THE UNIVERSITY OF SYDNEY

FACULTY OF LAW

TUESDAY, 15 SEPTEMBER 1981

ADMINISTRATIVE LAW REFORM IN AUSTRALIA - CURRENT CONTROVERSIES

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Chairman of the Australian Law Reform Commission

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ADMINISTRATIVE LAW REFORMS

No area of federal law reform in Australia has been so radical and pervasive as the changes in administrative law enacted by successive federal governments in the past six years. The key enactments have:

- established a comprehensive Administrative Appeals Tribunal;
- created a general Administrative Review Council;
- set up a Federal Ombudsman;
- reformed and simplified judicial review of federal administrative acts;
- provided for greater freedom of access to government information.

The breadth of the reform has elicited gasps from overseas observers. This is 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 experiment is the most comprehensive in a common law country.

At the Australian Legal Convention in Hobart in July 1981, papers by Professor H.W.R. Wade and Lord Lane dealt with administrative law developments in England and Australia. Lord Lane was full of praise for the operation of the 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.
(1981) 55 ALJ 383-4.

EMERGING PROBLEMS

It is not surprising that reforms so radical and pervasive should produce problems and controversy. Indeed it would be remarkable if they did not. One chance to review the Australian '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 those 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:

> 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.

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 bureaucracy be avoided?
- Can the costs of AAT review be justified in a particular area?
- What are the countervailing advantages of AAT review to 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.

BLURRING RESPONSIBLE GOVERNMENT

Some of the difficulties of principle that could emerge from the novel jurisdiction of the AAT were explored at greater length in a seminar held at the Australian National University, Canberra, on 18-19 July 1981. Organising the seminar was ANU Professor Dennis Pearce. The seminar was attended by Mr. Justice Brennan and a number of Federal Court judges, including Mr. Justice J.D. Davies, President of the AAT. The Commonwealth Ombudsman (Professor Jack Richardson) and a number of practitioners, academics and representatives of consumer organisations met to put the new federal administrative law under the microscope.

One paper, by me, written as a member of the Administrative Review Council, reviewed a number of cases in which the AAT had recommended reversal of Ministerial deportation decisions, notwithstanding the fact that the migrant involved had been convicted of a drug-related crime. I pointed out that the Federal Court of Australia had made it plain that the AAT was obliged to consider not only the facts and law in cases coming before it, but also government policy. The obligation of a quasi-judicial tribunal to review frankly and openly government policy, determined at a high level, posed special difficulties which had not previously been faced by the courts. Among the difficulties listed were:

- the apparent offence to democratic theory of unelected judges openly reviewing policy determined by elected Ministers;
- the creation of a possible 'dychotomy' between decisions made by the AAT and decisions of public servants, faithfully applying Ministerial policy;
- the limitation on the membership and procedures of the AAT which restricted any effective, wide-ranging review of government policy by it; and
- the potential damage to judicial prestige by the frank involvement of judges in debates over controversial matters of public policy.

Whilst stressing the valuable work of the AAT in the identification of government policy and in pursuing the substance of justice rather than being contented with compliance with its form, I said that in developing the AAT to be a general body for the review of federal administrative decisions, it would be essential to 'come to grips with the proper relationship between elected policy makers and the independent 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 linmes of responsible government have become blurred. True it is, the Minister may have the remedy avaiable 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.

The paper praised the 'notable steps' of the AAT towards greater informality of proceedings, the used of preliminary conferences and telephone conferences and other important innovations. However, it suggested there were dangers 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.

AAT VALUABLE ROLE

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, 2 August 1981:

> 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?

The Federal Attorney-General, Senator Durack, issued a statement of praise for the valuable role of the AAT, which he said was '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 area of deportation;
- the AAT had made it clear that whilst not bound by government policy it was carefully taken into account;
- it was the responsibility of Parliament to spell out the criteria by which the tribunal judged the decisions of the government coming before it.

OTHER DEVELOPMENTS

Meanwhile, a number of other developments to be noted:

- In June 1981 a report of the Administrative Review Council was released criticising the current system of social security appeals tribunals and urging transfer of jurisdiction to the AAT as well as a better system of internal review. The Minister for Social Security has indicated that the report will be closely scrutinised;
- A number of decisions are now being handed down by the Federal Court under the innovative Administrative Decisions (Judicial Review) Act. In June 1981 a decision of the Full Federal Court dealt with the requirement to give public servants an adequate hearing before the Public Service Board could act to suspend or dismiss them. In July 1981, Mr. Justice Fox held that a decision to pass or fail a candidate for a statutory examination was a 'decision' within the meaning of the Act and thus capable of being reviewed on the criteria stated in the Act by the Federal Court;
- At the end of July 1981, the High Court of Australia, in the case of Pochi, revoked an order granting the Commonwealth special leave to appeal against an AAT decision recommending revokation of a deportation order. The fact that a High Court decision in the case would not be binding on the Minister suggested that the appeal would be futile as the Minister could still proceed to make his own determination.

The area of administrative law continues to expand. Practical problems and issues of principle inevitably accompany this expansion.