

No snapback for the Bar: court chiefs confirm some changes will remain post-COVID

By Stephen Ryan

Appearances via email and appeals in virtual courts are likely to remain according to the country's chief justices and judges. Both Chief Justice James Allsop and Chief Justice Tom Bathurst confirmed that use of the virtual courtroom for some appeals to the Full Court of the Federal Court and the NSW Court of Appeal are likely to remain even after conditions imposed due to COVID-19 are relaxed.

'There is no reason why most directions hearings, applications and the like cannot be heard in a virtual courtroom,' Chief Justice Bathurst said. 'Consistent with current practice, more appeals may continue to be heard online. It will be left to the list judges to determine how they utilise the technology in the future. List judges will determine which matters are suitable to be heard virtually.'

Both Chief Justice Bathurst and Chief Justice Allsop noted the savings for litigants with a reduction in travel and waiting times for matters, particularly shorter matters, to be heard. Chief Justice Allsop said much has been learnt about how courts can operate more efficiently, but that efficiency should not be the only factor when considering further changes to court practice.

'Perhaps the clearest example of where we are likely to see dividends paid from the increasing use of remote technology is in the case management process,' he said. 'From the perspective of a client you need only think about how much money is spent on physically going to court for a case management hearing. There is the time spent travelling to court, clearing security, waiting around to meet practitioners and clients etcetera before your 15 minutes before the judge, only for you to then turn around and travel back again. That has cost the client a lot of money.'

'We should ask ourselves: is it necessary? There are of course many instances where face-to-face case management hearings will remain appropriate or necessary such as those involving unrepresented litigants who require the close assistance of the court. But for more seasoned users where we have shown that remote technology can



be used effectively, while still maintaining the requisite quality of engagement for all involved, we would be remiss not to integrate those gains into our day-to-day operations. Many appeals will be in the same category. The question will be why this form of engagement is not adequate.'

For trials, Chief Justice Bathurst envisages a hybrid model emerging where both the virtual courtroom and in-court attendance combine. However, jury trials will almost certainly revert to pre-COVID conditions.

'There will be a greater utilisation of technology in the courts than in the past as courts have appreciated that virtual

courtroom technology has benefits and increases flexibility,' Chief Justice Bathurst said. 'For example, it may be preferable for non-contentious witnesses to appear by audiovisual link. Despite attempts to hold virtual jury trials in other jurisdictions such as the United States, criminal trials will continue being heard in person, noting the difficulties that juries presented for virtual courtrooms.' NSW District Court Chief Judge, Justice Derek Price, confirmed that similar arrangements will continue.

'There will be increasing use of taking evidence of witnesses in both criminal and civil proceedings by use of audiovisual link,' he said. 'All criminal lists including readiness hearings; all civil lists before a judge, judicial registrar or assistant registrar; all notices of motion (civil) where the matter is confined to legal argument and no person is required for cross-examination; and applications for bail variations which are not contested, will continue to be conducted remotely.'

Fair Work Commission President, Justice Iain Ross, said the pandemic had accelerated a number of initiatives including the increased use of videoconferencing, the use of digital court books – effectively turning the Commission paperless – and trialing a number of technologies to provide greater access to the Commission.

'Certainly, if we think of courts using only the management metrics of efficiency or as carrying out some readily quantifiable function as producers of judgments, then one may be tempted to think that virtual hearings stand to render the traditional face-to-face hearing obsolete in the name of productivity, but that is not all that courts are. Courts are at their core human institutions charged with the public ventilation of grievances and resolution of disputes that have very real, very human consequences for all who are involved.'

Chief Justice James Allsop

'The Commission has placed users at the centre of our transformation for many years now, however consistent with many courts and tribunals the pace of our digital service transformation has increased significantly over recent times,' Justice Ross said.

The Commission is rolling out a range of online smart forms to assist parties to enterprise agreements, it can now track its workload via a 'data dashboard' including additional work under its new 'Jobkeeper jurisdiction' and is developing a Justice Innovation Hub that will allow courts and tribunals from around the world to share information and solutions to problems caused by COVID-19.

'To further facilitate the exchange of ideas we will also be convening a series of online events with key policy experts, institutional leaders and academics to identify critical issues facing the Australian recovery, particularly as it effects specific industries and segments of the community,' Justice Ross said.

Both the judiciary and the Bar have experienced difficulties with the technology relied upon for remote appearances. Audio dropping out, screens freezing and bandwidths stretched to their limits have contributed to a number of frustrating appearances.

Justice Price said he would continue to encourage the enhancement of remote technology while NSW Chief Magistrate, Judge Graeme Henson, also identified the need for improvements.

'What has been demonstrated throughout the pandemic thus far is how intermittently reliable our AVL technology is and that in an environment where the Supreme Court, District Court and Local Court all seek access at the same time, how much more can be done to enhance capacity within our legal systems so that we can build on our experiences thus far with a view to a more modern approach to our core responsibilities,' he said.

Chief Justice Bathurst noted: 'The rapid move to virtual courtrooms was particularly difficult for judges and the profession at the start. However, people have now gotten used to it and the technology has improved'.

What lies ahead is an enormous backlog of cases. In the Local Court alone, thousands of hearings were vacated and others adjourned to August or September to fix hearing dates.

'During 2019 there were 346,930 criminal cases commenced and 41,442 domestic and personal violence lodgements,' Judge Henson said. 'This number does not include the many bail applications, approximately 80,000 on an annual basis, civil proceedings or other application proceedings that come before the court in a given year. As can be readily understood, accommodating such a volume of people within a pandemic was a high risk environment.'

To get through the work, the Local Court is likely to encourage appearances via email where possible and the development of an online system of case management for some criminal matters similar to the online civil system. Discussions have also begun with NSW Police to explore whether officers can obtain an accused's telephone number and email address at the time a person is charged or served with a court attendance notice with a view to providing those details to the court. This would further enhance the court's ability to communicate with litigants.

But for all the gains made from the increased use of technology, Chief Justice Allsop for one is conscious of not losing the human face of our courts.

'Certainly, if we think of courts using only the management metrics of efficiency or as carrying out some readily quantifiable function as producers of judgments, then one may be tempted to think that virtual hearings stand to render the traditional face-to-face hearing obsolete in the name of productivity,' he said. 'But that is not all that courts are. Courts are at their core human institutions charged with the public ventilation of grievances and resolution of disputes that have very real, very human consequences for all who are involved.'

'In that sense it is not a coincidence that the common law has evolved the trial as the method of in-person hearings in open court as its preferred mechanism for the administration of justice. There is something profound about the ritual of an in-person hearing before a court of law which gives

THE NEW NORMAL AT A GLANCE

Federal Court

- virtual appearances for case management and some appeals

NSW Supreme Court

- virtual appearances for directions hearings, applications and some appeals
- increased use of technology in all trials

NSW District Court

- virtual appearances for case management in criminal matters
- increased use of technology in criminal trials

NSW Local Court

- continued use of email for some appearances
- online case management for some criminal matters

Fair Work Commission

- increased use of virtual appearances
- digital courtbooks
- online smart forms

humanity, legitimacy and social utility to the judicial process. It reflects the importance that the state gives to the resolution of disputes of those subject to its protection.

'The essential humanity and importance of that process cannot easily be replicated if judicial officers, practitioners, parties and the public are simply to log-in remotely to some virtual space – disembodied, from separate locations and physically removed from the engagement. For that reason, despite their increasing use in the wake of the pandemic I believe that remote technologies will not see the traditional practices surrounding the common law courtroom process disappear.'

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