ADMINISTRATIVE LAW WATCH

ALRC review of adversarial system of litigation

In November 1995 the then Attorney-General referred to the Australian Law Reform Commission (ALRC) an inquiry into (among other things) the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction and whether any changes should be made to the practices and procedures used in those proceedings.

The ALRC has produced a background paper to provide some initial information about the inquiry and to encourage submissions on its proposed approach. The ALRC plans to release a series of issues papers during 1997 and early 1998, together with some background papers.

The planned background papers (all due for release in late 1996) are on:

- Description of federal jurisdiction;
- Judicial and case management;
- ADR and the multi-door court; and
- Litigants in person.

The planned issues papers are on:

- Federal civil litigation (March 1997);
- Family proceedings (April 1997);
- Training and education (April 1997);
- Administrative proceedings (May 1997);
- Courts and tribunals (November 1997);
- Appellate proceedings (March 1998);
- Alternative dispute resolution (March 1998); and
- Courts and technology (March 1998).

The ALRC also plans to release the following interim reports or discussion papers:

- Federal civil litigation interim report (September 1997);
- Family proceedings discussion paper (February 1998); and
- Administrative proceedings discussion paper (February 1998).

The ALRC is required to make preliminary recommendations on the conduct of civil litigation by 30 September 1997 and a final report on the conduct of civil, administrative review and family law by 30 September 1998. For further information on this inquiry, the ALRC can be contacted by phone on (02) 284 6333.

Review of the Archives Act 1983

On 15 August 1995 the then Attorney-General asked the Australian Law Reform Commission to conduct a review of the *Archives Act 1983*.

The review is to identify what the basic purposes and principles of national archival legislation should be and whether the Archives Act has achieved those purposes and principles or whether it requires amendment.

The terms of reference issued by the Attorney-General require the ALRC to have regard to the:

- purposes of, and benefits intended to be conferred by the Archives Act and the functions of the Australian Archives;
- recommendations contained in the joint report of Administrative Review Council and the ALRC, *Open Government : a review of the federal Freedom of Information Act 1982* (particularly those recommendations concerning the Archives Act); and
- principles and provisions of relevant State and overseas archival legislation.

Among other things, the ALRC is also to have regard to the:

- role of the Australian Archives as a standards setter for records management and its relationship with other Commonwealth agencies;

- need to ensure that records in electronic and other non paper formats are managed effectively;
- need to ensure consistency between the Archives Act, the *Freedom of Information Act 1982*, the *Privacy Act 1988* and the *Public Service Act 1922*; and
- most appropriate access regime for Commonwealth records of enduring value.

The ALRC is preparing an issues paper for public consultation before the end of 1996 and is due to complete its inquiry and report to the Attorney-General by 31 December 1997. The ALRC can be contacted concerning this inquiry by phone on (06) 257 7029.

Human Rights and Equal Opportunity Commission reforms

On 8 August 1996 the Attorney-General, the Hon Daryl Williams AM QC MP, announced that Cabinet had agreed to the introduction of legislation to reform the functions and structure of the Human Rights and Equal Opportunity Commission. The reforms are in response to the High Court's decision *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.

In *Brandy* the High Court found the provisions for enforcement of a determination by the Commission to be invalid because the Commission, as a non-judicial body, did not have the constitutional power (reserved to courts established in accordance with the Constitution) to finally determine disputes.

The reforms involve the establishment of a Human Rights Registry within the Federal Court. Under the new system complaints will continue to be lodged, investigated and conciliated by the Commission, but matters that cannot be conciliated will be dealt with in the new Human Rights Registry. According to the Attorney-General the amendments will simplify dispute resolution procedures in human rights matters and will avoid the potential that currently exists for parties to be forced to litigate disputes in both the Commission and the Federal Court.

The Attorney-General said that the amending legislation would also implement steps to improve the administrative structure of the Commission. Complaint investigation, conciliation, cooperative arrangements and the powers and functions of the Chief Executive of the Commission will be conferred upon a full time President. This is designed to allow more effective control over the business and organisation of the Commission.

Migration Legislation Amendment Bill (No 2) 1996

The Migration Legislation Amendment Bill (No 2) 1996 was introduced into Parliament in June 1996. The Bill is a response to a Federal Court decision concerning the entitlement of a person in immigration detention to receive from the Human Rights Commissioner (and there is an equivalent entitlement in relation to the Commonwealth Ombudsman) confidential written communications in relation to a complaint made to the Commission.

A written complaint was made to the Commission by the Refugee Advice and Casework Service (RACS), relating to whether and how immigration detainees might be provided with legal advice. The Department had informed RACS that the Migration Act (section 256) allows a detainee access to legal advice only where the detainee first requests it, thereby precluding access by RACS to the detainees in the absence of a request by the detainees for such advice. After receiving the complaint from RACS, the Commission unsuccessfully sought to have a sealed envelope delivered to the detainees, and it commenced legal action in an attempt to require the Department to do so.

In *Human Rights and Equal Opportunity Commission v Secretary of the Department of Immigration and Multicultural Affairs* (30 May 1996) the Federal Court (Justice Lindgren) decided that the *Human Rights and Equal Opportunity Commission Act 1986* operates to give a detainee the right to have delivered to him or her a sealed envelope provided by the Commission to the detainee's custodian, with-

out the need for a prior request (meaning, under that Act, without the need for a prior request for facilities for either complaining to the Commission or for communicating with the Commission in relation to a complaint).

The Bill proposes to amend the Migration Act to ensure that certain provisions of the Human Rights and Equal Opportunity Commission Act and the Ombudsman Act do not apply to people who are unauthorised entrants to Australia held in immigration detention unless those persons themselves initiate a complaint in writing to the Commission or the Ombudsman. The Second Reading speech to the Bill says that:

> "The proposed Bill will ensure that parliament's intention in relation to the management of unauthorised arrivals in immigration detention, as reflected by s 256 of the Migration Act, is not able to be subverted through the use of the Human Rights and Equal Opportunity Act 1986." (and similarly through the use of the Ombudsman Act)

The Senate Standing Committee for the Scrutiny of Bills, in its Sixth Report of 1996, drew the attention of the Senate to the Bill on the basis that it considered that the Bill's provisions may trespass unduly on personal rights and liberties, in breach of the committee's terms of reference.

Legislative Instruments Bill 1996

The Legislative Instruments Bill 1996 was introduced into Parliament in June 1996. The Bill largely implements the Council's Report No 35, *Rule Making By Commonwealth Agencies*. It also draws on the examination of the Legislative Instruments Bill 1994 over the past two years by parliamentary committees (see [1995] *Admin Review* 28). The 1994 Bill was not passed before Parliament was prorogued prior to the March 1996 Federal Election.

The 1996 Legislative Instruments Bill differs from the earlier Bill in providing for sunsetting of legislative instruments and a more structured consultation regime. Very few instruments are exempted from coverage of the 1996 Bill and the range of exemptions is not expected to be expanded.

The Legislative Instruments Bill 1996 has recently been considered by the Senate Standing Committee for the Scrutiny of Bills in Alert Digest No 5 of 1996 and the Committee's Ninth Report of 1996. The Report outlines the Committee's concerns over certain aspects of the Bill, seeking the Attorney-General's responses. Put broadly, the Committee's concerns are about:

- whether the decision of the Attorney-General to certify whether an instrument is a legislative instrument for the purposes of the Bill should be subject to parliamentary disallowance in addition to judicial review;
- whether legislative instruments concerning national schemes of legislation (and certain proclamations about flags and other specified instruments in relation to the Government as an employer) should be exempted from parliamentary disallowance; and
- whether the capacity to make regulations that amend Acts with respect to the making of Rules of Court might have the effect of ousting parliamentary scrutiny of those rules.

The Attorney-General's responses, also in summary form, were that:

- having two review mechanisms would create uncertainty and that the preferable mechanism was judicial review under the AD(JR) Act;
- it would be premature to remove the exemption for legislative instruments concerning national schemes of legislation before knowing the views of the pending report on that subject by the Senate Standing Committee on Regulations and Ordinances (and that it is strongly arguable that accountability in relation to the Government as an employer should be in the industrial relations arena); and

- any modification of Acts relating to Rules of Court would be by way of regulations, which are themselves disallowable.

Following these explanations, the Committee retained some concerns in relation to the exemptions for instruments concerning national schemes of legislation and other specified instruments, and the provision for modifying Acts with respect to Rules of Court.

Senate Committee inquiry into contracting out of government services

The Senate Finance and Public Administration References Committee is undertaking an inquiry into contracting out of government services. Noting the necessity for public accountability of all government services provided by private contractors the Committee's inquiry includes an examination of:

- how best to ensure that the rights, interests and responsibilities of consumers, contracted service providers and government agencies can be defined and protected;
- the adequacy of tendering procedures;
- whether the Ombudsman's jurisdiction should be extended to contracted services;
- ministerial responsibility to Parliament for contracted out government services;
- whether government should have access to files and information generated by private sector contractors in meeting their contractual obligations; and
- the place of claims of commercial-in-confidence in limiting parliamentary examination of contractual arrangements.

The Committee has released its terms of reference and invited written submissions on those terms by 8 January 1997. The Committee Secretary, Derek Abbott, can be contacted by phone on (06) 277 3530.

Privacy protection in the private sector

The Government announced its commitment to developing a co-regulatory approach to privacy protection within the private sector in its Law and Justice Policy Statement. As the first step in the process of public consultation on the proposed privacy extension, the Attorney General's Department recently released a discussion paper, *Privacy Protection in the Private Sector*.

The discussion paper notes that the right to know what personal information is held about oneself and to ensure that such information is correct is a fundamental privacy principle. Concern over the need for privacy protection has grown with advances in communications technologies which have significantly increased the generation of personal information and the ability to collate it.

Some countries have already taken steps to address these broad concerns about privacy protection. New Zealand and Hong Kong have recently introduced comprehensive privacy protection for personal information that applies to both the public and private sectors. In October 1995 the European Union passed a Directive on data protection which will be implemented in European Community countries over the next few years. This will mean that transborder flows of personal data to non-European Community countries without an adequate level of data protection would, in some cases, be prohibited.

Australia currently has data protection standards for personal information in the Commonwealth public sector and the credit reporting industry. The *Privacy Act 1988* sets out Information Privacy Principles (IPPs) that regulate the collection, storage and security, individual access and correction, use and disclosure of personal information, but it applies only in the two areas noted above. The need for a more comprehensive regime has been identified.

The discussion paper outlines a possible co-regulatory approach to extending privacy protection to the private sector. This approach would apply to all individuals and organisations in the private sector. It would apply to records containing personal information but not to such information collected or held by indi-

viduals solely or principally for the purpose of, or in connection with, the individual's personal, family or household affairs.

The regime outlined in the discussion paper involves the application of statutory standards for data protection specified in IPPs with provision for the development of Codes of Practice based on the IPPs to provide a level of flexibility and enable the IPPs to be tailored to cover specified information, activities, organisations, industries or professions. The Codes of Practice would be initiated and developed by particular organisations, industries or professions under the guidance of the Privacy Commissioner, who would have responsibility for issuing them. The Codes of Practice would be disallowable instruments, able to be considered by both Houses of the Federal Parliament (either of which could disallow them).

The IPPs and/or Codes of Practice would provide rights of access to and correction of personal information, although such rights would be subject to exemptions. There would also be provision for the charging of fees for the exercise of access and correction rights.

The discussion paper says that while the IPPs would take effect immediately on the introduction of the regime, there would be a delay in the operation of enforcement provisions in relation to all IPPs other than those concerning storage and security of personal information and access to and correction of personal information. The delay would allow time for the development of tailored Codes of Practice.

The Privacy Commissioner would have a central role in the proposed regime. In addition to assisting with the development of Codes of Practice and issuing guidelines on privacy-related matters, the Privacy Commissioner would receive and investigate complaints of breaches of privacy, resolve disputes and monitor the operation of the regime. The Privacy Commissioner would have power to do all things necessary to or convenient for the performance of his or her many functions.

Where possible, disputes following investigation of breaches of the IPPs would be settled by negotiation. In the event that this process fails to settle a matter, there would be provision to commence proceedings in the Federal Court. There would also be provision for civil penalties to be imposed.

Comments have been sought on the proposed scheme. Copies of the discussion paper may be obtained from the International Civil and Privacy Branch of the Attorney-General's Department, phone (06) 250 6211. The closing date for comments was 29 November 1996.

Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984

This review, commissioned by the Minister for Aboriginal and Torres Strait Islander Affairs of the previous Federal Government towards the end of 1995, was conducted by the Hon Elizabeth Evatt AC (it was also the policy of the incoming Government to conduct a review of the Act). A brief outline of the way the Act can be used is included in the discussion of the *Wilson* High Court case described earlier in *Admin Review*.

The report of the Review was provided to the Government in August and was tabled in the Senate on 8 October 1996. The Review makes a variety of recommendations aimed at improving the operation of the Act, after pointing out a range of problems with the way in which it has worked to date. Many administrative law issues concerning ways to improve the procedural path to be followed when a decision by the Commonwealth Minister is called for (as opposed to negotiated outcomes, which the Review says should be promoted further at all levels of decision making) are discussed in the report. The question of how confidential information (according to Aboriginal tradition) should be dealt with during the process, including by the Minister, is dealt with in some detail by the Review.

The Review noted that the Act is one of 'last resort' (dealings with indigenous heritage interests first occur at State and Territory level). It also noted that when the Commonwealth is

called upon to make decisions under the Act, these often have a broadly 'political' character, both in terms of the range of people with interests at stake and in the sense that the Commonwealth and a State or Territory Government might have different interests at stake.

The report of the Review considers both land claims procedures and broader (Australian) heritage processes in considering possible models for reform of Commonwealth decision making. The Review concludes that where Commonwealth decisions are called for, a relatively informal process akin to that followed in dealing with broader heritage interests, and leaving the Minister with discretion whether to prevent development or subject it to conditions where a relevant heritage interest is established, should be followed in preference to a more formal and legalistic one.

Package on court service standards

The University of Wollongong's Centre for Court Policy and Administration has recently released a package of two books setting out standards for courts to use and assess the quality of their services to the public. The package is the product of 12 months research by a joint team from NSW Local Courts and the Centre for Court Policy and Administration.

The set of standards contained in the package are derived from a common core of five principles:

- access to justice;
- expedition and timeliness;
- equality, fairness and integrity;
- independence and accountability; and
- public trust and confidence.

In addition to the standards, benchmarks have been specified to evaluate a court's performance against the standards. Some benchmarks are process-oriented and are assessed through interviews. Others require measurement of waiting time, a census of the people voluntarily using the courts, and other measures.

Courts throughout Australia are being invited to consider the extent to which these standards are relevant to their own operations.

While not specifically directed towards administrative tribunals, it is likely that the standards and benchmarks will have relevance in assessing client services by tribunals as well as courts.

Review of Victorian tribunal system

In October 1996 the Attorney-General of Victoria, the Hon Jan Wade MP, released a discussion paper, *Tribunals in the Department of Justice: A Principled Approach.* The discussion paper describes the background to a review of Victorian Department of Justice boards, tribunals and other bodies created by statute for the purpose of adjudicating disputes or exercising a statutory discretion (collectively called 'tribunals' in the paper).

The review does not deal with substantive administrative law issues or the particular law administered by the tribunals. Rather, it deals with reforms to the structures, functions, appeal processes and procedures of the tribunals. The discussion paper sets out the perceived inadequacies of the current arrangements, outlines principles that ought to be followed in remedying those inadequacies and puts forward proposals for reform.

Freedom of Information issues in the United Kingdom

The United Kingdom House of Commons has recently released the Government Response to the Second Report From the Select Committee on the Parliamentary Commissioner for Administration, Session 1995-96 – the *Open Government* Report. That Committee reviewed the UK Code of Practice on Government Information.

Unlike Australia, the UK does not have a Freedom of Information (FOI) Act. The UK Code of Practice on Access to Government Information – which came into force on 4 April 1994 – is concerned with the provision of information, not of documents. It applies to

government departments, agencies and public bodies that fall within the jurisdiction of the UK Parliamentary Commissioner for Administration (referred to in the Code as 'the Ombudsman'). Each department has an internal complaints handling system. If a person seeking access to information remains aggrieved after this internal departmental review procedure, they can ask a Member of Parliament to refer their complaint to the Ombudsman. The Ombudsman can investigate the complaint and uphold or reject it. If the complaint is upheld, a report is made to the referring Member. Although the Ombudsman can not overturn a decision, the reports have persuasive influence.

The Select Committee commenced its review in 1995. During the review the Select Committee visited Australia to learn about Australian FOI issues, examining both the federal and New South Wales systems in detail. Given that the Administrative Review Council and the Australian Law Reform Commission were conducting a review of the federal FOI Act at the time, the Select Committee was able to obtain and discuss the papers and reports published as part of that review. The Select Committee also examined the New Zealand and Canadian FOI systems.

The Select Committee published its report in March 1996. Briefly, the Select Committee endorsed the benefits of greater openness through FOI and concluded that the Code of Practice had been an important and valuable contribution to more open government in the UK. The report contained 33 recommendations, the last being that the Government introduce a Freedom of Information Act.

The Government has welcomed many of the recommendations and reaffirmed a commitment to greater openness. The Government said that with all information, the presumption should be in favour of disclosure but information may be withheld where the harm caused would outweigh the public interest in disclosure. Subject to the sensitivity of the material, the Government accepted that where practicable, internal discussions preceding major policy decisions could be published, when the announcement is made or after a predetermined period within the normal thirty-year limit. In this regard departments will have to consider the harm which may result from disclosure of information at the time a request is made rather than at the time the relevant decision was taken. In effect, Cabinet papers will remain exempt, as there is a presumption that disclosure will be harmful to the public interest by weakening the principle of private deliberation at the highest level of government.

The Government did not agree that the wording of the Code of Practice should be amended to assert a right of access to documents (rather than to information). The Government believed that this would lead to too great an emphasis on the form of the material rather than its substance. It was also considered that information relevant to a particular request, which may summarise information contained in many documents, can be prepared more efficiently than editing paper records.

The Government did not accept the recommendation that a Freedom of Information Act be introduced. It considered that the Code of Practice is working in the way that it was intended to, that it is being refined through reviews and experience, and that it would not now be sensible to seek a fundamental change in the status of the Code.

Unites States administrative law cases for 1995

A short summary of significant American administrative law cases decided in the courts each calendar year is provided in the journal *Administrative Law Review*, published by the American Bar Association. The summary shows some interesting similarities and differences with Australian judicial review developments.

The 1995 summary (see 1996 *Admin L Rev* 399) includes summaries of cases showing that:

- the US National Railroad Passenger Corporation (Amtrak) is an 'agency' of the

government for constitutional purposes (such as First Amendment rights to freedom of speech) even though it is not an 'agency' for the purposes of the general Administrative Procedure Act;

- there are constitutional limits to the amount of legislative power that can be delegated (despite the fact that the Supreme Court has not invalidated a statute on delegation grounds since 1935);
- the standards concerning impartial adjudication as between courts and agency decision makers may be different, one view being that they should be higher for agency decision makers because of the absence of procedural safeguards normally available in judicial proceedings (note that the review describes American agency hearings as 'the administrative equivalent of a trial' involving rights of cross-examination and the like, suggesting a greater level of formality than applies in Australia);
- reasonable agency interpretations of rules made under legislation are given considerable deference by the courts; and
- an agency is not a 'person' for the purposes of the Administrative Procedure Act, so that an agency was denied standing to appeal against a decision by an agency tribunal that had reviewed an agency administrative decision.

TRIBUNAL WATCH

1996 Commonwealth Review Tribunals Conference

The 1996 Commonwealth Review Tribunals Conference was held in Canberra on Friday 13 and Saturday 14 September 1996 at the Law School of the Australian National University. The Conference was organised by the Council primarily for the benefit of members of Commonwealth merits review tribunals. Some State and Territory tribunal members also attended. Unlike previous conferences which had a greater focus on formal speeches to conference participants, the emphasis of the Conference this year was on interaction between tribunal members through workshops.

Keynote address by Attorney-General

The Attorney-General, the Hon Daryl Williams AM QC MP, gave the keynote address to the Conference (reproduced as the first Focus Article in this issue of *Admin Review*). As the Government is yet to respond to the Council's report *Better Decisions: review of Commonwealth Merits Review Tribunals*, conference participants were interested to hear the Attorney-General's comments. The Attorney endorsed the Council's emphasis on the dual role of merits review tribunals – to reach the 'correct and preferable' decision in the individual case and to improve the quality of administrative decision making generally.

The Attorney noted that it was time to reflect on the role of the Council and its relationship with government. He foreshadowed the review of the Council that is now being undertaken by the Senate Legal and Constitutional Legislation Committee (this is discussed earlier in this issue of *Admin Review*).

Workshops

Each workshop had presenters who spoke to open up the topic for discussion by participants. The presenters were drawn from a range of backgrounds including tribunal members, government officials, and private practitioners.

Some workshops were skills based and provided training for participants; others covered a range of legal and policy issues relevant to the work of review tribunals. Workshop topics included: assessing credibility; mediation; expert witnesses; normative effect and primary decision makers; user friendly Tribunals; government policy and tribunal decision making; tribunal cooperation; timely disclosure of relevant material in tribunal proceedings; writing reasons for decision; tribunal independence; and assessing tribunal performance through statistics.

The Australian Law Reform Commission also took the opportunity to obtain the views of tribunal members in relation to the Commission's current review of the adversarial system of litigation (discussed in Admin Law Watch).

Survey of participants

Following the Conference, a survey form was distributed to participants, seeking evaluation of the workshops and comments on the objectives, structure, participation and other relevant matters concerning the Conference. The Council would like to thank those Conference participants who responded to the survey as the feedback will assist in discussions between the Council and tribunals about the organisation of the 1997 Tribunals Conference. The general response was that the greater emphasis on workshops and discussion (by comparison to addresses) was desirable.

AAT developments

New AAT Practice Directions

Following a review of its practice directions the AAT has recently issued new practice directions. The new directions take effect from 30 September 1996.

The new practice directions include a General Practice Direction which combines and replaces a number of earlier practice directions as well as a specific Practice Direction con-