HOW THE ABSENCE OF A GENERAL MERITS REVIEW TRIBUNAL IN SOUTH AUSTRALIA MEASURES AND IMPEDES PUBLIC ENGAGEMENT AND PARTICIPATION IN ADMINISTRATIVE DECISION-MAKING

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South Australia is now one of only 2 states in Australia that does not have a general merits review tribunal.[1] Instead it retains a complex array of tribunals, boards and commissions to review State administrative decision making. Beyond the justifications of cost and the dearth of political will, there is some evidence to suggest that the absence of administrative justice reform reflects failures in democratic process and a lack of public participation in government decision-making. Given the intrinsic relationship between community engagement and merits review, the absence of a general administrative tribunal also creates further impediments to access to justice in South Australia.

This paper suggests that moving away from failed arguments about access to justice and focussing on public administration and the proven benefits to participation delivered through merits review, may be the only way forward to achieve administrative reform for South Australians.

Odd one out against a proven model

South Australia has prided itself on its history of legal innovation, particularly in the areas of social justice and law reform.

South Australia was the first place in the world to allow women to stand for Parliament, and one of the first places to allow women to vote. In 1976, it was the first place in the English-speaking world to ban rape in marriage. The list of Australian firsts is equally impressive. South Australia was the first state to introduce income taxes and the first place to have public archives, in 1920. In relation to social justice initiatives, South Australia was the first state to prohibit sexual and racial discrimination in access to goods and services, to decriminalise homosexuality in 1975, to introduce aboriginal land rights legislation, and to appoint the first Indigenous Australian governor, Sir Douglas Nicholls.[2]

However, in 2011, South Australia is currently an anomaly in the Australian civil and administrative justice landscape, for all the wrong reasons. When, in December 2009, the Queensland Civil and Administrative Tribunal ('QCAT') was established, it marked national acceptance that amalgamated generalist tribunals provide the best model of administrative review of government decision making in Australia. In a move similar to the establishment of each of the differing models in the other states, [3] QCAT amalgamated 18 tribunals and 23 jurisdictions into one single tribunal, including areas such as comprehensive administrative review, guardianship, residential tenancies and civil small claims decisions.

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The birth of QCAT also coincided with a comprehensive 20 year review of Australia's oldest State 'super' tribunal, the Victorian Civil and Administrative Tribunal ('VCAT'). While it was not an independent review, the 2009 VCAT Review analysed the growth and acceptance of VCAT and was able to expose some weaknesses and make proposals for reform. In doing so, however, the Review also highlighted the true value of a generalist model. It displayed the broad scale performance measurement, transparency, accountability, and community engagement with government decision making and merits review provided by a 'one stop shop'.

What does South Australia have instead?

In South Australia, administrative review of government-decision making is currently provided through a myriad of disparate boards and tribunals that operate in a manner which, through their management structures, do not appear to be entirely independent of Government.[4] In addition to these, Ministers and other public officials and Courts, including the Supreme Court, the District Court, the Environment Resources and Development Court and the Magistrates Court, also conduct administrative review in specific jurisdictions. In particular, the District Court of South Australia operates a merits review function through its Administrative and Disciplinary Division ('ADD').

The ADD of the District Court was established in 1991 and represented a significant decision by the South Australian Government of the time to locate administrative review in the Court system rather than in a tribunal.[5] The establishment of the District Court's new jurisdiction did not consolidate any existing boards or tribunals but simply sought to remove the administrative appeal and review jurisdiction of the Supreme Court. This move perhaps represented a cross roads for the progression of administrative justice in South Australia away from the national norm by avoiding the proposals for reform.[6]

While it is not my intention in this paper to critique the performance of the ADD or any of the individual merits review bodies in South Australia, there are a few unique features of the South Australian system of administrative review that impact broadly on its overall operation. In relation to the ADD of the District Court, a striking feature is the development of a different test for merits review than appears either in Commonwealth or interstate administrative review. Section 42E(3) of the District Court, enacted in 2000, states that the Court is required to 'give due weight to the decision being appealed against and the reasons for it and not depart from the decision except for cogent reasons'. This test contrasts with the scope and nature of merits review as to determining the 'correct or preferable' decision[7] and has been interpreted to imply that in South Australia the original decision should not in the ordinary course of events be departed from. It is beyond the scope of this paper to discuss the jurisprudence of this interpretation, however, the fact that the test within South Australia has remained so markedly different to the rest of the nation is in itself worthy of note.

In relation to the administrative boards and tribunals, there is no common coordinated approach to practice or procedure, all are separately resourced and funded and there are not necessarily any common members of any of these bodies. To illustrate the scale of this problem: as of 2008, there were still 31 administrative tribunals/boards operating in South Australia, 8 of which were managed and resourced by the ADD, while not in fact being formally part of the Court.[8] There are currently approximately 70 Acts that confer review functions on the ADD. Despite the complexity of this structure, there is also a dearth of accessible public information about the availability of administrative review. No clear instructions are provided anywhere by South Australia government or the Courts as to which body reviews which type of government decisions.

Finally, due to its piecemeal nature, the current system in South Australia is proving unable to adapt and grow as needs arise in public administration and regulation. For example,

recent regulation requirements under a new National Health Practitioners scheme were simply rolled into established tribunals in other states alongside all other occupational and professional regulations. In South Australia, yet another new tribunal needed to be established to meet this need.[9]

Why the resistance to a generalist tribunal in South Australia? The common excuses

Most South Australian public lawyers and administrators readily identify a few simple reasons why there has been no general administrative tribunal established in South Australia. These are the cost, small population and a lack of leadership from government in administrative justice policy. However, a closer analysis suggests these may not in fact be the critical factors.

It is true that South Australia has good reason to cry poor in the face of the justice budgets of the other States of Australia.[10] However, a single tribunal to replace the complex system of administrative bodies and Courts in South Australia[11] has cost saving advantages, even in the short to mid-term, and in some jurisdictions cost has proved an incentive rather than an impediment to administrative justice reform.[12] In addition, the idea that our small population has not yet reached a critical point for significant reform in court administration must be an argument only plausible to those outside the justice portfolio, as those within struggle with an overworked, under resourced Court system. While the lack of an independent law reform commission to push civil law reform initiatives[13] and successive attorneys-general focussed on crime and punishment in South Australia are disappointing, such political failings are phenomena unique to South Australia. Further, other significant lobby groups in the South Australia legal fraternity and justice sector[14] have demonstrated that they are just as active, skilled and persistent in pursuing this issue as has happened in other jurisdictions in Australia.

Lack of a coherent administrative justice policy framework

Another factor that has had an effect on the development of the administrative justice system in South Australia, is the lack of a conceptual policy framework to occupy the 'civil and administrative justice' space between the powers of government and the jurisdiction of the Courts. An analysis of the established models of generalist administrative tribunals in other Australian States demonstrates coherent pathways between these two branches of government that are facilitated and enhanced by the establishment of a generalist administrative tribunal. This conceptual administrative justice framework does not currently exist in South Australia and, more importantly, the value of these pathways to administrators has not yet been publically recognised by the South Australia Government.

To illustrate this by way of both contrast and example, in Victoria the readily available VCAT 'Values Statement' unequivocally explains to the public where VCAT sits in the established framework of both government and the justice system.[15] The location and position of VCAT is also confirmed by the broader 'Civil Justice Strategy'; VCAT is recognised by government as playing a role which both reflects and generates community engagement and participation.[16] These policy documents confirm that the Victorian Government and its administrative decision-makers have come to recognise the value of the 'super' tribunal in ensuring public confidence and support in their performance as well as an improved understanding of government decision-making and review rights. The administrative justice landscape in Victoria (as in some other jurisdictions) has, therefore, demonstrably moved beyond simply representing a cheaper civil dispute resolution alternative to the Courts to become an integrated tool of the government to promote transparency and community participation in decision-making.

In South Australia, this link ie the value to the South Australian Government of administrative review to improve government process or, more particularly, public participation and engagement, has not yet been made in public in civil justice policy statements.

Public participation and engagement in South Australian government decision-making?

As a lawyer, not a political scientist, it is beyond my ambit to adequately analyse the South Australian Government's performance with reference to complex democratic theory, such as attempting to measure 'public participation'. There are, however, some basic observations that I am able to make about the about community involvement in current government decision-making processes, relevant to administrative justice in South Australia.

For almost 10 years a defining feature of the Rann Labor government in South Australia [17] was its political rhetoric on public engagement and community consultation on policy initiatives. For example, the South Australia government conducted the largest 'public' consultation ever conducted in the State's history on the South Australia Strategic Plan.[18] A further characterising and controversial feature of this Labor Government was the external 'independent' advisory boards, of private non-government 'experts' formed to inform policy, and seek innovative community-led solutions for public administration. An example of this structure in the area of participation is The Community Engagement Board, which exists to promote the involvement of individuals and organisations outside State Government in South Australia's Strategic Plan.[19] The Community Engagement Board comprises a representative of the following eleven high level South Australian Government boards and committees, including the Social Inclusion Board.

The Social Inclusion Board itself is a policy initiative unashamedly adapted from Blair's UK model. While the Attorney-General or indeed any justice policy representative does not get a seat at this table, the Social Inclusion Initiative contains many social justice issues that directly impact on the justice sector. The Initiative's strategy states:

> In Australia's system of government, as with other countries based on the Westminster system, departments inevitably approach issues through the lens of their own departmental responsibilities. Progress in developing and implementing policy is often measured through internal refinements to individual systems. This departmental approach frequently leads to systems operating in isolation and ultimately, fragmentation in service delivery. There is often little incentive for collaborative action across multiple agencies on policy development and service delivery. For many highly disadvantaged people, this means that their complex, multi-dimensional and inter-linked needs are not properly met. [20]

Further, the Social Inclusion Initiative's Foundation Principles 8 & 9 are, relevantly, as follows:

- Systems and bureaucracies must always be orientated to SERVE people and community and not vice versa.
- Joined-up working can address more effectively the complex and inter-related needs of people. The organisational structures of systems and bureaucracy that create barriers must be addressed.[21]

In 2008 the South Australian Government's initiatives around social inclusion and participation seemed to culminate when a 'Thinker in Residence 2008', Geoff Mulgan, considered the issue of 'Social Innovation: Meeting Unmet Needs' in South Australia and asserted that South Australia had a great history of social innovation and one that had gained new momentum in the 2000s.[22]

A basic survey of all the recent policy statements concerning public participation, from an administrative lawyer's perspective, readily shows that there is no stated role for the civil

justice and/or Court system in achieving broader social justice aims. In all the initiatives seeking to encourage government to 'join up and serve the community', civil and administrative decision-making processes are not mentioned at all.

Further and perhaps even more tangible evidence of the omission of administrative decision-making from a developed civil justice policy strategy, from an administrative lawyers' perspective, may also be identified in the analysis and outcomes of the Constitutional Reform Convention held in Adelaide in 2003. The Convention, held to review the South Australian State Constitution, was an anomalous event, held as a direct result of a deal the Rann government made with an independent MP in order to secure a minority government [23]. The panel of experts was originally charged to consider, amongst five related questions, 'Measures to improve the accountability, transparency and functioning of government' this was then consolidated into the broader question of 'measures to improve parliament and government'.[24]

As of 2003 in South Australia, despite the established role of aAdministrative tribunals interstate and at a Commonwealth level, the Discussion Paper identified the possible 'transparency measures' as including Parliamentary Committees, an Auditor General, an Ombudsman, Freedom of Information and the Courts. There was no mention of the role of administrative merits review in improving public participation at all, even in a reform proposal context. A perhaps self-fulfilling finding of the Convention was that there was 'declining faith in our democratic systems and concern in the electorate about accountability'[25]. More generally, MacIntyre and Williams concluded their analysis of the Convention as follows:

> The task for reformers is to convince the Members (and the Government) that certain reforms are worthwhile and should be accepted.... When the causes of some of the most significant recent reforms in the South Australian Parliament are considered it can be seen that it was public opinion (albeit opinion led by articulate advocates of reform like Dunstan) that pushed the Parliament along the road to change… Perhaps, if the mood for reform generated by the Convention can be maintained and encouraged, there is some prospect that the Parliament of South Australia may, in time, recognise the need to embrace those reforms that will improve its transparency and accountability. Until then it stands at a pace behind other jurisdictions that have undertaken significant steps to modernise their colonial heritage.[26]

Conclusion

The reasons why South Australia lags behind the nNational agenda in administrative justice reform may indeed include lack of leadership, political will or lack of need due to our relatively small population. I would argue, however, that what is lacking more importantly is the recognition by government and administrators of the fundamental connections between state accountability, public participation and administrative tribunals. South Australia's decision to retain the cCourt system to review government decision-making back in 1991, rather than following the national trend of establishing administrative tribunals, avoided the development of a coherent civil justice policy that could provide a consistent and defined conduit between the cCourts and government decision-makers.

The South Australian government needs to publicly to recognise that the establishment of a generalist merits review tribunal is not actually a question of court administration and that the experience in other jurisdictions identifies administrative tribunals as an essential function of government accountability. Rather than being a law and justice question, administrative merits review may be equally aligned with the issues of community participation and social inclusion. It is difficult for lawyers to conclude that the current absence of a general merits review tribunal in South Australia provides a measure of public participation in administrative decision-making. The experience of the 'super' tribunals in other states, however, does provide evidence that not having one in South Australia is an impediment to further

development of a flexible and robust administrative justice system that encourages community engagement and access to justice.

In conclusion, and to retreat to my true loyalties as declared at the start of this paper, while South Australia currently stands well off the National agenda on aAdministrative tTribunals, what has been striking about the many recorded examples of social innovation in South Australia is a strong notion of 'catch up'. While the historical cases of social justice and law reform in South Australia were undoubtedly innovative and ground-breaking, they often only happened after the social need that they addressed had been neglected for quite some time. I therefore consider maintaining South Australia's self-image of social innovation is not yet out of reach in the sphere of administrative justice. As South Australia's longest serving Premier, Sir Thomas Playford, acknowledged in relation to his achievements:

> … the city [of Adelaide] was badly provided with social services and the country even worse … So that, when you're behind scratch, it is easier to make a spectacular advance.[27]

Postscript

On Friday 26 August 2011, the South Australian Attorney-General John Rau announced to the Law Society of South Australia that a Steering Committee to review the State's administrative boards and tribunals had been established. The Review will investigate and present a proposal to establish an amalgamated generalist merits review tribunal. The Committee is expected to report to the Attorney-General in early 2012.

Endnotes

1 Remaining States are SA & Tasmania. In 2011 the AG in Tasmania appointed a Committee to investigate a proposal for a 'super' tribunal.
2 Full list of SA social innovations see Manwaring, R "A collaborative history of social innovation in South Australia" in Bloustien, G (Ed) *The proceedings from the History and Future of Social Innovation Conference*; Adelaide 2008; Published online at http://www.unisa.edu.au/hawkeinstitute/publications/social-innovation/ 20/7/11.
3 The jurisdictions of each of the State Tribunals differ according to the need and efficiency issues within the state. For details, see State Administrative Tribunal of WA at www.sat.justice.wa.gov.au ; Administrative Decisions Tribunal of NSW at www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/pages/adt_index ; Victorian Civil and Administrative Tribunal at www.vcat.vic.gov.au.
4 As a basic example, in the 2010-2011 Annual Report of the Guardianship Board of South Australia p.28 they include in their organisational structure the Attorney-General and three senior bureaucrats as direct employers of Guardianship Board Members with no further explanation as to the nature of this relationship.
5 For a comprehensive overview of the jurisdiction see Byrt, C "An Analysis of The Nature of the Administrative Appeal Jurisdiction of the District Court of South Australia" Unpublished thesis, MALP University of Sydney 2006. Copy available from author.
6 Significant to note that the Final Report of the South Australian Law Reform Committee, prior to its abolition in 1984, recommended the establishment of an amalgamated generalist tribunal.
7 Test as set out in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60.
8 See overview at Byrt (2006) (n 5 above).
9 The South Australian Health Practitioners Tribunal, established July 2010, located in and administered by the Industrial Relations Tribunal of South Australia, at www.healthpractitionerstribunal.sa.gov.au.
10 By way of example, on the basic Annual Report data 2009-2010, the current expenditure of VCAT alone was $36.79m, compared to $94,723m expenditure for the entire SA Courts Administration Authority.
11 An excellent overview of the myriad of administrative bodies in SA is provided by Byrt, C "Should we have a "Super" Tribunal in SA?" Unpublished Paper presented to COAT(SA) November 2008. Copy available from author.
12 The process of establishment of QCAT proved cost-neutral ie the budget of the new tribunal has not exceeded the cost to the State to administer the previous administrative review system.
13 South Australian Law Reform Committee was abolished in 1984 (Final Report recommended the establishment of an amalgamated generalist tribunal). A new 'Law Reform Institute' was established in 2011 by the Attorney-General in partnership with Law Society South Australia and Adelaide University Law School.
14 The Administrative Law Committee of the Law Society of South Australia, in particular, has engaged in ongoing lobbying on this issue and has provided detailed written submissions to the AG on this issue in 2004, 2006 and 2011.

15 See VCAT website for Service Charter and other statements; www.vcat.vic.gov.au.
16 www.lawreform.vic.gov.au/resources/4/a/4ad3ac00404a1067a258fbf5f2791d4a/vlrc+civil+justice+review+-+report.pdf 2008.
17 The Hon Jay Weatherill was officially sworn in as new SA Labor Premier on 21 October 2011.
18 The 2007 Summary of Targets for the SA Strategic Plan ('SASP') only includes political participation not government or policy participation (Target 5). For a critical evaluation of the 2006 public consultation on SASP within the framework of democratic theory, see Manwaring, R "Unequal Voices: 'Strategic' Consultation in South Australia" (2010) 69(2) *Australian Journal of Public Administration* 178. Manwaring suggested that the SA government has carefully driven and retained tight control over both the strategic agenda and public feedback, consulting primarily with 'elites'.
19 See http://saplan.org.au/pages/45.
20 http://www.socialinclusion.sa.gov.au/.
21 http://www.socialinclusion.sa.gov.au/files/SA_SII_book_2009.pdf.
22 http://www.thinkers.sa.gov.au/thinkers/mulgan/default.aspx.
23 See discussion of background in MacIntyre, C & Williams, J "Lost Opportunities and Political Barriers on the Road to Constitutional Reform in South Australia" (2005) 20(1) *Australasian Parliamentary Review* 103-16
24 MacIntyre, C "Deliberating on the Constitution" 2003 Published by: Australian Policy online, accessed 20/7/11 at http://www.sapo.org.au/pub/pub202.html?q=MacIntyre.
25 See papers at MacIntyre, C & Williams, J (eds) *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* 2003, Wakefield Press, Adelaide.
26 MacIntyre & Williams (2005) at 114.
27 Cockburn, S. (1991) 'Playford: Benevolent Despot' Axiom Publishing, p.175; as quoted in Manwaring (2010) (n 18).