Resolving disputes and Covid-19

The content of this edition of *Bar News* was largely settled before the onset of the Corona virus epidemic. Its focus on alternative dispute resolution and the Bar has proved to be prescient given the circumstances in which we find ourselves and that which has occurred to the judicial system in which we work and participate. Whatever be the nature of any dispute and the identity of the court potentially exercising jurisdiction, the impetus to resolve disputes extra-curially is ever greater when our court system is challenged as we have seen it challenged in the last two months or so. Much can (and should) be achieved by informal resolution that is external to litigation, in whatever form that takes; although there is always some risk that disputes will be settled because of the difficulties encountered in litigation. By way of example, and quite apart from the impact of Covid-19, that risk can materialise when the cost of litigation is prohibitive. In the time of Covid-19, if parties resolve their disputes without litigating in court because they have no real choice, that also risks a failure being marked down as a success.

In the current circumstances much has been done to find ways of conducting litigation using various software platforms and we have seen considerable improvement in delivery of "virtual courts" or "remote courts" in a remarkably short period of time. There is a general expectation that after the passing of Covid-19 the justice system will never be the same again; the implication being that a good deal more litigation will be conducted by audio visual means. There is no doubt that we have all quickly learnt that a great deal more can be done by audio visual means than we may previously have thought possible. A good deal of time and resource-wasteful travel can be avoided; and a good number of the steps in litigation can be conducted by these means. Notwithstanding the significant difficulties involved, trial courts have been conducting, or are currently listed to conduct, litigation by these means and the profession has adapted quickly and effectively to these changes. Appeals, even complex ones (albeit not involving witnesses) can, if necessary, be conducted by these means.

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However, I would like to express a significant reservation on this subject. Trials are public affairs and they are also personal ones. The physical presence of the parties, and the court, are important parts of the process. The personal engagement with the judge or court, measuring reactions, and decisions to say this or not that are, to my mind, essential parts of the curial process we value so highly. So too, the actual presence of the witness, the challenging in (a public act of) cross-examination on credibility, gauging reactions and so forth, are to my mind all distinctly personal activities that have to be done in a forum where everyone involved (including the public) are physically present. This is all the more so when it comes to criminal defendants and the very public activity of criminal trials.

Communication by audio visual means is a different thing. Certainly the nature of the experience is far better when the technology is good, and faces, reactions etc can be better perceived. However, and irrespective of the quality of the medium, it is no substitute to my mind for an actual open court.

Ultimately decisions will have to be made as to which parts of litigation are heard by what means. Nobody at present is actively suggesting the conduct of serious litigation (civil or criminal) by electronic means. If and when that conversation is forced upon us I would like to say emphatically that this is something which should not be countenanced by the profession for the kind of reasons I have touched on but briefly here.

To the extent that technology can appropriately be used at a functional level, it must nevertheless satisfy our requirements for an open court and the experience of its use by all participants must reflect that of a court so that the authority of our courts is upheld. Justice Sofronoff noted in his recent Byers lecture: "When a Court resolves a dispute between citizens, or between a citizen and the State, the parties are not being rendered a dispute resolution service; they are being governed". This is an important distinction to bear in mind when assessing the suitability of technology in court.

This distinction is also an important one when considering the subject matter of this edition of *Bar News*. A primary duty of a barrister is to the court, their role is intimately tied to supporting the role of the judge, the third arm of government. That necessarily impacts on the way a barrister goes about their work and the skills they need to carry out that role. The role of the advocate in what is now perhaps misleadingly termed "alternative" dispute resolution is different. ADR has as its primary focus the resolution of a dispute. Although a barrister briefed to appear in a mediation must appear as a barrister with the rules and ethics that that position dictates

and while there are skills that a barrister develops in conducting litigation that are transferable to ADR, it must be recognised by anyone planning to, or building a practice in ADR, that the development of complementary skills and expertise is essential. Given the prevalence of ADR in our society it is almost imperative that members develop those skills and expertise. To that end I commend the papers in this edition of *Bar News* and thank all the editorial team and contributors. I would particularly like to thank Her Excellency the Hon Margaret Beazley AO QC, Governor of New South Wales, the Hon TF Bathurst AC, Chief Justice of the Supreme Court of New South Wales, the Hon Justice Will Alstergren, Chief Justice of the Family Court of Australia and Chief Judge of the Federal Circuit Court of Australia and the Hon Justice Robert McClelland, Deputy Chief Justice of the Family Court of Australia for their contributions.

Finally, on a more sombre note, I would like to pay my respects to Philip Selth OAM who died on 3 May 2020. Philip was the Executive Director of the New South Wales Bar Association for 19 years from 1997 to 2016, working with 12 Presidents during that time with great distinction. Philip was a devoted servant of the NSW Bar and a passionate advocate on its behalf. Philip was instrumental in building the Association into the organisation it is today, and played a leading role in the development of the Legal Profession Uniform Laws and the introduction of BarCare. It is important to recognise the enormous contribution he made over his long tenure to the Bar Association, the NSW Bar and the legal profession as a whole. He will be sorely missed by his family and friends and his many former staff and colleagues. BN

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