

If misleading advice by a Department is established in a case, this may create a legal entitlement to compensation for detriment, in which event a pecuniary remedy would not be by way of an act of grace payment. If the Ombudsman finds defective administration warranting a pecuniary remedy, a recommendation to that effect could not be made until the question of legal entitlement has been determined by the AAT or it is clear that the appellant has no legal entitlement (and in this event even a concession by the appellant might not suffice).

Australian citizens returning – proof of identity

The Ombudsman investigated a number of complaints concerning the provision of resident return visas to Australian citizens for a fee. The Ombudsman recommended that the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) obtain legal advice on this point as it did not seem that the Migration Act gave power to issue visas and entry permits to Australian citizens. The advice obtained confirmed this view and in February of this year DILGEA instructed its posts to cease issuing resident return visas to Australian citizens except in very limited circumstances. It later put in place arrangements to refund fees paid by Australian citizens for such visas. At the moment DILGEA proposes to refund fees only for visas issued since it received the legal advice, rather than since the Ombudsman drew the matter to DILGEA's attention or some other time. Discussions with DILGEA on this point are continuing.

The administrative and practical advantages of DILGEA's policy of actively encouraging Australian citizens to present an Australian passport to prove nationality when re-entering Australia were recognised by the Ombudsman. He stressed, however, and it was accepted by DILGEA, that Australian citizens are not currently obliged by law to carry, obtain or use an Australian passport when travelling overseas, provided that they have a valid passport issued by another country.

The question of what documentation will be accepted by DILGEA as proof of Australian citizenship is currently receiving attention in that Department.

Administrative Law Watch

Report: Review of Codes of Conduct for Public Officials

The Council recently received a copy of the May 1992 report *The Review of Codes of Conduct for Public Officials* by the Electoral and Administrative Review Commission (EARC) of Queensland. The report had its genesis in a Fitzgerald Report recommendation that EARC 'implement and supervise the formulation of Codes of Conduct for public officials'.

The Codes developed in the report provide a general foundation for many of the traditional expectations and conventions of conduct referred to as the 'Westminster' principles of government. Emphasised in the report is the principle that all public officials – Ministers, other elected representatives, career public servants and contracted executives alike – are obliged to act as trustees of the public interest. To this end the proposed Public Service Ethics Act states in broad terms 5 core ethical obligations for public officials. They are:

- respect for the law and the system of government;
- respect for persons;
- integrity;
- diligence; and
- economy and efficiency.

As well as the statement of general principles in legislation, provision would be made both for more detailed general Codes of Conduct for various classes of public official and for agency-specific rules. No new particular ethical offences are to be created and breaches of the Codes of Conduct are to be dealt with on a discretionary basis under existing disciplinary procedures.

In order to promote increased awareness of public sector ethical standards among agencies and individuals, the creation of a small, independent statutory office called the Office of Public Service Ethics (OPSE) is proposed. Finally, to ensure that the standards are responsive to changes to community standards and expectations, it is proposed to create a community-based consultative body called the Advisory Panel on Public Service Ethics. This body would meet at least 3 times a year and would advise the OPSE and report to Parliament on public service ethics matters generally.

If you are interested in obtaining a copy of the report, contact EARC in Brisbane, phone number (07) 237 9696.

Paper: Administrative Justice in Future South Africa

The Council recently received a copy of *Empowerment and Accountability: Towards Administrative Justice in a Future South Africa*, a paper by Professor Hugh Corder of the University of Cape Town, dated December 1991. The stated object of the paper is to stimulate discussion and change in the field of South African administrative law.

The author argues that with the growth of executive power at the expense of the legislature in the late 20th Century, and particularly in the context of an activist executive trying to restructure society, the theory that ministerial responsibility to parliament and judicial review of administrative action together control the executive is severely limited. He therefore conducts a review of the new structures and procedures that the UK and several members of the British Commonwealth have developed to increase executive accountability. The hope is that, whatever the form of a future SA Constitution, change will mean that the executive will be both empowered to make South Africa a safer, more equitable and less corrupt society and at the same time more accountable to the people in various ways.

The paper contains an interesting synopsis of the administrative law in each of Australia, New Zealand, Canada, Britain, Singapore and Malaysia, Hong Kong, Sri Lanka, India, Nigeria and Namibia. Professor Corder suggests that a future Constitution should protect only 'a right to review of administrative action' and provide for structures to enforce this right, leaving the details to legislation. The changes he recommends South Africa adopt following his comparative study are:

- creation of an ombudsman-type office;
- a liberalised notion of standing to sue;
- a statutorily defined extension of the grounds for judicial review;
- an amendment to the Rules of the Supreme Court for faster and more skilled handling of judicial review applications;
- creation of 2 new tribunals with lay participation in the areas of police powers and access to land, with a view to the possible founda-

tion of an Administrative Appeals Tribunal of general jurisdiction in the future;

- establishment of a code for proper decision-making and rule-making;
- establishment of an Administrative Review Council with general supervisory and advisory powers over the whole state administration; and
- continuing education programs for public officials and a public awareness program
- to inform all South Africans of their rights and duties under this scheme.

The preface by Albie Sachs places the author's work into a broader political context, raising several questions in relation to the development of a new Constitution. He suggests that the right to judicial review of administrative action will be an essential element of a Bill of Rights under a new Constitution, and that the Bill of Rights should be open and self-explanatory so that people know what their basic rights are without having to go to a lawyer.

The paper was published by the SA Constitution Studies Centre, London and Cape Town. If you are interested in obtaining a copy of the paper, contact Hugh Corder or Albie Sachs, Department of Public Law, University of Cape Town, Rondebosch 7700, South Africa.

New Zealand FOI Review

The Law Commission of New Zealand has advised the Council that it will be reviewing specific provisions of the *Official Information Act 1982* (NZ). The review will be of a fine-tuning nature rather than a comprehensive examination of the principles underlying the Act. The subject of the review will include:

- provisions dealing with both confidentiality of advice and the free and frank expression of opinion, with a view to more precise definition of the interests to be protected;
- provisions used to deal with broadly defined requests and requests for large amounts of information;
- whether there should be an ability to charge for time spent and other expenses incurred in assessing requests for information;
- whether grounds for refusal should apply to requests for personal information; and
- whether diplomatic documents should be subject to special rules.