ADMINISTRATIVE LAW IN THE CHANGING PUBLIC SERVICE ENVIRONMENT

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Last month I was given the opportunity to participate in the 20th Anniversary of the AAT. Although the Convention arranged to mark the occasion did not shy away from critical analysis the mood was largely celebratory. The future was foreseen, in the words of Justice Michael Kirby, as "more of the same".[1]

The general tone of satisfaction is understandable. The 'ambitious new federal administrative law', whose innovative characteristics are still clearly visible two decades on, has provided the framework for a generation of decision-makers. It has proved a remarkable and lasting achievement. It has transformed the notion of public accountability for decision-making. It has, in a real sense, helped to keep the public service honest and government open.

It is true that public administrators, myself included, have on occasion been frustrated by the system. I talk for example, of:

- the apparent concern with form rather than substance, process rather than issue, the application of rules rather than managerial common-sense;
- insufficient weight being given to Government policy;
- the tendency for administrative tribunals, no matter how informal in intent, to become adversarial and legislative - and to persuade many public servants to legalise and judicialise their decisions;
- the difficulty of ensuring that a tribunal understands the range of material, much of it undocumented, which influences the primary decision; and
- the personal attitudes and inclinations of tribunal decision-makers, making reliance on 'precedence' unreliable and patterns of consistency difficult to discern.

Administrative review is, from the bureaucrats' desk, the law of hard knocks. And the bruises do not come cheap. As Lionel Woodward has pointed out, "administrative law processes have developed such that perhaps not enough attention is paid to the overall cost implications of these processes".[2]

Administrative review is also a significant part of the legislative constraint which buries public service managers in internal red-tape. Comparison of the public service employment framework with that in best practice private sector organisations quickly reveals the problems. Australian public servants operate within a complex array of outdated, rigid and cumbersome regulations; systemic barriers and a culture of prescription rather than trust.

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The Public Service Act, introduced in 1922 and amended more than a hundred times since, is riddled with unnecessary restrictions and arcane details. There are over 500 pages of legislation, guidelines and circulars specifying requirements for recruitment and selection; some agencies can take up to 29 steps when processing leave and entitlement applications; and the Act devotes 39 pages to prescribing the arrangements for dealing with misconduct. In 1996 permanent public servants are still employed to occupy a particular 'office' rather than doing a job of work.

The current APS framework is characterised by regulation through various statutes and associated delegated legislation; Service-wide and agency-specific industrial awards: and certified agreements, reached on both a Service-wide and agency basis. It, too, has produced a process-driven culture born of regulation and an entitlement mentality.

Little wonder, then, that the National Commission of Audit has recently argued for fundamental change:

> The public sector acts and regulations should be stripped back and simplified to promote improved performance. Any legislation covering the public sector should be limited to core fundamental principles under which the public sector should operate.[3]

In this environment, so inhibiting to a focus on results, the panoply of administrative law can often seem an additional burden of process. In 1994, the Public Service Commission reported the "often heard view that ... APS Managers still do not have the same capacity as their private sector colleagues to pursue efficiency and effectiveness ... The trend often appears to try to make APS people management more cumbersome by adding further levels of legally mandated process".[4]

At a time when public service leadership is being criticised as conservative and risk-averse, rather than creative and innovative, such views carry additional weight. Administrative law can be portrayed as a cost which does not have to be borne by private sector service deliverers. Even in the area of personnel services public servants routinely report that there "are too many avenues of appeal. There's a need to satisfy a variety of external sources as to the legality of both decisions and processes - people can (and do) pursue appeals through a number of channels, which include Reg. 83; the MPRA; the Ombudsman; HREOC; AAT".[5]

These are views worthy of consideration although I am sensitive to the fact that, from the other side of the fence, such concerns may be perceived as evidence of "growing pressure that due process and accountability as they have been enshrined in the administrative review principles are rather old-fashioned and a waste of time and money".[6]

But the fundamental challenge to our system of administrative law comes not from the gripes of those who are subject to it. Such criticisms, one might surmise, are simply manifestations of a creative tension between those who take decisions and those who scrutinise them - both driven by a concern for public interest.

The more profound challenge comes from the significant changes taking place in the nature of public service. These changes, I emphasise, bear no relation to party politics - they were driven by a Conservative government in the UK, a Labour government in New Zealand and a Democratic President in the USA. In the Commonwealth of Australia they are changes begun under Labor but now pursued with greater conviction by the Coalition.

Let me summarise:

- First, the role of Government, and the definition of a public good, is being

progressively narrowed. Government is withdrawing from public investment and the provision of infrastructure in areas such as utility supply, transportation, communications and banking. There will be less intervention in the operations of the market economy.

- Second, the distinction between the purchaser and provider of government services, between policy implementation and program delivery, is becoming manifest in administrative separation.

- Third, the delivery of government services is becoming competitive, with an increasing share of services being outsourced to the private or non-profit sector. Contract is emerging as "the most significant mechanism for the ordering of public resources and the delivery of services, both to the public and to the government itself".[7]

We are, in essence, moving to a 'contract state', in which the role of the core public service will be to contribute to policy development, administer legislation, regulate the market (to the extent required by government) and oversight contractual relationships that deliver government programs. Government services, traditionally provided by the Australian Public Service, will increasingly be purchased from the market.

In my view this poses fundamental challenges both for the nature of public service and for the discipline of administrative law.

The role of a public service until now has been clear although its articulation has been somewhat hidden by the rhetoric of contemporary managerialism. Because governments have found it impractical to undertake all the administrative tasks required to deliver their policies they have delegated substantial powers to an appointed public service. These powers have traditionally been exercised as a monopoly.

The public service serves the public interest. Its actions express the will of the state as set out in the Constitution, the judicial interpretation of that document, and the policies set by the government of the day and scrutinised by representative parliaments. In providing policy advice the public service does so on the basis of its understanding of the public interest. That is why it continues to set high store on strong, impartial and apolitical public service leadership.

It also delivers programs that have a public intent and are paid for out of the public purse. It has access to the coercive powers of government in implementing policy. For their efforts public servants are paid out of money levied from the people of Australia.

It is for these reasons that the scrutiny to which the public service is subject is significantly greater than in the private sector. The disciplines which public servants face, and the ethical traditions to which they aspire, derive from the need to control governmental power, keeping it within proper bounds to protect the Australian citizen from abuse and excess. Public servants are part of the democratic process.

Public service decisions are expected to be transparent and open to question by parliamentary committees, the framework of administrative law, the investigation of Ombudsman and Auditor-General, and the application of freedom of information (FOI) legislation. The attitude toward risk management is far more restrictive than in a commercial environment: the Australian public may be 'share-holders' in the nation but the willingness to let risks be managed in the interests of efficiency and effectiveness is significantly constrained by the need to be accountable for public monies.

However, the framework of governance is now about the be transformed. It will no longer be accepted that a public good has to be delivered by a public service. Governments will purchase the services they require from a variety of providers on the basis of outcome payments with the public purpose set (and costed) as 'community service obligations'.

In the process the distinction between the public and private sector will become less clear. Public administration, and its service culture, will increasingly be subject both to the discipline of administrative law and of the market place - and just how an effective balance will be struck between the two is not yet clear.

In this environment, characterised by demarcation between steerer and rower, funder and deliverer, it will be necessary to rearticulate our vision of public accountability. To the extent that provision of Government services is contracted out of the public service it will need to be established what parts of the administrative law framework will continue to apply ... and to whom.

Will the private sector competitors be subject to the same administrative law framework as the public service? Or, alternatively, could the traditional values of public service be confined only to the 'core' public service? Is the discipline of the Administrative Appeals Tribunal, Ombudsman, FOI and Auditor-General to apply to the private sector 'provider' or only to the public sector 'purchaser'? Where government services are provided by an 'autonomous' delivery agency, a private company or a non-government organisation does ultimate responsibility for delivery lie with the Minister (because of government 'ownership'), with the departmental Secretary (on the basis of portfolio responsibility) or with the agency Chief Executive Officer (because the Minister and/or Secretary is responsible only for policy direction)?

To some critics it appears that administrative law will be pushed out of the public sphere by the re-labelling of public activities.[8] Others fear that the "traditional administrative law remedies are on the retreat as a result of the new managerialism".[9]

In my view there are a number of ways to preserve the public interest in those significant areas of government that are now being transformed from public administration to private delivery.

One is to depend upon market competition to ensure consumers of government services can exercise choice in choosing the best quality deliverer. However public choice is unlikely to be fully effective. The reality is that although the monopoly of the public service will be broken, in most regional areas the private supplier will operate in a monopolistic or oligopolistic environment.

An alternative is to ensure that community service obligations or other 'extraneous' matters of government policy are built into the procurement contract. The contract for delivery of government services could, for example, not only include provisions to promote equitable access by disadvantaged groups but also to ensure equal employment opportunities within the private company delivering the service. The justification would be to ensure that the government, as trustee, is seeking to make best use of the people's resources in the achievement of a variety of public goals.

This option could be strengthened through the government setting public standards for the delivery of its services. It is important to remember that the contract is between the government and the 'outsource' company not between the company and the public 'customer'. Consequently its effectiveness as a guarantee of quality is largely dependent on the commitment of government.

To this end the Commonwealth Government has recently announced that it intends to develop Government Service Charters to apply to public and private deliverers alike. "Consumers", the Minister for Small Business and Consumer Affairs has stated, are "entitled to a guarantee that appropriate service standards will still apply where existing public service functions are corporatised".[10]

The question remains whether the public service will be able to ensure the quality of service to end-users (the public) through the development and oversight of contract standards. Does the public interest still require that the public are able to seek remedy through the agencies of independent scrutiny such as the Auditor-General, the Ombudsman, even the Public Service Commissioner?

The development of market competition challenges the framework of public accountability. If adequate mechanisms are not in place to ensure protection for the public there is a danger that "considerations of public policy and public interest (will) be marginalised by commercial and competitive considerations".[11]

The contractual environment presents new challenges to administrative review. How, in this new world, will we ensure that government is "rendered truly accountable"? How will we ensure that agencies will "not contract out responsibility at the client's expense"?[12] And how are we to define that expense - in terms of reduced service quality, the closing off of government from public scrutiny or, perhaps the systemic corruption of the democratic process?

These are important issues. The Australian Institute of Administrative Law has a responsibility to address them. The new environment offers enormous opportunities to improve the cost, quality and effectiveness of government services. In order to compete the public service will have to develop a far more flexible framework.

But, in outsourcing service delivery from those interested in the public good to those motivated by commercial gain, there will need to be a means to ensure that public good does not become subverted by private interest. This, perhaps, is the key challenge which will face administrative law as we enter the next millennium.

Endnotes

1 The Hon Justice Michael Kirby AC, CMG, "AAT - Back to the Future", speech to the AAT - Twenty Years Forward conference, 2 July 1996, p 15.
2 Lionel Woodward, "Does Administrative Law Expect Too Much of the Administration?", in Stephen Argument, ed, *Administrative Law and Public Administration: Happily Married or Living Apart Under the Same Roof?*, 1994, p 36.
3 National Commission of Audit, *Report to the Commonwealth Government*, June 1996, p 84.
4 Public Service Commission, State of the Service Report No 3, *People Management and Administrative Law*, 1994, p 3.
5 MAB/MIAC Report No 18, *Achieving Cost Effective Personnel Services*, 1995, p 85.
6 Philippa Smith (Commonwealth Ombudsman), "Form vs. Substance", in Kathryn Cole, ed, *Administrative Law and Public Administration: Form vs Substance*, 1996, p 339.
7 Nicholas Seddon, *Commonwealth Contracts: Federal, State and Local*, 1995, p 31.
8 M Allars, "Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises", *Public Law Review*, Vol 6, 1995, p 44.
9 Seddon, op cit, p 49.
10 The Hon Geoff Prosser MP, Minister for Small Business and Consumer Affairs, Media Release, "Government Service Charters", 14 August 1996.
11 M Freeland, "Government by Contract and Public Law", *Public Law*, Vol 86, 1994, p 103.
12 Joanna Mullins, "Handling Complaints Related to Government Services Delivered by Contract", in Kathryn Cole, ed, *Administrative Law and Public Administration: Form vs Substance*, 1996, p 225.