Administrative Law Values and Cultural Change

Commentary by Mark A Robinson, Barrister on a
Paper Delivered by Professor John McMillan, Commonwealth Ombudsman
at an AIAL, NSW Chapter seminar in Sydney on 24 July 2008

One cannot but be impressed by the work of the current Commonwealth Ombudsman and his busy office. I have a particular interest in the many immigration detention cases he spoke of as I am presently briefed to advise and assist the NSW Legal Aid Commission in managing over 100 of them to successful false imprisonment actions. I have had cause to read the Ombudsman's many reports in this area and they are all excellent and most valuable sources of research.

Professor McMillan's talk has raised many issues. Most of them are fundamental to the ultimate achievement of the central tenets and goals of administrative law in a representative democracy.

We need to remind ourselves of these from time to time. Tonight is a good opportunity to do so. The primary tenets of administrative law are to ensure that in the making of administrative decisions, there is :

a. legality;
b. fairness;
c. participation;
d. accountability;
e. consistency;
f. rationality;
g. proportionality; and,
f. impartiality.

Each of the players and systems that comprise the administrative law system in Australia have their own focus within these tenets, their own subset of goals and, their own work to do.

The major players in the Commonwealth field are:

a. the Ombudsman;
b. the Administrative Appeals Tribunal;
c. the Courts : the High Court of Australia, the Federal Court of Australia & the Federal Magistrates Court;
d. the Administrative Review Council; and, at times,
e. the Australian Law Reform Commission and the Auditor-General.

Parliament and the executive become major players from time to time not merely by reason of making of legislation and statutory rules, but by the standing committees and by setting up ad hoc inquiries and commissions which are often so very effective.

The major systems in the Commonwealth field are still:

a. Merits review (internal and external);
b. Judicial review;
c. Freedom of information;
d. Ombudsman review; and,
e. Continuous advice, review and law reform activities of the Administrative Review Council.

I would also include "self help" as a major "system" in and of itself. In many ways, particularly for legal practitioners, it is the most useful one of all.

The primary aim of judicial review is to ensure (and to some extent, enforce) legality, namely the legal correctness of administrative decisions. It seeks to prevent unlawful decisions standing on the public record.

The primary aim of an external merits review process is to provide a review applicant with a correct or preferable administrative decision, while at the same time, improving quality and consistency in relation to the making of decisions of that kind. It is an aid to good public

administration while providing an individual with administrative justice.

The aim or object of freedom of information legislation should be (as was determined by the ARC Report No. 40 and the ALRC Report No 77 in 1995 in "*Open Government: a review of the federal Freedom of Information Act 1982*" at paragraph 4.7) "to provide a right of access which will:

- enable people to participate in the policy, accountability and decision making processes of government;
- open the government's activities to scrutiny, discussion, comment and review;
- increase the accountability of the Executive;

and that Parliament's intention in providing that right is to underpin Australia's constitutionally guaranteed representative democracy."

Ombudsman, whistleblowers, privacy and anti-corruption agencies also do their part.

My point is: - the entire package of administrative law players and systems works well together most of the time.

It does so because it is a package and the modern version of it was designed to be such (see: the Kerr, Bland and Ellicott Committee Reports as reproduced in The Making of Commonwealth Administrative Law compiled by Robin Creyke and John McMillan in 1996 Published by the Centre for International and Public Law, Law Faculty Australian National University)

I do not regard one component or group of components as being more effective or as more important overall than another. There is not and should not be "competition" between them - they are complementary (of the administrative law system) and they often rely on each other in different combinations in order to be effective.

At times, one component is or appears to be more effective or useful than another. For

example, the Commonwealth Ombudsman's Office at the moment is positively shining and plainly moving from strength to strength.

The Ombudsman has many in-built advantages. He is and seen to be independent and a moral exemplar. He can take the high moral ground. He can also pick his cases, being the most important ones that will likely effect systemic change. Most of us do not have that luxury of choice. Very often, as legal practitioners, there is only the case now before us. We do the best we can with it.

Only on occasion can legal practitioners generate effective change without clients first attending on them with a particular problem. For example, recently, on a Friday afternoon, while reading the NSW Gazette (as you do), the keen eye of Cameron Murphy, the President of the NSW Council of Civil Liberties fell upon the late promulgation of a new World Youth Day regulation in Sydney. An opinion was obtained from Jeff Shaw and John Griffiths SC and two law students were then found to conduct a test case in the Federal Court. They swore an affidavit and lodged it along with two condoms at the Sydney Registry of the Federal Court (see: "World Youth Day 'anti-annoyance' law be damned: appalled barristers quick to fight state" *The Australian,* 18 July 2008). The case was partly successful in that, just before World Youth Day commenced in Sydney in July 2008 and after an urgently convened hearing, the Federal Court declared that clause 7(1)(b) of the *World Youth Day Regulation 2008* was invalid, as it was beyond the regulation making power conferred by s 58 of the *World Youth Day Act 2006* (NSW), to the extent that it purported to empower an authorised person to direct a person within a "World Youth Day declared area" to cease engaging in conduct that causes annoyance to participants in a World Youth Day event - *Evans v State of New South Wales* [2008] FCAFC 130 (French, Branson and Stone JJ).

Judicial review can at times be a most effective and useful process. However, I agree with Professor McMillan that its impact is often overemphasised, overanalysed and overrated. I partly blame Australian university law schools for this. Examine most law school course outlines in administrative law and there is an undue emphasis of the subject of judicial review. Judicial review is a tool of last resort. It should be taught as such. Much greater emphasis should be given to the processes and remedies of self help, internal merits review,

tribunal review, freedom of information and ombudsman intervention. However, many law schools are fixated on judicial review.

Professor McMillan has prepared in his paper an impressive and commendable list of recommendations for lasting change concerning education and other positive measures to instill such cultural change.

In NSW, when devising the creation of what came to be the Administrative Decisions Tribunal of NSW, a "super-tribunal" of both external merits review and other original jurisdiction combined, the following was placed into the objects provision of the Act (s 3 of the *Administrative Decisions Tribunal Act 1997* (NSW):

> (f) to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs,
>
> (g) to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales.

It is a pity those provisions did not make their way into the body of the Act as separate and positive legislative requirements. Perhaps that is for another day.

As to his discussion of the Immigration Department's recent upheavals, I do not agree with a central premise of Professor McMillan's paper to effect that intensive judicial review and administrative review had little impact in instilling the right cultural values and attitudes in immigration administration and that what had gone wrong may have primarily been caused by sloppy internal systems and a lack of internal rigour in respect of detention decisions. It was also suggested that the "complexity" of government and its regulations might be to blame as well as clashing or overlapping agency obligations.

My theory on this is that the former federal administration (led to the charge by the administration before that) manifested such a culture of continuous and comprehensive

legislative reform in this area that lower level administrators could correctly assume that the outcome of most if not all court decisions did not matter much because the Commonwealth Parliament would shortly be legislating amendments to remove or rectify the perceived problem. Migration reform was, for much of the 1990s and the early 2000s, touted as a high priority and as a special case for parliament and the role of the courts was played down (and often publically criticised) from the highest echelons in the Immigration Department.

In this environment, combined with escalating tension created between the courts and the parliament over the scope and validity of many of those legislative amendments, culminating in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 - the immigration department was ripe for change.

The Cornelia Rau and Vivian Alvarez cases were only the triggers. They were given much publicity by the Australian media. In the absence of the other significant tensions and stressors of the day, I doubt very much whether there would have been the calls there were for major structural reform.

All of these tensions move in cycles and that is why the administrative law system works best when all the components are utilised at the appropriate time.

As Matthew Smith, Federal Magistrate, explained in his paper, "*The Constitutional Right to Judicial Review of Administrative Action: Reflections on Bodruddaza*" in (January/February 2008) 84 *Precedent* 39 immigration used to be relatively peaceful department and free from judicial review up until the mid 1980s. The department did not like the early scrutiny by way of judicial review mostly under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and responded with the introduction of detailed mandatory statutory criteria for classes of visas and entry permits. This culminated in the present (as Smith describes it) "legal morass which is the *Migration Regulations 1994*". Lawyers were excluded from giving immigration assistance in 1992 and a failed system of a modified ADJR grounds of review also set up in that year (omitting natural justice and some other grounds of judicial review). The High Court was inundated with applications under its Chapter III "constitutional writ"

jurisdiction and migration class actions flourished. I was involved in the very last one for about 6,700 on-shore refugee applicants in the High Court of Australia in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601; (2002) 76 ALJR 966 before they were banned in future by yet more legislation (see my discussion of this in "*Refugees and Natural Justice - the High Court Decisions in Muin and Lie v Refugee Review Tribunal: Procedural and Substantive Aspects*" in (2002)(6) *Immigration Review* 91). Then, all immigration litigation was to be confined by the enactment of the mother of all privative clauses, ultimately held to be ineffective in the face of jurisdictional error in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

During the hearing of the *Bodruddaza* case in the High Court, Chief Justice Gleeson was moved to remark during argument that the invalid time-limit on the Constitutional jurisdiction provided yet another illustration of "*legislative overkill*" in Parliament's efforts to place special restraints upon applications for judicial review of the administration of the *Migration Act* (see Smith at p 42).

The raft of migration legislation continues in 2008 (see the *Migration Legislation Amendment Bill (No 1) 2008*) in spite of the commendable changes to the immigration department described by Professor McMillan. This, in my view again potentially sows the seeds of administrative complacency which leads to sloppy internal systems and atrophy.

In a paper given earlier this year ("*The Expanding Ombudsman Role: What Fits What Doesn't*" on 27 March 2008 to the Australia Pacific Ombudsman Region Meeting in Melbourne), the Ombudsman was right to say that his office must remain "adaptable and flexible in order to remain relevant".

From my perspective, for those of us who are mere legal practitioners, we should also be as "adaptable and flexible" in the day to day practise of administrative law both in order for us to remain useful and thereby relevant and in order to identify and reflect administrative values and thereby to effect cultural change where it is most needed.

There is much resistance to this concept by many practitioners. Practitioners are not directly

concerned with "cultural change". They have no immediate use for it. If it happens, it is a happy by-product of us acting in the best interests of the client. It might even be an accident.

It is much easier for a practitioner to hear a client's problem, define a "ball" and to put one's head down and run with it to the (sometimes bitter) end.

In my view, responsible legal practitioners would:

- Recognise and continuously review fully what items are available to be used in the modern Administrative Law Toolkit;

- Keep an open mind as to which one or more of those items to engage and deploy and when to do it and in what manner;

- Be prepared to think laterally and be alive to personal motivations, particularly on the part of various administrative decision-makers;

- Never underestimate the power and utility of "self help" remedies and combinations of remedies in order to achieve an end; and,

- Identify, support and engage groups and reform bodies that (in a realistic and practical way) makes our professional life easier, such as the Administrative Review Council and one of its spawn, the Council of Australasian Tribunals (COAT).

The modern administrative law lawyer must have a range of skills available. However, technical professional skills are unfortunately only a base requirement. One must have tactical skills, good timing, good judgment, a well developed sense of morality and fairness (as viewed from a number of perspectives), doggedness and, on occasion, rat-cunning. An ability to think laterally and outside the square is an advantage. A drop of ingenuity also helps (but it is in short supply).

Government lawyers each have a special and possibly crucial role to play in all this. They also bear special responsibility in that:

- They are often very close to the action, as it were;

- They often have the ability to influence senior administrative decision-makers to do the right and fair thing (both in process and in outcome);

- They often must be model litigants (see the formal requirements on the Australian Government Solicitor's office imposed by the Legal Services Directions made under section 55ZF of the *Judiciary Act 1903* (Cth));

- As representatives of public bodies, they must be "moral exemplars" - Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151 at 197C (Finn J);

- they should advise their agencies that judicial review and external scrutiny should be positively welcomed and that much can be learned by an agency as to proper and lawful behaviour as a result of exposure to same; and,

- they should heed the sage words of the new Commonwealth Solicitor General, Stephen Gageler SC (as reported in *The Australian* on 18 July 2008) and desire to see "right, fair and just outcomes" and not to desire to "win at all costs".

Finally, too often, in the face of raw and, on occasion, expanding statutory power, the best skill a legal practitioner can manifest is to know when to give up and move on!

I will do that now.

Thank You.