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FOCUS ARTICLES

Lessons and insights from other common law countries.

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The Administrative Review Council has links with a range of people involved in administrative review in countries around the world. It maintains institutional contact with its closest counterparts in the United Kingdom (the Council on Tribunals) and the United States (the Administrative Conference of the United States) and with the general law advisory bodies in Canada (the Law Reform Commission of Canada) and New Zealand (the Legislation Advisory Committee), which have a particular interest in administrative law and structures. In addition, the Council's mailing lists include individual academics and practitioners of law or public administration from many countries.

The Council derives great benefit from the exchange of information and views which these links encourage and make possible, through correspondence or direct discussion with international experts visiting Australia.

An example of the benefits of exchange was the visit I made to the United Kingdom in September 1990. The purpose of the visit was to join other administrative review advisory bodies at a colloquium in Oxford organised by the Law Reform Commission of Canada. The Commission had brought the group together to assist it in formulating its advice to the Canadian Government on whether an advisory body should be established for Canada and, if so, what form it should take. While in the United Kingdom I also presented a session on the Australian administrative law reforms to an international course on new directions in administrative law offered by the British Council at University College, London and joined other participants from Africa, Eastern Europe, Asia, Canada and the United Kingdom for the remainder of the course.

With hindsight, it was a host of minor things that prompted my reaction at that time and my renewed appreciation of the benefits of comparative work. One which still sticks in my mind was leafing through a report from the Administrative Conference of the United States on its current work program and realising its considerable overlap with the Council's then current concerns: review of refugee decisions; accountability for intergovernmental programs; the extent to which decisions are altered in favour of an applicant after a successful judicial review application. On this last matter the Council had found it surprisingly difficult to obtain sufficient information from which useful conclusions could be drawn. The consultants' study for the Administrative Conference had encountered similar difficulty, but offered a helpful methodology and their own preliminary conclusions as a starting point. (Schuck and Elliott, "To the Chevron Station: An Empirical Study of Federal Administrative Law" cited at page 31.)

On a quite different issue, I was struck by the discovery that the new Constitution of Namibia contained a clause entrenching judicial review of executive action, comparable to section 75(v) of the *Commonwealth Constitution*, but inserted with a much greater degree of deliberation.

Instances of this kind do not provide the basis for a coherent presentation, however, either individually or collectively. This paper is organised around three broad themes prompted by con-

sideration of the insights to be gained from other common law countries, although of course they by no means exhaust the possible field. The themes are first, the need to be cautious before drawing conclusions for one country based on the comparative experience of another; secondly, an assessment of the Australian administrative law reforms in the light of experience elsewhere; and thirdly lessons and insights into the functions and role of the Administrative Review Council itself. While the title of the paper refers to other common law countries, contrasts are also made from time to time with other Australian jurisdictions, from which equally valuable conclusions can be drawn.

Caution with Comparisons

At one level, the issues raised by scrutiny of executive action in very different systems of government appear remarkably similar. In discussions in Thailand shortly after the Council began its rule-making project, for example, executive rule-making without recourse to the legislature was mentioned as an important current problem in that country, without any knowledge of Australian developments. Similarly, the point has been made to me in China that the National Peoples Congress is not alone amongst legislatures in acting as a "rubber stamp". Other differences between these and the Australian system of government are sufficiently obvious to deter close parallels being drawn. Comparisons are more seductive, however, with other common law countries with legal and constitutional systems superficially much the same as ours.

While comparisons can be useful however, as both a source of new ideas and an incentive to lateral thinking, they can also be misleading unless properly based. Administrative law is inseparable from the broader context of the system of government, including its institutional structure, political culture and constitutional framework. Variations in important detail inevitably exist from system to system and will affect the validity of any conclusions drawn unless they are understood and taken into account.

Thus, while the implications of the separation of legislative and executive powers in the United States may not be fully appreciated in Australia, its fundamental principles are sufficiently well-known to suggest caution in comparing procedures for the making of rules by the executive branch and their scrutiny by legislatures or courts.

Further, the implications of the constitutional separation of federal judicial power for the respective roles of courts and tribunals in review of administrative action have only just begun to be recognised in Australia and are not always understood by commentators on the Commonwealth system, even when they come from the perspective of the Australian States.

The need to be wary of comparisons of ideas or institutions without a knowledge of the context in which they have developed was brought home most forcefully, however, in discussions with Canadians about appointments to Canadian tribunals, their relationship with government and the potential for establishment of a general administrative appeals tribunal.

The Law Reform Commission of Canada has a long-standing project on administrative law. I have met formally with them twice to discuss comparisons with Australia and at a general level discussions have been most useful. In particular, we derived great benefit from exchange of views on accountability for appropriation and spending decisions, whether through external review or otherwise, in which we had each independently developed an interest.

On both occasions, however, we appeared to be talking past each other when the discussion turned to tribunals. While some aspects of the subject seemed to represent common ground, there were underlying considerations of obvious concern to the Canadians which invariably diverted the debate well before it reached the advantages or otherwise of a general tribunal for administrative review, in which the Canadians were relatively uninterested. Chief amongst them was the need to avoid encouraging a judicial rather than an administrative culture for decision-making in the public sector. Another was the need to increase the influence of government policy in tribunal decisions.

These issues are, of course, not unfamiliar here, but in Canada they seemed to assume a greater weight and urgency. To an Australian, the emphasis placed on these issues in Canada and the conclusions to which they led were both puzzling and somewhat alarming. I realised only gradually that these concerns had developed with reference to a very different bureaucratic structure, in which a far wider range of primary decisions were made by agencies, sometimes

called tribunals, established at arms-length from executive government and following quasi-judicial procedures. In these circumstances, a focus on the modes of decision-making and on relations between some, major tribunals and government policy was much more explicable.

These structural differences do not make the Canadian debate irrelevant for us: on the contrary, much of the material emanating from Canada about the distinction between the judicial and administrative cultures is very instructive. They do mean, however, that any simplistic application of Canadian views to Australia without fully understanding the context in which they have been developed will be misleading and ultimately unhelpful. They also suggest that a useful and perhaps more interesting subject for comparison might be the governmental structures themselves and the reasons why they have developed so differently.

Evaluating the Administrative Review System

The key elements of the administrative review system established at the Commonwealth level of government in Australia from the mid 1970s are:

- a central Administrative Appeals Tribunal (AAT), available to determine appeals "on the merits" from executive decisions affecting individuals in any area of government activity in which the tribunal has jurisdiction conferred on it. Coupled with it is an understanding of what merits review means and rough agreement about the types of government decisions which should be subject to merits review. (Administrative Review Council, Eleventh Annual Report 1986-87, ch.9.)
- specialist appeal tribunals in some areas of mass volume jurisdiction: specifically, social security (Social Security Appeals Tribunal), immigration (Immigration Review Tribunal), veterans' review (Veterans' Review Board) and student assistance (Students Assistance Review Tribunal). All have a similar concept of administrative review, although their procedures are significantly different. All except the Immigration Review Tribunal are linked to the AAT
- codified procedures, grounds and remedies for judicial review (*Administrative Decisions (Judicial Review) Act 1977* (Cth)), reinforced by a constitutionally entrenched jurisdiction for the High Court to grant certain remedies against "officers of the Commonwealth" (*Commonwealth Constitution* section 75(v))
- an Ombudsman, to investigate issues broadly described as "maladministration"
- a right to reasons for most statutory decisions
- an Administrative Review Council (ARC) to advise the government on the operation and development of the system
- a statutory procedure for access to much government information (*Freedom of Information Act 1982* (Cth)).

Ever since the system was established there has been a tendency, more marked at some times than at others, to suggest that its continued existence is at risk. The suggestion was very pronounced at the earlier, 1987 conference organised by RAIPA, the ARC and the ANU Law Faculty, on "Administrative Law: Retrospect and Prospect". While that conference coincided with a low point in the relations between executive government and the administrative review agencies, with hindsight it marked the end of the establishment phase of the review system, which perhaps accounted for some of the tension. In recent years hostility towards the administrative review system as a whole seems rather to have been replaced with a sense of pride in the system and in its consequences for the quality of Commonwealth administration. Nevertheless, the lack of confidence which marked the previous era returns occasionally and in one sense, the system is not "settled" in matters of relative but important detail, and nobody would want it to be. Like any other structure designed to serve society, it needs to continue to evolve, not only to improve its institutions and to add new ones, if appropriate, but also in its scope, its principles and its theoretical framework.

Recent evidence that this process is going on is provided by examples as diverse as the ARC's investigation of the extension of review principles to decision-making under intergovernmental schemes (for example, under the Council's community services and health project); the experimentation with public inquiry procedures, as an adjunct to the administrative review system, through such bodies as the Resource Assessment Commission (*Resource Assessment Commission Act 1989* (Cth)); and examination of the use of

mediation in administrative tribunal procedures.

In broad terms, however, the administrative review system is now sufficiently well-established to be regarded as "settled". It would be almost inconceivable to return to the days, at least at the Commonwealth level, when reasons for decisions were not available on request; when judicial review was the sole independent recourse for persons aggrieved by an executive decision; when merits review of varying kinds was provided, if at all, in accordance with no consistent principles, by ad hoc, uncoordinated tribunals; when the procedures and grounds for judicial review were driven by the technicalities of the old prerogative writs and equitable remedies; and when the Ombudsman, the tribunals and the courts exercising judicial review had no sense of common purpose and no mechanisms to achieve it. On the contrary, comparison of the quality of administration and service delivery at the Commonwealth and State levels offers an incentive for the principles and concepts of the Commonwealth system to spread. To the extent that the openness in public decision- making which accompanies administrative review has modified parliamentary government as it traditionally operates, the administrative review system has taken on a quasi constitutional character. It is time to move on to the next phase of the debate, to ensure that the system works as well as possible and is adapted to changing and newly recognised needs.

It was perhaps uncharacteristic of Australia to consciously make a radical innovation in its system of government in the 1970s, but it is quite characteristic of Australia to continually doubt the wisdom of what it has done. One lesson we can learn from overseas is to be proud of the Commonwealth administrative review system. No other country in the common law world with a parliamentary system of government has had the foresight and the fortitude to comprehensively reform its institutions and procedures for review of administrative action. Fortuitously, the consequences have been generally beneficial for other aspects of the system of government, including primary decision-making and the parliamentary process itself. The defects which the Australian model was designed to overcome still plague most comparable countries overseas. In my experience, the Australian administrative review system is an object of envy by those who know and understand it, matched only by wonder that changes of that magnitude could politically be achieved. My impression also is that it is considerations of the latter kind, rather than objections sustainable in principle, that have so far prevented other countries following suit.

Administrative Review Council

The Administrative Review Council was established with the integrated administrative review system, as an advisory body in the Attorney-General's portfolio (*Administrative Appeals Tribunal Act 1975* (Cth), Part V). The Report of the Kerr Committee confirms what the Council's original close association with the AAT suggested, that one of its most important functions was expected to be investigation and advice on extension of merits review (Commonwealth Administrative Review Committee Report, 1971, paras 282-288). Nevertheless, the Council's statutory terms of reference enable it to advise broadly on the administrative review system and in recent years the Council's work has been divided more or less evenly between projects which would involve extension of the system and examination of the operation of the system as it stands.

There is no exact counterpart of the ARC elsewhere in the world. Superficially, its closest counterpart is the Council on Tribunals, established in the United Kingdom in 1958 (*Tribunals and Inquiries Act 1958* (UK)), on which the ARC clearly was modelled in part. The principal purpose of the Council on Tribunals is to monitor the constitution and working of the administrative tribunals entrusted to it, which in 1984 were estimated to number approximately 2000, divided into 60 different types (Harlow and Rawlings *Law and Administration*, Weidenfeld and Nicholson, (1984) 171). However awesome these statistics, the scope of the function of the Council on Tribunals was clearly unsuited to the Australian reforms, which were designed to encourage concentration of review in a single, general tribunal. In the event, the charter conferred on the ARC was considerably more broad than that of the Council on Tribunals and the ARC has evolved quite differently. The apparently greater relative influence of the ARC on government decision-making may similarly be attributable to the greater prominence of the reformed administrative review system in Australia.

The only other specialist administrative review

advisory body in the common law world is the Administrative Conference of the United States. The Conference was established in 1964 (*Administrative Conference Act* 5 USC 571-6. The first Chairman was not appointed until 1968) as "a permanent, independent federal agency to study the efficiency and fairness of the administrative processes in the federal government, and to recommend improvements to the President, the Congress, the agencies concerned, and the Judicial Conference" (Boley "Administrative Conference of the United States A Bibliography: 1968-1986" 39 Administrative Law Review 245 (1987)).

The Conference itself comprises a maximum of 91 members, drawn from both the public and the private sectors. It meets in full Assembly at least once each year. Inevitably for a body of that size, however, most of its substantive work is done through its six committees (The Conference has committees on Adjudication, Administration, Governmental Processes, Judicial Review, Regulation and Rule-making) or the executive Council of the Conference, which has ten members in addition to the Chairman, of whom not more than one-half may be drawn from Federal agencies. Most major research projects are undertaken by consultants under contract, which in the view of one recent commentator justifies description of the Conference as "a magnificent law professors' relief act" (Victor Rosenblum, in discussion during the program in the American Bar Association Section of Administrative Law and Regulatory Practice on "The Administrative Conference of the U.S.... Where Do We Go From Here?" August 5, 1990). As the terms of reference of the Conference suggest, its activities range over the whole field of federal administration. Current projects include Congressional access to confidential agency information; U.S. agency participation in international standard setting; FDA's drug approval process for AIDS drugs; oversight and regulation of government-sponsored enterprises; procedures for making determinations in antidumping and countervailing duty cases; and choice of forum in government contract litigation. (Taken from Administrative Conference News, Research Update, Vol IV, No 2, Summer 1990.)

Oddly enough, the most focused comparative work in administrative review being conducted at an institutional level between common law countries at present concerns the advisory bodies. From the standpoint of the ARC this is a continuation of a process which has been going on intermittently for some time with the Administrative Conference, with which the Council has a range of common interests. Thus Jeffrey Lubbers, the Research Director of the Administrative Conference, was the guest speaker at the opening conference for the ARC's rule-making project in 1989; I have been an observer at a meeting of the Council of the Administrative Conference; and the two bodies exchange reports and other materials.

The current driving force for comparison of administrative review advisory bodies, however, is the Law Reform Commission of Canada. The immediate aim of the Commission is to decide whether it should recommend to Government establishment of a body modelled on the ARC, despite its disinclination to adopt any other elements of the Commonwealth administrative review system. In formulating its advice, the Commission also is considering whether to recommend that a Canadian advisory body should have some executive functions, particularly in relation to the problems presently perceived to exist in the manner of appointment to and removal from tribunals.

A central question for administrative review advisory bodies is how to provide high quality advice which will benefit the review system but which also has a sufficient level of acceptance to maintain the credibility of the advisory body with the government and the legislature. The former requires independence of mind and the availability of expertise of a high order in relevant areas. Continued credibility is important, not only for the funding and ultimately the continued existence of the advisory body, but also for the attention which is paid to its views, including the extent to which its views are sought at a stage early enough to make them useful.

In the interests of maintaining the balance, however, the combined experience of the ARC and the Administrative Conference suggests that the Canadians should not mingle executive with advisory functions. The quality of advice which an advisory body gives ultimately depends on the appointments made to it and on the forbearance of government and legislature in relation to its activities. Executive functions, particularly in relation to something as sensitive as tribunal appointments, reappointments and dismissals,

would introduce a new element into the relationship between government and an advisory body which might be counterproductive in the long run. This is not to say, of course, that no changes should be made to procedures for tribunal appointments, but merely that changes should not take this form.

Similar arguments apply to other compulsive powers which it might be tempting to confer on an advisory body: the right of veto of certain departures from previously agreed principle, for example. It may be preferable for an advisory body to rely on the quality of its argument and its powers of persuasion to ensure consultation with it and adoption of its advice, rather than to become too closely entangled with the executive function itself.

In 1990 the Administrative Conference hosted a "brainstorming" session about future directions for the Conference at the American Bar Association meeting, possibly influenced by the minor crisis brought on by the freezing of its funds during the US budget crisis. The discussion covered all aspects of the operations and activities of the Conference. Many of the issues raised are familiar to the ARC. They include the need to maintain good relations with all principal branches of government without jeopardising the integrity of the advisory body; the need to develop a capacity both to deal with projects in depth and to respond quickly when required; and questions about whether and in what circumstances the principal budget allocation might with propriety be supplemented through projects undertaken for individual agencies or for specific purposes. Both the Conference and the ARC would also be likely to agree on the importance of being able to generate their own references, and on the need to use that power to deal with relevant issues and anticipate significant problems. Ultimately, each body must resolve these questions for itself, within the system in which it operates. At the same time, however, it is possible to draw both strength and broader understanding from the other's position on them.

Conclusion

Partly because of its own origins, the Administrative Review Council has been conscious of the opportunities for comparative work in administrative review since its establishment. It still has a long way to go in establishing an adequate data base but the relevance of international experience, judiciously used, is well accepted. The Council secretariat is most willing to share such knowledge and contacts as it has with others and to act as a clearing house for matters of this kind.

Comparative work in administrative review is likely to become even more important in the future. Nor should it be confined to comparisons between common law systems. As the level of international activity rises, the administrative law of different countries and legal systems may be expected to draw increasingly from each other, in both principles and procedures. Signs that this process is already underway are offered by, for example, the interest in Australia in inquisitorial procedures (expressed most recently in the establishment of the Immigration Review Tribunal and the determination of its procedures) and the debate in the United Kingdom about whether courts should consider proportionality in reviewing executive decisions. (Jowell and Lester "Proportionality: Neither Novel Nor Dangerous" in Jowell and Oliver (eds) *New Directions in Judicial Review*, Sweet and Maxwell (1988) 51.) In a sense the Australian administrative review system as a whole has already moved towards a continental model, in developing institutions and principles specifically devoted to public law.

This tendency is likely to be reinforced as the administrative review systems of different countries encounter and recognise responsibilities which they have in common and which call for the use of cooperative or at least complementary procedures. Most obviously, these responsibilities will take the form of supra-national arrangements, for which supra-national institutions have been created. Equally however they may be constituted by international standards, to be adopted, formally or informally, for domestic purposes. While much of this problem still lies in the future, the Council's rule-making project has revealed the extent to which international standards already influence Australian law and have implications for law-making procedure.

This is an edited version of a paper delivered to the 1991 Administrative Law Forum: 'Fair and Open Decision Making' (see page 27). The views expressed in this paper are those of the author and are not necessarily the views of the Administrative Review Council or any other members of it.

Subordinate Rule Making - An Historical Perspective

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Any system of rule making can be thought of as a means to impose a set of values over the way a society conducts its activities. In England and Australia, as with other Western common law countries, those values emerge as democratic principles where the rule of law is dominant.

Separation of powers is entrenched in the Australian Constitution. But history shows that the law making function has been practised by the Crown (now the Executive) as well as the Parliament.

Delegating legislative power to the Executive has not been without its difficulties given the distinct constitutional roles of Parliament and the Executive. Nevertheless responsible government sees the executive in control of at least one of the Houses of Parliament. An examination of the history of subordinate rule making provides an important perspective for any future reform.

Early Delegated Legislation in England

While there are instances of the making of delegated legislation dating back to the 14th and 15th centuries, it was only comparatively recently that delegated legislation became a popular method of rule making. The Committee on Minister's Powers (The Donoughmore Committee) cited an enactment made in 1385 concerning the staple as the earliest example of an Act allowing the making of delegated legislation.

The staple consisted of four products - wool, leather, tin and lead - and the marketing was regulated by the *Statute of the Staple*. Merchants, known as Staplers, had a monopoly in the staple and the mayors of towns from where the staple was exported held Staple Courts. However, the Statute of the Staple is on the Rolls of Parliament, not in the statute book. It gave the King power to determine the places where the staple could be held, the time of commencement, and the form and method of execution.

The reign of Henry VIII had many instances of Acts giving the power to make delegated legislation - the earliest of those being the *Statute of Sewers* made in 1531. This gave the Commissioners of the Sewers power to impose rates on land owners and to distrain and impose penalties for non-payment.

The *Statute of Proclamations* in 1539 is one of the most striking instances where an Act sets out the power to make delegated legislation, in this case in the widest possible terms. The Statute required 'that Proclamations made by the King shall be obeyed'. It empowered Henry VIII, with the advice of his Council,

> 'to set forth proclamations under such penalties and pains and of such sort as to His Majesty and his said Council should seem necessary and requisite, the said proclamations to be obeyed, observed and kept as though they were made by Act of Parliament unless the King's Highness dispense with any of them under his great seal'.

The Act also provided that Sheriffs or other officers were required, within fourteen days, to proclaim His Majesty's proclamations in market-towns, other towns or villages and post them up 'openly upon places convenient therein'. This statute is therefore not only an early example of delegated legislation but also a form of statutory rules publication.

This was not, however, Henry VIII's only use of delegated legislation. Section 59 of the *Statute of Wales*, made in 1542, empowered the King to 'alter the laws of Wales and to make laws and ordinances for Wales, such alterations and new laws and ordinances to be published under the great seal and to be *as of good strength, virtue and effect as if made by the authority of Parliament*' (emphasis added) So it is that a clause in an Act that provides a power to amend either that Act or another Act by delegated legislation is termed a 'Henry VIII' clause.

Other instances of use of the power to make delegated legislation can be found through to the nineteenth century, but its frequency certainly diminished after the reign of Henry VIII.

The industrial revolution saw the emergence of an increasingly complex society. The regulation of the activities of citizens required more detailed rules to cope with the complexities of life and also required more time to make those rules.

English statute law at the beginning of the