SYDNEY UNIVERSITY LAW SOCIETY

2021

LAW IN SOCIETY

Recovery?

Many thanks to everyone who made the production and publication of the 2021 Sydney University Law Society Law in Society Journal possible. In particular, we would like to thank the Sydney Law School and the University of Sydney Union for their continued support of SULS and its publications.

We acknowledge the traditional Aboriginal owners of the land that the University of Sydney is built upon, the Gadigal People of the Eora Nation. We acknowledge that this was and always will be Aboriginal Land and are proud to be on the lands of one of the oldest surviving cultures in existence. We respect the knowledge that traditional elders and Aboriginal people hold and pass on from generation to generation, and acknowledge the continuous fight for constitutional reform and treaty recognition to this day. We regret that white supremacy has been used to justify Indigenous dispossession, colonial rule and violence in the past, in particular, a legal and political system that still to this date doesn't provide Aboriginal people with justice.

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Editor-In-Chief Foreword

LLEWELLYN HORGAN

Sydney University Law Society is thrilled to present the latest edition of *Law in Society*, "Recovery?". In light of the events of 2020, the 2021 editorial team decided to attempt some optimism in setting the theme of this year's journal. After all, things were surely looking up. At the time, the worst of the pandemic seemed to be over, with COVID-19 all but gone in Australia and the assurance of forthcoming vaccines. After some further discussion and reflection, we opted to temper that optimism through the addition of a question mark. Frankly, considering recent events, the question mark seems like the right choice.

In putting forward our theme of 'Recovery?' We challenged our contributors to think critically about the role that the legal system and the legislature plays in social and economic recovery, and of the often wide-reaching and unintended consequences of reactionary legal reform. As you will no doubt find when reading through this journal, our contributors were more than up to the challenge.

In this journal, you will find a range of responses to the question of recovery, including Genevieve Couvret's critique of federalism in the context of Australia's pandemic public health response, James Kim's argument that 'COVID Success' has been at the cost of public trust, as well as Kimberley Hammerton's analysis of the impact that a move to virtual courts has had on participants' access to justice. Ingrid Jones argues for the need to increase legal literacy in Australia to protect the rule of law, and Janika Fernando writes on the merging of the Family and Federal Courts and the negative impact this may have on already marginalised groups. In a follow-up to his brilliant piece in last year's Law in Society edition, Samuel Chu argues for the societal benefit of charities retaining the right to engage in free expression and advocacy.

Looking overseas, Arundhati Ajith criticises the intellectual property protections that present a barrier to equitable vaccine access. Further afield, you will find Zeina Shaheen's argument that the 1967 Outer Space Treaty should be updated, in response to the space industry's rapid growth. Finally, entering cyberspace, Kiran Gupta propounds the need for defamation law reform to protect social media users, in light of a recent court decision that demonstrated emojis have the capacity to be defamatory.

Despite the challenges inherent in developing a journal during an extended lockdown, I am deeply impressed with the quality of work of all the contributors to this year's journal, and indeed the quality of work of my team of editors: Sarah Oh, Jasmine Todoroska, Liam Slabber, and Lachlan Muir. I would like to thank all of them for their fantastic work. On behalf of the *Law in Society* team, I would also like to thank the Publications Director, Justin Lai, for all his invaluable assistance, as well as the Design Director, Arasa Hardie, and his team for turning our contributor's articles into such an aesthetically pleasing publication.

With there no doubt being many more challenges (public health-related and otherwise) that the legal profession will have to adapt to in the years to come, it is of the utmost importance that law students and lawyers keep presenting new ideas and challenges to the status quo. I believe that this journal raises many issues and arguments that will continue to be discussed and only grow in relevance in the years ahead. You would therefore be well-advised to read the journal cover-to-cover, and thereby stay ahead of the competition.

Defending a Chimera

The TRIPS Waiver and Vaccine Inequality in COVID-19

ARUNDHATI AJITH
JD I

Abstract

As of August 2021, approximately 4.46 billion doses of COVID-19 vaccines have been administered globally, of which only 0.3% reached populations in Less Developed Countries (LDCs).[1] In October 2020, a group of countries led by India and South Africa proposed a temporary waiver of Intellectual Property Rights (IPRs) in the World Trade Organisation (WTO) to facilitate equitable access to COVID vaccines. High-Income Countries (HICs), who house large pharmaceuticals and have traditionally resisted such measures, did not support the proposal. As the world struggles to pave the road to recovery almost 18 months into the COVID-19 pandemic, vaccine inequality discourse must revisit the problem of intellectual property (IP) . This article submits a defence of the TRIPS waiver proposal, relying on three key propositions, (1) that IP is a real barrier to vaccine access, (2) that a waiver is consistent with international legal obligations, and (3) that a waiver is appropriate, despite its ambitious goals.

I. Background

In 1941, researchers at Oxford University proved the effectiveness of Alexander Fleming's penicillin against disease-causing bacteria. Set against the devastation of the second world war, the university decided against patenting the invention and instead looked to American manufacturers to scale production. Their decision to share penicillin moulds across the pond resulted in American production of penicillin increasing six-fold within a year.[2] A little over a decade later, Jonas Salk developed the polio vaccine and gave it away for free. He did not make any claims to its intellectual property, asserting it was owned by the people and reportedly declared in an interview, 'There is no patent. Could you patent the sun?'.[3] Although the sun has yet to be patented, it has become clear since the mid 20th century that very many things under it may be exploited in this way. Currently in the COVID-19 pandemic, patents regulated by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) continue to play a central role in vaccine access initiatives. Following the initial waiver proposal in 2020, the competing imperatives of protecting IPRs and increasing access to essential medicines have been brought to the fore. Considering the harrowing statistics of inequitable public health outcomes in 2021, it is imperative to re-assess international society's approach to IP during the pandemic.

II. Is intellectual property a barrier to vaccine access?

Whether IPRs are a real barrier to vaccine access is contested. Proponents of the argument suggest IPRs block knowledge sharing and technology transfer, resulting in underutilised manufacturing capacity in countries where that capacity already exists.[4] On the other hand, opponents argue the difficulties with scaling up production stem from a mixture of other factors like resource-constricted environments in LDCs that prevent domestic production,[5] export restrictions affecting the international vaccine

supply chain[6] and distribution delays associated with complex regulatory approval processes in some countries.[7] It has also been suggested that increased production is constrained predominantly by time, not by a need for more manufacturing centres.[8] The latter arguments converge on the notion that the problem of production should be addressed by adhering to the IP status quo and enhancing current cross-border, and critically, voluntary, partnerships.[9]

III. Voluntary Licensing and Charitable Initiatives

Some pharmaceutical companies have entered into voluntary licensing agreements with manufacturers to increase access to their vaccines. As early as May 2020, Gilead Sciences entered into voluntary licensing deals with manufacturers in India, Pakistan and Egypt to supply 127 developing countries with its Remdesivir vaccine.[10] In June 2020, the Oxford-Astra Zeneca vaccine was licensed to the Serum Institute of India, with an initial commitment to supply one billion doses to low- and middle-income countries.[11] The commercial strategy and legal minutiae underpinning these agreements is concerning. For example, Gilead faced criticism that supply to 73 countries were excluded from generic licensing deals, some of which were worst-hit by the virus like the US, Russia, Brazil, Britain and Peru.[12] These 73 countries make up nearly half the world's population, where Gilead was able to charge a price far greater than its generic counterparts and the cost of manufacturing.[13] Similarly, Astra-Zeneca's licensing deal with the Serum Institute of India (SII) is shrouded in secrecy and precludes SII from supplying markets most profitable to Astra-Zeneca. In October 2020, Moderna pledged not to enforce the patent on their mRNA COVID-19 vaccine. The company promised to refrain from doing so for the duration of the pandemic, whilst encouraging licensing of their IP after the pandemic period.[14] This provision gives the company total discretion to declare the 'end of the pandemic', thereby Moderna to revert to full prices at will. Some of the more recent manufacturing partnerships include GlaxoSmithKline and CureVac in Belgium,[15] Novartis and Pfizer-BioNTech in Switzerland,[16] Sanofi and Pfizer-BioNTech in Germany[17] and Bayer and CureVac in Germany.[18] Critically, these partnerships are temporary agreements and do not address vaccine shortages beyond a domestic market.

As a demonstration of their commitment to equitable access, many companies have pledged vaccine donations to poorer countries.[19] In the same spirit, the World Health Organisation (WHO) launched the COVID-19 Technology Access Pool (C-TAP) to facilitate patent sharing. This remarkable initiative sought to create a pooling mechanism to share the intellectual property, knowledge and know-how required to produce vaccines on a large scale.[20] However, its viability is dubious, as approximately 15 months since its inception, not a single pharmaceutical company has contributed to the pool.[21] COVAX, C-TAP's sister initiative, is a secondary pooled procurement mechanism geared to drive down the price of vaccines for participants. COVAX's rationale has however, remained unfulfilled, as not enough wealthy countries have contributed to the initiative.[22] Ironically, it appears that although COVAX is experiencing a vaccine shortage as a result, it is still contractually obligated to reserve one in five doses for HICs.[23] As a result, of the 80 million doses supplied to LDCs, 22 million have gone to HICs.[24] Where vaccinations in some poor countries have only just begun, COVAX has delivered to HICs whose vaccination programs are well underway. The incentive to contribute to COVAX has been further eroded by HICs executing bilateral licencing deals, some of which are mentioned above. The idea of a 'global vaccine hub' has disintegrated and relapsed to a 'traditional-aid financed approach', again excluding the needs of LDCs.[25] As C-TAP gathers dust and COVAX is entirely dependent on the good-will of profit-motivated companies, it is incorrect to conclude that voluntary mechanisms are equipped to increase access to vaccines. The goodwill of industrial leaders must not be the determinant of global health outcomes during a pandemic.

IV. TRIPS and Compulsory Licensing

TRIPS allows a country without adequate local manufacturing capacity to import a pharmaceutical product from a producing company under a compulsory license during a 'national emergency'.[26] On the face of it, this mechanism should remove the IP barriers faced by manufacturers who are unable to secure a voluntary licence and additionally drive prices down through the generic market. However, the provision has scarcely been invoked, due to excessive formalities and difficulties associated with the process.[27] In the past, compulsory licensing has instead been advocated as a tool by governments to threaten pharmaceutical companies into voluntary agreements.[28] In spite of this, the mechanism

has been invoked in the present pandemic. For example, Canadian Biolyse Pharma's co-founder, Claude Mercure, reported the company could make at least 20 million Johnson & Johnson vaccines a year.[29] After Biolyse was denied a license from the pharma giant, it tried to secure a compulsory license through the Canadian government, whose Access to Medicines Regime was described as a 'labyrinth' with limited government resources.[30]

The European Union (EU), in continued opposition of a waiver, has affirmed that the pandemic constitutes a 'national emergency' and has agreed to participate in negotiations to 'simplify the process of compulsory licensing'.[31] However, this statement is severely undercut by the sheer number of raw materials involved in vaccine production and the complexity of the supply chain, particularly with COVID-19 vaccines that employ messenger RNA (mRNA) technology.[32] The Pfizer-BioNTech vaccine comprises 280 ingredients sourced from 19 countries.[33] Viral vector vaccines like Oxford-Astra Zeneca and Johnson & Johnson are similarly complex.[34] Compulsory licensing is problematic because it does not account for the current use of export restrictions obstructing the integrity of international supply chains.[35] Secondly, a TRIPS-compliant compulsory license would not cover the additional IP required to manufacture a vaccine, such as trade secrets, regulatory data, copyright, industrial design etc.[36] The revised waiver proposal of May 2021, on the other hand, has extended its initial mandate to include these elements to facilitate bio-identical replication.[37] A further challenge to compulsory licensing exists in that several HICs have opted out of the Article 31bis regime. This regime came into force in 2017 and allows a country to issue a compulsory licence to import from a producing country, to then replicate and export to other countries.[38] The provision seeks to address the shortcomings of Article 31(f), which provides that compulsory licences must be used pre-dominantly for domestic supply. However, for this provision to be leveraged in COVID-19, the HICs need to exercise their opt-in to practically allow access to LDCs via parallel imports.[39] In light of these shortcomings and the evidence of underutilised manufacturing capacity,[40] IP barriers pose a real threat.

V. Is the waiver consistent with international law?

The TRIPS Agreement, like many international legal instruments, is implemented subject to principles contained within its provisions and more generally in international law. The Agreement has evolved over the years to account for the often-competing imperatives for IP protection and access to essential medicines.[41] Although the TRIPS waiver presents a theoretical solution to the issues identified in the previous section, it nevertheless infringes upon a core tenet of international IP regulation, the protection of private investment and incentives for technological innovation. The tension between access and innovation is best articulated in Article 7 of the Agreement, titled 'Purpose':

'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'.[42]

Opponents of the waiver suggest the successes achieved by pharmaceutical R&D in delivering a vaccine within a year of discovering a new pathogen stand to be negated by suspending IP protections.[43] For example, it is argued that the future of emerging mRNA technology, which underpins various COVID vaccines, is dependent upon the continued security for innovation dependent on IPRs.[44] On the other hand, the 'distorting effects of patents'[45] have been critiques with regard to dubious economic productivity. Putting aside the philosophical debate, this section seeks to achieve the balance in Article 7 above by drawing upon two legal principles recurrent in this field: good faith and the right to health.

In 1957, Sir Gerald Fitzmaurice articulated that 'a rule answers 'what' and a principle answers 'why' and the principle of good faith regulates 'how'.[46] Accordingly, a good faith interpretation of TRIPS can be said to impose a limitation on the sovereignty of states,[47] to act in a manner conducive to its purpose and objectives. In *United States – Section 211 Omnibus Appropriations Act* 1998,[48] the WTO Panel saw Article 7 as an expression of the good faith principle, indicating that Member States are bound by its application in TRIPS.[49] Alison Slade expands upon this argument, suggesting the decision effectively introduced the principle as a legal concept not otherwise found in the text of TRIPS, allowing Article 7 to act as a 'safeguard against the potential

arbitrary regulation of IP'.[50] In addition, Article 8, entitled 'Principles', provides that Members may 'adopt measures necessary to protect public health… provided that such measures are consistent' with the Agreement.[51] Read together, Articles 7 and 8 indicate that states may lend greater weight to accessing medicines in the conditions of this pandemic when undertaking the TRIPS balancing exercise.

Although the Doha Declaration sought to increase access to essential medicines through compulsory licensing, numerous health crises have since claimed the lives of populations in the developing world.[52] In eliminating inconsistencies between trade and human rights, the good faith principle is also linked to the right to health. The enforceability of the right to health in international law is precarious, with IP obligations often superseding health imperatives. However, human rights obligations should be considered by Member States in their implementation of TRIPS, both as an extension of the good faith principle and as an obligation to pay regard to public international law in conjunction with international economic law.[53] This principle is also reflected in domestic court decisions, such as the Indian Supreme Court's observation in *Novartis AG v Union of India* that a major objective of the *Patents Act* 1970 (India) is to 'prevent evergreening and provide easy access to life-saving drugs', referring to the human rights obligation contain in the *Indian Constitution*.[54] This case demonstrates that national governments can take steps under their international legal obligations to improve access to medicines.[55]

VI. Will the waiver solve vaccine inequality?

Jayashree Watal, India's negotiator to the TRIPS Agreement has categorically stated that waiving IP rights will not improve vaccine availability or equity.[56] She suggests that the petition for a waiver is instead an indirect attempt to pressure existing manufacturers to enter into voluntary licensing agreements in their own countries, so as to increase domestic production centres.[57] Voluntary licensing and charity are ideal solutions, but as discussed previously they are only practical where corporations are willing to sacrifice commercial profits. The experience of COVID-19 so far strongly repudiates this notion. Compulsory licensing has also proven incapable of delivering the necessary results. These circumstances beg the question, how will a waiver prove to be any more efficient? Owing to the current stage of the pandemic characterised by numerous variants, the reality is that a waiver is not a smoking gun. If successful, it is likely to be put into effect only after lengthy negotiations in the WTO, followed by a period of implementation and administrative delay. This article does not purport that the waiver can solve vaccine inequality at the speed and scale required by COVID-19. Rather, it emphasises that vaccine inequality is a dynamic phenomenon that has existed for many years. In 2004, a WHO consultation concluded that most developing countries would be unable to access vaccines during the first wave or even for the duration of a pandemic.[58] During the HIV/AIDS epidemic, therapeutic drugs were developed in the global north and took years to reach Africa, where the most deaths occurred.[59] In the H1N1 pandemic of 2009, only two out of 95 developing countries identified by WHO as requiring flu vaccine shipments received them by 2010.[60] The experience from H1N1 also illustrates the failure of the developed North to provide timely and suitable access to a vaccine, highlighting the global access issue,[61] as was the case in the 2014 West African Ebola outbreak.[62] History is repeating itself and for this reason, change is necessary.

Perhaps the strongest advocate for an IP waiver is the subject of the patent itself – the vaccines. With regard to the complexity of bio-identical vaccine replication, Johnson & Johnson's Chief IP Counsel emphasised the need for trade secrets and know-how in addition to patents. He described it as trying to replicate a family recipe, stating 'It wouldn't take like grandma's cookies.'[63] Albeit a profound metaphor, it is for this reason the revised waiver proposal accounts for all health products and technologies related to 'the prevention, containment or treatment of COVID-19', specifically covering the sharing of IP as well as 'trade secrets and know-how.'[64] In other words, if grandma were to reveal her secrets along with the recipe, perhaps the cookies would retain their special flavour, especially in a world where baked goods seemingly demarcate life and death. Particularly where generous government funding empowered pharmaceutical companies' development of vaccines in COVID-19,[65] the public is entitled to greater access even if that means diminished profits. The COVID-19 pandemic is substantially more serious than past health crises, with a rising fatality rate and the continued emergence of contagious variants.[66] The global economy stands to lose as much as USD

9.2 trillion if governments fail to ensure developing economy access to COVID-19 vaccines.[67] A waiver of TRIPS obligations may not provide an expeditious solution, but there is no doubt that acceptance of the status quo cannot continue. The lessons of the past should trigger a rethink of way in which TRIPS is interpreted and implemented.

VII. Conclusion

The TRIPS waiver is a chimera; it is a daydream of expeditious and equitable access to essential medicines. In an ideal world, companies would enter into transparent voluntary licensing agreements that ensure price equality, contributions to C-TAP and COVAX would sky-rocket and compulsory licensing would deliver results. Given these phenomena have yet to manifest on a scale that satisfies global demand, waiving IP protections in this manner will not immediately solve vaccine inequality. Analysing the separate elements of this problem reveals, however, that a solution cannot dismiss the waiver outright. IP barriers are a real problem to vaccine access that have existed far prior to the present crisis and threaten to fester if not addressed. Furthermore, arguments describing the issue as a zero-sum game between innovation and access are reductive. Where any waiver is temporary and private investment in research and development was largely supplemented by public funding in many key countries, it is entirely justifiable that therapeutic profits diminish. The current waiver proposal may be an idealism, but its call for a universal recognition of the limitations of the IP status quo must be defended. In a crisis where national recovery is interwoven with global recovery and time is of the essence, IP policies must evolve.

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The Contempt Inherent in Federalism

The failures of national leadership, the expansion of executive power and its role in COVID-19 recovery

I. Introduction

It's the biggest plot twist of the year – the second half of 2021 and the story of the coronavirus in Australia is far more deadly than the first. At the heart of the human strain of the virus is *contempt*: between states, between citizens and between states and the federal government. States and their citizens are crying out for national leadership – specifically, for the federal government to coordinate and bolster an effective vaccine rollout. Initially, the capacity for individual states to respond in different ways was invaluable. But as the disease spreads across state lines, a lack of uniformity worsens the crisis or leads to confusion – from inconsistent approaches to border closures, different health advice concerning the Astra-Zeneca vaccine and hotel quarantine blunders. Hence, where laws need to be enacted urgently and consistently across the country, federalism hinders the capacity for conformity. In this second wave, where states have previously been the gatekeepers of the majority of regulations, the recovery of the nation therefore ultimately hinges on the recognition that we are in fact a Commonwealth. The power and primacy of national action is no more salient than in the example of JobKeeper, which held the fabric of the economy together and – in its absence – has seen many states, particularly NSW, buckle under the pressure to simultaneously sustain the economy and enforce stricter lockdowns.

Indeed, the Commonwealth has not been idle. A vast raft of legislation has been introduced – from the initial coronavirus economic response which included JobKeeper payments, to migration schemes and regulating entry and exit of the country, to setting up aged care schemes and a national immunisation register. However, the federal government's weakness in taking action particularly relating to health – such as national guidelines and a swift vaccine rollout – bespeaks a political deference to the states. There are no real legal obstacles. The focus should now be on how the federal government can take greater steps to ensure a long-term national recovery from COVID-19, including responding to the relentless demand for vaccines, introducing economic initiatives such as national rent control and maintaining now forgotten means of financial relief. This article considers the breadth of parliamentary power available to the Commonwealth in times of crisis, through which it becomes apparent that it is perhaps not a lack of power that has rendered our Commonwealth impotent. Rather, the seemingly unprecedented exercise of executive power not only has precedent, but appears to be conditioned more by political will than the law itself.

II. The role of politics in law & property

The law may be the most powerful instrument in aiding the recovery of a nation, but it is always produced in a political context and inflected with related incentives – this is exemplified in the relationship between property and economic crisis. In modern times, it is axiomatic that the role of property, such as the mortgage, is a 'major vehicle for economic development'[1] and thereby economic recovery. The development of the mortgage can be traced along the path of the historical, economic and cultural developments in Anglo-Australian society; its sharpest inflection point being the Global Financial Crisis ('GFC'). Federal measures introduced in Australia post-GFC to protect mortgagors unable to pay their debts, or subject to unjust transactions,[2] are now pending removal. What this example reveals is that property rights are not only innately connected to political circumstance, but political incentives (such as those informed by the role of the big banks) shape the operation of the law even more than actual crises.

There is in fact precedent for the introduction of a national rent control mechanism to address the risks of eviction, such as those arising due to COVID-19, from similar periods of existential crisis.[3] States have introduced moratoriums on evictions and support for COVID affected tenants,[4] but the federal government has broadly failed to consider nationally implementing longer term solutions. Since the early 20th century, reform by successive governments has been underscored by parliamentary ping-pong. From the restriction of rent to 6% of a property's value in WWI,[5] to a 22.5% reduction and prohibition on eviction during the Depression,[6] to rent freezes and establishment of a Fair Rents Board during WWII,[7] rent control was consistently introduced and curtailed consistent with the political climate. A recent example is the 2019 repeal of the post-war initiative of protected tenancies[8] (where tenants live in government controlled premises protected from rent or eviction) because they negatively affected the value of properties.[9] This timeline echoes that perceivably short-term government solutions perpetually suffer from conceptions of property as an

asset, the value of which fluctuates, rather than being implemented to protect tenants *regardless* of global circumstance. It seems that global circumstance is always the driving force behind large-scale, national measures rather than something which legislation is built to withstand. The absence of this kind of legislation is increasingly glaring in a time when the most important thing is to stay at home.

III. The precedent for expansive Commonwealth power

Having established that the motivations behind the exercise of national measures are typically imbued with political imperatives, it is useful to hone in on specific legal mechanisms which expand and circumscribe executive power in the face of national emergency.

A brief examination of the defence power in s 51(vi) of the *Constitution* is apposite to illustrate how the role of the federal parliament is institutionally maximalised in the wake of threats to the nation. Its operation is premised on the seriousness of a given national security situation. It expands and contracts according to the extant political climate. For example, in *Thomas v Mowbray*, the High Court held that an internal threat to Australia's national security does not preclude reliance on the defence power.[10] Whether terrorism fits into the normative characterisation of ongoing conflict or urgency is a lingering question subject to much doctrinal debate.[11] Nevertheless, a change in the political landscape bears directly on the operation of executive power. Overall, powers of the federal parliament are heightened in periods of history where there is perceivably an imperative for the Commonwealth to loom larger. Essentially, if there is sufficient evidence of a threat to the nation, the secondary aspect of the power is enlivened – this widens the extent of the Commonwealth's constitutional power, often at the expense of states. In wartime, the High Court displays far greater deference to parliamentary opinion as conclusive.[12] The role of parliament is therefore imbued with greater importance during times of national or international crisis – this "respect which the court pays to the opinion…of government"[13] is enshrined in the jurisprudence of the High Court and thus in the constitution. In the *Communist Party Case*,[14] Fullager J quoted the following words of Dixon J:

"The court does not substitute for that of the Executive its own opinion of the appropriateness or sufficiency of the means to promote the desired end." [15]

It is apparent that the expansion of Commonwealth power, whilst vital, may be liable to cruelty or extremity. Kate Chetty considers how Parliament has historically attempted to curtail human and economic rights by implementing broad regulations for securing the defence of the Commonwealth under the power.[16] For example, during World War I, the Court upheld laws permitting the detention of a person not charged with an offence, who would not be entitled to a hearing and may not have been made aware of the grounds upon which they were detained.[17] The Defence Minister's belief that a naturalised person was disaffected or disloyal was 'the sole condition of his authority'.[18] It is worth reflecting on how indefinite lockdowns, penalties accompanying stay-at-home orders and a federal ban on leaving the country significantly and blanketly restrict freedoms. They are, to a significant extent, necessary - but they are nevertheless a remarkable display of governmental control. The exercise of power in broad strokes – particularly when the country is suffering – can cultivate conditions for harm or misuse. The role of the courts is a central tool in restricting this, but the law is, first and foremost, in the hands of parliament.

A brief nod to the defence power illustrates a principled deference to parliament and thereby the role of political imperatives in times of national crisis and recovery. Beyond the less relevant context of war and conflict is that of financial crisis. In *Pape v Commissioner of Taxation*, it was held that the Executive is the only arm of government capable of responding to a state of emergency due to the capacity and resources of the Commonwealth government.[19] This extended to the introduction of short-term fiscal measures, such as those introduced during the GFC to meet adverse economic conditions affecting the nation as a whole.[20] These measures were supported by the nationhood power,[21] a far more dubious means of executive control than constitutional heads of power. The nationhood power is underpinned by the notion that some executive and legislative powers are inherent in the fact of nationhood and international personality under the Constitution.[22] Its lack of precise scope and application to the GFC is a useful illustration of how commonwealth power was wielded and extended in a time of national crisis that sat outside the bounds previously ascribed to

'nationhood'.

The nationhood power is traditionally limited in character to provide a national response to matters involving symbolic aspects of nationhood, like the regulation of flags or issues requiring Commonwealth resources.[23] The GFC was held to be sufficiently national in character,[24] especially because the Executive was considered the only arm of government capable of and empowered to respond to a crisis on the appropriate scale designed to best engender a national recovery.[25] However, it was made abundantly clear that overarching considerations of federalism necessarily limit the nationhood power.[26] There must be no real competition with the states, such that the laws "cannot otherwise be carried on for the benefit of the nation".[27] Beyond the intricacies of the legal argument, it appears that whether the executive actually has power is treated like a pre-existing fact rather than a decision made by the courts. That is, the existence of executive power beyond express grants of legislative heads of power is considered "clearest" when it involves no real competition with state executive or legislative competence.[28] It is interesting that the language used by the court suggests this is something structural, something that can be seen, rather than a judgement call. These principles hum beneath the law to remind us of the intended harmony – and reality – of federation.

IV. Unresolved points of public law in a pandemic

The traversal of a couple mechanisms in public and constitutional law which extend Commonwealth power during crisis is not intended to search for some basis upon which the federal government could do something more about the pandemic. The foundations already clearly exist. This essay only seeks to colour the conversation surrounding the political incentives and legal principles which underlie executive power and how this bears on the federal government's reach. Nevertheless, it is of course open to consider whether unresolved points of law provide an opening for a more coordinated response to the pandemic. For example, COVID-19 is arguably an issue of international concern which may be sufficient to place it within the external affairs power.[29] Federal measures in response to the pandemic, such as international border closures or compliance with recommendations made by the *World Health Organisation*, is likely to concern relationships between Australia and other nation states. There has never been authoritative acceptance of the view that international concern is enough albeit statements of support by individual judges.[30]

Of greater interest is whether COVID-19 falls within the scope of the nationhood power, because this reveals the ambiguity of the precise interplay between the state and federal governments envisioned in the Constitution. The existence of a health crisis may not yield criteria of constitutional validity or illustrate that a national response is required by an unbounded executive power.[31] It arguably meets the criteria of being an issue of national concern insofar as it has precipitated a financial crisis but it may be argued that a crisis of public health is pre-eminently the business of the states. This is notwithstanding that Australia's status as a sovereign nation empowers the federal government who may come into its territory and who may not.[32] Moreover, there is the additional obstacle that the nationhood power cannot typically be used to support coercive legislation which creates penalties – such as those for breach of health orders or border closures.[33] It is not necessary to expound the bases upon which the federal government may justify the exercise of its powers – what is of greater importance is the need for something to be done in the first place. What should be impressed upon our leaders is that acting in response to crisis is not optional just because state governments with plenary power are also performing.

V. Conclusion

The imperative role of the federal government to aid in the nation's recovery cannot be understated in a federation more fractured than ever. Mediating the exercise of this power are legal institutions which entrench the inextricable relationship between states and the Commonwealth. This creates an inherent tension between states and between levels of government which can only be reconciled by national legislative action and an appeal to unity. It may seem like a call to arms falling on deaf ears, but the importance of holding our government accountable is manifest in influencing its response to domestic strife given the power of political goodwill, and the punishing force of contempt increasingly festering towards an historically fragile federation.

Legal Literacy

The Key to Recovering the Rule of Law

INGRID JONES
LLB III

I. Introduction

The principle of the rule of law has long governed western notions of how the law ought to function. The essence of the rule of law is that laws ought to apply to all citizens, irrespective of political position or class, and that in being bound by such laws, everyone should be able to access it, abide by it and be held accountable. However, a mere observation of current trends in the legal-political sphere suggests the demise of the rule of law and its consistent practice. In a world which sees the increased publicisation of the legal sphere, it is essential that the rule of law is preserved to ensure our legal system guarantees impartiality, universality and transparency.

In this article, I wish to specifically isolate certain principles of the rule of law which have gone astray and require recovery for effective legality and democracy. These principles include that the law should be readily known, clear and consistent, and that everyone should be able to competently access the legal system and advice.[1]

This article will explore how the introduction of comprehensive legal literacy in Australian education could help recover key principles of the rule of law; namely accountability, awareness and access to legal recourse. By empowering citizens with fluency that allows them to understand the legal system and their rights, these elements of the rule of law can be at least partially recovered.

This article will contend that the development of modern legal literacy can be perceived as an important part of a movement to empower citizens through engagement with the rule of law. It is readily apparent that in Australia, comprehensive legal knowledge seems to be left to those who go to law school. This has proven to have direct impacts on how Australians respond to their legal problems and thus how the rule of law principles of accountability, awareness and accessibility operate.[2] A continuum of legal literacy thereby exists which is dominated at the extremes, with academics and professionals at one end, and the remaining public at the other.[3] Common to both groups, is the requirement to be bound by the law, and how they are able to access and exercise it is largely dependent on understanding. The introduction of public legal education and literacy, when effected, will enable citizens to truly enjoy the benefits of the rule of law.

It is important to first limit the scope of this article. When referring to legal literacy, I refer to the term which is often synonymously understood as legal awareness. The definition adopted by legal scholar James White is 'that degree of competence in legal discourse required for meaningful and active life in our increasingly legalistic and litigious culture.'[4] Rather than the mere ability to obtain legal advice by oneself, legal literacy in this article is more concerned with the ability to make evaluative judgments about the substance of law, advocate for its improvement and effectively use the system.[5] In contemporary Australian society where we are governed by a palimpsest of statute and common law, legal literacy needs to entail the rudimentary knowledge and skills required to engage with the legal system. It is through this engagement that we will be enabled to recover the rule of law. When citizens are fluent in how their legal system functions, governments and legislators can be held accountable to exercise the rule of law and the law is capable of being known to everyone, enabling compliance. Further still, accessibility to services is heightened and citizens are equipped to become better advocates for its function.

II. How can the rule of law be recovered?

A. Recovering Accountability

According to the United Nations, four billion people live without the protection of the rule of law.[6] Without a primary level of knowledge in law, citizens are unaware of the rights which they should be provided at law, and in turn are not able to fight injustices and demand that their rights be exercised. Historically, the occlusion of legal knowledge has been perceived as a strategy to 'contain and pacify' the populace during periods of political turmoil.[7] Notably in India, Justice Kabir remarked that the lack of awareness of laws are the main causes for injustices in marginalised populations, especially women.[8] In turn, when women are unaware of what rights should be afforded to them, their accessibility to law is handicapped and thus the accountability of the government is severely limited. The provision of a primary level of legal knowledge connotes an ability to hold governments accountable. In the criminal context, this could be as simple as knowledge of the right to personal liberty or silence, thus requiring police to exercise their powers with more accountability. Where there are expectations

that rule of law will be observed are widespread because of enhanced public engagement, politicians are pressured to practise it.[9] Civic understanding about rights and obligations invites transparent and accountable governance based on the rule of law. The capacity to hold power to account requires collective understanding and participation in the legal and political order, thus limiting the authority and maximising the legitimacy of government.

B. Recovering Awareness

When there is unfamiliarity of the existence or function of laws, the law fails to serve its purpose of protection and instead, its exercise looms over unsuspecting victims.[10] Essayist and philosopher Walter Benjamin conceives this precarious balance between knowledge and law as a problem of 'ambiguity, guilt and indebtedness.'[11] A lack of legal fluency among citizens can lead to a failure to comply, or further still, a failure to act on legal remedies because of not knowing their existence. The imposition of western law on Aboriginal and Torres Strait Islander people above Aboriginal Customary Law presents a tense imbalance, whereby much of their law has been overwritten by century old legal practices and systems. The disproportionate issuance of Criminal Infringement Notices (CINs) in Aboriginal and Torres Strait Islander communities lays bare the issue of awareness of the rule of law. Not only do members of these communities unknowingly commit offences in showing resistance to police, but they are often unaware of any remedy which may exist. The NSW Ombudsman recently reported that 17% of CINs for offensive language were issued to Aboriginal and Torres Strait Islander people.[12] The Redfern Legal Centre found that, what follows from this disproportionate issuance of fines is the statistical unlikelihood that Aboriginal and Torres Strait Islander people will elect to have a CIN dealt with or reviewed by the court.[13] Although in court, most offensive language CINs would be unlikely to 'satisfy the legal test,' the 'overwhelming majority' are not reviewed, resulting in fine default.[14] Fine default in these communities perpetuates the cycle of disadvantage, whereby 89% of Aboriginal and Torres Strait Islander offenders do not pay their CINs on time and are thus subject to further punishment.[15] The issue of offensive language CINs in Aboriginal and Torres Strait Islander Communities is likely a part of a more important conversation about police accountability, underlying racism in criminal law and the suggested removal of the offensive language offence altogether. However, fine default is also a consequence of people being subject to exercise of law and merely succumbing to it with no understanding of recourse. Public legal education may go to some length to help reconcile this compounding of issues wherein by educating communities on their rights to legal redress and the way in which police powers can be lawfully exercised, these people will be empowered to fight charges, and similarly create accountability.

C. Recovering Accessibility

In Australia, 13% of the population live below the poverty line, however legal aid is only accessible to 8% of Australians.[16] This is owing to the economic threshold that is required to be met for legal aid, which means that a proportion of the population are considered 'not sufficiently impoverished' to access it.[17] There lies a substantive gap in the population who are precluded from the most basic form of legal assistance. Therefore, the right to seek justice, once considered as an element of the rule of law, is rendered ineffective and access to legal remedies becomes essentially moot. These people who are unable to access basic legal help become alienated from the law, cast under its spell but unable to benefit from it. The Productivity Commission into Access to Justice Arrangements of 2014 found that a lack of understanding of rights leads to a difficulty in identifying the 'legal dimensions' of problems and thus an inability to invoke means of resolution.[18] Thereafter, this lack of knowledge merely contributes to unresolved legal problems, and the severity is exacerbated with time.[19] Even if the provision of legal aid was able to be reconciled in Australia with the population of those who need it proportionately, the current system of legal aid is crisis oriented, provided only in response to legal troubles. Instead, a preferred model of legal literacy at a grassroots level would serve to provide a form of anticipatory knowledge, equipping people with the skills to guide themselves through a legal process that they are already familiar with. The introduction of a comprehensive system to educate Australians on the law at a basic level would enable citizens to recognise a legal right or conflict and take necessary action to avoid legal troubles or recognise where a solution through legal assistance would be available.

III. Where has legal education been effective?

Now that I have broadly detailed the benefits of the concept of legal literacy, it is crucial to consider what legal literacy models look like in practice. The last few decades have witnessed the emergence of public legal education as a 'grass-roots response to the monopolisation of legal knowledge by the profession and the academy.'[20] Around the world, multiple programs have attempted to reconcile this growing divide.[21] A Canadian study conducted by Ellis and Anderson[22] in 2003 found that when providing study participants with a divorce education program over a 12-month follow-up period, they had fewer case conferences, finalised their cases sooner and were approximately 50% better off than those who did not.[23] It is important to consider that although a multitude of programs exist, many are only sustained for short periods, and further still, little data is collated on their efficacy.

One pertinent case study of public legal education is the work of the United Nations, which has made several steps to reconcile legal empowerment and awareness of legal entitlements on a global scale. In 2005, the United Nations Development Programme (UNDP) hosted the Commission on Legal Empowerment of the Poor. The Commission drew upon three years of research to create proposals and initiatives for increasing legal empowerment of people living in poverty. Its 2008 report found that as many as 4 billion people are 'robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law'[24] whereby lack of understanding of legal rights and obligations serves as a barrier to access to justice.[24] The UNDP are involved in more than 55 ongoing projects related to legal empowerment globally. These include the work of the Committee on the Rights of the Child (CRC) who have been actively involved in the reform of constitutions of East-Timor, Brazil and South Africa in the drafting of laws which protect children, and the work of the International Labour Organisation (ILO) in Cambodia, Cameroon and Nepal which has endeavoured to assist workers and employers in rights-based dispute practices.[26] In Kenya, the Bar Hostess Empowerment and Support Group formed a legal literacy campaign which provides education and support services to assist sex workers in knowing their rights against HIV, violence and exploitation.[27]

Notably, the UNDP assisted in the introduction of a project on Legal Empowerment and Assistance of the Disadvantaged (LEAD) in Indonesia, which was aimed to strengthen justice for marginalised people through legal support.[28] Studies revealed that beneficiaries of the program showed levels of awareness relating to their rights to government services at 63.9% compared to 43.1% of non-beneficiaries, as well as 62.2% compared to 56.9% on land and natural resources rights and 87.2% compared to 73.6% on participation in politics.[29] Further, it led to an increase in the number of gender-based violence cases being reported and resolved on project sites. The beneficiaries became not only more aware of their rights, but more pro-active in seeking justice, thus enabling their access to the law. On the back of this success, Indonesia have now developed a second program, National Strategy on Access to Justice (NSA2J) which will be integrated in the long term.[30]

The UN Declaration on Human Rights Education and Training and affirms that the rule of law should form a part of every country's curriculum[31] and as such, their attempts to integrate the rule of law have been varied and thorough. Legal literacy models should endeavour to create programs which pay close attention to the empowerment of marginalised groups as the UN has done and monitor the effects it has on the recovery of the rule of law.

III. Recommendations for Australia

Having emphasised a need for legal literacy and observed global models, it is crucial to identify what a model of legal education might look like in order to bring about legal fluency in Australia.

In Australia, there already exist models of legal literacy for the public in many forms, however many of these exist in the form of legal aid such as Legal Aid NSW, which assists retroactively. Instead, I advocate for a grassroots model which equips members of the public with their own proactive basic knowledge, allowing them to recognise legal rights and recourse. I have observed two programs within Australia which are exemplary models of how legal literacy could unfold in Australia.

A. Launceston Legal Literacy Program

The Launceston Community Legal Centre previously

conducted a Legal Literacy Program which began in 2011 with the dual aims of 'improving document literacy and problem solving in rural communities.'[32] The program involved the training of individual local volunteers, supported by solicitors, who worked with local clients in their communities to recognise and resolve legal issues pre-emptively 'before the need for legal advice or intervention.'[33] The program particularly assisted individuals by providing them with the information they need to access their rights to services, as well as providing legal advice. However as of late 2020, the program has ceased to operate due to the state government's inability to re-fund the program.[34] It is an unfortunate oversight when programs like this are foregone, because whilst their potential may not seem measurably worthy of funding, the long-term community impacts of a service has proven invaluable in aforementioned case studies.

B. The Rule of Law Education Centre

The Rule of Law Education Centre was founded in 2009 to teach basic principles of the rule of law and its relevance to contemporary issues to school and university students through education programs. The Rule of Law Education Centre 'specialises in creating easy to understand resources and materials for students and the community to grasp legal concepts.'[35] Pertinently, in 2019, the Rule of Law Education Centre developed a primary school program of resources in teaching historical and civics subjects in the classroom. The Rule of Law Education Centre specifically attempts to reconcile the rule of law and legal literacy through teaching basic principles of the rule of law. However, whilst both these programs are exemplar indications of positive legal literacy models, it is significant that neither program is compulsory, nor practised widely.

C. Proposal

I propose that a positive model of legal literacy of Australia should ideally follow the trend of health literacy in childhood education. There has been no prior attempt by the Australian government to implement public legal education on a compulsory basis.[36] High school education in New South Wales mandates the teaching of health to students, because of the individual's inalienable right to good health. There exists a parallel between health literacy and legal literacy in that low levels of health literacy can jeopardise an individual's health in the same way low legal literacy can affect their legal welfare. Whilst one might argue that health is a matter of life or death and everyone is affected by their own personal health, it is analogous to suggest that each individual is bound by the law and will be subject to the workings of the justice system at one point in their life, either through overt forms of litigation and proceedings, or through mere exercise of rights. Further still, many areas of the law stand to protect the inviolability of the physical body.[37] Whilst health education educates student on how the body works, legal education undoubtedly informs one of their rights in respect of their body, ranging from abortion rights to the issue of consent and sexual assault. The implementation of compulsory legal literacy for students in high school would be the best method to ensure that Australians are provided access and comprehensive understanding of the legal system they are bound by. This is because the innate ability to integrate legal education before people become fully subject to the full force of the law at aged eighteen would brief young Australians with the necessary rudimentary legal understanding. Thus, by equipping citizens with a basic provision of legal knowledge to exercise on their own terms in their adolescent education, accountability, awareness and accessibility of the law can be enabled for citizens as they progress into adulthood and society.

V. Conclusion

The rule of law has, and continues to be considered an essential cornerstone of the western legal realm. However, Australia need not look beyond the increasing numbers of people denied access to justice, the increasingly complex pentimento of statute and common law and the continuous criticism of the justice system to perceive that the rule of law is being eroded. As such, the most optimal means to begin its recovery is to galvanise legal literacy in Australia and provide citizens with their civil right to understand, engage and access the law.

Public Trust

The Insidious Costs of COVID Success

JAMES KIM
LLB IV

I. Introduction

In 165CE, the Antonine plague ravaged the Roman world and caused extraordinary economic and social devastation. At its highest estimate, disease slashed the population in half, leading some scholars to point to the event as one of the most important factors that lead to the eventual decline of the Roman Empire.[1] The effects of the COVID-19 pandemic from a statistical standpoint have not been as dramatic. As of August 2021, Australia has only recorded 37,754 cases and 947 deaths, a far cry from the suffering of the ancient Romans.[2] Still, the effects of the pandemic and the way in which the Australian Constitution has forced it to be managed, may in fact be more insidious than such numbers suggest. To that end, Chief Justice Bathurst began the 2021 Law Term with the cogent observation that if there ever were a time that the populace had blindly trusted public institutions, it was now long gone.[3] Though his Honour had in mind the effects of various Royal Commissions into banking, aged care and detention, his words are equally applicable to the effects of Australia's response to the pandemic. Perhaps confirming these suspicions, following the announcement of a second lockdown, thousands of frustrated Australians marched through Haymarket prompting swift police action. As the nation looks to recover from COVID-19, a closer look at this cynicism is required. This essay therefore first explains how the Australian Constitution has restricted the way in which the pandemic has been managed and its effects on public trust. It then goes on to emphasise how the age of information has increased the need for greater consistency between the states. Finally, it examines the dimensions of public trust to conclude that Australia's statistical success with COVID-19 may have more long-term effects.

II. The Constitution

Australia is a Federation of states and territories that each operate with distinct legislatures, judiciaries and executives. Under the Constitution, the Commonwealth is only given exclusive domain over a limited number of subjects as listed in ss 51 and 52, with the states retaining jurisdiction over everything beyond that. In the context of the pandemic, this has meant that whilst the Federal government has been able to legislate on topics such as quarantine and border control, most other matters have been left to the states. This Constitutional approach to managing the pandemic certainly has its advantages. As Hegele and Schnabel point out a state-led approach can, inter alia, better adapt to local circumstances, improve policy experimentation and promote beneficial competition between constituent units.[4] Still, perhaps the biggest advantage of this approach is its uniformity. In Switzerland, despite being a Federal system like Australia, the power to manage the pandemic is given to the national government under the Swiss Constitution. Hence, following a unilateral decision by certain constituent units to close schools, the Federal government ordered all schools to close. This was in order to avoid the lack of uniformity and coordination, as well as general confusion that comes from a state-based approach.[5]

In Australia, the decentralised approach has been statistically effective, ranking Australia as amongst the most successful nations in containing COVID-19. Still, there are some indications that this has come with its own distinct costs to public trust. At the height of the pandemic, the states and territories mandated that citizens not leave their homes without a 'reasonable excuse', and that only 'essential services' remain open.[6] In stark contrast to the uniform approach valued by Switzerland, even these simple terms have been subject to a surprising degree of inconsistency across the states. To use one prominent example, the question of whether fishing constitutes 'exercise' within the meaning of a 'reasonable excuse' has received significant political attention. In New South Wales, fishing was only considered a form of exercise after the Police Minister 'personally intervened' following legal advice.[7] In contrast, the Queensland position was that fishing was very clearly not a form of exercise unless it was an essential source of food.[8] In a similar vein, these definitions are also in a state of flux. During the first wave of the pandemic, the definition of 'essential service' appeared to include hairdressers in New South Wales. This was so long as barbers complied with the 'four square metre per person' rule and appointments did not go for more than 30 minutes (a restriction that was later reversed).[9] Yet, following a Public Health Order made under s 7 of the *Public Health Act* 2010 (NSW) in response to the Delta Outbreak, hairdressers were no longer considered essential without much explanation or transparency as to why these services are no longer considered essential (if they ever were). Inconsistencies across states in how basic concepts such as exercise and essential services are construed, as well as how they constantly change, cannot be conducive to public confidence in the institutions that create the relevant rules.

III. The age of information

Beyond the scale of infections globally, what makes the COVID-19 pandemic so costly to public trust is the proliferation of false and unreliable information. Indeed, along with the pandemic, the World Health Organisation has also declared an 'infodemic' – an overflow of both correct and incorrect information that causes confusion and encourages risky behaviour.[10] 'Infodemics' are a dangerous state of affairs, especially during public health crises, because people are more likely to believe false information that aligns with their pre-existing worldviews or present an external scapegoat for the disruption to their lives, rather than relying solely on verified information.[11] Perhaps tellingly, even a correlation between the proliferation of 5G mobile internet technology and the COVID-19 pandemic has garnered a surprising degree of attention and support from a wide range of social groups.[12] Hence, in this context questions as to what constitutes 'exercise' or an 'essential service' must be answered with a degree of certainty across the states. Case in point, barbers are a profession that have been fined numerous times during the Delta lockdown, with one hairdresser explaining that this was because the rules were 'totally confusing'.[13] Hence, it is not only misinformation that has led to increased public scepticism and given more opportunities to malicious parties to erode trust in public institutions, but also the rules themselves.

The proliferation of social media as a tool for information dissemination throughout the pandemic has also led to new legal problems that are detrimental to trust in public institutions. In late 2020, the South Australian health department was ordered by the Ombudsman to apologise for 'sharing' the State Permier's live streams on its Facebook page, because it seemed to give the appearance of endorsing the Liberal Party of Australia.[14] This was despite the fact that the Ombudsman's report noted that the posts were merely a means of disseminating information regarding the COVID-19 pandemic and not a political act.[15] In any case it is unclear whether executive uses of social media to distribute accurate information are effective at all in swaying public opinion, as there has been limited study of the area.[16] Still, what is clear is that this flurrying age of information compounds the need to actively consider the effect of a state-led approach to pandemic management on the public trust.

IV. Public trust

Plato and Thucydides thought, according to some, that public trust was imperative when there was disagreement as to the right way to act.[17] It is easy to see how this dicta is relevant to Australia's handling of the pandemic, given that the states have taken different approaches in even simple definitions. One often proudly cited statistic is that trust in government has skyrocketed throughout the pandemic given Australia's success in containing COVID-19.[18] Yet, importantly, as polling by the Australia Institute shows, whilst confidence in state or territory government responses to the pandemic have grown, confidence in the federal government has fallen.[19] Some scholars contend that this trust is temporary, questioning whether it will last or even whether it has already dissipated.[20] The Sydney anti-lockdown protests were an unfortunate consequence of increasing public cynicism to how the pandemic is being managed. The topics discussed in this essay are areas in which renewed attention must be paid if public trust is to be maintained.

V. Conclusion

The Australian Constitution is a creature of compromise and negotiation, leaving vast powers to the states in how the pandemic is managed. As this essay has shown this approach has been largely successful in minimising both infections and deaths. Yet, there have still been unintended costs to the public trust. Admittedly, the answer to this question is likely not answered by any change to the Constitution nor to the way in which the states are able to implement measures independently. Still, at the very least these concerns over public trust should prompt a discussion on a more nuanced approach to basic definitional concepts, especially during an infodemic. Of course, some definitions will need to be flexible across the states, owing to local conditions, but there is much benefit in reconsidering others. As we enter a stage of recovery, more attention must be paid to how the populace sees public institutions.

The Merge

Questions of Violence, Inequality and Support

JANIKA FERNANDO
LLB I

I. Introduction

Over the past year, COVID-19 has seriously increased financial pressures on vulnerable families while, in some instances, causing or exacerbating family violence within homes. As the world begins to emerge from COVID-19, these families must be appropriately assisted in order to recover from the impacts of the pandemic. However, at a time when nuanced and specialised consideration is desperately needed, the Family Court of Australia (FCA) is being merged with the Federal Circuit Court of Australia (FCFA).[1] While this initiative aims to stimulate efficiency through fast and cheap solutions,[2] this move has faced criticism as it risks decreasing the specialisation afforded to complex family law matters. This is particularly concerning in cases of family violence[3] and in ensuring that often marginalised groups, such as Indigenous families, receive the support and assistance needed in this time of increased hardship.[4]

II. Will there be a benefit?

Attorney General Christian Porter introduced the bill for the merging of the FCA and FCFA by asserting that it would reduce "the costs and delays that thousands of Australian families experience as a result of a split federal family law court system".[5] Jack Snape provides insight into Porter's claim of a "long-broken family law system"[6] by arguing that the initiative to merge the courts will significantly improve the efficiency of the current legislation. In particular, it will improve the court's ability to deal with the number of cases and avoid backlogs. While facing scrutiny from the Opposition, crossbenchers and legal professionals, Porter maintained that the merger would avoid unnecessary delays in accessing justice within the family law system. The need to address delays is evident in the Productivity Commission's Report on Government Services in 2020. This report highlights the dramatic growth of cases in the Family Court pertaining backlogs, a 34% increase between 2012-13 and 2018-19 and 63% increase in the FCFA.[7]

The FCA is designed to promote specialisation in hearing all complex family matters such as divorce, child custody and abuse. While the FCFA deals with family matters as well and also other broad issues such as migration and bankruptcy,[8] the improvement promised by the bill is reliant on the funding provided to the Family and Federal Court to deal with these matters. Porter's proposal for the merger was sparked by the limited funding and the need to employ more members of the legal profession. He called out Labor for delaying these legislative changes, which could solve the issue of funding and needing to keep up to date with cases. The merger may provide beneficial outcomes if it helps avoid unnecessary delays through a single-entry pathway of rules, procedures and management styles, reducing costs and therefore creating better outcomes for families recovering from separation.

However, more information is required about the operation of the bill. As highlighted by the Shadow Attorney-General Mark Dreyfus, the merger risks the destruction of opportunities for families recovering at their greatest time of need. Specialisation is a key attribute of the Family Court

as the support of counsellors and mediators provides protection for vulnerable individuals. The Family Court system is underfunded but contributing funds to specialise the Court may potentially solve the problem, compared to unsubstantiated evidence as surmised by Dreyfus. Legal experts such as the Law Council President Pauline Wright also mirror Dreyfus's criticisms claiming that the proposal still lacks sufficient evidence to justify its implementation. In particular, Porter's claim that the merger will resolve 8,000 cases annually is based on the uncredited source of a six-week PWC desktop review that expressed time constraint limitations.[9] The Attorney General's Department itself has also recognised that, "there hasn't been a specific study of what impact the merger would have with respect to family and domestic violence issues".[10] The lack of consultation is concerning given the complexity of family law matters and risks the safety of survivors of domestic violence.

III. Recovery for victims of domestic violence

While the Court merge is intended to increase efficiency, it also leaves room for domestic violence impacted families to "fall through the cracks" as claimed by former judges and legal support services.[11] This is because the merger risks "undermining the integrity and structural specialisation of the Court".[12] The first Chief Justice of Australia, Elizabeth Evatt states that the Family Court is a specialist jurisdiction, where the safety of families must be paramount.[13] Her statement also supports the need for more training for judges, registrars and other support services that advocate for domestic violence are required to effectively access justice.[14] For individuals experiencing domestic violence, the merger limits proper judicial training for judicial officers and staff who can support the afflicted, on top of pre-existing issues with insufficient funding available for alternative legal support such as community legal centres. There is evidence provided by Senior Law Lecturer, Miranda Kaye, that the *Family Law Act* 1975 (Cth) is complicated. This is because judges must possess specialist knowledge of the implications of family violence on the safety of women and children in cases concerning violence, abuse, mental health and drug use.[15] By merging the courts, the epidemic of violence suffered by women and their children may not cease.

Diminishing the specialisation of the Court will only deny justice to families recovering from domestic abuse. As Queensland Leader of Australian Greens Senator Water highlights "justice delayed is justice denied" due to heavy backlogs.[16] The need for increased specialisation and resources is highlighted by the numerous inquiries conducted into domestic violence. As an example, the 2020 Australian Institute of Criminology survey found that two-thirds of women experienced physical or sexual violence by a current or former co-habiting partner since the start of the COVID-19 pandemic.[17] Such findings are alarming and highlights the limited protection families recovering domestic abuse have, which is a pertinent issue for the two courts to consider as they merge. It is only after the atrocities occur that light is shed on issues of domestic violence affecting family members.

This issue of domestic violence and what it means for families recovering becomes particularly pertinent in light of the COVID-19 pandemic. It is evident that the prevalence of domestic violence is increasing as women work from home and are exposed to greater abuse from their partners, risking the safety of children in the household. The Supreme Court in the case of *Workers Compensation Nominal Insurer v Hill* (2020) recently ruled that employment was a substantial contribution to the death of a woman working from home, murdered by her de facto partner.[18] This conveys the immense need for specialisation in contemporary times of COVID-19, where many women risk exposure to distinct instances of violence. Each case requires a different level of nuance. However, this idealisation of a single-point entry for the federal family law jurisdiction and common rule setting is starkly outweighed by the future impacts on families. In particular, the families experiencing violence who lack adequate just outcomes. Efficiency prioritised over specialisation will only result in a lack of protection of individual rights. What is more important is the need for specialisation, as family law matters themselves are very complex. The Law Council of Australia, National Aboriginal Torres Strait Island Legal Service (NATSILS) and the NSW Bar Association and Women's Legal Services Australia have every right to oppose the bill, as the future is uncertain for families recovering.

If the Court merger were to be initiated, the level of violence is likely to continue. This is confirmed by Jacqui Watt, CEO of No to Violence men's referral

service, who argues that the system will continue to be more advantageous for men.[19] As matters may be dealt with more quickly because of the merger, this may lead to less consideration of "coercive controlling behaviours" leading to an incessant chain of abuse.[20] This is because specialisation in the area of family domestic violence requires an understanding of the revenge tendencies of perpetrators. Therefore, the merging of the two courts will only disadvantage the level of recovery for families due to stimulating limitations of specialisation coupled with the stress of the COVID-19 pandemic.

IV. Accessibility for disadvantaged groups

The merging of the Family Law Court and Federal Circuit Court heavily contravenes the level of equal treatment and care needed to address complex family law matters. These complex family matters become especially concerning when considering the ability for Aboriginal and Torres Strait Islander (ATSI) families to recover.[21] The introduction of the merger bill would reduce the accessibility to specialist Indigenous Liaison Officers and lawyers who have expertise knowledge of Indigenous culture. This is supported by the Australian Law Reform Commission Report, which details the importance of Indigenous Liaison Officers to ensure an equitable family law system for Indigenous community members.[22] It is the responsibility of the Family Law Court to encourage funding for Indigenous Liaison officers in order to protect Indigenous children and families recovering.

The merger could potentially decrease the need to fund this area, as specialisation is catered towards more urgent cases of domestic violence. With evidence of the courts already busy at stand-alone courts,[23] the merging can increase the workload pressure, allowing the potential for Indigenous issues to become unrecognised. This merger could also mean an added financial pressure on Indigenous families, who do not have access to funding, making it difficult to recover, as the merger increases costs for litigants. This is evident as Indigenous members of the community have continually faced barriers of communication, cost, formality and a lack of Indigenous Liaison officers, consultants and dispute resolution practitioners in the family law system.[24] The National Aboriginal and Torres Strait Islander Legal Services Co-chair, Ms Cheryl Axleby,[25] provides insight into this issue, emphasising the importance of specialisation to truly provide an inclusive environment and encourage participation for Indigenous Australians. As reflected in the Croakey Health Media release,[26] the reaction of Indigenous groups to the passing of the merge has been dismay and disappointment. The introduction of the bill only places more pressure on the new single, stand-alone Court to produce just and efficient outcomes while dealing with 8,000 additional cases and the impact of COVID-19.[27]

Similarly, merging the courts will also heavily disadvantage families recovering in the area of migration. According to the Federal Circuit's Annual Report, the court is struggling to manage the large volume of migration cases in an efficient manner. Statistics from the report reveal that the pending migration cases rose by 58% in the years 2019-20.[28] These statistics highlight the significance of the migration caseload which may overpower and delay outcomes in complex family law matters. The volume of the migration and family law caseload will most likely create greater pressure on already tight resources, potentially infringing on individual rights.

Along with the COVID-19 pandemic, family law services are needed more than ever for families recovering. By inadequately managing migration law in the Federal Circuit Court, more issues are bound to arise through the merging of the two courts. In a recent study of the Federal Circuit Court, one duty lawyer commented the Court is "like a zoo, so many noises and it's so loud and confusing".[29] The study also revealed the lack of safety measures in the Court, with no safe rooms, separate entrances and exits, which is concerning for the safety of victims of family violence. It can therefore be deduced that the future of the merged Court will continue to be extremely busy. This is exemplified in the extent of the migration caseload for the Federal Circuit Court, the rising volume of domestic violence issues coupled with the pandemic and the increasing need for Indigenous members of the community to have access to greater legal support services.

However, it can be argued that the Commonwealth government has provided substantial benefits for the Federal and Family Court to deal with urgent family matters, linked to the COVID-19 pandemic. In response to supporting placement of state child protection and family violence systems, the Federal Government has provided $5.6 million to the Courts

and state child protection services.[30] The Government has contributed $35.7 million to support judges resolve migration and family law matters.[31] This additional funding is desperately needed in response to the COVID-19 pandemic, giving the Courts the resources required to establish National COVID-19 Court lists to deal with urgent cases in an expedited manner. Although, this funding has been provided and commended by the Law Council of Australia, it has also criticised the lack of funding for the legal assistance sector, which is deemed 'essential'[32] for families to recover from the impacts of the COVID-19 pandemic.

Also, assistance for ATSI is still to be questioned as COVID-19 has a bigger impact on Indigenous groups who require support, as "children are 10 times as likely to be living in out of home care and already experienced increased risks of poor health and well-being outcomes".[33] The reduced contact due to restrictions between children in out of home care and their family members has had a great impact on their cultural development and has delayed court decisions concerning child removal, family contact, placement and family reunification.[34] The possibility of courts merging could delay these outcomes further, as sufficient funding for additional resources to address reduced cultural contact for families during the pandemic is needed. This is further supported by the instances of family violence, as a number of stakeholders have commented on the lack of targeted funding for ATSI to access family violence services, and the difficulty in recovering through mainstream services.[35] Community controlled services,[36] better targeted towards maintaining cultural connections and relationships is needed, and the Court merging could prevent recognition of these issues of ATSI needing greater accessibility to legal assistance. They may have provided funding for urgent family violence matters, but this may not be enough considering emergency relief funding is needed for ATSI people experiencing family violence to access accommodation and essential items for safety.

V. Conclusion

When all Australians look to imagine the future of the legal system, it is clear that the merger will not pave an easy road forward for families recovering from the impacts of family violence. This is accentuated by the COVID-19 pandemic, which makes the issue even more challenging and uncertain. In addition, Aboriginal and Indigenous Torres Strait Islander families are at risk of not receiving proper access to justice and equality under the rule of law. The solutions for the future could involve greater discussion on how to emphasise specialisation for complex cases of family violence and accessibility for the community of Indigenous citizens and migrants to legal personnel and dispute mechanisms. While the merger seeks to encourage recovery through more efficient procedures to manage caseload, it has also heighted the climate of uncertainty, where safety is put at risk for many vulnerable members of the community and an increasing pressure applied on legal personnel. Should the legal system wish to truly assist families to recover, there must be a prioritisation of specialisation within the court system.

Virtual Justice

The effect of online courts post Covid-19

KIMBERLEY MACNAMARA-HAMMERTON
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I. Introduction

The effects of COVID-19 spreading so rapidly across our borders was felt in practically every area of human habitation. A shift into the digital space was demanded on all fronts – and the judicial system was no exception, with online courts quickly becoming the preferred means of ensuring that justice continued. This meant adopting the most effective technology to ensure the audio-visual experience allowed for adequate communication between judges, lawyers and their clients. And yet, while online courts have, on the whole, been adequate or even preferable in conducting civil matters, it is arguable that the heart of the experience in criminal matters has been usurped. With all new jury trials suspended so long as stay-at-home orders are in place,[1] judge-only trials have been encouraged to prevent a backlog of criminal hearings.[2] The remainder have largely been swept up by virtual courts.

The scope of our rights as citizens, including the extent to which they continue to be protected by the state, has become the focal point of public debate during the pandemic. In this paper, I propose to address how the parties' participation in, and perceptions of, the judicial process have been affected by the shift to virtual courts due to COVID-19. I will argue that, although there remains a delicate balance between progress and the protection of our entrenched legal entitlements, the lack of regard for parties' rights in a virtual space, particularly in criminal proceedings, risks compromising fundamental aspects of our justice system, including access to justice, open justice, the right to a fair trial, and adequate advocacy. Although empirical evidence suggests that many of the technological challenges initially encountered during the switch to online courts have been or are capable of being overcome, the isolation and disorientation experienced by some parties ought not merely be swept along in the tide of progress. Notwithstanding this, there is a mounting likelihood that virtual courts are here to stay.[3] Courts will be presented with the opportunity post COVID-19 to better prepare for the future and to ensure a constructive environment where court users can take advantage of what technology has to offer. And yet, if confidence in the judicial system is not to be diminished as a result of its progress, support systems must be implemented so that the parties can perceive justice to have been done, regardless of the outcome of their proceeding.

II. Judicial attitudes to virtual courts

Technology has been utilised by the judicial system in Australia since the 1990s.[4] Legislation came into effect in 1998 for the use of audio-visual links (AVL) in the form of the *Evidence (Audio and Audio Visual Links) Act* 1998 (NSW), and, in 1999, the Federal Court of Australia became the first Australian court to live-stream audio and video footage of a judgment summary online.[5] In November 2020, well into the first year of the pandemic, the NSW Government sought to invest more than $54 million into online court technology, to be implemented over a period of three years. NSW Attorney General Mark Speakman envisages that the project will create a 'single point of digital contact', whereby court users can seek adjournments, enter pleas, lodge documents and order transcripts online. The project has been hailed as a 'digital transformation' and dubbed a 'technology revolution' for NSW courts.[6] This update is undoubtedly a significant step forward in getting courts up-to-date with modern developments in technology – something that is surely long overdue.[7]

Following COVID-19, the transition to online technologies was pursued with a particular sense of urgency by the courts. It became clear within a fortnight of the World Health Organisation's acknowledgement of the global pandemic that policymakers and judges had no option but to embrace online technology, if court services were to continue.[8] As advised by Lord Reed in *R (UNISON) v Lord Chancellor* [2020] AC 869, shutting down the courts and patiently waiting out the pandemic was not a viable option as it would 'leave citizens without recourse to the law'.[9] Henceforth followed a widespread and unexpected reliance on semi or fully-remote hearings utilising Microsoft Teams, Zoom, and the Cloud Video Platform, combined with an increase in telephone hearings.[10] On 23 March 2020, the Chief Justice of the Supreme Court directed that, in line with public health advice, physical appearances were prohibited until further notice, bar in exceptional circumstances and with leave of the court.[11]

III. Access to Justice

While use of virtual courts during COVID-19 has prevented backlog and ensured an efficient litigation process, the role of online courts post-pandemic is in need of further consideration before it can be

permanently embraced by the public. On one hand, the online shift has created a real opportunity to save time and costs, thus increasing access to justice for more people than would otherwise be possible through traditional courts.[12] As reported by Justice Eniola Fabamwo of the Nigerian High Court, overseas litigants have particularly benefited from being able to appear online.[13] Some have argued that virtual courts achieve a form of distributive justice that has, until now, been impossible to achieve.[14] To see its potential, we need only examine the results achieved by Online Dispute Resolution (ODR), which occurs outside the courts, using information and communications technology.[15] For instance, eBay resolves some 60 million disagreements per year.[16] The use of incorporated online platforms, as advocated for by Professor Susskind,[17] can further increase access to justice by providing court users with the tools to better understand the relevant law and their various legal options. Portals that assist in filling out court forms, formulating legal arguments and assembling evidence would likely be taken up by the public with similar enthusiasm to ODR.[18]

However, there are still 2.5 million Australians that are currently not online.[19] Others in the community are not equipped with appropriate devices for audio and video facilities or are unfamiliar with the virtual platforms being used. Those left on the margins include First Nations populations, people from culturally and linguistically diverse backgrounds, self-represented litigants, those in rural areas, and people with a cognitive disability.[20] The common link between these groups is a greater risk of inadequate access to legal support and interpretation services; in turn, they share a greater need not to be left behind in the enthusiasm for progress.

It is not uncommon, even in higher courts, for technology to let down the judicial process. Richard Ackland relayed the experience of one barrister, appearing in the Supreme Court, where a judge could neither see nor consistently hear anyone – witnesses were confused, lines dropped in and out, and subpoenaed material was largely inaccessible.[21] While such issues could be overcome through appropriately channelled resources, the overall experience for those seeking justice is often one of alienation and disorientation. In the UK, a survey commissioned by President of the Family Division, Sir Andrew McFarlane, found that 73% of parents did not feel supported throughout their remote hearing.[22] As online courts restrict the ability of parties to communicate with their lawyers, formulating questions and giving directions can be much harder, particularly when parties lack understanding of legal language or procedure. Such difficulties are exacerbated for the elderly and those with poor digital literacy.

Where an accused is in custody, they will continue to appear via the established AVL system. During hearings, however, defendants have only been able to be accompanied by their legal representative via audio interface.[23] With lawyers unable to attend correctional facilities during lockdowns periods, the defendant is exposed to even greater isolation and may feel deprived of a sense of autonomy and control. This can be particularly problematic where the defendant is a juvenile or suffers from mental health issues. Alienating defendants in criminal proceedings can also create confusion about the procedure in which they are taking part. In some cases, defendants have reportedly not even realised they were appearing before a judge.[24] As scholar Emma Rowden argues, '*real* access to justice will only be achieved when remote participation does not equate to diminished participation'.[25] Where a party's experience is one of isolation, alienation, confusion and withdrawal, it is easy to envisage how their confidence in the judicial system might be eroded.[26]

IV. Open Justice

Section 17(1) of the *Federal Court Act* 1976 (Cth) (FCA) requires the jurisdiction of the Federal Court to be exercised in open court. However, section 17(4) permits the exclusion of the public if their presence would be contrary to the 'interests of justice'. In *Quirk v Construction, Forestry, Maritime, Mining and Energy Union (Remote Video Conferencing)* [2020] FCA 664, Perram J observed at [4] that '[o]pen justice is not absolute – a balance must be struck between the need for cases to be heard and determined, on the one hand, and the demands of open justice, on the other.' Unless it is waived, the public can exercise their right to witness the Court's proceedings.[27] It is this right, his Honour noted, which is the essential characteristic of a court rather than the physical locality of the proceeding. As McIntyre et al observe, open-access live streaming would make proceedings significantly more accessible for the public[28] – evidenced by the 1000 people who viewed an online NSW Supreme Court

proceeding that was live streamed on YouTube, where the police sought orders to prevent a Black Lives Matter protest.[29] However, accessing online hearings is not always as anonymous or simple as other streaming sites like YouTube. Links are either not published, not openly distributed, or require written permission to access. Indeed, the court often discourages the sharing of access information 'in order to minimise interruptions in the Virtual Courtroom environment.'[30]

In terms of open justice, it is the victim and the defendant who suffer the greater detriment from the shift to online courts. A criminal matter is a gruelling experience for defendants and victims alike. It is one thing to have friends and family tuning in remotely through a screen, and another to see them in the courtroom, knowing they have made time in their day to provide support through the daunting judicial process. Although transparency cannot guarantee fairness, it is critical in ensuring that parties can understand and can accept the outcome of their case.[31] Conversely, diminished trust in the judicial system will be galvanised where a person does not feel seen within it.[32] In promoting transparency, open justice is paramount in facilitating public confidence in the system, by allowing courts to be held accountable for their decisions.

V. A Fair Hearing

Issues of procedural fairness are more frequently arising for consideration as a result of the shift to virtual courts. A fair hearing may include, *inter alia*, the defendant's right to 'examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.[33] For instance, *ASIC v GetSwift Ltd* [2020] FCA 504 concerned an application for an adjournment, sought by the defendants who resided overseas. During the trial, 41 witnesses were to be called. In refusing the application, Lee J was of the opinion that, to the extent there was anything 'sub-optimal' about the virtual process, it was insufficient to cause prejudice to the parties.[34] While in some circumstances it might be in the interests of justice to adjourn proceedings due to the inadequacies of technology,[35] parties must demonstrate that prejudice or unfairness would otherwise result.[36] However, unfairness is often more complex than what prima facie appears on the facts.[37] Ostensibly simple cases can raise complex interpersonal issues that are unable to be properly assessed before trial. Parties in such cases keenly feel the absence of human support and are therefore more likely to feel alienated by the judicial process. Such feelings are compounded if they lose.[38] In the alleged words of Sir Owen Dixon, the most important person in the courtroom is the litigant who is going to lose – 'that person must leave the court satisfied with the system in which he has lost; satisfied that his counsel and his case had fair treatment and every chance'.[39]

The decision to suspend jury trials until face-to-face proceedings can recommence may naturally give rise to a lack of confidence in the capacity for online courts to proceed without prejudice – not least due to the complexities surrounding confidentiality and tampering when jury members are in their living room. Instead, defendants have been urged to opt for judge-only trials instead of waiting for jury trials to resume.[40] As trial by jury is considered a right, trial by judge alone must be understood as a waiver of that right.[41] Further, issues of bias have been raised where the safeguards of legitimacy and independence ensured by a jury trial are not present.[42] An impression of judicial bias is especially detrimental for First Nations people, whose historical experience has been shaped by instances of institutional racism and prejudice.[43] Being the most incarcerated population on the planet,[44] First Nations people seeking bail, parole or having to be sentenced via AVL are justified in a perception of prejudice. In this context, the need for impartiality and legitimacy is particularly high.[45]

VI. Adequate Advocacy

The formality of the court environment goes to the overall integrity of proceedings and thus is central to an adversarial system of justice.[46] The architecture of the court and the atmosphere of justice that it galvanises has been shown to influence how litigants and professionals conduct themselves in proceedings.[47] Jonathan Zittrain argues that courts are evocative of an almost churchlike atmosphere, in that 'they seem built to instil a certain sense of awe as a litigant, as an attorney, maybe even as a judge.'[48] This atmosphere is difficult to replicate in circumstances where the staging and performative aspects of the courtroom are removed, such as the raised bench and practice of bowing before the judge, and where the parties appear only as small two-dimensional squares on a screen. Baily J in Florida stressed the

need for virtual court hearings to be treated as such after relaying his experience of certain lawyers appearing remotely, including a male who appeared shirtless and a female attorney who appeared from under the covers of her bed.[49] What could the parties make of such appearances, except that the virtual courts are not treated with the same reverence of a physical hearing? The empirical research suggests professionalism more than formality is required if participants are not to rid themselves of the etiquette, protocols and procedures expected of them.[50] Where structures fall apart in the eyes of the parties, trust may easily be lost in the legitimacy of the system.

The swift uptake of virtual courts without appropriately considered measures to support the parties raises significant questions about the right to adequate advocacy.[51] The minimum requirement of legal assistance is guaranteed in Australia by the *International Covenant on Civil and Political Rights*.[52] As an advocate, establishing a rapport with the judge and witness is a critical component of a successful and well-argued case. Jeopardising the fluidity of communication between bench and bar risks obstructing the momentum of counsel's argument. At the onset of the pandemic, pupil Eleanor Durdy reported, 'I have heard the phrase "you're on mute" far more times than I care to relay.'[53] The effect of false starts or lost interjections, time delays or requests for adjournments due to technological failures diminishes the ability of the advocate to present their case. This increases the possibility that advocates must contend with a frustrated judge, perhaps having inadvertently put them offside. Further, when a party is prevented from seeking urgent instructions from their client,[54] or a point in cross-examination is simply 'lost in transit,'[55] the critical issues in dispute risk falling to the sidelines. In such instances, parties are more likely to become disorientated due to the disruptions to the flow of the proceedings.

On the other hand, it has been argued that, far from negatively affecting the parties' acoustics and visuals, virtual hearings have often been an improvement to open court.[56] In a recent survey conducted by Baker McKenzie and KPMG, most respondents had a positive experience with a virtual hearing, with ~66% rating their experience as "good" or "excellent",[57] albeit for the reasons of cost effectiveness and efficiency. In contrast, during the piloting stage of virtual courts in the UK in 2009, solicitor Brian Reid relayed simply, '[y]ou can't establish empathy'.[58] Empathy is a multifaceted and complex construct that recent research has shown plays a significant role in the judicial process.[59] Snaden J adverted in *Rooney v AGL Energy Ltd* (No 2) [2020] FCA 942 (at [18]) that 'technology inhibits (if not prohibits) the cadence and chemistry – both as between bar and bench, and bar and witness box – that personify well-run causes'. In a judicial setting, empathy and objectivity must work hand-in-hand if a human judgment is to be given, rather than a cold legal application of the law.[60] This applies equally to judges assessing the subjective factors in the offender's criminal behaviour,[61] as to advocates seeking to establish a genuine appearance before the judge.

Lawyers do not have the expertise of film directors, nor do they have the cinematography of a good crime drama. The extent to which their demeanour translates through the screen is often limited. When gestures are distorted and subtleties in communication are diminished, pivotal moments that are vital to establishing empathy are vulnerable to becoming lost. In turn, this can cause witnesses to come across as less credible.[62] Empathy as a behaviour is perceived as an indicator of concern and respect for the rights and feelings of another person.[63] The victim in virtual hearings is therefore at risk of losing this aspect of the proceedings when taking in the reasons for the judge's decision. The same is true for a defendant during the sentencing process. This touches on what might be considered the "liminal" experience of the proceedings[64] – the point in the court's ritual that is healing or transformative. Without better infrastructure around virtual courts, this is simply not something that can be properly achieved through a screen.

VII. Conclusion

Should virtual courts remain a feature of the judicial process post the emergency measures enacted due to COVID-19, the experience of the parties to the proceedings must be more seriously considered. As I have discussed in this paper, virtual courts raise important issues around access to justice in considering internet facilities, appropriate devices, and computer literacy. Virtual hearings must include an assurance that parties will not be made to feel bereaved of human support or left disengaged from the judicial process. I note that open justice may be significantly improved by making live streaming links more readily available to the public, and in making allowances for support people to be with the defendant in person. While fairness may be assessed on a case-by-case basis, if trauma for the parties is exacerbated by appearing virtually, or if they feel they are denied a satisfactory opportunity to be heard, the virtual judicial process has arguably failed. Finally, while advocacy may be improved by sufficient resources, consideration must be given to the advocate's capacity to effectively communicate online. It has been said that the test for a system that is working well will ultimately be whether the losing party feels as though they were treated fairly.[65] As empirical evidence suggests, if confidence is to be maintained in the judicial process, virtual courts must allow for the parties' real, human need not to be left in the dark.

Defamatory emojis

The overreach of defamation laws in New South Wales and the case for law

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Emojis have become an integral part of modern society. From academics to students to almost everyone who uses the internet, most Australians have had some experience with emojis. In some ways, it seems unfathomable that emojis can be considered defamatory. But the case *Burrows v. Houda* has demonstrated that emojis do have the potential to be defamatory if used incorrectly. This essay will analyse the specifics of the case, whilst aiming to situate it in a broader Australian defamation law context. It will then discuss the road to recovery, specifically in terms of law reform around defamation.

I. Introducing the Case Study

Burrows v. Houda was a case in the District Court of NSW in 2020 which held that emojis have the potential to be defamatory, even when posted on social media under NSW defamation laws.[1]

Defamation in Australia is determined under the Defamation Act 2005. Generally, for a publication to be defamatory, it needs to be injurious to the reputation of the person concerned. The publication needs to also be on or about the plaintiff. Slightly tautologically, the publication must also include defamatory material and must have been published. From this, it is clear that the bar for defamatory conduct is relatively low. In saying this, prior to Burrows v Houda there had not been an Australian case that determined whether emojis could be defamatory. However, there had been a UK case, where potential defamatory meaning had been ruled upon regarding an "innocent face emoticon" but this was only a tangential mention.[2]

The case concerned the alleged defamation of lawyer, Zali Burrows. In a previous (and unrelated case), Ms Burrows was admonished by the presiding magistrate, Justice Wilson, who recommended that Ms Burrows' clients be banned for life from securities trading for unethical behaviour and be prosecuted for signing false affidavits. She also recommended that Ms Burrows be referred to the Law Society for potential disciplinary action.[3]

The Sydney Morning Herald tweeted a story about Ms Burrows' conduct.[4] A third party then replied to the story, tweeting "July 2019 story. But what happened to her since?".[5] Adam Houda, a Sydney lawyer, then replied, tweeting a 'zipper-mouth emoji'.[6] This allegedly implied that there had been a cover-up and that Mr Houda could not reveal details. Justice Gibson said that the imputation that Ms Burrows had acted improperly was very clear to the "ordinary, reasonable reader of the tweets".[7]

Justice Gibson found it was open to find that the 'zipper-mouth emoji' had the capacity to be defamatory because "meanings may be gleaned from pictures as well as words" in current defamation law.[8]

II. Relevance for Modern Society

This case is directly relevant to modern society and people of all ages, who increasingly use social media as a medium for communication. Given that emojis are frequently used on social media, this result has a

'chilling' effect on social media discourse.[9] The case reinforces that even the tweeting of a single emoji (without any accompanying text) can be grounds for defamation. Consequently, social media users must exercise extreme care when making any controversial statements on social media, given that the threshold for proving defamation is so low.[10] Social media users must also remember that once the basic elements of defamation are established, it is up to them in a court of law to disprove a defamation claim, which is often quite difficult on social media.[11] This is in contrast to the United States (US), where the First Amendment to the Constitution protects freedom of speech and therefore, the onus is on the plaintiff to prove defamation.[12] In addition, anti-SLAPP (Strategic Lawsuits Against Public Participation) laws essentially allow cases to be dismissed from court summarily if it is believed that they are an imposition on freedom of speech.[13] This has resulted in a much freer US media culture compared to Australia and is a potential area for reform.[14]

Second, the case is relevant to all users of social media who frequently (or even infrequently) use pictures/emojis in their posts. Whilst defamation trials are heard before a jury in NSW, the court held that the meaning of the emoji was to be interpreted without the assistance of a jury or expert evidence. In this case, that meant the emoji was interpreted to impute that Ms Burrows had silenced the media, even though there were other possible interpretations of the emoji.[15] Further, third-party comments (such as a response to the 'zipper-mouth emoji' saying "Ohmigodbro !!!!") were used to provide context to the emoji in determining whether it was defamatory.[16] In other words, another person's words can contribute to a finding of defamation, taking it out of the defendant's hands. Both these issues reveal that the interpretation of emojis is somewhat difficult to predict, especially on a platform like social media where meaning changes so often and quickly.[17] This further reinforces that users need to take extreme care using pictures and emojis in online posts.

III. Recovery and Reform

Australia's laws for defamation are notoriously strong. In particular, New South Wales is regarded as the 'defamation capital of the world'.[18] The road to recovery in terms of defamation laws in Australia and more specifically, in New South Wales, is long and potentially arduous. In August 2020, NSW passed defamation law reforms to be implemented on July 1, 2021 to address the criticisms of defamation laws not being stringent enough, leading to excessive actions under the laws.[19] However, these still insufficiently protect social media users and must be further reformed to deal with the issues arising from this case.

The new defamation laws do not reference social media. This is problematic given that the *Defamation Act* 2005 (NSW) was enacted before Facebook and Twitter were publicly available.[20] This means that social media users are still largely unprotected from defamation claims.[21] Whilst the Attorney-General has stated that Stage 2 of the defamation law reforms will address these issues, at present, social media users are still unprotected from defamation claims on social media.[22]

There is a requirement in the new defamation laws that the plaintiff be 'seriously harmed' by the defamatory statement to reduce trivial claims. However, it is unclear how courts will interpret this requirement, so care is still advised for social media users.[23]

Finally, the primary remedy for defamation claims is financial. With the proliferation of social media, courts should be able to enforce apologies, removals of posts or corrections as an alternative to financial damages in less serious cases.[24] This would further protect social media users and allow for quicker recovery of debt, both literal and figurative. It will also allow for more reasonable responses in Australian defamation cases.

IV. Conclusion

As society changes, language will continue to evolve. There is no doubt that the emoji has become part of the global internet vernacular, both on social media and in online journalism. It is important that laws update sufficiently to be truly reflective of the society we live in. Its arguable that defamation laws have not kept up with the progress of society and rather, reflect a period long before the birth of social media. Whilst trivial changes have been made to address this, there is still a long road to recovery for defamation laws. The fact that emojis can be held to be defamatory, despite the many meanings that can be ascribed to an emoji is an arguably absurd result. This needs to be meaningfully interrogated so that both citizens and journalists are adequately protected in the future.

Advocacy by Charities

Before, During and After the Covid-19 Pandemic

SAMUEL CHU[1]
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I. Introduction

The breadth of Australian charities' right to engage in issue-based advocacy for charitable purposes is currently under significant scrutiny. Two recent areas of potential further movement in the law are worth considering in greater detail: the Commonwealth Government has introduced a set of proposed amendments to ACNC Governance Standard 3 that may restrict charities' right to engage in issue-based advocacy for charitable purposes, and (in contrast) the Supreme Court of New Zealand will issue a judgement in the near future that may expand charities' right to engage in issue-based advocacy.

Charities will be at the forefront of ensuring the world recovers from the Covid-19 pandemic, and will know how to best address the problems arising from the Covid-19 pandemic and the root causes of these problems. As charity law continues to evolve, it would be prudent for charities to have a clear idea of the scope of their right to engage in issue-based advocacy, to allow charities to effectively advocate for their charitable purposes. Whilst charities should not be allowed to engage in unrestricted issue-based advocacy and should certainly not be allowed to break the law or engage in partisan political advocacy, charities should be able to exercise their rights to free expression and political communication to engage with proposed changes in the law in a manner that will advance their charitable purposes, and benefit the Australian and wider community as a result.

II. The Law

A. Common Law

Historically, charities in the English Common Law world were prohibited from having ostensibly 'political purposes'. I*n Bowman v Secular Society Ltd*,[2] the House of Lords stated that a trust for political objects could never be charitable on the basis that a court could not determine the potential public benefit of a potential change in the law.[3] Countless decisions have strengthened and affirmed the view of Lord Parker in *Bowman*,[4] and accordingly, the prohibition on charities having ostensibly 'political objects' remains the law in England.[5]

However, Australia has never conclusively accepted the *Bowman* position. Firstly, in *Royal North Shore*,[6] some members of the High Court of Australia expressed doubts about whether a broad prohibition on political objects could be maintained in Australia, given that it would be impossible to imagine the subject matter of a charitable gift "which might not at one time or another become a subject of political propaganda."[7] In 2010, Bowman was definitively overturned in Australia when the High Court handed down its decision in *Aid/Watch Incorporated v Commissioner of Taxation*,[8] in which the Court provided that "the generation by lawful means of public debate … concerning the efficiency of foreign aid directed to the relief of poverty…" is a charitable purpose.[9] Central to the High Court's acceptance of charities' right to engage in issue-based advocacy for charitable purposes was its view that the Australian implied freedom of political communication supported charities' right to engage in communication "between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics".[10]

Other English Common Law jurisdictions have also overturned the *Bowman* position to varying extents.[11] The courts of New Zealand have ruled that there is no reason for a blanket prohibition on charities having "political objects".[12] Canada has gone further – the Superior Court of Justice in Ontario overturned a provision of the Canadian *Income Tax Act* and a policy of the Canada Revenue Agency that prohibited charities from expending more than 10 percent of their monies on public policy advocacy,[13] because these measures were in contravention of the Canadian protection for free expression in section 2b of the *Canadian Charter of Rights and Freedoms*.[14] There is a common approach evident from the courts of Australia, Canada and (to a lesser extent) New Zealand: charities are able to engage in issue-based advocacy for charitable purposes due to the presence of constitutional protections for free expression and political communication.

B. Statute

Given that charities' access to valuable tax concessions from the Commonwealth Government is an important part of these organisations' regulation in Australia, statutory intervention has codified the *Aid/Watch* position. The Commonwealth Government introduced the *Australian Charities and Not-for-profits Commission Act* 2012 (Cth) ('ACNC Act') and the *Charities Act* 2013 (Cth) ('Charities Act') to provide a centralised framework

for organisations seeking to be registered as charities with the Commonwealth Government. Section 25-5 of the *ACNC Act* provides that organisations seeking registration as a charity must (amongst other requirements) meet the Commonwealth definition of the term 'charity' in section 5 of the *Charities Act*,[15] and must comply with governance standards imposed on charities under section 45 of the *ACNC Act*.[16] An Australian 'charity' must have 'charitable purposes',[17] which include the purpose of promoting or opposing a change to law, policy or practice (as long as this advocacy is in furtherance of another purpose deemed to be a 'charitable purpose' under the Charities Act).[18]

However, statutory intervention from the *ACNC Act* and the *Charities Act* has also constrained the *Aid/Watch* position and introduced uncertainty relating to the limits of issue-based advocacy for charitable purposes. An Australian charity must also not have 'disqualifying purposes'[19] – that is, a purpose of engaging in activities that are contrary to law or public policy,[20] or a purpose of promoting or opposing political parties or candidates for political office.[21] The ACNC's guidance (our best guide to understanding section 11 of the Charities Act, due to the lack of any discernible case law in Australia relating to this provision) suggests that "a pattern" of disqualifying activities will lead to a disqualifying purpose.[22] Further, section 45.15 of the *Australian Charities and Not-for-profits Commission Regulation* 2013 (Cth) (that is, 'ACNC Governance Standard 3') provides that an Australian charity must essentially comply with all Australian laws.[23] Pursuant to ACNC Governance Standard 3, a charity registered with the ACNC must not "engage in conduct, or omit to engage in conduct, if the conduct or omission may be dealt with" as an indictable offence or as an offence by way of a civil penalty of 60 penalty units or more.[24]

III. The Problem

Issue-based advocacy for charitable purposes is vital for charities. The Covid-19 pandemic has highlighted the importance of community, and charities should be at the forefront of advocating for solutions to problems in the communities with government and wider Australian society. However, there is current uncertainty surrounding the extent of charities' right to engage in issue-based advocacy – this is not helpful for Australian society (especially charities, who need to understand what they can and cannot do whilst engaging in issue-based advocacy in furtherance of their charitable purposes).

In my previous treatment of this issue in this journal, I noted that the ACNC Review Panel (a three-person panel of charity law experts and stakeholders tasked with reviewing the *ACNC Act* and *Charities Act*)[25] had highlighted this uncertainty, having raised the need for clarity regarding the distinction between a 'disqualifying purpose' in the Charities Act and permissible issue-based advocacy for charitable purposes.[26] Recommendation 20 of the ACNC Review Panel's Final Report ('Final Report'), which I supported,[27] suggested that test case funding be provided to allow the law relating to issue-based advocacy for charitable purposes to be developed further.[28] Unfortunately, the Commonwealth Government has since rejected Recommendation 20 in its response to the Final Report, and instead suggested that it would explore "legislative options to resolve the uncertainty in the law"[29] surrounding issue-based advocacy for charitable purposes (especially the distinction between issue-based advocacy and a 'disqualifying purpose').

In 2021, the Commonwealth Government released its attempt at a "legislative [option] to resolve the uncertainty in the law".[30] The Commonwealth Treasury issued a proposed exposure draft of the Australian Charities and Not-for-profits Commission (2021 Measures No. 2) Regulations 2021 – this amending Regulation proposes to amend ACNC Governance Standard 3 to (1) expand the scope of activities that ACNC Governance Standard 3 covers to include a wide range of summary offences; and (2) expand the obligation in ACNC Governance Standard 3 beyond charities, and require charities to take reasonable steps to ensure their resources (including paid employees) are not used to engage in or omit to engage in disqualifying conduct.[31]

There is also potential uncertainty in the law arising from the New Zealand courts' consideration of issue-based advocacy. In 2020, the New Zealand Court of Appeal in *Family First New Zealand*[32] considered further whether there was general public benefit arising from issue-based advocacy that is not in furtherance of a charitable purpose. Acting as an intervenor to these proceedings, the Charity Law Association of Australia and New Zealand ('CLAANZ') argued that (1) it was inherent in all liberal democracies that constitutional frameworks protect freedom of expression, necessitating the expansion

(not the contraction) of issue-based advocacy;[33] and (2) there is public benefit arising generally from "free speech and associated political discourse in a rule of law, liberal and democratic society such as New Zealand"[34] – a proposition that the Court of Appeal agreed with. *Family First New Zealand* is currently subject to an appeal to the Supreme Court of New Zealand, and CLAANZ has intervened with similar arguments in these proceedings.

IV. The Solution

As Australian society and the world tries to recover from (and in some cases, continue to battle) the Covid-19 pandemic, charities will be at the forefront of this recovery. Due to their efforts in battling the pandemic, and their efforts at the frontline of global society, many charities will be well placed to engage in issue-based advocacy for charitable purposes. In order to support these efforts – which are protected by constitutional principles of freedom of expression – charities should be able to understand the parameters of their right to engage in issue-based advocacy for charitable purposes as the law in this area continues to evolve (be it through ACNC Governance Standard 3 or through a decision like *Family First New Zealand*). Figuring out the outer bounds of issue-based advocacy is thus essential.

Whilst attempts to limit issue-based advocacy for charitable purposes and constrain charities' voices should be opposed, the clamouring from much of the Australian charity sector in relation to the potential limiting effect of ACNC Governance Standard 3 on issue-based advocacy for charitable purposes is arguably misplaced.[35] After all, charities should not be able to expect to engage in unrestricted issue-based advocacy, and should not be allowed to break the law (a proposition that these proposals only reinforce, albeit very clumsily). ACNC Governance Standard 3 will only slightly limit charities' right to engage in issue-based advocacy for charitable purposes going forward, by preventing charities from engaging in isolated incidents of illegal activity or partisan political activity.[36]

A closer look at the proposed amendments to ACNC Governance Standard 3 clearly suggests that these reforms are arguably poorly drafted and ineffectual. Whilst proposed sub-section (2)(aa) was intended to capture summary offences that the Commonwealth Government believes are committed by progressive environmental or animal welfare charities (for example, protests, trespassing and property damage), the sub-section has (in reality) inadvertently captured most, if not all, summary offences under Australian law.[37] In contrast, proposed subsection (4) expressly states that the amended form of ACNC Governance Standard 3 will not cover any potential illegal actions of a charity's volunteers (which are most likely to be the persons involved in a charity that will seek to engage in illegal activity).[38]

Further, because issue-based advocacy by charities in Australia is grounded in the implied freedom of political communication, it is clear that reasonable limits on this implied freedom (in the form of ACNC Governance Standard 3 and relevant proposed amendments to the governance standard, and limitations on disqualifying purposes in section 11 of the Charities Act) would also be consistent with the implied freedom of political communication. Whilst limits to charities' right to engage in issue-based advocacy would burden political communication, these limitations would be compatible with the Australian Constitution and justified in the sense provided by *Lange v Australian Broadcasting Corporation*,[39] in order to maintain, protect and enhance public trust and confidence in the Australian charity sector.[40]

It is clear that charities should be permitted to engage in issue-based advocacy for charitable purposes. As such, future evolution of the law (whether it is through the enactment of amendments to ACNC Governance Standard 3 or the handing down of a judgement by the Supreme Court of New Zealand in *Family First New Zealand*) could push the law in two directions. On the one hand, pursuant to ACNC Governance Standard 3, charities will not be allowed to engage in disqualifying activities – as discussed above, a future court would look at an amended ACNC Governance Standard 3 and accordingly limit the scope of 'illegal' or political activities that a charity can engage in. On the other hand, there may be potential for charities to engage in issue-based advocacy generally (regardless of the charitable purpose) if *Family First New Zealand*'s positive perception of the public benefit of issue-based advocacy generally, grounded in free expression and the values of liberal Western democracies (as furthered by CLAANZ), is adopted by the Supreme Court of New Zealand.

Through the *Family First New Zealand* decision, New Zealand is likely to deem issue-based advocacy a

charitable purpose regardless of the ends pursued,[41] as the Supreme Court of New Zealand will recognise the public benefit of issue-based advocacy in New Zealand's liberal democracy. However, Australia's system of government is different to New Zealand's – the implied freedom of political communication, combined with statutory restrictions imposed on issue-based advocacy by the Commonwealth Government, is likely to constrain Australian charities from engaging in advocacy that is anything other than issue-based advocacy for charitable purposes. As such, with the right to issue-based advocacy for charitable purposes grounded in constitutional protections for political communication, Australian charities should not flirt with the boundary between issue-based advocacy and a disqualifying purpose. However, Australian charities should be able to make good-faith contributions and criticisms to the public discourse and Australian society in relation to their charitable purposes. In a world that needs support from those seeking to do good, there is room for charities, who are at the front line of crises like the Covid-19 pandemic, to make their voices heard and support the public. By lawfully advocating for a better recovery, these charities will be able to maintain (and enhance) public trust and confidence in charities as they seek to 'do good'.

V. Conclusion

Australian charities can engage in issue-based advocacy for charitable purposes. However, the breadth of this right is under significant scrutiny (both from courts in the English Common Law world and from the Commonwealth Government). Charities' right to engage in issue-based advocacy in Australia and Canada – and to an extent, in New Zealand – arose from courts' placing an emphasis on charities' rights to freedom of expression and engagement in the political process. Accordingly, charities' engaging in issue-based advocacy in Australia should be grounded in free expression and good-faith engagement in Australian society to further their charitable purposes. Whilst charities should not be entitled to engage in unrestricted issue-based advocacy and should certainly not be entitled to engage in illegal or partisan political activities, good-faith contributions to the public discourse and the political process by charities will support Australian society going forward as it seeks to recover from the worst of the Covid-19 pandemic.

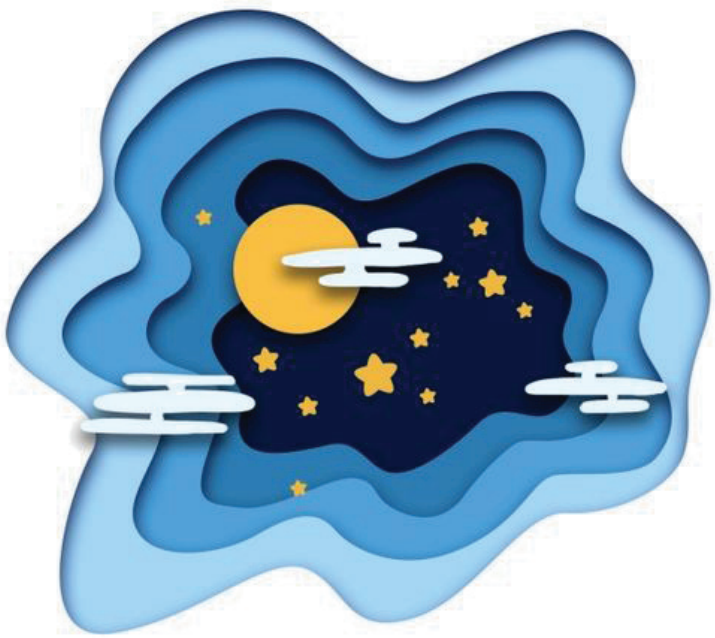
Outer space & the future of law

ZEINA SHAHEEN
LLB III

'That's one small step for man. One giant leap for mankind'
Neil Armstrong, first man on the Moon, 20 July 1969

'To the next generation of dreamers: if we can do this, just imagine what you can do!'
Richard Branson, first commercial sub-orbital space flight, 14 July 2021

'Two weeks after leaving his Amazon CEO post, the billionaire is leaving Earth'.[1]
Regarding Jeff Bezos' successful sub-orbital mission, 20



I. Introduction

Jeff Bezos' well-publicised expedition into space on 20 July 2021 is a fitting symbol for the rapid growth of the space industry in recent years, including its potential for commercial tourism and investment. Indeed, the new space age – otherwise known as 'New Space' – is one that has become dominated by commercial actors.[2] Despite the risks posed by the shift away from government-regulated space programs, New Space has not been met with updated international regulation. The Outer Space Treaty continues to provide the regulatory backbone on an international level, despite it being unchanged since its enactment in 1967.[3] While some countries such as Australia, New Zealand and the United States have implemented domestic legislation governing commercial space activities, this process has certainly not been universally adopted.[4]

As Judge Lachs noted in his dissenting opinion on the *Continental Shelf Cases*, 'freedom of movement into outer space, and in it, came to be established and recognised as law within a remarkably short period of time'.[5] Therefore, this article will argue that it is imperative that New Space, which is an established and recognised new age of space, is met with an updated set of international laws to meet the regulatory demands of rapid commercialisation. The article will first provide a summary of events leading to the commercialisation of space activities, looking particularly at space tourism and satellites. It will then consider the state of the current domestic and international law governing space activities, including the repercussions of stagnant law-making in an area of such rapid expansion.

II. The Space Industry and its Commercialisation

The commercialisation of the space industry comes at a time where the current law is evolving to meet the regulatory demands of emerging technologies, most of which have implications that are yet to be understood. It remains uncontested that the law must evolve to meet the demands of rising technologies, although whether that evolution is proactive or reactive remains an issue for policy-makers to resolve.[6] As noted in Judge Lachs' dissenting opinion in Continental Shelf Cases:

'The great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge: one it must meet, lest it lag even farther behind events than it has been wont to do'.[7]

A. The Emergence of the Space Industry

In contrast to the bloodshed of the two World Wars, the Cold War was fought largely on ideological grounds, as the United States and USSR attempted to establish themselves as the world's leading superpower. One manifestation of this struggle was the Space Race, which saw both countries flexing their respective technological "muscles".[8] This was largely made possible by the development of modern technology such

as 'nuclear weapons, missile technology, computers and satellites'[9] – for instance, the launch of the first satellite, Sputnik, employed similar technology to the launch of ballistic missiles.[10]

As a result of the Space Race, the United Nations drafted the Outer Space Treaty. This established an agreement between nations for the peaceful use of outer space for the benefit of all humankind in order to prevent monopolisation of space by States.[11] The Outer Space Treaty remains unchanged since it was first drafted in 1967 and to date it has been successful in establishing peaceful use of outer space; at least, we have not observed any acts to the contrary. But new challenges are emerging. In particular, State interests are changing and the balance of power is shifting towards the private, commercial actor.[12] It seems unlikely that current regulations, which have their origins in the post-war space race, will continue to be effective in regulating the commercial age of space.

B. The Commercialisation of the Space Industry

The space industry was initially a government-driven initiative, but as demand for satellites grew and governments sought to reduce their cost burden,[13] the world observed an influx of private commercial entities. These entities carried out space missions by subcontracting with government bodies or assisting in the manufacture of space infrastructure as a separate business entity. With the space industry 'expected to reach US$29.6 billion by 2027',[14] it is clearly an attractive area for investment.

i. Commercial Space Satellites

The space satellite industry was worth '95% of the estimated $366 billion revenue earned in the space sector' in 2019.[15] Space satellites are used for 'telecommunications and internet infrastructure, Earth observation capabilities, national security and more'.[16] Our modern globalised society is heavily reliant on cloud-based technologies, which in turn require the positioning of satellites in the Earth's orbit. As the demand for those services increased, it became an attractive business opportunity for large transnational companies such as Blue Origin, SpaceX and Virgin Galactic, as well as smaller start-ups seeking to capitalise on this new business venture. The growing private interest in the space industry resulted in an unprecedented increase in the volume of communication satellites, forming mega-constellations in Lower Earth Orbit ('LEO'). As of 30 March 2021, there was an increase of over 50%, amounting to 5,000 active and defunct communication satellites in LEO. SpaceX currently dominates the field and is on track to add 11,000 more satellites.[17]

The exponential increase in satellites launched into LEO has a high price – it has created millions of pieces of space debris, posing a very real safety risk for life on Earth. In 2007, for example, 'China intentionally destroyed a weather satellite, creating millions of new pieces of orbital debris'[18] – an event that was responsible for a 10% net increase in space debris.[19] Those orbital debris located in LEO 'will not fall to Earth anywhere from a few months to a few hundred years',[20] meaning most will not be destroyed through atmospheric re-entry but rather will remain orbiting Earth, travelling at speeds of up to 30,000 km/h.[21] Current research on space debris shows that a phenomena called Kessler Syndrome might occur as a result of the massive increase in satellites and the resulting debris. Worryingly, 'once the amount of debris reaches critical mass, collision cascading begins', in turn accelerating the increase in debris. Clearly, this poses a significant risk to orbital infrastructure and, by extension, much of Earth's telecommunications systems.[22] Current technologies proposed to dispose of the debris are very expensive to implement. Therefore, it is critical that the law evolves to meet this risk by imposing laws requiring authorisation to launch, encouraging debris mitigation strategies, and incentivising commercial involvement in the debris removal process.

ii. Commercial Space Tourism

The space tourism industry commenced, at least symbolically, with the first commercial launch of astronauts on board the Falcon 9 vehicle. Falcon 9 – manufactured by SpaceX and owned by Elon Musk – launched NASA astronauts, Doug Hurley and Bob Behnken, to the International Space Station on 30 May 2020. This was a historic launch event, being the first crewed vehicle to launch from a US base since the retirement of the space shuttle in 2011.[23] The Richard Branson-owned Virgin Galactic followed soon after, flying two vehicle pilots (Dave Mackay and Michael Masucci) and three Virgin Galactic employees (Beth Moses, Colin Bennet and Sirisha Bandla) to sub-orbital space on 14 July 2021,[24] as part of the "Unity 22" mission.[25] Shortly after, on 20

July 2021, Jeff Bezos left his post as CEO of Amazon to travel to space alongside the youngest and oldest people ever to do so:[26] 18 year old Oliver Daemen and 82 year old Wally Funk.[27]

Following successful launches by Virgin Galactic and Blue Origin, public interest and confidence in commercialised space travel has increased. Virgin Galactic opened ticket sales at a starting price of $450,000 USD per seat.[28] Evidently, space tourism is not yet accessible for most people due to its price; but with technological improvements and heightened public interest, wider access may become a reality in the near future. As with any activity, there will always be a risk of personal injury, which would ostensibly be regulated through tort and contract law. If, for example, a customer aboard a space flight sustained a personal injury while in space, what cause of action could the person raise and against whom would it exist? Article XI of the Liability Convention provides broad guidance for liability:

'Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State'.[29]

If a person brought an action in NSW courts, then which law would be applicable and on what basis will that be decided? Will it be based on lex loci deliciti, law of the place where the tort was committed,[30] or lex fori, law of the country in which the action is brought? Or will it be a similar situation to *Oceanic Sun Line Special Shipping Co v Fay*,[32] with an exclusive jurisdiction contractual clause? The issue here is that space is regarded as *res communis*, not subject to legal title of any State, and therefore to reach a resolution on this matter States must reach an agreement on the issue of territorial sovereignty of space. This issue is discussed in section III.

III. International Law governing Space Activities

Given the rapid expansion of the space industry in recent years, it is vital that governments and international bodies reconsider the adequacy of their regulatory frameworks. The Outer Space Treaty is the main international instrument regulating space activities. It comprises 17 articles and has over 105 signatories.[33] The overarching theme, as set out in Article I, is that the exploration and use of outer space shall be for peaceful purposes, for the 'province of all mankind', 'free from discrimination', on the 'basis of equality' and 'freedom of scientific exploration'.[34]

In terms of substance, the Outer Space Treaty provides regulatory guidance on issues of sovereignty, safety of astronauts, international responsibility for space activities, jurisdiction and control of objects sent into space, and international cooperation. It is widely accepted on an international level that 'treaties are not self-executing'.[35] For example, for the provisions of the Outer Space Treaty to be validly part of Australian law, it must be implemented by domestic statute.[36]

A. State Responsibility

Concerning the allocation of state responsibility for acts performed in outer space, Article VI of the Outer Space Treaty provides:

'State parties to the Treaty shall bear international responsibility for national activities in outer space, whether such activities are carried on by governmental agencies or by non-governmental entities. The activities of non-governmental entities in outer space shall require authorisation and continuing supervision by the appropriate State'.[37]

This international responsibility is further enforced by Article 5 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[38] Article 5 imposes state responsibility for the conduct of persons or entities exercising elements of governmental authority:

'The conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.[39]

An instance which would enliven Article 5 is where a governmental body, such as NASA, subcontracts with a private entity, SpaceX, to facilitate the launching and transportation of astronauts to the International Space Station. But what about the situation where a private company, not acting as a subcontractor for

a governmental body, launches satellites into space without State authorisation? Clearly, if a State has imposed domestic legislation in line with Article VI of the Outer Space Treaty, the private entity would be in breach. However, not all States have imposed domestic legislation to govern the launching of objects into space. Given the current attractiveness of the space industry as a viable commercial venture, this regulatory gap risks exploitation in the immediate future. As such, it is imperative that the gap between international and domestic law is promptly and appropriately addressed.

In 2018, for example, a US-start-up, Swarm Technologies, launched four satellites into LEO without authorisation from the Federal Communications Commission ('FCC'), which is the authority that grants licenses to launch objects into outer space in the US. It was reported that the FCC dismissed Swarm Technologies' application in 2017 because the size of their satellites was 'smaller than the Space Surveillance Network ('SSN') is currently capable of tracking'.[40] Swarm Technologies did not comply with the decision made by the FCC and, as a result, they faced a $900,000 USD fine in accordance with the relevant domestic legislation.[41] Undoubtedly, the risk posed from Swarm Technologies' actions was severe – satellites that cannot be tracked by the SSN could potentially collide with the International Space Station or other satellites, threatening human lives and adding further debris to LEO. Since domestic space legislation has not been enacted by all nations and because international law does not explicitly address this, it is possible that there will be recurrences of that incident.

B. Territorial Sovereignty of Outer Space

Article II of the Outer Space Treaty provides that: '[o]uter space … is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'.[42] This raises two main issues. First, it is not internationally agreed upon where the boundary between outer space and national airspace lies. On one hand, it is generally accepted that space lies beyond the Kármán Line – an 'imaginary boundary 100 kilometres above mean sea level'.[43] However, the US Military and NASA maintain that space begins at an altitude of 12 miles below the Kármán Line, meaning that anyone who reaches that threshold is deemed to be an 'astronaut'.[44]

Second, the reference to 'any other means' in Article II is ambiguous and provides an avenue for States to covertly assert control over outer space. This is exemplified by the behaviour of the US through the FCC. The FCC is currently 'assigning orbital shells to mega-constellations on a first come first serve basis, without assessing the effects on other countries'.[45] Given the risk of orbital overcrowding may deter other countries from adding their own satellites, the actions of the FCC arguably constitute 'appropriation by other means' and thus would be in breach of Article II.[46]

As an area that similarly goes 'beyond the national jurisdiction',[47] regulation of Antarctica can be used to inform legislative and policy measures on this issue. Claims of sovereignty over Antarctica are governed by Article VI of the 1959 Antarctic Treaty.[48] Following extensive negotiations in which State delegations were unable to reach an agreement about how Antarctica would be divided up, an innovative solution was reached – namely, the issue of sovereignty would be frozen for the life of the treaty. In other words, no claims of sovereignty can be made during this period.

However, this type of agreement would be ineffective to resolve the issue of sovereignty over outer space, given the active efforts of States to implicitly gain control of outer space 'by other means' and the growing demand for space infrastructure to facilitate life on Earth. It is also worth noting that if space law followed along the lines of the regulation on Antarctica, with the 'primary focus on science and environmental protection, it will more than likely have the same outcome as Antarctica with very little economic growth'.[49] Adding an avenue for economic growth to space activities provides further resources to enhance innovation and would ultimately yield superior scientific research. Therefore, it is vital for policy makers to encourage commercial activity in outer space through effective regulation to promote economic growth.[50]

C. Australian Domestic Law Governing Space Activities

To meet the licensing and authorisation requirements imposed by the Outer Space Treaty, some States have adopted domestic legislation. The first country to do so was the United States in 1958;[51] in 1998, Australia became the sixth country to implement such legislation.[52] *The Space Activities Act* 1998 (Cth)

in Australia was amended in 2018 and renamed as the *Space (Launches and Returns) Act* 2018 (Cth) ('Act'). It sought to 'accommodate technological advancements while not unnecessarily inhibit[ing] innovation in Australia's space capabilities'.[53]

The main objective of the Act is to 'ensure reasonable balance is achieved between removal of barriers to participate in space activities and the safety of space activities'.[54] To achieve this, the Act provides regulatory safeguards requiring authorisation per activity type, including launch facility licences,[55] Australian launch permits,[56] overseas payload certificates,[57] return authorisations,[58] authorisation certificates,[59] and Australian high power rockets permits.[60] In defining a 'launch', the Act adopts the widely accepted definition of space, the Kármán line, being 'an area beyond the distance of 100 km above mean sea level'.[61]

The Act offers safeguards against State liability issues for damage suffered by a third party, providing that 'the responsible party for the launch or return of a space object is liable to pay compensation for any damage the object causes to a third party'.[62] The Act also includes a debris mitigation strategy for overseas payload permit,[63] and an Australian launch permit.[64] The key amendment to the Act was a significant drop in the maximum insurance required, from A$750 million to A$100 million,[65] which purports to foster commercial activity in the space sector by lowering barriers to entry. In contrast, the Act imposes significant penalties for non-compliance with authorisation requirements – an individual would face a maximum of 5,500 penalty units and/or imprisonment of 10 years, and a body corporate would face a maximum of 100,000 penalty units – which further highlights the severity of the risk associated with unauthorised space activities.[66]

In line with the objectives of the Act, Australia established the Australian Space Agency ('Agency') on 1 July 2018. The Agency has since given two authorisations for launch facilities in South Australia to Southern Launch for its Koonibba Test Range and Whalers Way launch complex.[67] Since the Act only came into force recently, on 1 September 2019, its effectiveness and ability to achieve its objective is yet to be fully observed.

IV. Conclusion

Modern society's dependence on satellites and cloud-based technologies has driven the rapid commercialisation of the space industry. Where States traditionally held a monopoly over the industry, wealthy and innovative commercial actors have begun to penetrate the field. While current international law has thus far been effective in maintaining the peaceful use of outer space, there are significant regulatory gaps arising from commercialisation and technological innovation. But fear of the unknown ought not prevent us from pursuing the considerable opportunity for economic growth that space provides. Rather, it is essential that the law evolves in a consistent manner, both on an international and domestic level, to ensure the fair, sustainable and safe use of outer space.

Defending a Chimera: The TRIPS Waiver and Vaccine Inequality in COVID-19

Arundhati Ajith, JD I

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The Contempt Inherent in Federalism: The failures of national leadership, the expansion of executive power and its role in COVID-19 recovery

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Legal Literacy: The Key to Recovering the Rule of Law

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broad outline of our laws, they may grow up feeling that law is alien to their experience. I want them to grow up insisting that the law must be just and modern and accepting the citizen's responsibility to ensure that this is so.'

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Public Trust: The Insidious Costs of COVID Success

James Kim, LLB IV

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The Merge: Questions of violence, inequality and support

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Virtual Justice: The effects of online courts post Covid-19

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Defamatory emojis: the overreach of defamation laws in New South Wales and the case for law recovery and reform

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Advocacy by Charities Before, During and After the Covid-19 Pandemic

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1. * LLB VI, University of Sydney. This is my personal opinion only. For an example of this evolution, compare this article with my previous treatment of this issue in this journal in Samuel Chu, 'Charitable Advocacy is More Important than Ever' (2020) *SULS Law in Society* 72.
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11. The United States' position on issue-based advocacy for charitable purposes is different to the rest of the English Common Law, because its categories of tax-exempt organisation are much broader (and should not be considered here in depth). However, the United States has historically used the First Amendment to the United States Constitution to support free expression in the political process for charities, other not-for-profit organisations, tax-exempt organisations and (even) for-profit companies.
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Outer Space and the future of the Law

Zeina Shaheen, LLB III

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