THE IMPACT OF TECHNOLOGY ON THE ADMINISTRATIVE JUSTICE SYSTEM

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Writing recently in the *Weekend Australian*,[1] Phillip Adams speculated on how literary history would have been different had it unfolded in a digital age. Romeo and Juliet would not have communicated across the balcony but through text messaging. The revolutionaries in *Les Miserables* who were abandoned by the Parisians at the barricades could have organised a more successful uprising by using social media to mobilise a crowd. Tolstoy's *War and Peace* would have been longer still if he had composed on a keyboard rather than with a quill on vellum (probably more war, less peace). And, if God had used Twitter for each of the Ten Commandments, he would still have 121 characters to spell out a few exceptions after tweeting 'Thou Shalt Not Kill'.

Those examples illustrate how technology can change society in fundamental ways. It has changed how we purchase goods and services, plan and book holidays, talk to friends, access entertainment, read newspapers, do banking, watch movies, conduct research, participate in meetings and perform work.

Technology has equally changed how we relate to government – how we obtain information, enrol to vote, apply for a passport, access health services, lodge tax returns, apply for benefits, obtain publications and complain about government services.

The language of government is quickly changing. We talk of e-government, online government, Gov 2.0, crowd sourcing, the digital economy, cyber security, broadband platforms and government in the cloud.

Behind that new language lie not only different practices of government, but different theories of government. In a digital world, participatory democracy and engaged government are different from an earlier world of paper submissions and town hall meetings. Open government has new meaning when the obligation upon government moves beyond providing documents upon request, to proactively publishing information on the web and providing online access to government data sets. Evidenced-based decision making is similarly being transformed by practices of data exchange and big data analytics. And the concept of representative democracy is fast expanding to embrace new strategies for campaigning, lobbying, shaping policies, building community support and – as recent events illustrate – evaluating and changing political leaders.

Technology is changing everything, and at an astonishing pace. The number of internet users is estimated to have grown 100 fold between 1995 and 2012, and now extends to 86% of the population (and 100% of those aged 14-19 years).[2] The average worker receives up to 100 emails per day from this communication service which commenced in 1993. Facebook, founded in 2004, has an estimated 1 billion active users, including half the

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* *Professor John McMillan, Australian Information Commissioner, presented this speech to the AIAL National Administrative Law Forum, 'Administrative Law in an Interconnected World', Canberra, 18 July 2013.*

Australian population and 111 Australian Government agencies. Twitter, created in 2006, has an estimated 500 million registered users, including 2 million Australians and 154 government agencies. There has been the same uptake within government and the community of social media platforms such as YouTube, LinkedIn, RSS feeds, Podcasts and Blogs. An estimated 79% of the population aged 15-64 are cell-phone users.

The administrative justice system is not isolated from these changes. What that means, in a practical sense, is that it is no easier to predict how technology will transform that system than it is to foretell how technology will further transform government and society. We can, however, be guided by the dramatic administrative justice changes that have occurred over the past forty years, which point to the inevitability of further change in a digital age. I will briefly note four earlier phases of administrative justice before returning to the current theme.

Phase 1: the constitutional compact, **through judicial review of administrative action**

The history of administrative justice commences with the central, fundamental and constitutional role played by courts in checking government power. This phase, stretching back centuries, became anchored in a constitutional separation of powers that safeguarded the role of an independent judiciary in declaring the law, checking executive error and safeguarding the citizen against government.

Many core principles of administrative law – natural justice, good faith, jurisdictional error, the rule of law, reasoned decision making – are products of this phase. The influence of the judicial role continues alongside newer phases in administrative justice. Landmark judicial decisions are no less frequent, and new legal standards – legitimate expectation, proportionality, rationality – remain a vibrant topic of discussion and analysis.

Phase 2: correcting administrative error and ensuring correct decision making

This phase, which took root in the 1970s, can be traced principally to the 1971 report of the Commonwealth Administrative Review Committee. From its proposals emerged 'the new administrative law' that gave rise to the Administrative Appeals Tribunal, the Commonwealth Ombudsman and the Administrative Review Council. The philosophy underpinning this phase was that government was growing in size and exercising more administrative authority and discretionary power and with this came a heightened risk of error and impropriety in administrative decision making. Citizens wanted a justice agency they could approach to fix a mistake and make the correct decision.

This phase has been important in many ways. Members of the public have become accustomed users of administrative justice mechanisms that are accessible, inexpensive and efficient. The mechanisms are actively used in high volume areas of government decision making, such as social security, taxation and immigration. Over the years new specialist tribunals and complaint handling agencies have been created, between them reviewing tens of thousands of administrative decisions annually. Together, these accessible mechanisms have given added vitality to administrative law values of legality, rationality, fairness and transparency.

Phase 3: ensuring good administration, integrity in government and respect for human rights.

Administrative law expanded during this phase to embrace a stronger focus on broader systemic themes in decision making and administration. Until this time, agencies such as the Ombudsman had concentrated mainly on individual case review and on providing justice for the aggrieved complainant.

A changed focus in Ombudsman work in the late 1990s pointed to the broader shift that was occurring. The office drew more heavily on its long-standing power to conduct own motion investigations and also moved into compliance auditing, inspections, training, and publication of fact sheets and better practice manuals. This sprang from a recognition that an error occurring in one case may point to a systemic problem that would see the error repeated in other cases.

The objectives of the administrative justice system were changing also. The belief was that public administration, in addition to being rule based, should also be values based. It should be ethical, free of corruption and conflict of interest, and should respect and uphold international human rights standards. In a word, there should be integrity in government.

To advance these objectives, additional oversight agencies were established, with new roles and powers. They included human rights and anti-discrimination agencies; anti-corruption and integrity commissions; freedom of information and privacy commissioners; and public interest monitors.[3]

Despite some initial questioning, it is generally now accepted that these agencies and mechanisms fit under the umbrella of administrative law – or, perhaps more descriptively, the umbrella has become larger to cluster a broader range of independent agencies that together play a role in oversighting executive decision making and promoting integrity in government.

Phase 4: making public administration more 'customer focused' and 'citizen centred'

In the most recent and fourth phase, administrative law has become an ally in a reform movement to make public administration more 'customer focused' and 'citizen centred'.

The origins of this movement lie beyond administrative law, and beyond Australia. Influential factors were the customer service charter initiatives in the United Kingdom under the Thatcher Government in the 1980s, the 'citizens first' research studies that commenced in Canada in 1998, and the *Code of Good Administration* promulgated by the European Parliament in 2001.

These changes sprang from a recognition that the relationship between people and government had been transformed. Contact was occurring in different ways – over the counter, by mail, on the telephone and online. Contact was more frequent and diverse, covering benefits, subsidies, licences, taxes, authorisations, sanctions, penalties and services. The relationship had moved beyond that of 'citizen and government', to one in which the citizen was also a client and a customer of government. In this new environment people expected administrative systems to operate smoothly, predictably and competently. If a problem arose they wanted a quick, courteous and effective response.

While this trend goes beyond the province of administrative law, it has played an effective role in championing citizen-centred service delivery. Administrative law has promoted the importance of internal and external complaint handling; administrative review criteria have expanded to include customer service standards that sit alongside conventional legal standards; and a broader concept of remedy has developed that includes apologies, proper explanations, reconsideration of agency action, expedited agency action and discretionary compensation.

Phase 5: administrative justice in the digital age

We are now entering a fifth phase of administrative justice. As I noted earlier, technology is unstoppably changing everything and at a pace that makes it impossible to map the future. I will highlight four themes in the cultural changes that may lie ahead.[4]

Changes to the work practices of administrative justice agencies

At the immediate and practical level we have all experienced how technology changes the way that administrative justice agencies conduct business. They all have a web presence, through which they publish decisions, forms and guidance to practitioners and members of the public. They allow online lodgment of complaints, applications and submissions. They communicate with clients and exchange documents by email. Video conferencing and virtual hearing rooms are commonplace.

Technology is also posing new questions and practical challenges to orthodox business practices. How can a court prevent jurors from conducting independent research on the web or posting their views online?[5] Can confidentiality orders and publication restrictions be enforced when people can anonymously use social media to flout an order? Do we need new discovery and evidentiary rules to cope both with the volume of information that is digitally recorded, and the ease with which digital information can be erased or tampered with?[6] What are the implications if a party to a dispute emails the adjudicator?[7] Should rules of procedural fairness be rewritten to accept the reality that adjudicators probably use Google more often than they admit?

Changes in how people resolve disputes and their expectations of government and administrative justice

Technology is changing the way that people comprehend government, their expectations of government and the way they resolve disputes.

The proportion and volume of online transactions with government are increasing rapidly and will continue to do so with the roll-out of the high-speed National Broadband Network. It is estimated that by 2020, digital channels will be used by people in 80% of transactions to access government services, compared to 30%-40% at present.[8] In the space of one year, apps launched by the Department of Human Services were used by people to carry out more than 6.9 million transactions.[9] An Australian Taxation Office app was downloaded by more than 100,000 taxpayers within two weeks of release.[10]

In an online world people are increasingly choosing to conduct transactions through tablets, smart phones and downloadable apps. In dealing with government they want a quick response; they prefer short, clear, open and relevant responses; they expect to deal with people who understand their problem and are knowledgeable and display empathy; they may want an ongoing dialogue or interaction; and they may insist on a supplementary explanation or being given access to surrounding documents.

That model of communication, and the expectations that underlie it, may not fit easily with more traditional practices of dispute resolution. Until now we were accustomed to dispute resolution following a more ordered path that was controlled by the adjudicator, who may be a generalist with little direct experience in the subject area of dispute.

In future, a client who is dissatisfied with more traditional or established mechanisms will also have numerous other options to turn to. A person waiting in a queue or on hold at a call centre may achieve a faster result by tweeting their discontent. Indeed, many large agencies

now have social media monitoring units that glean valuable customer feedback that matches that obtained from complaint handling and internal review.

Another dispute resolution option in the digital age is to create your own website and electronically engage and mobilise a new community. 'Destroy the Joint', using Twitter and Facebook, achieved instant success in challenging sexism by radio broadcasters. It is doubtful that a complaint to a sex discrimination commissioner or media complaints authority could have matched this success. Another illustration is Vodafail, a website created by a computer expert and disgruntled Vodafone customer while he waited online in a call centre queue.[11] The website logged over 21,000 entries in a two year period.

Another aspect of this trend is that people may have different objectives in complaining or in commencing a dispute. In the traditional model there was a beginning and an end – a complaint, a file opened, an investigation, responses back and forth from the parties, and a reasoned decision by the adjudicator upholding or dismissing the complaint.

Commonly, now, a person's sole objective is to lodge a complaint, vent his/her immediate frustration and, with that immediate satisfaction, surf on to some other website. The process of complaining can be more important than the outcome of the complaint. Yet at the other end of the spectrum are disgruntled clients, aided by technology, who never let go, never give up and increasingly dominate the time of dispute resolution agencies.

In short, at both ends of the administrative justice spectrum there are groups with different objectives who use technology in similar ways to engage with agencies and steer disputes.

Changes to the models and philosophy of dispute resolution

Administrative justice agencies must heed and respond to this changed culture. To remain relevant they must embrace different approaches to dispute resolution and engagement with clients. This is already happening.

Complaint and investigation bodies, such as ombudsmen and commissioners, now receive and conduct reviews in a more responsive, engaged, interactive and informal manner. Tribunals and courts resolve an increasing proportion of applications by alternative dispute resolution rather than formal hearings and, as noted earlier, they have embraced technology in the registry and the hearing room.

Far greater adjustment and adaptation probably lies ahead. In a fast-paced digital world it is questionable whether people will have the time and interest to wade through lengthy and complex reasons statements in order to understand the principles applied to resolve a dispute. Shorter, clearer, crisper reasons may be required. Equally, the statements of reasons in individual cases may have diminishing importance in developing administrative law principles and jurisprudence. Many people prefer the option of visiting an administrative justice agency's website to read a coherent and comprehensive set of guidelines that explain the principles to be applied from one case to the next.

An even more fundamental question arises to do with the future importance of courts and court-like tribunals in the administrative justice system. In a digital world where people can choose from among a growing array of dispute resolution options, and generally prefer mechanisms that are online, responsive and cost-free, will people continue to turn to bodies that conduct formal hearings and adjudications?

Early trends are interesting. The workload of the NSW Local Court is reported to have declined by 23.9% over four years, and the workload of the NSW Supreme Court by 21.2%

in the last year.[12] At the same time the caseload of less formal dispute resolution options such as ombudsmen and tribunals has remained constant or increased.[13]

A related trend may be a contraction in the range of people who use courts – or, from an administrative law perspective, the range of decision making issues that courts address. The Federal Circuit Court of Australia (formerly the Federal Magistrates Court) received only 15 administrative law applications in 2011-12, comprising 0.2% of its general law caseload of 6,693 matters; there were an additional 1,464 migration applications (21% of the general law caseload).[14]

Federal Court of Australia statistics no longer contain separate entries for administrative law or judicial review of administrative action. The nearest statistic is that 40% of appeals in 2011-12 were migration related.[15] The Court's Annual Report 'Summary of Decisions of Interest' contains only three (of nineteen) cases that could broadly be described as administrative law cases; two of those were extradition cases and the other was a freedom of information case on legal professional privilege.[16]

The pattern that is emerging, from an administrative law perspective, is that the range of issues handled by courts is narrowing. At the federal level the caseload is likely to be dominated by migration matters, appeals from the Administrative Appeals Tribunal (most commonly in taxation and employee compensation matters) and occasional matters on government commercial regulation, extradition and professional services review. Other litigants who periodically approach courts are those with an immediate strategic purpose, for example, wanting to obtain an injunction to restrain impending government action, or to seek to disqualify a decision maker who may decide adversely.

Changing the theory of administrative justice

Will the digital age require us to rethink and reposition our theories of administrative justice? I will finish with two observations.

The first, drawn from the preceding point, is that it is doubtful whether courts are well-placed to go beyond the particular legal issues arising in a case, and extemporise generally on principles of good administration. The caseload they handle throws up a narrow range of government decision making and administrative law issues. Moreover, the caseload barely touches the issues that increasingly confront government agencies in adjusting their decision making, regulation and service delivery in a digital environment.

And yet it is an observable trend over the last decade or so, both in court decisions and in seminar papers, that judges propound general theories of good administration. An example is a conference hosted by the Australian Government Solicitor in June 2013, *Excellence in Government Decision-Making*, at which six of the nine sessions were led by superior court judges. Contemporary administrative law jurisprudence is also dominated by the discussion or development of general concepts that are put forward to guide decision makers, such as rationality, illogicality and reasonableness.[17] Speaking personally, I rarely find these broad concepts to be practically useful either in making decisions in the current government environment, or in administering an agency that reviews government administration.

My second observation concerns the way that public law theory is pitched. At the heart of classic theory is the desire to check executive abuse, regulate the exercise of legal power, safeguard individual rights against unlawful encroachment by government, and secure the rule of law in government and society. The classic system for achieving those objectives was the separation of powers, which enables judicial officers to exercise determinative and conclusive powers in an environment free of duress and external pressure and influence.

That classic theory is uncontentious, but no longer adequately describes the administrative justice system. That theme was taken up in last year's AIAL National Administrative Law Forum that looked at the integrity branch of government.[18]

The digital age questions classic theory in an equally fundamental way. The web has become the greatest force yet seen for advancing and protecting three of the core administrative law values – participation, transparency and accountability. As a decentralised mechanism with few restrictions on access and no hierarchy of expertise, the web is an immensely powerful democratising force that cannot be ignored. It provides an open market in information, ideas and action channels.

Society is turning to the web for every transaction, issue and concern with government. This cannot be ignored by government, and is not being ignored. Every aspect of the world we live in will be fundamentally changed by technology. The future of the administrative justice system must be carved in this digital environment.

Endnotes

1 Phillip Adams, '2B or not 2B', *The Weekend Australian Magazine*, 15-16 June 2013.
2 Figures taken variously (in July 2013) from Wikipedia, Sensis Social Media Report, and www.australia.gov.au/news-and-media/social-media.
3 See John McMillan and Ian Carnell, 'Administrative Law Evolution: Independent Complaint and Review Agencies' (2010) 59 *Admin Review*.
4 See also Melissa Perry, 'Administrative Justice and the Rule of Law: Key Values in the Digital Era', Paper to the 2010 Rule of Law in Australia Conference, Sydney, 6 November 2010.
Eg, 'Justice Tweeted is Justice Done', The Law Report, ABC Radio National, 9 July 2013.
6 Eg, Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts*, ALRC Report 115 (2011).
Eg, Matthew Groves, 'Emailing Judges and Their Staff' (2013) 37 *Australian Bar Review* 69.
8 Department of Broadband, Communications and the Digital Economy, *Advancing Australia as a Digital Economy: an Update to the National Digital Economy Strategy* (2013) 46.
9 Minister for Human Services, 'New App Breaking Down Language Barriers', *Media Release*, 12 July 2013.
10 Chris Jordan, Commissioner of Taxation, 'It's About Time', Speech, 25 July 2013.
11 www.vodafail.com.
12 Chris Merritt, 'Fewer Cases, Less Cash for Courts', *The Australian*, 21 June 2013.
13 Eg, the NSW Ombudsman has received approximately 9,500 formal complaints in each of the last four years: NSW Ombudsman, *Annual Report 2011-2012*, 'At a Glance' section. The NSW Consumer, Trading and Tenancy Tribunal received 64,803 applications in 2011-12, which was a 10% increase on the previous year; 54% of applications were lodged online: www.cttt.nsw.gov.au, 'Facts and Statistics'.
14 Federal Magistrates Court of Australia Annual Report 2011-12, at 45.
15 Federal Court, *Annual Report 2011-12*, Appendix 6. The proportion was higher than 50% in most prior years.
16 Federal Court, *Annual Report 2011-12*, Appendix 8.
17 Eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59; *Minister for Immigration and Citizenship v Li* [2013] HCA 18.
18 See the papers in *AIAL Forum* No 70, October 2012. I have also taken these themes up in two other articles: 'Ten Challenges for Administrative Justice' (2010) 16 *AIAL Forum* 23; and 'Rethinking the Separation of Powers' (2010) 38 *Federal Law Review* 423.