

# Trials from home



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speed, quality of camera and sound, capacity to view documents – some have more fundamental practical issues: the absence of a room that no-one else in the house needs, with a desk.

And then there is the issue of sharing your home with children. Remember the viral video of Professor Robert Kelly, an expert on Korea, being interviewed by the BBC from his study, as first his toddler and then his baby in a walker come into the room, followed by his wife sliding in and grabbing the children?

Trials are inherently difficult to conduct electronically. Criminal trials in particular. Witnesses who are unwilling to give evidence cannot be subpoenaed to appear from their home. And even if willing, how do you get them to master the technology, never mind the court book? As for a child giving evidence from their home in family law proceedings, it would be hard for that evidence not to appear affected by those at home with them.

It is interesting to speculate whether Covid-19 will cause ongoing changes to practice. One member of the Bench wondered out loud whether those in charge of Court finances will start to question why so many court rooms are needed, when a percentage of court work could be done by phone or video.

One change I have noticed, which is not positive, is the tendency for such hearings to lack the trappings of formality which promote the necessary respect, leading to witnesses speaking over the top of Judges.

When the Associate said “All rise” I remained seated. Wearing shorts and a t-shirt.

It was not an anxiety dream. I was appearing before the Federal Court, Covid-19 style, by phone. Whether anyone *did* stand as the Judge took her seat I never found out.

Covid-19 restrictions had an immediate and dramatic effect on the Bar. First the High Court, and then progressively each other court and tribunal, vacated most upcoming hearings.

The changes hit many at the Bar hard. Large criminal trials stopped. They particularly

affected those already earning the lowest income: those who do legal aid work.

The commercial bar has been affected, but to a lesser extent. It has taken time for courts to work out how they can operate effectively with counsel, solicitors and witnesses appearing from their homes by phone and video link. Much of the usual Local Court and District Court civil work at the time of writing remains moribund, affecting the livelihood of many juniors.

There is no doubt we will all welcome a return to the physical court room.

Appearing from home is not easy. Quite apart from issues of technology – internet

Covid-19 will no doubt hasten the recent trend to do away with the need to attend direction lists in person. It is difficult to justify going to court and waiting two hours to deal with something that could have been done in 15 minutes by phone or video from your room in chambers.

As with society as a whole, Covid-19 restrictions will hasten the uptake and use of technology. They will see an increase in the use electronic briefs, cloud-based shared documents and video conferencing.

Will they in time introduce more far-reaching changes? Pre-trial depositions that are accepted into evidence? More cases determined on the basis of written submissions only?

This edition was largely complete when Covid-19 hit. Our next edition will invite authors to examine the changes it brought about and give thought to some of the consequences.

Let me turn to this edition.

### ADR - A special edition

Mary Walker, who chairs the Bar Association's ADR committee, enthusiastically embraced my suggestion more than 12 months ago of a special edition examining Alternative Dispute Resolution.

Three decades ago ADR and the Bar had a troubled relationship. Some early adopters were evangelists, while at the other end of the spectrum traditionalists decried ADR, claiming it took away work, was a means to justify a decrease in spending on courts, and involved no great skill.

Today, as this special edition confirms, the Bar and ADR are settled life partners. ADR has achieved appropriate status – as an equally valid means for parties to achieve their legal rights, requiring on the part of the advocate significant skill and preparation.

The Bar Association's last survey of its members identifies that upwards of two thirds of the Bar are involved in ADR (it is not a feature of the criminal bar), who on average spend at least 10% of their time doing it. The latter figure is likely an underreporting that focuses only the time directly associated with ADR. Given that much of the preparation of a matter is

equally applicable to hearing and mediation, no doubt many of those surveyed could have validly nominated a greater percentage of their total time as 'mediation' work.

The Bar, as Anthony Cheshire identifies, is uniquely placed to appear at mediations. Who better to assess the likely outcomes if the matter goes to trial, to provide advice to the client as to the risks, and to convince the other side of the merits of the proposed settlement, than the person who would otherwise conduct the matter at trial?

Under Mary Walker's guidance the ADR committee has assisted to pull together a wonderful collection of insights into various aspects of ADR.

Ian Davidson SC's article *The Art of Advocacy in Mediation* provides a masterclass in the skills and techniques needed to effectively appear for a party in a mediation.

The Hon Chief Justice Bathurst AC considers the proliferation of statutory tribunals and industry-led complaints bodies, focusing on NCAT's residential tenancies jurisdiction, and the financial complaints jurisdiction of the AFCA. He concludes by asking whether there is a case for creating a range of tribunals and other decision-makers each tailored to address a particular type of dispute.

Her Excellency the Hon Margaret Beazley AC QC, Governor of NSW, considers the thorny question of apparent bias and conflicts of interest in the arbitral process. Arbitrators are not permanently appointed judicial members, and are usually chosen for their industry expertise. In what circumstances can their prior business dealings with a party be raised as a barrier to their hearing a matter?

Paddy Bergin SC considers some of the ethical issues that arise in mediation, including the duty not to knowingly mislead, and the duty to bargain in good faith.

The Hon Chief Justice Alstergren and the Hon Deputy Chief Justice McClelland discuss the necessity for ADR and Mediation across various aspects of Family Law and Family Dispute Resolution.

There is a wonderful interview with Terry Sheahan AO, ex-Attorney General and Chief Judge of the Compensation Commission, who was instrumental in

establishing the first independent ADR organisation in 1986, and practised extensively as a mediator.

There are also two tributes: to Sir Laurence Street AC KCMG QC, who after stepping down from the Bench became perhaps the best-known mediator in NSW; and to Professor Emeritus Frank Sander of Harvard University, known as the father of modern dispute resolution.

### Other articles

The fires that devastated so much of NSW over the summer of 2019/2020 affected many members of the Bar. Stephen Ryan's article *Bar Firefighters* focuses on two volunteer firefighters: Belrose Senior Deputy Captain Josh Beran of Eleventh Floor Garfield Barwick, and Tom Davie of Queen's Square Chambers, a member of the Davidson Rural Fire Service.

Mark Maconachie has provided another wonderful photo essay of the Commencement of Law Term services, including the service held in the Greek Orthodox Cathedral in Redfern, and the first service to be held at the newly constructed and beautiful Punchbowl Mosque. My thanks to Judge Gerard Phillips, President of the Workers Compensation Commission, for providing the accompanying drawings by Simon Fieldhouse, who has beautifully captured the procession of robed Judges.

Bullfry makes a sartorial return. His shock in spotting a retired distinguished jurist strolling down Phillip St wearing a beanie leads him (somewhat surprisingly for the old curmudgeon) to question the continued need for robe and wig.

As always, can I thank my fellow *Bar News* committee members for all their work to produce this edition. In addition to the pieces mentioned, there are concise case notes, interesting book reviews and a number of news items.

Finally, this edition carries my obituary for my dear friend Peteris Ginters, taken much too early by motor neuron disease. I know there are many at the Bar who, like me, will always remember him. **BN**