COMMENTS

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REFORM OF ADMINISTRATIVE LAW IN AUSTRALIA: A RECENT PROPOSAL

Introduction

Predictably, the Commonwealth Administrative Review Committee in its report tabled in the federal Parliament on 14 October 1971 has called for sweeping reforms of the present law pertaining to the review of governmental administrative action.[1] The Committee recommends legislation creating a four-part administrative review structure, coupled with provisions prescribing minimum standards to be followed by all Commonwealth administrative tribunals. If adopted, these recommendations will lead to a significant widening of the grounds upon which and by means of which individual grievances with administrative action may be aired.

Necessarily, the Committee's recommendations are confined to the Commonwealth sphere but their application to the States is apparent and, indeed, made simpler by the absence of the constitutional problems bedevilling the Commonwealth in the wake of the *Boilermakers'* case.[2] In that case the Privy Council affirmed the High Court's 'artificial rather than functional'[3] view that the Commonwealth Constitution required that the Commonwealth's judicial power be exercised separately from the Commonwealth's non-judicial powers. Complaints regarding administrative action which involve 'justiciable' issues can only be dealt with by a judicial forum having regard only to legal standards, whereas those com-

[1] Commonwealth of Australia, *Report of the Commonwealth Administrative Review Committee* (August 1971), Parliamentary Paper No. 144. References *infra* are to this report unless otherwise stated.
The Committee was comprised of Mr Justice Kerr, Chairman, Mr Justice Mason (formerly Commonwealth Solicitor-General), Mr R. J. Ellicott, Q.C. (the present Commonwealth Solicitor-General) and Professor H. Whitmore. It was established on 29 October 1968 and its terms of reference, as amended, were:
1. To consider what jurisdiction (if any) to review administrative decisions made under Commonwealth law should be exercised by the proposed Commonwealth Superior Court, by some other Federal Court or by some other Court exercising federal jurisdiction.
2. To consider the procedures whereby review is to be obtained.
3. To consider the substantive grounds for review.
4. To consider the desirability of introducing legislation along the lines of the United Kingdom Tribunals and Inquiries Act 1958.
5. To report to the Government the conclusions of the Committee.

[2] *A-G. (Commonwealth) v. The Queen; Ex parte Boilermakers' Society of Australia* (1957) 95 C.L.R. 529 (P.C.); (1956) 94 C.L.R. 254 (H.C.).

[3] Para. 62.

plaints not falling under that heading must go to some other forum which may take other matters (such as social policy) into account. Thus, in its proposed four-part review structure the Committee recommends that there be included an Administrative Court and an Administrative Review Tribunal.[4]

At present a person aggrieved by Commonwealth administrative action will normally seek review by invoking the original jurisdiction of the High Court[5] on an application for a prerogative writ, although sometimes it is possible to seek a declaration or injunction in a State Supreme Court.[6] The grounds for review are limited to matters concerning the legality of the proceedings or decision, and not the merits of the decision. In the absence of machinery for appeal within the governing legislation, an aggrieved person is able only to obtain a reopening of the case by indulging in a charade of sorts—pleading excess or want of jurisdiction, denial of natural justice or *ultra vires*. Although ineffective in relation to such pleas, commonplace privative clauses do ensure the inviolability of administrative action where the merits of the decision are in dispute.[7]

Before making its recommendations, the Committee summarises the approaches to review of administrative action taken in three common law countries (the United Kingdom, New Zealand and the United States at the federal level) and one civil law jurisdiction (France).[8] Although its conclusions borrow to varying degrees from the three common law jurisdictions there is nothing of consequence drawn from the French experience. The Committee makes the following observations in assessing the French system:

> [France's] mixture of inquisitorial and adversary procedures stimulates thought about some of the disadvantages, in the administrative field, of the full adversary system as seen in the ordinary courts in Australia.[9]

However, this enquiry is not pursued any further. The review process proposed by the Committee is adversarial, save for some inquisitorial powers of the General Counsel for Grievances which will be considered further below.

Review Process—Proposal

Having dealt with the above matters, the Committee then outlines a four-part administrative review structure to be interposed between the administrators and the High Court. It is comprised of an Administrative Review Council, a Commonwealth Administrative Court and Administrative Review Tribunal, and an office of General Counsel for Grievances.

[4] Generally, Chapter 4, paras 59-73.
[5] Commonwealth Constitution, s. 75.
[6] Generally, paras 22-8.
[7] Generally, paras 29-58.
[8] Chapters 6, 7, 8 and 9, paras 95-223.
[9] Para. 223.

The Committee calls for the early establishment of the Council, so that it can survey in detail the discretions and decision-making powers exercised by Commonwealth tribunals, bodies and officials under existing statutes and subordinate legislation with a view to determining the precise jurisdiction of the Court, Tribunal and General Counsel and to what extent existing privative clauses should be amended or repealed. Once all of the review bodies proposed by the Committee are functioning, it is envisaged that the Council would act as a type of secretariat. It would be responsible for maintaining research staff and facilities, investigating complaints which the General Counsel is unable to handle and handling appearances before the Court and Tribunal when necessary. It would also maintain a continual review of any new legislation containing powers which ought to be made amenable to the Court, Tribunal or General Counsel.[10]

Whether a complaint about a decision or action of a Commonwealth tribunal, body or official may be dealt with by the Court, Tribunal or General Counsel depends primarily upon its character. Complaints which impugn the legality, in the strict sense, of a decision or action would go to the Court, whereas complaints about the merits of the decision or action would be taken to the Tribunal and/or the General Counsel.

A secondary consideration will be whether the decision or action belongs to one of the categories over which the Court, but more especially the Tribunal or General Counsel have jurisdiction. Normally, cases will fall clearly within the mandate of the appropriate body, but there will be some cases which are doubtful or outside the jurisdiction of any body.[11]

In many cases, especially where the complainant has been unrepresented or the decision or action complained of is of a relatively minor and routine nature, the complainant will seek the help of the General Counsel for Grievances. This office is modelled on the successful office of ombudsman pioneered in Scandanavian countries and adopted to varying extents by the United Kingdom (there known as the Parliamentary Commissioner for Administration),[12] and New Zealand (there simply named 'Ombudsman')[13] and has attracted much popular attention. Although an inquisitorial office is a radical departure from accepted notions of justice in our community, applicability of this approach across the whole spectrum of review might usefully have been considered by the Committee.

As in New Zealand, the Committee recommends that the General Counsel should only be entitled to investigate complaints in certain enumerated fields of administration.[14] However, the Committee gives no reason

[10] Paras 346-53, also, paras 275-88.
[11] It is questionable whether such a policy is desirable, but for the Committee's reasons see T.A.N. 37.
[12] See paras 133-5.
[13] See paras 148-54.
[14] Para. 313.

why such a restriction on the General Counsel's powers is desirable. The expansive approach to powers evident on the part of the Committee in regard to the Court and Tribunal is peculiarly absent here.

Another surprising restriction recommended by the Committee is that the General Counsel be prohibited from examining, in the course of his investigations, documents and files where this might be 'injurious to the public interest'.[15] Surely a person of the calibre likely to occupy this office could be trusted to exercise his discretion in this regard wisely. Such a restriction is not proposed for the Administrative Court and indeed the Committee applauds the reform of the law, culminating in *Conway v. Rimmer*,[16] allowing courts to look behind Ministerial affidavits as to the 'public interest'.[17] The Committee does not consider whether the General Counsel should have any right of action in the Administrative Court where a document has been withheld in the 'public interest', but to fail to provide him with such a right would be a severe impediment to his effectiveness. If the Court can intervene then at least the General Counsel may not be wholly obstructed, but it would be far more expeditious and would, in this writer's view, not jeopardize the public interest for the General Counsel to deal with the question himself.

The sanctions available for use by the General Counsel are limited. It is recommended that where his investigations reveal that there is justification for the complaint he shall furnish a report of his findings to the person, Member of Parliament or Minister bringing the complaint to his notice and advise the complainant of his rights to obtain actual relief from the Administrative Review Tribunal or Administrative Court.[18] No doubt, it is anticipated that the report will be sufficient in most cases to achieve redress. In this regard the Committee could usefully have recommended some form of publicity, as this is probably the most effective sanction of all. The Committee does not consider if any sanction, short of undertaking proceedings in the Court or Tribunal, should exist to prevent the government tribunal, body or official ignoring the report. The General Counsel should at least be entitled to table reports in Parliament as the occasion arises.[19]

Although the sanctions are limited, the bases upon which the General Counsel may impugn administrative action suggested by the Committee are broad. The General Counsel may take action if he is of the opinion that:

(a) there has been procedural unfairness towards the complainant;
(b) the action taken is contrary to law;
(c) the finding of fact on which the administrative decision complained of was based is manifestly erroneous;

[15] *Ibid.*
[16] [1968] A.C. 910.
[17] Paras 343-4.
[18] Para. 315.
[19] *Cf.* para. 288 proposing such a power for the Administrative Review Council.

(d) there has been an improper exercise of discretionary power;
(e) the decision complained of is manifestly wrong on the merits;
(f) a particular decision has been unduly delayed.[20]

A significant recommendation is that the General Counsel be empowered to seek relief in the Court or Tribunal on behalf of the complainant.[21] An analogous instance of such a power is that provided under recently enacted South Australian legislation permitting the Prices Commissioner to sue for relief in respect of consumer complaints.[22]

The Committee also envisages that the General Counsel would be entitled to grant legal aid in appropriate cases.[23] Surprisingly, this is the only reference to provision for legal aid within the administrative review structure throughout the report. Notwithstanding the Committee's belief that the administrative review procedure devised would be relatively inexpensive compared with proceeding in the High Court (as was usual formerly), this writer contends that costs would still often be out of the reach of persons aggrieved, especially since cases will often be vigorously defended and brief fees will no doubt have regard to the fact that these cases are arising in the federal jurisdiction. The failure of the Committee to make no more than a passing reference to the question of legal aid is a significant gap in its work. The Commonwealth has no generally available legal aid scheme and it would seem that this would have been a useful context in which to stimulate debate on the issue. For example, it is quite likely that most complaints concerning the administration of social welfare are likely to come from recipients of benefits who would rarely have the means to fund a review action.

The broader question arises whether any person who has more than a mere vexatious or frivolous grievance about the administration ought to be expected to fund his own action regardless of his means or the ultimate resolution of the dispute.[24] The provision of an office of General Counsel goes some way towards providing adequate legal aid but a more comprehensive scheme is necessary. It is interesting to note in this regard that the United Kingdom's Franks Committee urged that an extended legal aid scheme be established to ensure that legal representation was available to persons appearing before administrative bodies or complaining of their actions.[25] Yet the United Kingdom possesses a far wider scheme in

[20] Para. 314.
[21] Para. 315.
[22] Prices Act 1948-70 (S.A.), s. 18a(2).
[23] Para. 315.
[24] The Committee does recommend that costs should not be awarded by the Administrative Review Tribunal against an applicant whose application for review was reasonably justified: para. 297.
[25] United Kingdom, *Report of the Committee on Administrative Tribunals and Enquiries,* (1957) Cmnd 218, para. 88.

terms of eligibility criteria and the range of matters dealt with than schemes currently available in any Australian jurisdiction.[26]

The General Counsel will probably deal with the majority of complaints of administrative injustice. Most will, no doubt, be disposed of by him and so the Court and Tribunal will be left free to entertain more serious complaints. As between these two forums, most complaints will go to the merits of the decision or action impugned and accordingly will be dealt with by the Tribunal; the Committee expects that only a small number of cases will go to the Administrative Court.

The Administrative Review Tribunal will mainly be concerned with 'review as to fact-finding and improper or unjust exercise of discretionary power'.[27] Without developing the point, the Committee suggests that the Tribunal might be enhanced by an interlocutory process.[28] The obvious analogy is the hearing examiner stage in the United States' federal agency hearing process.[29] The Committee recommends that the requirements of *locus standi* before the Tribunal be liberal and that the nature of the interest affected giving rise to a right of action should include not only rights but privileges and liberties.[30] In keeping with the fact that the Tribunal is not a manifestation of the Commonwealth judicial power, the Committee recommends that argument on 'questions of law, fact, discretion and application of policy' should be permitted before it.[31]

It is proposed that the Tribunal will consist of three members.[32] The president would be a judge drawn from the bench of the Administrative Court and would rule on any questions of law that might arise. The Committee does not consider the possibility that this may give rise to an unconstitutional mixing of judicial and non-judicial functions. It may be that all questions of law, or mixed fact and law should be referred to the Administrative Court for resolution, although the utility of the Committee's suggestion is apparent. The other two members would be an officer from the Commonwealth department or authority responsible for administering the matters under review and a layman drawn from a panel of persons 'chosen for their character and experience in practical affairs'.[33] The Committee suggests that a Commonwealth public servant sit on the Tribunal so that the other members will be apprised of the procedures

[26] See the Legal Aid and Advice Acts 1949-64 (U.K.). Compare, *e.g.*, Legal Aid Act 1969 (Vic.).
[27] Para. 299.
[28] Para. 294.
[29] As to the hearing examiner stage, see paras 189-90. See also Schwartz, *An Introduction to American Administrative Law* (2nd ed. 1962) 127-33, 155-60. Note also the stress placed on pre-decision inquiries in the English administrative process: paras 125-7.
[30] Para. 306.
[31] Para. 295.
[32] Para. 292.
[33] *Ibid.*

and practices usually followed, and the reasons for them, in the area giving rise to the complaint. The Committee elsewhere rejects the Franks Committee's[34] view that complete independence in the composition of tribunals generally is desirable.[35] Whatever the proper view may be regarding the composition of the ordinary Commonwealth tribunals, this writer feels that public confidence in the paramount Administrative Review Tribunal would deteriorate rapidly if it included an officer from the department or authority which is the source of the grievance.

The mandate of the Administrative Review Tribunal where it finds a complaint justified is broad. It can order that the case be reconsidered by the administrator responsible for the decision, or substitute its own decision where 'substantial justice' so requires. The Tribunal should have power not only to award costs but also not to make an award of costs against any complainant whose application for review was 'reasonably justified'.[36] Such a power will mitigate the deterrent effect of costs, and encourage applicants whose cases are borderline to proceed.

But the Committee does strike a cautionary note late in its report in regard to the range of matters over which the Tribunal may act.

> There will always be some administrative decisions from which Governments will not be prepared to allow appeals; there will be some from which Governments will probably wish to be protected by privative clauses; there will be some which involve important policy considerations . . . there will be some in respect of which only limited appeal or appeal to specialist tribunals will be permitted.[37]

In such cases, the Committee nevertheless suggests that the opinion of the Administrative Review Council approving the inclusion of a privative clause should be obtained.[38]

The Administrative Court, it is proposed, will exercise the traditional jurisdiction for review on the grounds of excess or want of jurisdiction, or denial of natural justice. However, the Committee recommends that the usual remedies, the prerogative writs, be replaced by a simple order which may issue on any of the usual grounds, thereby avoiding the 'treacherous procedural snares'[39] of the writs. It is also proposed that the Court should have power to issue such an order, if none of the usual grounds is applicable, 'as is necessary to do justice between the parties',[40] a discretion of startling potential which may render the other grounds superfluous. The Committee also recommends that the Court's power to make orders extend to recommendations and reports, which at present are not amenable to review by the prerogative writs. Such a reform is long

[34] *Supra* n. 25.
[35] Para. 321.
[36] Para. 297.
[37] Para. 358.
[38] Para. 287.
[39] Davis, *Administrative Law Treatise* (1958) III, 388.
[40] Para. 263.

overdue. As the Court's workload would not be very great, it is suggested that the Court could be staffed from the present federal judiciary.[41]

The High Court would of course remain as a forum for relief, but the Committee expects that, because of the simpler procedures and uncomplicated substantive grounds and remedies available, the Administrative Court or Administrative Review Tribunal would ordinarily be resorted to and that only the most significant cases would be taken directly to the High Court.[42]

Administrative Procedure—Proposal

As well as the four-part administrative review structure described above, the Committee recommends that the enabling legislation should prescribe minimum standards to be followed by all Commonwealth administrative tribunals.[43] The proposed legislation goes further than the United Kingdom's Tribunals and Inquiries Act 1958 which refrains from laying down any universal standards, the view of the Franks Committee being that each tribunal should devise its own procedure appropriate to its own circumstances. But it does not go as far as the United States' Administrative Procedure Act 1946 which lays down an elaborate code governing all aspects of the federal administrative agencies' process. Recommendations are made, *inter alia,* as to the constitution of tribunals, notice, legal representation, cross-examination and the giving of reasoned decisions. The Committee refutes the not unpopular notion among administrators that persons appearing before 'informal' administrative tribunals do not need representation:

> Many parties to tribunal hearings are ordinary citizens who are not skilled at presenting fact and argument. Furthermore, some of them are quite inarticulate.[44]

In regard to the mode of argument before tribunals the Committee makes the sensible observation that

> [l]awyers should be prepared to reconcile themselves to techniques of analysis and investigation which are different from those in the common law courts.[45]

Government Reaction

The initial reaction of the present Commonwealth Government to the Committee's recommendations has been cautious and unhurried. The proposal that an Administrative Review Council be established immediately has not been followed although the Prime Minister (The Honourable W. McMahon) did announce, when presenting the report to Parliament, that

[41] Generally, paras 251-74. The Committee explains its reasons for preferring a new Court instead of those already existing at paras 237-50.

[42] Para. 380.

[43] Generally, paras 319-44, especially para. 342.

[44] Para. 330. Cf. the remarks of the Victorian Minister for Social Welfare (Mr I. Smith) when questioned why legal representation was not allowed for prisoners before visiting magistrates: 'Quite frankly I don't think lawyers are all that damn good. Representation would give them a field day. Prisoners can say their pieces for themselves . . .' Victoria, *The Age,* 8 February 1972, 3.

[45] Para. 334.

> [a] group of three people will be appointed to examine existing administrative discretions under Commonwealth statutes and regulations and to advise the Government as to those in respect of which a review on the merits should be provided.[46]

At this stage the Commonwealth Government has therefore refused to endorse in principle the creation of an Administrative Review Council. The second and more perplexing announcement by the Prime Minister was that the Attorney-General (Senator Greenwood) has been asked 'to institute a review of the prerogative writ procedures available in the courts'.[47] Such a review would be unlikely to add anything to the work of the Committee. Despite a great deal of public pressure,[48] the Government has refrained from implementing the recommendation for an office of General Counsel immediately. And, without referring to the Committee's detailed and cogent arguments that cost was not a significant obstacle[49] the Prime Minister also warned that

> [i]t must be recognised that any substantial extension of institutions and procedures for the formal review of administrative action will in the nature of things add materially both to the time taken in the administrative process and the cost it entails. I need not remind honourable members that speed and efficiency in the conduct of Government business are important both for the Government itself and for those who rely on decisions of the Government.[50]

It is to be hoped that the landmark contribution of this Committee's report to the development of Australian administrative law will not be stifled by government inaction, as has already happened with a report of a similar kind tabled in the Victorian Parliament four years ago.[51] That report is cited with approval in the course of the Commonwealth Committee's report.[52] The Victorian report called for the appointment of an Ombudsman, the creation of an Administrative Appeals Tribunal and considered but did not recommend the creation of a Tribunals Committee similar in nature to the Administrative Review Council proposed by the Commonwealth Committee.

The need for a co-ordinated and comprehensive system for review of governmental administrative action at both federal and state levels is apparent. The report of the Commonwealth Administrative Review Committee provides an eloquent statement of the reasons for immediate action and a practicable blueprint for a new system of review.

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[46] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 14 October 1971, 2355.
[47] *Ibid.*
[48] See sub-leader 'Cause for grievance', Victoria, *The Age,* 2 February 1972, 9.
[49] Paras 365-88.
[50] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 14 October 1971, 2355-6.
[51] Victoria, *Report from the Statute Law Revision Committee upon Appeals from Administrative Decisions and a proposal for an Office of Ombudsman* (1968).
[52] *E.g.,* paras 77-80.

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