COMMENTARIES

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I showed Mr Justice Kirby's paper to the people in the Department of Immigration and Ethnic Affairs who have the prime responsibility for deportation matters. All of them and I came to the conclusion that we had virtually nothing to disagree with in the whole of the paper. I should make it clear that my own experience of the operations of the AAT is confined to the area of appeals against criminal deportations. That, of course, is a very unusual area. It was interesting yesterday to hear that most of the speakers in the first session referred to the balance between the citizens and the state, or the citizenry and the state. This is an area where most of the case law does not affect citizens. It affects people who are not citizens.

It is unfortunate in some respects, as both Mr Justice Kirby and Professor Pearce have said, that the fundamental questions about the role of the Tribunal in relation to policy have arisen in the context of criminal deportation cases where decisions tend to be controversial and have a high political content. In addition, it is an unusual area in that the Tribunal can only either affirm the Minister's decision or remit the matter for reconsideration in accordance with any recommendations of the Tribunal.

It is probably an area where over a period there will be a continuing interplay between the Minister's decisions, the recommendations of the Tribunal and the Minister's reaction to recommendations that suggest the revocation of deportation orders.

The Minister who is bound, whether it is by law, convention, political realities, or whatever, to give effect to Cabinet decisions, still has the last word in these cases or, at least, probably has the last word. That word is still to be spoken in a number of cases, including one or two mentioned in Mr Justice Kirby's paper. It is probably not known that the Minister decided in one case not to accept the recommendation to revoke a deportation order. That decision was taken over fifteen months ago in a drug offence case. In that instance the letters to inform those affected were about to be despatched when it was learned that the subject of the deportation order had been struck by a tree and killed. Now, there seems to be a fairly serious message somewhere in that. Indeed the Minister seems to have an awesome power. Perhaps it is not the Minister's power that was invoked in that particular case; but that introduces another factor in administrative review which I have not yet heard discussed.

There are several files with the Minister relating to recommendations for the revocation of deportation orders where he has to make his final decision in the light of Government policy and the recommendations of the Tribunal. I must say that the situation is becoming complicated by the fact that there are appeals to be determined by the courts in some of these cases or in

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other similar cases. It does not need much imagination to see that the Minister (and the present Minister considers that he has a personal commitment to ensure that the institutions of Government work as effectively as possible) is faced with a dilemma in considering what to do about recommendations to revoke deportation orders. It is not necessarily drug offence cases which cause the most soul-searching. In fact, my own experience has been that it is in criminal deportation cases other than drug offence cases that the most difficult decisions have to be made.

It will be evident from Mr Justice Kirby's paper that the Minister and his advisers find themselves in a strange situation. On the one hand they believe that they must give effect to the Government's policy in regard to criminal deportation. I emphasise that that policy was the result of a Cabinet decision and the statement agreed on by Cabinet was tabled in the Parliament. As far as I am aware there was no dissent about the substance of that statement. On the other hand the Tribunal, on the basis of Federal Court decisions, seems to be in a position where it is not bound by Government policy. Indeed, as Mr Justice Kirby indicated, individual judges have apparently given different weight to Government policy in reaching their decisions in these cases. They have also been prepared, as he mentioned, to comment about the policy in regard to deportation, particularly as it relates to drug offences. In this connexion it is my understanding that the policy was intended to be draconian and that the primary reason for adopting that particular policy was not related to Administrative Appeals Tribunal litigation, but to the Government's determination to take the firmest possible action in relation to drug offenders in the light of Royal Commission reports and other information available about this particular problem area. So, when the Minister considers recommendations for revocation of deportation orders, clearly he has to operate in accordance with Government policy.

The difficulties for public servants advising the Minister must be obvious. If courts and tribunals are to stand in the shoes of the administrator, let them start to formulate policies. Why should they not be required to state clearly how they will exercise the discretionary powers conferred by the relevant legislation.

It is extremely difficult for administrators to ascertain the views of the Tribunal as a whole in relation to this area of criminal deportation. For example, different judges take different views about the question of policy. There is bound to be confusion in the minds of administrators if they are uncertain about what weight to place on the various aspects of the Government's policy. As more decisions are made rules will emerge and one may well get to the stage where there will be a need for manuals of departmental practice to be amended in the light of recommendations which are accepted by the Minister. Under the Freedom of Information legislation, these manuals will have to be made available to the public, at least in some form. I believe that the interaction between Tribunal decisions and ministerial responses to recommendations will eventually lead to a clearer understanding of the bases for decision-making and of the weight to be given to Government policy in reaching decisions. Certainly as a result of the decisions of the Administrative Appeals Tribunal there will be some effect,

as has already happened, in relation to the content of Government policy and the way in which it is interpreted and why.

In case there is a view that I am being excessively critical of the whole system at the moment, I do emphasise that, as public servants, we see our task as being to make the institutions of Government work effectively. In this respect, the Administrative Appeals Tribunal is one of the institutions of Government in administrative decision-making and it is really our objective to make the new system work as effectively as possible—even in such a tricky area as this.

There has been comment on whether Tribunal recommendations or decisions can be affected by the fact that they see only a small proportion of cases in a particular subject area. In the case of criminal deportations I must say I was astounded to find when we did some figuring recently that there are somewhere around 6,000 individual cases each year where people come within the scope of sections 12 and 13 of the Migration Act. The number of cases coming before the Tribunal is about thirty-four percent of the total number of cases where deportation orders are signed under sections 12 and 13 and the total number of deportation orders, which is about 120-130 a year, is only about two to three percent of the cases where people are within the scope of those sections. One wonders what attitude the Tribunal and individual members of the Tribunal would take if they saw the whole pattern of decisions that have to be taken in this area or at least if they saw those where there are difficult decisions. Obviously the vast majority of the 6,000 are relatively straightforward and there is no question of signing a deportation order. The more difficult ones, which would probably amount to about 700, come to the higher levels of the central office each year.

One possibility to deal with the conflict of approaches mentioned might be, as Mr Justice Kirby said, to prescribe more details of the policy in legislation. I think that, for the reasons he has given, that would be unwise since those of us who have to deal with the manifold variations in situations of individual immigrant offenders see the need to retain a significant element of discretion. Moreover, the circumstances of individual offenders change and circumstances in their home countries change as well. At the same time, where a Government policy has been adopted deliberately on a matter as important as deportation of criminal offenders, and if that policy as tabled in the Parliament by the Minister is not being put into effect, it is obviously a possibility that the legislation might be changed to ensure that the policy will be put into effect. Another approach might be to change the whole nature of the process of criminal deportations. This is one thing that we have got to look at as a result of consideration of this policy area in the light of the advent of the Administrative Appeals Tribunal. A possibility might be to prescribe more clearly in the Migration Act those categories of offenders who would be liable to deportation and then to change the whole nature of the process by providing for all persons who are guilty of those types of offences to be deported, except where a Tribunal finds there are compelling circumstances supporting their remaining in Australia. Now this would obviously provide a much more onerous workload for the Tribunal and be a costly procedure for individual immigrant offenders.

There is also the question that was raised about the composition of tribunals in areas such as this. There are very strong views being put forward by sections of the community that only people who have been through the migration process can understand what it is all about and should be in a position where they can choose who is going to come into the country or remain.

Yet another possibility would be to remove this area of decision-making from the jurisdiction of the Administrative Appeals Tribunal. That, of course, is not contemplated at this stage but nonetheless it is one of the options that would have to be considered in due course if there were problems; but I do not think that will arise.

Finally, I would like to put forward for your consideration a few points that are raised to some extent by Mr Justice Kirby's paper but were dealt with more specifically yesterday by some of the speakers.

The first is whether policy and administrative decision-making have improved as a result of the operations of the Administrative Appeals Tribunal. Certainly there is more precision in policy statements—although you might well query that when you see the policy statement in regard to deportations and on deportations of drug offenders. I believe also that there are longer and perhaps better arguments than previously going to the Minister on criminal deportations. That probably is a good thing—provided the Minister is left with enough time to do all the other things that Ministers have to do.

In terms of the decisions themselves, there has been a tendency (and perhaps I am reading too much into this) for an increase in the proportion of the Minister's decisions being affirmed: sixty-two percent in 1977/78; fifty-five percent the following year; sixty-seven percent in 1979/80 and seventy percent in 1980/81. Those are fairly woolly figures because some of the decisions are subject to appeal and conclusions have not yet been reached. An interesting thing is that there was a smaller number of appeals to the Tribunal in the financial year just ended. We are not sure why that was. It could well be related to factors such as the number of people who were being released from prison; the downturn in the immigration intake in the early nineteen-seventies; and perhaps some people who would otherwise have gone to the Tribunal in cases where decisions have been taken which were adverse to them, have decided that it is not worth the effort.

The second question is whether the cost and complexity of the Administrative Appeals Tribunal procedures outweigh the value there may be in having an established system of external review. As I have indicated, the administrators now are in some confusion about the state of play with individual deportations since there is a tendency to use every available review mechanism. Some people go to the Ombudsman, some to the Administrative Appeals Tribunal and others to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977—as well as making representations to the Minister or the Department. Some try all of these avenues. In the area of criminal deportations where there can be patterns of similarities in offences, particular cases may become intricately entwined with others of a like nature which go to appeal. Mr Justice Kirby

asked me if I was going to mention the case where the cost to the taxpayer exceeded $60,000. Well, indeed I am, because it is now up to $70,000 and I was told yesterday that it was $74,000 because the appeal books have cost $4,000 to print.

Linked with the question of costs is the question of delay in decision-making where literally years may elapse now in some deportation cases which go to the High Court.

I have overstepped my time so I will not go on to talk about some of the other matters that it was suggested I raise. I might end by asking a third question and that is whether there is a net benefit to the community through the external review apparatus? From the point of view of senior public servants there is no doubt that the amazing leap forward, referred to in Mr Justice Kirby's paper, has meant a considerable redistribution in the allocation of time and effort in the direction of involvement in external review and away from primary decision-making, policy advising and management of the Department. There is certainly no doubt about this in the area of administration with which I am familiar. Compared to the situation four or five years ago, the most senior public servants now have less time to spend on policy advice and administration. External review requires more senior public servants to be involved in the process of preparing submissions to the Minister on matters relating to the Administrative Appeals Tribunal; preparation of statements the Minister has to submit to the Tribunal; briefing of counsel; and, a more recent development, actually appearing before the Tribunal and the courts. In a time of staff ceilings when there are limited senior public servant resources, I wonder whether it is a rational allocation of priorities to increase the amount of time being spent on external review within the higher levels of the public service or at least in certain sections of it.

I should like to conclude my remarks there. This may seem a fairly gloomy approach and one that might tend to suggest that there is more conflict on the part of the bureaucracy with the whole approach to administrative review than is in fact the case. As I want to emphasise, Ministers, and certainly senior public servants, see it as their duty (and indeed as being something that is desirable) to make the institutions of Government work. In this area one of the things that would be helpful and perhaps will emerge more clearly over a period, would be to have the opportunity for discussions with the members of the Tribunal on matters such as overall policy, on the way in which things operate, with a view to making the whole system operate more effectively. To some extent, that is already happening. The idea of preliminary conferences has been accepted and seems to be a useful innovation.