The State of Administrative Law in the Northern Territory — the last frontier?

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Law Society Council member and solicitor with the Northern Land Council Mr Robert Gosford recently presented a paper on administrative law issues in the Northern Territory which highlighted the need for Freedom of Information legislation. An edited version of his address presented at the 2001 Administrative Law Forum in Canberra is reprinted below.

The theme of this conference is the "Essentials of Administrative Law". There have been many statements of these essential elements, but for present purposes I'll use those developed in the 1994 report of the Access to Justice Advisory Committee — the Sackville Report — to which I'll take the liberty of adding legislation allowing cheap and efficient judicial review and an Administrative Law Review agency or office charged with the oversight of administrative justice.

Administrative reform has not been a "hot button" electoral topic in the Northern Territory and few of the lessons learnt elsewhere in Australia have yet to be applied there.

The first Sackville essential is: *"A comprehensive, principled, accessible and independent system of merits appeal of administrative decisions".*

Ten years ago the Acting Chairman of the Northern Territory Law Reform Committee, Mr Max Horton, presented the Attorney-General of the Northern Territory Government with the Committee's "Report on Appeals from Administrative Decisions".

The Committee proposed a "system of administrative review based on the models already operating in Victoria, the ACT and the Commonwealth". The report runs to 66 pages and includes a useful discussion of Australian and international administrative law at that time and makes 54 recommendations for reform.

The Committee identified the first element of the proposed reforms as a requirement that an administrator give reasons, if required, for a particular decision. The second element is the creation of a general appeals tribunal with powers to review administrative decisions.

The Committee's report is an important starting point in any assessment of administrative justice and reform in the Northern Territory. It appears to be the only publicly available consideration of administrative law issues ever undertaken in the Northern Territory. Sadly the report of the Law Reform Committee appears to have sunk without a trace.

The second essential identified by the Sackville Report is: *"A requirement that government decision makers inform persons of their rights of administrative appeal".*

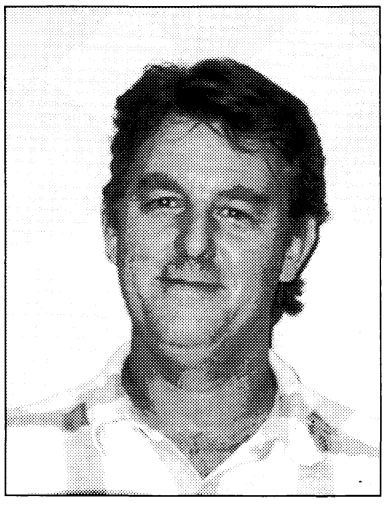
The Law Reform Committee made a number of recommendations concerning greater community awareness of administrative rights generally and in particular concerning the role of the Administrative Review Committee in the dissemination of information and of community representation on that Committee.

The third Sackville principle is: *"A simplified judicial review procedure".*

In discussing the jurisdiction of the proposed Tribunal the Committee, at Recommendation 7, noted that: "In the Territory there are presently five different types of appellate bodies. At the date of this paper there are 117 statutory rights of appeal against administrative decisions".

In the ten years since the Committee's report was provided to the Government I have no doubt that these numbers will have increased.

The fourth Sackville principle is: *"A right of persons affected by decisions to obtain reasons for decisions".*



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Recommendation 16 of the Law Reform Committee' Report addressed this issue:

> There should be an entitlement to reasons for an administrative decision. That right should be independent of the right to apply for review, however it should be subject to the same exclusions as the rights of review.
>
> Reasons for a decision should be given on request where no application for review has been made to the Tribunal, and automatically on the making of an application to the Tribunal.
>
> Those persons whose interests are affected by a decision should have standing to obtain reasons for that decision, subject to the exclusions provided to the entitlement above.

The fifth Sackville principle is: *"Broad rights of access to information held by government".*

While Freedom of Information legislation was not within the Law Reform Committee's reference it noted the centrality of FOI in any system of administrative justice:

> Other jurisdictions within Australia have addressed review of administrative decisions as a part of a system of administrative review which includes Freedom of Information legislation, improved models of judicial review and

the setting up of specific tribunals for review on the merits of administrative decisions.

Freedom of Information has, however, attracted some considerable attention since the time of the Report, and I would now like to examine this further.

The first report of Freedom of Information (FOI) emerging on the political agenda in the Northern Territory was in August 1990 when the Country Liberal Party Chief Minister Marshall Perron announced an "interdepartmental committee" to examine the issue of FOI in the NT. Also in that year FOI made it's way on to the CLP Government's election strategy as an election "promise".

The committee's report to Government has not been publicly released. The election promise was not honoured.

In 1993 the Labor Party, with the support of an Independent member, introduced an FOI Bill that did not receive the support of the CLP Government and was defeated on the numbers.

In April 1996 the Labor Party again presented a Bill for an FOI Act to the NT Legislative Assembly. Before that Bill could be voted upon an early election was called and the Bill lapsed. The Bill was presented to the Assembly again in February 1998 and negatived in August of that year.

Labor's Bill was again presented to the Legislative Assembly in February 1999 and was negatived in the June sittings of that year. This Bill, substantially similar at all presentations, was based upon the Queensland FOI legislation.

The CLP government's rejection of Labor's proposed FOI legislation was consistent on all presentations. It has said that FOI legislation was unnecessary in the Territory because:

- It was too expensive for such a small jurisdiction as the Territory;
- "Territorians" had access to information though their Ministers and MLAs and could find the information they needed through attendance at Parliament, through the annual reports of governments departments and by writing to the Chief Minister;
- The offices of the Ombudsman and the Auditor-General provided effective oversight (Government; and
- Rigorous Public Service guidelines constrained the actions of public servants.

Moving forward to December 1999 the Chief Minister of the Northern Territory, Denis Burke, in what was reported at the time as a "major about-face", said that he would now support FOI legislation for the Northern Territory. He said that:

> A consultant will be appointed to investigate the best type of FOI bill for the Territory. I have no intention of lumbering Territorians with expensive and unproductive FOI systems that cost millions of dollars to administer and rarely deliver anything useful. I am still unconvinced that disclosure to third parties with no direct involvement or relationship to the data they are seeking is a responsible direction to take. However I am interested in identifying where the potential exists to broaden our proposed information access scheme.

The consultancy to develop the Government's approach to FOI was to cost $100,000. As recently as late June 2001 Mr Burke expressed disappointment that this cost had now blown out to around $300,000. No report of the conduct of that consultation has been made available to date.

In 1999 Mr Burke had expressed a liking for the Victorian model developed by then Victorian Premier Kennett. He has since expressed a similar liking for the models developed in the UK and in Canada.

On 6 June 2001 the Northern Territory News editorial referred to the " ... welcome news flagged in Parliament yesterday that a long-awaited version of Freedom of Information legislation would be introduced at the next sitting". The editorial noted that Mr. Burke had said the legislation would be "state of the art".

«The legislation, likely to be called "Access to Information", is likely to differ from that in other states" he said.

Without sighting the CLP's proposed legislation, there is every indication that it lacks many of the characteristics of FOI information developed in other Australian jurisdictions. The proposed legislation will not allow third party applications, will have no independent oversight mechanisms, no right to the reasons for a decision and no comprehensive system of ensuring that public servants make the right decision. In short, it appears to be information legislation in name only. I hope that I am proved wrong.

The last essential identified by the Sackville Report is: *"A comprehensive and adequately resourced Ombudsman".*

There has been limited comment about the role of the Northern Territory Ombudsman, except that the office is not as well-resourced as its counterparts elsewhere in Australia. There have also been concerns expressed about the limits of the Ombudsman's jurisdiction. It might well be appropriate that a review of that office be undertaken in the near future to ensure that it meets the standards set elsewhere.

The lack of FOI and the other mechanisms of administrative justice affects not only my working life as a solicitor for the Northern Land Council, but also the capacity of small community government councils operating on remote Aboriginal communities and the administration of those councils. There are many cases I have personally dealt with which could illustrate this point.

The issue of statehood for the Northern Territory will no doubt come up again in the near future. Hopefully by that time the Territory will provide it's citizens with an appropriate system of administrative justice.

But, as this paper shows, there is much work to be done. A starting point might be to ask the question "What are the minimum standards of administrative justice and how do you develop and apply them to small jurisdictions like the Northern Territory?". Many of the answers lie in the Law Reform Committee's Report.