'SOFT LAW' AND ADMINISTRATIVE LAW: A NEW CHALLENGE

Robin Creyke*

What is soft law?

Definition of 'soft law'

Soft law – or as it was dubbed by a Commonwealth Interdepartmental Committee [1]- 'grey-letter law' – is a rule which has no legally binding force but which is intended to influence conduct.[2] As such, the expression is capable of covering multiple edicts.

Descriptions of soft law embrace instruments many of which will be familiar to the administrative law community. They include 'internal guidelines, rule books and practice manuals',[3] 'circulars, operational memoranda, directives, codes [of conduct]'.[4] Two leading English authors on this topic list eight categories of soft law: procedural rules, interpretive guides, instructions to officials, prescriptive/evidential rules, commendatory rules, voluntary codes, rules of practice, management or operation, and consultative devices and administrative pronouncements.[5]

Given the potential breadth of these categories of instruments, it is only the content and language of the instrument which will enable the reader to know whether the document is intended to be aspirational only, for example the *APS Values*,[6] the *National Framework for Values Education in Australian Schools 2006*,[7] and the *Australian Sports Commission Statement of Intent 2007/08*[8], or to have a behaviour-changing effect.

Relying on this definition of soft law, instruments which have legal effect because they are authorized to do so by legislation can be excluded. For example, the *Permanent Impairment Guide* is statutorily required to be used to assess the amount of compensation payable by Comcare,[9] and would not be classified as soft law. If an instrument is legislative in character it can be assumed to fall outside the soft law category. However, even determining whether an instrument is legislative or administrative in character is to enter contested territory.

It might have been thought that the *Legislative Instruments Act 2003* (Cth) which distinguishes between legislative and non-legislative instruments would clarify the position.[10] That assumption would be unsafe. Not only does the definition of 'legislative instrument' itself lead to a degree of uncertainty, referring as it does to an 'instrument' as legislative if it 'determines the law' and has an 'indirect effect' on rights and interests[11] – both expansionary notions – but, in order to avoid their lack of enforceability,[12] agencies have chosen to register as legislative instruments any instruments the legislative character of which is doubtful. The result has been to include on the register many instruments which could be categorized as soft law since they are executive, not legislative, in nature.

---

* *Robin Creyke holds the Alumni Chair of Administrative Law at the Australian National University.* *This paper is based on an article written jointly with Professor John McMillan 'Soft Law v Hard Law in L Pearson (ed) Administrative Law in a Changing State (Hart Publishing, 2008, forthcoming), essays in honour of the contribution to administrative law of Emeritus Professor Mark Aronson.*

Nor has the ACT, the only other Australian jurisdiction which has attempted to define 'legislative instrument', taken the matter further.[13] The *Legislation Act 2001* (ACT) defines an instrument as 'legislative' if it is a 'subordinate law, a 'disallowable instrument', a 'notifiable instrument', or a 'commencement notice'. Since each category requires further defining, and no further definitions are provided, this Act too provides only limited guidance. As a consequence, identifying what is soft law as distinct from what is an instrument of a legislative character remains an uncertain task.

The matter is further complicated because there is a tendency to categorise by type of instrument, rather than its legislative or other character. Hence, some codes are specifically authorized by legislation, others are not. Any attempt to be too prescriptive is bound to fail. Nonetheless, the behaviour-changing intention of soft law instruments is a constant element and will be used for the purpose of this paper

Nomenclature: Is 'soft law' simply policy by another name?

These difficulties of definition are compounded by some skepticism about the utility of the expression 'soft law' itself. There are those who believe that soft law is no more than policy with a fashionable label. Two leading writers have attempted to meet this criticism by describing soft law as a bridge between law and policy.[14] The better view, in my view, is that soft law both encompasses policy and is also a special subset of policy instruments, distinguished by its intention to change behaviour.

Soft law and policy share other features. The essential status of an executive policy is that it is a non-statutory rule devised by the administration to provide decision-making guidance, particularly in administering legislation.[15] To the extent that 'guidance' can be equated with 'influencing behaviour', policy and soft law occupy common territory. However, policy comes in many guises. Broad general policies made by Ministers and tabled in parliament, such as the deportation policy,[16] clearly have a different legal status to informal policies such as those found in press releases, circulars or bulletins, which may do little more than describe the objectives or timelines of a program, or a guidance note which specifies the template for preparing formal advice. These policy documents have in common that they have little formal status and are unlikely to qualify as soft law.

Similarly, documents which are aspirational in nature such as the *APS* (Australian Public Service) *Values* may be core public sector policies but are not soft law. For example, statements in the *APS Values*, that 'the APS is apolitical, performing its functions in an impartial and professional manner' tell the public what they should expect of officials, but they are not prescriptive 'rules'. At the 'tabled in Parliament' end of the policy spectrum an instrument is also less likely to be categorized as soft law. In other words, policy covers a broader range of documents than soft law.

Nonetheless, there are similarities. Administrative law standards apply to soft law, as they do to policy. The orthodox view is that policy must not be inconsistent with legislation, is not binding, and must not be applied inflexibly at the expense of features of the individual case.[17] These same principles apply to soft law. For example, in *Vero Insurance Ltd v Gombac Group Pty Ltd,*[18] a case dealing with guidelines developed by the Victorian Civil and Administrative Tribunal in relation to the award of costs. Gillard J discussed guidelines – a form of soft law – in terms which could equally have applied to the legal standards which apply to policy.

Why then the distinction? The hypothesis is that the use of 'law' in 'soft law' is designed to emphasise the objective of soft law to control behaviour. The language is designed to reinforce that intention by clothing such instruments with a patina of enforceability, a

characteristic of law. Whether this hypothesis is correct and whether, too, the clothing is like the Emperor's clothes, is discussed later in this paper.

How prevalent is soft law?

There are no solid figures. An indicator, however, is that in 1997 the Grey-letter Law report which dealt with the growth of soft law in the business and regulatory environment, estimated that there were some 30,000 codes then in existence.[19] These included legislative,[20] quasi-regulatory,[21] and self-regulatory codes, which would not be classified as soft law. The number also covered 5,700 Australian standards, about half referenced in legislation, the remainder being voluntary.[22] In addition to these forms of soft law, as the earlier description indicated, there are now a host of other instruments that fall into the soft law category. That was over a decade ago. Since there has been no diminution of regulatory endeavour, the figure must now be much higher.

The consequence, as Sossin and Smith note, is that soft law has become the 'principal administrative mechanism used to elaborate the legal standards and political and other values underlying bureaucratic decision-making'.[23] As such it warrants attention.

What has led to the emergence of soft law?

In part, the answer is provided by the behaviour-changing nature of soft law. In this context, three aspects of soft law warrant attention. Public administration has moved beyond administrative law standards to develop its own higher professional standards. Further, there are practical advantages for government and the moves to managerialism and commercialisation within public administration signal pressure by agencies and companies for more tailored regulation.

Professionalism, ethics and a values-based public service

The emergence of soft law marks a new development in public administration. Regulatory and administrative law standards no longer provide the dominant standards. As the Tax Commissioner, Michael D'Ascenzo, in a paper to this forum in 2007, put it: '[I]n many respects administrative law standards are becoming the base level, not the ultimate benchmarks for the Australian public service'.[24] The complexity of government requires 'more responsive and sophisticated mechanisms'.[25] The administrative law standards with their emphasis on fairness, rationality, lawfulness, transparency and efficiency focus principally on process rather than outcomes and are no longer sufficient.[26]

While the focus remains on lawfulness, the public sector is now expected to meet ethical obligations and make official decisions with reference to a set of values.[27] The demands of a more professional, values-oriented public sector have outstripped the underlying standards prescribed by administrative law legislation and case law. Something more is required. It is here that soft law has its place.

Practical advantages

Soft law rules possess a number of practical advantages. They can be made by government without the delay and complexity associated with the creation of legislation; they are flexible, informal, cheap, and largely immune from judicial review.[28]

Soft law rules are not only easy to make but they are easy to change. The Australian Law Reform Commission in its report on censorship laws in Australia noted of censorship guidelines that they are an important way of ensuring that the classification criteria reflect community standards without the need for constant changes to the national code.[29]

In addition, soft law fosters a collaborative approach between government and those being regulated – assuming that codes and guidelines are developed in conjunction with users and those being regulated. Soft law, more than legislation, is better able to provide innovative solutions, tailored to meet the needs of individual industries or particular government agencies.[30]

Managerialism and commercialisation

Another impetus for the development of soft law has been the move within the public sector to managerialism and commercialisation. Activities which governments have contracted out include construction and operation of public highways, management of prisons and immigration detention centres, welfare assistance, building inspection, licensing and accreditation, and public sector recruitment.

These arrangements are generally based on contract, supplemented by a range of soft law instruments such as codes and guidelines. The function is often beyond the oversight of traditional administrative law, defined as it generally is to apply to decisions made under statute.

A feature of this trend to managerialism is the emphasis placed on efficiency and effectiveness as the operating ethos. For that reason, unlike the move to professionalism, this trend aimed to reduce, rather than enhance, the reliance on administrative law.

Nonetheless, in combination, these developments have taken government outside the traditional framework of administrative law accountability standards and institutions. They have been replaced by standards seen to be more appropriate to the tasks of a modern, professional, efficient, effective and ethical public sector. This realm is inhabited by soft law.

What are the problems with soft law?

Despite its growth and apparent popularity there are problems., These include government use of soft law to make law without resort to Parliament, to instruct judges on the meaning of statutes and to insulate bureaucracies from review.[31]

Practical issues of concern to government and business are that soft law is generally drafted by 'loving hands at home' with the attendant problems of lack of clarity and, in some cases, legal error, that can arise. Soft law instruments are not regularly updated and may be inconsistent.[32] As the Grey–letter Law report noted, these problems can create confusion about compliance standards. 'Voluntary and mandatory requirements are encapsulated in the one document with little distinction made between compliance obligations'.[33]

Another issue is that use of soft law leads to back-door regulation that is difficult to access, gives too much discretion to regulators, and sets higher compliance standards than are required by law. Soft law rules can also place extra burdens on consumers or businesses. For example, a guideline identifying an entity as 'high risk' may mean the entity is subject to higher levels of surveillance by regular auditing, or may face additional barriers before services can be accessed. In combination, these issues can lead to confusion and higher costs, and ultimately to litigation to resolve these uncertainties.[34]

A more significant danger is that agencies can attribute an inflated stature to their own policies. Agency policies are designed to structure discretion, provide certainty and consistency, and guide officials in decision-making. These are laudable objectives but if policies are couched in mandatory terms, this can obscure the fact that a more flexible

application of rules is permissible. For example, the overarching statement on corporate policies with the Australian Taxation Office states:

> It is mandatory for all Tax Office employees to … follow Practice Statements relevant to the tasks they are performing [except] 'where there are concerns about the application of the Practice Statement (for example, unintended consequences)'.[35]

This overstatement could lead to internal policies being applied inflexibly.

So the consensus is that while there is value in soft law, there are also dangers which need to be addressed. Whether the application of administrative law standards and mechanisms could meet these challenges is the question.

Soft law: is there an accountability deficit?

Given the prevalence of soft law, should it be governed by administrative law values, standards and accountability mechanisms? Assuming the answer to that question is a qualified 'Yes', what are the current accountability mechanisms in place?

The picture is not uniform. The legal status of an instrument can depend on a number of factors including: the text of the instrument; the purpose to which it is being put; and whether the instrument has statutory backing or authorization. The position is considered in relation to the administrative law framework and to these listed factors.

Parliamentary review

Soft law rules generally do not have to be tabled in parliament for scrutiny and may not be exposed to public consultation during development. They do not usually have the benefit of professional drafting. Scrutiny under the *Legislative Instruments Act 2004* (Cth) is a possibility but only if the instrument is tendered as a legislative instrument.

Reviewability of soft law

Where a soft law instrument (using that expression in its popular sense, rather than as defined in this paper) is authorized directly by legislation, it is often subject to the full spectrum of administrative law mechanisms including merit and judicial review. For example, the *Guide to the Assessment of Rates of Veterans' Pensions* (GARP) is, by statute, binding on those assessing rates of veterans' pensions and is fully reviewable.[36]

By contrast, where direct statutory authorization is absent, a soft law instrument and action taken in reliance on it is not reviewable under judicial review statutes since it is not 'made under an enactment'. Nor will it be merit reviewable since merit review must be provided for by statute. However, reviewability under the *Judiciary Act 1903* (Cth) remains open in some circumstances.[37]

Soft law instruments may, however, be indirectly reviewable by courts. Australian Standards, for example, are accepted in courts as having evidentiary status. [38] These standards may be used, for example, in negligence actions to set the standard against which actions are judged.[39] There is a tendency for Australian Standards to become prescriptive as the mandatory minimum standard for other purposes.[40] For example, the Australian Standards on complaint handling[41] and on whistleblowing[42] have been adopted by many government agencies and private sector bodies. In that guise the standards directly perform an administrative law or standard-setting function.

Soft law instruments may also be the basis of a judicial review claim. For example, an instrument, if couched in promissory form, may raise a legitimate expectation, which if not complied with could give rise to a breach of natural justice.[43] Failure to follow a soft law standard may also be unreasonable, be a failure to take account of a relevant consideration, or indicate that a policy has been applied inflexibly. These were all arguments raised in *Adultshop.com v Members of the Classification Review Board*,[44] a challenge to the classification of a film, *Viva Erotica*, in accordance with the *Classification Code* and authorized *Guidelines for the Classification of Films and Computer Games 2005.*[45]

The language of the soft law instrument or its source of authority may be relevant to its legal enforceability. For example, the *Public Service Act 1999* (Cth) s 13(5) (PSA) states: 'An APS employee must comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction'. Relying on that provision, endorsed corporate Practice Statements in the Australian Tax Office, for example, are expressed to be directions of the Commissioner, breach of which could lead to Code of Conduct action under the PSA, as a breach of 'a lawful and reasonable direction'. Other agencies have similar provisions.[46]

Whether a 'direction' under the PSA was intended to cover a direction in a particular case or applies generally to all soft law instruments within an agency, has not been decided. The provision does not appear to have been litigated. The courts have a tendency to prefer the narrower view.[47] In support of the courts' approach, to the extent that such instruments could be inconsistent – a distinct possibility given that they are drawn up at different times and often by different parts of an agency – to require an official to comply with both on pain of a Code of Conduct breach suggests that the courts would find the 'direction' was not intended to cover all policy or soft law instruments within the agency.

Supervision by investigative bodies

Other accountability measures include monitoring by investigative agencies of government. Some soft law instruments may come under the scrutiny of ombudsman offices. Under the *Ombudsman Act 1976* (Cth), for example, the Ombudsman can look at any dimension of an administrative action by government and commonly the Ombudsman reports on whether administrative manuals within agencies provide accurate and adequate instruction to officials.[48] Further, the Ombudsman can examine actions by private sector suppliers of services to government which may capture another significant proportion of private sector generated soft law.[49]

Similarly, the Human Rights and Equal Opportunity Commission and the Privacy Commissioner have jurisdiction over both public and private sector institutions and can recommend the introduction of, or improvements to, soft law controls.

Self-regulation

Indirectly, the executive can influence the content of soft law rules. Where government is in a position to impose legislation, absent sufficient compliance, the executive can ensure self-regulators set standards for performance. For example, the *Australian Ballast Water Management Guidelines* were introduced to avoid the introduction of legally enforceable requirements. Similarly, to have a satisfactory manual, was a condition precedent to a foreign registered aviation company gaining permission to operate in the international cargo market.[50]

What this discussion illustrates is that the enforceability of soft law lacks coherence and that the accountability mechanisms for soft law generally do not address the problems identified

earlier. It also highlights that the description of the instrument does not assist with its legal status.

Conclusion

A quiet revolution has been occurring within public administration. There is now a focus on primary decision-making, on education rather than review and on standards in addition to those provided by administrative law. This quiet revolution has seen the increasing influence of soft law at the expense of more orthodox legal standards. As Baldwin and Houghton put it, there is 'now discernible a retreat from primary legislation in favour of government by informal rules'.[51] This movement has, unaccountably, slipped under the radar of the Australian administrative law community.

It is time to start asking whether such a significant element in our regulatory environment should be examined to see whether there is a need for soft law to be more accountable. Should we, for example, develop more extensive procedures to require consultation, publicity and professional drafting in the making of soft law instruments? Should the range of instruments tabled in Parliament be extended? Should more be done to ensure that administrative law review mechanisms, remedies and grounds of review that focus on government decision-making are extended to apply to the development and application of soft law instruments? To make these changes may require re-thinking the administrative law system, and refashioning it to meet this new challenge.

Endnotes

1 Commonwealth Interdepartmental Committee on Quasi-regulation, Report *Grey-Letter Law* (1997) (Grey-Letter Law report).
2 M Cini 'From Soft Law to Hard Law? Discretion and rules-making in the Commission's State Aid Regime' (2000) *Working Paper 35*, European University Institute 4; Grey-Letter Law report, ix; L Sossin & CW Smith 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867, 871.
3 M Aronson 'Private Bodes, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 3.
4 L Sossin 'The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada' in M Hertogh & S Halliday (eds) *Judicial Review and Bureaucratic Impact* (Cambridge, CUP, 2004) 130.
5 R Baldwin & J Houghton 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] *Public Law* 239, 241-5.
6 *Public Service Act 1999* (Cth) s 10(12)(a).
7 http://www.earlychildhoodaustralia.org.au/early_childhood_news/october_2006_government_report_on_values_education.html.
8 http://www.ausport.gov.au/__data/assets/pdf_file/0004/115780/Australian_Sports_Commission_Statement_of_Intent.pdf.
9 *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 24(4), (5), 28.
10 *Legislative Instrument Act 2003* (Cth). s 5 defines a 'legislative instrument'.
11 *Legislative Instrument Act 2003* (Cth) s 5(2) (a), (b).
12 *Legislative Instrument Act 2003* (Cth) s 31.
13 *Legislation Act 2001* (ACT) s 12.
14 L Sossin & CW Smith 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867, 892.
15 R Creyke & J McMillan *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 2005) 599.
16 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.
17 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 420; *Chumbairux v Minister for Immigration and Ethnic Affairs* (1986) 74 ALR 480, 492-3; *Elias v Federal Commissioner of Taxation* (2002) 123 FCR 499.
18 *Vero Insurance Ltd v Gombac Group Pty Ltd* [2007] VSC 117
19 Grey-letter Law report, at xi.
20 eg *Trade Practices Act 1974* (Cth) s 51AE provides for industry codes made under s 51AE to be mandatory when so declared by regulations.

21 eg *Trade Practices Act 1974* (Cth) s 51ACA provides for a voluntary industry code to be binding on a person who has agreed to be bound. See, for example *Trade Practices Regulations 1998* (Cth) reg 3 which makes the Franchising Code a mandatory industry code.
22 Grey-letter Law report, 35.
23 L Sossin & CW Smith 'Hard choices and Soft Law: Etthical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867, 871.
24 M D'Ascenzo, 'Effectiveness of Administrative Law in the Australian Public Service' (2008) 57 *AIAL* Forum 63.
25 *Ibid* 64.
26 *Ibid* 65.
27 *Ibid* 66-67. See also N Hosking, 'The APS Values and Code of Conduct: Their Practical Application to Government Lawyers' (Paper presented at the Australian Corporate Lawyers Association Conference, 'Government Lawyers: Your Role in Governance', Canberra, 2 June 2006) 3; J McMillan, 'Accountability of Government' (Paper presented at the AboveBoard Accountability Forum, Australian National University, Canberra, 12 May 2007
28 R Baldwin & J Houghton 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] *Public Law* at 239–40.
29 Australian Law Reform Commission, *Film and Literature Censorship Procedure*, Report No 55 (1991) [3.8].
30 Grey-letter Law report, at xv.
31 R Baldwin & J Houghton 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] *Public Law* at 239.
32 Administrative Review Council *Complex Business Reference*, Discussion forums, 2008.
33 Grey-letter Law report at 43.
34 Grey-letter Law report at xii-xv.
35 *Tax Office Practice Statement System* (PS 2003/01) 3. This Practice statement is being revised.
36 *Veterans' Entitlements Act 1986* (Cth) s 29.
37 *White Industries Australia v Federal Commissioner of Taxation* (2007) 160 FCR 298; 240 ALR 792,
38 Grey-letter Law report, 43.
39 *Anne Christina Benton v Tea Tree Plaza Nominees* (1995) 64 SASR 494.
40 Grey-letter Law report, 44.
41 *AS ISO 10002-2006 Customer Satisfaction – Guidelines for Complaints Handling in Organizations*.
42 *HB 401-2004 Applications of Corporate Governance*.
43 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396. Although the claim was not successful, the justices being divided 3:3 and the result being determined by the ruling of the most senior puisne judge, the outcome would be different today. See also *Henzell v Centrelink* [2006] FCA 1844.
44 *Adultshop.com.v Members of the Classification Review Board* [2008] FCAFC 79.
45 The Code and the Guidelines were made under the authority of the *Classification (Publication, Films and Computer Games) Act 1995* (Cth).
46 A similar provision is found in the *Parliamentary Service Act 1999* (Cth) s 13(9); the *Public Sector Management Act 1994* (ACT) s 9(i); and is repeated in various Commonwealth Agencies' guidelines such as the *Code of Conduct of the Civil Aviation and Safety Authority*.
47 *Bennett v HREOC* (2004) 204 ALR 119; *Evans v New South Wales* [2008] FCAFC 130.
48 See, for example, the recommendations in the *Application of Penalties under Welfare to Work*, Report No 16/2007, and *Department of Immigration and Citizenship: Administration of Detention Debt Waiver and Write-off*, Report No 2/2008.
49 *Ombudsman Act 1976* (Cth) s 3BA.
50 *HeavyLift Cargo Lines v Civil Aviation Safety Authority* [2007] AATA 1005.
51 R Baldwin & J Houghton 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] *Public Law* 239.