# Judicial and Administrative Review in Western Australia: Blueprints for Development

R D NICHOLSON†

*Western Australia has not yet introduced statutory reforms to facilitate judicial review and to provide administrative review. It is out of step with developments in the Commonwealth and other States. This paper describes the relevant issues, recommendations made for change and matters now requiring investigation.*

As one of the architects of administrative law reform at the Commonwealth level has recently put it, research does not reveal any comprehensive study of State and Territory tribunals or even a contemporary attempt to list them all.[1] Indeed the same person went further and said that a study of Commonwealth tribunals gives little preparation for a study of State and Territory tribunals.[2] The aim of this paper is to identify: (i) work done on the future of administrative law in Western Australia; (ii) work which has already come into effect; and (iii) the measure of distance between Commonwealth and State administrative law as it operates in respect of matters within the State of Western Australia.[3]

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† Justice of the Supreme Court of Western Australia. This article is based on a paper presented at the Australian Institute of Administrative Law forum "Administrative Law: Are the States Overtaking the Commonwealth?" (Brisbane, July 1994).

1. L Curtis "Agenda for Reform: Lessons from the States and Territories" in R Creyke (ed) *Administrative Tribunals: Taking Stock* (Canberra: Centre for International & Public Law, 1992) 35.
2. Id, 34.
3. A handy set of criteria against which to assess State administrative justice was provided in the recent Access to Justice Report. The Committee making that report took the view that such a system fails if it does not provide: "(i) a comprehensive, principled and accessible system of merits review; (ii) a requirement that government decision makers inform persons affected by government decisions of their rights of review; (iii) a simplified judicial review procedure by comparison with judicial review under the common law; (iv) a right for persons who are affected by decisions to obtain reasons for those decisions; (v) broad rights of access to information held by government; and (vi) an adequately resourced ombudsman or commissioner of complaints with a general power to review government action": Cth of Aust *Report of the Access to Justice Advisory Committee*

## CONSTITUTIONAL CONSIDERATIONS

The scope for the application of administrative law in Western Australia is of course governed by the constitutional settings provided by the Commonwealth and State constitutions. Considerations arising from the constitutional requirement for a separation of powers are more readily apparent in relation to Commonwealth than State jurisdiction in Western Australia. Whether or not the doctrine of separation of powers is recognised by the Constitution of Western Australia is an undecided point on which differing opinions have been expressed.[4] Only if a strictness of separation is found to be constitutionally mandated would it be inappropriate for a court to exercise powers of administrative review.

## 1971: THE FIRST STEP – A PARLIAMENTARY COMMISSIONER

By the Parliamentary Commissioner Act 1971 (WA), the Parliament of Western Australia provided "for the appointment of a Parliamentary Commissioner for Administrative Investigations for the investigation of administrative action taken by or on behalf of certain government departments and other authorities and for incidental purposes".[5] The Act came into force on 12 May 1972. By styling the Commissioner as a Parliamentary Commissioner;[6] by provision for conferral of investigatory jurisdiction upon the Commissioner by Parliament;[7] by providing power in certain circumstances for the Commissioner to lay a report before each House of Parliament;[8] and by a requirement for annual reporting to Parliament together with a right to report to Parliament at any time[9] the enactment emphasised the centrality of Parliament at the same time as creating an office independent of Parliament for investigation of administrative action. As the enabling Act presently reads, the jurisdiction of the Commissioner, subject to the Act, is to:

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(Canberra, 1994) 323. Western Australia meets only the fifth and sixth criteria although it has a number of blueprints for achieving the first and third criteria.

4. L B Marquet "The Separation of Powers Doctrine and the Constitution of Western Australia" (1990) 20 UWAL Rev 445, 448; DK Malcolm "The State Judicial Power" (1991) 21 UWAL Rev 7, 32; P Hanks *Australian Constitutional Law* 5th edn (Sydney: Butterworths, 1994) 260; R D Lumb *The Constitutions of the Australian States* 5th edn (St Lucia: Qld UP, 1991) 132.
5. Parliamentary Commissioner Act 1971 (WA).
6. S 5(1).
7. S 15.
8. S 25(6).
9. S 27.

> [I]nvestigate any decision or recommendation made, or any act done or omitted, that relates to a matter of administration and affects any person or body of persons in his or its personal capacity in or by any government department or other authority to which this Act applies in the exercise of any power or function.[10]

The words "a matter of administration" are not defined by the Act. In 1993, 2 040 complaints containing 2 332 allegations were received by the Parliamentary Commissioner concerning the administrative actions of 121 organisations.[11] Nevertheless the Commissioner considers that "at present there are far too many gaps in my jurisdiction".[12] In 1992, the Commissioner indicated that the then State Government proposed to amend the Parliamentary Commissioner's Act to replace the present schedule of inclusion with a schedule of exclusion so that all government departments, local authorities and statutory authorities would be subject to the Commissioner's jurisdiction unless specifically excluded. No such action was taken in the life-time of that Government and the matter does not appear to have been taken up by the present Government. The independence and work of the Commissioner received support specifically and generally in the recommendations of the WA Royal Commission into Commercial Activities of Government and Other Matters.[13] However, the introduction of the Freedom of Information Act 1992 (WA) did not see review jurisdiction under that Act vested in the Parliamentary Commissioner as it had been vested in the Ombudsman in Queensland.[14]

## PRE-1975: ENGLISH INFLUENCE

Prior to the Commonwealth initiatives in 1975, to which reference will be made, administrative law in Western Australia was conceived in terms of the common law of England. In the writer's judgment based on recollections of law-teaching and early experience in legal practice, there was no sense that initiatives and reforms taken at the Parliamentary level in the United Kingdom could be readily paralleled in Australia or the Western Australian jurisdiction. Law School teaching drew attention to the Donoughmore Report of 1932[15] and the implementation of some of its recommendations post-

10. S 14(1).
11. WA Parliamentary Commissioner *Annual Report* (Perth: Govt Printer, 1993) 3. The organisations about which allegations were received were: Police Department and Police Force 1203, local authorities (60 throughout the State) 224, Department of Corrective Services 159, Homeswest (State Housing Commission) 100, Crown Law Department 56, Water Authority 46, Department for Community Development 40, Health Department 34.
12. *Annual Report* supra n 11, 5.
13. Id, 7-10.
14. Id, 10.
15. UK Parliament *Report of the Committee on Ministers' Powers* Cmnd 4060 (London:

war;[16] likewise the Franks Report of 1957[17] and the resultant Tribunals and Inquiries Act 1958 (UK) requiring tribunals to give reasons for decision and making them subject to the right of appeal to courts on points of law. These steps were carried forward by the Tribunals and Inquiries Act 1971 (UK), which replaced the 1958 legislation.

Despite these initiatives in the United Kingdom the predominant attitude to administrative law in the years preceding the Commonwealth initiatives of 1975 was that it was a slowly developing but not dynamic area of the law. Tribunals during these years were regarded with some suspicion, being viewed as the manifestation of all the evils to which the Donoughmore Committee drew attention. There was an acceptance of the proposition that in the years ahead the use of tribunals would be cut back in favour of retention of jurisdiction in courts. That proved to be a wrong expectation.

## 1975: THE COMMONWEALTH PACKAGE

Following the reports of the Kerr,[18] Ellicott[19] and Bland[20] Committees, the Commonwealth introduced its package of administrative law reform constituted by the enactment of the Administrative Appeals Tribunal Act 1975 (Cth), Ombudsman Act 1976 (Cth) and the Administrative Decisions (Judicial Review) Act 1977 (Cth). The effect of this package was to simplify the system of judicial review; establish a system of administrative review through the Administrative Appeals Tribunal; establish an Administrative Review Council with ongoing functions of identifying appropriate areas for review; bring into being the office of the Commonwealth Ombudsman and establish a right to reasons for decision.[21] Subsequently there was added to this package the Freedom of Information Act 1982 (Cth).

The effect of the introduction of this package was to provide to persons resident in Western Australia a wide range of simplified and new remedies in relation to federal jurisdiction. The legal profession was quick to understand and exercise the rights made available by the new provisions. In that informed and active climate concerning Commonwealth administrative

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HMSO, 1932).

16. Crown Proceedings Act 1947 (UK).
17. UK Parliament *Report of the Committee on Administrative Tribunals and Enquiries* Cmnd 218 (London: HMSO, 1957).
18. Aust Parliament *Report of the Committee on Administrative Review* Parl Paper 144 (Canberra, 1971).
19. Aust Parliament *Report of the Committee on Prerogative Writ Procedures* Parl Paper 56 (Canberra, 1973).
20. Aust Parliament *Committee on Administrative Discretions: Interim Report* Parl Paper 53; and *Final Report* Parl Paper 316 (Canberra, 1973).
21. Administrative Decisions (Judicial Review) Act 1977 (Cth) s 13; Administrative Appeals Tribunal Act 1975 (Cth) s 28.

law, the contrast with State administrative law became increasingly obvious as well as anomalous. In State matters judicial review was accessible only by the comparatively cumbersome use of prerogative writ procedures while administrative review on merits existed only in some cases where appellate provisions admitted of such review.

## 1982: THE FIRST STATE RESPONSE – ADMINISTRATIVE APPEALS

Doubtless stimulated by Commonwealth initiatives, the Law Society of Western Australia made a submission to the government of the day expressing concern at the lack of co-ordination in existing State appellate arrangements in the administrative law area.[22] As a consequence the Western Australian Law Reform Commission ("WALRC") was asked to recommend the principles and procedures which should apply in Western Australia in relation to the review of administrative decisions both by way of appeal and by way of the supervisory jurisdiction of the Supreme Court.[23] The WALRC decided to deal with the terms of reference in two parts: appeals and judicial review. With reference to administrative appeals, the WALRC published a working paper in November 1978 which discussed various methods of rationalising the existing law relating to appeals from administrative decisions and included a survey of Western Australian statutes in force as at 31 December 1977 which made provision for an appeal from an administrative decision.[24] Its report on administrative appeals was issued in January 1982.

In that report the WALRC recognised that the right of appeal from administrative decisions involved "a review of the merits of a decision" but:

> In each case in which a right of appeal is created the ambit of the appeal and the powers of the appellate body depend on the terms of the legislation creating the right. In some cases, the appellate body may deal with the matter afresh and substitute its own decision for that of the original decision-maker. In other cases, the appellate body may only be able to reverse or vary the original decision if the appellant satisfies the appellate body that the original decision was wrong, either in law or in fact or both.[25]

The WALRC classified existing rights of appeal in Western Australia into the following categories: (i) matters affecting public servants; (ii) rates and taxes; (iii) licences, authorities, permits or duties concerning (a) occupations and commercial activities, (b) premises, (c) the manufacture

22. WA Law Reform Commission *Review of Administrative Decisions: Appeals* Project No 26 Pt I (Perth, 1982) ¶ 2.18.
23. Id, ¶ 1.1.
24. Id, ¶ 1.4.
25. Id, ¶ 1.5.

and control of food stuffs, (d) land and land conservation and the environment and (e) other matters; (iv) medical matters; (v) compensation; (vi) industrial matters; and (vii) miscellaneous.

It concluded as a result of its survey that the Law Society had been correct in its submission and that the arrangements concerning administrative appeals in Western Australia were the result of ad hoc legislation over a long period of time without an apparent overall plan. The WALRC said that there were approximately 257 administrative decisions subject to a statutory right of appeal to more than 43 appellate bodies. The consequence was that the arrangements incorporated inconsistencies and variations in the rights of appeal from the decisions of bodies with similar responsibilities which were difficult to justify. Nevertheless, the WALRC said it seemed to have been accepted that the ordinary courts provided a satisfactory appellate body in many cases.[26]

A further defect to which the WALRC pointed was that, in many cases, the law did not provide for questions of law to be determined ultimately by the Supreme Court. The scope for review of questions of law by the Supreme Court by means of judicial review was limited, the remedies were discretionary and the Court did not have power to substitute its decision for that of the decision-maker.[27] An additional defect identified by the WALRC was the absence of any single, simple code of procedure for conducting appeals.[28]

In examining approaches to reform in administrative law elsewhere, the WALRC identified two major lines of approach. The first involved a rationalised appeal system based mainly on the creation of a limited number of specialist appellate bodies, such as was foreshadowed in the United Kingdom by the Franks Committee. The second was the establishment of a general appellate body with a limited number of specialist appellate tribunals, the existence of which was required by particular circumstances. The WALRC considered three types of general appellate bodies, namely (i) an administrative court; (ii) an administrative appeals tribunal; and (iii) an administrative division of an established court.[29] In the event the WALRC considered that a more coherent and rational system could be developed by making greater use of the ordinary courts.[30]

The keystone of the WALRC's proposal was that there should be an administrative law division of the Supreme Court to which appeal would lie on questions of law from an administrative law division of the Local Court and from specialist appellate tribunals including Ministers as well as directly

26. Id, ¶ 2.20.
27. Id, ¶ 2.21.
28. Id, ¶¶ 2.22 & 4.1.
29. Id, ¶ 3.1.
30. Id, ¶ 4.1.

from administrative decision-makers. There would be a further appeal from the administrative law division to the Full Court on questions of law.[31]

The WALRC was of the view that there should be a presumption against the creation of ad hoc bodies to hear rights of appeal in the administrative area and that only if it was not appropriate for a right of appeal to lie to one of the existing bodies should a further specialist appellate body be created.[32] The result was that the WALRC concluded that a system could be developed based on the established courts with the desired attributes of specialisation and flexibility of procedure and without undue delay or cost. It pointed to the undesirability in terms of cost of establishing a new administrative appeals tribunal given the population of the State.[33]

Having adopted this system it was then necessary for the WALRC to consider in which case the appeals should lie to the administrative law division of the Supreme Court or to the administrative law division of the Local Court.[34] In addition, there were a number of specialist appellate bodies which the WALRC considered should be retained, in particular the Land Valuation Tribunals, the Licensing Court and the Town Planning Appeal Tribunal.[35]

The WALRC recommended that lay members should be appointed to sit on the administrative law divisions of the Supreme and Local Courts. Furthermore, it was recommended that the various appellate bodies should have power to exercise all the powers and discretions conferred on the original decision-maker.[36] A judge of the administrative law division of the Supreme Court should have power, it was recommended, either on motion or application, to remit a matter from that Court to the Local Court or vice versa. A common code of procedure would be developed for appeals to the proposed administrative law divisions.

The WALRC recommended that a body along the lines of the Commonwealth Administrative Review Council be established or that the functions of an existing body such as the Legislative Review and Advisory Committee be expanded to that end.[37] The WALRC attached various appendices to its report analysing the jurisdiction suggested for the administrative law division of the Supreme Court and Local Court and specialist appellate tribunals as well as the rights of appeal which should be considered by an ongoing review body.[38] For example, Appendix 2 on the

31. Id, ¶ 4.4.
32. Id, ¶ 4.4.
33. Id, ¶ 4.21.
34. Id, ¶ 5.2.
35. Id, ¶ 5.3.
36. Id, ¶ 5.19.
37. Id, ¶7.4.
38. Id, ¶67-69.

"Jurisdiction Suggested for the Administrative Law Division of the Supreme Court" listed the rights of appeal suggested for that division of that Court, classified according to the categories previously referred to, and identifying the statute under which the right arose, the body from which the appeal originated, the subject matter of the appeal, the existing appellate body and the page of the working paper survey at which the matter had been dealt with. This was a "contemporary attempt" to list all the tribunals in Western Australia[39] and provided the type of information in relation to tribunals in Western Australia at that date as was later provided in the State of Queensland by the Electoral and Administrative Review Commission.[40]

The blueprint provided by the recommendations of the WALRC was considered by the South Australian Law Reform Committee which saw the available blueprints as being four-fold, namely:

- The present system could be left basically as it is, but some rationalisation could be carried out as in England; for example, an attempt could be made to amalgamate tribunals if practicable, and also the procedure used for the various tribunals could be standardised as much as possible.
- An administrative division of the Supreme Court (and perhaps also the Local Court) could be established as was done in New Zealand and was recently recommended in Western Australia.
- An Administrative Court could be established, as was recommended to the Franks Committee by Mr Robson and to the New Zealand Public and Administrative Law Reform Committee by Mr Orr.
- An Administrative Appeals Tribunal along the lines of that recommended by the Victorian Statute Law Revision Committee, the Law Reform Commission of New South Wales, and the Commonwealth Administrative Review Committee, which in the case of the Commonwealth was later implemented by the Administrative Appeals Tribunal Act 1975.[41]

The New Zealand experience had been influential on the WALRC which had referred to the establishment of the administrative law division of the Supreme Court of New Zealand in 1968 following a recommendation of the New Zealand Public and Administrative Law Reform Committee in the same year.[42] The Victorian and New South Wales reports were made in 1968 and 1973 respectively and thus preceded the introduction of the Commonwealth reforms.[43]

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39. Cf Curtis supra n 1, 35.
40. Qld Electoral & Administrative Review Commission *Appeals from Administrative Decisions* (Brisbane, 1991 & 1992) App B & Sched respectively.
41. SA Law Reform Committee *Relating to Administrative Appeals* (Adelaide, 1984) 15.
42. See WALRC *Review of Administrative Decisions: Appeals* supra n 22, ¶ 3.5.
43. Vic Statute Law Revision Committee *Appeals from Administrative Decisions and a Proposal for an Office of Ombudsman* (Melbourne, 1968); NSW Law Reform

## 1984: PROFESSIONAL PRESSURE

Perhaps encouraged by the finding of the WALRC supporting its recommendations, in 1984 the Law Society of Western Australia together with the Australian Society of Accountants, the Institute of Chartered Accountants and the Taxation Institute of Australia submitted a report to the then Premier of Western Australia based on the concern of those bodies that the objection and appeal provisions of the State's revenue legislation did not have uniform and consistent provisions and that some of the provisions operated unfairly against taxpayers. The report recommended that all objection and appeal provisions of State revenue legislation should be repealed; that there should be a new Act, the State Taxation Appeals Procedure Act; that the new Act should contain provisions in relation to reasons for decision, time limits for lodgement of objections and extension of grounds of objection; and that there should be provision in the Act for review on the merits (if a general tribunal was created) and other matters of specific relevance to revenue law.

The need for re-assessment of State administrative law remedies was also the subject of focus, following the making of the report on State Taxation Appeal Provisions, in the professional journal of the Law Society of Western Australia.[44] The view espoused there was that prima facie there was no reason why Western Australians should have less administrative remedies in relation to State matters than in relation to Commonwealth matters and that provided administrative law reform could be accommodated satisfactorily from the viewpoint of cost, there was no reason why attention should not again be re-directed to the work of the WALRC.

There was at this time some cause for optimism that government had become receptive to the recommendations of the WALRC and to the general climate pertaining to administrative law reform. The Attorney-General of the day in a Ministerial Statement announced that the Government approved the recommendations contained in the first report of the WALRC in principle but that further studies were required before legislation could be drafted.[45]

## 1986: A FURTHER STATE RESPONSE – JUDICIAL REVIEW

In 1981, the WALRC issued a working paper on the second aspect of

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Commission *Appeals in Administration* (Sydney, 1973).

44. R D Nicholson "State Administrative Law Remedies - The Need for Re-assessment" (1985) 12 Brief 9.

45. The Hon J M Berinson MLC, WA Legislative Council *Debates* vol 254 (Perth, 1985) 1630; WA Attorney-General "Media Statements" (Perth, 26 Sept 1985 and 18 May 1986).

its terms of reference under the title "The Judicial Review of Administrative Decisions". The report of the Commission on that aspect issued in January 1986.[46]

In its report, the WALRC said that it had deferred consideration of the grounds of judicial review, the rules of standing and the statutory exclusion of judicial remedies, matters which it intended to report upon in a subsequent report along with the question of whether or not a right of appeal should be created from administrative decisions. No such further report has issued from the Commission.

There were two matters dealt with in the report. Apart from the central question of reform of the procedure of judicial review, the WALRC came to the question of reasons for decision because of the very important part which a statement of reasons had to play in ensuring the effectiveness of the procedural reforms recommended in the report. After examination of developments elsewhere, the WALRC recommended that any person with a sufficient interest in a decision made in the exercise of a public function should be entitled to obtain a statement in writing from the decision-maker (i) setting out the findings on material questions of fact; (ii) referring to the evidence or other material on which those findings were based; and (iii) giving the reasons for the decision.[47] Limited exceptions to this obligation were recognised.[48] The WALRC based its recommendation on four considerations, namely the need for a person affected by an administrative decision to be in a better position to assess whether or not there was a good ground for seeking judicial review;[49] the need for such a person to choose between different means of challenging decisions;[50] the desirability of promoting better decision-making;[51] and the assistance which a statement of reasons would provide to the court in determining issues under review.[52]

On the question of the reform of the procedures for judicial review, the WALRC, after reviewing developments in the United Kingdom and New South Wales and taking into account trenchant criticisms of prerogative writ procedures, recommended that the existing procedures for obtaining certiorari, prohibition and mandamus be replaced with a procedure whereby relief in the nature of these remedies would be obtained by an order in an ordinary civil action, commenced either by a writ of summons or an originating motion as is appropriate in the particular case.[53] It attached

46. WA Law Reform Commission *Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons* Project No 26 Pt II (Perth, 1986).
47. Id, ¶ 6.16.
48. Id, ¶ 6.17.
49. Id, ¶ 6.9.
50. Id, ¶ 6.10.
51. Id, ¶ 6.11.
52. Id, ¶ 6.12.
53. Id, ¶ 4.20.

appendices containing drafts of statutory provisions and rules of the Supreme Court to give effect to the recommendations contained in the report.

On the question of the appropriate review court, the WALRC concluded that the existing provision for hearings of prerogative writ applications before the Full Court of the Supreme Court was unwarranted and recommended that there was no need to depart from the usual practice of hearings being conducted before a single judge except for cause shown.[54] A right of appeal would be maintained from a single judge to the Full Court. The WALRC made supplementary recommendations on issues of procedure such as time limits and additional powers of court to dismiss proceedings against officers or bodies exercising a public function on the ground that no matter of substantial importance was involved and other matters.[55] In mid-1986 the Western Australian Attorney-General announced Cabinet had approved the drafting of legislation generally following the WALRC recommendations.[56] By 1989, with no changes having resulted from these recommendations, it was still professional opinion that there was a continuing need for reforms of judicial review despite a change in judicial focus from procedure to substance.[57]

## 1992: RE-STIMULATION

Following the 1986 report of the WALRC and the Ministerial Statement, it was generally understood that legislation was in the process of being drafted to implement the recommendations made by the Commission. On 5 March 1992, the State Attorney-General announced that the drafting of legislation was subject to constraints imposed by the need to identify the mass of statutes subject to specific appeal procedures, assess their appeal processes and determine how these would be accommodated under the changes. This involved analysis of arguments put forward for retaining present structures of a specialist character in addition to those recommended for retention by the WALRC. He expressed doubts about the need for detailed reasons for decision, stating experience in other jurisdictions showed it created additional workload and cost.[58] Perhaps not surprisingly, the task of collecting these responses or of obtaining sufficient positive responses from the Departments responsible for tribunals ran out of steam.

In 1988, the chairman of the WALRC at the time the first report was

54. Id, ¶ 5.3.
55. Id, 50.
56. WA Attorney-General "Media Statement" (Perth, 8 May 1988).
57. M Barker "Practicalities of Obtaining Prerogative Relief in WA including other Alternatives" (Perth: WA Law Soc, 17 Oct 1989) Paper No 3, 1-2; W Martin "Reform of Judicial Review of Administrative Decisions in WA" id, Paper No 4, 3.
58. WA Attorney-General "Media Statement" (Perth, 5 March 1992).

handed down (Mr D K Malcolm QC) became the Chief Justice of Western Australia. In 1992, in order to progress consideration of the recommendations of the Commission, he encouraged the Law Society to conduct a seminar on "Reform of Administrative Law". The seminar was held on 20-22 May 1992 with the Chief Justice acting as chair of both sessions.

Two principal issues were dealt with at the seminar. The first was whether the WALRC had been correct in proposing to use the existing court system or whether an administrative appeals tribunal structure was preferable. The second was the extent to which administrative law reform could be achieved by amendment of rules of court. On the first question, different cases were presented on behalf of the Law Society's Courts Committee (by its chair, Mr Neil McKerracher) and the Society's Administrative Law Committee (by its chair, Mr Wayne Martin).

In the paper stating the case for using the existing court system, Mr McKerracher said that it was not clear to him that there was anything which a tribunal could accomplish which a flexible and modern court could not accomplish. The constitutional imperatives obliging the Commonwealth to separately constitute an administrative review system on the merits did not apply to the States provided a code of procedure was developed which was sufficiently flexible to enable an appellate court to deal with each appeal in a way most appropriate in the circumstances of the case; an appeal to a court need not involve undue delay or expense. The creation of a separate administrative law division within the Supreme Court would result in a division comprised of judges with a special knowledge of administrative law and special expertise in dealing with administrative appeals. They would require a new set of rules which would entail the abolition of anachronistic forms of process. Undue formality would be avoided by adoption of one simple form of process. In his view, there was no reason why court jurisdiction would be more costly than a tribunal. On the question whether judges would have difficulties in implementing social, economic or industrial policy, he pointed to the involvement of judges with policy issues in the Commonwealth Administrative Appeals Tribunal and to the judicial involvement in policy aspects in negligence, sentencing and criminal law. He submitted there was no reason why courts should be any less consistent or less specialised than tribunal members. The use of a court was no barrier to involvement of lay-members. Use of the court structure would avoid the difficulty of defining the relationship between an entirely new appellate body and the ordinary court system. Courts were perceived as independent although, he concluded, the arguments for a tribunal or a court on the grounds of actual independence were "about even". Cost considerations favoured utilisation of the existing system.

In summary, the blueprint favoured by the Law Society's Courts Committee was as follows:

- An Administrative Law Division of the Supreme Court be formed, with a Presiding Judge and its own registry.
- The role and function of all existing independent tribunals be examined with the presumption being that they should be abolished and their jurisdiction vested in the Courts.
- The President of the Division or his delegate sit at a directions hearing for each appeal and there direct in which court the appeal be heard and the constitution of that Court: viz, that it be heard by a Supreme Court Judge, District Court Judge or Local Court Magistrate, with or without lay assessors.
- An appeal on a question of law lie from a magistrate to a single judge of the Supreme Court; and if the matter was heard by a Judge, there should be an appeal on a question of law to the Full Court.
- The Administrative Law Division Registry be the registry for any independent tribunal which was retained, with a view to:
  (a) achieving savings of costs;
  (b) ensuring that the tribunal is seen to be separate from and independent of the Commission or other body; whilst
  (c) enabling registry staff to develop an expertise in specialised areas, so as to assist members of the public.[59]

The view expressed in the paper by Mr Martin was that the creation of an umbrella tribunal, centralising the rights of appeal which presently exist to the various specialist tribunals, was the preferred option. This model had the advantage of maintaining the distinction between the three arms of government which lay at the core of the respect enjoyed by the judicial system. It would be generally undesirable to expose the courts to involvement in the type of controversy which arises from the subjective considerations applying to the performance of the administrative function and in relation to which quite differing views were often held by reasonable men. The umbrella tribunal should be comprised essentially of personnel with appropriate administrative/policy/specialist expertise. The panel for any particular case would be determined by reference to the circumstances of that case. The independence of an umbrella tribunal could be achieved through a number of means including security of tenure and relative budgetary independence. Informality was more likely to occur outside the court system. Expense to the litigant was more likely to be lower outside the court system. Expense to government could be assisted by economies achievable by an umbrella tribunal, although no analysis had been done to support this. Such a tribunal would facilitate specialisation and consistency. Lay members were usually seen outside the court system. Furthermore, there

59. N McKerracher "Administrative Appeals on the Merits: The Case for Using the Existing Court System" (Perth: WA Law Soc, 20 May 1992) Paper No 1, 39-40.

were practical considerations, namely that the resources of the court system of the State were under considerable and increasing strain at all levels and conferral of significant additional amounts of jurisdiction would exacerbate that problem.[60]

On the question of the extent to which the judiciary could reform the process of review by changes to Rules of Court, Mr Greg McIntyre explored issues of procedural reform. He drew a distinction between the vesting of a power by legislation to dismiss unmeritorious applications or a leave procedure. Time limits flowing from legislation could be extended on well established principles. The discretionary nature of remedies was well established and able to operate without legislation. Whether or not a claim for damages might be joined with claims for prerogative relief was a matter relating to procedure and susceptible to judicial rules. Whether applications should be to a single judge or the Full Court was a procedural issue and capable of being dealt with by rules. The requirement for reasons for decision required statutory support. Tests of standing were gradually evolving by way of judicial decision. Costs were a matter within the rule-making power.[61]

Following the May 1992 seminar, the Chief Justice encouraged the Law Society's Courts and Administrative Committees to meet and resolve the conflict in their views and to submit recommendations for reform of the Rules of the Supreme Court upon the assumption that the Court was prepared to consider the adoption of a single form of initiating process.

There was much common ground between the Committees. On the subject of judicial review both Committees agreed that major amendment to the Supreme Court Rules relating mainly to prerogative writs was required. On the subject of administrative review it was agreed that it should be a State entity responsible for dealing with purely administrative review of administrative decisions. The entity should operate with the same sort flexibility, right to representation, input of lay persons, informality and cost minimisation as was perceived to be the case with the Commonwealth Administrative Appeals Tribunal. A detailed cost analysis may be necessary to consider whether the utilisation of the existing courts or the establishment of an independent appellate tribunal would be more or less costly if that were the major consideration. Furthermore, the process of analysing which tribunals should be abolished and which should be retained and which divisions of the entity should absorb the jurisdiction of tribunals would require an up-dated review of the appendices to the Part I of the WALRC's 1982 report. Provided the requisite character was obtained by an entity under

60. W Martin "Administrative Appeals on the Merits: The Case for Creating an Administrative Appeals Tribunal Outside the Existing Court System" id, Paper No 2.

61. G McIntyre "Reform of Judicial Review: Return of the Juridical Guerilla" id, Paper No 3.

the court umbrella, both Committees agreed that would be an acceptable entity.

In the event, the Supreme Court Rules Review Committee has not been able to advance proposals by way of recommended amendments to the Rules of the Supreme Court. The WALRC has, however, prepared an up-date of the second appendix to the 1982 report to 1988.[62]

## 1992: ROYAL COMMISSION SUPPORT

On 12 November 1992, the Royal Commission into Commercial Activities of Government and Other Matters reported to the Governor of Western Australia. In Part II of the Royal Commission's report it made recommendations relating to matters such as "Open Government", "Accountability" and "Integrity in Government". It has been said that its recommendations and observations on issues pertaining to administrative and judicial review were "blunt".[63] Under the first heading, it recommended that Freedom of Information legislation[64] be enacted as a matter of priority. It also recommended that an Administrative Decisions (Reasons) Act[65] be enacted as a matter of urgency in accordance with the 1986 report of the WALRC. Even more generally it recommended under the heading of "Accountability" that the recommendations contained in each of the reports of the WALRC[66] be implemented "forthwith". However, on the question of the preferable model for provision of administrative review, the Royal Commission had this to say:

> Since the Law Reform Commission first gave consideration to the matters here under consideration, both the Commonwealth and, more recently, the State of Victoria have had extensive experience with a system of administrative appeals conducted by an Administrative Appeals Tribunal which operates quite separately from the judiciary. In the Commonwealth, this separation is required by reason of a constitutional embargo on the merging of judicial and administrative functions embodied in the Commonwealth Constitution. The values reflected in the principle of separation of powers are also reflected in the administrative appeal system adopted in Victoria. The Commission believes this principle to be of importance to the maintenance of a strong and independent judiciary. In consequence, we invite consideration of the adoption of the separate structure for administrative appeals. We believe an Administrative Appeals Tribunal should be established to meet the needs identified in the Law Reform Commission's report.[67]

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62. Advice to the author by the Executive Director of the WALRC (24 May 1994).
63. M Barker "Administrative Law in the Coming Decades: Meeting the Public Interest - A Lesson from Western Australia" (Canberra: Aust Inst of Admin Law, April 1993) 5.
64. WA Royal Commission *Report into Commercial Activities of Government and Other Matters* Pt II (Perth: Govt Printer, 1992) ¶ 2.2.3.
65. Id, ¶2.2.10.
66. Id, ¶3.4.8.
67. Id, ¶3.5.2.

In relation to judicial review of administrative action, the Royal Commission expressed the opinion that it did not believe there was any need to introduce statutory grounds for judicial review such as those set out in the Administrative Decisions (Judicial Review) Act 1977 (Cth) additionally to the existing common law grounds of review. In the view of the Royal Commission, the common law has now developed to the point where it considered it well reflects the statutory grounds of judicial review contained in that Act. On the question of the rules of standing, also deferred by the WALRC for later consideration, the Royal Commission said the common law had now proved sufficiently flexible to support judicial scrutiny of unlawful executive and administrative action without statutory intervention on these rules.

## 1992: FREEDOM OF INFORMATION

The Freedom of Information Act (WA) was enacted in 1992. It became fully operational on 1 November 1993. Although the Act raised the possibility that review of requests for information may necessitate the resolution of wider issues as to the proper location of such review jurisdiction generally, the system adopted by the Act followed that in operation in Queensland and provided for the establishment of an Information Commissioner with power to make such decisions.[68] Provision is made in the Act for an appeal to the Supreme Court on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application and in some other respects.[69]

## 1994: A FURTHER INQUIRY

The Coalition parties won government in a State election in Western Australia in early 1993. In its policy published prior to the election on the issues of law and justice, it was said that a Coalition Government would "examine and report, within six months of election, on the role and functions of all independent tribunals, including the various appeals processes established under various Acts with a view to producing a general administrative jurisdiction and a single administrative appeals division".

The State Attorney-General has now established a Review of Tribunals with effect from 1 March 1994. The inquiry will be conducted by Acting District Court Commissioner Gotjamanos assisted by Mr Graham Merton. They are required to assess the range of roles presently discharged by

68. Freedom of Information Act 1992 (WA) ss 55 & 63.
69. S 85.

tribunals and the nature of their powers, functions and structures; the degree to which the operation of particular categories of tribunals could be merged or combined in the interests of greater accessibility and efficiency; the merits of creating a single management and administrative structure covering tribunals; and the adequacy of existing appeal rights and the desirability of providing different arrangements including a single appeal mechanism operating outside the ambit of the State's higher courts. The inquirers anticipate they will report this year.[70]

## 1994: PARLIAMENTARY PROPOSALS CONCERNING STATE AGENCIES

In the Thirty-Sixth Report of the Standing Committee on Government Agencies of the Legislative Council of the Parliament of Western Australia, made on 27 April 1994, the view is expressed "that the time has arrived when a more coherent approach can profitably be adopted to the question of administrative decision-making and review".[71] In relation to judicial review the Committee said that "if there is to be an orderly system of open decision making, it is logical to the committee that judicial review is an integral part of that process".[72] The Committee report attaches a draft State Agencies Bill 1994. Relevantly, the Bill spells out basic procedural requirements deriving from procedural fairness and the principle that no-one should be a judge in his own cause.[73] In relation to judicial review it proposes that provision would be made that where an enactment specifically provides for review of an agency decision, the person seeking review can opt to proceed either under the proposals for judicial review or the specific provisions of the enactment.[74] The Bill proposes that where a court finds an agency decision is made in excess of power or jurisdiction; in the absence of, or without proper regard for, procedures; in an arbitrary or capricious manner, or as an abuse of discretion or is unsupported by the weight of substantive evidence; or where facts in issue by consent are unsupported, it may in its discretion annul the agency decision and remit or otherwise deal with the matter.[75] In addition, it is proposed that such a provision would be in substitution for and to the exclusion of any review or relief by way of prerogative writs or otherwise.[76] These recommendations do not introduce any proposals in relation to administrative review as such. Furthermore, they have the effect

70. Advice to the author from Inquiry Secretary (May, 1994).
71. WA Legislative Council *Thirty-Sixth Report of the Government on Government Agencies, State Agencies - Their Nature and Function* (Perth: Govt Printer, 1994) ¶ 3.4.
72. Id, ¶3.5.
73. Cls 14-17.
74. Cl 21.
75. Cl 24.
76. Cl 26.

of seeking to codify the conditions under which judicial review would take place, at least so far as such review relates to a State Agency. It is proposed that the Bill will receive public exposure at a series of workshops and that a revised Bill will be introduced into Parliament in 1995.[77]

The report introduces a further additional element to the blueprint it offers. It proposes that the power of judicial review be exercised by a judge of the District Court with an appeal to a Full Court of the District Court.[78] The Supreme Court would only be involved on appeal from that court. This would be a substantial re-alignment of jurisdiction, the Supreme Court having been the principal locus of jurisdiction up to now.

## OTHER BLUEPRINTS

The Guardianship and Administration Act 1992 (WA) became fully operational by 20 October 1992. It provides for the vesting in a Guardianship and Administration Board of the jurisdiction previously exercised by the Supreme Court in relation to guardianship and administration. In contradistinction to the models adopted in other States and Territories, this Act provides for the chairperson of the Board to be a judge of the Supreme Court and for the deputy chairperson to be appointed at the level of a Registrar of the Supreme Court and to hold such an appointment. The consequence is that this new tribunal has been established under the umbrella of the Supreme Court, with rights of appeal to it but with markedly different obligations in respect of formality of procedure.

There is a further model available for consideration in Western Australia which has not yet been formulated into a blueprint. It is the model referred to but not developed by the WALRC in its 1982 report as a general appellate body in the form of an administrative court. If the recommendations of the Royal Commission are heeded and it is now considered inappropriate to create an administrative law division in the existing court system but, nevertheless, the consensus reached between the Law Society's Courts and Administrative Law Committees is observed, it would be possible to create an administrative court to which judges of the Supreme, District and Magistrates' Courts could be assigned as appropriate for the hearing of applications relating to appeals from administrative actions. This would enable sittings of the Court to be constituted by a mix of Supreme or District Court judges, Magistrates and lay persons in a manner appropriate to the particular appeal. The establishment of a court would provide the aura of security not generally present for tribunals, but would nevertheless keep administrative review separate from the general business of the court structure.

77. Advice to the author by the Clerk of the WA Legislative Council (2 June 1994).
78. Cl 25.

## BLUEPRINTS – SUMMARY

The blueprints available for reform of administrative review in the State jurisdiction of Western Australia are therefore threefold:

- The establishment of administrative law divisions within existing courts. Although this was the approach adopted by the WALRC the recommendation of the Royal Commission against this course must make its adoption less likely;
- The establishment of a general appellate tribunal along the lines of the Commonwealth and Victorian Administrative Appeals Tribunals;
- The establishment of an Administrative Court by way of nomination of judges and magistrates from existing courts together with lay persons.

In considering each of these models it would also be necessary to distinguish between first tier and second tier review. The requirements of the latter may well justify quite different treatment along the lines of proposals recently discussed by the Australian Institute of Administrative Law.[79]

## MAJOR ISSUES FOR INVESTIGATION

There are presently six central issues for further investigation. The first is to review the reports and legislation at State level which have appeared since 1986. These include the Reports on Review of Appeals from Administrative Decisions by the Queensland Electoral and Administrative Review Commission and the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW). In addition, there is now available for examination the existence of an Administrative Appeals Division provided for in the District Court Act 1991 (SA) and experience in assessors sitting with judges as provided for in the Land and Environment Court Act 1979 (NSW).

The second is to again identify the tribunals and the existing appeal provisions in Western Australia. This involves a further up-date of the second Appendix to the 1992 report of the WALRC.

The third is that of cost and resources. This involves a consideration of the budgetary provisions made by departments for the existing range of tribunals. It may also require a consideration of whether all tribunals should be located under the portfolio of the Attorney-General, a suggestion which would be bound to bring departmental opposition. The Appendix to this article lists salient financial features of some Western Australian tribunals for which data is readily available.[80] The degree to which a tribunal is a

79. Aust Inst of Admin Law Conference *Towards a Tribunal Non-Proliferation Treaty* (Sydney, May 1994).

80. As the Appendix shows often to be the case.

positive source of revenue may be an important factor in resisting centralisation and in maintaining disparate departmental bases.

The fourth issue is whether the Rules of the Supreme Court can implement some of the measures of reform now sought in relation to judicial review. That issue seems to admit of further examination. The key to the proposal of the WALRC for amendment of the Rules of the Supreme Court was the origination of the review process by a single form of originating motion in place of orders nisi for writs of mandamus, certiorari, or prohibition. While the step to that process may at the time have required a re-thinking of other aspects of the Rules, that is not now the case. In making Rules under the Corporations Law the judges of the Supreme Court have approved a single initiating form of process. The time is now appropriate to reconsider simplification of judicial review by amendment of the Rules.

The fifth is the appropriateness of a general procedural Act for all tribunals, if they are to remain disparate.[81] The sixth is the need for introduction of a requirement for provision of reasons for decision — that cornerstone of review and arguably also of sound public administration.

## CONCLUSION

In the case of Western Australia, it cannot be said that the State is overtaking the Commonwealth in administrative law. After an early start in providing a Parliamentary Commissioner, administrative law reform has not attracted significant support leading to implementation. Freedom of information legislation was finally enacted as the consequence of the political aftermath of a Royal Commission into the Commercial Activities of Government. It may yet be the case that governmental commitment to implement the recommendations of that Commission or the Inquiry initiated by the Attorney-General will be productive of bringing greater cohesion and principled order to administrative review. In the case of judicial review, the best hope appears to be in amendment to the Rules of the Supreme Court. Until these steps occur, however, it cannot be the case that the Commonwealth is in any danger of being overtaken by Western Australia in this area.

81. Cf M Allars "A General Tribunal Procedure Statute for New South Wales" (1993) 4 Pub LR 19.

## Appendix

## Financial Features of Some Western Australian Tribunals as shown in Annual Reports to 1993

| Tribunal | Income | Surplus /Deficit | Govt Funding | Fee Income |
|---|---|---|---|---|
| Agriculture Protection Board | 17 012 751 | 121 954 | 13 824 943 | |
| Builders' Registration Board | 1 284 438 | 86 649 | | 1 036 567 |
| Dairy Industry Authority | 4 610 375 | 490 892 | | |
| Fire Brigades Board | 55 823 297 | (3 093 199) | 53 292 356 | |
| Hairdressers' Registration Board | 244 091 | 57 183 | | 217 055 |
| Medical Board (1992) | 636 813 | 17 744 | | 525 550 |
| Nurses' Board | 1 102 408 | 95 265 | | 1 102 4 08 |
| Real Estate & Business Agents Board | 269 134 | 15 422 | | |
| Settlement Agents Board | 376 344 | 372 344 | | 25 769 |
| Occupational Therapists Board | 33 914 | 6 410 | | 28 425 |
| Painters' Registration Board | 337 068 | 74 545 | | 312 523 |
| Pharmaceutical Council | 576 613 | 5 944 | | 290 539 |
| Podiatrists Registration | 36 037 | 4 100 | | 33 135 |
| Board Potato Marketing Authority | 129 999 | (94 470) | | (Sales) |
| Psychologists' Board | 110 121 | (25 867) | | 105 593 |
| Racing Penalties Appeals Tribunal | 103 648 | 26 656 | | |
| Taxi Control Board | 1 979 017 | 1 130 042 | | 796 523 |
| Water Authority | 478 108 | 82 659 | | 448 114 |