

Innovation in a pandemic: Reflections from the Great Pause

By Michael Green SC

For many barristers, the Great Pause of 2020 has provided opportunities for reflection and connection. After the shock and disbelief that courts had stopped conducting face-to-face hearings, barristers explored ways to make the 'new normal' normal.

In this uncharted territory, in the best traditions of the Bar, we challenged the idea of the 'new normal' and its meaning. Even as recently as the last decade, some barristers prided themselves on not having a mobile phone or email. Until now we were used to gradual change with a period to adapt. But this time, change was sudden, unplanned, and non-negotiable.

Courts and tribunals rushed for makeshift solutions and off-the-shelf videoconferencing was in easy reach. Some courts had already been using it on a limited basis. For others, it was untested and extremely testing for those attempting to appear.

Understandable panic set in. Will practising as a barrister forever mean that we will need to develop our 'remote advocacy' skills? Will 'chambers' become an assemblage of Zoom meeting gallery boxes rather like the *Brady Bunch* or *Blankety Blanks*? How do I cross-examine on documents with a witness 500km away with an inconsistent internet link? How do I prepare cases for trial and appear while home-schooling? Which buttons do I press? How can I be heard and seen?

The panic spread to our instructing solicitors. Enterprising barristers used social media and other online channels to remind the world of their readiness and ability to appear in cyberspace. That's because we had all been using this technology for decades. An amount of advocacy work had already been moving online. Many of us already knew the diverse limitations of remote hearings.

The Bar Association established a help line to provide practical assistance with getting connected to courts, and the variety of systems they required barristers to use. Most requests were made either late at night or early in the morning. In the last month requests have become less frequent, as members have become more familiar (or aware of colleagues that might help).



It follows that the profession, particularly the Bar, needs to sponsor (or at least co-ordinate) more research on how we can design online hearings which are not just efficient, but also support the broader social purpose of public justice and an independent judiciary. We should collect experiences – good and bad – during the present period to enable future reflection.

The Association and its staff worked tirelessly to collate and produce materials which gave members and the wider community assistance in developing the necessary 'soft-skills' to be a successful advocate online using video. Chambers held Zoom meetings to permit members to develop online confidence.

The Association worked with courts, tribunals, and governments, to protect the importance of the rule of law and the principles of justice by seeking to articulate standards online. The Bar Association's *Protocol for Remote Hearings*¹ is a demonstration of the complex challenges presented by moving from a model of face-to-face justice to one where

all of the participants are isolated and their interactions intermediated by an imperfect means of communication. The protocol was discussed and authored by a committee online and remotely using collaboration tools and video. The production of the protocol demonstrated the skill and collegiality of the Bar and its ability to adapt and bring together the diverse experience needed to consider complex problems.

As we explored the topic, we were all humbled as to how little we really knew about the implications. Our legal training kicked in: we were all able to imagine problems which favoured the nuanced *status quo*.

One of the fundamental things the preparation of the protocol demonstrated was the lack of any relevant empirical study of the effects of remote hearings on the maintenance of the rule of law, or the position and perception of courts and the judiciary and open justice. Another issue which arose was how online hearings amplified the vulnerabilities of the participants, both as parties and witnesses.

The closest comparable was research done on consensual online dispute resolution (ODR) in the alternative dispute resolution (ADR) context. Without meaning disrespect to those researchers, at its base, the model of 'innovation' was to merge ADR with ODR to make it 'AODR' and then universalise it for all disputes. Looking further ahead, once online, that line of research suggested the automation of dispute resolution. The research had no need to consider the rule of law or the amplification of vulnerabilities emerging from participation. It had nothing to contribute as to how criminal hearings might take place or how the public perception of the administration of justice might be affected by online streaming without any background. This is because, as the President pointed out in a recent edition of *Bar News* citing Justice Sofronoff's recent *Byers Lecture*, courts are the third arm of government, they are not merely a dispute resolution service, the jurisprudential issues raised in moving courts to an online environment are considerably more complex than for ADR.

The Association produced materials which gave members and the wider community assistance



PHOTOGRAPH BY JACKIE CHARLES

Ivan Griscit participates in a virtual court hearing from Level 22 Chambers

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Which technologies are most suitable should come only after we properly understand the contexts in which remote hearings are desirable having regard to the broader social purpose. During the Great Pause – acting pragmatically – many courts and tribunals have done their best to keep the doors of justice open, just as they did during the Black Death² almost 700 years ago. Admittedly, the courts then did not have the luxury of video cameras and virtual

backgrounds, but there was an awareness of the need to move some courts to more remote locations to protect the participants and indirectly the rule of law.

The other consequence of the Great Pause has been an acceleration of the use of paperless briefs, preparation, and hearings. That is a topic in itself and one which has been covered previously in articles in *Bar News*.

We have more to do to make ‘digital’ or ‘paperless’ briefs work in practice. The Innovation and Technology Committee is working with other of the Association’s committees, including the Practice Development, Wellbeing, and New Barristers Committees to develop these soft-skills in a novel way which also furthers the collegiality of the Bar by providing reverse mentoring opportunities. We aim to use this activity to uncover the subtle changes which have

been caused to practice during the pandemic and how we can support a successful and sustainable Bar during and after the pandemic.

The Bar has shown its ability to adapt and to do so quickly and respectfully of the rule of law. Now is the time to demonstrate that this hitherto accidental phase is moving in an appropriate direction by undertaking a principled consideration of those early responses using an evidence-based framework. **BN**

ENDNOTES

- https://nswbar.asn.au/uploads/pdf-documents/remote_hearing_protocol.pdf.
- Michael J Bennett, ‘The Impact of the Black Death on English Legal History’, (1995), 11 *Australian Journal of Law and Society* 191, at 192.