F O C U S

As part of its 1989 public education program the Department of the Senate recently organised three public lectures on the theme 'Unchaining the watchdogs: Parliament, government and the independence of public officers'. Speakers were the Commonwealth Auditor-General, Mr John Taylor, the Commonwealth Ombudsman, Professor Dennis Pearce, and the President of the Administrative Review Council, Professor Cheryl Saunders. The following is an edited version of the address given by Professor Saunders on 7 December 1989.

THE ROLE AND INDEPENDENCE OF STATUTORY OFFICE-HOLDERS: THE PARTICULAR CASE OF ADVISORY BODIES

The Administrative Review Council is an integral part of the administrative review system which, over the past 13 years, has played a major role in achieving greater openness and accountability at the Commonwealth level of government in Australia. The Council's role is, in effect, to monitor the operation of the entire review system and to advise the Government accordingly.

Statutory advisory bodies have received very little detailed attention as a phenomenon in their own right. By contrast, statutory authorities generally have been the focus of quite a lot of research and writing. At one level the issues that arise are similar. Where do these bodies fit within the traditional theories of ministerial responsibility to Parliament for the business of government? What relationship do they have to the departments of state, particularly for the purposes of resource allocation and management? In the case of advisory bodies, however, these issues may take different forms or require different emphases, because of the advisory function itself.

The first part of this paper therefore makes some general observations about advisory bodies established by statute. The remainder describes the role and operations of the Administrative Review Council, in the light of some of these issues.

Statutory advisory bodies

Three features of statutory advisory bodies raise particular questions for their relationship with the rest of the system. The first is that, like other statutory authorities, advisory bodies have links with both the government and the Parliament which must be accommodated appropriately and consistently with constitutional principles. The functions of most advisory bodies require them to advise the government, rather than the Parliament. Creation by statute, however, gives such bodies a special standing which may have implications for both the political and judicial processes. While advisory bodies are part of the executive branch, it is clearly appropriate that

the Parliament from which they derive their authority takes a continuing interest in the way that authority is used.

The second feature concerns the relationship between an advisory body and its portfolio department. The reliance of such bodies on departmental support and advocacy is most obvious in relation to resource allocation although it occurs in other contexts. An advisory body can effectively be stymied by an inadequate allocation of resources, whatever the lofty goals of its constituent statute.

The third feature is the need for advisory bodies to operate independently in formulating the advice which they give to government. This flows from the purpose for which they are established. In most cases the justification for creation of a statutory body to give advice to government is to introduce particular expertise into the decision-making process. Variations on this theme sometimes occur where the advisory body is required to canvass public opinion, or to represent the views of a particular segment of the community. Even then, however, the essential function of the body is to offer facts or opinions which would not necessarily find their way into the process otherwise. If the views of the advisory body are not formulated independently, within its terms of reference, their value to the decision-making process is lost.

These features suggest some standard principles which might be considered for adoption in relation to statutory advisory bodies.

1. There should be a statutory requirement for reports from such bodies to be tabled in the Parliament, within a fixed period after submission to government. This at least makes the report a public document and its existence a matter of public knowledge.

2. The terms of reference within which the body is being asked to give advice must be clear and public. In some cases, of which the Administrative Review Council is an example, the functions will be fully described in the body's constituent statute. In others, including the Australian Law Reform Commission, the body is dependent on formal references from government which describe the ambit of the advice required. Under a third technique, the constituent statute describes the subject matter on which advice may be sought, but enables it to be circumscribed by directions or guidelines issued by the Minister.

   The principles espoused here demand that any such directions or guidelines be made public, preferably by tabling in the Parliament. To the extent that these instruments qualify or supplement functions conferred on a body by statute, there is also a question whether they are legislative in character and should be subject to disallowance as well as tabling.

3. The constituent statute should prescribe criteria or selection mechanisms for appointment to the advisory body. These should be set in the light of the function which the body is intended to perform. They may need to be phrased in general terms, so as not to inhibit appointments unduly. Even general criteria will require

appointments to be justified and will enable them to be evaluated by reference to the purpose for which the body was created. This requirement would not only help to ensure that advisory bodies are satisfactorily constituted but would have the advantage of focussing attention on the purpose of the body at the time of its establishment.

4. An independent secretariat should be provided to service each statutory advisory body, adequate to the purpose for which the body is created. It is unrealistic to expect a body to provide high quality independent advice if it is limited to a pool of hard-pressed departmental officers for its support.

5. A mechanism might be developed within the Parliament to review the appropriations to advisory bodies within each portfolio, in the light of the purposes each body is intended to serve.

6. The role of advisory bodies should be borne in mind in measuring their performance. Adoption of recommendations by government alone is too blunt a measure. A high adoption rate may indicate high performance; equally, it may indicate advice unduly tailored to suit known governmental or departmental preferences. A low adoption rate may have implications for the performance of the government or the department, as well as the advisory body itself. High quality, expert advice has an important educative effect, however unlikely it is to be accepted in toto in the short term. Furthermore there are often circumstances in which it cannot be clear whether advice has been accepted or not, in whole or in part.

The Administrative Review Council

The Council was established by the Administrative Appeals Tribunal Act 1975 (AAT Act), as a component of an integrated, reformed, Commonwealth system for administrative review. The three principal elements of the system are:

- an Ombudsman, to deal with complaints about what may loosely be described as maladministration;

- the Administrative Decisions (Judicial Review) Act 1977 (AD(JR) Act), providing a simplified process and codification of the grounds and remedies for judicial review in the Federal Court, including a right to reasons; and

- the Administrative Appeals Tribunal (AAT), a general appeals tribunal providing a mechanism for high quality, independent review on the merits.

The Council's statutory function is to advise the Attorney-General on the matters set out in section 51 of the AAT Act. These matters cover all aspects of administrative review, at the Commonwealth level, which were features of the system in the 1970s. They do not encompass features more recently introduced, most notably the FOI and privacy legislation.

The manner of the creation of the Council suggests that the primary focus of its advice initially was expected to be the operation and jurisdiction of the AAT. The Council's terms of reference, however, have enabled it to adapt its activities to the changing needs of the review system as it has evolved.

Membership

The Council has 13 members, three of whom are ex officio. The participation of the Ombudsman and the President of the AAT enables the Council to monitor and maintain co-ordination as well as providing a direct source of information and understanding for the performance of its other statutory responsibilities. The links with the Australian Law Reform Commission have facilitated co-ordination of a different kind, between the work programs of these two bodies.

The remaining 10 members of the Council are appointed on a part time basis in accordance with criteria set out in section 50 of the AAT Act. The criteria are general but have served the purpose foreshadowed earlier of focussing attention on the particular qualifications of individuals proposed for appointment to the Council. Current categories of membership are:

- Representatives of the community which uses the review system;
- Public service officers, from both line departments and central agencies;
- Members drawn from the private sector, with business or management qualifications; and
- Members of the legal community.

Work program

The work program of the Council over time can be divided into three phases. In the initial phase the Council concentrated on the principles which should govern review on the merits for the purposes of deciding which jurisdictions should be conferred on the AAT. It systematically examined each of the major portfolios in which Commonwealth decision-making impacts directly on individuals.

By the middle of the 1980s, the relevant principles were fairly well established and the Council had reported to the government on decision-making in the obvious portfolios. A change of emphasis thus became possible.

Review on the merits remains an important part of the work of the Council but it is no longer a major preoccupation. The Council's activities in relation to merits review, moreover, are taking new directions. First, the Council has recently embarked on an examination of decision-making in some portfolios which have more complicated aspects. Decisions made in the course of intergovernmental programs are an example. A second development is the growth in the number of review tribunals in addition to the AAT. In the interests of maintaining both the efficiency and fairness of the system, the merits review aspect of the Council's work now also extends to the activities of the intermediate and single jurisdiction tribunals.

The second phase in the evolution of the Council's work program began several years ago, when the emphasis on extension of merits review was balanced by a roughly equal emphasis on the operation of the system as a whole. An important aspect of the latter is the accessibility of the system to all groups in the community. The Council's ongoing access project has identified a range of actual or potential impediments to access including lack of knowledge about the system; costs of using it; deterrence by primary decision-makers or internal review bodies; and perceptions by potential users of the review bodies themselves. The access project is currently running in parallel with the Council's multiculturalism project, which is concerned with the effect of different cultural backgrounds on the ability and willingness of members of the community to question government decisions which affect them.

The activities of the Council are now moving into a third phase, in which advice to government is linked to a more comprehensive and specific view of the role of the administrative review system, in its broadest sense, in the overall structure of government. The Council is taking a correspondingly greater interest in those aspects of the structure which impinge upon administrative review.

Achievements

The Council keeps a running record of acceptance or otherwise of its advice, in terms of the Government's response. In general, I think the record is quite good. There are various factors, however, which complicate accurate measurement of the effect of the Council's activities. Some of them, at least, are likely to be common to other advisory bodies. They include the following:

1. The point of time at which an issue reaches the Council is a relevant factor. Sometimes an issue arrives too late, after it has been decided by Cabinet or, worse, included in a bill which has been introduced into the Parliament. By contrast, sometimes issues are brought to the Council's attention at such an early stage that the Council's views are reflected in the initial formulation of policy. If, as increasingly happens, this contact takes place at officer level, with informal reference to the Council, the Council's advice will not appear on the public record although it will have influenced the outcome on the issue.

2. On some occasions the views of the Council influence the action that is taken by government quite significantly, although the detail is so different that it would not be accurate to say that the Council's advice had been adopted.

3. Sometimes the Council's advice floats ideas which may take a while to become accepted but which ultimately are likely to influence government action.

4. Finally, there is a significant proportion of the Council's work which does not fully manifest itself in public advice at all. A recent example is the project on intermediate and single jurisdiction tribunals, the chief benefits of which will lie, at lease initially, in getting tribunal

members together and providing a basis for informed future action.

Administrative review and Parliament

We may be arriving at a critical point in the development of the Australian constitutional system. Australia as a nation seems, for the moment at least, to have set its sights against constitutional guarantees of individual rights. Whether this position will be maintained indefinitely in the face of the adoption of such guarantees elsewhere in the world is impossible to predict.

A much greater burden of protecting individual rights and interests is thus thrown on the rest of the constitutional system and in particular on the Parliament. The need to ensure that Parliament works effectively becomes correspondingly more important. If we accept that the checks and balances in our system lie primarily in the political process, it will be necessary to look at that process carefully, to ensure that it is able to produce the desired result. Quite significant rethinking may be needed. In my view, however, the relationship between the parliamentary process and administrative review has already been a significant early step in this direction. Administrative review provides avenues for individuals unhappy with executive action to seek redress. It complements the role of Members of Parliament in this regard; and I suspect that there is room for further interaction.

I am aware of an incipient idea that all this external review is unnecessary because public agencies and officers can be trusted to carry out their responsibilities properly. All sorts of answers to that are possible, only two of which need to be made now. First, it is a mistake to see administrative review as a denial of the hard work and quality of the public service; but nevertheless, experience tends to show that trust alone is no substitute for good old-fashioned checks and balances over time. And secondly, many issues pursued through review suggest a misjudgment in relation to a particular case and do not raise considerations of trust at all.

Administrative review has turned out, possibly unexpectedly, to complement the role of Parliament in another respect as well. The system enforces greater openness and impartiality in executive decision-making and focusses attention not only on the decisions made but on the policies underlying them. This in turn has contributed to the base of knowledge and understanding on which the parliamentary process can work. This approach to achieving an appropriate balance between executive flexibility and public accountability may prove to be the Australian alternative to more familiar constitutional devices adopted elsewhere. It has the potential to make a real contribution to the theory and practice of effective parliamentary government. There is a long way to go, of course, but getting there could be a satisfying process.