REFORM OF ADMINISTRATIVE LAW

The Hon David K Malcolm AC[*]

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Introduction

I am very pleased to have been invited to speak to you this evening on the reform of administrative law. Despite recommendations by a number of law reform bodies since the 1970s, legislative change to judicial review of administrative decisions has been slow. Calls for reform have been made on at least three discernible bases. The first is the need to clarify and unify existing avenues of appeal. The second is the need to develop uniform and streamlined appeal procedures which will assist, rather than hinder, applicants for review. The third has been more recently identified as being an important aspect of reform and is, to an extent, an extension of the first two, namely, the need to assist in-person or unrepresented litigants in seeking administrative review.

Despite unified themes being discernible in the moves for reform, there are divergent opinions on the object of reform. Proposals for reform have advocated either an appellate body within the court system or an appeal body external to the existing structure. Much of the source of this divergence in opinion arises out of the conceptualisation of the separation of powers and the role of the courts in the review of administrative decisions on the merits. I would like to start this evening by developing these observations in calls for reform since the early 1980s.

WA Law Reform Commission's recommendations

It is now 16 years since the Western Australian Law Reform Commission produced its report entitled *Review of Administrative Decisions*.[1] The Commission's Working Paper[2] and Report examined the various methods of seeking review of administrative decisions and concluded that the inconsistencies in procedure between the various statutory schemes was the result of an *ad hoc* approach by the legislature.[3] The defects in the existing statutory arrangements created a system of review that was unco-ordinated, inconsistent and unsystematic. The Commission found that there were more than 43 appellate bodies. The Commission's report identified three main defects:

- Appeal arrangements did not, in many cases, provide for questions of law to be ultimately determined by the Supreme Court.

- The arrangements incorporated inconsistencies and an unjustifiable variation in the rights of appeal from the decisions of bodies with similar responsibilities.

- There was no unified code for the conduct of appeals.

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1 Western Australian Law Reform Commission, *Report on Review of Administrative Decisions - Part 1 - Appeals*, Report No. 60, (WALRC; Perth, 1982), (hereinafter WALRC Report I).

2 Western Australian Law Reform Commission, *Review of Administrative Decisions - Part 1 - Appeals - Working paper and Survey*, Paper No. 53, (WALRC; Perth, 1978) (hereinafter WALRC Report I).

3 *Working Paper*, ibid, para 4.1; WALRC Report I, id, para 2.19.

The Commission recommended the development of an appeals system which consisted of the Full Court of the Supreme Court, an Administrative Division of the Supreme Court, an Administrative Law division of the Local Court and the retention of a number of specialised appeal tribunals.[4] Under the proposed system, an appeal against an administrative decision would lie either to the Administrative Law Division of the Local Court, in the case of appeal jurisdictions conferred on the Local Court or Courts of Petty Sessions, or the Administrative Law Division of the Supreme Court in the case of appeal jurisdictions conferred on the Supreme Court and District Courts. An appeal of a point of law would lie to either body with provision for consideration by the Full Court.[5]

In addition, the Commission recommended that in the establishment of this regime, the following measures should be included:

(a) Provision be made for the appointment of lay members with particular qualifications to sit in the Administrative Law divisions where appropriate.
(b) The appellate body should have the power to affirm, vary or set aside the decision, substitute its own decision for that of the original decision-maker or remit the matter for reconsideration.
(c) The Supreme Court Administrative Law Division should have the power to remit a matter to the Local Court Administrative Law Division and *vice versa*.
(d) A unified code of procedure be adopted, including a requirement to furnish reasons for the making of an administrative decision, and that appellate bodies not be bound by the laws of evidence.[6]

It is implicit in the Commission's report that jurisdiction to review administrative decisions on the merits should be conferred on the courts, rather than an external review body. The question of the separation of the judiciary and the executive in administrative decision-making was not however directly dealt with, the Commission referring only to the appearance of independence which would be encouraged by the creation of appellate jurisdiction within the Court rather than by an extra-judicial tribunal.[7] What is clear, however, from the report is that the Commissioners considered that functions of an AAT-style tribunal could be incorporated within the existing court structure. The Commission dismissed concerns over expense and formality as not being reasons for the establishment of a separate body.[8] The Commission considered that the demonstrated flexibility of the courts meant that issues such as policy review, consistency, specialisation and the appointment of lay members could be incorporated into an administrative division of the existing court structure in accordance with its recommendations.[9]

By 1984, all of the recommendations of the Commission had been adopted by the attorney-general and cabinet of the day. My understanding was that in December 1984, while the drafting of legislation was deferred, cabinet decided that ministers should provide the attorney-general with information concerning existing rights of appeal.

Law Reform Commission's second report

The Law Reform Commission's original report was supplemented in 1986 with the publication of the *Report on Judicial Review of Administrative Decisions: Procedural Aspects*

4 WALRC Report I, id. Recommendation 1.
5 WALRC Report I, op cit. Recommendations 4 and 5.
6 WALRC Report I, op cit. Recommendation 12.
7 Id at para 4.20.
8 Id at paras 4.12 and 4.13.
9 Id at paras 4.14 to 4.21.

and the Right to Reasons.[10] This second report gave closer attention to difficulties in the procedures applicable to judicial review of administrative decisions. The Commission's report identified the following problems:

(a) An applicant was forced to choose between a number of remedies of uncertain scope which could not be joined together.
(b) The uncertain scope of existing remedies was exacerbated by different rules of standing to sue, and different time limits for those remedies.[11]
(c) A lack of interlocutory proceedings in an application for a prerogative writ could result in inadequate information being brought before the court.[12]
(d) A claim for damages could not be joined to proceedings for judicial review.[13]

In order to overcome these problems, the Commission recommended the introduction of a procedure which would allow for a person to apply for judicial review by an ordinary civil action which could be combined with an application for declaratory relief or an injunction or with an action for damages. For example, if an applicant sought one remedy, and the law allowed for another, the court would be entitled to award an appropriate remedy. A compulsory directions hearing was recommended in order to 'screen' applications and ensure an expeditious hearing.[14]

These recommendations were adopted by the attorney-general of the day in 1986. I was informed that cabinet had approved the drafting of a Bill to provide for judicial review of administrative action based upon the Commission's recommendations. I was told that ministers would be required to provide up to date information on appeal procedures in order to assist with the drafting of a comprehensive Bill. Not long afterwards, the Minister for Planning recommended that the Town Planning Appeal Tribunal which the Commission had previously suggested be included in the jurisdiction of the proposed Administrative Law Division of the Supreme Court and that specialist assessors be appointed to the Court on a full or part time basis. These recommendations were adopted by the government of the day in December 1986.

Supreme Court and Law Society responses

In the context of reform within the court, in June 1988, a Supreme Court Planning Committee, chaired by the Hon Justice Brinsden was established to consider the implementation of the Commission's recommendations. The Committee was established with the primary purpose of encouraging the government of the day to push on with the enactment of the proposed legislation. Despite adoption of the Commission's recommendations, and having expressed the intention to pursue their implementation, no further action was taken by government to implement the Commission's recommendations.

In 1992, I chaired the seminar conducted by the Law Society of Western Australia on *The Reform of Administrative Law in Western Australia*. At that seminar, it was clear that little or no action had been taken by government in the area. At that seminar there appeared to be a difference of opinion between the Law Society's Courts Committee and the Administrative Law Committee. The Administrative Law Committee favoured the creation of an external appeals body, similar to the Commonwealth Administrative Appeals Tribunal. My impression, however, from discussion with the chairmen of the respective committees was that the

10 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons*. Rep No. 26 - Pt II. 1986 (hereinafter WALRC Report II).
11 WALRC Report II, ibid, para 3.2
12 WALRC Report II, id para 3.6.
13 WALRC Report II, id, para 3.8.
14 WALRC Report II, op cit, para 5.9.

differences were more apparent than real. I encouraged the two committees to meet. Subsequently, a joint submission was prepared and presented to me by the Law Society's Courts and Administrative Law Committees in mid-1992. The joint submission was adopted by the Law Society Council as outlining the preferred option for reform in Western Australia. The Society's submission raised the need for consideration to be given to unrepresented litigants seeking review. The Society's view at that time was that any new appellate body be established within the court structure, rather than external to it.[15]

In a media release at the time of the Law Society seminar, the attorney-general indicated that it was unlikely that legislation would be enacted at that time. The attorney-general identified the enormity of the task of rationalising appeal procedures under the various statutes as precluding enactment of the legislation in the short term.[16] It appeared that a major difficulty was also the unwillingness on the part of individual ministers to surrender the perceived power which they had in relation to administrative decisions to a single appellate structure. It also came to my attention that the draft legislation had become bogged down in the process of obtaining comments from individual departments.

Royal Commission comments on administrative law reform

In November 1992, the Royal Commission into the Commercial Activities of Government and Other Matters[17] reported to the Governor. Under the heading of "Accountability", the Commission recommended *inter alia* that the Law Reform Commission's 1982 and 1986 recommendations be enacted "forthwith".[18] The Royal Commission however recommended that administrative review should be conducted by a body distinct from the courts.[19]

More recently, the Commission on Government considered judicial review of administrative decisions as a specified matter. The Commission's report[20] reviews the public submissions received and highlights the repeated calls for independent, informal review of administrative decision making on the merits. In this respect, the Commission on Government report is not far removed from the Law Reform Commission's reports. The submissions received by the Commission on Government mirror the findings of the Law Reform Commission with regard to the inconsistency and lack of uniformity in appeal procedures as between the various legislative arrangements.

The Commission on Government's report did not however go beyond the recommendations of the earlier 'WA Inc' Royal Commission to consider the merits of the establishment of a separate review body as against a division of the existing court structure. Instead, it simply recommended the establishment of a separate Administrative Review Tribunal to conduct review on the merits. This was despite the question of the creation of a separate review body being directly raised in a submission by the then State Ombudsman, Mr Robert Eadie. Mr Eadie said in his submission:

> In essence, while I believe that a body such as the Commonwealth AAT may well be appropriate in the Federal sphere, and do not dispute the need for rationalisation (and some amalgamation) of the structure and functions of tribunals and the current system for review of administrative decision in Western Australia, I am not convinced that the establishment of an additional, possibly expensive and

15 Law Society of Western Australia (Courts Committee/Administrative Law Committee), *Submission*, (1992), p 3.
16 Media Statement. Attorney-General, 5 March 1992; Reproduced in Law Society of Western Australia. Seminar Papers, *The Reform of Administrative Law*, (1992).
17 Western Australian Royal Commission, *Report into the Commercial Activities of Government and Other Matters*, (1992).
18 Ibid at para 3.4.8.
19 Ibid at para 3.5.2.
20 Commission on Government, *Report No. 4*, (1996).

> bureaucratic structure to deal with administrative matters will necessarily [remedy] the deficiencies identified by the WA Law Reform Commission and the WA Inc Royal Commission in its Second Report.[21]

1996 Review of Tribunals

A more detailed review of proposals for the reform of judicial review in Western Australia has recently been completed by Commissioner Gotjamanos entitled the *Report of Tribunals Review*.[22] The Review was commissioned in 1994 by the incoming state coalition government. Starting from a similar point to that of the first Law Reform Commission report, the Review found that there were 56 different tribunals acting exclusively or almost exclusively as appellate bodies. The Review found that the review of administrative decisions remained plagued by the same problems which had been identified in successive reports, namely, inconsistency in procedure and diversity in purpose.[23] The Review's recommendations were thereby grounded in the first two bases I have identified. For the first time, the Review was also able to provide estimates with regard to the operation of diverse tribunals, thereby giving greater weight to arguments for rationalisation as a method of improving efficiency.[24]

The Review also supported its recommendations by reference to the *Access to Justice* Report published in 1994, sometimes referred to as the "Sackville Report".[25] That Report was principally concerned with the simplification and rationalisation of the justice system in order to improve access, particularly for unrepresented litigants. The Tribunals Review adopted the observations by Sackville that:

> [A]n administrative justice system fails if it does not provide:
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> - a comprehensive, principled and accessible system of merits review;
> - a requirement that government decision makers inform persons affected by government decisions of their right to review;
> - a simplified judicial review procedure by comparison to judicial review under the common law;[26]

With regard to the needs of unrepresented litigants, the 1998 Australian Law Reform Commission terms of reference on the *Review of the Adversarial System of Litigation* has also placed some emphasis on the need to simplify appeal processes. The Commission's Issues Paper, entitled *Federal Tribunal Proceedings*,[27] deals exclusively with applicants for review of decisions of federal tribunals. The issues raised by the Commission are however of broader application. For example, the Commission identifies the following problems arising in review proceedings:

- Frequent non-appearance by applicants and requests for adjournments.
- Failure to specify the grounds on which the applicant relies for review of the tribunal's decision.
- Failure by the applicant to understand the nature of judicial review, in particular, attempting to obtain review on the facts.
- Consequent adverse costs orders against disadvantaged applicants who have pursued hopeless cases.[28]

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21 Eadie R, Submission to the Commission on Government, (1996) at p 4.
22 Commissioner Gotjamanos, *Report of the Tribunals Review to the Attorney General*, 1996.
23 Ibid at pp 83-85.
24 Id at pp 87-90.
25 Access to Justice Advisory Committee/Sackville R, *Access to Justice: An Action Plan*. (AGPS, Canberra, 1994).
26 Ibid at p 323; Review op cit at p 72.
27 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Federal Tribunal Proceedings*, Issues Paper No. 24, (AGPS; Canberra, 1998).
28 Ibid at para 13.43.

The Tribunals Review recommended the establishment of a separate review body rather than a division of the existing court structure. The Review revisits the arguments advanced, considered and dismissed by the Law Reform Commission.[29]

Where to from here?

In summary, it is clear that there is a broadly acknowledged need for reform. That need has traditionally been expressed with reference to two broad justifications, namely, the need to clarify and unify existing avenues of appeal and the need to develop uniform and streamlined appeal procedures which will assist, rather than hinder, applicants for review. Despite the acknowledgment by successive governments that there is a need for legislative reform, little has been actively achieved. More recently, the need for reform has been linked with the needs of unrepresented litigants and calls for access to justice generally. I will return to this final element shortly in the context of reform to procedure.

In the context of reform, there is a need to clarify and discuss the merits of establishing a review body which is separate from the courts, in particular, with regard to review on the merits. The reports which follow the original Law Reform Commission recommendations do not deal with the Commission's proposal that flexibility, informality and expertise are elements which can be incorporated into an Administrative Law Division of the Local and Supreme Courts opting instead for the Commonwealth and Victorian AAT models. In the last decade the courts have demonstrated a great capacity for reform and innovation as well as flexibility in relation to matters of procedure.

Leaving aside the question of how reform will be implemented, it would appear as though the process of legislative reform has again stalled. The present morass of administrative appeal structures remains. The position is largely unchanged since the Law Reform Commission published its report in 1982. The need for reform continues to increase, particularly in relation to access to review by unrepresented litigants. We need to actively consider all of the issues that I have outlined this evening and re-start the process of reform.

Proposed reform of court procedure

In the context of the reform of procedure, upon my appointment as Chief Justice, I established the Supreme Court Rules Review Committee to conduct a comprehensive review of the *Rules of the Supreme Court*. Draft Rules were subsequently prepared in 1995-1997 by a consultant to the Committee, Mr David Newnes. Since the latter part of 1997 the Supreme Court Rules Committee has been reviewing the Newnes Draft in detail to prepare a final draft with a view to harmonisation wherever possible with the rules of other Courts and the Federal Court in particular. It is expected that the final draft will be ready shortly. Two matters which have been addressed by the Committee are the reform of the present procedure relating to prerogative writs and the development of a single form of originating process.

With regard to the procedure which applies to prerogative writs, the consultant recommended no change be made to O.56, suggesting that legislative reform was required before substantial change could be made to the Order. The Committee have not accepted this recommendation and have identified a number of aspects of the present procedure which require reform. For example:

- It is unnecessary, in most cases, for the Full Court to deal with applications for prerogative relief at first instance.

29 Review, op cit at pp 41 et seq.

- The long-standing complaints concerning the unavailability of 'discovery' in applications for prerogative relief should be acknowledged. Although discovery may not be necessary where the application is based upon an assertion of an error of law on the face of the record, there may be some scope in the context of a jurisdictional error or failure of natural justice.

- The present rules do not allow for more than one type of relief to be claimed in the same application. A form of originating process which has more universal application would assist an applicant and the Court in fixing an appropriate remedy. For example, a universal form of application would avoid a situation in which an application is dismissed because an applicant has sought a writ of *mandamus* when the appropriate remedy is a writ of *certiorari*. Alternatively, it would allow for an application for both prerogative relief and some other remedy such as a declaration.

Amendments to O.56 are currently being given further consideration by the Committee to deal with these matters. In particular the Committee is considering the most appropriate form to be a single form of originating process. The present proposal which is currently being considered by the Committee is the adoption of a form of 'Application' similar to that in use in the Federal Court. The application will be in two forms, *inter partes* and *ex parte*. The application will contain either:

(a) an endorsement of claim sufficient to give, with reasonable particularity, notice of the grounds and nature of the claim and of the relief sought; or

(b) a statement of claim.

What is then proposed is a single form of procedure. The applicant would be required at the commencement of the proceedings to make an election whether to have the matter dealt with as if an action or on affidavit. The matter will then be referred to a Case Management Registrar who will assess the election made by the applicant and may direct that the matter proceed in the appropriate manner.

The key to this proposal is the adoption of a greater degree of flexibility within the present system. The distinction which is currently drawn between an action determined on oral evidence and a matter determined on affidavit evidence should no longer be so rigidly applied. For example, it may become apparent in a matter which has proceeded by way of affidavit that there are discrete areas of dispute between the parties. An order could then be made directing oral testimony in relation to those areas alone. The evidence which is presented may be a combination of affidavits, oral testimony and cross-examination. Prerogative relief still does not sit comfortably with the proposed amendments. The Committee is currently considering making all applications for prerogative writs to be by way of the same form of application and subject to a similar procedure but returnable first instance before a single judge.

The procedure which I have outlined remains in draft form and the subject of ongoing discussion and consideration by the Committee. It does not represent the 'final word' on amendments to the Rules. The proposal does however have considerable merit in implementing the recommendations of the 1986 Law Reform Commission report and simplifying the procedure which applies to prerogative writs.