SPECULATION ON THE FUTURE OF ADMINISTRATIVE LAW

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The current Administrative Review Council ('ARC') consultation on judicial review is about taking stock of how Commonwealth law stands in relation to judicial review and working out how it should be shaped for the future. What has changed since the legislative innovations of the late 1970s and early 1980s? With the rise in importance of the Constitutional writs as a means to achieve judicial review of administrative decisions, what role is there for legislation and what should it be seeking to achieve?

There are some themes relating to judicial review that will be important considerations for policy makers looking towards the future.

Judicial review is central to maintenance of the rule of law. It is the means by which the judiciary ensures that executive action remains within lawful boundaries. A quote from the judgment of Brennan J in *Church of Scientology v Woodward* is particularly relevant for administrative decision makers:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[1]

A great deal of Executive power is exercised by administrative decision makers. Some are significant decisions, made at a high level after consultation and discussion; others are relatively minor, made in a routine way at a junior level. For all these decisions, judicial review exists to ensure that decision makers do not do things that are beyond their power – that they do not affect individuals in a way that they do not have power to do.

In looking to the future we need to consider how best judicial review can ensure that people making administrative decisions on behalf of the Commonwealth take action that is lawful because it does not go beyond its lawful limits. One way to optimise the benefits of judicial review is to ensure that statutory rights mesh effectively with rights to judicial review under the *Constitution* in a way that ensures accessibility.

Statements of reasons

One of the innovations that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') provided for administrative justice in Australia was a statutory right to a statement of reasons for an administrative decision. At common law there is no general duty to give reasons for a decision.

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The intersection between statements of reasons and judicial review is canvassed in the Administrative Review Council discussion paper. This is an area in which I think there is potential to enhance administrative decision making and to improve access to justice.

Section 13 of the *ADJR Act* provides that a statement of reasons must be given on request to a person who has the right to apply for judicial review of a decision by the Federal Court or the Federal Magistrates Court.

Section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*') provides that a statement of reasons must be given on request to a person who has a right to apply for merits review of a decision by the AAT.

Other statutes include a requirement for decision makers to provide a statement of reasons in relation to specific discretionary powers. As a result, many, though not all, Commonwealth administrative decisions have an associated right to request a statement of reasons.

Sir Anthony Mason noted, in his review of the first 12 years of the *ADJR Act*, that, '...the absence of a general duty to give reasons meant that the administrator could, and at times did, frustrate judicial review of a decision by refusing to give reasons.'[2] He went on to say, 'it is tempting to think that reasoned and principled administrative decisions are an indispensible element in a modern democracy.'[3]

Although there are notable limitations to the regime provided by section 13 of the *ADJR Act* and section 28 of the *AAT Act*, it is clear that these statutory rights to ask for reasons for a decision have brought about a change in the way Commonwealth government agencies approach administrative decision making. Agencies understand that they may be asked for reasons for a decision. Consequently, they have processes for recording them and sometimes for providing reasons for decisions at the same time as they are communicated to the person affected.

Mark Elliott in his recent article '*Has the Common Law Duty to Give Reasons Come of Age Yet?*'[4], explores arguments that a common law duty to give reasons should be part of the requirement for application of principles of good administration to support lawful decisions. He argues that if the law recognises duties to act fairly and reasonably in administrative decision-making, it should also recognise the duty to provide a contemporaneous record of the reasons why the decision maker reached the particular decision.

The view that a requirement to provide reasons supports and is part of good administrative decision-making practise is widely supported. For example: the ARC *Best Practise Guide 4 – Decision Making: Reasons* says, "Providing reasons for a decision should not be treated as an obligation that is separate from other principles of good decision making."[5]

An obligation to describe the reasoning process can ensure that decision makers think more carefully about their task. Irrelevant or unreasonable elements may also thereby become more obvious to the decision maker or to an internal quality assurance or review process.

So, an obligation to provide reasons is likely to lead to better primary decision making – which is one reason for it to be embraced by government and administrators. Better primary decision making leads to a reduced number of complaints and less review applications, with corresponding savings in resources.

Providing reasons also gives the person affected by the decision information to make a properly informed decision about whether to request review. Without knowing the basis for the decision, it is difficult to form a view about whether incorrect facts, irrelevant

considerations or a misunderstanding about the scope of the power available to the decision maker were involved.

It can avoid unnecessary challenges. As Woodward J said in *Ansett Transport Industries (Operations) Pty Ltd v Wraith*:

> … my view [is[that s 13(1) of the *Judicial Review Act* requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.[6]

At a time when we are focussing on resolving disputes as early as possible with the lowest possible level of escalation, statements of reasons can be an important component in an agency's dispute management process, one purpose of which is likely to be reduction in the number of litigated disputes.[7]

With all these benefits to good administration, the question we need to ask is whether we should consider imposing a general statutory obligation to provide a statement of reasons for all administrative decisions. Would there be value in requiring decision makers to provide reasons regardless of whether review was possible under the *ADJR Act*, under the *AAT Act*, under a specific statutory provision or by way of the Constitutional writs?

Mark Elliott argues that a general duty to provide reasons is part of a process of fair decision making that enhances the quality of the decision making, supports the legitimacy of government and recognises the dignity of the individual affected.[8] He also suggests that the right to a statement of reasons should not be confined to those who are directly affected by the decision but should be extended to others who are indirectly affected or who have an interest in upholding the rule of law by ensuring that decision makers act only within the scope of their power.[9]

Using these arguments, would a general statutory right to reasons serve not only the practical aims of better primary decision making, reduction in unnecessary challenges and better informed dispute management but also the principled aims of strengthening the rule of law, enhancing the legitimacy of government action and improving access to justice?

Considered in this light, a general right to a statement of reasons is appropriately linked to judicial review. This is not in the sense that a right to reasons should only be available where judicial review is available – but in the sense that it is a mechanism for checking the potential for misuse of public power.

This might lead us to consider whether, as is canvassed in the ARC discussion paper, the provisions in section 13 of the *ADJR Act* should be widened to provide a more general right to reasons or whether the right should be located in a general statute, such as the *Acts Interpretation Act 1901* (Cth), or the *Freedom of Information Act 1982* (Cth). At the same time we might consider whether the right to request a statement of reasons for a decision should be open to people who are not directly affected. Perhaps, as for FOI requests, entitlement to transparency on government decision making should be available to all citizens.

Proportionate use of resources

If a person is entitled to know the reasons for a decision that affects them, should they also be entitled to know those reasons at the same time as they find out about the decision? All the grounds supporting a general right to a statement of reasons will, as pointed out in the

ARC discussion paper[10], support an argument for provision of reasons at the time that the decision is made.

Contemporaneous reasons are more likely to reflect the actual thought processes of the decision maker. Insistence on preparation of reasons as an integral part of the decision making process places provision of reasons as of equal importance with other elements of good administration, such as procedural fairness or natural justice.

In a practical sense, contemporaneous preparation of reasons is likely to be part of an agency's dispute management plan, allowing it to be ready to deal effectively with potential disputes at an early stage. Once an agency has recognised the utility in terms of quality primary decision making and effective dispute management of contemporaneous preparation of reasons, what significant barriers would then prevent those reasons being supplied at the same time as the decision is notified?

This may be part of future recognition that routine provision of statements of reasons at the time of notification of decisions is not a burden on resources or an additional work load for hard pressed administrative staff but is part of a strategy aimed at proportionate dispute resolution.

In the absence of significant barriers, a business case for routine provision of statements of reasons at the time of notification would, of course, need to consider whether there was evidence to support the proposition that it would reduce the number or seriousness of disputes for an agency. Any evidence that it tended to increase the number or scope of formal review processes would be a factor in a balanced business case.

Robin Creyke and Matthew Groves have commented that, 'The reduced emphasis on adjudication has led to an increased focus on getting decisions right the first time.'[11] They foresaw an increasing emphasis on proportionate dispute resolution and a corresponding increase in the use of methods other than litigation to resolve disputes about government decisions.[12]

In a recent decision, the UK Supreme Court (in *Cart)* considered whether unappealable decisions of the Upper Tribunal are subject to judicial review by the High Court. It concluded that they are – but only where there is an important point of principle or practice or some other compelling reason for the case to be reviewed.[13]

The Court noted that the object of judicial review is to maintain the rule of law and, therefore it had to consider:

- what machinery is necessary and proportionate to keep mistakes of law to a minimum ?
- what level of independent scrutiny outside the tribunal structure is required by the rule of law?[14]

The issue of proportionality was a significant factor in the Supreme Court's decision. On the one hand, it considered judicial review to be a matter of principle, not discretion. On the other hand, judicial review had always been a remedy of last resort.[15] The Court considered that judicial review could change to keep pace with other changes. There was a limit to the resources that the legal system could devote to trying to get a particular decision right.

The Court took into consideration that statutory appeal rights had been introduced in immigration and asylum cases because the limited resources of the High Court and the Court of Appeal had been overwhelmed by judicial review applications.[16]

The issue of proportionate allocation of limited judicial resources is a crucial one for government. Mechanisms such as clear contemporaneous statements of reasons and appropriately tailored statutory review rights are likely to reduce the need to use judicial resources by helping to ensure that the right decision is made in the first place and that any dispute about the decision is resolved at an early stage.

Agencies may feel that routine preparation of statements of reasons for decisions simply adds to their work load – but against this must be weighed the additional resource burden on government that flows from litigation, particularly protracted litigation.

Additional resources put into developing statements of reasons that are overly technical or defensive – perhaps by having 'draft' statements cleared through agency hierarchies or settled by lawyers – is also not a proportionate use of resources.

Peter Anderson, providing a business perspective on administrative law, comments that, *'Decisions that are too technical diminish the precedent value of a decision by reducing the business's capacity to understand and apply the decision more broadly.'*[17]

Stephen Lloyd and Donald Mitchell also comment that practices that lead to a statement of reasons not reflecting the original decision maker's reasons detract from the utility of the process and, where judicial review is involved, present a threat to the rule of law.[18]

Resources might more appropriately be channelled into educating and supporting primary decision makers to understand the requirements for lawful exercise of power and giving them confidence to prepare genuine statements of reasons.

Increased transparency – one of the objectives of a requirement for statements of reasons – could be achieved by making relevant background material, such as internal policy documents[19] and explanations of the legal basis for decisions, available on agency websites. This could provide context for reasons while reducing the need to include explanatory material each time reasons are provided on high volume decisions.

Better proportionality might also be achieved by allocating resources to education of affected community groups – again perhaps by providing quality online information – about the purpose of judicial review.

Andrew Metcalf, Secretary of the Department of Immigration and Citizenship, has commented: '*Some of our clients seem to feel that they must take every available step in the review process in order to achieve administrative justice. Because the judicial review process is concerned with the lawfulness of decisions rather than their merits, however, this course of action might not actually resolve the matter at the forefront of applicants' minds. Educating individuals about the review process might help to remedy this.*'[20]

Conclusion

Looking to the future, the current reflection on the role of judicial review in our administrative justice system presents exciting opportunities:

- the opportunity to embrace judicial review as a means of guidance on the lawful boundaries of our decision making; and
- an opportunity to consider enhancements to existing statutory rights to statements of reasons, which could be used as a tool to achieve better decision making, reduced levels of disputes and, as a consequence, more proportionate use of judicial resources.

Endnotes

1 (1982) 154 CLR 25, 70.

2 Sir Anthony Mason, 'Administrative Review: the Experience of the First Twelve Years', (1989) 18 *Federal Law Review* 122.

3 Ibid.

4 [2011] *Public Law* 56

5 Administrative Review Council, *Decision Making: reasons,* Best-Practice Guide 4, Commonwealth of Australia, 2007, 1.

6 (1983) 48 ALR 500 at 507

7 NADRAC, *Managing Disputes in Federal Government Agencies: Essential Elements of a Dispute Management Plan*, September 2010,

http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(9A5D88DBA63D32A661E6369859739356)~FINAL++Managing+Disputes+in+Federal+Government+Agencies++Essential+Elements+of+a+Dispute+Management+Plan.PDF/$file/FINAL++Managing+Disputes+in+Federal+Government+Agencies++Essential+Elements+of+a+Dispute+Management+Plan.PDF

8 Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet*',* [2011] *Public Law* 56, 63.

9 Ibid, 59.

10 Administrative Review Council, consultation paper, *Judicial Review in Australia,* April 2011, http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Latest_News_Current_Projects_Consultation_paper_-_Judicial_Review_in_Australia

11 Robin Creyke and Matthew Groves, 'Administrative Law Evolution: an Academic Perspective*', Administrative Review* (59) May 2010, 33.

12 Ibid, 34-35

13 *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent); R (on the application of MR (Pakistan)) (FC) (Appellant) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department (Respondent)* [2011] UKSC 28, 22/6/2011.

14 Lady Hale, *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent); R(on the application of MR (Pakistan)) (FC) (Appellant) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department (Respondent)* [2011] UKSC 28, 15,[37].

15 Lady Hale, ibid, 13, [33]

16 Lady Hale, ibid, 18-19, [47].

17 Peter Anderson, 'Administrative Law Evolution: Thoughts from a Business Perspective*'*, *Administrative Review* (59) May 2010 70, 73.

18 Stephen Lloyd and Donald Mitchell, 'Current Topics: Statements of the Decision Maker's Actual Reasons', *Administrative Review* (59) May 2010 73, 77

19 Anderson, above n15, 72.

20 Andrew Metcalf, 'Administrative Law Evolution: an Administrator's Point of View', *Administrative Review* (59) May 2010 59, 65.