Endnotes

1 For background, see ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, May 2003. The HRA does, however, depart in significant respects from the recommendations in this report.
2 *Entick v Carrington* (1765) 19 St Tr 1030 is widely regarded as the seminal case. Some judges now wish to substitute a narrower concept; see n 4 below.
3 Ibid at 407.
4 This substance is now sometimes subsumed under another use of the principle of legality; see JJ Spigelman, 'Principle of legality and the clear statement principle' (2005) 79 ALJ 769 at 774-776.
5 See *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 321-322 [103]-[105] (Kirby J).
6 Spigelman, n 4, at 775 provides a useful list, and more generally see P Bayne, 'The protection of rights – an intersection of judicial, legislative and executive action' (1992) 66 ALJ 844.
7 See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 414 [28]-[31] (Kirby J) for the various ways this step is justified.
8 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 492 [30], (Gleeson CJ). In *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 the High Court held that the Parliament of New South Wales had clearly authorised the Governor to make 'arrangements' for compensation for the acquisition of property which were not just or adequate in terms of the common law presumption that property not be taken except on this basis; see at 414 [28] and [31], and 417 [36] (Kirby J). Judges do however differ as to what rights are within the common law conception, and what is required by way of statutory provision to displace them. In *Malika Holdings Pty Ltd v Stretton supra*, compare the reasoning of McHugh J at 298-299 [26]-[31] to that of Kirby J at 328 [121], and 332 [130]-[131].
9 AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, MacMillan, 1920) pp 191-192.
10 The unreasonableness ground of review has long been a vehicle for protecting rights. In *Kruse v Johnson* [1898] 2 QB 91 at 99-100 Lord Russell of Killowen CJ said that local authority by-laws might be unreasonable if 'they were found to be partial and unequal in their operation between different classes...[or] if they involved ... oppressive and gratuitous interference with the rights of those subject to them...'.
11 *Ex parte Grinham; re Sneddon* [1961] SR (NSW) 862 illustrates how this technique may be employed to read a statutory power restrictively out of a desire to protect a common law right. A power to make regulations under a scheme governing the regulation of public vehicles, which was wide enough to permit the creation of new offences, was held to be insufficient to authorise a regulation which made it an offence to fail to provide information. The statutory power did not plainly authorise displacement of the common law right that a person should not be required to be her or his own accuser.
12 This proposition applies to decision-makers in all Australia jurisdictions, although in somewhat different ways, depending on the higher laws operating in the particular jurisdiction. The High Court is not sympathetic to the argument that 'rights' limitations can be spelt out of the grant of legislative power to a State or Territory parliament to make laws for the 'peace, order and good government' of the jurisdiction; see *Durham Holdings* n 8. Compare to developments in the United Kingdom, discussed in A Twomey, 'Implied limitations on Legislative Power in the United Kingdom' (2006) 85 ALJ 40.
13 For example, in *Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 195 at 209-213 Pincus J held that Constitution s 116 (the guarantee of the free exercise of religion) required that the Minister take certain matters into account in the exercise of a power to grant (or not) a person permanent residence in Australia.
14 The right to political free speech has ramifications for the way administrative power may be exercised. The *Irving* cases illustrate the complexities of bringing this right to bear on an examination of administrative power; see *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 44 FCR 540, and *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84; see generally, L Maher, 'Migration Act Visitor Entry Controls and Free Speech: The Case of David Irving' (1994) 16 Syd LR 358, and P Bayne, 'David Irving, and the Federal Court and Free Speech', (a paper delivered to the seminar Silencing and Censorship in Australian Culture, Humanities Research Centre, ANU, 28 February 1997.)
15 In some contexts, it is very difficult to work out just what is the extent of s 23(1); see *Australian Capital Territory v Pinter* [2002] FCAFC 186. See too s 69(1) of this Act: 'Subject to subsection (2), trade, commerce and intercourse between the Territory and a State, and between the Territory and the Northern Territory, the Jervis Bay Territory, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands, shall be absolutely free'. Thus, administrative action which impinged on the freedom of 'trade, commerce and intercourse' would be invalid; compare *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.
16 These numbers refer to the relevant section of the *Human Rights Act 2004*.
17 All of the HRA rights are within the common law conception of what rights deserve protection, but that conception is much broader than the HRA statement. For example, the principle that a law, or the exercise of a legal power, should not operate retrospectively is stated in the HRA s 25 in respect only of criminal laws. Despite HRA s 7, there is a risk that the HRA statement of rights will diminish the significance of those common law rights not recognised in the HRA.
18 This fundamental point was missed by the Territory Administrative Appeals tribunal in *Merritt and Commissioner for Housing* [2004] ACTAAT 37; see P Bayne, 'The Human Rights Act 2004 (ACT) – Developments in 2004' (2005) 8 Canberra LR 137 at 165-166. A similar result follows under the New Zealand and Canadian bills of rights; see P Rishworth, 'Interpreting Enactments: Sections 4, 5 and 6' in P

CHALLENGES WHEN OUTSOURCING LEGAL SERVICES

Ian Govey*

I was fortunate last month to hear the UK Lord Chancellor deliver a wide-ranging talk in Sydney. One of his major themes was the rule of law, in particular, the critical role the Courts play in exercising jurisdiction over the Executive and thus defining and restraining the conduct of the Executive.

It is interesting that the critical role played by legal advisers to government in ensuring the Executive adheres to the rule of law is seldom referred to. In one sense this is understandable – because the role is largely hidden from notice. But, in a day to day sense, the government's legal advisers play a more critical role in achieving adherence to the rule of law than the judiciary.

Of course, government legal advisors do more than advise on what the Executive can and cannot lawfully do. Handling various forms of dispute resolution and assisting in commercial transactions are other key roles.

There have, of course, been fundamental changes over the last 10-15 years in the way legal services are provided to government.

We have gone from a highly centralised system when virtually all legal work for most agencies was directed to or through AGS, to one of almost complete freedom of choice. Except for the very small areas of 'tied work', agencies have freedom to choose between AGS, private law firms, barristers or, with the further exception of litigation, in-house lawyers.

The requirement that 'tied' work be performed by government lawyers, primarily AGS, probably applies to only around 2-3% of the current external legal services market.

The few limitations on agency autonomy, including the requirements for handling tied work, are set out in binding rules issued by the Attorney-General under the *Judiciary Act 1903* – the Legal Services Directions 2005.

The previous framework was set by the provider of the legal services and contained in the Crown Solicitor's and then AGS's legal practice manual which was largely an internal set of procedures. By comparison, the Legal Services Directions enable greater accountability. Unlike the previous system, where the controls rested essentially with AGS and before that the Crown Solicitor's Office, the Legal Services Directions impose the primary compliance obligation on the client agency within the Australian Government.

The policy and regulatory role in relation to the rules for government legal services is now the responsibility of the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department.

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The dismantling of the previous monopoly service provided by AGS and the Crown Solicitor's Office should not be allowed to detract from the many good aspects of their work. However, in major respects, they were not in a position to provide the level of service, both as to quality and timeliness, that agencies needed. Resourcing problems meant that salaries, office support and management systems fell behind the private sector. A 'free service' meant that other means of rationing the service were used. I remember hearing of advices delivered over a year after the request. Responsiveness to client needs was not as high a priority as it might have been.

In essence, legal services were often delivered in a form and at a time determined by the needs of the lawyer. This is best illustrated by the common complaint at the time that legal advice tended to be couched in terms of 'your question as I have rephrased it' – so that agencies were given the answer the Department wanted to give them to the question the Department thought they should be asking, rather than the question they may actually have been seeking assistance with.

Over recent years probably no area of government expenditure has been the subject of more scrutiny than legal services. We have had:

- the Logan review which led to the current structure being implemented in 1999
- the 2003 Tongue report which evaluated these reforms and provided valuable recommendations for improvement, and
- the 2005 ANAO report on Commonwealth legal services to which I will refer shortly.

In addition to these formal reviews, numerous questions on notice and extensive media commentary have focussed on the Commonwealth's management of its legal services. The current system has stood up very well to this scrutiny.

It has probably three key advantages:

1. the separation of the role of the legal services provider from the role of the regulator;
2. the ability of agencies to choose their provider and the corresponding agency accountability, and
3. the flexibility and freedom for AGS to conduct its business largely as it sees fit in meeting client needs.

The result is that the provision of government legal services is largely determined by ordinary market forces – based on price and quality.

What are the ongoing challenges?

I see four essential requirements for the successful delivery of legal services to government:

1. sufficient high-quality providers of government legal services to assure a competitive market;
2. a high quality government provider;
3. well informed and responsive clients, and

presented to the Legislative Assembly by a Minister. In respect such a bill, the Attorney 'must prepare a written statement (the compatibility statement) about the bill for presentation to the Legislative Assembly': s 37(2). That statement must state 'whether, in the Attorney-General's opinion, the bill is consistent with human rights' (s 37(3)(a)), and, 'if it is not consistent, how it is not consistent with human rights' (s 37(3)(b)).

Section 38 is obviously linked to s 37, but its scope of operation is not confined by it. Section 38(1) provides:

> 38 Consideration of bills by standing committee of Assembly
> (1) The relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

As matters stand in January 2005, the relevant Committee is the Standing Committee on Legal Affairs (performing its role as a Scrutiny of Bills and Subordinate Legislation Committee). In this role, the Committee is referred to as the 'Scrutiny Committee'.

The Committee has long been concerned about the privative clause, and in recent reports it has buttressed its long-standing concern that a private clause is an undue trespass[49] on rights by pointing to HRA s 21(1).[50] It has also pointed[51] to the possibility that the power of the Assembly to restrict judicial review is limited by s 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*, which might be read in a fashion similar to s 75(v) of the *Constitution*.[52] For some time the government resisted the view that the privative clause was problematic, but may now be conceding that it is undesirable.[53]

Conclusion

This brief and necessarily somewhat speculative review of the impact of the *Human Rights Act 2004* on administrative law in the ACT warrants at least a recognition that we may be on the brink of a substantial re-working of the principles of administrative law.

The review also raises a question whether, at least in respect of the way it impinges on the exercise of administrative power, the proponents of the HRA adopted an appropriate model. Section 21(1) is a quite unsatisfactory way to state principles to govern the exercise of administrative power.[54] Its language is obscure, and if (combined with s 28) it is applied according to the European theory outlined above, its effect will be very difficult to explain. This is likely to obstruct human rights dialogue.

An alternative formulation of the principles which may be inherent in s 21(1), is found in s 27 of the *New Zealand Bill of Rights*:

> 27. Right to justice. – (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's right, obligations, or interests protected or recognised by law.
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
> (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Section 27 deals with the problem of administrative power directly and in words that are easily grasped by the common lawyer, and indeed by administrative decision-makers and the public. It commends itself as a preferable statement to that found in HRA s 21(1).

Rather,

> the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact (at 454 [59]).

Lord Hoffman offered some more general guidance as to how a court should assess whether a particular decision-making scheme coupled to some form of judicial review was Art 6(1) compliant. He cited 'the great principle' which *Bryan v United Kingdom* (1995) 21 EHRR 342 at 360 [45] decided, being that

> in assessing the sufficiency of the review ... it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal ([2003] 2 AC 430 at 451-452 [51]).

He concluded with a statement of a deference principle:

> I entirely endorse what Laws LJ said in [*R (Beeson's Personal Representatives) v Secretary of State for Health* [2002] EWCA Civ 1812, (unreported) 18 December 2002], at paras 21-23, about the courts being slow to conclude that Parliament has produced an administrative scheme which does not comply with constitutional principles (at 454 [59]).[45]

At its most general level, the theory spelt out in *Runa Begum* is quite mystifying. The notion that 'the procedures, viewed as a whole, provide full jurisdiction to deal with the case as the nature of the decision requires' is devoid of significance. The somewhat more precise guidance provided by the 'great principle' of *Bryan*, even as elaborated by some United Kingdom caselaw,[46] still leaves to the judiciary much room for choice when ruling upon the adequacy of a particular administrative decision-making regime. This theory confers on the ACT Supreme Court an extensive power to re-fashion the principles of administrative law, and to decide just how far its jurisdiction to review the legality of administrative action can be modified. This result is, however, of a kind which flows from the enactment of a law like the HRA.

One important matter is clear. The assessment of whether the derogation from s 21(1) is justified under s 28 will turn critically on the ability of the person affected to seek legality review of the decision from a court. In relation to this last matter, in *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 at 328 [81] Lord Hoffman said that the European Court saw Article 6(1) 'as a means of enforcing minimum standards of judicial review of administrative and domestic tribunals', adding:

> The cases establish that article 6(1) requires that there should be the possibility of some form of judicial review of the lawfulness of an administrative decision (at 329 [84]).

Clearly, HRA s 21(1) will provide another platform for challenge to the privative clause, although not perhaps as effective as other platforms.[47]

On any view, there is much grist in s 21(1) for the mills for academic administrative lawyers and practitioners. As yet, s 21(1) has not fallen for analysis by the ACT Supreme Court. Its effect has, however, been addressed by the Territory 'Scrutiny of Bills Committee', in particular where a Bill contains a privative clause. The role of the Committee in relation to the HRA deserves a brief note.

The Scrutiny of Bills Committee and privative clauses

HRA Part 5 is headed 'Scrutiny of proposed Territory laws', but the operative provisions apply only to bills (and not, thus, to proposed subordinate laws),[48] and, furthermore, only to bills

4. an effective facilitator and regulator of the market.

My aim now is to provide an assessment of where I see the greatest challenges to the delivery to government of quality legal services, taking into account these four criteria.

1. High quality providers in competitive market

Clearly, the operation of an effective market would be at risk if too few good firms were available to supply legal services to government. A couple of major firms have closed their Canberra offices in recent years. Whether they were major providers for government is perhaps open to debate. More importantly, however, all the available information suggests that strong competition exists in providing legal services to Commonwealth agencies.
Issues do arise from time to time about agencies obtaining the best value for money and ensuring they are not over-serviced – but these appear to relate more to individual matters, rather than to the market as a whole.

For private law firms there are no doubt risks relating to their ability to develop and maintain expertise in government law. These risks will be greater if the rewards do not provide sufficient incentive to focus on this area or if staff turnover makes it difficult to maintain the expertise. While isolated instances may arise of such risks being realised, there is nothing to give rise to systemic concerns.

2. Good quality government lawyer (AGS)

For AGS the greatest challenge probably revolves around the need to maintain its unique expertise in meeting the legal needs of the Commonwealth Government and its agencies.

It is worth recalling one fundamental point about AGS which was emphasised in the former Attorney-General's speech introducing the Bill to set up AGS as a separate statutory authority:

> The AGS is not, and cannot be, the same as privately owned law firms. Its unique value to government is based on its government ownership and its expertise in delivering legal services to government clients... The public interest served by having the AGS undertake this role is not inconsistent with having the AGS operate at the highest level of efficiency and making a profit as a government business enterprise.

There are some who query whether a new generation of AGS lawyers will match the expertise of their predecessors in servicing government, especially in the highly critical and sensitive areas. Some who express concerns of this kind believe that AGS's ability to handle constitutional, cabinet and other sensitive issues has been diminished by their separation from the Attorney-General's Department.

The Attorney-General and the Department would be very exposed if AGS's expertise in these areas were diminished.

The impact of the split of AGS and the Department on the handling of these areas of work, especially constitutional law work, is difficult to assess. However, in my view AGS would have struggled to be viable if it did not provide services on constitutional law and other 'core' areas – they are what make AGS unique and indispensable. The advantages of separating AGS from the Department and the need for an ongoing, strong legal services provider able to deliver all legal services required by government, in my view, justified the decision to have AGS handle these core areas. Nothing that has happened since the separation alters this view.

Most importantly, however, our very clear view is that AGS has handled constitutional law and other core government law matters in a very high quality manner since their creation as a separate entity. And there is no reason to doubt its ability to continue to do so.

3. Well informed and responsive clients

Agencies undoubtedly face significant challenges under the current arrangements.

They need to know their needs and the market. They need to make appropriate decisions about how to obtain the best value, which includes applying rigorous scrutiny and management to in-house legal services, as well as the management of external legal services. They need to be vigilant in their handling of particular matters – both in ensuring compliance with the Legal Services Directions and in making judgements about their handling of those matters.

Of course, these risks 'come with the territory'. They represent the 'flipside' of agencies' benefiting from freedom of choice and the removal of a monopolistic, paternalistic supplier of services.

The ANAO report emphasises the responsibility of client agencies to ensure the efficient and effective purchase of their legal services. The report also found that most agencies do have proper systems in place to manage this process.

Major agencies are increasingly operating under panel arrangements. The competition to be on these panels and then to get work after being selected for a panel is, according to most reports, very strong. There are continuing and we think sensible trends for panels to be somewhat smaller than earlier. This is likely to increase the initial competition to be selected, and make the ongoing management of the panel and relationships easier.

Agencies face obvious challenges in ensuring they get proper and consistent service. Some of these challenges result from agencies spreading work across several firms.

Judicial officers and Tribunal members are in a good position to notice if an agency is adopting a different approach in handling matters solely because a different firm is representing the agency. Informal feedback from a few sources suggests that in some matters some Commonwealth agencies could do better in ensuring consistent practice, especially in handling high volume disputes.

Recent informal indications also suggest that some Commonwealth agencies are seen as taking an unnecessarily hard line in handling disputes, giving rise to concerns about compliance with the model litigant rules.

While I don't want to overstate the concerns arising from this feedback, it does highlight the ongoing need for agencies to be active in monitoring and controlling the way in which their matters are handled. Agencies' lawyers can be expected to play a significant role in ensuring high quality services, but the real responsibility rests with each agency. The trend of having fewer firms on panels should make this more manageable.

One point is worth making in light of the occasional publicity about the amount of money Commonwealth agencies spend on legal services. Commonwealth legal expenditure has undoubtedly increased over recent years, although almost certainly not to the extent sometimes suggested. Such an increase does not of itself, in my view, justify criticism that agencies have lost control of their legal expenditure. This growth is equally consistent with the view that legal services providers can add value to new areas of work or existing areas

> when a decision turns upon questions of policy or "expediency", it is not necessary for the appellate court to be able to substitute its own opinion for that of the decision maker. That would be contrary to the principle of democratic accountability. But, when, as in this case, the decision turns upon a question of contested fact, it is necessary either that the appellate court have full jurisdiction to review the facts or that the primary decision-making process be attended with sufficient safeguards as to make it virtually judicial (at 447-448 [37]).

Lord Hoffman rejected this distinction as a helpful guide to deciding whether an administrative decision-making scheme is Art 6 compliant.[40] But he did draw some other distinctions. Dealing with *Bryan v United Kingdom* (1995) 21 EHRR 342, Lord Hoffman said that a finding of fact by an administrator in the context of an enforcement proceeding 'was closely analogous to a criminal trial' (at 448 [41][41]), thus suggesting, it appears, that such a decision was affected by a general principle which he then stated:

> The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to compensate for lack of independence and impartiality on the part of the primary decision maker: see *De Cubber v Belgium* (1984) 7 EHRR 236 (at 448-449 [42]).

On the other hand,

> utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare. … in determining the appropriate scope of judicial review of administrative action, regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament (at 448-449 [42]).

Consideration of these factors in a particular context might justify (in terms of what Art 6(1) requires) a finding that fact-finding may be entrusted to an administrator subject only to a limited degree of judicial review of fact-finding. In this context, review of fact on 'conventional principles of judicial review' (at 451 [50])[42] was appropriate.

Just what degree of judicial review is necessary will depend on the nature of the decision. In the *Runa Begum* context, Lord Hoffman noted that an earlier Lords decision had held that housing authority decisions should not be easily susceptible to judicial review.[43] Less clear is the statement that

> When one is dealing with a welfare scheme which, in the particular case, does not engage human rights (does not, for example, require consideration of article 8) then the intensity of review must depend upon what one considers to be most consistent with the statutory scheme (at 451 [49]).[44]

He described the review officer's decision as a 'classic exercise of an administrative discretion'. That is, 'the decision was arrived at was by the review process, at a senior level in the authority's administration and subject to rules designed to promote fair decision-making' (at 452 [52]). He held that 'the Strasbourg court has accepted, on the basis of general state practice and for the reasons of good administration which I have discussed, that in such cases a limited right of review on questions of fact is sufficient', (at 452 [53]), and that '[i]n the normal case of an administrative decision, however, fairness and rationality should be enough' (at 452 [54]). By the 'normal case', it appears that he referred to decisions in 'areas of the law such as regulatory and welfare schemes in which decision-making is customarily entrusted to administrators', and included decisions which were based on 'preliminary findings of fact' (at 453 [56]).

Thus, Lord Hoffman rejected the notion that

> the test for whether it is necessary to have an independent fact finder depends upon the extent to which the administrative scheme is likely to involve the resolution of disputes of fact. I think that a spectrum of the relative degree of factual and discretionary content is too uncertain (at 453 [58]).

But this development posed a problem. In the practice of the European states administrative decision-making was commonly entrusted to an administrative official who was not 'an independent and impartial tribunal established by law', and whose decision was not subject to a right of appeal on the merits to a court ((at 446 [31] (Lord Hoffman)).[37] On one view, any such scheme did not comply with Art 6(1) because at no stage did a body which was 'independent and impartial' make the decision. To avoid this result, Lord Bingham LC said that this 'elastic' interpretation of the term 'civil rights' this must be accompanied by a 'flexible … approach to the requirement of independent and impartial review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided' (at 439 [5]).

Lord Hoffman noted that in *Kaplan v United Kingdom* the European Commission on Human Rights had

> offered what would seem to an English lawyer an elegant solution, which was not to classify the administrative decision as a determination of civil rights or obligations, requiring compliance with article 6, but to treat a dispute on arguable grounds over whether the administrator had acted lawfully as concerned with civil rights and obligations, in respect of which the citizen was entitled to access to a fully independent and impartial tribunal. By this means a state party could be prevented from excluding any judicial review of administrative action (as in the Swedish cases which I have mentioned) but the review could be confined to an examination of the legality rather than the merits of the decision (at 446 [32]).[38]

Of course, what an examination of the legality of a decision must involve in the particular context would remain for debate, as it does under the theory (see below) which has been adopted. For example, a short limitation period on the availability of review might render the scheme non-compliant.[39]

But the European Court has not adopted the *Kaplan* solution, and in *Runa* Begum the House of Lords confirmed that United Kingdom courts should follow suit. Lord Hoffman does not elaborate, but rejection of this theory might derive from the lack in many European states of a system of judicial review akin to the English system. It is however a solution open to a Territory court in its application of HRA section 21(1), and on the face of it has much in its favour. One matter in favour of the rejected *Kaplan* theory is that the European Court theory is convoluted and mystifying, and yet the result arrived at is close to that produced by the *Kaplan* theory ((at 446 [34], Lord Hoffman).

Lord Hoffman summarised the preferred European Court theory in four propositions:

> first, that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing) court has "full jurisdiction" over the administrative decision. And fourthly, as established in the landmark case of *Bryan v United Kingdom* (1995) 21 EHRR 342, "full jurisdiction" does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in the *Alconbury* case [2003] 2 AC 295, 330, para 87, "jurisdiction to deal with the case as the nature of the decision requires." (at 447 [33], and see for a shorter statement, at 463 [100]-[101] (Lord Millett)).

In relation to the third proposition, Lord Hoffman noted that 'the English conception of the rule of law [which] requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts' is 'accompanied by an approach to the grounds of review which requires that regard be had to democratic accountability, efficient administration and the sovereignty of Parliament' (at 447 [35]). Concerning the application of the third proposition to the case at hand, it was argued by the appellant that

where greater service is needed. Contracting, procurement and policy development all seem to be areas where this has occurred.

The flexibility and ability of the market to meet new demands are, in my view a clear indication of the success of the current arrangements. Interestingly, the legal expenditure detailed in the ANAO report shows that the increases were not disproportionate.

Nevertheless, securing value for money does seem likely to be an ongoing challenge, especially in the current fairly tight labour market. More detailed information about agency legal expenditure is now required under recent amendments to the Legal Services Directions.

The risks relating to value for money are probably greater in relation to solicitors than barristers. Because of the Commonwealth's ability to exercise its purchasing power in engaging barristers the Commonwealth gets very good value overall for its expenditure.

4. Attorney-General's Department role as regulator and facilitator

A major risk will arise if we in the Attorney-General's Department don't properly perform our role in facilitating the operation of the market, if we don't properly help in educating providers and client agencies about their opportunities and obligations under the Legal Services Directions and if we don't actively work to ensure compliance with the Directions.

Agencies and law firms have incentives to ensure they have a high level of compliance. Suspected breaches of the Legal Services Directions are all investigated. Where confirmed they are reported to the Attorney-General and publicised through our annual report and at Senate Estimates. The level of breaches is not high and, while undoubtedly some breaches go undetected, our sense is that the problems are not major. In fact, since 2000 OLSC has reported an average of only about eight breaches a year.

OLSC has enhanced its role in facilitating information sharing between Commonwealth agencies, including through lunchtime forums for legal unit heads, and by acting as a clearing house for sharing information and solutions between legal units of different agencies. .

The ANAO consulted OLSC very closely in publishing in August this year a *Better Practice Guide for Legal Services Arrangements in Australian Government Agencies.* It is a concise, but comprehensive and very useful guide, covering the full range of matters agencies need to focus on - from assessing their needs, purchasing legal services, compliance with the Legal Services Directions, managing relationships and evaluating and reporting on performance.

A major area of increasing focus for us will be the requirement for agencies to avoid litigation wherever possible, especially in some of the more difficult and protracted disputes. This requirement has been strengthened in the recent changes to the Legal Services Directions. OLSC is becoming more active in this area and we are very hopeful that this will continue to lead to positive outcomes.

Another area of activity will be to prepare more detailed guidance on purchasing and tendering. OLSC has contacted the agencies and law firms on its contact list to seek input to this project. OLSC will also be conferring with the Department of Finance and Administration. If you are interested in being involved and have not been contacted please contact OLSC (6250 6424, olsc@ag.gov.au).

Conclusion

My involvement with the reforms and the ongoing delivery of the Commonwealth legal services makes it hard for me to provide an entirely objective assessment. However, the independent reviews, including one by the ANAO and the feedback we receive from agencies and lawyers suggests that overall the current system is working well. It will always be capable of improvement. I've highlighted some of the issues we will be focussing on, and we look forward to doing this in close consultation with agencies and providers.

Where the power to make a decision of a kind encompassed within s 21(1) is not vested in a court or tribunal, or, say, will not be made after a 'fair and public hearing' by a court or tribunal, the relevant ACT law will, on its face, derogate from s 21(1). But the scheme might be found under s 28 to be a justifiable derogation of s 21(1) if, to use the rubric of the UK case-law, 'the procedures, viewed as a whole, provide full jurisdiction to deal with the case as the nature of the decision requires'.[36]

This theory was spelt out by the House of Lords in *Runa Begum v London Borough of Tower Hamlets* [2003] 2 AC 430. Having presented herself as homeless to the Tower Hamlets Council, Begum was provided with temporary accommodation under a non-secure tenancy, terminable upon a month's notice. She was then assessed as eligible for assistance and in priority need. In accord with a statutory duty, the Council offered Begum a secure tenancy, which she refused, citing various reasons. The council then determined that this refusal was unreasonable, and thus had discharged its duty. Begum was given notice to quit the temporary accommodation. Begum then sought an internal review, which in accord with statute was conducted by an officer of the Council who was not involved in the original decision and who was senior to the officer who made it. The Council notified Begum of the procedure to be followed (and in this case she was interviewed by a Council officer) and of her right to make representations in writing. The reviewing officer also decided that Begum's refusal was unreasonable. Begum then exercised her right to appeal to a county court on 'any point of law arising from the decision'. This enabled an applicant 'to complain not only that the council misinterpreted the law but also of any illegality, procedural impropriety or irrationality which could be relied upon in proceedings for judicial review' (at 443 [17] (Lord Hoffman).

Eventually, the House of Lords was called on to consider whether this scheme for decision-making and appeal failed to satisfy the provision in Art 6(1) of the European Convention that in the determination of a person's 'civil rights and obligations' he or she was guaranteed 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

The Lords held that the review officer could not, by reason of her employment by the Council, be regarded as 'an independent and impartial tribunal established by law' (for example, at 438 [3] (Lord Bingham). But did the decision of the review officer amount to a determination of Begum's 'civil rights'? One possible answer was that Art 6 had no application to an exercise of administrative power. This was arguable on the basis that 'the *travaux préparatoires* and other background to the Convention' revealed that

> the term "civil rights and obligations" was originally intended to mean those rights and obligations which, in continental European systems of law, were adjudicated upon by the civil courts. These were, essentially, rights and obligations in private law. The term was not intended to cover administrative decisions which were conventionally subject to review (if at all) by administrative courts. It was not that the draftsmen of the Convention did not think it desirable that administrative decisions should be subject to the rule of law. But administrative decision-making raised special problems which meant that it could not be lumped in with the adjudication of private law rights and made subject to the same judicial requirements of independence, publicity and so forth. So the judicial control of administrative action was left for future consideration (at 445 [28] (Lord Hoffman)).

Nevertheless, the absence of 'addition to the Convention to deal with administrative decisions' led the European Court of Human Rights 'to develop the law' (at 445 [28] (Lord Hoffman)) concerning Art 6 in various ways to the general effect that it applies to much (but not all) administrative decision-making. Some judgments contain analysis of the relevant case-law, but each Law Lord declined to decide this issue, being content to assume that the decision of the review officer was a determination of Begum's 'civil rights'.