Commentary on Paper by Robin Creyke on The Structure of Administrative Review

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Introduction

Robin Creyke has come up with an ambitious and interesting paper that is effectively an assessment of the state of the health of the Australian administrative law system as she sees it in 1997.

My experience and interest is primarily in the area of administrative tribunals. Coincidentally that is the scene of much action at present and receives considerable attention from Robin.

I should issue the usual disclaimer and emphasise that what follows is my own view and not that of the Commonwealth or DSS.

Impending changes to the Commonwealth merits tribunals system

Robin has summarised the current knowledge of proposed change to the merits review tribunal system. She has also put that knowledge into context by relating the Attorney-General's announcement[1] to intelligence from the Administrative Review Council's *Better Decisions* report[2] and other material.

As Robin says, structurally at least, what are currently five separate tribunals are expected to be amalgamated into one. As Robin also says, an IDC is looking at implementation of this proposal.

Since the Attorney-General's announcement there has been understandable nervousness about the proposed changes. Community groups accustomed to having resort to the existing tribunals are concerned that they will lose something that they currently value. Other interested parties, not least the current members of the tribunals, have concerns also.

It should be remembered that the thrust for change in the tribunal landscape came from the Hon Duncan Kerr, Minister for Justice, in 1992. He and other senior members of the Labor Government had begun to doubt that Australia had a rational system of administrative review.

The most obvious indication that something was wrong was the proliferation of specialist tribunals. It was noted that two new tribunals, not just one, had recently been created in the immigration area. Mr Kerr considered that this proliferation, in retrospect, was at odds with the original intentions of the architects of the Australian administrative law reforms of the 1970s.[3]

The Kerr Committee in 1971[4] favoured a general administrative tribunal but contemplated specialist tribunals in special situations where expertise did not exist in the general tribunal. The Bland Committee[5] was even keener on a single general merits review tribunal on bases including, that a proliferation of tribunals would be wasteful of resources, and would be inefficient. The Bland Committee said that 'the fewer tribunals there are the more likely will be the most economic use of resources and a better and more even resolution of individual issues because members of tribunals will not be narrowly circumscribed in their jurisdictional range'.[6]

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There need not, therefore, be anything at all sinister in the proposal to implement the Bland and Kerr proposals. Robin's paper helps to explain some of this. She very helpfully places this development in the context of other developments, many of which she sees as problematic. She provides some cogent arguments in this respect.

What's been good about tribunals?

There have been many good and beneficial effects in many jurisdictions from the existence and work of the Commonwealth tribunals. However, the best thing about tribunals, especially in the benefits areas of interest to me, has been their tendency to clarify a person's entitlements to government support. Since 1980 the AAT has handed down 3,717 social security decisions. We in the Department, and the welfare community, know immeasurably more now about social security law and entitlements than was the case before. I am sure this is true also in a number of other jurisdictions.

The rule of law has been better served by the incentive these decisions, and the less public SSAT decisions, have given the Department to act in accord with the law, rather than as convenience or commonsense might dictate.

Robin raises the spectre that there may, under the proposed ART arrangements, be no second tier review, that is no equivalent body to the current AAT. She sees this as problematic because consistency in decisions at the first tier level would be more difficult to achieve, a source of principles of general application would be lost, and because of the risk of over-judicialisation in the first tier.

Robin's arguments are sound and I for one would be sorry to see no second tier review, even if accessible only by leave or by reference from the lower tier.

At their best, the tribunals have also empowered individuals to relate to the State in ways otherwise not possible, and to press for recognition of their rights. It is trite to say that the AAT has had an unfortunate tendency to formalism in too many circumstances. Robin in her paper says that the AAT was for all intents and purposes a court in another guise. This is a bit harsh, I think, but not without some truth. I have been pleased on many occasions to see individual members of the AAT skilfully elicit information from unrepresented individuals who were certainly not disadvantaged by the AAT's structure and procedures.

However, from the perspective of public administration, problems with the tribunals have emerged.

The problems

What are these problems? How have they come about? In a sense my thesis is that the tribunals do need a thorough shake up and they have brought this upon themselves.

The first problem is the tribunals' lack of sufficient interest in government and departmental policy and practice. Researching these matters it becomes clear that the tribunals found this a matter of great interest in the early 1980s.

We all know what Brennan J (as he then was) said in *Drake (No 2)*.[7] He saw declared policy as conducive to attaining consistency in decision making. Consistency was seen as desirable in public administration. He said that the AAT had therefore to apply lawful ministerial policy unless there are cogent reasons to the contrary. A cogent reason might be that application of the policy would produce injustice in the particular case.

The problem, of course, is that there is often not a lot of ministerial policy but there is a great deal of departmental policy. Departmental policy can include such aspects as administrative criteria

in a manual guiding the exercise of a statutory discretion, a set of procedures or processes in a manual that officers are to follow and the outcome dictates entitlement or non-entitlement. The bulk of AAT authorities on the relevance and force of these inferior policy sources date back to 1985 or earlier.

In the case of DSS the problem is often one not of policy but of the exercise of judgment. This is so, for example, in deciding how to weigh the factors that suggest whether a person is in a marriage-like relationship or whether a person has failed an activity requirement because of something beyond his or her control.

It is in these cases that the SSAT and AAT often make a 'preferable' decision at odds with the correct, but not so preferable (as the Tribunal sees it) decision made by DSS. This, quite frankly, is driving many administrators to distraction and is seen by some prominent Ministers to be an unacceptable subversion of government policy.

In this area of judgment the answer may be to make the decisions non-reviewable other than by the courts or by the Ombudsman. Alternatively it may be possible to replace the tribunals' power to make the 'correct or preferable' decision with a power to alter an original decision only where it is manifestly incorrect or grossly unreasonable. The presumption would be that the original decision stands unless there is something clearly wrong.

As a quid pro quo, the Department would have to accelerate its efforts to ensure that primary decision making improves.

In DSS some staff say that it is futile to breach someone for failing the activity test for Newstart Allowance because, after a lengthy period of inactivity, at the point of the breach decision, the person says he or she is about to apply for work. The tribunals then accept this story and overturn the original decision.

Returning to policy issues, the tribunals in fact scarcely ever refer to departmental policy and assess its relevance in a particular case. The emphasis tends to be on the individual decision and whether it appeals to the tribunal. The tribunals have not continued to seriously develop the jurisprudence related to the various forms of policy.

As a related matter, the tribunals have tended not to explain why they do not accept and apply departmental policy as the AAT decisions used to do in the early 1980s. It would be consistent with the notion that departures from government policy are to be for cogent reasons. Presumably the reasons would need to be less weighty for departure from departmental policy.

It should come as no surprise to the tribunals that a considerable number of senior administrators in the Commonwealth Public Service would like to find a way to require the tribunals to apply government policy unless there are cogent reasons for departure. Robin has referred to the introduction of the Repatriation Medical Authority and the Specialist Medical Review Council in the veterans jurisdiction. This seems to have been a highly successful innovation.

Section 499 of the *Migration Act 1958* is another example. It permits the Minister for Immigration to give general directions in writing to a person or body having functions or powers under that Act. The person or body must then exercise those powers or functions in accordance with the Ministerial directions. The directions are a disallowable instrument.

This is a more effective provision than section 1297 of the *Social Security Act 1991* which permits the Minister for Social Security to publish a statement of government policy to which DSS decision makers and the tribunals merely have to have regard.

I believe that we will see many more examples of the use of such devices to protect the integrity of government policy in the near future.

What are some other problems? I said above that the AAT is somewhat unfairly accused of legal formalism at times. That is not to say that the AAT could not and should not have cleaned up its act in these regards long ago. The AAT, organisationally, has been far too wedded to court like architecture in its hearing rooms and to court like processes, for example the tradition that all in the tribunal stand as the member or members enter. DSS has not been alone in criticising these matters in submissions related to the various AAT reviews that have occurred. I see nothing in the Administrative Appeals Tribunal Act that compels such an approach.

Many years ago I participated in several telephone hearings in the AAT and I was impressed to see how informal and efficient these were. Of course not all cases are amenable to a telephone hearing, but if a more relaxed approach is possible in those cases, surely it could become more common.

The vast bulk of AAT members are serious, professional and committed in their work. However, the AAT has failed to bring the odd less professional or more eccentric member into line. Members are entitled to be independent and to enjoy that status. However, there have been cases where the antics of individuals come close to bringing the tribunal into disrepute.

An example – following a preliminary conference in a social security matter I received the following report from a departmental advocate:

> The presiding member observed that he didn't think the Department should be allowed to appeal on questions of fact. While it's doubtful a conference is the proper forum to air (repeatedly) this view, given the customer's presence (Lord knows what the customer makes of this), this is not the reason I write.
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> The member then proceeded to say 'Some of the Department's appeals amount to an abuse of power.'

The presiding member seems ignorant of the fact that the Department has a legislative right to appeal on a question of law or fact, just as a customer has. He also ignores the fact the Department takes very seriously any decision to appeal to the AAT against a SSAT decision. The decision is taken by the Permanent Head of the Department who would be horrified by the suggestion that he is abusing his power.

In another case the member issued a suppression order apparently prohibiting a relatively junior departmental advocate from discussing the case or seeking instructions from the Permanent Head, whom he was representing, or seeking assistance from the advocate's manager within DSS.

It is noteworthy that the Administrative Review Council, in chapter 8 of the *Better Decisions* report, does not explain why it wants to call the new, all-inclusive tribunal the Administrative Review Tribunal, rather than retain 'AAT' as the title. The argumentation is presented so that it looks as if the Council will recommend that the AAT assume the jurisdictions of the other tribunals but at the last minute it does not do this. It could be that it expects the new tribunal to make a fresh start and avoid some of the errors of the AAT.

As a final observation, it seems to me that the tribunals have brought this amalgamation proposal upon themselves in yet another way. The tribunals have been far too insular and disinclined to research and apply best practices, despite this being an imperative throughout the rest of the Australian Public Service.

While tribunal members are often knowledgeable about the procedures and practices of other tribunals they seem not to see these as directly relevant to them or as containing elements that might usefully be incorporated into their own tribunal.

One of the arguments in favour of the ART proposal was the improved opportunity a single tribunal would offer for adoption of best practices.

Some of my judgments may seem harsh although I have tried to indicate that, despite their faults, we have much to thank the tribunals for. The time has come, however, to assess honestly where we are with the current system. Some sort of major change in the administrative law system in Australia has been foreshadowed by Alan Rose repeatedly in earlier years in these forums, and last year by the Public Service Commissioner, Dr Peter Shergold, at this Institute's Annual General Meeting. The stakes are now too high to avoid confronting some difficult issues.

Notes

1 Press Release "Reform of Merits Tribunals" issued by the Attorney-General and Minister for Justice, the Hon Daryl Williams AM QC MP, 20 March 1997; the text of the press release appears in TRIBUNAL WATCH in this edition of *Admin Review.*

2 Administrative Review Council Report No 39, *Better Decisions: review of Commonwealth Merits Review Tribunals* AGPS, Canberra, 1995.

3 See *Address to the Annual General Meeting of the Australian Institute of Administrative Law*, The Hon Duncan Kerr MP, Minister for Justice (1993) 15 AIAL Newsletter 14 - 18.

4 Commonwealth Administrative Review Committee *Report* Parliamentary Paper No 144 of 1971, Commonwealth Government Printing Office, Canberra.

5 Final Report of the Committee on Administrative Discretions, AGPS, Canberra 1973.

6 Final Report of the Committee on Administrative Discretions, AGPS, Canberra 1973, para 125.

7 *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634, see in particular pages 642- 645.