CHALLENGES OF A NEW AGE

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The conference themes, 'challenges of a new age' and 'balancing fairness with efficiency and national security', raise many contemporary administrative law issues.

Australia's administrative law system is based on a package of reforms that were introduced in the 1970s and 1980s.

These are the *Administrative Appeals Tribunal Act 1975*, the *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977* (*ADJR Act*), and the *Freedom of Information Act 1982*.

The administrative law system has developed significantly since that time. The common law history of administrative review, together with the review mechanisms created by Parliament, form the core of the comprehensive system of administrative law that now exists in Australia.

The administrative law system has two key goals:

- to protect the individual's rights by providing mechanisms to ensure government decisions which affect them are legal and properly based on the merits of their case; and
- a broader goal to provide an appropriate check on the use of Executive power, promoting quality government decision-making.

Fundamental values and principles underpin the administrative law system. Decisions must be fair, lawful and impartial, and the system must be transparent. These values and principles have become well-developed and entrenched. They form part of the everyday fabric of government policy and decision-making in Australia.

Administrative law, like other areas of legal practice, is not immune from the influences of the environment in which it operates. While the key administrative law goals and values remain constant, a changing social and political environment creates new challenges for the administrative law system.

The fundamental principles of administrative law are well accepted, but controversy can arise when these are applied to new challenges. Perhaps no other challenge creates such a wealth of differing and complex perspectives than that of national security.

Responding to threats to national security is a key focus for the Government as we strive to ensure the safety and security of the Australian community. This paper considers some of the Government's key measures in national security, and how they interact with the administrative law system.

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In 2006, the Security Legislation Review Committee stated that:

> an appropriate balance must be struck between, on the one hand, the need to protect the community from terrorist activity, and on the other hand, the maintenance of fundamental human rights and freedoms.

The Committee went on to point out that 'striking this balance is an essential challenge to preserving the cherished traditions of Australian society'.[1]

The Government seeks to ensure that its response is necessary and proportionate to the threats faced and that the mechanisms and powers are limited in appropriate ways. I see administrative law as a dynamic field which must constantly engage with many other subject areas, from national security to privacy and information law. The amalgamation of Commonwealth merits review tribunals is an example of how improving operational efficiency does not have to be at the expense of high quality services; indeed it can lead to benefits for the user.

National security

The nature of threats to national security has changed and heightened as we move from an age of group-planned mass casualty attacks to the autonomous actions of the 'lone wolf'.

Australia, like many other nations, is facing a very real and present threat from terrorist organisations involved in the Syria and Iraq conflicts.

The theatres of conflict in Syria and Iraq represent not just a distant concern. Around 175 Australians have travelled to participate in conflict zones in Syria and Iraq. These Australians, collectively referred to as 'foreign fighters', may have fought alongside listed terrorist organisations, including Daesh and Al-Qaeda. They return to Australia with enhanced terrorist capabilities and ideological commitment, which heighten the level of threat we now face.

Last year, the Government passed a suite of legislative reforms intended to enhance the capability of Australia's law enforcement and intelligence services to respond proactively and effectively to these threats.

The most significant of these reforms were enacted as part of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (*Foreign Fighters legislation)*. Among other things, this Act introduced a power to suspend the travel documents of an Australian citizen on security grounds.

In crafting such laws, one must always be vigilant that the imperatives of national security are balanced against the hallmarks of a free and democratic society. The Government has sought to provide appropriate avenues for review of Executive decision-making while also ensuring these laws are effective.

Preventative detention

The preventative detention order regime under the *Criminal Code* allows for the detention of a person for up to 48 hours. This applies either where there is a threat of an imminent terrorist attack or immediately after a terrorist act if it is likely that vital evidence will be lost. These decisions are entirely exempt from *ADJR Act* review.

Judicial review in relation to these decisions is not likely to be helpful given their limited duration, but review under section 39B of the *Judiciary Act 1903* remains available.

A detention decision can also be challenged using a merits review process, after the conclusion of the detention period. That process may declare the preventative detention order in relation to the person to be void. It will determine whether compensation should be paid by the Commonwealth.

The merits review process provides an effective forum in which to review the validity of a preventative detention order and it promotes accountability of decision-makers. This appropriately balances the security interests of the broader community with individual rights.

Passport suspension

Most recently, the *Foreign Fighters legislation* introduced a framework for the suspension of Australian travel documents for 14 days, when the Australian Security Intelligence Organisation (ASIO) suspects, on reasonable grounds, that the person may leave Australia to engage in conduct that might prejudice the national security of Australia or a foreign country and that suspension of their travel documents will prevent the person from engaging in such conduct.

The primary purpose of this initiative was to enhance the Government's capacity to take proactive, swift and proportionate action to mitigate security risks relating to foreign fighters.

This decision is excluded from merits review and judicial review under the *ADJR Act,* on the basis that both forums may compromise the operation of security agencies and defeat the purpose of the passport suspension measure. Merits review and *ADJR Act* review are not appropriate as the suspension is an interim measure until a more permanent decision, on whether or not to cancel the passport, is made.

The exclusion of the decisions from review under the *ADJR Act,* and merits review, is balanced by the fact that the suspension is limited to 14 days. This measure and the limited review avenues are drawn from the recommendations of the former Independent National Security Legislation Monitor, who recognised that review had to be limited in order for the suspension mechanism to be effective. Moreover, the role of the Inspector-General of Intelligence and Security (IGIS), who has oversight of decisions made by ASIO, provides a further accountability measure to ensure the appropriate exercise of ASIO's powers.

Administrative law in the intelligence context

The challenge of balancing accountability and national security has also arisen in the context of security assessments by ASIO. Many of the accountability mechanisms for security assessments sit within the administrative law arena, but in a modified form. Procedural rights are protected, but in a way that recognises the public interest in protecting national security.

Merits review of security assessments

ASIO's security assessment function provides a mechanism for 'security' to be considered in certain regular government decision-making processes, such as the granting of visas and access to restricted areas, for example, airports. In making a security assessment, ASIO considers whether it would be consistent with, and necessary or desirable for, the requirements of security, for prescribed administrative action to be taken in respect of a person. The assessment can range from a basic check of personal details, to a complex,

in-depth investigation to determine the nature and extent of an identified threat to national security.

Where ASIO provides an Australian Government agency with an adverse or qualified security assessment, an individual has a right to merits review of that assessment in the AAT. Processes for merits review in the Security Division of the AAT are tailored to the sensitive nature of security assessments. Applications are heard by members of the AAT with experience in security matters, and special rules of procedure apply. Reviews are conducted in private.

The review applicant and the applicant's representative may be excluded from the proceedings, when evidence is given or submissions are made, if it is considered that national security interests may be prejudiced.

Unclassified statements of reasons for decisions are published. To the extent that any of the Tribunal's findings do not confirm ASIO's assessment, they are to be treated as superseding it.

Getting the balance right

Despite the enduring threat of terrorism, Australian laws continue to provide a means through which the public may seek redress for Executive excess or error. The judicial and merits review mechanisms available ensure that the exercise of Executive power is lawful and proportionate in all circumstances. The measures discussed are exceptional in nature and are only triggered in particular circumstances. These are extraordinary powers and viewed as such by the agencies responsible for their exercise.

Moreover, the oversight functions of Parliamentary and independent bodies provide a continuous feedback loop through which Government can assess whether the balance between security and civil liberties remains appropriate.

Citizenship

The Parliament is also currently (in July 2015) considering the Australian Citizenship Amendment (Allegiance to Australia) Bill, which provides that a person who has dual nationality and who engages in terrorism or foreign fighting will automatically lose his or her Australian citizenship.

The Bill contains appropriate safeguards, the Minister will have the power to exempt a person from loss of citizenship, if that is in the public interest. In addition, a person who loses his or her Australian citizenship under these provisions will be able to challenge the loss of citizenship and seek judicial review by a court.

The Government has referred this Bill to the Parliamentary Joint Committee on Intelligence and Security.

Citizenship consultations

I was recently tasked, along with my colleague the Hon. Phillip Ruddock, to lead a national conversation about the role of citizenship in shaping our future. Australian citizenship is a privilege which requires a continuing commitment to this country. Australian citizens enjoy privileges, rights and fundamental responsibilities. Submissions on the Discussion Paper closed on 30 June and we are in the process of analysing the responses. It is clear that

there are some important trends emerging, namely the need to value citizenship; increase an understanding by all Australians of the rights and duties of citizenship; and the importance of learning and speaking English.

Countering violent extremism

It is important to achieve balance between individual and collective interests in keeping Australians safe from home grown terrorism. We cannot afford to wait until people have been radicalised and formed the intent to do harm and we cannot rely on law enforcement responses alone. We need to reduce the risk of violent extremism by taking steps to tackle the problem at its roots; communities play a critical role in this effort.

As Parliamentary Secretary to the Attorney-General and Parliamentary Secretary to the Minister for Social Services, my responsibilities range from community engagement in order to counter violent extremism, to social cohesion. Both roles focus on building on the strengths of our communities.

Data retention

The passage of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Data Retention Act)* through Parliament has highlighted complex competing considerations. Unsurprisingly, there was debate about the protection of individual privacy, and how this relates to protecting the community.

For the Government, data retention represents a necessary, effective and proportionate response to the serious threat to national security. It ensures that law enforcement and national security agencies have the information they need to keep the community safe. It also gives appropriate protection to individual privacy.

This data includes information such as the date, time, duration and location of a communication, as well as its type—such as SMS or email. However, it does not include content, access to which will continue to require a warrant. Telecommunications metadata is important in protecting public safety. It is used in almost every serious criminal and counter-terrorism investigation. Our agencies would struggle to perform their vital duties if these records were no longer available.

For this reason, the *Data Retention Act* ensures that agencies can access the data they need by setting a common industry standard for record-keeping in the telecommunications industry. This record-keeping includes a limited subset of data, which is to be retained for two years.

Appropriate protections are built into the legislation, to promote the balance between effective law enforcement and national security measures, and the protection of individual civil liberties.

This is achieved by:

- substantially reducing the number of agencies which can access telecommunications data;
- requiring authorised officers to be ‘satisfied on reasonable grounds’ that a proposed disclosure or use of telecommunications data is ‘justifiable and proportionate’ to the interference with the privacy of any person that may result from the disclosure or use;

- establishing oversight by the Commonwealth Ombudsman and the Inspector General of Intelligence and Security;
- applying the *Privacy Act 1988* to retained data, meaning individuals will be able to request access to their personal retained data, and service providers will be required to protect and handle the data in accordance with the *Act*;
- placing a further obligation on service providers to encrypt retained data;
- requiring annual reporting on the measures; and
- mandating a review by the Parliamentary Joint Committee on Intelligence and Security.

Collectively, these measures are designed to ensure that the regime is fit for purpose, transparent and accountable.

Privacy

The Government is also taking steps to introduce a mechanism for notification of data breaches, such as unauthorised use, loss or disclosure of personal information.

According to a national privacy survey conducted by the Office of the Australian Information Commissioner in 2013, data breaches are among the top privacy concerns of Australians.

Concerns around data breaches have also been raised in the context of the data retention legislation.

Although the *Privacy Act* requires agencies and organisations to take reasonable steps to protect personal information, it does not oblige entities that experience a data breach to notify affected individuals. At present, mandatory data breach notification is only required in relation to specific eHealth information.

However, agencies and organisations are free to participate in the Office of the Information Commissioner's voluntary data breach notification scheme; the Office received 71 notifications in the 2013-14 financial year. The Office encourages entities to notify the Privacy Commissioner and affected individuals in cases where a data breach involves a 'real risk of serious harm'.

By the end of 2015, the Government will introduce a mandatory data breach notification scheme as recommended by the Parliamentary Joint Committee on Intelligence and Security's report on the Data Retention Bill. The Committee considered that the security of retained telecommunications data was a critical issue. In the Committee's view, mandatory data breach notification is one way to encourage telecommunications providers to implement appropriate security standards and create community confidence in the security of stored data.

Tribunal amalgamation

On the 1st of July, the newly amalgamated Administrative Appeals Tribunal (AAT)—incorporating the AAT, Migration Review Tribunal-Refugee Review Tribunal (MRT-RRT) and the Social Security Appeals Tribunal (SSAT)—commenced operation, thereby implementing the recommendations of the Kerr Committee in the 1970s, for a single generalist merits review tribunal.

A trigger for the reform was the National Commission of Audit's *Towards Responsible Government* report in 2014. The report identified that merging resources of merits review tribunals could generate significant savings and improve the quality of tribunal services.

The amalgamation of four key commonwealth merits review tribunals is a significant reform in the federal administrative law landscape, which simplifies and modernises processes; builds on existing successful merits review frameworks; and maintains citizens' access to a simple method to challenge government decisions that affect them.

The new Tribunal will deal with about 40,000 matters per year, across a wide range of government decision-making. It is a strong generalist body, but will retain and nurture the key specialist expertise of the migration, refugee and social security tribunals. The jurisdiction of these tribunals will be exercised in the new specialist divisions of the AAT. Practices and procedures adapted to these jurisdictions will be maintained.

A robust governance structure is essential to public confidence in the AAT's review function. The President of the AAT, the Honourable Justice Duncan Kerr Chev LH, is responsible for ensuring the expeditious and efficient discharge of the business of the Tribunal, and for ensuring that the Tribunal pursues its statutory objectives.

The AAT has a Divisional structure, enabling management of the Tribunal's diverse workload and specialisation where appropriate. Similar amalgamations have already occurred in most of Australia's States and Territories. These 'super tribunals' successfully provide a 'one stop shop' dealing with a range of disputes.

Amalgamation will improve the merits review system. It will:

- provide a better and clearer user experience;
- facilitate collegiality and best practice; and
- enhance efficiency.

In the new AAT, structure supports function by fostering an environment where good decision-making occurs. In particular, the size of the tribunal will provide members and staff with greater opportunities for a broader range of work, and enhanced career pathways. The new AAT will comprise experts from varied fields who will be encouraged to share knowledge and expertise across jurisdictions. The end user experience of engaging with the tribunal will be enhanced by the amalgamation.

The new AAT provides an effective framework for fair, just, economical, informal and quick merits review. The new AAT also has the benefit of incorporating technological innovations used in the previous tribunals, assisting people to access services more efficiently.

Amalgamation produces significant efficiencies through consolidation of information technology and staffing in corporate support functions. Property co-location adds further efficiency by providing opportunity for more centralised services. These efficiencies contribute to the amalgamated AAT operating effectively, and support the existing features of informality, flexibility and independence.

Conclusion

I would like to draw on the words of then-Chief Justice Gibbs in *Church of Scientology v Woodward*:

> in a democratic society, it is sometimes difficult to strike the proper balance between the maintenance of national security and the protection of individual liberties. [2]

A Government that gets the balance wrong risks increasing antagonism, encouraging mistrust of the Government and corroding the effectiveness of its national security legislation.

Ultimately, the success of Australia's counter-terrorism strategy rests upon its ability to get the balance right between national security and civil liberties.

The Government's national security measures illustrate some of the ways administrative review mechanisms can be appropriately tailored to support this balance. The means of achieving the fundamental goals of the administrative law system are not limited to the suite of legislation introduced in the 1970s and 1980s.

These goals are also being pursued through a variety of other measures and accountability mechanisms; the reformed Commonwealth tribunal system will assist in the pursuit of these goals.

Endnotes

1 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), p 3, 40.
2 *Church of Scientology v Woodward* (1982) 154 CLR 25, p 55.