RECONSIDERING REVIEW: PARTICIPATION AND ACCOUNTABILITY

Paper for Administrative Law for a Future South Africa

(UCT Dept of Public Law and UWC Community Law Centre Administrative Law Workshop, Breakwater Campus, 10-13 February 1993)

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Introduction

Will we achieve democracy? Upon the answer to that question depends South Africa's future. Most of our political leaders are behaving as though the answer lay solely in economics or constitutional law, or some combination of the two. In fact the answer may depend as much upon routine relationships between government and subject - upon how officials treat the people they govern in daily dealings - as it does upon the vitality of the economy or the loftier aspirations of the Bill of Rights, important though they doubtless are. It will depend deeply, in other words, upon the everyday decisionmaking processes of government. Whether we attain democracy will consequently depend upon administrative law: upon the legal forces which pull government decisionmaking towards democratic decisionmaking.

If those forces are to guide decisionmaking in a democratic direction, they must themselves be guided by a proper conception of democracy. For a very long time, democracy was understood to mean no more than our right to participate in the selection of agents to represent us in government. That right often means no more than the common franchise - the right to vote in a general election. And that right means no more than the opportunity to pass judgment, in a single act, upon the hundreds of thousands of decisions made by the government since the last general election. Snapshot democracy - the belief that the citizen's capacity to influence government can democratically be exhausted by a single decision, taken twice a decade - is austere democracy. It is therefore in widespread discredit. In South Africa it is in double discredit, because the representatives elected have so obviously been unrepresentative.

But snapshot democracy, because of its austerity, draws attention to the difficulties in the way of achieving, in literal form, pure democracy - government by the people. Because modern government means a myriad decisions, citizens cannot hope, in more than a metaphorical sense, to govern themselves. The best that democracy can be is a system in which government responds to the governed. Democracy has therefore come, recently, to mean responsive government.

But responsiveness is an ambiguous idea. Does it mean that individuals participate in the decisions that affect them, or does it mean that government must account to the individuals whom it governs? Participation in a decision that affects one

means an opportunity to affect its content, to influence the outcome. Accountability means that government has to justify its decisions to the people whom they govern. Participation and accountability both make government responsive to the people governed, but each makes government responsive in different ways. Participation and accountability may translate into different institutions - into different rules of law, and, in particular, into different grounds of review.

Participation

The aspiration to participate in a governmental decision that affects one most often translates, in administrative law, into a demand to be heard before the decision is taken. In South Africa, that demand has very often been frustrated by the reply that natural justice is available only where the decision affects the rights of the person doing the demanding. But to say that the decision must 'affect' the person's rights contains an ambiguity. It could mean that the decision has to take away the person's existing rights. That is a narrow meaning of 'affect', and it restricts the right to be heard to decisions that deprive a person of a prior legal right. It may therefore be said to rest upon a deprivation theory of natural justice, which is a parsimonious theory.

But to require the decision to affect a person's rights could mean something much more generous. It could mean that the decision has to determine what a person's rights are. If we attribute that meaning to the test for natural justice, it gives us a determination theory; that any decision which decides what a person's legal rights are requires a prior hearing. The determination theory is much more generous than the deprivation theory. Taken without qualification, it encompasses the great bulk of governmental decisionmaking. It may be that the only important class of decisions that it excludes comprises decisions with merely advisory effect; and if we construe the determination theory in a sufficiently unformalistic way, we can perhaps bring most of them under its embrace too.

For decades, South African administrative law oscillated between the deprivation theory of natural justice and the determination theory. The deprivation theory was too narrow to do justice: it permitted extensive administrative decisionmaking without any form of participation; without the disclosure even of the case that those affected had to meet. But the determination theory was too wide: applied literally, it would impose procedural constraints that might frustrate effective government. In recent years the courts have been trying, through the doctrine of legitimate expectation, to find a middle path.

The doctrine of legitimate expectation, so far as it governs participation, operates in much the same way as the deprivation theory does, but it works with an expansive conception of deprivation. It attaches the right to be heard not only to decisions which deprive one of a legal right, but also to those which deprive one of an expectation resembling a right. The doctrine consequently accepts the central idea of the

deprivation theory - that those who merit a right to participate in a decision affecting them are those at risk of suffering a deprivation through that decision - but it expands the class of interests that the deprivation theory protects from strictly legal rights to the near rights that the doctrine recognizes as legitimate expectations. The doctrine extends participation to those at risk of being deprived of their near rights.

But although the doctrine expands the limited class of decisions upon which the deprivation theory confers participatory process, it does so on the relatively accidental basis that the interest at stake happens to resemble a legal right. And it leaves beyond the pale of natural justice many cases in which, although there is nothing that can properly be called a deprivation, the government's power to determine your rights (for instance by deciding, in the exercise of some open discretion, that you are ineligible for welfare, or that you do not deserve admission to a State college) can have a decisive effect on your future.

Rather than work outwards from the deprivation theory, our courts might have done better to work inwards from the determination theory. The goal of fostering participation in governmental decisionmaking might have been served better if the courts had set themselves the task not of liberalizing the boundaries of deprivation, but of putting proper boundaries to determination. Any decision, after all, which determines what your rights are is prima facie one of importance to you. That makes it proper to ask not why you should be heard before the decision is taken, but why you should not be heard.

In respect of a particular kind of decision, there might well be a cogent case against participation: participation might frustrate expedition; it might destroy confidentiality; it might be that, within a class of decisions, so very few cases are contested that it is far more efficient to permit participation only on appeal; the interest affected might be too trivial to justify any kind of procedure, no matter how rudimentary; generally, participatory process might be an undue clog on good government. Some of these kinds of arguments have been advanced with such profligacy in South Africa that our administrative lawyers now respond to them with instinctive scepticism. But it is important to remember that they have generally been put forward to justify limitations upon the already restrictive deprivation theory. As arguments to justify limitations upon the much more generous determination theory, they may be far more persuasive. In any event, that they have in the past been abused does not mean that they are bereft of validity.

It may consequently be that the best via media between the constraints of the deprivation theory and the burdens of a pure determination theory is what we might call a provisional determination theory: a theory which gives anyone affected by a decision which determines his or her rights a prima facie entitlement to participate in the decisionmaking process; an entitlement, that is, which may be defeated by some cogent case to the contrary, but which cannot so be defeated unless the government discharges the burden of justifying that defeat. Such a theory would recognize that any person is entitled to

participate in the making of any governmental decision that settles her or his rights unless there is good reason to the contrary.

One kind of reason which might justify excluding participation is impracticability. Impracticability is raised most often as a reason for excluding participation in the decisions which produce subordinate legislation. It is said that subordinate legislation affects so many people that it is impracticable to hear them all before deciding. As the Americans have shown, however, the practical impediments are far from insuperable. Under their notice-and-comment procedure, anyone affected by a proposed regulation is invited to submit written comment within a fixed period, and the proposing agency is expected to show, by answers published with the final regulation, how it meets all the objections received as comment upon its proposal.

That procedure, at least in its essence, and without all the elaborations of which it may be thought susceptible, places a far from excessive burden on a well-run administration, and yields a far more responsive government than we now enjoy. Under the prevailing South African law, there is in general nothing to stop an official from drafting a major regulation in the morning, taking it to the Minister for signature that afternoon, and promulgating it in the Gazette that week. By a process which is entirely unresponsive to the wishes and the interests of the governed, a regulation may consequently be made that decides, or even takes away, the rights of hundreds of thousands of people. Even a rudimentary form of the notice-and-comment procedure would make legislative agencies immeasurably more responsive to their subjects than they are now. And it would substantially improve their legislation, because the discipline of responding to the comments that it receives compels the legislator to confront the deficiencies of its proposed enactment.

Our administrative jurisprudence, which has been so active these last few years in breaking down the barriers erected by the strict deprivation theory, in finding expectations to characterize legitimate, and in extending hearings to areas of administration (such as public employment) where until recently they were unheard of, has left subordinate lawmaking, by far the most intrusive sector of government decisionmaking, virtually untouched.

It follows that much can be done - and done very easily - to make government more participatory. The two steps required most urgently, in my view, are (a) the adoption of something resembling the notice-and-comment procedure to govern the subordinate lawmaking process; and (b) the adoption of a provisional determination theory of natural justice.

Those two steps would make government in this country palpably more participatory than it is now; radically more responsive than anything we have come to expect of our rulers. But who, we might fairly ask, will participate? A pervasive anxiety which the notice-and-comment procedure excites is that it permits regulated industries to 'capture' their regulating agencies: that it creates an avenue to influence the regulating agency

which the regulated industry is best placed to exploit. It is true generally of any participatory process that it will be used to greatest effect by interests which are literate, articulate, well organized, and in possession of the facilities which produce persuasive advocacy. A corporation which makes large profits from a process that yields a noxious effluent will often find it a matter of the utmost simplicity to invest a portion of those profits in deploying the scientists and other advocates necessary to give it a decisive advantage in any participatory process over the dispersed, perhaps rural, perhaps poor, perhaps educationally disadvantaged, communities who in a state of underregulation will have to absorb the harmful toxins.

In South Africa, access to the resources necessary effectively to use any participatory process is particularly unevenly distributed. That makes especially urgent the question: if we make government more participatory, who will participate? Will participation become a matter of mere form, the substance being that the powerful and the mobilized monopolize all participatory process? Will responsive government mean no more than that government responds to the wealthy and the well-organized?

There are institutions that we can develop to try to counter this prospect. We can set aside State funds to facilitate effective involvement in participatory process by underresourced constituencies. We can create conditions that foster organizations - trade unions, environmental lobbies, civic associations - that mobilize dispersed interests, and put them in a position to use participatory process. We can create State organs - commissions, ombudsofficers - to intervene on behalf of underresourced and poorly mobilized constituencies. These remedies are expensive, and it is unlikely that we will be able to resort to them to the extent necessary to assure adequately responsive government before the funds available for them are exhausted. I think that that throws us back upon the other great principle of responsive democracy: accountability.

Accountability

Accountability is often taken to mean the duty of a representative to account to her or his constituency. In that sense, it is an aspiration to refine representative government. But representative government is not the only ambition of modern democracy; certainly not the only ambition of a country aspiring to responsive democracy. Responsive democracy is an aspiration towards government which is accountable to its subjects; towards a government that acknowledges a responsibility to justify its decisions to those whom they govern.

In administrative law, that translates into an aspiration towards institutions which foster the justification of government decisions. Most obviously, that aspiration translates into a demand for the express articulation of the reasons for a decision. Less obviously, the aspiration is part of the force behind the growth of natural justice, because compelling a decisionmaker to hear the parties affected by a decision not only gives them an opportunity to participate, but also conduces

to better justified decisions. The aspiration also underlies the recent judicial development of the duty to consider, because forcing decisionmakers explicitly to consider factors relevant to their decisions has the same effect.

Pre-eminently, however, the aspiration to better justified decisions translates into a demand for review for unreasonableness; rationality review, as it is sometimes called. It is important to understand that that demand does not necessarily entail judicial review as we know it: review by the Supreme Court under Rule 53. It may be that the review jurisdiction would be more accessible and effective if it were vested in a special division of the Supreme Court, operating under revised rules; rules, for instance, which provided for class actions and which strengthened the applicant's right to procure discovery. It may be that the review jurisdiction would be more skilfully discharged if it were vested in judges with administrative experience, such as sit in the Conseil d'Etat. It may be that the best solution is a general administrative appeal tribunal. The choices among these institutions may make rationality review more or less successful. But the essential case for rationality review is independent of these choices: you can argue for rationality review without choosing among the institutions which will be employed to implement it.

In South Africa, it remains the law, formally at any rate, that to vitiate a decision, its unreasonableness has to be gross 'to so striking a degree as to warrant the inference' that the decisionmaker has abused its discretion.[1] Read literally, that test means that the decision has to be not just grossly unreasonable, not just strikingly grossly unreasonable, but worse than strikingly grossly unreasonable; worse enough to prove that the discretion has been abused.

It is difficult to see why the fact that a decision is strikingly grossly unreasonable does not, on its own, prove abuse of discretion. Or why gross unreasonableness does not, on its own, prove abuse of discretion. Or, for that matter, why unreasonableness does not, on its own, prove abuse of discretion. After all, if we characterize a decision as unreasonable, we mean much more than that we disagree with it, or that we consider it wrong. We mean that we judge it to lack plausible justification. If so, how can we believe it to have been reached without an abuse of discretion?

It is true of course, that some of our judges have substantially diluted the literal force of the test. Though paying lip service to it, they have demonstrated a willingness to undertake scrutiny far more searching than it permits. But as long as the test retains formal authority, it remains a powerful counterweight to any effort to develop proper rationality review. The test discloses so zealous an antipathy to rationality review that the failure of our courts, in the two

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[1] National Transport Commission v Chetty's Motor Transport 1972 (3) SA 726 (A) at 735G-H.

decades since it was announced, seriously to rebel against it[2] suggests pervasive judicial suspicion of rationality review. Why?

Rationality review is often resisted on the ground that it necessarily draws the reviewing body into a judgment on the merits. If we conceive unreasonableness to be merely what the court considers gross error, then the line between unreasonableness, which warrants intervention on review, and mere error, upon which a reviewing body should defer to the judgment of the decisionmaker under review, becomes one of degree alone. That plainly makes it easy to stray across the line.

In fact, however, rationality review calls for scrutiny far more specific than the mere identification of gross error. It requires the reviewing body to ask

> (a) whether the decisionmaker has considered all the serious objections to the decision taken, and has answers which plausibly meet them;
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> (b) whether the decisionmaker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and
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> (c) whether there is a rational connection between the information (evidence and argument) before the decisionmaker and the conclusion reached.

Plainly, even this particularization of the nature of rationality review is open textured, and its key terms - serious, plausible, rational - call for the exercise by the reviewing body of considerable judgment. That is something which has to be; it is necessary in order to empower the reviewing body to defer to the proper exercise by the decisionmaker of discretion deliberately entrusted to the decisionmaker.

Rationality review consequently confers substantial latitude on the reviewing body. The reviewing body can choose to apply a more searching standard of scrutiny or a less searching standard. It can, moreover, abuse its discretion. But so, too, can every other organ of government; and there is nothing, a priori, to suggest that abuses on the part of the reviewing body are more likely, or likely to be more egregious, than abuses on the part of bodies to be reviewed. And if the reviewing body has to work in the open, if it has to publish reasoned judgments which are available for public scrutiny, and if its members are

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[2] Although there have, of course, been important acts of disaffection: see, for instance, Bangtoo Bros v National Transport Commission 1973 (4) SA 667 (N) at 683ff; the judgment of Jansen JA in Theron v Ring van Wellington van die N G Sendingkerk in Suid-Afrika 1976 (2) SA 1 (A); Katofa v Administrator-General for South West Africa 1985 (4) SA 211 (SWA).

chosen expressly for a demonstrated capacity to put aside their own preferences when reviewing others' - chosen, that is, for their judicial qualities - then there are constraints which will tend to make the reviewing body less prone to abuse of discretion than bodies which are free of those constraints.

More important, what is likely - very likely - is that a decisionmaker which knows that its decisions are likely to be reviewed for rationality will invest effort during decisionmaking to pass review. The decisionmaker is likely, when deciding, closely to consider the possible objections to the decision that it is contemplating, and how to meet them; it is likely closely to consider the alternatives to the decision that it is contemplating, and why it is discarding them; and it is likely to ponder the cogency of the case that connects the information before it to the conclusions that it reaches. All these processes foster better justified decisions; they conduce to discharge by the government of its responsibility to justify its decisions to those whom they govern. And the necessity of satisfying the reviewing body compels the decisionmaker to articulate reasons which are available to the subject of the decision as explicit justification.

So rationality review, properly practised, is a powerful force in support of accountability, and in support of good government. But that is not all it is good for. It is also a powerful force in support of participation. Remember that the great anxiety about participatory process is that it can so easily be monopolized by those who command the resources that produce effective advocacy. Rationality review, precisely because it fosters the justification of decisions, can be used to include the interests of people who find it difficult to make effective use of participatory process.

When the reviewing body asks whether the decisionmaker has considered and plausibly met objections to the decision, that body can scrutinize especially closely whether the decisionmaker has considered and plausibly met the objections raised, or the objections which might have been raised, by parties who are at a disadvantage in using participatory process. When the reviewing body asks whether the decisionmaker has considered the alternatives to the decision taken and discarded them on plausible grounds, it can scrutinize especially closely whether the decisionmaker has respectfully enough considered the alternatives suggested, or the alternatives which might have been suggested, by parties at that disadvantage.

Anticipating such scrutiny, decisionmakers will be under pressure to take affirmative steps to ensure that such parties participate fully, and are heard fully, in the decisionmaking process. In these ways, rationality review can be used to strengthen participatory process. In these ways, an institution committed to fostering accountability and justification can help make participation more participatory. Indeed, it may be that no process can ever be fully participatory if it is not supported by a strong reviewing body committed to assuring the effective inclusion of those who find it difficult to participate.

Constitutionalizing Participation and Accountability

From what this section follows, I hope it is clear that the rights to natural justice and justified decisions are more than a set of merely technical entitlements arbitrarily dreamt up by administrative lawyers. Those rights rest upon the principles of participation and accountability which embody the aspiration to responsive democracy. If our Bill of Rights is to comprise the principles that create the conditions for democracy - and if it does not, it is open to question why we want an instrument which pre-empts the will of the majority - then the principles of participation and accountability merit recognition in that instrument.

Most of the draft Bills of Rights now part of the South African constitutional process make some attempt to incorporate those principles.[3] Unfortunately, however, many of the attempts to articulate the principles are caught in the thrall of discourse popular at some or other moment in the history of our administrative law. The Government, for instance, proposes to limit the constitutional rights to natural justice and to reasons for decision that it envisages to decisions based on 'findings of fact or of fact and law'.[4] That is an expression which was in vogue in the middle of the century,[5] and its purpose was to restrict natural justice to administrative proceedings bearing a clear resemblance to those that take place in court. It is perhaps fortunate that the formulation is not very effective for the purpose. Inept as it is, though, it still has the capacity, in the wrong judicial hands, seriously to limit the reach of participatory process.

The ANC, on the other hand, in its very creditable effort to constitutionalize rationality review - an effort which the Government does not make at all - is frozen in the discourse of gross unreasonableness, a discourse that has stultified South African administrative law for the better portion of the century.[6] In the first draft of its Bill of Rights, the ANC

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[3] Government's Proposals on a Charter of Fundamental Rights (2 February 1993), Clause 29; S A Law Commission Interim Report on Group and Human Rights (August 1991), Article 32; ANC Bill of Rights for a New South Africa (Preliminary Revised Version 1.1 May 1992), Article 2 (26); Hugh Corder et al A Charter for Social Justice (December 1992), Article 23.

[4] Government's Proposals on a Charter of Fundamental Rights (2 February 1993) Article 29.

[5] See, for instance, Hack v Venterspost Municipality 1950 (1) SA 172 (W) at 190.

[6] See, for instance, Union Govt v Union Steel Corporation 1928 AD 220 at 236-7.

proposed to entrench review for 'such gross unreasonableness in relation to the procedure or the decision as to amount to manifest injustice'.[7] Happily, the latest draft[8] deposits brackets around the word 'gross'. There they stand like unsure scoops, awaiting the order to flick the word right out of the document. One can only hope that in the next draft, the weight that 'gross' carries will not prove too much for them, and that the momentum of the exercise will carry with it the requirement of 'manifest injustice'. After all, if you accept as fundamental - and who does not? - the right not to be burdened with a decision in support of which no plausible justification can be adduced (which is what it means to call a decision unreasonable), what is the point of hedging the right about with so many caveats and qualifications that it can scarcely ever be enforced?

Both the Government and the ANC, moreover, resort to the liberal version of the deprivation theory now current - the one whose boundaries have been expanded by the doctrine of legitimate expectation - to limit the reach of the rights to administrative justice that they propose to confer. The Government confines its proposed constitutional rights to natural justice and to a reasoned decision so that they avail only in 'administrative proceedings where ... [a person's] ... rights or reasonable expectations are or may be infringed'.[9] This wording makes the deprivation theory, modified by something resembling the doctrine of legitimate expectation, a limitation on the rights conferred.[10]

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[7] ANC Bill of Rights for a New South Africa (Working Draft for Consultation 1990), Article 2 (24).

[8] ANC Bill of Rights for a New South Africa (Preliminary Revised Version 1.1 May 1992), Article 2 (26).

[9] Government's Proposals on a Charter of Fundamental Rights (2 February 1993), Clause 29.

[10] Disquietingly, however, the explanatory note to Clause 29 of the Government's draft Bill fails to reveal either this limitation or the one discussed above. It reads:

> 'It has already been held that the two rules here under discussion ("no one may be a judge in his own cause", and, "also hear the other side") form part of our law. In short, the latter rule means that before an administrative organ comes to a decision that may affect the interests of a citizen adversely, such organ must allow that citizen an opportunity to put his side of the case. These rules now become fundamental rights.'

The implication is that the constitutional right to be heard proposed is available whenever an administrative decision 'may affect the interests of a citizen adversely'; in effect, an application of the determination theory. But the limitations contained in the draft Bill itself and discussed here make large incursions into the breadth of that implication.

The ANC does something similar: the latest version of its draft Bill restricts the constitutional rights to administrative justice which it puts forward so that they pertain only to administrative and executive acts that 'adversely [affect a person] in his or her rights, entitlements or legitimate expectations'.[11] It is far from clear what is covered by 'entitlements' that is not exhausted by the combination of rights and legitimate expectations; but it is clear that here, too, the protection offered by constitutional administrative justice is restricted by the deprivation theory, as liberalized by the doctrine of legitimate expectation.

That restriction is particularly disturbing because it is new. The latest draft of the ANC's Bill of Rights retreats from the first version, which extended rights of administrative justice to all administrative and executive acts that adversely affect a person.[12] That version embodied the determination theory: its effect was to guarantee the rights of administrative justice that it proposed in all administrative proceedings which decide what a person's rights are.

And why should it not? If you accept that a right of administrative justice is basic enough to merit constitutional entrenchment, why should it be available only in a restricted subset of the class of administrative decisions that may affect people's rights critically? And why should that restricted subset be defined by the deprivation theory, expanded by the doctrine of legitimate expectation? The expanded deprivation theory, as we might call it, started becoming fashionable in our law during the late eighties, and it was developed for a purpose quite different from that to which it has been put in the latest ANC draft. It was developed to extend the reach of natural justice, and to resolve the struggle in our law between the strict deprivation theory and the determination theory. It was never intended as a limitation on constitutional administrative justice, and it may ultimately prove to be no more than an ephemeral moment in the history of our administrative law.

Do we really want to wrench the expanded deprivation theory away from its original function, tear it from its historical context, and engrave it in our Bill of Rights as a permanent limitation upon the reach of constitutionally protected administrative justice? Surely the Constitution must strive to capture the principles which are basic to our democratic aspirations, not the transient by-products of a dynamic branch of our law. And surely the Constitution must avoid translating ideas that in one

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[11] ANC Bill of Rights for a New South Africa (Preliminary Revised Version 1.1 May 1992), Article 2 (26).

[12] ANC Bill of Rights for a New South Africa (Working Draft for Consultation 1990), Article 2 (24).

context, at a special moment in history, had a liberating effect into restrictions which, in a different context, and in an instrument designed to endure indefinitely, will have a stultifying effect.

Generally, I think, we must strive in the Constitution to capture the principles of participation and accountability as principles, unencrusted by arbitrary limitations, and free especially of historically contingent restrictions developed for other purposes in other contexts.

Conclusion

Democracy means making government more responsive. That means fostering (a) participation and (b) accountability, which is to say, the responsibility of government to justify its decisions to those whom they govern.

In administrative law, the aspiration to participation translates most often into a demand to be heard before decision. In trying to extend the right to be heard, our law is resorting to the doctrine of legitimate expectation to liberalize the boundaries of the deprivation theory. A better path might be to adopt a provisional determination theory. Either way, we urgently need to subject subordinate lawmaking to participatory process; preferably some sort of notice-and-comment procedure.

The aspiration to accountability, or justification, translates, pre-eminently, into a demand for rationality review. Rationality review fosters accountability, it fosters good government, and, used properly, it can help overcome the central weakness of participatory process: that it favours those who have at their disposal the resources which yield effective advocacy. Translated into proper institutions, accountability, a democratic end in itself, will therefore also foster participation, another democratic end.

Finally, since participation and accountability are conditions for the attainment of responsive democracy, it is right to entrench them in the Bill of Rights, but we must strive to avoid capturing them in that instrument encrusted with arbitrary and historically contingent limitations.

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APPEAL OR REVIEW

THE EIPERIENCE OF ADMINISTRATIVE APPEALS IN AUSTRALIA

by

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A paper prepared for the Workshop on "Administrative Law for a Future South Africa", Breakwater Campus, University of Cape Town, 10-13 February, 1993.

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THE EIPERIENCE OF ADMINISTRATIVE APPEALS IN AUSTRALIA

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I THE AUSTRALIAN BACKGROUND

Australia has a federal system, comprising a central or Commonwealth government; six States; various Territories, including two mainland Territories with self-government[1]; and a network of local government throughout much of the mainland and the island of Tasmania.

Over the latter part of the 1970s, administrative law was comprehensively overhauled at the Commonwealth level. The new structures were based upon the recommendations of three advisory committees[2], which met and reported between 1968 and 1973. While there was some overlap and contradiction between each of these reports, with hindsight their combined objectives were to overcome the technicality and complexity of judicial review of administrative action; streamline the tribunal system, in the face of the multiplicity and fragmentation of the structures and powers of administrative

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appeals bodies which typically exist in common law jurisdictions; and provide individuals with more accessible and effective avenues for redress of grievances against government decisions specifically affecting them.

The new, integrated administrative review system has four core components.

The first and most distinctive is a single, general Administrative Appeals Tribunal (AAT). Under section 25 of its constituent statute[3], the AAT may review decisions under any Commonwealth enactment when the necessary jurisdiction has been conferred on it. The meaning of "review" in this context is taken up below; but for present purposes it should be noted that it enables and in fact requires the decision to be remade. The composition of the AAT can be varied to suit different jurisdictions and includes members with a wide range of expertise in fields other than law, although lawyers hold most of the senior positions. Through its charter and the flexibility of its membership the AAT is thus in a position to absorb the jurisdiction of existing tribunals and to offer a standing facility for the review of new decision-making powers. While its actual jurisdiction was relatively limited on its establishment in 1975, the AAT now has jurisdiction under approximately 200 statutory instruments, ranging from taxation to veterans' affairs and from therapeutic goods to wildlife protection. In 1991-92 4,794 applications were lodged with the AAT[4] and 5,516 were finalised[5].

The other original components of the new arrangements comprised a codification and rationalisation of the principles, procedures and remedies for judicial review in the Administrative Decisions (Judicial Review) Act 1977 (Cth) (AD(JR) Act), which also created a statutory right to reasons for most decisions and conferred jurisdiction on the Federal Court of Australia; an Ombudsman[6], to investigate and attempt to resolve complaints which might broadly be described as "maladministration"; and an advisory body, the Administrative Review Council (ARC), to monitor the operation of the new arrangements. The ARC is established by the

Administrative Appeals Tribunal Act itself[7] and includes the President of the AAT, the Ombudsman and the President of the Australian Law Reform Commission among its members.

The system has been augmented in various ways since it was established. Freedom of Information[8], rchives[9] and Privacy[10] legislation complement both the principles and practice of the administrative review arrangements although they do not fall within the terms of reference of the ARC and in that sense are not integrated with the rest of the system. In addition, a small number of specialist review tribunals has been established in the mass volume jurisdictions of social security[11],veterans benefits[12], immigration,[13] student assistance[14] and decisions on refugee status[15]. All the specialist tribunals are or will be linked with the AAT, in most cases as the first tier in a two-tier appeal structure[16]. All work closely with the Administrative Review Council, although they do not have direct membership of it[17].

The changes which have taken place in Australia have significantly altered administrative law as it traditionally operates in common law countries. Moreover, while the new arrangements so far have been comprehensively implemented only at the Commonwealth level, there are signs that they are spreading to the States, by deliberate adoption[18] or through intergovernmental schemes.[19] The evolution of the new administrative law has sometimes been controversial, but the principles on which it is based, of openness and effective, independent redress of grievances, appear now to be well entrenched in the expectations of Australians about how governments will and should operate.

This paper will focus primarily on review by tribunals, with particular reference to the AAT. The next part examines relations between courts and the tribunals, which at the Commonwealth level are heavily influenced by the constitutional setting. Part III of the paper looks more closely at aspects of the operation of tribunal review which may assist in its understanding, including the concept of merits review, the scope of

tribunal jurisdiction and the structure of the tribunal system. The final part canvasses some issues for administrative review as a whole which are or have been significant in Australia and which may be of interest for the South African debate as well. They are the pressures and mechanisms for cost reduction; the effects of review on primary decision-makers; and the implications of review for the principles of parliamentary government.

II COURTS AND TRIBUNALS

The relationship between federal courts and tribunals has been shaped by three features of the Commonwealth Constitution in particular.

The first is specific and may be disposed of briefly. Section 75(v) of the Constitution confers jurisdiction on the High Court in all matters "In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". In effect, this paragraph gives the Court an inherent jurisdiction to review the actions of federal officials, including tribunals. The jurisdiction cannot be ousted by Act of Parliament, although an attempt to do so may be taken into account in interpreting the scope of a power or discretion[20].

The second feature is more pervasive. It has been accepted since the decision in the Boilermakers' case[21] in 1956-57 that the Constitution requires a strict separation of judicial power at the Commonwealth level. This means that only courts can exercise federal judicial power and that federal courts cannot exercise non-judicial power. A court for this purpose is either a State court or a federal court constituted in accordance with section 72 of the Constitution, whose members are appointed by the Governor-General in Council and have the security of tenure prescribed by the section[22].

Finally, section 77(iii) of the Constitution expressly empowers the Commonwealth Parliament to confer federal jurisdiction on State courts. This facility is less important than it once was, since the establishment by the Commonwealth of its own superior courts of record, the Federal Court and the Family Court of Australia, in the 1970s. Nevertheless, federal jurisdiction is exercised extensively throughout the State court system and in particular at the lower levels, making it unnecessary for the Commonwealth to establish inferior courts for its own purposes.

This constitutional setting has had various consequences. In the first place, it has made it necessary for the review tribunals to be clearly distinguished from the federal courts, in both their constitution and function. While there is in fact an overlap of membership between the courts and the AAT, in the form of 15 judges who are members of both, this has been rationalised as the appointment to the tribunal of individuals who happen to be judges in their personal capacity[23] and does not significantly detract from the basic model. The tribunals thus are in a position to develop as a discrete form of government body, within a framework of rules and practices appropriate to their own circumstances, which will not necessarily be the same as those which have evolved for the courts. While some consideration has been given to the terms and conditions of appointment of members which might allow some flexibility in the constitution of tribunals without jeopardising necessary independence[24], the full potential of this position has not yet been realised. The ARC is currently conducting a project on tribunal procedures, which offers an opportunity to deal more thoroughly with these issues.

The separation of judicial power and the establishment of a comprehensive system of merits review may also have inhibited the scope of judicial review. While courts in all common law countries are conscious of the limits of judicial review and give at least formal deference to them, specific references to the need to avoid merits review may have some special significance in the Australian context. A prominent example is the

observations of Mason J. in Minister for Aboriginal Affairs v Peko-Wallsend[25]. In the course of setting out what has become the definitive statement for Australia of the ground of failing to take into account a relevant consideration, His Honour noted that:

> "a court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits."[26]

In a similar vein, in Minister for Immigration and Ethnic Affairs v Conyngham[27] the Full Court of the Federal Court rejected the use of section 16(1)(d) of the AD(JR) Act[28] to order a Minister to take a particular course of action where a residual discretion remained as a matter of law[29].

Despite earlier criticism of it[30], the constitutional separation of federal judicial power may well have assisted to preserve the independence of the federal courts. With hindsight, it has also had advantages for the development of the new system of administrative law as well. One current issue in Australia, which may have relevance also in South Africa, is whether a strict separation of judicial power would be similarly beneficial for the States.

At present there is no constitutional separation of power under State Constitutions[31]. The result is that, while the broad notions of judicial independence and even separation of judicial power are accepted in the States, there is no clear line of demarcation between courts and tribunals and their respective roles. Courts can and do perform functions which at the Commonwealth level would be characterised as non-judicial. Specialist bodies, often called tribunals, are established to resolve justiciable issues, sometimes to the exclusion of the jurisdiction of the courts. One consequence has been a degree of bitterness between courts and tribunals which is unhealthy for the system as a whole.[32] Another has been genuine confusion about the members of which bodies should have tenure to

retirement in the interests of judicial independence and those who need not, as long as the terms and conditions of membership are appropriate to the body to which they belong.[33]

These problems would be avoided, or at least minimised, by a constitutional separation of judicial power. On the other hand, it may not be practicable to maintain the already difficult distinction between judicial and non-judicial power throughout the State court hierarchy, which begins with courts of summary jurisdiction. The Commonwealth has not encountered this difficulty in the same degree, partly because it can use State courts at this level and partly also, perhaps, because of differences in the nature of its jurisdictions. The implications of a separation of State judicial power between only superior courts and tribunals is presently under consideration in some quarters. Meanwhile, two States have introduced patchwork measures, designed largely to protect the courts. The Victorian Constitution entrenches the jurisdiction of the Supreme Court and requires an explanation to be given in parliament and special majorities to be obtained, before the jurisdiction is diminished.[34] Recent amendments to the Constitution of New South Wales protect members of courts from the abolition of their office by listing the bodies which are deemed to be courts for the purpose.[35]

A further aspect of the relationship between courts and tribunals which causes more familiar difficulty is the supervisory role of the courts. While the High Court has been relatively restrained in developing the principles on which Australian courts should review tribunal decisions,[36] tribunals have been inhibited by courts in varying degrees from using procedures which depart significantly from the adversarial model, despite indications to the contrary in their constituent statutes. The Commonwealth AAT, for example, has broad statutory discretion to determine the conduct of its own proceedings and to inform itself "as it thinks appropriate"[37] but has repeatedly been criticised as too legalistic and court-like.[38] To the extent that these criticisms are valid,[39] one cause may be the influence of court decisions applying common law

principles developed against the background of the adversarial model to tribunal procedures.[40] If so, the only lasting solution is likely to be a better understanding, by courts and by tribunals themselves, of the distinct character and functions of review tribunals, which in turn should shape the acceptable limits of their respective actions.

III STRUCTURE AND OPERATION OF THE TRIBUNAL SYSTEM

This part considers several aspects of the Australian administrative appeals tribunal system which are central to its current operation and may be of interest to the Workshop. They are the scope of merits review, the criteria for providing merits review for particular classes of decisions and the relationship of the administrative review tribunals to each other. While the broad framework of principle is now well established, each of these areas continues to give rise to issues which need resolution.

(1) The Scope of Merits Review.

The powers of the AAT on review are described in section 43 of its constituent Act as to:

> "exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and ...make a decision in writing-
>
> (a) affirming the decision under review;
>
> (b) varying the decision under review;
>
> (c) setting aside the decision under review and-
>
> (i) making a decision in substitution for the decision so set aside; or
>
> (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal."

This section has been interpreted and applied to mean that the AAT reviews decisions "on the merits", "stands in the shoes of the original decision-maker", or makes "the correct or preferable decision" on the material before it.[41] This formulation is generally accepted and now

represents a standard common to the AAT and all specialist tribunals, whatever other differences may exist between them. Other, more limited review functions have been suggested from time to time, but so far have not found favour. They include appeal on a question of law only, at least where the original decision-maker had specialist or technical expertise;[42] restriction of review to material before the primary decision-maker;[43] and a requirement or practice that weight be given to the original decision.[44]

The problem of the extent to which tribunals should or must follow government policy was a prominent feature of the Australian debate on the pros and cons of the new administrative review arrangements in the late 1970s. While it is revived from time to time, it is no longer a substantive issue in its own right. In part this is due to the accommodation reached within the AAT itself, which is described below. That has been accompanied, however, by improved and more sophisticated understanding of the concept of policy and the manner in which it is made and implemented.

The starting point is the broad brief of the AAT under section 43 of its Act, quoted earlier. In an early decision in the highly politically charged area of the exercise of criminal deportation powers by the Minister for Immigration, the inaugural President of the Tribunal, Justice Brennan, made it clear that the powers of the Tribunal extended not only to consideration of whether any government policy had been improperly applied but also to a refusal to apply a policy in a particular case.[45] His position was not an inherently radical one: a distinction was drawn between different types of policies and it was made clear that departure from "basic" or "political" policies in particular was likely to be rare. Two years later, however, the significance of the position was highlighted in a decision of the Federal Court, overturning a decision of the AAT on the ground that it had taken government policy as given and had not made an independent decision of its own.[46]

The inevitable excitement that followed was largely quelled by the careful and sensitive decision of President Brennan when the matter was reheard by the Tribunal. While accepting the need for the AAT to exercise an independent judgement in reaching the correct decision, he also stressed the importance of consistency in administrative decision-making, lending further weight to the application of an existing lawful policy.[47] His observation that the AAT should be particularly loathe to depart from a policy which had been scrutinised by Parliament led to the tabling of some significant policies in the Parliament, to the benefit of Parliament as an institution.

This delicate compromise has proved to have additional benefits in terms of the coherence and public availability of government policies and for the most part has worked well. While the AAT occasionally declines to apply a policy, the potential for continuing and destructive confrontation between Ministers and the AAT was effectively avoided by President Brennan's explanation of the proper function of the latter. Signs that the issue still has some life surface occasionally, however: in proposals to confer recommendatory, rather than determinative jurisdiction on the AAT or in the statutory conferral on Ministers of powers to give general directions, binding on primary decision-makers and review bodies alike.

In its most recent guise the issue has some connection with the debate mentioned earlier, over whether the AAT should give weight to the decision which is under appeal. To the extent that the aim of this suggestion is to ensure that AAT decisions are as fully informed by the relevant policy context as those of the original decision-maker, it may be achieved better by improving communication between tribunals and their users, including public agencies.[48] The AAT is currently examining ways in which it can inform itself of policy and of the context in which decisions are made, without compromising its independence, in reality or appearance.

A related and topical question concerns consistency. The administrative review tribunals are not bound by precedent, but a degree of consistency between tribunal decisions clearly is desirable, in the interests of fairness and efficiency and to maximise the benefits of review for primary decision-making. A threshold problem, on which differences of view probably are inevitable, is whether consistency should be sought only in the interpretation of the law or whether it should extend further, to the approach to be adopted in the exercise of a discretion.[49] On either view, practical problems arise, which have not yet been satisfactorily resolved. They include the logistical difficulty of co-ordinating large numbers of decisions in a wide variety of jurisdictions delivered in different locations around the country.[50] There is also the further question of how a later tribunal should act when confronted with an earlier decision which it considers to be wrong. A partial solution is for procedures to be developed to identify legally or conceptually difficult cases in advance, so that a tribunal can be constituted at an appropriately high level to resolve them.

(2) <u>What Decisions should be subject to Merits Review?</u>

Unlike courts carrying out their judicial review function, administrative appeals tribunals have only the jurisdiction which is expressly conferred on them. Before the establishment of the AAT, Commonwealth legislation provided for review of decisions on an ad hoc basis, by reference to no consistent criteria. The creation of a general appeals tribunal, capable of receiving jurisdiction in any area of Commonwealth decision-making, forced the development of principles to govern the provision of review and encouraged systems to ensure that they are taken into account.

The Administrative Review Council performs an important role in this regard. From the outset, a large part of the Council's work has involved examination of existing and proposed new jurisdictions to determine whether they are appropriate for merits review and by what means. Through that

process, the Council has developed guidelines for itself and others on the provision of merits review.

In its Eleventh Annual Report 1986-87, the Council identified a decision which prima facie should be subject to review as one "made in the exercise of a power conferred by an enactment...if the interests of a person will be or are likely to be affected by an exercise of the power." Review would not necessarily be precluded by the expertise of the primary decision-maker, the unstructured nature of a discretion, the status of the primary decision-maker or the influence of government policy on the decision. Circumstances which might render a decisions inappropriate for merits review, selectively or as a class, included:

- where a decision is of the highest consequence to government or involves major political issues. The Council identified this category with some trepidation citing, for example, decisions involving protection policy or Australia's relations with other countries. In some cases of this kind, the Council recommends that the decisions be liable to review as a class, subject to the power of a Minister to issue a certificate, to be tabled in the Parliament, to exclude a particular decision from review.[51]

- where a decision involves significant polycentric elements: e.g. the apportionment of a finite resource or quota allocation decisions.

- where review would require a wide inquiry, involving the competing interests of several parties.[52]

A judgement about whether proposed new discretions should be subject to review on the merits is now made at the drafting stage at the latest, roughly by reference to these guidelines. Discretions which slip through are likely to catch the attention of the Senate Standing Committee for Scrutiny of Bills and may result in an adverse report to the Senate. The terms of reference of the Committee include:

> "whether ..Bills or Acts, by express words or otherwise - ...make rights, liberties and /or obligations unduly dependent upon non-reviewable decisions."

The guidelines are not static and need regular revision in the light of greater experience with administrative review and new legal or institutional frameworks for government decision-making. The Council has recently been forced to consider more closely the limits of the "finite resource" exception, which is likely to lead to further refinement of that guideline.[53] A new exception, for decisions of government-owned bodies which are both competitive and commercial may emerge from the current Council project on the applicability of administrative review to government business enterprises. Another live issue is the extent to which ex post facto review is appropriate where the original decision was based on formal public consultation and/or adjudicatory procedures. Some resolution of it may emerge from the project on review of environmental decisions, referred to the ARC by the 1991 Review of the Administrative Appeals Tribunal. For some time, however, the Council has been moving to a position from which it is likely to accept that prior openness and consultation balance the need for review of the final decision and vice versa. A comparable approach was adopted in its recent report on Rule-Making, which recommended a comprehensive regime of consultation, publication and parliamentary scrutiny for subordinate legislative instruments, which tend to be subject to only limited judicial review and, of course, are not subject to tribunal review at all.[54]

(3) Structure of the Tribunal System

As originally conceived, the AAT was to be a general central tribunal, albeit possibly with specialist divisions. The advantages of this model were efficiency, fairness and consistency in the quality and standard of review. While it was never envisaged that the AAT would be the only Commonwealth review tribunal, the logic of the system clearly demanded that others be created sparingly, and only when a case for them could be made out.

The model in fact has been augmented over the years in two main ways. First, specialist tribunals have been created in some "mass volume" jurisdictions, as a quicker, cheaper filter for decisions that are subject to appeal. The five such tribunals presently operating are the Veterans' Review Board (VRB), the Social Security Appeals Tribunal (SSAT), the Student Assistance Review Tribunal (SART), the Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT). The first three were created on the recommendation of the ARC and operate as a first level of external review, leaving more difficult cases or persistent parties to proceed on further appeal to the AAT. The remaining two tribunals, the IRT and the RRT are now linked to the AAT in a different way, which involves the immediate transmission to the AAT of cases deemed to require a higher level of review at the time they are lodged with the first tribunal.

Secondly, agencies have tended to establish internal review mechanisms, with varying degrees of formality, to reconsider decisions before they are dealt with by an external tribunal. While the ARC has supported internal review, it has generally taken the view that its use should not be mandatory, because this may deter some applicants from pursuing appeals which otherwise are justified. The increasing tendency for internal review to be prescribed as a prerequisite for application to a tribunal is a matter of current concern.

The two tier tribunal structure is presently being reassessed. While it performs the filtering function for which it was designed, it is too crude to ensure that the right applications are finally determined at the right level and unnecessarily prolongs the review process in some cases. An alternative, on which discussion is just beginning, is to return to the notion of a single appeals tribunal, incorporating all existing tribunals, but with an internal hierarchy which could ensure that only appropriate cases, however defined, are dealt with at the highest level.

IV CURRENT ISSUES FOR ADMINISTRATIVE REVIEW

The administrative law reforms at the Commonwealth level in Australia have been effective, not only in extending access to individual justice, which was expected, but also in improving the quality of administration and the openness and accountability of government. While much is due to the individual components of the system, with hindsight their integration with each other has been an important feature as well, which has enabled the evolution of a comprehensive view of the place of administrative review in Australian government.

Three significant, continuing issues for the system as a whole concern costs, the functions of primary decision-makers and the implications of external review for parliamentary government. Each is outlined briefly below.

(1) Pressures for cost reduction

In the early 1980s, the central issue in the debate on the administrative review system was its direct and indirect costs, including capital and recurrent costs of the review bodies themselves, the extra expenditure incurred by agencies in responding to review requests and the follow-on expenses of decisions of review bodies for the administration of government programs. During this period the ARC began, and then abandoned a project assessing the costs and benefits of the system largely because,

while the former were readily quantified, the latter were not and the results were likely to be misleading in the atmosphere which for a while prevailed.

A decade later, the benefits of the system are more readily apparent and its existence is no longer under challenge. Costs remain a major consideration, however. The need to contain them manifests itself in all sorts of ways which raise current issues for administrative review. The funding of the review bodies themselves has been under scrutiny, to improve cost-effectiveness in the face of fluctuating case-loads. A variety of mechanisms has been tried to reduce costs to users and tribunals, including rationalisation of increased use of one-person as opposed to three-person tribunals and procedures to eliminate or at least minimise reliance before tribunals on legal representation. Increasingly, in recent years, attempts have been made to recoup costs through the review process itself, by the imposition of filing fees for cases not connected with income maintenance. And within the last twelve months the possibility of awarding costs in tribunal proceedings has been raised again, against "vexatious" applicants, unsuccessful agencies or merely the losing party.

The ARC recognises that the continued health and development of the system depends on its cost-effectiveness and on acceptance that it is beneficial for government as a whole. Nevertheless, the Council has sought to modify some cost cutting measures in the interests of other features of the system which it considered more fundamental. Thus in general the ARC has supported three member rather than single member tribunals and has encouraged the development of public criteria to guide the constitution of tribunals for this purpose. The Council has opposed filing fees for tribunal applications, partly for reasons of access and partly to deter the already strong tendency to equate tribunals with courts. And for the same reasons, but with rather greater success, the Council has opposed the conferral on tribunals of powers to award costs.

This last is becoming an increasing problem, however, with the use of the administrative review system by large corporate clients, whose cases may take a considerable period of time. While the potential for such actions has always existed, they have achieved a higher profile through the acquisition by the AAT of jurisdiction over decisions of the Australian Securities Commission and through several environmental cases. If it were decided that in principle the costs of review might be recovered in these cases the difficulty would lie in devising arrangements which applied only to parties who were able to pay and which did not jeopardise other important underlying principles of the system.

(2) Effects on primary decision-making

There has been much discussion in Australia in recent years about the implications for the system of government of new approaches to public sector management, with its emphasis on risk-taking and outcomes. Inevitably, some of that discussion has considered the implications for administrative review. It is not appropriate in the context of this paper to canvass the whole of that debate, but to look at two specific manifestations of it.

The first concerns the attitudes of agencies. For all sorts of reasons, including the measurement of results against performance indicators, agencies are likely to want to minimise applications to tribunals and courts, ombudsman complaints, and the proportion of actions which they lose. Obviously, there are strategies for achieving these results which the most ardent proponent of review would applaud. But others are more problematic. One, which has been mentioned already, concerns the structure and use of internal review. Internal review makes good management sense. It can be desirable even from the standpoint of access to review, although that argument works both ways. But compulsory internal review, of the kind introduced in recent years for the IRT and the SSAT raises larger problems. One current challenge is to identify ways in which it might be made more palatable.

The second manifestation takes the perspective of individual public service officers. There have been natural human problems with review from the outset, stemming from the attitudes of persons whose decisions are reviewed and, often overturned. On the one hand the threat of review may induce soft decision-making, although the extent to which it does or not is difficult to determine. On the other hand a review decision which reverses or modifies a decision of an officer may give rise to resentment, which not only heightens tensions between the different levels of decision-making but probably also inhibits the full benefits of review being felt at the primary level.

The standard responses are that review should not be resented; that the system recognises that review bodies have more time to examine difficult cases than primary decision-makers; that review is part of the total decision-making process; that variation of a decision does not reflect adversely on the officer who originally made it. for these to be convincing, of course, decisions on review must genuinely be value-added. But even so, there is likely to be resistance. A current challenge for the system is to counter this reaction, through education within agencies or greater sensitivity in the way in which review is conducted on the part of the review bodies themselves.

(3) Implications for parliamentary government.

Issues of principle for parliamentary government arise under at least two broad heads. One, which was touched on earlier in the context of tribunals and government policy, is the effect of review on the principles of responsible government. This group of issues is not confined to the policy question, however, but includes the intrusion of review into traditional relationships within the public service and between departments and ministers. It also extends to and possible competition between review bodies and the constituency work of Members of Parliament. One simple answer to them all is to acknowledge that review does not sit neatly with traditional principles; but to note that nor do traditional principles work

as the theories assume. While the accommodation is still uneasy from time to time, there now is growing acceptance that review enhances, rather than detracts from, the operation of parliamentary government.

The second group of issues concerns equity: between applicants (raising the question of consistency, referred to earlier); between applicants and tax-payers (raising the question of cost); and between applicants and the rest of the community. In particular, it is sometimes argued that those who appeal get more favourable treatment than those who do not, although the latter may be meritorious. In this, as in any other aspect of government activity, it is necessary to be aware of the delicate balance between individual and collective interests. One answer to the critics, however, lies in the systemic effects of review, which benefit applicants and non-applicants alike.

V CONCLUSION

With hindsight, the Commonwealth administrative review system has survived three main challenges since its introduction in the mid-1970s. The first was the shock of the realisation of its impact on government prerogatives to make and apply policy in relation to the exercise of statutory discretions, with relatively little parliamentary or public scrutiny. The second was the debate about cost. And the third was the need to accommodate administrative review principles and procedures to new approaches to decision-making under the influence of the new managerialism.

The survival of the system has largely been attributable to its acceptance, both within and outside the public sector. Anecdotal evidence at least suggests that Australians expect reasons for government decisions affecting them, the right to appeal and reasonably quick and inexpensive appeal procedures. We have come a long way since the days when the lawfulness of a decision to deny a school leaver unemployment benefits could be tested only in the High Court of Australia, seeking equitable and

prerogative remedies.[55] The depth and standard of administrative review may partially compensate for the absence of constitutional guarantees of rights, for which Australia is notorious.

Nevertheless, the system needs constant vigilance. In part, this reflects its relative novelty; review bodies still lack the framework of agreed principle which for centuries have been applied to the courts. As a corollary, there is a real potential for day-to-day decisions of governments or parliaments to erode review arrangements, often unwittingly, in response to immediate problems. But most particularly, on-going monitoring is made necessary by the changing patterns of the structures, modes and scope of decision-making in the public sector itself, to which review must continually adapt. Creation of a body charged with publicly monitoring the operation and development of the system has proved a useful device for all these purposes.

ENDNOTE

1. The Northern Territory and the Australian Capital Territory.
2. The Commonwealth Administrative Review Committee 1968-71 (the Kerr Committee); the Committee on Administrative Discretions 1971-73 (the Bland Committee); and the Committee of Review of Prerogative Writ Procedures 1973 (the Ellicott Committee).
3. Administrative Appeals Tribunal Act 1975 (Cth).
4. The largest jurisdictions, by percentage of total applications lodged in 1991-92, were Veterans (35%); Social Security (22%); Employment, Retirement Benefits and Compensation (22%); and Taxation (11%): Administrative Review Council Sixteenth Annual Report 1991-92,40.
5. Reducing the backlog of applications to 5,092: ibid.
6. Ombudsman Act 1976 (Cth)
7. Part V.
8. Freedom of Information Act 1982 (Cth).
9. Archives Act 1983 (Cth).
10. Privacy Act 1988 (Cth).
11. Social Security Appeals Tribunal (SSAT).
12. Veterans' Review Board (VRB).
13. Immigration Review Tribunal (IRT).
14. Student Assistance Review Tribunal (SART).
15. Refugee Review Tribunal (RRT).
16. There is no appeal to the AAT from the IRT and the RRT, but cases raising issues of special importance may be transferred from these tribunals to the AAT, specially constituted to include the principal member of the transferring body.
17. The President of the ARC meets regularly with the Heads of Tribunals; the ARC hosts the annual Commonwealth Administrative Tribunals Conference, in consultation with the tribunals themselves; and the Council has an ongoing tribunals project, with which the tribunals are actively involved at particular stages. In a new development,

the President of the ARC has been a member of the Resources Reviews for both the AAT and the SSAT in recent years, pointing to a potentially greater use of the ARC as a buffer between the tribunals and government.

18. All States have an Ombudsman. Victoria has an AAT and partially reformed judicial review legislation. Queensland is considering wholesale changes to administrative review, generally along Commonwealth lines.

19. The only tangible evidence of such at development at present is the somewhat vague references to agreements on systems for "user rights" under individual intergovernmental programs: notably, housing assistance. The Administrative Review Council currently has a project on review of decisions under intergovernmental arrangements in the Community Services and Health portfolio, which should provide some guidelines for future development.

20. R v Hickman; ex parte Fox and Clinton (1945) 70 CLR 598.

21. R v Kirby; ex parte Boilermakers' Society of Australia (1956) 94 CLR 254; Attorney-General v The Queen (1957) 95 CLR 529.

22. Since 1977, High Court justices must be appointed until the age of 70. The Parliament may prescribe a lesser retirement age for justices of other federal courts: in the absence of such provision they also retire at 70. Federal justices can be removed only by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity: section 72(ii).

23. Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577.

24. Commonwealth Parliament Report of the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals, November 1989; submission to the Joint Select Committee by the Administrative Review Council Fourteenth Annual Report 1989-90,17. The Council's suggestion to the Committee, which was not adopted, was that appointees to tribunals should be offered a choice between tenure to

retirement and tenure for a single, non-renewable period of years, with remuneration packages tailored to suit each option.

25. (1985-86) 162 CLR 24.

26. At 42.

27. (1986) 68 ALR 441.

28. Section 61(1):"On an application for an order of review in respect of a decision, the Court may, in its discretion, make...(d) an order directing any of the parties to do...any act or thing...which the Court considers necessary to do justice between the parties".

29. "If the decision-maker, although his discretion has miscarried, is left with a residual discretion under the statute to decide the ultimate question favourably or unfavourably to the successful applicant, the order which the court makes should, notwithstanding the width of s 16 of the Act, usually, if not invariably, be one which remits the matter for further consideration according to law.." per Sheppard J. at 453.

30. G. Sawer, "The Separation of Powers in Australian Federalism" (1961) 35 Australian Law Journal 177, C. Howard, Australian Federal Constitutional Law (1985), 248.

31. This was expressly confirmed for New South Wales in Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372.

32. In its 1988 Annual Report the Supreme Court of Victoria drew attention to the conferral of exclusive jurisdiction on some Victorian tribunals as "diminishing the standing and the constitutional role of this Court as the third and independent arm of Government in this State." at 27.

33. The issue came to a head in Victoria in late 1992 with the abolition of the Accident Compensation Tribunal. Although the tribunal had most of the trappings of a court, its members were not appointed to other bodies and their tenure effectively was terminated.

34. Constitution Act 1975 (Vic) section 85.

35. Constitution (Amendment) Act 1992 (NSW). A referendum to be held in 1993 will determine whether these provisions should be entrenched.

36. Public Service Association (SA) v Federated Clerks' Union of Australia (1991) 173 CLR 132. Per Brennan J.: "This Court has not accepted Lord Diplock's view that the distinction between jurisdictional and non-jurisdictional errors was for practical purposes abolished by the decision of the House of Lords in Anisminic..." at 141.

37. Administrative Appeals Tribunal Act 1975 (Cth) section 33 (1).

38. Electoral and Administrative Review Commission Appeals from Administrative Decisions Issues Paper No. 14, 1991 para.7.8

39. "I often hear these criticisms but never supported by chapter and verse or even anecdotal evidence" : J. Dwyer "Overcoming the Adversarial Bias in Tribunal Procedures", an address to a public seminar of the Electoral and Administrative Review Commission on Appeals from Administrative Decisions, 19.

40. Sullivan v Department of Transport (1978) 20 ALR 323; Australian Postal Commission v Hayes (1989) 87 ALR 283. Cases to the contrary include Kuswardana v Minister for Immigration and Ethnic Affairs (1981) 35 ALR 186. Other causes include the expectations of parties and advocates before tribunals and the resource constraints on tribunals which are minded to play a more active role.

41. Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60. See generally M. Allars, Introduction to Australian Administrative Law (1990), 318.

42. Electoral and Administrative Review Committee, op.cit. n.36 para. 6.10.

43. Ibid. para. 6.11.

44. P. Bayne "Tribunals in the System of Government" Papers on Parliament No. 10, (1990).

45. Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158.

46. Drake v Minister for Immigration and Ethnic Affairs 91979) 2 ALD 60.

47. Re Drake and Minister for Immigration and Ethnic Affairs (No.2) (1979) 2 ALD 634.

48. As recommended by the Administrative Review Council to the 1991 Review of the Administrative Appeals Tribunal: Administrative Review Council Sixteenth Annual Report 1991-92, 39.

49. R Balmford "The Life of the Administrative Appeals Tribunal" in R Creyke (ed) Administrative Tribunals: Taking Stock (1992) 50,76.

50. "Between November 1976 and the end of December 1991, the Tribunal handed down over 7650 written decisions, more than 1000 of them in 1991. There is no internal indexing system...Given the rate of change in relevant legislation, the significant decision is often so recent as to be unreported..." Balmford, op.cit. n.47,76.

51. See, for example, the Council's recommendations on review of decisions on refugee status: Fifteenth Annual Report 1990-91, 87.

52. Administrative Review Council Eleventh Annual Report 1986-87, Ch. 9.

53. Administrative Review Council Fifteenth Annual Report 1990-91, 5. The immediate consequence was to deny merits review by the AAT to decisions about fisheries allocation and medical research grants.

54. Administrative Review Council Rule Making by Commonwealth Agencies Report No.35.

55. Green v Daniels