LexisNexis®

Volume 9 • Issue 2 • December 2020

Advancing together

RULE OF LAW UPDATES AND PERSPECTIVES

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RULE OF LAW UPDATES AND PERSPECTIVES

LexisNexis® Capital Monitor's editorial team prepares the Advancing Together, Rule of Law Updates and Perspectives from the Asia Pacific bulletin. The team is located in the Press Gallery of Parliament House, Canberra.

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A message from Greg

Hello, and welcome to the December edition of Advancing Together.

As we round out what will no doubt be remembered as one of the more challenging years in living memory, it seems like a good opportunity to reflect on the developments of recent months.

In response to the upheaval of COVID-19, we have adapted quickly to ensure the safety of our staff, while also working to minimise any disruption to our customers along the way.

Shortly after the pandemic began, we launched our COVID-19 Information Hub, and began to collect and publish insightful and beneficial content from all corners of our business to this central source.

We curated complementary resources like the Australian COVID-19 Practical Guidance Toolkit, which contains over 120 items including guidance materials and pandemic-related information.

We also assisted customers working from home via a format shift by granting them access until mid-December, allowing free digital access to titles for customers who were unable to access their purchased print content. We also continue to provide free access to disadvantaged students and affected members of our legal community.

Our guiding mission remains to engage in projects that embody equality under the law, transparency of law, independent judiciary and accessible legal remedy. And throughout the ups and downs of the year, our commitment to advancing the rule of law has been unwavering.

Our long-term partnership with the Australian Human Rights Commission continues, and we were incredibly proud to join the AHRC in recognising the tireless efforts of 10 Human Rights Heroes. From representatives of our Indigenous and Sikh communities, to activists and advocates of all walks of life, the finalists represent the best of humanity—and you can find more about them at the AHRC website.

We continue our rule of law work throughout the Pacific region, with legislative updating and consolidation projects continuing in Nauru, the Cook Islands, and Fiji. As always, we are grateful for these opportunities and thankful to our partners in the Governments of these nations.

We hope you enjoy this edition of Advancing Together, and we look forward to seeing you, renewed and refreshed, in 2021.

Redefining boundaries, redefining power: future diplomacy and international affairs in the Asia Pacific region

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Australian international diplomatic efforts underpin our ability to travel internationally, launch businesses in new countries, adopt the best medical technology as soon as it is available, eat imported delicacies, enjoy incredible ecological diversity, and, at least these days, not wear clothes made only by our grandmothers. Australia's foreign affairs efforts are what allows us to hitch ourselves to the "engine of global growth" – the Asia Pacific – and live in relative safety, security, and prosperity.

In short, Australian international relations give us options.

Yet, the Asia Pacific is also a region irrevocably changing the way we do international affairs. It will impact on how we relate to ourselves and each other long into the future. It is integral to the future of maintaining a rules-based order in the region – where each country shares rights and responsibilities and acts accordingly. Given the region's dynamism, diversity and sheer population, getting our international relations right in the Asia Pacific is vital to ensuring we get the future application of the rule of law right more generally.

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The context: from coasts to communities

In the Asia Pacific region, understanding history and the contemporary context is key. Already, rising tides lap at Pacific Island shores, with climate change a dominating force for our neighbours in the largest ocean region in the world – the Blue Pacific.

Directly above us, the capital of the world's biggest Islamic democracy, Jakarta, is sinking with an estimated 95 per cent of North Jakarta to be submerged by 2050.

Hong Kong is undergoing increased political tensions and social unrest, eroding the city's once-leading role in business and innovation. North Korea remains as opaque as ever, and ethnic tensions persist in civil conflict across Myanmar. In Brunei, rule by law – not rule of law – dominates, with the governing royal family literally above the law.

Meanwhile, China's *One Belt, One Road* strategy of regional development is rapidly modernising much of historic Southeast and Central Asia, resulting in the construction of significant new roads, bridges, and other major infrastructure. Ramifications of this are unclear in the long term – for both China and for those now indebted to their benefactor.

Health remains a priority during COVID-19 recovery across the region, with mixed quality and access to medical facilities characterising many countries' systems. COVID-19 has also wrought devastation on complex supply chains and put pressure on already stretched resources, deepening inequalities.

Coupled with intergenerational shifts, a rising middle class, growing entrepreneurialism, over-crowding and smart cities, new forums for international engagement, and a massively diverse geographic and political context, there are a number of factors that impact on the international rule of law, as well as state's acceptable and proportional use of power.

Redefining boundaries / redefining power

In the context of historic trajectories and new challenges to the rule of law, major boundaries across the region are currently being redefined. The battle for supremacy, hegemony or shared power between China and the US underpin the regional dynamics from which everything else flows. These dynamics determine how and to what extent we support the US, how and to what depth we rely on China's economy, and how, where, and why we engage in advocating common shared values and rules between them.

The East China Sea and South China Sea remain important battlegrounds for resource extraction, shipping routes and naval influence – with ideological boundaries mooted as much as physical boundaries.

As seas rise in the Pacific, questions remain around what happens to sovereign nations when their land is submerged. Will those on the Pacific rim – including Australia and New Zealand – provide new lands and sovereignty for these territories to relocate? Will we provide just land? Or will we provide nothing? Whichever way, we need to rethink where we draw the line.

Boundaries around what citizens can and cannot do are also shifting. Social entrepreneurship – the ability to address social or environmental issues through business means – is increasingly relied on in cases where governments have failed to address

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systemic gaps. Not only do ordinary people have increasing power to determine their own lives, but the direction – and limits – of their nation too.

Changing demographics also shift the balance of power. The biggest population of the world's youth live in the Asia Pacific. Not only have they been systemically excluded from power to date, but they are also more powerful now than ever – digital natives, cross-culturally competent, highly entrepreneurial, and acutely aware of the failing intergenerational bargain.

The boundaries around who does what, how much power they have, and what the future of the region will be – are changing.

Ramifications on regional complexity

Given these challenges, complexity is one of the core issues that governments face in navigating foreign affairs and diplomacy across the Asia Pacific. Policy-making, advocating Australia's interests, establishing working regional partnerships, encouraging domestic audiences to grow Asia capabilities, planning for the future and facilitating business and economic growth in the region are difficult enough in usual times. These challenges increase in the wake of new boundaries both real and imagined, and new power dynamics that are yet to fully fledge.

As the Rule of Law is the foundation of good and equitable relations between states, as well as being the base of fair societies, complexity therefore has a big impact on our region's long-term prosperity and security. Appealing to the rules-based order is one of our major priorities in international affairs – fundamental to international peace and security, political stability, economic and social progress and development, and the protection of citizen's rights and fundamental freedoms.

Yet, tackling the myriad challenges across myriad different political systems mean that our ability to conduct strong international affairs and advocate – and live by – the rule of law will require an increased agility and aptitude for complexity.

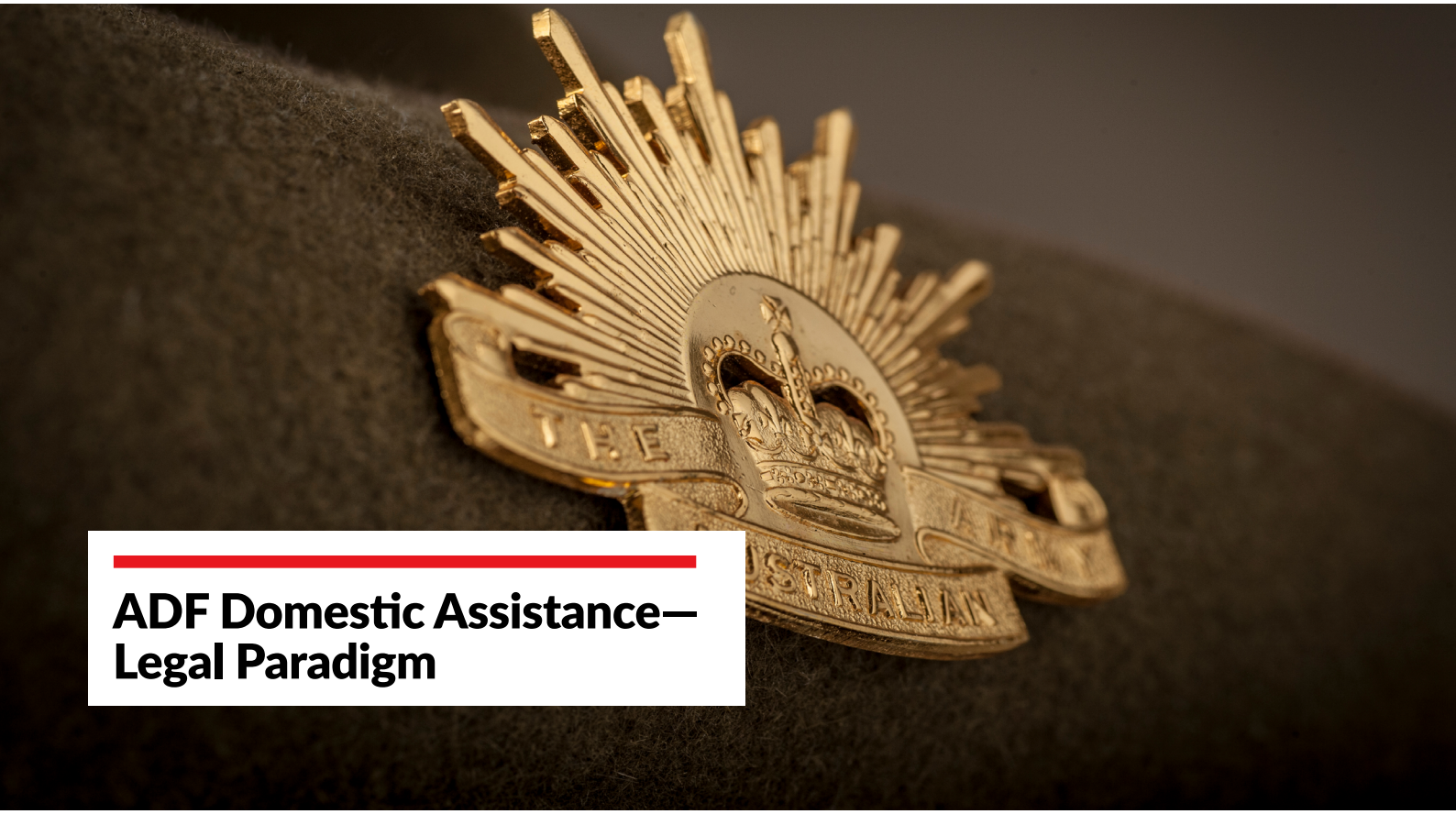
Impact on the Rule of Law

Globalisation continues to be a theme underpinning our international affairs, even despite the disruptions wrought by COVID-19. Yet, more than this, regionalism and the ability to do business and policy "in the bubble" are just as important – and likely to have significant long-term implications too.

Across the region, redefining boundaries and power today is therefore an essential element influencing the future of the rule of law. There remain major questions to ask.

- In the past, we have relied on strong leadership and an overarching US-influenced rules-based-order. Will everyone continue to play by the rules in the region? Or is rogue-stateism and opting out of well-worn international (and regional) frameworks going to be more the norm?
- With rising climate issues in the Pacific, how will the region incorporate new territories within existing nation states, and how will they balance who has access to old territories subsumed under new maritime waters?
- With the digitisation of our foreign affairs more necessary than ever before, how will this affect our ability to negotiate new laws and policy, influence foreign audiences and deliver the full suite of Australian national interests?

Ultimately, Australia's international affairs and diplomacy apparatus – from government to business and beyond – must think more creatively and adaptively about the challenges that lay ahead. Increasingly, the Asia Pacific's future is our future too.



ADF Domestic Assistance—Legal Paradigm

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The last few years have seen an increased presence of the Australian Defence Force (ADF) assisting and working alongside State authorities in times of emergencies. This has, of late, been with Police under the ADF COVID-19 Task Force and State Emergency Service responding to natural disasters. While many in the Australian community expect this assistance from the ADF, and at times our political parties get involved and express their views of ADF involvement, there is little public conversation surrounding the legal framework necessary for this to occur.

Putting personal views about COVID-19 aside, the management of the current pandemic has highlighted the legal complexities and dynamics at play between States and Territories, and the Commonwealth. Our Federation design creates legislative limitations to what work or tasks the ADF can undertake while operating on domestic soil. The ADF is generally an organisation designed to look outwards for the purpose of the protection of Commonwealth interests, as States focus internally with their respective Police Forces. In support of this design, our Constitution ensures States and Territories continue to govern themselves (e.g. the closure of their borders) while s51 of the Australian Constitution limits the legislative powers of the Commonwealth, including the generation and maintenance of the ADF.

Currently, the legislative authority for ADF to operate on domestic soil has largely been limited to Part IIIAAA of the *Defence Act 1903*. This was, until recently, limiting and arduous in its activation. The latest amendments to the *Defence Act 1903 (Defence Amendment (Call Out of the Australian Defence Force) Act 2018)* have provided for a more streamlined process and

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enhanced support capability from the ADF to assist State and Territory authorities. However, Part IIIAAA of the Defence Act 1903 only has a narrow focus on matters relating to terrorism and domestic violence. The inference here being violence perpetrated at a national/state level is in this context not a reference to family and domestic violence, as domestic violence is not defined in the Act. Part IIIAAA of the *Defence Act 1903* provides a good framework and protection for ADF personnel when the use of force is contemplated but there continues to be a void regarding natural emergencies.

This focus on internal/domestic violence and terrorism within Part IIIAAA of the *Defence Act 1903* was topical in 2015 following the Lindt Café siege (being one of the drivers for these recent amendments). Of late, however, the question is what legal framework exists for ADF domestic assistance that doesn't fall into the category of domestic violence or terrorism – as seen with "Operation Bush Fire Assist" and "Operation COVID-19 Assist". This support relies on the States and Territories requesting assistance from the ADF under the Defence Assistance to the Civil Authority (DACC) policy framework.

Notwithstanding the prevailing purpose of Part IIIAAA of the *Defence Act 1903* and DACC (to assist the community at a time of need), there are two distinctions between these frameworks: 1) the contemplation of the use of force, and 2) the legislative protections the *Defence Act 1903* provides. As DACC is an internal policy framework, it essentially renders ADF personnel assisting the community with no greater protections than any other civilian. Although ADF personnel are exercising the same civil powers as every other civilian, these powers may be perceived as different when a civilian is confronted by a well-disciplined, uniformed military member.

The concern, however, comes when that civilian is not compliant, refuses the direction (e.g. decides not to provide personal details for COVID testing, or a direction to remain in the State Government imposed residential restricted areas), or becomes violent. In this paradigm, ADF personnel do not have additional powers to use force (even for self-defence) or for arrest beyond those that are available at Common law or provided under the specific legislation of the State or Territory in which they are performing their duties. The Police Force maintains this power and can direct ADF personnel to assist in performing Police duties. This provides for "limited" protection of the ADF personnel when operating together and is the reason a Police Officer will often get attached to a single or a group of ADF personnel. Currently, this is most identifiable at the COVID-19 State border checkpoints where States have imposed a restriction on civilian liberties, i.e. State Police maintain legal primacy with ADF personnel providing increased manpower and capability.

It is true, ultimately, that that the ADF personnel are less likely than civilians to face legal recourse for their actions, providing they were acting within the orders as to why they were deployed to assist in the first place. This however will provide little comfort or guidance to those performing tasks on the ground. While ADF personnel assisting in these natural disasters may still be able to provide a level of force for the protection of themselves or others, undertake an arrest for the prevention of a crime or the destruction of property, or to save a life, their protection in undertaking these actions are limited to those that all civilians have in Australia. This highlights a distinct legal void in periods of non-hostile emergencies.

Until an additional legislative framework is developed to provide for protections, ADF personnel will be limited to a narrow set of duties and expectations while deployed to assist during natural disasters. The importance of providing clear protections for ADF personnel working alongside other emergency personnel (who do have protections) has recently been identified by the Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020. This was entered for the first reading in September but remains in review. This Bill looks to amend the *Defence Act 1903* to introduce specific indemnities to ADF personnel responding under DACC type tasks. Where this will end up and when, remains unknown. Although this will hopefully fill the current void, it doesn't assist those that are currently undertaking their duties.

Mounting stakeholder pressure underpins reforms to judicial and regulatory structures in Australia

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Responding to pressure from stakeholders and the public, federal and state governments are putting in place reforms to judicial and regulatory structures. Faced with a seemingly endless parade of political scandals, the Morrison Government has released for public comment a draft of its legislation to implement a Commonwealth Integrity Commission. The draft has come under much criticism, proposing what many believe to be a neutered body, without the necessary powers to properly tackle corrupt conduct in the public sector. At the same time, the Federal Government has introduced the last piece of legislation necessary to support the transition from the Superannuation Complaints Tribunal (SCT) to the Australian Financial Complaints Authority (AFCA). In Tasmania, the State Government has recently passed the necessary legislation to establish the Tasmanian Civil and Administrative Tribunal (TasCAT), with similar purpose and functions to its peers in other Australian states and territories.

Integrity Commission

Attorney-General Christian Porter released an exposure draft of the Government's Commonwealth Integrity Commission (CIC) legislation on Monday, 2 November. Mr Porter said that the proposed CIC would have greater powers than a Royal Commission, including the ability to: compel people to give sworn evidence at hearings, with a maximum penalty of two years imprisonment for not complying; compel people to provide information and produce documents (even if the information would incriminate the person), with a maximum penalty of two years imprisonment for not complying; search people and their houses, or seize property (under warrant); arrest people; tap phones and use other surveillance devices to investigate them; and confiscate people's passports by court order.

According to the Government, the first phase of its plan for a CIC has been underway for some time. Funds to expand the

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Australian Commission for Law Enforcement Integrity's (ACLEI) jurisdiction from 1 January 2021 to include four new agencies, and additional funding and staff were allocated to ACLEI in the October 6 budget already. The second phase is the full delivery of the CIC by legislation, which will subsume ACLEI and cover the remainder of the public sector. The public sector integrity division will have jurisdiction over the rest of the public sector and other regulated entities. This division will investigate potential criminal corrupt conduct perpetrated by public sector, intelligence agency and Australian Defence Force employees; the staff of federal judicial officers; parliamentarians and their staff; higher education providers and research bodies (in some circumstances).

The Attorney-General criticised alternative models proposed by Labor and the Greens as representing "a NSW ICAC on steroids", possessing "extreme coercive powers" and being used for "the most minor code of conduct breaches that would otherwise be minor disciplinary matters." Mr Porter said that the Government's proposed model struck the right balance between protecting individual rights and reputations while guarding against potential corruption.

A national anti-corruption body with similar powers to the NSW ICAC is likely to be anathema to the Morrison Government. Recently departed Federal President of the Liberal Party, Nick Greiner, established the NSW ICAC with a view towards investigating the actions of his predecessor Neville Wran's Labor Government, yet found the Commission's powers turned against his own Government, leading to his resignation. It is perhaps this experience that informs Mr Porter's criticism of the power of integrity commissions to ruin reputations.

Shadow Attorney-General Mark Dreyfus criticised the Government's delay in putting forward its draft plan, after Mr Morrison and Mr Porter promised a National Integrity Commission in December 2018 in the lead up to the 2019 election. Mr Dreyfus said that a key deficiency in the Government's proposed model was an inability to self-start: the Commission would have to wait for the Government to refer matters of public sector corruption to it. Other issues raised by Mr Dreyfus include the limitations on public hearings, inability to make findings of corrupt conduct, limitation to investigating only criminal offences, and lack of proper protections for whistleblowers.

The Law Council of Australia noted that while the legislation would create a specialist centre for the investigation of corruption throughout the public sector, with one division to oversee law enforcement and another to oversee the public sector more broadly, each of these divisions would have a different working interpretation of corrupt conduct. That is, conduct deemed to be corrupt would differ depending on whether it is perpetrated by members of law enforcement or by members of public sector agencies. The Law Council maintains that there should be an alignment of powers between the divisions and the same broad definition of corrupt conduct should apply - the same conduct that is deemed corrupt in one context should also be deemed corrupt in the other.

The Centre for Public Integrity went further, describing the distinction between law enforcement corruption and public sector corruption as "both unfortunate and unwarranted". Other issues identified by the Centre included the absence of public hearings in cases of public sector corruption, a too narrow definition of corruption which would exclude anyone outside the public sector, too high a threshold for making referrals, the inability to investigate on its own motion in the case of public sector corruption, the failure to operate retrospectively, and the inability to make findings of corruption against any parliamentarian of public servant on any final report. The Centre called for the Bill to be modified over the next month so that a serious Commonwealth Integrity Commission can be achieved.

By contrast, right-wing think tank the Institute for Public Affairs called on the Attorney-General to completely abandon plans for the proposed Integrity Commission, saying that public hearings risked being turned into show trials. "History demonstrates that commissions and bodies purported to address corruption inevitably become undemocratic and illiberal kangaroo courts," Dara Macdonald, Research Fellow at the Institute of Public Affairs, said. "The inclusion of private hearings shows that there has been some consideration of the flaws of similar state-based bodies such as the NSW ICAC. However, this is no guarantee that corruption inquiries will be held privately, or that prejudicial information of accused parties will be kept from the headlines." The IPA said that the proposed CIC would do away with traditional legal rights, including the privilege against self-incrimination, and undermine the rule of law in Australia.

The consultation period on the draft Commonwealth Integrity Commission legislation will run from November 2020 to March 2021. Submissions close on 12 February 2021.

Australian Financial Complaints Authority (AFCA)

The Federal Government has also recently introduced legislation to complete the transition from the Superannuation Complaints Tribunal (SCT) to the Australian Financial Complaints Authority (AFCA). Introduced to the lower house on 28 October 2020, the Treasury Laws Amendment (2020 Measures No. 4) Bill 2020 facilitates the closure and any transitional arrangements associated with AFCA replacing the SCT. The legislation provides

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for the transfer of records and documents from the SCT to ASIC, the remittal of matters on appeal by the Federal Court and introduces a rule-making power to allow the Minister to prescribe other matters of a transitional nature.

The transition from the SCT to AFCA has been several years in the making. The 2017 review of the financial system external dispute resolution and complaints framework by Professor Ian Ramsay (Ramsay Review) investigated dispute resolution procedures shared between the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT). In general, the Ramsay Review found that the existence of multiple avenues for dispute resolution had led to confusion, difficulty in pursuing complaints and unnecessary duplication. The Review found that "dispute resolution arrangements for superannuation are broken", with the SCT "unable to resolve disputes quickly". The average time for resolution of a dispute from lodgement to determination was 796 says in 2015-16, although 87 per cent of cases were resolved before the determination stage. A key problem identified by the review was chronic underfunding of the SCT, with no link between funding and the number of complaints received. Despite an increasing caseload, staff numbers fell from 44 to 32 between 2010 and 2015-16. The Ramsay Review said that any replacement for the SCT must be adequately resourced to deal with a workload likely to continue to grow.

In the 2017-18 Budget, the Government announced it would respond to the Ramsay Review by creating a new dispute resolution framework, AFCA, for external dispute resolution and greater transparency of internal dispute resolution by financial firms. Shortly after the Budget, on 17 May 2017, the Government released a draft of this framework - the Treasury Laws Amendment (External Dispute Resolution) Bill 2017 and Treasury Laws Amendment (External Dispute Resolution) Regulations 2017 - for four weeks of public consultation. This was followed up with a supplementary issues paper on 31 May 2017, with amended terms of reference to make recommendations on the establishment, merits and potential design of a compensation scheme of last resort; and consider the merits and issues involved in providing access to redress for past disputes. On 26 July 2017, then-Financial Services Minister Kelly O'Dwyer announced the creation of a transition team, chaired by Dr Malcolm Edey, the former Assistant Governor (Financial System) of the Reserve Bank of Australia (RBA).

On 14 September 2017, the Government introduced Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Bill 2017 in Parliament and released a fact sheet outlining its response to the consultation process.

As the Bill made its way through the Parliament, Dr Edey's transition team released a further consultation paper, focusing on aspects of AFCA's operations that would differ from existing arrangements for the FOS, CIO and SCT. These issues included: monetary limits; enhanced decision-making; use of panels; independent reviews; an independent assessor; and exclusions from AFCA's jurisdiction.

The Bill finally passed both Houses on 14 February 2018 and received the Governor-General's assent on 5 March 2018.

The Australian Financial Complaints Authority was established on 1 November 2018, replacing the functions of the FOS, CIO and SCT. In its 2019-20 Annual Report, the Superannuation Complaints Tribunal noted that this was four months later than originally anticipated. Furthermore, as a result of increased public awareness arising from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the SCT received a flood of complaints in October 2018. The 343 complaints received were the most received in any month in the Tribunal's history. The additional four months of accepting complaints, combined with the increased workload brought about by the Royal Commission, significantly impacted plans for the SCT's closure. Treasurer Josh Frydenberg therefore allocated an additional $2.3 million to ASIC to enable the SCT to resolve all outstanding complaints by 31 December 2020. At the start of July 2019, there were 1264 open complaints before the Tribunal. This was reduced to 170 complaints by the end of June 2020. The Tribunal therefore seems likely to be able to resolve outstanding complaints and wind up operation by the end of 2020.

Tasmanian Civil and Administrative Tribunal

The establishment of the Tasmanian Civil and Administrative Tribunal has been the product of long consultation and

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deliberation and brings the State in line with other Australian jurisdictions. Stage One of the process began in 2015 with the publication of a discussion paper, which examined whether amalgamation presented an opportunity to benefit not only the Tribunals, with respect to resourcing and capacity building, but also the community through better access to justice and delivery of services. The stated policy objectives of the discussion paper included: improving delivery of dispute resolution services and access to justice for the Tasmanian community by creating a 'one-stop shop' of dispute resolution of administrative decisions; streamlining administrative structure of Tribunals while retaining their necessary specialist features; providing economies of scale and promoting greater consistency in processes and decision making; and progressing the use of Alternative (Appropriate) Dispute Resolution services across tribunal processes.

On 18 March 2020, Tasmania's Attorney-General Elise Archer reaffirmed her Government's commitment to establishing a single civil and administrative tribunal, to streamline services and improve access to justice. Ms Archer said the first step in progressing the reform would be the establishment of a new physical space, with the Resource Management and Planning Appeal Tribunal, the Guardianship and Administration Board, the Workers Rehabilitation and Compensation Tribunal, Asbestos Compensation Tribunal, Motor Accident Compensation Tribunal, Anti-Discrimination Tribunal, Forest Practices Tribunal, Health Practitioners Tribunal and the Mental Health Tribunal to be the first to be co-located at the Barrack Street facilities in Hobart.

On 20 March 2020, the Office of Parliamentary Counsel published a consultation draft of the Tasmanian Civil and Administrative Tribunal Bill 2020, drawing submissions from a broad cross-section of stakeholders. The Tasmanian Bar was generally supportive of establishing a single administrative tribunal, but raised several serious concerns regarding the governance, membership and objectives of the Tribunal, as well as the need for legislation to amend other Acts so as to grant jurisdiction to the Tribunal. The Bar said that without such amendments, TasCAT would not have the tools it needed at law to operate as intended.

Community Legal Centres Tasmania (CLC Tas) echoed the Bar's concerns regarding the ramifications of the High Court's decision in Burns v Corbett [2018] HCA 15, which placed limits on the powers of state tribunals across Australia. CLC Tas warned that without establishing appropriate safeguards, TasCAT would be unable to exercise judicial power in relation to federal matters involving residents of different states, the Commonwealth, and the State of Tasmania and a resident of another state.

The Environmental Defenders Office (EDO) and the Tasmanian Conservation Trust (TCT) both raised concerns regarding prospective changes to the Resource Management and Planning Appeals Tribunal (RMPAT) and Forest Practices Tribunal. The EDO recommended that the prospective legislation not alter the rights, duties and obligations of the RMPAT as set out in the Resource Management and Planning Appeal Tribunal Act 1993, particularly the mediation and confidentiality protections in ss16A and 17, the position with respect to costs in s28, the determination of the appeal in s23, and rights of appeal in s25. According to the EDO, any changes to existing procedures, functions, powers and duties of the RMPAT would have the potential to create considerable uncertainty, for all participants – councils, statutory authorities, developers and affected parties alike. The TCT similarly called for the key elements of the RMPAT to be retained, including: an explicit requirement for a list of dedicated specialists to administer and hear planning and environmental appeals; minimising the cost risks associated with planning appeals; maintaining broad tests for standing to commence or join appeals; facilitated mediation processes; and maintaining the less formal inquisitorial nature of proceedings.

Attorney-General Archer officially opened the new TasCAT facilities at 38 Barrack Street, Hobart on 7 July 2020. The new centre offers state-of-the-art facilities, including 19 new hearing and mediation rooms and advanced audio-visual equipment. Ms Archer said she was confident that TasCAT would deliver a more client-centric focus, particularly for protective jurisdictions, and promised to work closely with existing tribunals and stakeholders to support them through the transition phase.

On 19 August 2020, Ms Archer introduced the Tasmanian Civil and Administrative Tribunal Bill 2020 to the Parliament. The Bill establishes TasCAT, sets out its objectives, provides for its membership and staffing, sets out its structure, and assists with issues arising from co-location at the Barrack Street premises. Further legislation will be required to expand TasCAT's jurisdiction and provide further powers including in relation to costs, diversity proceedings and alternative dispute resolution. The Bill passed quickly through both houses of Parliament without amendment, gaining the Assembly's approval on 27 August and the Council's agreement on 15 October.

Ms Archer welcomed the Bill's passage through the Parliament on 17 October, calling for applications from across the country for the role of TasCAT President. The Attorney-General said that passage of the legislation would allow existing tribunals to amalgamate and commence operations under the new President in or about July 2021. The Tasmanian Civil and Administrative Tribunal Act 2020 received the Governor's assent on 4 November 2020.

Technology must evolve to support virtual courts

Emily Rowbotham

Graduate Officer at Attorney-General's Department and former Judge's Associate at the NSW District Court

As the realities of the COVID-19 pandemic became apparent, the adversarial system (an industry notorious for being averse to all things paperless) was quick to adapt. Court staff, legislators and legal representatives across Australia displayed resilience and innovation in designing new procedures to ensure the satisfaction of health and safety standards and that justice mechanisms remained available. This allowed a mostly seamless transition from normal to abnormal operations, while emphasising the legal profession's commitment to the maintenance of the rule of law and access to justice.

From March 2020, most jurisdictions postponed 'non-urgent' procedures and began to conduct criminal trials via the 'Virtual Court', a video conferencing system. In the New South Wales District and Supreme criminal jurisdiction, all new jury trials were suspended, bail applications were predominantly heard in chambers, and 'non-urgent' procedures included nearly all proceedings where the defendant was not in custody. From April, almost all courts moved to the exclusive use of the Virtual Court and, despite some initial teething problems, it appears here to stay.

Maintaining the principles of open justice

The courts have shared with other industries the common challenges brought about by working from home. However, the profession also has a unique difficulty in balancing the principles of open justice and transparency.

The Virtual Court has limited capacity to allow interested members of the public and media to view proceedings. The relationship between the judiciary and the media is considered foundational to judicial accountability, but also plays an important function in encouraging public confidence in the judicial system. And such reassurance is only possible when society can see and understand the system itself. There is currently no mechanism for the public to 'tune in' to courtrooms, whereas previously one could choose to simply sit in the gallery of the court.

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The beginnings of the Virtual Court saw incidents where parties connected early to test their server, only to disrupt closed court proceedings. This emphasised the need for a secure platform that is equipped to facilitate public streaming of proceedings, while still allowing that same court to be swiftly 'closed' for the hearing of suppressed matters. Similarly, written submissions and orders made on the papers are both efficient and necessary in the COVID-19 environment. However, overuse without a mechanism for public access inhibits media oversight, integral to the rule of law.

As noted by the Honourable Wayne Martin, the principle of open justice can also be impeded by what his Honour dubbed 'practical obscurity'.[1] Among other things, this obscurity is brought about by the technicalities of legal jargon and the physical inaccessibility of the courtroom itself. The Virtual Court has all but eliminated this physical inaccessibility, bringing the court to the homes of those in rural and remote locations.

The Virtual Court may also reduce some of the 'practical obscurity' associated with the formality of court, that can be isolating for the civilian observer and trained lawyer alike, somewhat paradoxically helping to humanise the process. While the court has continued to emphasize maintaining tradition (seen in the retention of wigs, gowns, bows and knocks), the intention is inevitably derailed by the online environment – perhaps through a fleeting glimpse of a barrister's Ugg-boots as she appears from home, or in the moment a key witnesses' puppy gate-crashes cross-examination. It is important to note that too much informality may impact how seriously jurors or witnesses take proceedings. However, these small elements of informality and humour also create a level of approachability, consequently increasing accessibility.

Fairness in witness examination

Although potentially eliminating some practical obscurity, these new practices have also created questions regarding the fairness of conducting a virtual trial – specifically the limitations associated with examining key individuals via video-link.

In NSW, jury trials were resumed in June, and while that meant the return of jurors in person (under strict social distancing requirements), travel and distancing restrictions mean that key witnesses are commonly prevented from appearing in person. Even following the current easing of restrictions, appearances by legal practitioners remain largely dictated by the policy of the court, state restrictions and practitioner comfort.

The theatricality of the courtroom is embodied in the art of cross-examination. Advocates tie witnesses in knots, lay subtle traps and elicit emotional responses, enabling the jury to assess their demeanour and reliability. There is undeniably an element lost in the virtual examination of a witness. The pace, flow and efficacy of regular witness examination is undermined by technological glitches. For counsel who are uncomfortable with the online system, these technological barriers may impact their ability to confidently and fairly argue their case. To have the success of a trial subject to the strength of a witnesses' Wi-Fi, or their ability to access a functioning device, undermines the right to a fair trial.

Moving forward: virtual court and the rule of law

There are undoubted benefits to the online court. It has allowed for continued access to justice in turbulent times and holds promise for increased access to the rule of law going forward. The legal profession has united through the process of digitizing an industry previously considered technologically inept, reinforcing its commitment to fairness and access to justice. This dedication should be acknowledged.

However, the new technology was adopted quickly, with an unspoken pardon for its limitations, to allow justice to move forward during an emergency. As it has become apparent that these are not temporary measures, the technology must evolve to provide more secure, transparent platforms that are durable and fit for purpose. This will need to include platform developments that allow for monitoring and media oversight through streaming, the viewing of electronically filed documents, and the availability of extemporaneous judgments. Without development, heavy reliance on the virtual system could eventually threaten the quality of the judicial system and legitimacy of the rule of law.

It is pertinent that the legal system also considers the extent to which criminal practice and procedure - a craft that explores human nature, relationships and society - should and can be digitized with adequate fidelity to the underlying principles of justice that it originally evolved from. There would be great value in an ongoing plan for the technological development of the courts going forward, especially given the rapid pace that technology and society continues to develop and change. This plan should consider if and how the human elements of the court can translate to the digital world while conserving the right to a fair trial. Ultimately, the changes resulting from COVID-19 have reinforced the importance and power of advocacy in the traditional trial setting and demonstrated that virtual proceedings are no substitute without significant advancements.

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1 The Honourable Wayne Martin, 'Improving Access to Justice: The Role of the Media' (Speaking at Curtain University, 15 October 2009).

New legal need and new service responses in a year of compounding crises

Kate Fazio

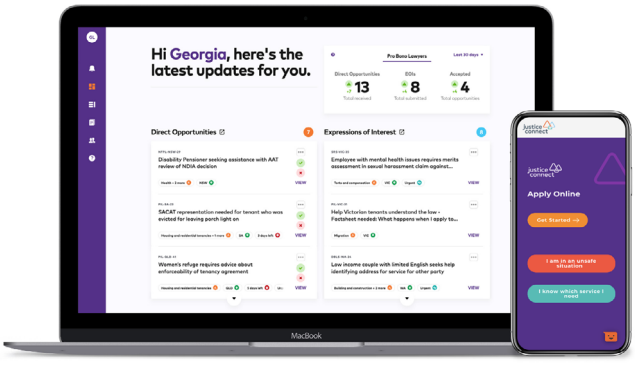
Head of Innovation and Engagement, Justice Connect

A year of compounding crises

For the East Coast states of Australia, 2020 has been a year of compounding crises. An extraordinary bushfire season devastated communities across NSW and Victoria. As bushfire recovery efforts were underway, the impacts of COVID-19 started to hit Australia. Outbreaks, lock downs, travel restrictions and closed state and national borders soon followed, leading to business closures and rising unemployment.

The bushfire and COVID-19 crises have each created new legal needs as well as novel service delivery challenges. In an incredibly dynamic environment, legal services have had to flex to deliver more, in new issue areas, using new service modalities.

This article shares the experiences of the Australian legal services charity, Justice Connect, and the important role that digital transformation and technology products have played in the organisation's delivery of scaled up services despite the many challenges of 2020.



Justice Connect Screens (© Justice Connect)

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Leveraging technology for scale and impact in response to crisis

Justice Connect is an Australian charity that designs and delivers high impact interventions to increase access to legal support and achieve social justice. It provides free legal services for individuals and for community organisations across a range of jurisdictions with varied models and intensity depending on the client group, drawing on a network of over 10,000 pro bono lawyers. Beyond service delivery, the charity works to prevent problems and improve the experience of the justice system by advocating for system-level changes and building system-level solutions.

Justice Connect has played a central role in the legal sector response to both the bushfire and COVID-19 crises this year.

In the context of the bushfires, Justice Connect coordinated the pro bono response across Victoria and NSW. The organisation's award-winning Pro Bono Portal played a critical role in efficiently matching need with help. Frontline services worked on the ground to find those in need of assistance and used a digital channel provided by Justice Connect to make facilitated referrals so that Justice Connect could then match people with pro bono lawyers. Justice Connect posted matters to the Portal which algorithmically matched matters to firms and provided curated email alerts. In January 2020, the number of firms registered to use the Portal rose from 51 to 150.

While digital tools provided infrastructure to support distribution and connection at a sector level in the organisation's bushfire response work, in its response to COVID-19 digital tools played a more prominent role in consumer-facing strategies. Demand for legal assistance soared from April 2020, and Justice Connect reached out directly to consumers to assist them with self-help options as well as connecting them directly with its legal services. The charity closely tracked the needs and behaviour of those engaging with it online and used these insights to inform resource development and service promotion approaches. It also piloted an entirely online legal clinic, Justice Connect Answers.

Between 1 January and 30 June 2020, Justice Connect saw the following growth in use and uptake of its online and digital products:

- Use of its online information resources by individuals grew by 470%
- The number of not-for-profits attending legal training sessions online increased by 574%
- The number of law firms working with Justice Connect via the Pro Bono Portal increased from 51 to 162 firms

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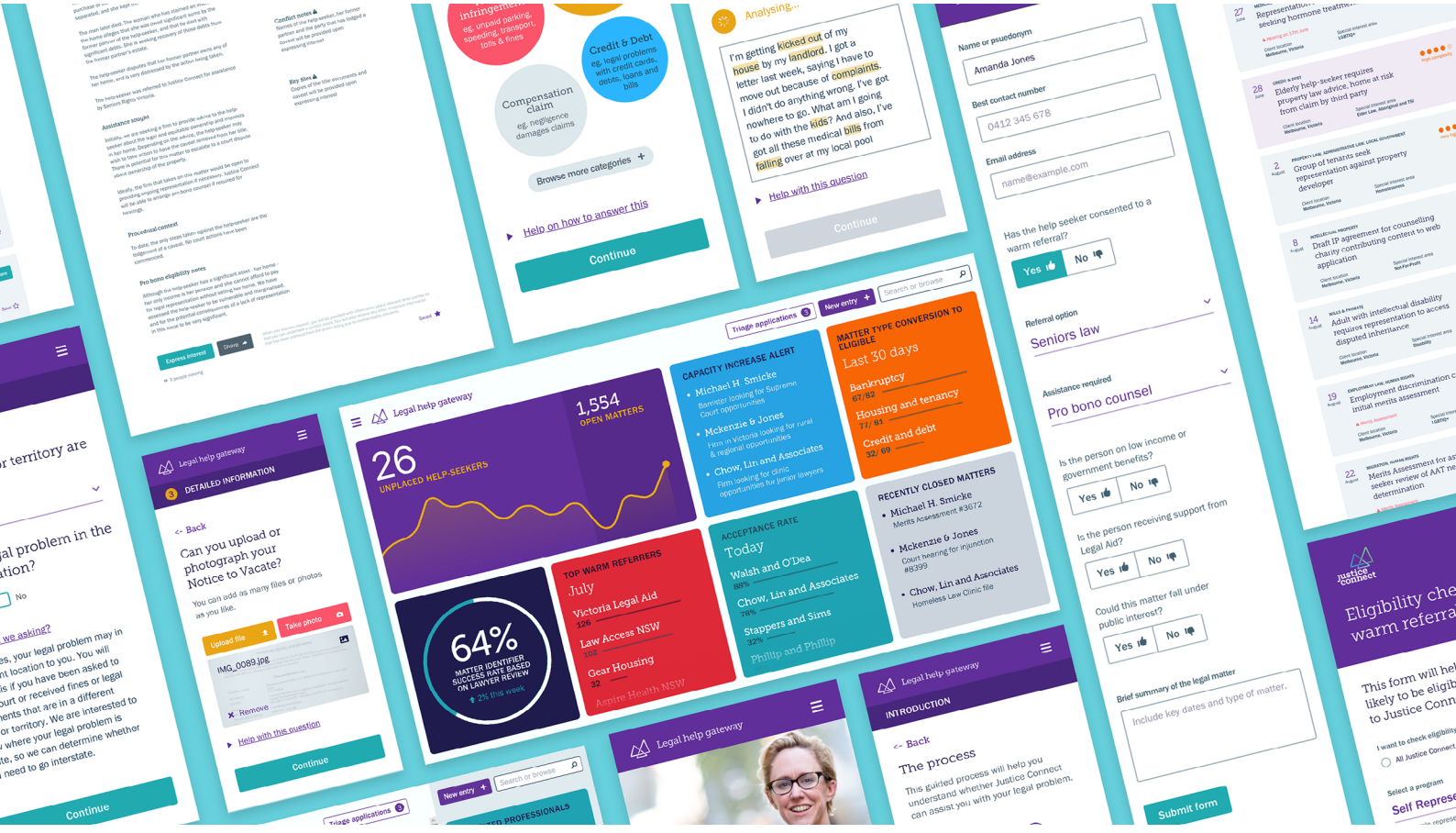

Justice Connect Render Screen (© Justice Connect)

- The number of pro bono referrals brokered by Justice Connect via the Pro Bono Portal increased by 50%
- The number of inbound referrals made via the organisation's referrer tool doubled
- The number of applications made directly by help-seekers via the intake tool increased by 40%

The growth and activity across the period reflect a convergence of increasing demand for digital products (whether demand from those looking for legal assistance, or demand from pro bono practitioners hoping to contribute), and Justice Connect providing appropriately tailored and accessible digital products in the right setting at the right time.

Importantly, Justice Connect believes that the trends witnessed since January do not reflect a radical shift, but rather an acceleration of existing trends towards digital service adoption and increasing community preferences to engage with services online. Prior to 2020, Justice Connect's research showed that many Australians, including in cohorts that are often dismissed as being 'digitally excluded', such as migrant workers and people at risk of homelessness, actively look for and have a preference for dealing with services online. Depending on the cohort, the research found that between 35 and 66% of people would prefer to apply for legal assistance online compared with the option of making an application for assistance over the phone.

Justice Connect Concept Critique (© Justice Connect)

How three years of human centered design driven technology project led us here

For Justice Connect, the 2019 culmination of a program of digital transformation and product development work in train since 2016 - Gateway Project - was incredibly fortunate.

Justice Connect has long been an early adopter of technology in the delivery of legal services, and since 2016, digital transformation and innovation has been a central organisational priority. Its Gateway Project was born of a desire to better understand the different experiences of Justice Connect's complex ecosystem and many stakeholders, and to look for opportunities to improve experience, efficiency and outcomes by tackling problem areas.


Kate Fazio Workshop (© Anna Carlile)

With seed funding received through the Google Impact Challenge, Justice Connect carried out twelve months of intensive human centered design research, prototyping and testing with users including help-seekers, clients, referring agencies, sector peers, pro bono lawyers and staff. This research led to the development of the three cornerstone products that played essential roles in Justice Connect's disaster response work:

- The online intake tool - released August 2018
- The Pro Bono Portal - released August 2019
- The referrer tool - released October 2019

Justice Connect's Gateway Project has won several awards recognising the inclusive design process followed and impactful outcomes of the work, including a Gold Good Design Australia Award in the Social Impact category, and the Victorian Premier's Design Award, Best in Class, Service Design.

Justice Connect is now focused on extending its Gateway Project products and a range of new digital initiatives across its services. Top priority is to build inclusive and accessible services that meet the needs of those engaging with them, and there is no doubt that in the coming years, the organisation's clients will increasingly (but not exclusively) seek to engage with its offering online.

LexisNexis partners with Fiji on key project to make law reporting accessible to all

Myfanwy Wallwork

LexisNexis Executive Director, Emerging Markets & Corporate, reflects on an important rule of law project

Law Reporting in Fiji had begun in 1876 but I recall that my journey with this important function only began in 2014. At that stage, volumes had not been published since 2001 and LexisNexis was fortunate to be selected as partner for this important project. The 2012 volume was published in early 2015, led by the Honourable Justice Suresh Chandra, under the auspices of Chief Justice Gates.

Justice Chandra was a leading advocate of access to reliable and authoritative legal information, as an acknowledged basis for the rule of law. His commitment to ensuring a democratic society in which all human rights are protected, was amply demonstrated in the way he generously gave of his own time and formidable intelligence to the important function of law reporting.

As he noted:

> "The stability of the legal system of a State is usually assessed by the availability of its laws and their application. This is made possible through the availability of the statutes of that State and law reports which show how the laws are interpreted and applied in the courts of that State. Thus law reports form an integral part of the legal system of a State and the availability of such shows the stability of that State.

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> Transcription of judgments on a website though being useful do not serve the same usefulness of law reports. Law reports provide a host of valuable information in the form of catchwords, which give an indication what the judgment is involved with, the head note which is a summary of the judgment and a useful guide. In addition a law report would provide a digest of topics dealt with by the cases included in that law report, an index of other decisions that are referred to in the judgments in that report, an index of statutes referred to in the judgments etc. In a sense a law report serves as a ready reckoner for lay persons, students, academics, lawyers and judges."[1]

Since 2015, a further eight volumes have been added, with only the 2011 volume remaining incomplete at the time of Justice Chandra's passing, earlier this year. Electronic versions of these volumes are all freely available to the public, a most important matter upon which Justice Chandra insisted. I am so grateful that the Acting Chief Justice, Mr Justice Kumar, has ensured that the momentum created by Justice Chandra is continuing and has in fact been expanded to include Family Law Reports – an important area when considering access to justice for disadvantaged groups.

This momentum has been substantively supported by the United Nations Development Programme, with generous funding from the European Union, as part of an Access to Justice program in Fiji. Access to justice is an important part of the Sustainable Development Goals (SDG), particularly SDG 16 which promotes peace, justice and strong institutions. The stated aims of the project[2] were to support impoverished and vulnerable groups and to work with and strengthen key organisations, the Judicial Department itself and the Legal Aid Commission.[3]

I would humbly like to suggest that these partnerships between the Judicial Department, UNDP, EU and LexisNexis also align very well to SDG 17 – partnerships for the goals. Building upon the success of the publication of annual volumes, this collaboration has ensured the publication of digital versions in both online and offline formats (important for those wishing to be able to carry the volumes on a tablet or laptop but in locations where internet connection is variable). In turn, this has created the basis for the latest development: linking the digital Fiji Law Reports to the Laws of Fiji at laws.gov.fj. This website was launched by the Fiji Office of the Attorney-General in 2019, making the Laws of Fiji freely available to the people of Fiji for the first time ever.

As Justice Chandra noted in the paragraphs above, the stability of the legal system relies on access to both statutes and law reports; the linking project effectively "closes the loop" for access to the complete legal materials of a common-law jurisdiction. It is now a straightforward process to find the statutes referred to in the law reports, themselves containing the application and interpretation of the laws through the judicial process.

For further reading please visit the UNDP Pacific Office in Fiji page here.

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1 https://sdgresources.relx.com/articles-features/revival-fiji-law-reports

2 https://www.pacific.undp.org/content/pacific/en/home/projects/Fij_A2J.html

3 Significant portions of the 2013 Fijian constitution are dedicated to the purpose and operations of the Legal Aid Commission (eg s 15(10); s 118) and it is worth noting that the Government of the Republic of Fiji mandated adequate funding, along with constitutionally recognised independence, as a key tenet of the proper function of this institution (s 118 (9); s 45 (11)). The Commission has also been able to implement a policy which allows them to support both parties in a Family Law matter, which is important in ensuring gender quality and protecting the rights of women and girls (SDG 5).

Human trafficking in the time of COVID-19: a snapshot of current issues and growing threats

Emerson Rynehart

Sub-Editor,
LexisNexis Capital Monitor

The theory 'human trafficking thrives where the rule of law ends'[1] suggests that a rampant international culture of human trafficking and exploitation is indicative of a society that has failed to protect the basic rights and freedoms of its people. While the issue of public health and safety was the key focus of governments around the world in 2020, COVID-19 should not be used as an excuse for complacency in other areas. Prior to the pandemic, it was estimated that approximately forty million people were living in slave-like conditions or being exploited due to human trafficking.[2] Of this number, two-thirds reportedly resided in the Asia Pacific region.[3] Despite borders being closed and national shutdowns, many believe that the socio-economic challenges created by COVID-19 have led to a substantial increase in exploitation around the world. There is a considerable correlation between disease outbreaks and their capacity to create unstable socio-economic environments in which exploitation can thrive. Notably, the

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1 Olivia Enos, "Human trafficking thrives where rule of law ends", The Diplomat, 16 Mar 2015, https://thediplomat.com/2015/03/human-trafficking-thrives-where-rule-of-law-ends/

2 International Labor Office & Walk Free Foundation (2017), *Global estimates of modern slavery: forced labour and forced marriage* [online] Geneva, International Labour Office. Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf

3 Submission to the Australian Department of Home Affairs, Australian Border Force ABF (2019), *'National Action Plan to Combat Modern Slavery 2020-24: Public Consultation Paper'* [online] Australia. Available at: https://www.homeaffairs.gov.au/reports-and-pubs/files/combat-modern-slavery-2020-24-consultation-paper.pdf

outbreak of Ebola in 2014 created thousands of orphaned children that were subsequently exposed to an increased risk of trafficking in West Africa.[4] As the world attempts to understand the impact COVID-19 has had on virtually every facet of society, we must also consider the impact it has had on international efforts to combat trafficking. If action is not taken, international law and regional stability will be compromised, and the continued promotion of a free and equitable society under the rule of law will be critically threatened.

Poverty and rising unemployment

COVID-19 has significantly impacted job security and the job market as a whole, with the worldwide estimated rate of unemployment sitting somewhere around 8.5 per cent in April.[5] Many island nations in the Asia Pacific region that are often economically dependent on tourism have seen extensive losses in national revenue, resulting in widespread poverty in the region.[6]

As more people find themselves without work or a steady source of income, the number of people left in vulnerable economic situations increases. This type of widespread economic instability and increased rate of poverty is the leading factor contributing to an escalation in human trafficking around the world, especially in disadvantaged areas. As people find themselves losing their jobs and falling into a state of poverty, many may unwillingly find themselves at risk of exploitative employment or working in illegal conditions. This risk will increase further if companies and businesses turn to unethical forms of labour to cheapen production and subsequently make up for any income lost throughout the pandemic.[7]

To alleviate this growing risk, governments must take into consideration the impact that policies enacted to tackle economic instability may have on vulnerable communities. As one of the major influencing nations in the Asia Pacific region, Australia is uniquely situated to lead the fight against exploitation and human

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4 Catherine Z Worsnop, 'The Diseases Outbreak-Human Trafficking Connection: A Missed Opportunity (2019) 17(3) *Health Security* 181.

5 United Nations Department of Economic and Social Affairs (2020) *World Economic Situation and Prospects: August 2020 Briefing, No. 140* [online] New York: United Nations. Available at: https://www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-august-2020-briefing-no-140/

6 Patrick Flannery, "The suffering we cannot see: COVID-19 and human trafficking in the Indo-Pacific", *Young Australians in International Affairs*, 31 May 2020, https://www.youngausint.org.au/post/the-suffering-we-cannot-see-covid-19-and-human-trafficking-in-the-indo-pacific

7 Grazia Giammarinaro, M. (2020), *Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro*, [online] New York: United Nations. Available at: https://www.ohchr.org/Documents/Issues/Trafficking/COVID-19-Impact-trafficking.pdf

trafficking. Australia has a strong domestic framework designed to criminalise and prevent human trafficking, but the Australian Government must reassess these policies to account for COVID-19's impact.[8] Domestic responses must include continued financial support for those who are at a high risk of exploitation, and the continued funding of programs and initiatives that work to protect the rights of victims and vulnerable people in the community. However, any attempt to view the problem of human trafficking through a domestic lens will not succeed as, by its nature, trafficking is often a crime undefined by traditional borders. As one of the parties to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Australia has an obligation to work co-operatively with the broader international community to prevent trafficking.[9] Through regional partnerships, Australia must provide aid and support to neighbouring nations to stimulate their economies and counteract poverty in the region. Without such measures, any attempt to reduce the risk of trafficking cannot succeed, and the stability and safety of the Asia Pacific region will only be weakened in the post-COVID era.

Digitalisation and exploitation

Over the past year, nearly every type of industry has had to undertake some form of digitalisation in order to abide by public health measures. Trafficking and criminal organisations are no exception to this phenomenon. Over the past twelve months, as borders have closed and labour patterns have changed, the prevalence of digital and cyber trafficking has increased at a dramatic rate. However, the internet being used as a forum for exploitation and trafficking is not a new phenomenon. Our reliance on the internet has gradually increased over the past two decades, and traffickers have had to adapt to align with the practices of society to meet new forms of demand. Children are often at the most risk of falling victim to trafficking and exploitation via the internet[10] and this statistic has only been reaffirmed in 2020 as most schools around the world move their classrooms online.

Despite this alarming previous trend, authorities have seen an unusually high spike in trafficking via the internet throughout the COVID-19 pandemic, indicating a rapid rise in online exploitation. For example, predators who rely on human trafficking for personal and sexual satisfaction have also had to move predominantly online, with the Australian Defence Force reporting a notable increase in cases of online child exploitation throughout the pandemic.[11]

It is critical that policy responses to online trafficking and exploitation still be a key focus of governments around the world, despite the socio-economic impacts of COVID-19. A failure to prioritise this threat promotes a digital sector that is unsafe and encourages trafficking to thrive at a rapid rate that may become difficult to counteract in the future. In February, ASEAN held a regional conference on child online exploitation and called for multi-sector and international co-operation to counter-trafficking efforts in the Asia Pacific.[12] This call to action must not be dismissed in the post-COVID era. If organised crime and human traffickers can succeed in the online sector, continued international and regional security will be threatened, human rights will be compromised, and the continued promotion of prosperous societies under the rule of law will be critically undermined.[13]

Moving forward

In these vastly uncertain times, it is crucial that continuing to combat human trafficking and exploitation not be forgotten. As one of the key leaders in the Pacific region, Australia must lead the way and promote international co-operation to effectively combat trafficking. To fail to do so would be a disservice to the continued promotion and protection of the rule of law as the foundation of modern-day society, with catastrophic consequences for some of the world's most vulnerable people.

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8 Law Council of Australia (2020), *Inquiry into the Australian Government's response to the COVID-19 pandemic: Select Committee on COVID-19 pandemic*, [online] Canberra, Law Council of Australia. Available at: https://www.lawcouncil.asn.au/publicassets/07db1969-e0ec-ea11-9434-005056be13b5/3830%20-%20Senate%20Select%20Committee%20on%20COVID.pdf

9 United Nations, *Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children*, 55th sess, UN DOC A/RES/383 (15 November 2000).

10 Office of the High Commissioner, United Nations: Human Rights (2014), *Fact Sheet No. 36: Human Rights and Human Trafficking*, [online] New York and Geneva: United Nations. Available at: https://www.ohchr.org/Documents/Publications/FS36_en.pdf

11 Australian Federal Police AFP, "Predators exploiting kids online during virus second wave", *Australian Federal Police*, 21 Jul 2020, https://www.afp.gov.au/news-media/media-releases/predators-exploiting-kids-online-during-virus-second-wave

12 United Nations Office on Drugs and Crime, "ASEAN and partners meet online to accelerate action on child online protection", *United Nations Office on Drugs and Crime*, 25 Feb 2020, https://www.unodc.org/southeastasiaandpacific/en/2020/02/asean-child-online-protection/story.html

13 United Nations Office on Drugs and Crime (2008), *An Introduction to Human Trafficking: Vulnerability, Impact and Action*, [online] New York, United Nations. Available at: https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf

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Volume 9 • Issue 2 • December 2020

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