Law in a Time of COVID

STEPHEN GAGELER

The Title of this presentation—"Law in a Time of COVID"— is with apology to Gabriel Garcia Marquez. The subtitle could well be "Never let a good crisis go to waste." The aphorism is often attributed to Churchill.

The aphorism, or something very like it, was actually introduced into public discourse in this century by Rahm Emmanuel at the time he was appointed Chief of Staff to President Barak Obama during the Global Financial Crisis. What he then said was words to the effect, "You never want a serious crisis to go to waste. It's an opportunity to do the things you once thought were impossible."

Pope Francis chose a similar theme in speaking about the COVID-19 pandemic at its global height in June last year. The "scourge" of the pandemic, he then said, "has tested everyone and everything. Only one thing is more serious than this crisis, and that is the risk that we will squander it, and not learn the lesson it teaches". "It is a lesson", he said, "in humility".

My theme—of what we should take away from our experience of having lived through COVID—is similar. As a judge inevitably is to a pope, however, my ambition is less lofty, my focus is more confined and my content is less profound.

For the past two years, we have been living through a global crisis which, from an Australian national perspective, has been broader and deeper than any since at least WWII. The most recent Intergenerational Report prepared by the Australian Treasury describes it as the most severe global economic shock since the Great Depression.

We who work in Australian courts and at the Australian bar have experienced the longest interruption of, and greatest disruption to, our institutional and professional practices that has occurred in our professional lifetimes. Of course, each of us will have had different experiences of living through the pandemic during the past two years. These experiences have been shaped by where we live and the communities of which we are a part.

We are, in the language of this conference, now "re-emerging" from the crisis. We meet as professionals at a national gathering in person for the first time since the pandemic began. It would seem a great waste if we aimed to do nothing more than simply to carry on as before.

This is a moment for reflection on the experience we have just been through. It is an opportunity to ask ourselves questions. What is it that has happened? What has it taught us about the society we serve and about our role in that society? What has it taught us about our core values? What has it taught us about what is important and what is unimportant within the institutional and professional practices which we used to take for granted? How might we aspire to be better versions of our former selves going forward?

Lest I be thought to raise expectations unduly, I should make clear that I have more questions than I have answers.

I do not want to dwell on technology. That is a topic to be addressed by Professor Susskind and to be taken up by Chief Justice Allsop later this afternoon. The most I want to contribute on the topic is to remark on the positive effects of our belated, COVID-enforced, take-up at an institutional level of communications technologies that have been widely available for some time. The ability now for practitioners and parties routinely to gain access to most courts remotely has led to an increase in efficiency. It has led to an increase in access to justice.

Equally importantly, it has led to an increase in the openness of justice. The fact that parts of the anti-vaccination proceeding brought against the New South Wales Minister for Health at first instance and on appeal to the Court of Appeal in the Supreme Court of New South Wales late last year were streamed live to over 100,000 viewers is no bad thing. The fact that parts of the Djokovic proceeding in the Full Court of the Federal Court were viewed nationally and internationally by over 1.2 million people is similarly no bad thing. It has enhanced the public understanding of the role that courts play as neutral arbiters in disputes about competing visions of the public good. It has in turn enhanced the standing of the courts and the profession within society. By both of those means, it has strengthened the rule of law.

I do not want to say much about the impact of the pandemic on the relationships between other branches of government. Its impact on the balance of power between the Commonwealth and the States will be a topic of in-depth discussion tomorrow morning. Like the crisis of WWII, and before that of WWI, the recent global health crisis has led to a greater degree of coordination between governments and has precipitated an alteration in the "federal balance", considered not in terms of any formal allocation or reallocation of constitutional power, but in the essentially practical terms of which level of government within the federation at any given time has responsibility for doing what.

The change that occurred in each of those earlier crises was an accretion of responsibility to the Commonwealth. Since the immediate post-war era, in which Sir Robert Menzies was prime minister, those earlier crises have been seen to have launched us on a one-way trajectory. Interestingly, the change that occurred in the recent crisis has been an accretion of responsibility to the states. That is not a phenomenon unique to Australia. Centrifugal forces have been felt in other federations throughout the world. Whether in Australia the earlier centripetal forces will return again to predominate, it is too early to attempt to predict.

The Hon Justice Stephen Gageler AC

The impact of the pandemic on the balance of power between the executive and legislative branches of government at each of the Commonwealth and State levels is another topic worthy of in-depth discussion. Inevitably in a representative democracy, any crisis in which the public is put at imminent risk of harm will swing the balance of power in favour of the executive branch: it has the immediate power of the purse; it has immediate access to expertise; it is better able to assimilate information; through its management of government resources, it is better able to provide a real-world response in real time.

Usually, although not quite inevitably in a representative democracy, as a crisis becomes protracted, the balance will swing back in favour of the legislative branch which will remain more in touch with the electorate. Those again are not tendencies unique to Australia. They have been experienced, and continue to be experienced, in representative democracies the world over.

What I do want to say something about is the impact of the pandemic on the relationships in Australia between the citizen and the state, between the courts and the citizen, and within the profession. Let me take those topics in that order.

There is in the rare books section of the library of the High Court in Canberra a small and valuable book. It is a first edition copy of a monograph entitled *The Bill of Rights*, written by the American jurist Learned Hand and published by Harvard University Press in 1958. What makes the library copy valuable is that inside the front cover there is a handwritten inscription from former justice of the US Supreme Court, Felix Frankfurter, to the then-Chief Justice of the High Court of Australia, Sir Owen Dixon. The two had become friends when Dixon had taken time out from his judicial duties to become Australia's ambassador to the United States in the midst of WWII.

The inscription reads: "For Dixon CJ who is not burdened with applying the Bill of Rights but [who] has a great judge's true instinct about it all. With Esteem and friendship, Felix Frankfurter." The inscription hints at the theme of Learned Hand's book. The theme is that, whatever might be contained in the text of a bill of rights (or as we might now say a charter of rights) and, however precisely the meaning of that text might be sought to be expounded by the judiciary, the application of the text in a concrete case will come down to the making of a judgment. The making of that judgment will demand of the judiciary, and of those practitioners who are involved in the process of adjudication, sensitivity to their own strengths and weaknesses as much as to the strengths and weaknesses of those whose rights and duties will be determined by the judgment.

The theme is a continuation of that eloquently expressed by Learned Hand in a speech he gave not long after the United States had entered WWII, at a time when Dixon was still our ambassador in Washington, and at a time when Allied victory remained uncertain. He entitled the speech, "The Spirit of Liberty". He was anxious to make the point that the true meaning of "liberty" was something very different from "ruthless ... unbridled will" or "freedom to do as one likes". That selfish view of liberty, he said, was ultimately destructive of liberty, as the global crisis then being played out illustrated.

"The Spirt of Liberty" in which Learned Hand put his faith at that time of crisis, he said he could not define but only describe. He described it as "the spirit which is not too sure that it is right ... which seeks to understand the minds of other men and women ... which weighs their interests alongside its own without bias ... [which] remembers that not even a sparrow falls to earth unheeded". "Liberty", Learned Hand said, "lies in the hearts of men and women; when it dies there, no constitution, no law, no court

can save it: no constitution, no law, no court can even do much to help it".

Overwhelmingly, Australians during the pandemic manifested by their conduct a spirit which conformed to the faith of Learned Hand. They did so, I venture to suggest, more than did the citizens of any other representative democracy with the possible exception of New Zealand. There were some vocal exceptions. But by and large, we were spared in Australia the polarising, confrontational and atomistic assertions of individual freedoms that occurred in the homeland of Learned Hand and Felix Frankfurter and in many places elsewhere.

Australians were prepared to recognise the gravity of the circumstances and the need for government action to address those circumstances. They were prepared to trust scientific expertise and to heed the public health advice. They sacrificed their own individual freedoms of movement and association to ensure the welfare of others. They made a choice to do their best to conform to the letter and to the spirit of constantly changing public health orders despite the personal inconvenience doing so caused them.

The experience tells us much about the character of our society which bodes well for the resilience of our democracy.

The consequence was that, measured in world terms, we experienced in Australia not only extraordinarily low rates of COVID-related illness and mortality but also relatively low rates of COVID-related litigation.

Interestingly, and tying in again with the thesis of Learned Hand, neither the severity of the restrictions on freedom, nor the level of compliance, nor the incidence of challenge in the courts, seems to have varied noticeably from one jurisdiction to another in Australia according to the presence or absence of a charter of rights and freedoms in that jurisdiction.

Those challenges to COVID-related measures which were pursued in Australian courts were heard and determined quickly and fairly. Of equal importance is that the challenges were dealt with in a manner that was considerate of the sincerely advanced concerns of a relatively small number of persons. They found in the courts a forum where they were treated with dignity and listened to with respect. That is again something which bodes well for the strength of our democracy.

The High Court dealt with constitutional challenges to restrictions on freedom of inter-state and intra-state movement quite early in the management of the crisis. State Supreme Courts around Australia dealt with challenges to a range of other measures.

As to the impact of the pandemic on the mainstream non-COVID-related case-load of Australian courts, two rather disparate effects seem to have been felt. For civil proceedings and for appeals, after some teething issues associated with adjusting to remote hearings, it very soon became very much "business as usual". Backlogs occurred but have not become highly significant. The New South Wales Court of Appeal, I know, prides itself on never having missed a day of sitting.

For criminal proceedings, mainly because of the difficulty of assembling and accommodating juries, the effect of the pandemic has in contrast been highly disruptive. Perhaps because the restrictions on movement were most sustained here in Victoria, the impact of the pandemic on criminal proceedings seems to have been most severe here in Victoria. In a sentencing case concerning the utilitarian value of a guilty plea during the pandemic decided in June last year, the Victorian Court of Appeal predicted that the "backlogs in the resolution of criminal cases in [the Magistrates' Court and the County Court] will take years to reign in".

One hopes that will not be so. Perhaps there is a silver lining in the attention that has been focused on the need to ensure adequate resourcing of courts to accommodate the increased volume of criminal cases going forward.

That brings me, last but not least, to the topic of the impact of the pandemic on relationships within the profession. When he was sworn in as Chief Justice of New South Wales last month, Andrew Bell remarked to the multitude of mask-clad legal practitioners who had assembled for the occasion that their continuing absence from chambers and solicitors' offices will sap them of vitality and will stunt the personal growth and professional development of young lawyers in particular. An essential part of being a good lawyer, he pointed out, is understanding people and human nature, how others react to different situations, perform under pressure, and interact with each other. Much of that is lost, he pointed out, in a professional practice or hearings reduced to scheduled Zoom or Teams meetings.

No profession—especially not the Australian legal profession and especially not that branch of the Australian legal profession that is the Australian Bar—can long expect to maintain its professionalism without the collegiality that comes through the combination of shared professional experience and incidental serendipitous contact. To adapt a refrain from a current long-running musical production, which has itself withstood COVID and which is about the life someone who spent time as a trial lawyer, our professional lives are diminished if we are not "in the room where it happens".

Without the combination of shared professional experience and serendipitous contact that comes with physical proximity, individual members of the bar will survive. Boomers in the twilights of their careers will make it to the end. Those who have become curmudgeons will do so happily. Gen Xs will probably do OK. Gen Ys, and especially those who are at the dawns of their careers will miss out. If they miss out, the Bar, and in turn the Bench, and ultimately the system of law we both administer, will be weaker for it.

That is part of the reason why I regard the holding of this conference as important and why I have braved the airport crowds to make my first trip to Melbourne in three years to support it. I congratulate Matt Collins and all of those responsible for organising the conference on pushing through. I commend you all for attending.

I for one am ready to mingle!

Flagstaff Bowls

CAROLINE PATERSON

The annual Flagstaff Bell barefoot bowls event was held by the Family Law Bar Association on 18 February 2022. This event is in its fourth consecutive year and has managed to dodge rain, wind and the pandemic each time. Just over 200 members of the family law profession attended, and we all had a fabulous time. The solicitors finally managed to beat the Bar and Bench. Their Captain, Jason Walker, sporting dashing red trousers and an ear-to-ear grin, rang the bell and proclaimed that this is the first sporting victory he has ever had in his life. We all believed him.

Jason Glass, solicitor; Jason Walker, Captain of the Solicitors; The Hon Justice Alister McNab, Captain of the Bar and Bench and Sophie Mariole, Secretary of the Family Law Bar Association.