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# aialFORUM

Editor: Elizabeth Drynan

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**Editor:** Elizabeth Drynan



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# RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

***Katherine Cook****

**New South Australian tribunal to streamline justice**

On 24 July 2013 legislation to establish a South Australian Civil and Administrative Tribunal (SACAT) was introduced into the South Australian Parliament ahead of consultation during the winter break.

Attorney-General John Rau said the SACAT is an important step towards access to efficient and fair justice and will take pressure off the court system.

'The SACAT will provide a 'one stop shop' for the community on a broad range of civil and administrative matters. This is a significant leap forward for South Australia'.

'The Tribunal will simplify access to justice for South Australians by providing one body for making and reviewing a range of administrative decisions which are currently performed by a wide array of decision making bodies such as ministers, commissioners, specialist boards and tribunals.

'It will also assist in relieving some of the backlog and delays experienced by our court system and provide the courts with more capacity to deal with other matters more quickly.'

The 2013-14 State Budget included $6.4 million over four years to establish the SACAT.

The South Australian Civil and Administrative Tribunal Bill 2013 outlines provisions to establish the Tribunal. The Bill will be followed by further legislation, once consultation has been completed, to make necessary amendments to existing statutes to confer jurisdiction on the Tribunal.

The Tribunal will:

- act with as little formality and legal technicality as possible;
- ensure efficient and cost effective processes for all parties involved;
- allow for streamlining of registry and administrative functions through a single organisation; and
- facilitate access to its services throughout the State by use of technology.

'The Tribunal will have the power to obtain evidence, manage parties, make appropriate determinations and control its processes to suit the matter it is considering,' Mr Rau said.

'It will also focus on alternative dispute resolution and assist parties reach agreement in their own way.'

'The SACAT is just one element of a package of reforms by the State Government to improve court efficiency and access to justice.'

The SACAT will be headed by a President, who will hold concurrent office as a Judge of the Supreme or District Court. The Tribunal will consist of members with a broad range of expertise and qualifications.

http://agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/2013-MR-sacat.pdf

**President appointed for NSW super tribunal**

The NSW Attorney-General Greg Smith SC has announced the appointment of Mr Robertson Wright SC as a Supreme Court judge and as the inaugural President of the NSW Civil and Administrative Tribunal (NCAT).

'NCAT will become the gateway for almost all tribunal services in NSW when it begins operating in January and I am pleased to announce that its first president has extensive experience not only in the law, but in tribunal operations and dispute resolution,' Mr Smith said.

Mr Wright has been practising as a barrister for 30 years and has been a Judicial Member of the Administrative Decisions Tribunal (ADT) since 2007.

'On the ADT, Mr Wright has presided over a range of matters including disciplinary hearings for legal practitioners and cases involving breaches of discrimination law,' Mr Smith said.

'As a barrister, Mr Wright has appeared in a large number of cases relating to competition and consumer protection.'

'He has also been involved in numerous mediations, assisting parties to resolve disputes and avoid expensive court proceedings.'

Mr Wright obtained a Bachelor of Laws and Arts at the University of Sydney, receiving first class honours for both degrees. He began practising law in 1980, was admitted to the bar in 1983 and has been a Senior Counsel since 2001.

Outside the law, Mr Wright served for 15 years in the Army Reserve, attaining the rank of major.

Mr Wright will be sworn in as a Supreme Court judge on 25 October 2013. On the same date, he will begin a five-year term as NCAT President.

'As President of NCAT, my focus will be on ensuring that tribunal processes are simple and efficient and that just outcomes are delivered quickly, cost effectively and transparently,' Mr Wright said.

NCAT will integrate 23 of the State's tribunals and bodies. Harnessing the expertise of the State's existing tribunals, NCAT will operate four specialist divisions:

- Consumer and Commercial;
- Guardianship;
- Administrative and Equal Opportunity; and
- Occupational and Regulatory.

NCAT will also have an internal appeals panel to enable accessible and timely reviews of most tribunal decisions.

'The creation of a tribunal network will build a collegiate atmosphere among division members, which will help to improve the quality and consistency of services,' Mr Smith said.

http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_news2013#16102013

**Retired Judge to review the South Australian State Records Act**

The South Australian State Government has initiated an independent review of the *State Records Act 1997* (SA) so that it remains relevant to current practices and technologies across Government.

Attorney-General John Rau said he believes the Act as it presently stands is not achieving practical results. 'Official government records are an important resource for the community for understanding the history of decisions made across Government,' Mr Rau said.

'It has become increasingly apparent to me that the State Records Act, which was written in the late 1990s, is losing its relevance in the digital information age.

'The Government's requirement for agencies to share more information to improve services and provide more information to the public also supports the need for a review'.

'The vast majority of government business is now conducted online.

'Government needs legislation that supports practical and sustainable management of these official records, while at the same time ensuring records of long-term value to the community are preserved'.

'Whilst retaining information remains critical; what is kept, how this is done, when this is done and why this is done are all questions that must be addressed'.

'Today I am announcing that Retired District Court Judge Alan Moss will be conducting a thorough review of the Act to address these questions and others relevant to the keeping of State records'.

Mr Rau says he expects the review will require a great deal of work in order to understand the full nature and extent of the issues involved.

'I do not intend to impose an arbitrary or unrealistic timeline on Mr Moss as we are after a good outcome for the community, not a superficial quick fix,' Mr Rau said.

'The review may recommend that more education is required, it may make suggestions for amendments to the Act, or it may even call for a new Act altogether.

'What is important is that the Act becomes relevant to current and foreseeable means of communication and that any ambiguities about how the Act is understood and implemented across Government are cleared up.'

http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/2013%20-%20MR%20state%20records.pdf

**ALRC seeks input into Serious Invasion of Privacy law reform**

The Australian Law Reform Commission (ALRC) has released the Issues Paper, *Serious Invasions of Privacy in the Digital Era* (ALRC Issues Paper 43, 2013), to begin the consultation process for its Inquiry.

The Terms of Reference for this Inquiry ask the ALRC to consider the detailed legal design of a statutory cause of action, and in addition, other innovative ways the law might prevent or redress serious invasions of privacy.

ALRC Commissioner for the Inquiry, Professor Barbara McDonald, said 'Although there has been significant privacy reform in recent years, there are still gaps in the legal protection of privacy. The digital era has created further challenges for the law, as, every day, we learn about new technologies for the tracking or surveillance of others and about new ways in which organisations and individuals may use and communicate all sorts of private information online. The task of designing a civil action to allow people to sue for serious invasion of privacy requires a careful balancing of legitimate interests in privacy with other matters of public interest including freedom of speech and expression, media freedom to inform and investigate, the effective delivery of services including healthcare, and the promotion of a vibrant and prosperous national economy.'

Key considerations for the ALRC include ensuring that any new protection would be compatible with existing privacy laws and regulation and that any proposed legislation is adaptable to future technological changes, but not so vague as to cause uncertainty.

The Issues Paper builds on work previously undertaken by the ALRC in 2008 and the Department of Prime Minister and Cabinet in 2011, and the recent work of both the NSW and Victorian Law Reform Commissions. It asks for submissions not just on issues relating to a stand-alone cause of action but also about alternative ways that existing laws could be supplemented or amended to provide more and appropriate protection for privacy in the digital era.

Privacy law affects not just government, big business and the media. It affects a range of occupations and activities in all kinds of social contexts. It has the potential to affect everyone. The ALRC invites individuals and organisations to make submissions in response to the questions contained in the Issues Paper, or to any of the background material and analysis provided. This community input will help inform the development of draft recommendations for reform to be released in a Discussion Paper due at the end of February 2014.

The Issues Paper is available free of charge from the ALRC website, www.alrc.gov.au, and is also available as an ebook.

For more information about the ALRC enquiry go to www.alrc.gov.au/inquiries/invasions-privacy. To keep up to date with the Inquiry, subscribe to the Inquiry e-news or follow #PrivRev or @AusLawReform on Twitter.

The Final Report is due to be delivered to the Attorney-General by 30 June 2014.

http://www.alrc.gov.au/news-media/media-release/alrc-seeks-input-serious-invasion-privacy-law-reform

**Freedoms and Rights concerns in QLD bikie laws**

The Commonwealth Human Rights Commission has significant concerns about the effects of the three Bills passed by Queensland parliament this week to curtail criminal activity among bikie gangs throughout the state. – The Vicious Lawless Association Disestablishment Bill, The Tattoo Parlours Bill and The Criminal Law (Criminal Laws Disruption) Amendment Bill.

'We have concerns that the internationally agreed freedoms and rights of specific groups of people in Queensland may be breached by the effect of these laws,' said Commission President, Professor Gillian Triggs. 'Indeed, we have concerns that the very manner in which the Bills were passed - rushed through without any form of public consultation – carries with it serious human rights ramifications, as does the fact that they target people on the basis of who they associate with, rather than for something they have done.'

Article 25 of the International Covenant on Civil and Political Rights, to which Australia is a signatory, states that 'Every citizen shall have the right and the opportunity … to take part in the conduct of public affairs, directly or through freely chosen representatives … to have access, on general terms of equality, to public service in his country.'

'The fact that the laws were rushed through without being subjected to the parliamentary committee process, without affording public consultation or scrutiny, would very likely not satisfy the requirements of the International Covenant on Civil and Political Rights,' Professor Triggs said.

Additionally, the Commission is concerned that people deemed by the legislation to be 'vicious lawless associates' will now be automatically subject to mandatory extra punishment above what would apply for the declared offence, including an additional 15 to 25 years imprisonment, and be subject to the potential waiving of bail and parole and a reversal of the onus of proof.

'The provision which we think raises the greatest concern from a human rights point of view is that each person is entitled to be treated equally with others before a court of law' said Professor Triggs. 'Here we have an attempt to specifically identify a class of person - members of a criminal motorcycle gang - and to require that there be mandatory sentences in relation to them.'

'As a democratic and fair society, freedom of association, freedom of expression and our right to be treated equally before the law in accordance with the International Covenant of Civil and Political Rights should be fundamentals under which we operate.'

Professor Triggs said that the passing of any laws, especially those creating wide reaching or sweeping powers, should be accompanied by a statement of Human Rights compatibility, as they are at the federal level, and also allow for their debate and scrutiny beforehand.

http://www.humanrights.gov.au/news/stories/freedoms-and-rights-concerns-qld-bikie-laws

**Recent Decisions**

*Kingborough Council v Resource Management and Planning Appeal Tribunal* [2013] TASSC 60 (16 October 2013)

Mr Kalis (the respondent) applied to the Kingborough Council (the Council) for a permit to develop a shopping centre at Margate. The Council refused the application. The respondent appealed to the Tasmanian Resource Management and Planning Appeal Tribunal (the Tribunal) and was successful. The Tribunal made two decisions. First, it directed the Council to issue a permit. Negotiations then followed as to the appropriate conditions to be attached to the permit. The Tribunal subsequently directed the Council to issue a permit subject specified conditions.

The respondent then applied to the Tribunal for an order for the Council to pay its costs. As part of that application the respondent applied for, and was issued, a summons, under the *Resource Management and Planning Appeal Tribunal Act 1993* (Tas), requiring the Council to produce to the Tribunal the minutes of a closed meeting which considered the respondent's earlier offer to resolve the appeal without proceeding to a hearing. The respondent argued that those minutes were relevant to his application for costs.

The Council applied under s 17 of the *Judicial Review Act 2001* (the Act) to the Tasmanian Supreme Court for a review of the Tribunal's decision to issue the summons. That section provides that a person aggrieved by a decision to which the Act applies may seek an order of review relating to the 'decision'. A 'decision' to which the Act applies is 'a decision of an administrative character made under an enactment'. A person aggrieved by a decision is a person whose interests are adversely affected by the decision.

Before considering the substantive issue, the Court considered two preliminary matters.

First, the respondent contended that the application was misconceived, in that the Tribunal's decision 'was conduct' for the purposes of making a decision (s 18), rather than a 'decision' (s 17).

The Court held that although the dispute about the permit had been determined, and the issue of the summons was a step along the way in the argument about costs, the issuance of the summons raised a discrete issue. Both the presiding member and the parties obviously considered it a matter of importance, given the extent of the submissions and the fact they resulted in a written decision by the Tribunal. If the summons was left unchallenged the ability of the Council to protect the minutes of the closed meeting from scrutiny would also potentially be lost. As such the Court found that the actions of the presiding member amounted to a decision and that this preliminary argument must fail.

Second, the respondent contended that the Council was not a person aggrieved because no adverse consequences flowed to the Council as a consequence of the issue of the summons. Instead, all that the summons required was that the relevant minutes be produced to the Tribunal. Without more, that would not result in the respondent or anyone else being able to view the minutes. In effect there was no loss of confidentiality, and therefore no adverse consequences. The Council contended that it was a person aggrieved because the summons affected its legal rights. It was being compelled to do something it would otherwise not be required to do and it could be punished if it failed to comply.

The Court held that the purpose of the summons is to obtain material which may have an impact on a decision of the Tribunal as to costs. The documents sought to be produced were from a closed Council meeting. Under the *Local Government (Meeting Procedures)*

*Regulations 2005* (Tas), such material is required to be kept confidential unless the Council authorises its release. By issuing the summons, the Tribunal was overriding this and forcing the Council to produce material it would otherwise have no legal obligation to produce. In addition, there was a potential penalty if the Council did not comply. As such the Court was satisfied that the Council's interests had been adversely affected by the Tribunal's decision and therefore it was a person aggrieved.

*SZQBN v Minister for Immigration and Citizenship* [2013] FCAFC 94 (Jacobson, Edmonds and Logan JJ)

On 27 January 2011, a delegate purporting to act under s 116(1)(g) of the *Migration Act 1958* (the Act) made a decision to cancel the appellant's tourist visa, on the basis that she was satisfied that the appellant had ceased to be a genuine visitor. The delegate cancelled the visa following a lengthy interview at Sydney airport. The delegate's reasons included a statement that while the appellant claimed he had an incentive to return to China when he was interviewed, he then refuted that claim by stating that he did not want to return to China because he believed he may be treated unjustly. After being notified of the decision, the appellant applied for a protection visa.

The appellant sought judicial review of the decision in the then Federal Magistrates Court. He sought final relief, including a writ of certiorari quashing the decision and a writ of prohibition prohibiting the Minister from giving effect to the delegate's decision.

At the hearing, the Minister conceded jurisdictional error in the delegate's decision on the basis that she had denied the appellant procedural fairness by failing to give him particulars of an allegation that he intended to apply for a protection visa using false documents (s 120 of the Act). However, the Minister argued that the Court should exercise its discretion to refuse relief on the basis that the appellant had acted in bad faith and come to the Court with 'unclean hands' because he had misled the delegate during the interview by claiming that he was a genuine visitor to Australia. The appellant's protection visa application gave rise to an inference that the appellant's answers during the interview were untruthful and were designed to perpetrate a fraud on the delegate.

The Federal Magistrate refused to grant relief to the applicant on the basis of the appellant's bad faith and dismissed the application. The appellant then appealed to the Full Federal Court. The essential issue in the appeal was whether there was a sufficient connection between the bad faith found by the Federal Magistrate and the relief sought by the appellant to withhold the grant of an order in the nature of certiorari or prohibition.

In the Full Federal Court's view, notwithstanding the different nature of prohibition, and the different test for standing in comparison to mandamus, it must be accepted that in appropriate circumstances, bad faith by an applicant may be a discretionary bar to relief.

After considering the authorities the Full Federal Court held that the exercise of discretion to refuse relief for jurisdictional error due to bad faith or unclean hands is the exception, not the rule (*MZYSU v Minister for Immigration and Citizenship* [2012] FCA 1073). Bad faith which justifies the exercise of the discretion is characteristically constituted by significant dishonesty on which an applicant relies to subvert the proper processes of, and secure an advantageous outcome in, the relevant transaction or court proceedings (*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389).

The Full Federal Court found that the decision at first instance suffered from a failure on his Honour's part to identify, and with precision, the finding of bad faith and its connection with

the relief that was sought: see *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35. In the Full Federal Court's view there was no immediate or necessary connection between the untruths the delegate found, about the appellant's intention not to return to China, and the delegate's failure to give the appellant particulars of the adverse information as required by s 120 of the Act.

In the Full Federal Court's opinion it would have been open to the Minister to contend that the delegate's failure to comply with s 120 of the Act would have made no difference as the appellant's visa would have been cancelled anyway: see *Stead v State Government Insurance Commission* [1986] HCA 54. However, the Minister did not do so either at first instance or on appeal.

*Wingfoot Australia Partners Pty Ltd v Eyup Kocak* [2013] HCA 43 (30 October 2013)

On 16 October 1996, the respondent worker suffered a neck injury at work. In 2009 the worker commenced two proceedings in the Victorian County Court relating to that injury: one seeking leave to bring proceedings for common law damages ('the serious injury application'); and the other seeking a declaration of entitlement to medical or like expenses under the *Accident Compensation Act 1985* (Vic) (the Act) ('the statutory compensation application').

The statutory compensation application was transferred to the Victorian Magistrates' Court, which at the employer's request, referred three medical questions to a Medical Panel for determination under s 45(1)(b) of the Act. Upon receiving the Medical Panel's opinion and written statement of reasons, the Magistrates' Court made consent orders to adopt and apply the opinion, and dismissed the statutory compensation application.

The serious injury application subsequently came before the Victorian County Court. The employer foreshadowed a contention that the County Court was bound by the Medical Panel's opinion either by virtue of s 68(4) of the Act (which provides that the Panel's opinion must accepted as final and conclusive by a court); or on the basis that the orders made by consent in the Magistrates' Court gave rise to an issue estoppel that precluded the worker from arguing that his injury was related to the injury he suffered on 16 October 1996.

The employer's foreshadowed contentions provoked the worker to apply to the Victorian Supreme Court for an order in the nature of certiorari to quash the Medical Panel's opinion. The grounds included that the Medical Panel failed to give adequate reasons for its opinion, thereby failing to meet the standard required by the *Administrative Law Act 1978* (Vic) (the *Administrative Law Act*). The application was dismissed but the worker successfully appealed to the Court of Appeal, which found that the reasons given by the Medical Panel were inadequate. By special leave to appeal, the appellant appealed to the High Court.

The High Court unanimously held that inadequacy of reasons is an error of law on the face of the record of an opinion of a Medical Panel for which certiorari will ordinarily be available. The High Court found that a Medical Panel is a 'tribunal' and its opinion on a medical question referred to it is a 'decision' within the meaning of the *Administrative Law Act*. Therefore an error of law manifest on the face of the Medical Panel's opinion is an error of law on the face of the record, and certiorari will be available to remove the legal consequences of an opinion for which non-compliant reasons have been given.

However in this case, an order in the nature of certiorari was not available, as the opinion of the Medical Panel had no continuing legal consequences. The function of an order in the nature of certiorari is to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power. An order in the nature of certiorari is not

available in respect of an exercise or purported exercise of power, the legal effect or purported legal effect of which is moot or spent. The operation of s 68(4) of the Act in the present case required the opinion given by the Medical Panel on the medical questions referred to it in the statutory compensation application to be adopted and applied by all courts and persons in the determination of the question or matter the subject of the statutory compensation application. Therefore the Medical Panel's opinion was spent when the Magistrates' Court dismissed the statutory compensation claim and had no bearing on serious injury application.
The Court also held that s 68(4) cannot create an estoppel giving a greater measure of finality to a medical opinion than that provided by s 68(4) itself. As the Medical Panel's opinion was spent when the Magistrates' Court dismissed the statutory compensation application there was no issue estoppel binding the parties in the conduct of the serious injury application.

Further, the High Court held that, in any event, the Medical Panel's reasons explained the actual process of reasoning by which it formed its opinion in sufficient detail to enable a court to see whether the opinion involved any error of law, and therefore met the standard required by the *Administrative Law Act*.

The High Court held that the Court of Appeal erred when it considered a higher standard was required. Unlike a judge deciding the same medical questions, a Medical Panel when explaining its reasons is under no obligation to explain why it did not reach a different opinion, even if that different opinion is shown by material before it to have been formed by someone else.

When considering the issue of the adequacy of the Medical Panel's reasons, the High Court also confirmed that in Australia there is no freestanding common law duty to give reasons for making a statutory decision.

*Jamal v Director of Public Prosecutions* [2013] NSWCA 355 (25 October 2013) (Meagher JA, Gleeson JA, and Latham J)

On 10 November 2011, Mr Jamal was found guilty in the NSW Local Court of assault and sentenced to a conditional good behaviour bond for 12 months. The Local Court also made a final apprehended violence order (the AVO) against Mr Jamal. Mr Jamal appealed to the NSW District Court.

The appeal was heard on 23 March and 1 June 2012. At the first hearing the possibility for an adjournment to obtain legal representation was raised with Mr Jamal by the Crown. However, he did not seek an adjournment until very late in the second hearing after Nicholson DCJ informed Mr Jamal that he was ready to give his decision. The adjournment was refused and Nicholson DCJ confirmed the conviction and the sentence imposed by the Magistrate, but amended the terms of the AVO.

On 29 June 2012, Mr Jamal sought review of the District Court's decision in the Court of Appeal. Mr Jamal's Counsel contended that he had been denied procedural fairness on the basis that he had not been given a reasonable opportunity to present his case because, among other things: (1) he was not afforded the opportunity to be legally represented; (2) his application for an adjournment (on 1 June 2012) was refused; and (3) he did not have the assistance of an interpreter (on 1 June 2012). While Mr Jamal's Counsel acknowledged that Mr Jamal had a day-to-day command of the English language and had been a lawyer in Egypt, Mr Jamal was out of his depth before an appeal court.

The Court of Appeal held that the obligation of procedural fairness is concerned with providing a person whose rights are potentially affected in a matter with the opportunity to deal with relevant issues. However, a party's failure to make proper use of that opportunity cannot be used to support a claim of procedural unfairness.

The Court of Appeal held there had been no denial of procedural fairness on the basis that the adjournment had not been granted. It was clear from the transcript, that in rejecting that application, Nicholson DCJ attached primary significance to the significantly late timing and content of the application, the utility of the adjournment to enable Mr Jamal to find legal representation (given he had been unable to find legal representation after the 23 March hearing), and the likelihood that a legal representative could not meaningfully assist Mr Jamal based on his assessment of the transcript of the Local Court hearing.

The Court of Appeal also found there was no denial of procedural fairness on the basis that Mr Jamal did not have the assistance of an interpreter for the entire hearing. After examining the District Court transcript, the Court of Appeal found (1) that when the interpreter was present he was used infrequently; (2) the application for an adjournment was made on the basis that Mr Jamal wished to seek legal representation, not that he required an interpreter, and (3) on those occasions when the Nicholson DCJ had trouble understanding Mr Jamal, he gave Mr Jamal further time for explanation and clarification.

# THE IMPACT OF TECHNOLOGY ON THE ADMINISTRATIVE JUSTICE SYSTEM

***John McMillan****

Writing recently in the *Weekend Australian*,[1] Phillip Adams speculated on how literary history would have been different had it unfolded in a digital age. Romeo and Juliet would not have communicated across the balcony but through text messaging. The revolutionaries in *Les Miserables* who were abandoned by the Parisians at the barricades could have organised a more successful uprising by using social media to mobilise a crowd. Tolstoy's *War and Peace* would have been longer still if he had composed on a keyboard rather than with a quill on vellum (probably more war, less peace). And, if God had used Twitter for each of the Ten Commandments, he would still have 121 characters to spell out a few exceptions after tweeting 'Thou Shalt Not Kill'.

Those examples illustrate how technology can change society in fundamental ways. It has changed how we purchase goods and services, plan and book holidays, talk to friends, access entertainment, read newspapers, do banking, watch movies, conduct research, participate in meetings and perform work.

Technology has equally changed how we relate to government – how we obtain information, enrol to vote, apply for a passport, access health services, lodge tax returns, apply for benefits, obtain publications and complain about government services.

The language of government is quickly changing. We talk of e-government, online government, Gov 2.0, crowd sourcing, the digital economy, cyber security, broadband platforms and government in the cloud.

Behind that new language lie not only different practices of government, but different theories of government. In a digital world, participatory democracy and engaged government are different from an earlier world of paper submissions and town hall meetings. Open government has new meaning when the obligation upon government moves beyond providing documents upon request, to proactively publishing information on the web and providing online access to government data sets. Evidenced-based decision making is similarly being transformed by practices of data exchange and big data analytics. And the concept of representative democracy is fast expanding to embrace new strategies for campaigning, lobbying, shaping policies, building community support and – as recent events illustrate – evaluating and changing political leaders.

Technology is changing everything, and at an astonishing pace. The number of internet users is estimated to have grown 100 fold between 1995 and 2012, and now extends to 86% of the population (and 100% of those aged 14-19 years).[2] The average worker receives up to 100 emails per day from this communication service which commenced in 1993. Facebook, founded in 2004, has an estimated 1 billion active users, including half the

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* *Professor John McMillan, Australian Information Commissioner, presented this speech to the AIAL National Administrative Law Forum, 'Administrative Law in an Interconnected World', Canberra, 18 July 2013.*

Australian population and 111 Australian Government agencies. Twitter, created in 2006, has an estimated 500 million registered users, including 2 million Australians and 154 government agencies. There has been the same uptake within government and the community of social media platforms such as YouTube, LinkedIn, RSS feeds, Podcasts and Blogs. An estimated 79% of the population aged 15-64 are cell-phone users.

The administrative justice system is not isolated from these changes. What that means, in a practical sense, is that it is no easier to predict how technology will transform that system than it is to foretell how technology will further transform government and society. We can, however, be guided by the dramatic administrative justice changes that have occurred over the past forty years, which point to the inevitability of further change in a digital age. I will briefly note four earlier phases of administrative justice before returning to the current theme.

**Phase 1: the constitutional compact**, **through judicial review of administrative action**

The history of administrative justice commences with the central, fundamental and constitutional role played by courts in checking government power. This phase, stretching back centuries, became anchored in a constitutional separation of powers that safeguarded the role of an independent judiciary in declaring the law, checking executive error and safeguarding the citizen against government.

Many core principles of administrative law – natural justice, good faith, jurisdictional error, the rule of law, reasoned decision making – are products of this phase. The influence of the judicial role continues alongside newer phases in administrative justice. Landmark judicial decisions are no less frequent, and new legal standards – legitimate expectation, proportionality, rationality – remain a vibrant topic of discussion and analysis.

**Phase 2: correcting administrative error and ensuring correct decision making**

This phase, which took root in the 1970s, can be traced principally to the 1971 report of the Commonwealth Administrative Review Committee. From its proposals emerged 'the new administrative law' that gave rise to the Administrative Appeals Tribunal, the Commonwealth Ombudsman and the Administrative Review Council. The philosophy underpinning this phase was that government was growing in size and exercising more administrative authority and discretionary power and with this came a heightened risk of error and impropriety in administrative decision making. Citizens wanted a justice agency they could approach to fix a mistake and make the correct decision.

This phase has been important in many ways. Members of the public have become accustomed users of administrative justice mechanisms that are accessible, inexpensive and efficient. The mechanisms are actively used in high volume areas of government decision making, such as social security, taxation and immigration. Over the years new specialist tribunals and complaint handling agencies have been created, between them reviewing tens of thousands of administrative decisions annually. Together, these accessible mechanisms have given added vitality to administrative law values of legality, rationality, fairness and transparency.

**Phase 3: ensuring good administration, integrity in government and respect for human rights.**

Administrative law expanded during this phase to embrace a stronger focus on broader systemic themes in decision making and administration. Until this time, agencies such as the Ombudsman had concentrated mainly on individual case review and on providing justice for the aggrieved complainant.

A changed focus in Ombudsman work in the late 1990s pointed to the broader shift that was occurring. The office drew more heavily on its long-standing power to conduct own motion investigations and also moved into compliance auditing, inspections, training, and publication of fact sheets and better practice manuals. This sprang from a recognition that an error occurring in one case may point to a systemic problem that would see the error repeated in other cases.

The objectives of the administrative justice system were changing also. The belief was that public administration, in addition to being rule based, should also be values based. It should be ethical, free of corruption and conflict of interest, and should respect and uphold international human rights standards. In a word, there should be integrity in government.

To advance these objectives, additional oversight agencies were established, with new roles and powers. They included human rights and anti-discrimination agencies; anti-corruption and integrity commissions; freedom of information and privacy commissioners; and public interest monitors.[3]

Despite some initial questioning, it is generally now accepted that these agencies and mechanisms fit under the umbrella of administrative law – or, perhaps more descriptively, the umbrella has become larger to cluster a broader range of independent agencies that together play a role in oversighting executive decision making and promoting integrity in government.

**Phase 4: making public administration more 'customer focused' and 'citizen centred'**

In the most recent and fourth phase, administrative law has become an ally in a reform movement to make public administration more 'customer focused' and 'citizen centred'.

The origins of this movement lie beyond administrative law, and beyond Australia. Influential factors were the customer service charter initiatives in the United Kingdom under the Thatcher Government in the 1980s, the 'citizens first' research studies that commenced in Canada in 1998, and the *Code of Good Administration* promulgated by the European Parliament in 2001.

These changes sprang from a recognition that the relationship between people and government had been transformed. Contact was occurring in different ways – over the counter, by mail, on the telephone and online. Contact was more frequent and diverse, covering benefits, subsidies, licences, taxes, authorisations, sanctions, penalties and services. The relationship had moved beyond that of 'citizen and government', to one in which the citizen was also a client and a customer of government. In this new environment people expected administrative systems to operate smoothly, predictably and competently. If a problem arose they wanted a quick, courteous and effective response.

While this trend goes beyond the province of administrative law, it has played an effective role in championing citizen-centred service delivery. Administrative law has promoted the importance of internal and external complaint handling; administrative review criteria have expanded to include customer service standards that sit alongside conventional legal standards; and a broader concept of remedy has developed that includes apologies, proper explanations, reconsideration of agency action, expedited agency action and discretionary compensation.

**Phase 5: administrative justice in the digital age**

We are now entering a fifth phase of administrative justice. As I noted earlier, technology is unstoppably changing everything and at a pace that makes it impossible to map the future. I will highlight four themes in the cultural changes that may lie ahead.[4]

**Changes to the work practices of administrative justice agencies**

At the immediate and practical level we have all experienced how technology changes the way that administrative justice agencies conduct business. They all have a web presence, through which they publish decisions, forms and guidance to practitioners and members of the public. They allow online lodgment of complaints, applications and submissions. They communicate with clients and exchange documents by email. Video conferencing and virtual hearing rooms are commonplace.

Technology is also posing new questions and practical challenges to orthodox business practices. How can a court prevent jurors from conducting independent research on the web or posting their views online?[5] Can confidentiality orders and publication restrictions be enforced when people can anonymously use social media to flout an order? Do we need new discovery and evidentiary rules to cope both with the volume of information that is digitally recorded, and the ease with which digital information can be erased or tampered with?[6] What are the implications if a party to a dispute emails the adjudicator?[7] Should rules of procedural fairness be rewritten to accept the reality that adjudicators probably use Google more often than they admit?

**Changes in how people resolve disputes and their expectations of government and administrative justice**

Technology is changing the way that people comprehend government, their expectations of government and the way they resolve disputes.

The proportion and volume of online transactions with government are increasing rapidly and will continue to do so with the roll-out of the high-speed National Broadband Network. It is estimated that by 2020, digital channels will be used by people in 80% of transactions to access government services, compared to 30%-40% at present.[8] In the space of one year, apps launched by the Department of Human Services were used by people to carry out more than 6.9 million transactions.[9] An Australian Taxation Office app was downloaded by more than 100,000 taxpayers within two weeks of release.[10]

In an online world people are increasingly choosing to conduct transactions through tablets, smart phones and downloadable apps. In dealing with government they want a quick response; they prefer short, clear, open and relevant responses; they expect to deal with people who understand their problem and are knowledgeable and display empathy; they may want an ongoing dialogue or interaction; and they may insist on a supplementary explanation or being given access to surrounding documents.

That model of communication, and the expectations that underlie it, may not fit easily with more traditional practices of dispute resolution. Until now we were accustomed to dispute resolution following a more ordered path that was controlled by the adjudicator, who may be a generalist with little direct experience in the subject area of dispute.

In future, a client who is dissatisfied with more traditional or established mechanisms will also have numerous other options to turn to. A person waiting in a queue or on hold at a call centre may achieve a faster result by tweeting their discontent. Indeed, many large agencies

now have social media monitoring units that glean valuable customer feedback that matches that obtained from complaint handling and internal review.

Another dispute resolution option in the digital age is to create your own website and electronically engage and mobilise a new community. 'Destroy the Joint', using Twitter and Facebook, achieved instant success in challenging sexism by radio broadcasters. It is doubtful that a complaint to a sex discrimination commissioner or media complaints authority could have matched this success. Another illustration is Vodafail, a website created by a computer expert and disgruntled Vodafone customer while he waited online in a call centre queue.[11] The website logged over 21,000 entries in a two year period.

Another aspect of this trend is that people may have different objectives in complaining or in commencing a dispute. In the traditional model there was a beginning and an end – a complaint, a file opened, an investigation, responses back and forth from the parties, and a reasoned decision by the adjudicator upholding or dismissing the complaint.

Commonly, now, a person's sole objective is to lodge a complaint, vent his/her immediate frustration and, with that immediate satisfaction, surf on to some other website. The process of complaining can be more important than the outcome of the complaint. Yet at the other end of the spectrum are disgruntled clients, aided by technology, who never let go, never give up and increasingly dominate the time of dispute resolution agencies.

In short, at both ends of the administrative justice spectrum there are groups with different objectives who use technology in similar ways to engage with agencies and steer disputes.

**Changes to the models and philosophy of dispute resolution**

Administrative justice agencies must heed and respond to this changed culture. To remain relevant they must embrace different approaches to dispute resolution and engagement with clients. This is already happening.

Complaint and investigation bodies, such as ombudsmen and commissioners, now receive and conduct reviews in a more responsive, engaged, interactive and informal manner. Tribunals and courts resolve an increasing proportion of applications by alternative dispute resolution rather than formal hearings and, as noted earlier, they have embraced technology in the registry and the hearing room.

Far greater adjustment and adaptation probably lies ahead. In a fast-paced digital world it is questionable whether people will have the time and interest to wade through lengthy and complex reasons statements in order to understand the principles applied to resolve a dispute. Shorter, clearer, crisper reasons may be required. Equally, the statements of reasons in individual cases may have diminishing importance in developing administrative law principles and jurisprudence. Many people prefer the option of visiting an administrative justice agency's website to read a coherent and comprehensive set of guidelines that explain the principles to be applied from one case to the next.

An even more fundamental question arises to do with the future importance of courts and court-like tribunals in the administrative justice system. In a digital world where people can choose from among a growing array of dispute resolution options, and generally prefer mechanisms that are online, responsive and cost-free, will people continue to turn to bodies that conduct formal hearings and adjudications?

Early trends are interesting. The workload of the NSW Local Court is reported to have declined by 23.9% over four years, and the workload of the NSW Supreme Court by 21.2%

in the last year.[12] At the same time the caseload of less formal dispute resolution options such as ombudsmen and tribunals has remained constant or increased.[13]

A related trend may be a contraction in the range of people who use courts – or, from an administrative law perspective, the range of decision making issues that courts address. The Federal Circuit Court of Australia (formerly the Federal Magistrates Court) received only 15 administrative law applications in 2011-12, comprising 0.2% of its general law caseload of 6,693 matters; there were an additional 1,464 migration applications (21% of the general law caseload).[14]

Federal Court of Australia statistics no longer contain separate entries for administrative law or judicial review of administrative action. The nearest statistic is that 40% of appeals in 2011-12 were migration related.[15] The Court's Annual Report 'Summary of Decisions of Interest' contains only three (of nineteen) cases that could broadly be described as administrative law cases; two of those were extradition cases and the other was a freedom of information case on legal professional privilege.[16]

The pattern that is emerging, from an administrative law perspective, is that the range of issues handled by courts is narrowing. At the federal level the caseload is likely to be dominated by migration matters, appeals from the Administrative Appeals Tribunal (most commonly in taxation and employee compensation matters) and occasional matters on government commercial regulation, extradition and professional services review. Other litigants who periodically approach courts are those with an immediate strategic purpose, for example, wanting to obtain an injunction to restrain impending government action, or to seek to disqualify a decision maker who may decide adversely.

***Changing the theory of administrative justice***

Will the digital age require us to rethink and reposition our theories of administrative justice? I will finish with two observations.

The first, drawn from the preceding point, is that it is doubtful whether courts are well-placed to go beyond the particular legal issues arising in a case, and extemporise generally on principles of good administration. The caseload they handle throws up a narrow range of government decision making and administrative law issues. Moreover, the caseload barely touches the issues that increasingly confront government agencies in adjusting their decision making, regulation and service delivery in a digital environment.

And yet it is an observable trend over the last decade or so, both in court decisions and in seminar papers, that judges propound general theories of good administration. An example is a conference hosted by the Australian Government Solicitor in June 2013, *Excellence in Government Decision-Making*, at which six of the nine sessions were led by superior court judges. Contemporary administrative law jurisprudence is also dominated by the discussion or development of general concepts that are put forward to guide decision makers, such as rationality, illogicality and reasonableness.[17] Speaking personally, I rarely find these broad concepts to be practically useful either in making decisions in the current government environment, or in administering an agency that reviews government administration.

My second observation concerns the way that public law theory is pitched. At the heart of classic theory is the desire to check executive abuse, regulate the exercise of legal power, safeguard individual rights against unlawful encroachment by government, and secure the rule of law in government and society. The classic system for achieving those objectives was the separation of powers, which enables judicial officers to exercise determinative and conclusive powers in an environment free of duress and external pressure and influence.

That classic theory is uncontentious, but no longer adequately describes the administrative justice system. That theme was taken up in last year's AIAL National Administrative Law Forum that looked at the integrity branch of government.[18]

The digital age questions classic theory in an equally fundamental way. The web has become the greatest force yet seen for advancing and protecting three of the core administrative law values – participation, transparency and accountability. As a decentralised mechanism with few restrictions on access and no hierarchy of expertise, the web is an immensely powerful democratising force that cannot be ignored. It provides an open market in information, ideas and action channels.

Society is turning to the web for every transaction, issue and concern with government. This cannot be ignored by government, and is not being ignored. Every aspect of the world we live in will be fundamentally changed by technology. The future of the administrative justice system must be carved in this digital environment.

**Endnotes**

1 Phillip Adams, '2B or not 2B', *The Weekend Australian Magazine*, 15-16 June 2013.
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8 Department of Broadband, Communications and the Digital Economy, *Advancing Australia as a Digital Economy: an Update to the National Digital Economy Strategy* (2013) 46.
9 Minister for Human Services, 'New App Breaking Down Language Barriers', *Media Release*, 12 July 2013.
10 Chris Jordan, Commissioner of Taxation, 'It's About Time', Speech, 25 July 2013.
11 www.vodafail.com.
12 Chris Merritt, 'Fewer Cases, Less Cash for Courts', *The Australian*, 21 June 2013.
13 Eg, the NSW Ombudsman has received approximately 9,500 formal complaints in each of the last four years: NSW Ombudsman, *Annual Report 2011-2012*, 'At a Glance' section. The NSW Consumer, Trading and Tenancy Tribunal received 64,803 applications in 2011-12, which was a 10% increase on the previous year; 54% of applications were lodged online: www.cttt.nsw.gov.au, 'Facts and Statistics'.
14 Federal Magistrates Court of Australia Annual Report 2011-12, at 45.
15 Federal Court, *Annual Report 2011-12*, Appendix 6. The proportion was higher than 50% in most prior years.
16 Federal Court, *Annual Report 2011-12*, Appendix 8.
17 Eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59; *Minister for Immigration and Citizenship v Li* [2013] HCA 18.
18 See the papers in *AIAL Forum* No 70, October 2012. I have also taken these themes up in two other articles: 'Ten Challenges for Administrative Justice' (2010) 16 *AIAL Forum* 23; and 'Rethinking the Separation of Powers' (2010) 38 *Federal Law Review* 423.

# OPEN DISCLOSURE AND APOLOGY – TIME FOR A UNIFIED APPROACH ACROSS AUSTRALIA

***Chris Wheeler****

This paper concerns the importance of open disclosure and apology and the need for a unified approach across Australia to the protection of apologies. It considers why we need to recognise and admit our mistakes, to authorise people within an organisation to admit mistakes and to take responsibility for corrective action, and to remove any actual or perceived legal impediments to the making of full apologies.

I will be referring to two types of apologies:

- 'partial' apologies – an expression of sorrow without any exploration of why,
- 'full' apologies – apologies that include an explicit admission or acceptance of fault or responsibility.

The importance and potential effectiveness of appropriate apologies have been recognised for millennia. Unfortunately, the litigious nature of our society generally and the innate caution of lawyers have resulted in apologies being associated more and more in people's minds with unacceptable risk taking.

It is time to reverse this trend and recognise that the giving of apologies is not only the ethically and morally right thing to do when mistakes for which we are responsible have caused harm but also, in a very practical sense, a very powerful risk management tool. This change in attitude would be assisted by the adoption of a unified approach to the legal protection of apologies across Australia.

**What is the statutory status of an apology in Australia?**

***Australian jurisdictions with protections for full apologies***

NSW, the ACT and Queensland protect 'full' apologies from being admissible in civil proceedings. NSW became the first jurisdiction in the common law world to legislate to give legal protection for a full apology made by any member of the community a decade ago, through an amendment to the *Civil Liability Act 2002.*[1] Section 69(2) of that Act specifically provides that evidence of such an apology 'is not admissible in any civil proceedings as evidence of the fault or liability' (other than the categories of civil liability excluded by s 3B of the Act).[2]

The NSW legislation was followed almost immediately by the ACT (*Civil Law (Wrongs) Act* 2002, s 132 – with limited exclusions), and more recently by Queensland (*Civil Liability Act 2003*, ss 72A-72D – with exclusions similar to those in the NSW legislation).

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Unfortunately, the other 5 Australian states and the Northern Territory have only legislated to protect 'partial' apologies, ie apologies that do not include any admission or acceptance of fault or responsibility - in other words apologies that need no legislative protection! For completeness I should add that all Australian jurisdictions have adopted statutory protections for full apologies in their defamation legislation (see Annexure A).

The protection for apologies in the New South Wales *Civil Liability Act* has three elements:

1) a declaratory element – an apology is not an admission of fault
2) a relevance element – an apology can't be taken into account in determining fault, and
3) a procedural element – an apology is not admissible as evidence of fault.[3]

In other words, in most circumstances people in NSW can make a full apology for any harm they have caused without prejudicing their legal position in any subsequent or related legal proceedings.

It is also important to note that where action is taken to rectify a problem, for example as part of a package of measures in a 'full' apology, in proceedings relating to liability or negligence:

> …the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk. [4]

There is a dearth of judicial consideration of the scope of such statutory provisions. A Canadian decision (*Robinson v Cragg,* 2010 ABQB 743), which considered a largely equivalent apology protection provision, distinguished between expressions of sympathy/regret and admissions of fault on the one hand, and factual admissions relating to liability on the other. Only the former were held to be covered by the protection.

It is quite possible that Australian courts would adopt a broader approach. As clearly stated in the Second Reading speech to the amendments to the *Civil Liability Act 2002* that introduced ss 67-69*,* the intention of those provisions was to encourage apologies that are accompanied by explanations. The then Premier, Bob Carr, explained the benefits of an apology in the following terms:

> Injured people often simply want an **explanation** and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases ending up in court.[5] [emphasis added].

A review of the few Australian cases that have considered apology protection provisions similar to that in NSW[6] indicates a consistent approach to statements that include an apology. The Australian courts that have considered the issue:

- have not adopted a narrow definition of an apology as confined to sympathetic utterances; and
- have not looked at the apology in question to find evidence of fault or liability – focussing instead on acts and/or omissions that have occurred before and/or after the event in question, finding no probative value in the apology.

Some support for a broader interpretation of apology protections can also be found in the view expressed by the presiding judge in another Canadian case. In *Hutchison v Fitzpatrick* [2009] ACTSC 43, Harper J expressed the view that it was regrettable, in light of such

provisions, that lawyers continued to advise their clients not to speak with other parties. Harper J was presumably of the view that apologies should be given a broad definition. If Harper J meant that lawyers should advise their clients to only make sympathetic utterances, it seems that most lawyers would prudently advise their clients to make no statement at all in case the apology went further than a sympathetic utterance. This would effectively render such legislative protections ineffective.

Until such time as either the legislation is clarified or the interpretation of the current provisions is considered by the courts, there will remain a grey area around the scope of the protection provided. Hopefully the courts will interpret the protection broadly to encompass statements explaining the reasons why the giver of the apology is accepting fault or responsibility – generally an essential element of an effective apology.

**What is the statutory status of an apology in Canada and the USA?**

Looking elsewhere in the common law world, most Provinces of Canada took to the legislative protection of apologies like ducks to water. Starting with British Columbia in 2006, at last count 8 Provinces now have passed laws protecting full apologies, all based on the Canadian *Uniform Apology Act*, which is drafted in terms that are simpler and tighter than the NSW law. In particular, the uniform Act and all apology laws passed so far contain no exceptions.

Most States of the USA have gone down a different path (see Annexure A). While, since 2003, 20 States have passed laws giving protection to full apologies, such protection is in all cases limited to health care providers only. A further 18 States have passed laws to protect 'partial' apologies (7 of which are limited to health care providers). As I mentioned earlier, such protections serve little purpose in practice because a 'partial' apology by itself would be most unlikely to incur legal liability in civil proceedings – even in the USA!

**What is the common law status of an apology?**

It is unfortunate that the standard response by lawyers across the common law world to any suggestion that their client should apologise is to advise against it. Time and again I have heard and read of such advice, always predicated on the view that to give a full apology is to incur legal liability. Such advice seems to be almost always accepted by clients without question. I have never heard of legal advisers being asked to prove it – to quote case law that demonstrates the downside of a full apology.

In fact, the Australian case law gives little if any support to the claim that even a 'full' apology will be found by the courts to incur legal liability. The High Court of Australia considered the issue of apologies and liability in *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139. The defendant in that case had made a written apology that included a statement that it had '*failed in its duty of care*' to its customers. In holding that this statement did not amount to a basis for finding negligence, Gleeson J said:

> ... care ... needs to be taken in identifying the precise significance of admissions, especially when made by someone who has a private or commercial reason to seek to retain the goodwill of the person or persons to whom the admissions are made ... And it is always necessary for the fact-finder to consider precisely what it is that is being admitted. If the driver of a motor vehicle says to an injured passenger: 'I am sorry, I let you down', that may not mean much, or anything. … The statement that the appellant '[failed] in its duty of care'…. cannot be an admission of law, and it is not useful as an admission of failure to comply with a legal standard of conduct. There is no evidence that the author of the statement knew the legal standard.[7]
>
> It may readily be accepted that what is said after an event may constitute an admission of relevant facts. Tendering an apology for what has happened ... may, in some cases, amount to such an admission. But

> there is always the risk that what is said after an event is informed only by hindsight, and the speaker's wish that the clock might be turned back.[8]

While this case focused on an explicit admission of liability, it is a strong indication of the general approach to apologies and liability that we can expect from Australian courts, even in jurisdictions without a statutory protection for full apologies.

Research in the USA has gone some way towards a possible explanation of the reluctance of lawyers in relation to offering apologies. Jennifer Robbennolt, Professor of Law and Psychology, University of Illinois College of Law, has observed that:

> …contemporary empirical research has … generally found that apologies influence claimants' perceptions, judgments, and decisions in ways that are likely to make settlements more likely – for example, altering perceptions of the dispute and the disputants, decreasing negative emotion, improving expectations about the future conduct and relationship of the parties, changing negotiation aspirations and fairness judgments, and increasing willingness to accept an offer of settlement.[9]

However, Professor Robbennolt went on to note that her research '…demonstrated that attorneys react differently to apologies than do claimants'. She observed that while '…apologies tend to lower claimants' aspirations and estimates of a case's fair settlement value…', on the other hand '…apologies pushed attorneys' aspirations and estimates of fair settlement values in a different direction…'. She also commented that:

> [m]any commentators are concerned about the risk that attorneys' focus on the relevant legal rules will dominate the negotiation process and the ultimate settlement of the dispute, to the exclusion of the non-legal interests of the parties.

In practice, there is a growing body of evidence, particularly from the USA but increasingly also from Australia, that a full apology, given at the right time, in practice has the opposite effect to that traditionally claimed by lawyers.

In other research, Professor Robbennolt found that while 52% of claimants accepted settlement offers when no apologies were offered, this number jumped to 73% when settlement was offered along with an acknowledgement of fault and expression of regret.[10] The Ombudsman of British Columbia cited similar research from the USA which showed that an apology from a medical practitioner would have stopped 30% of negligence claims going to court.[11]**Why apologise?**

***The benefits that can flow from an appropriate full apology***

The important benefits that can flow to all parties from a 'full' and sincere apology include:

- moral/ethical benefits – from doing the right thing – when our mistakes have caused harm, an admission of fault and an appropriate apology is what good management practice dictates, moral/ethical conduct requires and the public expects.
- emotional/psychological benefits, including:
  - showing respect to the recipient;
  - giving peace of mind to the recipient through the giver accepting responsibility for a problem and/or through giving an explanation as to what occurred and why; and
  - forgiveness, allowing both the giver and the receiver of an apology to 'move on'.
- interactional benefits, including:
  - repairing or laying the groundwork for a restored relationship, which is particularly important where there will be on-going interaction between the giver and receiver; and

  - improving the credibility of the giver and the level of trust between the giver and receiver.
- personal or operational benefits – a reduction in the likelihood and/or severity of negative outcomes.
- financial benefits – a reduction in the chances of on-going difficulties that can seriously impact on time and resources, including litigation.
- systemic benefits – the transparency that goes with a 'full' apology, admitting that there is a problem increases the chances that mistakes or other problems will then be properly addressed.

***Addressing the needs of people harmed***

A 'full' apology – an apology that includes an admission of fault and acceptance of responsibility to appropriately address the harm caused – can be remarkably effective in addressing the key needs of people who have experienced harm. Although they are not guaranteed to work in every case, the more an apology addresses the psychological and material needs of the person harmed, the greater the likelihood it will be effective in reducing anger, restoring a damaged relationship, and helping the person to 'move on'. The potential benefits of an apology are well expressed in the quote that an apology is 'the superglue of life [because it] can repair just about anything'.[12]

An apology shows an individual or agency taking moral, if not legal, responsibility for his/her/its actions and research shows that this is what many people are looking for.

***Facilitating resolution of problems***

If a mistake or error led to harm, those harmed often see an appropriate apology as an essential part of the proper resolution of their problem – an appropriate apology that accepts responsibility and expresses regret or remorse is often the main thing they really want. The greater the harm, the greater the likely value of an appropriate apology to the person harmed.

When things go wrong, often the people harmed or otherwise wronged want no more than to be listened to, understood, respected and – if appropriate – given an explanation and apology. A prompt and sincere apology for any misunderstanding can work wonders, as the old English proverb points out: 'A fault confessed is half redressed'. It will often avoid the escalation of a dispute and the significant cost, time and resources that can be involved. An apology can also start a process that can lead to the resolution of a conflict or dispute, particularly if there is an on-going issue that needs to be dealt with. A 'full' apology given at the right time can:

- restore dignity, face and reputation;
- provide vindication, a sense of justice or an acknowledgement that the recipient was right; and
- clarify that the recipient of the apology is not at fault (a common feeling after a mishap).

When something goes wrong, the injured party or their family will generally want to know what went wrong, who was responsible and how those responsible are going to address the problem. They also will want to know that the organisation or person accepts responsibility to appropriately address any ongoing care obligations, and/or to pay compensation for any damage or loss arising from the wrong.

***Reducing legal and other costs and detrimental impact on staff***

Particularly in the health sector, a number of studies have been reported in recent years showing that effective open disclosure and apology programs can have a significant impact on litigation costs, the average time taken to resolve claims and lawsuits, and on the numbers of claims and lawsuits lodged. A recent study of 10 Chicago area hospitals found that open disclosure programs had resulted in:

- an 80% reduction in time to close cases;
- a 70% reduction in litigation expenses; and
- a 20% reduction in defensive medicine.

Another benefit is the reduction in the associated stress experienced by staff who are the subject of such claims and lawsuits.

**How should we approach disclosure and apology?**

***Options for responding when action or inaction has caused harm***

When a mistake is made that causes harm, those affected want to know who was responsible and what they are going to do to set things right.

*Option 1 – Cover-up*

Taking active steps to hide involvement or responsibility is certainly unethical. In the public sector, it would constitute maladministration and, depending on the circumstances, may well be illegal. While the public can forgive honest mistakes where these are admitted and appropriate steps taken to address any harm caused, they do not forgive being misled. This applies equally to partial truths and to outright lies – in both cases the public's response is likely to reflect the proverb: 'a half the truth is often a whole lie'.

*Option 2 – Deny and defend*

This is a common response and, in the public sector, would again constitute maladministration. History is replete with cases where this approach has merely 'added fuel to the fire' and resulted in people who perceive they have been wronged waging long campaigns seeking 'justice'.

*Option 3 – Head-in-sand*

Ignoring the problem and hoping it will go away. This too would constitute maladministration in the public sector.

*Option 4 – Yes, but…!*

Arguing that responsibility was minimal and/or that the harm was minor. Partial acceptance of responsibility when a greater level of responsibility is clear is certainly not best practice, and depending on the circumstances, could constitute maladministration in the public sector.

*Option 5 – Acceptance of responsibility*

Recognition that a mistake was made and full acceptance of responsibility for any harm caused by the agency is what good management practice dictates, moral and ethical conduct requires, and the public expects.

We all have made mistakes and no doubt will make more in future - as they say, 'to err is human...'. Sir Liam Donaldson, Chief Medical Officer of the UK Department of Health took this saying further when he said: 'to err is human; to cover up is unforgiveable; and to fail to learn is inexcusable'.

How people and their organisations respond to their mistakes says a lot about their character and culture. It can also have a long term and profound impact on whether and to what degree the mistake will damage their reputation and credibility, level of trust, on-going relationships, resources and more. As another old adage puts it, while 'pain is inevitable, suffering is optional'.[13]

The way we respond to problems requires us to make certain decisions about:

- *Leadership* – do we lead or follow?
- *Recognition* – are we prepared to recognise we made an error?
- *Responsibility* – are we prepared to accept responsibility for our error and the harm caused?
- *Ownership* – are we willing to take ownership (and control) of the problem and its resolution?

*Leadership*

Where a mistake has been made resulting in unintended harm to others, in a practical sense the choice that is open to the individual or organisation responsible is effectively between leading or following! If you lead, you retain at least some control over events and their repercussions. If you follow, you give away that control. Which choice is made will often come down to questions of leadership and courage. As Doug Wojcieszak, Founder of Sorry Works!, an American NGO dedicated to open disclosure and apology in the health sector, has said '[f]olks, we don't have a med-mal crisis in this country, we have a leadership crisis post-event. Medical people by and large fail to lead after something goes wrong'.[14]

*Recognition of error*

A preparedness to recognise that we or our organisations have made a mistake is a fundamental pre-requisite for an appropriate apology. A full apology is only appropriate where we have recognised (or reasonably suspect) and accepted that we have done wrong by somebody. If someone has suffered harm, but our action or inaction is not the cause, while an expression of sympathy may well be in order, an apology would not be appropriate.

Recognition of error is also important because we need to recognise a problem to do anything about it – to know what to fix. Two thousand years ago, the Roman philosopher Seneca said: 'The first step towards amendment is the recognition of error'.[15] For an apology to be effective where harm has been done, it needs to be given in the context of appropriate action being taken (or promised) to address the harm done and to prevent re-occurrence. 'Actions speak louder than words'.[16]

If answers are not forthcoming, if there is a failure to acknowledge the problem or the harm it has caused, or in particular if the person suspects a cover-up, this is likely to result in resentment and anger. In another Sorry Works Newsletter, the alternative approaches to dealing with problems were contrasted as being the difference between the 3 **A**s and the 3 **D**s:

- between on the one hand:

- **A**ccessibility to those harmed;
- **A**ddressing the problem; and
- **A**pologising

- and on the other hand:

- **D**istancing;
- **D**enying; and
- **D**efending.

The 'deny and defend' strategy so loved by lawyers often has the opposite result to what is intended. It leads directly to frustration, and as the Roman philosopher Seneca pointed out 2000 years ago, frustration leads to anger. Research has shown that anger is a primary trigger for litigation, particularly in relation to medical misadventure. This is a central theme of the Sorry Works! Message, illustrated by the following quote from a Sorry Works! Newsletter:

> "A growing body of evidence in the peer-reviewed medical literature shows that patients and families file lawsuits against doctors because of anger, not greed. Patients and families become angry with their doctors (…) when communication, honesty, accountability and – literally – good customer service are lacking after a perceived error. In other words, patients and families are suing not so much because of errors, but because of the bad behaviour surrounding errors".[17]

When a problem is obvious and responsibility clear (or reasonably perceived to be so), denying its existence or denying responsibility are likely to be seen as more than mere blindness or ignorance. Such responses are easily seen as wilful and deceptive. This can have serious detrimental effects on levels of trust and credibility. When your actions or the actions of your organisation have caused harm, or you reasonably suspect they have done so, if you don't respond appropriately you run the risk of turning a victim into an enemy.

*Responsibility*

Ignoring a problem or failing to engage and communicate with those affected is almost as bad as the 'deny and defend' option. Experience in many fields indicates that people who have been harmed don't immediately seek retribution, revenge or vindication. There is usually a two stage process – between the original issue or problem and a very negative response there is usually some intervening event or conduct. Experience indicates that this intervening event or conduct will usually relate to how the problem was dealt with, how the person was treated or how the person's initial expression of concern was handled. Justice theory (sometimes referred to as organisational justice theory) refers to such an intervening event as a 'double deviation'. Proponents of justice theory argue that if an original problem is not dealt with properly, and the person affected is not treated with courtesy and respect, including being given adequate information in a timely manner, this can lead to a particularly negative response. There will therefore usually be a window of opportunity after something

goes wrong to properly address the problem and its impact in ways that are acceptable to all concerned. In the NSW Ombudsman's experience, a failure to properly respond to an issue and the person concerned is often the trigger for what can become quite unreasonable conduct by that person.

If the response to the individual's concerns is respectful, positive and constructive (which can include an apology if appropriate), those concerns can often be resolved satisfactorily, enabling the person to 'move on'. If the response is rude, dismissive, negative, defensive or misleading, this is likely to result in an escalation of the problem with consequences that are detrimental to the interests of all the parties concerned.

Another often-quoted proverb is that: 'Attack is the best defence'. This is as true in the context of the response to a mistake as it is in war, subject to the same rider – that you have correctly identified your enemy! Where a mistake has been made causing harm, the correct enemy is the problem and the harm it caused, not the person harmed. It is far better to run towards our problems than away.

*Ownership*

Taking ownership, including accepting responsibility, engaging with those harmed and taking constructive steps to address the problem and the harm done, keeps you in the driver's seat. It also reduces the chances of unintended consequences and collateral damage and increases the chances of an ongoing workable relationship (or a restored relationship) with those harmed. Taking ownership of a problem allows us to keep some measure of control over, for example:

- how the problem is handled;
- options for a solution;
- how the problem is actually resolved;
- what happens next; and
- our reputation and credibility.

It is also far better to be seen to be doing the right thing voluntarily than reluctantly in response to pressure being brought to bear.

**Staff need to be given authority to disclose and apologise**

Particularly because admissions of error and responsibility (a fundamental element of a full apology) are associated in people's minds with risk, if we expect an organisation's staff to respond appropriately to mistakes, they need to be explicitly authorised to do so. This could either be in an organisation's policy or in individual delegations of authority. Precisely what authority is given to particular individuals would of course vary depending on such factors as their level of authority, the nature of their duties, the nature and degree of their interaction with the public/customers, etc.

As noted in the NSW Ombudsman's publication *Apologies – A practical guide*,[18] organisations should have an open disclosure and apology policy that addresses matters such as, among other things:

- the procedure to be followed by staff when they become aware that a mistake may have been made, or a complaint is made alleging that a mistake has occurred (eg who should be notified, what inquiries should be carried out before any disclosure is made and apology given);

- the events and circumstances in relation to which apologies can be given, and the events and circumstances in which the agency believes apologies should be given;
- the information to be disclosed at the outset when things go wrong or when a complaint is made, and to whom it should be disclosed;
- the content of apologies, including the types of admissions that can be made and the associated information that should be conveyed (eg details of the event or circumstance concerned; the cause of the problem, if known; the known or anticipated effect on the person(s) to whom the apology is to be given; the actions to be taken to rectify the problem and/or prevent its reoccurrence; any systemic issues highlighted by the problem);
- responsibility for the giving of apologies and any necessary delegations of authority to give apologies, offer redress;
- responsibility for coordinating the apologies process within the organisation; and
- records that need to be made and retained.[19]

Practical training should be provided to staff at all levels on the importance of apologies, and when and how to make them.

**Staff need to accept responsibility to disclose and apologise**

It is one thing to be given authority to apologies in appropriate circumstances. It is of course another thing entirely for people to accept responsibility to apologise. It is important to recognise that most people do not like to admit they are wrong — but this is a necessary precondition for a sincere apology. People may find it difficult to admit fault and apologise because of a range of internal or external reasons.

It is important that organisations send a clear message to their staff that a failure to acknowledge that something went wrong is dishonest, or at least lacking in full honesty, is often counter-productive, and can leave the person responsible 'living a lie' or experiencing feelings of inner turmoil, shame or guilt. On the other hand, staff should also be made aware that if people responsible for a problem acknowledge it and give a full apology, this may achieve a number of positive outcomes. For example, a full apology might lead to forgiveness (which helps the giver of the apology deal with any shame or guilt), reduce the possibility of retaliation or embarrassment, lead to a greater willingness to resolve a dispute, improve or establish the credibility of the giver, increase trust between the giver and the receiver, and lay the groundwork for a constructive relationship or the reconciliation of an existing relationship.

**What should an apology include?**

***The essential elements of a 'full' apology***

The idea of an apology is relatively simple – that expressing sincere sorrow, regret or remorse for wrong doing and/or the harm it caused can be an effective way to help resolve a problem and restore the relationship between the giver and the receiver. However, this simple idea tends to mask the complexities involved in its implementation.

In particularly complex, sensitive or serious situations, for an apology to be effective a wide range of issues will usually need to be considered. The most appropriate content and method of communication of an apology will depend on the circumstances of the particular case and what is hoped to be achieved by giving the apology. What is required for an apology to be effective comes down in the end to what is important to the person harmed.

Other than in the more simple situations, in principle, to maximise effectiveness an apology should incorporate the elements set out in Annexure B. This Annexure highlights the importance of clearly identifying the needs of the person harmed, and of taking steps to appropriately address those needs. In other words, where a problem has caused harm a full apology:

- may need to be the culmination of a process of communication, investigation and negotiation (including frank discussions with the person concerned to explore and attempt to appropriately address their questions and concerns); and
- may need to consist of a package of actions, including admissions of responsibility, explanations of cause, appropriate actions to put things right (where possible) and to address identified causes, and expressions of sorrow and remorse.

While the inclusion of each of the above elements in an apology will not guarantee that the apology will be successful, where they are important to address the legitimate needs of the person harmed, their exclusion will decrease the chances of success. Annexure C provides examples of things to be avoided in an apology taken from the NSW Ombudsman's *Apologies – A practical guide* (2nd edition).

When considering how to offer an apology, and what an apology should consist of, it is very important to bear in mind that you only get one chance to properly apologise. 'You never get a second chance to make a good first impression'.[20]

**Where to from here for statutory protection for full apologies?**

It is difficult to point to measurable benefits that flow from giving statutory protection for full apologies. Certainly, there is anecdotal evidence of a public sector showing a greater preparedness to apologise, however one crucial factor that reduces the impact of the legislation is the fact that public sector and community awareness of the statutory protection is limited.

Another way to look at the impact of statutory protections for apologies is to consider whether there has been a downside. Statutory protection for 'full' apologies has been around since 2002 in NSW and the ACT and has spread across many of the Canadian Provinces since 2006. This has not resulted in the end of civilisation as we know it in those jurisdictions. We have found no such evidence – not even a suggestion that the statutory protection for apologies has had any negative results.

***What issues need to be addressed?***

*Exclusions*

Both the NSW and Queensland apology protection provisions contain a number of exclusions. For example:

- Why do we need to exclude apologies for the contraction of a dust disease or for personal injury allegedly caused by smoking or the use of tobacco products? Was there any significant likelihood that this might happen to any appreciable extent? If it did, what would be the downside?
- Why deny the protection to people who wish to apologise for an intentional violent act? It doesn't mean they walk away scot free, but it does mean that the victim might receive something more personally meaningful than a criminal conviction and possibly incarceration of the perpetrator.

- Why in NSW do we deny the protection to people involved in a car crash? And don't think that any such admission of responsibility would void their insurance, because if the exclusion wasn't there the insurer wouldn't be able to bring the apology into evidence if taken to count for breach of the insurance contract. This problem would be completely solved if we adopted the Canadian model provision that specifically addresses insurance issues.

A further problem caused by the use of exclusions is that it creates an unnecessary complication that does not aid comprehension or comfort. The whole idea of such protections is to create a sufficient level of comfort to remove the fear of the legal consequences of a proper apology. One good example of this problem relates to communications with patients and their families following a medical misadventure. Much work has been done in Australia to develop and implement open disclosure policies in the public health sector. The National Open Disclosure Standard[21] and individual State Open Disclosure Policies advocate not only the open disclosure of incidents, but also the expression of regret and apology. However, it appears that the provisions outlining the content of the apologies that health professionals are authorised to make have been drafted narrowly, with the potential legal liability issue (and possibly the insurance issue) clearly in mind.[22]

*Scope*

The scope of the statutory protections in the NSW, Queensland and ACT provisions (as with the provisions protecting partial apologies in the other Australian jurisdictions) is limited to civil proceedings. The NSW and Queensland provisions go further and specifically exclude intentional acts done with intent to cause personal injury, including sexual assault or unlawful sexual misconduct.

As the protection of apologies in civil proceedings in various jurisdictions (extending back over a decade in some cases) has not resulted in any identifiable downside, maybe it is time to consider expanding the scope of the statutory protection to include criminal proceedings. This might initially be limited to criminal proceedings in certain circumstances, for example in relation to apologies given in the context of restorative justice processes such as victim-offender mediation, community or family group conferencing, and sentencing circles.

*Uniformity*

Another issue to consider is that the differences between the statutory protections for apologies across the Australian jurisdictions create confusion in relation to the legal position for businesses that operate in more than one Australian jurisdiction.

**Conclusions**

First, open disclosure about mistakes, the taking of responsibility for the cause and resulting harm and the giving of appropriate apologies is what good management practice dictates, ethical conduct requires and the public expects. Taking ownership of a problem and responsibility for its resolution is almost universally perceived to be a sign of strength and good character in an individual and an ethical culture in an organisation.

Secondly, only in NSW, the ACT and Queensland is there a statutory protection for full apologies (other than in certain circumstances in NSW[23] and Queensland, and limited circumstances in the ACT).

Finally, there should be a uniform approach across Australia to the legal protection for apologies. This might best be achieved by the Standing Council on Law and Justice adopting a Model Australian Apology Act (preferably along the lines of the Canadian Uniform Apology Act) that could be adopted by all Australian jurisdictions.[24]

**ANNEXURE A**
**Statutory Protections for Apologies ***

**Full apology – general application (12):**

Australia (3):
ACT (2003)
NSW **(2002)**
Qld (2010)

Canada (9):
Alberta (2008)
British Columbia **(2006)**
Manitoba (2007)
Nanavut (2010)
Newfoundland and Labrador (2009)
Nova Scotia (2008)
Ontario (2009)
Saskatchewan (2007)
Yukon [a lapsed Bill]

**Full apology – defamation actions (8):**

Australia (8):
All Australian states and major territories (2005)

**Full apology – health care providers (20):**

USA (18):
Arizona (2005)
Colorado **(2003)**
Connecticut (2005)
Georgia (2005)
Idaho (2006)
Illinois [time limit of 72 hours] (2005)
Louisiana (2005)
Montana (2005)
Nebraska (2009)
North Carolina (2004)
North Dakota (2007)
Ohio (2004)
Oklahoma (2004)
Oregon (2003)
South Carolina (2006)
South Dakota (2005)
Utah (2011)
Vermont [oral only & time limit of 30 days] (2005)
West Virginia (2005)
Wyoming (2007)

**Partial apology – general application (16):**

Australia (5):
Northern Territory (2003)
South Australia (2002)
Tasmania (2002)
Victoria (2002)
Western Australia (2003)

USA (11):
California (2003)
Florida (2001)
Hawaii (2007)
Indiana (2006)
Iowa (2007
Massachusetts (**1986**)
Michigan (2011)
Missouri (2005)
Tennessee (2003)
Texas (1999)
Washington (2002)

**Partial apology – health care providers only (7):**

USA (7):
Delaware (2006)
District of Columbia (2007)
Maine (2005)
Maryland (**2004**)
Minnesota (2010)
New Hampshire (2011)
Virginia (2005)

*** Sources include:** NSW Ombudsman research and the AMA Advocacy Resource Centre: '*Apology Inadmissibility Laws: Summary of State Legislation', 2012.*

**ANNEXURE B**

**The Essential Elements of a 'Full' Apology**

1) **Recognition -** This includes:
   - a description of the wrong – an honest and comprehensive description of the relevant problem, act or omission to which the apology applies;
   - recognition of the wrong – an explicit recognition of the action or inaction that resulted in the problem; and
   - an acknowledgement of the harm – an acknowledgement that the affected person has suffered harm, e.g. embarrassment, hurt, pain, damage or loss.

2) **Responsibility** – An acceptance or acknowledgement of responsibility for the wrong and harm caused.

3) **Reasons** – An explanation of the cause of the problem, or at least a promise to investigate the cause. An all too common failing in apologies is an attempt to justify the wrong by giving excuses. It is of course quite acceptable to provide an explanation of the reasons why the problem occurred for the purpose of outlining what has or will be done to ensure the problem does not re-occur. However, most people can distinguish a factual statement as to cause from an excuse designed to avoid or lessen blame. If the person (or organization) is in fact blameless, then the circumstances may warrant an explanation and an expression of sympathy, but not an apology.[25]

4) **Regret**. This is the core element of the apology, being a *statement* expressing sincere sympathy, sorrow, remorse and/or contrition. To be effective, an apology must meet the needs of the person(s) to whom it is given. In many cases (although not all) an essential ingredient of an effective apology will be sincerity, and whether or not it is present will be closely analysed by the recipient of the apology. Indicators of sincerity are likely to include:

   - whether the focus of the apology is on the needs and feelings of the person wronged or the consequences of the action on that person, not on the givers reputation or relationship with that person;
   - whether the objective of the apology is clearly to respond to the needs of the person wronged, rather than merely to appease that person or to attempt to justify what occurred; and/or
   - whether there is an acceptance or acknowledgement of responsibility for the wrong and harm, not an attempt to deny responsibility or imply that the person wronged was in some way responsible for the harm that occurred.

   Circumstances where sincerity may not be essential for an apology to be effective would include where the primary harm done has been damage to a person's reputation. In such cases it may well be that the needs of the person harmed are to receive a public admission of fault plus an expression of regret. As noted in *Apologies - A practical guide*: *'*[i]*t comes down in the end to what is important to the person harmed, for example one or more of the following:*

   - *the **fact** of the making of the apology;*
   - *the **content** of the apology (for example an admission of responsibility or an explanation of why something occurred); and/or*

- *the **feelings** that motivated the apology...'* [at p.19].

5) **Responsiveness** or **redress -** this would include:
   - a statement of the action taken or proposed to put things right, which might involve money, actions or promises to fix (whether or not raised by the person harmed, any reasonable ongoing care and compensation needs must be considered and appropriately addressed);
   - a promise not to repeat – a promise or undertaking that the action or inaction will not be repeated; and
   - timeliness – no undue delay.

*6)* ***Release – A request for forgiveness or a release from blame. This is an optional element in an apology, but it can be important. Forgiveness can have immense power to heal emotional wounds and sooth anger allowing people to move on with their lives. Forgiveness should not be confused with forgetting – it is about understanding and acceptance and no longer feeling resentment. Forgiveness means that the problem or hurt will be remembered without bitterness – that it will not be held against the giver, will not be brought up again, that the person will 'let go' and move on.***

**ANNEXURE C**

**Things to be Avoided in Apologies**

*Apologies - A practical guide* (2nd Edition) gives a number of practical examples of things to be avoided in apologies:

***Subject matter***

*Inaccurate apologies* — apologies that incorrectly identify the issues of primary concern to the recipient.

*Misguided apologies* — apologies for action/inaction or harm for which there was in fact no obvious responsibility.

*Generalized apologies* — apologies that fail to identify the relevant problem, fault or mistake, eg 'I am sorry for what occurred,' or the classic 'mistakes were made.'

***Content***

*Avoidance apologies*:

- apologies that try to excuse or avoid responsibility, eg 'I am sorry for what I said, but …';
- apologies that focus on the action or reaction of the recipient rather than the conduct of the person giving the apology, eg 'I am sorry you took offence at what I said'; and
- apologies that question whether there was a problem, eg 'A comment was made that may have caused offence'.

*Conditional apologies*:

- apologies that question whether the recipient was harmed, eg 'If you were offended by what I said, then I am sorry';
- apologies that are untargeted and conditional, eg 'If somebody was offended by what I said, then I am sorry'; and
- apologies that question whether any harm was done, eg 'If what I said was offensive, then I am sorry'.

*Partial apologies*:

- apologies that fail to include an admission of responsibility for the problem and the harm caused, eg mere expressions of regret, sympathy, sorrow, benevolence; and
- apologies that use the passive voice without taking 'ownership' of the problem, eg 'An offensive comment was made.

***Delivery***

- Impersonal apologies — eg apologies in form letters;
- Untargeted apologies — written apologies that do not identify the recipient, eg 'To whom it may concern …';
- Delegated apologies — apologies by a person who does not have direct or reasonably perceived responsibility for what occurred, eg 'On behalf of … I would like to apologize for the offensive comments he made …';
- Misdirected apologies — apologies made to the wrong person, or apologies made to people indirectly affected but not to the person directly affected;

- Selective apologies — apologies made to only some of the people who were affected;
- Serial apologies — the same person apologizing too often for different things [this can impact on the perceived sincerity of the person making the apologies]; and
- Repeat apologies — a series of apologies for the same re-occurring problem [each has less credibility than the last]. [see pages 12-13]

**Endnotes**

1 That introduced ss 67-69 (Part 10 Apologies) into the *Civil Liability Act 2002* (NSW)
2 The types of civil liability that are not covered by the protection for apologies in the *Civil Liability Act* can be briefly summarised as liability for:
   (a) an intentional violent act done with intent to cause injury or death (including sexual assault or misconduct)
   (b) the contraction of a dust disease, or for a personal injury allegedly caused by smoking or the use of tobacco products
   (c) the apology provisions of the Act do not apply to motor accidents, or to economic loss, non-economic loss or psychological/psychiatric injury to an injured person and liability for the compensation of relatives of a deceased person that arises from a motor accident (or transport accident as defined in the *Transport Administration Act 1998*) to which the *Motor Accidents Act 1998* applies, or from a motor accident or public transport accident to which the *Motor Accidents Compensation Act 1999* applies
   (d) damages payable by an employer for the injury or the death of a worker resulting from or caused by an injury, and compensation under various workers compensation legislation, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977*, or for the benefit payable under the *Sporting Injuries Insurance Act 1978*.[s.3B]

3 Per John Kleefeld, 'Thinking Like a Human: British Columbia's Apology Act' [2007] *UBC Law Review*, 40, 798-799.
4 s 5C, *Civil Liability Act 2002*.
5 Hansard, NSW Legislative Assembly, 23/10/02.
6 See: *Watson v Meyer* [2012 NSWDC 36; *AV8 Air Charter Pty Ltd v Sydney Helicopters Pty Ltd* [1012] NSWDC 220; *Kingi-Rihari v Millfair Pty Ltd/as the Arthouse Hotel* [2012] NSWSC 1592; *Wagstaff v Haslam* (2007) 69 NSWLR 1; *Hutchison v Fitzpatrick* [2009] ACTSC 43.
7 Dovuro Pty Ltd v Wilkins [2003] HCA 51 (11 September 2003), at para 25 (Gleeson CJ)
8 Dovuro Pty Ltd v Wilkins 2003] HCA 51 (11 September 2003), at para 173 (Hayne & Callinan JJ).
9 Jennifer K Robbennolt 'Attorneys, Apologies and Settlement Negotiation', Social Science Research Network: http://ssrn.com/abstract=1275419.
10 Jennifer K Robbennolt 'Apologies and Legal Settlement: an Empirical Examination', *Michigan Law Review*, Vol 102, No 460, 2003. Available at SSRN http://ssrn.com/abstract=708361 (at pp 484 & 486).
11 Ombudsman, Province of British Columbia, *The Power of an Apology: Removing the Legal Barriers*, Special Report No 27 to the Legislative Assembly of British Columbia, p 13.
12 Comic strip writer Lynn Johnston.
13 A quote usually said to be a Buddhist proverb.
14 Sorry Works! Newsletter, March 16, 2011.
15 Roman dramatist, philosopher & politician, 5BC – 65 AD.
16 Mark Twain (the full quote is '*Action speaks louder than words but not nearly as often*').
17 Sorry Works! Newsletter, June 29, 2009.
18 *Apologies – a Practical Guide*, 2nd Edition, NSW Ombudsman, March 2009: http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/apologies-2nd-ed.
19 At page 29.
20 Attributed to Will Rogers.
21 *Open Disclosure Standard,* Australian Commission on Safety and Quality in Health Care, 2008 (first published in 2003 by the former Australian Council for Safety and Quality in Health Care).
22 The indications are that NSW in particular is moving towards broadening the scope of the apologies health professionals are authorised, and encouraged, to make under the *Open Disclosure Policy* in the light of the broad statutory protection available in NSW (as well as the amendments to the Treasury Managed Funds' Contact of Coverage to make clear that an admission of fault made in accordance with the apology provisions of the Civil Liability Act would not void coverage – see cl.9.3 and *Appendix 4 - Apologies*).
23 See endnote 1 above.
24 As part of such a project, consideration should be given to expanding the scope of the statutory protection to include criminal proceedings, at least in certain circumstances.
25 *The Power of Sorry*, Consumer Directions, December 2012.

# IMPRISONMENT FOR INFRINGEMENT OFFENCES: USING JUDICIAL REVIEW AND HUMAN RIGHTS LAW TO PROTECT PEOPLE FROM MODERN DAY DEBTORS PRISON

***Saul Holt and Joel Townsend****

All States and Territories have some form of infringements system through which low level offending is dealt with in an automated way. In the vast majority of cases, the process works well: a person puts his or her feet on the seat of a train, gets caught, is issued an infringement notice and pays the fine. This paper concerns what happens when fines are not paid and, as a result, the non-payer becomes at risk of being imprisoned without any of the procedural safeguards normally associated with deprivation of liberty at the hands of the state.

In Victoria, for example, a person can be imprisoned for – in some cases – hundreds of days where the underlying offences have never been proved, the process to the point of imprisonment has been essentially automated, there is no prosecutor, there is no disclosure regime, there is only one (often very short) hearing before a magistrate, the term of imprisonment is usually imposed by formula, there is no right of re-hearing and no right of appeal. In Queensland and New South Wales imprisonment for infringement offenders is imposed through a similarly automated system, although without a hearing before a judicial officer.

The catalyst to challenge the operation of this regime in Victoria was the 81 day imprisonment of a man with an intellectual disability. His intellectual disability was unknown to the court and, if known, it would be likely to have led to him not being imprisoned. In the absence of a rehearing or appeal right this obvious injustice was apparently incapable of remedy within the statutory framework. A similar case involving a mentally ill woman imprisoned under the regime emerged and was dealt with at the same time.

The successful judicial review of the magistrate's[1] decisions in *Taha v Broadmeadows Magistrates' Court & Ors; Brookes v Magistrates' Court of Victoria & Anor [2011] VSC 642* (*Taha*), upheld by the Court of Appeal in *Victorian Toll & Anor v Taha and Anor;* and *State of Victoria v Brookes & Anor* [2013] VSCA 37 (*Victorian Toll*), highlights two important issues explored further in this paper:

1. The use of human rights law – both by way of the principle of legality and through the Victorian *Charter of Human Rights and Responsibilities Act* 2006 (the *Charter*) – as an element of statutory construction to aid a finding of jurisdictional error.

2. The response of administrative law to the blurring of the line between administrative and judicial decision making. This case resulted in the imposition on a judicial officer of a duty to enquire without an express statutory basis. This raised – but did not answer – the question of where *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 takes the distinction between inferior courts and administrative decision makers, particularly in a State context.

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However, at its heart, this case illustrates the power of administrative law remedies to 'step in' to a system that profoundly – and apparently intentionally – abrogates both substantive and procedural due process rights yet can result in imprisonment.

**The operation of the infringements system**

Richard Fox, in *Criminal Justice on the Spot*, traces the development of infringements systems in Australia as far back as 1938, when the Parliament of South Australia passed the *Police Act Amendment Act 1938*, permitting some minor offences to be expiated by the making of a prescribed payment, described as 'expiation'.[2] The growth in the ownership of motor vehicles[3] and advances in detection of offences,[4] amongst other factors, led to the creation and development of an infringements system in Victoria, by way of the passage of legislation through the Victorian Parliament including the *Parking of Vehicles Act 1953* and the *Road Traffic Act 1956*.

The precursor to the current version of the Victorian infringements system was the Penalty Enforcement by Registration of Infringement Notice (PERIN) system, established in 1985.[5] As Tate JA noted in *Victorian Toll*, this system, until 2000, led 'ineluctably' and 'in the absence of any judicial determination' to the imprisonment of an infringer 'unless he or she actively took steps to avoid imprisonment'.[6]

The *Infringements Act* (*the Act*) overhauled the infringements system in 2006. The Act sets out a procedure for the enforcement of infringements offences, being any offence which:[7]

> may be the subject of an infringement notice under … any Act or statutory rule; or …under any local law; or … a by-law made under section 171 of the Water Act 1989 or a by-law made a prescribed Act; or … any Commonwealth Act or any Act of another State or Territory or any instrument under such an Act that applies as a law of Victoria.

Infringement Notices are served under Division 2 of Part 2 of the Act. The Notice requires payment of the penalty specified in the Notice within a nominated period. There is provision in the Act for reminder notices.[8] The person served may pay the fine or elect to have the matter dealt with in the Magistrates' Court as an ordinary summary criminal case.

If the person served does not pay, enter into a payment plan, or elect to have the matter heard in Court, then they are in default and the enforcement agency can lodge details of the infringement penalty with the Infringement Registrar at the Magistrates' Court under s 54 of the Act. The Infringements Registrar may then issue an Enforcement Order under s 59 of the Act. The Enforcement Order is an order of the Court.

If payment is not made under the Enforcement Order, then the Infringements Registrar must issue an Infringement Warrant under s 80 of the Act. Once an Infringement Warrant has been issued the person subject to it becomes an 'Infringement Offender'.

The Infringement Warrant authorises various forms of enforcement. Pursuant to an Infringement Warrant, the Sherriff may seize personal property or arrest the Infringement Offender and bring the person before the Court.[9] Once an Infringement Warrant has been executed, the Infringement Offender may not seek the revocation of an Enforcement Order.[10]

Where an Infringement Offender is brought before the Court, a magistrate can imprison an Infringement Offender. This is the first and only time that the infringements process involves a judicial officer.

Under s 160(1*)* the court may:

order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount.

A 'penalty unit' is currently $144.36.[11] The 'outstanding fines' include enforcement costs accrued to date.[12] In many cases the enforcement costs make up one third of the total amount converted into prison time. It is not unusual to see very large figures owing, often relating to repeated toll road infringements where the toll road operator is a private company.

Section 160 provides two ways to avoid the formula for imprisonment set out in s 160(1). First, under s 160(2), if the Court is satisfied that the offender '*has a mental or intellectual impairment, disorder, disease or illness*', or that '*special circumstances* [otherwise] *apply'*, the Court may:

- discharge the outstanding fines in full;
- discharge up to two thirds of the outstanding fines;
- discharge up to two thirds of the fines and order imprisonment in respect of the remaining amount; or
- adjourn the matter for up to six months.

Secondly, under s 160(3), if the Court is satisfied that 'having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh', the Court may:

- order the offender to be imprisoned for up to two thirds less than one day in respect of the number of penalty units to which the fines are equivalent;
- discharge the fines in full;
- discharge up to two thirds of the outstanding fines;
- discharge up to two thirds of the fines and order the offender to be imprisoned for up to two thirds less than one day in respect of the number of penalty units to which the fines are equivalent;
- adjourn the matter for up to six months; or
- make an unpaid community work order.

If the Court makes an order for imprisonment in default of payment of outstanding fines, under any of s 160(1), s 160(2) or s 160(3), a warrant to imprison may be issued, and the Court may make an instalment order for the payment of the fines (s 160(4*)*).

Any breach of an instalment order automatically activates the imprisonment warrant which is sent to the Sherriff for execution. There is no process in the Act to bring the person back before the court to test whether there was in fact a breach, whether the breach was reasonable, or whether the person's circumstances have changed thereby warranting a change to the instalment plan. In that sense the imprisonment order is apparently self-executing.[13]

In *Victorian Toll*, Justice Tate of the Court of Appeal described the non-adversarial nature of s 160 hearing:[14]

> The hearing that takes place under s 160 of the Act is not at all readily assimilated to a conventional criminal trial; rather, it is wholly different to such a proceeding given that it does not itself involve a contest on the infringement offences and it does not occur after there has been a trial on the merits.

> The hearing under s 160 is the first time an infringement offender will have appeared before the Court and nothing will be known by the Court of the circumstances of the conduct of the offence or the circumstances, financial, social or psychological, of the offender. The hearing is not adversarial. There is no prosecutor, nor anyone performing a quasi-prosecutorial role. As mentioned above, the infringements registrar does not appear. The 'basic information' is provided by staff of the registry of the Court. The only person to appear before the magistrate is the infringement offender, who may or may not be legally represented. The hearing consists in an exchange between the magistrate and the offender, or his or her legal representative. As I have observed, there is an absence of the substantive and procedural protections that would usually be expected from a process where a person is at risk of losing his or her liberty; namely, a disclosure regime; a right of appeal; or a process for re-hearing based on new material.

The Victorian system differs, to some degree, from that of other Australian jurisdictions. In NSW, the *Fines Act 1996* does not prevent applications for the annulment of enforcement orders after enforcement action has taken place.[15] The *Fines Act* also provides for 'work and development orders' for the expiation of infringements incurred by vulnerable persons, and provides for considerable flexibility in the making of these orders.[16] On the other hand, imprisonment orders are made by the State Debt Recovery Office, rather than by a magistrate.[17]

In Queensland, the *State Penalties Enforcement Act 1999* (Qld) does not prevent applications for the cancellation of enforcement orders after enforcement action is taken.[18] Similarly to New South Wales, imprisonment is imposed by order of a State Penalties Enforcement Registrar, not by a judicial officer.[19]

The infringements system in Victoria has expanded substantially in recent years. Reports by the Attorney-General on the system indicate that, from 2006/7 to 2011/12, the number of infringement notices issued increased from approximately 4.1 million to 4.79 million.[20] Over the same period, enforcement orders under s59 of the Act increased in number from 837,735 to 1,565,585.[21] Affidavit material filed by the appellants in the Court of Appeal in *Victorian Toll* indicated that, from 2006/7 to 2010/11, the number of imprisonment orders made under s 160 had increased from 93 such orders, to 917.

In order to reduce pressure on the more labour intensive summary criminal process, Victoria is currently piloting the use of infringement notices for 'mens rea' offences such as shop theft and disorderly conduct. The pressure to convert more summary offences into infringements offences is likely to be irresistible – for understandable reasons. The time taken for a Police Officer to issue an infringements notice is dramatically less than that required for a summary prosecution. It also eases pressure on an already over-burdened Magistrates' Court. Anecdotally, it seems that automatic detection of number plate technology is also having a significant impact.

**Zacharia Taha and Tarni Brookes**

Zacharia Taha was a disability support pensioner with an intellectual disability. He had a full-scale IQ of 61. He lived with his wife, three year old daughter, his parents and two brothers at his parents' house. He had been an in-patient at a psychiatric hospital, suffering from suicidal depression. His only income was his Centrelink payment. He had no savings and substantial debts. English was his second language.

On 11 September 2007 an infringement warrant was issued in relation to 30 unpaid fines incurred by Mr Taha between 2006 and 2008. Mr Taha could not read and was embarrassed to ask others to read letters about his fines to him. On 3 February 2009 he was arrested and bailed to appear at the Broadmeadows Magistrates' Court on 26 February 2009, in relation to $11,250.20 in outstanding fines (including costs).

Mr Taha was represented by a duty lawyer who, in accordance with s 2 of the *Legal Aid Act* 1978 (Vic) was seeing him 'other than by prior arrangement'. Mr Taha's intellectual disability

was not known or obvious and was not put as a result. An enquiry of his bench clerk to look at the plaintiff's history on 'CourtLink' would have revealed that Mr Taha had previously been placed on a Justice Plan pursuant to s 80 of the *Sentencing Act 1991* (Vic), a disposition only available to a person whom the Secretary for the Department of Human Services has certified has an intellectual disability. Mr Taha was on a disability pension, and thus an enquiry as to his income might have led to the disclosure of his disability.

In the absence of any submission about matters that could enliven s 160(2) or (3), exceptions to imprisonment, the magistrate did not consider or enquire into whether Mr Taha met the terms of those provisions. He simply imposed the level of imprisonment required by the s 160(1) formula with an instalment order of $80 per month. Had Mr Taha paid the $80 per month the debt would have taken 11 years to pay off. In the event of any default over that time he would be immediately imprisoned for one day in respect of each penalty unit owed.

Mr Taha paid $1,280 of the outstanding fines then stopped paying. He was then liable to be imprisoned for a period of 81 days. Mr Taha was an in-patient at Orygen Youth Health, as a result of severe depressive episodes, when the sherriff came to execute the imprisonment warrant. The sherriff agreed to defer execution of the warrant and Mr Taha telephoned Victoria Legal Aid, which commenced judicial review proceedings on his behalf.

Tarni Brookes was diagnosed as suffering from Post-Traumatic Stress Disorder arising from assaults on her during the course of a violent relationship.

Between 1999 and 2001, Ms Brookes incurred numerous fines associated with driving a motor vehicle. A high proportion of these infringements were for driving on a toll road without CityLink registration. She deposed that many of these offences were committed by her violent former partner.

On 2 September 2004, Ms Brookes was arrested on 68 warrants. She was bailed to appear before the Magistrates' Court at Broadmeadows on 13 October 2004. She did not appear on that day. On 10 May 2006, a warrant was issued for Ms Brooke's imprisonment. On 24 October 2008, she was arrested. A total of seventy five fines were outstanding at this time.

Ms Brookes was seen by a duty lawyer rostered to the police cells while being held at Broadmeadows Police Station. Ms Brookes deposed that communication with the duty lawyer was difficult as they were limited to speaking through a narrow opening in the cell door, that she was extremely anxious, and that she was asking the lawyer to get her out of the cells. She had little recollection of the conversation.

The duty lawyer took instructions relating to the circumstances of the infringements, the violence Ms Brookes had experienced, an attempted suicide, and her ongoing involvement with the mental health unit of the Northern Hospital. The duty lawyer submitted to the Court that her mental health and her circumstances generally activated s 160(2) of the Act. The magistrate stated that the only way the court could entertain the submission as to Ms Brookes' special circumstances was with the tender of appropriate written material.

The duty lawyer advised Ms Brookes that she could seek an adjournment to obtain the materials that the magistrate believed were necessary to support an application under s 160(2). Ms Brookes instructed the duty lawyer to deal with the matter that day and not to adjourn the case. This was in spite of the his advice that continuing without such materials would result in the Court making an instalment order and that the court would impose an order for imprisonment in default.

The magistrate, made orders that the total sum of $15,164.50 fines for the Infringement Warrants before him be paid in monthly instalments of $45.00 commencing 1 December

2008 and that in default of the unpaid amounts, Ms Brookes be imprisoned for 134 days. In November 2009, having defaulted on her payment plan, Ms Brookes sought legal advice.

**The competing contentions and the result**

Before Emerton J in the Supreme Court, Mr Taha argued that the magistrate had committed a jurisdictional error by making an imprisonment order under s160(1) without considering the availability of s 160(2) or s 160(3). Thus, it was submitted that the magistrate has misapprehended the limits of his powers.[22]

This 'unified' construction of the provision was at the core of Mr Taha's case.[23] It was contrasted with a 'stand alone' construction of s 160(1) in which imprisonment for all of the outstanding fines was the presumptive position and the power of the court in s 160(2) and (3) to impose a shorter term of imprisonment – or no term – were exceptions to be pressed by the Infringement Offender.

The 'unified' construction would treat the options in s160 as just that – options. A suite of responses all of which needed to be actively considered by a magistrate before imprisonment under s 160(1) was imposed, and which operated with no hierarchy. It was argued that the word 'may' in s 160(1) is given content by the options in s 160(2) and (3).

It was submitted that this 'unified' construction could only be given meaning if the magistrate had a positive duty to enquire as to whether the preconditions in s 160(2) and (3) existed. This followed from the absence of procedural and substantive protections for an Infringement Offender in a s 160 hearing.

The enforcement agencies submitted that s 160(1) was a stand alone provision and, even if it was not, any error was made within jurisdiction by an inferior court. They submitted that a duty to enquire stood profoundly at odds with the role of a judicial officer in what they steadfastly characterised as an adversarial proceeding. They also argued for determinative weight to be placed on the fact that both Mr Taha and Ms Brookes were represented by duty lawyers, rather than being self-represented.

In addition to the 'unified' construction argument, Ms Brookes submitted that the magistrate had failed to have regard to a relevant consideration, being her mental illness, in imposing imprisonment. She also argued that the failure to adjourn her matter was a denial of procedural fairness, and that the Court failed to fulfil a duty properly to enquire into her mental health – it having been put on notice of a mental health issue.[24]

The enforcement agencies submitted in response that the 'exceptions' to imprisonment in s 160(1) and (2) were for the infringement offender to prove and that because Ms Brookes had expressly not sought an adjournment, the magistrate was entitled to proceed.

Justice Emerton accepted the 'unified' construction and imposed a duty to enquire on the magistrate in Mr Taha's case because there were 'flags' that required an inquiry into the exceptions. In the absence of such an inquiry, the magistrate could not implement a 'unified' construction and thereby committed jurisdictional error. In Ms Brookes' case, the magistrate made the same error of construction. The error manifested in the decision to proceed to imprison when the magistrate was on notice of a mental health issue. Emerton J held that to properly implement a 'unified' construction the magistrate was obliged to be positively satisfied that the 'less draconian orders' were not available, before ordering imprisonment.[25]

The Court of Appeal refused the enforcement agencies leave to appeal, and in three concurring judgments, dismissed the appeal. All three judges held that the 'unified' construction was correct, that the Magistrate had not adopted such a construction, and that he thereby committed jurisdictional error. They were also unanimous that the magistrate was

obliged to enquire into Mr Taha's circumstances and was not entitled to adjourn Ms Brookes' case.

Justice Tate relied heavily on human rights considerations in arriving at the unified construction. In that regard she relied both on the principle of legality and the requirement to interpret statutes consistently with protected human rights in the *Charter*. She went further than both Emerton J and Nettle JA in holding that the duty to enquire was not case specific, but rather a universal duty applicable in all s 160 cases. In her view the liberty interests at stake, and the lack of procedural protections, warranted an essentially inquisitorial process.

Justice Nettle also drew support from the principle of legality and the *Charter*. He saw the duty to enquire (albeit a more limited duty that Tate JA found) as a necessary corollary of the unified construction in the particular context of s 160 hearings.

Justice Osborn, in a short concurring judgment, agreed with Tate JA's universal duty to enquire.

**A 'unified' construction of s 160 – the impact of human rights**

Because the decision maker under s 160 is an inferior court, a critical question was whether there had been truly a *jurisdictional* error. This turned on the construction of s 160.

All four judges considered that the text of s 160 permitted the 'unified' construction. Each judge also agreed that the purposes of s 160 told in favour of such a construction. Of particular importance was Emerton J's conclusion that s 160 was intended to deal with the 'particular circumstances' of individual infringement offenders, and thus should be seen as a 'package' of measures.[26]

With heavy reference to the Second Reading Speech and the Explanatory Memorandum for the *Infringements Bill 2005*[27] Emerton J concluded – and the Court of Appeal agreed – that three key purposes of the Act were:

1. that vulnerable people inappropriately caught up in the infringement system are to be filtered out of the system at various stages;

2. that where the filtering mechanisms in the Act have not succeeded or the fines have not otherwise been paid, the Court retains a range of options for dealing with the vulnerable offender; and

3. that imprisonment of the vulnerable offender for non-payment of fines is to be a measure of last resort.

Nonetheless, a stand-alone construction as pressed by the enforcement agencies was plainly available. Section 160(2) and (3) can reasonably be construed as exceptions to a general or default power of imprisonment. It is an uncontroversial proposition that a judicial officer is not usually obliged to deal with matters that are not put in issue – particularly where a person is represented. Thus, the deployment of human rights based propositions in support of the 'unified' construction became critical in this case.

The use of the principle of legality in particular will be important to any similar action taken in other jurisdictions where the relevant infringements legislation is not accompanied by extrinsic material as helpful as in Victoria.

Three human rights were said to be engaged in the question of how s160 should be construed:

1. the right to liberty;

2. the right to a fair hearing; and

3. the right to equality before the law.

The first two – the right to liberty and the right to a fair hearing – were deployed both under the rubric of the principle of legality and the interpretative mandate in s 32 of the *Charter*. The third – equality before the law – was deployed only on a *Charter* basis.

The principle of legality holds that 'in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities'.[28]

As Tate JA noted: 'Statutes are not to be construed as encroaching upon certain rights unless Parliament has made its intention to do so unequivocal' and 'where the intention to encroach upon rights is not manifest with 'irresistible clearness' a court must interpret the legislation, consistent with the principle of legality, as not abrogating or curtailing the rights in question'.[29]

Section 32 of the *Charter* provides that *'*so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

The approach to s 32 was notionally settled by the High Court in *Momcilovic v R* (2011) 245 CLR 1. It is widely considered to have rendered s 32 less influential than was previously thought to have been the case.[30] However, Tate JA's exegesis and application of *Momcilovic* breathes new life into the provision, by carefully examining the High Court's analogising of s 32 to the principle of legality.

Justice Tate started with French CJ's proposition that s 32 applies to interpretation of statutes in the same way as the principle of legality but with a wider field of application.[31] However, she eschewed the suggestion that s 32 was no more than a codification of the principle of legality:[32]

> Six members of the High Court made it plain that s 32 of the Charter was not analogous in its operation to s 3 of the Human Rights Act 1998 (UK), but rather required a court to apply the techniques of statutory construction set out in Project Blue Sky. Nevertheless, there was recognition that compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, might more stringently require that words be read in a manner 'that does not correspond with literal or grammatical meaning' than would be demanded, or countenanced, by the common law principle of legality. [footnotes omitted]

If Tate JA's approach becomes embedded – bearing in mind that Nettle and Osborn JJA were silent on the point – then s 32 will have greater impact on statutory construction in Victoria than has been assumed.[33] One only needs to highlight the existence of protected *Charter* rights well beyond those traditionally protected by the principle of legality, most significantly the right to equality before the law,[34] the right to privacy and reputation,[35], freedom of movement[36], freedom of expression[37] and the right to protection of the family.[38]

Tate JA accepted that both the right to liberty and the right to a fair trial were basic common law rights, freedoms and immunities to which the principle of legality applied.[39] She concluded, as Emerton J had, that a stand-alone construction of s 160 would abrogate both of those rights without the necessary explicit statutory authorisation for such abrogation.

Tate JA considered that the bare right to liberty was engaged by the subject matter of the proceeding, that being whether an infringement offender should be imprisoned.[40] Her Honour gave content to the right through the language of s 21(2) of the *Charter* that protects a person from arbitrary arrest and detention and by reference to the interpretation of Article 9 of the *International Convention on Civil and Political Rights* upon which s 32 is based.[41]

Thus, she concluded that she was obliged to adopt a construction of s 160 that was 'compatible with the rights of Mr Taha and Ms Brooke's not to be imprisoned in circumstances that were disproportionate or unjust'.[42]

The right to a fair hearing was deployed both in relation to the construction question and – as is discussed below – in relation to the existence of a duty to enquire. Justice Tate concluded that a construction that requires the magistrate actively to consider exceptions to imprisonment was consistent with the right to a fair hearing in s 21 and to the common law right not to be tried unfairly.

Justice Tate found that the right to equal protection under the law without discrimination (s 8(3) of *Charter*) was engaged:

> Mention has already been made of the fact that the impairment some infringement offenders suffer from may itself render them less capable than persons without such an impairment of informing the Court of (1) their impairment or (2) the effect of their impairment on the control they have over their conduct or (3) their ability to understand that their conduct constitutes an offence. A construction of s 160 which requires them to raise these issues with the Court before the Court is obliged to consider whether there are special circumstances in the case impose a requirement, condition or practice that is likely to have the effect of disadvantaging persons with an impairment which is not reasonable. The requirement is not reasonable because it imposes a condition before a person's impairment is taken into account that only those without that impairment are likely to be able to meet.
>
> A construction which has this as a consequence is incompatible with the right to equality under s 8(3) and s 32 compels its rejection in favour of a construction which is compatible with that right, namely the unified construction of s 160 and the duty on the Magistrate to inquire that it entails.

Thus, the 'unified' construction was required on every basis – text, context, purpose, and consistency with fundamental common law rights and those protected by the *Charter*. The question left unanswered by this construction alone was whether there were implicit protections in the s 160 process for a person in Mr Taha's or Ms Brookes' circumstances. Given that the 'unified' construction was required specifically to ensure that vulnerable people were not improperly imprisoned and that imprisonment was a sanction of last resort, the 'unified' construction was only important if it led to positive obligations being imposed on the magistrate which is what led to the imposition of the duty to enquire.

**Imposition of a duty to enquire**

It is not entirely clear from *Victorian Toll* on what juridical basis a duty to enquire was imposed.

Justice Nettle's conception of the duty to enquire has more in common with the approach taken to such a duty imposed on administrative tribunals. That is, Nettle JA saw the duty as arising on a case by case basis where there was sufficient material to warrant the inquiry.

Justice Nettle concluded that it was sufficient to demonstrate jurisdictional error that the magistrate had not given consideration to s 160 (2) & (3) and to consider whether enquiries were necessary in Mr Taha's case to determine how those provisions applied.[43] In the alternative, Justice Nettle considered that the absence of any reasoning as to the application of the s 160 (2) & (3) was itself an error of law on the face of the record and that such an error was reviewed under s 10 of the *Administrative Law Act*.[44]

In relation to Ms Brookes, Justice Nettle noted that it was indisputable that s 160(2) had been considered. Justice Nettle differed from Justice Tate in finding that the magistrate had not been in error in requiring written evidence of Ms Brookes' psychological impairment.[45] However, his Honour found that because this was essentially an administrative proceeding (not an adversarial one),[46] the magistrate was required to undertake the task of determining whether Ms Brookes had a relevant psychological impairment irrespective of the way in which Ms Brooks conducted her case.[47] The fact that Ms Brooks had chosen to proceed

without the written evidence of her psychological impairment did not excuse the magistrate from considering whether an adjournment was required. Such consideration was necessary in order for the magistrate's decision making power under s 160 to be properly informed and exercised.

In contrast, Tate JA (with whom Osborn JA agreed) conceived of the duty as universal on the basis that it is the necessary corollary of the 'unified' construction ie that the requirement to actively consider s 160(2) and (3) would only be meaningful if translated into a duty of inquisition. It was put in this way:

> To my mind it is not satisfactory to conclude, as the judge did, that a duty to inquire is only created in those cases in which there are 'flags' arising from the circumstances of the case that prompt the need for interrogation (for example, the fact that Mr Taha was in receipt of a disability pension). It is the statutory framework that determines the obligations imposed on the Court and these obligations must be universal, arising as they do from the overall statutory scheme and the role played in that scheme by the s 160 hearing. In my view, the unified construction of s 160, which obliges a magistrate to consider whether he or she should exercise alternative powers to imprisonment under sub-s (1), could be rendered nugatory were the magistrate not also under a duty to inquire whether there were any special or exceptional circumstances arising. As the judge observed, given the nature of the circumstances underlying the exceptions, especially those of mental illness and intellectual disability, the legislative intent to protect the vulnerable could be thwarted if it fell to the offenders whom the exceptions were designed to protect to raise their circumstances with the Court. The basic information provided to the Court, as set out in the Act, would be unlikely to provide the necessary factual material on which a magistrate could rely to discharge the obligation to consider the alternative powers under sub-ss (2) and (3). Thus, in my view, the unified construction entails that the Court in a s 160 hearing is always under a duty to inquire; that is, the duty to inquire is a necessary consequence of the unified construction. [footnotes omitted]48

Justice Tate also addressed the question of the content of the obligations arising under s 160:

> what is required to discharge the obligation to inquire will depend on the particular circumstances of the case. This is somewhat analogous to the obligation to accord procedural fairness, the content of which 'will depend on the facts and circumstances of the particular case'. Just as the content of the requirement on a decision-maker to provide an opportunity to be heard is variable and admits of a 'chameleon' quality, so too what is necessary for a magistrate to do to discharge the duty to inquire will vary from case to case. It is not the case that the magistrate must mechanically ask a series of ritualised questions of every infringement offender, a vice which the judge wished to avoid, but he or she should at least ask every infringement offender, or the offender's legal representative, if there are any special or exceptional circumstances relevant to the case and, if necessary, if the offender has a mental or intellectual impairment, or a serious addiction to drugs or is homeless. It may be necessary to adjourn the proceeding for a legal representative to obtain the relevant information. In some circumstances, it may also be necessary, if the material would be of central relevance and is readily available, to check the records or information systems of the Court to determine whether special or exceptional circumstances arise in the case. [footnotes omitted]49

Justice Tate rejected the argument that the imposition of the duty to enquire would create uncertainly in the system. She held that this concern was addressed in part by the fact that the content of the duty to enquire would depend on the facts and circumstances of a particular case.[50] Further, the fact that Mr Taha and Ms Brookes had been represented by duty lawyers did not mean that the magistrate was relieved of the duty to enquire. While Her Honour indicated that representation would be relevant to the question of the scope of this type of duty to enquire, she pointed out the pressures under which duty lawyers operate and the vulnerability of clients in this system who might not raise with the lawyers the existence of their mental illness or intellectual disability.[51] Her Honour also rejected an argument that the duty to enquire would put the magistrate in an impermissibly inquisitorial role. Her Honour pointed out that precedent indicating that the magistrate might not be put in such a position had been made in a criminal context, not in circumstances of a proceeding which is not adversarial.[52]

Yet, this justification does not seem to provide a satisfactory answer. If the effect of a 'unified' construction is to make s 160(2) and (3) mandatory considerations, then that does

not necessarily carry with it the requirement of inquisition. It is more likely simply to require consideration of the various statutory options for disposition.

In reality, it seems that the duty to enquire was imposed as an exceptional response to the exceptional conditions under which a s 160 hearing operates; that is, a single hearing without a prosecutor, without disclosure, and with minimal legal assistance the consequence of which can be lengthy terms of imprisonment without rights of re-hearing or review. One cannot escape the conclusion that remedies available in administrative law were here substituting for the – presumably deliberate – decision of the Parliament not to provide the procedural protections that exist even for minor summary criminal prosecutions.

It is otherwise difficult to rationalise the imposition of a duty to enquire in this context with the otherwise heavily qualified and limited duties to enquire imposed on administrative decision makers. The primary statement of the duty in Australia is in *Prasad v Minister for Immigration and Ethnic Affairs*,[53] in which Wilcox J supposed three models for the duty to enquire:[54]

(1) At one extreme, the court would consider unreasonableness only on the basis of material actually or constructively before the court;

(2) At the other extreme, the court could refer to all the evidence before the decision-maker, even if that includes material not readily available to him;

(3) An intermediate model was favoured by his honour, with reference to 'such additional facts as the decision-maker would have learned but for any unreasonable conduct by him'.

His Honour elaborated:[55]

> It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make enquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have exercised it.

The theoretical basis for review based on a breach of a duty to enquire has been elusive. *Prasad* itself appears to treat the breach of the duty as amounting to unreasonableness or irrationality, whereas cases arising in the migration field tend to focus on jurisdictional error by the failure to exercise a statutory obligation to review.[56] In *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at 559-560 the question of a duty to enquire was treated as a subset of procedural fairness. In *Goldie v Commonwealth*[57] it was characterised as a failure to take relevant considerations into account. In *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, the High Court sounded a caution about the use of the term 'duty to inquire', noting that the term 'is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error'. The Court pointed out that a failure to make 'an obvious inquiry' might be characterised as a jurisdictional error of one sort or another, but indicated that this would depend to a significant degree on the particular statutory context of the decision in question.[58]

Arising from *Prasad* are two threshold requirements,[59] before the duty can be said to exist:

a) that the information is centrally relevant;[60] and

b) that the information is readily available.

Whether information is 'readily available' depends on context.[61] Examples of information that satisfies this criterion include an accessible medical opinion on recidivism,[62] information

comparing educational standards in Australian and Chinese schools,[63] and further medical evidence from a General Practitioner.[64]

Smythe identifies a number of additional relevant but not determinative factors in establishing a duty to enquire:[65]

a) **the efficiency of the process** – a duty to enquire may not exist if to impose such a duty would impede the proper functioning of the tribunal in its statutory and procedural context.

b) **awareness of further information** – A factor telling in favour of the existence of a duty to enquire is knowledge (whether actual or constructive) of the information that the inquiry would reveal. In the cases of Mr Taha and Ms Brookes, the magistrate did not have actual knowledge of the relevant information. There was nothing particular about the circumstances known to the magistrate which indicated the existence of their conditions.

c) **the nature of the decision** – A heightened level of scrutiny is expected to be given to certain kinds of decisions. In *Goldie v Commonwealth*[66] it was noted that *'[g]iven that deprivation of liberty is at stake, [relevant] material will include that which is discoverable by efforts of search and inquiry that are reasonable'*.

**Kirk and the difference between inferior courts and administrative tribunals**

This case illustrates the increasingly blurred line between administrative decision makers and inferior courts. Although the decision maker in these cases was clearly a judicial officer of an inferior court, the nature of the process he engaged in had as many hallmarks of administrative power – as Nettle JA expressly noted – as it did of judicial power. As noted above, one of the major changes that the Act introduced was to bring in a judicial officer at the point at which a person could be imprisoned. However, these cases strongly suggest that this may be no more than window dressing if all that the magistrate usually does is to apply the formula in s 160(1).

This issue was important in this case with the enforcement agencies relying heavily on the distinction between inferior courts and administrative tribunals to submit that any errors the magistrate made were within jurisdiction and that he could not be fixed with a duty to enquire. They relied on the High Court decision in *Craig*,[67] which held that where judicial review is sought of an inferior court the grounds of judicial review are more limited.[68] Particularly, it noted that an inferior court:[69]

> falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.

In *Kirk*,[70] the High Court confirmed the difficulty in classifying errors as jurisdictional or otherwise:

> In Craig v South Australia, this Court recognised the difficulty of distinguishing between jurisdictional and non-jurisdictional errors, but maintained the distinction. As was pointed out in Re Refugee Review Tribunal; Ex parte Aala:
>
> 'The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.'
>
> As was also pointed out in Aala, there can be no automatic transposition to Australia of the principles that developed in England in relation to the availability of certiorari and prohibition. The constitutional

> context is too different to permit such a transposition. At the federal level, allowance must be made for the evident constitutional purposes of s 75(v) of the Constitution; at a State level, other constitutional considerations are engaged. As was pointed out by Gummow J in Gould v Brown, '[w]hen viewed against the Constitution in its entirety, Ch III presents a distinct appearance. Upon what had been the judicial structures of the Australian colonies and, upon federation, became the judicial structures of the States, the Constitution by its own force imposed significant changes.' [footnotes omitted]

*Kirk* thus affirms the distinction between jurisdictional error and error of law in Australian administrative law. In doing so, the majority judgment acknowledges the work of Jaffe and cites his assertion that denominating some questions as 'jurisdictional':

> is almost entirely functional: it is used to validate review when review is felt to be necessary ... If it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified.71

Writing extra-judicially on the impact of *Kirk*, the Honourable JJ Spigelman AC said of the process of determining what matters are 'jurisdictional' that:

> The process of identifying what facts or opinions or procedural steps or judgments are jurisdictional is a matter which turns, primarily, on a process of statutory interpretation. All of the relevant principles of the law of statutory interpretation apply. The fact that different judges may reach different conclusions with respect to matters of this character is not surprising in view of the significant range of elements that must be taken into account.72

To put it another way, 'jurisdictional error' might best be seen as a functional post hoc classification, turning on pragmatic questions.[73] The upshot will be that 'intuitive assessments will need to be made of the extent to which a decision-making body is straying from its statutorily assigned functions'.[74]

The consequences of this conclusion have some importance in considering the use to which the concept of 'jurisdictional error' can be put. As one commentator noted:

> The evident doubt that the assumed distinction can always be clearly drawn, particularly in the State constitutional context, necessarily throws doubt upon the bifurcated approach to jurisdictional error that has been seen as flowing from, and based upon, that distinction. In short, the court would seem less willing to rely upon that distinction in the future and to be more prepared to engage in a frank assessment of the seriousness of the error made by the body under review, whether that body is a 'court' or a 'tribunal'.75

Following *Kirk,* and as illustrated by *Victorian Toll*, the limitations on the distinction in *Craig* between the narrow grounds of review available in respect of the decisions of inferior courts and the wider grounds of review available in respect of administrative tribunals, are becoming clearer. In *Kirk*, the High Court put it this way:[76]

> The drawing of a distinction between errors within jurisdiction and errors outside jurisdiction was held, in Craig, to require different application as between 'on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ.
>
> …
>
> The basis for the distinction thus drawn between courts and administrative tribunals was identified in the lack of authority of an administrative tribunal (at least in the absence of contrary intent in the statute or other instrument establishing it) 'either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law'. By contrast, it was said that 'the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine.
>
> Behind these conclusions lies an assumption that a distinction can readily be made between a court and an administrative tribunal. At a State level that distinction may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution. No less importantly, behind the conclusions expressed in Craig lie premises about what is meant by jurisdictional error. Unexpressed premises about what is

> meant by jurisdictional error give content to the notion of 'authoritative' when it is said, as it was in Craig, that tribunals cannot 'authoritatively' determine questions of law, but that courts can. [footnotes omitted]

Commentary on *Kirk* has pointed out that the High Court probably has a desire to retain a 'functional' view of jurisdictional error in order to afford itself flexibility in superintending other courts.[77] This is especially important in light of what the High Court identified as the difficulty in accurately identifying judicial, as opposed to administrative, decision making in a State context.

In any event, the application of *Kirk* was not determinative in these cases – perhaps surprisingly so. All of the judges on appeal held, like Emerton J, that the magistrate had fallen into an error within the scope of *Craig*, misconceiving the nature of his jurisdiction. Thus, it was of no final consequence whether the decision maker was, properly understood, exercising judicial or administrative power.

## Conclusion

*Victorian Toll* is an important decision mainly because it will mean that people like Mr Taha and Ms Brookes do not go to prison without a judicial officer properly assessing whether or not they should. It also highlights the increasingly important role of administrative law remedies as the State increasingly seeks – for understandable policy reasons – to make the administration of high volume criminal offences more efficient. It vividly highlights the way in which human rights principles – whether deployed through the principle of legality or by way of the *Charter* – can be used to creative effect. Further, it is difficult to escape the conclusion that the willingness to impose inquisitorial obligations on a judicial officer was precisely because of the absence of the usual features of the exercise of judicial power – particularly where that exercise results in loss of liberty.

Taha has had the pleasing effect of being a catalyst for legislative change. Amendments to create a re-hearing right have passed the Victorian Parliament[78] and await commencement. However, it *remains* the case that an instalment order can operate – as in Mr Taha's case – for more than a decade with a self executing imprisonment order for the barest or most understandable of breaches. When imprisonment is imposed in this way for offences including non-payment of road tolls to private companies are we really far beyond the debtors prisons of past centuries?

**Endnotes**

1 It was the same Magistrate in each case.
2 Richard Fox, *Criminal Justice on the Spot* (Canberra: Australian Institute of Criminology, 1995), 3-4.
3 Fox, above n 2, 7-9.
4 Fox, above n 2, 9-10.
5 Fox, above n 2, 54.
6 *Victorian Toll,* [65]
7 *Infringements Act 2006* (Vic) *s 3*.
8 *Infringements Act 2006* (Vic) s 29.
9 *Infringements Act 2006* (Vic) s 82.
10 *Infringements Act 2006* (Vic) s 65(2).
11 See *Monetary Units Act 2004* (Vic), s 5; Victoria, *Government Gazette*, No G 16, 18 April 2013.
12 See *Infringements Act 2006* (Vic), ss 3, 59 and 81.
13 This at least has been assumed to be the position. VLA has developed an argument that s 160(4)(b) of the *Infringements Act* Incorporates the scheme under the *Sentencing Act 1991* (Vic) which would mean that imprisonment orders were not self executing on default. Instead, a person alleged to have breached an instalment order would need to be brought before the court to be further dealt with, and the instalment order could be varied.
14 *Victorian Toll* at [184].
15 See *Fines Act 1996* (NSW) s 48, cf *Infringements Act 2006* (Vic) s 65.
16 See *Fines Act 1996* (NSW) ss 99A-99J.
17 *Fines Act 1996* (NSW) s 87.

18 *State Penalties Enforcement Act 1999* (Qld) s 56.
19 *State Penalties Enforcement Act 1999* (Qld) s 119.
20 Data sourced from:
*Attorney-General's annual report on the infringements system 2011–12.*
*Attorney-General's annual report on the infringements system 2011–12.*
*Attorney-General's annual report on the infringements system 2010–11.*
*Attorney-General's annual report on the infringements system 2009–10.*
*Attorney-General's annual report on the infringements system 2008–09.*
*Attorney-General's annual report on the infringements system 2007–08.*
21 Ibid.
22 *Taha* at [23].
23 *Taha* at [24].
24 *Taha* at [90].
25 *Taha* at [66].
26 *Taha* at [49], [66].
27 *Taha* at [56], [57].
28 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 384 n 56 per McHugh, Gummow, Kirby and Hayne JJ. This is a canon of construction directed to the objective of giving words of a statutory provision the meaning which the legislature intended them to have: See *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573, 591-592 [43] (referring to *Project Blue Sky*); *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, 437.
29 *Victorian Toll* at [191], [192], citing O'Connor J in *Potter v Minahan* (1908) 7 CLR 277.
30 See, for example, Stephen Tully *'Momcilovic v The Queen* (2011) 245 CLR 1' (2012) 19 *Australian International Law Journal* 279, 281.
31 *Victorian Toll* at [188] citing *Momcilovic* at [51].
32 *Victorian Toll* at [190].
33 Note, in this respect, the subsequent consideration of the operation of section 32 of the *Charter*, in *Nigro & Ors v Secretary to the Dept of Justice* [2013] VSCA 213, especially at [85] per Redlich, Osborn and Priest JA, which might be seen as advancing a narrower interpretation of the provision's effect.
34 *Charter,* section 8.
35 *Charter,* section 13.
36 *Charter,* section 12.
37 *Charter,* section 15.
38 *Charter,* section 17.
39 *Victorian Toll* at [201], [208].
40 *Victorian Toll* at [197].
41 *Victorian Toll* at [199], referring to *Minister for Immigration v Al Masri* (2003) 126 FCR 54.
42 *Victorian Toll* at [200].
43 *Victorian Toll* at [30].
44 *Victorian Toll* at [34].
45 *Victorian Toll* at [47].
46 Because it held that the Magistrate had misconceived his jurisdiction, the question of whether the s 160 process was a judicial or administrative process was not reached by the Court of Appeal. Justice Tate gave some consideration to the question of whether the power being exercised under *s160* should properly be characterised as judicial or administrative. She noted at [241] that, in circumstances where a court was imposing imprisonment, it had "many hallmarks of judicial power". Bodies other than Ch III courts cannot exercise the judicial power of the Commonwealth – see *New South Wales v Commonwealth* (the *Wheat Case*) (1915) 20 CLR 54. Punishment involving deprivation of liberty is generally considered to be a judicial function (see *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ; *Fardon v Attorney-General (Qld)* (2004) 219 CLR 562 at 611-13 per Gummow J). Thus, if the s 160 process were administrative, rather than judicial, there might be questions as to its constitutionality.
47 *Victorian Toll* at [50].
48 *Victorian Toll* at [167].
49 *Victorian Toll* at [168].
50 *Victorian Toll* at [168].
51 *Victorian Toll* at [173] – [177].
52 *Victorian Toll* at [184].
53 (1985) 6 FCR 155.
54 Id at169.
55 Id at 169-170.
56 Most notably *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429.
57 (2002) 117 FCR 566, 569 (Gray and Lee JJ).
58 At [25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
59 Mark Smythe, 'Inquisitorial Adjudication: the Duty to Enquire in Merits Review Tribunals', [2010] 34 Melbourne University Law Review 230, 248.

60 *Luu v Renevier* (1989) 91 ALR 39, 49–50 (Davies, Wilcox and Pincus JJ); *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 119 (Wilcox J); *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220, 251 (Sackville J) (as cited in Smythe, above n 57, at n.154).
61 *MZXRS v Minister for Immigration and Citizenship* (2009) 106 ALD 305, 315 (Jessup J).
62 *Luu v Renevier* (1989) 91 ALR 39, 50 (Davies, Wilcox and Pincus JJ).
63 *Yang v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 571, 578–9 (Ryan and Finkelstein JJ).
64 *Mustafay v Secretary, Department of Family and Community Services* [2004] AATA 819. (6 August 2004) [5] (Dr Christie).
65 Smythe, above n 57 at 254.
66 (2002) 117 FCR 566, 569 (Gray and Lee JJ).
67 *Craig v South Australia* (1995) 184 CLR 163 (*Craig*).
68 *Craig* at 176.
69 *Craig* at 177.
70 *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 (*Kirk*) at 571.
71 *Kirk* at 570.
72 James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 PLR 77, at 85.
73 Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 PLR 92, at 103.
74 Id at 103.
75 Id at 95.
76 *Kirk* at 572.
77 Wendy Lacey, '*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*' (2010) 34 MULR 641, at 660.
78 See Part 6 of the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).

# REVIEW ON THE MERITS OF MIGRATION AND REFUGEE DECISIONS – REFLECTIONS ON THE OPERATION OF THE MIGRATION REVIEW TRIBUNAL AND THE REFUGEE REVIEW TRIBUNAL IN AN INTERCONNECTED WORLD

***Denis O'Brien****

The Migration Review Tribunal (MRT) has jurisdiction under the *Migration Act 1958* (Cth) to provide final, independent merits review of decisions made by the Minister for Immigration and Citizenship or his or her delegates in the Department of Immigration and Citizenship to refuse to grant a wide range of migration visas or to cancel migration visas. The MRT's jurisdiction extends to certain visa-related decisions of the Minister or his or her delegates, including (in the skilled and business visa areas) decisions to refuse to approve sponsors, nominated positions or business activities.

The Refugee Review Tribunal (RRT) has jurisdiction under the *Migration Act* to provide final, independent merits review of decisions of the Minister or his or her delegates to refuse to grant, or to cancel, protection visas.

The tribunals are separately created under the *Migration Act* but members are cross-appointed to both tribunals. As appointments are made by the Governor-General, the members are independent statutory office-holders. Most members are appointed for 5 years but may be re-appointed.

The staff are also appointed to both tribunals and the Principal Member has agency head responsibility for them under the *Public Service Act*. The tribunals operate as a single agency for the purposes of the *Financial Management and Accountability Act 1997*.

The tribunals at present have 146 members, of whom 62 are full-time[1] and 84 are part-time. The members are drawn from a wide spectrum of society. Most are senior lawyers; many are not but have instead had careers as senior public servants, diplomats, academics or senior employees of international organisations.

The tribunals have about 340 staff.

With a budget of around $53.3 million in 2011-2012 and with 10,815 cases decided by the tribunals in that year,[2] the cost per case was about $4,900.

As administrative bodies, the tribunals are part of the Executive branch of government. They are independent of the Department of Immigration and Citizenship and are accountable through the Minister to the Parliament and the Australian public.

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* *Denis O'Brien was Principal Member of the Migration Review Tribunal and Refugee Review Tribunal, 2007-2012, and, before that, was a partner of Minter Ellison. This paper was presented at the 2013 AIAL National Administrative Law Conference, 19 July 2013, Canberra, ACT. The views expressed are personal to the author and are not the views of the tribunals. The author is grateful to Amanda MacDonald, Deputy Principal Member, and Colin Plowman, Registrar, of the tribunals for their assistance in reviewing some of the factual material in the paper.*

This paper discusses the work of the MRT and RRT and the growth in that work that has occurred in recent years. The paper then makes some comparisons with the workloads of the United Kingdom, Canada and United States tribunals and goes on to draw attention to particular features of the operation of the Australian tribunals. Finally, the paper raises for consideration aspects of the operation of the MRT and RRT that the author considers are in need of reform.

**Review on the merits by the tribunals**

In reviewing decisions of delegates of the Minister, the tribunals are required to provide a mechanism of review that is fair, just, economical, informal and quick.[3] These requirements are not mutually exclusive. The Parliament expects decisions to be made quickly but also fairly. In the case of the RRT, the legislature has defined what it means by 'quick'. Cases are to be determined within a maximum of 90 days.[4] This statutory time period reflects the intention of the Parliament that decisions on protection visa applications be made in a timely and efficient manner so as to provide transparency and certainty for protection visa applicants. The Principal Member must report regularly to the Parliament on the extent to which the time limitation is being met. Of course, in particular cases, fairness to the applicant may require that the applicant be given more time to prepare his or her case before the tribunal, with the result that the case is not completed within 90 days. At other times, the 90-day requirement is not met because the existing caseload of members is such that new cases must wait in a queue until member capacity allows them to be allocated.

Unlike a court's judicial review role, the role of the tribunals is not confined to reviewing the legal correctness of decisions of delegates of the Minister. The task of each tribunal is the same as that of other merits review tribunals. It stands in the shoes of the primary decision maker and makes the correct or preferable decision on the basis of the material before it:[5] correct in the sense that the decision is correct on the facts before the tribunal and according to the law it must apply, and preferable in the sense that, to the extent that a discretion exists in the making of the decision, the decision made is the most appropriate in the circumstances. The material before the tribunal quite often includes material that was not before the primary decision maker. In making its decision, the tribunal is not bound by technicalities, legal forms or the rules of evidence and is required to act according to substantial justice and the merits of the case.

Proceedings in each tribunal are not adversarial but are inquisitorial in character.[6] Neither the Minister nor the Department is represented before the tribunal and neither usually presents any further material after the primary decision is made and the Department's file is produced to the tribunal.

For the purposes of a particular review the MRT is to be constituted by 1, 2 or 3 members.[7] In practice, it is almost invariably constituted by 1 member. Hearings of the MRT are open to the public, subject to any direction the tribunal may give for particular evidence to be taken in private.[8]

The RRT, on the other hand, is required to conduct its hearings in private[9] and hearings and reviews are conducted before a single member.[10] The obligation to conduct hearings in private serves to protect applicants and family members from possible retribution in their country of origin. The combination of the privacy of the hearing and its conduct before a single member helps to establish an environment in which applicants should feel more comfortable in giving evidence about their personal situation.

More than 80% of RRT hearings require evidence to be taken through an interpreter. About 60% of MRT hearings require the use of an interpreter.

Through the decisions they make, the tribunals perform a significant educative role in providing guidance to primary decision makers in the Department – in relation to the Refugees Convention in the case of the RRT and in relation to the visa criteria set out in the Migration Regulations in relation to the MRT.

The rate at which the tribunals set aside decisions of primary decision makers can vary depending upon the particular cohorts of cases involved in the decisions. In the MRT the average set aside rate tends to be around 30-35%. In the RRT the average set aside rate is normally around 25%. As of writing, in 2013, the RRT set aside rate is a little higher at 38%. The likely reason for that increase is the taking on by the RRT of the review role in relation to irregular maritime arrivals that was formerly performed by the Department's Independent Protection Assessment Office. Indeed, in the recent appearance of the tribunals before the Senate Estimates Committee, Kay Ransome, Principal Member, noted that, since 1 July 2012, the RRT had received applications from 1,510 irregular maritime arrivals and said, in answer to a question from a Senator, that the set aside rate in relation to irregular maritime arrivals was 72%.[11] In the RRT, there can often be marked variations in set aside rates depending on country of origin of the applicant and depending on how conditions may have changed in particular countries.[12]

The tribunals have tried to publish about 40% of their decisions, although the significant increase in decisions in recent times (see below) has made achievement of this target impossible.[13] Publication of significant numbers of decisions across a range of visa categories and a range of countries serves to enhance openness and accountability in tribunal decision making.[14]

**Growth in workload of MRT and RRT**

The following table shows the number of MRT and RRT applications made in the year ended 30 June 2007, the number of cases decided in that year, the number of cases on hand as at 30 June that year and the like numbers for the following 5 years.[15]

**MRT and RRT annual caseload**

| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|
| | | | | | | |
| **MRT applications** | 5810 | 6325 | 7422 | 8332 | 10315 | 14088 |
| **RRT applications** | 2835 | 2284 | 2538 | 2271 | 2966 | 3205 |
| | | | | | | |
| **MRT decisions** | 6203 | 5219 | 5767 | 7580 | 6577 | 8011 |
| **RRT decisions** | 3102 | 2318 | 2462 | 2157 | 2604 | 2804 |
| | | | | | | |
| **MRT cases on hand 30 June** | 3534 | 4640 | 6295 | 7048 | 10786 | 16863 |
| **RRT cases on hand 30 June** | 582 | 548 | 624 | 738 | 1100 | 1501 |

In the current financial year to 31 March 2013 the statistics show a continuation of the trends shown above.

**MRT and RRT caseload year to date in 2013[16]**

| | |
|---|---|
| **MRT applications** | 12280 |
| **RRT applications** | 3899 |
| | |
| **MRT decisions** | 10089 |
| **RRT decisions** | 2652 |
| | |
| **MRT cases on hand 31 March** | 19060 |
| **RRT cases on hand 31 March** | 2748 |

The statistics show the following:

- there has been enormous growth in the MRT caseload, year by year, and the number of applications this year will again well exceed the number in the previous year;
- no doubt in response to the growth in those applications, there has been an impressive lift this year in the number of MRT decisions, with the number of decisions likely to come close to matching the number of applications; and
- there has this year been a similar increase in the number of RRT decisions but RRT applications have also significantly increased and at 31 March had already exceeded the 2011-2012 total by about 700.[17]

The tribunals were on track as at the end of May to decide more than 18,000 cases across both tribunals in 2012-2013.

The significant increase in the membership of the tribunals which occurred from 1 July 2012 and the return of members who had been undertaking independent protection assessment work have assisted in achieving the increased decision output, as have the strategies the tribunals have adopted of greater specialisation by members and the use of task forces to deal with particular cohorts of cases.

**Appeals[18] workloads – some international comparisons**

The existence, in the refugee determination area, of a facility for review accords with procedures recommended for signatories to the Refugees Convention by the United Nations High Commissioner for Refugees (UNHCR). The provision of a right of appeal is seen by the UNHCR as an essential guarantee for applicants.[19]

***United Kingdom***

The migration and refugee appeal body in the United Kingdom is the Asylum and Immigration Tribunal (AIT). The AIT hears appeals against decisions made by the Home Secretary and his officials in asylum, immigration and nationality matters. The AIT has two tiers. The first is the Immigration and Asylum Chamber and the second is the Upper Tribunal. In the Immigration and Asylum Chamber, appeals are heard and determined by one or more immigration judges. They provide a final determination of most appeals. In certain circumstances, either the appellant or the respondent (the UK Border Agency) can appeal a determination to the Upper Tribunal. Appeals to the Upper Tribunal can be made only on the basis of error of law made by the first tier tribunal and only if the first tier tribunal grants leave to appeal.

The UK Ministry of Justice is responsible for the AIT and publishes statistics for all tribunals in the UK. The published statistics for the year ended 31 March 2012[20] show that:

- the caseload for the AIT fell by 32% compared with the previous year;
- total appeals, in asylum, immigration and nationality matters, received by the Immigration and Asylum Chamber numbered 112,500; and
- the Immigration and Asylum Chamber determined 125,300 cases.

The number of asylum appeals made to the Immigration and Asylum Chamber over the past three years has been declining but there were still 12,300 asylum appeals lodged in the year to 31 March 2012.

***United States***

The Department of Justice's Executive Office for Immigration Review (EOIR) administers the US immigration court system. EOIR's main role is to decide whether foreign-born individuals who are charged by the Department of Homeland Security (DHS) with violating immigration law should be ordered to be removed from the US or should be granted protection from removal and be permitted to remain in the US. To make these determinations the Office of the Chief Immigration Judge within EOIR has more than 235 immigration judges who conduct administrative court proceedings in 59 immigration courts across the US.[21]

In most removal proceedings individuals admit that they are removable but then apply for relief. One of the grounds of relief commonly relied on is that the person is entitled to asylum.

Appeals lie from a decision of an Immigration Judge to the Board of Immigration Appeals (BIA) and are normally determined by the BIA on the papers. An individual (but not the DHS) dissatisfied with a ruling of the BIA may appeal to the appropriate federal circuit court.

Statistics published by the EOIR show that 44,170 appeals were made to the immigration courts in 2012.[22] Appeals granted numbered 11,978; appeals denied numbered 9,574.The bigger cohorts of cases involved nationals of China (10,985), Mexico (9,206), El Salvador (2,991) and Guatemala (2,895).[23]

***Canada***

The Immigration and Refugee Board of Canada (IRB) has both a primary decision making role and an appeal role. The statistics published on the IRB website[24] show that, as at 31 December 2012:

- claims pending before the Refugee Protection Division numbered 32,600; and
- claims finalised in that Division numbered 29,400.

The IRB also has an Immigration Division and an Immigration Appeal Division.

A new system for refugee status determination came into force in Canada on 15 December 2012. The new system is the result of two laws passed by the Canadian Parliament – the *Balanced Refugee Reform Act* and the *Protecting Canada's Immigration System Act*.[25] The Canadian Government has said that the new system is designed to weed out 'bogus' asylum claimants. For the first time most applicants will have access to a newly-created Refugee Appeal Division (RAD) of the IRB. Failed asylum claimants from countries that have a history

of producing genuine refugees will be able to appeal to the RAD. The claims of claimants from countries that do not normally produce refugees will be expedited; hearings for them will be held within 30 or 45 days, depending upon whether the asylum claim was made at an inland Immigration Office or at a port of entry. This system will depend upon the government designating certain countries of origin as 'safe' countries.

Countries of origin that have now been designated include the USA, most countries in the European Union, Japan, Australia and New Zealand.

In a press release of 30 November 2012, the Canadian Minister for Citizenship, Immigration and Multiculturalism, Jason Kenney, said:

> Last year alone, nearly a quarter of all asylum claims in Canada were made by people from democratic European Union nations – that's more claims than Canada received from Africa or Asia. We're spending too much time and taxpayers' money on bogus claims, and on generous tax-funded health and social benefits for claimants from liberal democracies.[26]

***Some conclusions***

The new refugee status decision making system in Canada is particularly worthy of note in that it is now very similar to the system in Australia. Public servants within the Immigration and Refugee Board now make the first decision on refugee claims, with some (but, in contrast with Australia, not all) applicants having access to an appeal on the merits process.

In a general sense, the above statistical information about the numbers of refugee status determination claims in Canada, the USA and the UK tends to make the numbers dealt with at first instance in Australia, and by the RRT on appeal, rather pale into insignificance. One might not get that impression about the Australian numbers if one spent too much time listening to many of our radio shock jocks.

**Complementary protection**

Prior to 24 March 2012 the only basis on which a person could be granted a protection visa was if the person was a non-citizen in Australia in respect of whom the Minister (or the RRT on appeal) was satisfied Australia had protection obligations under the Refugees Convention, or was a member of the family unit of such a person.[27] With effect from that date, the Commonwealth Parliament introduced into s 36 of the *Migration Act* a 'complementary protection' basis for the grant of a protection visa. 'Complementary protection' describes protection that is complementary to Australia's obligations under the Refugees Convention based on Australia's *non-refoulement* obligations under certain international human rights laws.[28]

The introduction of complementary protection brought the *Migration Act* into line with comparable provisions in the European Union,[29] Canada, the US and New Zealand.

A person meets the complementary protection criterion for a protection visa if the person is a non-citizen in Australia 'in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm'.[30]

Section 36(2A) defines in an exhaustive way the types of harm that will amount to 'serious harm', including 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment', terms that are further defined in s 5 of the Act. Section 36(2B)

provides further amplification of the concept of 'real risk' by providing that there is taken not to be a real risk that a person will suffer significant harm if, amongst other things, the Minister is satisfied that the person could obtain from an authority of the receiving country protection such that there would not be a real risk that the person will suffer significant harm (s 36(2B)(b)).

As is apparent from this brief and incomplete sketch of the complementary protection provisions, the new criterion for a protection visa is loaded with complex elements requiring interpretation by decision makers (including 'substantial grounds for believing', 'necessary and foreseeable consequence' and 'real risk'). Fortunately for the RRT, when complementary protection was introduced into the Act, members had the benefit of training on the new provisions which was delivered by Professor Jane McAdam of the University of NSW, assisted by Matthew Albert of the Victorian Bar. Professor McAdam is recognized as a world authority on complementary protection and is the author of *Complementary Protection in International Refugee Law*.[31]

In the context of this paper it is not appropriate to enter upon a full analysis of the complementary protection criterion for a protection visa[32] but it is worth noting that, following the introduction of the new provisions, the Minister took a different view from the RRT on one element of the criterion. In *Minister for Immigration and Citizenship v MZYYL*[33] the Federal Court did not accept the Minister's construction and instead upheld the construction adopted by the RRT.

In that case the Minister sought judicial review of a decision of the RRT in which the RRT had interpreted s 36(2)(aa) when read with s 36(2B)(b) as requiring an assessment of whether the level of protection offered by the receiving country reduced the risk of significant harm to something less than a real one. The tribunal had made that assessment and had found that the applicant could not obtain from an authority of the receiving country protection such that there would not be a real risk that he would suffer significant harm if returned to that country.

As indicated above, the Minister's argument that s 36(2B)(b) is satisfied if the State authority in question operates an effective legal system for the detection, prosecution and punishment of acts constituting serious harm and the non-citizen has access to such protection was rejected by the Federal Court.[34]

**Judicial review of migration decisions[35]**

In its recent important report, *Federal Judicial Review In Australia*,[36] the Administrative Review Council (ARC) made a series of recommendations aimed at restoring the *Administrative Decisions (Judicial Review ) Act 1977* (*ADJR Act*) to a central place in the federal judicial review system. The report proposed that the *ADJR Act* be expanded to pick up the prerogative writ jurisdiction under s 75(v) of the *Constitution* and s 39B of the *Judiciary Act 1903*.

The report is to be welcomed. However, I consider that, in one significant respect, the ARC has missed an opportunity to further restore the primacy of the *ADJR Act*. I refer here to the matter of judicial review of migration decisions.

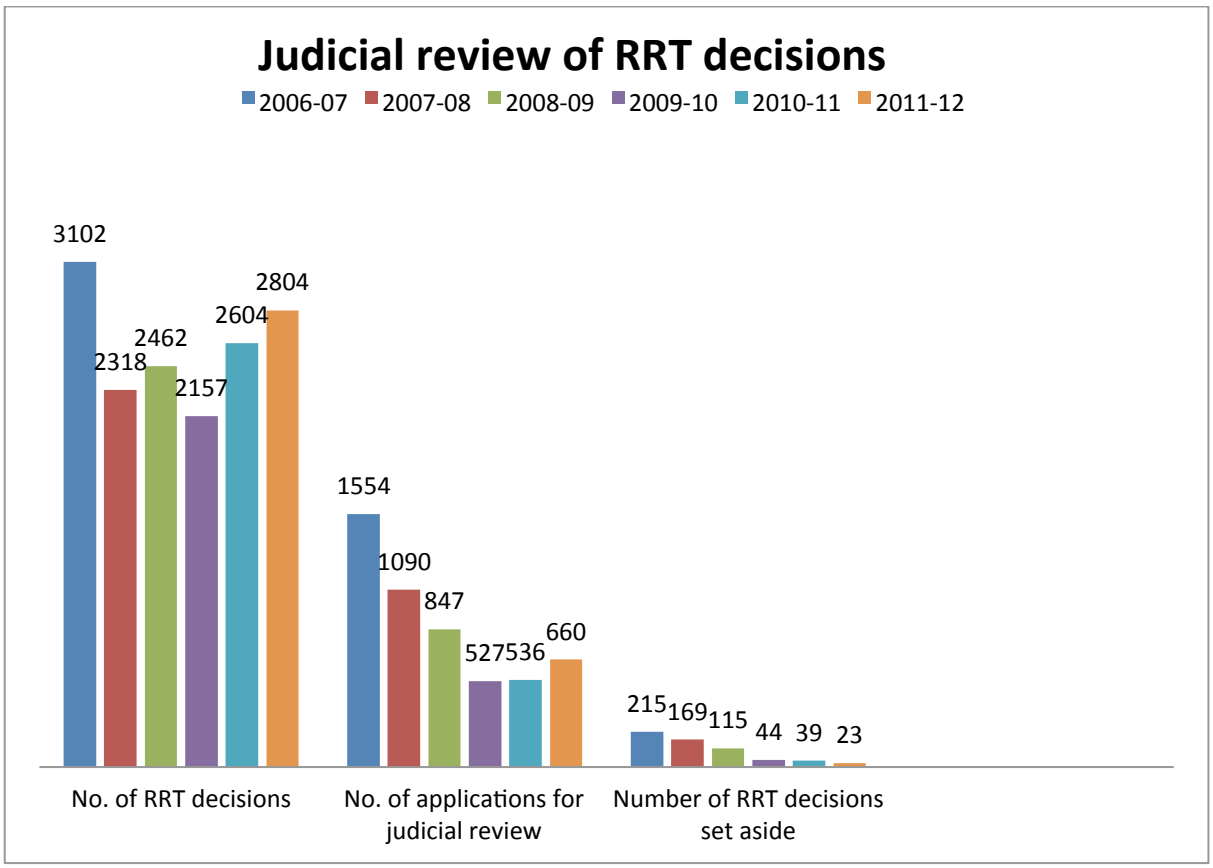
As is well-known, judicial review of migration decisions takes place not under the *ADJR Act* but pursuant to the provisions of Part 8 of the *Migration Act*.[37]

In a paper which I delivered at the AIAL's National Administrative Law Conference in 2009,[38] I mentioned that judicial review rates in relation to the RRT had been falling and that, while

judicial review rates in relation to the MRT remained steady, they were low in comparison with the number of decisions made by the MRT. I also referred to statistics showing that, by comparison with the UK and Canada, judicial review numbers in Australia were small. I said in that paper that it was time to repeal Part 8 of the *Migration Act* and to again bring migration decisions under the umbrella of the *ADJR Act*. I remain of that view.

Set out on the next page is a table showing, in relation to the RRT[39] for the past 6 financial years, the number of decided cases, number of applications for judicial review of those decisions and number of those decisions set aside on judicial review.

**Judicial review of RRT decisions 2006-2012[40]**




These figures highlight why I believe the ARC has missed an opportunity. It said in its report:

> Ultimately, the Council would prefer migration decisions to be reviewed under the general statutory scheme, if the Council's recommendation is accepted to extend the ambit of the ADJR Act to embrace constitutional judicial review. However, acknowledging that return to this structure would have resourcing implications for the courts and the Government, because of the likelihood that any change in the law in this area would lead to a temporary increase in litigation, the Council has not made a specific recommendation with regard to judicial review of migration decisions.[41]

It is difficult to see what resourcing implications the ARC was referring to here: judicial review of migration decisions is presently taking place in the federal courts system (albeit under a different jurisdictional source) and, as the above statistics indicate, the quantum of court resources needed to deal with the cases has reduced over the years. While it is true that, despite the drop in the number of judicial review applications in recent years, migration review still constitutes by far the major portion of federal judicial review,[42] the figures are not as stark as sometimes represented. For example, in the article referred to above,[43] John McMillan says:

> …in the period 2003-11, 1744 migration applications were filed in the Federal Magistrates Court, compared to 56 administrative law applications under the ADJR Act and s.39B.[44]

With all due respect to John, might I suggest that the comparison is more accurately represented when it takes into account the number of non-migration judicial review filings that are made in **both** the Federal Magistrates Court (recently renamed as the Federal Circuit Court of Australia) **and** the Federal Court. My experience as a judicial review practitioner would suggest that, outside the migration area, judicial review applicants file in greater numbers in the Federal Court than in the Federal Circuit Court.

If, as the ARC says in its report, its recommendations focus on restoring the *ADJR Act* to a central place in the federal judicial review system, it does seem a little odd that it should also say that for the time being the largest area of federal judicial review should remain outside the Act.

If the ARC's concern about the return of migration decisions to judicial review under the *ADJR Act* relates to its effect on workload in the original jurisdiction of the Federal Court, consideration could be given to maintaining arrangements similar to those presently in place under ss 476 and 476A of the *Migration Act* under which the Federal Circuit Court is conferred with the lion's share of original jurisdiction in relation to judicial review of migration decisions.

**Tribunal reform**

In my 2009 paper, referred to above, I argued that the provisions in the *Migration Act* which establish a procedural code for the MRT-RRT and which state that the procedures supplant the procedural fairness hearing rule[45] ought to be repealed. I remain of the view expressed in that paper. I note that the ARC in its report on judicial review referred to above has noted that 'endeavours to achieve compliance with the code have not necessarily enhanced the fairness of the review process, at considerable cost to efficiency and increased litigation.'[46]

A more fundamental matter relates to the place of the MRT-RRT in the overall structure of the Commonwealth system of merits review tribunals.

In 1994, the ARC, in a report entitled *Better Decisions: Review of Commonwealth Merits Review Tribunals*, proposed that the Commonwealth administrative review tribunals be merged into a single, new Administrative Review Tribunal (ART). The proposal was aimed at realigning the Commonwealth merits review system with the vision of the Kerr[47] and Bland Committees[48] that persons affected by administrative action of Commonwealth agencies should have available to them a general merits review tribunal the creation of which would avoid the waste of resources inherent in a proliferation of tribunals.

The ARC proposed that the ART have two tiers. The first tier would have seven divisions, a Welfare Rights Division, a Veterans' Payments Division, a Migration Division, a Commercial and Major Taxation Division, a Small Taxation Claims Division, a Security Division and a General Division.[49] Appeals would lie, with leave, from the first tier to a second tier review panel. Judicial review under the *ADJR Act* would be available to correct legal error by the ART.

In 2000 Attorney-General Daryl Williams QC introduced into the Parliament two Bills intended to give effect to the ARC's report, the Administrative Review Tribunal Bill and the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill. The Bills were the subject of much debate inside and outside the Parliament and ultimately did not proceed.

However, the thinking behind the ART remains sound. A single merits review tribunal would streamline merits review, remove duplication and inefficiencies and improve performance. Having at the Commonwealth level several tribunals which perform a similar review function but with separate membership, training programs and resources, staff, premises, case management and corporate services systems, is wasteful of resources. The existence of separate tribunals also limits career progression opportunities for members and staff.

In his *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio* (January 2012),[50] Mr Stephen Skehill recommended that the ART proposal be adopted by government as the most desirable outcome to achieve efficiencies in merits review tribunal operations. Justice Duncan Kerr, President of the Administrative Appeals Tribunal, has also said recently that the underlying philosophy of the ARC's ART proposal remains sound.[51]

I agree with Stephen Skehill and Justice Kerr. In addition to the benefits mentioned above, the creation of an ART would have the benefit of assisting access to merits review by applicants. It is further worth noting that there have been several changes in the operating environments of the existing merits review tribunals which may serve to overcome some of the points of difficulty that arose when the ART was being considered by the Parliament in 2000.

As Stephen Skehill noted in his report, a major matter that would need to be addressed in carrying the ART proposal forward would be the large capital investment that would need to be made by government to establish a case management system capable of efficiently handling the many thousands of cases coming before the ART. Also needing to be addressed would be issues concerning premises for the ART in each of the capital cities and elsewhere. To carry the ART proposal forward, two task forces may be necessary, one to work up a new legislative package and the other to deal with all the practical systems, premises and personnel issues associated with creation of the new tribunal.

A matter concerning the appointment of members of tribunals that should be addressed irrespective of any further consideration of the ART proposal is whether it is desirable that the policy and guidelines that the Australian Public Service Commission administers for making appointments to statutory offices[52] are appropriate in relation to the making of appointments of members of independent review tribunals. The guidelines require that the departmental Secretary or his or her delegate chair the assessment panel making recommendations in relation to appointments.

That requirement may cause questions to arise whether assessment processes are impartial and whether member independence is compromised in cases where the tribunal concerned is a specialist tribunal whose role is to review decisions of officers of the Secretary's department. While in my experience member appointment processes in the MRT and RRT have proceeded solely on the basis of merit and without any suggestion of partiality by the Secretary, what is important to public confidence in the independence of the tribunals is the appearance of impartiality in the appointment process. In order to avoid any question arising about this, it would be preferable for the Secretary not to have the role of chairing the assessment committee, particularly in a case where the appointments concerned are being made to a tribunal conducting reviews of decisions of officers of the Secretary's Department.

**Endnotes**

1 This number includes the Principal Member, Deputy Principal Member and Senior Members.
2 See below for a breakup of case numbers.
3 *Migration Act*, s 353 (MRT); s 420 (RRT).
4 Section 414A(1) of the *Migration Act* provides that the 90-day time limit starts on the day on which the Secretary of the Immigration Department gives the Registrar of the RRT the documents required under s 418(2) of the Act, ie the delegate's decision statement.
5 *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 at 943; *Re Drake and MIEA (No. 2)* (1979) 2 ALD 634 at 642.
6 For a discussion of the inquisitorial nature of RRT proceedings , see *Re Ruddock; Ex parte Applicant S154/2002* (2003) 201 ALR 437, [57]; *SZBEL v MIMA* (2006) 231 ALR 592, [40].
7 Migration Act, s 354.
8 Migration Act, s 365.
9 Migration Act, s 429.
10 Migration Act, s 421.
11 Senate, Hansard, Legal and Constitutional Affairs Legislation Committee, 27 May 2013.
12 China (PRC), eg has for many years constituted a reasonably significant cohort of cases and the set aside rate for these cases has tended to hover around 20%. The current set aside rate for Afghanistan, on the other hand, is 86%.
13 Publication is through the AustLII website.
14 In preparing decisions of the RRT for publication, staff of the tribunals edit them so that they do not contain information which may identify the applicant or his or her dependants or relatives (*Migration Act 1968 (Cth)*, s 431(2)). Section 91X of the Act should also be noted. It prohibits the names of applicants for protection visas from being published in the High Court, Federal Court or Federal Circuit Court. That is why cases in those courts involving protection visa applicants use letters instead of actual names when referring to applicants.
15 These statistics are taken from annual reports of the MRT and RRT which can be found on the website of the tribunals, www.mrt-rrt.gov.au.
16 Monthly caseload statistics are published on the tribunals' website: www.mrt-rrt.gov.au.
17 The 2013 Budget Statement for the MRT-RRT says that the tribunals expect to receive around 23,000 applications for review in 2013-2014.
18 The word 'appeal' is used here to refer to what in Australia is more commonly referred to as 'review on the merits'.
19 See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (December 2011), p 37-38.
20 www.justice.gov.uk/statistics/tribunals/annual-stats.
21 A disturbing account of apparent inconsistency in decision making between different immigration judges and different immigration courts can be found in J Ramji- Nogales, A Schoenholtz, P Schraq (Foreword by Senator Edward Kennedy), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009).
22 www.justice.gov/eoir/efoia/FY12AsyStats-Current.
23 There were 2 nationals from Australia who brought asylum appeals!
24 www.irb-cisr.gc.ca.
25 As is apparent from the short titles of these Acts, Australia is not the only country that has adopted the unfortunate practice of using the short title of an Act to make a political statement.
26 http://www.cic.gc.ca/english/department/media/releases/2012/2012-11-30.asp.
27 *Migration Act 1968 (Cth)* s 36.
28 Principally the *International Covenant on Civil and Political Rights, the Convention Against Torture and the Convention on the Rights of the Child.*
29 In the EU the concept is referred to as 'subsidiary protection'.
30 *Migration Act* 1958 (Cth) s 36(2)(aa)
31 Oxford University Press, Oxford 2007.
32 A comprehensive analysis may be found in chapter 10 of the RRT *Guide to Refugee Law* which is published on the MRT-RRT website: www.mrt-rrt.gov.au.
33 [2012] FCAFC 147.
34 The meaning of 'real risk' in s 36(2)(aa) has recently been considered by a Full Federal Court of five Justices in *MIAC v SZQRB* [2013]FCAFC 33.
35 The term 'migration decisions' refers here also to refugee decisions.
36 Report No 50, September 2012.
37 Professor John McMillan usefully summarises the position in a recent article,'Restoring the ADJR Act in Federal Judicial Review*' (2013)* 72 *AIAL Forum* 12.
38 'Controlling Migration Litigation*'* (2009) 63 *AIAL Forum* 29.
39 I have not set out judicial review figures for the MRT because they are of very little significance when regard is had to the number of MRT decisions.

40 Some applications for judicial review remain outstanding at the end of each year, with the result that published numbers of set aside decisions for a particular year may need small correction in later years.
41 At p 14.
42 See the numbers presented in Table 4 of the ARC's report, p 68.
43 At fn 37.
44 72 *AIAL Forum* 12 at p14.
45 See *Migration Act*, s 357A, s 422B.
46 *Federal Judicial Review in Australia*, Report No. 50, para 6.21.
47 Commonwealth Administrative Review Committee (Parliamentary Paper No 144 of 1971).
48 Committee on Administrative Discretions (Parliamentary Paper No 316 of 1973).
49 With the Administrative Appeals Tribunal now having been given jurisdiction under the National Disability Insurance Scheme, creation of an ART today would require consideration being given to the establishment of a further division, a National Disability Insurance Division.
50 A copy of the report may be found on the website of the Department of Finance and Deregulation, www.finance.gov.au.
51 Comments made at AIAL seminar, Canberra, 1 May 2013, *Carving out the Philosophy of their Tribunals' Existence.*
52 *Merit and Transparency: Merit based selection of APS agency heads and APS statutory office holders* (3rd ed, August 2012).

# ENABLING USER PARTICIPATION IN THE DECISION MAKING PROCESS

***Gráinne McKeever ****

This paper is based on empirical research on the experiences of tribunal users in Northern Ireland and the support that they can access throughout the duration of their dispute. The research was commissioned by a specialist not-for-profit organisation in Northern Ireland (Law Centre NI) and funded by the Nuffield Foundation; it was part of a joint research project with Brian Thompson, University of Liverpool, which was designed to inform a tribunal reform agenda for Northern Ireland. The research has served this purpose well with many of the findings and recommendations from the published research reports[1] featuring in government consultations on access to justice[2] and the structural reform of tribunals.[3]

The development of tribunal reform in Northern Ireland is an important objective in its own right but the research which informs this process has a broader reach than this 'local' objective and contributes to a significant body of empirical research on tribunal user experiences in Britain. The Northern Ireland research was constructed to enable a mapping of the research experiences of Northern Ireland tribunal users on to research establishing the diversity of tribunal user experiences in Britain, such as Genn et al's *Tribunals for Diverse Users*.[4] The conclusions of the Northern Ireland research projects were that the tribunal user experiences in each jurisdiction were not significantly different: that the diversity of experiences evidenced in the British studies was mirrored in the experiences evidenced in the Northern Ireland studies.

The geographical reach of the research from Northern Ireland to Britain may, realistically, be a matter of local rather than global interest, and fails to deal with the legitimate question of what any of this evidence has to do with the experiences of tribunal users in Australia, and the interests of administrative lawyers here. Not wishing to assume that a comparative perspective is always interesting, the justification for transporting the research findings to Australia rests on three main points. First – and with the caveat that this is a simplification of a set of similarities and differences which are comprehensively explored by Cane[5] – there are similarities between the UK tribunals conducting first tier merits review that the UK user research relates to, and the merits review conducted through the AAT, and the Social Security Appeal Tribunal (SSAT) as a first tier, specialist merits review tribunal. Secondly, new research by Gaze, Quibell and Fehlberg on the experiences of SSAT users indicates a similarity of human experiences by those interacting with this process of administrative justice in Victoria and New South Wales and those in the UK.[6] Third, the article proposes a model to understand the user experiences as forms of participation in dispute resolution processes. This model steps back from the detail of the local and provides a conceptual understanding that is not jurisdiction specific. This article therefore aims to provide a reflective account of the experiences of tribunal users, as documented in relevant research in the UK and Australia, by developing a model of tribunal user participation in dispute resolution practices that has common points in each jurisdiction.[7]

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**Why 'participation'?**

Participation has an obvious, common-sense meaning that those familiar with dispute resolution processes in administrative law are unlikely to find objectionable. The idea that the user can participate in decisions affecting him/her is inherent within administrative justice mechanisms such as tribunal hearings, and forms part of our understanding of what constitutes natural justice for the tribunal user. The concept of participation was also evident in a major review of UK-wide tribunals by Sir Andrew Leggatt in 2001, and Leggatt's recommendations were premised on the vision of 'tribunals for users'. In this context, participation was about ensuring that the user voice was heard during the decision making process. Participation, therefore, would seem to be a useful mechanism to understand the tribunal users' story, and so this article takes the opportunity to reflect on what constitutes participation and what the barriers to participation might be.

**Barriers to participation**

The user experiences of dispute resolution processes evidence the barriers to participation that exist. These different experiences can be categorised as intellectual, practical and emotional barriers to participation.

***Intellectual barriers***

Intellectual barriers for users exist where the user has difficulty in understanding how the dispute resolution processes work. These users struggle to understand what is required of them and how they can progress their case within an unfamiliar system. The acknowledgement of intellectual barriers has led to different forms of assistance being developed, some of which enable the users to overcome their intellectual barriers, but some of which fail in this objective. In the Northern Ireland studies, for example, the information provided by the tribunal administrators for social security appeal tribunals could add to the users' sense of bewilderment rather than alleviate it:

> *Social security appellant:* 'I couldn't really understand the booklet properly … so there could have been [useful] information in that [but] a lot of things just don't register in my head'

The intellectual barriers that users face pervade all parts of the dispute resolution process, and can include the tribunal hearing. For example, in the UK social security claimants who wish to dispute entitlement decisions appeal to a tribunal which conducts an independent merits review, and although the tribunal is inquisitorial in its approach, the issue under dispute is legal as well as factual. Consequently, the relative informality of tribunal hearings must accommodate the legal arguments and findings that are raised by the appeal, and the ability of users to participate in this process of legal decision making varies widely, as does the tribunal's ability to enable the users' participation:

> *Social security appellant:* 'some of the phrases in [the hearing] went completely over my head …'

The greater the intellectual barrier, the less participative the dispute resolution process is for the user.

***Practical barriers***

In addition to intellectual barriers, tribunal users can face practical barriers to participation. This categorisation describes the difficulties that users face in trying to get practical help in resolving their disputes. Where users were able to access practical support, the effect was often to reduce or overcome intellectual barriers, as well as emotional barriers (discussed

below). This practical support was required at each of the different stages of the dispute resolution process, beginning with the initial information required by decision makers and continuing through to the tribunal hearing. In Northern Ireland, users of social security appeal tribunals and Special Educational Needs and Disability Tribunals (SENDIST) described the difficulties faced in (respectively) applying for social security benefits and disputing the decisions of the education authority on the support needs of children in school:

> *Social security appellant:* 'all this form filling in … it's a mountain to climb for me without help.'
>
> *SENDIST appellant:* 'if you were a person who didn't have … the understanding of procedures and … the ability to write a good worded letter – you'd be stuck … I didn't feel that the whole process was very user friendly.'

The absence of practical support here meant that the intellectual barriers arising from the procedural requirements for determining entitlements remained. The experiences of tribunal users in Northern Ireland are typical of the barriers faced by users in Britain and those described by Gaze et al in their research with SSAT users in Victoria and New South Wales. In the Australian research, the authors note the potential benefit SSAT users would gain from greater access to advice about how to prepare and present their appeals.[8]

Practical barriers for users can also take the form of financial barriers: in accessing specialist advice and assistance, and in securing independent evidence to corroborate their claims. On the latter point, the success or failure of an appeal can turn on the evidence that tribunal users provide to substantiate their claim but practical barriers exist in accessing such evidence:

> *SENDIST appellant:* 'families have spent thousands and thousands of pounds, going to tribunals. I think we spent £800 on the psychology assessment …'

The inequality of arms between legally unassisted tribunal users and legally assisted decision makers is a long-standing problem that applies to populations beyond tribunal users. The tribunal experience is intended to be informal and to avoid the need to rely on legal advice, but the reality for tribunal users is often that the process is not informal, and that they are disadvantaged by the lack of legal or specialist assistance. Perversely, practical barriers may also arise where legal assistance becomes the problem: where the user is unable to participate in the tribunal hearing because the lawyers have taken over. The evidence of this in the Northern Ireland tribunal studies came predominantly from users of employment-related tribunals, which are adversarial in their nature and where the increased judicialisation of tribunals is most apparent. For these users, the lawyers need to argue the legal issues trumped the users' need to explain how their personal experiences were part of the case:

> *Industrial/Fair Employment Tribunal claimant:* 'briefings or preparation for the case was on the technical issues – what's detriment, has detriment been suffered – and there was no real space for me to say look, this is how it's affected me as a human being.'

Overall, and beyond the Northern Ireland findings, the user experience suggests that practical barriers can be overcome with specialist (although not necessarily legal) advice and assistance, where the user remains central to the process.

### *Emotional barriers*

For the majority of tribunal users, the issue under dispute is likely to be one of fundamental importance in their lives, ranging from entitlement to income-replacement social security benefits, to unlawful deductions from wages, to the determination of mental capacity and attendant detention under mental health legislation. Unsurprisingly, therefore, users are

often very emotional about their case. Notwithstanding this, the research with tribunal users reveals that this emotion extends beyond the issue under dispute and encompasses the procedures used to determine the resolution of the dispute. Dealings with decision makers and with the tribunal all contribute to the emotional barriers users face in resolving their dispute, either through the anticipation of the tribunal hearing, or the protracted battle that users feel they are engaged in. The Northern Ireland user experiences highlight this point:

> *SENDIST appellant:* 'I was so nervous on the day, it is one of the worst experiences of my life … didn't sleep the night before, felt physically sick.'
>
> *SENDIST appellant:* 'Whenever you're in such a negative situation, I guess you don't even see anything positive in it …'

For these users, the solution lies in providing support, so that they are able to deal with the additional demands that the dispute resolution process creates, thereby overcoming the emotional barriers they face.

**Conceptual clarification of 'participation'**

If participation is the concept used to understand the tribunal user's story, then some clarification is required to establish what this concept means. The value of this clarification is to tie down our understanding of how participatory (or otherwise) the user experience might be, where systemic barriers to participation exist and how solutions might be progressed. Much has been written on the concept of participation, predominantly in the area of political participation, where the seminal work remains that of Sherry Arnstein. Writing in 1969, and reflecting on a range of practices that purported to enable participation by community groups and individuals in decisions made by power holders, Arnstein conceptualised the different types of participative experiences as a ladder of participation. The ladder depicted a hierarchical progression of participative experiences, with different 'rungs' (or levels) of participation ranging from 'manipulation' as the least participatory, to tokenistic forms of participation such as 'placation' and 'consultation', through to 'citizen control' as the most participatory and empowering experience (see *Figure 1*).

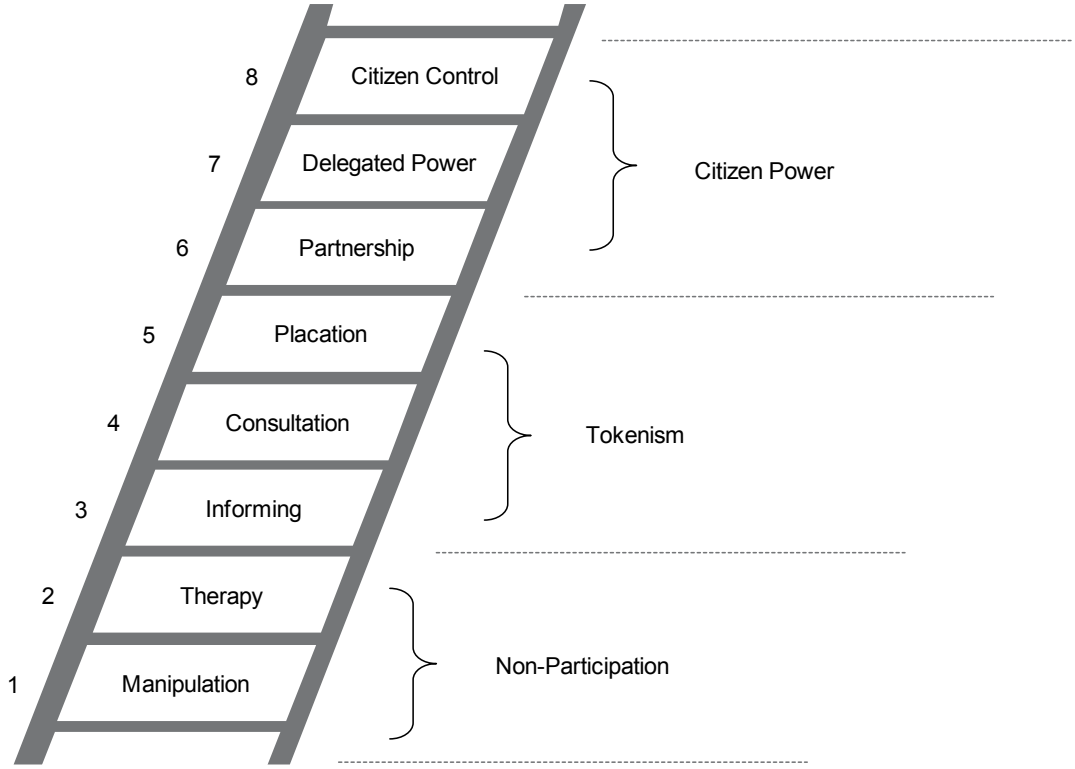


*Figure 1: Arnstein's ladder of participation*

This conceptualisation provides a useful starting point to develop a model of tribunal user participation: the research reveals that there are different levels of participation in this arena also, and the identification of user experiences as non-participative, tokenistic or participative provides a coherent perspective on the diversity of tribunal user experiences. Where a tribunal model departs from Arnstein's model of political participation is in its hierarchical arrangement. Tribunal user research testifies to the diversity of experiences that exist, and while some of this diversity may be attributable to good, bad or indifferent dispute resolution processes, some of the diversity is attributable to the tribunal users themselves. The ability of users to participate in legal processes is not uniform, and what constitutes a participative experience for one user may be an exclusionary experience for another. The processes of dealing with disputes must always be kept under review, and systematic problems dealt with, but the model must also take account of the inability or unwillingness of tribunal users to engage. Not all users want to participate, and a model of participation must defer to this entirely legitimate position. Consequently, the model of participation developed from Arnstein's ladder is not hierarchical.

One further, significant difference must also be noted. A ladder of legal participation for tribunal users does not aim to vest control of the dispute resolution process in the tribunal user and so differs from Arnstein's ambition for the ultimate form of participative practice. This limitation may be a reflection of the limitations of law, and the lack of participative practice in the process of rule development in particular but, for tribunal users, participation is concerned more with access than control: access to the processes through which a neutral third party determines legal entitlement, with the tribunal user having an effective voice as a necessary element of the process.

**A ladder of legal participation**

With the above qualifications in mind, the task becomes one of mapping the tribunal user experiences onto a ladder of legal participation, where the barriers to participation are present or absent to different degrees. The grouping of user experiences into non-participative, tokenistic and participative experiences provides the starting point for this mapping exercise, and it is within these three groups that the individual forms of participative experience emerge. Non-participative experiences can be understood as 'isolation' and 'segregation. Tokenistic experiences are those where the user faces 'obstruction' or 'placation'. Participative experiences are defined as 'engagement', 'collaboration' and 'enabling' (see *Figure 2*). These categories are explored further, below.

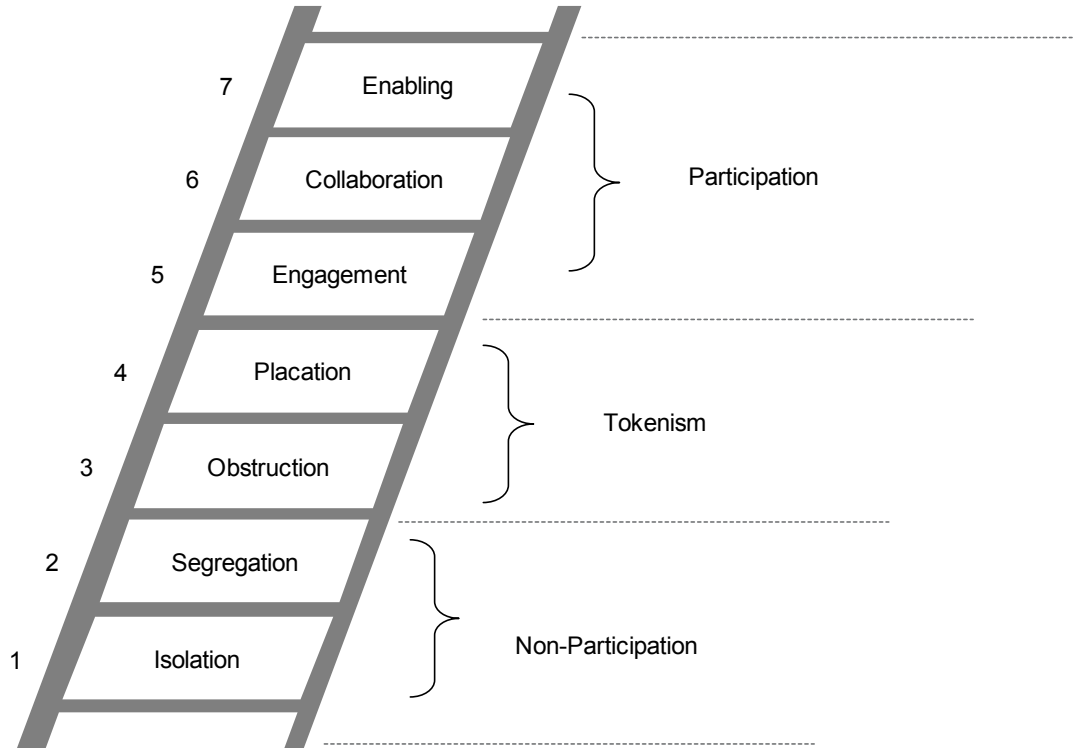


*Figure 2: a ladder of legal participation for tribunal users*

***Isolation***

Tribunal users who are isolated are those who are most excluded from the dispute resolution processes and who are unable to engage with it or negotiate their position within it, either because they are unaware of the option to engage, or unaware of how to engage. The users who experience isolation tend to see the dispute resolution processes as a 'rubber-stamping' of official decisions over which the individual has no control. Decision-makers can contribute to this sense of isolation where they fail to provide full or correct information to the user. Isolation can also describe the experiences of users who are geographically isolated from where decision making processes are located, and geographically isolated from the support structures that exist for users. Typically this may include users from rural locations, who are unable to access services that are predominantly located in urban areas. The support may exist but the user remains isolated from it. Language barriers may also constitute an isolating experience for tribunal users. Isolation may also be self-imposed: the user who does not want to participate in the decision making process will be isolated through personal choice, and the ladder of legal participation must recognise the validity of this choice.

***Segregation***

Where users are segregated they feel separate from the official process that is going on around them, or feel that their involvement in this process is of secondary importance to that of the decision maker. This segregated or inferior position exists where users experience a process that favours decision makers and power-holders, often through an apparent absence of equality of arms, where users have access to an informal, legally unassisted process that differs in its quality from the formal, legally assisted process that decision makers have access to. In the UK, this segregated process can include the use of paper-based tribunal hearings. In social security appeals, tribunal users who do not opt for an oral hearing have their case decided on the basis of the appeal papers. The research evidence is clear that users who attend their hearing are two to three times more likely to succeed in their appeal than users whose appeal is determined on the papers alone.[9] While some tribunal literature informs users that they may be more likely to succeed if they attend their hearing, there is little evidence that tribunal users understand the impact of their decision to consent to a paper hearing, and on this basis the user experience here is categorised as segregation. Tribunal users who describe a segregated, non-participative experience regard the tribunal as independent, and so differ from the isolated user who sees the process as a rubber-stamping exercise, but the segregated user still regards the dispute resolution process, including the tribunal hearing, as inaccessible.

***Obstruction***

Tokenistic forms of participation include where the user continues through the administrative system but his/her progress is obstructed at different points. This can take the form of continued referrals by different decision makers from one part of the system to another, leading to the user suffering from referral fatigue. It can also encompass inaccurate or incomplete information by decision makers, where progress is inhibited or obstructed by the user's lack of knowledge. Where the user faces delay in accessing the dispute resolution process, and in obtaining the decision, this can also constitute a form of obstruction.

***Placation***

Placation occurs where decision makers provide assistance that does not fully assist users. Typically this can include highly complex and/or voluminous information that the decision maker can point to as evidence of empowering the user and facilitating their participation. Where this information is inaccessible, the effect is to prevent effective participation by the user. Placation is also evident where decision makers have access to informal dispute resolution processes, that enable the dispute to be resolved swiftly and at any stage after the dispute arises, but where the decision maker does not utilise these informal procedures, or implements them so infrequently that they cannot be systematically relied upon by users.

The user experiences have highlighted the value of advice and, often, representation, but placation can occur where users have access to advice and/or representation that is of poor quality, and that masks the intellectual, practical and emotional barriers to participation that may remain. This type of placation can occur where users are unaware of the poor quality of support they are receiving, or where decision makers erroneously believe that the support is of sufficient quality to enable user participation.

**Engagement**

Engagement as a form of participation indicates that users are able to engage with the dispute resolution processes and with the people within these processes. This can include passive engagement, where users have access to good information, whether written or

audio/visual information, or as passive observers of decision making processes. Through these forms of passive participation, users can gain a realistic expectation of what is likely to apply in their own case, and this positive preparation can then allow users to engage with the processes themselves.

***Collaboration***

Collaborative user experiences exist where users are supported in their efforts to collaborate with decision makers in a co-operative venture to make the 'correct' decision. Collaboration results from accessible and informal tribunal hearings, where user understanding is taken as the starting point and user difficulties are dealt with as they arise. This is partnership-working, where there is a defined and necessary role for users. This role can include users identifying the best forms of support for themselves. It can also include public legal education, where those who are most likely to face problems (social security claimants, parents of children with special needs, employers and employees) are provided with information on their rights, responsibilities and means of redress. This can also apply to those who are traditionally tasked with supporting users, including medical professionals who provide corroborative evidence to substantiate a user's case.

***Enabling***

The means by which tribunal users are enabled range from the clarification of minor issues by administrative agency staff to the skill with which tribunal members enable users to present their case. Users describe the ability to talk to someone about their case as enabling. The ability to enable users exists at all levels of the dispute resolution process, but the experiences of tribunal users indicates that access to early and good advice is effective in dealing with the intellectual, practical and emotional barriers to participation. Good representation would also appear to have a privileged position as a form of participation, since this is not just about ensuring a successful outcome of the user's dispute, but about ensuring that the user has an effective voice within the dispute resolution process. Telling the user's story in a way that reassures the user that this has been heard is a participative experience, and the research indicates that user satisfaction derived from this type of participation can offset or reduce the 'outcome effect' whereby the user rates the experience on whether their appeal has been successful or not.

**From theory to practice**

The theorisation of participative experiences can bear more fruit than simply providing conceptual clarification, and offers the prospect of an on-the-ground value to the exercise. Identifying forms of participative experience lends itself to identifying participation in practice, and while this is not a simple measuring exercise it does contribute to the decision maker's ability to review where participative gaps might be plugged. The types of practice that can be observed at tribunal hearings, at informal dispute resolution proceedings, and through user contact with decision makers will all provide an indication of the level of participation that users experience at each stage of the dispute resolution process, and an indicative chart of this is provided below.

| **Participation** | |
|---|---|
| Enabling | • tribunal staff clarifying user queries;<br>• users knowing where to go for advice;<br>• tribunal members enabling users in setting out their case;<br>• users being put at ease;<br>• access to early and good advice;<br>• access to good representation;<br>• users able to talk to someone about their case;<br>• decision makers resolving disputes at earliest stage (including working with other agencies) |
| Engagement | • users able to witness other tribunal hearings (including video tribunals);<br>• users getting clear, concise and understandable information which takes account of low levels of knowledge |
| Collaboration | • decision makers working with users to identify useful forms of, and access to, support;<br>• public legal education for users and support workers;<br>• informal hearings without judicial trappings |
| **Tokenism** | |
| Placation | • written information that is not in 'Plain English';<br>• high volumes of information, with absence of summary information;<br>• policy, but not practice, of informal dispute resolution |
| Obstruction | • referral fatigue;<br>• delays in getting tribunal hearings and decisions;<br>• users intimidated by tribunal members (attitude, language, approach);<br>• misinformation from decision makers |
| **Non-participation** | |
| Segregation | • users' right to appeal reliant on economic support, particularly where decision makers have access to additional support;<br>• lack of awareness that legal issue is under dispute;<br>• lack of awareness of procedural aspects of lodging claim/appeal, including basis of initial decision, time limits, supporting evidence, legal tests and language;<br>• lack of awareness of implications of paper hearing;<br>• lack of awareness of right to challenge decisions |

| | |
|---|---|
| Isolation | • users unable to engage/negotiate with decision makers;<br>• misinformation from decision-makers;<br>• geographical barriers to accessing support;<br>• users unable to talk to someone about their case;<br>• users feeling anxious, agitated, unsure, unprepared;<br>• users unable to speak out;<br>• tribunal seen as lacking independence |

## Conclusion

The research is clear both that tribunal user experiences are diverse and that this diversity of experience exists in different jurisdictions, including those in the UK and Australia. Trying to find a way to use the knowledge of these experiences to improve the ability of users to participate remains a challenge, and this article proposes a modelling of this experience as a way to understand how the administrative justice system accommodates or excludes tribunal users. The model proposed is a ladder of legal participation that acknowledges the different types of participative experience that exist, and highlights where participative gaps emerge for users. The intention is to be able to recognise, respect and respond to the individual user's willingness or desire to participate in the dispute resolution process, from the initial decision through to a tribunal hearing, with a view to improving the quality of administrative justice for tribunal users.

### Endnotes

1 G McKeever and B Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast, Law Centre NI, 2010); G McKeever, *Supporting Tribunal Users: Access to Pre-hearing Information, Advice and Support in Northern Ireland* (Belfast, Law Centre NI, 2011); B Thompson, *Structural Tribunal Reform in Northern Ireland* (Belfast, Law Centre NI, 2011). The reports are available from Law Centre NI's website: www.lawcentreni.org.

2 Department of Justice Northern Ireland, *The Access to Justice Review Report*, 2011.

3 Department of Justice Northern Ireland, *The Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document*, 2013.

4 H Genn, B Lever, and L Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006). See also M Adler and J Gulland, *Tribunal Users' Experiences, Perceptions and Limitations: a Literature Review* (Council on Tribunals, 2003); D Cowan and S Halliday, *The Appeal of Internal Review: Administrative Justice and the (Non-)emergence of Disputes* (Oxford University Press, 2003); J Aston, D Hill, and N D Tackey, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases* (Department of Enterprise, Trade and Industry, 2006); M Adler, *The Potential and Limits of Self-Representation at Tribunals: Full Research Report* ESRC End of Award Report (2008); N Harris and S Riddell, *Resolving Disputes about Educational Provision* (Ashgate, 2011).

5 P Cane, *Administrative Tribunals and Adjudication* (Hart, 2010).

6 Beth Gaze, Ruth Quibell and Belinda Fehlberg, 'The Experiences of Users of the Social Security Appeals Tribunal: Diverse Individuals, Issues and Experiences' (forthcoming, 2013) *Federal Law Review*.

7 This model of legal participation was first published in *Public Law*: see G McKeever, "A Ladder of Legal Participation" [2013] *Public Law* 575-598.

8 Op cit, fn 6.

9 Hazel Genn and Cheryl Thomas, *Tribunal Decision-making: an Empirical Study,* UCL Judicial Institute Discussion Paper (2013), available at http://www.nuffieldfoundation.org/tribunal-decision-making.