there is significant utility in many of the measures implemented being adopted permanently.

QLS has sought feedback from our members, including members of our legal policy committees, about issues or problems they have faced in using the Courts through this time, as well as measures they would like to see remain once the effects of the pandemic ease.

The issues identified have generally fallen into three broad themes:

- court documents;
- appearances; and
- infrastructure and technology.

As promised some months ago, this letter provides comments on these three areas and some additional points for discussion. We have, addressed civil and criminal processes separately where appropriate. Similar letters are also being sent to the Chief Justice of the Supreme Court (with a copy being provided to the Attorney-General), the Chief Judge of the District Court, the Chief Magistrate and Brigita Cunningham, Executive Director, Magistrates Courts Service. QLS looks forward to discussing these issues with you in the New Year.

General observations

Many of the issues raised concern the ability to prepare and file electronic documents and conduct proceedings electronically. COVID-19 events have confirmed the benefits of such processes, including:

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- enhancing efficiencies, particularly given that most business in the State is conducted electronically;
- reducing legal costs for clients;
- reducing operating costs for law firms;
- reducing inefficiencies within the courts and the stretching of their resources;
- reducing delay and uncertainty in proceedings;
- encouraging the use of technology in litigation, generally;
- enabling individuals and businesses to continue using Queensland services to resolve disputes;
- enhancing access to justice;
- supporting more flexible work practices for lawyers and clients; and
- enhancing public health.

Concerns regarding the cost of access to justice remain, an important consideration for all solicitors and their clients. Solicitors when providing fee estimates and to clients must act in the best interests of their clients and they inevitably therefore when advising in relation to the dispute resolution processes must consider court and ADR systems available to their clients. Solicitors and clients will therefore most likely choose the jurisdiction that has the most cost effective and efficient processes.

A current prominent example of where it is imperative to demonstrate efficient and effective processes is in class actions, which require a substantial investment from firms and litigation funders. These parties may be less likely to commence in Queensland courts if they do not offer the same level of services as other courts.

Encouragingly, recent steps have been taken by the State Government and the Courts which with some refinement and additional investment will hopefully enable the courts to compete with other jurisdictions.

Court documents

Electronic filing

The measures taken by the Courts at the height of the pandemic, including the “drop box” in Brisbane and the acceptance of some documents via email, were warmly welcomed and embraced by the profession and its clients.¹

While these measures have assisted members, the way documents are filed in the courts still creates significant issues.² QLS continues to advocate for and support a broad roll-out of

¹ We acknowledge that this year, the Supreme and District Courts have permitted notices of discontinuance to be filed electronically.

² -In many cases, legal practices are forced to engage a town agent to file documents or alternatively send legal documents by post or courier. From regional locations, this can take over a week. Where there are postal delays or loss of documents, this can further impede the process and add to unnecessary delays and costs.

-Most court documents are created electronically. To file a hard copy, a firm needs to print the documents, sign them, make a few copies, send them for filing (by way of a clerk, town agent or by posting), copy/scan the sealed versions when they come back (to make them electronic again) and then serve them. When posting documents to the court for filing, individual letters are needed for each matter so documents are not inadvertently placed on the wrong court file.

-This causes delays, which is particularly concerning for urgent filings. The *Uniform Civil Procedure Rules 1999* requires that documents be served within three clear days of a hearing. Leave of the court

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electronic filing for documents, across all courts throughout the State. We believe this is critical to ensuring the effectiveness and efficiency of the justice system, and bringing Queensland courts in line with the majority of other jurisdictions in Australia.

In addition to addressing issues currently faced by our members when filing hard copies documents, electronic filing and processes in all Queensland courts would create additional benefits, such as:

- the ability to check the status of matters online, significantly reducing the number of phone calls to court staff;
- removing the need for court staff to return documents by post;
- providing regional practitioners with the ability to inspect court files, which is currently unavailable to them;
- ensuring limitation periods for filing (such as 60 days for a compulsory conference) are adequate for all practitioners; and
- facilitating stronger security practices in respect of access to court material.

In the criminal law jurisdiction, the utility of such services in remote locations would be of great benefit and would decrease many logistical challenges.

We are aware that work is progressing to establish and roll out electronic filing, commencing with civil jurisdictions in the lower courts. QLS welcomes this development and acknowledges and thanks the Courts for their work in this area. QLS is committed to assisting the Courts and the Department of Justice and Attorney-General in the development and implementation of the system.

We are also aware of current electronic filing pilots, including the pilot program allowing for consent order applications electronically, along with granting consent orders by the registrar, pursuant to rule 666 of the *Uniform Civil Procedure Rules 1999 (UCPR)*. We again acknowledge the Courts efforts and the ongoing consultation with the QLS in this respect and in respect of the work you are doing more broadly in reviewing the Civil Case Management System.

Our members report that improvements to better allow for electronic payment would be of great benefit also.

Signing documents

QLS welcomed the announcement that Queensland Court registries are now accepting any hard copy UCPR document for filing (except where it is a sworn document) that has a wet, stamped or electronic signature of the applicant or the applicant's lawyer/law firm.

We note that the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020*, now extended by the *COVID-19 Emergency Response and Other Legislation Amendment Act 2020*, allows affidavits to be electronically signed and remotely witnessed. We understand that such electronically signed affidavits will presently be accepted by the registry, however the News Item on the courts' website: "Use of electronic signatures" issued 28 May 2020, expressly excludes e-signed "sworn/affirmed affidavits" from the

needs to be sought to serve after this time, creating uncertainty for parties and this may also have an adverse impact on the proceeding.

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operation of the relaxation. In light of the regulation expressly authorising such affidavits, we request that this news item be updated to remove that exclusion.

QLS considers these reforms have great utility, through significantly increasing access to justice and should therefore remain in place after the regulations expire. Our members, particularly our regional practitioners, believe these reforms offer significant benefits in terms of efficiency, cost-effectiveness, and reliability. The benefits will only be further enhanced as the Courts transition to e-filing and an improved Civil Case Management System.

Accessing court files electronically

In addition to improving the intake of documents referred to above, which is of great importance during the current climate, parties to a proceeding need to be able to interact with the files in an efficient and effective way. This involves accessing documents electronically once filed, and the ability to conduct an electronic hearing. Of course the Courts, and in particular the judiciary, similarly need to be able to work effectively with the filed documents.

We note that electronic access to documents once filed is to form part of the new system being developed by the Courts. We again thank you for the work you are doing in this space and confirm our willingness to contribute. In the coming months, we will work towards providing further advice as to how documents may be made accessible. We look forward to working with you on this project.

Having such facilities in place provides resilience to the justice system in times of crisis. In addition to the benefits associated with electronic filing, the flexibility it would allow for court hearings is less easily appreciated. For example a judge in Mount Isa could access the court file for an urgent application in Brisbane. In strict quarantine, cases could be heard in which all parties, including the judge or magistrate, are at home or in safe locations and able to access the relevant documents. These systems would provide resilience in other types of crisis as well. If rioters burned down a courthouse, the records would be recoverable from the electronic backup. Although easily dismissed, the prospects of such an event are somewhat greater than remote, particularly given the Supreme Court in Brisbane was destroyed by arson in living memory. In times of unrest and pandemic, electronic court files would make it easier to set up emergency courts in alternate locations. In the 2011 floods, court services in Ipswich had to be suspended however With electronic records, a tribunal like QCAT could have easily re-located to commercial premises on higher ground.

Although eCourts is very much appreciated by our members, the functionality is limited to certain jurisdictions or lists. The broad lack of digital access for parties in Queensland, especially given the decentralised nature of this state, is problematic. Digital Access systems are available in most other jurisdictions. Our members, including regional members, report that interacting with Federal Courts is currently much easier than with State courts.

Accessing court files electronically is also relevant in the criminal law jurisdiction. There is great utility for regional and remote legal services to have available court resources in an electronic way as this would decrease many logistical challenges. An additional benefit may also be the ability for steps to be taken to support regional courts including support from metropolitan services and courts/judicial officers who could more readily hear matters remotely in those circumstances.

Court appearances

Civil jurisdictions

Callovers and applications via video

Our members have reported that many of the initiatives taken by the courts during the COVID-19 pandemic have improved efficiency, particularly the use of video conferencing for hearings and mentions.

Some of our members have however reported issues with scheduling. In some instances, there has been very late notification of a callover to be held remotely, for example, notice being given the day before. This has proved difficult for litigants and practitioners who were appearing at callovers in multiple courts. We understand in some locations there is cooperation between the registry and the profession such that when the registry receives notification of the callover, the practitioners do as well and there are no delays.

However in Bundaberg, for example, the court registry does not appear to have a database of email addresses to notify practitioners of call overs. This has meant that a number of practitioners have been left off email lists being sent by the registry. In one instance the registry failed to notify the managing practitioner at Legal Aid Queensland on the assumption that that practitioner had no matters on the list. While aberrations such as this have been addressed directly with the registry at a local level, we are not aware that there has been systemic addressing of the issue of the contact email lists.

In some regional courts, the technology has not always permitted appearances via video and, in some courts, telephone appearances are not able to be conducted by, for example, chorus call, but by the parties being joined by two telephone lines through the intercom system. These issues obviously require further somewhat urgent attention.

Notwithstanding these technical and administrative glitches, QLS members strongly support the continued conduct of callovers and applications by way audio visual facilities, after the pandemic ceases. QLS considers the ability to hold hearings by video should also be encouraged where appropriate.

We are concerned by the wording of the updated "Protocol for applications in the Supreme Court" which states, in paragraph 8, that parties and practitioners in applications requiring an oral hearing are expected to attend court in person for the hearing. We note that a similar requirement also appears in the recent "Protocol for Corporations Registrar Applications".

We understand the updated Protocol was not intended to represent a change in the Court's willingness to hear matters in ways other than in-person, but rather was a way to accommodate those who wished to appear in person. On that understanding, we ask that consideration be given to modifying the Protocol to give parties the clear option, without requiring leave to be obtained.

As previously stated, the overwhelming feedback QLS has received is that the ability to appear via telephone and video link has improved efficiency, promoted a co-operative approach amongst many practitioners and attracted broad positive responses from members of the judiciary. Most importantly it has very significant access to justice benefits for litigants by reducing cost, increasing accessibility for regional Queenslanders and enhancing solicitor's efficiency.

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It is our strong view that these measures should not be removed in circumstances where there are still some health directives in place, for example with respect to "social distancing" and consideration be given to adopting them permanently. Many lawyers (and support staff) continue to work from home, which in some firms, and for some people, will continue as a permanent work arrangement. In addition, the callover process and time spent waiting outside courtrooms for a matter to be heard makes it difficult to adhere to health directives and is not an efficient use of time. The use of video appearances largely eliminates all these issues.

In addition to the use of technology, our members note that the historical in person callover process for civil matters has inefficiencies and is expensive. The way in which matters have been called over since March has been well-received by our members and minimises these concerns. Members hold reservations about reverting to the previous practice of parties gathering in a courtroom and possibly waiting for a considerable time before their matter is heard. As discussed, such a practice remains difficult in light of health directives. It also increases the cost and burden on lawyers (particularly sole practitioners or those who need to travel, for example into the Brisbane CBD), their staff and their clients.

Dealing with matters without oral hearing/on the papers

During the height of the pandemic, some matters were heard or adjourned on the papers or by electronic consent. This initiative has been beneficial when the matter is administrative in nature and when all the parties are seeking the same outcome. In these matters, there are significant savings in costs and time and corresponding benefit in access to justice.

For applications generally, there is benefit in a judge determining whether a matter can be dealt with on the papers, without any appearance at all. In suitable matters, this process has been effective and allowed for orders to be made almost immediately. It appears this would be a very cost effective way for consent orders and other straight forward applications, particularly where the relevant documents can be emailed through to the Associate or uploaded through an electronic filing system to be dealt with.

Hearings

We acknowledge that the Supreme Court in Brisbane has had, for a considerable time, a simple e-trial platform that can provide substantial efficiencies for parties and the judiciary. Unfortunately, our members' experience is that there has been a limited uptake of e-trials. Further, there appears to be a lack of facilities available in regional courthouses.

We consider that the conduct of hearings electronically, including contested applications, is the natural extension of, and enhances the value of, many of the initiatives implemented in response to COVID and the future electronic filing progress (such as the ability to make and lodge electronic documents).

Consistent with feedback regarding callovers and applications, members have also provided positive feedback regarding costs and administrative efficiencies of trials conducted using video link and other forms of technology.

Some members have advised a preference for witnesses giving evidence via video without the cost and inconvenience, particularly in this time, of travelling. In other cases, for example in personal injuries matters, there appears to be a preference for evidence in person.

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We note that the default position is that experts are able to give evidence remotely, whereas it is the reverse for lay witnesses. We support flexibility, particularly in the current environment. It is however, of course critical that the Courts be provided the necessary infrastructure to provide this flexibility and QLS will continue to advocate for this.

Criminal jurisdiction

Adjournments

The Magistrates Court has recently updated its online platform for electronic adjournments, and in general this has been positively received. The form is better designed than the one previously utilised. The option for electronic adjournments, particularly for callovers, is an initiative that we consider should be retained because of the practice, time and costs efficiencies it creates. The higher courts have a less developed practice for electronic adjournments. QLS would advocate for electronic adjournments being an option in the higher courts where there is agreement between the parties and the adjournment is uncontroversial.

Further, due to the uptake of this practice during the COVID lockdown, court lists were reduced, anecdotally, by about half the usual numbers having positive effect on court time needed for daily mentions and reviews.

QLS sees the only present difficulty being with the requirement for 2 clear days. Matters naturally work to the court date as a deadline and often disclosure, instructions, and funds come to hand in the last 3 days. The process would work more efficiently (that is, with fewer court events) if it could be used on 24 hours' notice.

QLS asks for consideration of this model by the District and Supreme Courts and the Society would be pleased to advocate for any necessary legislative changes to support such a proposal.

Sentences and non-jury matters

Remote appearances in sentences and non-jury matters is supported. This was utilised in Brisbane and in circuit courts during the pandemic and resulted in significant cost savings and reduced travel time. When combined with staggered starting times, this proved very efficient.

Callovers, mentions and other administrative appearances

As a result of the pandemic, remote appearances for reviews and mentions using chorus call were adopted as the default position in the Supreme and District Courts. Video link and chorus call have also been used in the Magistrates Courts in Brisbane and in circuit courts. These initiatives resulted in significant cost savings and reduced travel time. When combined with staggered starting times, this also improved efficiency and QLS supports maintenance of this as the default position in the higher courts where fewer unrepresented clients attend.

Staggered starting times in the Magistrates Court were not as effective due to the volume of matters, but were sometimes beneficial.

In general, many criminal lawyers support the option of appearing by way of telephone or video-link at callovers, mentions and other administrative appearances, particularly in circumstances where only the appearance of the legal representative is required. This option

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creates both time and costs efficiencies, which in turn are able to be passed on to the client. It also creates much needed flexibility for solicitors and counsel who may be working parents, carers or otherwise work outside of usual business hours or remotely.

Some issues can arise in particular cases. Some courts appear to manage the processes of telephone and video link appearances more effectively than others. An example is the Southport District Court, which had listed groups of matters for mention in 15 minute intervals and then provided the details for legal representatives to phone in and stay online until their matter is mentioned. A less preferable approach, which appears to be utilised at the Magistrates Court level (particularly in regional jurisdictions) is where the Court will call the practitioner when the matter is ready to be mentioned. In many cases, the phone call could occur anytime between 8:30am and 5:00pm, which creates challenges for practitioners to be available.

Matters requiring oral evidence

QLS members have significant reservation about conducting criminal hearings by video where they involve the giving of evidence by witnesses. There remains a strong preference in these hearings for witnesses to attend a courtroom and give evidence in person. This is of particular importance when there are issues of credit.

There are limits when using a video platform in being able to properly assess the manner in which a witness gives evidence and having them feel the sense of occasion appropriately attaching to giving evidence about the commission of a criminal offence.

While the option to conduct hearings by whichever method is appropriate to the parties and the Court should be available, regard should also be had to maintaining the principles of open justice, which may be more difficult in electronic hearings. If electronic proceedings are made open to the public then there are risks of disruption and unauthorised recording and broadcast. However, we note that disruption and unauthorised recording could also occur in person. Decorum may also be harder to maintain, especially with unrepresented parties and it is possible that a confidential conversation, for example, between a Judge and Associate, could be heard. These issues should be addressed in any IT/systems' review.

Other issues

For several years now there has been a trend towards prisoners appearing by video-link. In the Magistrates Court, this is done even for sentences. This approach saves money in prison transport and the management of prisoners at the courthouse. Some of our members report this process has worked very well and has been embraced by criminal lawyers, save for obtaining signed instructions (the requirement was waived by Legal Aid for a time but is now a requirement again, which is causing difficulties).

However, some of our members report that this process has come at the cost of the prisoner's access to legal advice on the day of the hearing.

QLS considers there is a need for consultation booths at QCS facilities and remand centres. Where this is used in other jurisdictions, a scheduled time is made for the solicitor and client to confer, before and after the time scheduled for the hearing. If that facility was enhanced with a

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capacity to show documents to prisoners, and to obtain signed instructions, then many of the disadvantages would be overcome.

In Queensland, a pilot program was trialled about 6 years ago. The technology to implement that program exists. The value to the authorities in such facilities is that the use of these systems would avoid wasted court time. We are aware of one instance where an arraignment in the District Court could not be completed because the prisoner did not understand one part of the indictment, and he could not speak to his lawyer on the day. At Magistrates Court callovers, it is quite common for video-link matters to be adjourned with no progress made, effectively wasting the Court's time, when a conversation with a duty lawyer would have progressed the matter.

QLS is very conscious that there is a need for caution when considering wholesale change to face-to-face time with clients. It can be more difficult by phone or video to have complex communications with clients, particularly those from disadvantaged backgrounds, and the need for it to be done remotely (i.e. prison visits) can be difficult to accommodate at times. Juvenile clients in particular are a key cohort in this regard, where it can be challenging to obtain instructions generally.

The best approach is for there to be flexibility when interacting with the Courts and with clients. The clear advantages to in-person meetings and appearances, however, there are circumstances where this may not be possible. QLS supports the adoption of processes and facilities that enable access to justice and efficient and effective operation of the justice system.

Technology and infrastructure

Whilst we understand that some courts located in Brisbane and other major centres have the capacity to conduct electronic hearings, including having witnesses appear remotely via video link, we understand that not all courts and all regions have the same capability in this regard.

QLS has sought advice from members regarding the impact of the inability to use technology to conduct court matters. Our regional members are often the most affected in this regard and it is clear that the current deficiencies in court infrastructure and technology discriminate against regional legal practitioners and impose unnecessary additional costs on their clients. For example, difficulties have been experienced with connections and echoing in the court room. One Magistrate was very clear in notifying the profession of the Court's requirements when appearing by phone and regular meetings with the profession have provided a forum to address any ongoing issues.

Ensuring appropriate technology is available will allow court users, including witnesses, to adhere to current public health guidelines and will also better facilitate the efficient conduct of proceedings.

Some platforms, such as Pexip, which was being used in some State courts to allow video conferencing into courts can also support telephone link-in for parties who do not have the capacity to video in. Ensuring that platforms can be flexible and accommodate different users is important, as is the ability to control who is able to enter the "room" and the provision of break-out rooms. Any upgrades to court infrastructure should include a room in each courthouse with a screen for remote conferencing.

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QLS acknowledges, of course, that any upgrades to technology and other facilities may be part of longer term projects to be undertaken by the Courts. QLS considers, however, that the circumstances faced by Courts and users this year have demonstrated the benefits and the urgent need for these facilities to now be made available, and we would be pleased to see any possible interim measures be implemented as soon as possible.

Additional points

Communication with the courts


The pandemic has created increased options for dialogue between practitioners and the Courts. QLS asks that consideration be given to whether this is something that could continue in some format, given the benefits of ongoing engagement. Despite social distancing, the COVID-19 pandemic increased the level of dialogue between the solicitors' branch and the courts (mostly using video conferencing) and we are very supportive of this collaborative approach continuing.

Text message pilot, not operating prior to COVID lockdown.

The Department of Justice and Attorney-General has a service where a text message is sent to defendants due to appear in the Magistrates Courts (8 days out from a court appearance and the day before). We understand this has included information about court appearances and reference to the Legal Aid Queensland duty lawyer enquiry line. We understand there has been an increase in approaches to Legal Aid as a result of this initiative and that it is beneficial for both defendants and the courts. QLS strongly supports any initiative of this nature with such positive benefits.

QLS again thanks the Court administration for their work and assistance throughout 2020 and look forward to working with the Courts to continue our efforts to efficiently and effectively administer justice for our community.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.


Luke Murphy
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