

**2001 Blackburn Lecture**  
**‘Administrative Review – observations and reflections’\***  
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**President**  
**Administrative Review Council - 15 May 2001**

In my lecture tonight, I will look at the makings of the Commonwealth administrative review system, the system at present, and speculate a little about the future. I will also take the opportunity to canvas the Administrative Review Council, its role and contribution to the system.

It is my hope that some of the content of this lecture will stimulate thought and discussion about our system of administrative review. Its title, “*Observations and reflections*”, forecasts my intentions. Those of you who know my background will know that I do not approach this task from the perspective of an administrative law specialist. My career experience has been forged by the private sector. However, before, as part of, and since practising law that experience has always involved government agencies; sometimes as a lobbyist in relation to government policy, sometimes as a legal representative for persons aggrieved by government decision making, and sometimes as a private citizen exercising my right to comment on government initiatives. Over some 30 years I have developed a well-rounded knowledge of government agencies, and the scope of their powers and activities.

In my earlier career I worked with both private and institutional lobby groups. As a practitioner my practice largely turned on Commonwealth legislation and, moreover, policy. Latterly, as general counsel to one of the four major banks, managing the impact of government decision making on a large private corporation was a significant challenge and an integral part of my work.

I hope this background will put into some perspective the observations and reflections I wish to share with you tonight.

### **Then – Kerr and Bland**

Any reflection on the Commonwealth administrative review system must of necessity start with the 1971 Commonwealth Administrative Review Committee<sup>1</sup> (the Kerr Committee). The work of this group was truly remarkable; and thirty years later remains relevant to properly inform any debate about the system.

My lecture tonight could have been titled *Observations and Echoes*, for the issues discussed in the Kerr report (and its recommendations as a source of counsel) continue to guide thinking in this field, through its contemporaries, the Bland and Ellicott Committee reports, and the ARC’s work - particularly its recommendations in the 1995 *Better Decisions* report, and ultimately in relation to the Administrative Review Tribunal Bill 2000.

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\* The views expressed in this paper are those of the President and should not be taken as necessarily representing the views of the Administrative Review Council. I also acknowledge the invaluable assistance of the Council’s Executive Officer, Matt Minogue, in the preparation of this lecture.

<sup>1</sup> *Report of the Commonwealth Administrative Review Committee 1971*; Parliamentary Paper No. 144 of 1971 (referred to as the “Kerr Committee Report”)

At the outset, Kerr recommended an integrated system of administrative review. It was considered:

“neither correct nor practicable to examine in isolation judicial review in the traditional sense; it must be seen and examined in the total context of review of administrative decisions... further, it must be kept in mind that a question of importance which can arise in relation to some functions is whether they are better suited to judicial or non-judicial review.”<sup>2</sup>

Equally, a fundamental premise of Kerr was that the need for a modern system of administrative review was based on positive notions of justice rather than reactions to vested interests.

The simple ‘justice’ approach of Kerr is summed up in the Committee’s approach to the need for reform:

“In formulating our proposals we have concluded that there is an established need for review of administrative decisions. We have not thought this to be a matter of real debate...In coming to that conclusion we do not suggest that there is any propensity to err in the administrative process...It is the possibility of error that demonstrates the need for review.”<sup>3</sup> (emphasis added)

Applying the test of contemporary administrative experience shows that those statements remain acutely relevant. For example, the controversies surrounding the ART Bill were not based on a view that merits review was no longer necessary. In fact quite the contrary.

In introducing the Bill the Attorney-General outlined the Government’s objectives:

“A vast number of decisions made by government departments and agencies on a daily basis affect the rights and interests of individuals. The Government is committed to ensuring individuals have ready access to independent and high quality review of decisions that is inexpensive, prompt, informal and effective.”<sup>4</sup>

Senator Barney Cooney, part of the minority of the Senate Committee inquiring into the Bill said:

“A decision reached by Government should be fair and reasonable. ... Access to review of Government decisions, whether undertaken by courts or by tribunals, is crucial to ensuring they have been made in accordance with the law and the facts relevant to the matters with which they deal.”<sup>5</sup>

However, the Kerr report’s focus on justice understood the tensions between administrative review and administrative efficiency. That Committee commented:

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<sup>2</sup> Kerr Committee Report; paragraph 6

<sup>3</sup> Kerr Committee Report; paragraph 10

<sup>4</sup> The Hon, Daryl Williams AM QC MP, Attorney-General, Administrative Review Tribunal Bill 2000; Second Reading Speech, 29 June 2000

<sup>5</sup> “Additional Comments by Senator Cooney”, *Report of the Senate Legal and Constitutional Legislation Committee Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000*; February 2001

“We have been mindful that it is essential to achieve a balance between the desirability of achieving justice to the individual and the preservation of the efficiency of the administrative process... although administrative efficiency is a dominant objective of the administrative process, nevertheless the achievement of that objective should be consistent with the attainment of justice to the individual.”<sup>6</sup> (emphasis added)

Demonstrating that the balance was or would be set correctly, however, was a real issue for the Executive arm of Government from the outset.

The very first ARC report in 1978, *Administrative Decisions (Judicial Review) Act 1977 - Exclusions under Section 19*<sup>7</sup> considered submissions from departments that their decisions should be excluded because:

“the Act will precipitate a flood of applications for review, adding to delays.”<sup>8</sup>

The Council responded to this in two ways. At a practical level it noted that if a flood in fact occurred, that could be addressed quickly (including by an exclusion if that was warranted - although the Council noted the difficulties in taking away a right which had been frequently availed of).<sup>9</sup> More forthrightly the Council stated:

“In any event, if a high volume of litigation eventuates, this may be seen to be evidence that the operation of the [ADJR] Act has a salutary effect in checking unlawfulness which may not otherwise be exposed.”<sup>10</sup>

Kerr’s recommendations proposed an integrated system, which would comprise:

- revised and simplified grounds for judicial review to overcome the complexities of the prerogative writs, and the attendant risk that administrative justice “will be dispensed unevenly”<sup>11</sup>. This would include “a simple procedure in the Court to be provided for by Statute which should also set out the legal grounds upon which review may be granted;”<sup>12</sup> and
- a general policy of providing for merits review of administrative decisions.<sup>13</sup>

The integrated system would also have the following features:

- a Commonwealth Superior Court or Administrative Court with jurisdiction for judicial review, but not merits review (recommendation 1 & 2).
- a right to reasons for decisions (recommendation 8);
- the appointment of a “General Counsel of Grievances”, which ultimately became the Ombudsman (recommendation 22);

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<sup>6</sup> Ibid; paragraph 12

<sup>7</sup> Administrative Review Council, Report No. 1, 1978

<sup>8</sup> Ibid; paragraph 49

<sup>9</sup> Ibid; paragraph 49

<sup>10</sup> Ibid; paragraph 49

<sup>11</sup> Kerr Committee Report; paragraph 78

<sup>12</sup> Ibid; recommendation 3. The grounds of review would include :Denial of natural justice; Failure to observe prescribed procedures in cases where the failure has materially affected a person; Want or excess of jurisdiction; Ultra vires; Any error of law appearing in or from the record; Fraud.

<sup>13</sup> Ibid, recommendation 17

- the establishment of an Administrative Review Tribunal, chaired by a Judge, to be the main source of administrative review unless special circumstances warranted a specialist tribunal (recommendations 18, 19, 20); and
- the establishment of the Administrative Review Council.

The Kerr recommendation for an integrated system was supported by the Bland and Ellicott committees. It is pointless to speculate over which aspect may be the most important, and what might have happened had the recommendations been implemented differently. However, recent comments from the High Court about the numbers of applications in its original jurisdiction and the sudden resurgence of interest in the prerogative writs (now constitutional writs per *Aala*<sup>14</sup>) give some clue about what might have happened had the ADJR Act not been enacted. In a very real way the force of Kerr's recommendations echo now – issues of the role of an administrative review court and the proper function of the High Court as a constitutional and appellate court are the subject of current debate.

The Kerr Committee took the view that while the High Court would always have original jurisdiction to supervise Commonwealth administrative action under section 75(v) of the Constitution, it should not ordinarily do so. The Committee's reasons included the relatively minor importance or value of most disputes and the cost of proceedings. However, the strongest argument seemed to be that:

“...in the ordinary course of judicial review of Commonwealth or State administrative action the High Court would make its important contribution as the ultimate appellate court rather than as the regular supervisory court for Federal purposes, though its constitutional jurisdiction would always be available in cases to which it extends.”<sup>15</sup>

These sentiments parallel the more recent expressions of frustration by justices of the High Court following the 1992 *Migration Reform Act* restrictions of statutory judicial review of migration matters by the Federal Court and limitations on the scope of remittal under section 39B of the *Judiciary Act 1903*.<sup>16</sup> For example, in *Re The Minister for Immigration and Multicultural Affairs; Ex Parte Durairajasingam*, McHugh J noted that of the 102 applications for prerogative relief then pending in the High Court, 66 of them arose under the *Migration Act 1958*.<sup>17</sup> McHugh J noted that until these restrictions, the Court had been empowered to remit most claims for prerogative relief to the Federal Court for determination.<sup>18</sup> His Honour stated:

“...Given this history and the need for this Court to concentrate on constitutional and important appellate matters, I find it difficult to see the rationale for the amendments to the Migration Act which now prevent this Court from remitting to the Federal Court *all* issues arising under that Act which fall within this Court's original jurisdiction. No other constitutional or ultimate court of any nation of

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<sup>14</sup> *Re Refugee Review Tribunal and another; Ex parte Aala* (2000) 176 ALR 219

<sup>15</sup> Kerr Committee Report; paragraph 241

<sup>16</sup> The *Migration Reform Act 1992* amended the *Migration Act 1958* to provide for judicial review of migration decisions, repealing the Federal Court's AD(JR) and section 39B jurisdiction

<sup>17</sup> *Re The Minister for Immigration and Multicultural Affairs; Ex Parte Durairajasingam* (2000) 168 ALR 407, at page 409 footnote 2.

<sup>18</sup> *Ibid*, page 410, paragraph 11.

which I am aware is called on to perform trial work of the nature that these amendments to the Act have now forced upon the Court.”<sup>19</sup>

Similar criticism were made by Gleeson CJ and McHugh J in *Abebe v Commonwealth*<sup>20</sup>, and by Kirby J in *Re Refugee Review Tribunal; Ex parte Aala*.<sup>21</sup>

## Now

Where are we now?

It is trite to say that the nature and accessibility of review provided for in the then “new” administrative law package has had a profound effect on administration. But it has. And the effects are measurable.

In my mind several matters stand out:

- the obligation to provide reasons for decisions was of revolutionary impact;
- the improvement by agencies in better describing broad discretions in legislation, and indeed legislating what had previously been matters of culture, policy, and guidelines;
- the anticipated and delivered benefits of the normative effect of the reforms have been well demonstrated; and
- improved decision making processes and accountability in the private sector arising out of the adoption of some features of the administrative law system.

I would like to comment further on these matters in turn.

First

## Reasons for decisions

Even though there is no general rule of common law or principle of natural justice that requires reasons to be given for administrative decisions<sup>22</sup>, statements of reasons, containing the findings on material questions of fact and the evidence relied on are now given as a matter of course.<sup>23</sup>

As Ellicott J observed in *Burns v ANU*, the purpose of a legislated entitlement to reasons was to remedy the situation where:

“Those exercising administrative power under Commonwealth enactments were not under a general duty to give reasons. Up to a point, they were entitled to hide behind a wall of silence.”<sup>24</sup>

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<sup>19</sup> Ibid, page 411, paragraph 13.

<sup>20</sup> (1999) CLR 510, at paragraph 50

<sup>21</sup> *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57, paragraph 134.

<sup>22</sup> *Public Service Board v Osmond* (1996) 159 CLR 656

<sup>23</sup> See for example *Administrative Appeals Tribunal Act 1975*, sections 28, and 37 *Administrative Decisions (Judicial Review) Act 1977*, section 13, and *Acts Interpretation Act 1901*, section 25D

<sup>24</sup> *Burns v ANU* (1982) 40 ALR 707, per Ellicott J at 715

The requirement for statements of reasons was described by Sir Anthony Mason in his 1989 Blackburn Lecture as:

“a dramatic advance in arming the individual with effective remedies in the overall scheme to ensure administrative justice.”<sup>25</sup>

However, there were critics. Small agencies complained that the “seemingly innocuous” section 13 of the ADJR Act required more “detailed and formal” decision making processes for every decision (even though in fact only a small number of requests might be received). In fact the Australian Government Retirement Benefits Office argued in 1982 that this required a doubling of staff in the relevant area (from 3 to 6)<sup>26</sup>.

In 1988, Sir William Cole, former Secretary of Defence and Chairman of the Public Service Board argued that the requirement for statements of reasons undermined efficiency: the requirement to give reasons created timidity in decision making; marginal cases were treated favourably even where there were reasonable grounds for refusal (with implications for the budget); time and effort was spent couching reasons in legalistic terms to fit in with the “tram tracks” of judicial reasoning, with:

“the consequential risk that getting the procedures right becomes more important than getting the decision right.”<sup>27</sup>

This was not a view accepted by the ARC.<sup>28</sup> Equally, it was not a view universally accepted by administrators at the time; Derek Volker, then Secretary of the Department of Social Security, commented in 1987 that “the administrative law reforms contributed to improvement in the quality of administrative decision making.” This was not solely because of the ‘stick’ elements of scrutiny, but because of better decision making overall, including, *inter alia*, clarity and succinctness in identifying why a decision was taken.<sup>29</sup>

What the requirement for reasons did do was render individual decision makers open to scrutiny and criticism for each of their decisions.<sup>30</sup> We should not underestimate the impact and challenge this new regime had, even for the most professional and enlightened administrators. I do not make this point lightly – the reality is that decision making can be hard; it is not and never has been simply the decision makers’ view of the world. As the Bland Committee noted:

“In so many cases, the administrator cannot come to his decision on an individual case in, as it were, a vacuum. He has to take his decision not solely on premises acceptable to a court but in a context of a broad government response to its

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<sup>25</sup> Sir Anthony Mason, *Twelve Years of Administrative Review in Australia*; published in Commonwealth Law Bulletin, July 1990, page 1011

<sup>26</sup> R.C. Davey, *The New Administrative Law: A commentary on cost*, Australian Journal of Public Administration, June 1983, p 261

<sup>27</sup> R.W.Cole, “*The Public Sector: The Conflict Between Accountability and Efficiency*”, Australian Journal of Public Administration, September 1988

<sup>28</sup> see ARC Discussion Paper – *Review of the Administrative Decisions Judicial Review Act: Statements of Reasons for Decisions*, 1991

<sup>29</sup> Volker “*The Effect of Administrative Law Reforms – Primary Level Decision Making*”, Canberra Bulletin of Public Administration, No. 58, April 1989, Page 112

<sup>30</sup> This discipline also applies to tribunals as well as primary decision making – see for example the comments of Hely J in *Industry Research and Development Board v Phai See Investments* [2001] FCA 532, at paragraphs 43-45

interpretation of socio-economic values acceptable to the community. He absorbs this in the culture of his total administrative activity.”<sup>31</sup>

There was probably little comfort in knowing that Courts approach the task of reviewing reasons without striving to find error. In this context, in 1996 the High Court commented on the approach which should be adopted by the courts when scrutinising a statement of reasons in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*<sup>32</sup>. In expressing approval for the approach of the Federal Court which held that reasons “are not to be construed minutely and finely with an eye keenly attuned to the perception of error”, the majority (Brennan CJ, Toohey, McHugh and Gummow JJ) said:

“These propositions are well settled. They recognise the reality that the reasons of an administrative decision maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.”<sup>33</sup>

Secondly

## **Legislative treatment of discretions**

It seems to me that the improvement in legislative treatment of administrative discretions is a key outcome of the administrative law reforms. Some discretions were, by today’s standards, impossibly wide, or as the Bland Committee noted in 1973, “difficult and subjective.”<sup>34</sup>

For example, the *Social Services Act* provided that an age pension would not be granted unless a person was of good character. Similarly, it could be refused if the applicant was “not deserving of a pension”<sup>35</sup>. Other provisions in a range of legislation fixed the maximum amount of a benefit and authorised a Minister or official to determine what the benefit should be, or allowed the fixing of a maximum charge with an unguided discretion to decide on a lesser fee or charge.<sup>36</sup>

As Bland suggested, decision makers were expected to identify and understand Government policy, and then absorb it as part of the “culture” of their total administrative activity.

I described such discretions as “impossibly wide”. How could administrators be expected to demonstrate a rational basis for a decision when left to work within such open parameters? How could an applicant have any confidence they were being treated fairly?

It seems to me that when asked to explain a decision without clear criteria or guidance it would have been inevitable for the reasoning in many cases to come down to little more than “because”. Perhaps this is too harsh, but in any event there would have been many cases

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<sup>31</sup> Bland Committee Report; paragraph 172(e)

<sup>32</sup> (1996) 185 CLR 259

<sup>33</sup> Ibid, at page 272

<sup>34</sup> Bland Committee Report; paragraph 53

<sup>35</sup> Ibid, paragraph 53

<sup>36</sup> Ibid, paragraph 97. In paragraph 98, the Bland report noted “Rarely are there any guidelines as to how the quantum is to be decided or as to the circumstances in which exemption or relief is to be granted...Doubtless, departmental manuals derived from experience provide some guidelines. Inevitably, decisions related to the same set of circumstances will vary with the individual decision maker.”

where the reasoning would have been subjective to the decision maker, and out of the grasp, and therefore influence, of applicants.

Such a position also demonstrates why the integrated law reforms were vital - a decision based on “because” may well be lawful, but whether it could be “correct or preferable”<sup>37</sup> was questionable.

This does not mean that there is no room for discretion. An appropriate balance must be struck between clearly identifying the circumstances in which the power may be exercised, and leaving sufficient margin for decision makers (and tribunals) to make the ‘correct or preferable decision’ in unique but nevertheless legitimate cases “precisely because it is impossible to foresee accurately all the permutations and combinations of circumstance which might arise for decision.”<sup>38</sup> The question of reserving an appropriate realm for discretion in decision making will become an increasing area of concern in the future as agencies move to adopt automated decision support and decision making technologies.

Thirdly

## **The Normative Benefits of Administrative Law**

In *Better Decisions*, the ARC considered the overall objective of the system was to ensure that administrative decisions of government are correct and preferable.<sup>39</sup> In particular, the merits review system should have the specific objective of:

“...ensuring that particular review tribunal decisions are, where appropriate, reflected by agencies in other similar decisions...”<sup>40</sup>

However, the normative effect might be seen more as a general objective of the administrative review system directed to continuously improving the standard of decision making at the primary decision, internal review, and tribunal levels.

Once again, Kerr resonates. In rejecting suggestions that increased scrutiny would lead to inefficiency, the Kerr Committee noted:

“It does not follow that a more comprehensive review of ...decisions will lead to inefficiency in the administrative process ...Indeed the very existence of machinery for review ...is likely to produce a greater efficiency and correctness in the making of those decisions.”<sup>41</sup> (emphasis added)

The introduction of an integrated system of administrative review *did* improve the decision making process. For example, widespread, accessible external merits review is a far more effective mechanism for continuous improvement than the traditional “normative” process of occasional and costly appeals to a superior court, confined as they were to questions of lawfulness – not merit; and in respect of matters which were not representative of the majority of decisions that administrators make.

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<sup>37</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at page 68

<sup>38</sup> See Justice Deirdre O’Connor, *Merits Review in the New Millennium*, published in AIAL Papers Presented at the 2000 National Administrative Law Forum, at page 20

<sup>39</sup> a reference of course to *Drake* (above), see *Better Decisions*; paragraph 2.9

<sup>40</sup> *Better Decisions*, paragraph 2.11. The Council referred to this specific objective as “the normative effective”.

<sup>41</sup> Kerr Committee Report; paragraph 12



However, the “normative” battle continues. *Better Decisions* cautioned that pressures for efficiencies and savings might hinder acceptance of merits review, and the objective of cost effective decision making could be seen as incompatible with improving the quality of decisions.<sup>42</sup> That report also noted the concerns expressed by Sir Anthony Mason at a forum in 1995 that:

“Despite re-assuring statements that the [administrative review] system has brought about a significant change in the administrative culture and in improvement in the quality of administrative decision-making, I am not altogether convinced that these statements are entirely accurate... [and] I doubt that we have succeeded in bringing into existence a new and enduring administrative culture.”<sup>43</sup>

In particular, Sir Anthony doubted whether the recognised improvements:

“...would endure at the same level if the existing system were to be dismantled.”<sup>44</sup>

My own view is that these comments discount, to some extent, the normative improvements that have in fact been achieved. I do not see it as a point of vulnerability that the improvements are the product of the present system of administrative review. I note that Mr Stephen Skehill, then Secretary of the Attorney-General’s Department, responded to Sir Anthony’s concern at that forum:

“As an ‘old’ public servant with experience in a range of agencies and across both primary decision making and review systems, my very clear view is that our primary decision-making is now very markedly better than it was 20 years ago.”<sup>45</sup>

However, I believe that Sir Anthony’s and Mr Skehill’s views can be reconciled, and in fact the issue is one of cultural and generational change.

Notwithstanding 30 years of administrative review reforms, agency executives and ministers are still subject to the pressures of increasing efficiency while decreasing costs. In any event it indicates the need for continued assessment of the impact of government initiatives on the rights of individuals.

However, at the level of the administrative decision maker I believe the culture has changed. I say this because over the last 30 years a generation of administrators have experienced nothing but an environment of access to reasons, merits review of decisions, FOI and Ombudsman inquiries.

While improvements have been realised, I would not advocate complacency. In the course of its recent report on *Internal Review of Agency Decision Making*,<sup>46</sup> a number of concerning views were put to the Council:

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<sup>42</sup> *Better Decisions*; paragraph 6.10

<sup>43</sup> Mason, *Administrative Law – Form versus Substance*, 1995, published in “Administrative Law and Public Administration,” 1995, page 1, paragraph 9

<sup>44</sup> *Ibid*, page 9

<sup>45</sup> Skehill, *Future Directions in Administrative Law*, published in *Ibid*, page 332 at 336

<sup>46</sup> ARC, *Internal Review of Agency Decision Making*, Report No. 44, November 2000

“80% of all decisions reviewed are affirmed. The primary decision maker doesn’t understand why they get it right, though. They have no understanding of the legislation. No responsibility is accepted by management for quality of decision making at primary decision maker level. Even though decision making is the bread and butter of the agency, no emphasis is put on skills for doing this well.”

“Quality in primary decision making is going down as more experienced people are leaving, leaving more work to the internal review officers. We are also getting more complex cases to review because primary decision makers don’t know how to deal with them properly anymore.”

“There is a complexity of legislation and policy - many times staff don’t even know what the law is.”

“The legislation is getting more complex and there are more appeals.”

“If laws were easier to understand, and more user friendly, primary decision makers would understand sections of the Act. Even the Guide to the Act is confusing. Making these changes may result in fewer appeals to internal review officers.”

“Primary decision makers are making quicker decisions while things are becoming more complex.”

“Generally, reviews happen because of lack of training. People are pushed into making decisions that they are not trained for. Lack of time and a lack of feedback compounds this problem.”

“We are asking people to make the most important decisions in the organisation when they are not at the correct level. New products are being offered to clients and we are unsure as to what resources will be given to deal with it.”<sup>47</sup>

(It should be noted that these comments were elicited as part of a dialogue about internal review, rather than as an quantitative research).

Similar concerns are coming through in a comprehensive attitudinal survey of the *Views of Commonwealth Agencies to External Review of Administrative Decision Making* being conducted by my fellow Council Member, Ms Robin Creyke, and her colleagues Professor Dennis Pearce and Professor John McMillan. That research shows that while 61% of officers had some access to a central database where they could access information on tribunal or court decisions relevant to their agency (which in itself is low), 48% of administrators surveyed did not feel they had sufficient time to absorb the information they receive on tribunal decisions and developments in administrative law relevant to their role. Despite this, 79% of officers felt that the administrative law system achieved its core objectives.<sup>48</sup> However, it does reinforce the need for an ongoing commitment to proper structures and training as recommended in *Better Decisions*.

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<sup>47</sup> Ibid, page 54

<sup>48</sup> Pearce, McMillan and Creyke, *External Review Project Draft Report*, (unpublished) December 2000, pages 17-19

- That research is not yet published, and I thank Robin and her colleagues for allowing me to draw from it.

It was for concerns such as these that the ARC sought to entrench the normative effects in *Better Decisions* by recommending that:

“All agencies should actively promote the potential beneficial effect of review tribunal decisions on the general quality of the agencies’ decision making. As an important aspect of this, agencies should make a visible, formal and real commitment to promoting that effect.”<sup>49</sup>

The Council also recommended that agencies should ensure that their organisational structures maximise the beneficial effect of tribunal decisions by providing for:

- appropriate levels of independence for legal policy and review staff;
- effective communication systems; and
- appropriate training for primary decision-makers on the function and role of merits review in the decision-making process.<sup>50</sup>

Of course, Tribunals must also work towards the maintenance of the culture which not only permits, but enhances the normative effects of administrative review. In particular, tribunals’ effectiveness and consistency are crucial to maximising the normative benefits. Agencies will question the value of administrative review where decisions provide little guidance or indeed contradictory precedent on the correctness of departmental policies and practice while, at the same time, inconsistently overturn or affirm primary decisions in like cases.<sup>51</sup>

I should also take the opportunity to mention the role of the Ombudsman in this context.

The Ombudsman’s investigations and monitoring can highlight systemic issues and areas where administration is either causing concern or is under stress. In each case, the aim is to improve the way officials deliver accountable and effective services. I also note the Council’s recommendation (in conjunction with the ALRC) in the *Open Government* report for the appointment of an FOI Commissioner.<sup>52</sup> This was adopted by the Senate Legal and Constitutional Committee, which recommended that this role be conferred on the Ombudsman.<sup>53</sup> That function also embraces normative responsibilities, as his role would be to improve the quality of FOI administration, rather than looking at what may have gone wrong in particular cases.

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<sup>49</sup> ARC, *Better Decisions*; Chapter 6, Recommendation 71

<sup>50</sup> Ibid, Recommendation 72

<sup>51</sup> G Fleming *Administrative Review and the Normative Goal-Is Anybody Out There?* 2000 28 FLR 62, 64

<sup>52</sup> ARC, ALRC *Open Government: a review of the Freedom of Information Act 1982*, Report No. 40 1995, recommendation 6

<sup>53</sup> *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, April 2001, Recommendation 1(d)

Fourthly

### **The cross over of some features of the public administrative law system to the private sector**

Having regard to the administrative law values which the ARC promotes<sup>54</sup>:

- lawfulness;
- fairness;
- rationality;
- openness and transparency; and
- efficiency

my view is that these systemic values are as critical for private corporations as they are for government.

The traditional view of administrative review is that its mechanisms apply only to public sector agencies, leaving private law remedies to govern activities outside the public sector. That view is increasingly being challenged. A number of commentators and government studies have referred to the blurring of traditional distinctions between what is ‘public’ and ‘private’.<sup>55</sup>

Traditionally, private sector accountability mechanisms are driven (and limited) by market forces and principles, profitability and relationships between the body, through its board, and its shareholders.

Many private corporations still define their duty as limited to the interests of shareholders. For example, bank closures or staff rationalisations are justified on the basis of share value – the duty to customers, employees, suppliers, and communities who may be affected in a most real way is often subrogated to the interests of shareholders.

The ARC’s 1998 report on *The Contracting Out of Government Services* summarised some of the traditional, limited avenues for redress available to a member of the public affected by the actions of a private corporation.<sup>56</sup> These include:

- industry-based complaint-handling schemes, such as the Banking Industry Ombudsman, the Telecommunications Industry Ombudsman and the Financial Services Complaints Resolution Scheme;
- remedies under contract, but as this is generally dependant upon the existence of a contract between the private service provider and a recipient of that service, in the case of outsourced government functions a member of the public will be unable to enforce the terms of the contract, even though they may be the intended beneficiaries of the contract;

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<sup>54</sup> see ARC submission to the Senate Legal and Constitutional Legislation Committee 1996, paragraph 15

<sup>55</sup> See Seddon N, *Government Contracts: Federal, State and Local*, The Federation Press, 1995, at pages 14-15. See also Aronson M, ‘A Public Lawyer’s Responses to Privatisation and Outsourcing’, and Mullin D, ‘Administrative Law at the Margins’ in Taggart M (ed) *The Province of Administrative Law*, Hart Publishing, Oxford, 1997; Barnes J, ‘Is Administrative Law the Corporate Future?’ (1993) 21 *Australian Business Law Review* 66; Airo-Farulla G, ““Public” and “Private” in Australian Administrative Law’ (1992) 3 *Public Law Review* 186.

<sup>56</sup> ARC, Report No. 42, August 1998, paragraphs 3.7-3.33

- legislated consumer law remedies, such as under the *Trade Practices Act 1974*. Additionally, complaints may also be made to regulatory bodies such as the Australian Competition and Consumer Commission; and
- in very limited circumstances, the law of torts may provide a remedy for loss or damage suffered by a person as the result of the actions of a private body.

These limited remedies suffer from the deficiencies Kerr identified in relation to government decision making; that is:

“The basic fault of the entire structure is...that review cannot as a general rule...be obtained ‘on the merits’ – and this is usually what the aggrieved citizen is seeking.”<sup>57</sup>

As communities and governments expect more of private enterprise corporations, increasingly aspects of public administrative law and review will be incorporated into the conduct of private sector business.

For example, under the *Privacy Amendment (Private Sector) Act 2000*, business organisations (other than small businesses as defined in the Act) will be subject to the National Privacy Principles, or a code approved by the Privacy Commissioner. A privately developed code must incorporate all the National Privacy Principles or set out obligations that are at least equivalent to those principles. The advantage for business in not just providing, but embracing, privacy protections will be that, with increased transparency and accountability for their handling of private information, will come increased consumer confidence in business. This must be a powerful incentive, for I note recent reports that in the US research has found that \$12 billion worth of e-business was not conducted due to concerns over privacy.<sup>58</sup>

I should also note the importance of Ombudsmen in this context. In my view, the ARC’s recommendations in the *Contracting Out* report to empower the Ombudsman to investigate actions by contractors, with all of the powers to obtain information and documents they would have in respect of government agencies<sup>59</sup> are the simplest, yet strongest recommendations of that report. Unfortunately - nearly 3 years on - the Government has not yet responded to those recommendations.

Today, some industries have established ombudsmen schemes, which are modelled to a greater or lesser extent on government ombudsmen, to deal with spheres of activity including telecommunications, banking, credit and insurance. A number of other industries operate complaint resolution schemes, such as health complaints commissioners. As my colleague on the ARC, the Ombudsman, Mr Ron McLeod AM has noted “This is a good example of public sector best practice being taken up by the private sector.”<sup>60</sup>

It is worth noting that the extent of remedies available to these industry ombudsmen can go beyond that available to their government counterparts. For example, the Banking Industry

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<sup>57</sup> Kerr Committee Report, paragraph 58

<sup>58</sup> “*Keeping a close eye on protecting your privacy*”, Jenna Price, Canberra Times 29 April 2001. See also concerns that Australian business risks losing trade with Europe due to the European Commission’s finding that Australian privacy legislation does not satisfy EU requirements, an assessment which is challenged by the Attorney General (see News Release, 26 March 2001)

<sup>59</sup> ARC Report No. 42, see recommendations 9-11

<sup>60</sup> Commonwealth Ombudsman, *Annual Report 1999-2000*, page v

Ombudsman and the Telecommunication Industry Ombudsman are able to make monetary awards to complainants, an option unavailable to the AAT or the Commonwealth Ombudsman.

## Observations on the statistics

What do the statistics show?

## Judicial Review

I referred earlier to concerns about the ADJR Act giving rise to a flood of applications for review. What actually happened?

In its 1989 report “*Review of the Administrative Decisions Judicial Review Act: The Ambit of the Act*” the ARC reported that:

“assertions about the growing propensity for judicial review to interfere in the administrative process are not borne out in fact”<sup>61</sup>.

That report produced evidence that over the five years from 1984 - 1988 there was a slight increase in the number of applications for ADJR review, from 248 in 1984 to 287 in 1988.<sup>62</sup> Of these, roughly one third were migration matters (for example 93 of the 287 ADJR applications in 1988 were migration matters).<sup>63</sup> The 1999-2000 Annual Report of the Federal Court noted that some 230 applications for judicial review were made.<sup>64</sup>

However, these statistics do not address developments in judicial review which have occurred outside the framework of the ADJR Act. As many of you will know, the *Migration Reform Act 1992* limited judicial review of migration decisions made under the *Migration Act 1958*<sup>65</sup>, repealing the Federal Court's AD(JR) and section 39B jurisdiction over migration decision-making. In the years following the legislative changes the number of *Migration Act* cases before the Federal Court has increased significantly, from 331 cases in 1995-1996 to 829 cases in 1999-2000.<sup>66</sup>

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<sup>61</sup> Administrative Review Council Report No. 32, *Review of the Administrative Decisions Judicial Review Act: The Ambit of the Act*; 1989, paragraph 27

<sup>62</sup> Ibid, Table 1, page 7. The table showed the number of applications was 1984 – 248; 1985 – 264; 1986 – 303; 1987 – 289; 1988 – 287

<sup>63</sup> ARC Report, No. 32 Op cit, paragraph 26. The report states the proportion of migration matters of total ADJR applications was : 1986 - 106 of 303; 1987 – 94 of 289; 1988 – 93 of 287

<sup>64</sup> Federal Court of Australia, 1999-2000 Annual Report, Figure 6.7, page 139. The report includes the following statistics : 1995-96 – 348; 1996-97 – 251; 1997-98 – 179; 1998-99 – 204; 1998-00 - 230

<sup>65</sup> Under section 476(1) *Migration Act 1958*, the grounds of review that are available in relation to Federal Court applications are:

- (a) that procedures that were required by the Act or the regulations to be observed in connection with the making of the decision were not observed;
- (b) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (c) that the decision was not authorised by the Act or the regulations;
- (d) that the decision was an improper exercise of the power conferred by the Act or the regulations;
- (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
- (f) that the decision was induced or affected by fraud or by actual bias; and
- (g) that there was no evidence or other material to justify the making of the decision.

<sup>66</sup> Federal Court, Op cit, table 6.7a, page 140, which shows the number of *Migration Act* matters as : 1995-96 – 331; 1996-97 – 554; 1997-98 – 655; 1998-99 – 864; 1999-00 - 829

I will return to this topic a little later.

## Merits Review

In relation to merits review, the workload of the AAT increased markedly since the AAT commenced operations on 1 July 1976. In the financial year ending 30 June 1977 the Tribunal had jurisdiction under 27 separate Acts, received 49 applications for review, and had a membership of two full time and four part time members.<sup>67</sup> In 1980-1981 with new jurisdiction in Social Security appeals, the Tribunal had jurisdiction under 100 Acts and received 652 applications<sup>68</sup>. In 1999-2000 the AAT had jurisdiction under 373 Acts, had 92 members and received 6448 applications for review.<sup>69</sup>

The ARC's first Annual Report in 1977 noted that on commencement of its operations the AAT's jurisdiction did not:

“touch upon the areas in which citizens most commonly find themselves subject to governmental decision making – the large-volume areas of decision making.”

and, further:

“the present jurisdiction of the Tribunal takes into account only a small proportion of all Commonwealth administrative decision making powers.”<sup>70</sup>

Since that time, the AAT has been joined by other specialist tribunals in the social security, immigration and veterans' jurisdictions, some of which had ancestors before the advent of the Kerr Committee report.

Statistics compiled by the ARC in its *Review of Commonwealth Merits Review Tribunals: Discussion Paper*<sup>71</sup> demonstrate the progression in workload for all merits review tribunals, for example the AAT workload increased from 4,806 in 1991-1992 to 6,009 in 1993-1994. Comparing current statistics for the key Commonwealth merits review tribunals with earlier figures indicates that, as with judicial review, apart from the immigration area, the number of applications for review has not grown exponentially (and in some cases has decreased):

Applications Lodged	1991-92	1992-93	1993-94	1998-99	1999-2000
AAT	4806	5543	6009	6437	6448
SSAT	9628	9981	9065	10,130	8965
VRB	6759	7615	8044	8796	6840
MRT*				4881*	6480
RRT		RRT not established	4637	5635	6093

(\*Note the MRT commenced 1 June 1999 and this figure is cases transferred from the IRT and MIRO)

<sup>67</sup> ARC, First Annual Report, paragraph 74

<sup>68</sup> see History of the Tribunal in Administrative Appeals Tribunal, Annual Report 1989-1990; page 13

<sup>69</sup> AAT, 1999-2000 Annual Report

<sup>70</sup> Administrative Review Council, *First Annual Report 1977*, paragraphs 80-81

<sup>71</sup> Administrative Review Council; *Review of Commonwealth Merits Review Tribunals: Discussion Paper*, September 1994, Appendix A

It should be noted that the overall number of reviewable decisions is growing, and these statistics should be seen in that context. In its 2000 *Managing Justice* report the ALRC noted that the following general numbers of reviewable decisions were made in 1997-1998:

- 36 million reviewable decisions in the social security jurisdiction;
- 58,463 claims for veterans' entitlements;
- just under 11 million reviewable taxation assessments; and
- over 3 million migration decisions.<sup>72</sup>

Not surprisingly, the cost of the review structures has grown. In 1976 the AAT had a budget of \$230,000<sup>73</sup> and a membership of 6. In 1999-2000, the AAT had a budget of \$26.8 million and 92 members. Figures from Portfolio Budget Statements and Annual Reports indicate that in 1999-2000, the five Commonwealth merits review tribunals had a combined budget of \$77 million, and a total of 471 members.<sup>74</sup> While the raw figures are factual, they may not provide a useful basis for comparison, given that the structure of the system has changed so much. However, they are at least indicative of the costs of review.

## Migration experience

It is difficult to discuss the present state of the Commonwealth administrative review system without some reference to the experiences of the migration jurisdiction. I do not single that portfolio out for criticism; indeed the Council has noted in the past that it is a difficult jurisdiction with its own sensitivities and pressures. However, it is worth examining what that jurisdiction indicates for the system overall.

By way of snapshot:

- 829 applications were made under the *Migration Act* to the Federal Court in 1999-2000, compared to 331 in 1995-1996.<sup>75</sup>
- the High Court received 152 order nisi applications involving immigration matters in 1999-2000, compared to 25 applications in total for 1998-1999.<sup>76</sup>

What lessons can be learned from this experience? Do the mechanisms chosen to limit review actually work?

The outcome of restricting access to general ADJR review, limiting the grounds of review by the Federal Court, and preventing remittal from the High Court, has increased the High Court's original jurisdiction workload significantly. However, these legislative mechanisms, whether one agrees with them or not, need to be seen in the context of governments' proper concerns about the cost of migration litigation.

<sup>72</sup> ALRC, *Managing Justice : A review of the federal civil justice system*, Report No. 89, January 2000, paragraph 9.3

<sup>73</sup> *Appropriation Act (No. 1) 1976-77*

<sup>74</sup> In 1999-2000, the budgets and staff of the main Commonwealth merit review tribunals was as follows :

	Budget	Membership	Staff
AAT	\$26.8 M	92 (17 F/T)	154
SSAT	\$12 M	243 (17 F/T)	45
VRB	\$7.1 M	52 (1 F/T)	48
MRT	\$10.5 M	32 (5 F/T)	104
RRT	\$21 M	52 (35 F/T)	133

<sup>75</sup> Federal Court, *Annual Report 1999-2000*, page 140

<sup>76</sup> High Court, *Annual Report 1999-2000*, page 5



Minister Ruddock has recently put the Government's position:

"Immigration litigation has reached totally unacceptable levels with more than 1,000 active cases before the Courts and the AAT at the beginning of this month [April 2001].

"Litigation is allowing people to remain in Australia while they pursue cases which in the main, they will not win.

"The cost to my portfolio will be about \$15 million, and that is before adding the costs of running the courts. My Department has had to write off more than \$4.5 million in unrecoverable court costs in the past five years."<sup>77</sup>

In my view, the question – does the mechanism work? – remains unanswered.

There is some theoretical advantage in preventing remittal; the High Court thereby becomes the court of first and last resort in actions for a constitutional writ. However, in fact it is not the court of only resort; applications can be pursued under both the Migration Act and the Constitution, simultaneously or sequentially, and on different grounds.

I am not seeking to address here the question of whether the Court should perform that increased trial role. But if it is, it should be given the resources required to do it properly and without diminution of its primary appellate responsibilities. If the costs of such resourcing were brought to account, perhaps the mechanisms used to address the problem may not be seen to have been effective.

However, there are initiatives in this area which can only be seen as positive. For example, I am aware that the NSW Registry of the Federal Court (which receives around 70% of Migration Act applications) has been flexible in its approach to streamlining matters with a view to reducing hearing times. Similarly, I understand the pilot scheme involving the Department of Immigration and Multicultural Affairs, the NSW Bar Association and Law Society of NSW and the Federal Court to provide independent legal advice to unrepresented applicants seeking review of Refugee Review Tribunal decisions is generally regarded as being worthwhile.<sup>78</sup> These measures suggest that using legislative mechanisms to restrict or remove rights of review are not the only options that should be considered to address the problem, and that non legislative responses may, in fact, be far more effective.

## **The Administrative Review Tribunal Bill**

I would like now to comment on the Government's proposals for an Administrative Review Tribunal.

I might begin with the present, apparently final conclusion. The Bill was defeated in the Senate on 26 February 2001. The minority Senate Committee Report stated that the Bill was "fundamentally flawed". However, both the Attorney General's and the Shadow Attorney

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<sup>77</sup> Minister for Immigration and Multicultural Affairs, Press Release "*Litigation and Bridging Visas Pass Milestones*", 29 April 2001

<sup>78</sup> The scheme has not yet been evaluated, but see *RRT Review Legal Advice Scheme – information for panel members*, Federal Court NSW Registry, January 2001

General's press releases give some cause for optimism that the door is not closed to the reforms recommended in the *Better Decisions* Report.

The original proposal for an Administrative Review Tribunal came from the Council's 1995 *Better Decisions* Report.<sup>79</sup> That report was initiated by a reference in 1983 from the Minister for Justice, with the central theme that the "Administrative law system should be simple, affordable, timely and fair."<sup>80</sup>

The report proceeded with a comprehensive review. Its recommendations fell into two broad categories:

- those that apply to all review tribunals, regardless of the structure of the tribunal system; and
- those directed to the structure of the tribunal system.

Most fundamentally, the Council recommended the unification of the separate tribunals into a new Administrative Review Tribunal. The Council considered that the benefits of the recommended structure would include:

- greater perceived and actual independence for the new tribunal;
- retaining the positive attributes of the existing specialist tribunals, with each division adopting its own procedures and processes, subject to general minimum standards and guidelines issued by the President;
- less formal and complex hearings, through the development and use of flexible procedures and processes;
- achieving the correct or preferable decision early in the process, so most applications need only one tier of review; and
- maximising the normative effect by ensuring that significant matters are determined by specially constituted review panels, enabling general principles to be more clearly identified and applied by decision makers and tribunals.

Following the handing down of the *Better Decisions* report in 1995, the Government introduced the ART Bill 2000. As many of you will know, that Bill provided for the amalgamation of the AAT, the MRT, RRT and SSAT. The Veteran's Review Board was not included. The Bill also provided for a non-judicial president. The Bill expressly gave effect to the Government's intention to unquestionably position tribunals within the executive arm of government. The Bill removed "as of right" access to second tier review. Ministers with portfolio responsibility for key jurisdictions were given influence over the Tribunal's administration, ranging from funding, to appointment of members, to the issuing of practice directions.

The Bill was heavily criticised in some quarters. Some of that was justified; some self-serving.

How should the Council have responded to the Bill as introduced? After all, its *Better Decisions* report was said by the Government to underpin the legislation<sup>81</sup> – but did it?

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<sup>79</sup> Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, 1995, recommendation 87

<sup>80</sup> The Hon Duncan Kerr MP, Minister for Justice, December 1983. See Appendix A of *Better Decisions*

<sup>81</sup> Attorney General, Administrative Review Tribunal Bill 2000, second reading speech, 29 June 2000

Clearly, some of the recommendations in *Better Decisions* were adopted in the Bill, and some were not.

In the end, the Council took the view that its contribution to the debate on the Bill should not be gratuitous. Accordingly, its submission to the Senate Committee inquiring into the Bill was directed to improving the Bill in the form it was tabled in Parliament, with a view to enabling the legislation, as far as possible, to achieve its objects and the Government's publicly stated expectations for the new tribunal. The Council's particular concerns were twofold, and related to, first the role of the President, and, second, the functioning of the ART as a single tribunal.

The Council saw the role and powers of the President as fundamental to the success of the ART. The President would be expected to lead the Tribunal and deliver the synergies, efficiencies and improved decision making expected by the Government. However, the proposed structural arrangements would, in the Council's view, have frustrated the President's ability to achieve those ends. The Council therefore suggested amendments providing for appropriate consultation between the President and Ministers. For example, given the President's direct experience of operational and procedural matters, it would be appropriate at the least that the President would be consulted by Ministers in relation to practice and procedure directions. Where there was a genuine difference of view between Ministers and the President, such matters would be better addressed by consultation and negotiation, rather than by legislating, unnecessarily, that a Minister's direction prevails.

In the Council's view such amendments were not contrary to the thrust of the Bill or the Government's expectations of the ART. For example, consultation in relation to appointments would not detract from the executive's power, but would reduce perceptions that members could be "owned" by Ministers, or were fettered from acting independently of them.

Council's second principal concern was that the ART may not, in practice, have functioned as a single tribunal, separate from the decision makers whose decisions form its jurisdiction, but rather as several separate tribunals, each answerable to individual portfolio Ministers. This concern arose out of the explicit funding and administrative arrangements which contemplated direct involvement in the administration of the tribunal by the various ministerial portfolios. This had clear risks for perceptions of independence.

In fact, as we know, governments legitimately control the manner and form of funding to their agencies. Similarly, statutory appointments are decided by the Prime Minister, or Cabinet<sup>82</sup>. It does seem of concern that the Government should have felt the need to expressly provide for these matters in the Bill. What does this say about the health of the administrative review system?

Similar issues arose with the Consequential Bill, which provided a self-contained code for immigration and refugee reviews. While *Better Decisions* advocated the benefits of empowering Divisions of the ART with the flexibility to tailor procedures to meet their own particular requirements, perpetuating significantly different review provisions in stand-alone legislation went beyond this concept. This put at issue whether the anticipated economies of

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<sup>82</sup> *Cabinet Handbook*, 5<sup>th</sup> edition January 2000, Department of the Prime Minister and Cabinet, para 6.1

scale could be realised. At best it limited the President's ability to synthesise the workings of the Tribunal to ensure that best practices reached beyond particular Divisions.

To overcome this, and to ensure that the Commonwealth merits review system was actually improved by the ART, the Council recommended that a review of the ART's operation and procedures be conducted two years after commencement of operations.

Of course, now that the Bill has been rejected, the whole issue can be revisited. While the original *Better Decisions* report may be the starting point of such an endeavour, it could be more than 10 years old, and therefore an outdated starting point, by the time Government can next consider an ART.

## **The Administrative Review Council**

As I noted earlier, the major theme underlying the Kerr Committee report was the need to develop a comprehensive, coherent and integrated system of administrative review. Central to the achievement of this integrated response was the establishment of:

“... a small permanent Administrative Review Council which would carry on continuous research into discretionary powers with special reference to the desirability of subjecting their exercise to tribunal review, either in a specialist or the general review tribunal.”<sup>83</sup>

Interestingly, however, the ARC was not provided for when the Administrative Appeals Tribunal Bill 1975 was introduced. (This failure was noted in debate by the Member for Bennelong, the Hon John Howard MP.<sup>84</sup>) The then Member for Wentworth, Mr R J Ellicott QC MP, observed:

“... the Opposition will press ... to establish an administrative review council and so implement another recommendation of the Kerr Committee. ... It would enable a permanent and informed consideration of the process of administrative and judicial review. It would review further discretions to see whether they were appropriate for review by the administrative appeals tribunal.”<sup>85</sup>

An amendment to establish the Administrative Review Council was in fact moved by the Government in the Senate. In referring to the amendments the Minister representing the Attorney-General, the Hon Senator James McClelland, stated that:

“The Council would exercise important functions in advising on developments that should be made from time to time in the area of administrative decision-making and the review of those decisions. The members of the Council will be appointed both from officials concerned in these matters and from other persons able to contribute to the work of the Council. It will be an important means of ensuring that the citizen's rights to the review of administrative decisions develop along with changes in this area of the law.”<sup>86</sup>

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<sup>83</sup> Kerr Committee Report, paragraph 283

<sup>84</sup> Mr Howard said “The United Kingdom experience with an administrative review council has been a successful one. It was seen to be a successful one in the Kerr Committee report, and the Opposition supports the establishment of such a body.” House of Representatives *Hansard*, 14 May 1975, p 2281

<sup>85</sup> House of Representatives *Hansard*, 14 May 1975, p 2287.

<sup>86</sup> Senate *Hansard*, 27 May 1975, p 1839

The Council was thus established.<sup>87</sup> Its membership included the President of the AAT, the Ombudsman, the President of the Australian Law Reform Commission and not less than 3, or more than 7, other members.<sup>88</sup>

During its early years, much of the Council's work was concerned with determining the classes of decisions which were suitable for merits review and examining the procedures which should apply in such reviews. The Council focussed mainly on the jurisdiction of the AAT. As proposals were made to extend the jurisdiction of the tribunal, the Council considered whether it was appropriate that individual decisions and classes of decisions should be capable of review by that tribunal.

Addressing its first meeting on 15 December 1976, the then Attorney-General, the Hon R J Ellicott QC MP, said to the Council:

“The Administrative Review Council is a tremendously significant body. You will be looking at Acts and Regulations to make sure that discretions which are appropriate are subject to review, you will be looking at fresh legislation to see whether the Parliament has overlooked some area of discretion for that purpose.”<sup>89</sup>

The Council's first annual report in 1977 outlined its understanding that:

“the [Council's] functions relate to the whole of the machinery of government for making administrative decisions. It is a wide field of enquiry. In this field, the Council is a promoter and not an executor – Council recommends, Government decides, and the public service implements.”<sup>90</sup>

While it is no doubt true that the Council cannot determine or execute government policy, the Council's role is not merely passive. While it will always advocate and support the principles of administrative review, I believe it has an important positive role to monitor the practical effect of government policies and administration, and ensure that those effects do not undermine the objectives of the system.

This positive role is consistent with the findings of the 1997 review of the Council by the Senate Legal and Constitutional Legislation Committee. Importantly, that Committee recommended:

“... that the Administrative Review Council should remain as a separate and permanent body, provided that it is making a significant contribution towards an affordable and cost-effective system of administrative decision-making and review.”<sup>91</sup> (emphasis added)

In this regard I note that the functions of the Council were expanded following that review. Two important new functions were added to the Council's powers. They include:

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<sup>87</sup> *Administrative Appeals Tribunal Act 1975*, section 47

<sup>88</sup> *Ibid*, section 49. Membership is now increased to appointed members, 10 or more if prescribed.

<sup>89</sup> Attorney-General, Hon R J Ellicott QC MP, press release of 15 December 1976.

<sup>90</sup> *ARC, First Annual Report 1977*, paragraph 32

<sup>91</sup> *Report on the Role and Function of the Administrative Review Council*, Senate Legal and Constitutional Legislation Committee, June 1997

- (aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and
- (ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner;

Paragraph (ab) is particularly, but not inappropriately, broad. It envisages a proactive, possibly interventionist, Council. I think the Council has yet to test the scope of that function.

In planning its future priorities, the Council will be mindful of how the administrative law values are delivered within the Commonwealth administrative framework; and the practical application of those values as they affect decision makers, tribunals, government and individual persons affected by decisions. This does not mean that the Council will not continue to be critical of unsatisfactory initiatives or practices which impinge on individual rights. Rather, there will be greater emphasis on ensuring that initiatives are assessed with a view to improving how administrative law principles are actually delivered. The Council intends to consider not only the impact of initiatives on individual rights but the processes and delivery outcomes of those initiatives. International observers have commented on our administrative review system favourably; it has been held up as an outstanding example.<sup>92</sup> However, the test of any system, no matter how good, is the actual delivery of results and outcomes. And it is in outcomes – actual change (including normative effects) – that I am particularly interested.

These goals are reflected in recent activities of the Council, as well as its current priorities. Seminal reports such as *Better Decisions*, and *Contracting Out*<sup>93</sup> were not just directed to the review of administrative discretions, but have a wider application, directed at improving the standard of government administration.

The Council's more recent activities in which I am particularly pleased to have been involved include the *Practical Guidelines for Preparing Statements of Reasons*, and its publication of standards for "What Decisions should be subject to merits review?". Both of these publications are intended to assist decision makers and agencies in the discharge of their responsibilities.

In relation to our "work in progress", the Council is maintaining a balance – we are nearing completion of our report on *Principles of Conduct for Members of Merits Review Tribunals*. The *Principles* are directed to the outcome of improving tribunal deliberations, and making their processes fairer and more transparent to the public. Some of you will be aware of the consultation forums the Council recently conducted in Melbourne, Canberra and Sydney. Feedback from these forums indicates that there is a continuing demand for the Council to lead in this area – particularly from smaller tribunals – including state and territory tribunals which might not otherwise have the opportunity to individually develop such principles.

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<sup>92</sup> See for example Professor Hugh Corder, *Reinventing Administrative Law in South Africa*, published in AIAL Sunrise or Sunset? Administrative law for the new millennium, June 2000, see page 102

<sup>93</sup> ARC reports No. 39 1995, and 42 1998

This practical focus is balanced by our current project on the scope of judicial review, which proposes a consideration of the principles supporting judicial review and the circumstances in which limitation of review might be appropriate. This project raises not only legal questions – it also raises interesting and difficult questions of policy. These questions impact on the agencies and tribunals who exercise discretions, the courts who review them, governments and parliaments who frame legislation and the High Court with its ultimate constitutional jurisdiction to “restrain officers of the Commonwealth from exceeding Federal power” – a reference to Dixon J in the *Bank Nationalisation Case*.<sup>94</sup>

The Council also continues to examine emerging areas relating to the processes by which administrative review is delivered. It will shortly commence a project on the use of technology in decision making. This project will examine the use of expert decision making systems, which seek to provide an automatic and logical process for identifying the relevant facts and law, and for the application to them of often complex legislation. These systems are currently employed in a number of Commonwealth and state agencies.<sup>95</sup> They offer at least the advantage of consistency, accuracy and uniformity of approach, no matter the diversity of personnel or location. However, their use also raises a number of questions which the Council intends to explore, such as:

- how are rules developed and tested to ensure they correspond with applicable legislation and accepted policy? What are the opportunities for independent scrutiny of the rule-base? What are the implications for primary decision making, particularly de-skilling decision makers?
- access and equity issues will be particularly important. While technology can enhance access, it can present barriers through reasons of age, culture, income or disability.

The ARC is also looking to promote the concept of a Council of Tribunals, as recommended at different times by both it and the ALRC.<sup>96</sup> Such a Council would provide a national forum for tribunal leadership to develop policies, secure research and promote education on matters of common interest. It would also be one way to realise synergies between the Commonwealth tribunals if amendments to the Administrative Review Tribunal Bill 2000 cannot be negotiated. Preliminary discussions indicate support for the proposal, both from Commonwealth tribunals and from State and Territory tribunals involved in administrative review.

Given the history of the Council and the energy and commitment of its members, both former and present, I am delighted also to record my pleasure in undertaking the role of its President.

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<sup>94</sup> (1948) 76 CLR 1 at 363

<sup>95</sup> The Departments of Veterans' Affairs, Defence and FaCS, Comcare, Environment Australia, ATO and Centrelink

<sup>96</sup> In *Better Decisions* the ARC proposed a “Tribunals Executive”, as part of formal arrangements for promoting and coordinating greater liaison between review tribunals, see paragraph 7.48, recommendation 85; and *Managing Justice : A review of the federal civil justice system*, Report No. 89, para 2.230, recommendation 10