JUDICIAL REVIEW AND THE PRE-TRIAL PROCESS

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This paper examines Schedule 2 to the *Jurisdiction of Courts Legislation Amendment Act 2000* ('JOCLA Act'). The JOCLA Act came in the wake of the High Court's decision in *Re Wakim*,[1] a constitutional decision which left co-operative legislative schemes involving the Commonwealth, States and Territories in considerable disarray.

The JOCLA Act consists of two Schedules. The policy background to Schedule 2 is entirely unrelated to that behind Schedule 1, but it is noticeable that the two Schedules do diametrically opposite things. Schedule 1 to the JOCLA Act restores a statutory right to judicial review, for decisions taken under a variety of co-operative schemes, after the right went up in smoke on constitutional grounds in *Re Wakim*.

Schedule 2, by contrast, is about taking away judicial review. Specifically it restricts access to statutory forms of judicial review, in relation to particular decisions taken prior to the commencement of a criminal prosecution.

Perspective

The author of this article is a member of the Law & Bills Digest Group, a part of the Parliamentary Library which provides legal information and research services to the Members and Senators of the Commonwealth Parliament.

The Law Group is primarily responsible for a Library publication known as a Bills Digest, which is produced for virtually every Government Bill introduced into the Commonwealth Parliament.[2] A Bills Digest is an attempt to provide parliamentarians with a one-stop document for the purposes of parliamentary debate, one which contains:

- a summary of the policy background to the Bill
- a plain English explanation (to the extent that is possible) of the technical provisions contained in the Bill
- reference to those aspects of the Bill which are likely to attract and/or which warrant parliamentary attention, for either technical or policy reasons.

Although public servants, staff in the Library are employed by Parliament rather than the Executive. Particularly where Bills are not referred to a parliamentary committee and there attract detailed analysis by interest groups and public submissions, a Bills Digest may be one of the few documents which provides a technical and policy perspective on incoming legislation which is independent of the Executive that introduced it.

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1 R*e Wakim; Ex parte McNally* (1999) 198 CLR 511.

2 Bills Digests are published in hardcopy by the Department of the Parliamentary Library (DPL). They can also be found at the DPL website at http://www.aph.gov.au/library/ pubs/bd/ (5 October 2000). The Bills Digest for the JOCLA legislation is at http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD149.htm (5 October 2000).

Accordingly, this paper takes what might loosely be called a parliamentary perspective on the JOCLA Act; and examines:

- what do its provisions contain as a matter of technical law?
- what issues might or should attract Parliament's (and public) attention?
- how persuasive is the case made by the Executive to the Parliament for changing the law affecting the legal rights of those facing criminal prosecution?

Overview of Schedule 2

Schedule 2 to the JOCLA Act is about restricting access to judicial review of administrative decisions taken in criminal cases prior to commencement of the trial. In summary, it:

- cuts back availability of judicial review of the decision to prosecute ;
- restricts access to *Administrative Decisions (Judicial Review) Act 1977* ('ADJR Act') review of other pre-trial decisions;
- clarifies exemptions from the right to obtain reasons under the ADJR Act for decisions made in the criminal justice process; and
- channels much of the remnant jurisdiction away from the Federal Court towards State and Territory Supreme Courts.

It achieves these objectives by amendments to 3 Acts: the ADJR Act, the *Corporations Act 1989* and the *Judiciary Act 1903*.

The Decisions in Question

Potentially many decisions can be taken prior to the commencement of a prosecution, under a Commonwealth enactment and/or by an officer of the Commonwealth. For example, under the Act governing his or her operations, the Commonwealth Director of Public Prosecutions (DPP) institutes prosecutions for offences against Commonwealth law, appeals and other legal proceedings.[3] A judge or nominated AAT member may issue a listening device warrant to the Australian Federal Police (AFP) to bug a person or premises.[4] A magistrate may issue a search warrant under the *Crimes Act 1914*,[5] the *Customs Act 1901*[6] and many other Commonwealth Acts. A non-exhaustive definition of decisions made in the criminal justice process is found in the JOCLA Act.[7]

The Amendments in Detail

(1) The ADJR Act

Two Features of the ADJR Act

The ADJR Act offers a statutory form of judicial review for a wide range of decisions made under enactments. Schedule 1 of the ADJR Act lists certain decisions exempted from review under the Act. Existing exemptions include, for example, decisions under the *ASIO Act 1979*,

3 *Director of Public Prosecutions Act 1983*, s.6.

4 *Australian Federal Police Act 1979* s.12G.

5 Section 3E.

6 Section 214AB.

7 Item 1 in Schedule 2, inserting new section 9A in the *Administrative Decisions (Judicial Review) Act 1977*.

the *Telecommunications (Interception) Act 1979* and the Commonwealth's witness protection program. Nevertheless, on its face, the ADJR Act applies to a number of decisions related to the criminal justice process.

The ADJR Act also, in section 13, gives people affected by a decision the right to obtain a statement of reasons from the decision-maker. Schedule 2 of the ADJR Act excludes some decisions from this requirement to provide reasons. Before the JOCLA Act, Schedule 2 already contained a general exclusion of decisions relating to the administration of justice, with some specific examples spelt out.

The Key Changes

Schedule 2 of the JOCLA Act does three main things in relation to the ADJR Act:

- it excludes from ADJR coverage decisions to prosecute for any offence (by adding that category of decisions to Schedule 1 of the ADJR Act);[8]
- it clarifies the general denial of a right to reasons for decisions made in the administration of criminal justice (ensuring decisions regarding committal, appeal and the grant of all varieties of warrant are included in the exempt category in Schedule 2 of the ADJR Act);[9] and
- it restricts the ability of defendants to seek ADJR review of other pre-trial decisions taken in relation to the criminal justice process.[10]

In relation to the third change, while a defendant can seek review prior to commencement of criminal proceedings, the Act now suspends the right to take these ADJR Act actions once a prosecution or appeal is on foot.

(2) The Judiciary Act

Section 75(v) of the Constitution constitutionally guarantees a right to obtain certain forms of judicial review against an 'officer of the Commonwealth'. The High Court has jurisdiction to hear such matters, but typically they are heard in the Federal Court, which has jurisdiction over such matters conferred on it by s.39B of the *Judiciary Act 1903*.

While the Parliament can remove the right to take *statutory* proceedings for judicial review of decisions under the ADJR Act, it cannot take away the *constitutional* right to take proceedings under section 75(v). In contemplation that defendants in criminal proceedings will continue to take section 75(v) proceedings despite or perhaps because of the absence of rights under the ADJR Act, the JOCLA Act deprives the Federal Court of its jurisdiction to hear such proceedings in certain circumstances and vests it instead in State and Territory Supreme Courts.[11] Essentially this will happen where the prosecution or appeal itself is before or heading for a State or Territory court. The intention is to avoid splitting matters between courts at different tiers of the federation.

(3) Corporations Act 1989

Other amendments achieve the same result for prosecution and other decisions taken by Commonwealth officials under the Corporations Law of the States and Territories.[12] Where the criminal proceedings are already in a State or Territory court or heading there, the

8 Item 2 in Schedule 2.

9 Items 3–5 in Schedule 2.

10 Item 1 in Schedule 2, inserting new section 9A in the *Administrative Decisions (Judicial Review) Act 1977*.

11 Items 11–15 in Schedule 2.

12 Items 6–10 in Schedule 2.

JOCLA legislation vests jurisdiction for related judicial review matters in the State or Territory Supreme Court at the expense of the Federal Court.

(4) Application of Schedule 2 Amendments

The last thing to observe about these amendments is that as originally drafted they applied not only to future decisions made in the pre-trial process, but retrospectively to decisions made before the commencement date, even when the relevant criminal or judicial review proceedings were already on foot. In addition, the effect of some provisions was to wipe out certain judicial review proceedings as soon as a prosecution commenced.

During parliamentary debate on the JOCLA Bill, the Senate made 9 amendments, which the Government accepted when the Bill returned to the House albeit 'with great reluctance'.[13] Thus the Act in its final form differed from the Bill in one major respect. The JOCLA Act effects a general denial of ADJR review of a 'related criminal justice process decision', while a prosecution or appeal is before the courts. But where, by the time he or she is prosecuted, a defendant has already commenced an ADJR action, the action can continue (as a result of the Senate amendment). A court may, however, grant a permanent stay of the ADJR proceedings where the issue is more appropriately dealt with in the criminal proceedings. Similar amendments were made regarding section 75(v) proceedings already on foot before the Federal Court, when a prosecution or appeal comes before a State or Territory court.

The retrospective operation of the JOCLA Act was modified by another amendment, so that only judicial review applications made after 13 April 2000 can be wiped out by the commencement of a prosecution or, in cases of the decision to prosecute itself, by the commencement of the Act.

Why Erode Judicial Review: Assessing the Government's Case

Obviously the question about Schedule 2 which warranted Parliament's attention was whether it should accede to the Executive's request that it restrict the rights of the accused in criminal matters, specifically their right to seek judicial review of decisions taken on the path to the commencement of a criminal trial.

Why? Because the Parliament should be concerned with the rights and liberties of Australians and with the lawful exercise of state power. Exposure of administrative action to judicial review has come to be seen as a close relative of the fundamental principle governing our legal system, the rule of law. As former Chief Justice Brennan put it:

> To the extent that the courts are impeded from exercising judicial review of administrative decisions, the rule of law is negated.[14]

In the migration context, but with potentially wider application, His Honour remarked:

> The Parliament has made a conscious incursion upon the rule of law. It is no answer to say that some grounds of judicial review are left standing or to point to the High Court's jurisdiction under s.75(v) of the Constitution that lies beyond the reach of the Parliament.[15]

Of course those comments are not necessarily of universal application. So the question is: does the Government make a case which outweighs or dissolves a prima facie concern that accountability and the rule of law may be at risk?

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13 House of Representatives, *Debates*, 9 May 2000, p. 16084.

14 The Hon Sir Gerard Brennan, 'The Mechanics of Responsibility in Government', (1999) 58(3) *Australian Journal of Public Administration*, 3–11, at 9.

15 Id.

Or to use the words of the Senate Committee for the Scrutiny of Bills concerning the JOCLA legislation:

> The Committee is concerned at such a significant reduction in the rights currently available to defendants and seeks the Attorney-General's advice as to why such action is appropriate; how the action proposed in the bill is proportionate to the mischief it is aimed at; and whether an alternative approach should be adopted…[16]

The Government's case for the JOCLA Act was set out in the obvious places: the second reading speech of the Attorney-General,[17] later contributions to the debate by Government Members and Senators, the explanatory memorandum and the Attorney-General's response to the Scrutiny of Bills Committee.[18]

The main arguments put in support of the amendments proposed in Schedule 2 of the JOCLA legislation were:

- avoiding fragmentation of proceedings between courts at different tiers of the federation;
- reducing cost and delay, and the consequential damage caused by delay to the prosecution case (loss of witness recall, possible unavailability of documents); and
- heading off 'the use of unmeritorious delaying tactics in the criminal justice process by removing the collateral access of defendants to federal administrative law procedures and remedies'.[19]

Other arguments which appeared in the course of the parliamentary debate included the following propositions:

- defendants still have judicial review remedies available to them (section 75(v) rights as available in State or Territory courts, ADJR jurisdiction either side of the prosecution proceedings);
- the criminal courts themselves provide adequate safeguards, through the discretion to deny admissibility to prejudicial evidence, the grant of a permanent stay to prevent an abuse of process and the appeal system; and
- the amendments place defendants in Commonwealth prosecutions in essentially the same situation as their State counterparts.

I will concentrate on three of these: the allegation of abuse of the system at present, the adequacy of the criminal process itself to deal with shortcomings in pre-trial decision-making and the likelihood of avoiding fragmentation.

Are such 'collateral' attacks always unmeritorious? Although the second reading speech might be interpreted to suggest that they are, the Attorney-General's response to the Scrutiny of Bills Committee was more carefully worded to suggest that judicial review was 'frequently' a stalling tactic.[20] But if the Government has a strong case on this point, it has not made the most of it. It is not assisted, for example, by the absence of statistics or any concrete examples to illustrate abuse of the system. Instead the assertions that 'collateral

16 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2000*, 10 May 2000, p. 171.

17 House of Representatives, *Debates,* 8 March 2000, p. 14109.

18 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2000*, 10 May 2000, pp. 172-174.

19 House of Representatives, *Debates,* 8 March 2000, p. 14111.

20 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2000*, 10 May 2000, p. 172.

attacks' generally lack merit and are 'invariably used only by defendants with deep pockets'[21] were left to stand in the parliamentary materials without empirical support.

If not all such applications are unmeritorious, the question posed by the Act is whether on balance it is better to impose a blanket prohibition on access to ADJR review, at least for certain periods? Or is it safer to trust the courts to exercise their judgment and grant relief only in exceptional cases of meritorious challenge?

Certainly wider opinion appears divided on the question of administrative law and its interaction with the criminal justice system. Some applaud administrative law as a desirable discipline on decision-making in the criminal justice context, imposing much-needed notions of reasonableness and accountability. Indeed D.J. Galligan sees the present judicially self-imposed regime of abstinence and restraint as excessively cautious. He calls for *more* due process at the pre-trial stage, because it is where so many decisions with a major impact on defendants are made.[22] Others see administrative law as an unwanted intrusion, a costly duplication of judicial supervision.

The courts themselves appear relatively firm in their view. Since the Full Federal Court decision in *Lamb v Moss* in 1983[23] the legal position has been relatively straightforward: the courts will not ordinarily interfere with the processes of the criminal law by way of judicial review but will do so in exceptional circumstances. Put another way, the courts will generally exercise their discretion under the ADJR Act *not* to grant relief but exceptional circumstances may produce a different result. The same principle appears to apply whether the decision is one to commit a defendant for trial,[24] to issue a warrant,[25] to prosecute a defendant[26] or to arrest a suspect.[27]

In developing this doctrine of judicial restraint the courts have identified a number of factors which will generally stay their hand when judicial review is sought regarding pre-trial decisions:

- the courts should not be seen to stand too close to the executive decision to prosecute;[28]
- there is a strong public interest in the expeditious completion of criminal matters;[29]
- defects may be remedied by the court exercising criminal jurisdiction in the primary matter;[30] and
- the fragmentation of proceedings between federal and State courts should be avoided where possible.[31]

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21 House of Representatives, *Debates,* 5 April 2000, p. 15328.

22 D.J. Galligan, “Regulating Pre-Trial Decisions”, N. Lang (ed)., *Criminal Justice*, OUP 1994, 151-176.

23 (1983) 76 FLR 296.

24 *Lamb v Moss* (1983) 76 FLR 296.

25 *Brewer v Castles (No. 1)* (1984) 52 ALR 571 The warrant was successfully set aside without the Court having to specify whether it was done pursuant to the ADJR Act, section 39B of the *Judiciary Act 1903*, section 32 of the *Federal Court of Australia Act* 1976 or the 'accrued jurisdiction' of the Federal Court.

26 *Smiles v Commissioner of Taxation* (1992) 35 FCR 405 (subject to doubt expressed by Davies J about the effect of the High Court's decision in *ABT v Bond* (1990) 170 CLR 321). The decision to prosecute was upheld.

27 *Grech v Featherstone* (1991) 105 ALR 107 (the application was unsuccessful and the arrest, pursuant to the *Migration Act 1958*, was allowed to stand).

28 *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1994) 27 ATR 584 at 590.

29 *Flanagan v Commissioner of Australian Federal Police* (1996) 134 ALR 495 at 528.

30 *Jarrett v Seymour* (1993) 119 ALR 46 at 54 per Lockhart and Beaumont JJ.

In a Federal Court case earlier this year, *Crane v Gething*,[32] French J reaffirmed the general principle of judicial restraint, subject to exceptions in appropriate cases. He indicated that petitioners for judicial review are likely to confront a spectrum of responses, with the best chance of success residing in cases which crystallise a pure question of law uncontaminated by disputed questions of fact, where (though investigation has commenced) no criminal proceedings are pending.

Essentially the courts appear to have developed a number of safeguards against defendants who might gain inappropriate collateral advantage by launching judicial review proceedings. First, as we have seen, the courts will only intervene in exceptional cases.[33] Secondly, judicial review applications are open to be dismissed as an abuse of process.[34] Thirdly, success is virtually impossible unless a case poses a discrete question of law without factual dispute.[35] Fourthly, the courts will not allow suspects to use judicial review proceedings as a fishing expedition.[36]

With these judicial safeguards in place the question posed earlier becomes more pointed: should Parliament impose a blanket prohibition sweeping aside the prospect of ADJR review regardless of merit in individual cases?

Moving to the next question: is the criminal justice system itself adequate to cure defects in the pre-trial process? The Administrative Review Council ('ARC') thought not, in its advice in the mid-1980s to the Attorney-General after the Commonwealth Director of Public Prosecutions had sought the exclusion of committal proceedings from the ADJR Act. The ARC said certain questions are more appropriately resolved in a judicial review context by a court with specialist expertise in that area, and that defendants should not have to wait for trial to get an answer, for example, on the jurisdiction of a magistrate to conduct committal proceedings.[37]

More recently, Mark Aronson[38] has described changes to the criminal law which suggest that, after the JOCLA Act, defendants are now likely to be squeezed from both sides. It seems that the JOCLA legislation pushes defendants away from the judicial review arena towards the criminal courts, just as the climate on that side of the fence has, according to Aronson, also become a little more inhospitable. He suggests that the recent High Court decision in *Ousley v R*[39] imposes significant restrictions on the ability of a defendant to challenge a pre-trial decision from within the context of a criminal trial, ie as part of his or her defence.

Finally on the question of eliminating fragmentation and delay, we return to the legal reality that Parliament cannot escape the constitutional guarantee of judicial review against officers of the Commonwealth under section 75(v) of the Constitution. Judicial review continues to be an option for defendants and potential defendants, albeit by potentially more cumbersome

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31 *Kovess v DPP* (1997) 74 FCR 297 at 299.

32 [2000] FCA 45 (18 February 2000).

33 *Flanagan v Commissioner of Australian Federal Police* (1996) 134 ALR 495.

34 *Kovess v DPP* (1997) 74 FCR 297 at 299.

35 *Crane v Gething* [2000] FCA 45 (18 February 2000).

36 *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1994) 27 ATR 584 at 590.

37 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Redefining the Act's Ambit*, Draft Report, 1988, Appendix B p. 5. See also *Jarrett v Seymour* (1993) 119 ALR 46 at 54 per Lockhart and Beaumont JJ.

38 M Aronson, 'Criteria for Restricting Collateral Challenge' (1998) 9 *Public Law Review* 237.

39 (1997) 192 CLR 69.

legal means than those available under the ADJR Act. Will delay be eliminated or even reduced by the Act's proposals? As to fragmentation, most major criminal proceedings, in the populous State of New South Wales for example, are conducted in the District Court. The JOCLA Act vests jurisdiction in the related judicial review proceedings in the State *Supreme* Courts. By splitting cases between two levels of court, albeit within the same territorial jurisdiction, it is questionable whether a reduction in fragmented litigation will be achieved.