PROFESSOR JOHN GOLDRING*

We should all be most grateful to Mr Justice Kirby, who, though an "amateur" in the business of administrative law (in the sense of being a part-time member of the Administrative Review Council), has made most significant contributions to the literature and knowledge of administrative review. Here is another example, and a timely one, when because of the new prominence of administrative law, developments within it raise fundamental issues such as the question of whether governmental policy should be subject to review.

It is clear that the "New Administrative Law" has brought, within the Commonwealth Government, new forms of administrative review which are permanent, because there was a clear need recognized by all (except perhaps some troglodytes in the bureaucracy). They are easily justifiable. In principle, and, I believe, in practice, the new administrative law leads to qualitatively better administrative decisions—because decisions are taken with proper case or proper grounds; because decision-makers know of the possibility of review. It provides a check on bureaucratic haste and high-handedness. It provides redress for the individual who feels aggrieved. It is a model which, in general terms, I think the States would do well to follow.

Please note the order in which I have listed these benefits. Up until now, lawyers have tended to study administrative law from the point of view of individual rights. It is now clear that it is also important as part of the procedure for implementing the collective benefits or burdens that flow from an organised society. It may now be preferable to regard administrative law more as an integral part of the machinery for the control of the structure of government than as a means of enforcing individual rights. It is as much part of the legal structure of Government as is the Constitution, and must be regarded as such by lawyers.

Mr Justice Kirby raises the impact of administrative review and especially review of policy by the Administrative Appeals Tribunal, upon democratic theory. He should have no worry. In this country, we have had, in large measure, review of policy in constitutional cases for many years, where the legalism of the courts has, not always improperly, been used to strike down policies embodied in legislation. Courts have also reviewed the implementation of policy where there are questions involving extent of powers, natural justice, "relevant" and "irrelevant" considerations and so on. In Australia, policy-*making*, as opposed to *review* of policy, by lawyers sitting in court-like institutions, is not new. Because of the peculiarities of section 51(xxxv) of the Constitution, lawyers, sitting first in the Court of Conciliation and Arbitration, and, since the *Boilermakers' Case* (1956) 94 C.L.R. 254, in the Conciliation and Arbitration Commission, now with non-lawyers, have quite explicitly been making policy decisions, often quite at variance with government policy, though that is one of a number of factors which is taken into account. These areas of *judicial* or *"quasi-judicial"* review are distinct. In the case of judicial enforcement of the

* B.A., LL.B. (Syd.), LL.M. (Columb.); Professor of Law, Macquarie University.

Constitution, the Court makes the final decision. Where the Conciliation and Arbitration Commission makes an award, section 51(xxxv) of the Constitution means that the decision is final. But in the case of administrative review, Parliament remains supreme. Parliament can always reverse a judicial decision on a question of administrative law: *a fortiori*, it can, in theory, override the Administrative Appeals Tribunal or ignore the Ombudsman. If review by courts and tribunals interferes too much with government policy the remedial legislative action may be specific—but there is always the possibility that the Parliament, having created administrative review by statute can always take it away by statute.

Reviews by the Administrative Appeals Tribunal are not *judicial* reviews, though from hearing discussions by lawyers about the role of the Tribunal, one could be forgiven for making this mistake. The Tribunal is part of the administration. If it chooses to override government policy, within the narrow limits permitted by *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, then the Minister, or, if necessary, the Parliament may override the Tribunal. The Minister has done so in the case of deportation policy.

The Tribunal operates within the structure of the executive branch of government. It is a watchdog, set up to review administration and to correct maladministration where the Parliament cannot or does not either because of the workload of members or because of the effects of party discipline. It provides a *check* on administrative action. It has a role of correcting illegal actions, but in this its role is common with that of the Ombudsman, another part of the executive branch. Parliament always has the last word, but the administration has an incentive to act carefully, and the public has a new mechanism for control of government.

Mr Justice Kirby pays some attention to the mode of operation of the Tribunal. He perceives a trend for it to be less formal than it was previously. I hope he is correct, for in its early days, its proceedings were rather court-like. This affected access to it, and its decision-making process. The Tribunal is still court-like. It hears evidence presented in an adversary manner, which is, perhaps, inevitable, given the reluctance of both the Bland Committee and the Administrative Review Council to permit expert departmental officers to sit on the Tribunal.

The Bland Committee referred to an "administrative culture". This is not the dominant culture of administrative review, for there *legal* culture predominates. In legal culture, the quest is for justice in the individual case, for meticulous examination of all relevant evidence—of which government policy is only part. While the two cultures have much in common, such as dependence on the selective use of precedent and the process of characterization, there are differences. Administrative culture, I suspect, is more concerned with distributive justice, legal culture with individual justice. While it may be desirable to reconcile the two wherever possible and a balance struck, it will not always be possible, and it may not be appropriate, for the legal culture, with its bias towards property rights, to prevail.

The legal approach of the Tribunal may have other effects, not the least of which is upon access to review of administrative action. While the Tribunal cannot make orders for costs and its procedures are adversary, it

is more likely the rich, or the desperate, who will use it, rather than the poor, or those whose livelihood or continued residence in Australia does not depend on an appeal.

The Ombudsman's procedures are inquisitorial, and there seem good arguments why this mode is often preferable, in the context of administrative review, to an adversary mode: it does seem a better way to acquire the full administrative background to a decision in its policy and administrative context, and it might well save costs for both the applicant and the government. This is not in any way to decry what the Tribunal has done nor the way of doing it or, indeed, the need for an independent review body external to the department or instrumentality in which the primary decision was made. The present role of the Ombudsman is limited, and there is an unanswerable case for an external body which can substitute its own view of what is the "right or preferable" decision. What does need examination is the procedure of that body.

To date the Tribunal has been concerned more with the implementation of policy than with policy-making—but the line is fine. The Dreary Drama of Dope and Deportation which the Judge presents demonstrates that most policy is made incrementally, in the decisions of particular cases, rather than by a new initiative. So review of policy implementation may, in some cases, be as significant as criticism of a new policy announced by a Minister. While the common law is made by judges in a rather similar, incremental, way, it does not follow that the legalistic approach, that is the decision of individual claims in the courts, is the best approach for review of administrative decisions.

Mr Justice Kirby gives great weight to arguments about judicial prestige —a matter no doubt of great concern to other judges, but, I think, overemphasised in this context. The fact that the deportation cases have been decided by Presidential Members who are also judges illustrates little, except that the operation of the Tribunal cannot really be anything but judicially influenced. I sense that Mr Justice Kirby suggests that while lawyers are necessary members of tribunals, a sentiment I share, they need not also be members of the Federal Court. If the Judge is suggesting that administrative review needs a special type of quasi-judicial technique, and specialist lawyers able to apply it, I would agree.

The arguments between those who support a general body of principle of administrative law and those who support specialised review tribunals have been resolved, at Commonwealth Government level, in favour of One Big Administrative Law. Why not take matters to their logical conclusion, lay Dicey to rest, and establish a new, expert, but separate, administrative quasi-judiciary to provide the necessary legal input for administrative review? The Conciliation and Arbitration Commission, though perhaps a not altogether satisfactory mechanism, arising from a constitutional peculiarity, does provide a precedent for a body in which lawyers, though not only lawyers, play an important role, involving policy and departing in significant ways from the strict judicial model. Given that the Administrative Appeals Tribunal is a single body, and that it is required to decide a wide range of applications, which are drawn from very different types of administrative procedures as Brennan J. pointed out in *Re Drake and Minister for*

Immigration and Ethnic Affairs (No. 2) (1979) 2 A.L.D. 634, not only is there a need for members who are to some degree experts in that they are familiar with a particular type of administrative practice and a subject-matter, but, I suggest, also for legally trained members who have the opportunity to develop in depth an awareness of administrative culture and to attempt a cross-cultural reconciliation. It seems to me that this has been the practice and the wish of legally qualified members, and it is a trend to be encouraged.

Such a suggestion for a specialised branch of lawyers may lead to the development of new techniques evolved for the purpose of reviewing administrative action which shed those elements of the formalistic traditions of the court that may impede the "best or preferable" administrative review.

Those who said, "Lawyers Keep Out" were unduly optimistic, but also perceptive. Now that lawyers have stepped onto the forbidden ground, we need to ensure that the approaches and tools they use are appropriate. While administrators may often be more legalistic than the lawyers, "the strict and complete legalism" of most members of the legal profession dedicated to individual justice at any cost, may harm the very valuable system of administrative review that has been established.