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DEVELOPMENTS IN ADMINISTRATIVE LAW

*Ron Fraser**

Government initiatives, inquiries, legislative and parliamentary developments

Strategy paper concerning federal civil justice system

The Commonwealth Attorney–General has released a major strategy paper prepared by the Attorney–General's Department concerning the federal civil justice system. It builds on previous work in this area, including the Australian Law Reform Commission's report, *Managing Justice* ... . The paper is organised around four key goals: promoting an understanding of the system to enhance public confidence in it; supporting access to justice for cases with merit; facilitating the resolution of disputes at the lowest appropriate level; and maximising the performance of the components of the system. Among the recommendations aimed to improve access to the legal system for cases with merit, including actions brought by self-represented litigants, are proposals to increase the availability of legal advice through such means as additional Community Legal Centres, and finding ways to expand court services in rural, regional and remote Australia. Other recommendations are designed to increase knowledge and use of Alternative Dispute Resolution options in the court system in appropriate cases. Some recommendations are aimed at preventing lawyers from encouraging unmeritorious litigation, and at increasing court control of the course of litigation, including cases where there are no real prospects of success, and some propose specific powers for the High Court to be able to deal expeditiously with unmeritorious actions. The paper contemplates a future in which the federal court system is more integrated, and in which the Federal Magistrates Court conducts the vast majority of less complex federal civil litigation. (**Commonwealth Attorney–General, Media Release**, 9 March 2004; ***Federal Civil Justice System Strategy Paper***, December 2003, available from website: www.ag.gov.au/civiljusticestrategy)

Human Rights Act passed by ACT Legislative Assembly

After consideration of the report of the ACT Bill of Rights Consultation Committee (see (2003) 38 *AIAL Forum* 1–2), the ACT Government introduced the Human Rights Bill 2003 which was passed on 2 March 2004. The legislation relates to the rights contained in the International Covenant on Civil and Political Rights, but not at this stage those in the International Covenant on Economic and Social Rights as the committee had recommended. The Act is based on the 'dialogue' model whereby legislation must be interpreted where possible to be compatible with the rights contained in the Human Rights Act, and new and existing legislation will need to be scrutinised for its consistency with the Human Rights Act. Where proposed new legislation does not meet those standards, the Legislative Assembly may still enact it but must explain the necessity for doing so. A Human Rights Commissioner will review existing legislation and conduct human rights education programs. Where an issue arises in an existing proceeding, the Supreme Court may make a declaration that legislation is incompatible with the Act. While such a declaration does not affect the validity of the law or the rights of anyone, the Attorney–General must table a response in the Assembly. The *Human Rights Act 2004* (ACT) is the first Bill of Rights in Australia; it will come into force on 1 July 2004 and will be reviewed in 2009. (**Chief Minister's Media Release**, 22 October 2003, including the **Government Response to the Report of the ACT**

Bill of Rights Consultative Committee; and **Chief Minister's Media Release**, 2 March 2004.) See further below Max Spry, The ACT Human Rights Bill 2003: A Brief Survey, page 34; Elizabeth Kelly, Human Rights Act 2004: A New Dawn for Rights protection, page 30.

Commonwealth legislative developments

Government legislative program Autumn 2004

Among the new bills proposed for the Autumn Sittings 2004 are the following, some of which were scheduled for earlier sittings (the list is available from: www.pmc.gov.au/new.cfm; the comments on Bills come from the government release):

- *Customs Amendment Bill*, to amend the principal 1901 Act to reflect elements of the World Trade Organisation Anti-Dumping Agreement and other matters.

- *National Security Information (Criminal Proceedings) Bill*, to put in place measures to safeguard classified information that is tendered as evidence in the course of a criminal proceeding (and see below under heading 'Freedom of information etc' for ALRC discussion paper).

- *Postal Industry Ombudsman Bill* and *Postal Industry Ombudsman Cost Recovery Bill*, to establish a Postal Industry Ombudsman (PIO) within the office of the Commonwealth Ombudsman, and to enact a taxation measure to recover the additional costs of the PIO from Australia Post and other postal industry operators who opt into the scheme.

- *Migration Legislation Amendment Bill*, including provisions implementing the government's response to the recommendations of the Joint Standing Committee on Migration's report on the Deportation of Non-Citizen Criminals (June 1998), and provisions allowing authorised officers to disclose International Movement Records to an individual to whom the record relates or to his or her agent.
  (*Note*: The previously listed *Administrative Appeals Tribunal Bill* does not appear on the Autumn Sittings list.)

Other legislative developments

- The Labor Opposition reversed its opposition to the *Criminal Code Amendment (Terrorist Organisations) Bill 2003* that allows the listing of terrorist organisations (other than those listed by the UN) by regulation rather than by a decision of the Attorney–General (and see (2004) 40 *AIAL Forum* 3 on previous legislative measures). The Bill, as amended in the Senate and accepted by the House on 4 March 2004, includes mandatory consultation with State and Territory leaders, as well as the Federal Opposition Leader, provision for appeals to the Federal Court by banned organisations, and expiry of listings after two years.

- The *Age Discrimination Bill 2003* and its consequential provisions bill were passed by the House at the end of November and introduced into the Senate on 1 December 2003. See also Report of the Senate Legal and Constitutional Legislation Committee on Provisions of the Age Discrimination Bill 2003, tabled on 19 September 2003.

- The *Disability Discrimination Amendment Bill 2003*, introduced into the House of Representatives on 3 December 2003, would ensure a person's drug addiction cannot be the sole basis of a claim of unlawful discrimination, reversing the effect of a Federal Court decision that addiction to a prohibited drug could be regarded as a disability.

- The *Military Rehabilitation and Compensation Bill 2003*, which has a companion consequential amendments and transitional Bill, is discussed briefly below under the heading 'Administrative review'. The Bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for report by 22 March 2004.

Migration legislation

The following are among the legislative developments in this area in late 2003, early 2004:

- *Disallowance of Migration Amendment Regulations 2003 (No. 6)*: These regulations were disallowed by the Senate on a motion by Labor and all non-Government parties other than One Nation. They provided for three matters: to broaden the Temporary Protection Visa (TPV) regime to apply to all asylum seekers arriving in Australia, not just those arriving unlawfully; enabling the grant of TPVs and offshore humanitarian visas for shorter periods than at present; and allowing those TPV holders who had arrived before (but not after) 27 September 2001, and who had stayed in another country on the way to Australia for more than 7 days without seeking protection there, to apply for permanent protection in Australia. The supporters of disallowance noted that it was not technically possible to disallow only the first two sets of provisions as they would have preferred.

- *Migration Amendment (Duration of Detention) Bill 2004*: This Bill replaces a 2003 Bill. As now drafted, it amends section 196 of the *Migration Act 1958* to put it beyond doubt that an unlawful non-citizen must be kept in immigration detention unless a court makes a final determination that (a) the detention is unlawful or (b) he or she is not an unlawful non-citizen. The legislation will prevent the interlocutory release of detainees prior to the resolution of their substantive court proceedings (see, eg *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249, discussed (2003) 36 *AIAL Forum* 9 and (2003) 35 *AIAL Forum* 6–7).

- The *Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003* and the *Migration Agents Registration Application Charge Amendment Bill 2003* were referred to the Senate Legal and Constitutional Legislation Committee which reported on 25 November 2003 that major changes should be made to the legislation.

Review of legal competition in legal services for Commonwealth agencies

A report prepared for the Attorney–General's Department by an independent review, conducted by Ms Sue Tongue, has concluded that the opening up of Australian government legal services to competition from the private sector has been a success in its first four years. It found that a wide range of private firms as well as the Australian Government Solicitor have a strong presence in the government legal services market, and government departments and agencies were generally satisfied with the quality, timeliness and cost effectiveness of legal services they received. There had been a steady increase in legal spending by government departments and agencies, rising from $198 million in 1997 to $242.97 million in 2001–02. The review made a number of recommendations largely concerning the ways in which the Office of Legal Services Coordination could improve the coordination of Commonwealth legal services, many of which have been accepted. (**Attorney–General's News Release**, 24 September 2003; ***Report of a Review of the Impact of the Judiciary Amendment Act 1999 on ... Legal Services and on the Office of Legal Services Coordination***, June 2003, and **Government Response**, September 2003, available at: www.ag.gov.au/JAAReport and www.ag.gov.au/JAAResponse)

Inquiry into the effectiveness of Australia's military justice system

On 30 October 2003 (amended 12 February 2004), the Senate Foreign Affairs, Defence and Trade References Committee was given a reference to conduct an inquiry into the effectiveness of Australia's military justice system. The inquiry will include the general issues of the provision of 'impartial, rigorous and fair outcomes' and mechanisms to include transparency and accountability of procedures, as well as particular issues concerning inquiries into peacetime deaths, mistreatment of personnel, inquiries into administrative or disciplinary action, drug abuse, the deaths of named service people and alleged misconduct in East Timor. Submissions were due by 16 February 2004, and a public hearing was held in Canberra on 1 March 2004. See the Committee's website:
www.aph.gov.au/Senate/committee/FADT_CTTE/miljustice/htm

ATSIC to challenge legality of ATSIS

The Board of the Aboriginal and Torres Strait Islander Commission (ATSIC) has resolved to launch a High Court legal challenge against the Federal Government's decision to establish the executive agency the Aboriginal and Torres Strait Islander Services (ATSIS). (**ATSIC, Media Release**, 11 March 2004)

The courts

Study of outcomes of judicial review

Professors Robin Creyke and John McMillan of the Australian National University have published the results of an empirical study into the outcomes of judicial review. The authors looked at the subsequent administrative history of 300 cases. They found that 'in a surprisingly high number of cases the ultimate decision of the agency was favourable to the applicant', and also examined subsequent changes to legislation or agency practice. (**Robin Creyke and John McMillan, 'Judicial review outcomes – An empirical study' (2004) 11 *AJ Admin L* 82–100)**

All decisions discussed below may be accessed on the Australian Legal Information Institute website: http://www.austlii.edu.au

High Court allows appeal by two Bangladeshi gay men seeking refugee status

By a 4–3 majority the High Court remitted to the RRT for reconsideration two matters in which the RRT had rejected claims for refugee status of two Bangladeshi gay men on the ground that, although homosexual men constituted 'a particular social group' in Bangladesh for purposes of refugee determination, they were unlikely to be persecuted on the basis of their sexuality because they were likely to continue to act 'discreetly'. The majority (McHugh and Kirby JJ, and Gummow and Hayne JJ, in separate joint judgments) accepted the finding on membership of a particular social group, but rejected any formulation that asylum seekers could be required or expected to take steps, or to modify behaviour, to avoid persecutory harm, whether on political, religious or other grounds. The RRT had not considered whether the appellants' 'discreet' lifestyle was a result of a well-founded fear of persecution, and had in effect divided the relevant social group into two groups, 'discreet and non-discreet homosexual males in Bangladesh'. Broadly speaking, the minority (Gleeson CJ, and Callinan and Heydon JJ in a joint judgment) did not consider the RRT had erred: it had not been satisfied as to claims of past persecution or that the appellants' expected expression of their sexuality would be likely to provoke future persecution. Justices Callinan and Heydon also expressed some doubt that sexual inclination or practice necessarily defines a social class for purposes of the definition of a refugee. (***Appellant S395/2002 v Minister for***

***Immigration and Multicultural Affairs; Appellant S396/2002 v MIMA* (2003) 203 ALR 112**; see also (2003) 38 *AIAL Forum* 6)

Failure to give reasons for visa cancellation not jurisdictional error

Mr Palme, a German national who had lived in Australia for 32 years since the age of 10, challenged the Minister's personal decision to cancel his visa on character grounds because of his conviction in 1992 for murder. He had served a minimum sentence of 10 years. The Minister's notification of his decision was accompanied only by a copy of the departmental brief to the Minister which included the Minister's approval of one of a range of options. All judges agreed that the Minister had failed in his duty to provide reasons for his decision: a neutral departmental brief that did not weigh the competing factors and indicate the views of the decision-maker could not be considered to be a statement of reasons. However, four judges (Gleeson CJ, Gummow, Heydon and McHugh JJ) considered that Mr Palme was prevented from challenging the cancellation decision on that ground because of a statutory provision to the effect that failure to comply with the reasons and other requirements of the Act did not affect the validity of a decision. Mr Palme could have brought an action for mandamus to compel the giving of reasons, but could not use the absence of reasons to establish jurisdictional error.

Justice Kirby dissented, holding that the statutory saving provision established the validity of a decision for practical purposes where there had been real but defective compliance with the statutory requirements, but could not serve to protect an 'unreasoned decision-making process' about the applicant's status which was the antithesis of the legislated process and amounted to a constructive failure to exercise jurisdiction: 'Some decisions cry out for a clear explanation.' (***Re MIMIA; Ex parte Palme* (2003) 201 ALR 327**)

In a subsequent decision, the Full Federal Court doubted that an order that the Minister provide a statement of reasons after a court hearing amounted to performance of his statutory duty to provide reasons at the time of notification, given the unreliability of later explanations of decisions. In the event, the Full Court found serious breaches of procedural fairness and set aside the Minister's decision to cancel the appellant's visa on character grounds. (***Dagli v MIMIA* [2003] FCAFC 298**, 19 December 2003; see also ***Preston v MIMIA (No 2)* [2004] FCA 107** where later reasons of the Minister were held inadmissible without consent, or an affidavit by the Minister)

High Court reverses position on application of aliens power to non-citizen Britons resident in Australia

Mr Shaw was born in Britain in 1972, migrated with his parents to Australia in 1974, and did not ever take out Australian citizenship or travel overseas. He was convicted of serious crimes beginning when he was 14. Following the retirement of Gaudron J and her replacement by Heydon J, the latter joined with the three minority judges from an earlier decision (*Re Patterson; Ex parte Taylor* (2001) 207 CLR 391) to hold that the aliens power supported the cancellation of his visa and his deportation. All judges except Heydon J considered that, while in 1901 a 'subject of the Queen' born in Britain who came to Australia would not have come within the aliens power, the situation had changed as a result of constitutional evolution, but they differed as to when this process was completed. Gleeson CJ, Gummow and Hayne JJ in a joint judgment considered the operative date was 1948 (when British nationality laws changed and Australian citizenship was introduced), while McHugh, Kirby and Callinan JJ accepted 3 March 1986 (the date of the coming into force of the various Australia Acts). Justice Heydon left open the question whether in 1901 British subjects were or were not aliens. Justice Kirby criticised the reopening of *Taylor*, which the

joint judgment considered did not rest on clear principle. (***Shaw v MIMIA* (2003) 203 ALR 143**)

Whether aliens power extends to children born in Australia of parents who are not Australian citizens or permanent residents

In a case described by McHugh J as 'probably one of the most important cases th[e] Court has ever had to decide', the High Court has reserved its decision on an application for a declaration that a child born in Australia is an Australian national as a 'subject of the Queen', and therefore not subject to deportation, even though the overseas-born parents of the child were not Australian citizens or permanent residents as required for citizenship by birth since 1986 by section 10(2) of the *Australian Citizenship Act 1948*. (***Singh v Commonwealth of Australia & anor* [2004] HCA Trans 5 & 6**, 10 & 11 February 2004; see also **Research Paper No 3 of 2003–04 (24 November 2003), *We are Australian – The Constitution and Deportation of Australian-born Children*, Commonwealth Parliamentary Library, Information and Research Services,** available from website: www.aph.gov.au/library/pubs/rp/index.htm)

Detention for deportation purposes

In a recent decision, a Full Court of the Federal Court followed a Full Court decision in *Vo v MIMA* (2000) 98 FCR 371 in rejecting an argument that a person can only be held pending deportation under section 200 of the Migration Act for the period reasonably necessary to effect deportation. There was no evidence that the intention to deport the applicant had changed, and delay in effecting his deportation was due in part to legal proceedings he had instituted, although a period of 6 months appeared to be due to bureaucratic inaction. (***Te v MIMIA* [2004] FCAFC 15**, 5 February 2004)

Effects on protection visa application of 'effective protection' of a refugee in another country – Article 33 of the Refugees Convention ('non-refoulement')

Two decisions of different benches of the Full Court of the Federal Court (*NAGV v MIMIA* and *NAEN v MIMIA*) deal with similar fact situations where Jews of Russian origin had a well-founded fear of persecution in Russia for a relevant reason, and were therefore refugees under the Refugees Convention and Protocol, but were legally able to gain 'effective protection' in Israel under its *Law of Return*. In neither case did the applicants wish to take advantage of that law. Both benches dismissed the appeals by the refugees, but for differing reasons. In *NAGV*, all judges considered that an earlier decision of a differently constituted Full Court (*Thiyagarajah v MIMA* (1997) 80 FCR 543) had been wrongly decided, but a majority of the court in *NAGV* (Finn and Conti JJ, Emmett J dissenting) felt compelled to follow the 'developed jurisprudence' of the court flowing from the earlier decision. In *NAEN*, all judges (Whitlam, Moore and Kiefel JJ) accepted that *Thiyagarajah* had been correct in holding that Australia did not have 'protection obligations' to a refugee where Article 33 of the Refugees Convention did not prevent the removal of the refugee to a third country which would provide 'effective protection' under the Convention. In contrast, the judges in *NAGV* were of the opinion that on a correct interpretation 'protection obligations' should be held to arise under the Convention where a person is a found to be a refugee, which would entitle the person to a protection visa. The court in *NAEN* was advised that an application for special leave to appeal had been filed in the High Court in *NAGV*. (***NAGV v MIMIA* [2003] FCAFC 144**, 27 June 2003; ***NAEN v MIMIA* [2004] FCAFC 6**, 13 February 2004)

Misfeasance in public office not established

In a matter that had been remitted by the High Court to the Supreme Court of Norfolk Island, a Full Court of the Federal Court allowed an appeal against the finding of the Chief Justice of Norfolk Island that Mr Sanders had committed the tort of misfeasance in public office when he, as Tourism Minister of Norfolk Island, directed the Tourist Bureau to terminate the contract of its Executive Officer, Mr Snell. It was held in the earlier proceedings that in giving that direction Mr Sanders had denied Mr Snell procedural fairness. The Chief Justice awarded compensatory and exemplary damages of $83,000 (including interest) for misfeasance in public office.

The Full Court dismissed a challenge to the decision on the ground of bias, but held that the evidence before the Chief Justice did not justify a finding that Mr Sanders had committed misfeasance in public office. On the basis of the law stated by the High Court in *Northern Territory v Mengel* (1995) 185 CLR 307 and subsequent cases, the court held that there was no evidence of an intention to terminate the plaintiff's employment as a means of harming him. That was not the actuating motive: he merely wanted Mr Snell out of the job because of the views he held about his performance in it. Moreover, Mr Sanders had not known, or been recklessly indifferent to the possibility, that denial of procedural fairness would render his action invalid as well as causing harm to Mr Snell. (***Sanders v Snell* (2003) 198 ALR 560**)

Effect of a decision held invalid under the ADJR Act

A Full Federal Court has considered the legal and factual effect of a decision revoking the approval of an aged care facility once that decision was set aside by an order of the Full Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act, Cth). All judges agreed that the High Court's decision in *MIMA v Bhardwaj* (2002) 209 CLR 597 did not mean that jurisdictional error on the part of a decision-maker will always lead to a decision having no legal or factual consequences whatever: it depends on the provisions of the particular statute. Gray and Downes JJ held that there was nothing in the legislative scheme to require the decision to be a nullity for all purposes, and the absence of jurisdictional error prevented this in any case. Justice Kenny considered that the court's earlier decision under the ADJR Act should not be construed by reference to the common law concept of jurisdictional error: the intention behind the ADJR Act was to simplify the common law of judicial review including the date of effect of an order quashing a decision. All judges held that the appellant was estopped from arguing for an earlier date of operation of the court's order. (***Jadwan v Department of Health and Aged Care* (2003) 204 ALR 55**)

Need to satisfy Statement of Principles concerning war-caused death or injury

A bench of the Full Federal Court has rejected as both *obiter dicta* and incorrect the statements of two judges in a previous Full Court decision (*Keeley v Repatriation Commission* (2000) 98 FCR 108, per Lee and Cooper JJ) to the effect that the link between the death or injury or disease of a veteran and war-caused service need be no more than temporal, and may not require satisfaction of the relevant Statement of Principles under the *Veterans' Entitlement Act 1986* (Cth). The legislation requires both a temporal relationship and a causal relationship, and the latter involves consideration of any existing Statement of Principles in determining the reasonableness of a hypothesis concerning the connection between war service and the injury, disease or death of a service person. A Statement of Principles in relation to a condition covers the field in relation to that condition. (***Woodward v Repatriation Commission, Gundry v Repatriation Commission* (2003) 200 ALR 332**)

Whether Minister had power to direct South Australian Director of Public Prosecutions to appeal a particular case

A recent decision of the South Australian Full Supreme Court throws interesting light on the scope of a power 'to give directions and furnish guidelines' that is not specifically limited in extent. Federal Court decisions concerning powers to give 'general directions' were held not to be relevant to the present power. The applicant sought judicial review of a decision of the South Australian Attorney–General (the Attorney) to direct the State's Director of Public Prosecutions (DPP) to institute an appeal against a suspended sentence of imprisonment for three years and three months for knowingly endangering a person's life. There had been considerable public controversy concerning the sentence.

Justices Prior and Vanstone agreed with Doyle CJ that section 9 of the *Director of Public Prosecutions Act 1991* (SA) (the Act) gave the Attorney the power to give directions to the DPP in general terms and that this had the capacity to dictate the DPP's decision in a particular case referred to in the direction. However, they disagreed with the Chief Justice that the specific direction to appeal in a particular case amounted to an exercise of the DPP's appeal powers conferred by the Act, powers which had specifically been withdrawn by the Act from the Attorney. The Act merely replaced the Attorney's previous powers in relation to prosecutions and appeals with a conditional power to give directions. There was no provision as in other jurisdictions prohibiting directions or guidelines 'in respect of a particular case', and Parliament had specifically rejected limiting the power in this way. The same majority allowed the appeal against sentence. Leave to appeal to the High Court has been refused in both matters. (***Nemer v Holloway & ors* [2003] SASC 372, *R v Nemer* [2003] SASC 375**, 7 November 2003; ***Nemer v Holloway, Nemer v The Queen* [2004] HCATrans 24**, 13 February 2004 and earlier transcripts)

Volume of migration litigation in federal courts system

The significant impact of migration litigation at all three levels of the federal courts system is apparent from their annual reports for 2002–2003. In the High Court, 82 per cent of all matters filed in the court were in the migration area, while all matters filed before the court increased by 217 per cent, most of them in the form of constitutional writs in the migration area. However, a large number of migration matters was remitted by the High Court to the Federal Court or the Federal Magistrates Court, many of them following the court's decision limiting the migration privative clause in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 (see (2003) 36 *AIAL Forum* 6–7) or resulting from the representative proceedings in *Muin v MIMIA* (2002) 190 ALR 601(see (2002) 35 *AIAL Forum* 3–4). Numbers in the Federal Court's migration jurisdiction had been expected to decline because of the concurrent jurisdiction of the Federal Magistrates Court, but the remittal of matters from the High Court resulted in about a 30 per cent increase in migration matters filed. Appeals in migration matters also constituted 66.5 per cent of the Federal Court's appellate jurisdiction. Meanwhile the Federal Magistrates Court dealt with over half of migration matters filed in that court and the Federal Court, the numbers rising from 182 in the previous year to 1397 in 2002–2003. The Attorney–General stated that he was considering the recommendations of the Migration Litigation Review established last year (see (2004) 40 *AIAL Forum* 5), and would shortly release a comprehensive paper on the federal civil justice system containing proposals to assist self-represented litigants and reduce the number of unmeritorious claims (see above under heading 'Government initiatives, etc'). (***Annual Reports for 2002–2003,* High Court, Federal Court and Federal Magistrates Court**, available from the websites of the courts; **Attorney–General's Media Release**, 22 January 2004)

Administrative review and tribunals

Senate Committee report on the administrative review of veteran and military compensation decisions

A recent Senate Committee inquiry arose out of concern about the review provisions in the Military Rehabilitation and Compensation Bill 2003, a bill which brings together into one piece of legislation provisions for compensation/income support where injury, disease or death is due to Australian Defence Force service on or after the commencement date (expected to be 1 July 2004). However, the Bill retains two separate avenues of administrative review drawn from the *Veterans' Entitlements Act 1986* (Cth) and the *Safety, Rehabilitation and Compensation Act 1988* (Cth); their availability depends on whether injury, etc, occurs during wartime or peacetime. The first avenue is to the Veterans Review Board (VRB) and then to the Administrative Appeals Tribunal (AAT); the second is directly to a different Division of the AAT. The committee recommended that future administrative review processes 'should be the same for all ADF and ex-ADF personnel', and that all appeals to the AAT should be heard by a single Division, perhaps entitled the Military Division. Because of the opposition of ex-service organisations, the committee envisaged a process of incremental reform rather than the abolition of the VRB tier of review, amalgamating the two tiers of review, or placing a limitation on appeal to the second tier, although it considered the last option should be kept under review. The report makes a number of recommendations aimed at resolving claims at an earlier appeal stage, including introduction at VRB level of pre-hearing mediation and conciliation processes, and measures to encourage the provision of full medical evidence at the earliest possible stage. (**Report of Senate Finance and Public Administration References Committee, *Administrative review of veteran and military compensation and income support,*** December 2003)

Tribunals Efficiency Working Group

The presiding officers of the AAT, the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal, and the Veterans Review Board, together with officers from their portfolio departments, have formed the above working group to investigate and evaluate measures to achieve administrative efficiencies between the key Commonwealth merits review tribunals, while maintaining their separate identities.

Ombudsman

Role and function of the Ombudsman in the modern context

The following contain interesting contributions on the present-day role and functions of the Commonwealth Ombudsman:
Assoc Prof Anita Stuhmcke, 'Privatisation and corporatisation: What now for the Commonwealth Ombudsman*?*' (2004) 11 *AJ Admin L* 101–114
Prof John McMillan, Commonwealth Ombudsman, 'The Ombudsman's Role – Looking Backwards, Looking Forwards', 25 June 2003, and **'Future Directions for Australian Administrative Law – The Ombudsman'**, July 2003 (available from: www.comb.gov.au)

Professor McMillan's Foreword to the Commonwealth Ombudsman's *Annual Report for 2002–2003* deals with similar issues. He mentions that the Prime Minister has agreed to a project initiated by the Ombudsman to prepare for the Government's consideration a proposal for a revised Ombudsman Act. The report notes that there was an increase of 3 per cent in complaints over the previous year (to 19,850), but a decrease in the proportion of complaints investigated (from 31 per cent to 29 per cent, 6,133 as against 6,496). There were substantial increases in complaints concerning the Child Support Agency (CSA) (21

per cent) and Centrelink (10 per cent), and a significant fall in tax-related complaints. The proportion of complaints investigated in which agency error or deficiency was identified remained the same, 29 per cent. The report notes that the previous Ombudsman, Mr Ron McLeod AM, had achieved acceptance by the Government of the Ombudsman's role in relation to the outsourcing of government functions. The Ombudsman has been active in relation to agency complaint-handling mechanisms, and has begun an own motion investigation into CSA change of assessment decisions. As usual, the report contains interesting case studies. (**Commonwealth Ombudsman, *Annual Report 2002–2003***, available at above website or from the Ombudsman's national office)

ACT review of statutory oversight and community advocacy agencies

Following earlier inquiries into disability services and ACT Health, the ACT Government established a review of the relationships between statutory oversight and community advocacy agencies, conducted by The Foundation for Effective Markets and Governance based at the Australian National University. Its report was released on 2 December 2003. Appendix H of the report sets out a number of options for the structural reform of the government's external complaints handling mechanisms, including the Ombudsman, and the Discrimination, Health Complaints and Disability Services Commissioners; the options range from a full amalgamation of the various agencies to a simple co-location model. The report is available from: www.dhcs.act.gov.au

Freedom of information, privacy and other information issues

Public service secrecy provision held invalid

In a landmark judgment, Finn J of the Federal Court has held that regulation 7(13) of the previous Commonwealth Public Service Regulations (see now regulation 2.1 of the Public Service Regulations 1999) was invalid as it burdened the constitutional freedom of communication about political and governmental matters and was not reasonably appropriate or adapted to serving the efficient operation of government under the system of representative and responsible government (see the test formulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567). His Honour considered the regulation to be 'a relic' of a different era of government that took no account of the developing public interest in open government in Australia. It was a 'catch-all' provision that did not differentiate between the types and quality of information protected, the protection of some but not all of which could clearly be justified constitutionally, and the provision could not be read down. The court remitted the matter to HREOC to consider whether the actions of Customs concerning Mr Bennett's public comments as President of the Customs Officers Association had been justified in terms of an APS employee's common law duty of loyalty and fidelity. There has been no appeal against the decision. The APS Commission has taken legal advice and will shortly approach the Office of Legal Drafting and consult with agencies. ALRC Discussion Paper 67 (below) proposes the amendment of the regulation so that a duty of secrecy is imposed only in relation to information that genuinely requires protection and where unauthorised disclosure is likely to harm the public interest. (***Bennett v President, HREOC and CEO of Australian Customs Service* (2003) 204 ALR 119**; **Research Note No. 31, 2003–04, *Public Servants Speaking Publicly: The* Bennett *Case*, Commonwealth Parliamentary Library, Information and Research Services,** available from website: www.aph.gov.au/library/pubs/rn/2003–04. See also **'Disclosure of information by APS employees – implications of the Bennett case',** available from website of the APS Commission: www.apsc.gov.au)

ALRC Discussion Paper on protecting classified and security sensitive information

The ALRC has issued a Discussion Paper containing draft proposals on protecting classified and security sensitive information (DP 67). The paper seeks to 'develop mechanisms capable of reconciling, so far as possible, the tension between disclosure in the interests of fair and effective legal proceedings, and non-disclosure in the interests of national security'. It proposes a new Act to be used in exceptional cases to deal with the protection of documentary or oral classified and security sensitive information, setting out a range of strategies open to courts and tribunals in such cases. The paper also proposes that there should be comprehensive public interest disclosure ('whistleblower') legislation, and that those standards in the Protective Security Manual intended to be mandatory and enforceable should be identified, and modified if necessary. It is also proposes that Ministerial certificates should not be conclusive on a question of public interest immunity, and that Ministers should be required to table a notice in Parliament concerning any certificate to withhold information, whether it relates to court proceedings, an FOI request, an investigation by the Federal Privacy Commissioner, or otherwise. The paper further proposes that certain criminal offences concerned with disclosure of information should be amended to enable injunctions to be granted to prevent disclosure or further disclosure. (See also above on *Bennett* case.) (**ALRC, *Protecting Classified and Security Information: Discussion Paper*, DP 67**, January 2004; **ALRC Media Release**, 5 February 2004)

Record number of Commonwealth FOI requests

Commonwealth FOI requests have increased by 11.6 per cent to 41, 481 in 2002–2003, the largest number since the FOI Act came into force in December 1982. Close to 92 per cent of requests were for personal information about the applicant. Agencies granted 71 per cent of requests in full, and 23 per cent were granted in part. The cost to the Commonwealth of FOI administration is calculated to be more than $18 million at an average cost of $444 per request; 1.4 per cent of the cost was collected in fees and charges. The annual report on FOI contains a list of agencies which have lodged with the National Archives of Australia (NAA) statements about documents required by section 9 of the Act to be made available for purchase. In May 2004, the Australian National Audit Office (ANAO) is due to release an audit of selected agencies' compliance with the FOI Act and their policies and processes for dealing with FOI requests. (***Freedom of Information Act 1982: Annual Report 2002–2003***, October 2003; **Attorney–General's Media Release**, 14 January 2004)

Federal ALP to review Freedom of Information Act

The Shadow Attorney–General, Labor's Nicola Roxon, has announced that Federal Labor will review the operation of the Commonwealth FOI Act. She stated that the review would cover all areas of the current FOI regime including, but not limited to: the breadth of the public interest test; the growing use of the commercial-in-confidence exemption; implications of new technology; and the use of conclusive certificates. (**Media release by Shadow Attorney–General, Nicola Roxon MP**, 10 February 2004)

Senate restricts commercial-in-confidence claims

The Senate voted on 30 October 2003 that it would not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from disclosure of the information. Labor Senator Kim Carr, who moved the motion, later referred to reports by the ANAO showing that only a small proportion of confidentiality

claims made by agencies were appropriate. (***Senate Hansard***, 30 October 2003; **Aban Contractor, 'Senate sick of commercial confidence'**, ***Sydney Morning Herald***, 31 October 2003)

Commonwealth review of government ownership of copyright material

The Commonwealth government's Copyright Law Review Committee (CLRC) has published an Issues Paper on the subject of crown copyright, both Commonwealth and State, a matter dealt with in Part VII of the *Copyright Act 1968* (Cth). The paper seeks public submissions on a range of issues, including the appropriateness of the legislative scheme establishing government ownership of copyright, the public policy issues in relation to ownership of material produced by the executive, judicial and legislative arms of government, and options for reform. The CLRC is to report to the government by November 2004. (**CLRC, *Crown Copyright: Issues Paper***, February 2004, available from website: www.law.gov.au/clrc)

Victorian online FOI requests

The Victorian Government has launched an online service for lodging FOI requests as part of a government policy to improve public access to information. It allows members of the public to both submit and pay for FOI requests online through a credit card online transaction facility, available on: www.foi.vic.gov.au (**Media Release by Attorney–General Rob Hulls**, 1 December 2003)

NSW Auditor–General's report on operation of FOI in three agencies

In August 2003 the NSW Auditor–General issued a performance report on the operation of the NSW FOI Act in three agencies, the Ministry of Transport, the Premier's Department and the Department of Education. The report was critical of a number of aspects of their practice, including tardiness, inconsistent charging of fees, inadequate reasons for refusing access, and the involvement of chief executives and ministerial staff in FOI decision-making. The Director–General of the Premier's Department responded to the criticisms in robust terms in a letter included in the report. (***Auditor–General's Report: Performance Audit, Freedom of Information, Ministry of Transport, Premier's Department and Department of Education***, August 2003, available from: http://www.audit.nsw.gov.au/repperf.htm)

Brief privacy issues

- On 4 March the ALRC issued Discussion Paper 68 on *Gene Patenting and Human Health* (see: www.alrc.gov.au).

- The Commonwealth Attorney–General's Department and the Department of Employment and Workplace Relations have prepared a discussion paper on privacy of employee records entitled *Employee Records Privacy: A discussion paper on information privacy and employee records.* A link to the document is available on the Privacy Commissioner's website at: www.privacy.gov.au/news/media/04_02.html

- The Government is developing legislation to give parents access on request to all information held by the Health Insurance Commission concerning their children who are aged under 16 (the present administrative practice cuts off at age 14).

- An issues paper on the operation of Residential Tenancy Databases in Australian has been developed by a working party chaired by the Commonwealth Treasury Department, of which the Commonwealth Privacy Commissioner is a member.

Replacement of National Office for the Information Economy (NOIE) by an Australian Government Information Management Office (AGIMO)

The Minister for Communications, Information Technology and the Arts, Daryl Williams QC, has announced that NOIE will be disbanded, and its role in promoting and coordinating the use of new information and communications technology in the delivery of Australian Government programs and services will be assumed by AGIMO, headed by a new position of Australian Government Information Officer. NOIE's functions in facilitating and promoting IT use in the rest of the economy will be handled by an OIE within the Department. Details of the reorganisation are contained in a News Release by the Minister. (**Minister for Communications, Information Technology and the Arts, News Release**, 10 March 2004; see also comment in ***Canberra Times*, 'Forum'**, 13 March 2004 at B10)

National Archives survey on record-keeping in the APS

In response to the ANAO's report on recordkeeping and the 2001–02 *State of the Service Report* by the APS Commission, the website of the NAA includes new practical advice on recordkeeping, and the NAA has released a training package for agency trainers and records staff for teaching staff about their recordkeeping responsibilities. (**NAA, *Using e-permanence: Advice on addressing ANAO and APS Commission findings on recordkeeping*, Archives Advice 60**, October 2003; **NAA training package, *Keep the knowledge – Make a record!***, June 2003, both available from: www.naa.gov.au)

Public administration

Debate on 'leaking' by public servants

Perhaps as a result of the *Bennett* decision (above under heading 'Freedom of Information etc'), there have been several significant items in the *Canberra Times* concerning the question of 'leaking' of official information by public servants. These include contributions by Dr Shergold, Secretary of the Department of the Prime Minister and Cabinet, Mr Podger, Public Service Commissioner, Professor Nethercote of Griffith University, and a *Canberra Times* editorial.
(***Canberra Times*, 'Opinion'**, 20 & 24 February and 4 March 2004, and editorial 'A question of public interest', 8 March 2004)

Report on the state of the Australian Public Service

The latest report of Public Service Commissioner, Andrew Podger, on the state of the APS provides valuable insights into the current makeup, mode of operation and governance of the public service at national level. The report is based on a survey sent to all APS agencies employing more than 20 people. Among other issues, the report deals with: the trend towards an older and more skilled workforce; APS values and the code of conduct (also the subject of a separate publication, see below), including breaches of the code; recordkeeping (see also below); relationships between public servants and Ministers and their offices; relationships between APS and the public; whistleblowing; public consultation; selection, performance, promotion, conditions of service, work-life balance and general job satisfaction of APS employees; conflicts of interest; workplace diversity; outsourcing; and many other matters. (**Public Service Commissioner, *State of the Service Report 2002–03***; and ***APS Values and Code of Conduct: Guide to official conduct for APS employees and agency heads*,** August 2003, both available from: www.apsc.gov.au)

Other developments

Proposed changes to the UK legal system

In mid–2003 the Blair Labor Government announced it intended to abolish the office of Lord Chancellor, replace the Lord Chancellor's Department with a Department of Constitutional Affairs, establish an independent judicial appointments committee, and substitute a new Supreme Court, not within the Parliamentary framework, to carry out the judicial functions of the House of Lords. In December the House of Lords called on the Government to withdraw its proposals and undertake meaningful consultation. The government introduced a Constitutional Reform Bill into the Lords to achieve the above aims, but encountered strong opposition from members who fear the new court system would reduce the authority and independence of the courts. The Lord Chief Justice, Lord Woolf, claimed in a speech to Cambridge University's Faculty of Law that the new Supreme Court would be a 'second-class' institution which would be a 'poor relation' of other Supreme Courts around the world, which could lead to strong pressures for a written constitution. After a nine hour debate, the House of Lords voted to refer the Bill to a select committee, which would prevent it reaching the Commons at all during the present session, prompting the Leader of the Commons to repeat threats to introduce the reforms in the Commons and use the Parliament Act to override the House of Lords. (***The Independent*, 'Minister and judges on collision course over asylum, says Woolf'**, 4 March 2003, **'Curb on Lords if they shun supreme court'**, 7 March 2004, and **'Government crisis as Lords scupper supreme court Bill'**, 9 March 2004)

Brief items

The Australian Institute of Judicial Administration (AIJA) and the National Alternative Dispute Resolution Committee (NADRAC) have released a new research paper to assist courts and tribunals to make decisions to refer a dispute to ADR. The paper acknowledges that 'one-model-fits-all' cannot be applied to the complex area of ADR and suggests that each court or tribunal develop its own program which considers factors including potential ADR users, the case mix, and the support required to effectively deliver ADR services. (**Attorney–General's Media Release**, 5 March 2004; **Prof Kathy Mack, *Court referral to ADR: criteria and research*, AIJA & NADRAC**, available from: www.nadrac.gov.au)

The Productivity Commission has published a draft report on the operation of the *Disability Discrimination Act 1992* (Cth), on which it will report to the government by 30 April 2004. (**Productivity Commission draft report, *Review of the Disability Discrimination Act 1992***, 31 October 2003, available from: www.pc.gov.au)

The new Western Australian Corruption and Crime Commission began operation in early January 2004.

The Australian Institute of Health and Welfare has published a new edition of its comprehensive work on welfare services in Australia. (**AIHW, *Australia's Welfare 2003*, Australia's Welfare No. 6**, December 2003, available from CanPrint on 1300 656 863)

Two major reports on poverty and disadvantage in Australia were published at the beginning of March. The Senate Community Affairs Committee has completed its inquiry into poverty and financial hardship, presenting a majority report by the ALP and Australian Progressive Alliance Senators, and a minority report by the Liberal Party Senators. The inquiry undertook public hearings in capital cities and some major regional towns. The second report, on community adversity and resilience, is published by the policy and research arm of Jesuit Social Services, The Ignatius Centre, and was undertaken by Prof Tony Vinson; it is a

follow-up to an earlier report by Professor Vinson in 1999. (**Senate Community Affairs References Committee, *A hand up not a hand out: Renewing the fight against poverty*, Report on poverty and financial hardship**, 11 March 2004, available from website: www.aph.gov.au/senate/clac_ctte/poverty/index.htm; **Prof Tony Vinson, *Community adversity and resilience: the distribution of social disadvantage in Victoria and New South Wales and the mediating role of social cohesion*, The Ignatius Centre**, March 2004, which can be purchased through website: www.jss.org.au)

THE EMERGENCE OF ADMINISTRATIVE TRIBUNALS IN VICTORIA

Justice Stuart Morris*

A paper delivered at the Annual General Meeting of the Victorian Chapter of the AIAL on 13 November 2003 at Parliament House, Melbourne.

On 1 July 2003, the Victorian Civil and Administrative Tribunal (VCAT) had its fifth birthday. It now seems that it has been around forever. Yet, when it was created in 1998, it was a new experiment; and the reforms were hailed as the most far-reaching of any jurisdiction in Australia. Thus it is a fitting time to cast an eye to the history and the future of administrative law in Victoria, and the role of administrative tribunals. Such an examination should provide insight, not only into where we have been, but also into where we are going.

At a little over five months into my appointment, it is also an appropriate time to reflect on the progress that was achieved under my predecessor, Justice Murray Kellam - to whose hard work so many of VCAT's successes of the last five years are due.

These five years have, on balance, reflected well on the intentions and aspirations of those behind the establishment of the tribunal.

It is noteworthy that the *Victorian Civil and Administrative Act 1988* enjoyed bipartisan political support, and that support continues to be enjoyed today. This has done much to cement the future of the tribunal, to protect the independence of decision-making and to bolster support amongst the people of Victoria for the tribunal, and the tribunal's role in the Victorian justice system.

VCAT houses under one roof all or part of 14 former boards and tribunals. They are now assigned to one of three divisions - Civil, Administrative, and Human Rights. Each division is headed by a County Court judge. Deputy presidents then head the various lists within those divisions.

Through this structure, VCAT processes close to 90,000 applications a year, with an operating budget, in 2002-03, of $23,000,000. On these figures, a description of VCAT as a 'super tribunal' is well earned.

I have been invited to speak on past and current perspectives of the operation of VCAT and the importance of VCAT in the administrative law framework in Victoria. Such a topic offers a rich selection of insights, not only into administrative law, but also into the changing relationship between the State and the individual.

This is not surprising, given the function of administrative law as a mechanism through which the power of the State is mediated. In other words, administrative law creates the framework

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through which individual rights are protected from the misuse of State power. In this sense, VCAT is not only central to the administrative law framework, but also to the justice system in general.

The emergence of administrative law

The earliest system of administrative law as we know it possibly began in pre-Tudor England, where justices of the peace were mainly responsible for the administration of executive decisions. The executive, at that time substantially unconstrained by Parliament, also supervised the judges of the assize, who in turn oversaw the justices of the peace.

This system was centralised under the authority of the Privy Council during the Tudors. The Star Chamber, an offshoot of the Council, was used by the executive to pressure the courts, while the Council was used to bypass the increasing power of the Parliament. With so much power still residing in the executive, Sir William Wade has said 'it was on the constitutional rather than on the administrative plane... that the issues between the Crown and its subjects were fought out'[1]. This included the decidedly non-legal device of civil war.

It was after the powers of the Star Chamber and Privy Council were broken, in 1641 and 1688, respectively, that the judiciary was able to assert authority over the executive. The Court of King's Bench stepped into the power vacuum, making available the writs of mandamus, certiorari and prohibition, as well as damages to those aggrieved by the conduct of a justice of the peace or other authority. This period in English history marks the emergence of responsible government and the separation of powers.

In the nineteenth and early twentieth centuries, particularly in England, the common law developed new concepts and remedies to meet changing social circumstances. Indeed, it was the common law, rather than statute law, which often provided the dynamic needed to keep the law relevant. These remedies proved sufficient to keep up with the expanding powers of governments. But, as the modern state emerged in the twentieth century, the courts increasingly fell behind.

Administrative law after World War 2

Following the Second World War, Western governments were forced to come to terms with increasingly strident calls for State intervention beyond the traditional boundaries of State responsibility. The welfare State emerged, as the State began to take responsibility for health, education and welfare schemes.

The State also began to regulate previously unfettered areas, previously dominated by private, rather than public, interests. The statute books exploded with an array of new laws. We saw new law regulating trade practices, the environment, and discrimination. And, although town planning had been around since the 1920s, it was only given legislative teeth in the 1950s.

It was recognised at an early stage in this period that, with increased state powers, mechanisms would be needed to hold governments accountable for their decision-making. The accountability mechanisms of the time were not suited to control this explosion of executive discretion. Judicial review was limited by the courts' refusal to review decisions on the merits. While some decisions fuddled the law/fact distinction in order to provide relief and avoid injustice, by and large the complexity, the length, and the expense of hearings meant that the courts could not plug the accountability gap created by the dramatic increase in governmental responsibilities.

This led to the development of administrative tribunals – slowly at first, then as a flood – to meet community demands to moderate the growing power of the bureaucracy. Merits review tribunals began to appear in the Australian legal landscape, with Victorian tribunals and boards being established on a needs-basis, and specialist bodies instituted in response to discrete subject matters as they arose. Tribunals also emerged as an alternative to the courts. Examples of tribunals include the Fair Rents Board, the Town Planning Appeals Tribunal, the Drainage Tribunal and the Land Valuation Board of Review.

Among the advantages claimed for these tribunals were lower costs to litigants, greater accessibility, a faster decision-making process, informality and simplicity of procedure, specialised knowledge, and a sidelining of legal technicalities.

Importantly, in the decades after World War 2 there was little political support for an overall solution to quasi-judicial merits review of administrative decisions. In 1967-68, the Statute Law Revision Committee produced the *Report upon Appeals from Administrative Tribunals and a Proposal for an Ombudsman*[2], recommending a consolidation of Victoria's boards and tribunals. The report was ignored for 15 years, despite being closely considered in the Kerr Report that led to the Commonwealth Administrative Appeals Tribunal.

Instead, the focus was on other areas of reform. Victoria passed the *Ombudsman Act* in 1973, the *Administrative Law Act* in 1978, and the *Freedom of Information Act* in 1982. There was, however, a substantial reform with the creation of the Planning Appeals Board (PAB), in 1981, which consolidated a number of planning, environment, local government and drainage tribunals.

A 1982 Victorian Law Foundation report[3] estimated the number of tribunals in Victoria at that time to be between two and three hundred. The report acknowledged the PAB reforms, but commented that 'there has yet to be any sustained focus upon administrative tribunals in this State'.

As the number of tribunals expanded, incorporating more and more administrative decisions within the framework of administrative review, the costs of an uncoordinated tribunal system began to mount. The increasing impact of government decision-making on individuals created pressure for a coherent, systematic approach to quasi-judicial institutions. Nevertheless, looking back, this phase, broadly extending from the post-war period to 1980, can be seen as the origins of strong, independent, administrative tribunals in Victoria.

Development

The years 1981 to 1998 can be seen as a period of development for quasi-judicial tribunals in Victoria. Following the establishment of the PAB in 1981, the parliament created the Administrative Appeals Tribunal of Victoria in 1984. This was closely modelled on the Commonwealth AAT, but had much more limited jurisdiction. As of 1986, the tribunal exercised jurisdiction under a paltry 18 Acts, and there were fewer than half a dozen (effective) full-time members.

The role of the Victorian AAT was subsequently identified by Attorney-General Jim Kennan as follows:

> In establishing the AAT, the Government sought to provide citizens with an independent and high quality forum in which appeals against decisions by ordinary administrative tribunals and statutory decision makers could be heard in a speedy and relatively informal setting.[4]

In 1987, when Jim Kennan was both the Minister for Planning and the Attorney-General and was thus able to insist on consultation between the two departments, he deftly incorporated

the PAB into the AAT, with virtually no actual consultation. It was rather a case of the tail wagging the dog – the PAB was then substantially larger than the AAT – but over time the unified tribunal demonstrated the advantages of consolidation.

The establishment of the PAB and the AAT, and the subsequent consolidation of these jurisdictions in the AAT, is the link between the disconnected, ad hoc tribunal system of the post-war period and today's VCAT. It represented recognition of the shortcomings of the previous approach, in its duplication of costs, lack of independence from government, different procedural rules, and inconsistency in approaches to administrative review; and it paved the way for a further consolidation of tribunal functions.

The AAT was designed as an independent body with powers to review a wide range of administrative decisions upon their merits. The centralised structure of the AAT was targeted at halting the proliferation of administrative review bodies, reducing the duplication of costs and providing for more consistent decision-making.

With the passage of the AAT Act, administrative law in Victoria emerged from its childhood. With the AAT, the perceived and actual advantages of an informal tribunal system over the court system were consolidated. Promoting flexibility in approach, with informal and expeditious procedures, accessible to a wide-range of affected persons, we can see an early impression of the modern VCAT. The AAT was said to represent the 'fourth pillar' of the new administrative law, pioneered by the Commonwealth. Along with the Ombudsman, a legislative reform of judicial review principles and the introduction of freedom of information legislation, an increasingly sophisticated administrative law framework began to emerge.

Over the following decade, the AAT's jurisdiction was expanded, eventually receiving jurisdiction from over 100 Acts. But many more Acts were not placed within the AAT umbrella. And, worse still, the growth of new tribunals, particularly civil tribunals, continued.[5] The AAT had failed to address the systemic issues that arose from administrative review's poorly planned, unstructured upbringing.

Consolidation

Despite the gains achieved under the 1984 legislation, the Victorian system of administrative review was still seen to suffer from several deficiencies. In 1996, the then Attorney-General, the Hon Jan Wade, described the system, possibly with some exaggeration, as 'a perplexing mosaic of jurisdiction, confusing to lawyers, lay people and public servants alike'.

The next round of reform was kicked off by the 1996 discussion paper entitled 'Tribunals in the Department of Justice - A Principled Approach'. The 1996 paper repeated, in many respects, criticisms of the pre-1980 system. This raises the observation that while the reforms of 1981 and 1984 had done much to rationalise the 'mish-mash' operation of the earlier, ad hoc arrangements, room remained for further improvement.

The Attorney-General set out the following issues that would guide the next stage of reform:

1 A unified tribunal

The establishment of the AAT, while a substantial improvement on the previous state of the world, did not wholly address the costs of a fractured tribunal system. These costs included the duplication of administrative infrastructure between tribunals, the exposure of discrete tribunals to 'capture' by particular interest groups, unnecessary and burdensome differences in procedure, an inconsistent approach to similar legal issues, overly narrow specialisation by tribunal members, and poor service delivery to rural Victorians.

A unified tribunal was set to remove cost duplication by allowing a unified registry to serve all jurisdictions, insulate jurisdictions from 'capture', unify procedure, promote consistency in decision-making and broaden experience of tribunal members. Cost savings and more-widely experienced decision-makers would allow the unified tribunal to significantly reduce the cost of hearings held in rural Victoria.

2 A rationalisation of jurisdiction

Two categories of disputes were seen as appropriate to quasi-judicial adjudication - firstly, administrative disputes, that is, disputes that arise between the Executive and the individual (the review jurisdiction), and secondly, civil, or *inter partes* disputes involving relatively small claims, of a high volume and specialised nature, where an informal, expeditious procedure could promote cost savings without sacrificing the provision of justice in Victoria.

3 Separation of adjudicatory functions from policy formulation or administration

The independence of an adjudicatory body is compromised by active involvement in policy formulation and by the administration of government policy. (In keeping with the maxim that 'not only must justice be done, it must be seen to be done', the community's regard for tribunal decisions would be increased by the separation of incompatible functions.)

4 An independent tribunal

To protect the unified tribunal from executive pressure, the new tribunal would be led by judicial appointments. Following the Commonwealth and Victorian AATs, it was seen that judicial members would be better suited to hear highly controversial decisions involving executive government interests.

5 A unified procedure

A unified tribunal would rationalise procedures, simplifying litigation and reducing costs. This would, in turn, promote the accessibility of the tribunal to the Victorian public.

6 The protection of specialist knowledge

A unified tribunal would allow the tribunal to be constituted by more than one member where a range of specialist knowledge is required. For example, a planning dispute involving planning and legal issues would be heard by a planning member and a legal member, so that important considerations were not sidelined on review.

7 Judicial review

Finally, the 1996 discussion paper emphasised the importance of retaining review by the courts on questions of law. This is an important mechanism of accountability for any tribunal system, and I do not intend to dwell on the importance of maintaining it.

This report, and the subsequent enactment of the *Victorian Civil and Administrative Tribunal Act* in 1998, marks the end of the adolescence of Victoria's tribunal system. With the establishment of the VCAT, the system entered its maturity.

Success of VCAT

I now turn to the key question I raised earlier - how successful has VCAT been in promoting the principles set out in the Attorney-General's 1996 discussion paper?

The VCAT is the primary provider of merits review adjudication in Victoria. With almost 200 members (including sessionals), and exercising jurisdictions conferred by over 150 Acts, VCAT represents the outcome of a process of consolidation that began almost two decades ago.

The size of the tribunal, and the fact that judicial officers head it, have done much to insulate the tribunal from government pressure. In my time at the helm, I can endorse Justice Kellam's comments that 'no political interference has been experienced in the appointment... or ... termination of members, and we do not anticipate that it will in the future'[6].

On the other hand, VCAT's size and importance in the justice system overcomes a problem experienced by smaller tribunals – participation in government decisions concerning judicial administration generally. It is important that the tribunal be able to communicate with the government to ensure that we continue to work towards the most effective system of justice we can achieve.

Judicial leadership has also improved the capacity of the tribunal to weather political controversy. With such a high profile in the community, it is inevitable, and indeed helpful, that VCAT receive community criticism. However, the presence of Supreme and County Court judges does much to facilitate the acceptance of VCAT decisions in the community.

The amalgamation of registry functions has produced significant cost savings. Procedures have been unified, simplifying access to the tribunal. The ability for members to gain experience across lists expands considerably the capacity of the tribunal to provide hearings in rural Victoria, as well as substantially reduce the cost of those hearings.

Many people were initially concerned that the creation of a single tribunal would result in a loss of specialist knowledge. However, it is VCAT's experience that this has not occurred. Rather, the ability to move members between lists can expand the pool of specialist members. This, in turn, adds significantly to our ability to constitute the tribunal, in an appropriate matter, with two or more members, each representing a specialised area of knowledge. This can improve both the quality, and the consistency of decision-making.

VCAT and merits review

I now turn to another question: is review on the merits, through VCAT, becoming the *central* pillar of administrative law in Victoria? Is VCAT gradually replacing judicial review, and for that matter the development of the common law, as the principal method of resolving issues between citizens and government?

Thirty years ago much of the focus of administrative law was on judicial review. Examinations of the laws governing judicial review were popular, culminating, in Victoria, with the passage of the *Administrative Law Act* 1978. But, as I mentioned earlier, judicial review is poorly positioned to provide an accountability mechanism over executive decision-making. The courts' reluctance to review decisions on the merits was an extension of a reluctance to engage in policy review. It was feared that such a function would reduce the independence of the courts and affect the authority with which the community received judicial determinations. Justice Brennan (as he then was) said:

> Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review ... Such advocacy is misplaced. If the courts were to assume a jurisdiction to review administrative acts or decisions which are 'unfair' in the opinion of the court - not the product of procedural unfairness, but unfair on the merits - [they] would put [their] own legitimacy at risk.[7]

Quasi-judicial bodies thus arose to fill the vacuum left by the refusal of the courts to review issues beyond procedural and legal defects.

The essence of a review 'on the merits' is the ability of the tribunal to decide for itself, on the material before it, whether the decision appealed against was the 'correct or preferable' one.[8] This involves an objective assessment of the facts, the identification of the applicable law and the nature of any discretion involved and the application of any policy that may be relevant. The decision of the tribunal is then substituted for the original decision. A sound merits review system is inextricably linked to a sound, principled tribunal system. One would expect a fractured, ad hoc system with a large number of specific, separate bodies to be more costly, less rigorous, and less able to review government decisions in a principled and consistent manner, with full recourse to the necessary information and considerations.

In this light, the institutional history of merits review is, to a significant degree, commensurate with the growing relevance of merits review in administrative law. And, thus, the creation of the Victorian Civil and Administrative Tribunal in 1998 stands as a watershed moment in the history of administrative law in Victoria.

Expansion of jurisdiction

Although VCAT is a creature of statute, and does not have any inherent jurisdiction[9], it has a very extensive jurisdiction. It encompasses the vast majority of tenancy and building disputes, jurisdictions which were previously exercised by the courts. It includes not just small claims, but even significant claims under the *Fair Trading Act*. And if the facts in *Rylands v Fletcher*[10] were to recur today it would be initially decided at VCAT!

In the human rights area, not only does VCAT deal with guardianship and administration matters, but the field of anti-discrimination law is growing. A good example of this is the disputes that have arisen this year under the *Racial and Religious Tolerance Act* 2001.

Planning, environmental and licensing matters are also prominent as VCAT jurisdictions. What is perhaps less obvious, but still important, is the gradual increase in the number of Acts which permit merits review in VCAT's General Division. It is not necessary to be a practitioner of Chinese medicine, or to provide certain services to infertile adults to be affected by VCAT's jurisdiction (although these matters are so affected), it would be enough to be a professional person, whether a doctor, dentist, nurse or teacher, or to have a traffic accident, or to seek access to a public document or to pay a State tax, in order to be affected by a VCAT jurisdiction. Indeed, VCAT even has jurisdiction in relation to the licensing of certain persons who provide services to fertile adults!

It can now be said that VCAT touches more Victorians' lives, more often, than any court.

Legislation has overtaken the common law as the principal source of new laws. With the exception of native title, the most important legal developments in the last thirty years have been driven by statute. Guardianship statutes have essentially replaced the supervisory jurisdiction of the courts in respect of disabled persons.[11] The *Fair Trading Act* has overtaken many of the principles of common law contract. Compensation claims for injuries incurred in motor vehicles are now determined by reference to statutory provisions. Town planning statutes have increasingly reduced the scope of operation for common law nuisance actions. Equal opportunity and anti-discrimination laws have plugged perceived gaps in the common law; while freedom of information laws have negated the development of a common law right to information. Many of these legal developments have expanded the scope of merits review in Victoria.

The question of privacy is topical. Two recent developments can be mentioned. First, in 2000 the Victorian Parliament enacted the *Information Privacy Act*. The main purposes of the Act were to establish a regime for the responsible collection and handling of personal information in the Victorian public sector and provide individuals with rights in relation to the way information is handled. The Act established a number of information privacy principles and a regime for the making of complaints. Importantly the Act vested in VCAT the right to hear certain complaints and to make a range of orders where the complaint is made out. These orders do not just include injunctive orders, but extend to mandatory orders and awards of compensation not exceeding $100,000.

Second, on 16 October 2003 the House of Lords of the United Kingdom decided that there was no common law right to privacy. The decision of the House of Lords, in *Wainwright v Home Office*[12] followed a judicial history where English courts were reluctant to extend other tortious principles to a general right to privacy. In rejecting the invitation that there was a tort known as *invasion of privacy*, Lord Hoffmann stated:

> Furthermore, the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's rights under Article 8 have been infringed by a public authority, he will have a statutory remedy.[13]

Thus the existence of a statutory solution was an influence in constraining the development of the common law. This pattern is not atypical. Not only is more and more law statute based, but also this fact acts as a constraint upon the extension of the common law into areas addressed by parliaments. Thus, it is increasingly the task of administrative tribunals to determine disputes under statute, usually on the basis of merits review.

As this trend continues, VCAT's position at the centre of Victoria's administrative law system is becoming entrenched through the conferral of new jurisdictions on the tribunal. Over the last four years, for example, VCAT has assumed jurisdiction under the *Chinese Medicine Registration Act* 2000, the *Dairy Act* 2000, the *Dental Practice Act* 1999, the *Electoral Act* 2002, the *Fair Trading Act* 1999, the *First Home Owner Grant Act* 2000, the *Health Records Act* 2001, the *Information Privacy Act* 2000, the *Psychologists Registration Act* 2000, the *Seafood Safety Act* 2003, the *Victorian Institute of Teaching Act* 2001, and the *Victorian Qualification Authority Act* 2000. An important new jurisdiction that VCAT expects to receive in 2005 will be to hear disciplinary charges against lawyers and determine lawyer-client disputes.

It is important that new jurisdictions appropriate to VCAT's dispute resolution framework be allocated to the tribunal. It would be a step back if we revisited the previous trend of creating specialist tribunals to deal with new jurisdictions. Many of the reasons for the creation of VCAT would be undermined by such a move. As we claim in our 2002-03 Annual Report, 'our ability to accept and integrate new jurisdictions at a relatively low cost to Government and VCAT users represents one of our greatest strengths'[14].

The fact that we have not returned to the 'bad ol' days' is indicative of the achievements at VCAT over the last five years. It is evidence that VCAT has successfully realised the principles set out in the 1996 discussion paper. This should not by any means be taken to mean that our job is done at the tribunal. If VCAT is to maintain its position in the justice system, we must build on the last five years. We must remain vigilant. To paraphrase a famous quote, 'the price of a successful justice system is eternal vigilance'.

But the success of the VCAT, and its emergence as the preferred method of resolving disputes between citizens and governments, positions the tribunal at the forefront of the administration of justice in Victoria.

Endnotes

1 *Administrative Law* (6th ed.), 1988, Clarendon Press, Oxford, at 16.
2 Parl Paper D-No. 6-1941/68.
3 Robbins, Adrian, *Administrative Tribunals in Victoria*, (1982), Victoria Law Foundation, Melbourne.
4 See the second reading speech of the Hon Jim Kennan in relation to the *Planning Appeals (Amendment) Act* 1987.
5 For example, the Domestic Building Tribunal was established in 1995.
6 The Hon Justice Murray Kellam, 'Developments in Administrative Tribunals in the Last Two Years' (2001) 29 *Fed L Rev* 427 at 431.
7 See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37-38.
8 See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.
9 *Body Corporate Strata Plan No 334479D v Scolaro's Concrete Constructions Pty Ltd* [2000] VCAT 45; *R v Perkins* [2002] VSCA 132 at [16].
10 *Rylands v Fletcher* (1868) LR 3 HL 330.
11 See *Gardner; re BWV* [2003] SCV 173.
12 [2003] 4 All ER 969.
13 At 980.
14 Victorian Civil and Administrative Tribunal, *2002-03 Annual Report* at 9.

ASIO TODAY

Denis Richardson*

Paper presented at an AIAL seminar, Canberra, 2 March 2004.

As some of you are aware, I have taken a layperson's interest in administrative law for some time, and going back to well before I took up this job in 1996.

Today I want to discuss ASIO's new powers and the global and national security picture against which the new powers should be viewed. Not surprisingly perhaps, I will outline why I believe the new laws were necessary, why I believe the community can have confidence that the new powers will not be abused and why, subject to careful thought and proper consideration, we should keep an open mind about further changes to Australia's counter-terrorism legislative framework.

Terrorism and Australia

Terrorism has been global for a long time. But historically, Australia has not been a terrorist target. Terrorism was something we saw on TV, often in less developed countries and directed against local targets or the diplomatic and/or military interests of the United States. it was something we deplored but it did not touch us personally. In addition to being a very direct attack on an ally who played a decisive role in preventing an invasion of this country 60 years ago, September 11 was something with which ordinary Australians did identify - in particular, with the ordinary men and women of New York and Washington who were murdered whilst going about their daily lives. 'It could have been us' was a familiar response.

Leaving aside principle and alliance, there are strong pragmatic reasons of self-interest why, in my view, we continue to have no choice but to actively engage in the fight against terrorism.

We have an interest and a responsibility to ensure that those very few Australians with links to international terrorism do not involve themselves in acts of terrorism, either in Australia or elsewhere. We have an interest and a responsibility to ensure that foreign interests in Australia are properly protected. We have an interest and a responsibility to the hundreds of thousand Australians who travel overseas every year, to do what we can to minimise the risk of global terrorism.

As we saw in Bali and New York race, religion and/or nationality does not provide protection. Finally, we now know that al-Qaida had an active interest in carrying out a terrorist attack in Australia well before 11 September and that we remain a target - so we don't have the option of standing aside in the vain hope that, by not looking at terrorism, it will not look at us.

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* *Director-General of the Australian Security Intelligence Organisation.*

We know this:

- from what bin Laden and his deputy, al Zawahiri, have stated explicitly several times since 11 September;
- from what happened on 12 October 2002;
- from the debriefings of the likes of Khalid Sheikh Mohamed and Hambali; and
- from the Willy Brigitte investigation.

While a continuing and as yet unfinished investigation, it is clear that Brigitte was in Australia to do harm - a reminder that terrorism is not something which can only happen 'over there'. Terrorism does not respect borders. It does not necessarily use the weaponry of a nation state. It does not negotiate as a nation state. Its targets of choice are innocent civilians. And, as I have stated previously, we should be in no doubt that, should bin Laden and al Qaida ever get their hands on WMD, they will seek to use them to devastating effect. That is not an alarmist comment, it is a measured assessment.

It is not possible to successfully overcome a global terrorist network like al Qaida and its associated groups such as JI, by seeking to put a fence around one country or one region. Al-Qaida's links are global and its battle ground is global. Certainly, ASIO simply could not do its job without global linkages and the information sharing and cooperation of our allies and close friends. The same is true for the Australian Intelligence Community as a whole and for the AFP.

Counter Terrorism Legislation

Following 11 September and 12 October, many countries reviewed and subsequently made major changes to their counter terrorism laws - Canada, the UK, Indonesia and the United States amongst them. In Australia, the Government announced on 14 October 2001 a wide-ranging counter terrorism review. Part of the review covered possible legislative changes. Subsequently, over the first half of 2002, the Parliament debated and passed a suite of new laws. The reforms included:

- the Security Amendment (Terrorism) Act, which created a new offence of terrorism and created a regime for making regulations listing organisations with terrorist links and which made membership or other specified links with such an organisation an offence;
- the Suppression of the Financing of Terrorism Act, which inserted a new offence into the Criminal Code directed at persons providing or collecting funds used to facilitate a terrorist act;
- the Criminal Code Amendment (Suppression of Terrorist Bombings) Act, which created an offence to place bombs or other lethal devices in prescribed places with the intention of causing death, serious harm or extensive destruction;
- the Border Security Legislation Amendment Act, which dealt with border surveillance, the movement of people and goods, and clarified the controls which Customs has to monitor such movement; and
- the Telecommunications Interception Legislation Amendment Act, which clarified that offences involving terrorism fall within the most serious class of offences for which interception warrants are available.

The legislation as passed had bi-partisan support.

The Bill containing ASIO's new powers was introduced into the House of Representatives on 21 March 2002, nine days after the legislation I have just detailed. The new ASIO powers were given Royal Assent on 22 July 2003, exactly one year and 17 days after the other legislation, and following three separate Parliamentary Committee hearings and reports. Understandably, the ASIO Bill was also the subject of extensive public debate. And like the ASIO Act of 1979, and all subsequent amendments, it was eventually passed with bi-partisan support.

ASIO's New Powers

The ASIO Act amendments of July 2003 provided a new power which permits the Director-General, with the Attorney-General's consent, to seek a warrant authorising the questioning (and, in limited circumstances, detention) of a person where to do so would substantially assist the collection of intelligence in relation to a terrorist offence, and relying on other methods of collection would be ineffective. The new power also covers persons who are not, themselves, engaged in terrorist activities, but who may have relevant information or documents.

So, the new powers only apply to terrorism offences and may only be issued as a measure of last resort. Unlike all other ASIO warrants, questioning and detention warrants are not subject to approval within the Executive arm of Government - ie. the Attorney-General - but can only be issued or approved by a Federal Magistrate or a Judge. Detention may only be authorised in circumstances where there are grounds to believe that the person may alert other persons to the investigation, or may destroy or damage relevant documents, or may not turn up for questioning. Any one warrant may authorise detention for a maximum period of seven days. A person subject to a questioning or detention warrant has the right to contact a lawyer of choice, although, in the case of a detention warrant, ASIO may object to a particular lawyer on security grounds, in which case the final decision rests with the 'prescribed authority'. All questioning must take place before a 'prescribed authority', being a former judge, a currently serving judge or a President or Deputy President of the AAT.

A person may be subject to questioning adding up to a maximum total of 24 hours, except where an interpreter is required, in which case the maximum total is 48 hours. After each eight hours of questioning, the prescribed authority must be satisfied that further questioning is justified for questioning to continue. Persons detained are held by the police in accordance with the conditions approved by the issuing authority and in accordance with the Protocol to the Act. A person under 16 cannot be the subject of a warrant. A person aged 16 or 17 can only be the subject of a warrant if the Attorney-General and Issuing Authority are satisfied that the person will commit, is committing, or has committed, a terrorism offence. If a person aged 16 or 17 is detained, he/she must be allowed to contact a parent or guardian and can only be questioned before a prescribed authority, in the presence of a parent or guardian, and questioning cannot be for periods of more than two hours at a time.

Under the legislation, it is an offence:

- not to appear before a prescribed authority;
- to knowingly make a materially false or misleading statement; or
- to fail to produce any record or thing requested in accordance with the warrant.

These offences attract a maximum penalty of five years imprisonment. However, anything said by a person under a questioning or detention warrant is not admissible in evidence

against the person in criminal proceedings, other than in relation to one of the above offences.

The new powers were used for the first time during the Brigitte investigation. Two questioning warrants have so far been sought and approved, To date, ASIO has not sought a detention warrant. As you will understand, I cannot comment on the substance of the warrants issued. What I can say is that, so far, the process has worked smoothly from a legal and administrative viewpoint. It is very resource intensive, but I suppose that is not unreasonable given the unusual nature of the powers. Secondly, the new powers can be a valuable tool in intelligence collection. As a direct result of our experience in the Brigitte investigation we identified three practical issues:

- the need to be able to prevent a person seeking to leave the country who is subject to a questioning warrant;
- the need for more time where an interpreter is required for questioning; and
- the need for a secrecy provision.

These issues were addressed in a Bill which was passed by the Parliament in December. From our perspective, the amendments were urgent because, as the Brigitte case demonstrated, things can come out of the blue. Having identified the issues, we believed it would have been irresponsible not to bring them to attention immediately for consideration by the Government.

The most controversial of the December amendments was, of course, the secrecy provisions, which make it an offence for any person:

- while a warrant is in force, to disclose anything about the existence of the warrant, or any ASIO operational information obtained as a result of the warrant;
- in the two years after the warrant ceases to be in force, to disclose any ASIO operational information obtained as a result of the existence of the warrant.

The secrecy provisions were considered necessary because of the fact that, to obtain information during questioning, it may be necessary to disclose operational or other sensitive information which, if revealed, could damage ASIO's capacity to do its job.

Given some of the commentary on this issue, I think it is worth noting that the secrecy provisions now in the ASIO Act are consistent with those which were already in the Australian Crime Commission Act, except that the secrecy provision in the latter is for five years with a one year imprisonment for unauthorised disclosure, whereas in the ASIO Act it is a two year secrecy provision with up to five years imprisonment for unauthorised disclosure.

Community Confidence

Given the nature of the new powers, why should the community have confidence that they will not be abused? ASIO is conscious of the fact that the new powers are unusual. We have a responsibility to act with propriety and legality, with due regard for cultural and other sensitivities and to be accountable for our actions. We also have a responsibility to do our job and not to back away from it simply because it may be difficult and/or controversial.

So, what is new and where is the balance? In recognition of the fact that the new powers break new ground, the approval regime for questioning and detention warrants is very different from that for the exercise of ASIO's other special powers, such as telecommunication interception. Notably the final approval and issuing authority is outside the Executive arm of Government.

A warrant permits a person to have a lawyer of choice although, in the case of a detention warrant, ASIO has the right to object on security grounds. All questioning must take place before a prescribed authority, who is a person independent of ASIO and Government. When first brought before a prescribed authority, a person must be informed:

- of the right to complain to the Inspector-General of Intelligence and Security in respect of ASIO or to the Ombudsman in respect of the AFP; and

- of the fact that they may apply to the Federal Court in relation to the warrant or their treatment.

The Inspector-General of Intelligence and Security, in addition to the virtual powers of a standing Royal Commission which the Office carries, may also attend any questioning.

Finally, the new powers are the only provision in the ASIO Act which is subject to a 'sunset clause', which means that the powers will cease to operate from 23 July 2006, unless the Parliament approves their continuation before that date. The Parliamentary Joint Committee on Intelligence will, in fact, conduct a review six months before July 2006. All of this is in addition to the accountability arrangements which already apply to ASIO, including the fact that the Director-General must consult regularly with the Leader of the Opposition, who must also receive a copy of ASIO's classified Annual Report.

In brief, while in theory at least, all laws are open to abuse, the special arrangements put around ASIO's new powers are such that the community can have confidence that they will not be abused.

Further Changes?

I believe it important that we keep an open mind about the need for further changes to Australia's counter-terrorism laws, if new issues or challenges are identified. For instance, the machinery governing the listing of prescribed organisations is being revisited. Also, the issue of the protection of classified and security sensitive information has been the subject of a background paper last July and a recent discussion paper by the Australian Law Reform Commission and, sooner or later, this will be a critical issue in a terrorism case in this country.

In the context of keeping an open mind, I believe it relevant to note that liberal democracies today probably remain more dependent than many of us appreciate on a range of other countries taking action under laws which, in different times, we might criticise, a situation which raises some interesting philosophical issues. I make no judgement about it, but it does highlight the fundamental nature of the challenge of terrorism when it is up close.

Properly considered, balanced tough laws are an essential component in the fight against terrorism. The notion that in a liberal democracy such laws constitute a victory for terrorists is a nonsense.Their victory lies in the death of innocent civilians, ours lies in its lawful prevention.

HUMAN RIGHTS ACT 2004: A NEW DAWN FOR RIGHTS PROTECTION?

Elizabeth Kelly*

Paper presented at an AIAL seminar, Canberra, 31 March 2004.

I would like to thank the Institute for inviting me to speak to you in this lunch-time seminar on the ACT Human Rights Act 2004. The topic of human rights protection is always of great importance but as the first legislation of its type in Australia our subject today is particularly significant.

After a lengthy and somewhat tortuous debate the ACT Legislative Assembly passed the Human Rights Act 2004 in the early hours of Wednesday 3 March 2004. The Assembly vote brought to a close, at least for a while, the discussion about the value of Bills of Rights and whether and what model should be adopted in the ACT. It has been a controversial and sometimes heated debate that has been going on for over two years in and around Canberra.

When the ACT Human Rights Act commences on the 1 July 2004 it will bring into Australian law for the very first time a coherent statement of human rights as a measure against which executive action can be tested. Although it will take some time for it to filter through to all parts of the system, the Human Rights Act holds the potential for profound change in the ACT. The intersection of human rights and administrative law is rich with possibility: a focused, consistent, transparent human rights framework has the ability to inform and reshape traditional administrative law methodology.

The Act is based on what is generally referred to as the interpretive model. It is an ordinary statute that incorporates into ACT law fundamental civil and political rights enshrined in the International Covenant on Civil and Political Rights (ICCPR). At the heart of the Human Rights Act is a direction to public decision-makers and the judiciary to interpret ACT primary and subordinate law in a manner that is consistent with human rights.

This statutory direction is subject to the proviso that a human rights consistent meaning must prevail but only to the extent that it is possible to do so without overriding the clear intention of the legislature. Unlike a constitutionally entrenched Bill of Rights, human rights will not 'trump' other laws where there is an inconsistency and the Assembly retains all its existing law making power.

This new rule of construction has been described as a codification of the common law presumption that parliament does not intend to legislate inconsistently with human rights. In fact it takes us several steps further than this – namely, to actively look for a human rights consistent interpretation wherever it is possible to do so. It is not limited to situations where an ambiguity has been identified. Instead, section 30 of the Act enables the judiciary to go beyond the traditional search for the Assembly's intended meaning and legitimises the reading in of rights into existing and future laws.

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A human rights approach requires judicial consideration of the right as its starting point and an assessment of the proportionality of any limitations.

As Sir Stephen Sedley points out in relation to the UK Human Rights Act, the effect of human rights legislation is 'to focus the sometimes fuzzy concept of reasonableness through a lens of proportionality, and so make judicial reasoning about it more structured and more intelligible....Courts and public administrators are still getting used to this reorientation, and it does not make headlines; but it affects hundreds of thousands of people every year, and to them it matters a great deal'.[1]

The Human Rights Act also expresses the clear intention that human rights principles in the local context are to be informed by international human rights law. It does not compel, but actively invites, recourse to the judgments of other national courts such as the House of Lords and the New Zealand Court of Appeal and the judgments, decisions and views of international human rights bodies such as the UN Human Rights Committee and the European Court of Human Rights.

This is a logical requirement if ACT law is to develop alongside and consistently with internationally accepted human rights norms. Although it is common-place for Australian judges to look to comparable jurisdictions for guidance we must acknowledge that it is rare for the judgments of international human rights bodies to play an explicit role in judicial reasoning. Australia's lack of a national bill of rights has kept the Australian judiciary isolated, although not entirely divorced, from the general trend towards greater integration of domestic law with international human rights jurisprudence.

I would suggest that this is quite out of step with public expectations that Australian law protects basic rights and that human rights treaties to which Australia is a party have domestic application. There are many factors at play here but there is no doubt that Australia's accession to individual complaints mechanism under three international treaties – the ICCPR, the Convention Against Torture and the Race Discrimination Convention - has slowly raised expectations and the arguments against incorporation overstated.

Attempts by the courts to give effect to fundamental rights in administrative law have been met with a swift response. The High Court decision in *Teoh*[2], for example, was criticised as a backdoor incorporation of fundamental rights. The introduction of the Human Rights Act in the ACT will mean that, in this jurisdiction at least, that judicial method is internationalised and administrative and human rights law will become more entwined.

The Human Rights Act provides the content to the standards by which executive action is to be exercised and measured. Decision-makers in all areas of ACT government will have to incorporate consideration of human rights into their decision-making processes. And statutory discretions must be exercised consistently with human rights unless legislation clearly authorises an administrative action regardless of the human right.

The Human Rights Act does not create a direct right of action in the Supreme Court but it will give rise to actions based on human rights grounds that did not previously exist. For example, a challenge could be brought under the Administrative Decisions (Judicial Review) Act 1989 (ACT) to an administrative decision subject to review under that Act. The question will be was the action or decision lawful and was it consistent with human rights. The failure to interpret the law by reference to human rights may result in an error of law, be otherwise contrary to law, or a failure to take account of a relevant consideration. In addition to its power to grant remedies under s17 of the Administrative Decisions (Judicial Review) Act 1989, the Supreme Court could also grant a declaration of incompatibility.

I want now to discuss declarations of incompatibility in some detail.

If a question of interpretation is raised during proceedings in the Supreme Court, the Court will have the power to issue a declaration of incompatibility. The discretion will only arise if the Court is unable to conclude that the law in question is consistent with the Human Rights Act.

A declaration of incompatibility does not invalidate either primary or secondary legislation. Nor will it make the operation or enforcement of the law invalid or in any way affect the rights or obligations of anyone.

It was suggested by the Legislative Assembly Scrutiny of Bills Committee that the power conferred on the Supreme Court is both non-judicial in nature and incompatible with the exercise of Territory and Commonwealth judicial power. The Government has rejected that view. The interpretation of the law is quintessentially an exercise of judicial power and the requirement to determine a question of compatibility is integral to that process.

The power to make a declaration of incompatibility is not unique to the ACT. In New Zealand declarations of inconsistency have been developed by the Court of Appeal, which said in *Moonen's* case[3] that the question of consistency is a legal one that is incidental to the judicial function of statutory interpretation. The UK followed New Zealand's lead and included an explicit power to issue a declaration of incompatibility in the UK *Human Rights Act 1998*. And in 2001 the New Zealand Government formalised the availability of declarations of inconsistency for discrimination matters.

From our point of view the provision for a declaration of incompatibility is an integral part of the interpretive approach and the dialogue model established by the Act. Its purpose is to alert the Government and the Assembly to an issue of incompatibility while preserving parliamentary sovereignty. Although the declaration of incompatibility is unique in Australia, judicial review can be regarded as a kind of dialogue between the judiciary and the executive. Judicial supervision of executive decisions is part and parcel of our system based on the rule of law and ideally the decisions of the courts and tribunals should operate as a feedback mechanism to government.

It is premature to say that the Government can simply ignore a declaration. There are statutory obligations to present the declaration within 6 sitting days of the Attorney-General receiving it and to make a written response within 6 months. There may be situations where the Government decides for policy reasons to leave an inconsistent law unamended. However, there will also be cases where the inconsistency may be one that was unintended or went unidentified. In these cases the Government may decide not to contest a matter or initiate a review before the question is finally decided. In any event, declarations should not be a common occurrence if decision-makers are actively interpreting and applying the law consistently with human rights. It should only be in those cases where it is impossible to do so that a declaration is likely.

These features of the legislation have generated some excited debate but we should not lose sight of the fact the the Human Rights Act is not primarily aimed at generating human rights litigation but a human rights culture. The Government is focused on creating change within the public service and to make sure the frontline managers are making decisions within the human rights framework. The Act is also designed to integrate human rights into policy development.

The requirement that the Attorney-General form an opinion on the consistency of each Government Bill is crucial to achieving that goal. The statement of compatibility must be in writing and be presented to the Assembly. Where legislation is inconsistent with the Human Rights Act, the Attorney-General is required to say how the Bill is inconsistent.

The statement of compatibility will institutionalise human rights considerations at the beginning of the policy process. And although this work will be invisible to practitioners and the public, in many respects it is where the biggest impact of the Act will be felt. It centralises the function in the Attorney-General's portfolio and requires a statement for every government bill – not just those that limit human rights. In this respect the ACT provisions are stronger than equivalent provisions in the New Zealand Bill of Rights Act 1990 and the UK Human Rights Act 1998.

To give effect to this new obligation we are developing pre-enactment scrutiny policy and introducing new procedures across the whole of the ACT public sector. This is a significant undertaking for a small government with relatively few resources. But it is important because it means that policy officials must start to integrate human rights into policy development and that individual Ministers and the Cabinet as a whole will be made aware of the human rights implications of legislative proposals.

To complement the government's new procedures, the Scrutiny of Bills Committee has a statutory responsibility to report to the Assembly on issues arising under the Human Rights Act. The Committee will no longer look for undefined intrusions into personal liberties, it will have to adopt a human rights framework when looking at all Bills – government and private members. And it will have to draw upon human rights law expertise to assist it in this process. This should have the effect of increasing the understanding of human rights amongst parliamentarians and improving debate.

If, for practical reasons, either the Government or the Scrutiny of Bills Committee fails to report before legislation is considered, this will not affect the validity of laws passed by the Assembly. This provision has met with some criticism but it would be quite inappropriate for the internal workings of the Assembly to be bound by the legislation. There is nothing to be gained by disrupting or subjecting parliamentary procedures to unnecessary delays.

The Act also establishes the office of 'Human Rights Commissioner'. Dr Helen Watchirs has been appointed as the first Human Rights Commissioner for the ACT. She will have several functions, namely, to review Territory law, conduct education programs and report to the Attorney-General on any matter relating to the Human Rights Act.

The Act does not allow individual complaints to the Commissioner. The Government agreed with the Consultative Committee that involving the Commissioner in complaints handling would conflict with the primary responsibility of the courts and tribunals to interpret ACT laws. Nevertheless, the Commissioner has a right, subject to the leave of the court, to intervene in proceedings that concern the interpretation and application of the Act.

In conclusion, the Human Rights Act will have a significant impact on how we work. It will provide a coherent and principled framework for decision-makers and open the judiciary to the rejuvenating influences of international human rights jurisprudence. Parliamentary procedure should be strengthened and a heightened interest and understanding of human rights will develop over time.

Endnotes

1 Sir Stephen Sedley, 'Colonels in Horsehair', *London Review of Books*, 19 September 2002, at 17.
2 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.
3 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 129; [2002] 2 NZLR 754.

THE ACT HUMAN RIGHTS BILL 2003: A BRIEF SURVEY

*Max Spry**

The ACT Human Rights Bill 2003 (the Bill) was presented to the ACT Legislative Assembly in late 2003. The Bill is expected to pass the Assembly in early March 2004.[1] Much has been made of the ACT being the first jurisdiction in Australia to introduce what is often described as a Bill of Rights[2] – as if being new is in itself a virtue.[3] Obviously, at this early stage we cannot be certain what, if any, impact the Bill, if passed, will have on the protection of human rights, as well as on broader issues such as democratic governance and accountability. Nevertheless, this paper offers some preliminary suggestions. It examines the Bill as presented to the Assembly, and considers whether it actually meets the objectives set by its proponents. The paper suggests that the Bill is a backward step in terms of rights protection, as well as in terms of maintaining respect for the Rule of Law, in the ACT.

The ACT Human Rights Bill 2003: An overview

The Bill runs to 44 clauses covering a wide range of human rights issues. One could write a book on most, if not all, of the individual clauses of the Bill (and this is before anyone has even had an opportunity to run a case before the Courts on the Bill).

Clause 5 of the Bill defines 'human rights' as those 'civil and political rights in part 3' of the Bill. The 'human rights' in Part 3 include (to use the clumsy and imprecise shorthand language of the Bill) the right to life (clause 9), protection against torture (clause 10), privacy (clause 12), rights relating to voting and to appointment to the ACT public service (clause 17), the right to a fair trial (clause 21), and certain rights in relation to criminal proceedings (clause 22). In addition to these specific 'human rights', clause 7 provides that the Act is not exhaustive of an individual's 'rights'. Thus, the Bill leaves the way open for other rights that only a reader with keen imagination and intuition would be able to identify but about which any two readers are likely to disagree.

Clause 28 of the Bill provides that 'human rights' may be limited by laws that 'can be demonstrably justified in a free and democratic society.'

The remedy for a breach of a human right is to be found in clause 32 of the Bill. If there is a proceeding before the ACT Supreme Court, and an issue arises whether a Territory law is inconsistent with a human right, the Court may, if it finds that there is an inconsistency between the Territory law and the human right, issue a Declaration of Incompatibility. Significantly, the Bill itself cannot be said to offer any substantive protection for the human rights it identifies because a Declaration of Incompatibility does not affect the validity or operation of the law that it impugns.

The Bill also provides for an ACT Human Rights Commissioner (clause 40). The functions of the Commissioner include reviewing the effect of Territory laws, including the common law,

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on human rights, and providing education about human rights (clause 41). The Commissioner may also intervene, with leave of the Court, in a proceeding involving the Act (clause 36).

The Bill's definition of human rights and other rights

As noted above the Bill defines 'human rights' as the 'civil and political rights in part 3.' However, by operation of clause 7, an individual's 'rights' are not limited to those 'human rights' as set out in Part 3 of the Bill. Clause 7 is important and has the potential to give rise to considerable litigation. It reads:

> This Act is not exhaustive of the rights an individual may have under domestic or international law.

The rights recognised by clause 7, an individual's 'rights', seem to be in addition to, and different from an individual's 'human rights' as defined by clause 5 and as set out in Part 3 of the Bill.

For example, the list of civil and political rights in Part 3 does not include a wide range of what many in the community might regard as rights. The right to own and deal with private property is not listed in Part 3. Arguably, this right falls within clause 7. Further, social and economic rights included in the Consultative Committee's[4] draft Bill, but not included in the Bill as introduced into the Assembly, such as the right to education, the right to the enjoyment of just and favourable conditions of work, and the right to be free from hunger, to name just three such rights, would also seem to fall within clause 7.

Clause 7 is a cause of significant concern. It leaves to the Court to determine, on an ad hoc basis, what rights, in addition to those 'human rights' set out in Part 3, individuals in the ACT possess. It is difficult to see how this could not give rise to a significant degree of litigation and consequent diversion of valuable court time, as individuals first seek to test which rights the Court is prepared to acknowledge, and further, what remedy the Court might be persuaded to give for breach of those rights. This is to be regretted. If the Assembly is intent on the passage of a Human Rights Act it ought to have at the least specified what rights an individual may possess. Also, by leaving it to the Court to find an individual's rights, the Bill fails to meet one of its key functions as identified by its proponents – that is, overcoming what is said to be the piecemeal and partial recognition of rights in the common law and in various statutes.[5]

More importantly, perhaps, it is doubtful whether a court is best placed to resolve the policy issues raised in respect of broad social and economic rights. As Lord Slynn has said in respect of the 'call in' procedures in relation to planning applications in the United Kingdom:

> The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for elected Members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for those objectives to be set out in legislation, primary and secondary, in ministerial directives and in planning policy guidelines.[6]

The extent to which clause 7 is used by the Courts to develop and expand rights depends entirely on whether the Court adopts an expansive or a conservative approach to its construction. Because this is beneficial legislation, it would be reasonable to expect the Court to adopt the former approach.

There is a worrying complication that the individual 'rights' recognised by clause 7 seem to be treated differently by the Bill to the 'human rights' defined by clause 5.

This is important, given clause 28 of the Bill which provides:

> Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

Clause 28 clearly applies to 'human rights', that is, Part 3 rights. But it appears that clause 28 does not apply to those individual 'rights' which fall within the terms of clause 7. So, for example, if the right to education is acknowledged by the Court as a clause 7 right it would appear to be absolute, and not subject to limitation.

It would also seem that the declaration of incompatibility procedure as set out in clause 32 of the Bill would have no application to an individual's rights under clause 7. This is because clause 32, like clause 28, specifically refers only to 'human rights', and not to clause 7 rights.

But does this mean that those who say that their clause 7 rights have been violated are left without a remedy? Again, this will depend on the approach of the Court. However, it is not difficult to imagine a scenario, for example, whereby an individual, Michael, an ACT public servant, claims that his right to the enjoyment of just and favourable conditions of work has been infringed. If Michael persuades the Court that he has this right, and that it has been breached by his employer, it seems to me that Michael should also be able to persuade the Court that he has a remedy by way of declaration, injunction or compensation relying on, amongst other things, Article 2 of the International Covenant on Civil and Political Rights (ICCPR).[7] Again, whether this occurs depends entirely on whether the Court adopts an expansive or a conservative approach to the construction of clause 7.

Part 3: Civil and Political Rights

Part 3 includes a selective list of civil and political rights. It is not by any means a comprehensive list of such rights. For example, and as noted above, Part 3 does not recognise the right to own and deal with private property. Nor, as is discussed further below, is there recognition of the right to a jury trial, even in criminal matters.

Clause 9 (1) provides in part that 'everyone has the right to life.' Clause 9(2), however, limits the application of clause 9(1) to 'a person from the time of birth.' Clearly, the drafters of the Bill did not wish to re-ignite the abortion debate by allowing anti-abortionists to run cases in the Court relying on clause 9(1). Whether the drafters have succeeded, though, is another matter, particularly if clause 9 is read with clause 10(2). Clause 10(2) provides:

> No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

Clause 10(2), unlike, clause 9, is not expressed to apply only to 'a person from the time of birth.' If passed in its current form, it could be argued that the Assembly intended clause 10(2) to apply to a person before birth because clause 10 does not include the exclusion that appears in clause 9. Does this mean that a human foetus cannot be subject to medical treatment without his or her free consent?

Clause 12 (a) provides that everyone has the right 'not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.' Clause 12(a), while superficially attractive, does not provide simply for a right to have one's privacy, family life, home and correspondence respected.[8] Rather, the clause confirms the right of Government to legislate to interfere with privacy, family, home or correspondence. In other words, providing the ACT Assembly follows the procedures for passing a valid law, it is difficult to see how the very narrow right conferred by clause 12(a) could be breached.

Clause 17(c) provides in part that every 'citizen' has the right to 'have access, on general terms of equality, for appointment to the public service and public office.' Section 69(2)(b) of

the *Public Sector Management Act 1994* (ACT) provides that a person shall not be appointed to the ACT public service unless he or she is an Australian citizen or a permanent resident of Australia. Does clause 17(c) of the Bill allow the Assembly to narrow the qualifications for appointment to the ACT public service to Australian citizens only (in other words, to exclude permanent residents of Australia)?

While 'citizen' is not defined in the Bill, it can only be assumed that the term refers to an Australian citizen. But this in itself raises further problems. Clause 17(b), for example, provides that every citizen has the right, and is to have the opportunity, to vote and be elected at periodic elections. Does this right extend to Australian citizens resident in Queensland? Similarly, most children who live in the ACT are Australian citizens but is the Bill suggesting that the Electoral Act will infringe their human rights by preventing them from voting in Assembly elections before they are 18 years old?

The right of a person awaiting trial not be to detained in custody as a general rule is set out in clause 18(5). Clause 18(5) is likely to be the subject of early consideration by the Court given the amendments proposed to the *Bail Act 1992* (ACT) by the Bail Amendment Bill 2003 presented to the Assembly on 11 December 2003. If passed, the amendments would, amongst other things, provide for a presumption against the granting of bail in certain circumstances, including where the accused is charged with murder.

Clause 21 provides for a right to a fair trial, and clause 22 sets out certain additional rights in relation to criminal proceedings. However, the Bill does not expressly provide for a right to trial by jury: a right to a fair trial does not necessarily equate to a jury trial. This omission is somewhat surprising, and indeed odd, particularly given that the Chair of the Consultative Committee, Professor Charlesworth, in arguing for the need for the ACT to have a Bill of Rights, had specifically referred to the limited protection offered by the Commonwealth Constitution in relation to the right to a jury trial.[9] The level of protection offered by the Bill, however, does not even meet the limited protection offered by the Constitution. This is to be regretted.

Remedies

On any view, the remedies provided in the Bill in relation to a breach of a 'human right' (that is, those rights listed in Part 3) are so weak as to be scarcely deserving to be characterised as remedies. Where a Territory law is inconsistent with a human right, the Court may, it would seem, only issue a Declaration if Incompatibility. Clause 32 provides:

(1) This section applies if –

  (a) a proceeding is being heard by the Supreme Court; and
  (b) an issue arises in the proceeding about whether a Territory law is inconsistent with a human right.

(2) If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right (the declaration of incompatibility).

(3) The declaration of incompatibility does not affect –

  (a) the validity, operation or enforcement of the law; or
  (b) the rights or obligations of anyone.

(4) The registrar of the Supreme Court must promptly give a copy of the declaration of incompatibility to the Attorney-General.

On receipt of the Declaration of Incompatibility, the Attorney-General must present a copy of the Declaration to the Assembly within 6 days of his or her receipt of the Declaration (clause 33(2)). The Attorney-General must prepare a written response to the Declaration and present this response to the Assembly within 6 months of presenting the Declaration to the Assembly (clause 33(3)). That is all that need happen. Human rights remain, therefore, 'subject to the political will of the day', one of the so-called 'problems' the Bill was intended to overcome.

It is noteworthy that clause 32 may be invoked only if a proceeding is before the Court. Second, even if the Court issues a Declaration of Incompatibility, the impugned law remains valid, operational and enforceable. The Court has no power to declare the impugned law invalid, or otherwise strike it down.

It is difficult to see in such circumstances who would put themselves to the not insignificant cost of running a hearing before the Supreme Court to obtain a Declaration of Incompatibility (and, if they are unsuccessful, facing the prospect of an adverse costs order). It must also be noted that proceedings to obtain a Declaration of Incompatibility are unlikely to be short, and that such proceedings may well be extended by virtue of the requirement to give notice to the Attorney-General, and to allow the Attorney-General a reasonable time in which to decide whether to intervene in the proceedings (clause 34). And, assuming a criminal trial, will the accused be held in custody while the Attorney-General considers whether or not to intervene? Even if a person successfully obtains a Declaration, he or she will still be subject to the law which the Court has found to be inconsistent with human rights. Would not most people ask: 'What is the point?'

It might be said that the Declaration of Incompatibility procedure ensures that human rights remain to be finally determined by the legislature, and not the Courts, and so democratic rule is preserved. But if the legislature was so intent on abrogating human rights in the first place, why would it feel the need to do anything different on receipt of a Declaration of Incompatibility?

This has been acknowledged by Professor Charlesworth: '[I]f we look at the one jurisdiction that now has three years history with Declarations of Incompatibility [ie the UK], ... the legislature certainly doesn't feel unduly pressured by such Declarations.'[10]

Further, the Bill is silent on what, if any remedies, are available to an individual whose 'human rights' have been breached by an ACT public agency or authority. Even the UK *Human Rights Act 1998* makes it unlawful for a public authority to act in a way incompatible with the rights incorporated in that Act.[11] Further, the UK Act expressly provides that, where a court finds that a public authority has acted or, proposes to act, unlawfully, the court may grant such relief 'within its powers as it considers just and appropriate',[12] and this includes the payment of damages.[13]

As Professor Creyke has recently commented:

> It is difficult to see how this law [the ACT Human Rights Bill] is an advance on the present position. Currently ACT citizens are covered by the HREOC Act 1986 which, as already mentioned, provides for findings by the Commission that acts or practices are contrary to the ICCPR rights. For the ACT Human Rights Bill also to provide for this right does not appear to add anything. At present, the HREOC also has the function of examining Acts and subordinate laws of both the Commonwealth and the Territory to ensure compliance with the ICCPR. So for the ACT Human Rights Commissioner also to have this function in relation to Territory laws appears to be otiose. Further, unlike the position under the Bill, HREOC is able to recommend an award of compensation for breaches of the ICCPR. This must be an advantage over a Bill which simply provides for an unenforceable declaration of incompatibility. In addition, to obtain a declaration the individual or agency must go to the ACT Supreme Court. At least HREOC can, in effect, make a declaration of incompatibility without the

> individual complainant facing any legal bills. The introduction of the ACT Human Rights Bill undoubtedly has symbolic significance. It is hard to see that it offers more than that.[14]

Other remedies

While the remedy set out in clause 32 is likely to prove ineffectual, is it the only remedy available to the Court in relation to a breach of a human right? (As noted above it is arguable a range of remedies might be held to exist, including the payment of compensation, in respect of a breach of a clause 7 right.) Arguably, should the Court adopt an expansive approach to the Bill, it may well be that the remedies available for a breach of a 'human right' are not limited to the invocation of the Declaration of Incompatibility procedure.

For example, clause 19(1) provides that 'anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.' Does this permit a court to refuse to sentence a person to prison if it considers the person unlikely to be treated in accordance with this right? A magistrate has recently been reported as saying that 'ACT courts are being blackmailed into putting mental health patients in custody when they do not belong there.'[15] Would clause 19(1) apply in such circumstances to prevent a mental health patient being placed in custody?

Similarly, if the right to a fair trial (clause 21), or the minimum guarantees in relation to criminal proceedings (clause 22) are infringed, might not the Court stay the proceedings, consistent with the principles in *Dietrich v R*?[16] If not, is the Bill an attempt to erode the inherent jurisdiction of courts to stay proceedings which will result in an unfair trial?

Conclusion

If the Bill becomes law it is unlikely to contribute in any meaningful way to the development of human rights in the ACT. More than likely it will have a negative impact on the protection of human rights, particularly as the Bill does not provide for proper means of enforcement.

As Lauterpacht said in 1948 of an International Bill of Rights, without proper enforcement and protection:

> It would foster the spirit of disillusionment and, among many, of cynicism. The urgent need of mankind is not the recognition and declaration of fundamental human rights but their effective protection by international society.[17]

Over 50 years later, the ACT Bill serves neither to declare fundamental human rights, nor to offer those rights actually specified in the Bill, any effective measure of protection. How could the ACT Bill not 'foster the spirit of disillusionment and, among many, of cynicism'? And this, in turn, can only entail a breakdown in the Rule of Law.

Endnotes

1 This paper was written before the Human Rights Act 2004 was passed on 3 March 2004. The Act passed with some amendments, and readers should consider the Act for themselves.

2 See for example: Dr T Faunce, 'Rights bill will remain neutral' *Canberra Times* 30 September 2003.

3 This fondness amongst Australian constitutional lawyers for things new reminds me of the consumerist values satirised in Aldous Huxley's *Brave New World*. See in particular A Huxley *Brave New World* 1977, p 51: "I love new clothes, I love new clothes, I love ...'.

4 In April 2002, the Chief Minister appointed a Consultative Committee, chaired by Professor Hilary Charlesworth, to enquire into the question whether the ACT should adopt some form of bill of rights. The Consultative Committee's report, Towards an ACT *Human Rights Act*, was released in May 2003.

5 See, for example, the Chief Minister, Media Statement, 18 November 2003; The Law Report, 9 December 2003: 'They're (rights) scattered, they're disparate, they can't be found and they're not well understood, and that's what we're seeking to overcome.'
6 *Alconbury* [2001] 2 All ER 929 at [48].
7 Article 2(3)(a) of the International Covenant on Civil and Political Rights (ICCPR) states: 'Each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms have been violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.'
8 Compare Article 8 of the European Convention on Human Rights incorporated into the UK *Human Rights Act 1998*.
9 H Charlesworth, 'Maybe Human Rights are not so well protected' *Canberra Times* 29 April 2002.
10 H Charlesworth, The Law Report, 9 December 2003.
11 *Human Rights Act 1998* (UK), s 6.
12 Ibid, s 8.
13 And see *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406 (16 October 2003).
14 R Creyke, 'The performance of Administrative Law in Protecting Rights' unpublished paper presented at the Workshop, Protecting Human Rights in Australia: Past, Present and Future', St Kilda, 10-12 December 2003.
15 M Boogs, 'Mental Health Patient Outcry', *Canberra Times*, 17 February 2004, 2.
16 *Dietrich v R* (1992) 177 CLR 292.
17 Quoted in AW Brian Simpson 'Hersch Lauterpacht and the Genesis of the Age of Human Rights' (2004) 120 *Law Quarterly Review* 72.

VEXATIOUS APPLICATIONS UNDER FOI

Amanda Green*

> Gone is the notion that people elect a government and then allow them to govern. Complexity in government business and the wish of people to participate more in the decision-making processes which affect the quality of their life in a democracy means that citizens need access to information and that governments have an obligation to facilitate transparency and consultation and to give adequate reasons for their actions.-Sir John Robertson[1]

Sir John Robertson identified that the basis of freedom of information legislation in Australia involves the provision of government-held information to encourage accountability and active citizenship. However, Robertson's statement fails to address the influential nature of citizens' applications for information. The exercise of power associated with freedom of information legislation requires that the people's need for government transparency is balanced against the ongoing preservation of governmental efficiency. Arguably, where an imbalance exists, the fundamental ideals of the legislation are compromised. This research paper discusses the impact of vexatious applications on the achievement of the governmental efficiency-accountability balance. The *Freedom of Information Act* 1982 (Cth), s24, and the South Australian legislative equivalent, s18, contain statutory provisions for addressing voluminous applications, a type of vexatious request. However, agencies are provided with no legislative guidelines with regard to other types of vexatious applications, such as repeat or serial requests, unlike Victoria, which is currently the only State to embody such a provision. Though there has been much Parliamentary and academic debate regarding the inclusion of a legislative provision to deter vexatious applicants generally, there has been consistent approval for encouraging a general culture of disclosure among government departments to ensure an appropriate balance between the interests of agencies and applicants alike.

Brief investigation of the legislative history of freedom of information in Australia reveals a concept which resides awkwardly between our inherited Westminster style of governance and the pertinence of maintaining democracy, but one mediated by positive attitudes and acceptance. Though Australia was greatly influenced by the 1960s 'open government' movement in the United States of America, there was uncertainty as to whether such legislation would be compatible with the inherent secrecy associated with our English-based regime.[2] In its consideration of the Freedom of Information Bill 1978 (Cth), the Senate Standing Committee on Constitutional and Legal Affairs rejected the perceived notion of legislative incompatibility with styles of government, stating that 'it is rather a question of attitudes, a view about the nature of government, how it works and what its relationship is to the people it is supposed to be serving'.[3] The resulting *Freedom of Information Act* 1982 (Cth) was used as a model for the legislative provisions of the States It embodied three primary intentions: (1) individuals should have the right to know and access what information the government holds about them; (2) when government is more open to public scrutiny, it is accountable, which should, in turn, foster competency and efficiency; and (3) public access to information should lead to increased public participation in policy making and government processes.[4] It is this underlying right to access government-held information, without having to prove standing, which is argued to be a fundamental safeguard of democracy in

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* *A paper presented at the University of Adelaide Law School and AIAL Administrative Law Students Forum 2003.*

Australia.[5] This proposition is supported by the freedom of speech cases, which discussed the fundamental significance of information and citizen access to that information to ensure active participation in Australia's representative democracy.[6] However, this paper will focus more closely on the second legislative intent, and whether the Commonwealth and South Australian legislation adequately address the need for balance between applicant and agency interests in the provision of information.

Commonwealth and South Australian freedom of information legislation includes provisions enabling government agencies and Ministers the opportunity to refuse the processing of requests in certain circumstances.[7] In essence, both provisions allow agencies to refuse to deal with an application if satisfied that processing would 'substantially and unreasonably divert' resources from the agencies[8] or interfere with the performance of the Minister's functions.[9] The obvious policy implication of this section is to allow agencies the discretion to determine whether they can meet the processing demands embodied in applications, particularly where a time limit is involved. However, by allowing agencies to exercise discretion to ensure that their continued efficiency is not compromised by public applications for information, does this help or hinder achieving the efficiency-accountability balance? Is this discretion justifiable in light of vexatious applications or does it undermine the spirit of freedom of information legislation?

Vexatious applications for information require government agencies to conduct resource intensive searches, resulting in a large administrative burden. Whilst the Commonwealth *Freedom of Information Act* s24 and the South Australian *Freedom of Information Act* s18 endeavour to remedy such burdens, it must be considered whether these sections extend far enough to ensure a balance between the interests of both agencies and applicants. Vexatious requests are those which can be described as having been made to 'cause waste or inconvenience'[10] and can be commonly characterised by the lodgment of multiple applications by one person on the same topic (repeated), or, by requesting many documents in one application (voluminous).[11] Understandably, the processing of such requests is time-consuming and encroaches on the efficiency of agencies. Vexatious applications have been reported to severely hinder the administration of freedom of information across the nation and agencies have called for amendments to be made to address the problems that such applications present.[12]

Arguably, the Commonwealth *Freedom of Information Act* s24 and the South Australian *Freedom of Information Act* s18 address the problem of voluminous applications by allowing agencies to refuse access where processing would hinder their operations. Commentary surrounding the inclusion of a similar provision in the Victorian *Freedom of Information Act* 1982[13] provides relevant insight into the acknowledged need for reform without undermining the legislative intention of the Act. In 1989, the Legal and Constitutional Committee of the Victorian Parliament recommended that it was necessary to alter the Victorian *Freedom of Information Act* 1982 to achieve a balance between the citizens' right of access to information and the diversion of governmental resources in processing large requests for information. The Committee reported that 'the public interest in efficient government requires that voluminous requests be discouraged' and, as such, agencies should have legislative support to enable the refusal of large applications.[14] The Committee asserted that, when used correctly, such a provision would not compromise the spirit of the Act. The Attorney-General of Victoria, in the second reading of the *Freedom of Information (Amendment) Act* 1993, echoed similar concerns, arguing that 'although the number of voluminous requests was relatively small it nevertheless caused severe disruption to agencies', citing one example in which an applicant lodged a request involving more than 2000 documents.[15]

In response to the 1989 Legal and Constitutional Committee recommendation, academic commentary suggested that the proposal 'failed to appreciate that an applicant may lodge a number of individual requests which, when viewed separately, appear to be reasonable.

However, when lodged together, often simultaneously, they form a package which is certainly voluminous'.[16] This argument pre-empted the discussion by the Victorian Court of Appeal in *Secretary, Department of Treasury and Finance v Kelly*[17] where the Department refused to process Kelly's application on the grounds that it was not 321 small requests, as Kelly contended, but one voluminous request which was aggregated on the basis of the commonality of the requests. It was later argued that Kelly might have actively sought to avoid enlivening s25A by lodging 321 small requests, which is certainly contrary to the intentions of the Act[18] and exploitative of the concept of freedom of information generally.

The Victorian *Freedom of Information Act* 1982 extends beyond the Commonwealth and South Australian provisions, with the inclusion of s24A to limit requests made by repeat or serial applicants. The addition of this provision was in response to the Australian Law Reform Commission and the Administrative Review Council's joint review of the Commonwealth *Freedom of Information Act* in 1995.[19] The ALRC/ARC Review, in their determination of whether the administrative objects of the Act had been achieved, received submissions from agencies expressing the need for reform regarding vexatious applications.[20] The ALRC/ARC Review recognised that s24 of the Commonwealth *Freedom of Information Act* placed agencies in a powerful position over citizens and, as such, emphasized the importance of officer consultation with applicants to narrow their requests, to ensure their applications would be processed. The ALRC/ARC Review recognised that agencies have no means of refusing repeated applications. In response the Review proposed Recommendation 35:

> The FOI Act should be amended to provide that an agency may refuse to process a repeat request for material to which the applicant has already been refused access, provided there are no reasonable grounds for the request being made again.

It is clear from the array of submissions made to the ALRC/ARC Review that vexatious applications compromise government efficiency, unsettling the intended balance between agencies and applicants. Though the Commonwealth has not acted upon the ALRC/ARC's recommendation, Victoria has successfully integrated s24A into their freedom of information legislation, though, as yet, it has not been subject to litigation.

The inclusion of provisions allowing refusal of vexatious requests cannot be complete without consideration of the possible disadvantages. Of course, such provisions are open to abuse, swinging the pendulum toward encouraging greater government agency discretion and away from their role as caretakers of the public interest, arguably hindering the achievement of an appropriate efficiency-accountability balance. The ALRC/ARC Review received submissions expressing concern about the potential for decision-makers to abuse such a provision, most notably from the Commonwealth Ombudsman.[21] The Review said that such a provision would enable agencies to refuse processing requests simply because they pose a nuisance to the usual performance of operations in already stretched government agencies.[22] The Review acknowledged the word 'vexatious' could not be clearly defined and predicted awkward implementation of the concept.[23] Academics Helen Sheridan and Rick Snell, contend that vexatious requests are extremely rare and an inevitable consequence of any information access scheme.[24] Thus, opponents argue that the inclusion of a provision allowing agencies to refuse all vexatious applications would be an excessive response when, as is discussed below, the balance between agency and applicant interests would be better achieved by encouraging a general governmental attitude of disclosure.

It has been argued that if agencies are legislatively empowered to refuse vexatious applications, such discretion should be mediated by consultation with the State Information Commissioners or Ombudsmen, in conjunction with guidelines, to ensure that the potential for abuse is minimised and an appropriate balance between agency and applicant interests is realised. Queensland's 1990 Electoral and Administrative Review Committee

acknowledged that although State government agencies were unhappy with their inability to refuse vexatious applications, the insertion of such a provision would be contrary to the spirit of freedom of information legislation as it would go to the applicant's motive for making their request, 'a matter which Australian FOI legislation deliberately avoids'.[25] The Information Commissioner of Western Australia, however, saw benefit in the government being able to refuse unreasonable applications but recommended that the agency must have the permission of the Information Commissioner before refusing such a request.[26] The South Australian Ombudsman recommended that, although reasonably rare, applications that are frivolous, vexatious, misconceived or lacking in substance should be able to be refused, and should be provided for in South Australian legislation.[27] He made reference to a case where he was 'requested by the same applicant to review two determinations which ostensibly dealt with the same documents...(and he) saw no practical purpose in wasting already limited resources...(and) had concerns about the bona fides of the applicant'.[28] Both the Information Commissioners of Queensland and Western Australia believed that it would not be contrary to the aim of freedom of information legislation if a provision were included to refuse vexatious applications. However, the discretion of decision-makers needed to be reduced by the imposition of guidelines to ensure that the statute is appropriately applied by agencies.[29] Likewise, the South Australian Ombudsman stressed the importance of allowing the Ombudsman the 'legislative discretion' to refuse vexatious applications.[30]

Certainly, the administrative success of freedom of information legislation, especially provisions allowing agencies to refuse the processing of applications,[31] must be tempered by strong, positive attitudes regarding the provision of information. Bayne expressed concern that s25A has the potential to limit the effectiveness of the Victorian Act if misused and thus, it was important for officers to approach applications openly.[32] Likewise, the Victorian Ombudsman encourages freedom of information officers to maintain a positive and open attitude, to actively consult with applicants to ensure their requests are processed and achieve resolution.[33] Given the similarity of s25A of the Victorian *Freedom of Information Act* 1982 with the Commonwealth and South Australian legislative equivalents, calls for administrative openness should be heard and seriously considered. The ALRC/ARC Review emphasized the importance of establishing a proactive rather than reactive attitude to freedom of information. This approach finds support in the South Australian Ombudsman's 1997/1998 Annual Report which suggested that State legislation should 'contain a presumption in favour of the release of information'.[34] More recently, administrative attitudes were regarded as highly influential in the United Kingdom, where it was argued that 'openness does not begin and end with an FOI Act...statutory provisions need to be championed within government itself if openness is to become part of the official culture rather than an irksome imposition'.[35] It has further been submitted that developing a culture of disclosure within government has the potential to reduce the burdensome effect of vexatious applications.[36] Thus rather than attempting to control the number of vexatious requests that are submitted, it would be beneficial to develop other areas of freedom of information, over which the government has more control, to achieve a greater balance between governmental efficiency and accountability, and ensure that the interests of agencies and applicants are met.

It could be argued that the South Australian *Freedom of Information Act* 1991 s18(2a), which came into effect on 1 July 2002,[37] is the most flexible provision as it enables agencies to validly refuse *both* vexatious and voluminous applications, whilst maintaining an acceptable efficiency-accountability balance. Section 18(2a) reads:

> An agency may refuse to deal with an application if, in the opinion of the agency, the application is part of a pattern of conduct that amounts to an abuse of the right of access or is made for a purpose other than to obtain access to information.

As discussed above, s18(1) enables the agency to refuse the application if it would compromise agency operations, but s18(2a) allows refusal where the agency believes the application abuses the spirit of the legislation. Whilst the provision does not expressly extend as far as the Victorian *Freedom of Information Act* 1982 s24A, it enables wider agency discretion than does the Commonwealth legislation. Certainly, this presents a more balanced approach to maintaining governmental efficiency and accountability in light of vexatious applications for information.

The South Australian Ombudsman's recommendations are complemented by the opinions expressed by Paul Williams, Principal Auditor for the South Australian branch of the Department of Administrative and Information Services. Mr Williams, who has had much first hand experience with compiling freedom of information reviews, believes that governmental accountability is enhanced by freedom of information legislation, as it sets clear boundaries for agencies and allows various levels of appeal for unsatisfied applicants. Mr Williams explained, much like the ALRC/ARC Review and the Victorian and South Australian Ombudsmen, that voluminous applications are rare. However, he conceded that while such requests can have a detrimental effect on the administration of the freedom of information regime due to time constraints, limited resources and few sufficiently trained officers, most agencies have freedom of information officers whose full time job entails the co-ordination of freedom of information reviews. Mr Williams agreed that while there would be some benefit in including a provision like s24A of the Victorian Act to deter repeated requests, he believed that it would have a limited impact on governmental efficiency due to the rarity of such applications.

One of Mr Williams' most distinct arguments in relation to vexatious requests stressed the importance of weighing the interests of the individual against those of the wider community. He felt that the *Freedom of Information Act* 1991 (SA) may be compromised in spirit where agencies have the discretion to refuse applications in certain circumstances. However, reality suggests that limited government resources can only extend so far before costs of processing large or repeat applications will be passed on to the greater community. As Mr Williams argues, the question which then arises is 'whether one person's right to information is greater than the community's right to services'. Thus, whilst the spirit of the Act is somewhat compromised, the inclusion of sections regarding vexatious applications would not be without merit.

Current Commonwealth and South Australian freedom of information legislation achieve a tenuous balance between the interests of agencies and applicants. It seems unavoidable that vexatious applications will arise in any freedom of information regime. Therefore, rather than attempting to control the number of applicants, it appears more beneficial to incite change in areas where the government has control. Suggested means of control include investing Ombudsmen and Information Commissioners with legislative discretion with regard to the processing of such applications, greater encouragement of consultation between officers and applicants to reduce or focus requests, and the development of a general culture of disclosure among agencies. Democracy demands that government remain accountable for its decisions and that citizens are encouraged to scrutinize those decisions. Though vexatious applications arguably compromise freedom of information legislation, it is consistently suggested that its administrative success is best achieved, and the interests of agencies and applicants are met, when both a positive attitude and a conciliatory approach are adopted.

Endnotes

1 6th International Ombudsman Conference, October 1996, Buenos Aires, Argentina as cited by the South Australian Ombudsman, *25th Annual Report* 1996/1997 at 99.

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3 Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 ('Senate Committee'), Freedom of Information, AGPS, Canberra, 1979 n 2 at para 4.63, as cited above in n 2 at 5.
4 Senate Committee, n 2 at paras 3.3-3.5, as cited above in n 2 at 2.
5 As cited above in n 2 at 4.
6 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
7 *Freedom of Information Act* 1982 (Cth) s24; *Freedom of Information Act* 1991 (SA) s18.
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10 Electoral and Administrative Review Committee (EARC), GoPrint, Brisbane, 1990, n 7 at (x), as cited above in n 2 at 44.
11 Department of Justice and Attorney-General (Queensland), *Freedom of Information Annual Report* 1997/1998, n 35 at 10, as cited above in n 2 at 44.
12 Ibid per submissions made by the Queensland Police Service, Department of Tourism, Sport and Racing, Office of Health Professional Registration Board and the Queensland Corrective Services Commission, as cited above in n 2 at 44.
13 s25A.
14 The 38th Report of the Legislative and Constitutional Committee upon Freedom of Information in Victoria, November 1989, para 5.19.
15 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 1993, 1738.
16 Editors, 'Victorian Government Responds to Legal and Constitutional Committee Report' (1990) 29 *Freedom of Information Review* 62, 63.
17 [2001] 4 VR 595.
18 Editors, 'Victorian FOI Decisions: *Kelly and Department of Treasury and Finance*' (2002) 98 *Freedom of Information Review* 23, 24.
19 Australian Law Reform Commission and the Administrative Review Council, 'Open Government: A Review of the Federal *Freedom of Information Act* 1982' (1995). <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html>
20 Ibid, para 7.18, per submissions made by the Department of Finance, Department of Employment, Education and Training, Department of Defence, Department of Administrative Services and the Department of Immigration and Ethnic Affairs.
21 Ibid, submission 53.
22 Ibid, para 7.18.
23 Id.
24 Ibid, submission 58.
25 EARC, n 7 at para 18.71, as cited above in n 2 at 44-45.
26 Information Commissioner of Western Australia, *4th Annual Report* 1996/1997, n 261 at 12, as cited above in n 2 at 45.
27 South Australian Ombudsman, *26th Annual Report* 1997/1998, n 57 at 72.
28 South Australian Ombudsman, *23rd Annual Report* 1994/1995, Recommendation 8 at 65.
29 As cited above in n 2 at 45.
30 As cited above in n 28.
31 *Freedom of Information Act* 1982 (Cth) s24; *Freedom of Information Act* 1991 (SA) s18; *Freedom of Information Act* 1982 (Vic) s24A and s25A.
32 Peter Bayne, 'Freedom of Information' (1993) 1 *AJAL* 51, 51.
33 Victorian Ombudsman, *29th Annual Report* 2001/2002, at 159.
34 South Australian Ombudsman, *26th Annual Report* 1997/1998, at 64.
35 UK Government, 'Your Right to Know: The Government's Proposal for a Freedom of Information Act' ('White Paper'), December 1997 at para 7.1, as cited above in n 2 at 11.
36 As cited above in n 2 at 43.
37 Freedom of Information (Miscellaneous) Amendment Act 2001, No 61 of 2001 [Assented to 6 December 2001].

THE REMISSION OF PENALTIES UNDER THE PRIMARY INDUSTRIES LEVIES AND CHARGES COLLECTION ACT 1991

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Introduction

The Levies Revenue Service (LRS) is an agency of the Australian Government Department of Agriculture, Fisheries and Forestry. The role of the LRS is to administer the efficient and effective collection and disbursement of levies and charges imposed by Commonwealth legislation on a wide range of rural commodities. These Commonwealth levies and charges are collected under the *Primary Industries Levies and Charges Collection Act 1991*(hereafter *PILCC* Act). Late payment penalties were imposed by LRS from 1stJanuary 2003 following a period of about two years in which penalties could not be calculated due to difficulties with the accounting software. It is thus an opportune time to review the current decision-making process[1] for remission of penalties. This paper is limited to examining the remission of late payment penalties under s16 of the *PILCC* Act, and will not address instances of department initiated penalty remission.

Section 15 of the *PILCC* Act imposes penalties for late payment of levies at the rate of 2% per month on the outstanding levies or charges and s16 provides for remission of penalties.[2] Section 16 (1) of the Act confers discretion on the Minister or an authorised person to remit the whole or part of a penalty amount payable under s15. A decision made under s16(1) is appealable to the Administrative Appeals Tribunal under s28(5).

Government departments and agencies are not only confined by inherent legal parameters imposed by statute but are also influenced and structured by constitutional principles and the political climate in which they exist. However, while an administrative body may be operating lawfully within this sphere, significant benefits can be achieved by adopting a proactive approach to government administration. This paper examines how the decision-making process for the remission of late payment penalties could be improved and the administrative principles which underpin these goals. These benefits will be evaluated by their capacity to effectively contribute to achieving efficiency, consistency and transparency and by the extent to which they uphold the department's Client Service Charter. Central to this evaluation, and in particular, achieving efficiency and consistency, is an examination of how policy guidelines are used in the decision-making process to confine the exercise of discretion. The accessibility and content of information disseminated and reasons for decisions is intrinsic to evaluating the transparency and openness of decisions. Although requests for remission of penalties under s16 of the *PILCC* Act is not a high-volume decision-making area,[3] it demands considerable resources to be properly administered. This paper will demonstrate how implementing three key recommendations will deliver greater efficiency, consistency and transparency in this process. It is recommended that the Levies Revenue Service:

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1. Improve client access to information
2. Formulate more flexible guidelines for penalty remission
3. Improve communication of reasons for decisions.

Upholding the principles of the Client Service Charter

Since the transformation of administrative law in the 1970's, Australia has seen an improvement in the framework for government decision-making.[4] One example is the development of client service charters which routinely commit government agencies to establish standards of administrative decision-making, such as providing reasons for decisions and establishing client complaint procedures. The department's Client Service Charter sets out accountability principles and grievance procedures.[5] Among the service standards it sets include being objective and unbiased in decision-making, communicating openly and providing explanations for decisions. The recommendations above not only support, but actively encourage, the principles of the department's Client Service Charter.

Openness and Access to Information

Understanding how decisions are made and the criteria on which decisions will be based is essential to an accountable and open government. It follows from this that access to information and documents relating to the process of decision-making is essential.[6] It is suggested that the LRS makes available to its clients general advice as to the criteria against which their request will be assessed. The existence of the *Freedom of Information Act* 1982 (Cth) does not preclude the LRS from making this policy readily available to its clients. Indeed, the role of freedom of information legislation should be considered a last resort where other avenues of obtaining the information have proved inadequate.[7] Levy payers seeking remission of penalties will generally consult one of the following sources of information: telephone call to LRS office, written letter, information brochure or the agency's website.[8] The website has no specific information about the procedure for lodging a request for penalty remission. It directs clients to the levy information brochures which themselves advise the client to call their nearest LRS office. LRS officers will generally advise a client who is enquiring over the telephone about remission to submit their request in writing. Current practice within LRS is for officers to advise clients to put their request in writing and under no circumstances should an officer offer an opinion as to the possible outcome of a decision. While the doctrine of legitimate expectation, in terms of giving rise to duty to accord procedural fairness, is no doubt an important consideration here, it is contended that providing general advice in a standard form such as a brochure or on the agency's website would encourage openness and transparency without compromising the exercise of the Minister's discretion. Disclosure of the policy may increase instances of abuse of the system by enabling levy payers to mould their grounds for requesting the remission to fit within the relevant criteria. This could be circumvented, at least partially, by carefully wording and limiting the information disseminated, for example, by including the broad objective considerations and information about circumstances in which penalty will not be remitted but omitting specifying circumstances in which it will. Such information should include a statement to the effect that each case will be considered on its merits.

In *Re Scott and Minister for Primary Industries and Energy*,[9] an appeal to the Administrative Appeals Tribunal on a decision not to remit penalties, one of the submissions was that there was a failure by the department to communicate the policy to the applicant at any of the meetings held prior to the payment being made in full. Importantly, the appellant did not argue that the policy adopted was unfair, only that it was not communicated to him. The Deputy President stated that 'failure to communicate the policy had no bearing on the appropriateness of the policy'.[10] Thus, while the appellant did not ultimately succeed on these grounds, at a practical level, it supports the contention that considerable resources could have been better directed if disclosure of the relevant policy and other documents had

taken place at a much earlier stage in the process. If the relevant criteria and reasons for the decision had been made available to the appellant this may have assuaged his sense of injustice, notwithstanding that he may not necessarily have agreed with the decision. Indeed, this demonstrates the value of participation in the process: not only is a fair decision made but a fair decision is *seen* to be made. Access to information and documents relating to the process of decision-making is essential to achieving this open relationship.

The Role of Discretion in the Decision Making Process: being open without compromising the integrity of the Minister's discretion

How is good decision-making measured? There are no absolute or determinable standards.[11] However, discretionary powers, a central notion of administrative law, forms a crucial element in the framework for creating a benchmark model. Discretion, in the context of administrative decision-making, is a choice between lawful alternatives. It is both an inevitable and desirable element of administrative decision-making.[12] As KC Davis contends in his classic argument for seeking the optimum balance between rules and discretion, even where rules can be written, discretion is often better as it fills the need for individualised justice.[13] Rules without discretion leave little or no room for unique individual circumstances to be taken into account. But while discretion allows the decision-maker to consider individual circumstances and offers the flexibility and element of choice which is intrinsic to the rule of law, it leaves the task open to the risk of arbitrary decision-making and inconsistency. This is because administrative decisions are not simply a syllogistic process of application of legal rules to facts; personalities, resources, skills, knowledge, politics and methods all affect the decision-making process.[14] Discretion can be confined by rules, policy statements and guidelines. Policy is also a means of achieving consistency in decision-making and the good administration of government demands a high level of consistency. This is an important consideration for the LRS due to the geographically fragmented nature of the agency. It has four regional offices nationally and a central office. It has developed an operating manual, the 'Guidelines for Remission of Penalties', which outlines the relevant policy considerations for remission of penalties.

Policy itself must be lawful and is limited to the statutory context in which it exists. Particularly in cases where a broad discretion is conferred on administrators, it is widely acknowledged that policy guidelines and manuals should 'echo rather than supplant legislation'.[15] Section 16(1) of the *PILCC* Act confers discretion on the Minister or an authorised person to remit the whole or part of a penalty amount payable under section 15. This provision, subject to subsection (2), which limits the amount that can be remitted under subsection (1) to $5,000 or such lower amount as is specified in the authorisation', vests a broad discretionary power in the Minister. However, discretion is confined by the policy objectives, as stated in s3 of the Act, the broad interpretation of the Act and the common law principle of ultra vires. For example, in *Re Scott*, Deputy President McMahon interpreted the discretion, having regard to the scope and purpose of the statute.[16] This common law principle is now also reflected in 5(2)(b) *Administrative Decisions (Judicial Review) Act 1977*. Deputy President McMahon also had regard to an affidavit of the executive director of the Australian Meat and Livestock Industry Policy Council which set out examples of the uses of the levy funds. He also considered an affidavit of the executive director of the Cattle Council of Australia which gave details of matters of national and industry significance which depend upon the levy. In other Administrative Appeals Tribunal hearings concerning the remission of penalties[17] the views of Deputy President McMahon in *Scott* have been affirmed, the respective members also concluding that the guidelines were lawful and consistent with the objects of the Act. Therefore, it is likely that, in any future appeals in this area, the guidelines will also be held to be lawful. Despite this, the LRS should take a proactive approach to ensuring that the guidelines are sufficiently flexible so that individual, unique circumstances which cannot be foreseen can be taken into account without the need for the decision maker to be satisfied that the circumstances are exceptional.

Establishing a Flexible Policy

Where policy exists in a particular decision-making area, administrators need to be careful that it is not applied inflexibly without regard to the merits of the particular case. Decisions whether or not to remit penalty are made by Regional Support Officers and Investigation Officers. These recommendations are endorsed by the Regional Manager and submitted to the Director for approval. Thus, if a policy exists, it should, in most instances, guide the decision-maker otherwise consistency is undermined. However, if the policy leaves open too narrow a window of discretion, it is likely that the policy will be too rigid and rule based to allow discretion, in truth, to be exercised by the recommending officer. The policy guidelines currently in place are particularly prescriptive about the criteria upon which decisions are made. For example, it details the specific timings to be taken into account for postal deliveries with Australia Post, special circumstances beyond the levy payer's control, ignorance of initial liability, levy payer mistakes and bankruptcy and external administration. In essence, these guidelines only leave open to the Minister a reason to depart from the policy in cases of 'exceptional circumstances'. As Brennan J said in *Re Drake and Minister for Ethnic Affairs (No 2)*,[18] there are substantial reasons which favour only 'cautious and sparing departures' from Ministerial policy.[19] Although Brennan J was referring to policy which has been scrutinised by Parliament, other observations support the appropriateness of following Ministerial policy.[20] In general, Ministerial policy should be followed unless it is either not lawful[21] or unless an injustice would occur in the particular circumstances.[22] In *Re Scott* the reasons put forward by the applicant were clearly outside the circumstances outlined in the guidelines for remission of penalties. Thus, the applicant relied on an argument that 'special circumstances' warranted, as a matter of justice, departure from the guidelines in this particular case. This argument that 'special circumstances' warranted remission in their respective cases was also put forward by the appellants in each of the cases *Mansfield Meat Supplies*,[23] *Ray Brooks Pty Ltd*[24] and *Tarago River Cheese*.[25] However, *Mansfield Meat Supplies* was the only one of these appellants who was successful on this ground. In that case Deputy President McDonald said that while the individual reasons put forward by the appellant may not constitute sufficient reason for remission, the co-existence of a number of these circumstances justified a special circumstance. It can be seen that demonstrating exceptional circumstances may be difficult for an applicant. It is recommended that the guidelines be formulated in more flexible terms, allowing the Minister to have regard to individual circumstances of the case without the need for these circumstances to be exceptional.

Reasons for Decisions and Transparency

'At a practical level knowing why an administrator has made a decision which is adverse to one's interests is crucial to the formation of a view as to the fairness of the decision'.[26] Empowering clients with this information will enable them to make an informed judgment as to whether the decision was made fairly. Was the decision made by adherence to policy guidelines? Was the policy applied appropriately? Was an unfair policy adopted? Was an error of law made? Answers to these questions will enable clients to make a decision as to whether the matter ought to be taken further. Currently, in its letters to clients advising that a decision has been made not to remit a penalty, no specific reasons are given. For example, clients are advised that, 'The authorised officer has considered your request and has determined that the reasons given do not constitute sufficient reasons for remission'. Draft documents prepared under the current departmental policy review indicate that reasons for decisions will be included in future letters to clients refusing remission. This is a positive move towards open decision-making, however, to be a useful source of information this must be coupled with information about criteria for penalty remission.

Empowering people with information about the department's decision-making policies and practices no doubt exposes the task to greater scrutiny. However, human experience shows

that where decisions are open to scrutiny, decision-makers are likely to ensure that care is taken and that decisions made are based on sound judgement and fair process.[27] This will no doubt encourage better decision-making. Furthermore, it will place the person making the request in a position to make an informed and coherent argument and to make available to the LRS relevant information, thereby improving efficiency in the process. It could also be argued that revealing the criteria upon which decisions are based and the provision of reasons for decisions undermines the Minister's discretion. It risks creating a rigid rule-based system in which discretion, in truth, is no longer present. However, it is not suggested that the information disseminated include specific criteria or absolute statements. Rather, as discussed above, communicating the broad policy objectives which underpin the decision-making process will achieve a balance between openness and integrity.

Conclusion

The three key recommendations of this paper will deliver greater efficiency, consistency and transparency in the decision-making process. Not only do these recommendations uphold the principles of the department's Client Service Charter, they actively promote them. Formulating its guidelines in more flexible terms will allow the Minister to have regard to the individual circumstances of the case without the need for these circumstances to be exceptional. This will no doubt deliver greater efficiency and fairness to the decision-making process. Improving client access to information and communication of reasons for decisions will establish an open and accountable relationship between the department and its clients. Furthermore, it enables the person affected by the decision to participate in the decision-making process. This promotes an appearance of impartiality and preserves confidence in the system. It can be seen that by adopting a proactive approach to improving its decision making practices, the Levies Revenue Service will be able to deliver a higher standard of service to its clients.

Endnotes

1 This phrase is to be interpreted in a broad sense to include the process of making general rules as well as decisions of individual application; it's meaning is not restricted to procedural issues; Cane, P, *An Introduction to Administrative Law*, Oxford University Press, Oxford, 1996 at 133.
2 The relevant sections of the *PILCC* Act are set out in Appendix A.
3 The LRS has received about 100 applications for penalty remission since 1 January 2003.
4 McMillan J, 'Better Decision Making: By What Standard?' (2002) 105 *Canberra Bulletin of Public Administration* 43 at 44.
5 The relevant sections from the department's Client Service Charter are set out in Appendix B.
6 Douglas, R, *Douglas and Jones Administrative Law*, 4th ed, The Federation Press, Sydney, 2002 at 89.
7 Administrative Review Council and Australian Law Reform Commission, 'Open Government: A Review of the Federal *Freedom of Information Act* 1982' (1995) AGPS, Canberra.
8 www.affa.gov.au/levies.
9 (1994) 35 ALD 157.
10 At 165.
11 McMillan, op cit n 4 at 46.
12 Allars, M, *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990 at 10.
13 Davis, KC, *Discretionary Justice: A Preliminary Enquiry*, Louisiana State University Press, 1969 at 17.
14 Allars, op cit n 12 at 3.
15 McMillan, op cit n 4 at 43.
16 (1994) 35 ALD 157 at 162.
17 *Re Tarago River Cheese Co Pty Ltd and Minister for Primary Industries and Energy* (1996) 41 ALD 605; *Re Ray Brooks Pty Ltd and Minister for Primary Industries and Energy* (1995) 42 ALD 122; and *Re Maclure and Minister for Primary Industries and Energy* (1997) 4 ALD 757.
18 (1979) 2 ALD 634.
19 At 644.
20 *Re Dainty and Minister for Immigration and Ethnic Affairs* (1987) 12 ALD 416.
21 *Green v Daniels* (1997) 13 ALR 1; *Re Secretary Department of Social Security and Diepenbroeck* (1992) 27 ALD 142.
22 *Minister for Immigration, Local Government and Ethnic Affairs v Roberts (1993)* 113 ALR 151.

23 *Re Mansfield Meat Supplies Pty Ltd and Minister for Primary Industries and Energy* (1996) 41 ALD 609.
24 See note 17.
25 Ibid.
26 Allars, M, *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990, at 129.
27 McMillan, op cit, n 4 at 43.

APPENDIX A

The relevant sections of the Primary Industries Levies and Charges Collection Act 1991 are set out below:

3 Objects

The objects of this Act are:

(a) to rationalise levy and charge collection; and

(b) to make provision for the efficient and effective collection of primary industry levies and charges.

15 Penalty for late payment

(1) If any levy or charge in relation to collection products remains unpaid after the time when it became due for payment, there is payable by the producer to the Commonwealth, by way of penalty accruing from the time the levy or charge became due for payment until it is paid in full, an amount worked out as follows:

(a) during the month in which the levy or charge became due for payment the amount of penalty accrues at the rate of 2% per month on the levy or charge due;

(b) during the next and each subsequent month the amount of penalty consists of the sum of each amount that accrued during a previous month and the amount accruing during that month at the rate of 2% per month on the sum of the amount of levy or charge then payable and penalty payable at the end of the previous month.

(2) Where:

(a) an intermediary deducts an amount under subsection 8(1) in relation to the unpaid levy or charge on any collection products; and

(b) the intermediary does not pay the amount deducted to the Commonwealth, a collecting authority or a collecting organisation at or before the time when the levy or charge became due for payment;

there is payable by the intermediary to the Commonwealth, by way of penalty accruing from the time the levy or charge became due for payment until the amount deducted is paid to the Commonwealth, an amount worked out as follows:

(c) during the month in which the levy or charge became due for payment the amount of penalty accrues at the rate of 2% per month on the amount deducted;

(d) during the next and each subsequent month the amount of penalty consists of the sum of each amount that accrued during a previous month and the amount accruing during that month at the rate of 2% per month on the sum of the unpaid amount deducted and penalty payable at the end of the previous month.

(3) Where:

(a) a person purchases prescribed goods or services in respect of a collection product of a particular kind; and

(b) a person fails to pay to the seller of those goods or services an amount on account of levy or charge (in this subsection called the **unpaid amount**) in accordance with subsection 9(2) within the period prescribed for the purposes of that subsection;

there is payable to the Commonwealth by the person, by way of penalty accruing from the end of that period until the unpaid amount is paid to the seller, an amount worked out as follows:

(c) during the month in which that period ends the amount of penalty accrues at the rate of 2% per month on the unpaid amount;

(d) during the next and each subsequent month the amount of penalty consists of the sum of each amount that accrued during a previous month and the amount accruing during that month at the rate of 2% per month on the sum of the unpaid amount and penalty payable at the end of the previous month.

(4) Where:

(a) a person who sells prescribed goods or services has received an amount on account of levy or charge; and

(b) that person does not pay the amount received to the Commonwealth before the end of the period within which, under subsection 9(1), it should have been so paid;

there is payable to the Commonwealth by that person, by way of penalty accruing from the end of that period until the amount is so paid to the Commonwealth, an amount worked out as follows:

(c) during the month in which that period ends the amount of penalty accrues at the rate of 2% per month on the amount received;

(d) during the next and each subsequent month the amount of penalty consists of the sum of each amount that accrued during a previous month and the amount accruing during that month at the rate of 2% per month on the sum of the amount received and penalty payable at the end of the previous month.

16 Remission of penalty

(1) Where an amount of penalty becomes payable under section 15 because an amount of levy or charge in respect of particular collection products remains unpaid after the time when it becomes due for payment, the Minister or an authorised person may, subject to subsection (2), remit the whole or a part of that amount of penalty.

(2) An amount remitted by an authorised person under subsection (1) is not to exceed $5,000 or such lower amount as is specified in the authorisation.

28 Reconsideration and review of decisions

(1) A person affected by a relevant decision who is dissatisfied with the decision may, within 28 days after the day on which the decision first 11 comes to the notice of the person, or

within such further period as the Minister (either before or after the end of the period) by notice in writing served on the person allows, by notice in writing given to the Minister, request the Minister to reconsider the decision.

(2) A request under subsection (1) must set out the reasons for making the request.

(3) The Minister must, within 45 days after receiving a request under subsection (2), reconsider the relevant decision and may make a decision:

(a) in substitution for the relevant decision, whether in the same terms as the relevant decision or not; or

(b) revoking the relevant decision.

(4) Where, as a result of a reconsideration under subsection (3), the Minister makes a decision in substitution for or revoking a relevant decision, the Minister must, by notice in writing served on the person who made the request under subsection (1) for the reconsideration, inform the person of the result of the reconsideration and give the reasons for his or her decision.

(5) An application may be made to the Administrative Appeals Tribunal for review of a decision of the Minister under subsection (3).

(6) A person who makes a relevant decision must give to a person affected by the decision a statement in writing to the effect that a person affected by the decision:

(a) may, if the person is dissatisfied with the decision, seek a reconsideration of the decision in accordance with this section; and

(b) may, subject to the Administrative Appeals Tribunal Act 1975, if the person is dissatisfied with a decision made upon that reconsideration, make application to the Administrative Appeals Tribunal for review of that decision.

(7) Where the Minister makes a decision under subsection (3) and gives to a person affected by the decision notice in writing of the making of the decision, that notice must include a statement to the effect that, subject to the Administrative Appeals Tribunal Act 1975, application may be made to the Administrative Appeals Tribunal for review of the decision to which the notice relates by or on behalf of a person affected by the decision.

(8) A failure to comply with the requirements of subsection (6) or (7) in relation to a decision does not affect the validity of the decision.

(9) In this section:

relevant decision means:

(a) a decision to refuse to remit, under subsection 16(1), the whole or part of an amount; or

(d) a determination by the Secretary, or a delegate of the Secretary, under subclause 5(2) of Schedule 8 to the Primary Industries 12 (Excise) Levies Act 1999, of the declared value of a quantity of deer velvet used in the production of other goods; or

(e) a determination by the Secretary, or a delegate of the Secretary, under paragraph 3(3)(a) of Schedule 6 to the Primary Industries (Customs) Charges Act 1999, of the declared value of a quantity of deer velvet exported from Australia.

APPENDIX B

The relevant sections of the Australian Government Department of Agriculture Fisheries and Forestry Client Service Charter are set out below:

Our service standards

We aim to provide a high level of service to you by:

- providing prompt and accurate information on request □being professional in our manner by dealing with you competently and openly, and by communicating clearly. We will:
- include contact names and phone numbers in our correspondence
- consult widely before making decisions
- inform you about decisions that will affect you.
- being objective and unbiased in our decision making. We will:
- seek to engage you, where possible, on policy proposals that affect you
- give you reasonable time to respond to policy proposals.
- being respectful and sensitive to your needs and being fair and efficient in our dealings with you. We will:
- explain our decisions
- provide clear, accurate, ongoing advice and information.
- being accountable and adhering to sound business practices in accordance with the Public Service Act 1999 and other relevant legislation. We will:
- monitor our performance by analysing feedback and assessing the extent to which we have consulted
- strive at all times to manage our work efficiently and effectively.
- being accessible. We will:
- try to make contacting the correct staff as easy as possible
- try to have staff available when required □ensure the information you need is easy to get.
- The department's values of professionalism, integrity, openness, fairness and respect underpin these standards.