

CAN ADMINISTRATIVE LAW FOSTER GOOD ADMINISTRATION?

THE WHITMORE LECTURE – 2009

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It is personally rewarding to have the honour of paying tribute to a great Australian administrative lawyer in this third Whitmore Lecture. I begin by noting the special role that Harry Whitmore played at many stages in the development of my own interest and career in administrative law. I was fortunate that Harry was my administrative law lecturer at the Australian National University in 1970; he later supervised my honours thesis on government secrecy in 1972; as Dean of Law at ANU he recommended me for my first job in 1973 as Associate to Sir Anthony Mason; then, as Dean of Law at the University of New South Wales, Harry gave me my next job as a Lecturer in 1974; and I learnt administrative law through the prism of Harry's path-breaking texts on administrative law and civil liberties,¹ and through the report of the Commonwealth Administrative Review Committee² to which he contributed much learning.

My own interest in administrative law was a product of Harry's infectious enthusiasm for the discipline. Above all, he viewed administrative law as a practical discipline – as a means of securing a just outcome and an appropriate remedy for a person in dispute with a government agency. Harry was alive to the problems that people encounter in their dealings with government. He drew on his academic knowledge, his experience as a military officer and civil servant, and also his own rough-and-tumble battles with government, particularly local government. Harry's lectures were always stimulating and challenging.

In that 'Whitmore era' period in the 1970s, administrative law was an emerging branch of learning in Australia. It was not a compulsory or separate subject in many law schools, nor was there a recognised discipline of practising administrative lawyers. Not surprisingly, the Kerr and Bland Committees framed in a limited way the objectives of the new system of administrative law they were proposing.³ The purpose of administrative law as they saw it was to protect citizens against government, at a time when government was growing in size and was exercising more administrative authority and discretionary power. Both Committees pointed to a heightened risk of error and impropriety in administrative decision making as government became larger, and to the threat this posed to the rights and liberties of citizens.

There was, at most, a glancing recognition by both Committees that administrative law could stimulate better decision making beyond the case under review. Nowadays, of course, this broader or systemic impact is a core goal of administrative law. This view is expressed by many writers, commenting that an objective of administrative law is to 'improve ... the quality

¹ At the time: D G Benjafield & H Whitmore, *Principles of Australian Administrative Law* (1971, 4th ed, Law Book) and E Campbell & H Whitmore, *Freedom in Australia* (1966, Sydney Uni Press).

² Commonwealth Administrative Review Committee Report (1971); see also H Whitmore, 'Administrative Law in the Commonwealth: Some Proposals for Reform' (1972) 5 *Federal Law Review* 7.

³ See R Creyke & J McMillan, 'Administrative Law Assumptions ... Then and Now' in Creyke & McMillan, *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (CIPL, 1998) 1 at 7.

and consistency of government decision-making',⁴ to 'influence the way that decision makers exercise their functions',⁵ and 'to secure an improvement in primary decision making'.⁶ As commonly it is claimed that judicial and external review can entrench 'good governance' – an aspiration endorsed by the Commonwealth Heads of Government in the Latimer House Principles in 2003.⁷

It is not often explained how administrative law will have that effect. For the most part, it is assumed that constant review and correction of erroneous administrative actions by external review bodies will have a broader effect in improving administrative decision making. It is expected that agencies and officials will model their conduct on the guidance provided in the reasoned decisions of courts and tribunals.

Is that a realistic assumption? Can administrative law foster good administration, and if so, how and to what extent? My belief is that it can, though more is needed than a belief in the persuasive promise of a well reasoned decision by a review body. Three questions need to be asked: what is meant by good administration; how can courts, tribunals, ombudsmen and other review agencies stimulate good administration; and what should be done to integrate the work of those review bodies and of government agencies?

Defining good administration

Firstly, what do we mean by good administration? What are the standards?

The natural tendency of lawyers is to look to the standards they have developed. 'Good administration', on this approach, is often equated to 'compliance with the grounds for judicial review'. A good decision is said to be one that is reasoned, is based on relevant and not irrelevant material, is procedurally fair, adheres to the legislative standards, and involves a genuine exercise of discretion.⁸

A variant of this approach is to argue that the grounds of review listed in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) have hampered administrative law in promoting good administration. Those grounds – particularly *Wednesbury* unreasonableness – are criticised for being narrow and constraining or arresting the expansion of judicial review.⁹ The correction that is said to be needed is new or additional standards, such as 'proportionality' or 'substantive legitimate expectation'.

⁴ W B Lane & S Young, *Administrative Law in Australia* (Law Book, 2007) at 3.

⁵ P Cane & L McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford, 2008) at 8.

⁶ Sir Gerard Brennan, 'Twentieth Anniversary of the AAT' in J McMillan (ed), *The AAT – Twenty Years Forward* (AIAL, 1998) at 11.

⁷ *Commonwealth (Latimer) House Principles on the Three Branches of Government*, adopted by the Commonwealth Heads of Government meeting, Nigeria, December 2003.

⁸ Eg S Rares, 'Blind Justice: the Pitfalls for Administrative Decision-Making' (2006) 50 *AIAL Forum* 14.

⁹ For example, *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 549 per Lord Cooke; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant @20/2002* (2003) 198 ALR 59 at [157], [166]; cf M Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202, 212.

This belief in legal standards as the linchpin of good administration is also seen in other ways. One is the current debate about adoption of an Australian bill of rights. Here it is argued that the quality of administration will be improved by placing an actionable legal obligation on decision makers to decide consistently with human rights standards. Another approach, noted recently by former Chief Justice Gleeson of the High Court, is the proposition that the exercise of public power will be more rational and fairer '[w]here a society is marked by a culture of justification ... as a precondition to the legitimate exercise of public power'.¹⁰

There has been little attempt in Australia beyond that legal analysis to define what is meant by good administration. More work has been done in some other regions. An example is the *Code of Good Administrative Behaviour* adopted by the European Parliament in 2001 that applies to European Union institutions and bodies in their relations with the public.¹¹ The Code includes legal standards that are familiar in Australia, but goes further in stating that officials should be courteous and helpful, respond to requests without delay, protect personal data, provide information upon request, and maintain adequate records.

Another noteworthy code is the *Principles of Good Administration* published by the United Kingdom Parliamentary Ombudsman. This code is based on six principles: 'getting it right', 'being customer focussed', 'being open and accountable', 'acting fairly and proportionately', 'putting things right', and 'seeking continuous improvement'. In the same vein is a recent report of the House of Commons Public Administration Select Committee on *Good Government*.¹² The Committee identified as the five prerequisites for good government, 'good people', 'good process', 'good accountability', 'good performance' and 'good standards'.¹³

Work has begun in my own office of the Commonwealth Ombudsman on developing a charter of good administration, drawing from those precedents and our own experience. Our charter will be based on four pillars: compliance with the law; fair and reasonable process; strong administrative systems; and a customer focus. I will say a little about the last two of those pillars.

Customer focus

Compliance with legal standards is the starting premise in all codes of good administration, but the newer codes go further. An emerging principle or standard is the need for agencies to be customer focussed – or, as Prime Minister Rudd recently described it, to engage in

¹⁰ Chief Justice McLachlin, 'The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law' 12 CJALP 171 at 174, cited by Chief Justice Gleeson in 'Outcome, Process and the Rule of Law', *Administrative Appeals Tribunal 30th Anniversary Speeches 1976-2006* 5 at 12.

¹¹ The Code is administered by the European Ombudsman: www.ombudsman.europa.eu/resources

¹² HC 97-1, published 18 June 2009.

¹³ A similar statement by Queensland Premier, Ms Anna Bligh, in support of the Integrity Bill 2009 was that it would establish 'a robust integrity and accountability framework encompassing strong rules, a strong culture, strong scrutiny and strong enforcement': Queensland Government Ministerial Media Statements, 10 Nov 2009, 'Sweeping reforms deliver Queensland strong integrity and accountability'.

'delivery of citizen-centred services ... Deliver high-quality programs and services that put the citizen first'.¹⁴

The reason for this new emphasis is that people now interact with government differently, more frequently, and with heightened expectations. This is a product of the expansion in government benefits, subsidies, licences, taxes, contracts, authorisations, sanctions, penalties, services and regulatory programs. People now relate to government in many ways – as citizens, clients, consumers and customers.

The expansion of government activity is matched by growth in the volume and complexity of the rules being applied. It is inevitable that mistakes will be made by agencies, and those mistakes can be damaging. An example we see commonly in the Ombudsman's office is that a simple postal delivery mistake can result in the late delivery of a person's passport, which in turn can have significant adverse personal, business or emotional consequences for the person. Minor and trifling administrative errors – misfiling a document, misspelling a person's name, mis-recording their address – can cause great damage or inconvenience to a person. The result can be that a person loses a benefit, incurs a sanction, is wrongly detained, or is refused a permit.

Administrative law cannot ignore that new dimension in the relationship between people and government. Legal rights and consequences are involved, no less than in more traditional areas of administrative law review. A different kind of response is required, including by administrative law, to remedy the adverse effect that administrative errors have upon people.

Foremost is the need to define standards of good administration that are attuned to the variety of problems that arise in contact between government and the community. The need for a 'customer focus' in government service delivery is one such standard. This will require officials to be courteous, responsive, timely, flexible and committed to resolving problems in a prompt and practical way.

A 'customer focus' standard is different to conventional legal standards. It is nevertheless a standard that can be monitored by external review agencies, no less than a legal standard such as procedural fairness, relevancy/irrelevancy, and consideration of the individual merits of a case. It is relatively straightforward for an Ombudsman to find that an agency has failed to act promptly on a matter, has been unhelpful or rude, or is obstinate and uncooperative. This task is made easier if the agency is in breach of its own Customer Service Charter that sets out the standards the agency has committed to abide by.

In law, when a standard is breached the question of remedy arises. It is no different if the standard that is breached is a customer service standard. All that is needed is a broader concept of remedy, to include an apology to a person, a better explanation of an agency's decision, or action by an agency to expedite a person's case. Harder-edged remedies also have a role to play. An example is that administrative compensation is now frequently given

¹⁴ Prime Minister Kevin Rudd, 'Reform of Australian Government Administration – Building the Best Public Service in the World', John Paterson Oration, Australia New Zealand School of Government Annual Conference, Canberra, 3 September 2009. This point was echoed in the Government Discussion Paper on *Reform of Australian Government Administration* (2009, at 28), outlining the Government commitment to a 'citizen centred philosophy'

as a remedy by Australian Government agencies where a person has incurred loss or injury arising from administrative defects such as incorrect advice, lost documents, damaged property or costly delay. The compensation payments are made under an executive scheme designed for that purpose, the *Scheme for Compensation for Detriment Caused by Defective Administration*.¹⁵

Lest it be thought that that this is moving too far from the traditional province of administrative law, we should note a similar theme in legal service reform initiated by the Australian Government. Three inquiries are currently underway into access to justice – by the Senate Legal and Constitutional Affairs Committee,¹⁶ the National Alternative Dispute Resolution Council¹⁷ and an Access to Justice Taskforce in the Attorney-General's Department.¹⁸ An *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth) was enacted by the Parliament to facilitate alternative dispute resolution. In describing these reform initiatives, the Attorney-General has spoken of the need to 'trigger something of a cultural shift in the way disputes are resolved',¹⁹ 'to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible',²⁰ and 'to increase the capacity of individuals to understand the laws that affect them [and] to empower people to find their own solutions to disputes'.²¹

Strong Administrative Systems

Much the same can be said of another of the four pillars of good administration that I noted earlier – the need for strong administrative systems. The importance of this issue was brought home in a large investigation undertaken by my office into 247 cases of wrongful immigration detention. This investigation followed publicity about two cases: the wrongful detention for ten months of an Australian permanent resident, Ms Cornelia Rau, and the wrongful removal from Australia of an Australian citizen, Ms Vivian Alvarez. My office published nine reports that identified legal and factual errors in nearly all 247 cases. Twenty-six of those who were wrongly detained were Australian citizens, and the periods of detention were as high as six years in one case, and months and years in some other cases.

Errors and mistakes had been made in individual cases, yet the core finding of my office was that those errors stemmed from systemic administrative problems. Poor administrative systems produce bad decisions; conversely, well-developed systems will minimise problems and result in better decision making.²² That was the theme of the Ombudsman report that

¹⁵ The Scheme is discussed in Commonwealth Ombudsman, *Putting things right: compensating for defective administration*, Report No 11/2009.

¹⁶ *Access to Justice* (2009).

¹⁷ *The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction* (2009).

¹⁸ *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

¹⁹ The Hon Robert McLelland, Attorney-General, 'Speech to the Multi-Door Court House Symposium', Canberra, 27 July 2009.

²⁰ The Hon Robert McLelland, Attorney-General, Second Reading Speech, *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, 22 June 2009.

²¹ The Hon Robert McLelland, Attorney-General, 'Remarks at the Queensland Law Society Symposium', Brisbane, 28 March 2009.

²² See J McMillan, 'Lessons for Public Administration: the Ombudsman Investigation of Referred Immigration Cases' (2007, July-Sept) *Public Administration Today* 36. A similar view was expressed by the House of Commons Public Administration Select Committee in its report on *Good Government*. One

concluded this investigation and that spelt out ten lessons for public administration. They included the need for agencies to maintain accurate, comprehensive and accessible records; to control the exercise of coercive powers, such as the power to detain; actively to manage unresolved and difficult cases in the agency; to implement effective communication of information both within the agency and with other agencies; and to forestall administrative drift.

In the same vein, a policy on 'Administrative Deficiency' adopted by my office lists fifteen categories of administrative deficiency that are grouped under two headings: *administrative deficiency in an individual case*, such as unreasonable delay, procedural deficiency, legal error, factual error and human error; and *administrative deficiency in the agency or system of government*, such as inadequate knowledge or training of agency staff, flawed agency systems or processes, and unreasonable or harsh impact of agency policy.²³

The role of administrative law review bodies in stimulating good administration

A chief objective of administrative law is to monitor whether the standards for good administration are being observed. As new standards are set, new mechanisms are required for checking administrative compliance. Individual case review is the traditional administrative law mechanism, but it must now be supplemented by other approaches. I will explain that point by describing the recent approach of my own office to promoting good administration.

Ombudsman offices have been a part of Australian administrative law for over thirty years.²⁴ The dominant activity during much of that period was individual complaint investigation. As envisaged by the Kerr and Bland Committees, Ombudsman offices focussed on correcting error and impropriety in individual cases, and providing a remedy to the aggrieved citizen. Less attention was given to the other statutory function of Ombudsman, of conducting own motion investigations.²⁵ For example, in the five year period 1996-2000 – a quite recent period – my office published only 15 reports. Times have changed, and in 2008 the office published 15 reports, and will publish 20 in 2009. (Though not, I add, at the expense of complaint handling: in the year 2008-09 the office recorded over 45,000 approaches and complaints and investigated over 5,000.)

The main explanation for this growth in public reporting is that reports are a more effective way of highlighting systemic problems and prompting agencies to undertake reform. Three examples will illustrate the practical benefits that can arise from this process, of using individual cases to promote better administration and an administrative justice outcome for a broader group of people.

of the five prerequisites, 'good process', was explained as follows: 'this means ensuring that appropriate structures, systems and procedures are in place for government to run smoothly – whether for the development of sound policies and legislation, successful policy implementation or for competent day-to-day administration of routine government business' (at 3).

²³ See Commonwealth Ombudsman, 'Administrative Deficiency', *Fact Sheet 2* (2009).

²⁴ The first office established in 1971 was the Western Australian Parliamentary Commissioner for Administrative Investigations. The Commonwealth Ombudsman commenced operation in July 1977.

²⁵ *Ombudsman Act 1976* (Cth) s 5(1)(b). See A Stuhmcke, "Each for Themselves" or 'One for All'? The Changing Emphasis of the Commonwealth Ombudsman (2010) 38 *Federal Law Review* 143.

- After receiving five complaints from people denied a business assistance grant following the equine influenza outbreak in 2007, we published a report²⁶ concluding that the scheme guidelines had been misinterpreted in those five and possibly 800 other cases. The agencies accepted the need to contact all unsuccessful claimants, resulting in over 450 claimants receiving payments exceeding \$2.3M.
- Three other reports in the past year have dealt with a similar problem, of incorrect decision making under schemes that are created by executive rather than statutory rules.²⁷ Executive schemes are now widely used for purposes such as redundancy payments, emergency financial aid, drought relief, health payments, LPG conversion, farming restructure, industry incentives and administrative compensation. In responding to these recent reports, agencies have accepted the need to implement administrative reforms to address problems that include poor drafting of executive scheme rules, inconsistent application of the rules, non-publication of the rules, and the lack of external review of decisions made under executive schemes.
- Another approach adopted in recent reports is to conduct an audit or case study analysis of a selection of agency files. This has been used to review departure prohibition orders issued by the Child Support Agency, decisions under s 501 of the *Migration Act 1958* to cancel a visa on character grounds, grant application processing by Film Australia, re-raising old tax debts by the Tax Office, detention debt waiver by the Department of Immigration, and recording of reasons by examiners in the Australian Crime Commission. In each case the reports have pointed to substantial weaknesses in decision making systems, and made recommendations that have been implemented for administrative reform.

I would draw from those examples three lessons that are relevant more broadly to administrative law. The first is that individual cases or decisions can be an effective trigger for general administrative reform. All our Ombudsman reports commence with a handful of complaints that point to a broader problem. These case studies are used to illustrate what can go wrong under the system as it is presently designed or administered. Recommendations for administrative and legislative reform are made in the report, but the central message – illustrated by the selected cases – is that unacceptable mistakes are occurring at present and need to be remedied.

A powerful demonstration of that point is that the cases of Cornelia Rau and Vivian Alvarez were more effective in triggering comprehensive immigration reform than other processes in and outside government in the preceding decade. Many other examples can be given of government and administrative reform that was triggered by individual cases or incidents that highlighted unacceptable administrative practices.²⁸

²⁶ Commonwealth Ombudsman, *Centrelink and Department of Agriculture, Fisheries and Forestry: Claim and Review Processes in Administering the Equine Influenza Business Assistance Grant (Third Payment)*, Report No 13/2008.

²⁷ See Commonwealth Ombudsman, *Executive Schemes*, Report No 12/2009.

²⁸ Other examples are given in J McMillan, 'Thirty Years of Complaint Handling – What have we Learnt?', Speech to the 30th Anniversary Seminar of the Commonwealth Ombudsman, August 2007.

The second lesson is that an individual case is unlikely by itself to prompt change. The significance of the case has to be explained and taken forward. That is why my office uses reports, e-bulletins and other measures to explain our investigation findings. Nor can the process stop there. A report must be used to open a dialogue with agencies and the parliament. And, six months after a report is published, a formal process is needed to ask an agency to explain what steps it has taken to implement the Ombudsman recommendation.

The same processes, with suitable modification, can apply to court and tribunal decisions. Those decisions expose administrative failings, and have great potential to stimulate reform and promote good administration. The starting point, as Sir Gerard Brennan has explained, must be the quality of the reasons expressed by the court or tribunal.²⁹ Next, as the Administrative Review Council recommended in the *Better Decisions* report in 1995, agencies should have organisational structures and procedures in place for evaluating and responding to court and tribunal decisions.³⁰ Some agencies do, but it is probable that many do not. A study that I undertook with a colleague a few years after the *Better Decisions* report revealed that only about one third of agencies had addressed that ARC recommendation.³¹ Linda Pearson has noted that there has been a consistent call over the years from all quarters for better communication between tribunals and agencies, but there is limited evidence beyond the anecdotal that proper systems are being developed.³²

Australian Government agencies are expected to note significant court and tribunal decisions in their annual reports, but for the most part this reporting does not explain how administrative decision making within an agency has altered in response to a decision. Indeed, the impression arising from some agency analysis is that there is a stronger focus upon whether legislative amendment is needed to counter a court or tribunal reasoning.

Courts and tribunals could be more explicit in drawing attention to administrative failings that warrant agency consideration. It is always open to a court or tribunal to forward an issue to the Ombudsman for further analysis, either as part of the reasons for a decision or separately.³³ I can vouch that my office would seriously consider undertaking an own motion

²⁹ I cannot resist the observation that the doctrine of jurisdictional error is not a good starting point for opening a dialogue with government on administrative reform!

³⁰ A similar recommendation has since been made in two other reports. An *Access to Justice* report in 2009 recommended that all government agencies develop mechanisms for reporting to tribunals and the Ombudsman on the action taken in response to individual case decisions and recommendations, to help resolve systemic shortcomings and to communicate external review findings to staff of the agency: Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 135-7. The Henry review of the Australian taxation system in 2010 recommended that the Joint Committee of Public Accounts and Audit should monitor implementation by the Australian Taxation Office of recommendations of the Commonwealth Ombudsman and the Inspector-General of Taxation: *Australia's Future Tax System – Final Report* (2010) Recommendation 118.

³¹ R Creyke & J McMillan, 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 159 at 179-180.

³² L Pearson, 'The Impact of External Administrative Law Review: Tribunals' (2008) 59 *AIAL Forum* 57.

³³ The UK Law Commission for England and Wales proposed in 2008 that courts should be empowered to stay proceedings to enable a matter to be referred to the Ombudsman, and for the Ombudsman to be able to refer a matter to a court: *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper 187 (2008) at 104-8. Cf *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 10(2)(b).

investigation into any such issue highlighted by a court or tribunal. I can add that I have never received any such reference during my term as Ombudsman.³⁴

The third lesson I draw from my earlier examples is that new mechanisms must be utilised to examine the quality of primary decision making and to prompt reform. One tool we use increasingly in the Ombudsman's office is audits and case study analysis to examine the strength of an administrative system. A salutary lesson for the administrative law community is that the Auditor-General, through performance auditing, has increasingly led the way in improving public administration to the benefit of members of the public. In recent years, for example, the Auditor-General has undertaken many studies that have an administrative law relevance, on complaint handling in agencies, internal review, compliance with customer service charters, appeals processing, and freedom of information administration.³⁵

Integrating the work of review bodies and government agencies

Administrative law will be more effective in promoting good administration if the work of administrative law review bodies and agencies is integrated. This can be done in many ways, including by meetings and informal liaison, and through seminars and conferences organised by bodies such as the Australian Institute of Administrative Law.

A formal means by which this integration was to occur, and the one that I will address in the remainder of this talk, is through the work of the Administrative Review Council. The Council was established following a recommendation of the Kerr Committee, in furtherance of the Committee's aim of developing 'an Australian system of administrative law' that would be distinctive, integrated, comprehensive and coherent.³⁶ This would be achieved through research, advice and coordination work, and also through the membership of the Council. It would include as ex officio members the President of the Administrative Appeals Tribunal, the President of the Australian Law Reform Commission and the Commonwealth Ombudsman. Over the years, other senior figures in government, the law, universities, industry and community practice have been appointed to the Council. It has always been well placed to synthesise at a peak level the wisdom and experience of review bodies, government agencies, academic commentators and community and business organisations.

At its height, during the 1980s, the Council, which then occupied separate offices, employed eight staff and up to five consultants, held an average of eight meetings each year, had as many subcommittees that met more regularly, published up to four reports a year, gave formal published advice to agencies about ten times per year, and published an annual report that provided a comprehensive survey and statistics of administrative law developments in Australia.

³⁴ After this speech was delivered the Principal Member of the Social Security Appeals Tribunal raised with me a general concern about the adequacy of letters of advice and reasons by Centrelink. The Ombudsman's office followed up this issue in meetings and investigation.

³⁵ See J McMillan & I Carnell, 'Administrative Law Evolution: Independent Complaint and Review Agencies' (2010) 59 *Admin Review*.

³⁶ Commonwealth Administrative Review Committee Report (1971) at [237] and title of Ch 18. See also R Creyke & J McMillan, 'Administrative Law Assumptions ... Then and Now' in Creyke & McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (CIPL, ANU, 1988) 1 at 10-11.

The reports and recommendations of the Council have shaped Australian administrative law. All major aspects of administrative law have been covered, including the administrative law framework, the ADJR Act, the scope of judicial review, the jurisdiction and procedures of the AAT and other specialist tribunals, Ombudsman jurisdiction, the relationship between review bodies, freedom of information, reasons for decision, rule making, access to justice, internal review structures and principles, automated decision making, contracting out, accountability of government business enterprises, and complex business regulation. Other publications of the Council have laid down the guidelines for administrative law practice, on matters such as the preparation of reasons statements, administrative law training in agencies, standards of conduct for tribunal members, the exercise of coercive information gathering powers, and best practice guides for administrative decision makers.³⁷

Unfortunately those days are passed. The Council has been a prime victim of budgetary tightening and executive rearrangement. Currently it does not have a separate budget, dedicated staff or separate premises, and it meets only intermittently during the year.³⁸ There are no Council projects or reports in preparation. Its primary activity is to meet if requested with officials of the Attorney-General's Department to comment on draft working papers. Speaking as an ex officio member of the Council, I lament that the Council's transformation by executive fiat means that I am unable to discharge an important statutory responsibility, of providing advice to government following close and formal consultation with other Council members.

I am reminded of the advice given recently by Mr David Borthwick, former Secretary of the Department of Environment in his Valedictory Lecture, entitled 'As if for a thousand years ...' Mr Borthwick's advice was that the first ingredient of 'a healthy Australian Public Service that can assist governments to pursue longer term reforms' is 'finding the space for longer term thinking'.³⁹ A similar sentiment was echoed by Prime Minister Rudd in a headland speech on 'Reform of Australian Government Administration', calling for development of a 'long-range blueprint ... It is precisely those organisations with a strong sense of their stability and continuity – of the strength of their culture and their values – that are best placed to change.'⁴⁰

That, in my view, has been the core, essential and valuable role of the ARC. My concern is that if the Council is not undertaking that longer term thinking and standard setting, the function will not be performed as effectively by any other agency.

³⁷ The inspiring work of the British equivalent of the ARC, the Administrative Justice and Tribunals Council, illustrates the valuable role such a body can play: see for example the Council's consultation draft proposing ten principles for administrative justice: *Principles for Administrative Justice: The AJTC's Approach* (2010) www.ajtc.gov.uk.

³⁸ In the first half of 2010 the Council met only once by teleconference. There was a six month gap in 2009-2010 between the retirement of the President and appointment of a new President.

³⁹ D Borthwick, 'As if for a thousand years ...', Valedictory Lecture, 10 March 2009 (www.apsc.gov.au).

⁴⁰ Rudd, above note 14.

Conclusion

Let me not end on a disheartening note. We have a system of administrative law in Australia of which we can be justly proud. The administrative law system has developed in a way that amply fulfils the objectives of the Kerr Committee. The system provides administrative justice in individual cases to tens of thousands of people, but nowadays it does much more. The system has developed to play an influential role in stimulating good administration to the benefit of the community generally. There is room for further development of this role of administrative law, and we have an excellent platform from which to work.

A strong factor in the growth of a vibrant Australian system of administrative law has been the passion, commitment and diverse experience of generations of administrative lawyers. Harry Whitmore was a leader in that respect. He was a role model and mentor for many administrative lawyers since. I applaud the initiative of the NSW Chapter of the Council of Australian Tribunals to establish an annual lecture to honour Professor Harry Whitmore's outstanding contribution to Australian administrative law. It is a great pleasure for me to mark that commitment by delivering the third Harry Whitmore lecture.