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VICTORIAN ADMINISTRATIVE LAW REFORM

On 8 October 1981 a report appeared in the Age which touches on the point that I wish to address today. According to the report the Attorney-General for Victoria, Mr Haddon Storey, has prepared a Freedom of Information Bill for the consideration of the Victorian Cabinet and, if approved, the Victoria Parliament. As reported, the draft State Bill would incorporate the principle of the 'right to know', spell out certain exceptions and provide for resolution of disputed exceptions by appeal, not to the courts but to the Victorian Ombudsman.[1] The same report carries a statement that the leader of the Opposition, Mr Cain, proposes to move for leave to bring into Parliament a Private Member's Bill dealing with the same topic. His Bill apparently envisages a different approach, including fewer discretionary grounds for rejecting a claim of access, and a right of appeal, in the event of disputes, to the Supreme Court of Victoria.[2]

The report in the Age is not sufficient to indicate the principles by which disputed claims to access would be judged. A recent report in New Zealand has proposed Ombudsman rather than court review. However, that report envisages that, in the end, the Ombudsman's decisions would be recommendations only (as they are at present) and the final decision will remain with the Minister.[3] This stand has been justified by the New Zealand Committee by appeal to the principle of ministerial responsibility and the accountability to the people of elected officials and those who serve under them.

The newspaper report does not indicate sufficient detail of the competing proposals for freedom of information laws in Victoria to allow a comparison with the proposed New Zealand law. The New Zealand proposal has attracted criticism. It is said that if the Ombudsman simply recommends, and if the Minister has the last say as to whether or not he will disclose disputed government information, effective external determination will be frustrated. On the other hand, defenders of the New Zealand approach urge that ministers, unlike judges, can be removed if they make unduly narrow determination about the public interest. Furthermore, it is said that political pressures will normally force ministers to accept the Ombudsman's recommendation.

In this controversy, about to burst upon the scene in Victoria, lies a debate with which we are becoming familiar in Australia. The debate concerns the great problem of how far the vast powers of modern government are to be controlled by law and where they are to be controlled, the further problem of which institutions are to have the requisite power to resolve disputes and the principles by which they are to act. In searching for these principles, it is necessary to delineate the respective functions of the elected organs of government, the permanent public service who serve them and the independent judiciary.

I say that we have become familiar with the debate about this issue in Australia because it is clearly posed, in the Federal domain, by a number of important and recent administrative law developments. The introduction of these developments has not been attended by a great deal of public controversy or popular notice. In fact, in the Federal sphere, the position is complicated by the constitutional doctrine of the 'separation of powers'. This limits conferring on Federal courts non-judicial functions in a way that would not apply to State courts. In many ways, the position in the States is less complicated than in the Federal domain. But the issue of principle will not go away. It is one to which attention will undoubtedly be addressed in Victoria by the foreshadowed debate about freedom of information laws.

As a Commonwealth officer, I may not presume to comment on the Victorian scene. However, perhaps I can do the State some service by calling to its attention the development of the new administrative law in the Federal sphere and by underlining some of the problems and possibilities that have attended the major reforms that have been introduced. Federal freedom of information legislation is still to come. The Bill is still before the Commonwealth Parliament. The reforms of which I speak go far beyond the issue of freedom of information, important though that is. Though some reforms of administrative law and procedure have been adopted in Victoria[5] so far they are not as radical (and therefore have not attracted the same controversies) as those raised by the Federal legislation.

The Administrative Law Act 1978 (Vic.) came into force on 1 May 1979. It provides a new, simplified procedure for seeking Supreme Court review of the decisions of a 'tribunal'. Further, it requires such a tribunal to furnish, upon request, a written statement of reasons for its decisions (s.8), and it overrides any provision in an earlier Act which seeks to exclude the review jurisdiction of the Supreme Court ('privative clause') (s.12). The Act does not provide for review on the merits. The establishment of a general Administrative Appeals Tribunal for Victoria was proposed in 1968 by the Victorian Statute Law Revision Committee of the Parliament, but this proposal has not so far found favour.

It may be useful for public administrators in Victoria to inform themselves about the whole 'package' of Federal administrative law reform. Some of these reforms may be suitable for export. Others will certainly have to be studied, whichever course is adopted in any freedom of information law for this State.

FEDERAL ADMINISTRATIVE LAW REFORM

The development of administrative law reform in recent years in the Commonwealth sphere represents one of the happiest features of law reform in our country. The reforms have attracted a generally multipartisan support. Major reports were commissioned during the Gorton government and tabled during the McMahon government. Their implementation began under the Whitlam government and have continued under the present administration. I refer, of course, to the 'package' of administrative law reforms known for convenience as the 'new administrative law'. This 'package' has seen:

- the establishment of an Administrative Appeals Tribunal (AAT), designed to provide a general Federal tribunal for appeals against decisions of Commonwealth officers in matters committed to its jurisdiction;[6]

- the creation of a general Administrative Review Council, designed to monitor current administrative law and practice in the Federal sphere and to push forward the development of a consistent system of administrative review;[7]

- appointment of the Commonwealth Ombudsman as a general Federal commissioner for grievances;[8]

- reform and simplification of judicial review of administrative decisions made by Commonwealth officers under Commonwealth laws, including a general right to reasons for administrative decisions;[9]

- a promise of further legislative reforms including in respect of freedom of information, privacy protection and general minimum standards of fair procedure in Federal tribunals.

The breadth of these reforms, particularly in aggregate, has elicited gasps from some overseas observers.[10] This is perhaps even more remarkable because administrative law reform is now decidedly in fashion. One of the Ministers appointed by President Mitterand upon the change of government in France, M. Anicet Le Pors, is designated Minister for Administrative Law Reform. He is a communist, one of the three in the new French Administration. He tackles an administrative law system which is sophisticated and long-established. The Australian Federal experiment is certainly the most comprehensive in any common law country.

At the recent Australian Legal Convention in Hobart in July 1981, papers by the noted English authority, Professor H.W.R. Wade and Lord Chief Justice Lane dealt with administrative law developments in England and Australia. Lord Lane was full of praise for the operation of the Australian Administrative Appeals Tribunal, describing it as having powers 'far in excess of anything hitherto dreamed of in the United Kingdom'. He described the powers afforded to the AAT to adjudicate on the merits of a decision and even the propriety of a government policy, as radical, such that he viewed them with astonishment and admiration:

> I see that these Acts were heralded by Senator Missen as measures which help to 'bring us out of the jungle of administrative law and help to put a little civilisation in that area. They provide for people who have an administrative decision and want an appeal against it, an idea of where to go and what they should do: they put some simplicity into the law which is applicable to the situation. ...' We are still in the jungle in the United Kingdom and I speak as one who has only been released from the jungle on parole for a short visit to your country and must soon return. It has not been possible for me, unhappily, to do more than grasp the merest outline of your great legislative changes. ...This radical approach of yours to the jungle is one which I view with astonishment and admiration. There is no doubt that at least in all countries operating under the Common Law system there is the same object in mind. That is to achieve a proper balance between on the one hand the legitimate right of the individual to be treated fairly and on the other hand the necessity for the administrators to be able to make decisions without having a judge breathing down their neck all the time. You seem to have taken the quick route — almost the revolutionary route — by means of these statutory enactments. We in our laborious fashion tend to proceed more slowly, feeling our way from decision to decision, gradually enlarging or extending the existing principles.[11]

The Administrative Appeals Tribunal deserves such words of approbation from this high English judicial quarter. The tribunal has coped with its establishment phase remarkably well. The establishment of a new national tribunal with wide and novel powers and a constantly growing catalogue of new jurisdiction is remarkable enough in itself. The figures provided in the annual reports of the Administrative Review Council demonstrate the large and increasing numbers of cases coming before the tribunal for review under an ever-expanding variety of Federal enactments. These enactments range from those that give rise to the controversial hearings under the Broadcasting and Television Act and Migration Act to the much more humble review of administrative decisions which takes place under the Defence Force Retirement and Death Benefits Act, the Home Savings Grant Act and various Bounty Acts. The range of Commonwealth legislation continues to expand. The variety and significance of administrative discretions expand with it. The value of independent, careful review by the AAT is sufficiently obvious to the numerous litigants who have come before it that the jurisdiction of the AAT has continued steadily to expand and the caseload to expand with it.

It would be presumptuous of me to expound on the high standard of individualised justice accorded to citizens by members of the AAT aggrieved against Commonwealth administration. Not all are judges, though some are, and all are bound to act in a judicial manner, according the parties before them a fair hearing. The tribunal is entitled to determine the appeal de novo, on the material placed before the tribunal according to the 'right or preferable' decision in the case.[12] But quite apart from these praiseworthy elements at a micro level, there are a number of macro considerations that should be weighed in assessing the value of a general administrative review tribunal. First, there is the value of such a tribunal, in those cases which do not come up for appeal, as an educator of administration. It states and explains the general principles that should be observed in fair administrative practice. Reasoned decision-making, the patient explanation of the law, the careful sifting of the facts, the application of the law to the facts and the detailed statement of the fair and impartial approach to administrative justice can have a value far beyond the facts of the particular case before the AAT. There is no doubt that many Commonwealth departments have improved their administrative procedures either as a direct result of comments or clarification provided in an AAT decision or as a result of preventative self-scrutiny, set in place by the obligations of new accountability to judges imposed by the Administrative Appeals Tribunal Act and, for the past year, by the Administrative Decisions (Judicial Review) Act.

The second impact of the AAT which has been highly beneficial, beyon4 the interests of the immediate litigants, has been its facility to 'flush out' the details of administrative decisionmaking and to reduce the secretiveness of the actual rules by which Federal administrative discretions are to be exercised. That there are such rules is entirely understandable and desirable. They promote consistency of decision-making and are frequently needed because of the generality of the discretions conferred by legislation, either on a Minister or on those under him. The procedures of individualised justice in the AAT have required the justification of a particular decision. This has required the production to the tribunal of the administrative 'rules of thumb' and their justification, not only against the standard of lawfulness (as established by reference to the legislation) but also against the standard of administrative fairness (inherent in the AAT's power to substitute its conclusion for that of the administrator in reaching the 'right or preferable decision' in the circumstances). Thus, in the area of deportation appeals, it was not until the AAT began the review of deportation decisions made by the Minister under statutory language of the greatest generality, that the detailed policy instructions to immigration officers were disclosed. In turn, the criticisms and comments of AAT members in the course of reviewing particular deportation cases led on to modifications and elaborations of the ministerial policy, which has now gone through three drafts. Furthermore, the policy was considered by the Cabinet and tabled in the Parliament. In this way the AAT has contributed directly to greater openness in policy, in a manner that is beneficial not only to the litigants who come before it, but also to all potential litigants, the whole migrant community and indeed the whole Australian community, comprised as it is now of such ethnic and cultural variety.

A third contribution of the AAT is more tentatively stated. In order to cope with the nature of its jurisdiction, involving sometimes review of subject matter of relatively little financial value (such as compensation for loss or damage of items in the post) the AAT has felt forced to explore in its procedures new means of saving costs. Its innovations may come, in time, to encourage greater inventiveness in the general courts. The AAT has, for example, experimented with telephone conferences for the purpose of interviewing witnesses at long distance. In a large country, where the costs and inconvenience of travel are great, who can doubt that the future of litigation will involve the greater use of telecommunications? Similarly, the AAT has been innovative in its use of preliminary conferences. I believe that the costs of litigation will force modifications upon at least some classes of adversary trial and that more conciliation will be encouraged by court procedures, both to cope with the pressures of business and to tackle the underlying disputes that sometimes are ignored in the application of current adversary procedures.

Both in dealing with the grievances of individual citizens in a public and reasoned way, and in contributing to the improvement of administrative justice generally, the AAT has made notable contributions in the Commonwealth's sphere. Its example should certainly have the closest possible scrutiny by State colleagues. The New South Wales Law Reform Commission delivered a report in 1973 proposing a scheme of administrative review for NSW broadly similar to that now established in the Commonwealth's sphere.[13] It suggested an Advisory Council on Public Administration, with functions similar to the Administrative Review Council and a Public Administration Tribunal. Legislation has been foreshadowed to implement these proposals but no legislation has so far been introduced.[14] It is expected that in the final report on the review of New South Wales Government Administration, Professor Wilenski will propose major reforms of administrative review in New South Wales.

EMERGING PROBLEMS

It should not be surprising that reforms at once so radical and pervasive should produce problems and controversy. Indeed it would be remarkable if they did not. One chance to review the 'package' in an international setting was provided by the conference of the Association of Schools and Institutes of Administration held in Canberra on 13 July 1981. Mr. Justice Else-Mitchell, who gave the initial thrust for administrative law reform at the Third Commonwealth Law Conference in Sydney in 1965, chaired the session in Canberra in July 1981. Mr. Justice Brennan, former President of the AAT and now a Justice of the High Court of Australia, delivered a reflective paper, 'Administrative Law : The Australian Experience'.

After reviewing the Federal legislation and institutions, Mr. Justice Brennan pointed to a special feature of the powers of the AAT. Within its powers to review the merits of a bureacratic decision and to substitute its own decision for that of the administrator is a specially wide power actually to review and reserutinise the perfectly lawful policy of the elected government:

> From time to time the Minister has changed the policy by which he governs the exercise of his discretion in [deportation] cases and the Tribunal had to determine whether it would follow the Minister's policy changes. It is entirely within its legal powers to adopt a policy of its own. ... On occasions the Tribunal appears to have given little weight to a Ministerial policy which it thought to be too harsh or rigid. And thus tensions have surfaced, generated by the exposure of a Ministerial discretion to review by an independent quasi-judicial tribunal.[15]

Listing a number of problems that had emerged in the operations of the AAT, Mr. Justice Brennan identified four in particular:

- If there is to be an independent review on the merits of discretionary administrative powers, how can a second judicialised bureaucracy be avoided?
- Can the comparatively high costs of AAT review be justified in a particular area?
- What are the countervailing advantages of AAT review to the improvement, on a broad front of primary administration?
- How should discretionary decisions be reviewed by the AAT, whilst leaving the formulation of broad policy with the Executive Government?

It is this last question which Mr. Justice Brennan described as the 'fundamental and abiding problem':

> How does a government confide to an independent tribunal the review of a discretionary power without abdicating to that tribunal the ultimate political power to formulate the policy by which the exercise of the discretion will be guided? To me that has been a fascinating conundrum of the new administrative law. The answer affects the extent to which jurisdiction can be confided to the tribunal, and the extent to which the individual can participate effectively and by right in the making of administrative decisions which affect his interests.[16]

THE AAT AND RESPONSIBLE GOVERNMENT

I have referred in my opening to the possible value of the debate about the role of the AAT in the Federal sphere to the debate that can be expected concerning freedom of information laws in Victoria. A number of difficulties of principle can emerge from the novel jurisdiction conferred on the AAT. In a paper written by me for a seminar in Canberra in July 1981, I reviewed a number of cases in which the AAT has recommended reversal of Ministerial deportation decisions, notwithstanding the general government policy that a migrant convicted of a drug-related crime should be deported. I pointed out that the Federal Court of Australia had made it plain[17] that the AAT was obliged to consider not only the facts and law in cases coming before it (in the way entirely familiar to judges and courts over the centuries) but also government policy. The obligation of a quasi-judicial independent tribunal to review frankly and openly government policy, determined at a high level, poses special difficulties which have not previously been faced by the courts. Among the difficulties I listed were:

the apparent problems for the democratic theory of Ministerial accountability and responsibility of unelected judges openly and avowedly reviewing policy determined by elected Ministers;

the creation of a possible 'dichotomy' between decisions made by the AAT and decisions of public servants, more faithfully and unquestioningly applying lawful Ministerial policy;

the limitation on the membership and procedures of the AAT which restricted any realistic, effective, wide-ranging review of government policy by it; and

the potential damage to judicial prestige of the frank involvement of judges in debates over controversial matters of public policy.

The AAT has been most valuable in the identification of government policy and in pursuing the substance of justice rather than being content, as lawyers generally are, in examining compliance with its form. But in developing the AAT to be a general body for the review of Federal administrative decisions, it will, as it seems to me, be essential to come to grips with the proper relationship between elected policy makers and the independent judicialised tribunal':

> When an unelected tribunal begins to evaluate, elaborate, criticise, distinguish and even ignore particular aspects of a Ministerial statement openly arrived at and even tabled in the Parliament, the lines of responsible government have become blurred. True it is, the Minister may have the remedy available to him. He can clarify a lawful policy to make his intentions plainer. He can propose to Parliament the amendment of the Act. ... More frequently, the response is likely to be a frustration with the AAT, a feeling that it has over-stepped the proper bounds of an unelected body and a determination to retaliate either by limiting its jurisdiction to inconsequential matters (largely free of policy) or even, in the migration area, of rejecting its decisions, framed as they are in the form of a recommendation.[18]

My paper went on to suggest, as I do now, that there may be problems in the development of two streams of decision-making:

> Some inconsistency between the more mechanistic and inflexible approach to government policy by public servants and the independent critical review of policy by an independent tribunal may be both inevitable and desirable. ... But too great a discordance between the approach in the tribunal and the approach in the departmental office will undermine the value of the AAT, at least in the eyes of those public servants who can only in the most grave and exceptional circumstances feel themselves as free as the AAT is to question, criticise and depart from clearly established government policy, particularly when laid down

> by their Minister. ... Astonishing to the lay mind, brought up in the traditions of judicial deference, will be a head-on conflict with a carefully formulated and perfectly lawful policy of a Minister reached after thorough inquiry and consideration by him of expert, community and political representations.[19]

AAT DEFENDED

In keeping with the current media vogue in reporting legal matters, some of the lastmentioned comments were recorded as if a criticism of the AAT and its members, rather than an exploration of important questions of legal and constitutional principle. Typical was the comment of Peter Robertson in the Sun Herald:

> If we cannot rely on the judiciary to protect us from venal, self-interested or incompetent politicians, who can we rely upon? If this is what a law reformer thinks about the issue, what can we expect from the true-blue legal conservatives?[20]

The Federal Attorney-General, Senator Durack, felt moved by the way my observations were dealt with in the media, to issue a deserved statement of praise for the valuable role of the AAT. It was, he said, 'providing the citizen with an independent review of government decisions which directly affected him'. Senator Durack pointed out that:

- the AAT was operating under powers which Parliament itself had conferred;
- the review of government policy was a difficult question and had arisen chiefly in the rather special area of deportation cases;
- the AAT had made it clear that whilst not bound by government policy it was carefully taken into account in every case; and;
- it was the responsibility of Parliament to spell out the criteria by which the tribunal judged the decisions of the government coming before it.

These points simply highlight the importance of facing, in a clear sighted way, the issue that is inevitably raised by the introduction of comprehensive independent review of decisions in public administration. That question is, where should the power lie? Should we recognise that in today's world, where public administrators have to make decisions of great variety, complexity and urgency, it is simply not possible for the elected Minister to scrutinise every such decision? If we give this factor weight, we will be encouraged down the track of the new Federal administrative law: conferring on an independent judicial type body, the right to make the final decision and on the merits. This we will do even if it involves a review and rejection of policy made in the name of

the Minister. Or should we, recognising the need for political accountability of decision-makers, insist that, in the ultimate, the elected government, through its Minister and loyal public servants should have the last say, subject to being publicly answerable at the ballot box? Like so many problems, this one cannot be over simplified. Ministers do make some decisions themselves. Some ministers make more than others. Most approve policy guidelines, though the extent to which the politically accountable officer gets involves in these is sometimes insignificant. Such decisions and rules of practice affect the lives of many citizens. On the other hand, governments always do retain the 'ultimate say'. It is always open to them to seek legislation from Parliament to clarify that which a judge or tribunal has found obscure or to set right to mischief done, in their opinion, by this judgment or that.

TIME-HONOURED PRINCIPLES UNDER THE MICROSCOPE?

The debate forced on public administrators in Victoria by the promised advent of freedom of information legislation is a thoroughly healthy one. It is debate about the effectiveness of ministerial responsibility in an age of big government, where ministers simply cannot, in practice, be responsible for every decision made under their administration and in their name. But the debate is also about the courts and tribunals of our country. To what extent, in the future, in the review of particular cases of aggrieved citizens, will they enter into the frank and acknowledged territory of reviewing policy — even government policy.

As one of the foremost writers on administrative law, Professor H.W.R. Wade, pointed out 20 years ago that debate is really one about power. It is a demarcation issue, if you like, between the respective powers of the executive government, the permanent public service, the Ombudsman, the tribunals and the judicial arm of government. In working out the resolution of the debate, a number of the time honoured principles of our democracy are coming under the microscope:

- that ministers are 'responsible' for decisions actually made in their name by public servants of their administration;
- that public servants merely loyally implement the policy of elected ministers;
- that judges simply mechanically apply pre-existing principles and do not involve themselves in policy evaluation.

The microscopic examination of these 'principles' will be very uncomfortable for some. The very examination of old verities will even be condemned in some quarters. What is surprising to me is that it has taken nearly the whole of the 20th century — the century of big government — before our institutions were forced to come to terms, frankly and openly, with the implications of such a profound social change as the growth of government and its agencies. If institutions, even powerful institutions, do not adapt to changing circumstances, they have the dinosaur before them as a constant warning of what happens when the world changes but big things stay the same.

I hope that the Victorian group of the Australian Institute of Public Administration will study closely reforms in administrative law now occuring in the Commonwealth's sphere and consider the implications of those reforms for public administration in Victoria.

FOOTNOTES

* Member of the Administrative Review Council (Cwlth). The views expressed are the author's personal views only.

1. The Age, 8 October 1981, 5.

2. ibid.

3. New Zealand Committee on Official Information (Sir Alan Danks, Chairman), Final Report, 1981.

4. H.W.R. Wade, 'Law Opinion and Administration' (1962) 78 Law Quarterly Review 188, 202.

5. Report on Appeals from Administrative Decisions and an Office of Ombudsman, D No. 6, 1941/68, Vic Government Printer, Melbourne, 1968.

6. Administrative Appeals Tribunal Act 1975 (Cwlth).

7. id., s.51.

8. Ombudsman Act 1976 (Cwlth).

9. Administrative Decisions (Judicial Review) Act 1977 (Cwlth).

10. Law Reform Commission of Canada, 7th Annual Report, 1977-8, 14. See also the comments of Lord Chief Justice Lane, 'Change and Chance in England', (1981) 55 Australian Law Journal, 383, 384.

11. Lord Lane, n.10 above.

12. The expression was first used in Re Becker and Minister for Immigration and Ethnic Affairs (1977) 15 ALR 696, 699-700; 1 ALD 158, 161. In Drake v. Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577, 2 ALD 60, 70, the Federal Court adapted the expression slightly to the 'correct or preferable' decision. See ibid, 589, 68.

13. New South Wales Law Reform Commission, Appeals in Administration, (NSWLRC 16), Sydney, 1973.

14. N. Wran QC, MP, Australian Labor Party Policy Speech, 1978.

15. F.G. Brennan, 'Administrative Law : The Australian Experience', Paper for the International Association of Schools and Institutes of Administration, Round Table, Canberra, 13 July 1981, mimeo, 19.

16. ibid.

17. Drake, op cit, n.12.

18. M.D. Kirby, 'Administrative Review : Beyond the Frontier Marked "Policy — Lawyers Keep Out"', Paper for the Administrative Law Seminar in the Australian National University, 19 July 1981, mimeo, 32. Federal Law Review forthcoming. See also reported statements of the Minister for Immigration and Ethnic Affairs (Mr. McPhee) in Australian Financial Review, 22 August 1981, 10.

19. ibid.

20. Sun-Herald, 2 August 1981.