AIAL FORUM

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Incorporating the 2023 Michael Will Address given in his honour by Professor Asmi Wood, at the 2023 Annual General Meeting of the Australian Institute of Administrative Law

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Appointment of Australia's first Anti-Slavery Commissioner

Chris Evans has been appointed as the inaugural Australian Anti-Slavery Commissioner, commencing a five-year term on 2 December 2024.

The Anti-Slavery Commissioner will further strengthen the work undertaken across government, business and civil society to prevent and respond to modern slavery by supporting victims and survivors, raising community awareness and helping businesses address the risk of modern slavery practices in their operations and supply chains.

The Anti-Slavery Commissioner will play a key role in helping to shape the implementation of future modern slavery reforms, including those arising from the statutory review of the *Modern Slavery Act 2018* (Cth).

We congratulate Mr Evans on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-australias-first-anti-slavery-commissioner-11-11-2024>

Report of the Inspector of the National Anti-Corruption Commission

On 30 October 2024, the Inspector of the National Anti-Corruption Commission, Ms Gail Furness SC, published the report of her investigation into the decision by the National Anti-Corruption Commission (NACC) not to investigate referrals from the Royal Commission into the Robodebt Scheme.

The Inspector made one recommendation in her report, that the Commissioner delegate the function under s 41(5) of the *National Anti-Corruption Commissioner Act 2022* (Cth), that is, to reconsider whether or how to deal with a corruption issue — in this case, delegating the referrals from the Robodebt Royal Commission to an appropriate person.

The NACC has accepted the recommendation and will have the decision remade by an appropriate person.

The Inspector's report can be accessed on the Inspector's website at <https://www.naccinspector.gov.au/publications/inspectors-report-national-anti-corruption-commissions-decision-not-investigate-referrals-royal-commission-robodebt-scheme>.

<https://ministers.ag.gov.au/media-centre/report-inspector-national-anti-corruption-commission-30-10-2024>

First day of the Administrative Review Tribunal

On 14 October 2024, the Administrative Review Tribunal (ART) commenced, replacing the Administrative Appeals Tribunal (AAT).

The ART is a new efficient, accessible, independent and fair federal tribunal for those who seek independent review of government decisions, such as whether they qualify for an age pension; are compensated for an injury they suffered while serving their nation; or receive funding for essential support through the National Disability Insurance Scheme.

A central feature of the new ART is a transparent and merit-based selection process for the appointment of non-judicial members.

The Hon Justice Emilios Kyrou AO is the inaugural President of the ART. Mr Michael Hawkins AM is the inaugural Chief Executive Officer and Principal Registrar.

Appointment of the foundational non-judicial membership of the Tribunal, comprising Deputy Presidents, Senior Members and General Members, followed a transparent and merit-based selection process.

The key features of the ART include:

- improved accessibility for users;
- a responsive, demand-driven funding model;
- more flexible procedures and greater harmonisation across different case types;
- mechanisms for effective escalation of issues of significance to administrative law and decision-making; and
- funding for a new case management system.

All ongoing and non-ongoing Australian Public Service employees who were employed at the AAT have now transitioned to the ART.

All matters that were before the AAT have now automatically transferred to the ART. People who have applied to the AAT for review of a decision do not need to submit a new application to the ART. However, the ART will not be considering anew any AAT decision that is already finalised.

The ART has the same jurisdiction as the AAT, and people can now apply to the ART for review of a decision. Information on how to make an application can be found on the ART’s website, <https://www.art.gov.au/>.

A fact sheet for ART applicants is available on the Attorney-General’s Department website at <https://www.ag.gov.au/legal-system/publications/fact-sheet-new-administrative-review-tribunal>.

<https://ministers.ag.gov.au/media-centre/first-day-administrative-review-tribunal-14-10-2024>

New justice reinvestment initiatives announced

The Australian Government has announced a further six initiatives as part of the commitment to justice reinvestment delivered by the Commonwealth.

The national justice reinvestment program is a long-term, community-led approach to preventing crime, improving community safety and reducing the number of Aboriginal and Torres Strait Islander people in contact with the justice system.

As part of the First Nations justice package, the Government has committed $79 million to support up to 30 community-led justice reinvestment initiatives in First Nations communities across Australia.

Following a rigorous assessment process by an independent panel, another six community-led justice reinvestment initiatives have been selected:

- Kurdiji Aboriginal Corporation, Lajamanu, NT
- Healthy Dreaming Pty Ltd, Port Augusta, SA
- Aboriginal and Torres Strait Islander Corporation Family Prevention and Legal Service – Djirra, Melton, Vic
- Balkanu Cape York Development Corporation, Mossman, Qld
- Napranum Aboriginal Shire Council, Napranum, Qld
- Aboriginal Males Healing Centre Strong Spirit Strong Families, Newman, WA.

These six initiatives take the total number of justice reinvestment initiatives now being funded to 26.

<https://ministers.ag.gov.au/media-centre/new-justice-reinvestment-initiatives-announced-30-09-2024>

Appointments to the Federal Circuit and Family Court of Australia (Division 2)

General appointments

The Government has announced the following appointments as Judges of the Federal Circuit and Family Court of Australia (Division 2):

- Sydney Registry: Alexandra Colquhoun (commenced 16 September 2024), Lisa Doust (commenced 14 October 2024), Gregory Shoebridge (commenced 16 September 2024)

- Canberra Registry: Vanessa Jane Leishman (commenced 14 October 2024)

- Parramatta Registry: Benjamin Zipser (commenced 16 September 2024).

We congratulate Ms Colquhoun, Ms Doust, Ms Leishman, Mr Shoebridge and Mr Zipser on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-federal-circuit-and-family-court-australia-division-2-30-08-2024>

<https://ministers.ag.gov.au/media-centre/appointments-federal-circuit-and-family-court-australia-division-2-27-09-2024>

Protection visa and migration case appointments

The Government has announced the appointment of nine new Judges to the Federal Circuit and Family Court of Australia (Division 2) to hear protection visa and migration cases.

The appointees, who commenced on 5 August 2024 across the Brisbane, Sydney, Parramatta, Melbourne and Adelaide Registries, are: Philip Corbett KC, Amanda Coulthard, Kate Cuthbertson SC, Arran Gerrard, Val Gostencnik, Sheila Kaur, Bernard McCabe, Peter Papadopoulos and Rania Skaros.

In the 2023–24 financial year the Government announced a $160 million package of reforms to restore integrity to Australia's refugee protection system. The package responded to the findings of the *Rapid Review into the Exploitation of Australia's Visa System* (the Nixon Report) that processing delays were "motivating bad actors to take advantage by lodging increasing numbers of non-genuine applications for protection".

The package included a significant investment in new judges for the Federal Circuit and Family Court of Australia to increase its capacity to deal with backlogs of protection visa and migration-related caseloads.

We congratulate the Judges on their appointments.

<https://ministers.ag.gov.au/media-centre/protection-visa-and-migration-case-appointments-federal-circuit-and-family-court-australia-division-2-05-08-2024>

Respect@Work: Groundbreaking costs reform for discrimination cases passes Parliament

On 19 September 2024, the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) passed Parliament. With the passage of this legislation all of the Respect@Work report recommendations have now been actioned. The *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth) commenced on 2 October 2024.

The *Respect@Work: Sexual Harassment National Inquiry Report* handed down in 2020 by the Australian Human Rights Commission (AHRC) found, among other things, that applicants are often deterred from proceeding to court with sexual harassment matters because of the risk of having to pay a respondent's costs. The Act addresses the barrier to seeking justice that the current regime presents, while balancing the interests of applicants and respondents.

The Act prevents a court from ordering an applicant to pay a respondent's costs in discrimination cases in the Federal Court, except in certain limited circumstances.

The Act recognises that not every respondent in an unlawful discrimination proceeding will be well-resourced or have a significant power advantage over an applicant. Examples of such respondents are some individuals and small businesses. That is why the Act provides an exception for successful respondents who do not have a significant power advantage, or financial or other resources, relative to the applicant. The Act also ensures courts are able to order an applicant to pay another party's costs where the applicant has acted vexatiously or unreasonably.

In this way, the Act achieves a better balance of the rights and interests of both applicants and respondents than the status quo. It seeks to address the significant barrier costs present for applicants in a way that achieves fairness for both parties.

More about the Bill's passage can be found on the Parliament's website at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7110>.

More about the Respect@Work report can be found on the ARHC website at <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

<https://ministers.ag.gov.au/media-centre/respectwork-groundbreaking-costs-reform-discrimination-cases-passes-parliament-19-09-2024>

Administrative Review Tribunal Regulations

The *Administrative Review Tribunal Regulations 2024* (Cth) (*ART Regulations*) have now been registered. These regulations aim to ensure integrity in appointments to the ART, which commenced operations on 14 October 2024.

The *ART Regulations* contain detailed requirements for the transparent and merit-based appointment of non-judicial members to the ART. The comprehensive arrangements for the assessment process include:

- requiring public advertising of roles;
- the selection criteria to be considered for each role;
- steps that an assessment panel must take before assessing an applicant as suitable for appointment (such as considering the person's application, conducting an interview, and seeking referee reports); and
- matters that must be included in an assessment panel's report.

Robust safeguards to protect the integrity of the assessment process include:

- requiring that a list of panellists is published following the conclusion of an assessment process;
- explicitly stating that panel members are not subject to direction by the Minister;
- prohibiting a person who is employed under the *Members of Parliament (Staff) Act 1984* (Cth) from being nominated as a panellist; and
- a clear process for disclosing and managing conflicts of interest in assessment processes.

<https://ministers.ag.gov.au/media-centre/administrative-review-tribunal-regulations-18-09-2024>

Appointments to the ART and AAT

The Australian Government has announced the appointment of four inaugural Jurisdictional Area Leaders for the ART.

Jurisdictional Area Leaders are key leaders in the ART, with responsibilities for managing members and caseloads alongside decision-making functions. They have an important role in ensuring Tribunal operations are tailored to meet user needs and identifying trends and emerging issues.

Following consultation with the Hon Justice Emilios Kyrou AO, the Attorney-General has made the following appointments:

- Deputy President Simone Burford as Jurisdictional Area Leader for Protection. Ms Burford was first appointed to the AAT in 2017 and was promoted to Deputy President in July 2024. Ms Burford is highly experienced in the protection jurisdiction, including serving as a practice leader in the AAT.

- Deputy President Kruna Dordevic as Jurisdictional Area Leader for the National Disability Insurance Scheme, and for Social Security. Ms Dordevic was appointed to the former Social Security Appeals Tribunal in 2006, becoming a member of the AAT from amalgamation in 2015, and was promoted to Deputy President in July 2024. Ms Dordevic's significant tribunal experience includes serving as a practice leader in the AAT's Social Services and Child Support Division.

- Deputy President Gina Lazanas as Jurisdictional Area Leader for Taxation and Business, the Veterans and Workers' Compensation, and the General Jurisdictional Area. Ms Lazanas has been a partner in several law firms, with a particular specialisation in tax and commercial cases. First appointed to the AAT in 2012 and promoted to Deputy President in July 2024, Ms Lazanas has undertaken complex work and assisted in the management and listing of cases across various areas of the AAT's jurisdiction.

- Deputy President Kathryn Millar as Jurisdictional Area Leader for Migration. Ms Millar has served on a number of tribunals and panels, including the former Migration Review Tribunal and Refugee Tribunal, the former Social Security Appeals Tribunal, and the South Australian Civil and Administrative Tribunal. As a Member of the AAT since 2015 and Deputy President since June 2024, Ms Millar is highly experienced in the migration jurisdiction, including serving as a practice leader in the AAT.

In addition, the Attorney-General has appointed Justice Kyrou as the Jurisdictional Area Leader for the Intelligence and Security Jurisdictional Area.

The Government has also made a number of appointments to the Tribunal, some commencing following the commencement of the ART on 14 October 2024.

We congratulate each of these Deputy Presidents and Members on their appointment.

More information is available on the Attorney General's Department website at <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.

<https://ministers.ag.gov.au/media-centre/appointments-administrative-review-tribunal-and-administrative-appeals-tribunal-16-09-2024>

Better protection of Australians' privacy

On 12 September 2024, the Australian Government introduced the Privacy and Other Legislation Amendment Bill 2024 (Cth) to strengthen privacy protections for Australians and outlaw doxxing (the malicious release of personal data online).

Strong privacy laws are essential to Australians' trust and confidence in the digital economy and digital services provided by governments and industry.

Australians have a right to have their privacy respected, and when they are asked to hand over their personal data they have a right to expect it will be protected.

Recent large-scale data breaches were distressing for millions of Australians, with their most sensitive personal information exposed by criminals. This Bill represents a significant step forward in the Government's commitment to update the *Privacy Act 1988* (Cth).

The Bill implements a first tranche of agreed recommendations from the *Privacy Act Review* conducted by the Government, which was finalised in 2021. These recommendations include:

- a new statutory tort to address serious invasions of privacy;
- development of a Children's Online Privacy Code to better protect children from a range of online harms, supported by an additional $3 million over three years to the Office of the Australian Information Commissioner (OAIC) for it to develop this important Code;
- greater transparency for individuals regarding automated decisions that affect them;
- streamlined information-sharing in the case of an emergency or eligible data breach, while ensuring that information is appropriately protected; and
- stronger enforcement powers for the Australian Information Commissioner.

The Bill also introduces new criminal offences to outlaw doxxing, imposing a maximum penalty of six years' imprisonment for the malicious use of personal data, and a more serious penalty of seven years' imprisonment where a person or group is targeted because of their race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality or national or ethnic origin.

The measures announced in this Bill build on the steps already taken by the Government on privacy, including:

- increased penalties for repeated or serious privacy breaches;
- greater powers for the Australian Information Commissioner to resolve privacy breaches and quickly share information about data breaches;
- restoration of the standalone position of Australian Privacy Commissioner; and
- an additional $66 million towards the OAIC.

More information on the Bill can be accessed on the Parliament's website at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7249>.

<https://ministers.ag.gov.au/media-centre/better-protection-australians-privacy-12-09-2024>

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

On 11 September 2024, the Australian Government introduced the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 (Cth). The Bill aims to strengthen Australia's protections against money laundering and counter-terrorism financing, and to tackle a key resource stream for organised crime.

Each year billions of dollars are generated from illegal activities such as drug trafficking, tax evasion, cybercrime, human trafficking and arms trafficking. The proceeds from these crimes are used to fund further serious crimes such as terrorism and child abuse.

In 2015 the Financial Action Task Force (FATF), the global financial watchdog, found that Australia had failed to comply with several critical standards. In particular, Australia had failed to extend its anti-money laundering and counter-terrorism financing regime to "tranche-two" entities, a category that includes lawyers, accountants, real estate professionals and dealers in precious stones and metals. The Bill will close a regulatory gap in Australia by expanding the regime to address vulnerabilities within these tranche-two entities. AUSTRAC's July 2024 report *Money Laundering in Australia: National Risk Assessment* noted criminals are increasingly exploiting these sectors to conceal illicit wealth and launder money. The Bill will also help bring Australia into line with international standards set by the FATF.

The Government is also taking the opportunity to simplify, clarify and streamline the anti–money laundering and counter-terrorism financing (AML/CTF) regime. This will reduce the regulatory burden on businesses and make it easier to understand and implement effective measures to combat financial crime. The reforms will allow industry to take a risk-based approach, allowing businesses to prioritise their resources. The reforms will also lead to better quality financial data and make it easier for businesses to protect themselves from misuse by criminals.

The Bill will modernise Australia's AML/CTF system to ensure it keeps pace with the global financial system — closing the gaps that increasingly sophisticated and professional criminal organisations can exploit. This includes extending the current regulation of virtual asset service providers that are exploited by serious and organised crime groups to launder the profits of their crimes and hide the origin of funds.

More information on the Bill can be accessed on the Parliament's website at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7243>.

<https://ministers.ag.gov.au/media-centre/introduction-anti-money-laundering-and-counter-terrorism-financing-amendment-bill-2024-11-09-2024>

Legislation introduced to establish independent National Student Ombudsman

On 11 September 2024, the Australian Government introduced the Universities Accord (National Student Ombudsman) Bill 2024 (Cth). The Bill seeks to establish an independent National Student Ombudsman to investigate student complaints and resolve disputes with universities.

The Bill forms part of the Action Plan Addressing Gender-Based Violence in Higher Education, agreed to by education ministers earlier this year.

The 2021 National Student Survey shows one in twenty students have been sexually assaulted since they started university and one in six have been sexually harassed. One in two have felt like they were not heard when they made a complaint.

The Ombudsman will allow all higher education students to escalate complaints about the actions of their higher education provider, including complaints about sexual assault and sexual harassment.

The role of the Ombudsman will include:

- considering whether decisions and actions taken by providers are unreasonable, unjust, oppressive, discriminatory or otherwise wrong;
- responding to a complaint while a provider is still considering the issue if there are unreasonable delays or the provider is acting unreasonably;
- recommending a provider takes specific steps to resolve the complaint;
- sharing information with relevant regulators for further compliance action if needed; and
- offering a restorative engagement process between the student and the provider.

The Ombudsman will have strong investigative powers including requiring a person or university to provide information.

A National Higher Education Code to Prevent and Respond to Gender-based Violence will also be established.

The Ombudsman will also be able to take complaints from students about a provider's handling of other matters — for example, where a student is subjected to homophobia, antisemitism, Islamophobia or other forms of racism on campus. It will not handle complaints about issues such as academic judgement or legal employment matters.

Subject to the passage of legislation, the independent National Student Ombudsman will start taking complaints from 1 February 2025.

More information about the Bill can be accessed on the Parliament's website at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7244>.

<https://ministers.ag.gov.au/media-centre/legislation-introduced-establish-independent-national-student-ombudsman-11-09-2024>

Legislation to combat foreign bribery and guidelines to aid corporations in compliance

Combatting foreign bribery Act

The *Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024* (Cth), which aims to combat foreign bribery and remove barriers to investigations and prosecutions, came into force on 8 September 2024.

From 8 September, corporations that fail to prevent foreign bribery face penalties running into the tens of millions of dollars.

Under the Act, companies will now be held directly liable for the foreign bribery activities of their employees, external contractors, agents and subsidiaries, unless the business can demonstrate that it had adequate procedures in place to prevent bribery.

This Act enhances Australia's response to foreign bribery by increasing its effectiveness in detecting, investigating and prosecuting foreign bribery.

<https://ministers.ag.gov.au/media-centre/combatting-foreign-bribery-act-now-force-08-09-2024>

Guidance for corporations on preventing foreign bribery

Following the passage of the Act, the Government released a new guide to assist corporations to implement effective anti-bribery compliance programs.

The *Guidance on Adequate Procedures to Prevent the Commission of Foreign Bribery* is principles-based and is designed to be used by corporations of all sizes and in all sectors.

The Guidance reflects current international best practice and incorporates feedback received by the Attorney-General's Department in the recent public consultation process.

The contribution and engagement of industry partners was vital in the development of the Guidance to ensure that it is robust, fit-for-purpose and practical, so that it will reduce the burden on corporations as they develop their anti-bribery and corruption compliance frameworks.

The Guidance can be accessed from the Attorney-General's Department website at <https://www.ag.gov.au/crime/publications/guidance-adequate-procedures-prevent-commission-foreign-bribery>.

<https://ministers.ag.gov.au/media-centre/guidance-corporations-preventing-foreign-bribery-28-08-2024>

National Access to Justice Partnership

On 6 September 2024, National Cabinet signed a Heads of Agreement for a new National Access to Justice Partnership that will provide a critical increase of nearly $800 million in funding over five years, beginning from 2025–26, to the legal assistance sector, with a focus on uplifting legal services responding to gender-based violence.

The Australian Government will invest a total of $3.9 billion in support for frontline legal assistance services to be delivered through a new partnership agreement with the States and Territories.

This is the largest injection of funding to the legal assistance sector in 20 years and provides much needed funding certainty for hundreds of services nationwide, including many who provide holistic support for victims and survivors of gender-based violence.

The funding was announced as part of a $4.7 billion package to respond to the national crisis of family, domestic and sexual violence, and to support legal assistance.

The National Access to Justice Partnership will commence on expiry of the current National Legal Assistance Partnership (NLAP) on 30 June 2025.

This commitment will deliver vital support to all parts of the legal assistance sector, including legal aid commissions, community legal centres, women's legal services, Aboriginal and Torres Strait Islander legal services and family violence prevention legal services. It will also allow for salaries in community sector legal assistance providers to better align with the rest of the sector, ensuring these services can recruit and retain staff.

The full National Access to Justice Partnership will be agreed through the Standing Council of Attorneys-General by the end of the year.

<https://ministers.ag.gov.au/media-centre/national-access-justice-partnership-06-09-2024>

Review of the *Federal Circuit and Family Court of Australia Act 2021*

The Australian Government has announced the appointments of the Hon Linda Dessau AC CVO and Professor Helen Rhoades OAM to conduct the review of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (*FCFCOA Act*). The review is required by s 284 of the Act.

The Government is committed to the ongoing improvement of Australia's family courts to ensure that family law matters are resolved safely, quickly and inexpensively.

The review will consider the Federal Circuit and Family Court of Australia's general federal law jurisdiction and also assess:

- the impact of the structural reforms to the Family Court of Australia and the Federal Circuit Court of Australia;

- any aspects of the *FCFCOA Act* that have had unintended impacts on the operation or the effectiveness of the courts' federal family law and general federal law jurisdiction, procedure or jurisprudence; and

- whether the operation of the Act can be improved through legislative amendments or other non-legislative changes, including structural changes.

Ms Dessau and Professor Rhoades are eminently qualified to conduct this review. Ms Dessau was the Governor of Victoria for 8 years and a Judge of the Family Court of Australia for 18 years. Professor Rhoades is an Honorary Professorial Fellow at Melbourne Law School, a former chair of the Family Law Council, and a former commissioner of the Australian Law Reform Commission on its review of the family law system.

The review's terms of reference are available from the Attorney-General's Department website at <https://www.ag.gov.au/legal-system/courts/review-federal-circuit-and-family-court-australia-act-2021>.

<https://ministers.ag.gov.au/media-centre/review-federal-circuit-and-family-court-australia-act-2021-30-08-2024>

Modernising our human tissue laws

The Australian Government will establish an Australian Law Reform Commission (ALRC) inquiry into human tissue laws to determine whether legislative reform is required to harmonise laws across the nation.

Human organ and tissue donation and transplantation are regulated by Commonwealth, state and territory legislation. Human tissue legislation was enacted by all Australian jurisdictions following recommendations of the ALRC's 1977 report, *Human Tissue Transplants*.

The ALRC's recommendations were aimed at harmonising laws across Australia regulating the donation of blood, tissues and organs for transplantation, and their use for scientific, therapeutic and medical purposes.

Almost 50 years later, human tissue laws have not kept pace with significant social, technological and scientific changes, while amendments to legislation have created increasing inconsistencies between jurisdictions.

The ALRC inquiry will look at how to ensure laws across Australia are up-to-date and consistent.

All Commonwealth, state and territory health ministers have agreed to fund the ALRC inquiry jointly. Health ministers are working together to develop terms of reference for the inquiry, which will be made public when the Attorney-General formally refers the inquiry to the ALRC later this year.

The ALRC review process will include an opportunity for public consultation. Further information about the inquiry will be available on the ALRC website in due course.

<https://ministers.ag.gov.au/media-centre/modernising-our-human-tissue-laws-15-08-2024>

Appointment of the Freedom of Information Commissioner

The Government has announced the appointment of Toni Pirani as the Freedom of Information Commissioner (FOI Commissioner) at the OAIC. Ms Pirani's 12-month appointment commenced on 16 August 2024.

Ms Pirani is currently serving as Special Adviser, Freedom of Information Decisions with the OAIC and has previously served as acting FOI Commissioner. She has made an outstanding contribution to the work of the agency in these roles and brings considerable Commonwealth sector experience.

We congratulate Ms Pirani on her appointment.

Information about the FOI Commissioner and the work of the OIAC can be accessed at <https://www.oaic.gov.au/about-the-OAIC>.

<https://ministers.ag.gov.au/media-centre/appointment-freedom-information-commissioner-15-08-2024>

Recent decisions

The Court does not interfere with the intra-mural activities of Parliament

Attorney-General (Tas) v Casimaty [2024] HCA 31

The case concerned a new interchange proposed by the Tasmanian Department of State Growth to be constructed at a road junction near Hobart Airport. The proposal was referred to and reported upon in 2017 by a Joint Committee of Members of the Legislative Council and House of Assembly known as the Parliamentary Standing Committee on Public Works. The Department subsequently engaged Hazell Bros Group Pty Ltd to construct the new interchange.

Mr Casimaty claimed that the commencement of the roadwork Hazell Bros had been engaged to undertaken contravened s 16(1) of the *Public Works Act 1914* (Tas) in that the roadwork was different from the proposed roadwork referred to and reported on by the Committee in 2017. The differences were said to be that the interchange cost $46.4 million, rather than an amount between $28.08 million and $29.99 million; would not have connections from the westbound on-ramp to Cranston Parade; and was to have two roundabouts.

Section 16(1) of the Act stipulates conditions precedent to the commencement of a public work proposed to be undertaken by a Tasmanian Government department of State authority, namely that the public work has been referred to and reported upon by the Committee.

Mr Casimaty filed a statement of claim in the Supreme Court of Tasmania in 2020. The Attorney-General for Tasmania filed an interlocutory application seeking an order that the statement of claim be struck out or that the proceedings be dismissed either because the statement of claim failed to disclose a cause of action in that there was no “justiciable issue before the Court” or because adjudication of the Supreme Court of issues of fact raised on the pleadings would “offend the principle that parliamentary proceedings are absolutely privileged”.

At first instance, Blow CJ found that for the Supreme Court to adjudicate on whether the intersection primary work had been referred to and reported upon by the Committee would necessarily contravene the privilege of the Tasmanian Parliament. His Honour struck out the statement of claim and dismissed the proceedings.

Mr Casimaty appealed to the Full Court of the Supreme Court of Tasmania. By majority, the Full Court allowed the appeal, set aside the order of the primary judge, and ordered dismissal of the Attorney-General’s interlocutory application. The Full Court found that for the Supreme Court to consider the matter would not necessarily contravene any privilege of the Tasmanian Government.

The Attorney-General sought and was granted special leave to appeal from the order of the Full Court. The question before the High Court was whether observance of the conditions precedent to the commencement of a public work is an obligation that is enforceable by a court.

The plurality (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ) found that, based on its proper construction, s 16(1) of the Act did not create an obligation enforceable by a court, such that a claim to enforce compliance with it cannot be justiciable: *Thomas v Mowbray* (2007) 233 CLR 207, [106].

In considering the construction of s 16(1), the plurality found that it was designed to not displace the mechanism of accountability of the executive government to the Parliament but rather to strengthen it. From beginning to end, the application of s 16 to a public work was considered within the control of the House of Assembly and the Legislative Council. As such, the steps needed to have been taken to meet the conditions precedent to the commencement of a public work by a Government department or State authority are steps that are wholly intra-mural. That is, they are activities undertaken exclusively by Members of Parliament, with which the court “does not interfere”: *Western Australia v Commonwealth* (1995) 183 CLR 373, 482.

The consequences of non-compliance with s 16(1) were considered political, such that compliance is enforceable by the House of Assembly and the Legislative Council, rather than legal and enforceable by a court.

Justice Edelman in a separate judgment noted that courts have traditionally taken a very restrictive approach to interpretation of provisions that would appear to exclude judicial authority to adjudicate upon an alleged breach of a duty by the executive. However, there are instances where courts have declined to recognise an authority to adjudicate upon an alleged breach of duty by the executive, namely where that matter is properly considered to fall within the scope of the exclusive cognisance of Parliament.

In considering who owed the duty imposed by s 16(1), the content of the duty and to whom the duty was owed, Edelman J found that the duty was created by Parliament, owed to Parliament, and related to the activities of Members of Parliament. As a result, the entirety of Mr Casimaty's claim of contravention of s 16(1) was within the exclusive cognisance of the Parliament of Tasmania, and the Supreme Court of Tasmania should not adjudicate upon the alleged contravention of s 16(1).

The continuing effect of NZYQ

YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 40

The plaintiff is from Eritrea and arrived in Australia in 2002 as a holder of a refugee (subclass 200) visa. Between 2006 and 2017, the plaintiff was convicted of serious offences and was sentenced to terms of imprisonment. His visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) in 2017. Upon his release from prison in 2018, the plaintiff was taken into immigration detention. On 23 November 2023, the plaintiff was released from immigration detention based on the assessment then made that there were no real prospects of his removal from Australia becoming practicable in the reasonably foreseeable future, such that the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 415 ALR 254 meant that his detention was not authorised by the *Migration Act*.

Soon after the plaintiff was released, the Minister granted the plaintiff a Bridging R (Class WR) visa in accordance with the *Migration Regulations 1994* (Cth), with conditions which included a monitoring and curfew condition under sch 2 cl 070.612A(1)(a) and (d), respectively. These conditions required the plaintiff to wear an electronic monitoring device and to remain at a specified location between the hours of 10 pm and 6 am.

The question before the High Court was whether the monitoring condition and curfew condition were invalid because they infringe Ch III of the *Constitution*. The majority (Gageler CJ, Gordon, Gleeson and Jagot JJ; Edelman J agreeing) found that the conditions imposed by the executive government were prima facie punitive and could not be justified such that the respective clauses of the *Migration Regulations* infringed Ch III of the *Constitution* and are invalid.

Clauses 070.612A(1)(a) and (d) formed part of the Commonwealth's response to the Court's decision in *NYZQ* and were intended to be applied to those persons released from immigration detention as a result of the decision in that case. The principle reinforced in *NYZQ* was that,

> exceptional cases aside, "a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the *Constitution* unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose", such detention being "penal or punitive unless justified as otherwise": *YBFZ* [8] (Gageler CJ, Gordon, Gleeson and Jagot JJ), citing *NYZQ* [39].

The two visa conditions in this case were held, by the majority, to be prima facie punitive. The curfew condition involved a deprivation of liberty which was material and relatively long-term, and that deprivation of liberty applies to all persons within the class (unlawful non-citizens) unless the Minister reaches the state of satisfaction that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community. The monitoring condition likewise was punitive because it effected an involuntary restraint on the liberty of the person wearing the monitoring device and applied to the same class of persons unless the Minister reached that same necessary state of satisfaction. The broad and flexible nature of the conditions which authorised "uncertain and unpredictable outcomes" to be applied to every person in the class unless the wide specified state of satisfaction is achieved by the Minister, that is there was no risk to the protection of the community, was considered "a concept of such elasticity that it is not necessarily inconsistent with the imposition of a criminal punishment following an adjudication of criminal guilt": *YBFZ* [81].

Justice Steward in a dissenting judgment noted generally that the plaintiff's visa was granted with several other conditions, a number of which could also be characterised as harmful, or as infringements on liberty, or even as punitive, none of which was said to be invalid. In relation to the curfew and monitoring conditions, Steward J found that they were not prima facie punitive. His Honour did not consider the curfew condition was punishment or "anything like the type of detention that only a judge may order in accordance with the *Lim* principle": *YBFZ* [217]. (The *Lim* principle is that "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt": *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.) The purpose of the monitoring device was not to punish the plaintiff but rather to protect the community: *YBFZ* [219].

Justice Steward also compared the decision of Nettle J in *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, who found that ongoing immigration detention did not constitute punishment in that case, to the fact that the two conditions in question here are "far less burdensome" than the ongoing detention described.

Justice Beech-Jones, similarly in dissent, noted that not every form of hardship or detriment imposed by the executive constitutes punishment. His Honour outlined the factors that have emerged from case law which have a bearing on an assessment of whether the power to impose a detriment is prima facie punitive: *YBFZ* [240]–[244]. These, he held, included: a consideration of the nature and severity of the detriment; whether the detriment is of a kind that has historically been imposed as punishment; whether the detriment is of a kind that is commonly imposed otherwise than by courts; and whether the detriment is selectively imposed on an individual or whether it is imposed on a broader section of society.

Justice Beech-Jones then turned to consider that the question of whether a statutory regime promotes the protection of the community through deterrence in fact pursues a non-punitive purpose. His Honour found that such a question turns on how the scheme seeks to effect that protection. For example, "if a detriment is imposed as a means of deterring or dissuading a person from engaging in anti-social conduct simply because this increases their risk of detection or minimises their opportunity to offend, then that is, or at least may be, a legitimate and non-punitive form of protection": [249]. In this case, Beech-Jones J found that the scheme behind the two conditions seeks to protect the community from future conduct of the visa holder: "Its object is not to protect the community by imposing punishment in the form of visa conditions, but to protect the community by making the visa holder *comply* with those conditions and to punish them by criminal sanction if they fail to do so": [286]. The result was the conditions are "purely protective" and consequently valid.

However, Edelman J agreed with the majority that cl 070.612A(1)(a) and (d) of sch 2 to the *Migration Regulations* are invalid because they infringe the *Constitution* and found in favour of the plaintiff: [88] (Gageler CJ, Gordon, Gleeson and Jagot JJ), [171] (Edelman J).

Australia's 2023 Voice referendum — some ways forward?

*Asmi Wood**

This article addresses a matter of significance to many Indigenous people.

Its broad context is based around the referendum held on 14 October 2023 (the Referendum) on an Indigenous Voice to Parliament (the Voice) within the meaning of the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth) (*Voice Act*),[1] and through the Voice, constitutional recognition of Indigenous peoples as the first peoples of the Continent.[2] The historical context is important. This article first examines the lead-up to the Referendum and then provides a prognosis for reconciliation in the medium term.

The voters' rejection of the Voice was unambiguous. The Referendum failed (i) in all states and (ii) to gain a majority of all electors (a double majority).[3] The central issue for this article is to examine both the lead-up and, more importantly, the effect and impact of this rejection for the future of Indigenous/non-Indigenous relations on the continent ("race relations"). A deeper underlying question then becomes what this outright rejection of the Voice might mean for the future of reconciliation, a closely related matter, the incidents which flow and thus relevant issues for fair and equitable future race relations.

The article explores some pathways to reconciliation. Key issues, abstracted more generally, are (1) how will Indigenous and non-Indigenous communities live together fairly, peacefully and harmoniously as equals; (2) how do we ensure power is shared equitably, arguably the easier of the intractable issues, as English law is well versed in separating or diffusing government power to protect freedoms for all peoples; and (3) how do we ensure forgiveness acts as a general gloss on past activities, especially where people have passed on. For the future, the parties need to establish a baseline of rights and standards of treatment to ensure that the race relations of the past are never repeated, while, crucially, contemporary leaders are held to higher, including international, standards especially for race relations.

Possible solutions considered here include, but are not solely limited to, those available under current constitutional arrangements. That is, it arguably has become necessary to focus on a broader set of options that might be available for developing or renewing paths towards reconciliation. Solutions which are contingent on obtaining constitutional change appear difficult to effect, especially if the Referendum result accurately reflects the mood of the majority.

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1 *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth) s 129(ii).

2 Ibid s 129.

3 *Australian Constitution* s 128.

Reconciliation and Indigenous re-empowerment[4] can involve (a) legislated solutions contemplating a combination (only of) domestic legal and political arrangements; and (b) options under the aegis of the United Nations and international law, while maintaining the nation's honour in the eyes of the international community. Taking a broader approach to reconciliation may provide answers to race relations in Australia, including by drawing on settled international norms and thus not becoming totally reliant on the approval of an ambivalent majority. Some of these future possibilities are considered briefly below, along with a very brief critique.

The lead-up to the Referendum

On the night of his party's victory at the general election in May 2022, one of the first commitments given by the Prime Minister elect was that his left of centre Labor government would give effect to the three key elements of the *Uluru Statement from the Heart* (*Statement*).[5] These elements broadly are (i) a Voice, (ii) a process leading up to treaty and (iii) truth-telling. Henry Reynolds characterised the Voice as "attracting the most discussion".[6]

The Prime Minister elect specifically undertook to put the Voice proposition to the electors,[7] seeking to entrench an Indigenous Voice in the *Constitution* and to do so in his government's current term. The actual form of this Voice, which was put to the people, was determined in time through a consultative process including with a range of Indigenous stakeholders.

A broad proposal to entrench an Indigenous Voice to Parliament — which in May 2022 was yet to be given its final shape and content[8] — appeared in principle to have majority support, with a peak of about 64% of voters.[9] Initially, most voters viewed the Voice as potentially beneficial to Indigenous people. Further, and in practice, the Voice would have almost no impact on the lives of the majority. This combination of perception and fact may explain the initial high "Yes" sentiment. Many voters were undecided on how they would vote on a Voice, but no doubt included a small but strong inherently "No" constituency.[10]

4 The author would like to acknowledge Auntie Andrea Collins and Ms Briannan Ross for the use of this expression "re-empowerment" in place of the term "empowerment" with respect to issues including Indigenous governance structures and self-determination from a strengths-based approach.

5 *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017) (*Statement*).

6 Henry Reynolds, *Truth-telling: History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021) 2. Since the loss of the Referendum in October 2023, however, the Government appears to have reconsidered its support for the *Statement* as a whole. At the Garma Festival in August 2024 the Prime Minister's undertaking for the future appear to have abandoned his Government's strong commitment to the *Statement*, focusing instead on the Closing the Gap approach to Indigenous relations: Patricia Karvelas, "Timidity reigns as Anthony Albanese backs away from Makarrata at Garma Festival", *ABC News* (online, 5 August 2024) <https://www.abc.net.au/news/2024-08-05/albanese-backs-away-from-makarrata-commission-promise/104181776>.

7 *Australian Constitution* s 128.

8 Tom Calma and Marcia Langton, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (Report, July 2021). This report recommended some possible models and approaches as to the detail that a Voice could entail.

9 David Crowe, " 'A tipping point': support for Voice falls below a majority", *Sydney Morning Herald* (online, 12 June 2023) <https://www.smh.com.au/politics/federal/a-tipping-point-support-for-voice-falls-below-a-majority-20230612-p5dfto.html>.

10 What is alluded to here is that about 9% of the electors voted against the propositions in support of what most people thought was granting equality to Aboriginal people in 1967: see Matthew Thomas, "The 1967 Referendum", *Parliament of Australia* (Web page, 25 May 2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/May/The_1967_Referendum>.

Labor would have known that its strong commitment to Voice, treaty, and truth-telling would not be an easy task to discharge. In practice, Labor would also have known that, unless forced, the Opposition was unlikely to co-operate on the Voice. It is, however, easy to be wise in hindsight.

The racial inferiority of Indigenous people vis-à-vis Europeans[11] today is, as it has been in the past,[12] undoubtedly a "fact" for a small minority of voters.[13] A truer and more important contemporary criterion for many voters is the urban, rural, and remote geographical divides on a large continent. Perhaps the Opposition's reasonable fear in the "bush" was that support for Labor's Voice proposition might have been interpreted as support favouring remote Aboriginal communities over (non-Indigenous) rural and remote communities — an important Coalition constituency — who also have difficulties accessing services including health and education.

However, the Opposition, arguably, harbours — at least — residual, assimilationist views,[14] euphemistically phrased as a rejection of "separatism".[15] An entrenched Voice could have provided a mechanism to help Indigenous people to work towards self-determination and re-empowerment of their communities within the meaning of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*),[16] including through measures foreseen by both major parties, as evidenced in debates held in the lead-up to the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1967* (Cth).[17] Unlike the Voice, the Bill (also in 2023) to incorporate *UNDRIP* into domestic law did not succeed.[18]

The Government was attempting to address well-documented historical injustices. In choosing to pursue constitutional entrenchment of a Voice however, it faced the double

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11 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, reprinted ed, 1976) 622; see discussion of the 14th Amendment.

12 Ibid 622–3.

13 The many instances that have been widely covered in the news of sportspeople, the Northern Territory police and others with strong negative racial characterisations of particular groups, predominantly against Indigenous people, is evidence of this residual feeling on race in the broader community. See, eg, Emma Kemp, "Almost a third of Indigenous AFL athletes and players of colour experienced racism, survey finds", *The Guardian* (online, 29 September 2022) <https://www.theguardian.com/sport/2022/sep/29/aflpa-survey-shows-concerning-incidents-of-racism-including-from-within-industry>.

14 National Archives of Australia, "John Gorton: during office", *Australia's Prime Ministers* (Web page) <https://www.naa.gov.au/explore-collection/australias-prime-ministers/john-gorton/during-office>.

15 Tony Abbott, "A No vote to Indigenous Voice says Yes to unity and equality", *The Australian* (online, 14 October 2023) <https://tonyabbott.com.au/2023/10/a-no-vote-to-indigenous-voice-says-yes-to-unity-and-equality/>; Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 1974, 3081–4 (Ian Viner).

16 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007) arts 3, 4 (*UNDRIP*). Self-determination within the meaning of the *UNDRIP* is for internal self-determination only: see art 46(1).

17 This includes through measures foreseen by both major parties, as evidenced in debates leading up to the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1967* (Cth): see Commonwealth, *Parliamentary Debates* (Ian Viner) (n 15).

18 The United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth) was voted down 6 December 2023: Commonwealth, *Parliamentary Debates*, Senate, 6 December 2023.

majority hurdle — and as it turned out[19] — without multi-party support.[20] As campaigning began, the electors' attention shifted to the cost of living and the rising cost of energy. Clearly, the "No" campaign also, successfully, created a sufficient level of doubt among "undecided" voters, including some initially "Yes" voters. The combination of these challenges was to prove insurmountable.

The Referendum

In brief, the Referendum proposition was as follows. The *Voice Act* contained two key elements: (i) it recognised Aboriginal and Torres Strait Islander Peoples as the first peoples; and (ii) it did so by establishing a Voice, whose structure, scope and power would, in time, be determined by Parliament.[21]

The Voice could "make representations",[22] (discretionary) representations that Parliament could, clearly, refuse even to consider. The Prime Minister, mindful of not alarming the majority, reasonably referred to the proposed changes as "modest".[23]

Parliament referred the Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) (Voice Bill) to a parliamentary committee, in this instance to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum. The resulting committee report was divided largely along party lines,[24] after which, in the absence of multi-party support, the Voice proposition appeared unlikely to succeed.

After the passage of the Voice Bill, opinion polls indicated that support for the Voice was falling. The subsequent efforts of the "No" camp were arguably prosecuted with great vigour. However, at that point and certainly once the Voice Bill had passed into law, the government was required to hold the Referendum within six months of the *Voice Act* coming into force.[25]

Broadly, support for the Voice by state, in the lead-up to the Referendum, appeared optimistically to be in the balance, as the "Yes" campaign made some late minor gains. The *Constitution* makes a "Yes" case significantly more challenging to prosecute, because it seeks to change the status quo. The onus is on those seeking reform to establish a convincing case for change. Thus (structurally) "No" is the easier case to prosecute.

The *Voice Act* left the operational details of the Voice, such as its structure, scope, and power,[26] to the Parliament. This approach is the accepted custom and practice in a Westminster, *Constitution*-based parliamentary system and accords strongly with Anglo-Australian expressions of the role of the Parliament. In Australia, the *Constitution* is supreme; the

19 See Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Report, May 2023) 57–86.
20 There has not yet been a successful referendum without multi-party support.
21 *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth) s 129.
22 Ibid s 129(ii).
23 Asmi Wood, "An Indigenous Voice to Parliament: a modest concession" (2023) 176 *Precedent* 5.
24 Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum (n 19) 57–86.
25 *Australian Constitution* s 128.
26 *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth) s 129(iii).

Parliament is sovereign, but not supreme, within constitutional limits.[27] Thus, constitutional entrenchment carries with it particular significance.

The Opposition and the Referendum

The Act passed into law but — ominously for the Government — it did so without Opposition support.[28] The Opposition supported constitutional recognition but opposed entrenchment through the Voice. To compensate, the Opposition promised a separate referendum on constitutional recognition if the Voice referendum failed.[29]

The Opposition, as would others with a knowledge of the history of referenda, knew that they could defeat this referendum. The arguably minor, practical differences between the major parties on a legislated versus entrenched Voice were misconstrued as major points of difference in the campaign and justified withholding bipartisan support, which in turn ensured the loss of the Referendum.

Issues not intrinsically linked to the Voice

The constitutional reform process involves intrinsic complexities, such as the requirement for referenda,[30] that are well understood by lawyers and politicians, but perhaps not so well by the voting public. These legal issues are clearly separate from the merits or otherwise of the Voice per se and ideally should have been kept separate.

The “No” camp conflated, whether intentionally or otherwise, a broad range of administrative law issues not directly enlivened by the Act.[31] This included the possibility of “flooding” the courts with Voice-inspired litigation.[32] Disputes arising under “Voice type” legislation usually are settled under general principles of law, including administrative law. Thus, the entrenchment of the Voice alone was extremely unlikely to create novel legal problems.

The conflation of a range of issues helped to seed a broader, more amorphous set of concerns and issues more properly associated with the functions of Parliament, rather than the Voice. Such confusion appeared to erode the initial, more wholistic and positive initial majority support for a Voice.

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27 “Supreme” as used in the English parliamentary context.

28 Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum (n 19).

29 Dana Morse and Brett Worthington, “Peter Dutton pledges second referendum on Indigenous recognition if Voice vote fails”, *ABC News* (online, 3 September 2023) <https://www.abc.net.au/news/2023-09-03/peter-dutton-pledges-second-referendum-if-voice-fails/102808598>; Josh Butler, “Peter Dutton and the Voice: what the Liberal party has got wrong about Indigenous recognition”, *The Guardian* (online, 7 April 2023) <https://www.theguardian.com/australia-news/2023/apr/07/peter-dutton-and-the-voice-what-the-liberal-party-has-got-wrong-about-indigenous-recognition>.

30 *Australian Constitution* s 128.

31 Opponents raised the likelihood of the Voice initiating a flood of litigation, particularly if the Parliament or the executive did not consider the representations made. While the Voice may have had access to administrative remedies generally, there is clearly no special, new or additional legal basis provided for in the Act giving the Voice power not available under the general law. Many of the floodgate arguments were prosecuted with little or no evidence and appeared to be purely “fear mongering”. Initially, some Coalition leaders also claimed that the Voice would be a “third chamber like” body, a claim with no legal support or merit.

32 Ian Callinan, Submission No 71 to the Joint Select Committee, *Inquiry into The Aboriginal and Torres Strait Islander Voice Referendum* (20 April 2023).

The conflation of tangential issues was a lesson in instrumental politics, where truth and principle play a subsidiary role to pragmatic political outcomes, issues completely unrelated to Indigenous concerns. Once the political waters were thoroughly muddied, apathy and ignorance of constitutional issues worked strongly in favour of the “No” or “do nothing” approach. However, it is noted that, despite the muddying of narratives and issues, a majority of 18 to 35 year-olds consistently were in the “Yes” camp,[33] creating hope for improved future legal rights for Indigenous peoples.

The Voice campaigns

The “No” campaign

For convenience here, the “No” camp is broadly divided into two segments: (1) the so-called progressive “No” camp, led by Indigenous people not satisfied by what the Referendum, if successful, would deliver to Indigenous communities; and (2) the rest of the “No” camp, those opposed to the Voice for a range of reasons. As with the 1967 Referendum, this group would include a certain percentage of people who would never support Indigenous re-empowerment. Arguably, it is a small, although not a negligible, minority.

As the campaign progressed, the percentage of “don’t know” voters appeared to grow significantly.[34] The cynical advice, shamefully advocated by some in the “No” camp to the undecided voter, was “if you don’t know, vote no”, encouraging ignorance and diminishing Australian democracy.[35] This slogan was also advocated by senior Opposition leaders,[36] aimed at undecided voters or even at the many disinterested or the so-called “soft” voters facing other pressing economic or financial concerns.

The better advice should have been “if you don’t know, find out, *before* you cast your vote”. A successful referendum can alter the *Constitution*, the founding document of the federation. Voters, especially those who claim that they are committed to a values-based liberal democratic society with human rights protection for all, should undertake this obligation seriously. Society, where voting is mandatory, has a concomitant obligation to ensure that voters have a reasonable level of knowledge to vote thoughtfully[37] — an obligation, however, that appears largely unfulfilled.

33 Katharine Murphy, “Guardian Essential poll: slim majority for a no vote in Indigenous voice referendum, survey shows”, *The Guardian* (online, 19 September 2023) <https://www.theguardian.com/australia-news/2023/sep/19/guardian-essential-poll-indigenous-voice-no-voters-in-majority-for-first-time-survey-shows>.

34 Ibid.

35 Australian Electoral Commission, *Official Referendum Pamphlet* (2023) 7.

36 Tory Shepherd, “Liberals accused of ‘dirty tactics’ over Indigenous voice pamphlet leading voters to site that harvests information”, *The Guardian* (online, 6 September 2023) <https://www.theguardian.com/australia-news/2023/sep/05/liberals-accused-of-dirty-tactics-over-indigenous-voice-pamphlet-leading-voters-to-site-that-harvests-information>.

37 The Australian Electoral Commission (AEC) rightly focuses on the procedural matters and did an excellent job in this instance, including by providing Indigenous language-based instructions, providing extended hours for voters in very remote areas (almost exclusively Indigenous voters) and ensuring that Indigenous enrolments were the highest ever on record. The For/Against cases are provided by the protagonists and do not have to be factually accurate. This information (usually in the physical form of a pamphlet in which both sides are allocated the same space) is distributed by the AEC in accordance with its governing law. The information is not fact checked by the AEC and is distributed according to the rules and regulations that govern the dissemination of this information but favours neither side of the campaign: see *Referendum (Machinery Provisions) Act 1984* (Cth) s 11.

The progressive "No" camp

For many Indigenous people, even many who ultimately voted "Yes", the concessions offered in the Voice proposition were minimal or unsubstantial. This was not an entirely unreasonable critique of the proposition for Indigenous people seeking to prevent a repetition of the past. Some Elders argued in principle that the Voice, either entrenched or legislated, was of little substance to Indigenous people. The Government, however, saw the Voice as the first step to truth-telling and treaty.

For many Indigenous people, self-determination and re-empowerment through traditional authority and structures is the way to escape what has been described by Judy Atkinson as "enforced dependency" and the asymmetric power dynamics that results.[38] Most voters support this broader aim[39] but, reasonably, require the result to be beneficial.[40] However, perhaps less reasonably, the yardstick for success at present — in an age of hyper-partisan politics, and unlike even the recent past[41] — arguably is based entirely on Anglo-Australian norms. *UNDRIP*, however, calls for self-determination based on Indigenous norms, which Australia has endorsed.[42]

There was also a strong view among some Elders that Indigenous efforts should be focused on what they perceived to be more substantial issues, including reserved seats for Indigenous people in the Parliament,[43] Indigenous self-determination, working towards statehood or treaty, among other options.[44]

That is, many Indigenous people sought self-determination where systems based on Indigenous self-reflection would provide normative frameworks for self-governing, discrete self-determined Indigenous communities, consistent with *UNDRIP*, and within the Commonwealth.[45] Generally, the Indigenous progressive "No" camp were seeking more than was on offer at the Referendum.[46]

Advocating for the progressive "No" side, lawyer Michael Mansell argued that an advisory body would further reinforce a colonial notion that the majority unilaterally will continue to manage and determine what is appropriate for the Indigenous minority. Further, Mr Mansell argued that such a body simply reinforced the notion that Aboriginal people were a mere "problem" to be managed by the Government, which is not so different to the mission management days. Such an outcome, he argued, is undesirable for Indigenous people.[47]

38 Judy Atkinson, *Trauma Trails: Recreating Songlines* (Spinifex, 2002) 65, 67.
39 "Australian Reconciliation Barometer", *Reconciliation Australia* (Web page, 2022) <https://www.reconciliation.org.au/reconciliation/australian-reconciliation-barometer/>.
40 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [40–44] (Gaudron J) (*Hindmarsh Island Bridge Case*). Her Honour said any law that does not meet the two-part criteria necessary to exercise s 51(xxvi) constitutional power may be struck down by the court as a manifest abuse of said power.
41 Commonwealth *Parliamentary Debates* (Ian Viner) (n 15).
42 *UNDRIP* (n 16) arts 3–5, 46(1); Jenny Macklin, "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" (Statement, Parliament House, Canberra, 3 April 2009).
43 See critique on "separatism" above.
44 Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016).
45 Contrary to some mischievous reports. Most Indigenous people are seeking self-determination within the meaning of *UNDRIP* (n 16), one that envisages *internal* self-determination only: art 46(1).
46 Wood, "An Indigenous Voice to Parliament: a modest concession"' (n 23).
47 Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (n 44).

However, while entrenchment of the Voice ensured its mere existence, it would, like a legislated Voice, only possess limited power for effecting change. Thus, for the progressive "No" camp, the Voice was not an entirely effective mechanism to address Indigenous disempowerment.[48]

The "No" campaign within Parliament

The Opposition did not act as a unified bloc in prosecuting a "No" case.

The National Party, the minor Coalition partner, expressed its opposition to the Voice proposition early in the process.[49] It was, however, a principled position. They did not blame "a lack of detail" or raise tangential objections with respect to the Voice. They said that a Voice should be legislated and consistently advocated that position.

In contrast, the Liberal Party, the main Opposition partner, opposed the Voice *and* constitutional recognition as a "package". The Liberal Party supported a legislated Voice alone.[50] In retrospect, however, the Liberal Party arguably played a much more "spoiling"[51] role by exaggerating differences with the Government, for example by constantly pressing for "greater detail", or raising tangential and sometimes misleading issues. The result was to seed or create doubt in the minds of a majority,[52] especially among those much less sharply focused on Indigenous issues.

In addition, there were a few political actors who aired their own "No" perspectives. For example, the Opposition spokesperson for Indigenous affairs in her party capacity claimed that colonisation has had many positive impacts for Indigenous people, thus arguably promoting assimilation as beneficial.[53] This appears to be her individual view.

Against her view, the Senate has acknowledged "Indigenous dispossession and ill-treatment" resulting from colonisation.[54] There is further acknowledgment that Indigenous

48 What many in the progressive "No" camp — but in this instance also including many Indigenous people not part of that camp — supported was free, prior and informed consent within the meaning of the *UNDRIP* (n 16): see arts 10, 11, 19, 29, 32. Australia voted against the *UNDRIP* at the UN General Assembly vote in 2007 but subsequently endorsed the instrument. The author confirmed Mr Mansell's position in a conversation on 29 February 2024. However, any omissions or errors remain the responsibility of the author.

49 Lorena Allam, "Why do the Nationals oppose the Indigenous voice and do their arguments stand up to scrutiny?", *The Guardian* (online, 29 November 2022) <https://www.theguardian.com/australia-news/2022/nov/29/why-do-the-nationals-oppose-the-indigenous-voice-and-do-their-arguments-stand-up-to-scrutiny>.

50 The Liberal Party supported a legislated Voice; the Leader of the Opposition also undertook to recognise Indigenous peoples in the *Constitution*: see Morse and Worthington (n 29); Butler, "Peter Dutton and the Voice: what the Liberal party has got wrong about Indigenous recognition" (n 29).

51 Shepherd (n 36).

52 See Josh Butler, "Dutton apologises for boycotting Rudd's apology to stolen generations", *The Guardian* (online, 13 February 2023) <https://www.theguardian.com/australia-news/2023/feb/13/dutton-apologises-for-boycotting-rudds-apology-to-stolen-generations>.

53 Tom McIlroy, "Colonisation had 'a positive impact': Jacinta Price", *Financial Review* (online, 14 September 2023) <https://www.afr.com/politics/federal/colonisation-had-a-positive-impact-nampijinpa-price-20230914-p5e4mh>.

54 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later: Report on the Feasibility of a Compact or "Makarrata" between the Commonwealth and Aboriginal People* (Parliamentary Paper No 107, September 1983) 12 [2.11] (*Two Hundred Years Later Report*).

people have “become, as a group, the most disadvantaged in Australian society”,[55] resulting from a period of racial exclusion that their Honours Deane and Gaudron characterised “as the darkest aspect of the history of this nation”.[56] However, the Opposition spokesperson’s views, including her vigorous opposition to the Voice, are popular with her non-Indigenous constituency, and the Opposition had enough internal Aboriginal support to prosecute its “No” agenda.

The Coalition’s approach was rejected by the broader Indigenous community, including the areas using the Australian Electoral Commission’s (AEC’s) Remote Mobile Teams which are predominantly Aboriginal,[57] including within the Opposition spokesperson’s own electorate.[58] Politicians rarely suffer visible sanctions for such instrumental use of history even when it is arguably clear that they are negating the views of those whom they specifically claim to represent. Thus, Indigenous people, even those sceptical of the potential efficacy of the Voice, were arguably equally sceptical and distrustful of the “No” campaign, and strongly voted “Yes”.[59]

The Opposition made a proverbial mountain out of a molehill of their differences with the Government and did so successfully with the support of Indigenous people on the Conservative side of politics. Unfortunately, for Indigenous people, these Indigenous leaders (that is, the non-progressive “No” element) in practice offered no real tangible alternative other than the promise of another referendum.

Many on the Conservative side appeared to have voted along party lines. Many Labor voters also appeared to have voted “No” contrary to their party’s very strong support for the proposition. The “Yes” campaign’s efforts to counter half-truths or even outright lies clearly proved to be much less effective. There were some explicit, strong elements of racism in the debate.[60] The final result, however, was arguably due to the inertia and the instrumental exploitation of apathy, rather than mass racism.[61]

55 *Native Title Act 1993* (Cth) Preamble.

56 *Mabo v Queensland* (1992) 175 CLR 1, 109 (Deane and Gaudron JJ) (*Murray Islands Case*).

57 Bronte Charles and Rachael Knowles, “The referendum failed. But data shows the majority of Indigenous communities voted yes”, *SBS* (online, 16 October 2023) <https://www.sbs.com.au/nitv/article/the-referendum-for-a-voice-to-parliament-failed-but-what-outcome-did-most-indigenous-voters-support/i2reavyqn>.

58 Ibid; the electorate referred to here is the Northern Territory.

59 Ibid.

60 Interview with AJ Brown, Board member of Transparency International Australia (Patricia Karvelas, ABC Radio National Breakfast Program, 31 January 2023). In the radio interview, AJ Brown spoke of the impact on the Voice campaign of overseas donations to the “No” camp. While Mr Brown did not say so, the monies appeared to come from White groups who did not want Indigenous communities in either the USA or Australia to assert their positions as the truer owners of the respective continents.

61 Josh Nicholas, “How the Indigenous voice referendum could have passed with bipartisan support — in charts”, *The Guardian* (online, 29 November 2023) <https://www.theguardian.com/australia-news/datablog/2023/nov/29/indigenous-voice-referendum-failure-why-bipartisan-support>. Following 14 October 2024, 76% of voters thought Indigenous people deserved a Voice and more than 80% supported a truth-telling process.

No doubt some Liberals in the future will publicly “regret” their spoiling role in 2023.[62] Key Liberals, including the Opposition leader, have in the past publicly “regretted” their own, often one-time politically advantageous, shameful actions with respect to Indigenous people.[63] It is governments of all shades who make the mistakes, but in practice it is Indigenous people who pay, and always have paid, the price for these mistakes, while politicians repent at leisure — if ever.

A recent Productivity Commission report confirms the futility of several, expensive, government programs by all sides of politics[64] which have failed, and have usually failed because of the poor levels of consultation with Indigenous communities. “Consultation” to date has largely been minimal, superficial, or perfunctory.[65] For taxpayers who bear the cost of government policies — currently but probably unrealistically estimated[66] by some annually at A$34,000 million[67] — with poor results,[68] surely this must change. Equally clearly, if the status quo continues the situation is unlikely to change.

The “Yes” campaign

The “Yes” case had the task of highlighting the benefits of the Voice. The majority had little to lose, or gain, other than perhaps the satisfaction of helping to address past injustices and to help acknowledge and reverse what Brennan J described as the “[Indigenous] dispossession [which] underwrote the development of the nation”[69] and which underpins its prosperity.

The Government for its part, the Minister in charge of Aboriginal Affairs and the Attorney-General expended significant political capital for which Indigenous peoples,

62 For example, the shadow Attorney-General and Indigenous spokesperson for the Liberal party talked about the positive impact of colonialism on Indigenous communities, which independent Senator David Pocock called “disingenuous”, “disrespectful” and in need of correction: Stephanie Gardiner, “Pocock calls out ‘disingenuous’ debate on the Voice”, *Canberra Times* (online, 24 August 2023) <https://www.canberratimes.com.au/story/8320910/pocock-calls-out-disingenuous-debate-on-the-voice>. See also McIlroy, “Colonisation had ‘a positive impact’: Jacinta Price” (n 53); Ali MC, “As vote nears, ‘horrific racism’ mars Australian Voice referendum campaign”, *Al Jazeera* (online, 6 October 2023) <https://www.aljazeera.com/news/2023/10/6/as-vote-nears-horrific-racism-mars-australian-voice-referendum-campaign>.

63 Josh Butler, “Dutton apologises for boycotting Rudd’s apology to stolen generations”, *The Guardian* (online, 13 February 2023) <https://www.theguardian.com/australia-news/2023/feb/13/dutton-apologises-for-boycotting-rudds-apology-to-stolen-generations>. The Opposition leader apologised 15 years later, when — arguably after political benefit had been extracted from that ungracious act — he admitted that boycotting the PM’s speech had been a mistake.

64 Productivity Commission, *Review of the National Agreement on Closing the Gap: Study Report* (Report, 7 February 2024) vol 1 (Productivity Commission Report).

65 This apathetic involvement of many voters puts little pressure on their elected representatives. However, if the “free, prior and informed” consent, as mandated by *UNDRIP* (n 16), becomes the legal standard for consultation (see n 48 above), it is suggested that the outcomes on Indigenous issues would improve dramatically.

66 Tom McIlroy, “Australia spends less on Indigenous affairs than you think: study”, *Financial Review* (online, 28 September 2023) <https://www.afr.com/politics/federal/australia-spends-less-on-indigenous-affairs-than-you-think-study-20230927-p5e84o>.

67 Nicholas Biddle, “FactCheck Q&A: Is $30 billion spent every year on 500,000 Indigenous people in Australia?”, *The Conversation* (online, 5 September 2023) <https://theconversation.com/factcheck-qanda-is-30-billion-spent-every-year-on-500-000-indigenous-people-in-australia-64658>.

68 See Productivity Commission Report (n 64).

69 *Murray Islands Case* (n 56) 69 (Brennan J).

anecdotally, are appreciative. Without diminishing the critiques of the progressive “No” camp, many Indigenous people acknowledge their principled leadership on important Indigenous issues. The Government funded an extensive campaign of education. It also promoted a “Yes” vote through its political network. Despite these efforts, many Labor supporters ultimately voted “No”.

In light of the Referendum outcomes available, the voting options appeared to be either (a) “Yes” to the proposed Voice with its clear limitations or (b) nothing but the status quo ante. The “Yes” campaign clearly could not persuade voters of the benefits of a constitutionally entrenched Voice.[70]

Referendum day

Referendum day did not prove to be the “knife-edge” result predicted by an optimistic few. Due to the daylight-saving time zones, Tasmania got to poll-closing before any of the mainland states. The “No” result in Tasmania, a state which was previously thought to be a marginal “Yes” jurisdiction, was so strongly “No” — a trend repeated in the other eastern states — that the ABC called the result as a definite nationwide “No” early in the evening. It was soon clear that the result was a landslide for the “No” vote.

Many Indigenous people were devastated. This loss was particularly profound given the *Statement* was made as a call for justice couched in love. Rejection of this generous invitation understandably made people ask, “Why do they hate us so much?” There were also knee-jerk claims[71] that the result was “largely racist”,[72] and paradoxically at odds with the broader, although largely inchoate, public sentiment towards Indigenous people.[73] The result in toto clearly needs closer analysis to determine voter intentions and to explain the Referendum outcome. One thing was certain: a largely negative “No” campaign had succeeded.

The Australian Capital Territory was the only “Yes” majority jurisdiction.[74] Its federal lower house electorates currently are held by the Labor Party, with the Senate seats split between Labor and an Independent supportive of the Voice. Select members of the Liberal Party in the ACT also supported the Voice and influenced the overall “Yes” result in the territory.[75]

70 Yet in the month following the 2023 Referendum, 76% of voters thought Indigenous people deserved a Voice and more than 80% supported a truth-telling process: Nicholas (n 61). See also Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (n 44) for the view of Mr Mansell.

71 But see below at p 30 for the advice of Indigenous Elders to the community.

72 There were, however, instances which bipartisan political opinion framed as “personal and racist”: Brett Worthington, “No campaign advertisement dubbed ‘personal and racist attack’ on Voice Yes campaigner Thomas Mayo”, *ABC News* (online, 6 July 2023) <https://www.abc.net.au/news/2023-07-06/no-voice-newspaper-ad-dubbed-racist/102304488>; Madeleine Wedesweiler, “*Australian* newspaper apologises over ‘racist’ ad from No campaign”, *SBS* (online, 6 July 2023) <https://www.sbs.com.au/news/article/australian-newspaper-apologises-over-racist-ad-from-voice-to-parliament-no-campaign/hic3jkzuq>.

73 Duncan Evans, “Yes vote wins big in Victoria, inner-city Australia”, *News.com* (online, 15 October 2023) <https://www.news.com.au/national/yes-vote-wins-big-in-victoria-innercity-australia/news-story/03177b0643661265944748fc9e555da3>.

74 “Voice Referendum live results and updates” *ABC News* (online, 15 October 2023) <https://www.abc.net.au/news/elections/referendum/2023/results?filter=all&sort=az&state=all&party=all>.

75 Harry Frost, “Canberra Liberal leader Elizabeth Lee will vote Yes in the Voice to Parliament, but her party is another story”, *ABC News* (online, 27 August 2023) <https://www.abc.net.au/news/2023-08-27/canberra-liberals-elizabeth-lee-vote-yes-voice-to-parliament/102780134>.

After the loss, many Indigenous leaders supporting the "Yes" campaign advocated for a period of silence spanning a fortnight or so after the Referendum. This wise decision provided for a "cooling down" period, invited calmer reflection and arguably avoided intemperate expressions of hurt or anger. While Indigenous leadership and wisdom is not generally valued among non-Indigenous people, there is much society generally could learn from their approach. Their call for restraint stands in stark contrast to others grieving in the public eye. In particular, calls made by Alexei Navalny's widow to direct "[r]age, anger, hatred towards those who dared to kill our future"[76] demonstrate the strength of Indigenous leaders not to lean into similar hate-driven approaches.

Interpreting the Referendum results

According to some on the political right, the "No" vote was a vote *for* assimilation, as a solution and for "reconciliation".[77] Forced assimilation, however, is a cruel and inhumane "solution" which failed in the past even when unequally applied laws, attitudes and government actions were socially acceptable.[78] An assimilationist approach is not likely to meet with contemporary international standards of human rights endorsed by Australia,[79] nor to be supported by the vast majority of voters, and therefore should not be given much consideration as a practical, ethical solution. Australia has endorsed the obligation to prevent forced assimilation.[80]

Most Indigenous people voted "Yes", even if they felt that the Voice delivered too little. It is important to remember that a liberal democracy, as opposed to mere majoritarian rule, is a key value of this society, and it would not bode well to disregard the wishes of the majority of Indigenous voters. The desire for self-determination and treaty are strong. The nation as a polity should be careful to work through lawful options and to ensure that Indigenous people are consulted so that equitable solutions result for all.[81]

Some possibilities for the future

A question that should expressly be considered is what the nation now expects from reconciliation. If, as Professor Langton said, reconciliation as we know it is "dead",[82] what would help to restore good faith interactions for the future?

What is arguably at the centre of the Aboriginal ethic and claims is a notion of "caring for country".[83] In Aboriginal ontology "Country" is geographically well-defined. It encompasses

76 Thomson Reuters, "Navalny's widow urges Russians to fight 'to get our country back' ", *CBC* (online, 19 February 2024) <https://www.cbc.ca/news/world/navalny-death-aftermath-1.7119320>.
77 But see McIlroy, "Colonisation had 'a positive impact': Jacinta Price" (n 56); Gardiner (n 62); Ali (n 62); Butler, "Dutton apologises for boycotting Rudd's apology to stolen generations" (n 63).
78 *Murray Islands Case* (n 56) 109 (Deane and Gaudron JJ).
79 *UNDRIP* (n 16) arts 8(1), 8(2)(d); Australia has endorsed the obligation to prevent forced assimilation.
80 Ibid art 8(2)(d).
81 See *UNDRIP* (n 16) art 10 generally on the notion of consultation broadly equated with "free, prior, and informed consent"; see also n 48 above.
82 Marcia Langton, "Whatever the outcome, reconciliation is dead", *The Saturday Paper* (online, 14 October 2023) <https://www.thesaturdaypaper.com.au/news/indigenous-affairs/2023/10/14/marcia-langton-whatever-the-outcome-reconciliation-dead>.
83 Bawaka Country et al, "Caring as Country: singing up sovereignties" in Nicole Graham, Margaret Davies and Lee Godden (eds), *The Routledge Handbook of Property, Law and Society* (Routledge, 2022).

linguistic, spiritual and culturally established entities with defined borders and clear responsibilities based on local knowledges. These knowledges relate to the flora, fauna, seasons and other systems such as country that burns, rainforest or wet-country, sea, riverine or desert. Each of these areas of specialist knowledge are deeply possessed by the law men and women of that country. Homogenisation of cultures, although politically convenient, is not a sensible way of managing such a biologically mega-diverse continent.

A means to achieving “care for country”, in practice, is to devolve a level of power-sharing to allow for fair, reasonable, effective and honourable transformational change. The practical question is: how to identify reasonable possibilities collectively, to get the nation there? Thus, some non-exhaustive, possible options are examined below.

While reconsidering a Voice might appear unwise given the recent Referendum loss, it is perhaps best to discuss it first. A narrow interpretation of the Referendum loss could just mean that the majority oppose constitutional entrenchment and prefer solutions to Indigenous issues, including a Voice, to be legislated. Speculation on broader views of the loss appear counterproductive and are not explicitly explored in this article.

A legislated Voice with the implementation of UNDRIP

Legislation is flexible and provides for prospective exigencies. The Opposition’s policy for a legislated Voice is still in play.[84] However, the Opposition’s support for truth-telling and treaty appears highly unlikely.[85] It is unlikely that Labor or the Greens would oppose a statutory Voice. A legislated Voice, if framed with a similar structure, scope, and power to the 2023 Referendum Voice (the Calma–Langton model), could examine legislation or audit government programs affecting Indigenous communities.

There are differences between the various legislated Voice models, including those centred around the Calma–Langton model.[86] Broader critique, including issues raised by the progressive “No” camp, would still apply to a legislated model, but clearly subject to its specific legislative content. However, as a non-entrenched body, a legislated Voice is susceptible to abolition, as was the case with the statutory Aboriginal and Torres Strait Islander Commission (ATSIC).[87]

If a future government is to legislate a Voice, there is merit in simultaneously incorporating *UNDRIP* into domestic law. This would help ease and dispel unfounded fears that the Voice would create “special” rights for Indigenous people.[88]

84 See Morse and Worthington (n 29); Butler, “Peter Dutton and the Voice: what the Liberal party has got wrong about Indigenous recognition” (n 29).

85 Tom Crowley, “PM discards commitment to set up Makarrata body despite millions in funding”, *ABC News* (online, 4 August 2024) <https://www.abc.net.au/news/2024-08-04/pm-discards-commitment-to-set-up-makarrata-body/104181696>.

86 Calma and Langton (n 8).

87 “Amanda Vanstone ATSIC”, *ABC News* (Correction, online, 22 August 2018) <https://www.abc.net.au/news/corrections/2018-08-22/amanda-vanstone-atsic/10152046>.

88 It is noted here that Indigenous people seeking equality, in the meaning of *UNDRIP*, is not a special right. A precondition for the rescission of the race power should not be seen as an extraordinary concession to Indigenous people but rather the rectification of an anomaly in the *Constitution*, one for which Indigenous people should not be blamed. *UNDRIP* does not create special rights for Indigenous people: *UNDRIP* (n 16) Preamble.

A legislated Voice together with *UNDRIP* would also help to develop gradually the notion of self-determination under the current constitutional arrangements. It would simultaneously create some opposable rights for Indigenous people, including equality with others.[89] Although the previous Bill to incorporate *UNDRIP* was unsuccessful,[90] the notion of racial equality has multi-party support in principle. Contrary to *UNDRIP*, the *Constitution* entrenches this anachronistic head of power, the legacy of a bygone area, granting contemporary Parliament a power that allows it to treat Indigenous peoples differently.[91]

Constitutionally entrenched recognition and racial equality

Constitutional recognition has multi-party support. Some have criticised constitutional recognition as being purely symbolic. Perhaps, though, symbolism is worth pursing, as it can certainly go beyond mere symbolism, and can be productive, if built upon in a sensible, careful way.[92] Constitutional recognition perfects legislative recognition,[93] and without overstating the point, protects against change by a future Parliament.

Mere recognition is clearly less useful and without more will do little to alleviate the current situation.[94] Recognition, however, still allows future generations to make progress where current generations have failed. On one hand, time helps to dispel irrational and overstated fears; on the other, Indigenous invisibility and misery continue[95] and time is clearly of the essence. Native title under the common law is a poignant example of the fact that mere recognition (in this case of a property right) does not necessarily create beneficial outcomes that reconcile ongoing injustice.[96]

Entrenched recognition by Australia, a UN member state, results in mutual recognition. It provides the strongest recognition that is possible under the current domestic system, and thus arguably includes the recognition of Indigenous legal personality.[97]

89 Asmi Wood, “Constitutional recognition and racial equality” in Jennifer Nielsen, Simon Young and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia* (Federation Press, 2016) 103.

90 Human Rights (Parliamentary Scrutiny) Amendment (Consideration of UNDRIP) Bill 2023 (Cth). The practical impact of this Bill (if passed into law) is that the Parliamentary Joint Committee on Human Rights may, in the course of the committee’s examination of Bills, legislative instruments, Acts and other inquiries, consider and report on the rights and freedoms outlined in an eighth international instrument, the *UNDRIP* (n 16).

91 *Australian Constitution* s 51(xxvi); *Hindmarsh Island Bridge Case* (n 40).

92 Asmi Wood, “Constitutional reform: what are we trying to achieve?” (2012) 37(3) *Alternative Law Journal* 156, 160; Asmi Wood, “Constitutional recognition: a case for less is more” in Marcia Langton and Megan Davis (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 104.

93 *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).

94 Asmi Wood and Christie Gardiner, “Identifying a legal framework for a treaty between Australia’s First Peoples and others” in Diane Smith et al (eds), *Developing Governance and Governing Development: International Case Studies of Indigenous Futures* (Rowman and Littlefield, 2021).

95 Asmi Wood, “The confluence of two rivers: constitutional recognition of Australia’s First Peoples” in Kelli Te Maiharoa, Heather Devere and John Synott (eds), *Peacebuilding and the Rights of Indigenous Peoples: Experiences and Strategies for the 21st Century* (Springer Press, 2017) 89.

96 See discussion on truth-telling with respect to native title below.

97 *Two Hundred Years Later Report* (n 54) 32 [3.3]. Note that this is precisely the fear expressed by the public sector and the Senate Committee with respect to this point; see discussion below under the heading “Treaties”.

Constitutional recognition provides a *stable* legal basis for developing lawful, future solutions based on agreement-making, including treaty. Mutual recognition is a basis for giving effect to democratic internal self-determination of self-identifying communities.[98] Recognition provides a solid legal basis — not based on, for example, the Corporations Law[99] — for establishing, refining and extending[100] law-based governance frameworks for Indigenous communities, and in time, to reap its downstream benefits.

When discussing constitutional reform and recognition, it is also important to consider the importance of achieving racial equality through the rescission of the races power.[101] The race power entrenches racial inequality.[102] Some, such as the Expert Panel on Constitutional Recognition for Indigenous Australians,[103] did not advocate for its rescission, but that view is not supported here.[104] The majority of voters today are likely to support racial equality at all levels, including through the rescission of the race power.[105] The power has been used *only* against Indigenous people[106] and this has excluded its positive application for the "inferior races" for whom the power was originally intended.[107]

Recognition is an internal issue for Australian law. Indigenous views on their own existence and ontologies have been consistently advocated since the continent was claimed by the British Crown. Indigenous people have always known this for themselves and have asserted sovereignty, even as against the legal fictions that have asserted otherwise.[108] Recognition has, and would, however, help to provide a sound stable legal basis to reset relations and to begin anew on a more honourable, domestically stable, legal footing.

98 *UNDRIP* (n 16) arts 3, 4.

99 For example, as was the now defunct National Congress of Australia's First Peoples which operated from 2009 to 2019.

100 *Native Title Act 1993* (Cth) ss 203BC(2), 251A(1); broadly approximating *Aboriginal Land Rights (NT) Act 1976* (Cth) s 77A.

101 Wood, "Constitutional recognition and racial equality" (n 89); Wood and Gardiner (n 94); *Australian Constitution* s 51(xxvi).

102 This conclusion fits in with the intention of the Founding Fathers who specifically refused to introduce the US 14th amendment's intent into the *Australian Constitution*: see Quick and Garran (n 11) 622.

103 Patrick Dodson and Mark Leibler, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Report, January 2012).

104 Wood, "Constitutional recognition and racial equality" (n 89). This chapter argues that any special legislation required (the key reason for the Expert Panel seeking to retain the race power or a power with similar reach but limited to "beneficial" acts only by the Parliament) can be achieved under the "special measures" provisions in the *Racial Discrimination Act 1975* (Cth).

105 *Australian Constitution* 51(xxvi).

106 Chief Justice Robert French, "The race power: a constitutional chimera" in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180, 180. In practice — for example, the Northern Territory Intervention — where the operation of the legislated Racial Discrimination Act *1975* (Cth) was suspended, this allows the Parliament to legislate adversely with respect to Indigenous people under its races head of power in s 51(xxvi). The specific and full discussion of this issue, while clearly important and broad, is outside the scope of the present article. See Wood, "Constitutional reform: what are we trying to achieve?" (n 92) 160.

107 Quick and Garran (n 11) 622.

108 Asmi Wood, "Unmasking Indigenous invisibility: reforming and decolonising the pedagogy of terra nullius" in Ntina Tzouvala, Foluke Adebisi and Suhraiya Jivraj (eds), *Decolonising Legal Pedagogy* (Routledge, 2023) 149.

Treaties

Treaty[109] is Indigenous peoples' preferred form for agreement-making.[110] Treaty generally is a matter for relations between peoples, and today is a matter for international law,[111] a position accepted in Australia.[112] Treaties are regulated by the *Vienna Convention on the Law of Treaties*[113] a convention to which Australia is party, and incorporate customary obligations which are binding in the international plane.[114]

The Australian public sector's cautionary note relates to the international implications and consequences of the use of the term "treaty" for agreements, a position re-iterated by the Joint Standing Committee on Treaties. However, the Parliamentary Standing Committee on Legal and Constitutional Affairs (PSCLCA) noted in 1983:

> In fact, in discussions of the subject [with Indigenous peoples], "treaty" is probably *the word with the widest currency*. The Commonwealth Government, however, notified the NAC [National Aboriginal Conference] through the Minister for Aboriginal Affairs in March 1981 that "*the Government cannot legitimately negotiate anything which might be regarded as a 'treaty', implying as it does an internationally recognised agreement between two nations*."[115]

The PSCLCA discussed the advantages and disadvantages of several treaty models for agreements between Indigenous and non-Indigenous peoples in some detail, which are not re-examined here.[116]

Notwithstanding the PSCLCA's advice to the contrary,[117] during the Australian Bicentennial in 1988 then Prime Minister Bob Hawke publicly announced that Australia *would* enter into treaty with Aboriginal peoples. At international law, unilateral undertakings given by a prime minister in their official capacity are binding.[118]

But in 2000, then Prime Minister John Howard stated on radio that he was opposed to the idea of a nation entering into "a treaty with itself".[119] However, this statement was not made

109 "Treaty" when used in the singular for stylistic reasons should be read as including the plural.

110 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Treaty: Let's Get It Right* (Aboriginal Studies Press, 2003).

111 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*VCLT*). Article 2(a) provides that "treaty" means "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

112 *Two Hundred Years Later Report* (n 54) 31 [3.2].

113 It is noted that the *VCLT* (n 111) as framed only operates between nation-states. It is also noted that Indigenous people may not be able to rely on art 53 as a rule of customary law, as this article was adopted with some opposition by states (72 votes in favour, 3 against and 18 abstentions). Australia acceded to this instrument on 13 June 1974; how this position has changed in time is not examined here.

114 *VCLT* (n 111) art 26.

115 *Two Hundred Years Later Report* (n 54) 20–1 [2.31] (emphasis added).

116 Ibid 29 [B.2].

117 Ibid 17 [2.23].

118 *Legal Status of Eastern Greenland (Norway v Denmark)* [1933] PCIJ (ser A/B) No 53, 71.

119 Interview with John Howard (John Laws, 2UE Radio, 29 May 2000) <https://pmtranscripts.pmc.gov.au/release/transcript-22788>.

in his position as a head of government and, more importantly, did not explicitly rescind Mr Hawke's undertaking.[120]

In any event, the current Prime Minister Anthony Albanese has committed to treaty, a commitment reiterated by senior government ministers and officials responsible for the execution of matters of state. As a legal matter, the Chief Justice of the High Court in 2009, Robert French, stated extra-curially that treaty between the government and Indigenous people *was* possible.[121]

Domestic law treaty frameworks

Agreements between Indigenous peoples, including with the Commonwealth, states and territories as stakeholders, could serve as a useful starting point in this context. Generally, domestic treaty models can include (a) contract-like agreements; (b) agreements based on Indigenous Land Use Agreements (ILUAs)[122] under the *Native Title Act 1993* (Cth) or (c) treaties backed by state or territory legislation. All these models have their own strengths and limits. For example, contract-like agreements are limited by the rule against perpetuity and privity issues, while ILUAS are, among other shortcomings of the *Native Title Act*, circumscribed by limits as prescribed in this Act. Statute privileges the state party with the unilateral power to amend or rescind legislation underpinning treaty or agreements.

There are localised treaty processes currently in train around the country, within state and territory jurisdictions. They are at various levels of development — not examined here — but do provide some benefits such as the building of experience and capacity, as an *interim* measure. They also provide an opportunity for the acquisition by Indigenous peoples of experience and expertise in the areas of governance and law.

State[123] (but differently with Territory[124]) legislation, including legislation enabling or incorporating domestic treaties, is subject to invalidation when inconsistent with federal legislation covering the field, an issue not examined here in detail, but which can be detrimental to Indigenous people. Treaties should be enduring agreements, but in Australia can be vitiated by a third party who is a stranger to the agreement (here, the Commonwealth Parliament). The PSCLCA recommended a cure to these problems,[125] briefly examined below.

The PSCLCA's solution for preventing the unilateral amendments to agreement by a single party was the inclusion in the *Constitution* of an enabling provision similar to s 105A, appropriately adapted for content.[126] It is both politically and legally a very significant change. Such properly framed, s 105A-like provisions would require the agreement of all

120 For a rebuttal of Mr Howard's position by former Chief Justice Robert French, see Joel Gibson, "Chief Justice backs Aboriginal treaty", *Sydney Morning Herald* (online, 28 March 2009) <https://www.smh.com.au/national/chief-justice-backs-aboriginal-treaty-20141112-9e79.html>.

121 Ibid.

122 See *Native Title Act 1993* (Cth) pt 2 div 3.

123 *Australian Constitution* s 109.

124 Ibid s 122.

125 *Two Hundred Years Later Report* (n 54).

126 Ibid 115 recommendation B.9.

parties for any alteration of said treaties and agreements.[127] Successful inclusion of such an appropriately adapted, mutually agreed upon provision in the *Constitution* would provide legal protection for all stakeholders, as it would be entrenched.

A domestic treaty would, however, require the federal and state governments to agree explicitly to this approach (before going to a referendum), as it will impact on subject-areas in which states have plenary power.[128] Such a framework, however, puts all parties (including Indigenous groups as parties to the instruments) on a more equal footing than the legislated frameworks alone. The disadvantage of this approach is that constitutional change is difficult to achieve, as demonstrated in the Voice Referendum — a modest change compared to this significant change suggested by the PSCLCA.[129]

Parliament, however, acknowledges that "successive governments have failed to reach a lasting and equitable agreement with Aboriginal and Torres Strait Islanders"[130] and suggests doing this including "by recognising international standards for the protection of universal human rights and fundamental freedoms [through, a named set of instruments]",[131] a commitment considered in the next section dealing with international legal frameworks. These named instruments are not comprehensive with respect to Indigenous issues.

Ensuring there are fair and equitable dispute-resolution forums is also fundamental in cases necessitating treaty- or agreement-interpretation generally, and is considered in the next section of this article.

Potential avenues for dispute resolution

The High Court is a skilled and useful forum to settle disputes arising under treaty, and the *Constitution* explicitly provides such jurisdiction,[132] although as used here, arguably, not exactly in accordance with the intention of the Founding Fathers. Clearly, total workload and practicalities of issues arising under the *Constitution*, and in cases related to treaty, would need to be addressed.

There would need to be a case-by-case option built into treaty agreements that allows the High Court to determine jurisdictional questions and empower it to remit issues for determination by state and territory Supreme Courts or the Federal Court. If dispute resolution is not achieved in domestic courts, Indigenous peoples should, by agreement with the state, have recourse to international dispute resolution. Access to international forums should not be precluded, but all these issues need to be explored carefully and studied for possible unforeseen outcomes, including enforcement-related responsibilities.

127 Ibid.
128 As suggested in the *Two Hundred Years Later Report* (n 54).
129 Ibid.
130 *Native Title Act 1993* (Cth) Preamble. Preambles can indicate aspirational aims but are limited in their legal effect when used to interpret provisions: *Wacando v Commonwealth* (1981) 148 CLR 1.
131 *Native Title Act 1993* (Cth) Preamble.
132 *Australian Constitution* s 71(i).

Treaty formation

Treaty formation should not be rushed; parties (particularly Indigenous people) should have both legal capacity through mutual recognition but also technical and financial capacity. Such capacity and general technical resources are not equally available to all Indigenous communities ultimately desiring treaty.

The treaty process is lengthy. In British Columbia it is said that the process took 22 and a half years on average for all sides to prepare for treaty. Communities should focus on quality and fairness. Communities should avoid succumbing to expediency or rush to treaty conclusion without first carefully considering the future effects on all people.

Some specific important issues for inclusion for Indigenous people under treaty are now considered.

Self-determination

Self-determination for Indigenous peoples, everywhere, is a matter of international concern.[133] The exact content of self-determination will need to be negotiated by the parties. Matters currently affecting Indigenous people under Australian domestic law include issues of race, equality and separate treatment at law,[134] which are potentially and relevantly matters of concern to the UN General Assembly.[135]

Australia is party to the *International Covenant on Civil and Political Rights* (*ICCPR*)[136] and has incorporated it into domestic legislation.[137] However, the nature of the right of metropolitan-colonial[138] Indigenous peoples to self-determination in *UNDRIP* was narrowed from the broader right of other peoples[139] within the meaning of the *ICCPR*. At minimum, self-determination is a right with a concomitant obligation *erga omnes* on all states.

The wording of the right to self-determination in *UNDRIP* is almost identical to that of the *ICCPR*. The context of the *UNDRIP* right to self-determination is circumscribed by art 46, which limits self-determination.[140] In this context, *UNDRIP* preserves “the territorial integrity

133 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2017] ICJ GL No 169 (*Chagos Archipelago Case*); *UNDRIP* (n 16) Preamble, arts 3–5, 7.

134 *Australian Constitution* s 51 (xxvi); *Hindmarsh Island Bridge Case* (n 40); *Northern Territory National Emergency Response Act 2007* (Cth).

135 *UNDRIP* (n 16) Preamble.

136 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*).

137 *Australian Human Rights Commission Act 1986* (Cth) s 3, which provides that the *ICCPR* (n 136) informs the content of a human right under Australian law. Article 1 of the *ICCPR* provides: “All people have a right of self-determination.”

138 Asmi Wood, “Voice, Treaty, Truth: Can we get to an affirmative 91.4 percent again?” (2022) (1) *Law Society Journal* 79, 84.

139 *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN Doc A/RES/2625 (24 October 1970).

140 Gudmundur Alfredson, “The right to self-determination and its many manifestations” in Ruth Thompson (ed), *The Rights of Indigenous Peoples in International Law* (University of Saskatchewan, 1987).

or political unity of sovereign and independent [Westphalian] States”,[141] here clearly including Australia.

That is, Australia, has a positive international obligation “to respect, to promote and exercise the right of [Indigenous peoples] to self-determination”[142] and importantly that such peoples are entitled to seek and receive support “in conformity with the provisions of the Charter”.[143]

Many Indigenous people advocate generally for the incorporation of *UNDRIP* as an aid to promoting equality, cultural and political rights.[144] Both parties — Government and Opposition — have, at various times, voted against its domestic incorporation.[145] They have other concerns with *UNDRIP*, which are primarily political rather than legal issues, not explored here.

For Indigenous people, self-determination will help ease “enforced dependency”,[146] promote agency (discussed below), and alleviate poverty and its associated ills such as high imprisonment rates, which include for failure to comply with administrative issues because summons or notices have not reached them.

Self-determination would allow services to be provided at a local community level in local languages. Having services delivered locally would address problems such as those alluded to above, including avoidable imprisonment that is a result of administrative failings and communication errors.

Self-determination would allow Australia’s most disadvantaged group[147] an opportunity to self-heal and recover from the devastating policies of the past and “fully entitle them to aspire”.[148] This is the right of all human beings, for the dignity that inheres in them by virtue of their humanity,[149] which for Indigenous peoples has been unjustly denied to them for so long.

Self-government and agency

A second important issue for Indigenous people under treaty is self-government.

As discussed in the next section, discrete geographical areas with significant Indigenous populations (Countries) could be granted a limited form of self-government, as prescribed in *UNDRIP*, as local government entities, which can be devolved under a legislative regime.

141 *UNDRIP* (n 16) art 46.
142 *ICCPR* (n 136) art 3; *UNDRIP* (n 16) art 3. This position is supported by the Productivity Commission Report (n 64).
143 *ICCPR* (n 136) art 3.
144 See reports on Closing the Gap targets discussed in the Productivity Commission Report (n 64).
145 See above n 90.
146 See Atkinson (n 38) 65, 67.
147 *Native Title Act 1993* (Cth) (n 55).
148 Ibid Preamble.
149 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948); *Native Title Act 1993* (Cth) Preamble.

If Aboriginal communities were allowed a limited degree of self-government, longer-term success could reasonably be expected.[150] Indigenous majority areas could, in time, become self-governing local government areas, funded as discussed by the PSCLCA with a share of federal taxes[151] — but this is an avenue of funding that does not fully free Indigenous people from enforced dependence.

The funding preference here, primarily, is for Indigenous self-financing using the so-called Indigenous estate as an economic base.[152] The Indigenous estate is an asset which currently is under-utilised and can be used for the economic development. It is unfortunately largely "locked up" under statute such as by the *Native Title Act*. Through agreement, it is a vast financial resource that can be used for development. The non-Indigenous majority's fear of Indigenous financial independence is acknowledged but the hypocrisy of opposition to such empowerment is also noted.

This solution is not to discount or reject resources that Indigenous people would receive either individually or collectively through existing financial agreements with various governments. Economically, self-government and, politically, self-determination are options likely to appear difficult to achieve but should not be dismissed without proper and careful analysis.

Governments of all shades have failed Indigenous people. They have also failed, and in cases prevented[153] Indigenous initiatives to manifest the dignity that inheres in them as sentient human persons. Indigenous people are also prevented and denied opportunities for development on their own terms.[154] If Indigenous people have agency in addressing their own problems within their communities, these problems are collectively likely to be resolved locally, as they have immediate impact.

Providing Indigenous people opportunities to create their own transformational change could be enabled at law. Indigenous forms of governance are significantly different from those of the non-Indigenous majority, as is recognised by the High Court[155] and in the *Native Title Act*.[156]

The realisation, however, of the importance of such elements such as care for Country to Indigenous wellbeing and development was recognised as far back as in 1976 when Mr Viner said:

> Most of us now appreciate more sensitively than in the past that traditional Aborigines think feel and act about land according to a plan of life a world apart from ours.[157]

150 See discussion below under heading "Co-locating local government boundaries and Indigenous Country's borders"; see also *UNDRIP* (n 16) Preamble.
151 *Two Hundred Years Later Report* (n 54).
152 Indigenous Land and Sea Corporation, *Unlocking the Indigenous Estate: Corporate Plan 2021–2022, Strategy to 2024* (Report, 2024).
153 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331.
154 Commonwealth, *Parliamentary Debates* (Ian Viner) (n 15).
155 *Love v Commonwealth* (2020) 270 CLR 152.
156 *Native Title Act 1993* (Cth) s 223.
157 Commonwealth, *Parliamentary Debates* (Ian Viner) (n 15).

Such recognition has not been followed by self-determination. At the same time, political means, often using the courts, have been used to frustrate Indigenous attempts at self-help, self-government or self-determination even at their own initiative and expense[158] — therefore highlighting the need for treaty.

Co-locating local government boundaries and Indigenous Country's borders in Indigenous majority areas

A third consideration important for Indigenous peoples when conducting treaty-making relates to the boundaries made by local governments and how these may be reimagined and redrawn to promote Indigenous self-government and self-determination.[159]

A modified local government scheme in Indigenous majority areas or regions[160] can set many Indigenous majority communities on the path to a limited form of self-determination and self-government.[161] For the broader nation, this scheme will allow local lands to be expertly managed by people with deep knowledge and caring for Country, and will improve ecological and tourism potential in many areas, and do so in a sustainable way.

Self-government will also put communities in a position that would allow local languages and customs to thrive while still broadly raising multi-lingual children, also speaking English and being integrated into the nation for most practical, including economic and trade, purposes. It will create local government–sized cantons with individuals of all races being protected by both domestic and international laws. Other possible benefits include local energy reliance on, say, solar micro-grids, which will help improve local economic opportunities; school attendance (by keeping schools open and cool/warm in all seasons); and promotion of local food and fibre production and export along traditional lines.

The legal obstacles for such a scheme should not be conflated with political obstacles which at first glance may appear to be insurmountable. Local government is a well-established and regulated institution in Australia and its adoption does not require constitutional change. For democracy to work for Indigenous communities, smaller cantons through re-aligned boundaries along Songlines appear to be a feasible solution.[162]

Smaller Indigenous communities could engage collectively, as set out in the *Native Title Act*, and enter into regional agreements.[163] The *Native Title Act* is a special measure aimed at improving Indigenous lives, including through the re-empowerment of communities through

158 *Koowarta v Bjelke-Petersen* (n 153).
159 This is a view supported by indigenous people overseas as well: Masaki Sashima, "Whose salmon? Ainu National lawsuit and international indigenous maritime rights"" (Press Conference, Foreign Correspondents Club of Japan, 29 May 2023); see *Sharing Story: Indigenous Struggles in the World: Report of the International Symposium* (Karinsha Publishers, 2023) 233.
160 *Native Title Act 1993* (Cth) Preamble.
161 Self-determination within the meaning of *UNDRIP* (n 16), being internal self-determination only: see art 46(1).
162 Note that many highways were built along the roads and tracks used by Indigenous peoples for centuries so this issue is not as difficult as might appear at first glance.
163 *Native Title Act 1993* (Cth) Preamble.

traditional laws and customs.[164] The *Native Title Act* can also help smaller communities to form regional groupings which will empower smaller local communities to self-govern.

For those concerned, all local government areas are still ultimately subject to state and federal jurisdiction, and will maintain Australia's territorial integrity.[165] This approach to Indigenous local governance simply enables Indigenous people to enjoy the rights contained in the *UNDRIP*, rights other people already take for granted.

In addition to the many obvious self-determination benefits that arise from self-government, it also has financial appeal. Significant resources are expended on Indigenous affairs.[166] The poor outcomes highlighted by the Productivity Commission[167] show a need for better financial analysis, particularly as to why so little actually reaches Indigenous communities. Self-government with strong accountability measures would be a more effective way to expend limited resources and would almost certainly provide better results than appears currently the case.[168]

Truth-telling

Truth-telling with respect to the history of contact, and as currently perceived by non-Indigenous communities, paradoxically appears to be uncontentious.[169] However, as with the initial support for the Voice, support for truth-telling might moderate[170] as significant legal consequences that flow become evident, or alternately, through the damaging intervention of partisan party politics.

Information flow, in both (a) truth-telling and (b) the content of truth told, must be handled in a way that permits voters of various baseline knowledges to (i) digest the content as well as (ii) the consequences (legal and otherwise) that can flow from the facts that will emerge during the process. Experience shows that rushed processes are unlikely to yield constructive results.

Truth-telling is not a novel concept. In Australia so far truth-telling has been ad hoc, done on the initiative of a few people, including in the law and the academy. Instances of truth-telling in the past include the High Court's denial of the application of the doctrines of "discovery" of the continent, which lawfully permitted British "settlement" of a "practically unoccupied"[171] parcel of land. The denial of the application of these doctrines to the continent sets an important precedent.[172] This denial did not, however, entirely reject the consequences of the well-established legal fiction that Australia was "settled" by the British[173] but nonetheless

164 Ibid s 223.
165 *UNDRIP* (n 16) art 46(1).
166 See Biddle (n 67).
167 See Productivity Commission Report (n 64).
168 Ibid.
169 After the Referendum, polling found more than 80% of voters support a truth-telling process: Nicholas (n 61).
170 See Crowe (n 9).
171 *Cooper v Stuart* (1889) 14 App Cas 286, 291.
172 *Murray Islands Case* (n 56).
173 *Coe v Commonwealth* (1979) 53 ALJR 403, 408.

allowed the Court to adjudicate on the consequences that flow,[174] including from the myth of terra nullius.

Further, the legal effects of the denial of these legal fictions were ameliorated by the High Court[175] and the Parliament,[176] by legitimising all past discriminatory acts, deeming expropriating Indigenous lands as lawful, but contrary to *UNDRIP*,[177] through clearly discriminatory laws (which ultimately are legitimised by the race power).[178]

In 1992 then Prime Minister Paul Keatings's Redfern Speech is another example of truth-telling, which stands in juxtaposition to the coming into force of the *Native Title Act*.[179] He delivered his speech on the eve of the UN's International Year of the World's Indigenous Peoples in 1993. It was both symbolic and practical. His speech did not lead to flood of claims for reparation such as the reclaiming of people's backyards as was erroneously claimed.[180]

In 2007 then Prime Minister Kevin Rudd's apology to the so-called Stolen Generations is a further example of truth-telling. He apologised while simultaneously, but unnecessarily, denying any financial liability.[181]

In 2015 then Prime Minister Tony Abbott's clear, unambiguous rejection of the call by some communities for the simultaneous constitutional recognition of newer immigrant communities is another example of clear leadership and a calling out of diversionary tactics.[182]

Perhaps a practical way forward would be to promote truth-telling initially at a community level, based on some agreed grounds that prima facie would be productive. Such grounds could include (1) avoiding a deficit discourse model,[183] (2) using strength-based approaches to narrative, and (3) notwithstanding the above grounds, ensuring that accurate statistics and records are maintained so that progress, or otherwise, can be measured as objectively as possible. From there, local truth-telling outcomes can be collated into national compilations, where appropriate, by academics focusing on fact and minimising commentary.

174 *Murray Islands Case* (n 56).
175 The High Court did not found jurisdiction to examine the acquisition of the continent by the British Crown, which it stated was an act of state and thus an act the examination of which is outside the competence of a municipal court.
176 See, eg, *Native Title Act 1993* (Cth) pt 2 div 2B, ss 228, 229.
177 *UNDRIP* (n 16) art 8(2)(b).
178 *Australian Constitution* s 51(xxvi); Michael Mansell, "*Mabo* perspectives: The Aboriginal provisional government — the Court gives an inch but takes another mile" (1992) 1(57) *Aboriginal Law Bulletin* 4; *Native Title Act 1993* (Cth) pt 2 div 2B.
179 Paul Keating, "Redfern Speech" (Speech, Australian Launch of the International Year for the World's Indigenous People, Redfern Park, 10 December 1992).
180 RMIT ABC Fact Check, "Pauline Hanson says a lot of people have been dispossessed of their lands due to the *Mabo* decision. Is she correct?", *ABC News* (online, 29 August 2019) <https://www.abc.net.au/news/2019-08-29/fact-check-mabo-decision-high-court-dispossession-pauline-hanson/11342504>.
181 Barbara McMahon, "Australia's 'stolen' children get apology but no cash", *The Guardian* (online, 14 January 2008) <https://www.theguardian.com/world/2008/jan/13/australia.barbaramcmahon>.
182 Helen Davidson and Shalailah Medhora, "Tony Abbott rejects proposal to hold Indigenous conventions on recognition", *The Guardian* (online, 3 August 2015) <https://www.theguardian.com/australia-news/2015/aug/03/tony-abbott-rejects-proposal-to-hold-indigenous-conventions-on-recognition>.
183 Deficit discourse is one which determines who is seen to know and who is seen to lack knowledge (in an individual capacity), which in turn is attributed to a whole group in a crude manner, as individuals constructed by disadvantage.

If issues are likely to become contentious, then such contention is to be left to negotiation between the contending parties. However, contention alone should not act as a justification to prevent truth-telling from proceeding.

Law should assist truth-telling but should not be the driver of such processes other than in instances where it is the past laws themselves that are being examined. Compensation should not be denied in principle but truth-telling should not be held hostage to a threat of claims for damages especially in cases where people have passed on. Unless causal links can be established with living persons, “damages” can be paid into trusts to be used to promote education and research.

When conducting truth-telling, clearly all sides would need to make accommodations. However, the extent to which there is compromise should be balanced by the fact that Indigenous people have contributed more than their fair share to nation building.[184]

Treaties framework including international norms

For Indigenous people, the international gaze is likely to prove helpful for treaty-making, as highlighted previously by Mr Viner.[185] Although this approach is desirable, it is likely, initially, to prove unpopular with lawyers and unfortunately it allows foreign despots to grandstand at Australia’s expense.

The safest path to treaty arguably is to use established international legal frameworks within *domestically agreed* but not domestically mandated parameters. Clearly this is easier said than done but should not be discounted on such perceived difficulties alone.

At international law however, the Australian state’s claim to the acquisition of the continent is incomplete and imperfect.[186] It will, although less importantly as a practical issue, remain so at law until a lawful basis is identified. Through treaty, shared sovereignty can lawfully be established and show Australia’s evolution away from the legal fiction of “settled” colony to a state that is granted legitimacy through good faith negotiations and agreements.

The High Court has in the past avoided adjudicating on this fundamental issue of the acquisition of territory and the related issue of sovereignty, as matters outside its jurisdiction.[187] It has highlighted the Court’s limits. The Court has, however, as a matter of necessity, corrected the record while protecting, in the words of Brennan J, “the skeleton of the law that gives it its shape”[188] and it can continue to help reconciliation with the current legal system.

Conclusion

After the victory of the same-sex marriage plebiscite, the then Prime Minister Malcolm Turnbull characterised the 62% “Yes” to the 38% “No” result as being as “definitive as it

184 *Murray Islands Case* (n 56) 69 (Brennan J).
185 Commonwealth, *Parliamentary Debates* (n 15).
186 *Murray Islands Case* (n 56).
187 Ibid 2.
188 Ibid 29 (Brennan J).

was irreversible”.[189] There are clear legal differences between a plebiscite, where a simple majority prevails, and a referendum under the *Constitution*. However, for many Indigenous people the 61%:39% “No” Voice result felt equally definitive and irreversible. It is time, therefore, to broaden the scope of the search for solutions, moving beyond those requiring constitutional entrenchment or domestic options alone.

The Founders sought to conserve the best elements of the federation for posterity. Consequently a “Yes” case is harder to prosecute. Progress, however, is never inevitable at the best of times, but with Indigenous people being only 3% of the population and among the least understood people of the world, progress, unless actively sought and supported, is far from assured.

The Indigenous community, as represented by *their* votes at the Referendum, however, appear to support self-determination emphatically. For Indigenous peoples a form of self-determination leading to self-government, as equals and as part of the federation, is arguably the better approach to race relations and for the overall economic and social health of all peoples.

Local government is a well-established institution in Australia. Self-government at the local level does not require constitutional amendment. Parliaments and legislatures can effect these changes to local government to promote self-government in Indigenous majority areas subject perhaps to, say, a two-thirds acceptance by their legislatures.

Self-determination, or self-government, under *UNDRIP* is not a form of separatism. It is the better solution to Indigenous re-empowerment and calls for a more nuanced and varied examination. As good faith negotiation progresses, answers will be found somewhere along that broad left–right spectrum, and extremes by all segments of society will be reasonably avoided.

Under current domestic arrangements, Indigenous people are almost completely subject to the will of the majority of non-Indigenous people. Compliant Indigenous spokespeople are a convenient, and an effective but dishonourable, tool in imposing the will of the majority on Indigenous people. On a positive note, however, voters under 35 years appear to understand the importance of good race relations and this bodes well for the future. It is time for truth and truth-telling to prevail over falsehoods of all forms, including fictions in the law that render Indigenous people largely, and insidiously, invisible. The nation should aim for parity of participation in its broadest sense, and not merely the single dimension of percentages: coming together as equals should be the aspirational goal for all.

A successful past Prime Minister, John Howard, said that “[Australian] politics is governed by the laws of arithmetic”. The Referendum shows that the Government, the Opposition, and the non-Indigenous majority, as well as Indigenous people, are collectively still searching for the right formula. For Indigenous peoples, however, the moral of the story is that the sums, like mere majoritarian rule, do not add up!

189 Media report 2017 (text no longer available).

Self-determination and self-government across local government areas provides Indigenous peoples agency within a democratic regime, one that allows Indigenous people to address their own — not insignificant — problems and issues. So far, nobody else has had the knowledge or will, nor demonstrated the capacity, to achieve such an outcome. Time is of the essence: much — such as capacity building — has to be done but as Australia ponders, Indigenous children are dying or being removed from their families, including for the failure of the current polity to comprehend the difficulties even remotely. This must change and the majority of voters appear to agree strongly with this. Again, this bodes well for the future.

Outsourcing administrative functions — an ongoing and evolving challenge for administrative law

*Janina Boughey**

In 1998 the Administrative Review Council (ARC) examined and reported on the concerning tendency of government outsourcing to result in a loss of administrative law remedies.[1] The ARC's overarching message in that report was that

> the contracting out of government services should not result in a loss or diminution of government accountability or the ability of members of the public to seek redress where they have been affected by the actions of a contractor delivering a government service.[2]

In this article I argue that Australian governments and legislatures have not done nearly enough to address this issue. In the first section, I show that the diminution of administrative law rights and remedies as a result of government contracting remains a problem, albeit one which is difficult to quantify and which has evolved as governments work with the private sector in new ways. In the next section, I outline the steps Australian governments have taken to address the ARC's recommendations, and the extent to which administrative law remedies now extend to government contractors. I argue that many of the legislative attempts to extend administrative law rights and remedies to contractors are unsuccessful due either to fundamental flaws or to the fact that new forms of contracting fall outside of the legislative responses. In the final section, I make some suggestions for how Australian governments and legislatures could address these gaps in administrative justice.

The evolving challenge of outsourcing for administrative law

The ARC's 1998 report discussed the importance of administrative law rights and remedies — including access to information and reasons, internal review, and external review by the Ombudsman, a tribunal and the courts — as mechanisms through which individuals are able to hold governments to account, as well as mechanisms for promoting good administration.[3] The report explained how these rights and remedies were (at the time) lost or diminished when governments contracted out the delivery of services. In brief, at the time (and as I will explain in the next section, largely still) the jurisdiction of the Ombudsman, tribunals and courts, and the scope of the *Freedom of Information Act 1982* (Cth) were defined by reference to the decisions, actions and documents of government agencies. When governments used contractors to make decisions, these statutory rights to information and reasons, and to seek review, did not automatically apply.[4] Contract law remedies are also largely unhelpful as a substitute due to privity of contract.[5] The ARC noted that other remedies and accountability

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1 Administrative Review Council (ARC), *The Contracting Out of Government Services* (Report No 42, August 1998) ("1998 report").

2 Ibid vii.

3 Ibid 15–17.

4 Ibid 18–20.

5 Ibid 21–3.

mechanisms might apply to government contractors, but that these have limitations and are not a substitute for the type of accountability that administrative law mechanisms provide.[6]

The ARC's focus was on rights and remedies at the federal level. But its observations and recommendations apply equally to state and territory administrative law mechanisms which are, for the most part, the same as mechanisms at the federal level.[7]

As I argue in the next section, most of the gaps in administrative law's coverage of contractors have not been addressed, or not adequately addressed, in any Australian jurisdiction. This is not because government outsourcing has gone away and ceased to be an issue for administrative law. Far from it. Government outsourcing has continued: it represents a greater percentage of both GDP and total government expenditure than it did in 1998 when the ARC wrote its report.[8] Australian Government spending on procurement is among the highest among OECD countries.[9]

Of course, much government contracting is of limited concern to administrative lawyers. While *all* government contracts have public law implications due simply to the fact that they involve the spending of public money, *some* contractual arrangements are of more concern than others. As I alluded to above, the ARC's focus was on those government contracts which involved contractors in the making of government decisions, often via the delivery of services. An example which the ARC focused on, and which remains Commonwealth government policy and practice, is the outsourcing of employment services provision. Employment services providers have a compliance monitoring function, which means they have input into decision-making about the suspension of social security benefits. In contrast, administrative lawyers, and the ARC, are generally *less* concerned about contracts to procure goods for use by government, such as the many defence contracts purchasing military hardware. The ARC referred to those contracts with which administrative law is concerned as "contracting out", and those in which contractors simply supply goods or services to government without direct impacts on individual rights, entitlements and interests as "contracting in".[10] As I argue below, and elsewhere,[11] the particular distinction between "contracting in" and "contracting out", or "services to government" versus "services to the public", or "outsourcing" versus "procurement" contracts, is problematic and serves to hide administrative law issues in many forms of government contracting. Nevertheless, the point remains: a certain subset of government contracts, in which contractors are, in some way, involved in making decisions which impact on individuals' interests, raise particular and significant concerns for administrative law.

6 Ibid 23–6.

7 See generally Robin Creyke et al, *Control of Government Action: Text, Cases and Commentary* (6th ed, 2021, Lexis Nexis) chs 4, 5, 9.

8 Organisation for Economic Co-operation and Development (OECD), *Government at a Glance* (Report, OECD Publishing, 2023) 121 <https://www.oecd.org/en/publications/2023/06/government-at-a-glance-2023_da193b0d.html>.

9 Ibid.

10 ARC, 1998 report (n 1) 2.

11 Janina Boughey, "Administrative justice in the modern mixed administrative state: moving beyond taxonomies" (2024) 44(3) *Oxford Journal of Legal Studies* 591.

It is near impossible to quantify or map the full extent of the particular kind of government outsourcing that most concerns administrative lawyers, for at least two reasons. First, it is difficult to delineate those contracts which involve the private sector in administering the law, and those which do not. And certain modern forms of government contracting make this delineation even more difficult. I demonstrate this below using the example of contracts to build and operate automated systems used in government decision-making. Second, even if it were relatively easy to identify which contracts are of concern to administrative law, it would be a difficult, perhaps impossible, task to identify all the government contracts in this category due to a lack of information about government contracts. While government agencies in most Australian jurisdictions are required to report regularly on contracts over a particular threshold,[12] the thresholds and reporting requirements vary considerably, making it difficult to obtain comprehensive data of procurement generally, let alone broken down by particular contract types.[13] In addition, very limited information is provided about the specific functions being performed by contractors after a tender process has closed.

Despite the barriers to identifying, and so quantifying and mapping, the government contracts of concern to administrative law, it is fair to assume that the category has increased in size and scope since the ARC's report, along with other kinds of government contracts. Australian governments rely on the private sector to perform an increasing range of tasks which impact on the interests of individuals. These include policing and law enforcement;[14] operating land title registries;[15] operating prisons and other detention facilities;[16] immigration services and compliance;[17] employment services and compliance;[18] complaints handling

12 See, eg, *Senate Procedural Order of Continuing Effect: Entity Contracts* (Senate Order of Continuing Effect No 13, 20 June 2001); NSW Government, *Register of Government Contracts* (Web page) <https://www.nsw.gov.au/departments-and-agencies/customer-service/access-to-information/register-of-government-contracts>; Department of Treasury and Finance (Vic), "Publishing details of procurements undertaken (Public Construction — Guidance 5.2)" (Guidelines, 1 July 2021) <https://www.dtf.vic.gov.au/practitioners-toolkit-guidance-public-construction-procurement/publishing-details-procurements-undertaken-public-construction-guidance-52>; Queensland Government, *Procurement Guidelines: Contract Disclosure* (Guidelines, April 2024) <https://www.forgov.qld.gov.au/__data/assets/pdf_file/0021/183630/procurementguidecontractdisclosure.pdf>; South Australian Government, *SA Tenders and Contracts* (Web page) <https://www.tenders.sa.gov.au/contract/buyerIndex>; Tasmanian Government, *Tasmanian Government Tenders* (Web page) <https://www.tenders.tas.gov.au/>.

13 Jim Stanford, *Raising the Bar: How Government Can Use Its Economic Leverage to Lift Labour Standards Throughout the Economy* (Report, Australia Institute, May 2018) 31–2 <https://australiainstitute.org.au/wp-content/uploads/2020/12/Raising_the_Bar_Formatted_Final_0.pdf>.

14 Penny Timms and Johanna McDiarmid, "Alleged Darwin gunman was wearing an electronic monitoring device. How do they work?", *ABC News* (online, 25 February 2022) <https://www.abc.net.au/news/2019-06-06/darwin-shooting-are-electronic-monitoring-devices-reliable/11182750>; Kristen Rundle, "Orphaned responsibility: contracting out the duties of government" (2021) 73 *Griffith Review* <www.griffithreview.com/articles/orphaned-responsibility/>; South Australia Police, "Police Security Services Branch Outsourcing of Security Service" (Tender SAPOL053810, September 2023) <https://www.tenders.sa.gov.au/tender/view?id=257020>.

15 NSW Land Registry Services, "About us" (Web page) <www.nswlrs.com.au/About-Us>.

16 Jane Andrew, Max Baker and Phillip Roberts, *Prison Privatisation in Australia: The State of the Nation* (Report, University of Sydney Business School, 2016) <https://www.pc.gov.au/__data/assets/pdf_file/0020/204266/sub140-human-services-identifying-reform-attachment3.pdf>.

17 Anthea Vogl, "Outsourcing deterrence: the humanitarian border, asylum seekers, and non-government organisations in Australia" in Mary Bosworth and Lucia Zender (eds), *Privatising Border Control: Law at the Limits of the Sovereign State* (Oxford University Press, 2022) ch 10.

18 "Providers", *Workforce Australia* (Web page) <https://www.workforceaustralia.gov.au/individuals/coaching/providers/>.

and review functions;[19] providing input on particular areas of decision-making such as trade marks;[20] social housing;[21] and designing automated decision-making systems.[22]

The ways governments work with and engage the private sector in administrative decision-making vary considerably. And different contractual arrangements will have different implications for administrative law. The administrative law challenges of government outsourcing have not only persisted, but have also evolved and become more complex and difficult to identify. Many of these modern outsourcing arrangements are complex, involving the private sector in parts of decision-making and administration, layers of sub-contractors, and different levels of government input and oversight.[23]

In some schemes, governments remain responsible for the final decision and statutory schemes establish robust administrative accountability regimes, so that the key administrative law implications of outsourcing centre on the transparency of the contractors' decisions and so whether they can in practice be questioned in administrative review or complaints processes. In other outsourcing arrangements, the private sector may be heavily involved in interpreting legislation and applying it to individual circumstances, so that there is a need for robust scrutiny and review mechanisms to ensure outsourced decisions are made in accordance with principles of good administration. Some of these modern government contracts seem to have made it difficult for governments to identify that there are administrative law issues involved.[24] Three examples illustrate these points.

Outsourced decision-making example 1: expert input into decision-making

The first is a current (at the time of writing) proposal by IP Australia to set up an Indigenous Knowledge Panel. The Panel will provide advice to IP Australia to assist IP Australia to perform the latter's regulatory and decision-making functions. The Panel's proposed functions include:

- assisting to develop, deliver and implement processes and policies related to Indigenous Knowledge
- providing advice and making recommendations for consideration on policy and legislative matters relating to Indigenous Knowledge in the context of IP
- participating in assessments and providing advice on applications relating to Intellectual Property Rights applications that contain, or appear to contain, Indigenous Knowledge
- assisting to promote awareness and understanding of Indigenous Knowledge as it relates to Intellectual Property Rights.[25]

19 Victorian Ombudsman, *Outsourcing of Parking Fine Internal Reviews — A Follow-up Report* (Report, 17 March 2021) <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/outsourcing-of-parking-fine-internal-reviews-a-follow-up-report/#full-report>.

20 "Indigenous Knowledge Panel pilot", *IP Australia* (Web page, 2024) <https://consultation.ipaustralia.gov.au/communication/ikpanel/>.

21 "Community housing", *Housing Victoria* (Web page, 19 June 2024) <https://www.housing.vic.gov.au/community-housing>.

22 See generally Lyria Bennett Moses, Janina Boughey and Lisa Burton Crawford, "Laws for machines and machine-made laws" in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 232.

23 See, eg, Jerry Mashaw's analysis of social security outsourcing in the United States, which resonates in the Australian context: Jerry L Mashaw, "Accountability and institutional design: some thoughts on the grammar of governance" in Michael Dowdle et al (eds), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 115, 139–51.

24 Janina Boughey, "Transparency in automated decision-making systems" [2023] April *Public Law* 206.

25 "Indigenous Knowledge Panel pilot" (n 20).

The third of these functions, in particular, will involve the Panel in administrative decision-making in the sense that it will have input into decisions affecting the interests, rights and entitlements of individuals and companies. IP Australia has made an approach to market for members of the Panel.[26] The tender documents make it clear that IP Australia remains the decision-maker, and that

> [t]he advice or recommendations of the Panel or its individual members are not binding on the Customer, the Commissioner of Patents, Registrar of Trade Marks, Registrar of Designs or Registrar of Plant Breeders Rights or their delegates, as applicable, but will be appropriately considered alongside all relevant matters in making a decision with respect to an application for an intellectual property right.[27]

This is just one example of a common way governments use contractors — to provide non-binding, expert advice. Other examples of this type of arrangement are the use of auditors to assess whether companies are complying with financial requirements under regulatory frameworks such as those regulating insurers, and the use of medical experts in assessing a person's level of disability to determine eligibility for social security benefits. It is entirely appropriate for governments to rely on the private sector for these types of expertise. Governments cannot possibly hold all the relevant expertise which they need to consult in decision-making, and consultation improves both the quality and democratic legitimacy of administrative decision-making.

The use of private sector expertise by governments takes different forms. In some schemes the role of the independent expert is set out in legislation.[28] In many others, including the proposed Indigenous Knowledge Panel, there is no express statutory source for the private sector's input into decision-making (or at least not yet[29]). However, what these schemes which use expert advisers have in common is that the relevant government authority remains legally responsible for the decision. While expert advice may be highly persuasive, the decision is still ultimately that of the agency, as the IP Australia tender documents make clear. This means, from an administrative law perspective, that the main implications of these kinds of outsourcing arrangements are access to information and transparency about the private sector's input. Given that the government agency retains legal responsibility for decision-making, there can be no question that judicial review is available. Internal and external merits review of the agency decision will be available if provided for by the statute. And ombudsmen will have complaints jurisdiction. However, the effectiveness of all of these administrative accountability mechanisms will depend on the quality of information provided to those affected by administrative decisions about the private-sector expert's advice. Administrative accountability bodies can only determine whether a decision was lawful, correct and in accordance with best practice, if they can understand the basis of the private sector's advice that fed into the decision.

26 Documents retrieved from AusTender, 7 July 2024.

27 Commonwealth Government, Approach to Market to Establish Contract for Indigenous Knowledge Panel Pilot — Committee Member Services, Reference ID: C2023/10183.

28 See, eg, *Guardianship and Administration Act 1990* (WA) s 110ZR; *Motor Accidents Compensation Act 1999* (NSW) s 177.

29 I understand that IP Australia is proposing to give the Indigenous Knowledge Panel's functions a statutory basis.

Outsourced decision-making example 2: automated decision-making systems

A second example of the ways in which governments outsource decision-making functions to the private sector is the building and operation of automated decision-making systems. I have examined the administrative law implications of these kinds of government contracts at length elsewhere,[30] so will only summarise them briefly here. Governments frequently, and understandably, rely on the private sector to build and operate IT systems which either make, or assist in the making of, administrative decisions. This type of contract means that the private sector is involved in interpreting legislation and in determining how it applies. Frequently, contractors retain some degree of ownership of the system as it operates and so are, in effect, responsible for the "decisions" it makes. Other scholars have explored the significant challenges that automated decision-making systems pose for administrative law,[31] and I have shown that these accountability and transparency challenges are compounded when the private sector builds and owns the details of how these systems operate. In essence, in addition to the inherent challenges of lawyers, administrative accountability bodies and affected individuals attempting to understand the "reasons" for automated administrative decisions, governments have often refused to release information about how these systems operate on the basis that the information is commercial in confidence. This makes appeal or review of the decision impossible.

O'Brien v Secretary, Department of Communities and Justice, a 2022 NSW Civil and Administrative Tribunal (NCAT) decision, exemplifies this challenge.[32] That case involved Ms O'Brien seeking information about how the NSW Department of Justice had calculated her private rental subsidy, in order to understand whether it had been calculated correctly. Private rental subsidies are payments provided to persons with a disability who are eligible for, but have not been provided with, social housing. The amount of private rental subsidy is based on the average market rent in particular areas and the type of housing deemed appropriate for the applicant. The Department uses an automated system, built by a private company, Northgate, under contract, to calculate subsidies. There are no appeal avenues for decisions about the quantum of the subsidy.[33] These decisions are likely subject to judicial review, but that is not a realistic avenue for most people on low incomes.

Ms O'Brien sought information under freedom of information legislation about how her subsidy was calculated by the automated system and the Department refused to provide this information on the basis that it was commercial in confidence and held by Northgate. The NSW Information and Privacy Commissioner supported Ms O'Brien in her appeal to NCAT of the decision to refuse her request for information. NCAT decided in favour of the Department.

30 See Boughey, "Transparency" (n 24); Janina Boughey, "Outsourcing automation: locking the 'Black Box' inside a safe" in Boughey and Miller (eds) (n 22) ch 8.

31 See, eg, Yee-Fui Ng et al, "Revitalising public law in a technological era: rights, transparency and administrative justice" (2020) 43(3) *University of New South Wales Law Journal* 1041; Anna Huggins, "Addressing disconnection: automated decision-making, administrative law and regulatory reform" (2021) 44(3) *University of New South Wales Law Journal* 1048; Katie Miller, "The application of administrative law principles to technology-assisted decision-making" (2016) 86 *AIAL Forum* 20.

32 *O'Brien v Secretary, Department of Communities and Justice* [2022] NSWCATAD 100.

33 Department of Communities and Justice (NSW), "Appeals policy", *Housing and Homelessness* (Web page, 22 July 2024) <https://www.facs.nsw.gov.au/housing/policies/appeals-policy>.

The central reason that Ms O’Brien’s application for information was denied was because the wording of the relevant freedom of information legislation covering information held by government contractors provides that

> [a]n agency that enters into a contract … with a private sector entity … *under which the contractor is to provide services to the public on behalf of the agency must* ensure that the contract provides for the agency to have an immediate right of access to [certain] information contained in records held by the contractor …[34]

The Department argued, and the Tribunal found, that in providing the automated system used in the decision-making, Northgate was not “providing services to the public on behalf of the agency”. Instead, the Tribunal characterised Northgate’s role in decision-making as providing software which allowed the Department “to fulfil its business functions” to provide services to the public.[35] In other words, the Government and Tribunal both failed to see the role the contractor played in administrative decision-making.

This is not an isolated example of this way of thinking about automated systems. For example, in a (now abandoned) proposal to engage the private sector to build an automated system for use in immigration decision-making, the Department of Home Affairs denied that the system had any impact on individual interests, categorising the system as merely a “workflow tool”.[36] As I have argued elsewhere at length, these examples highlight that new forms of outsourcing can make it difficult for governments to identify the administrative law implications of contracts. In the case of automated systems contracts, governments have tended to see these as “contracting in”, akin to the provision of computer hardware. However, they in fact involve both “contracting in” and “contracting out”: they confer aspects of decision-making functions on contractors.

Outsourced decision-making example 3: social service provision

A third example of how governments use the private sector in administrative decision-making is closer to that envisaged by the ARC’s 1998 report, and includes the modern iterations of outsourcing arrangements referred to in that report. There are myriad schemes in which governments engage the private sector to provide services directly to the public. They include the provision of employment services at the federal level, and community housing at the state level. Not all social service provision contracts involve contractors in decision-making. And those which do, involve contractors in different ways. But some schemes certainly do confer on the private sector powers to make decisions which directly impact on individual interests.

Perhaps the best-known example is the Commonwealth’s use of contractors to provide employment services to unemployed individuals in receipt of social security payments. This scheme has evolved multiple times since 1998, but continues to exist and has been

34 *Government Information Public Access Act 2009* (NSW) s 121 (emphasis added).

35 *O’Brien* (n 32) [64]–[66].

36 Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Impact of Changes to Service Delivery Models on the Administration and Running of Government Programs* (Report, February 2020) 20 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ServiceDelivery> (*Impact of Changes* parliamentary report).

the subject of some scholarly scrutiny.[37] It was also recently the subject of a major inquiry by the House of Representatives Select Committee on Workforce Australia Employment Services.[38] In its current "Workforce Australia" iteration, service providers make a range of decisions which directly impact individual interests, obligations and entitlements.

Individuals must agree to a "Job Plan" in order to receive certain social security payments. Job Plans are agreements to undertake specified activities, such as applying for jobs, accepting certain jobs, attending interviews and provider appointments, participating in training and obtaining certain qualifications.[39] For those individuals ineligible to self-manage their Job Plan, Workforce Australia service providers are responsible for developing Job Plans,[40] and for determining the activities individuals must do to meet their mutual obligation requirements by applying guidelines.[41] Service providers are also responsible for determining whether an individual has met the requirements of their Job Plan each reporting period.[42] If a service provider determines that an individual is not meeting the requirements of their Job Plan, they apply the "Targeted Compliance Framework"[43] — a complicated system in which individuals move between "zones" depending on their compliance and the number of "demerits" they have.[44] Service providers issue demerits to individuals for failing to meet Job Plan obligations, and once an individual has accumulated five demerits, they move to the "penalty zone". Subsequent failures to meet mutual obligation requirements result in payments automatically being suspended for one, two or four weeks. After the third suspension, an individual has to re-apply for payments.[45]

Technically only the agency which administers social security — Services Australia — is legally empowered to make decisions to pause or stop payments. However, decisions about whether a person has complied with their Job Plan obligations and to issue a demerit are determined by service providers without Services Australia involvement. Service providers are required to decide whether a person has a reasonable excuse for failing to meet their Job Plan requirements in deciding whether or not to issue a demerit. And when a service provider determines that a person does not have a reasonable excuse while in the penalty zone, suspension of their payment is automatic unless and until the individual takes action.[46]

37 See, eg, Peter Davidson, "Is this the end of the Job Network model?" (2022) 57(3) *Australian Journal of Social Sciences* 476; Rachel Harris, "Government accountability for outsourced employment services" (2007) 54 *AIAL Forum* 3; Kate Owens, "The Job Network: How legal and accountable are its (un)employment services?" (2001) 8 *Australian Journal of Administrative Law* 49, 56.

38 Parliament of Australia, House of Representatives Select Committee on Workforce Australia Employment Services, *Rebuilding Employment Services* (Report, November 2023) <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Former_Committees/Workforce_Australia_Employment_Services/WorkforceAustralia/Report> (Select Committee on Workforce Australia Employment Services Report).

39 Department of Employment and Workplace Relations (Cth), "Explainer — Workforce Australia and Points Based Activation System (PBAS)" *Newsroom* (online, 9 September 2022) <https://www.dewr.gov.au/newsroom/articles/explainer-workforce-australia>.

40 *Workforce Australia Services Deed of Standing Offer* (1 July 2023) cl 89.4I.

41 Ibid cl 100.

42 Ibid cl 89.4(i).

43 Ibid cl 89.4(j).

44 Workforce Australia, "Compliance, demerits and zones", *Obligations* (Web page) <https://www.workforceaustralia.gov.au/individuals/obligations/learn/dont-meet-your-obligations/compliance-demerits>.

45 Ibid.

46 Select Committee on Workforce Australia Employment Services Report (n 38) [1.35]–[1.36].

In short, under this scheme, service providers make a range of decisions which directly affect individuals' obligations and entitlements.[47]

The need for careful attention to the administrative law implications of outsourcing

These three examples of government outsourcing arrangements are just that — illustrations of the myriad different ways in which modern Australian governments engage the private sector in administrative decision-making. In some, such as the Workforce Australia program, contractors have a more obvious role in decision-making than in others, such as the delivery of automated decision-making systems. These examples do not purport to be anywhere close to exhaustive in representing the types of ways governments rely on outsourcing in decision-making. Rather, they simply seek to demonstrate how varied outsourcing arrangements are, and the fact that the different ways in which governments use contractors in administrative decision-making will have different administrative law implications. Furthermore, while certain arrangements may have commonalities (for instance, the use of contractors in the provision of social housing in different states, or the use of contractors to operate prisons in several states) each specific scheme or contract will be structured differently and so have different implications for administrative law. My point is simply that, in modern government outsourcing arrangements, administrative law is engaged in a range of ways, some of which are obscured by thinking about government contracting as "services to" either government or the public.

As a consequence, careful attention must be given to how to ensure administrative justice in each government outsourcing arrangement. There can be no "one size fits all" approach. Attention must be paid to ensuring that the administrative law issues involved in each arrangement are properly identified, as well as to designing appropriate processes and oversight mechanisms to ensure that administrative justice is protected when governments rely on contractors in administrative decision-making. In the next section I examine how each jurisdiction has responded to the concerns raised more than 25 years ago by the ARC (and others) about government outsourcing. I show that the key legislation and processes designed to protect administrative justice in each Australian jurisdiction are inadequate when it comes to government outsourcing.

Governments' responses to the ARC's recommendations

The ARC's 1998 report recommended changes to federal legislation governing judicial review, freedom of information and the Ombudsman's jurisdiction to ensure that these accountability mechanisms extended to government contractors where appropriate.[48] It also recommended that merits review should extend to decisions made by contractors where those decisions would be reviewable if they were made by government.[49] In this section I outline the extent to which relevant legislation and policy in each Australian jurisdiction effectively extends these review rights to contractors.

47 See further Rick Morton, "Private companies halting welfare payments", *The Saturday Paper* (online, 21 October 2023) <https://www.thesaturdaypaper.com.au/news/politics/2023/10/21/exclusive-private-companies-halting-welfare-payments>.
48 ARC, 1998 report (n 1) recommendations 9, 10, 15, 16 and 22.
49 Ibid recommendation 20.

Statutory judicial review

The ARC recommended that the scope of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) be extended to administrative decisions made under non-statutory schemes or programs. No such amendment has been made to the *ADJR Act*. Nor have any state or territory legislatures amended their statutory judicial review schemes to extend to administrative decisions made by government contractors.

Section 4(b) of the *Judicial Review Act 1991* (Qld) provides that a decision for the purposes of that Act includes decisions made under a non-statutory scheme or program involving funds obtained through parliamentary appropriation. It has been suggested that this might extend the Act to decisions to, or under, contract.[50] However, the provision is expressly limited to decisions "made, or proposed to be made, by, or by an officer or employee of, the State or a State authority or local government", so the better view is that it does not.[51] And as (then) Justice Catherine Holmes has argued, "construction of s 4(b) has never got very far"[52] and the provision "has been a signal failure in the sense that no-one has ever made a successful application under it".[53]

The question of whether judicial review remedies at common law can apply to the private sector remains uncertain and likely turns on the particulars of each government outsourcing arrangement.[54] In short, there likely remain significant gaps in the scope of judicial review at both common law and under statute, when governments outsource decision-making functions.

There is some evidence that governments have, at times, sought to exploit this gap and deliberately used outsourcing as a method of avoiding judicial scrutiny of administrative decision-making. The best example was the Commonwealth Government's use of contractors to perform merits review of asylum-seeker decisions in the early 2000s. First instance decisions were made by departmental officials, but merits review of adverse decisions was outsourced under a non-statutory scheme. There were no statutory review rights following the contractor's decision. In a judicial review challenge to one of the contractor's decisions, the Commonwealth argued that, among other things, contractors were not "officers of the Commonwealth" which meant that their decisions were not subject to judicial review under s 75(v) of the *Constitution*.[55] The High Court did not answer the question of whether contractors could be "officers of the Commonwealth", as it found the contractor decisions were steps taken in the course of the Minister's exercise of statutory powers.[56] Hence the decisions were judicially reviewable.

50 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 28.
51 Justice Catherine Holmes, "Not making a difference: Queensland's extension of statutory review" (2016) 85 *AIAL Forum* 1, 7.
52 Ibid 7.
53 Ibid 1.
54 See generally Justice Emilios Kyrou, "Judicial Review and decisions of non-governmental bodies exercising governmental powers: is *Datafin* part of Australian law?" (2012) 86 *Australian Law Journal* 20.
55 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.
56 Ibid 350 [68]–[69].

Three Australian jurisdictions have enacted statutory human rights protection — the Australian Capital Territory, Victoria and Queensland. While these Acts aim to protect individual rights, not complaints about the unlawful actions of concern in judicial review proceedings, there is considerable overlap between the two areas of law when it comes to government decision-making.[57] Each of these human rights statutes requires government decision-makers to consider human rights in decision-making and act in a manner that is compatible with human rights.[58] In doing so, they are also likely to comply with many of their administrative justice obligations, including obligations to make decisions fairly and reasonably. It is therefore relevant for the purposes of this article that all three human rights statutes expressly extend their operation to at least some government contractors. All three do so by providing that bodies performing "public functions", whether under contract or otherwise, are public authorities for the purposes of the respective statute.[59] The ACT *Human Rights Act 2004* sets out several functions that are taken to be public, including the provision of public housing, public transport, public education and utilities services and the operation of correctional facilities.[60] The Victorian *Charter of Human Rights and Responsibilities Act 2006* relies on indicia and examples,[61] while the Queensland *Human Rights Act 2019* does not elaborate on what functions are public in nature.

While the express extension of these sub-national human rights Acts to at least some contractors is an advance on both the common law and statutory judicial review tests, there are significant flaws in the approaches these Acts take. The first is that the concept of "public functions" is unclear and deeply contestable. In case law it has proven to do nothing more than allow judges to make their own policy choice about what decisions should be subject to public law requirements and remedies.[62] Thus, for instance, the 2015 Review on the Operation of the Victorian *Charter* found that private community housing providers in Victoria remain unsure as to whether they are required to comply with the *Charter*'s human rights obligations.[63] The second significant challenge for the Victorian and Queensland Acts, which I have explored elsewhere, is the effect of their remedies clauses. Each requires that, in order to bring an action against a public authority (or functional public authority) for a human rights breach, an individual must be otherwise able to seek relief or remedy against the authority on the grounds that its actions were unlawful.[64] These confusing provisions mean that, in effect, the actions of a functional public authority must be subject to judicial review. The result is that, to whatever extent the Victorian and Queensland Acts *do* extend to contractors beyond the scope of common law judicial review, contractors' actions will

57 Janina Boughey, "The use of administrative law to enforce human rights" (2010) 17 *Australian Journal of Administrative Law* 25.

58 *Human Rights Act 2004* (ACT) s 40B(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1); *Human Rights Act 2019* (Qld) s 58(1).

59 *Human Rights Act 2004* (ACT) s 40(1)(g); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(b); *Human Rights Act 2019* (Qld) s 9(1)(h).

60 *Human Rights Act 2004* (ACT) s 40A(3).

61 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(2).

62 ACL Davies, *The Public Law of Government Contracts* (Oxford University Press, 2008) 245. See also Janina Boughey and Greg Weeks, "Officers of the Commonwealth in the private sector: can the High Court review outsourced exercises of power?" (2013) 36(1) *University of New South Wales Law Journal* 316, 331–6.

63 Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 58–62.

64 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39; *Human Rights Act 2019* (Qld) s 59.

only be remediable if they fall within the scope of judicial review of administrative action. Which brings us full circle back to the uncertain common law position of judicial review of government contractors.[65]

Ombudsmen

The ARC recommended that the Commonwealth Ombudsman's jurisdiction, with respect to both complaints and systemic issues, should extend to government contractors. Sections 3BA and 3(4B) were inserted into the *Ombudsman Act 1976* (Cth) in 2005,[66] and provide that the actions of "Commonwealth service providers" (those providing goods or services for or on behalf of the Commonwealth under contract) are taken to be actions taken by the contracting department or authority. In other words, the Ombudsman may investigate the actions of government contractors who fit this definition of providing services "for or on behalf of" the Commonwealth. Since 2005, the Ombudsman has undertaken investigations, written reports, and provided guidance on the actions of government contractors.[67]

Victoria, South Australia, Tasmania and the Northern Territory have conferred on their respective ombudsmen jurisdiction over government contractors. Each Act uses a different formulation to do so. The Victorian and Tasmanian legislation refer to the performance of public functions.[68] The South Australian legislation,[69] like the Commonwealth *Ombudsman Act*, applies to those contractors which provide services for or on behalf of government.

There are potential problems with both of these methods, which I have examined at length elsewhere.[70]

As I explained above, the concept of "public functions" is unclear and contestable. Thus, the Victorian Ombudsman has reported that there is "uncertainty" as to whether its jurisdiction extends to some community housing providers, and that this has resulted in the office receiving far fewer complaints about community housing (which is run by not-for-profits) than public housing (run by the State Government).[71] However the Victorian Ombudsman *has* investigated complaints and issues relating to other instances of outsourcing. For instance in 2020, the Ombudsman investigated the outsourcing by councils of internal review of parking

65 See Janina Boughey, "The scope and application of the Charters" in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights A Decade On* (Federation Press, 2017) ch 2.
66 By the *Migration and Ombudsman Legislation Amendment Act 2005* (Cth).
67 See, eg, Commonwealth Ombudsman, *Inquiry into the Impact of Changes to Service Delivery Models on the Administration and Running of Government Programs* (Submission to Senate Legal and Constitutional Affairs Committee, 28 August 2019) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0037/286939/Inquiry-into-the-impact-of-changes-to-service-delivery-models-Cth-Ombudsman-submission-29-Aug-2019-A1817670.pdf>; Commonwealth Ombudsman, *Complaint Handling: Outsourcing* (Fact sheet) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0027/287370/Complaint-handling-outsourcing.pdf>.
68 *Ombudsman Act 1978* (Tas) s 12; *Ombudsman Act 1973* (Vic) s 2(1).
69 *Ombudsman Act 1972* (SA) s 3.
70 Boughey, "Administrative justice" (n 11); Boughey, "Transparency" (n 24).
71 Victorian Ombudsman, *Investigation into Complaint Handling in the Victorian Social Housing Sector* (Report, July 2022) 7 <https://assets.ombudsman.vic.gov.au/assets/VO-PARLIAMENTARY-REPORT_Social-Housing_July-2022_Digital.pdf>.

fines, and expressed doubt as to the legality of the practice.[72] The practice of outsourcing review of fines has now ceased and affected fines have been refunded.[73]

Approaches which centre around the idea of “service provision” to the public, by contractors, have also proven problematic. As the NCAT decision in *O’Brien* highlights, these provisions entrench a view that contractors are *either* providing services *to government* (often called “procurement” or “contracting-in”) *or* providing services *on behalf of government to the public*, and that only the latter warrants public law accountability. This type of thinking is what led the Department of Home Affairs to overlook the fact that in building and operating an automated system used in decision-making, the contractor would be doing both. The contractor would be providing a “workflow tool” to the Department, but that workflow tool would be used to determine people’s rights and obligations under law.[74]

The Northern Territory’s ombudsman legislation takes the broadest approach, providing that

> administrative action of a public authority includes administrative action taken for, or in relation to or incidental to the performance of functions conferred on, the authority, by an entity that is not a public authority, including for example, by an entity under a contract.[75]

Not all of the ombudsmen clearly explain their jurisdiction over government contractors on their websites — only the Commonwealth and Victorian websites mention their jurisdiction over certain private-sector organisations. This might explain why there appear to be relatively few investigations by other ombudsmen into the actions of government contractors.

The legislation governing the ombudsmen in New South Wales, Western Australia and the ACT extend those bodies’ jurisdiction to a much more limited range of government contractors. The NSW Ombudsman has no general jurisdiction over contractors, but is expressly given power over those in certain sectors including community welfare service providers and private prisons.[76] The WA Parliamentary Commissioner has jurisdiction over custodial contractors, and may have jurisdiction over contractors if their powers are considered to be “delegated”.[77] However, the Commissioner’s website suggests that this jurisdiction is not generally used to inquire into the administrative actions of contractors.[78] The ACT Ombudsman’s jurisdiction extends to those given authority to act by government agencies, which has been used to investigate the actions of government contractors.[79]

72 Victorian Ombudsman, *Investigation into Three Councils’ Outsourcing of Parking Fine Internal Reviews* (Report, 25 February 2020) <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-three-councils-outsourcing-of-parking-fine-internal-reviews/#full-report>.

73 Victorian Ombudsman, *Parking Fines Follow-up Report* (n 19).

74 *Impact of Changes* parliamentary report (n 36) 20.

75 *Ombudsman Act 2009* (NT) s 6(2).

76 *Community Services (Complaints, Reviews and Monitoring) Act (No 2) 1993* (NSW).

77 *Parliamentary Commissioner Act 1971* (WA) s 4A(e).

78 Ombudsman Western Australia, “What you can complain about”, *How to Make a Complaint* (Web page) <https://www.ombudsman.wa.gov.au/Complaints/What.htm>.

79 *Ombudsman Act 1989* (ACT) s 3A(3); ACT Ombudsman, “Complaints and Inspections”, *ACT Ombudsman Annual Report 2007–08* (Web page) <https://www.ombudsman.act.gov.au/publications-and-news-pages/publication-pages/reports/annual-reports/annual-report-2007-08/complaints_1.html>.

Freedom of information

The ARC's 1998 report recommended that the *Freedom of Information Act 1982* (Cth) be amended to provide that documents in the possession of contractors relating to their performance of contractual obligations be deemed to be in the possession of the contracting agency, and to require contractors to provide these documents to the relevant agency.[80] Only the Northern Territory's freedom of information laws do this — s 5(7)(c) and (e) of the *Information Act 2002* (NT) provide that contract service providers and other persons who provide services to government organisations under contract are public sector organisations for the purposes of that Act.

Both the Commonwealth and NSW freedom of information acts require that government departments and agencies take contractual measures to ensure that contracting agencies have a right to information from service providers.[81] There are three major problems with this approach. The first is that, where agencies *do* comply with this requirement, contractual measures are not enforceable by members of the public affected by the contractor's decisions. Only the contracting agency has a right to information — not the member of the public who is seeking the information. Second, the duty to include in contracts a requirement that the agency has a right to information is itself not enforceable. And third, both provisions apply only to "service providers" — contracts under which the private or community sector directly provides a service to the public on behalf of government. As I explained above, the boundary between "service provision" contracts and procurement or contracting-in is blurry. Its use in these statutes has resulted in information held by contractors which should clearly be public, because it relates to the way laws are interpreted and administered being withheld from release.

The ACT's *Freedom of Information Act 2016* cures the second, but not the first and third, of these problems. It provides that agencies are entitled to information held by contracted service providers.[82]

The freedom of information statutes in Queensland, South Australia and Western Australia have even weaker provisions in relation to government contractors. Queensland's *Right to Information Act 2009* only extends to private entities paid or controlled by government or exercising public functions if they are declared to be public authorities under regulations.[83] South Australia's *Freedom of Information Act 1991* extends to incorporated and unincorporated bodies which are "subject to control or direction" of government.[84] Western Australia's *Freedom of Information Act 1992* extends to custodial contractors only.[85]

The Victorian and Tasmanian freedom of information acts do not extend to contractors or require agencies to ensure they have access to the information held by contractors.

80 ARC 1998 report (n 1) recommendations 15 and 16.
81 *Freedom of Information Act 2010* (Cth) s 6C; *Government Information Public Access Act 2009* (NSW) s 121.
82 *Freedom of Information Act 2016* (ACT) s 100.
83 *Right to Information Act 2009* (Qld) s 16.
84 *Freedom of Information Act 1991* (SA) s 4(f)(iii).
85 *Freedom of Information Act 1992* (WA) Glossary.

Merits review

Unlike the jurisdiction of courts and ombudsmen and the scope of freedom of information laws, administrative tribunals do not have general jurisdiction over all matters that fall within a particular category or definition. Rather, their jurisdiction is conferred by each separate piece of subject-matter-specific legislation. Thus, tribunals do not have general jurisdiction over government contractors, but instead their jurisdiction over specific contractors will depend on what the relevant legislation dealing with the function being exercised by each contractor provides, if anything. Most contractors would seem to be outside the scope of tribunal review for the simple reason that their powers are sourced in contracts or other non-statutory schemes and not in legislation.[86]

I was not able to find any piece of legislation which expressly confers a right to merits review with respect to the decisions of contractors. Nor, in a search of tribunal case law databases, did I find any examples of administrative tribunals reviewing the actions or decisions of government contractors.

I wrote to the Attorney-General in each jurisdiction asking about the policies and processes in place for deciding whether and how external merits review will apply to the decisions and actions of government contractors. I also asked about processes for consultation with justice departments on the administrative justice implications of government outsourcing arrangements. To date (noting that at the time of writing it is six months after I sent my initial emails) I have received responses from four Attorneys General or their departments: the Commonwealth, New South Wales, Queensland and South Australia.

The Commonwealth Attorney-General noted requirements for consultation set out in the *Cabinet Handbook*[87] and the *Legislation Handbook*.[88] The latter, coupled with Drafting Direction 4.2, requires the Office of Parliamentary Counsel to refer draft legislation conferring administrative discretions to the administrative law section of the Commonwealth Attorney-General's Department (AGD).[89] The administrative law section of the AGD applies the *Administrative Law Policy Guide*,[90] which incorporates the ARC's guidance set out in *What Decisions Should be Subject to Merits Review*.[91] In addition, draft legislation is scrutinised by one of two Senate standing committees (depending on whether it is primary or subordinate legislation), which examine whether any administrative decision-making powers should be

86 Justice Deirdre O'Connor, "Lessons from the past/challenges for the future: merits review in the new millennium" (Speech, National Administrative Law Forum, June 2000).

87 Department of Prime Minister and Cabinet, *Cabinet Handbook* (15th ed, 2022) <https://www.pmc.gov.au/government/administration/cabinet-handbook-15th-edition/cabinet-government-australia> (*Commonwealth Cabinet Handbook*).

88 Department of Prime Minister and Cabinet, *Legislation Handbook* (February 2017) <https://www.pmc.gov.au/sites/default/files/resource/download/legislation-handbook-2017.pdf>.

89 Parliamentary Counsel (Cth), *Drafting Directions* (January 2023) Drafting Direction No 4.2: Referral of Drafts to Agencies <https://www.opc.gov.au/sites/default/files/2023-01/s06rd391.v154.pdf>.

90 Attorney-General's Department (Cth), *Australian Administrative Law Policy Guide* (Guidelines, 2011) <https://www.ag.gov.au/sites/default/files/2020-03/Australian-administrative-law-policy-guide.pdf>.

91 ARC, *What Decisions Should be Subject to Merits Review* (1 January 1999) <https://www.ag.gov.au/legal-system/publications/what-decisions-should-be-subject-merit-review-arc-publication-1999>.

subject to merits review.[92] In other words, there is a fairly rigorous, multi-layered process which ensures administrative law issues are identified in the process of drafting and making legislation, and merits review is made available where appropriate.

However, this process only applies to legislative proposals, and entering into a contractual arrangement with the private sector to assist with the performance of administrative functions which are themselves authorised by legislation, often does not involve statutory authorisation.[93] It is typically thought to be sufficient that s 23 of the *Public Governance, Performance and Accountability Act 2013* (Cth) provides a general authority for contracts “relating to the affairs” of non-corporate Commonwealth entities.[94] In addition, some subject-matter or agency-specific statutes confer general authority on ministers or agency heads to contract, meaning that legislation for the performance of specific functions is not needed.[95]

The consultation requirements in the *Cabinet Handbook* are very general in nature. Ministers are simply expected to consult those other portfolios.[96] There is no guarantee that the administrative law implications of government contracting would be identified in this consultation process. Nor do all, or even most, outsourcing arrangements necessarily need to go to Cabinet — only those that are particularly significant or might be controversial.[97]

The result is that the extension of review rights to outsourcing arrangements tends to be ad-hoc. It seems to depend on whether administrative law issues are identified by the responsible department or agency (and in cases of legislation, by the Office of Parliamentary Counsel), and if they are, with whom it is thought necessary to consult. I have examined the policy decision-making process involved in relation to review rights under the Workforce Australia program in detail elsewhere.[98] In brief, the decision to create the National Customer Service Line (NCSL), and not to extend any form of independent merit review to the program, seems to have been driven by a conceptualisation of the individuals required to engage with Workforce Australia service providers as “customers”. The NCSL is operated by the Department of Employment and Workplace Relations. It is designed like an ombudsman without systemic powers, or like a customer complaints line with more persuasive power due to the Department’s role in managing employment service-providers’ contracts. It has no power to remake service-provider decisions itself, but likely has considerable persuasive

92 Parliament of Australia, Senate Standing Committee for the Scrutiny of Bills, “Principle (iii): Inadequate review of decisions” (Guidelines) <https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/Guidelines/Principle_iii_guideline_inadequate_review_of_decisions.pdf>; Parliament of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, “Principle (i): Availability of independent review” (Guidelines) <https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/guidelines/Principle_i_availability_of_independent_review.pdf>.

93 For instance, the IP Australia and migration examples discussed above did not have express statutory authorisation.

94 Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 7th ed, 2023) 68–96. Though I note that this question should probably not be regarded as settled, as a matter of law, after the *Williams* cases.

95 See, eg, *Australian Prudential Regulation Authority Act 1998* (Cth) s 11; *National Disability Insurance Scheme Act 2013* (Cth) s 119.

96 *Commonwealth Cabinet Handbook* (n 87) 7.

97 Ibid 11.

98 See Janina Boughey, “Administrative justice and outsourced service delivery” in Peter Lindseth et al, *Comparative Administrative Law* (Edward Elgar, 3rd ed, forthcoming).

power. In the policy decision-making around the design of the scheme, there seems to have been either a failure to recognise that employment service providers make administrative decisions which, if made by government, would be subject to independent oversight, or a deliberate attempt to streamline appeal avenues.

There *are* whole-of-government policies that apply to government procurement, but these do not contain any provision for the identification of administrative law issues or seek to ensure appropriate merits review mechanisms are put in place when government entities outsource administrative functions.[99] Indeed, when I wrote to the Division of Procurement in the Department of Finance, which is responsible for the Commonwealth Government Procurement Framework, requesting additional information about whether and how administrative law issues are identified in procurement policy processes, the response showed no understanding of what administrative law issues might be raised in government contracting processes.[100]

In Queensland, the *Legislative Standards Act 1992* (Qld) requires legislative drafters to advise ministers on “the application of fundamental legislative principles”,[101] which relevantly include that legislation:

- “makes rights, liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review”;
- “is consistent with principles of natural justice”; and
- “allows the delegation of administrative power only in appropriate cases and to appropriate persons”.[102]

This requirement only applies to legislative proposals.

The Queensland Department of Justice and Attorney-General (DJAG) issued an Administrative Review Policy in 2018, which provides guidance on what decisions should be subject to merits review, the type of review that is suitable, and the appropriate body to review.[103] Its aim is to prevent the proliferation of specialist review bodies following the establishment of the Queensland Civil and Administrative Tribunal.[104] The policy establishes a useful framework, which overlaps with, but is not identical to, the ARC’s guidance on what decisions should be reviewable. While it applies to all administrative decisions, it states that “non-legislative based decisions … [are] not the main focus of this policy”.[105] The policy makes no reference to government contractors or what functions are suited (or not suited) to outsourcing.

99 Department of Finance (Cth), *Commonwealth Procurement Rules* (1 July 2024) <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules>.
100 Email from Department of Finance (Cth) to Janina Boughey, 24 March 2022.
101 *Legislative Standards Act 1992* (Qld) s 7(g)(2).
102 Ibid s 4(3)(a)–(c).
103 Department of Justice and Attorney-General (Qld), *Administrative Review Policy* (Policy, June 2018) <https://www.justice.qld.gov.au/__data/assets/pdf_file/0004/334228/administrative-review-policy.pdf>.
104 Ibid 1.
105 Ibid 3.

The Queensland *Cabinet Handbook* requires that,

> [w]hen proposing to establish a new right of review of a Queensland Government decision, or when proposing a significant change to an existing review process, the relevant Cabinet submission must set out how the issues identified in the Administrative Review Policy have been addressed. DJAG can provide advice on the application of the policy in specific circumstances.[106]

Like at the Commonwealth level, only “major”, “significant” or “sensitive” matters need to be put before Cabinet. So it is possible that certain types of outsourcing, such as a decision to engage a contractor to build an automated system to be used in decision-making, may not meet this threshold, or be identified as engaging the administrative law policy at all. The fact that the Administrative Review Policy focuses on legislative powers also means some outsourced administrative functions may slip through the net. Nevertheless, Queensland’s processes and policies appear to have the greatest chance of capturing outsourced decision-making functions and ensuring they are subject to appropriate administrative review.

The response from the NSW Department of Justice did not include details of any policy or process through which administrative law policy experts are consulted on either legislative or non-legislative proposals which confer administrative discretions on government officers, let alone contractors. The only formal oversight of legislative proposals from an administrative law perspective comes via the Parliamentary Legislation Review Committee, which reports on “the rights implications of legislation” including whether a Bill makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers or non-reviewable decisions.[107]

The response from the South Australian Attorney-General’s Department stated:

> There are some examples in South Australia where private individuals are engaged by the State Government to exercise administrative decision making functions. However it appears that these are generally pursuant to an appointment of the private individual to a statutory panel whose decision making functions and review provisions are specified in the relevant statute. Alternatively, there may be a delegation of a statutory function by a statutory officer to a private individual. Although I have been unable to undertake a comprehensive analysis across the statute book, I have not identified an example where administrative decision making is conducted by private individuals or entities outside of a statutory framework that governs the decision making and review mechanisms.[108]

While it may be accurate that all contractors involved in administrative decision-making in South Australia have powers sourced directly in legislation, this response suggests that, as in other jurisdictions, there is no whole-of-government policy or framework which ensures that any outsourced administrative functions are subject to the same or equivalent administrative review as if those functions were exercised directly by government.

In summary, no Australian jurisdiction appears to have a policy framework which ensures either that contractors do not exercise administrative decision-making functions, or that

106 Department of Premier and Cabinet (Qld), “6.2: Consultation within government” in *Cabinet Handbook* (Website, 2024) section 6.2.2 <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/cabinet-handbook/consultation/cons-within-gov.aspx>.

107 See *Legislation Review Act 1987* (NSW) s 8A(1)).

108 Email from Attorney-General’s Department (SA) to Janina Boughey, 21 June 2024.

where they do exercise administrative decision-making functions their decisions are subject to administrative review as if they were decisions of government. Queensland's framework comes the closest but, as I have explained, has some potential gaps.

Solutions

I have argued that government outsourcing remains a challenge for administrative law, and that 26 years after the ARC's 1998 report, Australian governments and legislatures have not done enough to address this challenge. I have highlighted what different legislatures and governments *have* done in an attempt to ensure that government contracting does not result in a diminution of review and information rights. None has done enough, but some have done better than others in particular areas. For instance, as I have outlined, the Northern Territory's *Ombudsman Act 2009* goes further than ombudsman statutes in other jurisdictions in extending the NT Ombudsman's jurisdiction to government contractors. The Territory's freedom of information laws also go further than those in other jurisdictions. And Queensland's Administrative Review Policy has the potential to apply to outsourced decisions and, at least, might result in administrative law issues in potential outsourcing arrangements being identified and subject to consultation. A good first step would be other jurisdictions adopting these examples of better practice. With respect to merits review consultation processes, it should be unambiguous that these processes apply to any government contracts in which contractors are providing services which might involve the interpretation or administration of law or non-statutory programs. Importantly, this suggestion would not bind governments to extend external review to contractors, but would at least raise the question of whether it is appropriate and what form it should take in each outsourcing arrangement. These questions would not be overlooked as they often are.

Judicial review should also be extended via statute to the decisions and actions of government contractors which impact individual interests. This should not be done using a public function test, for the reasons I explained above. Nor should it be restricted to decisions of contractors with express statutory support. Instead, the provisions ought to be drafted in as wide terms as possible, to provide that a right of review to any person aggrieved by a decision made by a private or non-government sector entity (or employee thereof), where that entity is paid by government to perform that decision-making function. Any concerns about such a broad provision "opening the floodgates" of litigation can be quelled by the fact that judicial review is a last resort and generally not an attractive way to spend one's time or money, particularly given the effect of its remedies. Courts also have various methods for filtering out nuisance and clearly unmeritorious claims. Applicants would also still need to meet standing requirements.

Only the Northern Territory has extended access to information rights to information held by government contractors, without requiring government agencies to put this requirement into individual contracts. However, the exemptions for commercially valuable information might still prevent individuals from accessing information held by contractors relevant to the administration and application of laws. Seddon has described this as "the principal obstacle to obtaining information relating to government contracting",[109] and says there is an

109 Seddon (n 94) 542.

“inaccurate and much over-used ploy of claiming that anything in a government contract is commercial-in-confidence”.[110]

In the *O’Brien* case, NCAT indicated that even if the information held by Northgate did fall under s 121 of the *Government Information Public Access Act 2009* (NSW), it would nevertheless be exempt from disclosure. The clear policy solution is therefore twofold:

1. freedom of information laws should deem information held by contractors to be held by the contracting department or agency; and

2. commercial-in-confidence exceptions should not apply to information held by contractors relating to the administration of laws and non-statutory schemes, the interpretation of laws, or the determination of individual rights, entitlements, benefits, obligations or interests.

This might disincentivise potential government contractors as it would result in the public release of commercially valuable information, such as the details of systems used in automated decision-making. Governments may have to pay more to compensate certain contractors for the public release of this commercially valuable information. Ultimately the market will dictate the value of this kind of information, which may well be overstated at present.

Conclusions

In this article I have argued that government contracting continues to pose challenges for administrative law, more than 30 years after the issue was highlighted by numerous commentators and 26 years after the ARC’s report on the topic. I have shown that the problem has evolved as government contracts have expanded their reach and become more complex and varied. Addressing the administrative law accountability deficit resulting from government contracts requires whole-of-government policies to (a) identify the administrative justice implications of each government contract, and (b) ensure that administrative justice is protected when the private sector makes decisions about the interpretation and administration of laws which impact on individuals. Addressing the deficit also requires stronger legislative responses in freedom of information and ombudsman legislation, to ensure that those accountability mechanisms effectively extend to government contractors. Australian governments and legislatures must take this problem seriously and ensure that, as governments’ use of the private sector in decision-making continues to evolve, further gaps in administrative justice do not occur.

110 Ibid 532–3.

National security legislation, administrative law and "AI" decision-making — where are we heading?

*Jake Blight**

There has been enormous growth in the volume of national security legislation in Australia. The first Act about the Australian Secret Intelligence Organisation (ASIO) in 1956 was 5 pages long. Today the laws underpinning the work of the national intelligence community run to over 5,500 pages and the growth trajectory does not appear to be slowing. Many of these laws contain extraordinary powers and immunities, granted in order to combat serious threats to national security. Decisions made under these laws can have significant impact on individuals and organisations. Decision-makers in national security matters can sometimes make errors, just like any other decision-maker. Yet the safeguards provided by administrative law and review do not apply in the usual way in this field. The requirements of security mean that those affected are often not able to access any information about the case against them and the content of procedural fairness can be effectively reduced to nothing. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) largely does not apply and judicial review is rare. When it comes to intelligence and security agencies, the *Privacy Act 1988* (Cth), *Freedom of Information Act 1982* (Cth) (*FOI Act*) and the jurisdiction of the Australian Human Rights Commission (AHRC) and the Commonwealth Ombudsman are effectively excluded. Scope for merits review is narrow and, even when available, modified procedural rules apply. Instead of these "usual" mechanisms for scrutiny and review, heavy reliance is placed on the oversight role of the Inspector-General of Intelligence and Security (IGIS), who has a general "legality and propriety" mandate in relation to the activities of intelligence and security agencies.

This article starts by assessing how much national security legislation there is in Australia today and what the growth trajectory has been for that legislation over the last 70 years. Some examples are provided of the types of powers given to national security agencies and how the scope of their functions has grown, particularly in the last 10–15 years. There is then a brief discussion about the fact that procedural fairness can be reduced to nothing in this context, as well as the scope of the exclusion of key statutory administrative law mechanisms. The bespoke oversight and review arrangements within the executive branch of government for national security matters are introduced. The article concludes by looking at "augmented" or "automated" decision-making using technologies like "artificial intelligence" (AI) by intelligence and security agencies as an example of an area that needs careful regulation and scrutiny because the "usual" regulatory mechanisms do not apply.

How much national security legislation is there?

It is no surprise that there is more national security legislation in Australia today than ever before. But how much more, and what is the growth trajectory? In order to answer these questions, Commonwealth legislation relating to national security was categorised and the number of pages counted. Growth was tracked in 10-year increments from 1964 to 2024.

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Any exercise in categorising and counting involves judgements. Others may take a different view of which laws are national security laws and how they should be categorised and counted.[1] I do not assert that the way laws have been categorised and counted in this article is the only way to do it, just that it is a reasonable way of doing so for the purpose of obtaining an indication of the volume and growth of legislation in this field.

What is national security legislation?

There are many definitions of national security.[2] For the purpose of this article I have approached the question of what constitutes national security legislation primarily by considering laws that were described as being for national security or counter-terrorism when they were enacted or amended by Parliament. This includes the laws that underpin the intelligence and security functions of Australia's national intelligence community.[3] Laws expressly included in the definition of "security" in the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) or the definition of "national security and counter-terrorism legislation" in the *Independent National Security Legislation Monitor Act 2010* (Cth) (*INSLM Act*) have also been included. The legislation being counted has been divided into six broad categories: (1) powers and functions of intelligence and security agencies; (2) law enforcement intelligence; (3) telecommunications interception and surveillance devices; (4) criminal offences directly linked to national security; (5) special oversight, accountability and procedural laws; and (6) other powers related to national security. A list of the Acts, and parts of Acts, that have been included and how they were categorised is provided in the appendix to this article.

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1 Keiran Hardy and George Williams counted 55 new counterterrorism laws between 2001 and 2011. They divided these into: laws introduced in response to terrorism; laws addressing procedural issues including evidence rules; and substantive amendments to either of the first two categories. In the second decade after the terrorist attacks on the United States of 11 September 2001 (9/11), they counted 37 additional laws, 5 fewer than the first decade, but which they said represents more than two-thirds of the same volume: Keiran Hardy and George Williams, "Two decades of Australian counterterrorism laws" (2022) 46(1) *Melbourne University Law Review* 34, 38, 44–5. The *Comprehensive Review of the Legal Framework of the National Intelligence Community* described the growth by observing that between 11 September 2001 and 1 August 2019, the Commonwealth Parliament passed more than 124 Acts making more than 14,500 changes to laws relating to the national intelligence community: Dennis Richardson, *Comprehensive Review of the Legal Framework of the National Intelligence Community* (Final Report, December 2019) vol 1, 33. For an international comparison see Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011).

2 For example, s 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) defines "national security" as "Australia's defence, security, international relations or law enforcement interests". Part 5.2 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) has a broad definition of national security which appears to be partially based on the definition of security in the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) but with the addition of "the defence of the country" and "political, military and economic relations with other countries" (see s 90.4). Some scholars argue for a wider definition of national security. See, eg, the recent argument for a greater role for intelligence agencies in climate change in Isabelle Bond, "Emissions, the strategic omission: climate security and Australia's national intelligence community" (2024) *International Journal of Intelligence and Counterintelligence* 1.

3 The national intelligence community currently comprises 10 agencies: the Australian Signals Directorate (ASD), the Australian Criminal Intelligence Commission (ACIC), the Australian Federal Police (AFP), the Australian Geospatial-Intelligence Organisation (AGO), the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Defence Intelligence Organisation (DIO), the Department of Home Affairs, and the Office of National Intelligence (ONI).

These are not perfect categories and many Acts overlap categories. For example, the *ASIO Act* contains offences (Category 4), yet the entirety of the *ASIO Act* is in Category 1. Where Acts have national security elements that can be easily distinguished from the more general purposes of the Act, then only the national security–related provisions have been counted. For example, the *Crimes Act 1914* (Cth) is currently 1,019 pages long, but only 236 of those pages have been counted as national security–related.[4] In some cases, it is not possible to make this distinction and the whole of the Act has been counted. For example, while counter-terrorism and other national security matters are an important part of the role of the Australian Federal Police (AFP), they are not the AFP's only functions.[5]

Matters relating generally to defence such as the *Defence Act 1903* (Cth) have been excluded on the basis that "defence", like "international relations", is generally described as a separate field from "security". For example, the *Defence Trade Controls Act 2012* (Cth) and the *Defence Force Discipline Act 1982* (Cth) are excluded. However, pt IIIAAA of the *Defence Act* has been included because it is expressly described as "counter-terrorism and national security legislation" in the *INSLM Act*. The *Defence (Special Undertakings) Act 1952* (Cth) has also been included as the only area currently proscribed under that Act is the intelligence facility known as the Joint Defence Facility Pine Gap.[6]

Although migration is sometimes described as a "national security" matter, the *Migration Act 1958* (Cth) and associated legislation have not been included — except for the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth). ASIO's power to make adverse security assessments which affect visas and citizenship decisions is contained in the *ASIO Act*, included in Category 1.

Parts of some Acts which might not intuitively seem like national security legislation have been included because they are expressly included in the definition of "security" in the *ASIO Act*. This includes parts of the *Crimes (Internationally Protected Persons) Act 1976* (Cth) and the *Crimes (Ships and Fixed Platforms) Act 1992* (Cth). In these cases, only the provisions expressly referred to in the *ASIO Act* have been counted.

Only principal Commonwealth Acts have been considered; amending Acts were not counted separately. Legislative instruments and state and territory legislation have been excluded.

Current national security legislation: a page count

Figure 1 represents a snapshot of the total number of pages of national security legislation in each of the six categories described above, as at 30 June 2024. The page count was based on how many pages would be printed if each Act or relevant part of the Act was printed from the latest consolidated version on the Federal Register of Legislation. See the appendix for a list of the Acts that were included.

4 *Crimes Act 1914* (Cth). The provisions in that Act which relate to national security pertain to terrorism-related powers and procedures as well as warrants and provisions for assumed identities. See pt IAA divs 3, 3A, 4B; pt IAAA; pt IAAB divs 5–6; pt IAAC; s 15AA; pts IAC, IAE; ss 19ALB, 19AG; pt IC sub-div B.

5 *Australian Federal Police Act 1979* (Cth).

6 In 2019, the then Defence Minister, Christopher Pyne, said: "Pine Gap has become a central element of our intelligence cooperation with the US and it continues to have relevance in delivering intelligence on a range of contemporary security priorities, such as terrorism, the proliferation of weapons of mass destruction and monitoring foreign weapons development." See Commonwealth, *Parliamentary Debates*, House of Representatives, 20 February 2019, 1087–91 (Christopher Pyne, Minister for Defence).

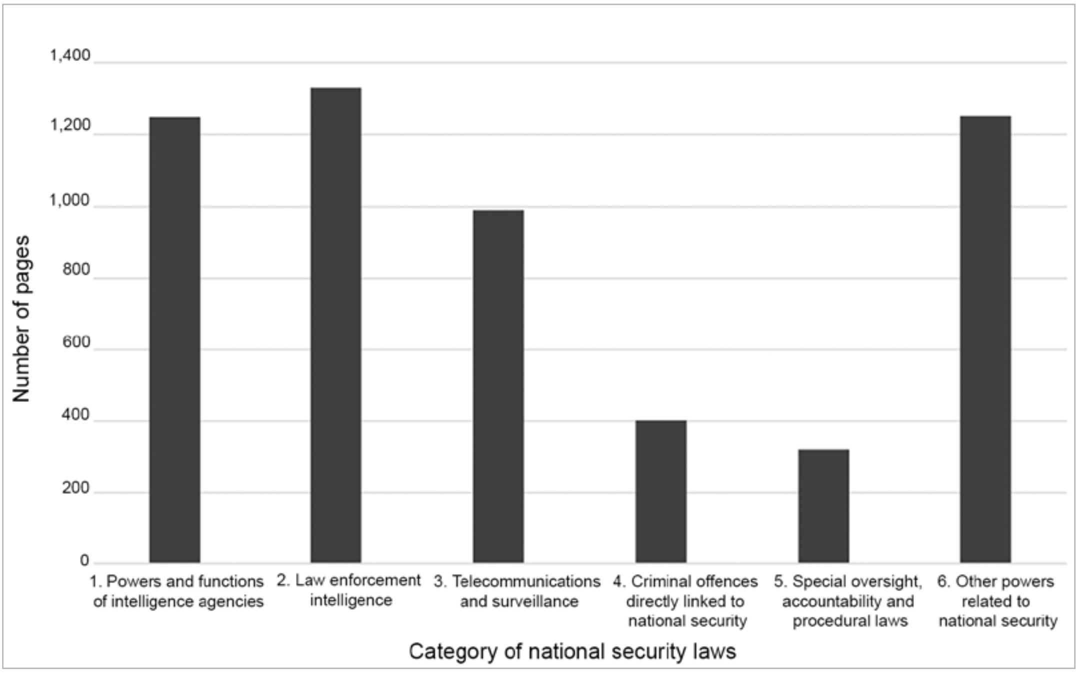

Figure 1: Number of pages of national security legislation as at 30 June 2024

The data reveals that there are currently over 5,500 pages of Commonwealth national security legislation. More legislation is on its way. At the time this article was written the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024 (Cth) and Intelligence Services Legislation Amendment Bill 2023 (Cth) were before the Parliament.

Not all the legislation counted in this estimate is legislation under which administrative decisions are made.[7] For example, some of the legislation sets out criminal offences and some is procedural. However, there are plenty of provisions which give power to members of the executive (ministers or officials) to make decisions which have a significant impact on individuals or organisations.[8] ASIO security assessments are possibly the best known. These assessments underpin many decisions including passport cancellations, citizenship and visa applications, amongst others.[9] The Attorney-General's power to issue ASIO questioning

7 Note that as many decisions are not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), the test of whether something is a "decision of an administrative character made under and enactment" may be less relevant for a significant portion of this legislation.

8 For an overview of the powers and functions of Australia's intelligence and security agencies see Jake Blight, "Powers and functions of Australian security and intelligence agencies" in Danielle Ireland-Piper (ed), *National Security Law in Australia* (Federation Press, 2024) 39.

9 *ASIO Act* (n 2) pt IV. The *Comprehensive Review of the Legal Framework of the National Intelligence Community* noted that security assessments can also be determinative of a range of other decisions affecting Australians, including accessing parole, and applications for firearm and security guard licences. That review recommended that Administrative Appeals Tribunal (AAT) review rights be extended to these sorts of decisions, but this has not been implemented: Richardson (n 1) vol 4, recommendations 193–197.

warrants, although rarely used, has been the subject of extensive commentary.[10] The ability to grant civil and criminal immunity to people involved in ASIO special intelligence operations is also significant.[11] Granting civil immunity can have the effect of stripping the right to recover damages from third parties. Other, perhaps less well known, powers include the ability to authorise the removal, disconnection or alteration of functioning of a computer following a cyber-security incident,[12] disruption of cybercrime[13] and the rather vague "other activities" function of the Australian Secret Intelligence Service (ASIS).[14] National security agencies also have extensive surveillance powers, some of which are authorised by officials, some by ministers and, for police, some by members of the Administrative Appeals Tribunal (AAT) and its successor, the Administrative Review Tribunal (ART) or by magistrates or judges acting in their personal capacity.[15] Decisions about sharing information, particularly with overseas agencies, can also have significant effects on a person.[16]

National security legislation across the decades

In order to examine the growth trajectory of national security legislation, a count of the number of pages of national security legislation in force at the end of each decade was calculated. An end date of 30 June 2024 was chosen to reflect the situation at the time this article was prepared. The start date of 30 June 1964 captures some of the earliest national security–specific laws — the *Australian Security Intelligence Organization Act 1956* (Cth) and the *Telephonic Communications (Interception) Act 1960* (Cth) (which gave express interception powers to ASIO, and only ASIO).[17]

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10 *ASIO Act* (n 2) div 3. See, eg, Lisa Burton, Nicola McGarrity and George Williams, "The extraordinary questioning and detention powers of the Australian Security Intelligence Organisation" (2012) 36(2) *Melbourne University Law Review* 415, 447–51; Nicola McGarrity, "Coercive questioning and detention by domestic intelligence agencies" (2014) 9(1) *Journal of Policing, Intelligence and Counter Terrorism* 48.

11 *ASIO Act* (n 2) ss 35C, 35K.

12 *Security of Critical Infrastructure Act 2018* (Cth) pt 3A.

13 It is a function of the ASD to prevent and disrupt, by electronic or similar means, cybercrime undertaken by people or organisations outside Australia. If the cybercrime is enabled by an Australian person, authorisation from the Defence Minister is required: *Intelligence Services Act 2001* (Cth) ss 7(1)(c), 8(1)(a)(iii) (*IS Act*). The AFP and the ACIC can also obtain data disruption warrants that have a similar effect inside Australia: *Surveillance Devices Act 2004* (Cth) s 27KE.

14 *IS Act* (n 13) s 6(1)(e). If those activities have a "direct effect" on an Australian, ministerial authority is required (see s 8(1)(a)(ii)).

15 For example, collection of telecommunications data within Australia is authorised internally by ASIO and police: *Telecommunications (Interception and Access) Act 1979* (Cth) ss 175–176, 178–180 (*TIA Act*). ASIO warrants for phone interception and other surveillance are authorised by the Attorney-General: *TIA Act* ss 8, 8A, 11A–11C; *ASIO Act* (n 2) pt III. Police warrants for phone interception are authorised by an ART member or eligible judge: *TIA Act* ss 46, 46A. Magistrates can issue AFP and ACIC account-takeover warrants: *Crimes Act 1914* (Cth) s 3XXUP.

16 A matter involving the decision to share information about Mr Habib with an overseas agency and the consequences of that decision were explored in detail by a former Inspector-General of Intelligence and Security (IGIS): *Inquiry into the Actions of Australian Government Agencies in Relation to the Arrest and Detention Overseas of Mr Mamdouh Habib from 2001 to 2005* (Report, December 2011), <https://www.therenditionproject.org.uk/documents/RDI/111219-Australian-Habib-Inquiry.pdf>.

17 Although, ASIO had been intercepting phones prior to 1960. On the early history of ASIO see David Horner, *The Official History of ASIO* (Allen & Unwin, 2014) vol 1. See also Jake Blight, "ASIO telecommunications interception and data access powers" (2023) 48(4) *Alternative Law Journal* 288.

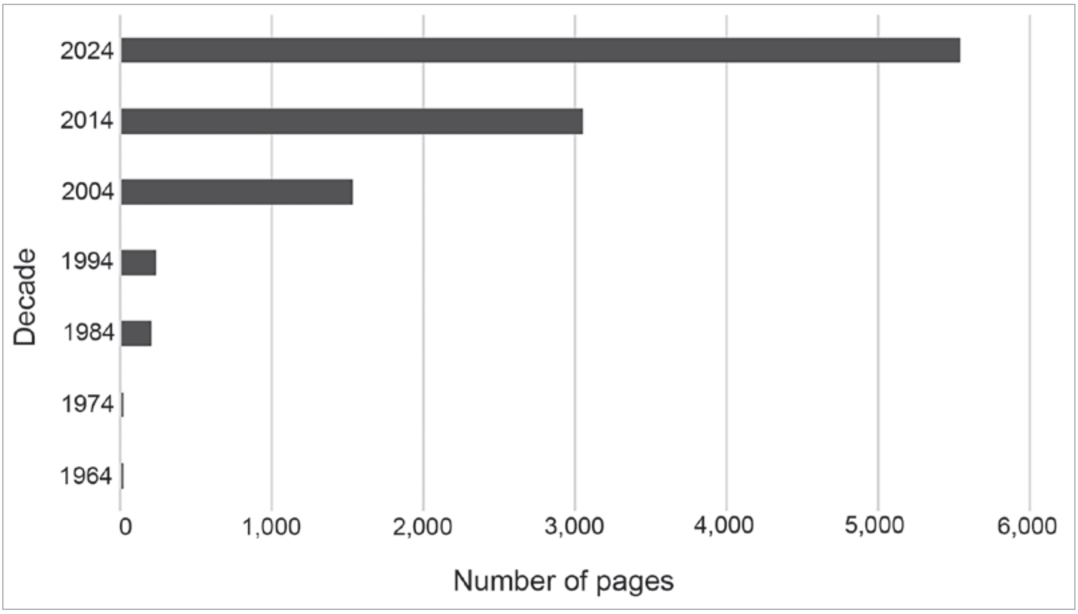

Figure 2: Number of pages of national security legislation throughout the decades from 1964 to 2024

As figure 2 demonstrates, there is a clear growth in national security legislation after the terrorist attacks of 9 September 2001 (9/11) in the United States.[18] The *Intelligence Services Act 2001* (*IS Act*) was already in Parliament when those attacks occurred.[19] Enactments that were a direct response to the 9/11 attacks include extensions to ASIO's powers and new offences relating to terrorism passed between 2001 and 2004.[20] According to George Williams, Australia enacted 54 counterterrorism laws in the decade after 9/11.[21]

What is striking about the growth rate in national security legislation is that it has not really slowed.[22] After the very large increase between 1994 and 2004 — much of which can probably be attributed to the response to 9/11 — there was a further almost doubling of volume between 2004 and 2014 (from 1,535 to 3,057 pages). This included legislation responding to the threat of people travelling to support Islamic State and participate in the

18 George Williams, "A decade of Australian anti-terror laws" (2011) 35(1) *Melbourne University Law Review* 1136; Hardy and Williams (n 1).

19 The *IS Act* (n 13) was introduced on 27 June 2001 and was in the committee process at the time of the 9/11 attacks. It was passed on 1 October 2011.

20 Key enactments during this time include the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth) and the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) which made substantial changes to the terrorism-related offences in the *Criminal Code* (n 2), and the ASIO questioning and detentions powers added by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth). See also Hardy and Williams (n 1) 38–43.

21 Williams (n 18) 1144.

22 Hardy and Williams (n 1) track the number of primary and amending counter-terrorism laws between 2002 and 2021 and draw a similar conclusion, noting spikes in 2002–04 and 2018–19: at 45.

conflicts in Syria and Iraq.[23] A similar growth rate occurred between 2014 and 2024 (from 3,057 to 5,541 pages).[24]

National security laws also tend to be passed quite quickly. Keiran Hardy and Williams calculated that national security bills spent an average of 2.47 days in the House of Representatives and 2.3 days in the Senate.[25]

The expansion in national security legislation and the application of administrative law review mechanisms

It follows from the growth in the volume of national security legislation that there is also likely to be an increase in the number of decisions that can be made under these enactments. As a practical matter, the growth in the sizes and budgets of intelligence and security agencies must mean they are doing more under that legislation. As noted above, many of these decisions and actions can have significant impact on individuals and organisations.

National security decision-making, like other government decision-making, is bound to comply with principles of legality and ordinary decision-making rules.[26] No matter how dedicated and diligent they are, decision-makers make mistakes. As Madgwick J observed,

> decision-makers in Australian agencies concerned with national security are unlikely to be less prone to mistakes than those decision-makers … in non-security agencies.[27]

Much of the litigation in this area arises from ASIO adverse security assessments.[28] By their very nature, these assessments, like any intelligence assessment, are often based on incomplete information which may be inaccurate. It is therefore not surprising that, despite ASIO's best efforts, they sometimes get it wrong.[29]

This raises the question of what review and oversight mechanisms are available and whether they are sufficient given the increasing volume of national security legislation and associated decision-making. As the size and scope of the legislation and the agencies have grown, the effect of exceptions to review mechanisms which were inserted many years ago has effectively grown as well.

23 For example, the *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).
24 The Acts with some of the largest growth across the decades include the *Criminal Code* (n 2) ch 5, which grew from 42 pages in 2004 to 360 pages in 2024; the *Australian Federal Police Act 1979* (Cth), which grew from 30 pages in 1984 to 237 pages in 2024; the *Foreign Acquisitions and Takeovers Act 1975* (Cth), which grew from 28 pages in 1984 to 341 pages in 2024; the *ASIO Act* (n 2), which grew from 5 pages in 1956 to 345 in 2024; and the *TIA Act* (n 15), which grew from the original 7 pages in 1960 to 780 in 2024.
25 Hardy and Williams (n 1) 46. See also Dominique Dalla-Pozza, "Refining the Australian counter-terrorism framework: how deliberative has Parliament been?" (2016) 27(4) *Public Law Review* 271.
26 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25; Caroline Bush, "National security and natural justice" (2008) 57 *AIAL Forum* 78.
27 *Leghaei v Director-General of Security* [2005] FCA 1576, [80].
28 Part IV of the *ASIO Act* (n 2) allows a subset of these decisions to be challenged in the AAT/Administrative Review Tribunal (ART). Such review is effectively limited to decisions about citizens and permanent residents, including passport cancellation. See *ASIO Act* ss 35–36A. Recent cases include *QDJM v Director-General of Security* [2021] AATA 4761; *SDCV v Director-General of Security* [2022] HCA 32; *KFDJ v Director General of Security* [2022] AATA 3185; *DPFX v Director-General of Security* [2023] AATA 2522; *AIX20 v Director-General of Security* [2024] FCA 88.
29 Richardson (n 1) vol 4, 62–3 [44.1]–[44.4].

The next three subsections of this article briefly describe key limitations on the application of the usual administrative review processes in national security matters: limitations on access to information and the way that most of the usual administrative review and accountability mechanisms are expressly excluded; and the role of specialised oversight of national security agencies.

Limitations on access to information

The first major limitation on review of any type of decision involving national security material is access to information. The work of security and intelligence agencies is largely conducted in secret. There is information which, in the wrong hands, can genuinely harm Australia's national security. The need to protect this information is in tension with longstanding legal principles and, in particular, the tradition of procedural fairness, which requires a person know the evidence being relied on to interfere with their rights so they can challenge that evidence and put their own case forward.[30]

Where a person does not know the case against them, bringing a successful action for merits review or judicial review is very difficult, if not impossible.[31]

An applicant may be denied access to information on national security grounds on the basis of a public interest immunity claim, through the application of statutory rules such as those applicable to merits review of intelligence and security decisions in the ART, or through the application of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (*NSI Act*) and decisions made under it. In the case of decisions connected to surveillance and international information-sharing, the person probably will not ever know a decision about them was made. The fact that a decision has been made can sometimes be intentionally withheld from the affected person in the interests of national security even where they theoretically have merit review rights.[32] An analysis of how each of these schemes operates is beyond the scope of this article, but the bottom line is that in national security–related matters it is often the case that an applicant is unable to access most (or sometimes any) of the information being used against them or the reasons for a decision.

It has been accepted that the content of procedural fairness can be effectively reduced to nothing where this is necessary to avoid prejudice to national security.[33] Courts have described the outcome of this lack of access to information as "unsatisfactory" and

30 *Duke of Dorset v Girdler* (1720) Prec Ch 531 is cited to show how longstanding this rule is: "the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method for discovering the truth": at 532. This principle can be modified expressly or impliedly by statute: *Kioa v West* (1985) 159 CLR 550; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [26].

31 *Imad v Director-General of Security* [2024] FCFCA 138 [63]; Ben Saul, "Security and fairness in Australian public law" in Matthew Groves (ed), *The Cambridge Companion to Australian Administrative Law* (Cambridge University Press, 2013) 93, 97; Pauline Collins and Anthony Gray, "*SDCV v Director-General of Security*: Procedural fairness and the ability to decide a matter based on secret evidence not disclosed to a party or their legal team" (2024) 98(1) *Australian Law Journal* 57.

32 *ASIO Act* (n 2) s 38.

33 *Leghaei* (n 27) [51]; *Imad* (n 31) [99], [101], [106].

independent reviews have called for changes to the *NSI Act*.[34] But, so far, these sorts of restrictions have been found to be constitutional.[35]

Exclusion of ordinary review and accountability mechanisms

The second significant limit on seeking review in national security–related matters is that most of the mechanisms that form part of the overall system of administrative law in Australia are excluded from the field.[36] Access to the writs in s 75(v) of the *Australian Constitution* of course remains — in theory. However, there are few who would call this an accessible route of review, particularly for security-related matters when an application must rely on information that is likely to be hard or impossible for an applicant to come by.

In relation to access to judicial review, the most significant limitation is the complete exclusion of the *ADJR Act* in respect of all decisions made under the *IS Act*, the *ASIO Act*, the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Inspector-General of Intelligence and Security 1986* (Cth) (*IGIS Act*). Nor does the *ADJR Act* apply to a broad range of decisions concerning counter-terrorism measures such as control orders, preventative detention orders or post-sentence orders, or decisions made when responding to "serious cyber security incidents" under pt 3A of the *Security of Critical Infrastructure Act 2018* (Cth). The *ADJR Act* is also excluded for criminal intelligence assessments made by the Australian Crime Intelligence Commission (ACIC).[37] Exclusion of the *ADJR Act* means no right to reasons and no access to the statutory review framework in that Act.

Merits review in the ART is only available in relation to a subset of ASIO security assessments, mostly those which relate to Australian citizens and permanent residents and their passports or citizenship applications, as well as some security vetting decisions.[38] Special procedures apply in the Tribunal when these matters are heard.[39]

Other legislation which forms part of the system of administrative law often contains an exception for intelligence and security agencies. The *Privacy Act 1988* does not apply to acts and practices of ACIC, the Australian Geospatial-Intelligence Organisation (AGO), the Australian Signals Directorate (ASD) — which includes the Australian Cyber Security Centre, ASIO, ASIS, the Defence Intelligence Organisation (DIO) or the Office of National

34 Ibid [50]; *Sagar v O'Sullivan* (2011) 193 FCR 311; Independent National Security Legislation Monitor (INSLM), *Review into the Operation and Effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004* (Report, 30 October 2023).

35 *SDCV* (n 28); *Lodhi v The Queen* [2007] NSWCCA 360, [72]; Collins and Gray (n 31); Natalie Ng, Steven Gardiner and Sarah Lim, "Casenotes: *SDCV v Director-General of Security*: Statutory secrecy provisions and the courts" (2023) 30(1) *Australian Journal of Administrative Law* 162.

36 Although better described as part of the criminal law framework than administrative law, it should be noted that on rare occasions ASIO actions may be challenged in court insofar as they affect the admissibility of evidence. See, eg, *R v Ul-Haque* (2007) 177 A Crim R 348 where certain evidence was ruled inadmissible.

37 *ADJR Act* (n 7) sch 1 s 3. There are additional exceptions in sch 1 for security-related decisions made under the *Telecommunications Act 1997* (Cth) by the ASIO Minister.

38 See *ASIO Act* (n 3) ss 35–36A, 83–83E. For recommendations extending the range of decisions, see n 9 above.

39 *Administrative Review Tribunal Act 2024* (Cth) pt 6. Similar procedures applied in the *Administrative Appeals Tribunal Act 1975* (Cth) ss 39A, 39BA, 39B, 39C.

Intelligence (ONI).[40] The *FOI Act* completely exempts all documents that originated with, or were received from, the AGO, the ASD, ASIO, ASIS, the DIO, IGIS and the ONI, as well as summaries and extracts of such information.[41] Certain Australian Transaction Reports and Analysis Centre (AUSTRAC) documents are also exempt.[42] These exemptions are in addition to the general exemption from disclosure in s 33 for documents that could reasonably be expected to cause damage to security, defence or international relations.

The Commonwealth Ombudsman and the AHRC cannot inquire into actions taken by the AGO, the ASD, ASIO, ASIS, the DIO or the ONI, and the AHRC is obliged to transfer any discrimination complaints it receives about an intelligence agency to the IGIS. [43] The *Public Interest Disclosure Act 2013* (Cth) has strict limits on disclosure of a very broad category of "intelligence information".[44]

Where exceptions are expressed as applying to the entire functions of an agency, the exception automatically covers additional activities as the functions of the agencies expand. Some of the additional functions given to intelligence agencies in recent years go beyond traditional intelligence-gathering activity.[45] What little litigation there has been suggests that a wide view is to be taken of the scope of the statutory functions of intelligence and security agencies.[46] In the case of the DIO, which does not have any statutory functions, the statutory exceptions can be expanded by a policy decision to change the "mandate" of the agency.[47]

Specialised oversight

Although most of the usual administrative law review mechanisms do not apply and the ability of individuals to bring an action for review are very limited, there are specialised arrangements for oversight within the executive branch of government for the actions of

40 *Privacy Act 1988* (Cth) s 7(1)(f)–(g), (h). The *Privacy Act* also exempts others from their obligations under the Act in relation to information passed to ASIO, ASIS, the ASD or the ACIC: s 7(1A). There is also a slightly more limited exception for material passed to the ONI in s 7(1B).

41 *Freedom of Information Act 1982* (Cth) s 7(2A) — except that the Australian Hydrographic Office, which is part of the AGO, is not exempt.

42 Ibid s 7(2G).

43 *Australian Human Rights Commission Act 1986* (Cth) s 11(3)–(3C); *Ombudsman Act 1976* (Cth) s 5(2)(e), which excludes actions taken by ASIO, ASIS, the ASD, the DIO, the AGO or the ONI from IGIS jurisdiction. Section 6F allows certain complaints relating to the AFP and ACIC which are in IGIS jurisdiction to be transferred from the Ombudsman to the IGIS. Both the Australian Human Rights Commission and the IGIS have some functions in relation to the AFP and ACIC: see *Australian Human Rights Commission Act* ss 20(4C), 49(4C); *Inspector-General of Intelligence and Security 1986* (Cth) pt IIIA (*IGIS Act*).

44 *Public Interest Disclosure Act 2013* (Cth) ss 26, 34, 41.

45 For example, the ASD's "cyber security" function has greatly expanded in scope (it was previously limited to advising government bodies and now includes a wide range of non-government entities): *IS Act* (n 13) s 7(1)(ca), (2). The AGO's functions now enable it to assist Commonwealth and state authorities that are engaged in emergency response functions, safety functions, scientific research functions, economic development functions, cultural functions and environmental protection functions, as well as expanded scope to assist the Australian Defence Force: *IS Act* s 6B(1)(ea)−(g). The AGO is also now the Hydrographic Office mentioned in s 223 of the *Navigation Act 2012* (Cth): *IS Act* s 6B(3)−(4). See further the discussion in INSLM, *Secrecy Offences — Review of Part 5.6 of the Criminal Code Act 1995 (Cth)* (Report, 27 June 2024) 82–3.

46 See, eg, *R (Cth) v Baladjam [No 39]* (2008) NSWLR 648, 660 [47]; *Jaffarie v Director-General of Security* [2014] 226 FCR 505, 524 [58]–[66]; *Church of Scientology* (n 26); *R v Collaery (No 12)* [2022] ACTSC 108 [13].

47 The INSLM recently recommended that the functions of the DIO be placed on a statutory footing: INSLM, *Secrecy Offences* (n 45) recommendation 5.

intelligence and security agencies. The absence of judicial or merits review does not mean that national security and intelligence decision-makers are free to ignore the rules of good decision-making.

Inspector-General of Intelligence and Security review

The *IGIS Act* gives the IGIS a broad mandate to review the operations and activities of ASIS, ASIO, the ASD, the AGO, the DIO and the ONI, as well as a narrow mandate to review actions taken under network activity warrants issued to the AFP or ACIC.[48] The IGIS can investigate complaints and conduct inspections, and has extensive powers when undertaking inquiries. The IGIS is not a merits review body and can only make recommendations. Reports are provided to the relevant agency head and the minister.[49] The language of the *IGIS Act* and the language in recent reports by the Inspector-General do not include terms like "procedural fairness", nor expressly mention as grounds of review the types of "classic" administrative law review grounds in ss 5–6 of the *ADJR Act*. Nevertheless, it seems reasonable to assume that the expression "legality and propriety" in the *IGIS Act* is wide enough to encompass all of these things, particularly in a context in which almost all other review is excluded.

One significant limitation on IGIS jurisdiction is the exclusion of any decision made by a minister.[50] This includes the issuing of warrants by the Attorney-General and authorisations by the Defence Minister or Foreign Minister.[51] The IGIS also cannot review matters that could be reviewed by the ART.[52] Neither of these exclusions is surprising given that the IGIS is part of the executive branch.

Individuals from outside government who are making a complaint to the IGIS are likely to suffer from a similar lack of access to information as applicants seeking another review mechanism.[53] The IGIS has power to access all relevant information when conducting an inquiry, but is subject to a strict secrecy obligation which limits what they can disclose, including to a complainant.[54]

The Inspector-General, as a statutory officer, is granted wide discretion as to how to prioritise their resources. By its nature much of the work of the IGIS relies on access to highly classified information. Different Inspectors-General have taken different approaches to publishing the outcomes of their reviews, but there are clearly limits on what can be disclosed, making it difficult to judge how administrative law principles are being applied over time.[55]

48 The Intelligence Services Legislation Amendment Bill 2023 (Cth), before Parliament at the time of publication, seeks to expand the jurisdiction of the IGIS to include the ACIC and the intelligence functions of AUSTRAC, the AFP and the Department of Home Affairs.

49 *IGIS Act* (n 43) s 22.

50 Ibid s 9AA(b).

51 In relation to these ministerial powers see: *IS Act* (n 13) ss 8, 9; *ASIO Act* (n 2) pt III; *TIA Act* (n 15) ss 9, 9A, 11A,11B,11C.

52 *IGIS Act* (n 43) s 9AA(c).

53 The IGIS has jurisdiction to receive employment-related complaints and public interest disclosures from staff members of intelligence agencies, and they would presumably have access to more information about the issue in contention than "outsiders" would.

54 *IGIS Act* (n 43) ss 18, 23, 34.

55 For a comparison on the different approaches see Christopher Jessup, "The role of the Inspector-General of Intelligence and Security: a primer" (Speech, Fiat Justitia Lecture, Monash University, 8 May 2024); Margret

Other specialist review

Since 2012 the Attorney-General has appointed a person to review ASIO adverse security assessments for people in immigration detention who have been found to be owed protection obligations under international law but are ineligible for a protection visa because of the adverse security assessment. People in this category do not have access to ART or *ADJR Act* review of their security assessment. This role is not a statutory role and can only provide advice. Statistics about the findings of these reviews is published in ASIO annual reports.[56]

The Independent National Security Legislation Monitor is a statutory officer who reviews the operation and effectiveness of a subset of national security legislation.[57] The Monitor and their Office are in effect a specialist law reform body and have no role in investigating individual complaints or merits review.

What does this mean for the future?

Discussion about decision-making in any field cannot ignore the increasing role of "artificial intelligence" and related technologies supporting "augmented" and sometimes "automated" decision-making. Security and intelligence agencies are traditionally early adopters of technology and there is significant investment by government in the technological capabilities of these agencies.[58] A recent report by the IGIS looked at the legality and propriety of the use of AI in intelligence agencies within IGIS jurisdiction and said that it had "not identified any legality, propriety or human rights concerns with the current use of AI systems nor has it identified any drivers for immediate changes to its oversight approach".[59] Although it does not contain much detail, this report is encouraging. But it must be remembered that IGIS reviews are measuring agency compliance with existing laws and directions. Emphasis in the report is placed on agencies developing their own internal governance and "ethics" frameworks.[60]

Stone, "Reflections on oversight of intelligence agencies: promoting compliance, trust and accountability" (2021) 95(10) *Australian Law Journal* 780; Vivienne Thom, "Reflections of a former Inspector-General of Intelligence and Security" (2016) 83 *AIAL Forum* 11; Ian Carnell and Neville Bryan, "Watching the watchers: how the Inspector-General of Intelligence and Security helps safeguard the rule of law" (2006) 57 *Admin Review* 34.

56 Australian Security Intelligence Organisation, *Annual Report 2022–23* (Report, 29 September 2023) 101–3. See also Attorney-General's Department (Cth), "Independent reviewer of adverse security assessments: reviewing ASIO adverse security assessments", *National Security* (Web page) <https://www.ag.gov.au/national-security/independent-reviewer-adverse-security-assessments>.

57 See the definition of "national security and counter-terrorism legislation" in *Independent National Security Legislation Monitor Act 2010* (Cth) s 4; see also ss 3, 6–9.

58 For example, the government recently announced a $2 billion investment in new data centres, including to "improve our ability to securely share and analyse our nation's most classified data at speed and at scale, and provides opportunities to harness leading technologies including artificial intelligence and machine learning": Prime Minister Anthony Albanese and Deputy Prime Minister Richard Marles, "Australian Government partners with Amazon Web Services to bolster national defence and security" (Joint media release, 4 July 2024). There was also a $10 billion commitment to REDSPICE, an expansion of the ASD's cyber-security functions including through the use of "advanced technology": Prime Minister Scott Morrison and Defence Ministers, "Budget 2022–23 delivers record investment in Defence and supporting our veterans" (Joint media release, 29 March 2022) <https://www.minister.defence.gov.au/media-releases/2022-03-29/budget-2022-23-delivers-record-investment-defence-and-supporting-our-veterans>.

59 IGIS, *Preliminary Inquiry — Use of Artificial Intelligence by Intelligence Agencies* (Final report, 29 May 2024) 2 (*IGIS Preliminary Inquiry into Use of AI*).

60 Ibid 5–6.

Much work is being done to develop regulatory frameworks to apply to this sort of technology in future *general* government decision-making.[61] For example, the recent *National Framework for the Assurance of Artificial Intelligence in Government* sets out principles for a consistent approach to government use of AI.[62] The frameworks seek to uphold and apply values around procedural fairness, exclusion of bias, transparency and reviewability — all core concepts in administrative law. However, based on the history of excluding national security decisions from the usual regulatory and review systems, it seems likely that when "frameworks" like this eventually get turned into law, national security decision-making will be treated differently.[63] Australia would not be alone in excluding national security matters from general regulation of AI. The European Union *Artificial Intelligence Act*, arguably the first major attempt at regulating AI by law, does not apply to AI systems used for national security purposes.[64]

This means the government and the Parliament ought actively consider what regulation *will* apply to the use of AI in national security–related decision-making in Australia. It is not enough to simply say that use of AI in this field must be "lawful": the key law which regulates data collection and use in this area, the *Privacy Act 1988*, does not apply to security and intelligence agencies, nor do the main mechanisms for review.[65] Concepts like "ethical AI" can be very broad and hard to apply in a practical way.[66] Security and intelligence legislation provides very broad discretion for agencies to collect, retain, use and disclose any information

61 In this context, the expression "regulatory framework" is being used in the broad sense and not limited to legislation. See Peter Drahos, *Regulatory Theory: Foundations and Applications* (ANU Press, 2017); Ian Ayres and John Braithwaite, "Responsive regulation: transcending the deregulation debate" in Martin Lodge, Edward C Page and Steven J Balla (eds), *The Oxford Handbook of Classics in Public Policy and Administration* (Oxford University Press, 2015) 559.

62 Australian Government et al, *National Framework for the Assurance of Artificial Intelligence in Government* (Policy, 21 June 2024). See also Department of Prime Minister and Cabinet, "How might artificial intelligence affect the trustworthiness of public service delivery?" (Long-term Insights Briefing, 27 October 2023) <https://www.pmc.gov.au/resources/long-term-insights-briefings/summary-how-might-artificial-intelligence-affect-trustworthiness-public-service-delivery>.

63 Key parts of the *National Framework for the Assurance of Artificial Intelligence in Government* (n 62) seem inconsistent with the way national security decisions are currently regulated. Examples include the emphasis on compliance with the *Privacy Act 1988* (Cth), disclosure of information about AI use to affected people, and access to review: see, respectively, chs 4.1, 6.1 and 7.1. The *IGIS Preliminary Inquiry into Use of AI* (n 59) recommended that the intelligence agencies "either through the Office of National Intelligence or independently, should continue to engage with Australian Government policy makers to ensure legislation and other frameworks governing the use of AI, remain applicable to, or don't preclude, the activities of the National Intelligence Community": recommendation 3.

64 European Parliament, Corrigendum to Regulation EU (2024) Laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) art 2(3).

65 *Privacy Act 1988* (Cth) s 7. The centrality of the *Privacy Act* is a feature of the Commonwealth Ombudsman, *Automated Decision-making — Better Practice Guide* (Guidelines, 1 January 2024) 11–16, 26. See also Office of the Australian Information Commissioner, "Guidance on privacy and developing and training generative AI models" (Web page, 21 October 2024) <https://www.oaic.gov.au/privacy/privacy-guidance-for-organisations-and-government-agencies/guidance-on-privacy-and-developing-and-training-generative-ai-models>.

66 See, eg, Luke Munn, "The uselessness of AI ethics" (2023) 3(3) *AI and Ethics* 869; Thilo Hagendorff, "The ethics of AI ethics: an evaluation of guidelines" (2020) 30(1) *Minds & Machines* 99.

which may be relevant to their functions.[67] Those broad schemes were not developed to deal with the challenges of technology like AI. It might be that there is no issue here and that self-regulation through policy and ethics frameworks is an appropriate outcome, but we should not reach that conclusion lightly — particularly when the issue is viewed through the lens of administrative law. The exclusion of most review mechanisms makes it especially important that additional scrutiny is given to what regulation (in the broad sense) should look like in this area.

Conclusion

This article has looked at the growth in national security legislation and the way that many of the decisions made under this expanding body of law are excluded from the usual system of administrative law — either through limitations on access to information or by the express exclusion of review mechanisms. More national security laws are being made, more decisions are being made under them, and there is more reliance being placed on review by the specialist oversight bodies and, in particular, the IGIS. These are bodies which have only recommendation-making powers. It seems likely this trend will continue.

There are certainly times when there is a need to maintain secrecy in order to protect national security, and this will inevitably place a practical limit on procedural fairness and the way aspects of the system of administrative law can operate. But each time we limit access to review rights, make exceptions or curtail other checks on government action, we undermine fundamental aspects of our system of law. This makes it essential that we regularly, and rigorously, review our existing — and future — national security legislation in order to ensure that special rules and exceptions created for national security and intelligence matters are necessary and proportionate. We should also actively consider what sort of regulatory framework is appropriate for the use of "augmented" or "automated" decisions supported by AI in national security agencies.

Appendix: Methodology

The volume of national security laws was calculated according to how many pages there were in each consolidated Act or identified part of the Act in force on 30 June of the relevant decade. The most recent consolidated version on the Federal Register of Legislation (FRL) was used.

Where the whole Act has been classified as a national security law, the "Order print copy" function on FRL was used to identify the total number of pages in that Act. Where only parts of an Act pertained to national security law, the "Download PDF volumes" function on FRL was used. This produced a version of the Act with a table of contents from which the number of pages for the relevant provisions or Part could be calculated. The number of relevant pages was calculated to the nearest whole number. This approach may underestimate relevant pages as definitions in other parts of the Act were not counted. When an Act repealed and

67 *ASIO Act* (n 2) ss 8A, 17,18; *IS Act* (n 13) ss 6, 6B, 7,15. This seemingly includes maintaining broad databases including reference data: Peter Dutton, Minister for Home Affairs, *Minister's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation of Its Functions and the Exercise of Its Powers* (Guidelines, August 2020) 3.2.

replaced an earlier Act (for example, the *Office of National Intelligence Act 2018* replaced the *Office of National Assessments Act 1977*), the original Act was used in the calculations of growth up until its repeal.

Table A lists the Acts included in each of the six categories, and indicates whether the whole Act or only certain provisions were included. The numbers of pages in this table are as at 30 June 2024.

Table A. Commonwealth Acts counted as national security laws, as at 30 June 2024

Act	Pages count	Provisions included in count
Category 1: Powers and functions of intelligence agencies		
Anti-Money Laundering and Counter-Terrorism Financing Act 2006	380	Whole Act
Australian Crime Commission Act 2002	203	Whole Act
Australian Secret Intelligence Organisation Act 1979	345	Whole Act
Intelligence Services Act 2001	144	Whole Act
Office of National Intelligence Act 2018	59	Whole Act
Security of Critical Infrastructure Act 2018	52	Pts 3, 3A and 4
Telecommunications (Interception and Access) Act 1979 [ASIO-only powers]	66	Ch 2 pt 2-2, ch 3 pt 3-2, ch 4 pt 4.1 divs 3, 4C sub-div A-B, sch 1 pt 4
Total	**1,249**	
Category 2: Law enforcement intelligence		
Australian Border Force Act 2015	66	Whole Act
Australian Federal Police Act 1979	237	Whole Act
Australian Passports Act 2005 [Passport Cancellation]	2	Sections 22A, 24A
Charter of United Nations Act 1945 [Terrorism Assets]	11	Pt 4
Counter-Terrorism (Temporary Exclusion Orders) Act 2019	34	Whole Act
Crimes Act 1914 [Assumed Identities]	37	Pt IAC
Crimes Act 1914 [Terrorism-related powers and procedures]	55	Pt IAA divs 3A, 4B, pt IAE, ss 15AA, 19ALB, 19AG, pt IC sub-div B

Act	Pages count	Provisions included in count
Crimes Act 1914 [Warrant Powers]	144	Pts IAA div 3, IAAC, IAAA, IAAB divs 5–6
Nuclear NonProliferation (Safeguards) Act 1987	17	Pt III div 2A
Proceeds of Crime Act 2002	482	Whole Act
Security of Critical Infrastructure Act 2018	195	Remainder of the Act
Terrorism and Cyclone Insurance Act 2003	52	Whole Act
Total	**1,332**	
Category 3: Telecommunications and surveillance		
Surveillance Devices Act 2004	275	Whole Act
Telecommunications (Interception and Access) Act 1979	714	Whole Act
Total	**989**	
Category 4: Criminal offences directly linked to national security		
Crimes (Aviation) Act 1991	4	Pt 2 div 1 and div 4
Crimes (Hostages) Act 1989	25	Whole Act
Crimes (Internationally Protected Persons) Act 1976	5	Section 8
Crimes (Ships and Fixed Platforms) Act 1992	8	Pt 2 div 1, pt 3
Criminal Code Act 1995	360	Ch 5
Total	**402**	
Category 5: Special oversight, accountability and procedural laws		
Administrative Decisions (Judicial Review) Act 1977	2	Sections 9A, 9B, schs 1, 2 paras (da), (db)
Administrative Appeals Tribunal Act 1975	28	Pt III div 3 sub-div B, ss 17B, 27AA, 29, 29B, 35AA, 38A, 39A, 39BA, 39B, 39C, 42, 43AAA, 43AAB, 69B
Archives Act 1983	3	Sections 29, 33, 50A, 53
Freedom of Information Act 1982	9	Pt VII div 9, ss 33, 55U, 60A

Act	Pages count	Provisions included in count
Independent National Security Legislation Monitor Act 2010	42	Whole Act
Inspector-General of Intelligence and Security Act 1986	90	Whole Act
National Anti-Corruption Commission Act 2022	13	Sections 33, 34, 35, 62, 102, pt 11 div 3
National Security Information (Criminal and Civil Proceedings) Act 2004	116	Whole Act
Ombudsman Act 1976	13	Sections 5, 5A, 5B, 6F, 14, 35AB
Privacy Act 1988	2	Sections 7, 49B
Total	**318**	
Category 6: Other powers related to national security		
Australian Citizenship Act 2007 [Citizenship loss]	14	Pt 2 div 3
AusCheck Act 2007	37	Whole Act
Australia's Foreign Relations (State and Territory Arrangements) Act 2020	88	Whole Act
Aviation Transport Security Act 2004	179	Whole Act
Defence (Special Undertakings) Act 1952	26	Whole Act
Defence Act 1903	63	Pt IIIAAA
Foreign Acquisitions and Takeovers Act 1975	341	Whole Act
Foreign Influence Transparency Scheme Act 2018	86	Whole Act
Foreign Passports (Law Enforcement and Security) Act 2005	35	Whole Act
Maritime Transport and Offshore Facilities Security Act 2003	271	Whole Act
Maritime Powers Act 2013	111	Whole Act
Total	**1,251**	
Grand total	**5,541**	

Fundamental values in the age of automated decision-making

*Kristian Hollins**

The integration of automation in government decision-making processes presents both opportunity and significant challenge. Technology often evolves at a rate that surpasses the development of legal frameworks, posing risks of unknown flaws and unaccountable decision-making processes. In this murk, what is the role of values and principles in administrative governance?

Administrative decision-making is the engine room of public administration and so is constantly faced with limited resources to deliver increasingly broad and complex government agendas. The restrictions on resourcing and the ever-evolving policy agenda are a vector for the possible opportunities of automation, with touted potential to "increase productivity, efficiency, accuracy, and the cost-effectiveness of service delivery".[1]

The downsides of these systems are many and various, but some of the more pressing challenges include: the complexity of legal reasoning by non-human logic; the meaning of a legal "decision" and the authority to decide; and the "opacity and bias risks associated with 'black box' automated systems".[2]

In describing "the capacity of a machine to activate and achieve its purposes without further human intervention", Yeung's analogy that simple automated systems demonstrate "functional autonomy" similar to that of a landmine appears particularly apt.[3] A landmine lacks an ability to differentiate or apply values-based discretion to the execution of its function.

Despite these possible and as yet unmitigated pitfalls,[4] it is near inevitable that governments will adopt automated procedures in administrative governance, and "there will be an increasing temptation to further automate complex decisions to enhance the efficiency of government decision-making".[5]

O'Sullivan compellingly argues that administrative law may not go far enough in regulating the lawfulness of government's socio-political directives.[6] Among those directives to speed up government administration and reduce operational and service delivery costs, the potential of automated systems to streamline manual processing tasks becomes apparent.

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1 *Royal Commission into the Robodebt Scheme* (Final Report, 2023) 471.

2 Anna Huggins, "Addressing disconnection: automated decision-making, administrative law and regulatory reform" (2021) 44(3) *University of New South Wales Law Journal* 1050.

3 Karen Yeung, "Why worry about decision-making by machine?" in Karen Yeung and Martin Lodge (eds), *Algorithmic Regulation* (Oxford University Press, 2019) 22.

4 Dominique Hogan-Doran, "Computer says 'no': automation, algorithms and artificial intelligence in government decision-making" (2017) 13(3) *Judicial Review* 345, 345.

5 Yee-Fui Ng et al, "Revitalising public law in a technological era: rights, transparency and administrative justice" (2020) 43(3) *University of New South Wales Law Journal* 1050.

6 Maria O'Sullivan, "Automated decision making and human rights: the right to an effective remedy" in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021) 72.

But what is the cost of embracing tools of automation to support legal processes? It is possible to incorporate neo-liberal managerialism into adjudicative processes, but perhaps not while maintaining the foundational idea of "administrative justice to the individual".[7] Shortcuts to process will eventually eat into the procedural frameworks designed to ensure the integrity of the decision.

This article posits that in the presence of fast-moving technological advances and the seeming lag, absence, or incapacity of comprehensive regulatory intervention, it is the values and principles underpinning administrative law themselves that provide the framework to govern automation in administrative decision-making.

What follows is a brief consideration of the fundamental values underpinning administrative law, where they arise, and what purpose they serve. I will then consider how these overarching values are operationalised through administrative justice, and particularly through the lens of legal reasonableness. In doing so, I will underscore these values' continued applicability to automation. In order to maintain these foundational strengths of the system at the forefront of technological change, I suggest that proper regulation of automation in public administration must start with ensuring the fundamental principles of administrative law, and the values on which they are based, are ingrained from the very inception of any policy or system of public administration.

What are the fundamental values of administrative law?

Ensuring the fundamental principles and values of administrative law are ingrained in policies and systems of course begs the question, what are the fundamental values of administrative law? The law itself gives some indications, though they are somewhat nebulous. Section 9 of the *Administrative Review Tribunal Act 2024* (Cth) (*ART Act*) provides that the objectives of the Act are to ensure a review system that is: fair and just; expedient, informal and inexpensive; accessible and responsive; transparent; and promoting of public trust and confidence.[8] Broadly these reflect the same objectives in the previous *Administrative Appeal Tribunal Act 1975* (Cth).[9] Though expressly discussing Tribunal review, these principles readily apply to all administrative decision-making.

The academic literature also mentions variations of these, with legality, rationality, impartiality, fairness and transparency all commonly mentioned.[10] The ultimate source of these lie in a conceptual understanding and practical application of the values of democratic governance. In this, it is incumbent on us to remember that administrative law functions as a regulatory system.[11] At the most fundamental conceptual level, administrative law serves an essential function as both a mechanism of the separation of powers, and to "regulate" the exercise of power by executive government through the judiciary; an authoritative set

7 Jessica Hambly and Nick Gill, "Law and speed: asylum appeals and the techniques and consequences of legal quickening" (2020) 47(1) *Journal of Law and Society* 3, 28.
8 *Administrative Review Tribunal Act 2024* (Cth) (*ART Act*) s 9.
9 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A.
10 John McMillan, "Ten challenges for administrative justice" (2010) (61) *AIAL Forum* 23, 23.
11 Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2nd ed, 2012) 6.

of rules, and a mechanism for monitoring and promoting compliance.[12] In more practical terms, administrative law exists to regulate government decision-making which impacts on the rights and responsibilities of civil society.

The purpose is multi-fold: administrative law ensures that power is not concentrated in any one branch of government,[13] and that power delegated to the executive is exercised in accordance with not only the *Constitution* and relevant statute, but with the common law, and the social values and principles on which they are all based.[14]

Regulation involves binding standard-setting, monitoring and sanctioning.[15] Through administrative law, the courts provide a scrutiny of how the executive has acted on the governance functions directed by the legislature. In this way, administrative law is one of the mechanisms through which civil society can, theoretically at least, actively participate in the evolving regulatory process. Those affected by government decisions can challenge those decisions in the courts, seeking to "responsively regulate" the actions of government.[16]

Returning briefly to the *ART Act*, we see these values at work. The Revised Explanatory Memorandum to the Act, though specifically discussing the re-establishment of the Administrative Review Council, states that the Act will provide for greater understanding of how administrative law principles underpin the appropriate use of public power.[17]

Principles and values in operation

How do we connect these conceptual regulatory and governance principles with day-to-day government?

In 1971 the Kerr Committee insightfully stated that "[s]ubstantive principles are often concealed in what appear to be procedural restrictions".[18] Through monitoring and sanctioning of jurisdictional error,[19] we see the operationalisation of normative administrative values. It is to this that I would like to turn, and in particular, the prima facie inconsistency of automated decision-making with the tangible expression of values in public administration. To that end, I will consider the broad example of legal reasonableness. Before I do so, however, I will provide a brief word on procedural fairness.

12 Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 3.
13 Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press, 2009) 15.
14 Cane and McDonald (n 11) 2.
15 Christel Koop and Martin Lodge, "What is regulation? An interdisciplinary concept analysis" (2017) 11(1) *Regulation & Governance* 95, 95.
16 John Braithwaite, "Types of responsiveness" in Peter Drahos (ed), *Regulatory Theory* (ANU Press, 2017) 117, 121.
17 Revised Explanatory Memorandum, Administrative Review Tribunal Bill 2024 (Cth) 6 [34].
18 Commonwealth Administrative Review Committee, Parliament of Australia, *Commonwealth Administrative Review Committee Report* (Parliamentary Paper No 144, 1971) 9 [21] (Kerr Committee Report).
19 Ibid 11–16.

Procedural fairness

Procedural fairness is at the core of administrative values. Denying the requirement for a fair hearing by an impartial arbitrator is an "abrogation"[20] of an "inviolable limitation"[21] imposed by the common law on all administrative decision-making.

The flexible content of these guiding rules has been the subject of much jurisprudence, though in the Australian context were best articulated by Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*, who said:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.[22]

It is this concept of practical injustice which must be explored when considering the use of automated systems in administrative decision-making.

Automation inherently and by definition dehumanises the decision-making process. While this might result in the removal or minimisation of individual human biases and prejudice, it also potentially systematises practical injustice at scale and speed. It eliminates human discretion, judgement and agency — the very basis of reasonableness which is "essential to overcome the imperfection associated with legal rules".[23] If we acknowledge that legal rules can be imperfect, then we must allow for reasonable, discretionary decision-making.

Let us turn then to reasonableness and automation.

Reasonableness

Reasonableness is one of the more tenuous concepts in administrative law, ever since the circuitous, tautological reasoning of *Wednesbury*.[24] It could be argued that all legal errors are in fact fundamentally errors of reasonableness, though that is outside the scope of this paper, and I digress. In any case, the operational substance of reasonableness is difficult to pin down, and often seems to be judged best in its egregious absence. Still, Australian courts have given us some idea of what a reasonable decision looks like. And I will take a moment to put forward why automated decisions cannot, in the current state of jurisprudence, be reasonable.

First, I posit that a *reasonable* decision requires *reasoning*. Legal reasonableness requires deliberation. The NSW Ombudsman report on automation perhaps summarises the common law position on this best:[25] an administrative decision requires an "active intellectual

20 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30].
21 Ibid 534–5 [160].
22 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [73] (Gleeson CJ).
23 Yeung (n 3) 29.
24 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
25 NSW Ombudsman, *The New Machinery of Government: Using Machine Technology in Administrative Decision-making* (Report, 29 November 2021) 53–4.

process”[26] or a “proper, genuine, and realistic consideration”,[27] which meets the standard of “honest confrontation” with human consequences.[28]

As Allsop CJ stated in *Hands v Minister for Immigration and Border Protection*:

> Mechanical formulaic expression … may hide a lack of the necessary reflection upon the whole consideration of the human consequences involved. Genuine consideration of the human consequences demands honest confrontation of what is being done to people.[29]

Though limited to a discussion of “real chance” in refugee assessment, the courts have held that confining evaluative processes to the use of statistical[30] or arithmetical approaches[31] to decision-making will be unlikely to meet the requirement for application to individual circumstances.[32] More simply, in the oft-cited case of *Pintarich v Deputy Commissioner of Taxation*, the full Federal Court held that sending an automated letter was not evidentiary of a process of deliberation by a delegate.[33] A valid decision requires the deliberative mental process of consideration of the facts and coming to a conclusion,[34] as well as the overt act of expressing that conclusion.[35]

Which raises my second submission on this point: *reasonableness* requires *reasons*. In *Minister for Immigration and Citizenship v Li*, the plurality argued that an unreasonable decision was one that “lacks an evident and intelligible justification”.[36] Such a justification, I argue, requires an evidentiary and intelligible statement, explaining why one outcome might be different from another, a mitigation of the apprehension of arbitrariness in decision-making. Yeung argues that “decisions based on analysis performed by machine learning algorithms that cannot be explained in terms that are comprehensible and intelligible to the individual” cannot meet this standard.[37] This denies a right to hearing, the right to understand, and the right to contest.

How would a decision made by an automated system be articulated and justified? Machine learning algorithms are not usually able to make such an articulation,[38] because they do not really “know”. Machine learning algorithms identify patterns in inputs of datasets and render those patterns into a usable form.[39] It is unclear whether the reasons a machine learning

26 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352, 364 [46]; *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112 [65].
27 *Navoto v Minister for Home Affairs* [2019] FCAFC 135 [89].
28 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 [3].
29 Ibid.
30 *Minister for Immigration and Multicultural Affairs v S152/2003* (2004) 222 CLR 1, 29 [80].
31 *MZAAD v Minister for Immigration and Border Protection* [2015] FCA 1031 [39].
32 *DZADQ v Minister for Immigration and Border Protection* [2014] FCA 754 [65].
33 *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79.
34 Ibid 12 [46]–[49].
35 Ibid 13 [53].
36 (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ) (*Li*).
37 Yeung (n 3) 25.
38 Janina Boughey, “Outsourcing automation: locking the ‘black box’ inside a safe” in Boughey and Miller (eds) (n 6) 142.
39 Michael Veale and Irina Brass, “Administration by algorithm? Public management meets public sector machine learning” in *Algorithmic Regulation* (Oxford University Press, 2019) 121, 121.

algorithm could produce will meet the "actual path of reasoning"[40] threshold that allows a court to identify or exclude the existence of an error of law; or whether the decision can be shown to address, in an active manner, the statutory and policy frameworks, material facts considered, weight given to evidence, and the connections to the ultimate conclusions which would allow for the identification of illogicality or irrationality.[41]

Although an oversimplification, the counterpoint to the legal idiom that "reasonable minds can differ" is that "unreasonable minds cannot". It is the reasons given by which the decision-maker demonstrates their subjective thought process;[42] subjective to the decision-maker yes, but also subjective to the case before them. The giving of reasons is meant in part as a defence against the claim or appearance of arbitrariness in the decision rising to the level of unreasonableness.[43]

The requirement for a decision-maker to act reasonably, to turn their mind to the individual case before them, and to explain their thought processes is the practical embodiment of fundamental administrative values. It is also one which cannot be abrogated, as it goes to how we expect government to conduct itself in its interactions with society.

So how do we ensure these values remain embedded in an age where machine learning continues to gain traction, as does the potential for automated decision-making?

Integrating values holistically

I have endeavoured so far to demonstrate briefly the ongoing application of fundamental legal and administrative values to automation. But the operationalisation of these fundamental values cannot occur in isolation from the broader administrative system. What is required is ensuring those fundamental values remain central to any policy development that results in changes to decision-making processes. Of course, this is true regardless of whether a decision-making system is automated or human.

Doctrinal law study commonly fails to recognise elements of regulation which occur outside of strictly legal processes. Similarly, policy makers appear at times to rely on systems of individualised administrative justice to protect overarching policy positions. This was made particularly clear in the Royal Commission's final report on the Robodebt scheme,[44] as well as the reports of the Commonwealth Ombudsman[45] and the Senate References Committee.[46] The failures of the Australian Government's initial foray into automation of administrative decision-making were not solely failures of automation themselves, but failures of the

40 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 501 [55].
41 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 649–50 [135].
42 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 346 [68].
43 *Li* (n 36) 352 [31] (French CJ).
44 *Royal Commission into the Robodebt Scheme* (n 1).
45 Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System* (Report No 2/2017, April 2017).
46 Senate Community Affairs References Committee, Parliament of Australia, *Accountability and Justice: Why We Need a Royal Commission into Robodebt* (Report, 2022).

administrative justice system operating as it should. The cost of rushing the underlying policy of Robodebt was a failure to establish "secure legal and procedural foundations".[47]

The Robodebt Royal Commission heard evidence that human staff reviewing the automated debt calculations and raising errors were told their job was to confirm the system calculated the debt as programmed, rather than whether the existence of the debt itself was correct. The Report concluded that "[t]here was no meaningful human intervention in the calculation and notification of debts".[48] It is difficult to consider a clearer example of practical injustice arising from limitations on human discretion.

In this context, the question we must ask is, what is the problem we are trying to fix through automation? The substantive benefits seem to lie in speed and consistency, often defined as "efficiency" in public administration. Again, the Kerr Committee was not blind to the tension between efficiency and individual justice, stating:

> [I]t is essential to achieve a balance between the desirability of achieving justice to the individual and the preservation of the efficiency of the administrative process. In approaching that question it is necessary to keep in mind that, although administrative efficiency is a dominant objective of the administrative process, nevertheless the achievement of that objective should be consistent with the attainment of justice to the individual.[49]

If we take this as true, the question becomes, what is it that we want administrative law to achieve in the age of automation?

If we continue to believe that it is necessary to balance individual justice and efficiency in public administration, we must ensure the values which underpin administrative law and democratic governance are "baked in" to the system across the whole spectrum of policy development: from initial conceptualisation and development, through implementation, execution, and ultimately throughout merits and judicial review. The regulatory function of administrative law cannot be limited to remedial compliance in the courts; it must exist as a foundation on which policies and administrative decision-making approaches are constructed.

Conclusion

Administrative law has developed over hundreds of years to remediate inevitable human errors in decision-making. The rise of neo-liberal public management ideals, and the practice of doing more with less, mean some forms of automation, machine learning, and algorithmic decision-making are nigh-on inevitable in public administration.

The substantive principles on which our democratic system is founded exist to rectify the power imbalance inherent in disputes between government and civil society. To dilute or do away with them in favour of automation based on administrative efficiency or bureaucratic expediency is to compromise the rule of law through managerialism. It is an insidious excess of state power.

47 Terry Carney, "Robo-debt illegality: the seven veils of failed guarantees of the rule of law?" (2019) 44(1) *Alternative Law Journal* 4, 6.
48 *Royal Commission into the Robodebt Scheme* (n 1) 477.
49 Kerr Committee Report (n 18) 3 [12].

It is also poor governance, and financially shortsighted public administration. Compare, for example, the possible efficiencies of automated decision-making compared to the potential expense of rectifying widespread legal error. I am certain government pursers would have something to say about the money ultimately raised by Robodebt compared to the costs of merits and judicial review, a court settlement, administrative rectification and a Royal Commission, not to mention the human cost or the loss of trust in government.

Indeed, if the Robodebt Royal Commission showed us anything, it was not simply the implementation of a flawed system of averaging, but a failure to embed and maintain the core values of administrative law in the governance of a public program. The Royal Commission showed us a system which compounded and automated substantive unfairness, and then wilfully avoided the checks and balances intended to oversee administrative justice. Robodebt was not only a failure of the automated system; it was a failure to integrate and nurture the principles and values which are meant to underpin public administration and regulatory administrative law.

What I have endeavoured to demonstrate is that the values and ethical principles which underpin Australian administrative law themselves provide a genesis for regulatory frameworks to govern automation in administrative decision-making. Substantive and procedural fairness, transparency, accountability — these are not just theoretical concepts or high-minded ideals. They are core components of effective and efficient governance, and essential components of a functioning democracy. Those pesky ideals of checks and balances, separation of powers, and avoiding executive overreach, are fundamental when we consider that the same democratically elected governments that have sole control over the legitimate use of violence to effect coercive compliance, are the ones who decide on the distribution of entitlements and encumbrances to civil society. These are not inconsequential powers. To quote Yeung, “the way in which benefits and burdens are distributed across society … raises fundamental questions of justice”.[50]

And they may feel like purely conceptual concerns; taken in abstract, they are. But they are worth considering as we contemplate changes to the concepts underpinning government decision-making, and ones that could result in both conceptual — and very real — systematic errors and systemic injustice.

50 Yeung (n 3) 38.

Trauma-informed administrative law — a preventative approach

*Jasmin Douglas and Catherine Saunders 2024**

In recent years, in Australia, the impact of trauma arising from past government decisions, policies and processes has been critically examined in an effort to improve and prevent further harm. Royal commissions and other inquiries have shone a spotlight onto the processes that led to those decisions and made recommendations that seek to enable decision-makers to act in a manner that reflects the fundamental values underpinning public service. Subsequently, governments have been held to account, accepted recommendations made, resourced their implementation and, in some cases, apologised for the wrongs that occurred. Such events can be an opportunity to listen and learn from the mistakes of the past.

Beyond these findings, we have an opportunity to consider deeply the potential vulnerability of people interacting with government systems, whether customers, staff or even us as lawyers practising within those systems or representing parties on either side of the equation. We also have an opportunity to keep coming back to administrative law principles and consider how these provide a solid foundation for preventing harm. We assert that a multi-layered, integrated approach is needed to achieve this. In his lecture "The foundations of administrative law", Justice Allsop conceptualises administrative law as "the part of the law that controls and shapes public power" with foundational features that are political, societal and temporal.[1] In describing the societal foundational feature, Allsop J says:

> [T]here is the need for the law to operate and manifest itself as a **human** expression of values that sustain a pluralist, democratic society, not as a desiccated and soul-less structure of abstract and abstractedly expressed rules, rights and duties, but as the decent, human and fair control of necessary power, giving appropriate trust to those elected to govern.[2]

This article examines how administrative lawyers can play a role in the prevention of trauma using six trauma-informed administrative law principles (the Principles), which we define as:

1. **Lawfulness**: correct and consistent application of the law and legislation to government systems.

2. **Transparency**: access to information.

3. **Accountability**: reasons for decisions, including understanding when automation has been used to make decisions.

4. **Voice**: the right to be heard.

5. **Safety**: physical and emotional safety, including using a model litigant approach.

6. **Recognition**: of individual rights, dignity and unique vulnerabilities.

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1 Justice James Allsop, "The foundations of administrative law" (FCA) [2019] FedJSchol 5.

2 Ibid (original emphasis).

The use of law as a preventative tool is not new. Deterrence predicated on fear of punishment is a cornerstone of the criminal law. This article suggests that administrative law can, when applied with purpose and intention, be used as a tool to prevent harm by using a trauma-informed approach.

We assert that timing is everything when regulating the exercise of government power against the individual or community. Harm could be prevented if the Principles are embedded in the policies and processes of public authorities and upheld throughout government administration. Administrative law practitioners, whether in public service or private practice, have a unique opportunity to influence the application of the principles of administrative law, to ensure incidents of harm are avoided.

The High Court judgment in *Green v Daniels*[3] is an example of the exercise of administrative decision-making in the absence of legal authority. Justice Stephen found that a government policy, introduced at the end of 1976, to deny unemployment benefits to young school-leavers for the period from when they left school until the next school year started, conflicted with the *Social Services Act 1947* (Cth), which fixed eligibility for those benefits; and with the obligation of the Director-General to consider Karen Green's circumstances by reference to the criteria in the legislation without being distracted by the government policy.[4] Fast forward to 2024, and one could argue that examples of decision-making and administrative processes, occurring in the absence of legal authority, appear to continue and, in some cases, cause harm.

This article explores the themes of a preventative approach to the application of administrative law using a trauma-informed lens, focusing on the Australian administrative law landscape. First we explain what it means to take a trauma-informed approach. Then we provide a brief history of administrative law and an explanation of the Australian federal administrative system, followed by practical suggestions as to how lawyers can practise trauma-informed law and advise decision-makers to apply the law in a preventative and trauma-informed way, among the myriad of government systems. Automation of decision-making will be offered as one of the ways forward to embed a trauma-informed approach. We explain how the law can be applied in a trauma-informed way in drafting beneficial legislation, together with how practitioners can apply the law in this way during litigation or other proceedings. Our conclusion summarises the discussion and articulate our hopes for the future in this space.

Overall, we hope to convey that the proper application of existing administrative law principles provides a strong framework for trauma-informed legal practice.

A trauma-informed approach — the human side

In order to develop a trauma-informed approach, one must first have an understanding of trauma. Trauma, sadly, is one of the most relatable human experiences. Almost every individual, at some point in their life, will experience a traumatic event. A person's response

3 (1977) 51 ALJR 463.

4 Peter Hanks, "Administrative law and welfare rights: a 40-year story from *Green v Daniels* to 'robot debt recovery' — closing the chapter" (2021) 103 *AIAL Forum* 19.

to that event is dependent on myriad intrinsic and extrinsic factors. The Principles, when applied, allow decision-makers to recognise unique and individual vulnerabilities.

The *Macquarie Dictionary* defines trauma as "a startling experience which has a lasting effect on mental life; a shock".[5] It is important to acknowledge that trauma is not always apparent directly following the distressing event. It may arise some time later — even years, particularly if the individual endures further injury. A trauma response may be triggered by a seemingly unrelated event. It is equally important to recognise that trauma responses are as varied as individuals.

We do not suggest that lawyers must be fluently versed in the psychology of trauma. Rather, they should simply be mindful, aware, empathetic and informed. Administrative lawyers must recognise that many government and legal processes can be overwhelming and stressful, and that the risk of trauma is high. "All individuals face stress in their daily lives, but this is often particularly true for those who enforce the law, administer justice, or are forced into the legal system."[6]

To take a trauma-informed approach to legal practice is to be cognisant of the human condition. Much has been written on reliability of memory in criminal proceedings, and the impact of trauma on victims of crime has been extensively examined. In administrative law proceedings, it is equally important to recognise that a person's experience of trauma may affect the way they participate in proceedings. Recognising the impact that trauma has on cognitive functioning, for instance, can shape the way legal proceedings are run. Exposure to trauma in childhood can affect cognitive functioning in adulthood.[7] A person's ability to remember details may be impacted by repeated exposure to stressful or traumatic events. Our brain, says University of Waterloo psychologist Myra Fernandes, is designed this way — it is a survival mechanism. It serves our well-being to remember the "gist rather than every detail".[8] This is important for lawyers to remember, particularly in litigation or other proceedings.

A brief history of Australian administrative law

The practice of administrative law concerns itself with the conduct and decision-making processes of government and can be thought of as the bridge between individuals, organisations and government. "Government" as an entity is a powerful machine, against which many may feel helpless. Administrative law is the body of law that regulates the exercise of this power by the government and falls within the broader area of public law.[9]

5 *Macquarie Dictionary* (online at 4 November 2024), "trauma" (def 2).
6 Monica K Miller and Brian H Bornstein, "Stress, trauma, and wellbeing in the legal system: an overview" in Monica K Miller and Brian H Bornstein (eds), *Stress, Trauma, and Wellbeing in the Legal System* (Oxford University Press, 2013) 3, 3.
7 Kristin S Lynch and Margie E Lachman, "The effects of lifetime trauma exposure on cognitive functioning in midlife" (2020) 33(5) *Journal of Traumatic Stress* 773.
8 Lucas Powers, "Trauma prompts brain to focus on survival, not 'peripheral details' ", CBC News (online, 7 February 2016), <https://www.cbc.ca/news/science/trauma-brain-memory-neuroscience-1.3431059>.
9 Judith Bannister, Anna Olijnyk and Stephen McDonald, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 3rd ed, 2023) 2.

Australian administrative law is based on hundreds of years of common law tradition. However, early Australian legal writers realised, mid last century, that "English sources are inadequate for Australian needs because of our different constitutional arrangements".[10]

Professor Robin Creyke, commenting in 2007 on the "remarkable transformation of administrative law in Australia in the 1970s and 1980s", details the adoption of a new approach to this law:

> At the federal level, a codified form of judicial review was introduced in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR Act"); the Federal Court was set up as a second tier judicial body below the High Court to nationally administer the newly defined judicial review jurisdiction; and a multipurpose merits review body, the Administrative Appeals Tribunal ("AAT"), was established. There was to be a statutory right to reasons, an Ombudsman, and later a *Freedom of Information Act 1982* (Cth) ("FOI Act") and a *Privacy Act 1988* (Cth). The package included tribunals in a variety of specialist areas, generally where the demand for review was high, and the new structure was to be monitored by an Administrative Review Council ("ARC"). These new services and bodies were set up alongside existing common law rights of judicial review offered by courts, including the entrenched jurisdiction of the High Court to grant mandamus, prohibition and injunction. In brief, this period in the 1970s and 1980s revolutionised the opportunities for the citizen to discover, be involved in, and challenge decisions made by government.
>
> Subsequently, it became common practice for agencies to offer internal review as a precursor to external review. Moreover, other administrative law standards have been imposed through codes of conduct and service charters, and consultation with stakeholders has been introduced, especially in developing statutory rules. Collectively these changes have resulted in the formulation of standards for good administration which are now widely accepted and applied.[11]

At a similar point in time, Michael D'Ascenzo, a former tax commissioner, exploring the effectiveness of administrative law in the Australian Public Service, gave an account of the emergence of Australian administrative law and its interface with the public service.[12] The author set the scene by reference to the newly created office of the Commonwealth Ombudsman in 1977, inviting people to contact them "if they were being 'trampled underfoot by officialdom', 'strangled by bureaucratic red tape', or were having their problems 'swept under the carpet' ".[13] Painting a different picture to that proffered by Creyke above with respect to the application and acceptance of standards for good administration, D'Ascenzo observed that "in many respects administrative law standards are becoming the base level, not the ultimate benchmarks for the Australian public service",[14] citing impacts of the need for efficiency, cost savings and complexity of legislation, resulting in administrative law taking a back seat.[15]

Fast forward to the present: the systems and structures referred to above persist today with the only significant change being the creation of the new Administrative Review Tribunal (ART), replacing the AAT, and the Commonwealth finally joining all other Australian jurisdictions with a National Anti-Corruption Commission. But has administrative law

10 Ibid 3.
11 Robin Creyke, "Administrative justice — towards integrity in government" (2007) 31(3) *Melbourne University Law Review* 705.
12 Michael D'Ascenzo, "Effectiveness of administrative law in the Australian public service" (2007) 57 *AIAL Forum* 59.
13 Ibid 59.
14 Ibid 59–61.
15 Ibid 62.

continued to take a back seat as suggested by D'Ascenzo? Judith Bannister, Anna Olijnyk and Stephen McDonald assert: "Today, administrative law retains that status [as its own distinct discipline] but is best understood as a sub-discipline of public law, interwoven with and informed by the sub-discipline of constitutional law."[16] For a succinct and contemporary description of accountability mechanisms available in the system today, have a look at the Australian Attorney-General's Department website.

Trauma-informed administrative legal practice — a preventative approach

The starting point is simple. As lawyers we have a solemn responsibility to ensure that administrative systems and decision-makers comply with the legislation that provides authority with its powers to function. So always *read the Act*![17] For those practising in the legislative spaghetti that exists in Commonwealth Government practice, this is easier said than done. A salient example is that there are 875 secrecy provisions in Commonwealth laws.[18] Applying complex legislation to complex government systems is just one example of how hard it can be to apply the law, let alone find it!

We assert that in a perfect world, administrative lawyers have a supportive and often educational role in ensuring good administrative decisions are made. The reach is far greater when this is made easy by systems that support a trauma-informed approach, that adhere to administrative law principles. We contend that applying the Principles, when they are systematised and embedded, will not only prevent breaches of administrative law, but will ultimately protect citizens, public servants and governments from the fallout if things go wrong.

Automated decision-making — an opportunity to embed a trauma-informed approach

We suggest that using an automated decision-making approach is one example of how this concept could be given effect. For example, where a decision can be automated, there is an opportunity to embed administrative law compliance and codified trauma-informed principles into the decision-making system.

The Commonwealth Ombudsman published an updated *Automated Decision-Making — Better Practice Guide* in 2019.[19] Although the second version is now nearly five years old, this is still an excellent resource for those practising in this space. The publication makes the very clear statement that

> automated systems must comply with administrative law principles of legality, fairness, rationality and transparency. They must also comply with privacy requirements and human rights obligations.[20]

16 Bannister, Olijnyk and McDonald (n 9) 4.
17 Hanks (n 4) 21.
18 Attorney-General's Department (Cth), *Review of Secrecy Provisions* (Final Report, 2023) 4.
19 Commonwealth Ombudsman, *Automated Decision-Making — Better Practice Guide* (Guidelines, 2019).
20 Ibid 6.

Another useful reference is found in the Canadian "Guide on the scope of the *Directive on Automated Decision-Making*".[21] This directive applies to departments that are using automated decision systems to automate an administrative decision fully or partially. It defines automated decision systems to include those that rely on artificial intelligence (AI) and other technologies. The directive applies to systems developed or procured after April 2020. It states that it helps departments identify, assess and mitigate the risks of automated decision systems to people and departments and to comply with principles of administrative law such as transparency, accountability, legality and procedural fairness.

The ability to build the Principles into these systems, as business rules[22] to apply in accordance with legislative provisions (such as criteria needed to be satisfied for eligibility for a particular payment), is where lawyers practising in these areas can influence and embed a preventative trauma-informed administrative law approach into government systems.

Andrew Mowbray, Philip Chung and Graham Greenleaf explained the concept of building in preventative administrative law approaches into automated systems:

> Rules as Code (RaC) is a technology that can be used to explicitly represent and apply rules such as legislation in a range of applications. This approach can be used in automated decision making systems to provide a "rule of law" basis for the operation of this type of software. Apart from ensuring that decision making takes account of, and is driven by, law, this approach also allows for explanations that can be expressed in terms of the legal basis of decisions being made.[23]

We are not suggesting that all administrative decisions are capable of full automation. For example, those that have an inherent discretionary element — the clue being where legislation uses the words "may" or "consider" — cannot be fully automated. However, decisions that have set binary criteria set out in the legislation, such as an entitlement to a payment if a person falls within a particular category, are capable of automation, as no discretion, no judgement, is invoked. Of course, the existence of automation enabling legislation is also necessary. This is reflected in words such as *may use a computer program to …*

Lawyers can and also must pay close attention to ensuring discretionary decisions are not automated until and unless our systems are sophisticated to the point of satisfying requirements of legislation. It seems likely that generative AI, or similar technology, will no doubt be developed that will provide this capability. Lawyers play an important role in the oversight of this emerging technology, to ensure the rule of law is upheld, together with the application of a trauma-informed approach.

21 Treasury Board of Canada Secretariat, "Guide on the scope of the *Directive on Automated Decision-Making*", *Government of Canada* (Web page, updated 18 July 2024) <https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/guide-scope-directive-automated-decision-making.html>.

22 Business rules provide the foundation for software systems by taking documented or undocumented information and translating it into various conditional statements. For example, when conducting a purchase order, there may be a different approval process depending on the cost. "What are business rules?", *IBM* (Web page) <https://www.ibm.com/topics/business-rules>.

23 Andrew Mowbray, Philip Chung and Graham Greenleaf, "Applying the rule of law in automated decision systems through Rules as Code (AustLII's submission to the Robodebt Royal Commission)" (UNSW Law Research Paper No 23–4, 10 February 2023) <https://dx.doi.org/10.2139/ssrn.4355989> 2.

An analogy could be drawn with the Industrial Revolution, beginning in Britain in the 18th century, when technological changes from an agrarian and handcrafted economy became dominated by industry and machine manufacturing. The technological changes fundamentally changed the way people worked and lived, and transformed society. Much like we are experiencing now in the new AI frontier, the Industrial Revolution generated rapid advancements in technology, transportation and production, and brought about profound changes that necessitated the evolution of the legal framework.

So how do we build into our systems the obligation to accord procedural fairness, where a statutory power exercised by an administrative decision-maker has the ability to affect a person's rights, or interests?[24] How do we do this using a trauma-informed approach?

Using the example of the rule against bias,[25] a case could be argued that embedding the criteria to make an unbiased, impartial decision into an automated system is one example of where a machine could make a better decision than a human. Matthew Groves refers to "an enormous body of research which has found that the faith of judges in their own ability to recognise and control their personal biases is somewhat misplaced".[26] It would be a reasonable question to ask therefore, that if judges struggle to make decisions in the absence of bias, what hope does an everyday administrative decision-maker in the public service have?

It must be said, however, that the human element in assessing credibility in witnesses through court proceedings, for example, together with the value that the jury system brings to the open and transparent administration of justice, is one aspect of decision-making that it is hard to imagine will ever be replaced by computers or robots.

So how do we build impartiality into decision-making by computerised systems? Is it possible to reduce such concepts to code using binary criteria built into business rules within systems?[27] How do we import the hearing rule into our systems, for example? Further, as generative AI matures, how do we ensure its use in making discretionary administrative decisions does not take us back to square one by muddying the waters of transparent, robust decisions in which there is solid public confidence? How do we ensure that the system design does not perpetuate the bias of those who designed and built it? Using the technology of today, how do we build into our systems the obligation to accord procedural fairness — for example, when a human decision-maker is considering a discretionary element in legislation, such as in child support matters? This could involve identification of the special needs of a child where there may be competing expert/medical evidence and resultant financial consequences. How do we do this using a trauma-informed approach?

24 *Kioa v West* (1985) 159 CLR 550, 584.

25 "An apprehension of bias will arise if courts find a fair-minded and reasonably informed observer might consider that a decision-maker might not approach their task with a sufficient level of impartiality. This twofold test to assess bias claims through the eyes of a hypothetical observer reflects the combined effect of *Webb v The Queen* (1994) 181 CLR 41 ('*Webb*') and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 ('*Ebner*')": Matthew Groves, "Clarity and complexity in the bias rule" (2020) 44(2) *Melbourne University Law Review* 565, 565 (abstract).

26 Ibid 576.

27 Binary describes a numbering scheme in which there are only two possible values for each digit — 0 or 1 — and is the basis for all code used in computing systems: Rahul Awati, "Binary", *TechTarget: WhatIs?* (Web page) <https://www.techtarget.com/whatis/definition/binary>.

It is possible. Examples include systems which use part automation only, remitting a discretionary decision to an individual to exercise judgement on the issue before automation resumes using those elements of the legislation which lend themselves to a system limited by binary coding.[28] There is still a long way to go to give full effect to the enormous technological advances happening in this space.

In this article, we pose these questions but also make some suggestions, to encourage the legal community's collective engagement with the concepts we have touched on. We ask that real consideration of the possibilities we propose is given, towards a better way of administrative decision-making.

Applying the law in a trauma-informed way in litigation

Lawyers are heavily focused on details and technicalities. These details may be vitally important to the case. But a trauma-informed approach to evidence-gathering would require us to first question what information is crucially necessary. Administrative lawyers can assist their government clients to identify areas where evidence requirements can be refined or narrowed. For example, when assessing a claim for disability supports, is it strictly necessary to obtain an independent medical report? Or could additional evidence from the applicant's own treating providers, with whom they have a relationship of trust, be substituted? If a subpoena or summons is required, is there an opportunity to consider a trauma-informed approach? For example, can the scope be narrowed to minimise delays or prevent unnecessary disclosure of information that may be triggering to an individual (for example, previous medical history that has no bearing on the current matters before the court or tribunal)? These principles have been enshrined in statute — we discuss this further later on.

In administrative law proceedings (court or tribunal), an understanding of wider systemic issues and their impact on well-being will help to foster a trauma-informed approach. Discovering the possibility of trauma requires an empathic approach of practitioners when interviewing clients. Sensitivity to comments raising the possibility must become part of a practitioner's skill-set. An individual's lack of choice in housing, benefits, service providers or other social services may lead to them having a heightened sensitivity to a perceived lack of choice and control in legal proceedings. A trauma-informed approach considers where there may be opportunities to empower individuals with choice. From a preventative perspective, administrative lawyers may be well placed to advise their government clients where there are options and alternatives for government scheme participants, and to examine where there is opportunity for flexibility when applying legislative criteria. Government lawyers are also in a position to suggest legislative amendments which may be helpful. If matters progress to legal proceedings, administrative lawyers can employ a trauma-informed approach by advocating for choice and control. For example, does the applicant prefer in-person or phone meetings? Do they prefer to give oral or written evidence? Would they like to be included in communication or do they prefer that we deal directly with their representatives? To take account of and respect the dignity of the individual involves encouraging the client's participation and taking account of their individual needs.

28 Ian Campbell, "The Department of Veterans' Affairs compensation claims processing system" (2004) 56 *Admin Review* 31.

It is important to note that the aim here is to ensure the process itself upholds administrative law principles and values that embody a trauma-informed approach. Applicants must be aware that the legal outcome may ultimately be unfavourable to them. The lawyer's role is to apply the law in a manner that upholds the trauma-informed approach that administrative law principles provide, but to explain the outcome and provide assistance if that would soften the disappointment. The Commonwealth Attorney General's department advises: "the provision of considered legal advice to decision makers is indispensable to sound public administration and the rule of law".[29] The Commonwealth Ombudsman published the *Ten Principles for Good Administration*[30] following the investigation of 247 cases of immigration detention which identified legal, factual and administrative errors in many of the cases. The factsheet provides guidelines for decision-makers to be active in identifying, preventing and reducing harm by, amongst other things, good record-keeping, effective information-exchange and communication, placing adequate controls on the exercise of coercive powers and guarding against erroneous assumptions.

For Commonwealth lawyers, the *Legal Services Directions 2017* provide binding rules for the conduct of government legal practice. The Model Litigant Obligations contained in Appendix B of the *Legal Services Directions 2017* are a clear example of a set of principles that, when applied, ensure a trauma-informed approach to legal practice. Section 2(d) of Appendix B, for example, requires the Commonwealth to limit the scope of legal proceedings where possible and to consider the possibility of alternative dispute resolution. The drafting notes in s 2(i) provide:

> In essence, being a model litigant requires that the Commonwealth and Commonwealth agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards.

And:

> The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

It is for us to question — if these principles exist, and we accept that public servants and lawyers are for the most part compassionate, empathetic and committed to the proper administration of justice — why, then, does harm occur? This article does not seek to answer that complex question but suggests that by engaging in trauma-informed practice, lawyers have an opportunity to work with decision-makers to create a better failsafe framework for adherence to the administrative law principles that exist to protect and support the vulnerable.

Applying the law in a trauma-informed way — legislation drafting

An important role for administrative lawyers in preventing harm is in the legislative process and in statutory interpretation. In this space, lawyers are well placed to offer a trauma-informed perspective at all stages of the process.

29 Provided in the context of recent guidance from the Commonwealth Attorney General's Department: Office of Legal Services Coordination, "Guidance on the use of draft legal advice within government" (Guidance, December 2023) <https://www.ag.gov.au/sites/default/files/2023-12/guidance-draft-legal-advice-government.pdf>.

30 Commonwealth Ombudsman, "Ten principles of good administration" (Factsheet, 2007) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0031/287365/Ten-principles-for-good-administration.pdf>.

While drafting beneficial legislation may seem inherently trauma-informed, the overall intent of the statute does not mean that each legislative provision will have a beneficial purpose. This is necessary for proper administration of schemes — a social security scheme, for example, could not operate without mechanisms for dealing with fraud and recovery of debts. However, for those provisions intended to operate beneficially, administrative lawyers working in the drafting stages have a significant role to play in ensuring that the scope and purpose of the provision is clear and that the policy objectives are expressed without doubt. Administrative lawyers have an opportunity here to embed trauma-informed principles into statute by consistently returning to the core administrative law principles.

Legislative drafting may present opportunities for trauma-informed principles to be specifically embedded in statute. In New South Wales, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW), which reformed criminal laws around consent,

> specifically acknowledges the trauma-informed approach to be taken to a complainant's evidence. This includes mandatory jury directions concerning consent which are "to discourage jurors from relying on misconceptions and assumptions about consensual and non-consensual sexual activity when making decisions about sexual trials". It also includes not making assumptions that the person's clothing or appearance, or the consumption by the victim of alcohol or drugs, could be a reliable indicator of consent in some cases. Further, misperceptions of the manner in which evidence may be given about an alleged sexual offence are addressed in new s 292D [of the *Criminal Procedure Act 1986*], which provides for a direction that trauma may affect people differently, with some showing obvious signs of emotion or distress when giving evidence about an alleged sexual offence while others may not, and that the presence or absence of either does not necessarily mean a person is not telling the truth about it.[31]

The challenge of assessing whether a client, applicant, plaintiff or appellant may be prone to having a traumatic response should be a watchpoint for government lawyers. A level of training is required to acquire the requisite level of sensitivity and such training should be required and sought out particularly for those working in areas where there is a high-risk of trauma.

It is obvious that trauma-informed principles are embedded into beneficial Commonwealth legislation. The *Veterans' Entitlements Act 1986* (*VEA*) and the *Military Rehabilitation Compensation Act 2004* (*MRCA*) contain examples of legislative provisions that enable decision-makers to act in a trauma-informed manner. For instance, s 119 of the *VEA* and the mirror provision in s 334 of the *MRCA* provide that the Repatriation Commission and the Military Rehabilitation and Compensation Commission are not bound by technicalities: the commissions must act in accordance to substantial justice and merits of the case without regard to legal form and technicalities. In our view, these provisions enable decision-makers to embody the Principles in the exercise of their administrative powers. Section 119 also permits deference to lack of probative evidence which may assist some claimants but underlines the difficulty for advisers in making an assessment that trauma is involved.

The *National Disability Insurance Scheme Act 2013* (Cth) provides another example where the Principles have been enshrined in statute. Provisions in that Act guide decision-makers to consider the unique needs of people with disabilities while recognising their individual rights and freedoms.

31 Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2019) section 12 "Trauma-informed courts" <https://www.judcom.nsw.gov.au/publications/benchbks/equality/section12.html> [12.4.5].

We can see that lawyers have significant influence in establishing the trauma-informed infrastructure in which decision-makers operate. We must continue to examine why, in spite of this framework, harm can and does occur. Implementation of new legislation presents an opportunity to ensure that administrative law principles are firmly represented in policy. Application and interpretation of the law in a manner that reflects legislative intention presents further opportunities for lawyers to support their clients by consistently engaging with trauma-informed practice.

Statutory interpretation of existing legislation is another area where administrative lawyers are uniquely placed to embed trauma-informed principles into everyday practice. An example of when this is expressly stated in legislation has been captured with the passing of the *Australian Veterans' Recognition (Putting Veterans and their Families First) Act 2019* (*AVR Act*) which provides that Acts such as the *VEA* and the *MRCA* (among others) ought to be interpreted in a manner that benefits veterans and their families. This piece of legislation recognises the unique sacrifice of veterans and their families; guides decision-makers to interpret legislation in a manner that benefits veterans, or their families, where that interpretation is consistent with the purpose of that provision; enshrines cooperation with veterans into statute; and includes a requirement to only require evidence sufficient to meet the standard of proof for any claim. Standards of proof in veterans' legislation have been carefully considered to reflect the nature of military service. The "reasonable hypothesis" standard of proof in s 120 of the *VEA* is deliberately designed to benefit veterans; the standard requires the Repatriation Commission to accept that incapacity from injury or disease or the death of a veteran is war- or defence-caused, unless there is evidence to establish to the negative beyond a reasonable doubt.

While the *AVR Act* expressly guides decision-makers to adopt a trauma-informed approach, the statutory interpretation principles within can be applied across the Commonwealth. This is not to say that enforcement and compliance should be softened or that the authors do not appreciate the importance of regulation. These mechanisms also preserve the principles of justice, fairness and accountability. A trauma-informed approach would ensure openness, transparency, right of review and accessibility in the application and operation of these provisions.

Preventative care — lawyers and their employers

It is equally important for lawyers to be aware of their own vulnerabilities and recognise when a situation in legal practice may evoke a trauma response in themselves. This will differ from person to person and will be variable at different stages of life. Employers should be aware of the risks and provide appropriate support.

Employers' obligations to mitigate risk of harm has recently been established at common law in the case of *Kozarov v Victoria*.[32] The appellant was employed by the respondent as a solicitor in the Specialist Sexual Offences Unit (SSOU) of the Victorian Office of Public Prosecutions (OPP). She was diagnosed with post-traumatic stress disorder resulting from vicarious trauma which she had experienced in the course of employment. She was

32 (2022) 273 CLR 115.

later diagnosed with major depressive disorder as a corollary of her post-traumatic stress disorder. The trial judge held the respondent liable to the appellant in negligence and awarded damages in her favour. Her Honour found that the respondent had been placed on notice of a risk to the appellant's mental health sufficient to require the respondent to take steps by way of reasonable response, such as offering her rotation out of the SSOU to work in another section of the OPP. The respondent appealed on numerous grounds and was successful in the Victorian Court of Appeal on the ground that the trial judge "erred in holding on the balance of probabilities that the injury and loss suffered by the plaintiff would have been avoided had the defendant done those things the Court held reasonably required in order not to breach the duty of care".[33] The High Court disagreed and found that the appellant's history of cooperative conduct, coupled with her knowledge and insight of the impact of her work on her mental health, was sufficient evidence that a rotation may have reduced the risk of injury.[34]

The High Court's findings indicate that employers have an obligation to put measures in place to minimise the risk of psychological injury.

Providing a supportive environment where lawyers are educated and informed to recognise signs of psychological injury and are empowered to request changes to their work will go a long way to prevent harm.

Conclusion

Trauma-informed legal practice is a broad topic. It is encouraging to see engaging and meaningful discussion in our profession. This article does not purport to be an exhaustive narrative but is intended to provide a starting point for administrative lawyers to begin to think about opportunities to explore preventative practices in their daily practice. We all have a role to play and the authors encourage you all to be curious, to embrace the new world of automation in administrative decision-making, and to be active champions of embedding the principles of administrative law into our government systems — but we also implore you to practise with humanity. Be trauma-informed.

33 *Victoria v Kozarov* (2020) 301 IR 446, [5].

34 *Kozarov* (n 32) [59] (Gageler and Gleeson JJ, Kiefel CJ and Keane J agreeing at [1]), Gordon and Steward JJ agreeing at [97], Edelman J agreeing at [99], [112]) .

The laws of standing — a revisit is needed

*Mark Robinson**

Fitting nicely within the conference theme of "Difficult conversations – values and administrative law" is the public law doctrine of standing. Standing is always riddled with values, questions of degree, and impression, and it is often difficult to deal with.

When standing is challenged

Normally, an applicant's right to commence and maintain proceedings in judicial review matters is unchallenged. Persons who are the subject of or affected by an adverse and arguably erroneous statutory or administrative decision are almost always permitted to test the legality of administrative or executive decisions in the courts. It is usually when one or more of the following exists, that the law of standing, or locus standi, is called into play by the defendant or by the court itself:

(1) the applicant is not the subject of the decision;

(2) the applicant wishes to injunct an executive body or official from proposed action which will not obviously affect the applicant personally;

(3) the applicant is a special interest or representative group or an association;

(4) the applicant is a competitor of the person or entity the subject of an executive decision.

Early determination of the question of standing to commence proceedings is sometimes useful in these cases.

At the federal level, if there is no standing, there is no "matter" that invokes the constitutional writs. The courts have determined that the general law test for the standing of a person aggrieved in a public law matter is both wide and flexible. The court will apply a "special interest" test (discussed below). If an applicant fails this test, the merits of their case are not considered, their case is dismissed, and they are left without a remedy in the courts. If the question of standing is determined early and if it is adverse, the plaintiff would not even be able to make any arguments in court on the judicial review matter.

The "special interest" test

A summary of the principles relating to the special interest test is as follows:

- Special interest means that although the applicant's right has not been infringed, their interest in the subject matter of the action is greater than that of other members of the public.

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- An applicant must show they have been specially affected in comparison with the public at large and that they have been affected to a substantially greater degree or in a significantly different manner. It is not necessary to show that the applicant is uniquely affected.

- A person is not interested within the meaning of the special interest test unless they are likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if the action succeeds; or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if the action fails.

- A special interest does not relate to the preservation of a particular environment or a person's mere intellectual or emotional concern.

The timing of a court's hearing and determination on standing is discretionary — the court has a discretion as to whether or not the question of standing to bring an action should be determined *before* substantive proceeding to determine the merits of the case.[1] While the substantive determination on standing itself is not discretionary, applying the tests do involve questions of *degree*.[2] In *Hobart International Airport Pty Ltd v Clarence City Council*, Gageler and Gleeson JJ said:

> In *Robinson* Mason J observed that "cases are infinitely various" and that "what is a sufficient interest in one case may be less than sufficient in another". In *Onus*, Brennan J added to that observation that the sufficiency of the interest of a person in a particular case "must be a question of degree, but not a question of discretion" and that in answering that question of degree it is appropriate to consider both whether the interest is "sufficient to assure that 'concrete adverseness which sharpens the presentation of issues' falling for determination" and whether the interest is "so distinctive" as to avoid a multiplicity of proceedings.[3]

Leading cases on the special interest test include:[4]

- *Australian Conservation Foundation Inc v Commonwealth* (*ACF*)[5]

- *Onus v Alcoa of Australia Ltd*[6]

1 *Robinson v Western Australian Museum* (1977) 138 CLR 283, 302 (Gibbs J); *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 532–3 (Gibbs J) (*ACF*); *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 38 (Gibbs CJ); *Australian Vaccination-Risks Network Inc v Secretary, Department of Health (Cth)* [2022] FCA 320, [8] (Perry J) (*Vaccination-Risks Network*).

2 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519, [66] (Gageler and Gleeson JJ). See also, eg, *Onus* (n 1) 63, 75 (Brennan J), quoting *Baker v Carr* (1962) 369 US 186, 204; *Kuczborski v Queensland* (2014) 254 CLR 51, 109 [184]–[186] (Crennan, Kiefel, Gageler and Keane JJ); *Vaccination-Risks Network* (n 1) [70] (Perry J).

3 *Hobart International Airport* (n 2) [66], citing *Robinson* (n 1) 327–8 and *Onus* (n 1) 75.

4 See also the following texts: K E Lindgren, "Standing and the state" in PD Finn (ed), *Essays on Law and Government — Volume 2: The Citizen and the State in the Courts* (Thomson Reuters, 1996) 268; M Spry, "A person aggrieved under the ADJR Act: three recent cases on standing" (1996) 3 *Australian Journal of Administrative Law* 120; Thomson Reuters, *The Laws of Australia* (online at 15 March 2022), "Administrative Law", [2.6.160]–[2.6.2030]; Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No 78, 1996).

5 *ACF* (n 1).

6 *Onus* (n 1).

- *Davis v Commonwealth*[7]
- *Yates Security Services Pty Ltd v Keating*[8]
- *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*[9]
- *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*.[10]

Public law matters in Australia have gravitated towards this "special interest" test for all remedies — the test was set out by the High Court of Australia in *ACF*. What is sufficient so as to amount to a "special interest" is debatable. Intellectual or emotional concerns, including belief, do not disqualify a person from having standing.[11] What amounts to a special interest in fact varies according to the nature of the subject matter of the litigation.[12] Whether a plaintiff has shown a sufficient interest in a particular case is a question of degree (and it is determined by a judge).

This is far from satisfactory.

Persons aggrieved who have suffered damage greater than that of the general public generally have standing to seek certiorari.[13] Where the duty lies towards the general public or the public good, it is difficult to discern whether or not any person has standing.[14] Some have argued that the law should identify and fashion a new category of standing which involves the protection and preservation of human life and which has an easier standing test to surmount. That is, where a person can establish that the subject matter of the proceedings involves life-threatening or seriously debilitating medical conditions, the principles for finding standing should be more liberal than the ordinary test. Where the fabric of human life might be compromised or adversely impacted, interested and involved members of the public, or those close to the relevant issues, should have a right of standing in such circumstances.

The leading standing cases

Australian Conservation Foundation v Commonwealth

The Australian Conservation Foundation (ACF) sued the Commonwealth and some of its ministers for declarations, injunctions and other orders to challenge the validity of decisions concerning a proposal by a company to establish and operate a resort and tourist area in central Queensland. Approvals for the development had been given under the *Environment*

7 (1986) 61 ALJR 32.
8 (1990) 25 FCR 1 (Full Federal Court).
9 (1995) 183 CLR 552, 557–8.
10 (1998) 194 CLR 247, [23], [34] (Gaudron, Gummow and Kirby JJ), [96]–[104] (McHugh J).
11 *Onus* (n 1).
12 *Robinson* (n 1) 328.
13 *R v Justices of Surrey* (1870) LR 5 QB 466. See also *Australian Institute of Marine & Power Engineers v Secretary of Department of Transport* (1986) 13 FCR 124, 131–2.
14 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ellis* (1954) 90 CLR 55, 64–5.

Protection (Impact of Proposals) Act 1974 (Cth). The ACF was found to have no standing to maintain the action and the action was dismissed.

In cases which do not concern constitutional validity, a person who has no special interest in the subject matter of an action over and above that enjoyed by the public generally has no locus standi to sue for an injunction or declaration to prevent the violation of a public right or to enforce the performance of a public duty.

Onus v Alcoa of Australia Ltd

Onus concerned the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic). Persons who claimed to be descendants and members of the Gournditchjmara people and custodians of the relics of those people according to their laws and customs, which relics were of cultural and spiritual importance to them, were held to have standing to commence an action to restrain another citizen from contravening s 21 of the Act. They sought to restrain the construction of a smelter that would threaten indigenous relics.

Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund

The first respondent operated a contributory funeral benefit fund business catering for members of the Aboriginal community in New South Wales. The second respondent operated a contributory life insurance business for members of the same community. The appellants had powers under the *Aboriginal Land Rights Act 1983* (NSW). The High Court held the respondents had standing on the basis of possible damage to their respective businesses.

Shop Distributive and Allied Employees Association v Minister for Industrial Affairs

This case concerned shop trading hours and regulation under the *Shop Trading Hours Act 1977* (SA). The applicant was the shop employees trade union. The High Court gave standing.

Yates Security Services Pty Ltd v Keating

This case concerned Paddy's Market, a landmark heritage site in the Haymarket area of Sydney, and the *Australian Heritage Commission Act 1975* (Cth). The applicant, Yates, wanted to redevelop the site but had no property holdings there. The Full Federal Court overturned the trial judge's ruling which allowed standing. The Full Court held that Yates did not have the requisite special interest in the subject matter of the proceedings to confer standing since the ability to negotiate for the acquisition and development of the site, even if of commercial benefit, is one which Yates had irrespective of the outcome of the proceedings. Yates stood in no different position from any other member of the public who may wish to negotiate for the acquisition and development of the site.

Davis v Commonwealth

The *Australian Bicentennial Authority Act 1980* (Cth) made it an offence for a person to use the name or prescribed symbols of the Bicentennial Authority in connection with a business, trade, profession or occupation, or in respect of the sale or hire of goods. The applicants claimed standing to sue on the grounds that one of them was manufacturing for sale by wholesale to others of them for retail sale, items of clothing bearing the Authority's name and prescribed symbols; that they were Aboriginal people having, as representatives of their class, a special interest in challenging the validity of laws concerning a celebration that offended them as an oppressed and deprived minority; and that they were taxpayers. The claim alleging the applicants had interests as members of a class to challenge the validity of a statute to which that class objected could not be dismissed as frivolous or hopeless and did suggest a special interest such that it would be wrong to exclude them.

They shoot horses, don't they?[15]

In *Maguire v Parks Victoria*[16] Moore J in the Supreme Court of Victoria heard an application by Philip Maguire, the owner of Mount Bundarra Station, which abuts the Alpine National Park. Mr Maguire has a strong attachment to brumby horses. He considers that the ancestors of Bogong brumby horses were originally bred on his land. Today, they graze on his land and some are de-pastured there. When necessary, Mr Maguire feeds them and provides them with veterinary care. In 2018, Parks Victoria implemented its Feral Horse Strategic Action Plan, a plan to cull the horses by shooting from helicopters and by professional shooters on the ground.

It was accepted that the brumby was a feral species and constituted a threat to the fragile ecosystem within the national park. The plaintiff sought an injunction of the killing and to have the plan declared invalid. There was no public consultation. The plaintiff said that if there was consultation, he would participate.

The court held that, applying *Onus*, the plaintiff had no interest greater than any ordinary member of the public. As to the proximity of the plaintiff's property to the national park and the presence of brumbies on his land, the court said:

> Whether the horses are removed by trapping or by culling or by some other means has no bearing upon the claimed amenity and other benefits said to flow from the presence of the horses on Mr Maguire's property.[17]

The plaintiff's case was dismissed. He appealed.[18] The Victorian Court of Appeal (Ferguson CJ, Kyrou and Niall JJA) agreed with the primary judge, holding that the plaintiff's connection to the brumbies amounted to a strong emotional and intellectual attachment to them. No matter how keenly felt, those interests were insufficient to establish standing.

15 Apologies to Jane Fonda and the 1969 movie of the same name.
16 [2020] VSC 303.
17 Ibid [46].
18 *Maguire v Parks Victoria* (2020) 245 LGERA 141.

The human special interest test?

The High Court of Australia is probably the only appropriate forum in which to resolve the question posed in this article. An attempt to raise it was rejected (or remitted) by Gageler J in one of the anti-vaccine cases concerning Covid-19 in 2023, *Parry v Secretary, Department of Health (Cth)*.[19]

The Parry case

Parry commenced in the High Court on 20 December 2022 by the filing of an application for constitutional writs (such as mandamus and prohibition and on occasion certiorari or declarations). Associate Professor Peter Parry and five other plaintiffs sued the Secretary of the federal Department of Health, seeking constitutional writs or a declaration directed to quashing or declaring invalid a decision of the defendant dated 19 July 2022. That decision was to approve provisionally the Spikevax (elasomeran) Covid-19 vaccine under s 22D(1) of the *Therapeutic Goods Act 1989* (Cth). The sponsor for Spikevax was Moderna Australia Pty Ltd. The vaccine was to be administered only to Australian children who were between six months and five years old (babies and toddlers).

The plaintiffs included Professor Wendy Hoy AO (a chronic disease specialist and renowned academic), Dr Julian Fidge (a GP and pharmacist), Mark Neugebauer (a foster father to a four-year-old girl) and the Australian Vaccination-Risks Network, a 28-year-old anti-vaccine lobby group and association.

The main thrust of the litigation was that the defendant's decision to conclude that the vaccine met the requirements of reg 10L(1)(a) of the *Therapeutic Regulations 1990* (Cth) was legally unreasonable in the *Li* sense.[20] Regulation 10L(1)(a) set out the minimum requirements for provisional registration of new drugs and vaccines in Australia, including safety and efficacy.

In seeking the writs, the plaintiffs were hoping to argue:

1. The vaccine did not meet the criteria for the treatment or prevention of a life-threatening or seriously debilitating condition.

2. The impugned vaccine did not provide material prevention from a life-threatening or seriously debilitating condition.

3. The data studies included evidence that there were adverse medical events, including fevers and seizures, in the toddlers which were causally related to reception of the vaccine.

4. There was low protective efficacy, and the main point of the vaccine was to prevent some of the Covid-19 symptoms, not to prevent Covid itself.

19 [2023] HCA 9.
20 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [68], [70], [71]–[74], [76], [82] and [85].

5. The overall level of vaccine efficacy was “lousy”.

6. Higher risk children (for example, those who had immunosuppression) were excluded from the trials, thus skewing the data results.

7. Section 30C(2) of the *Therapeutic Goods Act 1989* (Cth) provided that in the case of a gene altering or affecting drug, the Gene Technology Regulator must be consulted. This mandatory consultation requirement was not followed by the defendant, such that the decision was procedurally ultra vires.

Importantly, the plaintiffs’ High Court writ of summons asked in the originating process itself that the matter *not* be remitted to the Federal Court (where one of the plaintiffs had recently been unsuccessful on standing) and that the High Court should hear the matter for three reasons: it was within the Court’s original jurisdiction, it was a matter of public importance (concerning the safety of Australian babies and toddlers), and a new test for standing was to be proposed.

The plaintiffs also contended that they each had public law standing to make the application and, if they did not pass the common law test, they asked the High Court to identify or declare and apply here a new defined category of standing. That is, where a person can establish that the subject matter of the proceedings involves life-threatening or seriously debilitating medical conditions, the principles for finding standing should be more liberal than the ordinary test.

The applicants filed nine affidavits going to the substantive proceedings. In the affidavit of Lisa Mitchell, a statistician, made on 23 January 2023, she analysed the Commonwealth’s own published data on Covid-19 drugs and the adverse effects reported across Australia. She ascertained that when comparing adverse events reported (in all ages) following administration of Covid-19 vaccines for the 17-month period between 1 February 2021 and 30 June 2022, with adverse events reported (for all ages) following administration of *non*-Covid-19 vaccines (for the 50-year period between 1971 and 2021):

1. there was an increase of 591.6%, or seven-fold increase, for adverse events, including 900 deaths, reported following Covid-19 vaccines when compared to non-Covid-19 vaccines; and

2. the number of adverse events reported for non-Covid vaccines was 19,348, compared to 133,807 from Covid-19 vaccines in a period of 17 months. Annualised for 2021, this represents an increase of 10,567% following non-Covid-19 vaccines (2010–2021) to Covid-19 vaccines; and for 2022, this represents an increase of 6,398% following non-Covid-19 vaccines (2010–2022) to Covid-19 vaccines.

Another affidavit was from Dr Angela Jeanes, a scientist specialising in the molecular, cellular and environmental aspects of health and disease, specifically relating to embryonic development, who was awarded her PhD in the field of molecular and cellular biology, relating to cancer biology. She was going to give the following evidence:

> "The Covid-19 vaccine manufacturers Pfizer and Moderna have taken the SARS-CoV-2 virus and analysed its genomic code (made of Ribonucleic Acid (RNA)). A primary role of RNA is to convert the information stored in human DNA into proteins). …
>
> The modified RNA in the vaccine (vaccine RNA) is specifically designed to avoid being broken down by the body's immune system. The consequences of bypassing the immune system in this way [are] unknown but the persistence of any foreign product in the body might [be] very detrimental [to the] body's own immune system."
>
> "It is unclear if the correct protein is produced from this modified RNA sequence. Proteins are made up of [a] set of amino acid 'building blocks' linked together in a chain, initially. Each amino acid has different properties. Even one change in a protein's [a]mino acid sequence can cause severe disease in humans. The exact sequence of amino acids produced from these mod[ified] RNA 'instructions' have not been verified and any possible adverse functions of the resulting proteins have not been investigated. Therefore causing a human body to create foreign proteins without being certain which proteins are being produced is reckless and it carries extreme risk."
>
> "miRNAs are small molecules that control many cell functions and include cancer control mechanisms in the human body. Disruption of these can lead to disruption of normal cell mechanisms of which the most concerning is the generation of new cancers or failure to control existing cancers in humans."

The defendant filed a formal response to the application. In doing so, he challenged everything and said that the matter should go to the Federal Court first, that the plaintiffs had no standing and that there was no issue of public importance because the Commonwealth was not actually injecting babies and toddlers with the vaccine, other persons and entities were doing that.

There were two intervenors in the *Parry* case. One, Toni Colin Reihana, intervened to support the plaintiffs. The intervenor argued that he had been denied standing to agitate some Covid-19-related issues in the courts three times. He wanted to join this one. Another intervenor, Dr William Anicha Bay, sought to oppose the plaintiffs' application. He described himself as a suspended medical practitioner. He argued that the current rules of standing were "wonderful", that none of the plaintiffs here had standing, and that there was no reason for the law to fashion a new category based on human life. He called the plaintiffs "legal strangers". On his arguments, only babies and toddlers had standing.

Just before the first return date in the High Court in 2003, and without any warning to the parties, the matter was remitted by Gageler J (as he was then) to the Federal Court of Australia pursuant to s 44(1) of the *Judiciary Act 1903* (Cth). His Honour published a four-page set of reasons.[21] The power of remittal is discretionary. It is designed to free up the High Court from making factual findings if they can best be done by a trial court. Justice Gageler held that here there might be factual findings needed on standing, on the nature of the vaccine and on what the defendants did in making the vaccine approvals. He also opined that Moderna might need to become a party to the action. The plaintiff had also applied for expedition.

21 *Parry* (n 19).

Justice Gageler remitted the lot (including the interveners) to the Federal Court, having found that court had jurisdiction to hear the matter under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) (in that it arose under Commonwealth legislation).

The *Parry* case halted there. The plaintiffs refused to go back before the Federal Court and the important issues I have just outlined have never been heard, tested or determined by any court.

Similar cases on vaccine issues

The reason for the plaintiffs' reticence to have a go in the Federal Court are simple. In two earlier cases raising similar issues on the Covid-19 vaccines, the Federal Court held that at least one of these plaintiffs did not have standing to challenge the Therapeutic Goods Association approvals of the vaccines. Four judges heard these applications (one primary judge and three appeal judges) and four judges emphatically found that the plaintiffs there did not have standing.

The first case was *Australian Vaccination-Risks Network Inc v Secretary, Department of Health (Cth)* (*Vaccination-Risks Network*).[22] The plaintiffs sought mandamus as to the duty imposed on the Secretary by s 9A(1) of the *Therapeutic Goods Act* to "cause to be maintained" the Australian Register of Therapeutic Goods, noting that the Secretary had powers to suspend drugs (which he has exercised regularly) and to cancel drug registrations.

The judicial review case sought to quash the respondent's decision made about 3 December 2021 to make a Pfizer Covid-19 vaccine available to all Australian children aged five to eleven years. However, the primary judge set the matter down for a hearing on standing alone. She ruled out much of the plaintiff's evidence and made an early determination on standing in the absence of necessary evidence going to the special interests of the parties. There was a voluminous amount of evidence going to standing at the hearing. However, it was all objected to by the Commonwealth. The primary judge wound up making a blanket ruling that much of the applicant's evidence would not be admitted as proof of the facts, but only as to the deponent's belief or state of mind. This ruling was made under s 136 of the *Evidence Act 1995* (Cth).

It gutted the applicant's factual case on standing. For example, the court could not find that the applicant was "the peak vaccine organisation in Australia" or that it was "recognised as a leader amongst other organisations in Australia that have similar objectives" — the Court would only accept that this is what the deponent believed. Standing was refused.

On appeal, the Full Federal Court (Rares, Katzmann, Wigney JJ) agreed with the primary judge unanimously.[23]

22 *Vaccination-Risks Network* (n 1).
23 *Australian Vaccination-Risks Network Inc v Secretary, Department of Health (Cth)* (2022) 292 FCR 1.

Possible bases for standing

The leading cases suggest that the hope of a plaintiff later establishing a relevant business will not support a standing claim. Nor will the anticipation of being consulted by the decision-maker in the future. A special interest in the subject matter of the proceedings is not limited to a legal, proprietary or financial interest that the private law protects. There could be other bases for a finding of standing (as there existed in *Onus*).

Weigh these standing cases, of which there are many hundreds, against the proposed standing test for the preservation of human life. Can the following compare with the safety of human babies and toddlers — or humans in general?

- The environment?
- Trees and forests?
- Manufacturing and industry?
- Water quality?
- Plants?
- Animals?
- The wide-mouthed frog?[24]

Should we not afford more protection to human life than that which might be afforded to the environment and to plants and animals? Should not the common law reflect the special significance of human life? Or defer to it?

We shall see.

24 The wide-mouthed frog is protected by the *Nature Conservation (Animals) Regulation 2020* (Qld) under the heading Amphibians — *Cyclorana novaehollandiae* — Wide-mouthed Frog. See Australian Museum, "*Cyclorana novaehollandiae* — Wide-mouthed Frog", *FrogID* (Web page) <https://www.frogid.net.au/frogs/cyclorana-novaehollandiae>.