A VICTORY for the rule of law

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The new rights of administrative law.

Sixty six years ago, the then Lord Chief Justice of England, Lord Hewart, identified a threat to the rule of law which he called 'The New Despotism'. It was the extravagant growth of discretionary powers which had been granted to the Executive government (both ministers and public servants) and which he claimed had greatly reduced the right of individuals to obtain redress for their grievances against the modern state. Parliaments, governments and courts have been spurred into action to address the complaints of Lord Hewart and numerous other citizens over the years since 1929. It is not my purpose to cover all this ground but to deal with that aspect of it which I have been asked to address in this article, namely the contribution made by the Fraser Government (1975–83) in providing redress against the ever growing power over the individual citizen by the use of Executive discretions. In doing so, I must go back to a date some years before that Government was elected in 1975.

The Kerr Committee Report

The catalyst for what has become known as the 'new administrative law' in Australia was the establishment of the Commonwealth Administrative Review Committee (better known as the Kerr Committee) in 1968. It was set up by the Attorney-General in the Gorton Government, Nigel Bowen, QC (as he then was), and its members were carefully chosen for the task given to them. Despite the controversy of his later career, John Kerr was, in 1968, at the height of his powers as a lawyer and as a man of public affairs with a deep interest in the subject of this enquiry. He was, appropriately, made its Chairman. The other two members of the Committee were the Solicitor-General of the Commonwealth, Anthony Mason, QC (as he then was), and Professor Harry Whitmore, a leading academic lawyer. In May 1969, Mason was appointed a judge of the New South Wales Court of Appeal and his successor as Solicitor-General, Bob Ellicott, QC, was added to the Committee. In view of Ellicott's subsequent political career as the first Attorney-General in the Fraser Government, this appointment was particularly significant.

The report of this high powered and highly productive Committee was published on 14 October 1971 and it covered all aspects of the wide ranging subject it was asked to consider. A quick perusal of chapter headings indicates the measure of its work — Administrative Decision Making in Australia; Courts, Remedies and Principles of Review; Overseas Systems of Administrative Law (the United Kingdom, New Zealand, United States and France are covered); The Appropriate Court for Judicial Review; Procedures and Grounds for Review; an Administrative Review Tribunal; Constitution of and Procedures before Tribunals; an Administrative Procedure Act. There are 21 chapters in all but these illustrate the width of the report and the issues covered by it.

The Committee was, of course, confined to a survey of Commonwealth decision making and its terms of reference envisaged review

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by the courts as well as by tribunals other than those already in existence. The Committee acknowledged that there were already a number of avenues of appeal on the merits to a variety of bodies such as courts, ministers and specialist tribunals. In addition, judicial review was available on a question of law under the prerogative writs and by some equitable remedies. These, however, were regarded as outdated and 'inadequate'.

Some of the more important merit review bodies in 1971 were the Taxation Boards of Review, the various Repatriation Boards and Appeal Tribunals, the Copyright Tribunal and the Trade Practices Tribunal. The real question before the Committee was whether this type of remedy should be expanded by more specialist tribunals (as in the United Kingdom) or by a general appeals body. The Committee rejected any reforms along the lines of the French or United States systems for the obvious and perfectly correct reason that these systems had evolved under different political (albeit democratic) forms of government. The Committee was impressed, however, by the extent of administrative review on the merits which had evolved in the United Kingdom. The number of sophisticated forms of review by specialist tribunals was far greater there than anywhere in Australia. Furthermore, following the report of the Franks Committee in 1957, a Council on Tribunals had been established to oversee the operation of these tribunals and to lay down appropriate and uniform procedures for them to follow. The *Tribunals and Enquiries Act 1958* was also passed. This dealt with the appointment of members of tribunals and also introduced three most significant reforms of administrative law:

- privative clauses in most UK Acts were removed and the practice abandoned;
- appeals to a court from a tribunal on a point of law should always be allowed; and
- reasons for the decision of a tribunal should be given on request.

Despite these notable reforms in the UK, the Committee did not simply recommend their adoption in Australia. It pointed to a major weakness in the UK system. The reliance on specialist tribunals meant that a great range of administrative decisions were unaffected by this system of appeals. Accordingly, it recommended that Australia should set up a general administrative review tribunal so that appeals could be available from a much greater spectrum of bureaucratic decisions affecting the individual. The Committee also recommended the establishment of an Administrative Review Council which would keep the new system under constant review and make recommendations to government about its operation.

The Bland Committee Report

Although the electorate was bored by its details, the concept of law reform was much in vogue in the 1960s, in the same way as access to law is fashionable today. Attorneys-General at both Federal and State level began to take the subject seriously and to be seen as 'a reforming Attorney-General' was a political accolade. Accordingly it was a good time to get the subject of administrative law reform on the political agenda and, although on a low key, the report of the Kerr Committee was welcomed on a bi-partisan basis. The McMahon Government was in its decline but it acted on the report to the extent that it set up another Committee. This was headed by Sir Henry Bland, a senior public servant. He was asked to survey the actual extent of discretionary decisions by the Commonwealth. This had been seen to be a necessary first step by the Kerr Committee. Bland was also asked to advise the Government on what decisions would be appropriate for the jurisdiction of a general appeals tribunal.

His report on this question was not made until October 1973, nearly a year after the Whitlam Government had succeeded McMahon. Naturally nothing could have been expected from that Government until this vital groundwork had been completed. The Bland Report covered decisions which were already subject to some form of appeal as well as many others which were not. It was an impressive exercise.

The (slow) pace of reform

Despite all this preparation and the bi-partisan support for radical change to the system of administrative law, the momentum for these reforms was halted. Why should this have occurred? It seemed odd that the Attorney-General, Lionel Murphy (who was rightly seen as a reformist), did not accord these reforms a higher priority. From one or two conversations I had with him at this period, I know that he was in favour of the Kerr/Bland reforms, but he had a great deal on his plate and had many political problems about which the Opposition were not being helpful! However, I think there were other problems which stayed his hand. Here I am moving into the realm of speculation, although my later experience in government would tend to confirm my views.

It must be conceded that the proposed reforms would greatly affect the way in which the business of government was conducted. The Australian Public Service (APS), although honest and impartial, had become steeped in its traditions and methods. It believed in its ability to carry on government in a fair and efficient manner even though it exercised vast discretions about the lives and rights of individual Australians. It is only fair to acknowledge that these proposals for the external review of a great number of their decisions and much greater access to courts on legal grounds were pretty revolutionary. They are better understood and are more acceptable to lawyers than to administrators.

Nevertheless, the sort of review proposed did not embrace the substitution of the bureaucrat for the lawyer. There were (and still are) vast areas of administration untouched by this reform. The Kerr Committee had clearly pointed this out, stating (at para. 354 of the report) that:

> the purpose of extending the scope of administrative review is not to permit the review of decisions settling government policy or the change of established administrative policies but to permit the correction of error or impropriety in the making of administrative decisions affecting a citizen's rights, including those made in the application of settled policy in particular situations.

Furthermore, as I have already mentioned, there were many examples of such types of review of which the APS had had experience. Nevertheless, there was clearly a lot of resistance to change within the APS and in its highest echelons. A good measure of patience and determination was required to overcome the many objections thrown up at ministers, some of whom may not have seen the point of the exercise and even approved of the existing system. Some ministers like exercising these powers!

The reform process commences

By 1975, however, the implementation of administrative law reform did get under way. Lionel Murphy went to the High Court early in the year and was succeeded as Attorney-General by Kep Enderby. Soon afterwards, a Bill was intro-

duced into the House of Representatives to establish an Administrative Appeals Tribunal (AAT). Despite all the work of the Bland Committee, which the Government had had 18 months to digest, the Bill only provided for the structure of the AAT and failed to give it any jurisdiction! Furthermore, it only set up the AAT and ignored the recommendations of the Kerr Committee that an Administrative Review Council should be the first step taken on the path of reform. We in the Opposition naturally criticised these glaring omissions from the Bill and, in fact, put forward our own proposals for the initial jurisdiction of the AAT. The Government took the point and introduced amendments of the Bill to fill both gaps in the original Bill. The Bill went through the Senate with much goodwill on both sides of the chamber by mid-1975. During the year, the Government also set up (by an administrative decision) the Social Security Appeals Tribunal, which was a first step towards full external review of the huge number of discretions exercised by the Department of Social Security. However, the AAT had not been set up by 11 November 1975, when the Whitlam Government was dismissed.

The election of the Fraser Government

The election of the Fraser Government a month later quickened the pace of administrative reform in particular. This was substantially due to the appointment of Bob Ellicott as Attorney-General. As Solicitor-General, he had not only been a member of the Kerr Committee but had also headed the Committee of Review of Prerogative Writ Procedure, which had reported to the Whitlam Government in October 1973. Ellicott was also greatly interested in law reform in general, which he pursued along with the new administrative reforms. He also inherited the Family Court, which had only just been set up and there was an enormous administrative problem in getting it underway. Fortunately, he was close to the new Prime Minister, Malcolm Fraser, who had relied a good deal on his advice after he entered the Parliament in 1974. This gave him a good standing with the Cabinet, although he was not a member of it.

First of all, he had to get the AAT on foot and it commenced business on 1 July 1976, under the guidance of its first President, Gerard Brennan, QC, and two senior members. Mr Brennan (now, of course, Sir Gerard Brennan, Chief Justice of the High Court) was also appointed a judge of the Commonwealth Industrial Court and some other judges became deputy presidents, to sit on a part-time basis.

Shortly after he took office, Ellicott announced that the Government would set up a Human Rights Commission and work was put in train to establish that body (which proved to be rather controversial). By the end of his first year as Attorney-General, legislation was passed to establish an Ombudsman and to create the Federal Court of Australia, to which most judges of existing Commonwealth courts were appointed, together with some new appointees. Judicial review of administrative decisions was to be an important part of its jurisdiction. To that end, the *Administrative Decisions (Judicial Review) Act 1977 (AD(JR) Act)* was passed in 1977, which modernised and greatly facilitated review of these decisions on legal grounds (but not, of course, on the merits, which was the province of the AAT). It also required the reasons for decisions to be given. The reform had been discussed for a long time and the abolition of the antiquated procedures which limited legal redress was long overdue. It was a major piece of reform for which Ellicott deserved much praise. Unfortunately, its operation was delayed for three years, for reasons I will shortly discuss.

The establishment of the AAT and the ARC

The establishment of the AAT and, shortly afterwards of the Administrative Review Council (ARC), together with the *AD(JR) Act* was, in my opinion, the high point of Ellicott's career as Attorney-General. He had certainly established himself as a reformist. However, early in September 1977, he resigned over a difference of opinion with the Government about his handling of the notorious case of *Sankey v Whitlam* which was a private prosecution in the Magistrates Court at Queanbeyan. I succeeded him as Attorney-General and held the office until the defeat of the Fraser Government in March 1983.

For the previous 14 months, I had been the Minister of Veterans' Affairs and had been engaged in the implementation of the Toose Report into the whole repatriation system. Some of its more important recommendations concerned the appeals mechanisms which had long been available to veterans even though there was no simple appeal on a question of law to any court. I had already got through Parliament a Bill to implement some of these reforms at the administrative review level and a Bill to give a direct appeal on the law to the Federal Court was being drafted. They proved most beneficial to veterans, who ran several test cases successfully in the High Court. The Treasury, however, was not pleased with these results!

This experience had enlivened a long standing interest of mine in public administration in general and in administrative law reform in particular. During my one term as a member of the Western Australian Parliament (1965–68), I had formed a strong objection to appeals to a minister for the following reasons:

- ministers did not really have the time to devote to them;
- 'the hole in the corner' methods adopted in dealing with them;
- they were too close to the primary decision makers no matter how hard they tried to be impartial; and
- they had no rational method of obtaining the relevant facts.

As Attorney-General, I inherited a mountain of problems (including the *Sankey* case), many of which were the result of the pace of law reform since December 1972. There were many within the subject of this article. In relation to these, the position was as follows:

- the AAT had been in operation for just over one year and was still finding its feet;
- the ARC was established with a number of issues on its agenda;
- the Ombudsman was in business under the guidance of Professor Jack Richardson (however, he came under the Prime Minister's responsibility);
- the *AD(JR) Act* had not been proclaimed because it was awaiting decisions by the Government on the extent of its operation;
- the report of Mr Justice Hope, who had conducted a Royal Commission into ASIO, had been received by the Government and work had commenced on its implementation, which included the preparation of a new Act;

- development of the Human Rights Commission was proceeding;
- drafting of the *Freedom of Information Bill* was at an advanced stage; and
- a Bill to introduce an independent review for complaints against the Federal Police was also under way.

The most pressing matter on this list which I had to consider was the extent of the AAT's jurisdiction. It was very busy cutting its teeth on the jurisdiction it had been given. There were also some major conceptual issues which it was addressing and its members (particularly, of course, the President) were coping with these. In the circumstances, they were not anxious to take on more jurisdiction although this was being proposed. We were fortunate to have someone of Mr Justice Brennan's ability but he was also under demand to sit on the Full Court of the newly established Federal Court of Australia. Its first Chief Justice (Sir Nigel Bowen) was anxious to establish the Full Court's standing with the legal profession.

I have mentioned that some of the federal judges had been give a commission to sit as required on the AAT but they were also busy and there seemed to be a reluctance on the part of some of them to devote much time (if any) to this jurisdiction. For instance, one of the main tasks of the presidential members was to give advisory opinions to the Minister of Immigration on deportation cases. This was not a judicial role but that was the limit of the AAT's jurisdiction.

In the upshot, I decided not to give the AAT any of the mass jurisdictions (such as those in the social services and repatriation areas) at this stage. Nevertheless, its jurisdiction steadily increased, simply by the fact it was there and the drafter of new Bills would incorporate appeals in appropriate sections of these. I did not dissuade them from doing so. In order to relieve the President from his growing burdens, the Government appointed a new full time federal judge to assist him. He was Mr Justice Daryl Davies, who had had experience as a member of a Taxation Board of Review. Davies succeeded Brennan as President when he resigned to concentrate on his judicial work. A number of appointments of both full-time and part-time members of the AAT were made over this period.

Freedom of information

Freedom of information (FoI) is properly included in the collation of administrative law reforms. Information about the working of government empowers individual citizens and helps to create a more level playing field for them in their dealings with government. Discovery of documents and the right to inspect any relevant ones is a vital aspect in establishing the truth in a court of law. Although FoI covers a much wider area, it would also assist people affected by administrative decisions to find out the background and to make decisions of their own about what action to take. FoI would generally enable citizens to learn far more about the decision making of government and cause them to influence the process itself. The existence of this right, like the giving of reasons, makes for better decisions in the first place.

The *FoI Bill* did not cause many problems for me before its introduction in June 1978. There were, of course, a number of briefings and final decisions to be made but it was substantially drafted by the time I became Attorney-General. There were some difficult decisions about some exemptions, particularly those relating to 'internal working documents' and cabinet confidentiality. I was anxious to get the Bill into the Parliament and have it debated after some reasonable exposure. I certainly envisaged a healthy debate both in the Parliament and by interested people in the community. The Bill as introduced was not set in concrete. My main concern was to get it on the statute book and see how it worked. For a long time, I had felt that governments wanted too much secrecy and I hoped the Federal Government and Parliament would lead the way on this reform. However, this view was not shared by all my colleagues and their advisers. I was only able to obtain authority to introduce the Bill and then have it referred to a Senate Committee. This resulted in the Bill being delayed for three more years before it came into operation. We just managed to beat the Victorian Parliament for the first FoI Act in Australia!

The Senate Committee recommended a large number of amendments, many of which were acceptable to the Government. When the amended Bill was debated in the Senate, the Opposition put down a raft of further amendments to which the Government was opposed. Although the Government had control of the Senate until 30 June 1981, the Liberal Senators who had served on the Committee (and some others) seemed to be likely to cross the floor on some of these. It looked as though a stalemate was inevitable. Fortunately, the Shadow Attorney-General, Gareth Evans, was as anxious as I was to get a *FoI Act* on the statute book without delay. He was as prepared as I was to have a less-than-perfect Bill rather than no Bill. In the end, he and I reached a compromise which our respective colleagues accepted and the Bill was passed in June 1981. Neither of us wanted any further complications as a result of a change in the composition of the Senate from 1 July 1981.

That was not the end of my problems with the *FoI Act*. It still had to be proclaimed. Regulations had to be drafted and departments instructed about how the Act should work. We finally got it into force early in 1982.

The *AD(JR) Act*

Bringing the *AD(JR) Act* into operation was nearly as frustrating for me as getting the *FoI Act* onto the statute book. There were two schedules to the Act which had to be finalised. One allowed total exemption from the Act (for example, for security decisions) and the other allowed exemption from giving reasons for decisions. The latter seemed to be wanted by departments in a great many cases. However, I was not disposed to accede to many of these requests and so strongly were they pressed that Cabinet was often required to make the decision. Not unnaturally, I felt that the entitlement to reasons was a vital right for individuals adversely affected and was required by their legal advisers. Giving people reasons for a decision goes to the heart of the right to justice. In a Senate Occasional Lecture which I delivered many years later (November 1992), I said:

> The requirement of giving reasons for a decision is of enormous importance. For a start it greatly concentrates the administrator's mind if he/she is rationally to justify the decision. It gives greater satisfaction to the person concerned and it provides a means of challenging the decision both on its merits and on its legal basis.

The need to give reasons undoubtedly makes for better decisions in the first place and should be welcomed by any decision maker worth his/her salt. Ultimately the long rearguard action on these issues ended and the *AD(JR) Act* came into force on 1 October 1980. I was much relieved not only that the ordeal was over but, with an election in sight, I

thought that my term of office as the Attorney-General might end before I had completed this major reform which Bob Ellicott had initiated but which I was determined would not be frustrated. I have noted, however, that the sniping against the Act continues. I was pleased that the attempt to emasculate it in 1987 (the *Administrative Decisions (Judicial Review) Amendment Bill 1987*) failed. However, eternal vigilance will be required to keep it alive and well.

The Hope Report

The Hope Report led to a major overhaul of ASIO and the passage of a new Act — the *Australian Security Intelligence Organisation Act 1979* — for which I was responsible. However, most of these reforms fall outside this article, except for the Hope recommendation for a Security Appeals Tribunal to enable people who have received an unfavourable security assessment to have some redress. This proposal was accepted by the Government and the Tribunal was included in the Act. It sets out a rather lengthy and complicated procedure for the hearing of the appeal. This is designed to protect 'sources' of information from identification which is one of the main concerns of security bodies. However, the procedure seems to have worked out all right. It is clearly an exception to the rule of favouring the general appeal body as against the specialist body. Despite a long debate in the Senate on this Bill, there was not much debate about this provision.

The establishment of the Human Rights Commission

The establishment of a Human Rights Commission was one of the first policy announcements of Bob Ellicott but it did not have the same priority as the other initiatives which I have discussed. The Commission was to have an advisory role in Australia's adherence to the International Covenant on Civil and Political Rights, which the Fraser Government wished to ratify. This advice could extend to the 'acts and practices' of government as well as legislation and it could hear complaints from individuals. It was proposed at first that it should cover the States as well as the Commonwealth but that was abandoned fairly early on in the development of the Bill. After more trouble in the Senate, the Bill was passed in 1981 and it was proclaimed (together with Australia's formal ratification of the Covenant) on Human Rights Day in December 1981. It was later expanded into the Human Rights and Equal Opportunity Commission with much wider jurisdiction and powers. It is properly regarded, in my opinion, as a subject within the scope of this article.

Another candidate for inclusion in this area of reform is the legislation which deals with complaints against the Australian Federal Police. This followed a report by the Australian Law Reform Commission. The *Complaints (Australian Federal Police) Act 1981* set up an external review for these complaints by a tribunal presided over by a federal judge. Again, it raises the question of the need for a specialist tribunal but anyone with experience of the AFP would appreciate its sensitivities.

Conclusion

The 'new administrative law' of the Commonwealth has been in place for nearly 20 years and a new generation of bureaucrats has had to live with it. In the tradition of the APS, I am sure that, as good professionals, they have done their best to meet its demands and restrictions. It no doubt has it imperfections and there should always be debate about the working of any system, whether it be old or new. As I have shown in this article, it was not easy to get this system into place and I am sure there will always be resistance to some, if not all, aspects of it. Apart from FoI, there was little press interest in the debate about its introduction and many of my colleagues would have preferred not to be bothered by the issues presented to them. However, there were and still are some major principles about the rights of the individual at stake in this issue and no democracy worth its salt can ignore these.

One new attack on the system does disturb me. This is the claim that a modern government should now be concerned about 'outcomes' rather than 'process'. This sounds very much like 'the end justifies the means' or that we should only be concerned 'about the greater good for the greater number'. Democratic government must not only act according to law (that is, process) but should also be concerned that the rights of individuals are part of the outcome and that each of them is given a fair go.

Update: Complaint Admissible

The United Nations Human Rights Committee has declared admissible a complaint on behalf of a Cambodian boat person in relation to his detention in Port Hedland by the Australian Government.

The complaint, which was lodged in June 1993 pursuant to the First Optional Protocol to the ICCPR (see Poynder, N., 'Marooned in Port Hedland', (1993) 18(6) *Alt.LJ* 251 at 272), alleges that the Australian Government is in breach of articles 9.1 and 14 of the ICCPR, which deal with arbitrary detention and the right of access by persons in detention to lawyers and to the courts.

The person who is the subject of the complaint was held in detention for over five years while he was awaiting a decision to be made on his claim for refugee status. He alleges that his detention was inappropriate, unnecessary and unduly prolonged, and that the Australian Government refused to provide him with adequate access to legal advice and to the courts.

The complaints procedure is the same as that used in the well-known Tasmanian gay rights case (*Toonen v Australia*, UN Human Rights Committee 31.3.93 — UN Doc CCPR/C/50/D/488/1992, see Joseph, S., 'Gay Rights under the ICCPR' 14 *Tas LR* 392) where an adverse finding against Australia by the Human Rights Committee has led to legislation by the Federal Government to overcome Tasmanian anti-gay laws.

Australia now has six months in which to provide further comments to the Human Rights Committee, and the matter is likely to be determined by the Committee some time next year.