65 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.
66 Regina v Secretary of State for the Home Department, Ex parte Daly [2001] UKHL 26 [32].
67 See *Minister for Immigration and Citizenship v Li* [2013] HCA 18, where Gageler J was the only Judge to endorse the capricious or absurd standard of review: at [108]. The majority (Hayne, Kiefel and Bell JJ) concluded that the standard of unreasonableness is not limited to 'an irrational, if not bizarre, decision − which is to say one that is so unreasonable that no reasonable person could have arrived at it'. The majority Judges speculated that Lord Greene MR in *Wednesbury* had not meant to endorse such a stringent standard of review and that he had, instead, simply meant to suggest that 'an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified': at [68].
68 TRS Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65 *Cambridge Law Journal* 671, 675.
69 Ibid.
70 Ibid 675-676.
71 In New Zealand, this is made explicit by s 3 of the *New Zealand Bill of Rights Act*.
72 Such as where it is necessary to ascertain and assess facts before concluding that a limitation on rights is justifiable.
73 *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 (PC) 159.
74 The Rt Hon Sir Robin Cooke, 'The Struggle for Simplicity in Administrative Law' in Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, 1986) 1, 6-7.
75 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 7.
76 The Rt Hon Lord Woolf and others, *De Smith's Judicial Review* (Sweet & Maxwell, 7th ed, 2013) vii.

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Report into Freedom of Information completed

On 1 July 2013, Attorney-General Mark Dreyfus QC received a report on freedom of information laws by eminent former senior public servant and diplomat Dr Allan Hawke AC.

Dr Hawke's report reviews the operation of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010* and the extent to which those laws, and related laws, provide an effective framework for access to government information.

'I am pleased to receive Dr Hawke's report and I thank him for all the work he has undertaken during the course of his review,' Mr Dreyfus said.

'I will be giving Dr Hawke's report close consideration and will release it publicly once I have had an opportunity to consider the issues it raises.'

The review provided an opportunity to assess the impact of the Government's Freedom of Information reforms, which aimed to promote a pro-disclosure culture across the Government and build a stronger foundation for more openness in government.

The review was mandated by legislation to begin in November 2012, two years after the commencement of the FOI reforms, to allow enough time to assess the effectiveness of the reforms, including the structural changes to the FOI system.

Dr Hawke was asked to consult on aspects of Freedom of Information such as:

- the effectiveness of the Office of the Australian Information Commissioner;
- the appropriateness of existing FOI exemptions;
- the role of fees and charges; and
- minimising regulatory burdens and the cost of FOI.

Eighty-one submissions were made to the review.

The legislation establishing the review requires the report to be tabled within 15 sitting days after it has been received by the Attorney-General.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Third%20quarter/1July2013-ReportintoFreedomofInformationcompleted.aspx

Commonwealth whistleblower laws passed

Public-sector whistleblowers will have greater protection under legislation passed by the Government.

The Minister for the Public Service and Integrity Mark Dreyfus QC said the Public Interest Disclosure Bill and the Public Interest (Consequential Amendments) Bill were a significant step in advancing integrity and accountability of the Commonwealth public sector.

'The Public Interest Disclosure Bill strikes the right balance to achieve a comprehensive and effective framework of protection for public interest disclosures in the Commonwealth public sector. It will help build and maintain a culture of disclosure across the public sector,' Mr Dreyfus said.

'The Bill will encourage a pro-disclosure culture, by facilitating disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector. It provides a clear set of rules for agencies to respond to allegations of wrongdoing made by current and former public officials, and strengthens protections against victimisation and discrimination for those speaking out.'

The Public Interest Disclosure Bill implements the 2010 Government Response to the 2009 House of Representatives Standing Committee on Legal and Constitutional Affairs report, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*, chaired by Mr Dreyfus.

The Bill will have broad coverage across the Commonwealth public sector, including application to the Australian Public Service, statutory agencies, Commonwealth authorities, the Defence Force, Parliamentary departments and contracted service providers for Commonwealth contracts.

'I would like to thank all those who contributed to the development of this legislation, from my colleagues on the 2009 Committee Inquiry, to the Government members and senators who have had a sustained interest in the progress of this Bill, the Committees involved in the recent Parliamentary inquiries and those who made submissions to these inquiries. All have made valuable contributions to the Bill. I would particularly like to acknowledge the assistance of Dr A J Brown in the development of the legislation,' Mr Dreyfus said.

'A federal public interest disclosure scheme has been a long time coming. The passage of this legislation means that the Commonwealth is no longer the only Australian jurisdiction without dedicated legislation to facilitate the making of public interest disclosures or to protect those who make them.'

The Public Interest Disclosure Bill includes a statutory review of its operation two years after commencement.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/26June2013-Whistleblowerlawspassed.aspx

Parliament passes historic Commonwealth Sex Discrimination Amendment Bill

Attorney-General Mark Dreyfus QC has welcomed the passage through Parliament of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill, which legislates long-overdue protections for gay, lesbian, bisexual, transgender and intersex people.

The legislation will establish, for the first time at the Federal level, protections against discrimination in areas such as accommodation and healthcare.

Following consultation with aged care providers and a recommendation from the Senate Legal and Constitutional Affairs Committee, the Government amended the Bill to insert a qualification on the exemption for religious organisations for the provision of Commonwealth-funded aged care services.

'The Government is proud to have passed this historic Bill, which is an important step towards equality for all Australians, regardless of their sexuality or gender identity,' Mr Dreyfus said.

'This amendment has been strongly supported by UnitingCare Australia and Mission Australia, and other major aged care providers have confirmed they do not discriminate against any residents or those seeking care.'

'The vast majority of aged care service providers give dedicated and loving care to their residents no matter who they are, but it is important to ensure such discrimination cannot ever occur. Ageing gay, lesbian, bisexual, transgender and intersex people should not have to live in fear that they may be barred from essential care services.'

'This protection is particularly vital in regional areas where there is a limited choice of aged care providers.'

The new protections build upon the Government's reforms to eighty-five Commonwealth Acts which removed discrimination against same-sex couples and their children.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/26June2013-ParliamentpasseshistoricSexDiscriminationAmendmentBill.aspx

Protecting privacy in the digital era

The Attorney-General Mark Dreyfus QC has asked the Australian Law Reform Commission to conduct an inquiry into the protection of privacy in the digital era.

The inquiry will address both prevention and remedies for serious invasions of privacy.

'As I noted in March this year, further work needs to be done on whether to create a right to sue for breach of privacy,' Mr Dreyfus said.

'I am asking the Australian Law Reform Commission to consider this issue in light of changing conceptions of community privacy and rapid growth in information technology capabilities.

'The Government strongly believes in protecting the privacy of individuals, but this must be balanced against the Australian public's right to freedom of communication and expression.'

New technologies and modes of communication that provide new opportunities to connect, collaborate and create also pose new privacy challenges.

'Our privacy laws need to address future challenges and ensure people can take action against a person or organisation that seriously violates their privacy. Earlier consultations by the Australian Law Reform Commission in 2008, and responses to the Government's 2011 discussion paper, showed little consensus on how a legal right to sue for breach of privacy should be created, or whether it should be created at all,' Mr Dreyfus said.

A range of issues were raised, including whether a tort could create a more litigious culture, how it could impact on free speech and how the implied right to political communication could be balanced with an individual's right to sue.

'I have asked the Australian Law Reform Commission to ensure that the importance of freedom of expression and other rights and interests are appropriately balanced,' Mr Dreyfus said.

The Government will carefully consider the findings of the Australian Law Reform Commission before making a final decision.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/12June2013-Protectingprivacyinthedigitalera.aspx

New law to strengthen open justice in Victoria

On 26 June 2013, the Victorian Coalition Government introduced legislation into Parliament to strengthen and promote open justice in Victoria's courts.

The legislation consolidates and reforms the general statutory powers for the courts and VCAT to make suppression orders and closed court orders.

It establishes clear presumptions in favour of allowing free reporting of court proceedings and holding hearings in public.

'This legislation is another significant step in the Coalition Government's reforms to strengthen Victoria's justice system,' Attorney-General Robert Clark said.

'Open justice demonstrates publicly that laws are being applied and enforced fairly and effectively. Unless there is good reason to the contrary, the community is entitled to know what is being said in court where there are allegations that the conduct of an individual or organisation is in breach of the law.

'Restrictions on publishing information before the courts should only be imposed where there is a very good reason and should be limited to a clear and specific purpose.'

Key features of the Bill include:

- suppression orders under courts' general statutory power can only be made in specified limited circumstances where there is a strong and valid reason for doing so;
- the court must be satisfied on the basis of sufficient credible information that the grounds for making a suppression order are established;
- the type of information to which an order relates must be specified in the order and must be no more than is necessary to achieve the purpose of the order; and
- orders must be restricted in their duration. A court may only make an order for a fixed or ascertainable period, or until the occurrence of a specified future event. If there is a possibility that the future event will not occur, the order also must contain an expiry period that cannot be longer than five years.

Generally, orders restricting the reporting of court proceedings under the Bill can only be made where it is necessary to:

- prevent prejudice to the proper administration of justice;

- prevent prejudice to national or international security;
- protect the safety of any person;
- avoid undue distress or embarrassment to a party or witness in criminal proceedings involving a sexual offence or family violence; or
- avoid undue distress or embarrassment to a child who is a witness in a criminal proceeding.

The Bill does not alter the principle that matters that might prejudice a fair trial should not be reported ahead of a court hearing.

However, the Bill sets clear rules and guidelines for the making of any orders to suppress publication of such matters, to ensure those orders are limited to what is necessary and are not in force for longer than is necessary.

The Bill is based on a model Bill endorsed in 2010 by the Standing Committee of Attorneys-General. However, the Coalition Government has deliberately excluded from the Bill the sweeping and unclear 'public interest' ground for suppression orders that was included in the model Bill.

Instead, the Bill preserves specific statutory regimes that provide for the making of suppression orders where considerations other than those in the Bill are relevant, for example orders about serious sex offenders, child protection proceedings and other Children's Court matters.

The Bill also preserves the existing grounds for VCAT and the Coroners Court to make suppression orders, reflecting the unique nature of those jurisdictions.

The Bill makes clear that news media organisations may appear and be heard by a court or tribunal on an application for a suppression order under the Bill.

Media organisations and other relevant persons are also given express statutory rights to seek review of orders that are made to ensure that interested parties can have their say on whether an order should be varied, revoked or renewed.

Where an interim order is made, the court must proceed to determine the substantive application as a matter of urgency.

http://www.premier.vic.gov.au/media-centre/media-releases/7168-new-law-to-strengthen-open-justice.html

$4 million to assist unrepresented litigants in federal civil law matters

Attorney-General Mark Dreyfus QC and Parliamentary Secretary Shayne Neumann have announced new funding of $4 million over four years to support unrepresented litigants who would not otherwise have access to legal assistance and advice.

'The service fills an important gap by providing legal assistance in federal civil law matters to those who are unable to otherwise afford legal representation,' Mr Dreyfus said.

Assistance will be available for unrepresented litigants in the areas of social security, discrimination, consumer law, judicial review, bankruptcy, immigration and employment law.

'The national rollout will be based on the successful pilot conducted by the Queensland Public Interest Law Clearing House in the former Federal Magistrates Court and Federal Court,' Mr Neumann said.

'The pilot was a good example of an effective collaboration between government-funded services and the private sector to deliver cost-effective legal services that respond to the legal needs of the Australian community.

'It was modelled on the Royal Courts of Justice Advice Bureau which has been successfully operating in London for more than 30 years.'

Mr Dreyfus said there would be a focus on early resolution and mediation of disputes.

In addition, the scheme will help divert potentially frivolous or vexatious actions away from the Federal Court and Circuit Courts, lessening the burden on those courts,' Mr Dreyfus said.

'This is an important initiative in improving access to justice across our nation, and I commend the Queensland Public Interest Law Clearing House for its pioneering work with this program.'

Further information is available at www.ag.gov.au

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Third%20quarter/25July2013-4milliontoassistUNRepresentedlitigants.aspx

Commissioner appointed for ALRC inquiry into legal barriers for people with disabilities

A new inquiry will consider whether Commonwealth laws and legal frameworks create barriers to people with disabilities exercising their rights and legal capacity.

On 23 July 2013, Attorney-General Mark Dreyfus QC formally referred the inquiry into Legal Barriers for People with Disabilities to the Australian Law Reform Commission (ALRC), and appointed the Disability Discrimination Commissioner Mr Graeme Innes AM to the ALRC to support the inquiry.

'People with disability deserve the opportunity to make decisions affecting their lives,' Mr Dreyfus said.

In welcoming Mr Innes' appointment, Minister for Disability Reform Jenny Macklin said that as Australia's Disability Discrimination Commissioner Mr Innes has been a powerful advocate for people with disability.

'Mr Innes' work in ensuring that people with disability have access to the same rights and opportunities as Australians without disability ideally positions him to lead this important Inquiry,' Ms Macklin said.

'The inquiry follows the historic launch of DisabilityCare Australia on 1 July this year- a momentous achievement that will finally give people with disability the certainty they deserve.'

Inquiries undertaken by the Australian Law Reform Commission provide a unique opportunity for in depth consideration of issues of law.

The reference follows a three-week public consultation on draft terms of reference.

'Overall the feedback on the draft terms of reference was very positive,' Mr Dreyfus said.

'We have made changes to the terms of reference based on the consultation and I'm looking forward to the ALRC's final report on this topic, which is due in August 2014.'

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Third%20quarter/23July2013-Commissionerappointed-for-alrc-inquiry-into-LegalBarriersforPeoplewithDisabilities.aspx

Recent Decisions

A decision of a superior court of record is valid until set aside

***The State of NSW v Kable* [2013] HCA 26 (5 June 2013)**

1 From February to August 1995 Mr Kable was held in a New South Wales prison pursuant to an order made by Levine J purportedly under the *Community Protection Act 1994* (NSW) (the *CP Act*). The *CP Act* permitted a detention order to be made in respect of Mr Kable, if a Supreme Court judge was satisfied that he was likely to commit a serious act of violence and it was appropriate to hold him in custody.

2 Mr Kable successfully challenged the constitutional validity of the *CP Act* (*Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24) (*Kable No 1*). The High Court held that the *CP Act* was inimical to the exercise of judicial power. It was wholly invalid, as were all the steps taken under it.

In 1996 Mr Kable commenced proceedings seeking damages arising from the conduct of the State and its officers for detaining him for six months on the basis of the detention order made under the invalid *CP Act*. The primary judge dismissed Mr Kable's claims. On 1 November 2010, Mr Kable appealed to the Court of Appeal. That Court allowed the appeal in part, on the basis that an order made under the *CP Act* was not a judicial act and was void from the beginning.

By special leave, the State appealed to the High Court. The High Court unanimously allowed the appeal, holding that the detention order was a judicial order that was valid until set aside.

The High Court found that the order made by Levine J (although constitutionally invalid) was a judicial order because it was the result of an adjudication determining the rights of Mr Kable. It was made following proceedings in which witnesses were examined and cross-examined, opposing parties made submission and, subject to some exceptions, the rules of evidence applied. The High Court drew a distinction between *how* the power which the CP *Act* purported to be given to the Supreme Court was exercised and *whether* the power was given validly to the Supreme Court.

The High Court also held that it is now firmly established in Australian law that the orders of a federal court which is established as a superior court of record are valid until set aside, even if the orders are made in excess of jurisdiction (whether on constitutional grounds or for reasons of some statutory limitation on jurisdiction), and that these principles apply equally to the judicial orders of a State Supreme Court.

The High Court opined that there must come a point in any developed legal system where decisions made in the exercise of judicial power are given effect despite the particular decision later being set aside or reversed. That point may be marked in a number of ways. One way in which it is marked, in Australian law, is by treating the orders of a superior court of record as valid until set aside. Were this not so, the exercise of judicial power could yield no adjudication of rights and liabilities to which immediate effect could be given. An order made by a superior court of record would have no more than provisional effect until either the time for appeal or review had elapsed or final appeal or review had occurred. Both the individuals affected by the order would be required to decide whether to obey the order made by a court which required steps to be taken to the detriment of another. The individuals affected by the order would have to choose whether to disobey the order (and run the risk of contempt of court or some other coercive process) or incur tortious liability to the person whose rights and liabilities are affected by the order.

Therefore the order made by Levine J under the *CP Act* provided lawful authority for Mr Kable's detention until set aside, and the primary judge's orders dismissing Mr Kable's claims were reinstated.

Apprehended bias – too many statements, not enough questions

***SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 (25 July 2013)**

The appellant, a Nepalese citizen, arrived in Australia on 18 February 2009 on a student visa. On 28 September 2011 he applied to the Department of Immigration and Citizenship for a Protection (Class XA) Visa. The appellant claimed, among other things, that he (as a Hindu) had made a Muslim girl pregnant and that the girl's father and some Muslim associates had attacked his family home.

A delegate of the Immigration Minister refused that application. On 29 March 2012 the appellant applied to the Refugee Review Tribunal (the Tribunal) seeking review of the delegate's decision. The appellant attended a hearing before the Tribunal member. On 21 August 2012, the Tribunal affirmed the delegate's decision and published its reasons for decision.

The appellant then sought judicial review of the Tribunal's decision by the then Federal Magistrates Court. That Court dismissed the application on 26 March 2013.

On 16 April 2013, the appellant appealed to the Full Federal Court. The appellant contended, among other things, that the Federal Magistrate erred in not concluding that the decision of the Tribunal was vitiated by reason of a reasonable apprehension of bias on the part of the Tribunal member.

The Full Court found, after considering the entirety of the transcript of the Tribunal hearing and the surrounding circumstances, including the statutory power being exercised by the Tribunal, that the course of the hearing did give rise to a reasonable apprehension of bias.
The testing by the Tribunal of the appellant's claims and evidence was too frequent and what the Tribunal said was too absolute and definite, taking the form of statements rather than questions.

The Full Court held that it is one thing to manifest scepticism and to test credibility vigorously but it is another to state, on approximately a dozen occasions in the course of a relatively short hearing of less than two hours and over fewer than 10 pages of transcript, that the Tribunal does not or cannot believe the appellant or using words to that effect such as 'Don't