

ADMINISTRATIVE REVIEW COUNCIL

Emeritus Professor Dennis Pearce AO*

Paper delivered at the 25th Anniversary Proceedings of the Administrative Review Council, Canberra, 6 December 2001. The Proceedings were published by the Council in June 2002. This paper is reproduced in the AIAL Forum to bring it to the attention of a wider audience.

Establishment of the Council

The exercise of some means of control over the decisions of the executive that affect citizens, whether that executive be a King, a dictator or an elected government, has been a major pre-occupation of all societies throughout the ages. It was as a means of effecting some control over the Commonwealth executive that the administrative review system was adopted in the 1970s.

The Administrative Review Council (the "ARC") was established as a key element in that system. It has played an important role in the development and maintenance of the system as a check on the unchallenged exercise of executive power. At the 25 year mark in its history, the ARC is facing increasing pressure from the executive that would constrain its activities – as indeed is the whole administrative review system. It is appropriate at this time to look back across the life of the Council to see what it has achieved. But more importantly, it is necessary to consider where it is going and what role it should play in the future.

The Administrative Review Council was constituted on 11 November 1976 and first met on 15 December 1976. The functions of the Council are set out in s51 of the *Administrative Appeals Tribunal Act 1975* (the "AAT Act") which presently reads:

- (1) The functions of the Council are:
 - (aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and
 - (ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and
 - (a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and
 - (b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and

* *Dennis Pearce is an Emeritus Professor of Law at the Australian National University. He is also a Special Counsel at Phillips Fox Lawyers. Professor Pearce was a member of the Administrative Review Council from 1988-1991 while Commonwealth Ombudsman. The Council when publishing this paper indicated that the comments did not reflect the view of the Council.*

- (c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and
 - (d) to inquire into:
 - (i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and
 - (ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and
 - (iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction;and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in respect of any of the matters referred to in subparagraphs (i), (ii) and (iii); and
 - (e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and
 - (f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and
 - (g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and
 - (h) to promote knowledge about the Commonwealth administrative law system; and
 - (i) to consider, and report to the Minister on, matters referred to the Council by the Minister.
- (2) The Council may do all things necessary or convenient to be done for or in connexion with the performance of its functions.
- (3) If the Council holds an inquiry, or gives any advice, referred to in paragraph (1)(ab), the Council must give the Minister a copy of any findings made by the Council in the inquiry or a copy of the advice, as the case may be.

It can be seen that this is a wide remit that embraces all aspects of review of government decisions and leaves it open for the Council to look into the full range of decision-making processes.

The three principal documents concerned with the establishment of the Council can be seen as predictive of its future life. The need for a council was recommended as part of the administrative review package proposed by the Commonwealth Administrative Review Committee (the "Kerr Committee") in its report of August 1971. The Kerr Committee recommended "that there should be a small permanent Administrative Review Council (the "ARC") which would carry on continuous research into discretionary powers with special reference to the desirability of subjecting their exercise to tribunal review, either in a specialist or

the general review tribunal [which the Committee had recommended be established].”¹ The Kerr Committee believed that the ARC should have senior administrative officials among its number in addition to lawyers and that there should be one member with either broad political experience or experience in the study of administrative law.²

The Committee saw the ARC as performing functions similar to those of the Council on Tribunals in the United Kingdom but having additional functions relating to making recommendations as to the administrative discretions which should be the subject of procedures for tribunal review, and whether such discretions should be reviewable by specialist tribunals or by the general review tribunal.³ It was also proposed that the Council should consider the appropriateness of the inclusion of privative clauses in Commonwealth legislation and make reports from time-to-time to the Attorney-General.⁴

The Kerr Committee was clearly influenced in its recommendation for the establishment of an ARC by the experience in the United Kingdom of the Council on Tribunals. This body, which is still in existence, has as its task the general oversight of tribunals, including their procedures, membership, and performance. Complaints about the operation of tribunals can be taken to the Council. The Kerr Committee recommendations had the ARC proceeding in a somewhat different direction in that its principal task was to determine the range of matters that ought to be subject to tribunal review rather than monitoring the tribunals themselves.

It is important to put the work of the Kerr Committee in its context. The Committee had adopted as a basic premise that the exercise of discretion by a government agency should be subject to external review. At the time of the Kerr Committee, the only way to seek a review of the vast majority of government decisions was by means of judicial remedies or parliamentary oversight. The Kerr Committee quite rightly considered that the former were out of reach of most persons affected by government decisions and the latter was ineffectual. It was to overcome this position that the Committee recommended that tribunal review be extended and judicial review simplified. To give effect to the first proposal, it was first necessary to identify the decisions suitable for external review. The Kerr Committee considered that it was unable to identify these decisions and that this should be the task of the proposed ARC.

The response of the Government to the Kerr Committee’s proposals relating to external review of government decisions was to appoint a committee called the Committee on Administrative Discretions (the “Bland Committee”) to identify the decisions that ought to be subject to review by a tribunal. This Committee reported in October 1973.⁵ It tried to identify every discretionary decision provided for in Commonwealth legislation and consider whether it was appropriate for external review. However, significant among the Bland Committee’s recommendations was that it had in large measure done what the Kerr Committee proposed should be undertaken by the ARC and that there was no need for such a body.⁶

It is of relevance to note that the Kerr Committee comprised all lawyers, only one of whom had a connection with government. The Bland Committee comprised a majority of public servants.

Legislation to give effect to the first element of the review package, the establishment of the Administrative Appeals Tribunal, was introduced into the Parliament in 1975. The AAT Bill contained no provisions relating to the ARC. However, the Opposition indicated that it supported the establishment of an ARC. The Government bowed to this pressure and an amendment to the AAT Bill was introduced in the Senate to establish the ARC. The Minister representing the Attorney-General, Senator James McLelland, said:

...the Council would exercise important functions in advising on developments that should be made from time to time in the area of administrative decision-making and the review of those decisions. The members of the Council will be appointed both from officials concerned in these matters and from other persons able to contribute to the work of the Council. It will be an important means of ensuring that the citizens' rights to the review of administrative decisions develop along with changes in this area of the law.

The AAT Bill, with the inclusion of Part V establishing the Council and setting out its functions, powers and membership, was assented to on 28 August 1975 and commenced on 1 July 1976. The provisions of the Act relating to the Council have been refined since then but the general concept of the Council as provided for in 1975 has continued unchanged.

At its first meeting, the Attorney-General, M R J Ellicott QC, who had been a member of the Kerr Committee, said:

It is important that this Council be seen by the public as the expert body designed to be a watchdog for the citizen, to ensure our system is as effective and as significant in its protection of the citizen as it can be.⁷

As can be seen from this brief summary, the support for the establishment of the Council came from lawyers and parliamentarians. Opposition to such a body came from the Executive. This has largely been the story of the Council ever since.

Senate Committee Review of the Council

Before looking at the Council in detail it is pertinent to mention the review of the Council that occurred in 1996-97 as it impinges on the operations and work of the Council.

Following a suggestion from the Attorney-General, the Honourable Daryl Williams, the Senate in September 1996 referred to the Senate Legal and Constitutional Legislation Committee a general review of the Council with particular reference to:

- the benefits of having a separate and permanent administrative law advisory body;
- the membership structure of the ARC;
- the functions and powers of the ARC;
- the effectiveness of the ARC in performing its functions and any obstacles to that effectiveness;
- the need for any amendment to Part V of *the Administrative Appeals Tribunal Act 1977* (the "AAT Act").

The Committee reported in June 1997.⁸ Its conclusions and recommendations were, in general, most favourable to the ARC. All its recommendations except one were subsequently accepted by the Government and amendments were made in 1999 to the AAT Act to give effect to those recommendations that required legislative intervention for them to be carried out. The recommendations of the Senate Committee are dealt with at the appropriate points in the discussion which follows.

It is worth observing, as a general comment, that the review seems to have been a fairly gentle one, perhaps stemming from the fact that the majority of members of the Legal and Constitutional Committee are lawyers. Only one genuinely critical submission was received by the Committee and that, interestingly, was from a practising barrister. His criticisms were directed to the administrative review system rather than the Council itself. All the non-institutional submissions were from lawyers and they were generally commendatory of the Council.

It is interesting to compare this review with that conducted by the Senate Standing Committee on Finance and Public Administration in 1991 of the Office of the Commonwealth Ombudsman.⁹ The members of that Committee set out to be highly critical of the Office. However, somewhat reluctantly, they were obliged to concede that the Ombudsman was doing a very good job within the limits of funding made available to it. It would have been interesting to see what a committee less sympathetic to the concept of administrative review would have said of the Council. Perhaps the choice of committee is a reflection on the comparative impact that the Ombudsman and the Council have on the government.

The most obvious absence from the Legal and Constitutional Committees' recommendations relating to the Council was that of the need for an increase in funding. Since the date of the Committee's report, the Council's resources have been cut. It is fairly clear from the Committee report that this was not expected nor was it assumed that the Council would do less than it had been doing. The unstated assumption is that its resourcing would continue at its then current level. The absence of this issue being addressed has not been of assistance to the Council. (Again this was in contrast with the report on the Ombudsman which did recommend greater resources be provided to the Office: a recommendation implemented by the Government.)

Structure of the Council

The Council comprises part-time members supported by a small secretariat. From its commencement in 1976 until November 1979, the President of the AAT was also President (at that time called Chairman) of the ARC. The legislation was amended in 1979 to provide for the appointment of a separate Chairman. This was a significant but essential change in distancing the Council from the operation of the AAT as the interests of the Council and the AAT do not necessarily always coincide. The change also recognised that the increasing workload of the AAT did not allow its President sufficient time to further the work and interests of the ARC. However, the President of the AAT was retained as a member of the Council, an issue which is returned to below.

The Council has had six leaders since its establishment:

- Justice Gerard Brennan (then President of the AAT 1976 – 1979)
- Ernest Tucker (Company Director and business man) 1979 – 1987
- Professor Cheryl Saunders (Legal academic) 1987 – 1993
- Dr Susan Kenny (Practising barrister) 1993 – 1995
- Professor Marcia Neave (Legal academic) 1995 – 1999
- Bettie McNee (Commercial lawyer) 1999 – the present.

While the President of the Tribunal is a part-time position, performance of the role requires a significant commitment of time from the incumbent. The President has a considerable effect on the nature of the work of the Council and its relationship with government. The selection of the projects to be undertaken by the Council and the form and content of reports are heavily influenced by the President's choice and this has had an impact on the matters dealt with in the Council's reports.

The second significant internal factor that has impacted on the work of the Council has been the nature of the support secretariat provided to the Council. By 1980 a secretariat of six full-time positions had been established led by Dr Graham Taylor who was designated Director of Research and was a Senior Executive Service level officer.¹⁰ The first three Directors were academics at the time of their appointment. The philosophy underlying the formative years of the administrative review system and affecting its later development was influenced by those appointments. Subsequent Directors have (except in one instance) all come from the public service, thereby establishing a pattern of greater executive influence in the Council, an issue returned to below.

The Fifth Annual Report (1980-81) of the Council noted, "the Council is a relatively new organisation and its secretariat has not yet developed to the point where its size is adequate to ensure continuity and stability of operations." In fact, the personnel establishment of the secretariat remained around this figure for many years. There seemed always to be difficulty in holding members for an extended period, largely because the secretariat is not regarded as part of the mainstream of the public service. Nonetheless, a number of very able and creative persons have spent periods at the Council secretariat and have contributed at a high level to the work of the Council. However, in 1998/1999 the size of the secretariat fell to only four, including an administrative officer.

Another subtle change, which might not be thought to have any great significance, but which is nonetheless indicative of the view taken of the status of the Council, was the decision in 1998 to require the Council to operate from the same premises as the Attorney-General's Department. At the time of the establishment of the Council, it was thought appropriate that it should operate from premises outside the Attorney-General's Department to indicate that it was a body that functioned independently of government. Financial constraints on the Department resulted in the abandonment of this principle and the removal of the Council to offices in the Department. Appearances are important and this action, as with the reduction in resources available to the Council, and the Director of Research becoming a de facto public service position, are indicative of a desire on the part of the executive to reduce the status of the Council and to include it within the general ambit of government activities.

Membership

The Kerr Committee said that the ARC should contain senior administrative officials in addition to lawyers in its membership. The body that ultimately came into being followed a somewhat different format.¹¹ It contains three ex-officio members – the President of the AAT, the Commonwealth Ombudsman and the President of the Australian Law Reform Commission (the "ALRC"). When first established, the legislation provided that the Council was to comprise not less than three and no more than seven other members. This provision was amended in 1977 to provide for a possible ten other members.

The qualification for membership is phrased in a somewhat curious negative fashion: that a person should not be appointed as a member "unless he or she has had extensive experience at a high level in industry, commerce, public administration, industrial relations, the practice of a

Members are appointed for 3 years and most serve one term. The figures on reappointments are interesting. Nineteen of the 57 persons appointed to the Council have been reappointed for a second term. Nine of the 23 public servants have had their office continued; 4 of the 8 business representatives; but only 3 of the 14 lawyers. Extended familiarity with the work of an organisation usually increases a member's influence. The ability of the public service members of the Council to have had this influence is manifested by these statistics.

The position of the senior public servants who have played a substantial role as members of the Council is an interesting one. There is no doubt that some came with the intention of being critical of the work of the Council and stayed to be its supporters. Others came not supportive and remained that way. When proposals impinged directly on the operation of the department from which the member was drawn, the reluctance to endorse proposed review mechanisms increased. While the presence of senior public servants almost certainly acted, from time-to-time, as a brake on what the Council recommended, it also brought clearly to Council members' attention, the likely response that the government would give to a recommendation. Regrettably, the endorsement of recommendations by senior public servants as members of the Council has not guaranteed that the recommendations would be accepted by the government and given effect. Nonetheless, the fact that a senior colleague was prepared to endorse a proposal served to give it much more clout than would have been the case if the recommendation came from persons who could be denigrated as unaware of the impact that their recommendation would have on the management of the public service.

However, the powerful influence of the executive through its membership of the Council has almost certainly resulted in the Council's reports and recommendations leaning towards the interests of the government. This has been exacerbated by the minimal voice given to users of the review system through Council membership. This is perhaps reflected in the fact that only 9 of the Council's 44 reports have been concerned directly with the welfare and income support sector.¹²

The public service representation on the Council has changed somewhat in the last few years. The Secretary of the Attorney-General's Department is, as usual, a member. However, there is now no member from a mainstream Commonwealth service delivery agency, that is to say, a body directly affected by the administrative review system. It is pertinent to ask whether this indicates that the Council is seen as less relevant to Commonwealth government decision-making than in earlier times?

The appointment of persons with a background in business was significant through most of the early years of the Council but more recently seems to have been given less importance. This is not surprising as the overwhelming number of matters considered by the Council involve either the welfare and income support sector or general government administration. The Commonwealth administrative review system does not impinge as heavily on the business sector as on the welfare, including immigration, sector.

The position of the three ex-officio members on the Council poses some questions. The President of the AAT and the Commonwealth Ombudsman are continually involved in the working of the administrative review system. It is apparent that they can bring to the Council a deal of experience that is relevant to the matters being considered by the Council. On the other hand, they can be the subject of Council inquiry and recommendation. In particular, what are established as independent review authorities could be said to be being subjected to oversight by another body. This, however, is expressly provided in the powers of the ARC.¹³ Notwithstanding this statutory remit, one AAT President absented himself from the meetings of

the Council for a short period because he did not consider that he should be subjected to questioning about the role and the procedures of the Tribunal.

Julian Disney suggested that it might be desirable for the President of the AAT and the Ombudsman to cease to be members of the Council and that their role should be limited to providing regular reports and being invited to attend specific sessions of the Council to discuss their operations.¹⁴ However, this view has not been followed up and the report of the Senate Committee referred to above made no recommendations that there be any change in the membership of these officers.

There is mutual advantage for both the Council and the two office holders in membership of the Council. The Council benefits from the hands-on experience of the review system provided by the AAT President and the Ombudsman. The holders of those offices benefit from the overview of the whole review system they gain through Council discussions. Any proposals for removal of these ex-officio members from the Council should be rejected.

There has been some discussion about the President of the ALRC continuing as a member of the Council. The Council itself, in its submission to the Senate Committee, indicated that, if there were to be changes to the membership of the Council, the relationship with the ALRC could be terminated. The Senate Committee indicated that it considered that the membership of the Council would benefit from being able to appoint a person or persons as Council members for the purposes of a particular project. In the Committee's view, such a change would obviate the need for the President of the ALRC to remain a permanent member of the Council. In its response, and in subsequent legislation, the Government accepted the first element of this recommendation but not the second. It is now possible for persons to be appointed as Council members for a particular project but no action was taken to remove the President of the ALRC from the Council. No person has been appointed to the Council for a particular project.

While there have been some questionable appointments to the Council from time-to-time over the years, taken overall, there has been a very high level of quality in Council members. Senior representatives from government, the legal profession and from business have been brought together to consider the structure and workings of the administrative review system. The quality of the reports and the advice to government provided by the Council reflects the ability and attention given to the projects by the Council members. The major issue still outstanding is the balance of membership. The present Council has fewer public service office holders than any previous Council. However, it still lacks welfare sector representation and, indeed, has three vacant membership positions. This may well reflect the lack of importance that the present Government places on the work of the Council.

Functions of the Council

When the Council was first established, its primary function was seen to be that of identifying the administrative decisions that should be subject to review and to oversight the procedures followed by the review bodies that made up the Commonwealth administrative review system. Section 51 of the AAT Act which set out the Council's functions reflected this understanding. However, it also included a necessary or convenient power to do things that related to the performance of these functions.

The Council did not at any time seem to feel under any great constraint arising from limitations that might have been thought to flow from the way in which its functions were specified. As is discussed below, it gradually expanded the range of matters on which it reported to embrace more generalised issues that were pertinent to the administrative law system. It also saw itself

as having a significant role in educating the community generally about their administrative law rights.

However, persons making submissions to the Senate Committee pointed out the narrow construction that could be put upon the statement of the Council's functions and recommended that they be expanded to cover the range of matters that were in fact being dealt with by the Council. Witnesses supported the scope of actions that the Council had undertaken and considered that it was appropriate to amend the legislation to ensure that there could be no doubt about the Council's power to engage in those activities. The Senate Committee agreed with these views. The result of this was an amendment of s51 of the AAT Act in 1999 to express broadly the functions of the Council to oversight the administrative law system and the procedures used by authorities of the Commonwealth in exercising administrative discretion. Similarly, the Act was amended to ensure that the Council's educational role was also given formal recognition.

If the changes had stopped there, it could quite reasonably have been said that the amendments did no more than recognise what the Council had, in practice, been doing. But the amendments went further. Section 51(1)(ab) reads:

- (ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner.

It can be seen that the Council is given a proactive role to inquire into procedures used by administrative decision makers at large – both Commonwealth authorities and other persons. This could include private contractors. The power is certainly expressed broadly enough to embrace the Council undertaking an audit of a particular agency's decision-making practices. It would clearly allow the Council to perform the watchdog role stated as its purpose by Attorney-General Ellicott at the first meeting of the Council.

Another investment of power, and one that had not so obviously been something which the Council had undertaken in the past, was the inclusion in s51(1)(d)(i) of the power to inquire into "the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions" and also to inquire into "the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons".

It will be interesting to see how the Council exercises this power because qualifications for membership of the proposed Administrative Review Tribunal were the subject of considerable controversy. It appeared that the Government was proposing to reduce the level of qualification required for appointment to that body. It would be desirable for the Council to undertake a review of this sensitive issue as little attempt has been made to indicate what should be expected as the basic requirements for appointment to a Commonwealth review authority.

The functions of the Council as originally stated, were based on a self-motivating model that allowed no formal room for the Minister to influence the matters that should be looked at by the Council. The Senate Committee recommended, and s51 was amended to provide, that the Council is to consider, and report to the Minister on, matters referred to the Council by the Minister. This position had been achieved in practice by agreement between the President of the Council and the Attorney-General. However, subject to two provisos, it is a worthwhile amendment to recognise formally the capacity of the Minister to request that the Council look at

particular matters referred to it. First, the Council should not become dependent upon Ministerial references, but should be able to pursue issues that fall within its stated functions without having to seek a reference from the Minister. Secondly, there is a danger that, unless adequate resources are provided, the Minister could overwhelm the Council with references which, if not attended to, could lead to criticism and indeed a case being made out to terminate the existence of the Council. The exercise of this power will require goodwill on the part of the Minister and will make it more necessary than ever for the President to establish a good working relationship with the Attorney-General.

Work of the Council

The Council's activities broadly fall into three categories:

- the preparation of reports;
- advice to government on specific issues and general liaison with government agencies on matters relating to administrative law;
- educational activities through seminars and publications.

(i) Reports

The 44 reports made by the Council since its establishment are listed in the Appendix. It is interesting to note the subject matter of the reports. The major categories are as follows:

- 5 : *Administrative Decisions (Judicial Review) Act 1977* (the "ADJR Act")
Administrative Appeals Tribunal
Welfare and income support
- 4 : Customs and Exercise
Immigration and citizenship
- 3 : Access to administrative review

The number of reports devoted to the ADJR Act and to the AAT reflect the major role that these play in the administrative review system. The groups of reports relating to customs and to immigration reflect the fact these were two major areas of government decision-making that, until the adoption of the administrative review system, had largely gone unquestioned. One of the major contributions of the Administrative Appeals Tribunal has been in the development of customs law. Immigration has, of course, been a significant area of contention as to the nature of review processes that should be applied to it

It is interesting to note that the reports on access to administrative review, starting with Report No. 27 in 1986 relating to notification of decisions and rights of review, did not appear until some time after the establishment of the Council. That report was also significant in marking the first of a change of emphasis in the reports of the Council. Up until then all the reports related to specific review bodies or the review mechanisms that should be put in place in relation to particular types of decisions. From Report No. 27 onwards, 10 of the 17 reports relate to broader matters raising issues of principle relevant to review of administrative decisions. Indeed, of the last 6 reports of the Council, only one, relating to review of patent decisions, has been concerned with a specific area of decision-making. This reflects the maturation of the administrative review system whereby there are now few decisions that do not have some

review component relating to them. The issues that are now of concern are those which apply across the system or which reflect changes in government policy such as the increase in contracting out of government decision-making.

These types of issues raise much more difficulty for the Council in the approach that it should take to the content of its reports. The Council has been, and will continue to be, presented with a choice in many cases between principle and pragmatism. With the general decline in government support for external review of decisions exemplified by the adoption of the contracting out of decision-making and the limitation of review of immigration decisions, the Council has difficult choices to make as to whether it endeavours to maintain the purity of a once much praised review process or whether it goes along with the change in government attitude and tries to preserve the best system that this change of attitude will permit. Report No. 39: "Better Decisions: review of Commonwealth Merits Review Tribunals" and Report No. 42: "The Contracting Out of Government Services" reflect this dilemma. "Better Decisions" ran with the tide of government pressure to amalgamate all the tribunals into the one mega-tribunal while trying to preserve the features that were regarded as valuable in the various existing bodies. The Government seized on the model but ignored a number of the provisos relating to best practice that the Council tried to build into its approval of the amalgamation process. The result was the Administrative Review Tribunal proposal which was defeated in the Senate, largely because the Government had not followed the ARC proposal. With hindsight it may have been wiser for the Council to have stood on the issue of principle. It should have foreseen that the Government would draw from its report support for what it wanted to achieve without implementing the Council's qualifications.

By way of contrast, the Contracting Out report is an entirely principled report. It endeavours to bring within the scope of administrative review the range of decisions that formerly were subject to such review but which have been moved outside the ambit of the system as a result of the contracting out of the function. The principle is clear and the Council properly endorsed it. Without mechanisms being available for review of decisions made by non-governmental bodies, citizens are placed in a position that is worse than that which led to the establishment of the Kerr Committee. Unfortunately ideology has so far carried the day and the recommendations of the Council have been ignored.

The Council is placed in the difficult position of having to suggest mechanisms that will preserve the protection of persons affected by adverse decisions whether made by governmental or non-governmental agencies while recognising that governments nowadays wish to place limitations on external review.

This dilemma for the Council is reflected in the extent to which recommendations contained in the Council's reports have been accepted and implemented by government. The Council sets out the results of its more recent reports in its Annual Report. Its submission to the Senate Committee included a detailed statement on the implementation of its first 40 reports. Despite prompting from a number of the witnesses to the Committee, the Committee reached no general conclusion on the extent of implementation of the Council's reports by the government but suggested some changes in approach that might increase the opportunity for implementation. These are returned to below.

It is noteworthy that, in more recent years, the government has simply not responded to some of the major reports of the Council. For example, Report Nos 32 and 33 relating to the ADJR Act made in 1989 and 1991, respectively, have not prompted any response at all. Nor have the substantial reports on Government Business Enterprises (No. 38, 1995); Open Government: review of the federal *Freedom of Information Act 1982* (No. 40, 1995); and The Contracting Out of Government Services (No. 42, 1998). A number of years have elapsed since these reports

were made and to have simply no response from the government at all raises questions as to the significance that is placed on the work of the Council. These were carefully thought through and detailed reports dealing with significant questions. The failure of the government to respond has been disappointing, not only from the viewpoint of the Council but also from the community at large.

The Senate Committee recommended "that the Government give an undertaking to respond to all Administrative Review Council project reports within twelve months of their delivery".¹⁵ This was the one recommendation of the Committee that was rejected by the Government. Its response to the Report said that it recognised the importance of responding in a timely manner but did not accept that it was necessary to bind itself to a response within 12 months.¹⁶

This approach reflects badly on the commitment of the Government to the maintenance of the system of review for citizens affected by executive decisions. It makes hollow the prediction expressed by Attorney-General Ellicott at the first meeting of the Council that a legislative obligation to respond to Council reports was unnecessary because future Attorneys-General would ignore such reports at their peril.

(ii) Advice and Submissions to Government and Parliament

To the end of June 2001, the Council had provided around 245 letters of advice and submissions to Ministers, parliamentary committees and government agencies of various kinds. Until recently they ran at the rate of 10-15 each year. These advices have, since the Council's Tenth Annual Report for the year 1985-86, been set out in the Annual Report. They primarily deal with individual matters rather than the broad policy issues with which the reports are concerned but they provide useful guidance to public administrators and administrative law practitioners on a diversity of issues. They are a very significant collection of wisdom. Any assessment of the value of the ARC cannot ignore this contribution. The Council itself has said that it should like the opportunity to comment more fully and at an earlier stage of the formulation of proposals than it is often given the chance.¹⁷ Certainly this would be a wise step for prudent administrators to take. It would often avoid later tangles with the Senate Committees on Scrutiny of Bills and Regulations and Ordinances.

Whether the Council would be capable with its limited resources of providing greater assistance to agencies is a separate question. This may be some explanation for the fact that the number of advices and submissions has dropped markedly in recent years – 6 in 1998-99; 9 in 1999-2000; 4 in 2000-2001. But the greater concern is that it appears that the advice of the Council is no longer being sought by agencies and other bodies. If this be so, it is a commentary on its perceived relevance.

(iii) Education and Training

The Council has published a number of significant papers aimed at improving decision-making. In recent years this has formed a significant part of its activities. Noteworthy among these guides have been the recent publications:

- What Decisions Should be Subject to Merits Review, 1999
- Practical Guidelines for Preparing Statements of Reasons, 2000
- Guide to Standards of Conduct for Tribunal Members, 2001

These are necessary aids to decision-making for government officers. They are also valuable guides to persons affected by government decisions in setting out the standards with which the public can expect government officers to comply.

The Council has also initiated a regular Tribunals Conference attended by members and staff of Commonwealth, State and Territory tribunals. The Conference provides a forum for the exchange of views and experiences between tribunals. The Conference will, it seems, lead to the establishment of a Council of Tribunals which will involve tribunals across Australia. It is not yet clear whether this will lead to the end of the Council's role in the annual Conference. It may well be that the Council should involve itself still in bringing Commonwealth tribunals together. The demise of the ART proposal has left the way open for greater informal cooperation between those tribunals.

The Council has, since 1984, published a journal called *Admin Review* which provides information about recent developments in administrative review as well as the work of the ARC. In more recent times *Admin Review* has published articles on matters pertinent to the Commonwealth administrative law system. When *Admin Review* first appeared there was no journal devoted to administrative law in general or to the Commonwealth administrative review system in particular. *Admin Review* filled a very valuable gap. It is questionable, however, whether it needs to be maintained in view of the fact that there is now the *Australian Administrative Law Journal* and the Australian Institute of Administrative Law quarterly publication called *AIAL Forum*. These two publications obviate the need for *Admin Review* to publish articles as there are other appropriate outlets for such writings. The broader information that is contained in *Admin Review* and which is very useful could well be published on a cooperative basis with *AIAL Forum* which would provide a useful avenue of mutual distribution of such information and relieve the Council of its publishing obligation.

Members of the Council, particularly the various Presidents, have participated in administrative law and public administration conferences frequently. The Council itself has seldom run a conference of its own volition. In 2001 the Council was a joint sponsor of the AIAL Annual Conference. This seems to be a role that it could well undertake routinely with the benefit of making itself better known in the administrative law community. It would also provide a means of input into matters that it has under consideration. Workshopping discussion papers or advancing through a major paper possible proposals for change in the active forum that assembles each year for the AIAL Conference would be advantageous to the Council.

Future activities

The Council has indicated that it intends to continue with the following projects:

- Council of Australian Tribunals:
 - the ARC will continue with its support for the establishment of a Council of Australian Tribunals. This body would not be limited to Commonwealth tribunals but would encompass also the major State and Territory tribunals. It would provide a national forum for tribunal heads to develop policies, secure research and promote education on matters of common interest.
- The use of technology in government decision-making:

- an examination of the processes by which administrative action is delivered. This will focus on the use of technology in decision-making including the use of expert decision-making systems.
- The scope of judicial review:
 - a consideration of the principles supporting judicial review and the circumstances in which limitation or exclusion of review might be appropriate.

These are all significant and timely projects and suitable for the ARC action. How they might be carried through is returned to below.

Assessing the ARC

The Senate Committee was required to inquire into "the effectiveness of the ARC in performing its functions". It said that it found that objective assessment of the ARC's effectiveness was not easy because of the wide range of activities that the Council undertakes and the inherent difficulties in assessing such things as the quality of its advice, the value of policy recommendations, and the success of its efforts to promote administrative law values. The ARC itself suggested to the Committee that assessment of its effectiveness should be based on the extent to which:

- its advice was accepted and its recommendations implemented, or, if not implemented in full, acted as catalysts for change;
- its reports and advices served as useful summaries and analyses of the law, thereby making an important contribution to debate and discussion;
- its other forms of policy input, such as its comments on proposals being submitted to Cabinet and its submissions to parliamentary and other inquiries, were successful;
- its reputation was high in the eyes of those outside government; and
- its contribution as a facilitator led to worthwhile exchanges of ideas, cross-pollination of best-practices, and experiments and innovations.

These, together with a suggestion from the Attorney-General's Department that regard should be had to the Council's record in completing references and agreed projects, were used by the Committee in reaching its conclusion that the Council was indeed an effective body. The factors used by the Senate Committee have been broadly adopted by the Council for the purpose of reporting on its performance in its Annual Reports.

The Senate Committee's summary of submissions to it based against the performance criteria that it adopted revealed that the ARC was held in high regard, it had a very good record of completing references and agreed projects, its reports were regarded as useful summaries of the law and made a good contribution to debate subject only to one qualification to which I return below; and it had performed its facilitation role at a high level. There seems no basis for differing from these conclusions. Some criticism was made of the way in which the Council went about the preparation of its reports and advice. The Attorney-General's Department thought that there should be greater use of the issues/discussion paper technique and there should be more early and ongoing consultation with relevant agencies. These are somewhat curious suggestions because in fact the Council does consult widely before making a report. It is usual

for it to distribute issues papers as draft proposals and to invite comment from interested parties.¹⁸

The Attorney-General's Department also suggested that the Council should develop a "Financial Impact Statement" to accompany all advices presented to the Attorney-General and this view was also reflected in the Department of Immigration and Multicultural Affairs' submission that there should be greater emphasis on cost effectiveness. The Council noted that it did take these matters into account but, with the greater emphasis governments now place on expenditure control and measurable return for money spent, the Council will have to highlight the impact of its proposals in resource terms more clearly for its recommendations to have optimum effect.

Finally, a suggestion was made that there had been a lack of empirical research underpinning some of the ARC's work. This seems to me to be a valid criticism. The Council has on two occasions at least started work on a general review of the impact of the administrative review system on government decision-making with a view to demonstrating the overall value of the system. It has abandoned both projects because of the difficulties of obtaining material that would provide an answer to the issues to which the study gave rise. Stated broadly, the project contemplated was probably too large and too difficult. However, it could have been broken up into components and research undertaken of the effect of particular components of the review system on government decision-making. This has been done effectively by researchers at the ANU Law School supported by a modest grant from the Australian Research Council.

A review has been undertaken of the effect of judicial review on decisions when these have been referred back by the Federal Court to the decision maker for reconsideration.¹⁹ The review involved approaching the lawyers for successful applicants and also tracing the outcome of reconsiderations by contacting the agencies concerned. Similar work has also been undertaken in relation to decisions referred back by the Court to the AAT. A third project involved obtaining the views of government officials who have been required by their work to take decisions subject to review as to the impact upon them of the review system. This last research revealed a remarkably supportive view of the value of the review system by those at the coalface contrasted with the scepticism of officers in policy positions who are not subjected to administrative review in their decision-making processes. It would seem that the review system presents more dangers theoretically than it does in practice.²⁰

The fact that this work could be undertaken by academic researchers reflects somewhat unfavourably on the Council in that they are tasks that it could well have carried out and would have been better placed in terms of status and resources to have pursued. If the Council for some reason does not want to undertake this sort of study, it could profit by undertaking joint projects with, or funding projects by, academic researchers.

Conclusion

It is without doubt that over its 25 years existence the Council has performed much valuable work. The administrative review system established in the 1970s has developed as a result of the Council's contribution. However, the Council is now at a cross road, as indeed is the review system itself. In recent years the government has not encouraged continued expansion of the concept of review of government decisions. Financial and other limits have been placed on review bodies with the result that the effectiveness of the system to provide adequate means for review of government decisions has been markedly diminished. By way of diverse examples, the Ombudsman now exercises the discretion not to undertake an investigation in relation to 70% of the complaints received by the Office. In 1995-96 the AAT had 8 full-time and 2 part-

time Deputy Presidents and 10 full-time and 11 part-time Senior Members. It now has 4 full-time and 2 part-time Deputy Presidents and 8 full-time and 5 part-time Senior Members. It is difficult not to see this other than as a process of degrading the skill level of members.

The continuing debate on the scope of review of migration decisions has spilled over into other areas of government decision-making raising broad issues about the merits of external review. The Kerr Committee would be surprised to find many of the issues with which it was concerned being revisited.

The Council should be monitoring and publishing material relating to the state of the administrative review system. Indeed, if it does not pursue an active part in the debate about the role of the system, the forces that opposed administrative review 30 years ago are likely to turn the clock back to pre-Kerr days (with greater limitations on judicial review).

With this in mind, the Council should be looking to reinforce those connections that would at least preserve and perhaps even strengthen administrative review mechanisms. That support has come in the past from among lawyers and parliamentarians. The Council must establish links with these bodies and must educate them on the effect of limitations being imposed on the review system.

The Council has also now been given much extended powers to review agency decision-making. These powers should be used in cooperation with others – for example, academics to undertake empirical research; the Ombudsman to investigate systemic issues.

These are signs that the Council is becoming less relevant in the eyes of the government – the failure to respond to reports, the drop in the number of advices being sought, the absence of representatives of major agencies from Council membership, the failure to fill membership vacancies. These are signs that the executive is using time-honoured methods to undermine the Council – reducing resources, limiting its independence, ignoring its proposals.

If the Council does not recognise these signs and act to rebut them, it will not have a 50 year anniversary celebration. This would be a triumph for executive power but it would be a cost to the people of Australia. It would mean that the body established expressly to oversight the system put in place to provide the means to call the executive to account when it affects individuals would be lost. The demise of the system itself would not be far behind.

POSTSCRIPT

Sadly, since the preparation and delivery of this paper, the Council President, Ms Bettie McNee died. Mr Wayne Martin QC is now the President of the Council.

In the last 12 months, the Council produced an overview of the Council of Australasian Tribunals and the Council's work in securing the establishment of that body. It has also issued a revised version of its Practical Guidelines for Preparing Statements of Reasons. In the reporting year 2001-2002 the Council provided formal written advice to the Government on 7 occasions. The government has not responded to any previous Reports of the Council other than those mentioned in the paper. The Council's funding was reduced marginally in the 2001-2002 financial year.

Endnotes

- 1 *Commonwealth Administrative Review Committee Report*, 1971, Commonwealth Government Printing Office (Kerr Report), para 283.
- 2 *Ibid*, para 284.
- 3 *Id.*
- 4 *Ibid*, paras 287 – 288.
- 5 *Final Report of the Committee on Administrative Discretions*, 1973, AGPS.
- 6 Para 229 (xlviii).
- 7 Senate *Hansard*, 27 May 1975, p 1839.
- 8 *Report on the Role and Function of the Administrative Review Council*, June 1997.
- 9 *Review of the Office of Commonwealth Ombudsman*, AGPS, 1991.
- 10 The Directors of Research/Executive Officers of the Council have been:

NAME	YEARS
Graham Taylor	1 November 1977 – 1981
Geoffrey Flick	1981 – 1982
John Griffiths	1983 – 1985
Denis O'Brien	1986 – 1989
Bert Mowbray	1989 – 1992
Stephen Lloyd	1992 – 1993
Kathy Leigh	1993 – 1994
Phillipa Lynch	1994 – 1998
Philip Harrison	1998 – 1999
Gabrielle Lewis	1999 – 2000
Matt Minogue	2000 – 2002

- 11 AAT Act, s50.
- 12 Reports:
 - 2, 20: repatriation
 - 8, 21: social security
 - 11: students assistance
 - 27, 30, 34: access to the review system
 - 37: community service support.
- 13 AAT Act s51(1)(d)(iii).
- 14 Julian Disney, "The Administrative Review Council: Progress and Prospects" (1991) 66 *CBPA* 103.
- 15 *Report on the Role and Function of the Administrative Review Council*, 1997.
- 16 Administrative Review Council, *Twenty-second Annual Report 1997-1998*, Appendix 4.
- 17 Para 6.33 of the *Legislation Handbook*, 2000 refers to the Council's role in the process of preparing drafting instructions.
- 18 Indeed one cannot but help compare the secrecy with which the policy leading to the attempt to enact the Administrative Review Tribunal was formulated with the open approach that has been adopted in relation to significant matters by the Council. The Attorney-General's Department would have been much better served if it had been prepared to consult with those affected before producing its abortive attempt to construct one single mega-tribunal.
- 19 Robin Creyke, John McMillan, Dennis Pearce, "Success at Court – Does the Client Win?" *Administrative Law under the Coalition Government*, 1997 National Administrative Law Forum, 239. The research indicates that, far from being a remaking of the decision to arrive at the same conclusion but with the correct procedures, the outcome on reconsiderations is likely to be favourable to the person affected.
- 20 Robin Creyke and John McMillan, "Executive Perceptions of Administrative Law – An Empirical Study" (2002) 9 *A J Admin L* 163.

APPENDIX

Reports of the Administrative Review Council

- 1 Administrative Decisions (Judicial Review) Act 1977 – Exclusions under Section 19 – 1978
- 2 Repatriation Appeals – 1979
- 3 Review of Import Control and Customs By-Law Decisions – 1979
- 4 Administrative Appeals Tribunal Act 1975 – Amendments – 1979
- 5 Defence Force Ombudsman – 1979
- 6 Entry to Cocos (Keeling) Islands and Christmas Island – 1979
- 7 Citizenship Review and Appeals System – 1980
- 8 Social Security Appeals – 1980
- 9 Administrative Decisions (Judicial Review) Amendment Bill 1980 – 1980
- 10 Shipping Registration Bill – 1980
- 11 Student Assistance Review Tribunals – 1981
- 12 Australian Broadcasting Tribunal Procedures – 1981
- 13 Commonwealth Employees' Compensation Tribunal – 1981
- 14 Land Use in the A.C.T. – 1981
- 15 Australian Federal Police Act 1979: Sections 38 & 39 – 1982
- 16 Review of Decisions under the Broadcasting and Television Act 1942 – 1982
- 17 Review of Taxation Decisions by Boards of Review – 1983
- 18 Compensation (Commonwealth Government Employees) Act 1971 Amendments – 1983
- 19 Rights of Review under the Migration Act 1958 and Related Legislation: Interim Report on the Constitution of the Administrative Appeals Tribunal – 1983
- 20 Review of Pension Decisions under Repatriation Legislation – 1983

- 21 The Structure and Form of Social Security Appeals – 1984
- 22 The Relationship between the Ombudsman and the Administrative Appeals Tribunal – 1985
- 23 Review of Customs and Excise Decisions: Stage Two – 1985
- 24 Review of Customs and Excise Decisions: Stage Four: Censorship – 1985
- 25 Review of Migration Decisions – 1985
- 26 Review of Administrative Decisions (Judicial Review) Act: Stage One – 1986
- 27 Access to Administrative Review: Stage One Notification of Decisions and Rights of Review – 1986
- 28 Review of Customs and Excise Decisions: Stage Three Anti-Dumping and Countervailing Duty Decisions – 1987
- 29 Constitution of the Administrative Appeals Tribunal – 1987
- 30 Access to Administrative Review: Provision of Legal and Financial Assistance in Administrative Law Matters – 1988
- 31 Review of Decisions under Industry Research and Development Legislation – 1988
- 32 Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act – 1989
- 33 Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions – 1991
- 34 Access to Administrative Review by Members of Australia's Ethnic Communities – 1991
- 35 Rule Making by Commonwealth Agencies – 1992
- 36 Environmental Decisions and the Administrative Appeals Tribunal – 1994
- 37 Administrative Review and Funding Decisions (A Case Study of Community Services Programs) – 1994
- 38 Government Business Enterprises and Commonwealth Administrative Law – 1995
- 39 Better Decisions: review of Commonwealth Merits Review Tribunals – 1995
- 40 Open Government: a review of the federal *Freedom of Information Act 1982* – 1995
- 41 Appeals from the Administrative Appeals Tribunal to the Federal Court – 1997
- 42 The Contracting Out of Government Services – 1998

43 Administrative Review of Patents Decisions – 1999

44 Internal Review of Agency Decision Making – 2000