

Memorandum

To: Directors
Constituent Body Presidents
Constituent Body Chief Executive Officers
Section Chairs

From: Pauline Wright, President

Date: 20 May 2020

President's update – 20 May 2020

Moving towards the COVID-19 recovery phase

Last Friday the Prime Minister announced the National Cabinet's agreed [three-step framework](#) for the easing of restrictions and entering Australia's recovery phase. The Prime Minister's announcement is of course welcome news for all Australians and for our own profession, highly anticipated. It is important to note that States and Territories will outline their own timetables for the three-step plan. And each stage would be assessed on its success, which would determine when to proceed to the next stage.

With this in mind, we will be returning to a changed world both with ongoing and new challenges and also many new opportunities around the way we work and our united voice in leading and promoting the legal profession.

As featured in yesterday's Law Council COVID-19 Update communication, the National COVID-19 Coordination Commissioner wrote to me in regard to preparing for Australia's recovery phase, in particular encouraging businesses and organisations to develop COVIDSafe Business Plans. The National COVID-19 Coordination Commission has developed an [online planning toolkit](#) to assist with the development of these plans for your organisation. The toolkit responds to the Australian Government's [National COVID-19 safe workplace principles](#) and complements the [Safe Work Australia online hub](#), which provides a range of resources and guidance tailored to each state and territory jurisdiction.

I am very pleased to inform you that under guidance of ongoing advice from the Federal and ACT governments, the Senior Management Team at the secretariat have begun their preparations for bringing back the staff team to the offices at 11 and 19 Torrens Street, Braddon. It is expected, pending further guidance by the governments, that over the coming weeks the reentry of the staff team will be staggered, allowing flexibility for staff who will continue carers' responsibilities for children (school age and below) with the full complement of staff in situ by late May.

As the restrictions relax around the country it will be wonderful to welcome back each Constituent Body as you return to your usual places of work over the coming weeks.

Mental Health and Wellbeing Pandemic Plan

I was pleased to learn of the National Cabinet's endorsement of the [Mental Health and Wellbeing Pandemic Plan](#) at their meeting held on 15 May

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The Plan acknowledges the significant impact that COVID-19 has had on the mental health and wellbeing of so many Australians, including mental health impacts from economic downturn through loss of income and job losses.

The Mental Health and Wellbeing Pandemic Plan has three core objectives to:

- Meet the mental health and wellbeing needs of all Australians to reduce the negative impacts of the COVID-19 pandemic in the short and long term;
- Outline seven key principles and 10 key priorities to inform the jurisdictions as they respond to the challenges of COVID-19 during the response and recovery from the pandemic; and
- Define governance, coordination and implementation requirements across jurisdictions to facilitate informed planning and decision making

The Commonwealth Government has also committed to investing \$48.1 million to assist the plan.

All governments agreed on the need for each jurisdiction to ensure that Australians receive the mental health services and support they require at this time, and in the coming phases of recovery and rebuilding.

Strong mental health will be a foundation stone as we move ahead, not just to productivity and the economy, but to family wellbeing, social cohesion, community functioning and national resilience.

Update on key activities

As I noted in my last update, since late March the Law Council Executive have been meeting twice a week to discuss emerging and ongoing issues in relation to our response to the COVID-19 pandemic. As of last week the Executive have now reverted to a weekly meeting format and will focus on emerging issues as we move into the recovery phase.

• Federal Courts

I would like to acknowledge the excellent work undertaken by the courts in federal jurisdictions for their innovation in responding to the COVID-19 pandemic. As you will be aware through our communications via the Law Council's regular COVID-19 updates for the past six weeks, these courts have been providing open and transparent information on an almost daily basis and have very much led the charge in implementing innovative solutions to ensure the continued operations of the courts and access to justice during this time.

In supporting the recovery phase in this area, the Law Council Committees and Sections have commenced initial work on the development of a set of principles regarding jury trials and the reduction of a backlog of cases during the recovery phase. Once these draft principles are sufficiently developed the Law Council will seek the views and input of the federal courts. In developing the principles, the Law Council aims to outline best practice for adoption by the legal profession when interacting with the courts post lockdown. I envisage that in the coming weeks we will share these documents with Constituent Bodies.

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- **Information Sharing Group update**

As reported in my last update the first meeting of the Information Sharing Group was convened on 14 April which I hosted by for the purpose of distilling and anticipating issues to be raised at the next meeting, which was to be attended by the Attorney General. This preliminary meeting was attended by the heads of federal jurisdictions, the President of the Australian Bar Association (ABA), the Acting Executive Director of the ABA, and Acting Chief Executive Officer and the Director of Policy.

The second meeting, held on 17 April 2020 and attended by the Attorney-General, included the addition of the Commonwealth DPP and an adviser to the Attorney-General.

During these meetings, participants acknowledged that in order to assist in the recovery phase it was essential to ensure the backlog of cases was minimised to the fullest extent possible.

Participants agreed that information sharing about processes that work well at the federal level might assist States and Territories to also clear any backlog of matters within their jurisdictions, and successful processes would be shared.

The third meeting of the group was held on Monday with the focus very much looking toward the recovery phase for the Courts. Across the jurisdictions, there is a strong appetite to continue with a number of the COVID-19 solutions that have been implemented, such as the ongoing value in virtual operations, in particular for short matters, vulnerable witnesses and increasing access to justice for people in RRR areas.

- **JobKeeper and special purpose entities**

Over the past two weeks the Law Council and the Taxation Committee of the Business Law Section and separately Law Firms Australia have advocated for an amendment to the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* for eligibility of special purpose entities to qualify for the JobKeeper payment package. The enclosed **Attachment** is a briefing note prepared for the Executive's information on 5 May 2020 which details the issue.

I welcome the sharing of this briefing note to the members of Constituent Bodies and the Sections. Although not all will qualify, the amendments we were able to achieve have enabled many more firms and barristers to qualify for the JobKeeper program.

- **Legal Assistance Funding**

On 6 May 2020 by the Attorney-General announced that legal assistance funding will be boosted by an additional \$63.3 million delivered this financial year and into the 2020/21 financial year. In response the Law Council distributed a [media release](#) welcoming the provision of additional funding, which arose from continued advocacy from the Law Council and other key legal assistance advocates from around the country. I am particularly pleased to see the recognition that investment is needed across legal assistance services and in particular addressing IT capability needs.

The Law Council has reiterated, and will continue to do so, that publicly funded legal services remain chronically underfunded. As we have all experienced, these services are

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continually in high demand and without long-term and substantive funding increases, many Australians will continue to be unable to access the legal services they need. These issues have only been exacerbated during the COVID-19 crisis.

The \$63.3 million in addition funding will be distributed as follows:

- \$49.8 million to allow the sector to respond to increased demand due to COVID 19, including:
 - \$29.8 million to respond to COVID-19 related issues, such as tenancy disputes, insurance, credit and debt related problems, and work-related claims; and
 - \$20 million specifically to assist those dealing with domestic violence matters.
- \$13.5 million to enable service providers to improve their technological (IT) capabilities.

The funding will be distributed to all subsectors including, Legal Aid Commissions (LACs), Community Legal Centres (CLCs), Aboriginal and Torres Strait Islander Legal Services (ATSILSs) and Family Violence Prevention and Legal Services (FVPLSs).

- **COVIDSafe App – Law Council Principles and Legislation**

As you will be well aware, one of the key components of the Australian Government's response to the COVID-19 pandemic has been the development and release of the CovidSafe App. Following the government's initial announcement in late April the Law Council drafted and submitted its [Principles for design of a COVID-19 contact tracing app](#) recommending a range of safeguards for consideration by the government in its design phase of the app and for the drafting of its relevant legislation.

The government released its Exposure Draft Bill for the COVIDSafe App in early May, and I was pleased to note that the draft Bill incorporated a good number of key elements of our *Principles* submission.

While the Exposure Draft Bill contained several welcome improvements to the Biosecurity Determination, the Law Council remained concerned that a number of key matters remained outstanding in the draft.

These concerns focused on ensuring that comprehensive oversight provisions are provided to the Privacy Commissioner, making the allowance for the prohibitions on the use and disclosure of COVIDSafe app data to have application after the automatic repeal, and applying a gradation to the maximum penalties.

Last week, the Privacy Amendment (Public Health Contact Information) Bill 2020 was introduced in Parliament. The Bill placed the regulatory framework for the app on a legislative footing and will replace the current Determination made under the *Biosecurity Act 2015* (Cth).

I was pleased to note, that the Bill presented to the Parliament had, to a point, addressed our concerns with the Exposure Draft from earlier in the month.

The Bill subsequently passed into legislation late last Thursday afternoon.

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There are a number of issues not dealt with in the legislation including an absence of protections for derivative data obtained from COVIDSafe app data, and prohibitions on reverse engineering of de-identified data.

It is important that the legislation and its practical application, and the operation of the app and data store, are kept under ongoing Parliamentary scrutiny, despite the urgent passage of this legislation. To this end, I look forward to engaging with the Senate Select Committee on COVID-19 on the COVIDSafe app and its governing legislation, and other matters arising in the course of the response to the COVID-19 pandemic.

Another concern was that because the COVIDSafe app data is held by an Australian wholly owned subsidiary of a US parent company, the data it holds is potentially accessible by warrant or subpoena under the US CLOUD Act. For that reason we have also advocated for the government to enter into an appropriate executive agreement with the US to minimise that risk.

- **Engagement and representation**

On 12 May, together with Mr David Neal SC (Co-chair, National Criminal Law Committee), Ms Sarah Pritchard SC (Chair, National Human Rights Committee) and Dr Natasha Molt, Director of Policy, I represented the Law Council at the Parliamentary Joint Committee on Intelligence and Security hearing on the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 (the IPO Bill). The key points raised in our submission to the Committee and reiterated at this hearing, included:

- The Law Council's acknowledgement of the challenges in timeliness and efficiency that law enforcement agencies have identified in investigating serious crimes in the digital era, in which crucial data can be stored in foreign countries.
- The Law Council's understanding of the opportunities that the recent enactment of the US CLOUD Act and the UK Crime (Overseas Production Orders) Act present for Australia to participate in agreement-based arrangements with our foreign partners.
- In principle, the Law Council has no objections to Australia making such arrangements. However, it is essential that the domestic legal framework implementing these agreements contains adequate safeguards to ensure that any limitations on human rights go no further than is necessary, reasonable and proportionate.
- We raised significant concerns about the adequacy of safeguards in nearly all aspects of the proposed International Production Orders or IPO scheme. These issues may impede Australia's ability to make an agreement with the US. Entering into an executive agreement with the US would ensure, among other things, that the protections of the CLOUD Act would be enlivened, enabling an order for the production to US authorities of data held by an Australian arm of a US company (eg by AWS, which holds the COVIDSafe app data) to be quashed via a prescribed statutory process.
- Our key concerns pertain to parliamentary scrutiny, human rights protections and independence.

The Law Council's submission made over 35 recommendations suggesting amendments to the Bill, to ensure that Australia has a robust legal framework that achieves both efficiency and rights protection and will facilitate Australia's entry into an executive agreement with the US.

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On 20 May I will participate in the Human Rights Commission consultation on their [Human Rights and Technology Project](#). This consultation follows on from the release of the Discussion Paper in December 2019. The Discussion Paper makes proposals to safeguard human rights and encourage accessible, equal and accountable use of new technology in Australia.

Additionally, on 27 May the Human Rights Commission is hosting a symposium on the topic of *Rights-protection in policy development and law-making processes*. This symposium forms part of its major project announced in December 2018 – [Free and Equal: An Australian conversation on human rights](#) and follows on from the project conference held in 2019. The objects of the symposium are:

- To identify existing challenges and limitations to respecting, protecting and fulfilling human rights and fundamental freedoms in policy development and law-making processes
- To discuss options for improving transparency of the processes of policy development and law-making, and enhanced accountability for the laws and policies produced, particularly where they negatively impact on human rights and fundamental freedoms, and
- To discuss options, and where feasible identify points of consensus, for improving the rights-protection capabilities of policy development and law-making processes.

It is expected that the outcomes of this symposium will inform the Commission's final report on this project and contribute to the Commission's reform agenda on human rights.

- **Maintaining international networks**

Since my previous update, I have been in contact with the Law Society of England and Wales and the Japan Federation of Bar Associations to share organisational responses in relation to COVID-19.

On 27 April, I participated in a virtual Presidents' Roundtable hosted by the Law Society of Hong Kong with the theme 'Resilience through COVID-19'. I appeared as one of eight speakers, and am pleased to note that my remarks on balancing the conflicts between public health objectives and human rights was well received. 57 international bar associations and law societies and 35 jurisdictions were represented in the Roundtable, including some of the Law Council's Constituent Bodies.

Also on 27 April, the Law Council submitted a written statement to the 2020 UN Economic and Social Committee (ECOSOC) High Level Segment for follow-up and review of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals. Drafted with contributions from the Chairs of the Law Council's Legal Practice Section, the Australian Environment & Planning Law Group and National Human Rights Committee, the statement promoted the Law Council's Justice Project and 'Missing Middle' work in tracking Australia's progress under Goal 16.3 and making constructive recommendations for further progress. It noted that these initiatives are a helpful model to guide research and policy initiatives in other countries. The statement also promoted the Law Council's Sustainable Development Policy as a useful tool to inform government, corporate and civil society decision-making, and noted its use to underpin the Law Council's submission on the EPBC Act.

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On 20 April, the Law Council released a statement expressing concern at the arrest of fifteen prominent pro-democracy figures in Hong Kong on 18 April. The Law Council made this statement following a request from the International Bar Association Human Rights Institute. The Law Council has also been notified by Philip Dykes SC, Chair of the Hong Kong Bar Association, of additional constitutional issues following an assertion by the Liaison Office that it is not bound by Hong Kong's Basic Law and other local laws, and has the power of 'supervision' in Hong Kong.

I have been in communication with Mr Dykes to offer the Law Council's support and assistance, and the International Division has also held a teleconference with representatives of Australia's Consulate-General in Hong Kong to discuss these developments and share information.

On 8 May, the Law Council released a statement of concern regarding constitutional amendments proposed in Samoa with inadequate public consultation. I wrote to the Leiataualesa Komisi Koria, President of the Samoa Law Society, to offer the Law Council's support, and have also been in contact with Tiana Epati, President of New Zealand Law Society on this issue. Next Wednesday 20 May, I will speak at a Roundtable convened by the South Pacific Lawyers' Association on Constitutional and Rule of Law in the South Pacific, alongside a number of other bar leaders from the South Pacific.

Also on 8 May, the new [website](#) of the South Pacific Lawyers' Association was launched. Feedback so far has been very positive, and the Secretariat is now working to develop the SPLAhub online portal to facilitate access to quality online CPD resources.



Pauline Wright
President