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ATTORNEY-GENERAL (NSW) V QUIN AND THE LIMITS ON THE EXECUTIVE'S RIGHT TO CHANGE ITS MIND

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The High Court's decision in Attorney-General (NSW) v Quin[1] contains fascinating discussion on a number of issues relevant to modern administrative law. These include Brennan J's doubts whether it is appropriate to seek judicial review with respect to advice tendered to the Governor (at 26); and his stress upon the need for caution in the making of declarations in administrative law when the availability of a substantive remedy is doubtful (at 31). The case also contains strong statements against confusing administrative law review and review on the merits; and a scattergun of positions about the role of legitimate expectation in public law.

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This note is however confined to the comments in the case about the legal

limitations upon the Executive's right to change its mind.

The key provision in the *Local Courts Act 1982* simply stated that 'the Governor may, by commission under the public seal of the State, appoint any qualified person to be a Magistrate' (s12). Initially the Executive decided not to appoint five of the 101 former magistrates in circumstances which were held in Macrae's Case[2] to involve a denial of natural justice. Subsequently the Attorney-General effectively undertook to ensure that the applications of the excluded magistrates would be considered on their merits by a fresh panel and excluding the Briese allegations of particular unfitness that had led to the Macrae decision unless an opportunity to respond to them was given. The Government case was that the decision in Macrae went no further than this and the majority of the High Court so held.

In 1984 the decision had been taken to appoint all serving magistrates other than the five plaintiffs in Macrae. The reason for excluding those plaintiffs was that the Government acted on specific adverse comments without giving the plaintiffs any opportunity of responding. In 1987 the Government announced that it would permit the excluded magistrates to apply but that it intended to appoint the most suitable persons offering without any special regard for the position of the former magistrates. This involved a change of the criteria for exercise of the otherwise general discretion to appoint 'any qualified person'. Mason CJ and Dawson J held that the Government was able to change the ground-rules in this way since the new decision was still within the scope of the statutory discretion. In doing so their Honours discussed the extent of the Executive's right to change its mind. Each stressed the general proposition that an unfettered statutory liberty could not be fettered by reference to an earlier practice or even an earlier indication that particular criteria would be applied in the selection process. In particular the Chief Justice cited a number of cases in support of the proposition that:

> The executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power (at 17).

He pointed out that:

> this principle extended beyond legislative powers and duties to common law powers and functions of the Crown or the Executive when they involve the making of decisions in the public interest (at 18).

What is interesting however is that various justices noted four possible limits upon the Executive's power to change its mind notwithstanding its liberty to exercise public duties and discretions.

The first, specific to the type of case involved in Quin, was quickly dismissed by the Chief Justice when he noted (at 16) that 'there is nothing in the materials which would support any suggestion that the change of policy was motivated by a desire to take into account the adverse materials regard to which gave rise to the decision in Macrae'. This statement is slightly ambiguous in that it leaves open whether the Chief Justice was concerned about a denial of natural justice arising from the lingering effect of the Briese allegations, or about the more direct contravention of the *res judicata* established by the declaration in Macrae itself. Perhaps both were encompassed. Neither of the other two justices in the majority seemed to advert to this matter, although each was at pains to confine the decision in Macrae to a past breach of the obligation of natural justice (Brennan J at 32, Dawson J at 50).

By contrast the dissenting justices saw the Government's change of policy in 1987 as contravening the decision in Macrae. To them further relief as sought by Mr Quin was called for in order to provide (in Deane J's words at 48) 'partial protection from the continuing injustice of a denial of procedural fairness' (see also Toohey J at 69). Citing FAI Insurances Ltd v Winneke[3] the dissentients noted the capacity of the Court to mould its relief consequent upon a finding of denial of natural justice in a way which will prevent the consequences of that denial becoming entrenched. Two possible methods of such entrenchment which were mentioned by Deane J were the unavoidable delays of litigation and the unilateral decision of the Executive to change the rules of the game (at 46). It is interesting that his Honour noted, without comment, that the law had not recognised a cause of action for damages for denial of procedural fairness. This issue is discussed at length in an interesting article by Professor Enid Campbell.[4]

A second and more general limitation upon the Executive's legal right to change its policies is found in the recognition by Mason CJ (at 18 and 23) and Toohey J (at 68) that there could be circumstances in which an estoppel could arise against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. This was said to derive from the fact that the public interest necessarily comprehends an element of justice to the individual. The Chief Justice noted the observations of Lord Denning in Laker Airways v Department of Trade[5] which supported this notion and the criticism of it by Gummow J in Minister for Immigration v Kurtovic.[6] Although not cited by his Honour, this idea of some limited role for estoppel in public law matters may be traced back to his discussion in Ansett Transport Industries (Operations) Pty Ltd v Commonwealth.[7]

In a passage that would I think be anathema to Brennan J and Dawson J, Mason CJ (at 23) contemplated that legitimate expectations of receiving a benefit or privilege might possibly, in an appropriate case, give rise to a right to substantive protection from the court provided that the court did not thereby cause detriment to the public interest intended to be served by the exercise

of the relevant statutory or prerogative power. Toohey J is also clearly of this view because he cited with approval a statement from Attorney-General (Hong Kong) v Ng Yuen Shiu[8] (cited in Quin at 68) that 'when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty'. What is interesting is that Toohey J applied this passage outside of a case involving a promise of procedural fairness (as in the Attorney-General (Hong Kong) Case) to a case where the promise was of a substantive nature (ie to treat former magistrates in a special category). He, unlike the majority justices, saw no difficulty in point of public policy in holding the Executive to this promised policy: see also Deane J at 48-49. It is not clear whether Deane J would go this far, since his decision in Quin seems to be based on narrower notions of *res judicata* flowing from the earlier case of Macrae. However other indications suggest that he could give support to the notion of fairness having a substantive content.

This concession of a judicial right to perform yet another balancing act will doubtless be an encouragement for those judges who have few qualms about second-guessing the Executive. There have already been some indications that the window of opportunity thus opened in these dicta will be seized upon. In the case about the Woolloomooloo Finger Wharf[9] Cole J saw no difficulty with the proposition that the State would have been liable in damages had it been party to a contract with an implied term that the State promised to override a planning refusal of the Sydney City Planning Committee.

A third rider noted by the Chief Justice, but left for examination on an appropriate occasion, was the 'conflict of authority upon the question whether a person who is adversely affected by a change of policy has a legitimate expectation which enables him to make representations' (at 24). Dawson J expressed the view (at 60) that it would only be in circumstances of a special kind that an individual would be entitled to a hearing before a departure from an administration policy affecting his other interests occurred. This proved to be a minority position when a differently constituted High Court heard Haoucher's Case.[10]

A fourth possibility of putting a break upon the Executive's right to change its mind was adverted to by Dawson J when he distinguished the case where 'a particular decision involves, not a change of policy brought about by the normal processes of government decision making, but merely the selective application of an existing policy in an individual case' (at 60). That was not an issue in Quin. However the open-endedness of notions that are based on a court's perception of the 'normal processes of government decision making' and 'selective application' of criteria, especially coming from Dawson J, shows the fecundity of administrative law. What to one judge might be seen as unfairness, to another will be lack of proportionality, and to another unreasonableness. In any case we are light years away from the time when, as one judge wrote to Lord Atkin after Liversidge v Anderson:[11]

Bacon, I think, once said the judges were the lions under the throne, but the House of Lords has reduced us to mice squeaking under a chair in the Home Office.

Endnotes

1 (1990) 170 CLR 1.

2 (1987) 9 NSWLR 268.

3 (1982) 151 CLR 341.

4 'Liability to compensation for denial of a right to fair trial', (1989) 15 Monash Law Review 383.

5 [1977] QB 643 at 707.

6 (1990) 92 ALR 93 at 121-122.

7 (1977) 139 CLR 54 at 75.

8 [1983] 2 AC 629 at 638.

9 Pivot Group Ltd v State of NSW (unreported, 17 July 1990).

10 (1990) 169 CLR 648.

11 (1942) AC 206.

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THE SOCIAL SECURITY APPEALS TRIBUNAL: ACHIEVING CONSISTENCY AND COPING WITH CHANGE

Anne Coghlan*

- presented to the Australian Institute of Administrative Law, 25 July 1991, Canberra

Specialist tribunal

The impact of administrative review and its role in improving decision making within the social security field has been well traced in a number of areas. I have myself looked at several areas in detail and traced the Government's and the Department of Social Security's response to issues raised in the course of administrative review.[1] We can see how manual instructions have changed or legislation has been amended to clarify matters in response to matters raised.

The specialist tribunal is particularly well placed to quickly identify areas of difficulty and to bring those matters to the attention of decision makers so that any adjustments can be quickly made and so that the system operates fairly and justly for all concerned. In the Social Security Appeals Tribunal (SSAT), during the course of a review, some matter may come to notice where there is a problem with forms, or Departmental instructions or procedures, or where the legislation operates harshly; in these cases, members are asked to bring those to attention. The matter is then taken up by the National Secretariat and sent to

the Minister or Department for their information and as they see fit for any appropriate action.

In the social security portfolio, processing times for appeals now are such that the area of responsibility will get feedback from us via the SSAT Liaison Section quite promptly. It is quite possible, though I am not familiar with any details, that they will also have had feedback through the Department's own internal review system. There is the opportunity then for the matters raised to be addressed quickly so that future clients can be assisted.

You may be interested in the sorts of matters that we have recently brought to the Government's and the Department's attention.

The matters that are brought to the Minister's attention generally relate to any anomalies in the legislation that are highlighted or where a particular class of cases might indicate that the law is operating harshly or unfairly. They would only relate to particular cases the Tribunal has dealt with, as it is not the Tribunal's role to comment generally on policy. These matters would generally be referred to in my Annual Report to the Minister.

For example, we have recently raised concerns about the limited scope for granting double orphan's pension. We have raised the anomaly of payment of additional benefit for a new born child only from date of notification whereas family allowance is paid from date nearest birth if the claim is lodged within 28 days. We have expressed concern about the harsh effect of short-term work on eligibility for resumption of rent assistance and its effect as a disincentive to work. We have continued to draw attention to the lack of discretion to pay family allowance unless a claim has been lodged within 4 weeks of a child's birth. We have brought to the Minister's attention the continuing large number of illegal entrants applying for refugee status who cannot be paid special benefit or any pension or benefit and yet have been given permission to work in this country, but can be left destitute.

Liaison with the Department on matters that arise in the course of review is far more frequent. These can range from simply bringing to their attention mistakes or omissions on forms to, say, highlighting what in our view are major problems in processing certain matters. Again, the issues arise because someone has applied to us for review.

As I said, the issues we raise might be quite simple ones, and yet the solutions can be quite difficult. We have had quite a few appeals from parents concerning payment of family allowance arrears where, following notification of the rejection of a claim for Austudy, the Department is notified of the rejection within 28 days, therefore preventing payment of arrears. The problem here is that family allowance is paid to a parent, and the Austudy claim is made by the family allowance child. The child, then, is the only one who is notified of the rejection, which can cause problems for the parent. Apparently the Department of Employment, Education and Training do not have the capability to record parents' details but have arranged for details of the 28 day restriction to be included in the rejection advice which is sent to the student.

We would quite often come across situations where the Department's advices to their clients have not been sufficiently clear, or where they have failed to give advice and have therefore created problems. As we would all appreciate, it is very difficult to express something that might be quite complicated in a simple and straightforward manner, especially where the audience may have difficulty with the language anyway.

Situations we have quickly highlighted were, for example, the failure to advise on the Unemployment Benefit First Income Statement of the potential effect of moving residence on future payment of benefit. As you could imagine, this would have had a devastating effect on some clients. I was advised in due course that all 'continuation forms' had been amended to advise clients of the need to contact the Commonwealth Employment Service (CES) before considering a change of location, and to the possibility of a non-payment period being imposed. Another situation is the case where there is lack of clear advice. For example, advice that both members of a couple have to notify, for example, changes in the income of one member. To the elderly pensioner who carefully notifies a change of circumstances it is hard to understand that the Department needs to be separately notified by the their spouse, particularly if it is a wife's pension that is involved.

There are those classes of cases too where, in our view, the procedures or processes adopted by the Department have not been in accordance with the legislation. We raise our concerns with the Department. The Department of course may take a different view of the law from us. The problem here is what has been done has been done and the cases come to us for review. The Department will then quite rightly appeal the matter to the Administrative Appeals Tribunal (AAT) and await for the outcome of such an application. It is unfortunate that this may all take some considerable time and the area of doubt not be resolved perhaps as speedily as it should be.

Whilst it is never pleasant to have difficulties or problems brought to one's attention, it is helpful to no one, particularly not to clients of the Department, to insist that the SSAT has got it wrong and to persist with a particular course of action. The SSAT is not infallible but it does have the advantage of seeing matters afresh and will often read words as they are written and not as they were meant to be written.

You may be wondering whether the Minister or the Department raises with the Tribunal any matters arising out of our review of decisions. Neither the current nor the previous Minister has ever done so. The Department, if it disagrees with our decisions, would simply appeal the matter to the AAT. The Department may occasionally let me know what their view of some interpretation of the law may be, but this would be rare and from memory only in a situation where they had chosen not to appeal the matter. Then, of course, we may still not agree with their view.

If we look at the most recent statistics, over the latter 6 months of 1990, approximately 3,400 appeals were lodged with the Tribunal. During that period 465 AAT applications about or

on SSAT decisions were finalised, although these finalised matters of course are not related to those lodged with us. Of those finalised by the AAT, the Department had appealed approximately 6% of our decisions and our clients had appealed approximately 9%. However,only one third actually went to a hearing, the balance being withdrawn, conceded or dismissed prior to the hearing. Of those heard, approximately half our decisions were affirmed. These rates of hearing and determination do not markedly vary.

The *Social Security Act 1991*

I am not aware how many of you here will have had the opportunity to look at the new style Plain English *Social Security Act 1991*. If you have, what first strikes you is its size, and this can be quite daunting. For the professional, used to using legislation, this is something completely new and many no doubt may take one look at it and just say it's terrible. We need to remember that it has been prepared with the non-professional in mind. The legislation has been set up in modules, one for each pension, benefit and allowance. One will be able, for instance, to go straight to the module of interest, and find out in that part all one needs to know. It is full of 'notes', 'sign posts' and 'examples' to make it easy to use.

The Tribunal will be the first external body to look closely at the legislation and, of course, to apply it and for us it is an exciting challenge.

With 180 part-time members and 20 full-time members, how have we gone about introducing this new legislation? We tackled it in a very practical way, and ran workshops in 5 locations throughout Australia. Background papers were prepared and sent ahead. These covered the background and structure of the new Act, how the transitional provisions worked, and some basic material on interpreting legislation.

Actual case situations were then used and workshopped in groups, so that members had actual practice working their way around the Act. The general feeling was that now that members had had a go using the legislation it was not as daunting as it first looked. It was important that members shared their concerns and realised it was new to everyone. Professor Pearce's book 'Statutory interpretation in Australia'[2] has proved very useful in assisting with interpretation of the transitional provisions and was also used extensively in one workshop case, where we covered a situation where the new legislation said something different from the old and our example went through the process of how one should present such a case.

On the question of interpretation of the law, of course I do not have the power to direct members how to interpret the law. However, in relation to the operation of the transitional provisions, if any member wishes to take a different view from the one that has been expressed to be our preferred view, they have been asked to argue their view fully and address all the issues raised in the very detailed and comprehensive background paper prepared by one of our legal members, and on which my general instruction has been based.

A recent example of very successful co-operation with the Department has been with the transitional provisions for the new 1991 Social Security Act. When we started to look at this legislation which would operate from 1 July 1991, it became clear that our view on which legislation would apply when a matter was reviewed by us where the delegate's decision was made before 1 July 1991, differed from the Department's. In our view, the legislation was clear and agreement was reached with the Department, so that we all took the same view. We were happy to provide the Department with the background papers that had been prepared for our use. However, the legislation was not so clear in relation to an undetermined claim as at 1 July 1991. Given that the new legislation should not have changed anyone's rights, and mindful of section 15AB(3) of the *Acts Interpretation Act 1901* and 'the need to avoid prolonging legal or other proceedings without compensating advantage' we are taking the same view as the Department and determining these matters under the new Act.

Consistency

My last comments lead me to talk briefly about how we endeavour to achieve consistency.

As I said, I cannot direct members on how to interpret the law nor of course on questions of fact.

If a new issue arises that involves an interpretation of the law, that case is generally circulated. In the initial stages, the views on interpretation may vary, but they generally settle quickly. If a member does wish to take a different view, it is expected that they will fully address all the arguments. In this way we strive to be consistent in our approach and deliver the same level of justice and fairness wherever one may be in Australia.

One must remember that our cases involve legal merits review, with different facts in each case. It is of course a nonsense to talk about consistency when facts are different. However, one might hear it said that 'the SSAT does not make consistent decisions in *de facto* marriage cases'. I often think that this comment arises from a misunderstanding. Of course the facts in each case are different, but it is also important to remember that, in deciding such a case, the legislation requires that 5 factors be considered. The legislation, however, does not say what weight is to be given to particular factors and still requires the decision maker to have regard to all the circumstances of the relationship. It would be most inappropriate to fetter the discretion of decision makers by directing what particular views should be taken on or weight given to any of the factors considered.

The Tribunal has also introduced its own internal issues folders. These are on separate topics and enable members to consider any background material, AAT or Federal Court cases and, of course, other SSAT decisions. This helps with consistency and also relieves members from continually reinventing the wheel.

Newstart program

This program involves a further change for the Tribunal. We will now be reviewing decisions made by CES

officers who have certain delegations under the Social Security Act.

CES is part of the Department of Employment, Education and Training and there is no history of external review of decisions that may have been made in the past.

We are particularly keen to see that things go smoothly, and have assisted in some of the training of their review officers. We hope we gave some context to the process of administrative review and to impress the need to refer to the legislation and to explain to an applicant why a particular decision was made.

We will be looking forward to giving CES as much feedback as we can, particularly as it is all so very new for them.

If we do strike problems with their procedures or their instructions, again we trust we will be in a position to raise this quickly so that such matters can be addressed as early as possible which is of benefit to all concerned.

Many of the matters under Jobsearch Allowance and Newstart Allowance will of course be fairly familiar to us. We will still be looking at matters to decide, for example, if someone has failed the works test or not, or reduced their prospects of employment by moving, in the same manner as we did with the previous legislation. What will be new to us will be reviewing the Newstart Activity Agreements. I imagine the cases that come to us will generally be whether or not someone has complied with the terms; on those questions we have power to make decisions. When it comes to actually reviewing the terms of a Newstart Activity Agreement we are only able to affirm the decision or set it aside and send it back for reconsideration in accordance with any recommendations we may make. Whether this will cause uncertainty or confusion for applicants we will only know as the program is implemented. If we become aware of particular difficulties we will of course be bringing those to attention as appropriate.

Disability and sickness support

There is legislation currently before Parliament that will introduce major reforms to income support for people who are disabled or sick.[3] Invalid pension will be replaced by disability support pension (DSP), which will have revised qualification criteria.

Sickness benefit will be replaced by sickness allowance (SA) with the idea that it will clearly not be payable on an indefinite basis. There will be a greater emphasis on rehabilitation and assistance to return to the labour market.

The challenge for the Tribunal then will be applying this new legislation. The Tribunal will be the first external body to review the legislation. There will be Tables for the Assessment of Impairment that will form part of the legislation, and all members equally will be expected to be able to use and apply these.

We will of course be ensuring that our members are given training in the use of the new legislation and in how to use the Tables, to ensure that they can take on this task in a confident and fair manner.

The new impairment tables will operate on diagnosed conditions and I imagine that in many ways the cases that will come to us may not be too different from many we already hear, where an applicant is saying that they have various symptoms, but for which there is no diagnosis. Looking at the tables, if one has diagnosed conditions it will not be difficult to actually cross the 20% threshold. The new challenge will probably be in other areas, for example, in deciding whether someone is severely disabled in portability cases or whether a person has a continuing ability to work.

Conclusion

What I have referred to in this paper is only a small part of our functioning. Yet it highlights for the specialist tribunal just how much there is to cover and thus how difficult it is to ensure that all Australians receive the same standard of review wherever they live. It is a challenge that I am confident that all members take on with enthusiasm and with a sense of striving to achieve our objective, which is to conduct review of decisions in a 'fair, just, economical, informal and quick' manner.

Endnotes

1 Coghlan, A, 'Can review bodies lead to better decision making?', paper delivered at 'Fair and open decision making: 1991 administrative law forum', 30 April 1991, Canberra.

2 Pearce, DC and Geddes, RS, 'Statutory interpretation in Australia', (Third edition) (1988, Butterworths Pty Limited, Sydney).

3 The *Social Security (Disability and Sickness Support) Amendment Act 1991* was passed by both Houses of the Parliament on 12 September 1991 and received the Royal Assent on 10 October 1991.

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LION HUNTER

Alan Cameron*

- presented to the annual general meeting of the Australian Institute of Administrative Law, September 26, 1991, Canberra

My immediate predecessor was fond of quoting an American commentator to the effect that while the office of an ombudsman was 'not very well equipped for hunting lions, ... it can certainly swat a lot of flies'. A disrespectful commuter to this national capital may be forgiven for observing that, when summer finally arrives, someone will have to swat the flies, so it may just as well be the Ombudsman. However, I think the time may have come to change the emphasis within my office, so that we set out to hunt more lions, on the basis that, thereby, that which attracted the flies in the first place will be reduced and the flies will tend to go away of their own accord.

Tempting though it is to seek to continue this analogy throughout this talk, there is a distinct risk of scatological humour replacing serious analysis; therefore, let me now speak unambiguously of what I mean. My office now receives over 30,000 approaches a year. Fortunately around 20,000 are misplaced - the caller is really looking for a state ombudsman, or an industry ombudsman or is simply complaining about private enterprise, or is looking for a telephone number - an increasing phenomenon now that directory assistance has become slower and less user friendly. But that still leaves over 10,000 contacts which require some consideration, by a total staff of around 70. Again fortunately, many of these can be dealt with virtually instantly, because it is obvious that we cannot help, or should not because they have another remedy open to them, or whatever.

But the sheer number of complaints which remain and require action by my office, ranging from a telephone call, or a letter, means that my staff tend naturally and inevitably to concentrate on handling that person's immediate concern. The person is frequently emotionally involved in the cause of their complaint, and I do not want my staff to be so remote and detached from their complainants' feelings that they have no emotional reaction in response. But this natural desire to remove the immediate cause for complaint, and move on to do the same for the next, may mean that we do not achieve the optimum result overall.

For example, underlying deficiencies in departmental training or practices are less likely to be identified and drawn to the department's attention. A second consequence, which I mention but immediately concede is trivial, is that annual reports of such an office would be rather boring. A third, of far greater significance, is that the staff of such an office would tend to be preoccupied with processing the complaints, rather than giving them individual attention. We all know that the chief characteristic of fly swatting is that it is a process that never ends.

But what concerns me is that unless we do occasionally seize upon major issues, we will miss out on or work having any exemplar effect. Unless there is the occasional *cause celebre*, the incident which brings the Ombudsman to bureaucratic and public attention quite forcibly, the office runs the risk of being thought to be trivial, and perhaps being trivial, because it only deals with matters identified by others as trivial, even if highly important to those directly concerned.

I have therefore sought to introduce some changes in how the office works, in order to increase the chance of the exemplar effect having a chance to apply. The Deputies and I now constitute an executive, to which investigation officers are encouraged to refer matters of moment at an early stage. Despite our notorious lack of resources, a policy task force has been established to seek to ensure that any such matters can be given due priority; unless there are investigation officers who do not receive the calls and letters which flood in and distract them from the priority matters, those matters will rarely come to attention.

To a person brought up on the 'grievance man' concept of the Kerr

Committee,[1] this may well seem heretical. That Committee thought in terms of individual complainants receiving individual solutions, but that seems to me to be too limited. Nevertheless, I want to stress that I am not just talking about identifying and remedying what are usually called systemic problems; I am seeking to have an impact in part by highlighting issues which require attention because of their general impact, even when no particular remedy can be found.

Incapable of determination

One area where action by my office in one or two instances might have significant flow-on effects is in the police complaints area. At present, as most of you would know, our role is in practice confined to reviewing and reporting on the results of investigations conducted by the Internal Investigations Division (IID) of the Australian Federal Police. It was not the intention of the Law Reform Commission that this should be our sole role, but a shortage of resources has prevented any significant investigations by my office. At the same time there has continually been a high proportion of complaints under the *Complaints (Australian Federal Police) Act 1981* which cannot be determined one way or the other, a source of frustration to complainants and officers alike.

The proportion of complaints which were not capable of resolution was 26% in the year to 30 June 1991. This is clearly quite unsatisfactory, and we will address that this year. Hopefully, with the assistance of extra staff to be recommended by the Senate committee reviewing my office,[2] it will be possible to conduct some of the investigations of those matters which on first blush are clearly going to involve a conflict of evidence. Such investigations will enable my staff to form an opinion as to who should be believed in cases of a stark dispute to the facts; but there may need to be a legislative change as well.

When the police complaints regime was originally proposed, the Law Reform Commission suggested that the civil standard of proof then in operation before the Police Appeal Board should continue: I quote from para 167 of ALRC Report No 1:

> Although the standard is the civil standard, the degree of satisfaction will, quite naturally, depend upon the seriousness of the charge laid. The Common Law has in this regard proved itself a flexible and appropriate instrument as is shown by a reading of the decisions of the High Court of Australia in Briginshaw v Briginshaw (1938) 60 CLR 336, Helton v Allen (1940) 63 CLR 691 and Rejfek v McElroy (1965) 112 CLR 517. In the Commission's view the present position should not be changed. Indeed to do so might well put at nothing the power of the Tribunal to determine that class of misconduct by police which, while not warranting criminal prosecution, must be punished if the good order and discipline of the force are to be maintained.

Nevertheless, a regulation was promulgated in 1985 making all disciplinary proceedings subject to proof on the criminal standard. That seems to me to be unreasonable; and puts police officers in a preferred position over public servants. (The *Complaints (Australian Federal Police) Act 1981* was amended in 1987 to allow for the standard of proof to be the subject of regulations, and there should therefore be considerable doubt about the validity of the 1985 regulation.) I propose to suggest its repeal, thereby allowing the return to the flexible standard espoused in Briginshaw, which for those who have forgotten, provides in the words of Mr Justice Dixon, that 'when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found... The seriousness of an allegation made, ... or the gravity of the consequences flowing from a particular finding ... must affect ... whether the issue has been proved to the reasonable satisfaction of the tribunal'. That standard ought to hold no fears for an officer; the criminal standard tends to dissuade my office and the IID from pressing matters where reasonable satisfaction is felt, but not beyond reasonable doubt.

Nor am I convinced that my office is necessarily restricted at present to reporting based on the criminal standard. The complainant, the Commissioner and the officer are entitled to my office's view of the complaint, even if disciplinary proceedings cannot ultimately be taken. That is no more unjust than the process of a Royal Commission or other commission of inquiry.

It is a worldwide phenomenon that police complaints are hard to resolve, but our strike rate is not satisfactory to the police officers or the public.

Reports to Parliament

Taking on major cases, especially ones where the government already has a strong view, may well lead to more cases coming to the point where a report to the Parliament has to be considered. The assumption at the time the Ombudsman Act was drafted was that Parliament would intervene to require the Executive to remedy a problem identified by the Ombudsman.

The lack of action on each of the only two section 17 reports to date may throw some doubt on the assumption, but my concern now is whether I can take the 'risk' of lodging any more section 17 reports. I have decided recently not to take 2 matters to the Parliament, on the basis that, while the cases were persuasive, they were not compelling. It was certainly in my mind, however, that if I were to report to Parliament and again be rebuffed, it may look to some people as though my office were incompetent of ineffective, and this may be a difficult claim to negate. My personal perspective is that history shows that the instances at Commonwealth level of Ombudsman recommendations which are controversial with government are so few that the government ought to be prepared to go quietly even when it disagrees with the Ombudsman.

Is there an alternative? There may be. Several witnesses at the Senate Committee raised the possibility of the Ombudsman being entitled to designate a report to Parliament as a

category of disallowable instrument, so that it would take effect unless either house of parliament moved to disallow it within 15 sitting days. The recent determination of the NSW Legal Fees and Costs Board provides an example of the device and its effect, as it was duly disallowed. At the risk of killing the proposal before it has got off the ground, I mention that the *Remuneration Tribunals Act 1975* also provides a model for this suggestion.[3] The advantage is that the government can choose to prohibit the decision if it regards it as unworkable for financial reasons or because of the dangerous precedent it would set; on the other hand, if the decision relates to a body like the Australian Broadcasting Corporation (ABC), over which the government is unwilling or unable to exercise control, the decision is taken without its having to act. I look forward to a debate on the desirability of such a change - I know that in one important respect, it breaks the rules of ombudsmanship, by providing a determinative power, but in substance if not in form, the power is given to the Parliament. (It would not be a disallowable instrument as defined in section 46A of the *Acts Interpretation Act 1901*, however, in order to ensure that a mere notice of motion was not sufficient to prevent it taking effect. The instrument may well have to be in the form of a requirement to pay compensation.)

Finding the right remedy

Another lion at which my predecessors have taken aim from time to time but been unable to do more than wound, is the tendering process. The recommendation in the Industrial Sugar Mills case that the unsuccessful tenderer should be compensated for its loss of profit was not accepted by the government, or acted upon by the Parliament, even though supported by the Senate Standing Committee on Constitutional and Legal Affairs.[4] There also being a convincing case that the appropriate remedy in such cases is the reimbursement of the costs of the tender, I propose to continue Dennis Pearce's policy of restricting my recommended remedy in most cases to such reimbursement. Dennis explains the reasoning so well in the 1987-88 annual report that I will leave you to read that.

The question of appropriate remedy is one that continues to arise in quite difficult circumstances. Let me construct a hypothetical case. Assume a veteran complains that he had been misled about his eligibility for a Defence Service Loan, with the result that he had committed himself to acquiring a swimming pool to be funded by the loan, before he was told that there had been an error and he was not in fact so entitled. He had certainly acted with alacrity, in that he had committed himself to the construction of the pool on the same day that he claimed to have been misled, with the result that the correction of the error the following day was too late to prevent his loss. you may say, what loss? Well, the pool company apparently told him that to cancel the contract would cost him $6,000 of the $12,000 price; he sought no legal or other advice on that proposition. He used other money which he had to pay for the pool, but still wanted compensation for the lost opportunity to use the loan to which he believed he had an entitlement. By the time we came to consider the matter, he had completed the construction of

the pool, which with surrounding works cost closer to $20,000. But he had also sold the house and moved on. He produced a letter from the real estate agent saying that the pool had added only $12,000 to the value of the home.

I find it difficult to see that such a complainant has really suffered a loss of a kind which merits an act of grace payment. I cannot find such material which sets out the principles underlying the calculation of act of grace payments, but it seems to me that those rules must include the following:

1 Claimants must themselves take reasonable steps to mitigate their loss. In this case, I would query whether failing to take steps to cancel the contract was reasonable. Perhaps the loss was the nominal amount to which the contractor would have been entitled on termination, but once the complainant chooses to go ahead and build the pool, even that 'loss' may have been subsumed.

2 The result must not be to enrich the claimant, meaning that subsequent events can and should be taken into account to decide whether there was a loss and of what amount. In the hypothetical case, the benefit of having the pool and the subsequent sale at a price which substantially recouped the cost of the pool, have to be taken into account.

3 Any set of principles worthy of the name would have three elements. I cannot think of a third which is entirely satisfactory, but let me venture for discussion the proposition that the overall reason of the case must be considered. The posited situation has some unreasonable features but assume that at the time you are considering the claim, you become aware that the same person has lodged a further claim, on the basis that he has visited another office, explained his veteran status over the counter, again been told that it seems that he is entitled, and goes out and makes a commitment, only to be informed quite correctly within 24 hours that he is not and never has been entitled. Such a person would seem to have made an art form out of so describing his history as to create the impression that he has an entitlement; clearly one should reject the second claim, in my view, but should that affect the first? One does not seek to exclude the claim of the gullible, but should one by sympathetic to the guileful?

Ombudsman as plaintiff; as simple as ABC

When I was preparing to address students at Wollongong University recently, I was told by the lecturer that he still had a problem convincing students to take the ombudsman part of the course seriously, because there were so few cases in the law reports. That is certainly true, and perhaps the reason is that ombudsmen do not want to take the risk of losing. My predecessor and I have both gone on record as saying that we consider it inappropriate to litigate the dispute over jurisdiction with the ABC; the

uncertainty may well come to an end shortly, with the government about to release a white paper on the subject. There is also a private member's bill before the parliament which will explicitly put the ABC within my jurisdiction for all purposes - the mover has said that it is his aim to make the Ombudsman the 'arbiter of good taste' on the ABC.[5] Some would say that would be a part-time job.

Be that as it may, the Attorney-General's Department submission to the Senate Committee suggested that it would not be inappropriate to resolve this question by litigation - after all, the Parliament had specifically amended the Ombudsman Act to provide for the referral of such matters. Having regard to that comment, and the fact that user-pays for legal services comes in next July; if the government does not resolve the ABC issue one way or the other quite soon, I do intend to review the possibility of a Federal Court action. I suppose that in the context of lions as targets, an organisation run by David Hill is in the category of a mountain lion.

I am making my own contribution to the judicial workload at present, if unwillingly. For the first time, a complainant to my office has applied to the Federal Court for judicial review of my decision not to re-open his complaint. The Senate Committee has been interested in where complainants dissatisfied with the Ombudsman's office could go for redress - the answer at present is generally to the Ombudsman himself. Parliamentary committees, whether general or specific, do not provide an appropriate vehicle for reviewing the handling of individual complaints. I might say that the lack of a formal appeal is no more unusual in my view than the finite number of appeals available in the court system; it is because the Ombudsman has no determinative power that no more obvious appeal mechanism is needed. I look forward with real interest to the Court's hearing and decision

Access to administrative review

A research project of the Administrative Review Council, conducted under the aegis of the Multicultural Australia Project, has found a low level of understanding of the administrative review system generally in various ethnic groups which it surveyed. The Report, which was launched on Monday by the Attorney-General in Melbourne and in a shameless publicity stunt by me (almost) simultaneously in Sydney, recommends that my office act as a central reference point for those who are dissatisfied with a government decision, but who do not know what remedies are available. It is also suggested that my office adopt a leading role in the dissemination of information about administrative review, particularly the basic message that one can complain or appeal. Subject to resources permitting, I will be happy to do so.

Coincidentally, I have noticed that I am not alone in considering the issue. The Ontario Ombudsman's Annual Report 1990-91 noted that it had been one of her major objectives to deal with public awareness of how to access the Ombudsman's services, correct knowledge as to what those services are, and public access to the services. To assist in achieving this objective, she commissioned a survey on public

awareness, which confirmed her suspicion that 'far too few people were aware of the Ombudsman - particularly the people who might be more vulnerable to unfairness and who have limited resources to deal with the problems which result'.

The survey, conducted by telephone of randomly selected Ontario residents, revealed the following:

> one person in five said they had a complaint in their dealings with government administration, most frequently about delay or unfairness; most had done nothing about it;
>
> those most vulnerable (defined as membership of a racial minority, arrived in Canada within the last 5 years, a single parent, or limited in daily activities for health reasons) have a higher proportion of complaints;
>
> 0.6% (six people in every thousand) contacted the Ombudsman about their complaint);
>
> 69% were aware of the Ombudsman, and generally had an accurate perception of the Ombudsman's jurisdiction and mandate - but awareness was positively correlated with education, negatively correlated with vulnerability. And awareness was low compared to the Ontario Human Rights Commission (95%) and the Worker's Compensation Board (97%).
>
> 52% of Ontarians feel that they are not well protected against unfair government action. This sense is particularly marked among those who are most vulnerable.

To place the level of recognition for the Ontario Ombudsman in context, for I believe it is very high, I should say that she has one of the largest and best funded Ombudsman offices in the world, with a network of offices, and a staff of 120. Nevertheless, I wonder what your guesses would have been as to the level of knowledge in the community at large in Australia of the jurisdiction and mandate of the Ombudsman; of course, in this room, I would expect a perfect score of 100%. The menu for dinner tonight doubles as a survey form, but in flagrant violation of relevant privacy principles will not be anonymous, I hope in any event to have given you food for thought.

Endnotes

1 Commonwealth Administrative Review Committee. Its Report is reproduced as Parliamentary Paper No 144/1971.

2 The Senate Standing Committee on Finance and Public Administration.

3 See section 12DD.

4 See Senate Standing Committee on Constitutional and Legal Affairs, Report on the Commonwealth Ombudsman's Special Reports, Parliamentary paper no 446/1986.

5 The Ombudsman Amendment Bill 1991 was introduced by Mr MacKellar MP. A Private Senator's Bill in similar terms was introduced in the Senate by Senator Herron.

* Alan Cameron is the Commonwealth Ombudsman.

LETTER TO THE EDITOR

I found your recent Newsletter [No 6] very interesting. There are however a couple of points which I feel should be made, arising from the article by John Bundock on 'AAT - New Practice Directions'.

1 I was surprised to read that '[w]here the parties reach a settlement without a conference the AAT will still need to list a conference'. The decision of Davies J in Re Lombardo and Commonwealth of Australia (1985) 8 ALD 334 appears to me to suggest that the Tribunal may give effect to an agreement by consent, even where the requirements of subsection 34(2) have not been complied with. Section 34 has a mandatory effect but the Tribunal has a discretion to give effect to an agreement by consent even in other circumstances. This is the interpretation given by Pearce, Administrative Law Service, para 254(A), page 1815.

2 I do not understand what Mr Bundock means by suggesting that the AAT 'is often more court-like than many courts in insisting on persons who have made statements giving their evidence orally, on oath, before it is admissible.' In my experience this is not a fair criticism of the Tribunal. I would be interested to know what we do that is 'more court-like than many courts'.

3 I agree with Mr Bundock's discussion of the circumstances in which good decision making will be best served 'by permitting surprise in cross-examination', which is supported, as he pointed out, by the Federal Court in Australian Postal Commission v Hayes and Another (1989) 87 ALR 283 and also by the Tribunal in Re Lindsay and Australian Postal Corporation (1989) 18 ALD 340. It is however worth pointing out that in Re Parremore and Australian Postal Corporation (1991) 13 AAR 201 the Tribunal more recently has reached a different conclusion, based on an interpretation of new provisions in the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*.

Yours sincerely

Joan Dwyer
Senior Member
Administrative Appeals Tribunal

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW

MEMBERS NOTES

(accompanying Newsletter no 7 1991)

GPO Box 2220
CANBERRA
ACT 2601

Annual general meeting

The Institute's 1990 annual general meeting was held on 26 September at University House, Canberra. Approximately 30 members were in attendance.

The President of the Institute, Professor Dennis Pearce presented a report to the meeting on the activities of the Executive Committee over the previous 12 months. A copy of that report has been circulated to all members.

The Treasurer, Dr Gary Rumble, presented an audited statement of income and expenditure and an audited balance sheet for the 1989-90 financial year. An abbreviated version of those accounts, which indicate that the Institute now has a relatively healthy financial position, is attached to these Members Notes.

The meeting then considered the nominations for positions on the Executive Committee for 1990-91. The Secretary, Stephen Argument, reported that, as there was an equality between the number of vacancies in each category of office and the number of nominations for each relevant category of office, pursuant to subrule 29(3) of the Rules of the Institute, the following persons were elected:

President - Professor Dennis Pearce (Dean, Faculty of Law, Australian National University);

Vice Presidents - John McMillan (Senior Lecturer, Faculty of Law, Australian National University) and Deputy President Robert Todd (Administrative Appeals Tribunal);

Treasurer - Dr Gary Rumble (Partner, Blake Dawson Waldron);

Secretary - Stephen Argument (Secretary, Senate Standing Committee for the Scrutiny of Bills);

Officers - John Carroll (Principal Legal Officer, Attorney-General's Department), Kathryn Cole (Director, Law and Government Research Group, Parliamentary Research Service), Alan Hall (former Deputy President of the Administrative Appeals Tribunal), Geoff Kolts QC (Partner, Freehill Hollingdale and Page) and Pamela O'Neil (Principal Member, Immigration Review Tribunal).

The meeting considered and approved an amendment to the Rules of the Institute relating to the service of notices on members by means of facsimile and document exchange facilities.

The meeting set the membership fees for 1991-92 at $100 for institutions, $30 for individuals and $10 for students and persons not engaged in paid employment (see separate item below regarding membership renewals).

At the conclusion of the formal business, the meeting was addressed by Alan Cameron, the Commonwealth Ombudsman, whose topic was 'Lion hunter'. Mr Cameron's paper is reproduced in Newsletter No 7, which accompanies these Members Notes.

President:
Dennis Pearce
(06) 249 3398

Secretary:
Stephen Argument
(06) 277 3050

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW INCORPORATED

INCOME AND EXPENDITURE STATEMENT
FOR THE YEAR ENDED 30 JUNE 1991

	1991 $	1990 $
INCOME		
Membership subscriptions		
- Individual	6,270	4,560
- Organisation	2,700	2,300
- Student	30	70
- Not in paid employment	10	40
Interest	315	233
Conference and Dinner surplus	15,071	2,955
Donation	20	-
Miscellaneous	250	-
	24,666	10,158
EXPENDITURE		
Word processing	371	2,761
Stationery/postage	1,702	1,118
Notices	79	591
Speakers dinners and executive luncheon	251	81
Typesetting	120	1,086
Bank charges	87	24
Travel	492	-
Meeting Refreshments	239	-
Miscellaneous	810	-
Audit fee	548	-
	4,699	5,661
Operating surplus for the year	19,967	4,497
Income tax expense	(1,243)	1,243
Operating surplus for the year after income tax	$21,210	$3,254

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW INCORPORATED

NSW CHAPTER

INCOME AND EXPENDITURE STATEMENT FOR THE PERIOD ENDED 30 JUNE 1991

	1991 $
INCOME	
Income from seminar	640
Advance from membership fees - National	250
	$890
EXPENDITURE	
Catering	456
Stationery/postage	83
	$539
Operating surplus for the period	$351

QUEENSLAND CHAPTER

INCOME AND EXPENDITURE STATEMENT FOR THE PERIOD 30 JUNE 1991

	1991 $
INCOME	
Conference	1,107
EXPENDITURE	
Stationery/postage	288
Miscellaneous	63
	351
Operating surplus for the period	$ 756

State chapters

As the enclosed membership list indicates, the Institute continues to flourish in the various States, principally through the establishment and activities of energetic State chapters. Details of State chapter activities are set out below.

Australian Capital Territory: The next ACT meeting will be held on 19 November. The topic will be the tender process. Details will be provided in due course.

New South Wales: The chapter's seminar on 'Immigration law: Regulatory chaos?' was well-attended and very successful.

The chapter's next function will be the end-of-year dinner on 25 November. Inquiries about the dinner should be directed to the Secretary of the chapter, James McLachlan, on (02) 258 6000.

Plans are also under way for a 1 day seminar on administrative law in NSW, to be held early in the new year.

Queensland: A function is planned for 31 October, at which it is hoped that the Queensland Attorney-General, the Hon Dean Wells MLA, will speak. Further details will be provided to Queensland members in due course. Inquiries should be directed to the Chairperson of the chapter, Maurice Swan, on (07) 360 5702.

South Australia: It is hoped that an inaugural meeting will be held in November. South Australian members will be advised in due course. Inquiries should be directed to Eugene Biganovsky, the South Australian Ombudsman, on (08) 212 5712.

Victoria: A preliminary meeting has been organised for 12 November. All Victorian members will receive details in due course. Inquiries should be directed to Professor Cheryl Saunders, on (03) 344 6206.

Western Australia: It is hoped that an inaugural meeting will be held in November. West Australian members will be advised in due course. Inquiries should be directed to Deputy President Peter Johnston (09 421 0226) or Associate Professor Hannes Schoombee (09 332 2984).

1992 administrative law conference

Members have previously been advised of the plans for the 1992 annual conference, which is to be held in Canberra on 27 and 28 April, on the theme 'Administrative law: Does it benefit the public?'.

Response to the announcement has been pleasing. About 15 members of the Institute have so far volunteered to present papers. However, there are still some vacant places, particularly on the impact of administrative law in different areas (such as environment, migration, criminal law, broadcasting, consumer affairs). The earlier request for papers suggested that workshop sessions might be held on those topics. In the light of the interest shown, it will probably be more appropriate to run a number of concurrent streams on those topics.

A draft timetable for the conference will be settled in early November. Any person interested in presenting a paper should contact John McMillan at the ANU Law Faculty on (06) 249 4662 (W), (06) 287 1971 (H) or (06) 249 0103 (Fax) by 31 October.

Newsletter

The Newsletter continues to grow and to impress with the quality of the material it contains. Contributions from members and others are always welcome and should be directed to the Editor at the address which appears at the head of these Members Notes.

MEMBERSHIP RENEWALS

Membership fees for 1991-92, as set by the annual general meeting, are due by 26 December 1991. A membership renewal form is attached. Pursuant to subrule 7(4) of the Rules of the Institute, members who joined in the latter half of the 1990-91 financial year will only be liable to pay half of the membership fee for 1991-92. Those members will be sent forms indicating that this is the case. Please read carefully the renewal form that you have been sent before sending your renewal.

Please note: Members who have joined in the last few months will not receive a renewal form and should not forward any fees at this stage.