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ACADEMIC ARTICLE

Courts in Victoria, Australia, During COVID: Will Digital Innovation Stick?

Anne Wallace* and Kathy Laster†

We present a case-study of the swift digital response to COVID-19 restrictions by the courts in the State of Victoria, Australia's second-largest jurisdiction. We analyse the extent to which the management of this crisis (Step 1 in John Kotter's model of innovation) can serve as the catalyst for digital innovation in these courts. We contend that the history of innovation in Australia is of quick, pragmatic fixes which do not translate into systematic change. For example, although Australian courts are often credited with being pioneers in court technology, recourse to apparent 'virtual courts' before and during COVID is probably not truly innovative. Applying Boschma's theory about the 5 'proximities' which promote innovation — geographical, social, cognitive, institutional and organisational — we maintain that for these courts, those factors have, paradoxically, worked in the opposite direction to undermine technological innovation. However COVID has seen critical changes in a number of these elements, supported by ideological and practical concerns for courts. Taken together, we are cautiously optimistic that post-COVID, Kotter's final stage of "Making it Stick" through a technologically friendly legal culture which supports systematic and sustained court innovation, might just be possible if government is willing to fund a grander innovation agenda and has confidence in the courts' ability to carry it through.

Keywords: COVID-19; innovation; technology; virtual court; audio visual link (AVL)

Introduction

In Australia, the government response to the COVID-19 pandemic was swift and highly effective in controlling the spread of the infection in this island continent. Courts, like other public and private institutions, were abruptly required to comply with stringent measures, including protracted lockdowns and strict social distancing. They responded by transforming the way they typically go about their work.

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The State of Victoria, the subject of this case study, is Australia's second most populous State and legal jurisdiction. It was the hardest hit by the pandemic, experiencing a second wave in July resulting in a strict Stage 4 'lockdown' which was only lifted in early November 2020.

Victoria, like other States and Territories in Australia's federal system of government, administers its own justice system. It has a 3-tiered court hierarchy. The high volume lower (Magistrates Courts) deal with the majority of less serious criminal prosecutions and civil matters. The intermediate (County) Court hears the majority of serious criminal matters and has a substantial commercial and common law (civil) caseload.¹ The Supreme Court has a limited original jurisdiction including some serious crimes, such as murder, as well as commercial and common law lists dealing with more serious and complex matters.² Victoria also has a number of administrative tribunals, the largest of which, the Victorian Civil and Administrative Tribunal ('VCAT'), hears around 83,000 cases a year in various lists including residential tenancies, guardianship and town planning.³

Court governance centres on a Courts Council, consisting of the heads of all the courts and VCAT, chaired by the Chief Justice of the Supreme Court and supported by Court Services Victoria (CSV), a statutory corporation managed by a Chief Executive Officer. This governance model was introduced in 2014 with an explicit mandate to support innovation 'to the benefit of court users and the broader Victorian community.'⁴

Soon after the initial COVID lockdown, the Chief Justice of Victoria reassured the public and the legal profession that the Victorian courts were still able to function effectively and were not only coping with the crisis, but doing so through 'responsive' and 'agile' digital innovation.⁵ In this paper we examine that claim and consider whether a culture of digital innovation in these courts is likely to be a legacy of the COVID-19 crisis.

We begin by situating the work of the courts in the broader context of Australia's history of innovation, noting that the 'tyranny of distance' has consistently encouraged pragmatic technological problem-solving but without embedding a culture of systematic innovation. We argue that this pattern holds true for the Australian court system by showing how technology has been applied in Victoria's courts before and during the pandemic, most notably, the use of audio visual links ('AVL') and 'virtual courts'. We go on to demonstrate that, according to John Kotter's Innovation Framework, Victoria's courts are still in the early stages of their innovation journey. We contend that the explanation for their relatively slow progress, according to geographic economist Ron Boschma's 'proximity theory', is that the factors which typically support innovation have, paradoxically, worked in reverse in the closed hierarchical system of these courts. However, we conclude that the experience of rapid transformation during COVID-19 may be sufficiently disruptive to reverse some of these effects and facilitate future technological innovation in the Victorian courts, provided two conditions are met: firstly, that court governance and leadership continues to demonstrate commitment to comprehensive change, and secondly, that government is prepared to fund genuine innovation.

¹ County Court of Victoria, 'Court Divisions' at <<https://www.countycourt.vic.gov.au/learn-about-court/court-divisions>> [accessed 29 December 2020].

² Supreme Court of Victoria, *Annual Report 2017–19*, p. 3 also outlining the appellate jurisdiction of the Supreme Court and Court of Appeal. The County Court also exercises various appellate jurisdictions: County Court of Victoria, *ibid*.

³ Victorian Civil and Administrative Tribunal 'About VCAT' at <<https://www.vcat.vic.gov.au/about-vcat>> [accessed 29 December 2020].

⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 2013, p. 3664 (Robert Clark, Attorney-General).

⁵ Chief Justice Ann Ferguson, 'Statement from the Chief Justice of Victoria', Media Release, Supreme Court of Victoria, 20 March 2020.

Innovation in the Land of DIY

Innovation is an over-used term which is surprisingly difficult to define. Nevertheless, Australia and Australians have a reputation as innovators, or at the very least, as early adopters of technology.⁶

For a vast, newly colonised country at the 'end of the world', the challenges of 'the tyranny of distance' had to be conquered.⁷ It is not surprising therefore, that Australia was a pioneer in transport and communication technology. Specific contributions include the pre-paid postal system, refrigeration (to transport Australian primary produce internationally), aviation – especially long-range flight and the 'black box' flight recorder – solar-powered telephone and digital radio concentrator systems for clear phone connection across remote areas, and more recently, the foundations of GOOGLE Maps, as well as the invention of WIFI and ADSL for high-volume connections.⁸

Australian consumers have high levels of mobile phone usage,⁹ computer ownership and internet connectivity.¹⁰ However, this apparent technological openness has not necessarily translated into a higher state of digital readiness in government and business. A 2017 report described Australia's progress in digital government readiness as 'subdued' with the State of New South Wales the only jurisdiction that was 'digital government ready.'¹¹ Official statistics rate only 44% of Australian businesses as 'innovation-active'; defined as 'the introduction of a new or significantly improved good or service; operational process; organisational/managerial process; or marketing method'¹² In 2020, Australia was ranked 23rd on the Global Innovation Index.¹³ Australia's outputs in the knowledge and technology ranked considerably lower, in 40th place.¹⁴

Students of Australian history would suggest that the explanation for these contradictions lies in our pragmatic problem-solving culture which responds to immediate needs by making use of materials at hand – exemplified by the 'DIY' or 'Do It Yourself' handyman approach to innovation.¹⁵ Once we find the right one-off solution, we quickly move on to the next

⁶ However, although a recent report ranked Australia 3rd on the list of countries that have embraced digitisation rapidly: Ferret 'Australians Fast Adopters of Digital Tech' 18 July 2016 at <<http://www.ferret.com.au/articles/news/australians-fast-adopters-of-digital-tech-n2525543>> [accessed 29 December 2020], the percentage of Australians who can be classified as early adopters has been found to be as low as 19%: Roy Morgan 'Technology Early Adopters are pioneers for much more than just new technology' 1 September 2016 at <<http://www.roymorgan.com/findings/6947-technology-early-adopters-are-pioneers-for-many-things-june-2016-201609011503>> [accessed 29 December 2020].

⁷ Geoffrey Blainey, *The Tyranny of Distance*, Macmillan, 1966.

⁸ Australian Geographic, '20 Australian Inventions that Changed the World' at <<https://www.australiangeographic.com.au/topics/history-culture/2010/06/australian-inventions-that-changed-the-world/>> [accessed 29 December 2020].

⁹ Australia has achieved a peak saturation point of 91% smart phone ownership: Deloitte, 'Mobile Consumer Survey 2019' at <<https://www2.deloitte.com/au/en/pages/technology-media-and-telecommunications/articles/mobile-consumer-survey.html>> [accessed 29 December 2020].

¹⁰ As at 30 June 2017 87% of Australians used the Internet, over 85% of Australian households had Internet access, 91% used desktop or laptop computers to access the Internet, 91% also used mobile or smart phones to access the Internet, with a mean of 6.2 devices per household: Australian Bureau of Statistics 'Household Internet Access' 28 March 2018 at <<https://www.abs.gov.au/statistics/industry/technology-and-innovation/household-use-information-technology/2016-17>> [accessed 29 December 2020].

¹¹ Intermedium, *Digital Government Readiness Report* (June 2017) p. 3.

¹² Australian Bureau of Statistics, 'Characteristics of Australian Business' 2018–2019 and see 'Glossary' for definition at <<https://www.abs.gov.au/statistics/industry/technology-and-innovation/characteristics-australian-business/2018-19>> [accessed 29 December 2020].

¹³ Cornell University, INSEAD, and WIPO (2020). *The Global Innovation Index 2020: Who Will Finance Innovation?* Ithaca, 2020, p. xxxii.

¹⁴ *Ibid.*, p. 15.

¹⁵ Kathy Laster and Ryan Kornhauser, 'The Rise of "DIY Law": Implications for Legal Aid' in *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need*, Flynn A., and Hodgson J. (eds.), Bloomsbury Publishing Plc, 2017.

problem. This individualistic, restless pragmatism is not conducive to embedding sustained innovation through systemic change. The Australian innovation paradox is well reflected in the courts' approach to technology.

Courts – early adopters, but little sustained innovation

Australian courts have certainly promoted themselves as leaders in the use of technology. In 1998, the then Chief Justice of the High Court of Australia¹⁶ described the use of information and communications technology in Australian courts as 'a revolution in the way that participants in the justice system receive and process information.'¹⁷ The Chief Justice was referring to the use of technology to publish court judgements on the Internet, a result of the pioneering work by the AUSTLII consortium in providing free-online access to judgments from all Australian courts and tribunals.¹⁸ Also in the 1990s, Australian courts were internationally acknowledged for their early adoption of AVL.¹⁹

AVL was welcomed as a technological solution to minimise trauma for children and other vulnerable witnesses by enabling them to give their evidence remotely rather than in front of their alleged perpetrators in the courtroom.²⁰ It was also embraced to overcome a particular 'tyranny of distance' – connecting criminal defendants in custody to the courtroom for, often multiple, appearances²¹ – to reduce the costs and security risks associated with transporting prisoners to and from courts.²² These factors were the primary motivators behind a recent upgrade and expansion of AVL technology in the Victorian courts prior to the pandemic.²³

Outside of those areas where its use is mandated, the use of AVL in a court hearing has been largely at the discretion of the individual judicial officer.²⁴ Research has revealed divergent views among judges as to factors that influence the exercise of these discretions.²⁵

However, there has been less investment in other applications of technology to extend the benefits of AVL to promote more accessible public court services generally. The approach to related innovations such Online Dispute Resolution ('ODR') has been patchy and minimalist.

¹⁶ Australia's constitutional court and ultimate court of appeal from Federal and State courts: High Court of Australia 'Role of the High Court' at <<https://www.hcourt.gov.au/about/role-of-the-high-court>> [accessed 29 December 2020].

¹⁷ Chief Justice Sir Gerard, Brennan, 'Opening address', (Speech delivered to AIJA Technology for Justice Conference, Melbourne, 23 March 1998) p. 6.

¹⁸ Sandra Davey, 'Managing the Magic—Standards for Australian Electronic Legal Information', (1998) 6(2) *Australian Law Librarian* pp. 73–79 at pp. 77–78; Graham Greenleaf 'AustLII's Roles' *Journal of Law and Information Technology* (1997) 2 at <https://warwick.ac.uk/fac/soc/law/elj/jilt/1997_2/greenleaf/austlii1/#a1.1> [accessed 29 December 2020].

¹⁹ Martin Gruen, 'Courtroom Audio, Video, and Videoconferencing' (Paper presented at the 5th National Court Technology Conference, 9–12 September 1997). For convenience, and for consistency with the enabling legislation, we use the term 'audio-visual link' (AVL) to encompass all technologies used to provide real time audio and visual links in courts, e.g. Closed-Circuit Television, fixed infrastructure videoconferencing systems, and internet-based software, e.g. Skype, that can be used on a desktop computer or mobile device.

²⁰ Rowden, E., Wallace, A., Tait, D., Hanson, M. & Jones, D. *Gateways to Justice: design and operational guidelines for remote participation in court proceedings*, University of Western Sydney, 2013, pp. 21–22.

²¹ *Ibid.*

²² *Ibid.*, p. 22; Carolyn McKay, *The pixelated Prisoner*, Routledge, 2018, p. 10.

²³ Supreme Court of Victoria, supra note 2, p. 16. County Court of Victoria, *Annual Report 2018–19*, p. 7. Magistrates Court of Victoria, *Annual Report 2018–19*, p. 9.

²⁴ Rowden, et al. supra note 20, p. 27: discretions that typically involve the application of considerations such as 'fairness', 'the interests of justice' and, sometimes, 'convenience'.

²⁵ Including perceptions about the impact of the technology on the way that the remote participant is perceived by those in the courtroom, their behaviour, the ability to confront a witness and challenge their credibility, the dignity of the court, and a range of practical concerns about the operation of the technology: Rowden, et al. supra note 20, pp. 31–33, also noting the lack of empirical research on these issues: pp. 24–25.

A successful ODR pilot program in VCAT in 2018,²⁶ was subsequently not funded for full implementation, and there have been no attempts in Victoria, or elsewhere in Australia, to set up anything akin to the highly successful ‘Money Claim Online’²⁷ portal in England and Wales, or the British Columbia model of exclusively on-line civil dispute resolution for categories of small claims.²⁸

There has also been a lack of consistent investment in technology infrastructure and software that are foundational to further innovation in courts. In Victoria, an urgent need to improve the outmoded case management system in the Magistrates Court was identified in 2016²⁹ but a new system will only finally come online in 2021.³⁰ Progress towards electronic filing has been gradual and, until recently, tended to remain optional, rather than mandatory. Because of the slow move to electronic filing, digital case files are not yet the norm in all courts. While the Victorian Supreme Court and the County Courts had made significant progress towards full electronic filing prior to the pandemic,³¹ the two high-volume jurisdictions, the Magistrates Court and VCAT, were still operating without electronic filing and largely reliant on paper-based case-files.³²

Given this background, it was notable that the Victorian courts’ response to COVID-19 centres on a claim that the pandemic is providing an opportunity for digital innovation, in the form of ‘virtual hearings’. In the following section we consider that claim, after briefly detailing the impact of COVID-19 restrictions on the courts.

COVID-19: An opportunity for innovation?

The COVID-19 public health emergency began to impact the Victorian Courts in March 2020, when the Government proclaimed a State of Emergency.³³ Restrictions introduced to slow the spread of the virus included limits on the numbers of persons who could attend indoor gatherings, restricting the reasons for which people could leave home,³⁴ requiring

²⁶ Victorian Civil and Administrative Tribunal (‘VCAT’) *Annual Report 2018–2019*, p. 16.

²⁷ HM Courts & Tribunals Service, ‘Money Claim Online’ at <<https://www.moneyclaim.gov.uk/web/mcol/welcome>> [accessed 29 December 2020].

²⁸ Justice Education Society, 2020, ‘Small Claims BC’ at <<http://www.smallclaimsbc.ca/settlement-options/ODR>> [accessed 29 December 2020].

²⁹ Royal Commission into Family Violence, *Report and Recommendations Volume 3* (March 2016) at <<http://rcfv.archive.royalcommission.vic.gov.au/MediaLibraries/RCFamilyViolence/Reports/Final/RCFV-Vol-III.pdf>> [accessed 29 December 2020] p. 152.

³⁰ Court Services Victoria, *Annual Report 2018–19*, pp. 26–27.

³¹ The Supreme Court has required electronic filing in civil cases since 2018: Supreme Court of Victoria, *Annual Report 2017–19*, 15; the County Court had also mandated e-filing in civil prior to the pandemic: County Court of Victoria, ‘Civil eFiling’ at <<https://www.countycourt.vic.gov.au/going-court/lodging-court-document/civil-e-filing>> [accessed 29 December 2020]. It became mandatory in the criminal cases in both courts in 2019: Supreme Court of Victoria, Practice Note SC CR 9 ‘Joint Jurisdictional Practice Note for the Electronic Filing of Indictments’ 29 August 2019 at <https://www.supremecourt.vic.gov.au/sites/default/files/2019-09/practice_note_sc_cr_9_-_web_1.pdf> [accessed 29 December 2020] but there are significant exceptions for documents that can still be provided in hard copy: Supreme Court of Victoria RedCrest e-filing User Guide (September 2019) at <<https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/commercial-court/redcrest-electronic-filing-user-guide>> [accessed 29 December 2020] p. 5.

³² Magistrates Court of Victoria, *Covid-19 Response Plan*, 9 November 2020 at <<https://www.mcv.vic.gov.au/news-and-resources/publications/covid-19-response-plan>> [accessed 29 December 2020]. Despite an electronic link between the Victoria Police Magistrates Court and police: Royal Commission into Family Violence, *supra* note 29, p. 153. VCAT had been progressively implementing electronic filing on a voluntary basis in some lists, although the take-up rate appears to have slowed in recent years: Victorian Civil and Administrative Tribunal, *supra* note 26.

³³ Minister for Health, *Declaration of State of Emergency*, Victorian Government Gazette No S129 Monday 16 March 2020 p. 1.

³⁴ Deputy Chief Health Officer *Stay at Home Directions* Victorian Government Gazette No S169 Tuesday 31 March 2020, p. 8.

workers to work from home and, during a subsequent 'second wave', the closure of all but essential businesses and services.³⁵ Courts and tribunals, and court attendance, were largely exempted from these restrictions³⁶ and so remained open, but were required to comply with density quotients, social distancing, cleaning, mask-wearing and record-keeping requirements.³⁷

In managing the courts' response, the Chief Justice of Victoria, Anne Ferguson, was keen to assure the public that, rather than simply maintaining operations, COVID-19 would provide an opportunity for the courts *'to move to a more agile and flexible environment'*³⁸ while restricting on-site operations to urgent and priority matters.³⁹ The key to their strategy for continuing to manage the caseload, while minimising the requirement for people to attend court, has been the use of digital technology through 'virtual court', a concept that is central to the claim of innovation.⁴⁰

'A virtual court'?

In court administration and academic literature, the terms 'virtual court' or 'virtual hearings' have been applied broadly, sometimes aspirationally. They refer to an environment where technology enables the conduct of hearings and trials with participants in far-flung places, not dependent on a physical courtroom, with communication between all participants conducted over high-speed, high-quality electronic networks that permit interactive data, voice and visual transmissions.⁴¹ In addition to AVL, enabling the virtual court requires the integration of various software and technical infrastructure necessary to provide case management, electronic filing, legal briefs and research, the court record, evidence and information presentation.⁴²

Although Victorian courts made significant use of AVL prior to the pandemic, the ability to conduct a true 'virtual court' was largely illusory. The use of electronic filing was patchy, digitised case files were only a reality to some extent in the higher courts, and, in most trials,

³⁵ Deputy Chief Health Officer, Various directions in Victorian Government Gazettes Nos S346 Thursday 9 July 2020, S351 Friday 10 July 2020: *Restricted Activity Directions (Restricted Areas) (No 6)* and Victoria State Government, Department of Health Housing and Community Services 'Stage 4 Restrictions' at <<https://www.dhhs.vic.gov.au/sites/default/files/documents/202008/Permitted%20Work%20Premises%20for%20the%20purposes%20of%20the%20Restricted%20Activity%20Directions%20%28Restricted%20Areas%29%20%28No%206%29-05082020.pdf>> [accessed 29 December 2020].

³⁶ Directions issued by Deputy Chief Health Officer, Victorian Government Gazette Nos S135 Thursday 19 March 2020, S142 Sunday 22 March 2020, S156 Thursday 26 March, S169 Tuesday 31 March 2020, S191 Wednesday 8 April 2020, S194 Tuesday 14 April 2020, S199 Saturday 18 April 2020, S206 Saturday 25 April 2020; Chief Health Officer *supra* note 36, p. 11.

³⁷ Chief Health Officer: Various directions in Victorian Government Gazette No S492 Monday 28 September 2020 and subsequent amendments: in Nos S515 Monday 12 October 2020, S531 Monday 19 October 2020, S548 Tuesday October 2020, S552 Wednesday 28 October, No. S555 Thursday 29 October.

³⁸ Chief Justice Anne Ferguson *supra* note 5.

³⁹ Priority matters in the Magistrates Court included bail applications and plea hearings, cases involving those in custody and family violence applications: Magistrates Court of Victoria, 'Chief Magistrate Judge Lisa Hannan Introduces Online Magistrates Court' 16 July 2020 at <<https://www.mcv.vic.gov.au/news-and-resources/news/chief-magistrate-judge-lisa-hannan-introduces-online-magistrates-court>> [accessed 29 December 2020]. See also Supreme Court of Victoria, 'Changes in Response to COVID-19' 20 March 2020 at <<https://www.supremecourt.vic.gov.au/news/supreme-court-changes-in-response-to-covid-19>> [accessed 29 December 2020].

⁴⁰ Supreme Court of Victoria, 'Virtual Hearings' at <https://www.supremecourt.vic.gov.au/law-and-practice/virtual-hearings> [accessed 29 December 2020].

⁴¹ Australian Law Reform Commission, *Technology – what it means for Federal Dispute Resolution*, Issues Paper No 23 (1998) at para 8.26; Bermant G, and Woods WD, 'Real Questions About the Virtual Courthouse' (1995) 31(10) *Trial*, p. 43.

⁴² Fred Lederer, 'The Road to the Virtual Courtroom? A Consideration of Today's – AND Tomorrow's – High-Technology Courtrooms' (1999) (Spring 1999) (50) *South Carolina Law Review* pp. 799–844, pp. 803–826.

documentary proof and other case documents were only supplied in hard copy. There was also insufficient integration between AVL, e-filing, case management and digitised case files to enable courts to switch seamlessly to virtual mode.

The Victorian courts and VCAT made significant progress on some of the components of the virtual court during COVID-19 restrictions. The courts' AVL network has been further upgraded⁴³ and its use significantly increased, facilitated by a change to the legislation broadening the courts' powers,⁴⁴ so that matters are only heard 'in person' if they cannot be dealt with in any other way.

The Magistrates Court quickly doubled its regular daily number of AVL hearings,⁴⁵ and created an Online Magistrates Court, staffed by selected magistrates, to deal with long lists of matters identified as suitable for AVL adjudication.⁴⁶ VCAT is also making extensive use of AVL as an alternative to in person hearings.⁴⁷ The Supreme Court and County Courts have used AVL for most criminal matters that do not require a jury 'such as pleas, applications, case conferences and preliminary hearings'⁴⁸ and applications to determine mental fitness to stand trial.⁴⁹ AVL is also being used to enable the media and the public to access court proceedings.⁵⁰

The increased use of AVL in the pandemic has led to greater standardisation and court control of the process, including the provision of detailed information and guidance to the profession and the public through the issue of user guides, templates for e-court books and fact sheets for practitioners. The guidelines outline operational and technical requirements, protocols for court dress, etiquette, and even digital backdrops.⁵¹ In another marked departure from previous practice, the courts are also using a wide variety of proprietary AVL platforms to supplement the court's own videoconferencing network.⁵² The pandemic has prompted a renewed push for electronic filing and the provision of electronic case documents⁵³ – the other dimensions of 'the virtual court'.

⁴³ Karen Percy, 'Justice hasn't changed, just the mode of delivery': How Victorian courts are adapting to coronavirus' 20 May 2020, ABC News at <<https://www.abc.net.au/news/2020-05-20/coronavirus-pandemic-for-victorian-courts-judges-justice-system/12258858>> [accessed 29 December 2020].

⁴⁴ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) and *Victorian Civil and Administrative Tribunal Act 1998* (Vic). *Open Courts Act 2013* (Vic) as amended by *COVID Act 2020* (Vic).

⁴⁵ Percy, supra note 43.

⁴⁶ Magistrates Court of Victoria, supra note 39.

⁴⁷ Victorian Civil and Administrative Tribunal, 'VCAT hearings during coronavirus restrictions' at <<https://www.vcat.vic.gov.au/news/vcat-hearings-during-coronavirus-restrictions>> [accessed 29 December 2020].

⁴⁸ Supreme Court of Victoria, supra note 39. While it has not been possible to conduct jury trials 'virtually', they have been resuming in compliance with social-distancing requirements using of AVL in the jury management process to avoid large numbers of potential jurors congregating in the courthouse for extended periods of time.

⁴⁹ Supreme Court of Victoria, 'Managing Crimes Mental Impairment Applications During COVID-19' 31 March 2020 at <<https://www.supremecourt.vic.gov.au/news/managing-crimes-mental-impairment-applications-during-covid-19>> [accessed 29 December 2020].

⁵⁰ For details see Supreme Court of Victoria, supra note 40.

⁵¹ *Ibid.*

⁵² In the Supreme Court, WebEx in criminal cases, and WebEx, Zoom or Skype for Civil (non-criminal) cases: Supreme Court supra note 40; WebEx in the Magistrates Court: Percy, supra note 43, and Zoom in VCAT: supra note 47.

⁵³ The Supreme Court has extended electronic filing to the Probate Division and made it mandatory: Michael J Halpin, 'Launch of Redcrest-Probate-1 July 2020' Supreme Court of Victoria Practice Note, 22 May 2020, at <<https://www.supremecourt.vic.gov.au/law-and-practice/practice-notes/notice-to-the-profession-launch-of-redcrest-probate-1-july-2020>> [accessed 29 December 2020]. The court also now requires lodgement of documentation in digital form, and has published detailed requirements for electronic court books: Supreme Court of Victoria, supra note 39 and 'Guidance for Civil Proceedings affected by Coronavirus' at <<https://www.supremecourt.vic.gov.au/news/guidance-for-civil-proceedings-affected-by-coronavirus>> [accessed 29 December 2020]. The County Court has also tightened its requirements in criminal cases, so that most documents will no longer be accepted in hard copy: County Court of Victoria 'eLodgment' at

The Victorian courts have made significant progress towards truly 'virtual courts' during the pandemic. They have certainly been set up rapidly, driven by the courts' imperative to serve the public despite COVID-19 restrictions. However, rapid change does not, of itself, amount to innovation. Nor is it necessarily indicative of a longer term commitment to innovation.

Innovation or improvement?

In court reform literature 'innovation' is generally contrasted with 'improvement', as Reiling explains: 'Within the area of reform, the term improvement is reserved for remedying existing processes. Innovation is the term reserved for developing new processes and services not in existence before.'⁵⁴ However, we note that the boundaries between 'innovation' and 'improvement' are often blurred in some of the literature,⁵⁵ particularly, in the way 'innovation' is sometimes used to encompass incremental change,⁵⁶ possibly because of its greater public relations cachet.

'Virtual hearings' in Victoria during the pandemic are not a new process or service but simply examples of the use of technology to deliver an existing service in a new (albeit familiar) way. The courts are using the tools at hand to improve and adapt, in a way that is entirely consistent with Australia's past approach to problem-solving. This pragmatic approach has been facilitated by the fact that only a few of the measures to cope with COVID-19 restrictions have required legislative amendments. Most draw on the discretions contained in existing legal provisions and the courts' inherent rule-making powers.⁵⁷

Given these apparently far-reaching changes, how readily will they translate into lasting innovation? To highlight the extent of the challenge, we turn next to John Kotter's theory of innovation to identify not only the point of departure, but also the next steps to achieve effective innovation in courts.

Kotter's Innovation Framework

The model proposed by Kotter⁵⁸ is one of the most commonly used frameworks for planning and implementing innovation in organisations. While certainly not the only innovation model,⁵⁹ it has the advantage of taking a top-down approach to change, which appears

<<https://www.countycourt.vic.gov.au/going-court/lodging-court-document/elodgement>> [accessed 29 December 2020]. Implementation of the Magistrates Court's new case management system to allow full electronic filing has been accelerated, with a new e-lodgement portal currently being rolled out: Court Services Victoria, 'Case Management System Project' Monday 26 October 2020 at <<https://www.courts.vic.gov.au/projects/case-management-system-project>> [accessed 29 December 2020]. VCAT has created online application forms and 'smart forms' in several of its jurisdictions: Victorian Civil and Administrative Tribunal, *Annual Report 2019–2020*, at <<https://www.vcat.vic.gov.au/media/394/download>> [accessed 11 February 2021] at pp. 6, 8, 30.

⁵⁴ Dory Reiling *Technology for Justice*, Leiden University Press, 2009 p. 27.

⁵⁵ Borins, S. cited in Machado, M., Sousa, M., Rocha, V. and Isidro, A. 'Innovation in judicial services: a study of innovation models in labor courts', *Innovation & Management Review*, (2018) 15(2) pp. 155–173, at p. 159; Jackson, Brian A. Duren Banks, John S. Hollywood, Dulani Woods, Amanda Royal, Patrick W. Woodson, Nicole J. Johnson, *Fostering Innovation in the US Court System*, Rand Corporation, 2016 p. ix.

⁵⁶ Jackson et al, *ibid.*, p. 1.

⁵⁷ The Supreme Court, in particular, has made it clear that it has the power to adopt flexible rules and procedures to accommodate the changing circumstances associated with the pandemic and that it expects the legal profession to adapt accordingly: Supreme Court of Victoria 'Guidance for Civil Proceedings Affected by Coronavirus', *supra* note 53 and: Supreme Court of Victoria 'Guidance for Criminal Proceedings Affected by Coronavirus' 7 May 2020 at <<https://www.supremecourt.vic.gov.au/news/guidance-for-criminal-proceedings-affected-by-coronavirus>> accessed 29 December 2020].

⁵⁸ J. Kotter, *Leading Change*, Harvard Business School Press, Boston, 1996.

⁵⁹ See, for example, the McKinsey model: Essa Basford and Bill Schaninger, 'The 4 building blocks of change' April 11, 2016, *McKinsey Quarterly* at <<https://www.mckinsey.com/business-functions/organization/our-insights/the-four-building-blocks-of-change>> [accessed 29 December 2020].

well-suited to the hierarchical nature of courts. Its drawback, however, is that it was developed in the private sector, so may need to be tailored to the specific bureaucratic and political environments which shape innovation in the public sector.⁶⁰

Kotter's model **Figure 1** identifies 8 organisational stages in planning and implementing innovation:

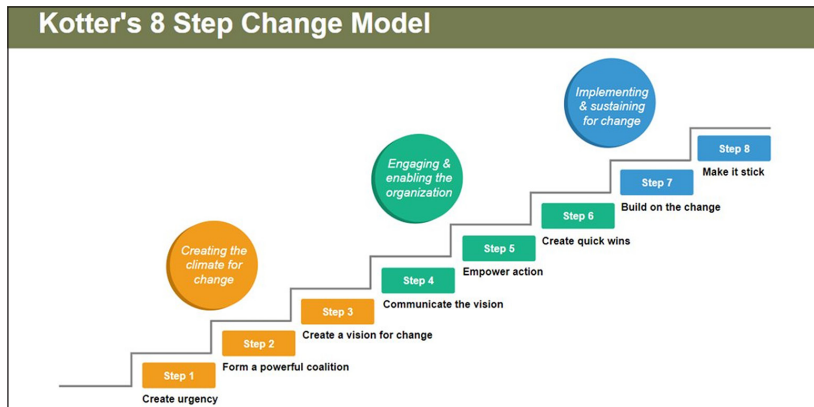


Figure 1: Kotter's innovation framework.

As is evident both from the measures adopted by Victorian courts, and the public announcements made by the Chief Justice and individual courts, the COVID-19 crisis certainly created the sense of urgency which placed the courts on Step 1 of the model.

While the public messaging suggests a desire by the Chief Justice to be perceived to be leading the response, the nature of leadership in the courts makes it highly likely that the statements reflect a general consensus of the Courts Council, the governing body comprised of all heads of jurisdiction (Step 2 coalition). However, the various messages and specific actions adopted by individual jurisdictions do not reflect any sense of overall vision or strategy (Step 3).

Given that the Victorian courts appear to be at an early stage of their innovation journey, it is useful to consider what factors might influence, advance or impede, their progression along Kotter's framework. A small body of work has considered innovation in the courts generally, and to a lesser degree, digital innovation.

The most comprehensive consideration of innovation in the US Courts, the Rand report⁶¹ focussed on the creation of an innovation *agenda*, rather than an examination of the innovation *process* in courts. Bowen and Whitehead identify a number of practical and structural challenges, but these are specific to therapeutic courts innovation.⁶²

An overview of European jurisdictions found that innovations designed to implement the delivery of electronic services in the public sector require institutional as well as technological change, a particularly difficult task in courts because:

The judiciary is a normatively thick public domain, with a heavy regulative status and a bulk legacy system that makes it quite recalcitrant to innovation [citation omitted].

⁶⁰ E. Aldemir, 'Models and Tools of Change Management: Kotter's 8 Steps Change Model' at <DOI: 10.13140/RG.2.2.16064.07688> [accessed 29 December 2020] p. 11.

⁶¹ Jackson et al, *supra* note 55.

⁶² Bowen, Phil and Whitehead, Stephen, *Better Courts: Cutting Crime Through Justice Innovation*, Center for Justice Innovation, 2013, p. 19.

Problems of authority, autonomy, control, territorial jurisdiction, legal validity and legitimacy make all efforts at introducing ICT to the judiciary rather cumbersome.⁶³

Economist Ron Boschma's influential 'proximity theory', developed in the field of human geography, provides, we suggest, provides further insights into the difficulties associated with achieving innovation in the Victorian (and other) courts.

Boschma's Proximity Theory Of Innovation

Boschma proposes 5 five types of inter-organizational relationships which can have both positive and negative impacts on innovation – geographical proximity, social proximity, cognitive proximity, institutional proximity and organisational proximity.⁶⁴ Applying these to the Victorian courts, we see either an absence of proximity or conditions in which proximity operates against, rather than supports, innovation.

- **Geographical proximity** (the 'water cooler effect') refers to 'the spatial or physical distance' between actors, both in absolute and relative terms.⁶⁵ Closeness is theorised to bring people together which, in turn, contributes to the sharing of contacts and the exchange of tacit knowledge which contributes to innovation.⁶⁶

In courts, the architecture, especially of the older courts but sometimes replicated even in modern buildings, is not conducive to regular interaction. The long, largely empty corridors, with their labyrinthine offices encouraged social distancing, well before it became a public health requirement. This is reinforced by the remoteness of social proximity among judicial officers.⁶⁷

- **Social proximity** refers to relations that are socially-embedded, that is, involving 'trust based on friendship, kinship and experience.'⁶⁸ High levels of trust and commitment are thought to stimulate interactive learning, thus contributing to innovation.⁶⁹

Judges are frequently perceived as belonging to an exclusive and prestigious club. In Australia, most are appointed later in their professional life after successful careers, generally as courtroom advocates.⁷⁰ Their professional lives are shaped by a set of long-standing values and traditions, and as practising lawyers, they are likely to have formed long-standing social relationships with others, sharing a common educational, social and professional background.⁷¹ However, although judges may enjoy good collegial relations with their peers, especially in social and formal or ceremonial settings, they are more likely to have regular, and closer, interactions on a day to day basis with their (junior) personal support staff and court officers.

⁶³ Francesco Contini and Giovan Francesco Lanzara, *ICT and Innovation: European Studies in the Making of E-Government* Palgrave MacMillan, 2009, p. 3.

⁶⁴ Boschma R. A. (2005) Proximity and innovation: a critical assessment, *Regional Studies* 39, 61–74, 61.

⁶⁵ *Ibid.*, p. 64.

⁶⁶ *Ibid.*, p. 69. Geographical proximity is generally thought to work as an adjunct to other types of proximity, rather than being sufficient to achieve innovation on its own: p. 70.

⁶⁷ Opportunities for geographical proximity in courts may occur when judges share common recreation or other facilities (libraries, common rooms), serve on court committees together, or attend court social events, however these may not be regular, or even frequent, occurrences.

⁶⁸ *Ibid.*, p. 68.

⁶⁹ *Ibid.*

⁷⁰ For data on the professional background of Australian judges, see Kathy Mack and Sharyn Roach Anleu 'The National Survey of Australian Judges: An overview of findings' *Journal of Judicial Administration* (2008) 18 JJA pp. 5–21, pp. 12–14.

⁷¹ In fact, there is little empirical research on judicial demographics in Australia, see: Mack and Roach Anleu *ibid.*, for some demographic data comparing the background of judges with those of the general population: pp. 10–14.

Judicial culture, ideologically and in practice, is also highly individualistic. In their previous role as advocates, judges will have operated essentially as sole proprietors of their own business enterprise, directly competing for work against each other as advocates in the adversarial courtroom.

As a judge, each will control their own courtroom and experience a degree of separateness that is also mandated by the high value accorded to judicial independence. Independence is broadly defined and highly prized. It is generally understood to not just encapsulate the common law ideology which gives the judiciary freedom from interference by executive government and other external influences, but also encompasses the importance of each judge arriving at their own in decision in each case, with their interpretation of the law constrained only by the common law doctrine of precedent.⁷²

- **Cognitive proximity** posits that creating opportunities for knowledge creation and learning requires that the cognitive base of each heterogeneous actor is 'close enough to the new knowledge in order to communicate, understand and process it successfully.'⁷³ Successful digital innovation in courts requires a combination of diverse, complementary capabilities – legal, technical and administrative.

Victorian judges are legal specialists and most do not have strong information technology backgrounds or experience, so that their cognitive base will be some distance from those of technological experts. The business model they have been socialised into means they are likely to lack any experience of leading, or even having been involved in, projects that involve organisational change, especially technological. They are also likely to exhibit a cognitive bias that favours logical step-by-step problem-solving, mostly by identifying and attributing blame.⁷⁴ As Reiling has observed, this approach to legal decision making sits awkwardly with the methodology of 'agile product development', the current recognised IT industry standard for the development of digital processes, which provides 'a framework for experimentation' in which 'the line between design, development and implementation becomes blurred.'⁷⁵

- **Institutional proximity** envisages a pro innovative environment where actors share 'the same institutional rules of the game, as well as a set of cultural habits and values.'⁷⁶ However, Boschma acknowledges that institutional proximity can also create 'institutional rigidity [that] leaves no room for experiments that are required for the successful implementation of new ideas and innovations.'⁷⁷

In Victoria, as previously noted, the prevailing judicial culture is likely to have little tolerance for the acceptance of risk that comes with experimentation. As a result, it is likely that these courts tend to operate as a 'closed network' brooking little room for outsiders with new ideas.⁷⁸

⁷² See, for eg. Australian Institute for Judicial Administration, *Guide to Judicial Conduct I*, 3rd edition, AIJA, 2017, pp. 5–8.

⁷³ Boschma & Lambooy cited in Boschma supra note 64, p. 63.

⁷⁴ Dory Reiling, 'Court Information Technology: hypes, hopes and dreams' in *New Pathways to Civil Justice in Europe*, (Springer Nature, forthcoming).

⁷⁵ Ibid.

⁷⁶ Zukin & DiMaggio cited in Boschma supra note 64, p. 68.

⁷⁷ Boschma supra note 64, p. 68.

⁷⁸ An observation that is consistent with a previous examination of the application of technology in the Victorian courts: Parliament of Victoria, Law Reform Committee *Technology and the Law* (May 1999, Melbourne, Australia) p. 30.

- **Organizational proximity**, that is, ‘the rate of autonomy and the degree of control that can be exerted in organizational arrangements’⁷⁹ is theorised to promote learning and innovation by facilitating the transfer and exchange of knowledge.⁸⁰

Although Victoria’s courts may be perceived as hierarchical in cultural terms, the Chief Justice and other heads of jurisdiction have not been invested with strong powers of management and regulation.⁸¹ The Chief Justice is legally defined as the ‘first among equals’ and individual judges work in a highly autonomous fashion, exercising substantial discretion over their approach to, and management of, their caseload. As a result, we suggest that the courts operate organisationally as a ‘loosely coupled network’,⁸² although devoid of the degree of co-ordination and integration necessary to create the degree of organisational proximity required to achieve real change.⁸³

Despite this rather pessimistic assessment of the application of theoretical models of innovation to courts historically, it is clear from the Chief Justice’s recent communications that the courts are, at the very least, keen to progress an innovation agenda in response to COVID restrictions. Further into the pandemic, the Chief Justice declared:

“[The change] has shown us we didn’t need to be afraid. There’s a real upside, an opportunity to drop the barriers to look at different ways to do things because we’ve had to.”⁸⁴

Given that evident desire, and assuming it is more than a public relations exercise, we now consider whether the Victorian courts’ experience during the pandemic can lay the foundation for realizing Kotter’s 8th level of transformative change – a judicial culture which supports and promotes on-going technological innovation.

COVID’s Legacy of Digital Innovation?

In response to the COVID-19 crisis Victorian courts were able to pivot to on-line justice in a relatively short period. But will the changes stick post-COVID or will courts ‘flip back’ to their pre-COVID ways once the crisis has passed? A discussion of this question is not necessarily specific to any particular technology, but rather depends on the cultural factors which inhibit or enable digital innovation.

Drawing on both Kotter and Boschma’s theoretical frameworks, we reconsider 3 interrelated factors which give us cause for optimism.

1. Institutional Proximity & Creating and Communicating the Vision for Change

The Chief Justice and the Courts Council have invested in a well-publicised agenda for change grounded in technological innovation. The Chief Justice’s evident desire for the courts to be perceived as agile, responsive and in touch in dealing with COVID-19 suggests that she has perceived a risk to public trust and confidence in courts if they are seen to be out of step with other sectors of the economy and the public sector.

⁷⁹ Boschma supra note 64, p. 65.

⁸⁰ Ibid.

⁸¹ A recent change to the law gave the Chief Justice explicit responsibility for ensuring that the business of the court is carried out and the powers to do all things necessary or convenient for that purpose: *Supreme Court Act 1986 (Vic)* s.28AAA. The extent of this power remains untested.

⁸² An organisational arrangement theorised to be conducive to interactive learning and information exchange: Boschma supra note 64, 65.

⁸³ Ibid., pp. 65–66, and sources cited there.

⁸⁴ Percy, supra note 43.

The tone of the communications issued by the Chief Justice's office directed to stakeholders — the media, executive government, the legal profession and the public — sought to reassure them that the courts could do more than merely 'cope', asserting that courts were actually at the forefront of digital developments. For courts, resiling from such a commitment would pose more than merely a reputation risk. Potentially, it undermines the legitimacy on which they depend to maintain public confidence. There is thus a strong ideological foundation for continuing along the path of digital innovation set during COVID-19.

A related ideological rationale is the legal system's commitment to 'access to justice' — the cornerstone of its claim to ensuring fairness and equality before the law. The pandemic accelerated the digitization of services across both the public and private sectors. Undoubtedly, the public's experience of online services such as tele-health and education will heighten expectations for accessible digital delivery of legal services beyond the pandemic. These expectations accord with the dictates of legal ideology that courts should be open and accessible.

The business model of law firms was disrupted well before COVID-19. Their costing model is still largely based on time and clients are increasingly being priced out of the legal market. Efficiency and productivity gains were the only way they could survive aggressive competition from technology based consortia and other industries.⁸⁵ This sector of the legal profession fully appreciated the need for change in court operations as a way of reducing their own bottom line. There is also evidence that the criminal bar and legal aid sector were becoming increasingly concerned with the inefficiencies of court operations prior to the pandemic.⁸⁶

This increased emphasis on messaging, collaboration and consultation, suggests that the courts are now cognizant of the need to bring the profession with them on their innovation journey. It also signals a shift in institutional values which now appear to be disposed positively toward innovation and to recognizing the importance of technology in court operations.

During COVID-19, the courts started to meet the demands of the legal profession for efficiency gains through technology. They increased the frequency of their communications with the profession⁸⁷ and the foreshadowed easing of COVID-19 restrictions in September brought an announcement of a co-ordinated response between the profession and other justice stakeholders.

A key element of the change is leadership. The Chief Justice has appointed a working group of the Courts Council headed by the State Coroner to oversee the innovation agenda. The latter, a County Court judge, has an atypical background for judicial office. Significantly, he held senior management roles across the legal sector, including the private profession, government and the public sector where he championed technology.⁸⁸ It remains to be seen, however, whether the governance structure of the courts will be robust enough to look beyond immediate priorities and the concerns of individual jurisdictions to adopt longer term, whole of court thinking.

2. Organisational proximity and Building on the Change

Within courts, the alliances formed and the reliance on different kinds of expertise, seem to have given rise to new organisational arrangements that are likely to have engendered new respect for, and trust among, groups which had hitherto rarely operated as agile teams. At the level of the Courts Council, the need to ensure consistency between the different levels of the

⁸⁵ Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts*, Oxford University Press, 2015, pp. 66–71.

⁸⁶ Dan Nicholson, Director of Criminal Law, Victoria LegalAid, quoted in Percy, *supra* note 43, describing the situation in the lower courts as 'paper-based chaos.'

⁸⁷ The County Court, for example issued 33 'Notice to Practitioner' circulars in 2020, with only one previously in 2019.

⁸⁸ Chief Justice Anne Ferguson, 'Easing of Coronavirus (COVID-19) restrictions joint statement' September 2020 at <<https://mcv.vic.gov.au/news-and-resources/news/easing-coronavirus-covid-19-restrictions-joint-statement>> [accessed 30 December 2020].

courts in relation to the use of technology, and in relation to the messaging to be given to the public, the media and the legal profession, is likely to have required a high degree of collaboration among the various judicial members. At the level of individual courts, working groups formed to develop and implement strategies to cope during COVID-19 restrictions, such as the project team responsible for developing and piloting the Online Magistrates Court⁸⁹ are also likely to have enhanced organisational proximity.

3. Social and Cognitive Proximity & Empowering Action and Quick Wins

The rapid changes required to make the courts function effectively during COVID-19 meant that judges, court administrators and IT specialists needed to work in close collaboration, for example, to work out in detail how 'virtual hearings' would operate. This experience will have promoted greater social proximity as well as enhanced cognitive proximity among all parties in relation the operation of the technology and court processes.

Judges also had to master new skills which should presumably make them more open to acquiring greater levels of technological competence in the future. The COVID experience probably accelerated an inevitable generational shift in the skills demanded of judges in the contemporary digital world. But, taken as a whole, the COVID experience probably brought forward interdisciplinary interdependence, which is likely, over time, to erode the traditional hierarchical isolation of judicial officers from other court actors.

Notwithstanding this evidence of greater cognitive, institutional and organizational proximity, in a conservative culture, these developments could turn out to be short-lived. The presumption in favour of AVL for example, may give way to a strong tradition of judicial discretion and a legal profession where advocates developed their careers in an era where in-court hearings were the norm.

The attitude of government and its preparedness to support a 'new normal' of technological innovation in the courts will be a critical factor in advancing any innovation agenda. Before making a significant funding investment in the courts, government will need to be confident that the courts are up to the job of transforming themselves. The level of trust between the judiciary and the executive branch of government has varied over time, and self-management by the courts⁹⁰ was intended, in part, to repair relations. However, paradoxically, court self-management means that government is now once removed from responsibility for the operation of the courts. Under this governance model, it is essential that the courts have the capacity to negotiate effectively on their own behalf and that government has confidence in the courts' ability to deliver on any project that government agrees to fund. Whether these conditions are fulfilled post-COVID remains to be seen.

Conclusion: Conditional Optimism?

It is clear that COVID19 has ushered in significant improvements to the Victorian courts' technological infrastructure. More tellingly, there is an awareness among the judiciary of their vulnerability if their capacity to serve the public does not keep pace with community expectations.

The pandemic has demonstrated a new capacity in the Victorian courts for experimentation, acceptance of risk, and the possibility of trial and error, all occurring in a climate of extreme workload pressure. That experience may turn out to be the most positive predictor of their capacity for future innovation.

⁸⁹ Magistrates Court of Victoria, *supra* note 32.

⁹⁰ Tin Bunjavec, *Judicial Self-Governance in the new Millennium – an Institutional and Policy Framework*, Springer, 2020 p. vi–vii.

The courts, however, remain dependent on the executive government for funding. Here, the immediate outlook gives some grounds for optimism. Despite a downturn in economic conditions associated with the pandemic, the crisis has enabled the courts to access additional funding for digital initiatives to cope with the workload during the COVID-19 restrictions. The State budget in November, for example, included expenditure of \$AU47.3 million in the next year 'to improve audio-visual technology and provide greater flexibility in court and justice processes' creating 'a faster, more adaptable and efficient court system'.⁹¹

However, to make the reform agenda stick in the courts, the vision, and funds to realise it, need to go beyond the low threshold of 'improvement'. Retrofitting technology to existing processes and practices is not, we argue, the path to true digital innovation.⁹² Now that the courts have demonstrated the will, the open question is, can government provide the way to fund truly transformative change in the courts?

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Competing Interests

The authors have no competing interests to declare.

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⁹² Reiling, *supra* note 74.

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