Submission on the *Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill* 2021

Introduction

My name is Niamh Kinchin and I am a Senior Lecturer with the School of Law at the University of Wollongong, NSW. I teach and have research interests in Administrative Law, Constitutional Law, Refugee Law, administrative justice, the digitisation of administrative decision-making, and the accountability of international organisations.

I have read the *Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill* 2021 and wish to make a submission on the following proposed amendments:

> ***Federal Circuit and Family Court of Australia Act 2021***
>
> **3 After subsection 136(2)**
>
> Insert:
>
> (2A) For the purposes of subsection (2), the circumstances in which the jurisdiction of the Federal Circuit and Family Court of Australia (Division 2) is exercised in open court include where the exercise of jurisdiction is made accessible to the public by way of video link, audio link or other appropriate means.

AND

> ***Federal Court of Australia Act 1976***
>
> **5 After subsection 17(1)**
>
> Insert:
>
> (2A) For the purposes of subsection (1), the circumstances in which the jurisdiction of the Court is exercised in open court include where the exercise of jurisdiction is made accessible to the public by way of video link, audio link or other appropriate means.

My submission focuses on the following, overarching question:

1. Do the proposed amendments infringe Chapter III of the Constitution?

In order to address this question, this submission is separated into the following two sub-questions:

a) When the exercise of a court's jurisdiction is accessible to the public by way of video link, audio link or other appropriate means, is the court's jurisdiction exercised according to open justice, which is a defining characteristic of a court?

b) In declaring that the jurisdiction of a court is exercised in open court where its exercise is made accessible to the public by way of video link, audio link or other appropriate means, is the legislature impermissibly declaring the constitutional validity of the proposed amendments?

Open Justice

The common law has long accepted that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done' (*R v Sussex Justices; Ex parte McCarthy* [1924] KB 256). Open justice is also understood as the 'open court' principle. According to the High Court 'the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances' (*Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44]). The 'ordinary rule' of courts of Australia is that their proceedings shall be conducted 'publicly and in open view' and without public scrutiny, 'abuses may flourish undetected' (*Russell v Russell* (1976) 134 CLR 495, [520]).

Chapter III and Open Justice as a Defining Characteristics of a Court

The well-known *Kable* principle establishes that Chapter III of the Constitution protects the institutional integrity of Chapter III courts (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51). Parliament cannot impair the institutional integrity of a Chapter III court by depriving it of any of its defining characteristics (*Wainohu v New South Wales* (2011) 243 CLR 181**,** French CJ and Kiefel J).

The Federal Court of Australia, the Federal Magistrates Court and the Family Court of Australia are Chapter III courts.

Defining characteristics of Chapter III courts include adherence as a general rule to the open court principle (*Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, French CJ**).** In *Hogan v Hinch* ((2011) 243 CLR 506, [46]) French CJ stated that the 'open hearing is an essential aspect of courts, which supports the reality and appearance of independence and impartiality'. An essential characteristic of courts is that they sit in public for the benefit of public and professional scrutiny. (*Hogan v Hinch* (2011) 243 CLR 506, [20] French CJ).

The common law permits limits on the presumption of open justice where 'necessary for the administration of justice' *(R v Kwok* (2005) 64 NSWLR 335) or 'in the interests of justice' (*BUSB v The Queen* (2011) 80 NSWLR 17). Examples of public interest considerations include the protection of sensitive information and protection of the identities of vulnerable witnesses, including informants in criminal matters. (*Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, French CJ)**.**

Do the Proposed Amendments Infringe Chapter III of the Constitution?

Question 1: When the exercise of a court's jurisdiction is accessible to the public by way of video link, audio link or other appropriate means, is the court's jurisdiction exercised according to open justice, which is a defining characteristic of a court?

If the proposed amendments impair the open court principle, which is a defining characteristic of a Chapter III court, they may infringe Chapter III of the Constitution.

As Cunliffe observes, 'Australian case law has not yet coalesced around a coherent theory of the substance of open justice principles.'[1] Accordingly, the characteristics that define an 'open court' are open to interpretation. It is submitted that a number of issues, which may arise from the remote exercise of a court's jurisdiction (i.e. by video link, audio link or other appropriate means), *could* impair the open court principle.

First, when matters are heard remotely, members of the public and professional observers such as reporters, cannot have the same level of access to public hearings than they may have had previously. As McIntyre et al point out, 'reporters often rely on guidance from court staff and the ability to move between court rooms to effectively cover the justice system, something not easily replicable digitally'.[2]

Second, increased use of technology inevitably comes with the risk of technological failures. Technological failures may prevent public participation in a hearing. This risk is heightened by insufficient technical support, 'and a general lack of expertise on the part of the judiciary as to how to utilise online tools'.[3]

Third, some members of the public will be excluded from remote hearings because of deficient digital skills and knowledge. Limited, or a lack of, technological equipment, including internet access, will also likely exclude some people from remote hearings.

It is not obvious, however, that the potential for the above occurring would amount to the proposed amendments impairing the open court principle. In *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486, Justice Perram held that 'technology hiccoughs are likely to be encountered along the way'. 'Technology hiccoughs' included a lack of access to a computer, adequate knowledge about operability, the unreliability of internet connection, and access to hardware and software. Whilst Justice Perram stated that he thought 'this is a poor situation in which to have to run a trial' he did 'not think that it means the trial will be unfair or unjust'. However, he did concede 'that there will be many cases for which such a mode of trial will not be feasible. For example, I doubt that a fair trial can be had where an applicant does not speak in English and is in immigration detention.'

In *Capic* Justice Perram also emphasised that 'the Court must do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice'. It is noted that courts in Australia have implemented a number of measures to address concerns around public participation and remote hearings during the COVID-19 pandemic. Measures include screening hearings in a physical courtroom that is open to the public, providing individuals the option to dial into the hearing by telephone and advertising the hearings in public court lists. Transcripts of proceedings have been recorded

[1] Emma Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) 40 *Federal Law Review* 405.
[2] Joe McIntyre, Anna Olijnyk, Kieran Pender, 'Civil courts and COVID-19: Challenges and opportunities in Australia' (2020) 45(3) *Alternative Law Journal* 198.
[3] *Perspectives from Australia on the impact of the COVID-19 pandemic on the administration of justice: Submission to the Special Rapporteur on the Independence of Judges and Lawyers* Castan Centre for Human Rights Law, Monash University (15 February 2021) 14.

and back-ups created, and Judges who made decisions 'on the papers' have further published written reasons for those decisions.[4]

Whether the open court principle will be impaired by risks to open justice that are inherent in the nature of remote hearings, is a matter that will need to be determined by the Court. However, practically there must be some limits to publicity of court proceedings that lie outside of public interest limitations. Accordingly, if the risks of remote hearings are temporary, and are addressed by a court through practical, *ex ante* safeguarding measures, it seems unlikely that a judicial determination will find that the proposed amendments impair the open court principle.

Question 2: In declaring that the jurisdiction of a court is exercised in open court where its exercise is made accessible to the public by way of video link, audio link or other appropriate means, is the legislature impermissibly declaring the constitutional validity of the legislation?

An 'open court' is a constitutional principle, because it is a 'defining characteristic of a Chapter III court', as established by *Condon v Pompano* and *Hogan v Hinch*. However, the meaning of, or characteristics that define an 'open court' remain undecided.

In the *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 (*Communist Party Case*), Fullar J famously said:

> The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse.

In declaring that the jurisdiction of a court is exercised in open court where its exercise is made accessible to the public by way of video link, audio link or other appropriate means, the legislature identifies some of the characteristics of an open court. Accordingly, the validity of the law depends on the opinion of the law-maker that an 'open court' includes remote hearings. Although it is the legislature's role to enact laws, it is the role of the judiciary to conclusively determine the constitutional validity of those laws. There is a possibility that the proposed legislation (if challenged) may be found to breach the separation of judicial power as established by Chapter III of the Constitution, and confirmed in the *Communist Party Case*. The legislature may be found to be trying to 'recite itself into power' by defining a constitutional principle and as a consequence, proclaiming the constitutional validity of the law.

Thank you for the opportunity make a submission on the *Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill* 2021. Dr Niamh Kinchin

[4] *Perspectives from Australia on the impact of the COVID-19 pandemic on the administration of justice: Submission to the Special Rapporteur on the Independence of Judges and Lawyers* Castan Centre for Human Rights Law, Monash University (15 February 2021) 14.