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Public Accountability And The Law

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THE PARLIAMENT

During the whole of this century there has been a steady erosion of the power of Parliament. The tendency, not confined to Australia, has seen the loss of power to the political and administrative executive government. They, in turn, have lost power to the political leader, now closeted with privately appointed and unaccountable personal staff who formulate policy, write speeches and sometimes manipulate the elected officer according to an agenda of-their own. There has also been a loss of certain power to the judicial branch which I will explore.

It is true that occasional progress is made. Thus, in New South Wales, where independents hold the balance of power in the Legislative Assembly, reforms of Parliamentary procedure and a greater sensitivity to the will of Parliament has reflected the Government's necessities. In the Federal Parliament we seem to have reached the point where no major party will control the Senate in the foreseeable future. This, in turn, means that governments must be sensitive to minority opinions, reflected by the Democrats or Independent Senators. This, in turn, has produced negotiation to ensure the passage of legislation. But it has also produced improved scrutiny of Bills by Senate Committees.[1] The late Lionel Murphy, when a Senator, enhanced the power of the Senate by contributing notably to the development of its committee system. Senate Committees tend to be much less controlled by the Party Whip. They tend to demand more information from officials and from the Government of the day.

An urgent source of concern lies in the decline of the Parliamentary Question Time. This is the distinctive feature of our Parliamentary system. It greatly improves the capacity to call the Executive Government to account in a public way by searching interrogation. There is no equivalent procedure in the United States of America, France or other non-parliamentary systems. The United States, for example, is largely dependent upon the free media to interrogate the Chief Executive, although Congressional Committees can, exceptionally, interrogate members of the Administration. The weakness of the Presidential system in the United States was demonstrated in two recent crises. During the Watergate affair, it was impossible, short of the impeachment proceedings ultimately launched, for the Congress to interrogate the President as could easily have occurred here with a head of government in Parliament. Similarly, in the early years of President Reagan's presidency, he was never interrogated about his Administration's strategies and policies on HIV/AIDS. The much vaunted free press of the United States asked no questions. During his first term, the President never put his lips around the avoided acronym. The result was a ravaging epidemic. In our Parliamentary system in Australia, through the contributions of notable politicians on both sides of the Chambers, we were able to do better.

Question Time is, however, undoubtedly in decline, at least in the Australian Federal Parliament. Part of the problem may be the attitude of some politicians to this instrument of accountability. According to the former Minister, Mr Wal Fife, the present Prime Minister in 1988 asserted that: [2]

> *"Question Time is a courtesy extended to the House by the executive branch of Government. This is the constitutional position and Standing Orders are simply to facilitate delivery of that courtesy."*

Mr Fife cites statistics which indicate that the average number of questions asked during a 45 minute Question Time in the Australian Federal Parliament fell from 19 in 1978 to 11.5 in 1988 and 11.7 in 1989 but rose slightly to 12.9 in 1990. The increase of Question Time to an hour has allowed a small increase in the number of questions. But the position in Australia may be contrasted with the United Kingdom Parliament where, within an hour, the average number of questions reaches 70. In the Canadian Parliament, which has Questions Without Notice, an average of 26 to 30 questions are asked in the 45 minutes allotted. In the United Kingdom, the Prime Minister answers questions, most of them in practice without notice, twice a week for a 15 minute period. The United Kingdom and Canada have time-tables for written answers whereas the Australian Parliament does not. This is a serious defect in the crucial procedure available in Parliament to bring the Executive Government to account to the peoples' representatives. It may be hoped that it will be corrected by the initiatives of Parliament itself.

THE EXECUTIVE

The most noticeable reforms which have been introduced in recent years concern the accountability of the Executive Government, in its administrative manifestations. Especially at the Federal level, a series of legislative reforms in Australia has brought about a remarkable shift in power between the individual and the bureaucracy. The new system is by no means perfect. But it is a significant improvement in accountability over that which existed before the mid-1970s. The office of Ombudsman has been established in all jurisdictions, Federal and State. Freedom of information legislation has been enacted in the Federal sphere and in New South Wales, Victoria and South Australia. A new administrative tribunal, the Administrative Appeals Tribunal (AAT), has been created in the Federal sphere. It has a counterpart in Victoria and equivalent bodies are under consideration in other jurisdictions. Within the Federal AAT, attempts are underway to reduce court-like features and speed up the case-flow without reduction in the quality of decisions. Also in the Federal sphere the *Administrative Decisions (Judicial Review) Act* 1977 has been passed to simplify the system of judicial review and to improve the accountability of the administration to the law of the land. An important innovation of that Federal statute was the introduction, by s 13, of the obligation to provide reasons for most administrative decisions.

The rationale for these reforms can be found in the perceived need to render official decisions in the administration more open and more fair. But something of a backlash has set in because of the perceived cost of the administrative law reforms. This is now said to be running at about $40 million a year. Cost/benefit issues are now being

considered. Warned by the excellent study in civics found in the television programme *Yes Minister*, we must all be on our guard lest the vehicle of cost-saving is not used by the Sir Humphreys of this world to cut back the important achievements of administrative law reform. At the same time, as the President of the Administrative Appeals Tribunal (Justice Deidre O'Connor) herself recognises, there is a need to improve the present system. The dominance of lawyers, the burgeoning cost, the abstract nature of many of the rights, the complexity of the language in which laws and practices are written, and the intimidating nature of some of the tribunal's procedures need constant attention. Otherwise, the system may not deliver real justice to the ordinary individual approaching those with power in the administration for accountability. It seems likely that the future of accountability of public administration in Australia will lie in less judicialization of dispute resolving procedures; less adversarial investigation; and incremental improvements upon the basic system which is now in place.

We should not deceive ourselves that the present system secures really effective accountability for all Australians. In the lower (and not so lower) socio-economic sections of our community (increasing in number by reason of the economic difficulties) there is a feeling of alienation from the privileges of administrative law. A real measure of the accountability of public administration can be tested by the impact it has had upon Aboriginal Australia. More than twenty years ago concern was expressed about the social deprivations of Aboriginals and the disadvantages which they suffered in many walks of life, including in their interface with the criminal justice system. Twenty years later despite the expenditure of millions of dollars and the vital work of the Aboriginal legal services, there is still the same proportion of Aboriginal Australians in prisons, the same high rates of social disintegration and individual despair, and the same low rates of educational retention and achievement. Administrative accountability on the micro-level is no substitute for macro-policies which attack the basic causes of individual disadvantage. We should not fall into the lawyer's trap of thinking that procedures, institutions and mechanisms are the answers to Australia's social problems. Sometimes they are simply a palliative to ensure that things look good or are done correctly. But whether *what is* done is good and what is achieved is correct remain the more fundamental questions.

THE JUDICIARY

Five More Years

Five years ago I was asked to contribute the foreword to the Public Interest Advocacy Centre's book *Five Years in the Ring*.[3] In it, I traced the achievements of PIAC and the fundamental problems which public interest lawyers faced in invoking the courts to secure social and economic change through law.

In my foreword I listed four impediments, as I saw them, to the success of the initiatives of public interest advocacy in our courts. They were the comparative lack of substantive rights upon which to hang legal claims brought to law; the tendency of the courts to avoid conceptualisation of legal themes and to go beyond the narrowest available solution of the instant case; the barriers of the law of standing and of costs; and the failure of our legal system to pursue systematically judicial suggestions for reform of the law.

During the past five years there has, I believe, been progress in each of these areas. It is worth noting some of the main points.

Substantive Law Developments

A number of developments can be mentioned in respect of substantive law. They include Australia's action in signing the first *Optional Protocol* to the *International Covenant on Civil and Political Rights*. This initiative, led by Senator Gareth Evans, took place in September 1991. By December 1991, Australia's laws were accountable to the Human Rights Committee of the United Nations, established under the *Covenant*. Already the first communication has been sent to the Committee. It has been made by Mr Nicholas Toonen of Hobart. It complains about the laws of Tasmania which criminalise homosexual conduct between consenting adults. It asserts that such laws breach the fundamental human rights of privacy and equality before the law.

Then, in recent days, three remarkable decisions have been handed down by the High Court of Australia. The first of these, *Mabo v Queensland*[4] reversed a legal theory which was accepted for the previous two hundred years. This was that Australia had not been acquired from the indigenous people by conquest but was an empty continent, acquired by settlement. The importance of the distinction was that, if Australia were *terra nullius* (as had previously been held to be the law) there was no obligation on the part of the Crown to negotiate the terms of acquisition of the territory from the indigenous people. By reversing this theory an amazing legal change has occurred. It creates the potential by which, at least in certain lands and in certain circumstances, it will be incumbent upon governments and others to perform the negotiations which were disdained at the time of the initial acquisition of Australia by European settlers.

For present purposes, it is important to note one step in the reasoning which Justice Brennan exposed for his decision in *Mabo*. In the course of that decision, with the concurrence of Chief Justice Mason and Justice McHugh, he pointed out that Australia's signature to the *Optional Protocol* would inevitably have an impact upon the common law of Australia. As our law becomes answerable to the Human Rights Committee, and thus to the principles of basic rights which it serves, an indirect influence of those principles upon our own common law will come about in order to avoid disharmony between the two. It is therefore timely for us to celebrate the appointment to the Human Rights Committee of the United Nations of its first Australian member, Justice Elizabeth Evatt.

The domestic application of international human rights norms signalled in *Mabo is* not the only way by which the world-wide human rights movement will have a practical impact on Australia. In two further recent decisions of the greatest importance, the High Court struck down legislation regulating electoral advertising[5] and an over-extensive provision rendering susceptible to punishment criticism of the Australian Industrial Relations Commission.[6] Less surprising than the results of these two cases were the explanations given by the High Court for the rulings. Those explanations were found, substantially, in the implied right to freedom of communication on political and economic matters which the High Court found in the language, structure and purposes of the Australian Constitution although not spelt out in its express terms. The very system of representative government, with an elected

Parliament answerable to the people, imported the right to free political discussion about who the representatives should be. The regulation of pre-election advertising and the punishment of criticism of an executive institution (whether that criticism was justified or not) were held to be disproportional to the legitimate objectives which the Federal Parliament could lawfully secure. Adopting the approach of the European Court of Human Rights, it was said that regulation of pre-election advertising (and prohibition on criticism of the IRC) were outside the "margin of appreciation" which would be left to the in legitimately derogating from basic rights.

This is clearly a development of constitutional principle of the first importance. It shows that the Australian Constitution is far from being past childbearing. Lionel Murphy's oft repeated assertions about the implied rights inherent in the very nature of our Constitution must now be re-scrutinized. [7] Although at the time they were expressed, Murphy's views were regarded by most Australian lawyers as wholly heretical, they now look less so. The Chief Justice of Australia (Sir Anthony Mason) once answered Lionel Murphy's claim by stating that he could not find a s 92A in the Constitution to justify the asserted right to freedom of communication. But now, it seems, that right, or something awfully like it, has been found in the very nature of the political system which the Constitution establishes.

Public interest lawyers will study with fascination this development of Australian legal theory. It opens up a new realm of opportunity, undreamt of even five years ago.

Conceptualising Law

At a recent conference which attended with Sir Robin Cooke, President of the New Zealand Court of Appeal, he suggested that the whole of the administrative law in common law countries could be encapsulated in three little words. The actions of administrators must be legal, fair and reasonable.

One of the greatest disappointments of my judicial career was the reversal of the decision in *Public Service Board of New South Wales v Osmond*[8] You will recall that, by that decision, a majority of the New South Wales Court of Appeal (Priestley JA and myself) held that, at least in the circumstances which there existed, public officials, being the donees of legislative power, were obliged to give reasons for their decisions.

A holding of the same Court in 1979 had required all judicial officers to give reasons for their decisions. Initially this was justified upon a requirement inherent in the right to appeal. But now, the rationale for the obligation to state reasons is found, more

decisions? May not the obligation to state good reasons be an assurance that good reasons do exist which are legal, fair and reasonable?

With respect, the decision of the High Court of Australia rejecting the right to reasons at common law in the circumstances of the *Osmond* case, seem unconvincing. The dismissal of overseas developments in common law countries smacked of xenophobic reactions - as if we in Australia had nothing to learn from any country of the common law save England. The call to await legislative development is certainly not the approach of judges of our tradition of the past - or of more recent times. Perhaps in a more creative phase, *Osmond* would have gone the other way in the High Court in 1992. Perhaps at some time in the future the issue will be re-opened if it is not overtaken by legislative reform. The decision tends to bear out Lord Denning's categorisation of judicial spirits of bold or timid. On this occasion timidity triumphed.

Standing and costs

There have been some recent developments in the law of standing and in legal procedures which have improved the position of individuals invoking public law.[11] But the fundamental problem of legal costs remains. Indeed, the situation has become more serious. Time charging by Australian lawyers has actually increased the burden of legal costs. So far as individuals are concerned, there remain serious impediments. They cannot ordinarily appear for a corporation without exceptional circumstances warranting leave by the court.[12] If they do appear for themselves, under current authority, litigants cannot secure all of the costs reasonably incurred by them, such as costs for preparation of argument and for attending at court.[13] A decision on this last point is the subject of an appeal to the High Court of Australia. For all that, courageous individuals, dedicated lawyers, legal aid and like centres working with disadvantaged individuals and groups, and bodies such as the PIAC have continued to do valiant work in important causes. Test cases continue to come forward. Some important victories for the application of the rule of law and to uphold the principles of fairness and reasonableness of administrative action, have been achieved.

Law Reform

Since 1975 there has also been some progress in the processing of law reform suggestions. The idea that law reform reports would pass automatically into law through a Parliamentary procedure has not been achieved. But, short of that, new systems have been introduced which pick up judicial suggestions for reform. No judge has a right to expect that his or her proposals for law reform will be adopted uncritically into the law. But that such suggestions will be seriously considered, in a routine and orderly way, seems a not unreasonable expectation. A reflection about the defects of the law and the need for its reform will often emerge from presiding over gruelling litigation. Proposals by an experienced and well-intentioned judicial officer for legislative or other change should command virtually automatic consideration at a high level.

During the period that Mr John Dowd QC was Attorney-General in New South Wales a system was introduced by which such judicial suggestions for law reform are referred to the Attorney-General's Department by the Chief Justice. The system has now been in

place for a number of years. The evidence of the statute book suggests that proposals for reform which deal with anomalies or anachronisms in legislation get reasonably prompt attention. If the proposals involve procedural improvements they will usually be adopted. If they involve little or no expenditure from the public purse, they are more likely to be accepted. If they promise the saving of public costs, they are likely to be accepted most quickly of all. These new procedures are definitely an improvement. They should encourage judicial officers, at every level of the hierarchy, to call to official attention defects in the law which suggest the need for reform.

We should not, however, think that the path of law reform in the future is rosy. In Canada, the Law Reform Commission at the Federal level was recently abolished as a cost-saving measure. And in Australia, the wheels of reform grind slowly wherever powerful interests are involved in the subject matter. The best example of this is in the law of defamation. The proposals for reform of defamation law and procedure were put forward by the Australian Law Reform Commission sixteen years ago. They were welcomed and praised by observers and experts in this country and overseas. They concentrated attention on the need to improve procedures: by the introduction of novel techniques derived from civil law countries: including rights of correction and rights of reply. But the proposals became bogged down in the Standing Committee of Attorneys-General. They then went off to a suggested initiative of the law ministers in the Eastern States of Australia. That initiative has now been roundly criticised by a New South Wales Parliamentary Committee.[14] The proposal is now to go back to the New South Wales Law Reform Commission. We seem no closer to serious reform of defamation law. In the wake of the High Court's decision, about the right to free communication on matters of political and economic concern, it is possible that a constitutional implication, relevant to the law of defamation, will be found to reduce the ambit of such proceedings on the part of public figures and to enhance the entitlement of the media to scrutinize and criticise such persons.

CONCLUSIONS

The result of this analysis, five years further in the ring of public interest law in Australia, is a mixed bag. Although there have been some improvements in parliamentary procedures, cynicism about parliament is widespread and possibly now even endemic in the Australian community. The vituperation and personal attacks in the chambers of Parliament, broadcast to the community, do nothing to enhance their reputation as serious places of national and state decision-making of high importance.

Administrative law reforms continue to be some of the most innovative legislative changes Australia has seen in recent decades. But the defects of the system are also clear. Some of them are being addressed by a new scrutiny, particularly of the operations of the AAT.

Within the judicial branch there have been some exciting and important developments, particularly in recent days. Some of the pessimism of five years ago must now be reassessed. Perhaps the golden years for public accountability through the courts lie in the immediate future. Perhaps a new millennium is beckoning after all. And then, when we get starry-eyed, we read a case such as the following which requires new energy of all those dedicated to accountability. It appeared in *The Times*[15] (London) under the heading: "Outrageous decision not unlawful":

"Regina v Secretary of State for Defence, Ex parte Sancto Before Mr Justice Rose [Judgment July 24]]

The parents of a soldier who died in an accident in the Faulkland Islands were not entitled to judicial review of a decision by the Secretary of State for Defence to refuse to disclose the report of the board of enquiry into his death.

The decision refusing disclosure was so outrageous that no sensible person could have reached it, but the secretary of state was under no legal duty to disclose or to exercise a discretion in relation to the disclosure of such a report.

Mr Justice Rose so held in the Queen's Bench Division dismissing an application by Paul and Ingeborg Sancto for judicial review of the secretary of state's decision of May 23, 1990 to refuse to allow them to see the report of the enquiry into the death of their son, Sapper Kirk Sancto."

FOOTNOTES

* President of the New South Wales Court of Appeal. Chairman of the Executive Committee of the International Commission of Jurists.

1. H Evans, "Towards Closer Scrutiny of Legislation: New Procedures for Examination of Bills by Senate Committees" in Canberra Bulletin of Public Administration, No 66, October 1991, 13.

2. W Fife, "Question Time and the Role of Parliament" in *Canberra Bulletin of Public Affairs*, No 66, October 1991, 11. For a schedule showing trends in questions without notice in the Australian Federal Parliament, see *Commonwealth Parliamentary Debates (House of Representatives)*, 20 August 1992, 297.

3. P Waters, *Five Years in the Ring*, Public Interest Advocacy Centre, Sydney, 1987. See also P Macalister, "PIAC: Testing Cases in the public interest" (1988) 36 *Law Soc* J (NSW) May, 35. Cf H Selby "Lawyers Should Support a Public-Interest Law Centre" in (1992) 27 *Aust Law News* #6, 22 (July 1992); G Palmer, "The new public law" (1992) 22 Vic *Uni Wellington L Rev 1*. (1992) 66 ALJR 408 (HC). See esp 422 and note (1992) 66 ALJ 551, 552.

5. Australian Capital Television Pty Limited & Ors v The Commonwealth of Australia (1992) 66 ALJR 000 (HC).

6. *Nationwide News Pty Limited v Wills* (1992) 66 ALJR 000 (HC).

7. See eg *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth* (1977) 139 CLR 54, 88; *Buck v Bavone* (1976) 135 CLR 110, 137; *McGraw-Hinds (Aust) Pty Limited v Smith* (1979) 144 CLR 633, 670; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 312; *Miller v TCN Channel 9 Pty Limited* (1986) 161 CLR 556, 581.

8. *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, reversing *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 (CA).

9. *Pettitt v Dunkley* [1971] 1 NSWLR 376 (CA). See also *Soulemezis v Dudley (Holdings) Pty Limited* (1987) 10 NSWLR 247 (CA).

10. *See* Mahoney JA in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Limited* [1983] 3 NSWLR 378 (CA) at 385f.

11. For some recent developments see *Coles Myer Ltd & Anor v O'Brien and Ors*, unreported, Court of Appeal (NSW), 8 September 1992, note (1991) 65 ALJ 735 and S Bottomley, "Shareholder Derivative Actions and Public Interest Suits: Two Versions of the Same Story?" (1991) 15 *UNSWLJ* 127, 137f. But see also *Yates Security Services Pty Limited v Keating & Ors* (1990) 25 FCR 1 (FFC), 28f; cf *Bishop v Bridgelands Securities & Anor* (1990) 25 FCR 311 (FC). Note generally E Crowther, "The three 'Ds' which damn Australian Justice" (1991) 155 *Justice of the Peace* 675.

12 *Bay Marine Pty Limited v Clayton Country Properties Pty Limited* (1986) 8 NSWLR 104 (CA).

13 *Cachia v Hanes* (1991) 23 NSWLR 304 (CA). (SLG).

14 See New South Wales Parliament, Joint Parliamentary Committee, Report on the Proposed Uniform Defamation Act, October, 1992. See E German, "Uniform Defamation Bill a Disaster, Committee Warns", *Sydney Morning Herald*, 15 October 1992, 7.

15 *Times Law Reports*, 9 September 1992.