# Recent developments

*Anne Thomas*

**Cost model consultation paper released**

The Government, as part of delivering on its commitment to implement the recommendations of the Respect@Work Report, has opened a public consultation process on an appropriate cost model for Commonwealth anti-discrimination proceedings.

The Respect@Work Report 2020 set out the conclusions and 55 recommendations from the *National Inquiry into Sexual Harassment in Australian Workplaces*, carried out by the Australian Human Rights Commission.

In implementing some of the recommendations from the report, the Government last year introduced the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*, which requires employers to take proactive steps to prevent sexual harassment in the workplace.

The Government considered the recommendations of the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Bill and listened to stakeholder concerns about the cost provisions that were included in the original version of the Bill and based on a recommendation of the Australian Human Rights Commission.

As a result of these considerations the Government removed the cost provision from the Bill and committed to referring the issue of costs in discrimination proceedings to the Attorney-General's Department for review.

The Attorney-General's Department has released a consultation paper as part of its review into the most appropriate cost model in anti-discrimination proceedings.

The Department will also conduct virtual roundtables with key stakeholders to inform its advice to the Government and ensure that any unintended consequences of cost reforms are properly considered.

<https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/>

<https://ministers.ag.gov.au/media-centre/cost-model-consultation-paper-released-24-02-2023>

**How Australia broke its migration system, and what we can do to fix it**

The Minister for Home Affairs, the Hon Claire O'Neil, in a speech to the Australian Financial Review Workforce Summit on 22 February 2023, has released a plan for addressing issues with the current migration system.

The Minister stated that structural reform is necessary which is significant in scope and scale, and has set out eight big changes that will drive a new model for migration in Australia. The changes required are to:

- articulate a clear definition of why our migration system exists, and what problems it is to solve, in order to design a program where the structure, rules and administration meet those objectives.
- redesign the fundamental structure of the migration system, and rebalance the temporary and permanent programs. Sensible, good discussion on the long-term management of the migration program as a whole is necessary, including working with State Governments to address infrastructure, services and housing. The push is for more care, time, attention and strategy to getting the right people to Australia when they are needed.
- remove policies which create 'permanently temporary' conditions, requiring clarity where migration is truly temporary and managing this fairly.
- sharpen the focus on skills, both having clear strategic thinking behind the people Australia needs, and where they will come from, as well as a streamlined process that makes this easy. This will involve actively selling Australia to the right people. Part of the goal is to create a system that helps deliver skills to the regions, and to small business — two groups which are struggling to access the current migration system.
- unlock migrant potential, by improving the speed and ease with which migrants' existing skills are recognised when they arrive, and increasing support to translate the skills of secondary applicants and others into the labour market.
- coordinate and integrate the needs of the labour market, training and education system and the migration system, which will require giving Jobs & Skills Australia a formal role in the migration system for the first time.
- design out migrant worker exploitation wherever possible.
- fix the administration of the system and simplify the arcane rules and reduce complexity.

The next steps proposed by Ms O'Neil to prepare a draft architecture for a new migration system which will be released for consultation and discussion in April. The draft architecture will be guided by the report of the Review into the Migration System which was established by Ms O'Neil in September 2022. The Review is due to report to the Minister early this year.

More on the Migration Review can be found at <https://www.homeaffairs.gov.au/reports-and-publications/reviews-and-inquiries/departmental-reviews/migration-system-for-australias-future>

<https://minister.homeaffairs.gov.au/ClareONeil/Pages/how-australia-broke-its-migration-system.aspx>

**Government commits to significant metadata reform**

The Government has committed to a reform of Australia's metadata retention laws in its response to the bipartisan Parliamentary Joint Committee on Intelligence and Security (PJCIS) review of the Mandatory Data Retention Regime. The Government's response was released in February 2023.

The mandatory data retention regime is a legislative framework which requires carriers, carriage service providers and internet service providers to retain a defined set of telecommunications data for two years, ensuring that such data remains available for law enforcement and national security investigations.

The PJCIS tabled its report in October 2020, making 22 recommendations for revised practices and legislative reform.

The PJCIS concluded that while the Mandatory Data Retention Regime provides critical assistance to law enforcement and intelligence services, the regime lacks transparency and adequate safeguards.

The PJCIS raised concerns about the absence of clear guidelines for agencies that access and manage metadata under the Mandatory Data Retention Regime, inadequate record-keeping obligations and the fact that the legislation does not require officers who are authorised to access telecommunications data to undertake specific training.

The PJCIS also heard evidence that a large number of non-criminal law enforcement agencies, including local councils, were using other laws to gain access to people's metadata outside of the Mandatory Data Retention Regime. The PJCIS argued that such practices should cease.

The Government accepts most of the PJCIS's recommendations. The implementation of many of these recommendations will require legislative reform.

The Government is committed to ensuring the Mandatory Data Retention Regime continues to support the work of law enforcement and national security agencies while also ensuring that these powers are subject to appropriate safeguards.

The Government will now work to implement the Committee's recommendations as soon as practicable.

The Government's response can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Dataretentionregime/Government_Response>

<https://ministers.ag.gov.au/media-centre/government-commits-significant-metadata-reform-21-02-2023>

**Expert Advisory Group to Guide Reform to Australia's System of Administrative Review**

The Government has announced the Expert Advisory Group that will guide the landmark reform to Australia's system of federal administrative review.

On 16 December 2022, the Australian Government announced that it would replace the Administrative Appeals Tribunal (AAT) with a new administrative review body. The Expert Advisory Group will provide advice on key policy and legislative issues in relation to this reform.

The Advisory Group will comprise:

- Former High Court Justice, the Hon Patrick Keane AC KC (Chair)
- Ms Rachel Amamoo
- Emeritus Professor Robin Creyke AO
- Professor Anna Cody
- Emeritus Professor Ron McCallum AO
- Former Federal Court Justice, the Hon Alan Robertson SC
- Emeritus Professor Cheryl Saunders AO

Each member is highly qualified and brings a wealth of experience to the Advisory Group, which will guide the delivery of a new, trusted federal administrative review body that serves the interests of the Australian community**.**

The Hon Patrick Keane AC KC (Chair) is a former High Court Justice; former Chief Justice of the Federal Court; former Justice of the Queensland Supreme Court; and former Solicitor General of Queensland. Mr Keane was admitted to the Queensland Bar in 1977 and in 1988 he was appointed Queen's Counsel. He was appointed a Companion in the General Division of the Order of Australia in 2015.

Ms Rachel Amamoo is a barrister, admitted to the Bar in 2019 and was named in Doyle's Guide as a Leading Administrative and Public Law Barrister, junior counsel, Australia 2022.

Professor Anna Cody is the Chair of the Community Legal Centres Australia Board; Member, Legal Aid Commission NSW Board; Dean, School of Law, Western Sydney University; former Chair, Community Legal Centres NSW Board; former Director, Kingsford Legal Centre; and former Deputy Chair, NSW Legal Assistance Forum.

Emeritus Professor Robin Creyke AO is an Emeritus Professor at the Australian National University; former Member of the Administrative Review Council of Australia; former Integrity Advisor to the Australian Taxation Office; former Senior Member of AAT; Senior Sessional

Member of the ACT Civil and Administrative Tribunal; member of the Administrative Law Committee of the Law Council of Australia and Chair of the National Customs Brokers Licensing Advisory Committee.

Professor Creyke has been writing about tribunals for over thirty years and has also undertaken empirical research into the impact of judicial review cases both within government and also for successful applicants and their lawyers.

Emeritus Professor Ron McCallum AO is an Emeritus Professor at the University of Sydney Law School; former Dean of Sydney Law School; former Member, AAT General and NDIS Division; former Deputy-Chair, Board of Directors of Vision Australia; Senior Australian of the Year (2011); former Chairperson, United Nations Committee on the Rights of Persons with Disabilities; former (and inaugural) president of the Australian Labour Law Association; and former Asian regional vice-president, International Society for Labour and Social Security Law.

Professor McCallum is a highly respected industrial and discrimination lawyer and a prominent human rights advocate. In 1993, he became the first totally blind person appointed to a full professorship at any Australian university when he became Professor in Industrial Law at the University of Sydney.

The Hon Alan Robertson SC is a former justice of the Federal Court of Australia (2011–2020); formerly a Deputy President of the AAT; formerly a Deputy President of the Australian Competition Tribunal; President of Australian Academy of Law; Deputy Chair of the NSW Electoral Commission; and Honorary Professor, College of Law at the Australian National University.

Emeritus Professor Cheryl Saunders AO is the Emeritus Professor at Melbourne Law School and former President of the Administrative Review Council of Australia. Professor Saunders has published widely in the areas of administrative law, constitutional law, constitutional reform, comparative constitutional law, and federation.

Professor Saunders is a President Emeritus of the International Association of Constitutional Law; a former member of the Victorian Judicial Remuneration Tribunal; a former President of the International Association of Centres for Federal Studies; and the founding Director of the Centre for Comparative Constitutional Studies.

<https://ministers.ag.gov.au/media-centre/expert-advisory-group-guide-reform-australias-system-administrative-review-17-02-2023>

**Landmark Privacy Act Review report released**

The Government has released the report of the Attorney-General's Department's review of the *Privacy Act 1988*, noting that strong privacy laws are essential to Australians' trust and confidence in the digital economy and digital services provided by governments and industry.

The Privacy Act has not kept pace with the changes in the digital world demonstrated by the large-scale data breaches of 2022 which affected millions of Australians, with sensitive personal information being exposed to the risk of identity fraud and scams.

Following those breaches the Government has sought to increase significantly the penalties under the Privacy Act for serious or repeated privacy breaches and give the Australian Information Commissioner improved and new powers.

The Government is now seeking feedback on the 116 proposals in the report before deciding what further steps to take.

Submissions on the report were due on 31 March 2023. Further information can be found at <https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>

<https://ministers.ag.gov.au/media-centre/landmark-privacy-act-review-report-released-16-02-2023>

**Extension of the Robodebt Royal Commission**

The Governor-General, His Excellency General the Honourable David Hurley AC DSC (Retd), has amended the Letters Patent to extend the Royal Commission into the Robodebt Scheme.

Royal Commissioner Catherine Holmes AC SC advised the Government that a short extension was needed and the Government has agreed. The Royal Commission will now deliver its report on 30 June 2023.

The Royal Commission has been examining, among other things:

- the establishment, design and implementation of the Robodebt scheme, who was responsible for it, why they considered it necessary, and any concerns raised regarding legality and fairness,
- the handling of concerns raised about the Robodebt scheme, including adverse decisions made by the Administrative Appeals Tribunal,
- the outcomes of the Robodebt scheme, including the harm to vulnerable individuals and the total financial cost to government, and
- measures needed to prevent similar failures in public administration.

More information on the Robodebt Royal Commission can be accessed at <https://robodebt.royalcommission.gov.au/>

<https://ministers.ag.gov.au/media-centre/extension-robodebt-royal-commission-16-02-2023>

**Government Response to Joint Select Committee Family Law Inquiry**

On 25 January 2023, the Government released its response to the inquiry conducted by the Joint Select Committee on Australia's Family Law System.

The Committee's inquiry was wide-ranging and covered issues such as additional training, accreditation and monitoring of family law professionals and services, delays, and legal costs in the courts, enforcing court orders, addressing family violence, and the operation of the child support scheme.

The response includes agreement from Government to consider simplifying and clarifying legislation on the resolution of parenting matters and the enforcement of parenting orders.

The Government is progressing work that implements several of the Committee's recommendations. The 2022–23 Budget confirmed $87.9 million over four years to continue to expand the successful Lighthouse Project approach to managing family safety risk in the Courts to 15 Federal Circuit and Family Court of Australia registries, nationwide.

The Government is also considering innovative approaches to support families to resolve post-separation financial matters, and measures to improve standards for critical professions and services, such as family report writers and Children's Contact Services.

The Hon Amanda Rishworth MP, Minister for Social Services, said that changes to the family law system to make it safer and easier to use that would ensure the welfare of victim-survivors of family violence, including children, were paramount.

'It is critical that the family law system protects those at risk of violence — including children and young people — who are victims and survivors of family violence in their own right,' Minister Rishworth said.

'We know that long, complicated and adversarial court proceedings can have negative effects on the health and wellbeing of people who are already in a fragile emotional state dealing with the breakdown of a relationship — including children.'

The response also includes agreement from Government to implement key recommendations to improve the operation of the child support scheme.

The Committee concluded its two-year inquiry on 22 November 2021, when it released the last in a series of reports outlining its recommended improvements to Australia's family law system and child support scheme.

The Government response can be accessed at <https://www.ag.gov.au/families-and-marriage/publications/australian-government-response-inquiry-joint-select-committee-australias-family-law-system>

<https://ministers.ag.gov.au/media-centre/government-response-joint-select-committee-family-law-inquiry-25-01-2023>

**Federal judicial commission consultation opens**

The Government has released a discussion paper on the establishment of a federal judicial commission.

The Albanese Government gave in-principle support to a federal judicial commission in its response to the Australian Law Reform Commission's (ALRC) report, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, which can be found at <https://www.ag.gov.au/legal-system/publications/government-response-australian-law-reform-commission-report-138-without-fear-or-favour-judicial-impartiality-and-law-bias>.

The ALRC found that while problematic conduct by judges is relatively rare, a federal judicial commission would provide a transparent and independent means to address complaints about the conduct of federal judges and reinforce public trust in the judicial system.

The ALRC report does not propose a particular model to adopt. The Government will consult broadly on possible models with a discussion paper providing a starting point to guide the early stages of this reform.

This reform work reflects and builds upon the Government's commitment to integrity, fairness and accountability across all public institutions.

A federal judicial commission will complement the work of the National Anti-Corruption Commission which will commence operation this year.

Feedback on the questions raised in the discussion paper will be critical to inform the Government's consideration of any potential federal judicial commission model.

The discussion paper can be accessed at <https://consultations.ag.gov.au/legal-system/federal-judicial-commission/supporting_documents/discussionpaper.pdf>

<https://ministers.ag.gov.au/media-centre/federal-judicial-commission-consultation-opens-17-01-2023>

**Appointment to the Australian Law Reform Commission**

The Government has appointed the Hon Justice Mark Moshinsky to serve as acting President of the Australian Law Reform Commission, following his appointment as a part-time member of the advisory body.

The Australian Law Reform Commission plays an important role to ensure our laws remain relevant and fit-for-purpose. It makes recommendations to government including how to simplify the law, adopt new or better ways to administer the law and improve access to justice.

Justice Moshinsky will serve as acting ALRC President while a merit-based recruitment for the role is conducted.

Justice Moshinsky is a judge of the Federal Court of Australia. His appointment coincides with the concluding appointments of the Hon Justice Sarah Derrington AM and the Hon Justice John Middleton AM, who served as President and part-time Commissioner of the ALRC respectively.

We congratulate Justice Moshinsky on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-australian-law-reform-commission-09-01-2023>

**Review of Commonwealth secrecy offences**

The Government has commenced a comprehensive review of Commonwealth secrecy offences.

In two unanimous bipartisan reports, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended that the former government conduct a review of all secrecy provisions in Commonwealth legislation. Of particular concern to the PJCIS was whether existing legislation adequately protects public interest journalism.

Secrecy offences play an important role in circumstances where the unauthorised disclosure of Commonwealth information may cause harm to essential public interests, such as national security and the safety of the public. However, multiple reviews have raised concerns about the number, inconsistency, appropriateness, and complexity of Commonwealth secrecy offences.

There are 11 general secrecy offences, 487 specific offences and over 200 non-disclosure duties in Commonwealth legislation. This review of Commonwealth secrecy offences is the first critical step to ensuring that these laws, which are designed to protect essential public interests, remain fit-for-purpose.

In response to a recommendation of the Royal Commission into Defence and Veteran Suicide, the review will specifically consider whether amendments are needed to protect individuals who provide information to Royal Commissions.

The Attorney-General's Department will consult widely across government and civil society, including media organisations and legal experts, to ensure the review responds to information by a broad range of expertise and perspectives.

An interim report was provided to Government on 31 January 2023. The review's final report will be delivered by 30 June 2023.

The terms of reference for the review are available on the Attorney-General's Department website: <https://www.ag.gov.au/crime/publications/terms-reference-review-secrecy-provisions>.

<https://ministers.ag.gov.au/media-centre/review-commonwealth-secrecy-offences-22-12-2022>

**Albanese Government to abolish Administrative Appeals Tribunal**

On 16 December 2022, the Government announced that it will abolish the Administrative Appeals Tribunal and replace it with an administrative review body that serves the interests of the Australian community.

The Government is committed to restoring trust and confidence in Australia's system of administrative review, beginning with the establishment of a new administrative review body that is user-focused, efficient, accessible, independent, and fair.

The Government will consult with stakeholders on the design of the new body. This work will be led by a taskforce within the Attorney-General's Department and be informed by an Expert Advisory Group led by the Hon Patrick Keane AC KC, a former Justice of the High Court of Australia.

As part of this reform, the Government has committed:

- $63.4 million over two years for an additional 75 members to address the current backlog of cases and reduce wait times while the new body is being set up; and
- $11.7 million over two years for a single, streamlined case management system.

The Government will undertake further work as part of the reform process to ensure the financial sustainability of the new body.

The new body will have a transparent and merit-based selection process for the appointment of non-judicial members. Existing non-judicial members of the AAT will be invited to apply for positions on the new body in accordance with that process.

The Government has developed a set of guidelines for appointments to the AAT prior to its abolition. Appointments for non-judicial members to the new body will be consistent with the principles set out in these guidelines.

Matters currently before the AAT will be unaffected. They will continue to be heard as the reform progresses and will transition to the new review body once it is established.

Current AAT staff will transition to the new body as part of the reform. The Government is committed to working closely with the Public Sector Union and the AAT to ensure that the staff of the AAT are supported throughout this process.

The Hon Justice Susan Kenny AM has been appointed as the Acting President of the AAT. The Government will conduct a transparent and merit-based selection process for the role of President in due course.

<https://www.markdreyfus.com/media/media-releases/albanese-government-to-abolish-administrative-appeals-tribunal-mark-dreyfus-kc-mp/>

**Appointments to the Federal Court of Australia**

The Governor-General, His Excellency the Hon David Hurley AC DSC (Retd), has appointed Justice Catherine Button, Justice Geoffrey Kennett, and Mr Ian Jackman SC as judges of the Federal Court of Australia.

Justice Button has been appointed to the Victorian Registry and commenced on 16 January 2023. Justice Button came to the Bar in 2007 and took silk in 2018. In July 2021, Justice Button was appointed as a Judge of the Supreme Court of Victoria.

Justice Kennett has been appointed to the New South Wales registry and commenced on 19 December 2022. Justice Kennett came to the Bar in 1998 and took silk in 2010. In March 2022 Justice Kennett was appointed as a Judge of the Supreme Court of the Australian Capital Territory.

Mr Jackman has been appointed to the New South Wales Registry and commenced on 6 February 2023. Mr Jackman was admitted as a barrister in the Supreme Court of New South Wales in 1989, and took silk in 2002.

We congratulate Justices Button and Kennett, and Mr Jackman on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-federal-court-australia-15-12-2022>

**Commonwealth Ombudsman's Stored Communications and Telecommunications Data Annual Report**

On 7 March 2022, the Attorney-General, the Hon Mark Dreyfus, tabled the Commonwealth Ombudsman's annual report on stored communications and telecommunications data powers under the *Telecommunications (Interception and Access) Act 1979*.

The report is the outcome of 37 inspections across 21 agencies that used powers covertly to access stored communications and all agencies that had access telecommunications data powers between 1 July 2021 and 30 June 2022.

The Ombudsman made 13 recommendations, 145 suggestions and 97 better practice suggestions — a decrease on the number of recommendations and suggestions made in the previous year.

The Ombudsman inspects Commonwealth, state and territory law enforcement and integrity agencies' use of these powers against the requirements of the Act, reporting annually to Parliament.

Stored communications include items existing on a telecommunications carrier's system like emails and text messages. Telecommunications data is the information about a communication, but not the content of the communication itself and may include subscriber information, call charge records and location-based data.

The report identifies areas posing the greatest risk to agencies' compliance with the Act in 2021–22 such as destruction of stored communications, data vetting and quality control frameworks, use and disclosure record-keeping obligations and reporting to the Minister.

The report makes findings about instances of non-compliance in authorisations and warrants as well about the adequacy of risk controls such as agency governance frameworks, systems and training.

The report can be found on the Commonwealth Ombudsman website <https://www.ombudsman.gov.au/__data/assets/pdf_file/0013/115222/Commonwealth-Ombudsman-2020-21-Annual-Report-Stored-Communications-and-telecommunications-data.pdf>

**Publication of report to the Attorney-General**

On 6 February 2023, the Attorney-General, the Hon Mark Dreyfus, tabled the Commonwealth Ombudsman's report summarising the Ombudsman's oversight of the following covert powers:

- controlled operations
- delayed notification search warrants
- health checks of agencies' preparedness to use new account takeover warrant powers introduced in 2021.

The Commonwealth Ombudsman, Mr Iain Anderson, noted that as each of the above powers are used covertly, '[m]y Office's oversight helps shed light on the use of these powers and supports agencies to continuously strive towards full compliance with legal requirements'.

The Office of the Ombudsman made 13 suggestions and 13 better practice suggestions across these three regimes to the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC).

Controlled operations are covert (undercover) operations carried out to obtain evidence of a serious Commonwealth offence. Controlled operations provide legal protection for authorised participants who engage in conduct that would otherwise be unlawful or lead to civil liability. There was a significant decrease in the number of issues identified per inspection at the ACIC and AFP in 2021–22, in comparison with 2020–21, with both agencies taking action in response to our previous recommendations and suggestions to effect systemic improvements to their governance of the use of controlled operations.

Delayed notification search warrants allow the AFP to conduct a covert search of a premises to investigate certain terrorism offences. They are 'delayed' because the occupier of the premises does not know the search is happening at the time and is only notified later. The Report noted that there were no major instances of non-compliance by the AFP in using these warrants for the first time.

An account takeover warrant allows law enforcement to take control of an online account when investigating a serious offence. Online accounts include, for example, social media accounts, online banking accounts and accounts associated with online forums. The Report concluded that agencies had done well in ensuring their draft policies, procedures and guidance will support the proper use of these new powers.

The report can be found at:

<https://www.ombudsman.gov.au/publications-and-news-pages/news-pages/media-releases/commonwealth-ombudsman/06-february-2023-publication-of-commonwealth-ombudsman-report-to-the-attorney-general-on-agencies-compliance-with-the-crimes-act-1914>

**Recent decisions**

***The limits of jurisdictional error for a sentencing court***

*Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3

On 15 February 2023, the High Court handed down its decision in *Stanley v Director of Public Prosecutions.* The majority allowed the appeal remitting the matter to the District Court of New South Wales to be heard and determined according to law.

The matter concerned the appellant who, in 2019, in contravention of the *Firearms Act 1996* (NSW) committed offences of knowingly taking part in the supply of a firearm and having in possession for supply a shortened firearm. In October 2020, the appellant pleaded guilty in the Local Court of New South Wales at Dubbo and was granted bail pending sentence. In December 2020, the appellant was sentenced to an aggregate term of imprisonment for three years with a non-parole period of two years. The appellant appealed to the District Court against the severity of the sentence. Before the District Court, the appellant asked the Court, under s 7(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), to make an intensive correction order (ICO) that would have directed the appellant's sentence of imprisonment be served by way of intensive correction in the community.

In deciding whether to make an ICO, community safety is the paramount consideration as provided for under s 66(1) of the Sentencing Procedure Act, and subsection 66(2) requires that when considering community safety, the Court is to assess whether making the ICO or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.

The District Court dismissed the appeal, without referencing or making any findings in relation to s 66(2) of the Sentencing Procedure Act. Having no appeal rights, the appellant filed a summons in the New South Wales Court of Appeal seeking relief in the nature of certiorari, quashing the decision of the District Court. The majority of the Court of Appeal held that non-compliance with s 66(2) was not a jurisdictional error of law, but rather an error of law within the jurisdiction of the District Court, dismissing the summons.

The appellant was granted special leave to appeal to the High Court. The appeal raised two issues: one, whether the failure of the District Court Judge to make the assessment required under s 66(2) in declining to make an ICO was a jurisdictional error of law; and two, whether the District Court Judge failed to make that assessment. Justices Gordon, Edelman, Steward and Gleeson in the majority concluded that the answer to both those questions was 'yes' for the following reasons.

The Supreme Court's jurisdiction to determine proceedings for judicial review of a sentence is limited to review for jurisdictional error of law, as a result of the privative clause in s 176 of the *District Court Act 1973* (NSW). As an inferior court with limited jurisdiction, whether the District Court has made an error of law that is jurisdictional will depend on the proper construction of the relevant statute.

In considering the legislative framework, the majority noted that the power to order, or to decline to order, an ICO under s 7(1) is a discrete function that arises *after* the sentencing court has imposed a sentence of imprisonment. Once the power to make an ICO is enlivened, the sentencing court must address the relevant considerations in the Sentencing Procedure Act, specifically, in this case, s 66 which imposes specific mandatory considerations on the decision maker. That is, s 7 is not an inconsequential subsequent power after the sentencing process is complete, rather it is a sentencing function that is to be exercised in reference to the paramount consideration in s 66 of the Sentencing Procedure Act. Moreover, it is a discretionary power that fundamentally changes the nature of the sentence of imprisonment ([82]).

Noting the decision in *Craig v South Australia* (1995) 184 CLR 163, that a failure by a sentencing court to take into account a relevant consideration in the course of arriving at a sentencing decision will not ordinarily be a jurisdictional error without more, the majority found that even though the consideration in s 66 was not enlivened until after sentencing, this did not mean the court remained within jurisdiction when making the separate decision to order an ICO. The majority held that as a sentencing function, s 7 must be exercised by reference to the considerations in s 66, although a failure to do so would not invalidate the original sentence, as a separate decision to impose a sentence of imprisonment had already been made. Rather, the consequence of a failure to consider the s 66 requirements, is that the discretion to consider whether to grant an ICO under s 7(1) was invalid, and therefore had not been exercised.

Moreover, the majority held that it would be contrary to Parliament's intent essentially to enable a District Court Judge undertaking a rehearing of a sentencing process to be wholly immune from review where a fundamental step in the mandated process for deciding whether to make an ICO is omitted.

The majority concluded that the District Court Judge had failed to undertake the assessment in s 66(2) such that no decision on the ICO issue had been made and this duty remained unperformed.

Chief Justice Kiefel, and Justices Gageler and Jagot each wrote separate dissenting judgments. Each found that there was no jurisdictional error as s 66 of the Sentencing

Procedure Act does not condition the authority of the sentencing court to make or refuse to make an ICO under s 7(1) of the Sentencing Procedure Act. The decision to make or refuse an ICO is required to be informed by other considerations in addition to those in s 66, such that the obligation under s 66(2) does not condition the validity of the sentencing process. This is for two reasons: firstly, the authority of the sentencing court to sentence an offender to a term of imprisonment is not conditioned on the proper exercise of power under s 7(1) to make an ICO; and secondly, non-compliance with s 66(2) does not result in the sentencing court exceeding the limits of its decision-making authority conferred on it by s 7(1).

Justice Gageler reiterated that a restriction on power does not necessarily condition, and thereby limit, the authority to exercise that power, as noted in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 373–4. Moreover, the language and structure of s 66 and the essential evaluative nature of the decision it goes towards does not give rise to an inference that any element in s 66 is meant to be a jurisdictional fact.

Justice Jagot also emphasised that s 7(1) was about the manner of service of a sentence of imprisonment and not the imposition of a sentence of imprisonment, and while the way in which a sentence is to be served is important to the individual offender, the Sentencing Procedure Act does not make s 66 a pre-condition to a sentence of imprisonment ([190]). As such, an error as a result of not considering the matters under s 66 is one within jurisdiction.

***The requirement of procedural fairness where information derived from torture is considered***

*Director-General of Security v Plaintiff S111A/2018* [2023] FCAFC 33

The matter concerned an appeal from orders made by a single judge of the Federal Court setting aside two adverse security assessments (ASAs) made on the 23 April 2018 and 27 October 2020, respectively, by the Director-General of Security, concerning the respondent. Both ASAs had concluded that the respondent was directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979*. Specifically, the security risk posed by the respondent arose from an assessment that he had been a member of the Egyptian Islamic Jihad prior to coming to Australia, had held an ideology supportive of politically motivated violence, and was still likely to hold that ideology and to act upon it.

The respondent, an Egyptian citizen, had been in immigration detention since arriving in Australia in May 2012. In June 2015, the respondent applied for a protection visa. In undertaking a security assessment, the Australian Security Intelligence Organisation (ASIO), had obtained information from the AFP that the respondent had been sentenced in absentia in Egypt for terrorism offences. The evidence, however, upon which the respondent had been sentenced had most likely been obtained by torture. Upon making the decision to issue the 2018 ASA, the Director-General informed the Department of Home Affairs of the ASA. The briefing note which accompanied the Director-General's decision detailed aspects of the Egyptian trial provided by the respondent and attributed some weight to the allegations made against the respondent at the trial, describing them as 'merely contributing to a broader intelligence case underlying the security assessment'.

On 13 June 2018, a delegate of the Minister for Home Affairs refused to grant a protection visa to the respondent as a consequence of the 2018 ASA in line with s 36(1B) of the *Migration Act 1958* which provides that not having an ASA is essential to the granting of a protection visa.

On 15 September 2020, ASIO interviewed the respondent and informed him that his ASA was being reviewed. On 27 October 2020, the Director-General approved a decision brief to issue an ASA. The Department of Home Affairs was subsequently informed and once again refused to issue a protection visa in accordance with s 36(1A) of the Migration Act.

In overturning the 2018 ASA, the primary judge found that the decision constituting the security assessment relied upon material that was held by Her Honour to have been discredited as it was likely that it had been obtained by torture and/or prepared by Egyptian authorities. The primary judge also overturned the 2020 ASA on the ground that the respondent had been denied procedural fairness in relation to the future risk that he posed to national security having regard to his current and future circumstances. The information which may have been obtained from torture was not used in the 2020 ASA.

The Government appealed to the Full Court on three grounds. Grounds 1 and 3 were found successful by the Court, while Ground 2 could not be considered as it was an appeal seeking to rectify reasons and not the primary judge's orders.

Under Ground 1, which concerned the validity of the 2018 ASA, the Government contended that while evidence from the Egyptian trial had been referred to, it was neither material nor significant, or relied upon in a 'primary and material way'. This was emphasised by the conclusion of the 2019 report of Mr Robert Cornell, the Independent Reviewer of Adverse Security Assessments on the 2018 ASA, which did not find any reliance on that material met the description of being 'irrational, unreasonable, unfair, or contrary to any ASIO policy or procedure' ([110]). The Full Court found that the primary judge had failed to appreciate the distinction between the prohibition on ASIO itself engaging in torture or in some way endorsing torture by others, and the use of information obtained by others engaging in such conduct, and then it coming into the hands of ASIO, falling short of any such complicity, which is not prohibited by law or policy, but is required to be treated with restraint and caution ([93]). The Court drew out the distinction made by all the Lords in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, which stands as precedent for the common law exclusion from evidence in a curial proceeding of third party torture evidence, between curial and executive use of material that may have been obtained by torture, with a greater latitude allowed for executive use for the purpose of public protection ([17]). Neither did the Court find any denial of procedural fairness in the respondent's proposition that relying upon material that is not credible nor reliable is procedurally unfair noting that ASIO had weighed the evidence from the Egyptian trial with what the respondent had provided and had invited the respondent to comment on four occasions in addition to an interview.

Ground 3 concerned the validity of the 2020 ASA, in which the primary judge had found that ASIO had failed to explore the respondent's current ideology and future risk by failing, in particular, to put to the respondent certain questions identified as necessary by the judge. The Court agreed with the Government that information about the respondent's past beliefs

and conduct was relevant to the assessment of current beliefs and the future. Moreover, the power to issue a security assessment in s 37 of the ASIO Act does not, in and of itself require the assessment to be 'forward looking', an assessment can be made about current or recent events. The Court held that the assessment of a person's likelihood of engaging in, for example, politically motivated violence or other terrorist activity, 'is almost always going to involve a consideration of what that person has said and done in the past, and a view being formed as to whether any stance revealed by history has changed' ([128]). It was thus not unreasonable of ASIO to seek to ascertain what the respondent's position was in the past to assist in ascertaining whether there had been any material change in his position. Moreover, the Court concluded that the respondent had been provided with an ample opportunity to volunteer any further information on these issues. Procedural fairness, in this situation did not require the respondent be asked certain questions by ASIO, particularly where the respondent was given an opportunity to provide any information he wished to be considered, in light of a range of questions that had already been asked about matters concerning his ideology. The respondent had been made aware of the relevant concerns and given a reasonable opportunity to address them. The Court upheld Ground 3.

Under Ground 2, the Government sought to correct a mischaracterisation by the primary judge of the 2020 interview of the respondent. Her Honour had found that the ASIO interviewers had a predetermined view when they commenced the interview, flowing from ASIO views of the respondent's activities some 20 to 30 years ago. As Ground 3 has been upheld, the criticisms of the interviewers had likewise not been upheld. The Court did not find it necessary to decide this aspect. Moreover, it was not appropriate for the Court to consider as it was an appeal to correct reasons rather than an appeal on orders.

The orders of the primary judge setting aside the 2018 ASA and 2020 ASA were set aside and the matter dismissed with costs.

***One element of a multifactorial assessment does not lead to illogicality or irrationality of the whole***

*FSKY v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 2

The case concerned an appeal from a decision of the Federal Court made on 12 May 2022. In that decision, the primary judge dismissed an application for judicial review of a decision of the Administrative Appeals Tribunal made on 30 June 2021. The Tribunal had affirmed a decision of a delegate of the respondent (the Minister) made on 15 October 2020, refusing to grant the appellant a Protection (Class XA, subclass 866) visa (protection visa) pursuant to s 65 of the *Migration Act 1958*. Although the delegate had found the appellant was a person for whom Australia had protection obligations, the Tribunal affirmed the delegate's decision that the appellant had not met the criteria in s 36(1C) of the Act, having concluded the appellant was a danger to the community, due to having been convicted of a 'particularly serious crime'.

The appellant was a Cambodian citizen who was granted a Spouse (Class BC Subclass 100) visa in October 1999, as a dependent applicant in Australia. Between 2001 and 2015 the appellant was convicted of 131 separate offences and crimes and served 10 terms of

imprisonment. On 3 February 2017, the appellant's spouse visa was cancelled based on his 'substantial criminal record' as a result of being imprisoned for a term of 12 months or more in accordance with ss 501(6)(a) and 501(7)(c) of the Migration Act. On 3 April 2018, the appellant lodged an application for a protection visa. This was refused on 4 June 2018. On 15 August 2018, a delegate of the Minister decided not to revoke the appellant's visa cancellation. On 8 November 2018, the Tribunal affirmed the decision of the delegate not to revoke the cancellation and remitted the decision to the Department of Immigration and Boarder Protection. On 15 October 2020, the delegate refused to grant the appellant a protection visa on the basis that he did not meet the criteria in s 36(1C).

The Tribunal, in affirming the delegate's decision, noted that determining whether a person is a 'danger to the community' under s 36(1C), did not require the Tribunal to balance considerations or exercise a discretion. Rather, this was a matter of fact ([18]). The Tribunal adopted a non-exhaustive list of relevant factors to be considered in determining whether a person constitutes a danger to the Australian community. These factors were those that had been identified by Tamberlin DP in *WKCG and Minister for Immigration and Citizenship* [2009] AATA 512 at [26]–[29]. One such consideration was the appellant's risk of recidivism.

The primary judge found that the 'low to moderate' risk of recidivism finding of the Tribunal was only one of several factors that the Tribunal considered as part of the overall assessment of danger, dismissing the application, and upheld the decision of the Tribunal.

The appellant's appeal to the Full Court was made on the grounds that it was not logical or rational for the Tribunal to find that he posed a 'danger' to the Australian community required under s 36(1C)(b) where the Tribunal had found the appellant's risk of recidivism was 'low to moderate'. The decision of the Full Court was handed down 20 January 2023, dismissing the appeal.

The Full Court did not accept that the primary judge had fallen into error in finding the Tribunal had not erred in its determination that the appellant posed a danger to the Australia community. Noting in particular, the requirement in s 36(1C)(b) of the Migration Act involved a multifactorial assessment which included, but was not limited to, the risk of recidivism. The Court found that it was clear from the Tribunal's reasons that it had undertaken the multifactorial assessment it was required to do, and consequently, its reasons were rational and logical. Moreover, the concept of 'danger' in s 36(1C) was reliant on whether the appellant had been convicted of a 'particularly serious crime', not as the appellant contended, the risk of recidivism being 'high'.

In coming to its decision, the Full Court emphasised that the Tribunal's findings had to be understood in the context of the whole of its reasons on the topic of risk of recidivism. Importantly, the low to moderate risk of recidivism finding did not confine or impede the finding of 'danger', as the test of 'danger to the community', as already noted, is multifactorial which involves a complex assessment matrix ([59]). Rather, to isolate the bare probabilities of recidivism as constituting the relevant consideration required by s 36(1C) would constitute error. By way of example, the Court adopted the respondent's analogy, that is, it would be misleading to describe one turn of a gun barrel in a game of Russian roulette as only exposing the participant to 16.66 per cent chance of harm (which may be expressed as a

low to moderate risk in the abstract). One would, however, describe that exposure to being shot in the head as a 'danger' to the person in the firing line. That would be so even if the odds were smaller because while the probability of a bullet emerging from the gun may be low, the consequence of the gun firing a shot to the participant's head is catastrophic ([60]).

The Court upheld the respondent's submission that the decision-maker's task under s 36(1C) did not involve 'moving discs on an abacus', but rather comprises a 'melting pot' in which all factors, by instinctive synthesis are given consideration, as the Tribunal correctly adjudicated.

***IBAC, and the extent to which it is to afford natural justice***

*AB v Independent Broad-Based Anti-Corruption Commission* [2022] VSCA 283

Between 2019 and 2021, the Victorian Independent Broad-Based Anti-Corruption Commission (IBAC) conducted an investigation in accordance with its functions. As part of this investigation, AB was summoned to give evidence in a private examination. At the conclusion of the investigation, IBAC prepared a draft special report setting out its findings and recommendation. The draft report contained adverse comments and opinions relating to AB and CD (AB's employer, a non-governmental agency). In accordance with s 162 of the *Independent Broad-based Anti-corruption Act 2011* (IBAC Act), on 6 December 2021, IBAC sent AB a redacted version of the report and requested that he provide his response to it by 20 December 2021.

On 12 December 2021, AB's solicitor wrote to IBAC requesting the transcript of AB's witness examination, the transcripts of examinations of other witnesses and copies of other materials upon which IBAC relied in preparing the draft report. IBAC agreed only to provide a transcript of AB's examination.

On 31 January 2022, AB commenced proceedings in the Trial Division seeking judicial review remedies in relation to the draft report. AB alleged that IBAC had infringed the common law principles of natural justice in the manner in which it prepared the draft report and the natural justice requirement of s 162(3) of the IBAC Act in the manner in which it sought his response to the draft report.

On 7 February 2022, CD was served with the same redacted version of the draft report that had been provided to AB, a response was sought by 21 February 2022. On 11 February, CD was added as a party to AB's proceeding against IBAC seeking the same relief as AB. On 28 September 2022, the judge decided that IBAC had not infringed either the common law principles of natural justice or the natural justice requirements of the IBAC Act.

The applicants filed an application for leave to appeal to the Court of Appeal on a number of grounds. The Court, consisting of President Emerton and Justices of Appeal, Beach and Kyrou, grouped the applicants' grounds and considered them under two categories: category 1, natural justice in the context of s 162(3) of the IBAC Act; and category 2, natural justice in the context of the preparation of the draft report.

Prior to dealing with the above two categories, the Court addressed the issue raised in IBAC's notice of contention, that the primary judge should have found that the reference to 'adverse material' in s 162(3) of the IBAC Act consists only of comments or opinions contained in a draft report that are adverse to the affected person and it is only those opinions or comments to which the affected person is required to be given a reasonable opportunity to respond.

The Court found that the notice of contention should be upheld. As a matter of statutory interpretation, the word 'material' as used in s 162(2), (3) and (4) was a convenient label to refer back to the subject matter which enlivened IBAC's obligations in each subsection ([132]). For s 162(3), that is 'a comment or an opinion about which is adverse to any person' and not the material upon which those comments or opinions are based. Further, the provision in s 166, which is confined to the contents of the draft report, but makes no reference to 'adverse material', points to the conclusion that the natural justice obligation in s 162(3) is itself restricted to the contents of the draft report.

In regard to the first category of grounds, the key issues were what the hearing rule of natural justice required IBAC to do to ensure that it provided the applicants a reasonable opportunity to be heard, and whether the steps that IBAC took were sufficient in all the circumstances.

The Court noted that the requirements of the hearing rule of natural justice are 'flexible and respond to the circumstances of each case', informed by a variety of factors, including the scope and objects of the statute conferring the statutory power being exercised, the nature of that power, the right or interest of a person that may be affected by the exercise of the power and the severity of the consequences to that person resulting from the exercise of the power ([161]).

In this context, IBAC had a reasonable opportunity to provide any other contents of the draft report which disclosed the basis on which IBAC formed the adverse comments and opinions or which provided necessary context for them. The Court held that IBAC had satisfied the requirements in s 162(3) of the Act, with one exception, which consisted of a very vague statement in the draft report that was considered 'impossible for the applicants to respond to'. However, the Court found that this did not mean IBAC had denied the applicants a reasonable opportunity to be heard. As a *draft* report (emphasis added), the applicant could urge IBAC to change it in light of the response they provided. Yet, even if IBAC failed to make the requested changes, s 162(3) of the IBAC Act contains the addition protection of requiring IBAC to set out in its final report each element of the applicant's response. This was considered significant by the Court as such a requirement ensures anyone reading the report can consider not only IBAC's findings but also the applicant's perspective in relation to those findings.

The applicants' second category of grounds contended that the hearing rule of natural justice required IBAC to give them notice of the allegations it was investigating at an earlier stage of the investigation. The Court found that these grounds were not made out, finding neither support in the IBAC Act or legal authority.

The Court noted *Re Pergamon Press Ltd* [1971] 1Ch 388 and *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 as authorities which provides that a public official conducting an investigation may defer approaching a person being investigated until the investigation has advanced sufficiently to enable relevant information to be collected and issues to put to that person have been identified. Likewise, contrary to the applicants' submissions, *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 and *Coutts v Close* [2014] FCA 19*,* stipulate that it is usually sufficient for a public official to provide a person who may be affected by an investigation with the substance or gravamen of the matters that are adverse to the person. It is not necessary that all the relevant material supporting the allegations is provided for natural justice to have been afforded. As such, the fact that IBAC did not put to AB all the adverse material in the draft report did not mean that IBAC had not complied with the hearing rule of natural justice.

The Court refused leave for appeal.