F O C U S

The giving of reasons for decisions

The High Court has recently overturned a decision of the New South Wales Court of Appeal that the NSW Public Service Board is obliged to give reasons for dismissing an appeal brought pursuant to section 116 of the Public Service Act 1979 (NSW) - see Public Service Board of New South Wales v Osmond (21 February 1986). In Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447 the President of the Court of Appeal, Mr Justice Kirby, said that the central question in the appeal was "whether the common law imposes an obligation upon the Public Service Board of New South Wales to provide reasons for certain decisions in a promotion appeal in the absence of an express statutory requirement to do so". After comprehensively reviewing the state of the authorities and considering the policy questions involved, he concluded that the broad principle of the common law requiring those who have power under statute to make discretionary decisions to act fairly in the performance of their functions normally imposed on them an obligation to state the reasons for their decisions (p. 467). On this basis he held that the Public Service Board of NSW was required to give reasons for its decision. In a separate judgment Mr Justice Priestley reached a similar conclusion.

On an appeal to the High Court against the decision of the NSW Court of Appeal, the High Court denied that there was any general rule of the common law or principle of natural justice that required the giving of reasons for administrative decisions (see [1986] Admin Review 114).

On the day before the High Court handed down its decision in Osmond, Mr Justice Kirby delivered a speech in New Zealand which, while acknowledging the pending decision of the High Court on the appeal, described the NSW Court of Appeal decision as perhaps the turning point in the development of the common law in the region ("Accountability and the Right to Reasons", Legal Research Foundation of New Zealand, Seminar, Auckland, 20 February 1986). His Honour went on to survey recent developments in the law concerning the giving of reasons. He also drew attention to the policy reasons which favoured the courts taking the step of insisting upon a general rule that those who enjoy statutory power should act in a reasoned way and should, at least when asked, expose their reasons:

> "But the notion that administrators, who are the public's servants, can nowadays exercise power, which the legislature has conferred upon them and, hiding behind their power and their discretions, assert that they need give no reasons (and that it is not their practice to do so) amounts to an unacceptable administrative arrogance. The common law, defensive of our citizens, will not condone it."

The decision of the High Court in Osmond highlights the large question of the proper limits of the power of judges to extend the principles of the common law to circumstances to which they have not previously been applied. Much has been written on this question and it is beyond the scope of this bulletin to enter into the debate (apart perhaps from reminding readers that a similar question has arisen before in an appeal from the NSW Court of Appeal to the High Court, albeit with different judges involved: see Dugan v Mirror Newspapers Ltd (1979) 142 CLR 583).

The possibility of legislative reform was a matter expressly referred to by the High Court in Osmond. It is now up to the New South Wales Parliament whether or not it responds by taking appropriate steps to reform the law relating to the giving of reasons in that state.

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R E G U L A R R E P O R T S

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Administrative Review Council

CURRENT WORK PROGRAM

Access. Stage One of the Access project, Notification of Decisions and Review Rights, is nearing completion. A draft report is to be considered by the Access Committee in April and it is expected that the report will soon be considered by Council.