AUSTRALIAN NATIONAL UNIVERSITY

ADMINISTRATIVE LAW SEMINAR

SUNDAY, 19 JULY 1981

THE A.A.T. EXPERIMENT : A NOTE OF CAUTION

SUMMARY

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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REVIEWING MINISTERIAL AND GOVERNMENT POLICY

The purpose of my paper is, by an analysis of a series of largely comparable deportation review decisions of the A.A.T., to highlight some of the problems that arise when an adjudicative body such as the A.A.T. becomes involved in reviewing ministerial and government policy, for the purposes of reaching the 'correct or preferable decision' in the particular cases before it. The cases reviewed involve, all of them, appeals against deportation decisions made by Ministers, following conviction of a non-citizen migrant for drug-related crimes. It is pointed out that the Federal Court of Australia has made it plain that the A.A.T. is obliged to consider not only the facts and the law in cases coming before it, but also government policy and may not abdicate this function of review. The obligation of a tribunal comprising judges (even if sitting as personae designatae) to review frankly and openly government policy determined at a high level, poses special difficulties which had not previously been faced, at least so actively, by the courts. Amongst the difficulties are:

* The apparent offence to democratic theory of unelected judges reviewing policy determined by elected Ministers
* The creation of a dichotomy between decisions made by the tribunal and decisions of public servants faithfully applying ministerial policy
* The limitation upon the membership and procedures of the A.A.T. which restricts any effective, wide-ranging review of government policy
* The potential damage to judicial prestige by the frank involvement of judges in debates about controversial matters of public policy.

I must stress that in my view the A.A.T. has proved extremely effective, in deportation and other cases, in reviewing in detail the facts of particular cases and ensuring justice is done. The careful scrutiny of government policy by the A.A.T. has had the beneficial effect of 'flushing out' previously secret policy directives. There would certainly appear to be merit in the A.A.T.'s facility to have some government policy identified and clarified. Not least in deportation decisions, this has already been a beneficial result of the A.A.T.'s operations. Statements of policy went through three drafts in as many years. Furthermore, the facility to comment upon government policy when it operates in an 'oppressive, discriminatory or otherwise unjust manner' is also surely a useful and beneficial advantage of A.A.T. procedures. As the A.A.T. develops its expertise, it will have many useful comments to make, helpful to good adminstration in Australia. Its detailed study of individual cases will aid the identification of problems which even a sincere and dedicated official may not have foreseen and considered. However, in developing the A.A.T. to a general body for the review of Federal administrative decisions in Australia, it will be essential to come to grips with the proper relationship between elected policy-makers and the independent tribunal.

UPHOLDING DEMOCRATIC THEORY

A reading of recent deportation review decisions of the A.A.T. shows different attitudes to the government's policy for the deportation of migrants convicted of drug offences ranging from 'apparent endorsement of its terms' to 'scepticism' and even 'denunciation of aspects of it as Draconian'. Many readers of the deportation decisions of the A.A.T. may be led to a conclusion that is critical of the particular government policy in question. It may be seen as naive and based upon a collection of false premises : that migrants constitute a large proportion of the drug trade in Australia, that deporting migrants will have a significant deterrent effect and that there is no distinction in fact, or in the popular mind, between illegal drugs of differing kinds. But 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 Migration Act to modify the present deportation discretion at least in cases of drug offences. However, it may not always be convenient or appropriate to force the Minister to this course.

The reaction to the strong questioning of government policy on such questions might occasionally be modification or even abandonment of the policy. More frequently, I predict, there would be a sense of frustration with the A.A.T.
The response is likely to be a feeling that the A.A.T. 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.

DISCORDANCE WITH OFFICIAL POLICY

In my paper, I have praised the A.A.T. for having made notable steps towards greater informality of proceedings, the use of preliminary conferences and telephone conferences to

overcome the problem of resolving matters in a large country and in a tribunal without power to order costs. However, there are dangers in the development of a different approach in the A.A.T. from that applied by public servants, faithfully and consistently adopting the policy of their Ministers. 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. Indeed, it may be the very reason for promoting an external system of individualised justice such as the A.A.T. offers. But too great a discordance between the approach in the tribunal and the approach in the departmental office will undermine the value of the A.A.T., 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 A.A.T. is to question, criticise and depart from clearly established governmental policy, particularly when laid down by their Minister.

INABILITY TO REVIEW POLICY

Although the Federal Court has stressed the duty of the A.A.T. to consider the merits of government policy and not to abdicate this responsibility, it has to be acknowledged that the A.A.T. is not especially well constituted to approach the problem of policy review. It does not have a research unit. Nor does it have available to it the expertise which would be regarded as 'rudimentary' in a department for considering a matter such as deportation policy criteria. Moreover, the tribunal would not have access to party political considerations which frequently affect policy issues in Australia.

The fact that these views may be considered irrational, unjust and wrong-headed will not alter in the slightest the influence they will have upon the policy of governments and hence the administration of thatpolicy by public servants brought up in a tradition of loyalty, within the law, to their Minister and to the government of the day. In short, though the Federal Court committed to the A.A.T. in Drake a substantial power and duty of independent review of government policy, it has to be acknowledged that the A.A.T. is singularly ill-equipped to

perform that function, except in a superficial way and then only at the margins and in the circumstances presented by and illustrated in particular litigation.

The essential problem with the present legal position under which the A.A.T. operates is that it was almost bound to upset everyone:

* Politicians and administrators, because of the 'audacious' claim to review government policy
* Individual litigants, because of the inability to perform a thorough-going review of policy, despite the claim.

It would be a misfortune for litigants and for the A.A.T. itself if the assertion of the independent scrutiny of government policy were taken too much at face value. A body which asserts the claim to review policy but lacks the personnel and resources to do so in a satisfactory manner is bound, in the end, to fall victim to criticism from all sides. Either it will be said to have falsely raised expectations which it is unable or unwilling to meet. Or it will be said to have claimed a power which ought not rightly to belong to it and which in any case it is only ever able to fulfil in a superficial and somewhat haphazard way.

JUDICIAL PRESTIGE

Finally I refer to the reservation expressed by some writers concerning the involvement of judges in controversial areas of policy which may come before the A.A.T. There are limits to tolerable judicial creativity whether in the courts or in tribunals such as the A.A.T. It is particularly in matters that give rise to strong social controversy and emotion, such as immigration policy, that societies such as ours frequently look to the political process. Astonishing to the lay mind brought up in the traditions of judicial deference will be a head-on conflict with a carefully formated and perfectly lawful policy of a Minister reached after thorough inquiry and consideration by him of expert, community and political representations.

POLICY IN THE COURTS : END OF THE 'FAIRY TALE'

I acknowledge that policy considerations influence decisions of the courts. Nowadays few lawyers in Australia believe in the 'fairy-tale' that judges merely declare the law. Increasingly it is acknowledged that judges have a creative functior However there is a difference between creativity in the courts between the lines, as it were, and the role of the A.A.T. directly and frankly reviewing government policy.

The difference between the courts and the A.A.T. is that no court claims, in terms, an unlimited power to evaluate, review, modify, substitute for or negate government policy, not by reference to some pre-existing rule of law (however indeterminate) but by reference to the decision-maker's estimate of the correct or preferable decision in the particular case. It is the very boldness of the assertion for the A.A.T., so out of line with the usual modest and deferential language of the courts, that attracts attention and invites doubt and scepticism. Myths die hard. Ministers, government officials and probably the community generally, sleep easier in the notion that judges do no more than mechanically apply pre-existing rules. Often that is all they may do. When they have a choice, it is our tradition rarely to acknowledge that there is an open choice of policy to be made by the judge. Judicial recruitment and training, the procedures of the adversary trial, the experience and inclinations of most lawyers of our tradition, and the lack of facility for social research and inquiry combine to discourage a frank acknowledgement of policy choices. Our procedures of adjudication and decision-making would require too great a reform if matters of policy were to become too prominent.

CAN THE POSITION LAST?

I conclude my paper by asking whether the 'bold' claim of the A.A.T. to review government policy can last, compatibly with the principle of ministerial responsibility enshrined in our Constitution and history. Governments and Ministers in Australia may be robust enough to accept the A.A.T.'s critical scrutiny of their policies. Occasionally, they may even find a scrutiny helpful in the elaboration and application of policies to cases

not contemplated when the policy was drawn. In the event of a profound disagreement, legislation may be enacted to ensure that a policy, found uncongenial to the tribunal, is ultimately observed by it. However, a more likely response is the disinclination of the executive government to commit jurisdiction involving important policy questions to the A.A.T. and a disinclination of officials to recommend to Ministers that issues likely to raise the application of controversial policy should be committed to the A.A.T.'s review.

Sorting out the problems created by the establishment of the A.A.T. for the independent review of government decisions is bound to be difficult because the creation of the general independent review tribunal had been a 'bold reforming measure'. When bold reforms are enacted, difficult problems have to be faced as a consequence. In working out the proper function of policy in the A.A.T., the tribunal will force all branches of government to examine more closely the role of policy as it applied in individual cases. Furthermore, the examination of this issue in the A.A.T. will have consequences for a more honest approach to the role and function of policy in the courts than had existed until now.

In working out the proper relationship between the A.A.T., elected officials, administrators and individual litigants, the road ahead is not at all clear. Plainly, lawyers have crossed over into the territory of policy. There are some signs that lawyers were there before, though generally they covered their tracks and rarely admitted the adventure. The passage may come to nothing and those who guard the frontier may prevent too many incursions, for fear of the unpredictable damage that may be done. On the other hand, lawyers may well find that grappling more openly and frankly with policy issues in the A.A.T. points to the direction for the way in which the courts themselves should more openly address the problem of policy choices. In many ways, the A.A.T. requires all arms of government in Australia to face more precisely the role of policy in adjudicative decision-making. Whether a legal reformation will ensue from the A.A.T. experiment, or whether a counter reformation will curtail this brave endeavour, remains to be seen. It is to consider that questic that we have gathered together in this session.