F O C U S

Seminar - Administrative Law: Retrospect and Prospect

The 'new' Commonwealth administrative law package has now been in operation for over a decade. The Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976 and the Administrative Decisions (Judicial Review) Act 1977 which were shaped by the reports of the Kerr Committee, the Ellicott Committee and the Bland Committee were all in place by 1977 (although the AD(JR) Act did not come into force until 1980). These administrative law reforms, their impact and the future of administrative review in the context of law and practice at the Commonwealth level were assessed recently at a seminar jointly conducted by the Administrative Review Council, the Attorney-General's Department, the Law Faculty of the Australian National University and the Royal Australian Institute of Public Administration (A.C.T. Division).

The seminar was held on 15 and 16 May 1987 at the Australian National University. Entitled 'Administrative Law: Retrospect and Prospect', it was opened by the Secretary to the Attorney-General's Department, Mr Pat Brazil, on behalf of the Attorney-General, Mr Lionel Bowen, MP. Over 300 people attended. The widespread interest in the seminar, and in administrative law generally, was evidenced by the wide range of registrants. They included members of Parliament, representatives from many Commonwealth and state government departments and statutory authorities, members of the legal profession, academics, representatives of welfare and public interest groups and representatives of business.

The seminar program consisted of 5 plenary sessions and two small group sessions. The first plenary session was entitled 'The fading of the vision splendid?'. In that session Professor Dennis Pearce of the Australian National University considered what went before the reforms of the last decade, what it was hoped they would achieve and what had transpired. He described how the lead up to the reforms had seen a questioning of the capacity of traditional means to supervise government decision making. Parliamentary review through the mechanism of ministerial accountability was thought no longer able to meet the needs of individual citizens affected by decisions, and judicial review was technical and costly. The Kerr Committee's report in August 1971 envisaged an interlocking scheme whereby review of Commonwealth government decisions would be provided by an Administrative Court, an Administrative Review Tribunal and an Ombudsman like body - the 'vision splendid'.

Professor Pearce in his address then examined how this vision, as modified by the Ellicott and Bland Committees, was implemented and then modified over the last decade. In a

climate where the system of administrative review is being placed under close scrutiny in respect of its appropriateness and, more importantly, its cost, he concluded that the question that we must consider is not whether we can afford a review system but whether we can afford not to have one.

The second plenary session was entitled 'Crossing the frontier between law and administration'. Mr Lindsay Curtis, Deputy Secretary, Attorney-General's Department, presented an address which dealt with independent review of administrative action by Ombudsmen and review tribunals, in particular the AAT, and the relationship between those bodies and administrative decision makers. Mr Curtis noted that, although originally there was considerable opposition to the administrative law package from the bureaucracy, there is now a good deal of support for it from within departments and agencies. It has led to more open and responsive decision making within Commonwealth agencies. The no-man's land between administration and the law has been largely occupied and the quality of administration and administrative justice has been substantially improved.

However, in Mr Curtis' view, the questions concerning the relationship of administrative review to government policy which were raised in the reports of the Kerr and Bland Committees still remain the most critical issue after 10 years of the new administrative law. In his address Mr Curtis drew attention to the issue of accountability for administrative decision making which requires that decisions are made in accordance with law, that where policy considerations are involved in the making of a decision those responsible for the policy are publicly and politically accountable for that policy, that proper regard is had to the circumstances of each case, that the decision in a case is not influenced by the personal or political preferences or other improper motives of the decision maker and the discretions are exercised in a fair and reasonable manner. In addition to this there is an expectation that the policies of an elected government should be carried into effect so far as they are not incompatible with law. The exercise of a statutory power in a way which would defeat or frustrate the implementation of those policies would not be in accordance with that expectation. The challenge for the future, said Mr Curtis, was to work towards a better understanding of the relationship between review and ministerial accountability in the implementation of government policy.

Commentaries on this address were provided by Judge Rowlands, President of the Victorian AAT and Mr George Masterman QC, NSW Ombudsman.

The third plenary session was entitled 'The price of administrative justice'. The issue was tackled by 3 speakers, Senator Peter Walsh, Minister for Finance, Dr John Griffiths, Solicitor, and Mr Peter Cashman, Director, Public Interest Advocacy Centre. They considered the impact of the reforms taking into consideration matters such as the working of fundamental principles inherent in the Australian system of public administration (including relationships between Ministers and their advisers), and the extent to which resources can be provided to support the system of review brought about by the reforms.

Dr Griffiths said that no other single issue dominates current debate about Commonwealth administrative law more than the comparative costs and benefits of the present system. He warned of the risk, in a climate dictated by an ardent desire to achieve financial austerity, that important questions of principle may become obscured or neglected. He urged that decisions made by government concerning administrative review be made on an informed and rational basis taking into account the benefits as well as the costs; that, if complete administrative justice cannot be achieved, decisions be taken in full knowledge of their likely ramifications for policy objectives underlying the administrative review package; that the full consequences of cost saving be determined in case the decisions actually add to the overall cost without commensurate gains; and that there be full consultation before difficult decisions are made. Dr Griffiths was critical of the procedure of the Task Force on Review of AAT Procedure in this context.

Mr Cashman said that the debate about the cost of administrative review should only take place where there is adequate information available. He said that it was hard to get any facts on the real costs and cost effectiveness of administrative law but from what information was available, although the cost may appear substantial, as a proportion of overall government spending it was minimal.

Senator Walsh commented that an efficiently functioning administrative review system may provide for an equitable resolution of disputes but the costs of such resolution are often substantial and that often one person's equity is necessarily another's inequity. The Senator criticised the nature and cost of some AAT and court decisions. He argued that ultimate power over spending public money must reside with those who have the ultimate responsibility for procuring it, ie, in the hands of the elected government.

The fourth plenary session was entitled '<u>Judicial review and public policy</u>'. A panel consisting of Justice Murray Wilcox, Federal Court, Mr Alan Rose, Secretary, Department of Community Services and Mr Leigh Masel, formerly Chairman, National Companies and Securities Commission, commented on the relationship between the task of judicial review and the formulation of policy by government.

Justice Wilcox said that a court may review government policy for reasonableness and in certain cases may strike down a decision which reflects an unreasonable policy but this course should only be taken with circumspection and only in a clear case. In respect of the argument that policy should never be susceptible of judicial review, his Honour said that for the courts to refuse to intervene in a case where a decision has been based upon a policy that is clearly unreasonable is entirely to subordinate justice to administrative convenience. He concluded that administrators should be left to administer without interference on arguable matters, but they should not be permitted to tyrannise even when they do so as a matter of policy.

Mr Rose disagreed with his Honour's conclusion as to the role of courts in reviewing policy. He said that the executive and the courts have a different approach to decision making and that the way the courts approach the problem may not be appropriate to executive decision making which approaches the problem from the view of what the majority wants.

Mr Masel approached the question of judicial review of policy decisions from the point of a regulatory body. He commented that a body such as the National Companies and Securities Commission has a quasi-legislative power to vary the law to meet the circumstances of a particular case eg through its exemptions. The Commission exercises this discretion according to economic principles and the court should be slow to upset the decisions of a body exercising this type of discretion. In Mr Masel's opinion the courts have been slow to come to grips with the function and practice of such a regulatory body.

The final plenary session was entitled 'Administrative law in prospect'. A panel of Ms Mary Crock, Legal Officer, Ecumenical Migration Centre, Mr David Bennett, QC, and Mr Derek Volker, Secretary, Department of Social Security, examined this topic.

Ms Crock addressed the issue of the impact of the new administrative law on migrants, an area where the dilemma between administrative control and individual justice is perhaps more marked than in other jurisdictions.

Mr Bennett said that there must be a balance in administrative law as to what decisions should be able to be reviewed administratively or judicially. A system under which every decision could be reviewed would require an army of public servants and lawyers to deal with the results. He considered that the administrative structure set up by the Commonwealth had proved eminently satisfactory and, while there were matters which required clarification, injustice had been reduced and there was no sign of the dire floodgate consequences which might flow from the excessive availability of review procedures.

Mr Volker said that the administrative law reforms had, for the most part, worked well. He saw scope for some adjustments in the light of experience but cautioned that, if changes were made, they should not 'throw out the baby with the bath water'.

The small group sessions at the seminar dealt with administrative law in the welfare state; formality in the AAT; internal and first tier review, the Ombudsman, the costs and benefits of freedom of information, the values inherent in judicial review, administrative law as a 'sunrise industry', tribunals and public policy and consultation and public participation in rule making.

The papers presented at the seminar are to be published by the Royal Australian Institute of Public Administration (A.C.T. Division).

REGULAR REPORTS

Administrative Review Council

LETTERS OF ADVICE

Since the last issue of Admin Review (April 1987), the Council has sent 1 letter of advice to the Attorney-General. The subject of the advice was the operation of the Merit Protection and Review Agency. The advice also recorded the Council's views on the Merit Protection (Australian Government Employees) Act 1984.

REPORTS TABLED ON ANTI-DUMPING AND NOTIFICATION OF RIGHTS OF REVIEW

On 3 June 1987 the following reports of the Council were tabled in the House of Representatives by the Attorney-General:

- Report No. 27, Access to Administrative Review: Stage One, Notification of Decisions and Rights of Review;
- Report No. 28, Review of Customs and Excise Decisions: Stage 3, Anti-Dumping and Countervailing Duty Decisions.

CURRENT WORK PROGRAM

Constitution of the AAT. An issues paper and a briefer discussion paper were publicly circulated and open meetings were held in Canberra, Melbourne and Sydney in early July to discuss this matter. A wide range of persons and organisations was represented at the meetings, including AAT members, government departments and agencies, users of the AAT, community legal centres and private practitioners. A draft report is now being finalised.

Access to administrative review. The social security review officer survey, which is stage two of this project, was conducted in May. The outcome was unsatisfactory with fewer reviews reported than had been expected and only a handful of interviews with clients arranged. The Council at its July meeting decided that the review should be conducted again. The Council Secretariat will meet with officers of the Department of Social Security to discuss an appropriate methodology for this survey in an attempt to obtain results which are of greater use to the Council.

Industry research and development and related legislation. The draft report considered by a committee of the Council in April is being prepared for circulation to interested persons.