

The COVID-19 crisis

By Anthony Cheshire SC

A crisis presents a wonderful opportunity for scouring the internet for relevant aphorisms, many of which are no doubt misquoted or apocryphal and many of which are meaningless, trite or more knowingly clever than insightful.

Before the internet, we had hard-copy dictionaries of words, phrases and quotes, but often the immediacy of a crisis left one lost for anything but a cliché. I still remember my mother responding to me being retrenched (or dumped) by a girlfriend by informing me that there were '*plenty more fish in the sea*'. That may have been the last time I was lost for words.

So when the COVID-19 crisis broke and everyone scuttled to barricade themselves at home, I was pleased that members did not rush to the unrealistic platitude that such a crisis should be seen as an opportunity.

There was instead an immediate appreciation of the gravity of the situation. The Courts were shutting down and the accepted view seemed to be that there was little prospect of them opening up for six months. If that was the case, how would any of us survive for work and financially? And if that was the case, how would we cope emotionally?

There was a real risk that members would react to this crisis by retreating into self-isolation in relation to all forms of communication. I have previously written about the Bar's tendency to prefer to project a public image of being in control and busy rather than admitting to any lack of work or other stress ('The Bar under stress', *Bar News* Autumn 2019). This tendency could only exacerbate a potentially disastrous situation; and created a real risk of serious negative effects upon members' emotional wellbeing.

There was, however, an unexpected reaction of honesty to the onset of the crisis. When COVID-19 hit, I found members immediately willing to admit to work falling away and to fear and desperation for even the short-term future. Supporting strategies were put into place. These included telephone calls between barristers that were not related to particular briefs and did not have any particular purpose beyond checking to see



how things were; and Zoom chambers' drinks with invited guests including solicitors and members of the judiciary.

As time went on, we realised that many areas of work could in fact continue to operate in some fashion. But as we got back into the adversarial arena, there was a greater willingness to cooperate in overcoming together the difficulties of working with the technology. I have found more cooperation and courtesy and less unpleasantness than had often been the case before COVID-19 hit.

This is something that we should be entitled to expect professionally, but it is also something that is necessary to improve the emotional stress under which many members operate. We often use the word 'collegiality' in relation to the Bar, but it is not always apparent. My hope is that this crisis reminds members of the Bar how they ought to deal with each other, both inside and out of court; and achieves a lasting reset in our behaviour.

The same applies in regard to relationships across the three branches of the profession. In relation to solicitors, this should be self-evident, particularly in circumstances where solicitors have conducted many of the audiovisual hearings themselves.

In relation to the judiciary, the difficulties arising from audiovisual hearings have placed a greater emphasis upon the relationship and the need for cooperation between the Bar and the Bench, mostly for the good. I have previously written about the importance for coping with stress and

maintaining emotional wellbeing for there to be a dialogue across the three branches of the profession. As the Courts continue to open up, it seems to me that there is an opportunity to encourage closer links on both a formal and an informal basis.

And so to the important issue of work. Penny Thew has written elsewhere in this edition about how COVID-19 has made a difficult situation for the Bar even worse and about the importance of marketing in trying to promote our unique advantages and retrieve our position.

Aldous Huxley wrote in *Brave New World*:

'Most human beings have an almost infinite capacity for taking things for granted.'

I am sure there are many members of the Bar to whom that does not apply: I have spent the last 28 years worrying each day that this might be my last brief. Regardless of the position prior to March 2020, however, and even though we seem to have largely muddled through to this point, no barrister can now take it for granted that work will continue to flow as before.

In response to the encroachment of solicitors into the Bar's traditional domain of specialist advocacy and advisory work, many years ago the Bar in Britain developed a model involving the corporatisation of floors. Marketing was then done largely through the floor as a whole rather than by individual barristers. Floors also often entered into agreements directly with large providers such as insurers and local authorities. The client had the benefit of reduced rates and agreed turnaround times (even if matters continued to be done through a solicitor) while the barristers had a guaranteed flow of work and payment within an agreed period.

I am far from convinced that such a formalised model would work here, particularly when we are a smaller Bar with floors where there is still diversity of practice. There are, however, undoubtedly improvements that can be made.

The Bar Association is currently preparing its Strategic Plan for 2021 and beyond. While the Association contributes significantly

in relation to issues of law, including in particular legislative reform, I would like to see a greater emphasis on generating a higher profile in the community.

That is, however, a responsibility that falls upon all of us. We need to take up every opportunity to tell the community about what we do and that we do it well; and that we represent good value for money. While many members of the public are aware that barristers have specialist skills, particularly as trial advocates, I suspect that there are not many who would know that we are often cheaper and earn less than solicitors.

When our dealings with clients are filtered through solicitors, we cannot control the narrative and it is difficult to overcome an image of being clever and good with words but impractical and expensive; and best kept only for trial.

Television series such as *Rake* (and in earlier times *Rumpole of the Bailey*) can help, but of course artistic licence tends to

mean that the demonstration of our skills is accompanied there by unfortunate failings. The honourable exception is Bud Tingwell's depiction of the barrister in *The Castle*, although he was largely overshadowed by the wonderful Dennis Denuto.

In spite of the good relationships that we aim to foster, occasionally frustration breaks out. For those of you wondering whether referring to an instructing solicitor as Dennis Denuto may be defamatory, I suggest you read *Smith v Lucht* [2017] 2 Qd R 489. The term was used there in an unfriendly and derogatory way rather than in 'jocularity'. It did not in the circumstances cause anything beyond a trivial damage to reputation and therefore, to the relief and amusement of much of the legal profession, the action failed.

The Bar is a unique profession, which relies upon its relationship not only with its fellow-members, solicitors and the judiciary, but also with the community. In fostering and developing those relationships as we

deal with the fallout of the COVID-19 crisis, I commend to you the words of Kitto J in *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 298 (cited together with other useful authorities in *Body Corporate Repairers Pty Ltd v Oakley Thompson & Co Pty Ltd* (2017) 322 FLR 355 at [119] and following):

It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation... [The barrister] is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with ... fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. **BN**



Dennis Denuto, Michael Caton and Bud Tingwell in *The Castle*