FOCUS ARTICLE

Improving the Quality of Decision Making

The Hon Daryl Williams AM QC MP*

Introduction

I am pleased to join you today and to have the opportunity to offer some comments on the challenges ahead of those who work in administrative law and in Commonwealth tribunals.

Above all, I believe that we need to work proactively and openly, both as and with decision makers, to improve the quality of primary decision making in the administrative law arena. We need, for example, to constantly look for better and more efficient ways to conduct merits review. In doing so, we will ensure that Commonwealth tribunals meet the on-going needs of government and the diverse needs of the community.

Administrative law has been in the spotlight in recent months. I understand that there have been three major conferences on administrative law held in Canberra. The Australian Institute of Administrative Law held a forum early in July, the Australian Institute of Administrative Law Annual General Meeting was in late August, and the inaugural 'Public Law Weekend' was held at the Australian National University at the end of August. This demonstrates a high level of sustained interest in, and debate about, the Commonwealth's administrative law system and the role which Commonwealth's tribunals play.

The Government has a firm commitment to the functions and processes of administrative law which is reflected in our Law and Justice Policy. I would like to remind you of what was said regarding administrative law:

> "Administrative law exists to enhance administrative justice. It is a crucial means by which the Government and the bureaucracy are directly accountable to individuals affected by their actions.
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> ...
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> "The Liberal and National Parties are determined to review and improve the administrative law system, to improve administrative justice and government accountability."

I am committed to this policy and am indeed examining administrative review tribunals, particularly in the context of the Administrative Review Council's report on the merits review system. I will elaborate on this report a little later.

The role of merits review

I note that this conference is focusing on the future role of merits review and its effect on primary decision makers in government agencies.

It is clear that merits review has an on-going and important role to play in decision-making processes. While the present structures may evolve and be improved over time, the fundamental right must remain for members of the community to seek review of administrative decisions that adversely affect them.

Merits review, however, should not be solely a sterile exercise in correcting and reversing decisions. It shouldn't operate on a weary acceptance that bureaucratic decision makers make mistakes frequently enough that the merits review process is more than justified.

I believe that it is now up to tribunals to work more proactively and openly with decision makers so as to improve the quality of primary decision making. This in turn may well mean that fewer people will need to go to tribunals to get the right decision.

*Commonwealth Attorney-General and Minister for Justice. This was the opening address to the Commonwealth Review Tribunals Conference 1996, Friday September 13, Australian National University, Canberra.

Current environment

In times of economic restraint, the most pressing challenge facing the Government is how to deliver good government at an affordable cost. We must constantly ask of all Commonwealth activity whether there is a continuing need for the activity and whether it should be undertaken by the public sector.

At the Annual General Meeting of the Australian Institute of Administrative Law that I referred to earlier, Public Service Commissioner, Dr Peter Shergold, quite rightly identified three key changes that are taking place in Australian governments. These include:

- that the role of government, at all levels, is being progressively narrowed;
- that the distinction between policy development and implementation on the one hand and program delivery on the other is becoming clearer; and
- that the delivery of government services is becoming increasingly competitive as functions are contracted out to the non-government sector.

These changes are most evident in the outsourcing of activities that have previously been conducted by government. I will be examining whether administrative review mechanisms of some sort should follow the outsourcing of functions into the private sector to ensure appropriate levels of accountability.

My consideration will no doubt be assisted by the work of the ARC in their Contracting Out report. I understand that an issues paper is due to be released in November this year with a final report likely in the first half of next year and I look forward to receiving and considering that report. The Council's previous studies on the application of the administrative review system to Government Business Enterprises, and to Health Care Services provided under contract by the community sector will also be invaluable.

It is now 20 years since the new administrative law package burst onto the scene. Much has changed. On the whole, I believe administrative law decisions are being made better than ever before. This does not mean to say there is not room for improvement in the way things are done or in the processes that deliver those functions. The notion of continuous improvement must infuse the administrative review system just as it does other key areas of government and management.

Administrative Review Council's report, *Better Decisions: review of Commonwealth Merits Review Tribunals*

It is in this environment that the Government is considering the recommendations of the Administrative Review Council's report, *Better Decisions: review of Commonwealth Merits Review Tribunals.*

At the outset, let me say that the Government has made no final decision on its response to that report. However, I do expect to be in a position to release our response later this year. My Department has undertaken extensive consultations on the report with the tribunals, user groups, agencies, and professionals with experience in the tribunal system. We are considering our approach to the more than 100 recommendations contained in the report, and will be taking account of related matters such as the review of migration tribunals being undertaken by the Minister for Immigration and Multicultural Affairs.

The Council's report made a range of significant recommendations for improving the processes by which review tribunals operate. I understand that many of the proposals designed to enhance access and fairness are already being implemented by tribunals who are keen to ensure that they are operating at maximum effectiveness.

The most significant recommendations made in the report would, if accepted, mean fundamental changes to the structure and operations of Commonwealth merit review bod-

ies. I am referring of course to the proposal to merge the various first and second tier review bodies into a new Administrative Review Tribunal. The proposed new Administrative Review Tribunal would seek to adopt the best of the AAT, as it has evolved over the last 20 years, and combine it with the best of a range of other tribunals to form a more unified and streamlined system of external merits review.

While the Government has not finalised its response to the ARC report, I can outline the principles that will underlie my consideration of the structural changes proposed by the Council.

Firstly, citizens should continue to have effective access to merits review of government decisions. This is not only a matter of granting formal rights to seek review, but of providing a system that is straightforward enough to be used effectively by the average person in need of it, whether that be a war widow, a farmer or a small-business person.

In the past, there has been criticism of the Administrative Appeals Tribunal for being too 'court-like' and 'legalistic'. Whether you agree with this point of view or not, these criticisms cannot be ignored. While decisions made in the review process must be made according to law, a balance needs to be reached so that tribunal processes are user friendly.

The need for that balance will underpin the Government's response to the proposals for a new structure, and to the proposal that legal qualifications should not be required for most tribunal members.

Secondly, the structure of the system should allow for the development of procedures that are appropriate for different cases. In some contexts, mediation could play a constructive role. In some jurisdictions, an inquisitorial approach works well, while in others the adversarial approach is effective in isolating and resolving the matters in conflict.

Any restructure of the system should enable the review tribunal to tailor its processes to meet the needs of its clients.

Role of tribunal review

I would like to focus now on one aspect of the report that I endorse. That is, the role of tribunal review in improving primary decision-making.

Clearly, pursuit of the correct or preferable decision is at the heart of the role of Commonwealth tribunals.

However, I believe that any administrative tribunal which only sees its role in this light will fall into serious error. While administrative tribunals are of course independent of the executive and must be free from political interference in their deliberations, they are not, as courts are, constitutionally separate from the executive. Tribunals should see themselves as having a role of working with the executive arm of government in promoting normative or systemic change and in enhancing the quality of decision-making across the board.

The Administrative Review Council addressed this issue in its *Better Decisions* report. The Council said:

> "In the Council's view, the overall objective of the merits review system is to ensure that all administrative decisions of government are correct and preferable.
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> "Achieving this objective involves more than ensuring that the correct and preferable decision is made in those cases that come before review tribunals. It also means that all persons who benefit from merits review are informed of their right to seek review and are in a position to exercise those rights, and that the overall quality of agency decision making is improved.
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> "This overall objective therefore incorporates elements of fairness, accessibility, timeliness and informality of decision making, and requires effective mechanisms for ensuring that the effect of tribunal decisions is fed back into agency decision-making processes."[1]

Tribunals working proactively with primary decision makers

It has been common for administrative law conferences over the years to focus on the impact of the work of tribunals on the bureaucracy. It is not surprising that this has been the case. Tribunals and the administrators whose actions and decisions are subject to scrutiny have a common interest in achieving a position where administrative practices have been sanctioned by the tribunal. The tribunal is then more likely to be satisfied that 'correct and preferable' decisions will be made.

There is nevertheless a continuing tension between the work of tribunals and the activities of administrators. This tension was referred to by the Chief Justice Sir Gerard Brennan in his opening address to the Australian Institute of Administrative Law forum in July this year. His Honour noted – and in this I agree with him – that:

> "(t)he AAT was intended not only to give better administrative justice in individual cases but also to secure an improvement in primary administrative decision-making ...
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> "External review is only effective if it infuses the corporate culture and transforms it ...
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> "Bureaucratic intransigence would not be moved unless errors were clearly demonstrated and a method of reaching the correct or preferable decision was clearly expounded."

Equally, His Honour could have embraced the work of other Commonwealth tribunals in this analysis.

I note also that the Forum devoted time to consider the impact of the AAT on Commonwealth administration. I recommend to this Conference that you consider the effect of the work of your tribunals on Commonwealth administration. It seems to me that the next real challenge for all Commonwealth tribunals is to develop more effective relations not only with the individual applicant or client, but also with your 'long term' clients – that is, the departments and agencies with whom your tribunal has by necessity an ongoing relationship.

I believe that failure to consider and develop the long term relationship between decision-maker and review tribunal will be to miss the opportunity for continuous improvement in administrative practices. This relationship is vitally important to the role and function of review tribunals.

It is of fundamental importance that tribunals should constantly seek ways of contributing to the efficiency and overall effectiveness of the executive.

I believe all Commonwealth tribunals, have two equally important roles. They should ensure that the correct and preferable decision has been made in a particular case. And, as I've just stressed, tribunals should also ensure that there is a process of continuous improvement in the quality of administrative decision-making across the spectrum of the tribunal's jurisdiction.

I note that a number of other speakers at the forum considered this general issue (albeit in the context of the AAT), and I commend to you the papers presented by Messrs Skehill and Blunn and AAT Senior Member Dwyer.

Senior Member Dwyer made many valid suggestions on the operations of tribunals and I would like to draw them to your attention. They include:

- increasing feedback and liaison between departmental decision-makers and tribunals;
- striving for consistency of decision-making between tribunal members;
- developing a better understanding of the dimensions and purpose of any relevant policy; and
- carefully selecting expert witnesses to avoid the adversarial proceedings.

The *Brandy* decision

My interest in ensuring that we have a judicial and quasi-judicial system that is appropriate and accessible is reflected by the decisions I have made in the human rights area. Human rights deliberations are being transferred from the Human Rights and Equal Opportunity Commission (HREOC) to the Federal Court, following the High Court's decision in the *Brandy* Case.

Many of you will be familiar with the *Brandy* decision in the High Court. In that case, certain sections of the Racial Discrimination Act were held to be invalid. Those sections provided for a determination of HREOC to be registered in the Federal Court and enforced as if it were an order of that Court.

The High Court determined that those particular sections of the Act meant that the Human Rights and Equal Opportunity Commission, which is not a court, was performing functions of a judicial nature.

The sections were held to be invalid because of the principle of the separation of judicial from executive powers under the Constitution. In general terms, that principle is that:

- judicial functions may only be exercised by a court; and
- non-judicial functions cannot be exercised by a court.

On the 8th of August I announced significant changes to streamline the workings of the Human Rights and Equal Opportunity Commission to enable it to operate more effectively.

Under the revised arrangements, the Commission will continue to receive, investigate and conciliate complaints but will no longer make determinations on contested matters.

Matters that cannot be dealt with by conciliation will now be dealt with by the Federal Court which will establish a Human Rights Registry within the Court. This will apply to all complaints under the Racial, Sex and Disability Discrimination Acts.

These arrangements are consistent with the *Brandy* case. That is, that the Commission as a non-judicial body does not have the constitutional power to make final determinations. Tribunals should do what they do best, leaving courts to fulfil their proper role.

However, court procedures should be made as accessible as possible. Subject to constitutional requirements, the legislation will provide that the Federal Court should act informally and without regard to legal technicality.

I will be asking the Chief Justice of the Federal Court to consider new court rules for human rights matters so as to make the process more 'user-friendly'. Changes to court rules would make the process less intimidating and lessen the need for legal representation in every case. The legislation will allow applicants to appear in court in person, or be represented, not only by a barrister or solicitor, but by any other person with relevant expertise.

The new procedure will remove the potential for parties to be forced into litigation in the Commission *and* the Federal Court. This is an important step in the protection of human rights as it means that people need no longer face double litigation, and will feel more confident about pursuing their claims. It also more clearly delineates the conciliation function from the determinative function that properly belongs to the Court.

Changes to the legislation will enable judges to delegate some of their functions to Judicial Registrars. However, these Registrars will remain subject to the control of the Court.

An appeal against a determination of a Judicial Registrar will involve de novo review by the Court.

Commissioners will now be able to apply to the Court to intervene in proceedings as an amicus curiae if:

- in the Commissioner's view, the orders sought or likely to be sought may affect the

human rights of persons other than the parties to the proceedings; or

- the case has significant implications for the administration of the relevant Act; or
- there are special circumstances which satisfy the Commissioner that it is in the public interest that she or he should appear in the proceedings.

This power of intervention will ensure that the expertise of the Commissioners on discrimination and human rights issues is made available to the Court.

The changes will simplify dispute resolution procedures in human rights matters from conciliation through to litigation.

To sum up in this area, the changes reflect the Government's commitment to making the procedures by which people challenge alleged infringements of their rights as accessible as possible, without sacrificing the guarantees of lawfulness and due process.

Freedom of Information

Freedom of information (FOI) is another area that impacts upon the operations of the administrative law system.

The question of the scope and operation of the *Freedom of Information Act 1982* was referred by the previous Government to the Australian Law Reform Commission and the Administrative Review Council for review.

The overriding purpose of the inquiry was to determine whether the Act had achieved the purposes and objectives it was designed to achieve.

The Commission and the Council jointly published a report, *Open Government: a Review of the federal Freedom of Information Act 1982*, in December 1995.

The report outlined a number of deficiencies in the current FOI system and proposed a comprehensive list of reforms to the Act so as to achieve its three major objectives. They are:

- to increase public scrutiny and accountability of government;
- to increase the level of public participation in the processes of policy making and government; and
- to provide access to personal information.

To redress these deficiencies, the Review has proposed that a new approach to the Act is required. This would be from one of not disclosing information unless absolutely required, to one of giving information unless there was an extremely good reason not to do so.

There are 106 recommendations in the Report including:

- making changes to the Act's objects clause to ensure that agency culture is pro-disclosure and to acknowledge that information collected and generated by government officials is a national resource;
- reviewing all secrecy provisions to ensure they do not impose prohibitions on disclosure which are broader than the exemption provisions of the FOI Act;
- making certain that FOI charges are consistent with the objects of the Act; and
- amending both the Privacy and FOI Acts to ensure the continued smooth operation of the overlap between the two Acts in respect to access to and amendment of personal information.

While the Government is still considering its response to the Report, I would like to emphasise that I endorse the overall notion suggested by the report, namely that government activities should not be unnecessarily shrouded in secrecy.

Privacy

I would also like to bring you up to date with developments concerning privacy protection in the private sector.

In our Law and Justice Policy Statement, we signposted our commitment to developing a co-regulatory approach to privacy protection

within the private sector in consultation with all interested parties.

This was driven by increasing public concerns about the lack of privacy protection in the private sector. When reviewing the Freedom of Information Act, the Administrative Review Council and the Australian Law Reform Commission noted those concerns, and recommended that a comprehensive national legislative scheme be developed for privacy protection in all sectors.

The Government supports this recommendation wholeheartedly and I thank the Council for its important contribution to the public debate on this issue.

As a first step in the consultation process for the development of a co-regulatory approach to privacy protection in the private sector, I released a discussion paper by my Department yesterday. My Department is seeking comments on the approach outlined in that paper and any other issues that people believe should be considered in developing a regime for the protection of privacy in the private sector.

Following the process of public consultation, which closes on 29 November, I hope to be in a position to develop legislation for introduction next year to provide a privacy regime for all Australians comparable with international best practice.

Administrative Review Council

In reviewing aspects of administrative law, I believe that it is an appropriate time to reflect on the role of the Administrative Review Council and its relationship with government. There is no doubt that the ARC has played a leading role over the last 20 years. However, given the developments in administrative law, I believe consideration must be given as to whether government's needs in terms of administrative law advice are adequately reflected through the functions and powers of the ARC as they stand.

In the near future, I will be looking at how we can together, assess the functions of the ARC, and put in place any improvements necessary to ensure that it maintains its place as the Government's expert advisory body on the administrative review system.

Conclusion

Finally, I wish you well in your endeavours at this conference. I hope that it will encourage you to take up the challenge so as to further improve the operation of the merits review system in Australia. We all have an opportunity to contribute to reform in the administrative law arena and I am confident that you will meet this challenge.

Thank you.

Notes

1 *Better Decisions: review of Commonwealth Merits Review Tribunals*, paragraphs 2.9-2.11.