AUSTRALIAN POLITICS

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LAW REFORM AND BUREAUCRACY

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A NICE LITTLE REVOLUTION

Australia is in the midst of a revolution in the law and practices governing its Commonwealth bureaucracy. "Revolution" is not too high a word for it. A series of reports, delivered in the 1960s, procured support, first from the Labor Government and later from the present Government. Radical proposals for reform have been adopted. The extent of the reforms is not fully realised, including in the Commonwealth Public Service itself.

The history of administrative law reform in Australia can be briefly told. There was an almost complete lack of interest in the reform report of the Franks Committee in England in 1957. Even when the United Kingdom Parliament set up its Council on Tribunals in 1958, scarcely a mention of it appeared in Australia. We were just not interested. In fact, it was not until the Third Commonwealth Law Conference was held in Sydney in 1965 that any enthusiasm for reform of administrative law was sparked. This may be one of the few cases in which an international conference has fired legislative action. The conference found Australia with a multitude of governmental tribunals, many of them established since the War, without any apparent order and without any effective system for review of unfair administrative decisions.

In 1968 a committee called the Commonwealth Administrative Review Committee was established to consider procedures for review of administrative decisions, including the 1958 Act passed in the United Kingdom. The Commonwealth Committee was headed by Sir John Kerr. After its report, two further committees were appointed known, after their respective chairmen, Sir Henry Bland

and Mr. R.J. Ellicott. This procedure of appointing one committee, to consider the report of another and then a further committee to consider the report of the second is a classic procedure of procrastination in Australia. We see its dilatory trail in the delays that have accompanied the moves towards a uniform commercial credit law in Australia. There are many other instances, some of them current at this moment. Here, however, was a case where something finally came from it all. And what came was nothing less than the framework of a revolution, in the legal sense. Machinery has been established. Though in its nascent stage, it promises the potential of important reform in the control of the bureaucracy : review measured against the standard of fairness.

The statutory reforms which have been enacted by the Commonwealth Parliament, implementing the work of the three committees, is part only of the revolution. Other legislation has been passed or is promised. Even the judges have taken an active part in the revolution. In *Conway v. Rimmer* [1968] 2 *W.L.R.* 998, the House of Lords in England asserted that even where a Minister gave a certificate suggesting that a document ought to have Crown Privilege and be withheld in litigation then, "unless his reasons are of a kind that judicial experience is not competent to weigh" the court is entitled to have the documents produced for its inspection in order to judge whether withholding the document is really necessary for the functioning of the public service. If the court considers that it should probably be produced, it is up to the court generally to examine the document before ordering the production. In other words, the courts asserted their right to go behind the Ministerial certificate to make sure that justice, in the particular case, was actually being done. This principle has also been followed in Australia. It reversed earlier judicial disinclination to question Ministerial certificates. It illustrates the reactions that have occurred to the universal, burgeoning growth of the public service. Power tends, in our system, to produce mechanisms of control.

RECURRENT THEMES

The recurrent themes of the Kerr, Bland and Ellicott Committees were three :

* The development of a comprehensive and institutional structure for administrative law at a Commonwealth level in Australia.
* Avoidance of future reversion to haphazard growth of administrative bodies.
* Ensuring that the system actually worked by providing that administrative review would secure access to evidence and not be frustrated by exclusion from information in the name of a higher"public interest".

FOUR ACTS PASSED

Since 1975 four Acts have been passed by Federal Parliament which, in the course of time, promise to produce a comprehensive change in bureaucratic procedures and decision-making in the biggest public service of them all : the Commonwealth Service. The Acts are :

* *Administrative Appeals Tribunal Act 1975* (amended 1977)
* *Ombudsman Act 1976*
* *Administrative Decisions (Judicial Review) Act 1977*

I say there are *four* Acts because major amendments were introduced to the *Administrative Appeals Tribunal Act 1975* by the amending Act of 1977. Putting it shortly, the legislation introduces four reforms of great potential for a comprehensive structure of administrative law to guide and control the federal bureaucracy in Australia :

* The establishment of a general appeals tribunal : which became the Administrative Appeals Tribunal, a quasi-judicial body headed by a judge, the functions of which are to review decisions made by Ministers, subordinate tribunals and administrators.
* The establishment of the office of the Commonwealth Ombudsman : a recipient and investigator of

grievances in matters of administration, whose sanctions are persuasion and, ultimately, report to Parliament.

* The consolidation of a new system for judicial review of decisions of an administrative character, by the Federal Court of Australia, based on breach of the rules of natural justice and other like considerations and in terms both wider and more flexible than antique remedies previously developed by the courts.
* Finally, the establishment of a general council to keep the new structure of administrative law and administrative decision-making under review. This body is the Administrative Review Council. It is established by the *Administrative Appeals Tribunal Act 1975*. It has a role of general superintendence, wider than that assigned to the Council on Tribunals in England. It operates through recommendations to the Commonwealth Attorney-General and is obliged to table an annual report in the Parliament. Its first annual report is due to be tabled shortly.

Two other important reforms are on the horizon, which promise to take these reforms further, and possibly a third. The first is a proposed consolidation of the basic rules which should govern the procedures of Commonwealth administrative tribunals. It was originally planned to include this code of fundamental rules in the Judicial Review Act. On the advice of the Administrative Review Council, this was not done and work is still being performed to improve this proposed legislation. Clearly, it will be of great importance in standardising the rules of fair conduct, in subordinate tribunals: hopefully without freezing their procedures too much or imposing judicial-type inflexibility, delay and cost.

The legislation to provide for access to government information has been promised by successive governments in Australia. Departmental committees have worked on the subject. Inevitably critics focus on the exceptions that are proposed

to a citizen's right to see information in the hands of the bureaucracy. But some exceptions must obviously be allowed, in any country. We inherited in Australia the Whitehall style of relatively secretive government. There was nothing particularly malicious or wicked in it. It stemmed from two basic causes, in my view. The first, no longer with us, was the general ignorance of the community, its lack of education and appreciation of the issues facing government. Nowadays, with instant news, higher education and greater social consciousness, it is just not acceptable to "leave it to the experts".

The second consideration is still with us and is basic to any list of exceptions to citizen access. It is the system of responsible and cabinet government. We cannot ignore it but must fashion our legislation around its implications. In the United States, a President (Watergates apart) is guaranteed four years of executive power. Under our system of responsible government, there is no such guarantee. Governments can fall when they lose control of the legislature. Bureaucrats, doing their job, seek to protect governments from the hazards and dangers that controversy can present. Reconciling the public's "right to know" with the needs of executive government for a measure of calm in important decision-making, is not easy. The point must be made that great in-roads are being achieved into the elitist methods of the past. Whether they will work depends, in my view, more on the enthusiasm and determination of inquisitors than on the letter of the reformed law.

A third possible development of great importance here is the proposal for legislation on privacy protection. The Law Reform Commission is currently working on this task. The development of computing, accompanying the expanded public service, provides the potential for accumulating great masses of information upon every member of society, retrievable to government at low cost : cradle to the grave. Protecting the integrity, solitude, anonymity and intimacy of individuals in society against unreasonable intrusions by the bureaucracy

(private as well as public) may well be the most difficult but most important reform of all.

This, then, is the legislative reaction to the expanding civil service of the last quarter of the 20th century. Parliament, with the encouragement of successive governments, is fighting back.

THE NEW SYSTEM AT WORK

Now, it is all very well to pass Acts of the kind I have described, but will they work in practice? The *Ombudsman Act* has only just come into operation. The Commonwealth Ombudsman, Professor Jack Richardson, has only just taken up his office. Already, he is busily at work. If State colleagues afford any guide, most of the good work of the Ombudsman is done, not through the sanction of his reports to Parliament but by the force of persuasion and direct personal influence of the office-holder in cases where insensitiveness rather than illegality is the complaint of the citizen. The Administrative Appeals Tribunal has been established. It is not yet a general appeal tribunal. When the Act was proclaimed, it was accompanied by a schedule of decisions which are appealable. Other decisions have been added and the process is continuing. It has not been inundated with business and it does yet have jurisdiction in some of the most important areas of Commonwealth responsibility. In the year up to 30 June 1977, only forty nine appeals were lodged, of which twenty seven were brought under the *Air Navigation Act* and the *Customs Act*. The resources of the tribunal are limited and, in a time of general governmental restraint, unlikely to expand rapidly. The matters brought under the tribunal's jurisdiction, so far, are relatively specialised. The government has, however, announced its intention that the tribunal will acquire jurisdiction with respect to social securities, repatriation appeals and Capital Territory Ordinances. Only when these major matters come under its aegis will it be possible to describe the tribunal as one of general appeal. With the experience of hindsight, and the model of the *Ombudsman Act* before us, it is perhaps unfortunate that the *Administrative Appeals Tribunal Act* did not cover all decisions, subject to exclusion. Instead, only

such decisions as are brought under its umbrella, fall under its scrutiny. A positive act of inclusion is required for jurisdiction to attach and this allows for resistence.

The Administrative Review Council has had a busy year, commenting on some of the legislation mentioned above, in its draft form. This in itself represents something of a departure from the secret preparation of legislation that has been the hallmark of the Whitehall tradition. The Council is presently made up of public servants, lawyers and men of affairs. There are some vacancies to be filled. No doubt thought will be given to infusing into the Council some representation of consumers of the public service product and possibly representation of some of the lower echelons in the service. Many of the decisions which agitate the ordinary Australian are made across the counter at the local Commonwealth office, not in the bushland remoteness of Canberra.

The *Administrative Decision (Judicial Review) Act 1977* has been passed but not yet proclaimed. It is therefore too early to judge its impact or the attitudes of the new Federal Court of Australia in asserting statutory judicial review of administrative decisions. Happily, in that Act, the course has been followed of applying its provisions to all decisions unless specifically excluded. There will be much interest in the list of exclusions which will be published shortly.

YES, BUT DOES IT WORK?

Now, there will be some cynics who say "It's a great system. It's a bureaucrat's dream. But what will it do for John Citizen?"

It is true that the innovations I have described have not been accompanied by a great deal of publicity. There has been no great public debate on them. They are probably not fully appreciated in the legal profession of Australia, let alone in the general community. Nevertheless, the structures have been created. They will not go away. On the contrary, in my view, the pressures will inexorably develop to work the new machinery. The news will get around. Successes will be marked

up. The end product will be a public service more sensitive in its dealings with the community, if only because those dealings can be the subject of various forms of scrutiny.

As in all these things, much will depend upon the enthusiasm, determination and imagination of the personnel who man the organs of review. There are many problems to be faced, which should command the sympathy of the outside observer. The judicial method is not always easy of application to the review of a decision made below. A decision which turns on a question of fact or law does lend itself to the methods of judicial inquiry and determination. Decisions which turn on more general and evaluative concepts such as "fairness" or "equity" or decisions which depend upon value judgments or matters of general policy are not so easily adapted to the judicial mode. In such a case, there may be two perfectly permissible, competing decisions. The choice between them may depend on nothing more than the decision maker's value judgment. Shifting such value judgments from the ultimate responsibility of the Executive (which can be removed and is subject to periodical review) to the judicial or quasi-judicial arm of government is a pretty fundamental development. It brings in its train attendant problems for our democracy, not least because of the wide range of policy decisions that may ultimately come up for review in the tribunals I have described.

GIVE US A CASE

An illustration of the problem and yet, I believe, an example of the potential effectiveness of the new system, is to be found in one of the first decisions of the Administrative Appeals Tribunal. In *Becker v. The Minister for Immigration and Ethnic Affairs*, the tribunal was faced with a case where its evaluative decision came into conflict with that of the administrators below. The applicant was born and grew up in New Zealand. He left home at the age of seventeen and lost contact with his family. He drank frequently and too much. He had several encounters with the law. His record of convictions began with disorderly behaviour at the age of sixteen, ascended through assault (at 17), assaulting police (at 19) to

further charges of assault and public offences (at 20). On the last, he was sentenced to one year's probation and fined $100.

When he was twenty one he decided to "mend his ways". He came to Australia and "settled down ... to get [his] life straight". Except for a short return to New Zealand he lived quietly in Australia from September 1973. As a New Zealander he was exempt from the requirement to obtain an entry permit.

It was in Sydney that he was introduced to drugs; though he was not addicted nor even a heavy user of drugs. One day he decided to try some L.S.D. He bought a quantity at a hotel. A friend took what he bought, became berserk and injured himself. The applicant was frightened by this experience and never attempted L.S.D. again. However, he did smoke Indian hemp until December 1976. He was caught, prosecuted and convicted. He then gave up use of this drug, had a fairly good employment record, some close friends in Sydney and identified himself as a member of the Australian community.

His convictions in Australia included one arising out of the L.S.D. case, a small fine in a driving case and very low fines arising out of a police raid on his flat when Indian hemp was found in December 1976. Notice of the last conviction was furnished by police to immigration authorities. A deportation order was made. Though not in fact imprisoned, as a punishment, the offence for which he was convicted was itself punishable by imprisonment. This rendered him liable to deportation under the *Migration Act* 1958.

There was no doubt that the Minister was within his legal rights to order deportation. The Administrative Appeals Tribunal is empowered, as a court is not empowered, to review a decision *on the merits*. The "merits" include not only the facts of the case but any policy which has been applied. It is, as the tribunal remarked itself, a"novel jurisdiction".

To assist in the scrutiny of policy, departmental notes were tendered which cited press release statements by the Minister going back to 1960 and 1961. The Tribunal inferred that the Minister had concluded that the applicant should be deported because his record reflected "a serious and continuing deficiency in his attitude to the law". The Tribunal, Mr. Justice Brennan, then tackled the issue :-

> "If that conclusion were valid, the order was properly made for there were no counterbalancing considerations which warranted the retention of the applicant in Australia. An attitude to the law is an aspect of the immigrant's conduct. The question which really determines this appeal is whether one can properly infer that attitude from the list of his convictions. I do not think that one ought to draw that inference. ... I do not wish to suggest that drug offences are of no significance or that an immigrant who has been convicted of a drug offence is immune from deportation. But the circumstances of the applicant's conviction show that he had not engaged in conduct of which the court took a serious view. ... He has now had a most solemn warning and if his offence were to be repeated the case for his deportation would be strong. ... In this case I have had the advantage, which was denied to the Minister, of seeing the applicant and of forming an opinion as to his likelihood again to transgress. I think that on balance there is little risk to damage to the Australian community by allowing him to remain on the understanding that further offences would be seriously treated. In my judgment deportation at the present time is not warranted. I therefore recommend that the deportation order be revoked and I remit the matter to the Minister for reconsideration in accordance with that recommendation".

So this is the way in which the Administrative Appeals Tribunal

will work : a scrutiny of the law and the facts of the case, a consideration of the policy issues involved and a review of the decision appealed from. It is in truth a "novel jurisdiction" It may cause much anguish to the hard-pressed members of the Commonwealth's public service. But it may also ensure the greater elucidation of policy, clearer decision making in the first instance, and a tempering of rigid rules by the civilising principles of justice and fairness that we assert as having an important part in our social and legal systems.

We are on the brink of major new efforts to submit the bureaucracy to external review. I am an optimist. I believe that what has been done is significant. We have a whole new system and it is possible that the States will give early attention to the lessons it may have for them. But the real advantures lie ahead. We now have the system. The history of English speaking people has been one of troublesome, determined litigants. Let us hope we have a few of them, minded to put the new machinery to work.