RECENT DEVELOPMENTS

Katherine Cook

Review of national intelligence legislation

The Turnbull government will undertake the most significant review of intelligence legislation in more than 40 years.

Former Director General of Security, the head of the Australian Security Intelligence Organisation, Dennis Richardson AO, will head the review, which will examine the legal framework underpinning Australia's intelligence community and capability.

This will be the most comprehensive review of intelligence legislation in Australia since the Royal Commission on Intelligence and Security in the 1970s.

The review was a key recommendation of the 2017 Independent Intelligence Review conducted by Michael L'Estrange AO and Stephen Merchant PSM.

The legislative framework governing our intelligence agencies has evolved considerably since the *Australian Security Intelligence Organisation Act 1979* (Cth) and the *Intelligence Services Act 2001* (Cth) were first introduced.

The coalition government has so far passed 10 tranches of legislative reforms to properly equip our security agencies with the legal framework they need to respond to current and emerging security challenges. The 11th tranche of legislation to modernise espionage offences and establish new foreign interference offences is currently before the Parliament.

The national security environment is constantly changing, and it is essential that we ensure our agencies have the tools and framework they need to be effective and meet their core function — keeping Australians safe.

The review will consider options for harmonising and modernising the legislative framework that governs the activities of our intelligence agencies to ensure they operate with clear, coherent and consistent powers, protections and oversight.

Mr Richardson is ideally placed to undertake this important review, having an extensive career in the Australian Public Service, particularly in the national security, defence and foreign affairs environment. He was Secretary of the Department of Defence from 2012 to 2017; Director-General of ASIO from 1996 to 2005; and Secretary of the Department of Foreign Affairs and Trade from 2010 to 2012, prior to which he was Australia's Ambassador to the United States.

In addition to intelligence agencies, the review will consider the legislative frameworks for the intelligence functions of the Department of Home Affairs, Australian Federal Police, Australian Transactional Report Analysis Centre and Australian Criminal Intelligence Commission. This is consistent with the 2017 Independent Intelligence Review's recommendation to consolidate and expand linkages between members of the national intelligence community.

Terms of Reference for the review will be announced in the near future. It is expected the review will be completed within 18 months.

<https://www.attorneygeneral.gov.au/Media/Pages/Review-of-national-intelligence-legislation.aspx>

Privacy protection is everyone's business

Privacy Awareness Week (PAW) takes on a greater significance each year as technology evolves and people place more personal information online. The New South Wales Attorney-General Mark Speakman had this to say about the event:

'As we conduct an increasing amount of business and socialising online, we must be vigilant about reviewing social media privacy settings, choosing complex passwords and taking care when using public computers to access personal information.'

'PAW reminds us of the importance of safeguarding our privacy, particularly as new technology enables faster and easier collection, analysis and sharing of information', Mr Speakman said.

On 9 May 2018, Mr Speakman opened an Information and Privacy Commission event in Sydney that brought together leaders in privacy protection and the law.

Speakers included NSW Privacy Commissioner Samantha Gavel, New South Wales Government Chief Information Security Officer, Dr Maria Milosavljevic; Chair of the Law Society of NSW's Privacy and Communications Committee, Peter Leonard; and Microsoft Australia's Director of Corporate, External and Legal Affairs, Tom Daemen.

Mr Speakman said the New South Wales Government is aware of the need for legislation to evolve with technology in our rapidly changing world.

'The New South Wales Government's intimate image-based abuse reforms were introduced in 2017 to enable courts to penalise the non-consensual sharing of intimate images with sentences including terms of imprisonment.'

'In addition, the NSW Law Reform Commission is conducting a review of laws that affect access to a person's social media accounts and digital assets after they die or become incapacitated.'

PAW runs from 7 to 13 May. This year's theme is 'Privacy in the Digital Age'. For more information about privacy protection, visit www.ipc.nsw.gov.au.

<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/privacy-protection-everyones-business.aspx>

New VCAT president appointed

The Andrews Labor government has announced the appointment of Supreme Court Justice Michelle Quigley as the new President of the Victorian Civil and Administrative Tribunal (VCAT).

Justice Quigley was appointed to the Supreme Court in December last year and is the first woman to be appointed as the President of VCAT.

Prior to her Supreme Court appointment, Justice Quigley spent almost 30 years as a barrister specialising in administrative law, including planning and environmental law, and land valuation and acquisition.

As a barrister, she was involved in several high-profile inquiries into environmental matters and planning amendments, regularly appearing before the Supreme Court, Court of Appeal, VCAT and Planning Panels Victoria.

She has received several awards, including the National Australia Day Committee 'Citizen of the Year' award in 2001 for her contribution to the City of Yarra by providing legal assistance with planning and heritage matters and planning policy formulation.

She was also awarded the PILCH/Law Foundation Pro Bono Award in 2000 for her work assisting the Abbotsford Convent Coalition to oppose the redevelopment of the Heritage Victoria listed St Heliers Convent.

Justice Quigley was admitted to legal practice in 1987, joined the Victorian Bar in 1988, and was appointed Senior Counsel in 2002.

She replaces Justice Greg Garde AO RFD as President of VCAT. Justice Garde has served as President for six years and will now return to the Supreme Court.

Established in 1998, VCAT is Australia's busiest tribunal, dealing with more than 85 000 cases annually at more than 46 venues across the state, including administrative, civil, residential tenancy and human rights disputes.

Justice Quigley will begin work as VCAT President from 1 June 2018.

<https://www.premier.vic.gov.au/new-vcat-president-appointed/>

Mr Kenneth Charles Fleming QC to be nominated as the NT Independent Commissioner Against Corruption

On 9 May 2018, the Northern Territory Labor government announced that Mr Kenneth Charles Fleming QC is to be nominated for appointment as Independent Commissioner Against Corruption (ICAC).

'In accordance with the Judicial Appointments Protocol, an Advisory Panel was convened to make an independent recommendation for this important appointment', Ms Fyles said.

Ms Fyles said that the Advisory Panel appointed in accordance with the Judicial Appointments Protocol comprised the Hon Trevor Riley QC as former Chief Justice of the Supreme Court of the Northern Territory, Solicitor-General Sonia Brownhill SC, and Acting Chief Executive Officer of the Department of Attorney-General and Justice, Meredith Day.

'Mr Kenneth Fleming QC was the Advisory Panel's sole recommendation for appointment as the Independent Commissioner Against Corruption', Ms Fyles said.

'We promised Territorians we would have our anti-corruption commission up and running by mid-this year and with the proposed appointment of Mr Kenneth Fleming QC to the position of ICAC Commissioner that promise is being realised.'

'I thank the Advisory Panel for their consideration of this important appointment', Ms Fyles said.

Minister Fyles said Mr Kenneth Fleming QC has a wealth of national and international experience in the practice and interpretation of criminal law.

'Mr Kenneth Fleming QC comes to the Territory following a long and successful legal career', she said.

Mr Fleming QC was appointed Queens's Counsel in 1998 and, from 1999 to 2003, he held various roles with the International Criminal Tribunal for Rwanda.

Since 2003, Mr Fleming QC has continued to practise in Australia and is on Doyle's List of Leading Criminal Law Barristers — Queensland 2017.

He has also been an Ethics Counsellor with the Bar Association of Queensland.

Minister Fyles said the Territory's Independent Commission Against Corruption will be a powerful and independent investigative body that Territorians can trust to increase government accountability.

'ICAC will have the independence and power to investigate anyone involved in the NT government and anyone spending taxpayer money', she said.

'We want to be absolutely clear that the Territory Labor government will be held to account by ICAC, just the same as anyone else that deals with or receives taxpayer dollars.

A motion of the Legislative Assembly is required before appointing the Independent Commissioner Against Corruption. The Government will formally move a motion to appoint Mr Kenneth Fleming QC on Thursday.

<http://newsroom.nt.gov.au/mediaRelease/25589>

The Commonwealth Ombudsman releases investigation report on delays in the clearance of international sea cargo

Commonwealth Ombudsman Michael Manthorpe has released an own-motion report into the Department of Home Affairs (Home Affairs) and the Department of Agriculture and Water Resources (DAWR) processing of international containerised sea cargo.

Numerous complaints have been received by the Ombudsman's Office regarding delays in the processing of containerised sea cargo by the Australian Border Force (ABF) resulting in additional costs for importers.

This investigation identified that, while the ABF has well-established administrative processes to manage containerised sea cargo compliance, more could be done to manage backlogs at cargo and container examination facilities. This in turn could reduce delays and the costs imposed upon industry.

The report recommended that the ABF should consider introducing a timeliness target for performing its scrutiny of containers to ensure that it does not lose sight of its facilitation role in the performance of its border protection mandate. The report also noted that inspection targets should be set according to available resources.

The report made a total of 10 recommendations. Home Affairs has accepted nine of the report's recommendations that related to it. Six of these recommendations were supported in full and three in part. DAWR has partially supported the two recommendations in the report that are relevant to it.

New guidance for the Victorian public sector on how to deal with challenging behaviour

Victorian government departments, local councils and other agencies dealing with challenging behaviour from members of the public will benefit from a new guide tabled in the Victorian Parliament.

Tabling her *Good Practice Guide to Dealing with Challenging Behaviour*, Victorian Ombudsman Deborah Glass said the guide aimed to help create better understanding between government bodies and the public.

'We are constantly asked for advice from government departments, agencies and local councils on what to do with overly persistent or abusive people', Ms Glass said. 'We also hear from people who complain that an agency won't deal with them, when they think they have a justified complaint.

'We recognise this difficult balancing act. The public sector exists to serve the public including those who may be demanding. But public sector resources are limited, and agencies need to protect the health and safety of their workforce.'

Ms Glass said the guide recommends a graduated four-stage response, starting with preventing challenging behaviour where possible by dealing with complaints in a fair, prompt and respectful way, through to the last resort of limiting a member of the public's access to the organisation.

It sets out the steps public bodies should take to ensure their responses to challenging behaviour are compliant with the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the *Equal Opportunity Act 1995* (Vic), and the *Occupational Health and Safety Act 2004* (Vic).

The guide includes tips for dealing with common situations and examples of what does or does not work, based on actual cases.

'I hope the guide helps to defuse, deescalate and demystify the behaviours that public servants encounter daily, and that greater understanding leads to fewer complaints', Ms Glass said.

For more information, read the *Good Practice Guide to Dealing with Challenging Behaviour Report and Guide*.

<https://www.ombudsman.vic.gov.au/News/Media-Alerts/How-to-deal-with-challenging-behaviour>

Recent decisions

The Immigration Assessment Authority's ability to review a decision affected by a jurisdictional error

Plaintiff M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16 (Gageler, Keane, Nettle, Gordon and Edelman JJ) (18 April 2018)

The plaintiff, a citizen of Iran, entered Australia on 11 October 2012 as an unauthorised maritime arrival and subsequently was permitted to apply for a temporary protection visa (TPV).

On 1 September 2015, he applied for a TPV and he became a 'fast-track applicant' within the meaning of the *Migration Act 1958* (Cth). The plaintiff claimed, among other things, that he would face a real chance of harm if he returned to Iran because he is a Christian. In support of his claim to be a committed Christian, he told the Minister's delegate that he had regularly attended a church in Melbourne since his release from immigration detention and provided material including a letter from the reverend of his church. With the plaintiff's permission, the delegate called the reverend, who told the delegate that the plaintiff had attended the church but had stopped regularly attending two years earlier and had only attended on a few occasions since then. The delegate made a file note of the telephone call but did not give the plaintiff particulars about what the reverend said.

During an interview with the plaintiff, the delegate also erroneously told him that he could provide further information for her consideration up until seven days after the protection interview.

Five months later, the delegate refused to grant a protection visa to the plaintiff because she did not accept that he had genuinely converted to Christianity. She also found that he had only attended the church for the sole purpose of strengthening his claim to be a refugee. She set out the information provided by the reverend in her reasons for decision.

On or about 15 April 2016, the Minister referred the delegate's decision to the Immigration Assessment Authority (the Authority) under pt 7AA of the Migration Act.

Part 7AA of the Migration Act relevantly provides that when a 'fast-track reviewable decision' is made, it must be referred to the Authority for review together with specified 'review material'. The Authority may either affirm the decision or remit the decision to the Minister for reconsideration, but the Authority is not authorised to set the decision aside or to substitute its own decision. Subject to exceptions, the Authority is required to review decisions on the papers. One exception is that the Authority may invite a person, including an applicant, to provide 'new information' in writing or at an interview. However, under pt 7AA of the Migration Act, the Authority is not permitted to consider any new information unless it is satisfied that there are exceptional circumstances and that the information either was not and could not have been before the Minister or is credible personal information which was not previously known.

The delegate's file note was included in the review material provided to the Authority. The plaintiff, through his migration agent, requested the Authority interview him, the reverend and other congregants from his church. He also provided a second letter from the reverend. The Authority declined to conduct the interviews and affirmed the delegate's decision. The Authority did not accept that the plaintiff had genuinely converted to Christianity or that he would be at risk of harm for that reason if he returned to Iran. However, in doing so, the Authority took into account information in the reverend's second letter but only to the extent

that the letter stated that the plaintiff had occasionally attended church in 2016. The Authority was satisfied that this new information was not before the delegate and there were exceptional circumstances (namely an error on the part of the delegate in failing to tell the plaintiff that he could provide new information any time up until she made her decision), which justified its consideration.

Before the High Court, the plaintiff contended, among other things, that the delegate had failed to comply with s 57(2) of the Migration Act — namely, failing to provide the applicant with the information she obtained from the reverend during the telephone call — and that this failure deprived the Authority of jurisdiction to review the delegate's decision.

The plaintiff argued that the limitations imposed by pt 7AA of the Migration Act on the Authority's ability to obtain and consider new evidence mean that the Authority's procedures are insufficient to ensure that review by the Authority will 'cure' non-compliance with s 57 of that Act.

The High Court unanimously held that a failure by a delegate to comply with s 57(2) of the Act[1] in the course of making a decision to refuse to grant a protection visa to a 'fast-track applicant' did not deprive the Authority of jurisdiction to review the delegate's decision.

The High Court held that the jurisdiction of the Authority under pt 7AA of the Migration Act is to review decisions that are made in fact, there is no requirement that those decisions also be legally effective. The Authority's procedures in pt 7AA are not constrained as to preclude the Authority from conducting a review in a manner which would negate a want of procedural fairness by the delegate. The Authority's task is to consider the merits of a decision under review by determining for itself whether it is satisfied that the criteria for the grant of the visa are met. However, if a decision under review is affected by jurisdictional error because of a failure to provide relevant information to an applicant in compliance with s 57(2), a failure by the Authority to exercise its powers to get and consider new information about the relevant information may be legally unreasonable.

The High Court further held that, in this case, the delegate had not failed to comply with s 57(2) by not providing the information provided by the reverend in the telephone call. This information was not 'relevant information' within the meaning of s 57(1). It was not information of such significance that it would be the reason, or part of the reason, for refusing to grant a protection visa. Rather, the reverend's information supported the plaintiff's claim, so far as it went.

The High Court also found the Authority had not acted unreasonably by declining to exercise its powers to interview the reverend and other congregants: that exercise of discretion was open to it and was justified by the reasons it gave.

Procedural fairness and the refusal of an interpreter

BLD15 v Minister for Immigration and Border Protection [2018] FCA 3467 (Katzmann J) (1 June 2018)

In June 2011, the appellant, a Rwandan national, arrived in Australia to study. In February 2013 he applied to the Minister for a protection visa, claiming to have a well-founded fear of persecution because of his support for, and active involvement in, the Rwanda National Congress (RNC) — an exiled party in opposition to the then (and current) ruling party, the Rwandan Patriotic Front (RPF), for which he formerly worked but with which he claimed to have fallen out. His application was initially considered by a delegate of the Minister who, following an interview in English, refused to grant him a visa because he was not satisfied

that the appellant met the necessary criteria. The appellant applied for review of that decision to the then Refugee Review Tribunal (the functions of which are now performed by the Administrative Appeals Tribunal).

At the hearing, the Tribunal repeatedly offered the appellant the opportunity to give evidence through an interpreter. He declined, instead confirming he was competent in English. The appellant's migration agent told the Tribunal that the appellant's third language was English and therefore his range of responses may be limited.

Following the hearing, Tribunal affirmed the delegate's decision.

The appellant then appealed to the Federal Circuit Court for constitutional writs to quash the Tribunal's decision and require it to reconsider his application. The Federal Circuit Court was not persuaded that the Tribunal's decision was affected by jurisdictional error and dismissed his application with costs.

The appellant then sought review of the Federal Circuit Court's decision in the Federal Court.

Before the Federal Court, the appellant contended, among other things, that the primary judge erred in failing to find that the Tribunal denied him procedural fairness 'by failing to afford him the benefit of proper interpreting service in the Tribunal hearing'. The appellant's counsel submitted that, while the appellant did agree to proceed with an interpreter, he was in an 'unequal bargaining position', under pressure from the Tribunal, in a formal and frightening situation, and was trying to negotiate in his third language.

The Federal Court held that s 425 of the *Migration Act 1958* (Cth) imposes an obligation on the Tribunal 'to invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review'. The invitation must be 'a real and meaningful one' (*Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553) and it may readily be accepted that it would contravene s 425 to deny an interpreter to an applicant who cannot speak English or is not proficient in English.

The Federal Court found that, although the appellant's third language was English, the Tribunal had before it evidence (an interview conducted in English by the delegate) of the appellant's capacity to communicate in English. It also gave the appellant an opportunity to postpone the hearing and have an interpreter if he wished. However, the appellant chose to proceed without an interpreter and to give evidence and present arguments.

The Federal Court found that, in these circumstances, the Tribunal was not required to insist on the use of Kinyarwanda interpreter or even a French interpreter (the appellant's second language), because English was not the appellant's first language. The Tribunal was not required to override the appellant's preference, particularly when the interview with the Minister's delegate was conducted in English.

The Federal Court held that the Tribunal provided the appellant with a genuine hearing and a proper opportunity to give evidence and present arguments. As such there was no failure to comply with s 425.

A hearing with regard to a further ground of appeal (that the Tribunal denied the appellant procedural fairness by not disclosing to him that it had in its possession two certificates issued under s 438(1) of the Migration Act) was adjourned until the disposition by the High Court of the appeals from the judgements in *SZMTA v Minister for Immigration and Border*

Protection [2017] FCA 1055; *Minister for Immigration and Border Protection v CQZ15* [2017] FCAFC 194; and *BEG15 v Minister for Immigration and Border Protection* [2017] FCAFC 198.

Procedural fairness and identity of anonymous complainants

Summersford v Commissioner of Police [2018] NSWCA 115 (McColl JA, Basten JA, and Payne JA) (29 May 2018)

In March 2015, the applicant, a member of the NSW Police Force, was the subject of an anonymous complaint. The complaint alleged that the applicant had engaged in acts of harassment of fellow police officers and in other inappropriate, sexually-charged conduct. The complaint also identified 25 further potential witnesses. These 25 officers were required, under a directive memorandum issued by the investigating officer, Inspector Cadden, to identify if they had witnessed any acts involving the applicant of the kind identified in the anonymous complaint in the past two years.

On 31 March 2015, the applicant was notified that he was the subject of a complaint. On 20 July 2015, prior to being issued with the conclusions of the investigation, the applicant was interviewed by Inspector Cadden. During this interview the allegations in the anonymous complaint and those statements from the 25 other police officers describing instances of improper conduct were put to the applicant in general terms.

On 24 August 2015, Inspector Cadden completed his report, in which he concluded that, on the balance of probabilities, two of the allegations made in the anonymous complaint had been made out. The report also stated that the original anonymous complaint may have been made as an act of reprisal against the applicant.

On 24 August 2015, Superintendent Lennon, the delegate under the *Police Act 1990* (NSW), told the applicant that he had made a provisional order that, subject to the applicant's response, he would issue a Commander's Warning Notice and place him on a Conduct Management Plan (an internal police behaviour management plan). In response, the applicant said, 'people in the office have it in for me'. However, he refused to identify to whom he was referring.

On 1 October 2015, Superintendent Lennon again met with the applicant. He read out all the names of the officers who had provided statements to Inspector Cadden, but he did not identify which officers made allegations about the applicant. Again, the applicant did not identify any issues he had with those officers. However, at the applicant's request, the superintendent agreed that the anonymous complaint should be further investigated.

On 26 October 2015, during a further interview between Inspector Cadden and the applicant, Inspector Cadden again put to the applicant, verbatim, all of the allegations against him. The applicant complained that he did not know who the witnesses were who had made the allegations against him. He said if he had known he could have told the inspector whether their statements were likely to amount to reprisals. The inspector asked him to identify which witnesses fell within this category, but he declined to do so.

On 2 November 2015, Superintendent Lennon met with the applicant. The complaint was found to be proven in two respects and he was given a warning under the *Police Act 1990* (NSW) (the First Decision).

The applicant subsequently requested a review of the decision to issue the warning. This was refused by the respondent (the Second Decision). After the Second Decision, the

applicant was provided with an unredacted copy of Inspector Cadden's report. The unredacted report contained considerable detail, including the identities of the officers who stated they had seen the applicant engage in the conduct of the kind described in the anonymous complaint. It also showed that many officers responded to the directive memorandum by stating they had not witnessed conduct of the kind described in the anonymous complaint.

The applicant commenced proceedings in the Supreme Court alleging, among other things, that he had been denied procedural fairness in the making of the First Decision. Specifically, that he was denied procedural fairness because:

- he was not provided with copies of all the written responses to the directive memorandum (including the potentially exculpatory statements from officers that stated they saw nothing); and
- he was not provided with an unredacted copy of Inspector Cadden's report prior to the First Decision.

The applicant also argued that the material, which he was provided with before the First Decision was made, was vague, imprecise and lacking specificity and had left him confused.

The Supreme Court dismissed the applicant's appeal.

The applicant then sought leave to appeal to the NSW Court of Appeal. On appeal the issues were, among other things, what was the content of the obligation to accord the applicant procedural fairness prior to the first decision.

The Court found that, in this case, the obligation to accord procedural fairness required the disclosure of all adverse material which is credible, relevant and significant (*VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72). It did not require the respondent to disclose all exculpatory material, regardless of whether that material was adverse (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) [2006] HCA 63). In this case, the Court found that the various statements by different officers that they saw nothing relevant were not relevant or significant.

After comparing Inspector Cadden's report with the matters specifically put to the applicant during the October interview, the Court found that the only matters not disclosed before the first decision was made were:

- the name of the police officers who made allegations; and
- deliberative processes and proposed conclusions.

In the Court's view, while the disclosure of the identity of complainants is permitted where necessary for the effective conduct of an investigation under Police Act or *Police Regulations 2008* (NSW), there is nothing in that legislation that creates a legal duty on the decision-maker to identify a complainant. Therefore, in this case, the failure to identify which officers made complainants was not a breach of procedural fairness. Additionally, the obligation to provide procedural fairness did not require the disclosure the decision-maker's deliberative processes or proposed conclusions (*Minister for Immigration and Multicultural Affairs; ex parte Miah* [2001] HCA 22).

The Court also found that the material put to the applicant during the investigation was not vague, imprecise and lacking specificity and did not leave the applicant confused. Rather, during the October interview, Inspector Cadden put each allegation to the applicant,

verbatim. Further, the applicant was not denied procedural fairness in circumstances where he clearly understood the allegations made against him and was given ample opportunity to respond as he wished.

Endnotes

1 Section 57(2) of the Migration Act relevantly provides that, in considering a visa application, the Minister or delegate must provide 'relevant information' to a protection visa applicant and invite the applicant to comment on it. 'Relevant information' includes information that would be the reason, or part of the reason, for refusing to grant the visa; that is specifically about the applicant; and that was not provided by the applicant.