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## GILBERT + TOBIN CENTRE OF PUBLIC LAW NEWSLETTER No. 1 2019



Centre Director, Rosalind Dixon

Dear Friend,

The last six months have been a busy time for the Gilbert + Tobin Centre of Public Law. In February we hosted our annual Public Law in the Classroom conference and Constitutional Law conference and dinner, and in March, we farewelled A/Professor Sean Brennan as Director of the Centre. As part of that transition to new leadership, we also hosted a retreat for Centre members, to take stock of our work over the last five years, and jointly craft a new strategy for the next five years of the Centre's work.

Much of the feedback from the retreat was around making sure that we continue to excel in our existing areas of strength – i.e. that we continue to foster the strong and supportive research culture of the Centre, and its role in research and public engagement on a wide range of public law issues. But Centre members also emphasised that the changing public law landscape in Australia and across the globe means that as a community we should increase our efforts over the next five years to:

- inform and provide expert advice on proposals for constitutional change in Australia, especially those involving a 'Voice to Parliament', and potentially the creation of an Australia Republic;
- engage in scholarship and public debate on the relationship between technological change, administrative justice and the rule of law; and
- strengthen our links to Asia and the global constitutional law community, including by enhancing the Centre's international reputation and linkages.

As you will see from various items in the newsletter, we have already begun work on all of these objectives – but most notably on supporting constitutional change by co-hosting a workshop, joint with Professor Megan Davis's office, on the process for designing a Voice to Parliament, and a workshop with the Australian Law Reform Commission on law reform and public law.

We have also recently concluded negotiating agreements with the Centre of Asian Legal Studies at the National University of Singapore (NUS) and Centre for Comparative and Public Law at Hong Kong University (HKU) to create a formal partnership between those Centres and ours, which can support actual and virtual research exchanges between senior and junior scholars across the two sets of institutions. Consistent with this increased global focus, we are so pleased to welcome Professor Theunis Roux, who has re-joined the Centre as a member of the Comparative Constitutional Law Project, and to continue to support the amazing work that A/Professor Melissa Crouch has been doing in a comparative context.

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The Administrative Justice and Statutes Projects established last year have also been busy, producing a range of important work on a range of topics, including statutory interpretation. (As you will note from p 4 of the newsletter, the Centre also hosted a workshop on that topic bringing together scholars and practitioners from across Australia).

This newsletter remains one of our key ways of communicating with you as friends and supporters of the Centre. But we also increasingly rely on the AUSPUBLAW blog (<https://auspublaw.org/>) as a means of communicating with friends and supporters. We are also especially glad to be working with the ACL to expand the role of the blog as a shared resource for public lawyers in Australia, and grateful to them for their ongoing support for the work of the blog, as well as to our wonderful HDR blog editors – Zsofia Korosy and her newly appointed co-editor, Elisabeth Perham – and our Centre intern for T1 Rosie Short, for their work in that role.

The past six months have also seen a number of changes in personnel. I have begun the role of Director of the Centre and am delighted that Dr Lisa Burton Crawford has agreed to work with me as the Centre's Deputy-Director, before and after a period of maternity leave in the second half of this year. One of our Centre PhD students, Harry Hobbs has recently left us for a position at UTS, though he continues to be actively involved as an alumnus of the Centre. And one of our colleagues, Dr Lauren Butterly, has announced her decision to leave full-time academic work, and return to practice. Again, however, we look forward to continuing to work with her as a much-valued Centre fellow.

We have also been fortunate to welcome several new fellows to the Centre as advisors to our students and the AUSPUBLAW blog: Belinda Baker, Crown Prosecutor at the Office of the Director of Public Prosecutions (NSW); Chantal Bostock, UNSW Teaching Fellow, community member of the Medical Council of New South Wales, and former senior member of the Administrative Appeals Tribunal; Paolo Buchberger, Director of Constitutional & Administrative Law for the New South Wales Crown Solicitor; Craig Lenehan of the New South Wales Bar; Daniel Reynolds of the New South Wales Bar; and Celia Winnett of the New South Wales Bar. They join existing Centre fellows Shipra Chordia, Joanna Davidson, David Hume and Brendan Lim. We are looking forward to a special evening with friends and fellows of the Centre on Thursday 17 October from 5.30 - 7 pm, to highlight elective subjects and career possibilities in public law for our students, and welcome any of you interested in joining us at that event.

The most notable departure, of course, has been that of Sean Brennan as Director, and on behalf of all the friends and members of the Centre, we extend our very warmest thanks to him for his outstanding leadership over the last 5 years. It was wonderful to have the chance to thank him for his contribution to the Centre in person in March, and to celebrate with him and his family, as well as other members of the Centre community and their families, including both our current and former administrators Tom Chapman and Belinda McDonald. For now, Sean is enjoying some well-earned time away from Centre activities to focus on his own research, but we look forward to welcoming him back in September, and to his ongoing leadership from then onwards of our Indigenous Legal Issues Project.

We look forward to another busy 6 months of activities for the remainder of this year – including our upcoming 'Mason Conversation' with Justice Michael McHugh on 5 August from 5.45 - 7 pm at the Banco Court. We warmly invite you to join us for that and other events.

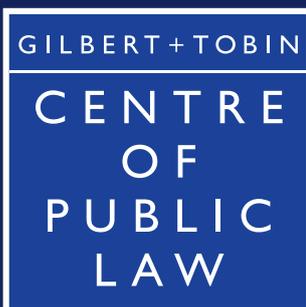
*Rosalind Dixon*  
Centre Director



Jacinta Dharmananda, Brendan Lim, Julia Quilter.  
Public Law in the Classroom 2019



Fred Chaney AO  
Constitutional Law Conference 2019



## \*\* SAVE THE DATE \*\*

**21 February 2020**

### Constitutional Law Conference and Dinner

For details of Centre events, publications, submissions and so on please go to our website: [www.gtcentre.unsw.edu.au](http://www.gtcentre.unsw.edu.au)

The Centre's Twitter account keeps you up to date between newsletters and e-bulletins: [@GTCentre](https://twitter.com/GTCentre)

Or if you prefer Facebook:

[www.facebook.com/pages/Gilbert-Tobin-Centre-of-Public-Law/138063326284705](https://www.facebook.com/pages/Gilbert-Tobin-Centre-of-Public-Law/138063326284705)

## CENTRE ACTIVITIES

### INTERPRETING EXECUTIVE POWER WORKSHOP

**14 December 2018**

Last December, Lisa Burton Crawford and Janina Boughey hosted a workshop on the topic of 'Interpreting Executive Power'. This combined the Centre's new strengths in statutory interpretation and administrative law. The workshop focused on the ways in which courts interpret statutes which confer executive powers, and the challenges posed in this regard by the proliferation of statute law and contemporary legislative drafting techniques. It produced an excellent set of papers from scholars, practitioners and judges, which we will be pleased to see published with The Federation Press later this year.

### PUBLIC LAW IN THE CLASSROOM

**14 February 2019**

Organised by the Gilbert + Tobin Centre of Public Law, UNSW and the Public Law and Policy Research Unit, University of Adelaide.

Public Law in the Classroom has become a community-building forum in which teachers of Australian public law can share ideas and inspire one another. The 2019 Workshop was presented in three sessions, each followed by a discussion and sharing of practice.

The first session, Public Law in a Global Context, examined the importance of international and comparative perspectives in public law classrooms. It featured a panel and wider discussion among the workshop participants. The second session showcased cutting edge teaching approaches in the area of Students as Co-Creators in Public Law. The final session was a panel-based discussion of why and how statutory interpretation in public law is important and not boring.

Event program available [here](#).

### CONSTITUTIONAL LAW CONFERENCE AND DINNER

**15 February 2019**

The 2019 Constitutional Law Conference and Dinner was the eighteenth consecutive staging of this flagship event. It was held at the Art Gallery of New South Wales on Friday 15 February 2019. Participants at this event were updated on recent important constitutional law developments in the High Court, Federal Court and State Courts and the surrounding issues that will emerge in 2019 and beyond. This event was organised by the Gilbert + Tobin Centre of Public Law at the Faculty of Law, UNSW, with the support of the Australian Association of Constitutional Law.

Here are the conference brochures with program:

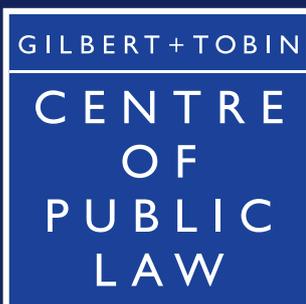
[General](#) or [Academic](#)



Julie Debeljak, Lea Armstrong, Houda Younan, Sean Brennan



First Nations Voice Workshop



Professor Gabrielle Appleby and Justice Mark Moshinsky delivered the morning keynotes on the year in constitutional law in the High Court, and in the Federal and State Courts, respectively. Other speakers were:

- Joshua Thomson SC (newly appointed Solicitor-General of WA);
- Professor Anne Twomey of the University of Sydney;
- Associate Professor Julie Debeljak of Monash University;
- Associate Professor Sean Brennan of UNSW Law;
- Frances Gordon of the New South Wales Bar;
- Houda Younan of the New South Wales Bar;
- Associate Professor Jason Bosland of Melbourne Law School;
- Professor Lyria Bennett Moses of UNSW Law; and
- Fred Chaney AO.

The panels covered a range of recent and forthcoming High Court decisions, as well as broader constitutional developments:

- *Unions NSW No 2* and the abortion clinic safe access zone cases from Tasmania and Victoria, all concerning the implied freedom of political communication;
- the section 44 cases of *Re Gallagher* and *Alley v Gillespie*;
- two cases about alleged inconsistency between Federal and Territory laws;
- the *Timber Creek* native title compensation case;
- *Minogue v Victoria*, with a focus on statutory interpretation, the Victorian Charter and parole;
- open justice and suppression orders;
- automated decision-making and the rule of law; and
- the Uluru Statement from the Heart.

The Conference Dinner was held at NSW Parliament House, where the dinner speaker was the Hon Justice Joe Williams, then of the New Zealand Court of Appeal.

## CURRENT ISSUES IN STATUTORY INTERPRETATION WORKSHOP

24 April 2019

In April, Lisa Burton Crawford (co-director of the Statutes Project) hosted a workshop for scholars across Australia working in the field of statutory interpretation.

This led to fruitful discussion of a range of topical issues, including: how theories of language might inform our understanding of statutory interpretation; the constitutional limits of Parliament's ability to dictate statutory meaning; and the principles which should guide senior appellate courts in considering whether to overrule statutory precedents (an important issue in the recent case of *Plaintiff M47/2018 v Minister for Home Affairs*, in which the High Court was invited to overturn the interpretation of the *Migration Act 1958* (Cth) from *Al-Kateb v Godwin*).

The Statutes Project hopes that similar events will follow in the future, building the Centre's strength and profile in this important area of research.

## A FIRST NATIONS VOICE: FROM REFERENDUM TO DESIGN

2 May 2019

On 2 May 2019, the Centre joined the Indigenous Law Centre and Pro-Vice Chancellor Indigenous, Professor Megan Davis, in hosting an academic workshop on 'A First Nations Voice: From Referendum to Design'. As Sean Brennan explains more fully in his report for the Indigenous Legal Issues Project (see pp 9-10), the workshop sought to engage leading academics across the country to jointly develop legal and constitutional strategies and design principles, which can guide and inform the next stage of debates over constitutional change in this area. Topics addressed at the workshop included: 'the nature of Constitutional reform and constitutional deferral', 'equality and the Uluru reforms', 'Constitutional drafting', 'referendum success', 'parliamentary relationship', and 'drafting the detail: the importance of process.'



UNSW ARLC Seminar



## SEMINAR ON THE FUTURE OF PUBLIC LAW REFORM

29 May 2019

On 29 May 2019, the Australian Law Reform Commission and UNSW hosted a conversation on the future of law and constitutional reform in Australia. The event launched the ALRC's new project that seeks public input in identifying areas of Australian law that may benefit from reform. The panel's discussion provided insightful suggestions for reform.

Professor George Williams AO noted that Australia is overdue for a comprehensive constitutional review and that there are practical and economic consequences of inaction on constitutional reform due to inefficiencies in the federal model. He proposed a standing Commission to conduct ongoing review of the Constitution and propose potential reforms.

Gemma McKinnon identified an urgent need for constitutional reform in order to implement the First Nations Voice to Parliament called for in the Uluru Statement from the Heart. However, she urged that reform should not be delayed by any future law reform inquiry (accordingly, attendees were not asked to vote on this proposal in our brief poll described below).

Dr Paul Kildea offered concrete ideas around improving the process for constitutional reform, and advocated for increased public engagement (such as citizens' assemblies), and ways to combat misinformation.

Following the seminar, participants were invited to vote for their top three priority topics for a law reform inquiry. Attendees' top concern was the need to establish a standing Constitutional Commission. This was followed by the need for holistic review of the Constitution, enhancing the process for constitutional reform, and improving public literacy on referendum topics.

## THE AUSPUBLAW BLOG

The AUSPUBLAW blog has established its reputation as an invaluable source of high-quality commentary on important developments across the spectrum of Australian public law. It provides informed analysis of recent cases and other matters in the public interest, as well as insights into the academic research being undertaken by Australia's best public law scholars.

The blog is currently edited by Zsafia Korosy and Elisabeth Perham, two HDR members of the Centre, and co-ordinated by Lisa Burton Crawford. We are grateful to our T1 Centre Intern, Rosie Short, for her assistance with the blog.

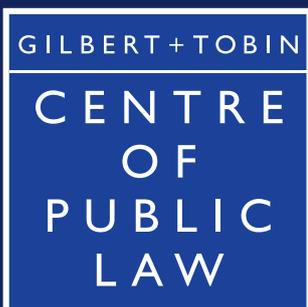
Under Zsafia and Elisabeth's leadership, the blog's readership has continued to grow. It now has near 1000 email subscribers and over 2100 twitter followers, and continues to publish regular substantive posts as well as an invaluable monthly roundup of public law events being held across the country.

In 2018, AUSPUBLAW began hosting "book forums": a new opportunity to promote and critically analyse recent publications in Australian public law. We were pleased to publish collections of posts on Dr Adam Fletcher's *Human Rights Scrutiny Regime: Democratic Masterstroke Or Mere Window Dressing?* (Melbourne University Press, 2018) and Associate Professor Luke Beck's *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018), and will be publishing a forum on Dr Dylan Lino's *Constitutional Recognition - First Peoples and the Australian Settler State* (Federation Press, 2018) later this year. Any authors of recent or forthcoming monographs who would like to see their book featured in this format should feel free to contact the editors.

In the future, AUSPUBLAW looks forward to collaborating with the Australian Association of Constitutional Law to keep members and readers abreast of key developments in public law (including the decisions of final courts across Australia,



Rosie Short,  
Centre Social Justice Intern, Term 1  
2019



the UK, Canada, South Africa and New Zealand). We thank the AACL for their support to grow the blog in this way. We are also grateful to our new and ongoing Centre Fellows, who will take on a more active role advising the blog editors into the future. The ability to draw upon their extensive and varied professional expertise will ensure that the blog maintains and enhances its reputation as a source of legal commentary of the highest standard.

We welcome contact from any friends of the Centre who are interested in writing for AUSPUBLAW. We accept contributions from academics, practitioners and students.

To subscribe to the blog, sign up at [www.auspublaw.org](http://www.auspublaw.org) or follow it on Twitter [@auspublawblog](https://twitter.com/auspublawblog). To submit a post for consideration at the blog, or to advise an upcoming public law event, contact the editors at [auspublaw@unsw.edu.au](mailto:auspublaw@unsw.edu.au)

## PEOPLE

New Centre Affiliates:

- Belinda Baker, Crown Prosecutor at the New South Wales Office of the Director of Public Prosecutions;
- Chantal Bostock, UNSW Teaching Fellow, community member of the Medical Council of New South Wales, and former senior member of the Administrative Appeals Tribunal;
- Paolo Buchberger, Director of Constitutional & Administrative Law for the New South Wales Crown Solicitor;
- Craig Lenehan of the New South Wales Bar;
- Daniel Reynolds of the New South Wales Bar; and
- Celia Winnett of the New South Wales Bar.

## SOCIAL JUSTICE INTERN REPORT

### Rosie Short, Social Justice Intern

#### Term 1 2019

I really enjoyed my Social Justice Internship at the Gilbert + Tobin Centre of Public Law in Term 1. The experience gave me insight into the depth of the work the Centre does and the importance of its role in fostering public debate on public law issues.

I began the internship in the final weeks of Associate Professor Sean Brennan's Directorship of the G+T Centre. He kindly invited me to the Centre's annual conference, where I had the opportunity to hear from leading public law figures on a range of current issues. It was a wonderful introduction to the Centre and the range of work the Centre and broader public law community do.

Engagement with stakeholders was a feature of my internship and I learned a lot from observing Centre member's approach to collaboration. I was fortunate enough to attend a number of workshops run by the Centre. At Dr Lisa Burton Crawford's Statutory Interpretation workshop I gained an understanding of the importance of fostering good working relationships in the academic community and the benefits of collaboration on academic writing.

One of the best experiences I had at the G+T Centre was attending the First Nations Voice workshop run by Professor Megan Davis and Dr Gabrielle Appleby, where some of Australia's best Constitutional law academics worked through issues relevant to the campaign for a First Nations Voice. These included constitutional deferral, the drafting of the proposed Constitutional amendment and potential strategies for success in a referendum. I learned about the work already done by Professor Megan Davis and many others on the Dialogues, Uluru Statement from the Heart and plans for reform. The workshop also exemplified the Centre's objectives of driving academic research, engaging with broader public law issues and actively working towards public law reform.

I was also able to assist Centre members with various individual projects on topics including Chapter III of the Constitution and detention, the outsourcing of legislative drafting and Parliamentary speeches on a First Nations Voice as well as working on updates to Centre resources and the monthly AUSPUBLAW events roundup.

I'm grateful to Professor Rosalind Dixon, Dr Lisa Burton Crawford and Associate Professor Sean Brennan for their guidance and commitment to making the Social Justice Internship a truly rewarding experience. I'd also like to thank all of the other members of the Centre who I had the opportunity to work with and learn from.

## PHD REPORT

### Harry Hobbs

Aboriginal and Torres Strait Islander peoples claim a distinctive relationship with the Australian state based on their pre-colonial status as self-governing sovereign communities. This relationship is not reflected in Australia's constitutional and political framework, which inhibits Indigenous Australians' ability to have their distinct interests considered in the processes of government. My thesis explored whether and how the Australian state could be restructured to rectify this failing and empower Aboriginal and Torres Strait Islander peoples.

I was very pleased to receive positive news from the examiners in early 2019. They noted that I took 'Aboriginal voices seriously', provided 'a clear and original analysis of Indigenous aspirations through the concept of sovereignty', and made a 'tremendous contribution to legal scholarship focused on Indigenous peoples and especially Indigenous peoples in Australia'. It is important to note, however, that my success was the result of many hands, particularly those in the G + T Centre and UNSW Law. In addition to my supervisors George Williams and Megan Davis, I would like to take this opportunity to thank Gabrielle Appleby, Ros Dixon, Lauren Butterly, Paul Kildea and Jenny Jarrett, as well as everyone in the HDR lounge. Particular thanks, however, should go to Sean Brennan, who as Director of the Centre during my PhD, read drafts, organised HDR workshops where I could present my work in a searching but welcoming environment, and found Centre funding to help me attend and present at several conferences across Australia.

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## PROJECT REPORTS

### ADMINISTRATIVE LAW AND JUSTICE PROJECT

#### ***Project Director: Janina Boughey***

The Administrative Law and Justice Project was launched at the start of 2019. The Project's aim is to bring together UNSW Law scholars, and the wider government law community, concerned with ensuring those who exercise administrative powers act in accordance with public law principles and values. The Project is particularly interested in accountability implications of changes in the nature, scope and exercise of government powers since Australia's administrative law 'system' was designed; such as the use of technology in administrative decision-making; mixed public-private administrative arrangements; and the modern use and interpretation of statutes which confer powers on the executive branch. The Project has had a busy first six months!

The Project Director, Janina Boughey, together with Lisa Burton Crawford, published several articles and book chapters examining the theoretical and doctrinal role that the (much maligned, but central) concept of jurisdictional error plays in judicial review, and the implications of that theory. Janina and Lisa's article, 'Reconsidering R (on the application of Cart) v Upper Tribunal and the rationale for jurisdictional error' [2017] Public Law 592, which compares the approaches to jurisdictional error in Australia and the UK, was discussed by the UK Supreme Court in its recent judgment in R (on the application of Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22. They have another article examining the implications of their theory for judicial

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Comparative Judicial Review Book Launch

review remedies and the constitutional entrenchment of judicial review forthcoming in the next issue of the Public Law Review.

Janina and Lisa are also co-editing the collection of papers that emerged from a workshop held at UNSW in December on the theme of Interpreting Executive Power, which will be published by The Federation Press later this year. Lisa also pursues the question of how courts should interpret statutory conferrals of executive power, particularly in light of recent High Court decisions concerning 'immaterial errors of law', in a forthcoming article in the Public Law Review.

In January this year, Professor Gabrielle Appleby and Janina, joined by Professor Mark Aronson, made a submission to the Senate Standing Committee on Regulations and Ordinances which is conducting an inquiry into Parliamentary Scrutiny of Delegated Legislation. Gabrielle, Janina and Mark addressed three key aspects of the Committee's terms of reference. The first was a series of recommendations relating to the Committee's scrutiny of delegated instruments made under broadly framed delegations of power that require matters of substance and policy to be determined by the delegated decision-maker. The second was a series of recommendations around improving the process for the scrutiny of instruments that authorise appropriations and executive expenditure. Finally, there were two recommendations to enhance the Committee's role in scrutinising the constitutional validity of delegated instruments.

Janina has contributed to a festschrift in honour of Emeritus Professors Robin Creyke and John McMillan, which was recently published by The Federation Press (Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019)). Janina's essay analysed the existing evidence of administrative law's impact on the bureaucracy. Janina also spoke on the current state of 'unreasonableness' at the Queensland Bar Association conference in March.

The Administrative Law and Justice Project has also recently begun an exciting new collaboration with our colleagues in the Allens Hub for Technology, Law and Innovation to work on issues associated with the automation of administrative decision-making (see Monika Zalnieriute, Lisa Burton Crawford, Janina Boughey, Lyria Bennett Moses and Sarah Logan, 'From Rule of Law to Statute Drafting: Legal Issues for Algorithm in Government Decision-Making', in the forthcoming Cambridge Handbook on the Law of Algorithms). Janina and Monika are currently working together examining some of the particular accountability issues raised by automated administrative decision-making from a comparative perspective in more detail.

## COMPARATIVE CONSTITUTIONAL LAW PROJECT

### **Project Director: Rosalind Dixon**

In December 2018, the Comparative Constitutional Law Project hosted the launch of several titles in Comparative Constitutional Law; Roux, T. (2018) *The Politico-Legal Dynamics of Judicial Review*; Dixon, R. & Stone, A. (2018) *The Invisible Constitution in Comparative Perspective*; Thiruvengadam, A. K. (2017) *The Constitution of India: A Contextual Analysis*. This was part of the annual comparative constitutional law Roundtable held at UNSW.

In January, the Director of the Comparative Constitutional Law Project, Rosalind Dixon, launched a new volume on 'Comparative Judicial Review' at 57th St Books in Chicago. The book was launched by University of Chicago Professor Aziz Huq, and involved Huq in conversation with Rosalind and her co-editor Professor Erin Delaney.

Rosalind was also involved, along with Gabrielle Appleby and Andrew Lynch, in a conference on the theme of 'Towering Judges' hosted at the City University of Hong Kong by Professors Rehan Abeyratne (CUHK) and Iddo Porat (CLB, Tel Aviv) (see further p 11).

### **Deputy Director: Melissa Crouch**

Melissa Crouch was appointed as Secretary (2019-2020) of the Asian Studies



Women in Asia Conference 2019

Association of Australia, which is the peak academic body in Australia for the study of Asia, with over 600 members. In her role with UNSW's Institute for Global Development, Melissa led a team of 16 academics in Yangon as part of the UNSW Myanmar Development and Research Dialogue Workshop. The purpose of the trip was to enhance collaboration and partnerships on development in Myanmar. The trip included engagements with five universities, the Australian embassy, five high level ministerial meetings, and a wide range of non-government organisations.

Melissa has been active in policy forums in Southeast Asia, being invited to speak at a conference on 'State, Religion and Prevention of Violent Extremism in Southeast Asia' in Indonesia, and a Chatham House roundtable on, Development, Conflict and Religion in Myanmar'. Recent invited academic talks include two separate conferences at ANU, Entrenched Illiberalism in Mainland Southeast Asia, and the Myanmar Update 2019. In March, Melissa was a Visiting Fellow at the National Library of Australia as part of their Asia Fellowship program. She continues to inform debates on legal developments in Myanmar and Indonesia through media engagement, including in the Sydney Morning Herald, CNN and Wall Street Journal among others. In June, Melissa hosted the Women in Asia Conference, together with five UNSW academics. This event is a biennial conference of the Women in Asia Forum affiliated with the Asian Studies Association of Australia. The theme for this year's interdisciplinary conference at UNSW was "Women in an Era of Anti-Elitism: Responding to the Challenge of Rising Populism and its Threat to Gender Inclusivity". This included a focussed set of panels on "Women in the Legal Profession and Judiciary in Asia", partly sponsored by the G+T Centre and Konrad Adenauer Stiftung.

## INDIGENOUS LEGAL ISSUES PROJECT

### **Project Director: Sean Brennan**

Members of the Indigenous Legal Issues Project continued to support the work of Professor Megan Davis, Pro-Vice Chancellor (Indigenous) and the work of the Indigenous Law Centre in progressing the calls for structural constitutional reform in the Uluru Statement from the Heart.

A [submission](#) on behalf of key members of the Indigenous Steering Committee of the Referendum Council Pat Anderson, Megan Davis, Noel Pearson, and technical advisors Gabrielle Appleby, Sean Brennan, Dylan Lino and Gemma McKinnon, was made to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples. This submission set out a roadmap to a constitutional referendum on the First Nations Voice. Drawing extensively on the Regional Dialogues and the First Nations Constitutional Convention, the submission proposed a constitutional provision to enshrine the Voice, a referendum question, and the release of a process to further design the Voice by reference to key design principles.

Following the Final Report of the Joint Select Committee in November 2018, Gabrielle Appleby wrote for AUPUBLAW on what this development meant for the calls for constitutional enshrinement of a First Nations Voice. The Committee strongly endorsed, by reference to the overwhelming number of submissions it had received, the need for a First Nations Voice. That same week saw a Labor commitment to a constitutional referendum on the Voice, representing a further significant milestone towards constitutional change.

In Cairns in December, Gemma McKinnon, Gabrielle Appleby and Sean Brennan participated in a UNSW Research Showcase organised by the Pro Vice Chancellor Indigenous, Professor Megan Davis in conjunction with the Uluru Education Project. They presented to invited Aboriginal and Torres Strait Islander participants on a range of legal issues including an analysis of the parliamentary Joint Select Committee report on constitutional reform and native title developments.

The Project was also very pleased to be involved with the Indigenous Law Centre and Megan in hosting an academic workshop on 2 May 2019, inviting leading constitutional lawyers from across the country to discuss 'A First Nations Voice:

From Referendum to Design'. The workshop provided a great forum for robust academic debate, and consensus building, about many important issues that will arise in any upcoming referendum to enshrine a First Nations Voice.

Gabrielle has also been working with Megan to explain the call in the Uluru Statement for a truth-telling of Australia's history. In a piece published in *Australian Historical Studies*, entitled, '[The Uluru Statement and the Contested Promises of Truth](#)', Gabrielle and Megan provide a more detailed explanation of the objectives behind the call for a truth-telling process in the Uluru Statement that participants gave during the Regional Dialogues, as well as their reflections on what these objectives mean for how a truth-telling process might be undertaken in Australia. The key message that came from the Dialogues was that truth-telling in Australia needs to build understandings within local communities, and, given the nature of our history, is not well-suited to a large, centralised national commission-style exercise. Rather, the objectives of a Makarrata – the coming together after a struggle – will be better realised through a localised truth-telling process, led by Aboriginal and Torres Strait Islander peoples working with non-Aboriginal people in that community.

Sean presented to the Centre's February Constitutional Law Conference on the Timber Creek litigation before the High Court, a test case about just terms compensation for the extinguishment of native title. After the High Court decision came down in March, he noted in a [blog post](#) on AUSPUBLAW the emphasis the Court gave to 'cultural loss' and the gravity of harm suffered by the traditional owners when the government takes their land. The blog post also connected the recovery of compensation for dispossession in other parts of Australia with the structural reforms advocated in the Uluru Statement from the Heart.

Other members of the Project have also been progressing important and interesting projects. Over the 6-8 May, Lauren Butterly was invited to participate in a multi-disciplinary, multi-agency CSIRO Cutting Edge Symposium on 'Charting the adaptation path for Australia's socio-ecological systems'. Lauren presented her research on Sea Country governance on a panel relating to the social, ethical and technical constraints and opportunities of adaptation, with a focus on Indigenous sea rights and self-determination. She was also a discussant on the topic of 'learning by doing: lessons for the future' considering how Indigenous Sea Country Indigenous Protected Areas have operated in the shadow of sea country legal rights.

Finally, the Project extends its congratulations to Harry Hobbs, who received two extremely positive examiner reports on his PhD, which explores whether and how an Indigenous representative body could empower Aboriginal and Torres Strait Islander peoples with the capacity to be heard in the processes of government in Australia. Harry has been a dynamic member of the Project and the Centre during his time as a PhD student, and we wish him all the best in his new position at UTS.

## THE JUDICIARY PROJECT

### ***Project Director: Gabrielle Appleby***

This report begins by saying thank you to the Project's founder, director and then co-director, Andrew Lynch. While Andrew is stepping back from position as co-director, of course, it is not farewell, as he will continue to drive, collaborate and scheme about many of the Project's ongoing research activities.

In terms of that research, we start by noting the very recent release of a major research output of the Project, reporting on a 2016 survey of the Australian judiciary that asked respondents to identify what they saw as the challenges confronting them in their role. Appearing as an advance publication from (2019) volume 42 of the *Melbourne University Law Review*, '[Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption](#)' is authored by Professors Gabrielle Appleby, (UNSW) Suzanne Le Mire (University of Adelaide), Andrew Lynch (UNSW) and Brian Opeskin (UTS). The article presents the results from the responses of the 142 judicial officers who participated in the survey, placing these in the context of recent

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Towering Judges conference, January 2019.  
From left to right: Samuli Seppanen, Gabrielle Appleby, Andrew Lynch, Richard Albert, Mark Tushnet, Tom Daly, Lawrence David (on screen)

developments and secondary literature. What was so fascinating about this project was the way certain topics, not necessarily those which the research team anticipated when it started its work, were revealed to be particularly important to the judiciary or were ones about which there appears to be strong division amongst its ranks.

At the risk of spoilers, the same research team has since embarked on a project examining judicial education in Australia. This work is supported by a seed grant from the Australasian Institute of Judicial Administration (AIJA) and will, in its initial phase, map the extent and variety of judicial education provided across all jurisdictions. Gabrielle and Andrew have already been very grateful to have received significant input into the project design from individual members of the judiciary, with a particularly informative trip to Melbourne to listen to judges of the Victorian Supreme and County Courts organised with the generous assistance of President Chris Maxwell of the Court of Appeal. Additionally, they have met with the chief executive officers and/or judicial members of the governing bodies of the National Judicial College of Australia, the Judicial College of Victoria and the Judicial Commission of New South Wales. These discussions have been invaluable in deepening understanding of the current landscape of judicial education, directing our sense of the central themes and issues with which the project will need to engage. The research team is currently being assisted by Trent Ford as a research assistant on this initial phase, and has sequenced distinct phases for its future work which will involve more structured engagement with the judiciary and stakeholder bodies, as well as a strong comparative dimension.

One other research avenue that the judicial survey project has already opened up was a deeper look at the ethical support that is available to judicial officers. Gabrielle and Suzanne Le Mire (University of Adelaide) have an upcoming piece in the *Federal Law Review*, 'Ethical Infrastructure for a Modern Judiciary', which explores the deficiencies of the traditional approach to judicial ethical support, which has been peer-based and informal, particularly in a legal landscape in which judicial numbers are growing as is the diversity of the judiciary. The article draws on the findings of the judicial survey to demonstrate the problems with the status quo and explore ways of providing greater ethical support to judges in the future through more formalised 'ethical infrastructure'.

In January, Gabrielle and Andrew participated in a conference on the theme of 'Towering Judges' hosted at the City University of Hong Kong by Professors Rehan Abeyratne (CUHK) and Iddo Porat (CLB, Tel Aviv). The conference was an international gathering at which scholars argued the case for the inclusion of a judge from their home country in the global pantheon of 'Towering Judges'. These submissions were bookended by some general reflections on the topic, including by Centre Director, Rosalind Dixon who spoke on 'Heroic Courts v Judges: Individual v. Collegial Demosprudence'. Gabrielle and Andrew presented the case for Sir Anthony Mason as Australia's most 'towering' judicial figure, though noting Sir Owen Dixon as both an alternative candidate and his legacy as essential, in turn, to Sir Anthony's own significance. As anticipated, the whole exercise is one designed to generate amicable disagreement and debate – and we have had a fair share in response to our choice. The papers from the event are intended for publication in an edited collection, but in the meantime succinct versions of all that were presented at the conference are available as a joint symposium on the [IACL-AIDC](#) and [I-CONnect](#) blogs.

At the Centre's 2019 Constitutional Law Conference, Gabrielle delivered the [keynote address](#), entitled, 'The 2018 Australian High Court Constitutional Term: Placing the Court in its inter-institutional context'. The paper approached the task of providing an overview and analysis of the 2018 Australian High Court's constitutional term through a slightly different lens: considering the developments by reference to their inter-institutional context. That is, how the High Court's jurisdictional and doctrinal developments do and should impact the jurisdiction and behaviour of the other branches of government, and in the context of constitutional judicial review, particularly the Australian Parliaments.

This paper drew heavily on Gabrielle's research out of her ARC Discovery Project,

*Law, Order and Federalism*. The latest paper from that project, 'Executive Policy Development and Constitutional Norms: Practice and Perceptions', written with Anna Olijnyk (University of Adelaide) will be forthcoming in the *International Journal of Constitutional Law*. That article drew on interviews with 48 executive actors, including Attorneys-General, policy advisers, government lawyers and parliamentary draftspeople, to develop a better understanding of how executive actors understand constitutional limits, and develop policy in areas of significant constitutional uncertainty.

Also at the Centre's 2019 Constitutional Law Conference, the latest instalment of the 'The High Court on Constitutional Law: The Statistics' was provided to delegates. This series began as an annual snapshot of High Court decision-making at the Centre's 2004 conference, presented by Andrew and Professor George Williams. The most recent study distinguished 2018 from any that had preceded it since the series began as the only year in which no Justice dissented from the Court's orders in a constitutional case. Justice Nettle delivered the most dissents with five of his 46 judgments (10.87 per cent) in the minority.

Finally, readers may recall discussion in the last newsletter of the 'Uncloaking the Judiciary' workshop hosted by Gabrielle and Andrew in July 2018. We are very excited to announce that papers from that event along with additional research that was subsequently invited by the organisers has been accepted as a book proposal by Cambridge University Press. We look forward to sharing about the publication in 2020 of this edited volume to be titled *The Judge, the Judiciary and the Court: Individual, collegial and institutional judicial dynamics in Australia*.

## STATUTES PROJECT

### **Project Co-Directors: Lisa Burton Crawford and Janina Boughey**

The Statutes Project was launched in 2018, with the aim of examining contemporary developments in legislative practice and statutory interpretation. Straddling the divisions of constitutional law, administrative law and legal theory, it aims to shed new light on important public law debates by viewing them in light of the way in which statutes are used as a tool of governance in the modern administrative state. The co-directors of the Project, Lisa Burton Crawford and Janina Boughey, have been busy pursuing two strands of research which are central to the Project's aims: first, examining contemporary developments in statutory interpretation, especially in constitutional and comparative perspective; and secondly, seeking to gain further insight into the practical realities of legislative drafting and the way in which Parliament and the executive interact with statute law.

In April, the Project hosted a workshop for scholars across Australia working in the field of statutory interpretation. This led to fruitful discussion of a range of topical issues, including: how theories of language might inform our understanding of statutory interpretation; the constitutional limits of Parliament's ability to dictate statutory meaning; and the principles which should guide senior appellate courts in considering whether to overrule statutory precedents (an important issue in the recent case of *Plaintiff M47/2018 v Minister for Home Affairs*, in which the High Court was invited to overturn the interpretation of the *Migration Act 1958* (Cth) from *Al-Kateb v Godwin*).

Last December, Lisa and Janina also hosted a workshop on the topic of 'Interpreting Executive Power'. This combined the Centre's new strengths in statutory interpretation and administrative law. The workshop focused on the ways in which courts interpret statutes which confer executive powers, and the challenges posed in this regard by the proliferation of statute law and contemporary legislative drafting techniques. It produced an excellent set of papers from scholars, practitioners and judges that we will be pleased to see published with The Federation Press later this year.

Lisa and Janina continue to examine ways in which statutory interpretation should be integrated into the Public Law curriculum — a key focus of their co-authored textbook, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017). Their piece, 'Situating Statutory Interpretation in its Public Law Context' will

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shortly appear in a special edition of the Legal Education Review, emerging from an earlier symposium on the teaching of statutory interpretation. Lisa has also recently published the co-edited collection of essays *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart, 2019). Published in honour of Professor Goldsworthy's retirement, this collection provides new perspectives from a range of leading public law scholars and theorists on the legal and philosophical principles that govern the making and interpretation of laws in a constitutional democracy — including a contribution from Lisa on the utility of 'parliamentary intention'.

For the remainder of 2019 and beyond, Lisa and Janina looking forward to delving further into the way that the realities of modern government shape the making and interpretation of statute law. This includes ongoing work into the complexity of modern legislation, the space (if any) for judicial deference to the executive's understanding of the law, the role of the legislative drafter, and the potential to further outsource — or even automate — aspects of the making or interpretation of statute law. The last of these will be a major focus of the new collaboration between the Gilbert + Tobin Centre and the Allens Hub for Technology, Law and Innovation (see Monika Zalnieriute, Lisa Burton Crawford, Janina Boughey, Lyria Bennett Moses and Sarah Logan, 'From Rule of Law to Statute Drafting: Legal Issues for Algorithm in Government Decision-Making', in the forthcoming *Cambridge Handbook on the Law of Algorithms*). As always, we welcome contact from anyone who may be interested in the Project's work.

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## PUBLICATIONS AND PRESENTATIONS

### PUBLICATIONS

#### Joint Publications

Gabrielle Appleby, Suzanne Le Mire, Andrew Lynch and Brian Opeskin, 'Contemporary Challenges Facing The Australian Judiciary: An Empirical Interruption' (2019) 42 Melbourne University Law Review 299.

Janina Boughey and Lisa Burton Crawford, 'Situating Statutory Interpretation in its Public Law Context' (2019) 29(2) Legal Education Review 1.

Lisa Burton Crawford and Janina Boughey, 'The Centrality of Jurisdictional Error: Rationale and Implications' (2019) 30 Public Law Review 18.

Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law Under a Democratic Constitution: Essays in Honours of Jeffrey Goldsworthy* (Hart, 2019).

Patrick Emerton and Lisa Burton Crawford, 'Statutory Interpretation Without Parliamentary Intention: Defending the High Court's "Alternative Approach"' in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law Under a Democratic Constitution: Essays in Honours of Jeffrey Goldsworthy* (Hart, 2019) 39.

#### Janina Boughey

'Administrative Law's Impact on the Bureaucracy' in Greg Weeks and Matthew Groves (eds) *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (The Federation Press, 2019) 93.

#### Lisa Burton Crawford

'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Dan Meagher and Janina Boughey (eds), *The Legal Protection of Human Rights in Australia* (Hart, 2019) 143.

'Book Forum on Adam Fletcher's Australia's Human Rights Scrutiny Regime: Democratic Masterstroke of Mere Window Dressing?' on AUSPUBLAW (24 April 2019) <<https://auspublaw.org/2019/04/book-forum-lisa-burton-crawford>>

#### Melissa Crouch

*The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*. (2019) Cambridge University Press.

'The Judicial Reform Landscape in Indonesia: Innovation, Specialisation and the Legacy of Dan S Lev' (2019) in M Crouch (ed) *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*. Cambridge University Press.

Legal Reform and Judicial Education: Final Report on Judicial Education in Commercial Law in Myanmar. (2019) Asian Development Bank.

#### **Rosalind Dixon**

'Proportionality & Comparative Constitutional Law Versus Studies' (2018) *Law & Ethics of Human Rights*, vol 12, no.2.

Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate (2019) *The American Journal of Comparative Law*, Volume 67, Issue 1, Pages 145–176.

'Introduction' (with Gregoire Webber and Geoffrey Sigalet) in *Constitutional Dialogue: Democracy, Rights, Institutions* (ed. with Gregoire Webber and Geoffrey Sigalet) (Cambridge University Press, 2019).

'Constitutional 'Dialogue' and Deference' in *Constitutional Dialogue: Democracy, Rights, Institutions* (ed. with Gregoire Webber and Geoffrey Sigalet) (Cambridge University Press, 2019).

#### **Svetlana Tyulkina**

'Militant Democracy as an Inherent Aspect of Democratic Constitution' in Kirshner and Malkopoulou (eds), *Militant Democracy and Its Critics* (Edinburgh University Press 2019).

#### **George Williams**

'The Rule of Law and Automation of Government Decision-Making' (2019) 82 *Modern Law Review* 425-455 (with Monika Zalnieriute and Lyria Bennett Moses).

'Australia's Constitutional Design and the Protection of Human Rights' forthcoming in Boughey, J, Groves, M, and Meagher, D (eds), *The Legal Protection of Rights in Australia*.

'Free Speech and Counter-Terrorism in Australia' Cram, I (ed), *Extremism, Free of Speech and Counter-Terrorism Law and Policy* (Routledge, 2019) 172-189 (with Keiran Hardy).

'Human Rights and Anti-Terror Laws in Australia' in Juss, S (ed), *Beyond Human Rights and the War on Terror* (Routledge, 2019), 168-188.

'Strategies for Countering Terrorism: An Australian Perspective' in Lennon, G, King, C, and McCartney, C (eds), *Counter-Terrorism, Constitutionalism and Miscarriages of Justice: A Festschrift for Professor Clive Walker* (Hart Publishing 2018) 63-80 (with Keiran Hardy).

'Parliamentary Human Rights Vetting and Deliberation' in Levy, R, Kong, H, Orr, G and King, J (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press 2018) 72-87 (with Daniel Reynolds).

## PRESENTATIONS

### **Joint Presentations**

Elisabeth Perham and Zsofia Korosy – 'Conducting legal historical research about the Pacific' – Presentation to Gilbert + Tobin Centre Meeting, 11 April 2019.

### **Janina Boughey**

'Updating Unreasonableness', Queensland Bar Association Conference, 2 March 2019.

### **Melissa Crouch**

LSA Author meets Reader panel: The Constitution of Myanmar; and discussant on three other panels on Indonesian Law; How to Save a Constitutional Democracy; and Constituting Religion in Malaysia, Jun 2019.

'Legal Denial, Disappearances and Violence as a Challenge to Dignity', Law and Society Association panel organiser, My paper: States of Denial, Washington, US., Jun 2019.

'Entrenched Illiberalism in Mainland Southeast Asia', ANU, Canberra, 8-9 April 2019.

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'ANU Myanmar Update', chair and book panel, The Constitution of Myanmar, March 2019.

'States of Legal Denial in Myanmar', UNSW Law Staff Seminar, Sydney, 26 Feb 2019.

'Development, Conflict and Religion in Myanmar', Chatham House Conference, Yangon, 14-15 Feb 2019.

'Constitutional Literacy for Development' UNSW Myanmar Development and Research Dialogue Workshop, Yangon, 4 Feb 2019.

'Mosaic Myanmar', Roundtable on Political Participation and Diversity, Myanmar, Yangon, 3 Feb 2019.

'State, Religion and Prevention of Violent Extremism in Southeast Asia', Mandarin Oriental Hotel, PPIM UIN Jakarta and UNDP Indonesia, 14-15 Jan 2019.

#### **Zsofia Korosy**

Institute for Global Law and Policy Scholars Workshop, Bangkok, Thailand, January 2019.

#### **Elisabeth Perham**

'Democracy-Enhancing Tools in Small State Constitution Making', ASLI Conference, Singapore, 12 June 2019 (with Maartje de Visser).

'Democracy-Enhancing Tools in Small State Constitution Making', ICON-S Annual Conference, Santiago, 1 July 2019.

#### **Svetlana Tyulkina**

'Populist Politics and Democracy: Rediscovering Inherent Democratic Quality of Self-Defence', ICON-S Annual Conference on "Public Law in Times of Change?", Santiago De Chile, July 2019.

#### **George Williams**

'The Constitution of Australia: Revisiting Reform', Public Seminar, Australian Law Reform Commission and UNSW Law, Sydney, 29 May 2019.

'Referendum Success', First Nations Voice – From Referendum to Design Workshop, UNSW Law, Sydney, 2 May 2019.

'The Future of Legal Education', FLIP Stream Seminar, Law Society of New South Wales, Sydney, 10 April 2019.

'Protecting Religious Freedom in a Human Rights Act', Religious Freedom after Ruddock, Australian Law Journal and University of Queensland Law School, Brisbane, 6 April 2019.

'The Constitution and the Australian Intelligence Community', Workshop on Oversight, Transparency and National Security Comprehensive Review of the Legal Framework Governing the National Intelligence Community, Canberra, 1 April 2019.

'Technology and Legal Education', UNSW Legal Office Seminar, Sydney, 28 March 2019.

'Globalising Australian Law Schools', Affinity Law Panel, Sydney, 5 March 2019.

'The Rule of Law and Automated Decision-Making by Governments', Global Social Justice Conference, Law Schools Global League, Faculty of Law, University of Stockholm, Sweden, 19 February 2019.

### **MEDIA PUBLICATIONS**

#### **George Williams**

'Pre-Poll Voting is Undermining our Democracy' *The Australian* (15 May 2019).

'Petitions Deserve a Meaningful Place in our Politics' *The Australian* (29 April 2019).

'Study the Family Tree before Nominating for a Seat' *The Australian* (15 April 2019).

'In Any Vote You Must be Careful What You Wish For' *The Australian* (1 April 2019).

'How House can Banish Anning' *The Australian* (20 March 2019).

'Law Lifts Bar on Human Rights' *The Australian* (5 March 2019).

'Territory's Arm-Wrestle is Unique' *The Australian* (18 February 2019).

'Citizenship-Stripping Bill is Unworkable Nonsense' *The Australian* (31 January 2019).

## SUBMISSIONS

### Joint Submissions

Janina Boughey and George Williams, Submission to Queensland Parliament Legal Affairs and Community Safety Committee, *Inquiry into the Human Rights Bill* (Qld) (14 November 2019).

Gabrielle Appleby, Mark Aronson and Janina Boughey, Submission to Commonwealth Parliament Senate Standing Committee on Regulations and Ordinances, *Inquiry into Parliamentary Scrutiny of Delegated Legislation* (24 January 2019).

Monika Zalnieriute, Lyria Bennett Moses, Lisa Burton Crawford, Janina Boughey and Nayan Bhathela, Submission to the OHCHR Thematic report to the United Nations General Assembly on Digital Technology, Social Protection and Human Rights (5 June 2019).

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