COMMENTARIES

Mr D VOLKER*

The availability of reasons for decisions is an important part of recent developments in Commonwealth administration. As Mrs Burnett's scholarly analysis shows, these developments have not been without their uncertainties. I would like to pursue a few of the issues raised in her paper and mention some issues associated with providing reasons for decisions in the Repatriation area.

There is much to be said for a person affected by a decision having a right to obtain full written reasons for the decision. This enables the person affected to find out why the particular decision has been made. It may also provide a possible basis for challenge to the decision. As Mrs Burnett notes, the need to give reasons has also been described as encouraging consistency and better quality in decision-making.

In the field with which I am most recently familiar, Veterans' Affairs, we have not had much experience of the obligation to provide reasons under the Administrative Appeals Tribunal Act 1975 (Cth) or the Administrative Decisions (Judicial Review) Act 1977 (Cth). However, statutory obligations roughly similar to those arising under those Acts apply at each of the three levels of the Repatriation determining system in respect of claims for entitlement to pension or assessment of the rate of pension payable. Thus, in the 1981-82 financial year, reasons for decisions were provided in respect of 19,690 entitlement decisions and 9,396 assessment decisions. The figures in the current financial year will be even higher. This is no mean task.

We are indebted to Mrs Burnett for her analysis of the way in which the courts are examining reasons for decisions in the course of the judicial review process. In respect of at least some of the decisions she has listed, judicial activism rather than judicial restraint seems to be to the fore. Judicial review under the Administrative Decisions (Judicial Review) Act seems to me as a non-lawyer to be drawing close to review on the merits. This is not surprising since I recall that Professor Whitmore said at the 1981 administrative law seminar at this University that, "it would be a very unimaginative judge who could not review an administrative decision on the merits"[1] under the Act.

The comments of Lockhart J in *Toy Centre Agencies Pty Ltd* v *Spencer*,[2] which are referred to by Mrs Burnett, seem to strike a sensible compromise between the need to ensure that decisions are taken properly, fairly and otherwise in accordance with law and the demands of practical administration. As Lockhart J pointed out:

> the Court must not require perfection from decision makers or impose such onerous duties upon them as to cause them to be afraid to make decisions, lest they be challenged on trivial grounds, or to pre-occupy them with *minutiae*.[3]

Similar sorts of judicial comments have been made when reviewing Repatriation decisions. However, my impression from reading Mrs Burnett's

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[1] H Whitmore, "Commentary" (1981) 12 FLR 117, 118.

[2] (1983) 5 ALD 121.

[3] *Supra* n 2, 128.

paper is that Mr Justice Lockhart's words have not always been followed by his brother judges. The attitude of the Federal Court in recent immigration cases is a little disconcerting for administrators endeavouring to do what in their considered opinion is best in the prevailing circumstances. The question whether the Court will in a particular case be prepared to pick over exhaustively the reasons that have been given by a decision-maker or fall back on expressions of the time-honoured conventions of judicial restraint is not one that now can be readily predicted in a particular case.

There is a good deal of justified criticism of the delays in the Repatriation determining system. I am convinced that one of the main reasons for the delays is related to the obligation to give reasons.

I have had some charts made of the mean times taken to process claims and appeals going back to 1972. It is significant that substantial increases in mean times taken at the Repatriation Board, Repatriation Commission and appeal tribunal levels have followed the introduction of the obligation to provide reasons for decisions.

Having said this, I emphasise that I believe that it is necessary to produce written reasons for decisions. Contrary to views expressed in some quarters I believe it is necessary to have written reasons for decisions even in cases where the decisions are favourable. This is because in the Repatriation system most claimants make multiple claims and use the various avenues of appeal or make applications for increase. In many instances it is as important to know why a favourable decision was given as why an unfavourable decision was given. Usually it should be possible to give succinct reasons where the decision is favourable.

It is also interesting that since the Repatriation Act was amended last year to enable the Repatriation Review Tribunal to give oral reasons for decisions,[4] output has increased considerably as advantage has been taken of this change in at least 70 per cent of decisions. The fact that we do not know why particular decisions were given, in an area where the approval rate is 85 per cent plus, is perhaps of concern only to the Repatriation Commission.

The right to obtain reasons is just one aspect of what should be an efficient primary decision-making process. The discipline of writing reasons no doubt has led to better decision-making. Nevertheless it would be a very sanguine and foolhardy Permanent Head who saw the availability of reasons as the answer, or even an important part of the answer, to good administration.

In her paper Mrs Burnett has made an implied criticism of existing guidelines available to public servants for the writing of reasons for decisions. My colleagues in the Department tell me that I would be less than honest if I said that the Administrative Review Council's memorandum on the subject represented its finest hour of achievement. We have to accept that guidelines for writing reasons must be expressed in simple and straightforward terms to be capable of understanding and application by officials. After all most decisions are made by fairly junior officers. Many of them must be bemused by references to statutory terms like 'findings on material questions of fact' and the use of the word 'evidence' as ingredients in the obligation to provide

[4] Repatriation Legislation Amendment Act 1982 (Cth) s 6.

reasons for decisions. I am not sure as to the exact distinction between facts and evidence. Indeed the lawyers in the Department tell me that they overlap.

Reasons for decisions ought to be intelligible to claimants and appellants. We strive to do this by using everyday language and simple constructions. It is a problem that reasons for decisions written on this basis can become crucial in Federal Court cases where standards more akin to those applicable to experienced lawyers may be applied.

There is one other point I should like to make before turning to the Freedom of Information Act 1982 (Cth). There is a continuing concern in the Public Service about the increasing convolution and complexity of the various determining systems. It is unlikely that the vast majority of people in the community understand the purpose of, or the avenues for action available under, the various administrative law Acts. One exception might be the Ombudsman Act 1976 (Cth) where all that is necessary is to make a telephone call or write a letter setting out a complaint. In the Repatriation area, what ought to be a simple, generous system to help Veterans obtain just compensation for service-related disabilities is now an incredibly complicated system. Anyone thinking of entering the system for the first time faces a daunting task in working out exactly how to proceed, what forms to fill in and what information to provide.

As a relative newcomer to the Repatriation area I have been struck by the fact that most of the claims and appeals lodged are by people who already have accepted disabilities. There is a consistent figure of 70-75 per cent of new claims and claims for new disabilities lodged by people who already have accepted disabilities. This could suggest a number of things. One thing I believe it shows is that those who use the system tend to be those who have already had experience of the system. The various avenues for review, the submission of further evidence, applications for increase in existing pensions and so forth are being used by the same people over and over again. Only a very small proportion of those without disability pensions is lodging claims in spite of the fact that many people must be deserving of assistance through the Repatriation system.

This leads to a conclusion that perhaps priorities have gone astray. For most administrative areas and certainly for the Repatriation area, the times taken to make decisions and to go through the appeals processes are increasing and the processes are becoming more expensive and more convoluted. Is a fair and efficient administrative system one where resources are directed to exquisite justice for a few after protracted deliberations or one where resources are directed to making everybody aware or his or her rights, assisting with lodging applications and reaching prompt decisions, even if perhaps rough justice may be involved in some cases? No doubt the Australian community needs the administrative review mechanisms which have been introduced in recent years; but it seems opportune to consider now whether there should be a re-emphasis on access to administrative systems and on the speedy and comprehensive operation of decision-making systems, even if these require more resources.

In short, should resources be directed to giving more attention to such matters as widening knowledge of entitlement and access; ensuring that there is an adequate access for people in non-metropolitan areas; improving techniques in investigating claims and assisting claimants; revising manuals; improving computerised information systems; upgrading training of decision-making

staff and those who have contact with clients; and generally making administrative systems more accessible and quicker in operation as well as devoting attention to a small proportion of the total number of individual cases in the administrative review system?

Turning to the Freedom of Information Act, it is still too early to speak with any authority about its effects. I wonder whether, however, the intricacies of the Act, to which Mrs Burnett refers, will lead to much difficulty in practice. Until a month ago, I would have said that it has had less effect and use than we had anticipated. In the five months to the end of April the Department of Veterans' Affairs had received 411 requests under the FOI Act. Two points that emerged were that each request had cost roughly $900 in terms of total outlays on Freedom of Information activities and that the average payment for photocopying, *etcetera* was 30 cents.

However, in the month of May there has been a dramatic change with 287 requests being received up to 25 May. Nearly all of these additional requests have been made in Sydney. The upsurge in activity seems to be related to publicity in RSL magazines about the operations of the FOI Act and the excellent service the Department provides. It also seems to be related to word of mouth advertising along the same lines combined with the effects of Anzac Day which always lead to an increase in the number of claims lodged each year.

So far all seems to be going smoothly. Of the 698 requests received since 1 December 1982, 492 had been finalised by 25 May. Of those requests 443 had been approved in full, 10 had been approved in part, 9 had been denied, 20 had been transferred to other Departments and 10 had been withdrawn. Where requests have been denied this has been on the basis that persons were seeking access to information on files relating to other persons.

There have been only three appeals to date which have been conducted by internal review. In no case so far have time limits expired. There have been two requests so far for amendment of personal records, one of which was approved and the other is currently under review.

The vast majority of requests so far have been for access to personal files. In most of these cases we believe that the Veteran has been mainly interested in information relating to a claim or an appeal. This is not surprising since for many years the Department has operated a system enabling access to personal files. Indeed we continue to receive many requests for this informal kind of access. Where access is granted, we ensure that there is an officer available to provide advice and information on any matters the Veteran wishes to raise whether under the Freedom of Information Act or the Department of Veterans' Affairs informal system.

Not much of this has relation to reasons for decisions or to the matters dealt with in Mrs Burnett's paper. So far we have provided reasons for decision in about 20 cases. These have usually been where the document sought relates to the personal affairs of a person other than the applicant, where a document is not held by the Department or where the request comes within the scope of s 41(3) of the Freedom of Information Act. Section 41(3) matters seem to have gone without serious problems so far with the particular documents being referred to medical practitioners of the Veteran's choice.

As I mentioned most people using the FOI Act in the Veterans' Affairs area

are apparently seeking information to assist with a claim or appeal. So far as I am aware the vast majority have been satisfied with their perusal of their files.

It may well be that the Veterans' Affairs experience is different from that of other Departments because of the long-standing arrangements for access to files and assistance in understanding their contents.

I make a final point: that a continuation of a situation where remarkably few instances of internal review arrangements having to be used will cause problems for those who are to undertake reviews. In reading Mrs Burnett's paper I was struck by how much the passage of time has dimmed my recollection of various sections in the FOI Act on which I had been well briefed only six to nine months ago. It seems that the more senior people in the Public Service will face problems of coming to grips with their responsibilities if the matters coming to them for review are as few and far between as has been the case to date. I hope this will not lead practitioners of investigative journalism to make and pursue requests to assist us in recalling the provisions of the Act.

Mr ROGER GYLES*

It has been a very polite seminar so far and the reasonableness of the public servants who have spoken has been noteworthy. May I just inject a slight note of scepticism, based probably upon the number of years one has sought access to information on behalf of clients, and been refused; and sought to challenge decisions when there have been no reasons given. Perhaps more importantly I have been involved in cases where either the other side or my own side has made claims for Crown privilege. I think those of us who have been involved in cases where Crown privilege was claimed in pre *Sankey* v *Whitlam*[1] days will appreciate that those claims were very often very poorly based. I am not speaking simply of Commonwealth authorities, my greater experience is with the various State authorities. I think it is also fair to say that *Sankey* v *Whitlam* has not received universal approval at all levels of the public service both Commonwealth and State. We now sometimes have the opportunity of actually seeing the documents that have been withheld because of the high public interest involved. This cannot help but make us rather sceptical because they are often very routine in their nature.

May I also be allowed a little scepticism about attitudes to freedom of information. Being a statutory office holder for the time being I am myself confronted with the demands of the new administrative law. I was discussing a question with an official from a very important department and I said "Well, I suppose you can put a note on your file about that". He looked at me as if I was absolutely mad and said "Files? I have no files, I have a series of internal working documents!" With that slightly sceptical eye, may I turn to some of the issues that have been raised by the previous speakers this morning.

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[1] (1978) 142 CLR 1.