

JUDICIAL RESPONSES TO COVID-19: JAPANESE AND VICTORIAN COURTS' USE OF TECHNOLOGY

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A/Professor Stacey Steele and Reegan Grayson-Morison highlight the potential for the COVID-19 outbreak to accelerate the use of technology in the Japanese and Victorian justice systems. A/Professor Steele is Associate Director (Japan) of the Asian Law Centre and Ms Grayson-Morison is an Associate of the Centre and barrister, practicing primarily in trusts, equity and probate.

Reegan Grayson-Morison (RG): Stacey, thanks for taking the time to discuss judicial responses to COVID-19 and, in particular, what's happening in Japan. My friends and colleagues from Japan have been asking me about how the Victorian courts have responded to COVID-19, especially from a technology perspective...

Stacey Steele (SS): Yes, I've experienced the same type of questioning. I understand that compared to Japan, the Victorian courts have accelerated their embrace of technology fairly quickly and continued to hear cases. I think our audience would be interested to hear about your experiences in Victoria too.

RG: Sure. I've been particularly impressed by how quickly the courts in Victoria have moved to online models in response to the COVID-19 outbreak. It's not been easy. But, let's start with what's going on in Japan...

SS: Well, the project of embracing technology in judicial proceedings has been dubbed "digitalisation" (デジタル化) or "IT conversion" (IT化) in Japan. Under the leadership of the Supreme Court of Japan, the judiciary has been planning for so-called IT conversion for some time. [From February 2020](#), courts in key locations and the Intellectual Property High Court commenced using web-based conferencing for civil litigation matters. In other words, the lack of digital sophistication was identified as a challenge for Japanese courts well before the COVID-19 crisis. In August 2019, the [Supreme Court of Japan allocated 150 million yen](#) for this plan in its [budget estimate](#) for the following fiscal year.

RG: It's interesting that the plan was developed prior to the COVID-19 crisis...

SS: Yes, expressions such as [対面] ('Face to face'), [押印] ('putting one's seal') and [書面] ('on paper') have long been cherished guiding principles in Japanese courts. However, these principles and the courts' approach have been [criticised](#). The perceived [delay in implementing technology solutions](#) in Japanese courts has been [particularly exposed in light of COVID-19](#). The focus on the Supreme Courts' plan to convert its practices from a technology perspective has therefore increased, but the issues have been brewing for some time.

Most people in Japan submit their complaint under a seal by hand to commence an action, and parties and lawyers attend court on oral argument dates. According to the [Supreme Court's statistics](#) (司法統計), more than 1.5 million civil proceeding actions were commenced in 2018. This number of actions requires a lot of people to be in and out of the courts each day. Furthermore, parties have to pay court costs by revenue stamps or cash. Parties cannot pay by a bank transfer or on credit card. Moreover, Japanese [detention houses, custody centres and jails](#) do not have web conferencing systems to facilitate online conferences with lawyers or courts.

RG: So, please tell us more about the content of the Japanese Supreme Court's plan to address these concerns...

SS: Of course. The plan focuses on [three pillars](#): e-Filing, e-Case Management and e-Court. Currently in Japan, documents are either lodged in court physically or mailed to the court. The goal of e-Filing is to establish a system that will allow online submission 24 hours a day, 365 days a year, without any co-existing paper for court records. The pillar of e-Case Management refers to establishing a system that enables parties to have electronic access to information such as complaints and responses which have been filed online, and information about their case such as due dates. Finally, the term "e-Court" refers to expanding the use of web conferencing systems by one or both parties throughout the civil procedure process to reduce the time and cost of appearance at courts for parties.

RG: It sounds like an ambitious set of goals. What stage are these plans up to?

SS: The web conferencing introduced under the current Code of Civil Procedure in February 2020, which I mentioned before, was an important first step. However, the operation has been limited to large courts so far. A number of amendments to the Code of Civil Procedure are needed to realise the goals reflected in these three pillars. The Code is due to be revised during 2022. Some of the issues that need to be worked out include concerns about parties inappropriately recording web and telephone-based hearings, equitable access to IT infrastructure and public access to courts.

RG: I understand that the IT conversion plan applies only to civil cases and excludes criminal proceedings and family court proceedings. Why do you think that criminal and family court proceedings have been excluded for now?

SS: I think the key reason is a question of resources, but the courts also want to allow all stakeholders time to adapt and implement learnings from the roll out in the area of civil proceedings. I understand that the IT conversion of criminal and family court proceedings will be considered in future. It seems that the judiciary felt that the transition would be easiest to implement in civil proceedings in the first instance in light of the resources and needs of the various parties involved, not just the courts' needs.

RG: Has the COVID-19 outbreak changed these priorities in terms of focusing on civil litigation?

SS: It's hard to say. Generally speaking, detainees, remandees and prisoners in Japan are unlikely to attend oral argument dates in civil litigation. As a result of the COVID-19 pandemic, I've heard that prison officers have been even more unwilling to take people to court because of the fear of spreading COVID-19. For criminal cases, on the other hand, the officers have no choice but to bring people to court for trial. From the lawyers' perspective, if they want to see their clients, then they basically have to go to the facilities and wait their turn to meet their client. Even then, I understand that the authorities are worried that someone might bring COVID-19 into the facilities unknowingly.

RG: Interesting. Why do you think that there has been this perceived delay in adopting technology in the Japanese judicial system until now?

SS: The reasons are multifaceted. In addition to resourcing priorities which I mentioned above, it's been difficult to overcome traditional views and concerns about privacy and information security. In some cases, even other stakeholders such as litigant parties and their lawyers haven't been that interested in adopting technology. Furthermore, I think we can say that, in certain areas at least, Japanese business and society as a whole has been slower than other jurisdictions to adopt some types of technology. To date, Japanese courts probably felt that they were fulfilling their role without the need to implement technology in light of the challenges they face — even if the approach was inconvenient or impacted on some people disproportionately.

RG: What has been the impact of COVID-19 on the existing plan for digitalisation?

SS: Many cases in Japan have been suspended or adjourned due to the National Emergency Declaration (緊急事態宣言) in response to COVID-19. COVID-19 has definitely increased the motivation of the Japanese Government to accelerate digitalisation plans. On 27 April 2020, Prime Minister Shinzo Abe ordered relevant cabinet members to seriously reconsider the principles of 'face to face', 'putting one's seal' and 'on paper' with a view to supporting efforts to respond to COVID-19.

I think that there is also a renewed urgency for the Supreme Court to accelerate its plan for digitalisation. In a [press conference held prior to the Constitutional Day on 3 March 2020, the Chief Justice of the Supreme Court, Judge Naoto Otani](#), noted the "unprecedented situation", even for the courts. He asked for people's "understanding and cooperation". However, groups such as the [Japan Federation of Bar Associations](#) have criticised the suspension of matters, particularly where the defendant is in custody. I hope that the Japanese courts will convert this crisis into an opportunity.

From that perspective, it would be interesting to hear a little bit from you about how the Victorian courts have

changed their processes in response to COVID-19. In particular, if courts move to telephone and video conferences, I know that Japanese people are concerned about how to meet the requirement for public trials. Article 37 of the Japanese Constitution guarantees that “in all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal”. Furthermore, Article 82(1) states:

Trials shall be conducted and judgment declared publicly. Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

How are Victorian courts handling this type of concern?

RG: As you are no doubt aware, the Courts were required to make very rapid changes to process and procedure when the pandemic was first declared. There was not necessarily a consistent approach to concerns of this nature even within the Victorian jurisdiction. This may be partly because it was unclear how some matters could be progressed with the strict social distancing regulations in place at that point in time. On 24 March 2020, the legislature enacted the [COVID-19 Omnibus \(Emergency Measures\) Act 2020](#) (Vic), which sought to address this concern, amongst other concerns. Specifically, Part 3.14 of the Act deals with the courts in Victoria. Regarding the question about transparency and the (usually) public nature of hearings in the judicial system, the Act amends the Open Courts Act 2013 to effectively allow for private hearings in some circumstances. As a result of this amendment to the Open Courts Act, there were new practice directions issued by the Magistrates’ Court¹, the County Court² and the Supreme Court of Victoria³ to provide guidance to practitioners as to how cases could be progressed. It will be interesting to see if there are any challenges by parties to that legislation (or matters heard behind closed doors) in the coming months.

SS: Why do you think there may be challenges to, or based on, that legislation?

RG: It is difficult to say at this stage, but it is certainly novel to have many matters dealt with ‘on the papers’ as opposed to being the subject of oral argument in Court. I cannot comment on criminal matters as I have no experience in that area, but it seems to be common knowledge that very few criminal matters progressed, particularly in the early stage of the lock down. The Courts have continued to list the hearing of all matters and, in the case of the Supreme Court of Victoria, each matter will be listed as a ‘virtual hearing’, instead of listing a physical court room on the daily hearing list.⁴ Having said that, because invitations are sent by the Associate to the relevant judicial officer ahead of the hearing, it seems more difficult than usual to ensure the transparency of the judicial system. Anecdotally, I have heard that in some of the bigger civil cases, which have continued via various online platforms — including Zoom, Microsoft Teams and Cisco Webex — media and other interested persons have been granted access to the hearings, thus preserving their public nature.

SS: Interesting. One characteristic of Japanese judicial practices is that they are generally more homogenous than those in Australia and the courts operate in close collaboration with the Supreme Court’s General Secretariat, which wields a lot of control over court administration. In Australia, court practices are much more dependent on the applicable court and region. Have you seen any particular differences between the responses to COVID-19 of the various courts in Victoria or Australia?

RG: I noticed different approaches in different jurisdictions and in different Courts, particularly at the start of the lockdown. In my experience, the Supreme Court of Victoria was very fast to implement electronic hearings in civil matters and it also encouraged parties to provide consent orders to progress the matter. Alternatively, some matters have been heard ‘on the papers’ with no oral argument by lawyers; that is, by written submission alone. I have also appeared in electronic hearings in the County Court. Some of the matters that I had in the Magistrates’ Court and the Victorian Civil and Administrative Tribunal appear to have been adjourned for the time being. It may be that the lower courts and tribunals, which have a larger number of cases (and also deal with many criminal matters in the case of the Magistrates’ Court) were overwhelmed with the administrative work in shifting to a different system so rapidly at the outset of the pandemic. In addition to those broad brush observations, I have noticed that there have been differences in how matters have been dealt with by different judges in the same court, although this occurred more in late March and early April. It seems there is a more consistent approach now. Although I practice more in the Victorian jurisdiction, I also noticed that the few matters I had in the federal jurisdiction were dealt with differently. The Federal Court seems to more commonly use Microsoft Teams and phone hearings than Zoom and Cisco Webex, which are commonly used in the State Courts.

1 See, eg, [Practice Direction No. 8, No.9 and No. 10](#).

2 See, eg, [practice notes related to Emergency protocol COVID-19](#).

3 See, eg, [practice notes related to COVID-19](#).

4 See, eg, [Supreme Court daily hearing list](#).

SS: It seems that there are many developments that other courts, not just our friends and colleagues in Japan, can learn from. And perhaps lawyers in Australia will learn to be more like lawyers in Japan when it comes to arguing cases on the basis of documentation submitted to courts... It will be fascinating to see which technology and procedures continue to be adopted after the pandemic subsides, and whether any courts will revert to pre-COVID-19 practices...

RG: Indeed. I think that many of the new practices are here to stay, but there will certainly be some areas where courts will revert to pre-COVID-19 practices. For example, I think that it is unlikely that the Courts will adopt hearings 'on the papers' in a wholesale fashion and continue to use electronic hearings for trials, because it is thought to be much more difficult to ascertain the demeanour of all witnesses through electronic platforms.

SS: It's been interesting to swap views on the development and use of technology in Japanese and Victorian courts, especially in light of COVID-19. Let's catch up again to compare notes soon!

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