AUSTRALIAN PUBLIC SERVICE BOARD

EXECUTIVE DEVELOPMENT SCHEME

ADMINISTRATIVE LAW SECTION

BELCONNEN, A.C.T., 7 OCTOBER 1981

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PROBLEMS AND POSSIBILITIES

The Hon. Mr. Justice M.D. Kirby
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FEDERAL ADMINISTRATIVE LAW REFORM

My contribution deals with one of the most important issues of law reform before Australia today. Certainly it is an issue which should be under the closest scrutiny of the future leaders of the Australian public service. I refer to the modification of a legal system which grew up in a world of small government and which has proved inadequate to cope with the variety, detail, technicality and trivia of a world of big government.

The range of procedures open to an aggrieved citizen against the government and its agencies is great. It goes beyond the new legal machinery. It includes avenues of redress afforded by the Cabinet, Ministers, Members of Parliament and Local Councils, internal public service review, Public Service Board scrutiny and review by the Ombudsman. To this armoury must be added the workings of the political parties themselves, and a most potent, if sometimes heavy-handed weapon, the media; with its ever-ready willingness to expose bureaucratic blundering and promote citizen well-being, so long as the latter happens to coincide with a good story or a good picture. In the variety and range of remedies there are available, lies hope for the aggrieved citizen. The more remedies, the more likely it is that ultimately, a person suffering from injustice, if sufficiently determined, will have wrongs righted. There are many means of redress open to the aggrieved citizen in Australia.[1] I want to concentrate on the new developments in Federal administrative law and to call attention to some of the strengths and one or two of the problems that attend this development.

One of the happiest features of law reform in the Commonwealth's sphere in recent years has been the generally bipartisan approach to the subject of administrative law reform. 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;[2]

- 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;[3]

- appointment of the Commonwealth Ombudsman as a general Federal commissioner for grievances;[4]

- 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;[5]

- 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 breadths of these reforms, particularly in aggregate, has elicited gasps from some overseas observers.[6] 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 a 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 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.[7]

The Administrative Appeals Tribunal deserves these 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 aggrieved against Commonwealth administration by members of the AAT. 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.[8] 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, beyond 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.[9] 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.[10] I assume that in his final report on the review of New South Wales Government Administration, Professor Wilenski will chart the road ahead for this State.

E..ERGING 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 '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 rescrutinise 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.[11]

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.[12]

THE AAT AND 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), the Chairman of the Administrative Review Council (Mr. Ernest Tucker) and a number of practitioners, government officials, academics and representatives of consumer organisations met to put the new federal administrative law under the microscope.

One paper written by me reviewed a number of cases in which the AAT had 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[13] 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 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.[14]

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.[15]

AAT DEFENDED

In keeping with the current media vogue in reporting legal matters, some of the last mentioned 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?[16]

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.

There are many other topics that could be considered in this review of the AAT. Though not strictly 'rescue by the judges', and though some of its members are not judges at all, the AAT does represent the judicial model in operation. Its work is now being supplemented by cases brought under the Administrative Decisions (Judicial Review) Act in the Federal Court. Those cases have already demonstrated the very ample language of the Act and the width of its provisions, beneficial to the aggrieved citizen. Some of the results have been surprising. 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 susceptible to being reviewed by the Federal Court of Australia

on criteria of fair procedures stated in the Act. It is too early to assess the operation of the Administrative Decisions (Judicial Review) Act. Its effect is likely to be less pervasive, but sometimes more dramatic and unexpected, than the decisions 'on the merits' made daily by the AAT in the jurisdiction specifically assigned to it.

I want to turn now to an issue for the future, namely the question of the recovery of damages for wrongful administrative acts. This is not yet part of the mosaic of the new Federal administrative law. It may come to be so and it is appropriate that members of the Executive Development Scheme should consider the issues of public policy involved.

DAMAGES COMPENSATION

Damages, that is, the obligation to pay money to an aggrieved party, represent the traditional remedy of the common law of England to redress legal wrongs. In our legal history, it required the development of an entirely different court system, to generate other remedies, such as injunctions, declarations of right and orders requiring the performance of specific conduct. The English law of torts, which we have inherited in Australia, has been profoundly influenced by, and on occasions distorted by, its reliance on the payment of damages.[17] The social purposes of damages are at least two-fold : first to compensate the aggrieved party for actual losses and out-of-pocket expenses or for intangible damage. Another purpose is to encourage compliance with the law by providing a sanction against breaches. It is in this sense that the award of damages to a particular aggrieved party can represent 'public policy in disguise'.[18]

Courts in many countries of the Commonwealth of Nations have made it clear, including recently, that the mere fact that a government official makes an invalid decision causing loss to an individual citizen, does not of itself give rise to a cause of action for damages against the government or the official. Only if the invalidity of the official conduct is accompanied by a recognised civil wrong, will the losses suffered by the individual citizen be transferred to the whole community by a verdict against the State. [19] The reason for this approach has been explained by the use of the fiction of referring to Parliament's intention:

> When Parliament confers a discretion ... there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors.[20]

The presumption about Parliament's intention is based upon legal history and the fact that in our legal tradition no general right to damages, compensation or otherwise, developed to meet cases of official error. True it is, sometimes the Constitition imposes obligations for compensation, as the Australian Constitution does in the case of the acquisition of property for purposes of the Commonwealth. Particular statutes may impose duties on public officials, the failure to perform which will give rise to liability in damages.[22] The courts too have been developing this area of the law. By expanding the notions of the law of negligence, a number of important decisions in Britain, Australia and New Zealand have recently pushed forward circumstances in which the aggrieved citizen can recover. Thus:

- Borstal officers were held to have owed a duty of care to a nearby resident to exercise a proper supervision of boys in their charge, since it was held reasonably foreseeable that damage to nearby property would occur if they failed to do so.[23]

- A local authority was held to owe a duty of care to eventual owners of houses arising out of the negligent inspection of foundations which subsided, the inspection being required by statute.[24]

- A Minister of the Crown in New Zealand was held to be arguably liable for a duty of care owed to a Japanese company which had suffered economic loss as a result of an invalid refusal to consent to a licence. The mere invalid exercise of statutory powers would not support a claim for damages. A case based on negligence, however, was allowed to proceed.[25]

- In South Australia it was held that damages could be awarded to a farmer against a government department for negligent technical advice, which led to the farmer's purchasing land for sheep farming. The case is under appeal to the High Court.[26]

The position at present seems to be that the government and public authorities are liable for damages suffered by ordinary citizens if their invalid action:

- involves a recognised cause of action, such as negligence, trespass and so on;
- is actuated by malice or personal spite; or
- arises from the blatant excess of power knowingly exercised.[27]

As recently as February 1981, however, in a New South Wales appeal, the Privy Council has made it clear that there remain areas of unlawful administrative action for which there is simply no liability in damages. In that case, a planning authority imposed a restriction which was arguably unlawful because in breach of natural justice or as a result of a mistake of law. But the restriction was imposed in good faith and no independent legal cause of action arose. Though heavy financial loss was suffered, and though the court would set aside the error, no compensation for consequential losses would be ordered.[28]

The growth in the functions of the administration and the stark contrast of some citizens recovering compensation from the government and others not, have combined to raise the question of whether a new principle should be found so that the risk of wrong or unlawful government activity is spread throughout the community and not borne by those upon whom it presently falls, without redress. The anomaly that has arisen in the law by which compensation can be secured from the government for maladministration which is also negligent (but no compensation secured for illegal conduct which is not negligent) is so glaring as to suggest the need for reform action. The existence, in other legal systems, of much wider rights to compensation for aggrieved citizens has become important since Britain, the source of our legal system, entered the European Communities. The contrast between French law which permits recovery if State action results in individual damage to a particular citizen, whether or not there is fault[30] and English law is now shown in high relief.

As a holding measure, and temporary remedy, in some cases, for this problem, provision has been included in most Ombudsman legislation, including that in Australia, for the Ombudsman to recommend ex gratia payments to compensate persons suffering as a result of wrongful actions of administrators.[31] In some of the cases where recommendations are made, a legal cause of action might arguably exist. In many, there is no legal redress and the recovery of money compensation depends on official reaction to the Ombudsman's recommendation.

Because of this unsatisfactory state of the law, a number of inquiries have recently addressed the issue of what should be done. In New Zealand, the Public and Administrative Law Reform Committee has presented a report on 'Damages in Administrative Law'.[32] In Britain a review of administrative law by a committee of Justice and All Souls College, Oxford, has included in its discussion paper of April 1981 a chapter on the subject of compensation.[33] In Australia, the Administrative Review Council has included the subject of compensation in its future program for Federal administrative law reform.

The New Zealand and British committees have chartered the option for the way ahead:

- leaving reform to the common law, given that the judges have already indicated a willingness to extend the scope of remedies to cover the area where the citizen is not protected;

- providing reform by piecemeal legislation i.e. providing definite schemes of compensation to protect the citizen against risks of error arising under particular statutes; or

- reform by general legislation adopting an entirely new principle of community liability.

The New Zealand committee favoured the piecemeal approach. The British committee has suggested that a better approach to reform may be by the establishment of a general liability in damages for unlawful administrative action. It has indicated that this would require legislation such as:

> Any person who sustains loss as a consequence of a decision or determination of a public body which materially affects him and which is for any reason ultra vires the public body concerned shall be entitled to claim compensation in accordance with the provisions of this Act.[34]

There are many problems which attend the adoption of such a general principle. The most obvious is the cost involved. Many consequential issues would also have to be faced. It may be easy to calculate a loss where a trading licence is wrongfully cancelled. But where a licensing authority refuses an original application for a licence on an invalid basis, there may be no certainty that the licence would have been granted, if the authority had acted on a perfectly lawful basis. How will compensation if any be calculated in such a case? Economists will tell lawyers that the provision of general compensation entitlements raises an issue of priorities. Is it better to spend scarce public funds providing compensation to the citizens who suffer or is it better to spend the funds on education, roads, defence and so on, ignoring citizen losses, or putting them down to the price of living in a complex society governed by complex legislation? Recent legal reviews of this topic make the point that a new approach to risk theory must be worked out if we are to shift the risk of administrative error generally from the individual to the government.[35]

> This raises a number of questions such as why proprietary interests are being protected by a risk theory before interests in physical security or liberty and why redress for lawful action should precede that for invalid government action. ... It is only when the general conceptual framework in which reform will operate is established, that one can rationally test the application of that reform within specific substantive areas. Further damages should not be thought of simply as something to be 'tacked on to' the existing structure. The provision of compensation may well have a significant effect on the way in which that area operates. This should not be lost sight of in the desire to compensate the specific deserving case.[36]

Few people nowadays suggest that, criminality apart, the individual officer of administration should be personally liable for the damage caused by his unlawful or invalid administrative decision. The old principle that the police force was not liable for the wrongs done by the individual constable, because he was an independent officer, has now succumbed to the general principle that the employer should normally pick up the tab.[37] Therefore, the damages penalty will rarely act as a direct and immediate sanction to the administrator. That is why some observers say that we should persist with cheaper and more accessible remedies for administrative wrongdoing. On this view, either through the Ombudsman or an informal speedy tribunal, we should concentrate on remedying wrongs quickly rather than providing another source of expensive complex litigation. The argument rings hollow for those who suffer financial loss by reason of unlawful government action and ask why they, unaided by their fellow citizens, must shoulder the burden of the occasional error that must occur in public administration in a busy and complex world.

Briefly and superficially, that is a review of the compensation issue. In due course the Administrative Review Council will report on this topic. But if progress in this area appears to be slow, the reforms elsewhere in Federal public administrative law have been rapid and dramatic. Clearly, they deserve the attention of participants in the Executive Development Scheme.

FOOTNOTES

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

1. I have used the word 'citizen' for convenience. I am aware that this is not a satisfactory expression, particularly in a country with a large population of non-citizen residents, such as Australia.

2. Administrative Appeals Tribunal Act 1975 (Cwlth).

3. id., s.51.,

4. Ombudsman Act 1976 (Cwlth).

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

6. 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.

7. Lord Lane, ibid.

8. 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.

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

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

11. 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.

12. ibid.

13. Drake, op cit, fn.8.

14. 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. Mimeo 32. See also reported statements of the Minister for Immigration and Ethnic Affairs (Mr. McPhee) in Australian Financial Review, 22 August 1981, 10.

15. ibid.

16. Sun-Herald, 2 August 1981.

17. For examples of the effect of damages on substantive law, see Australian Law Reform Commission, Unfair Publication : Defamation and Privacy (ALRC 11) 1979; Australian Law Reform Commission, Discussion Paper No. 11, Access to the Courts II - Class Actions (1979).

18. C.S. Phegan, 'Public Authority Liability in Negligence', (1976) 22 McGill LJ 605, 627.

19. See footnotes 23-28 below.

20. Lord Reid in Dorset Yacht Co. Ltd v. Home Office, [1970] AC 1004, 1031.

21. Australian Constitution, s. 51 (xxxiii). The provision requires 'just terms'.

22. See e.g. Thornton v. Kirklees MBC, [1979] 3 WLR 1.

23. Dorset Yacht Co. case. Above, n.20.

24. Anns v. London Borough of Merton, [1978] AC 728.

25. Takaro Properties Ltd v. Rowling, [1978] 2 NZLR 314.

26. State of South Australia v. Johnson, unreported, 15 August 1980. On appeal.

27. H.W.R. Wade, Administrative Law (4th ed, 1977), 639.

28. Dunlop v. Woollahra Municipal Council, The Times, 26 February 1981.

29. Justice and All Souls, Review of Administrative Law in the United Kingdom, Discussion Paper, April 1981, 72, para. 203.

30. P.N.L. Duguit, Traite de Droit Constitutionnel (3rd ed), 469. The position does not appear to be clear. See Review of Administrative Law in the United Kingdom, n.29, 78, para. 219.

31. see eg Ombudsman Act 1976 (Cwlth), s.15(2)(b), (3)(b). See also Commonwealth Ombudsman, Second Annual Report 1979, 12-14. See the amendment to the Audit Act 1901 passed in 1979 specifically providing for act of grace payments.

32. New Zealand, Public & Administrative Law Reform Committee, Damages in Administrative Law, 1980.

33. Review of Administrative Law in the United Kingdom, above, n.29.

34. id., 78, para. 217.

35. P.P. Craig, 'Compensation in Public Law', (1980) 96 Law Quarterly Review 413.

36. id., 455.

37. Australian Law Reform Commission, Complaints Against Police (ALRC 1), 1975, 58 (para. 213). See now Australian Federal Police Amendment Act 1981 (Cwlth).