Judicial Review of Administrative Action in the 1980s

Problems and Prospects: Conference February 1986, Auckland

On the 20th and 21st of February 1986 Auckland was provided with a rare privilege. Eight eminent lawyers, three of them highly respected judges, spoke to a packed auditorium on the key issues facing modern administrative law. This reviewer was an observer and accepted the task of summarising in the briefest possible way the scholarly and thought-provoking papers presented. (The Legal Research Foundation, which was responsible for organising the Conference, advises that the papers will be available in a text to be published by Oxford University Press and will contain a preface by Lord Wilberforce and an introduction by Professor John Smillie.)

THE STRUGGLE FOR SIMPLICITY IN ADMINISTRATIVE LAW

by the Right Honourable Sir Robin Cooke,
President of the New Zealand Court of Appeal

As the title indicates, this is no legalistic foray into the intricacies of traditional and archaic administrative law doctrine; quite the reverse. Cooke P's philosophy as first expounded to the Auckland District Law Society in 1979 is fleshed out and revised but the essentially iconoclastic view is vigorously and effectively reiterated. Unsubtley spurned are the half-truths or "shibboleths" (per Lord Scarman) of such concepts as "jurisdiction", "error of law on the face of the record", and "nullity" (which concepts "hinder progress") to give way to an uncluttered tripartite formulation of the essence of the grounds of judicial review. For Cooke P administrative decision making must first be in accordance with law, second it must be fair, and third it must be reasonable.

He has thus added to his "fair and reasonable" formula expressed in the 1979 papers.

Support for Cooke P's revised formulation is derived from the recent dictum of Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, 410 in which illegality, irrationality and procedural impropriety comprise that judge's tripartite formulation.

As to the first ground, Cooke P notes that the distinction between error of law within and outside jurisdiction has been well and truly abolished, both in England and New Zealand (*Bulk Gases Users Group v Attorney General* [1983] NZLR 129.) This is to be contrasted with the present position in Australia, which the paper by Sir Gerard Brennan summarises. Indeed the contrast in views of these two eminent judges is one going beyond mere difference of opinion on questions of detail to that of fundamentally opposing philosophies of the role and purpose of judicial review in the legal system. For instance, whilst Cooke P comments on the restrictions upon issues properly justiciable by the Courts, his passing remark that it would be only a "small step" from present judicial work to that carried out under the proposed Bill of Rights, clearly betrays a wide view of justiciability; "the Courts have long had to make value judgments in determining issues between citizens and authorities". Brennan J's paper, on the other hand, draws a firm line of demarcation which confines the court to strictly non-policy decision making.

That the duty to listen fairly to both sides lies upon "everyone who decides anything" (per Lord Loreburn in *Board of Education v Rice* [1911] AC 179) is taken seriously — in Cooke P's view — now refocuses the enquiry in fairness cases onto the *content* of fairness. No longer is fairness confined to purely procedural matters. Not disillusioned by the remarks of Lord Brightman in *Chief Constable of North Wales v Evans* [1982] 3 All ER 141 Cooke P cites the more recent House of Lords' authorities of *R v Inland Revenue Commissioners, ex p Preston* and *Wheeler v Leicester City Council* [1985] 2 All ER 1106 (the first involving breach of representation or contract — "unfair" or "unjust" — the second consisting of speeches in which no sharp differentiation in the grounds of review is made) as indications of a wider view of fairness being adopted by the House of Lords. In time Cooke P sees the emergence of a concept of fairness that is analogous with the principle in *Donoghue v Stevenson* [1932] AC 562 namely, that decision makers will owe a duty of fairness to persons sufficiently closely affected by their actions.

Reasonableness, as will be apparent, overlaps in Cooke P's scheme with fairness. The non-procedural content of fairness ensures that. But reasonableness has its own roots — *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 — and does provide a unique ground for review in some, albeit rare, cases. The permissive/obligatory distinction that he and his fellow judges drew in *Ashby v Minister of Immigration* [1981] 1 NZLR 222 and *CREEDNZ*

Inc v Governor-General [1981] 1 NZLR 172 is restated, together with the very important point that in certain circumstances *purposive* construction of a statute will lead a court to hold that certain considerations are mandatory ones.

Also caught by the reasonableness ground of review is "mistake of fact" as enunciated by Cooke P in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130. Although he cannot at this stage draw support from the other members of the Court of Appeal, Cooke P is of the view that in time the establishment of mistake of fact as a ground of review is "inevitable".

It goes without saying that, however much or little one may think of Cooke P's philosophy of administrative law, for the practising New Zealand lawyer it is absolutely essential that it be well understood. This paper provides this much and a lot more.

ACCOUNTABILITY AND THE RIGHT TO REASONS

by the Honourable Michael Kirby,
President New South Wales Court of Appeal

Kirby P, like his trans-Tasman colleague Cooke P, is no judicial conservative. In this paper he sets out to show "the triumph of the common law over its tendancy to formalise", chiefly by reference to a decision of the court of which he is the President, in *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447. It was one of the more eccentric moments of the seminar when the decision of the High Court of Australia, hearing an appeal from the New South Wales Court of Appeal's decision, was announced after Kirby P's paper was delivered. The High Court allowed the appeal. (For an analysis of the High Court's decision refer to a case note by Michael Taggart to be published with the seminar proceedings by Oxford University Press).

This unfortunate result for Kirby P sitting on the New South Wales Court of Appeal bench does not, however, substantially detract from the force and undeniable validity of the opinions expressed in the Court of Appeal decision and summarised in this paper.

Kirby P's starting point, like Dr Barton's in his paper on damages, is to hypothesise what the citizen in the street would have to say if asked whether it is "fair" that a statutory decision maker should be obliged to give reasons for decisions affecting him or her; for Kirby P there is no doubt what the citizen's answer would be, and no lengthy reasoning would be expected. Set against this "legitimate expectation" of the community, however, is the orthodoxy of the common law. The problem is that the orthodox position has always been that as there is no common law obligation on the *courts* to give reasons for their decisions (for a modern re-statement by the New Zealand Court of Appeal see *R v Awatere* [1982] 1 NZLR 644) it is easily concluded that mere administrators should not be obliged to do so. Even though it is obvious that "the unreasoned exercise of discretionary power conferred by law may be oppressive" it seems that some judges are not prepared to engage in a

bit of legitimate judicial activism so as to satisfy the community's standards of justice.

After stating the Australian position up to and including *Osmond*, Kirby P looks at New Zealand decisions. The promising starting point is the judgment of Chilwell J in *Connell v Auckland City Council* [1977] 1 NZLR 630 in which a general duty on "all judicial persons" to give reasons is expressed. *Duncan v Thames-Coromandel District Council* [1980–81] 7 NZTPA 65 and *T Flexman Ltd v Franklin County Council* [1979] 2 NZLR 690 follow in sympathy. Then comes *R v Awatere*, a decision of the Court of Appeal in which although the "desirability" of the giving of reasons (by, in this case, a District Court judge) is stressed, no common law duty was found to give it legal effect. Kirby P concedes that after *Awatere* it may be asking too much of New Zealand judges to make the sort of development he helped to achieve in *Osmond* and that it may well be necessary, as concluded by Michael Taggart and Ian Eagles in their Report to the Minister of Justice (1981), to adopt comprehensive legislative measures on the giving of reasons.

Of course, New Zealand already has a substantial piece of legislation requiring the giving of reasons namely, s 23 of the Official Information Act, but this provision does not apply to the courts or, indeed, all administative agencies. The legislation might, however, be viewed by the courts in the future as an aid to their task of developing the common law.

Kirby P concludes by arguing that the duty to give reasons is essential if decision makers are not to act arbitrarily. How, in the absence of reasons, can the Courts make any informed assessment of the legality or reasonableness of an administrator's decision? It is to be hoped that either the New Zealand legislature or Courts act quickly and give effect to a truly legitimate expectation of the community and not hide behind outdated orthodoxy. Kirby P's paper should provide an added impetus to this development.

THE PURPOSE AND SCOPE OF JUDICIAL REVIEW
by the Honourable Sir Gerard Brennan,
President of the High Court of Australia

Sir Gerard Brennan's paper provides an illuminating insight into a fundamentally different view of judicial review than that of Cooke and Kirby PP. For example, he unashamedly advocates the retention of the distinction between error of law outside jurisdiction (reviewable) and error of law within jurisdiction (unreviewable unless disclosed on the face of the record). Other "half truths" (per Cook P) are treated sympathetically. But the coherence of the judge's opinions and his breadth of vision make the paper very useful as a sobering reminder of the inherent limitations of the Courts in any system of justice.

The central theme running throughout Brennan J's paper is that the courts have neither the capacity nor the procedures appropriate to the review of policy-affected administrative law decisions. He shrugs off

Professor Wade's starting premise that judges "are up to their necks in policy, as they have been all through history" and is strongly critical of judicial dynamism (cf judicial activism).

He argues that it is essential that judicial activism, which the judge seems to support, does not outstrip the *consensus* of the community (which consensus is at the base of the legitimacy of the Court's role in the legal system). The big question therefore, if the legitimacy of the Courts' decisions is to be retained, is how far should judicial intervention go? In other words, the paper is about justiciability.

The extent to which issues come to be seen as justiciable by the Courts is affected by two deeply held (although seldom articulated) principles: first, that the Courts ought to protect individual interests but ought to leave policy to Government; second, that the Courts must operate by the judicial method i.e. they must have a healthy respect for precedent. Lord Scarman's "declaration" of jurisdiction in the *CCSU* case therefore comes in for criticism as failing to satisfy either of these criteria. So does Cooke P's judgment in *Daganayasi* on the subject of "mistake of fact", for the reason that in effect such a ground of review blurs the crucial distinction in Brennan J's mind between review and appeal. The Courts cannot substitute their decision for the decision under review.

Brennan J argues that the Courts are limited in policy-affected cases from making democratically legitimate decisions because their focus is too narrow, namely on the litigants rather than the wider public interest. They have neither the resources nor the procedural flexibility to accommodate the wide ranging enquiry that assessments of the public interest demand. It is this institutional limitation that called for the establishment of the Administrative Appeals Tribunal in Australia, which can hear appeals on the merits on a very wide range of administrative matters. One is inevitably drawn to the conclusion that Brennan J's exposition of the limited role and purpose of judicial review is born out of this experience of a legal system which expressly provides for appeal on the merits for administrative decision-making. Indeed, Brennan J's view is probably necessary for the successful division of function of the two branches of the administrative law system at the federal level in Australia. This complementary relationship between the Courts and the Administrative Appeals Tribunal is examined in more detail by Dr Taylor in his paper who adopts a philosophically similar attitude to judicial review to that of Brennan J.

RIVAL THEORIES OF INVALIDITY IN ADMINISTATIVE LAW: Some Theoretical and Practical Consequences

by Michael Taggart, Faculty of Law, Auckland University

Michael Taggart's paper tackles what on the face of it may appear a somewhat esoteric subject, but which in fact is one of considerable moment in practice for the reason that the theory, or as it seems, theories, of invalidity determine how such things as mandatory and

directory provisions in statutes, collateral challenge, privative clauses and curing are dealt with by the Courts of supervisory jurisdiction.

The orthodox view since *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 is that the decision tainted by error of law is in fact "no decision" and therefore void *ab initio*. This is the absolute theory of invalidity, or nullity, and is a very useful theory for dealing with all-encompassing privative clauses such as that found in *Anisminic*. However, Lord Wilberforce in the *Anisminic* case preferred to view the Court's ability to get around privative clauses as being based upon constitutional principle and inferred legislative intent. He rejected the "nullity" reasoning. It is the reasoning of Lord Wilberforce that Taggart relies upon in arguing in support of a new theory of invalidity, called the *relative* theory of invalidity.

But there is a step between absolute and relative, and that is the formulation of Professor Wade. His theory is called the theory of legal relativity and holds that a decision is "accepted or treated as valid" until quashed. This formula allows for curing in certain circumstances and also provides a way of dealing with mandatory and directory provisions in statutes. The Courts are able to shift their focus from concepts of "void *ab initio*" to the discretionary nature of the extraordinary remedies, and thereby better do justice in individual cases.

We are told, however, that the theory of legal relativity is closely wedded to the absolute theory in that when the decision in question is eventually quashed, it is in fact declared retrospectively void and is thereafter treated as always being void. It is this link with the absolute theory that Taggart criticises as it encourages uncertainty and woolly thinking on the part of the judges. The author calls for adherence to one universally applicable theory of invalidity ("universality") and shows that adoption of his theory, support for which can be found in several cases, will provide the same results as those achieved by use of the legal relativity theory. The Taggart theory of invalidity holds that decision is not *treated* as valid until retrospectively quashed by a Court of competent jurisdiction, but indeed *is* valid until quashed. By this means, the shift of focus merely *facilitated* by the theory of legal relativity is made complete: the Courts can honestly and realistically rely upon the discretionary nature of the prerogative remedies.

There is, of course, much more in the paper including a discussion of the effect on third parties of whatever theory is adopted. Of considerable interest will be the response of judges and academics, and in particular Professor Wade, to the persuasive arguments presented in this paper and whether Taggart's undeniably elegant ideas achieve wider currency.

CONTROL OF DISCRETIONARY POWER : PROBLEMS OF JUSTICIABILITY *by Professor David G. T. Williams, President Wolfson College, Rouse Ball Professor of Law in the University of Cambridge*

The inherent difficulty in formulating coherent ideas about jus-

ticiability is that judicial review is in practice a highly selective process — the absence of an integrated system of administrative law sees to that. This makes justiciability a vague concept and one by its very nature subject to the ebb and flow of judicial thought as the community's demands and expectations shift. This definitional problem is tackled head on by Professor Williams and a realistic appraisal of the ways in which the Courts have approached the question of "to intervene or not intervene" is comprehensively addressed.

The leading cases on justiciability are discussed: the *CCSU* and *Wheeler* decisions and the two recent New Zealand Court of Appeal cases of *Ashby* and *CREEDNZ*. All four cases involve new and politically charged issues for the Courts yet also indicate the limits of judicial reach. We are told it is the shift of emphasis from "rigid legal categories" to "overall evaluation" that has contributed to the increasingly unpredictable results in recent administrative law cases. A very real problem with the Courts making activist inroads into one field of governmental activity historically immune from judicial scrutiny is how the Courts are to react when confronted with requests to enter into another new area of government. On the one hand there will always be a limit, politically determined by public sentiment, to judicial activism. Yet, against this, will be the natural discomfort felt by the judges when appearing to act inconsistently or on an *ad hoc* basis by deciding not to intervene in a given new area. And, of course, whenever new inroads are made there is the predictable barrage of political criticism to further complicate matters. Professor Williams recognises the difficulties faced by the Courts. The shift to "overall evaluation", unfortunately, makes this inevitable.

Professor Williams argues that although some of the techniques and procedures of the Courts might not be ideally suited to the types of policy-affected decision-making they are required to engage in, the Courts nevertheless do a good job in the circumstances and are better equiped to handle politically sensitive issue than politicians, for example, give them credit. He does suggest, however, that such things as written submissions, employment of expert assessors and use of commission of inquiry-type procedures would be a step in the right direction.

Although these suggestions would be helpful in easing the position of the Courts, it is difficult to be persuaded that anything less than the real reform outlined by Dr Taylor in his paper calling for a complete overhaul of the administrative law system with the establishment of a full-blown administrative appeals tribunal in the Australian mould, can achieve what Professor Williams argues for. Professor Williams' suggestions are based on an implicit acceptance of the legitimate role of the Courts in policy and politically sensitive areas and are designed to facilitate the better performance of that role. However, it may be that the future of administrative law lies rather in questioning the role itself and thinking up long-term remedies that better deal with the political difficulties so expertly outlined in this paper.

DAMAGES IN ADMINISTRATIVE LAW

by Dr George Barton, Barrister

Dr Barton argues in this paper for a much wider availability of damages in administrative law. The established causes of action, although fertile and ever-expanding, are inherently limited and do not provide the sort of comprehensive remedy that the hypothetical man-in-the-street would unhesitatingly expect i.e. that administrative errors should be corrected and any damage caused by such errors should be compensated.

Much of the paper is concerned with an investigation of the existing causes of action, it being clear law that once the defence of statutory authority is removed then damages may only be recovered from an administrative decision-maker if one of the established causes of action can be made out. These causes of action comprise the intentional torts (e.g. trespass), detinue and conversion, the economic torts, breach of statutory duty, and the two most productive torts in administrative law to date: negligence and the tort of misfeasance in a public office.

The existence of the tort of misfeasance in a public office seems to be beyond doubt now as Dr Barton shows by referenc to the cases of *Dunlop v Woollahra Municipal Council* [1982] AC 158, *Roncarelli v Duplessi* [1959] 16 DLR (2d) 689, *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314 and *Vermeulen v Attorney-General of Western Samoa* (Unreported, Supreme Court of Western Samoa 2/5/85). Although the cause of action most closely resembling a truly "public law" remedy, the tort of misfeasance in a public office is severely limited by its requirement of malice, liberally defined in *Roncarelli* to mean "acting for a reason and a purpose *knowingly* foreign to the administration".

That leaves negligence, a cause of action Dr Barton concedes has been usefully employed in administrative law cases, *Takaro Properties* and *Meates v Attorney-General* [1983] NZLR 308 being recent notable New Zealand Court of Appeal examples. As revealed in *Takaro Properties*, *ultra vires* is not conclusive of negligence; the action may succeed or fail regardless of the existence of an unlawful exercise of statutory power. It is this complete independence, at least in law, of negligence, and indeed the other causes of action, from *ultra vires* that produces the gap in the law attracting Dr Barton's strong criticism. Although the gap might have been partially filled by the now rejected principle formulated by the High Court of Australia in *Beaudesert Shire Council v Smith* (1966) 120 CLR 145 ("liability must depend upon the broad principle that the council intentionally did some positive act forbidden by law which inevitably caused damage to the plaintiff") but this case principle has been rejected on all sides and Dr Barton concludes that it is only by means of legislative action that the question of damages in administrative law can be addressed so as to satisfy what he regards as the natural expectations of the community. A good portion of his paper is therefore directed at challenging the report of the Public and

Administrative Law Reform Committee on damages in which the majority of the Committee rejected the call for the kind of legislative treatment advocated by Dr Barton.

Dr Barton concludes by final reference to the Continental administrative law system that what is needed in New Zealand is a very simply stated remedy: the ability of plaintiffs to recover damages for loss suffered at the hands of unlawful administrative action regardless of the state of mind of the decision-maker. His rationale makes a lot of sense: "The community which benefits from the governmental activity should also bear its cost".

MAY JUDICIAL REVIEW BECOME A BACKWATER?

by Dr Graham Taylor,
Legal Counsel, Office of the Ombudsman

If Sir Robin Cooke's paper is the most important paper of the seminar to the New Zealand practitioner (for obvious reasons) then Dr Taylor's is a real tour de force for the academic. Its sheer force of logic is overwhelming. Like many of the other papers, Dr Taylor's effort addresses the real focus of modern administrative law, justiciability, but it goes beyond mere descriptive analysis (or diagnosis) to providing an extremely coherent scheme within which, in Dr Taylor's view, unless the Courts accede to a much reduced role, their judicial review function will be in danger of indeed becoming a "backwater".

The bare outline of Dr Taylor's "integrated" administrative law system is as follows: the Courts with a limited function (in terms of justiciable issues), an Administrative Appeals Tribunal based on the Australian model, Ombudsmen, and freedom of information legislation. Taylor's thesis is that the Courts cannot stake a legitimate claim over policy-charged administrative law issues and that unless they turn away from such issues the community will lose confidence in their decisions with obviously serious consequences. Other forums are needed to provide legitimate avenues for the resolution of less *judicially* justiciable issues. The Administrative Appeal Tribunal contemplated by Dr Taylor would be a single tribunal capable of adjudicating upon a wide range of appeals on the merits (i.e. Town Planning, Liquor Licensing, Social Security, Accident Compensation, Taxation, Land Valuation and other tribunals would be combined in the single tribunal) and would possess much more informal procedures, of an inquisitorial character, than the Courts. There would be a limited right of appeal to the Administrative Division of the High Court from the Tribunal's decisions. The formula suggested by Taylor is "as from discretion".

The Ombudsmen would continue to provide as a complement to the Administrative Appeals Tribunal an avenue for truly non-justiciable issues. Dr Taylor recommends that the Ombudsmen's rulings have the force of an arbitrator's award so as to be capable of enforcement in the Courts.

A critical adjunct to these three adjudicatory forums, each concerned

with different levels of justiciability, is freedom of information legislation, which New Zealand already possesses. The major adjustment needed in Dr Taylor's view is to extend the Act to cover all those governmental agencies not presently covered.

Although the precise detail of the scheme suggested may be criticised for its complexity, the *theory* underpinning it surely deserves very careful consideration. It is only in the context of this sort of radical change that Dr Taylor predicts the future viability of judicial review. By narrowing the issues capable of judicial adjudication, the Courts' legitimacy will be regained and enhanced and the true value of their decisions, which Dr Taylor describes as being to change the *ambience* of administration, can be fully enjoyed.

ADMINISTRATIVE LAW IN THE REAL WORLD : A VIEW FROM CANADA *by Mr Mario Bouchard, formerly Co-ordinator of the Administrative Law Project, Law Reform Commission of Canada*

The final paper is completely different from the others. It is by a civilian lawyer, Mario Bouchard, formerly a member of the Law Reform Commission of Canada. It is radical and thought-provoking and one which all open-minded common lawyers should read.

The basic thesis and indeed constantly reiterated theme, is that common lawyers have got it all wrong: the concept of administrative law as judicial review of administrative action, even when extended to cover governmental agencies' internal appeal procedures and the decisions of the Ombudsmen, is a false one. Mr Bouchard adheres to the Continental view which defines administrative law as providing "a framework of rules for all relationships, friendly or otherwise, between the Administration and a bearer of rights ... it also provides a framework of rules which are meant to assist in the fair and efficient implementation of public policies". It is this second limb (after all, the first limb is simply the *wide* interpretation of administrative law accepted by common lawyers) that establishes the definitional base from which Bouchard proceeds to build his critique.

One of his central arguments is that the common law concept of judicial review is counter-productive in the widest social sense because it is inherently ill-equiped to act (decide cases) in the public interest, which by definition is at the root of all legislation. When common law judges decide administrative law cases they bring to the judicial process such inappropriate notions as the rights of the individual and the superiority of the adversarial system with its preference, for example, of oral over written evidence. This mental baggage prevents the Courts from considering the *effects* of their decisions on the Administration and therefore, indirectly, the public at large.

An important "effect" discussed by Bouchard is the cost-effect of judicial review decisions on the government department involved in the litigation. Paraphrasing the author, by providing one plaintiff with a

Rolls Royce, the Courts deprive everyone else of a Volkswagen. Bouchard argues that instead of the Courts unfailingly upholding the rights of the individual, regard should be had to the political and social purpose of the legislation and this may mean limiting individual rights so that everyone else can at least obtain *some* benefit. In this scheme the Courts act as a positive influence on the Administration, interpreting empowering statutes liberally and with a focus on the public interest, thereby providing a final mechanism (judicial) by which government *policy* may be implemented.

Although it is difficult to accept his view of administrative law, and perhaps we should not, the problem of the public interest versus the individual and how best to resolve it will remain. Other papers in the Conference directly or indirectly address the same point. In rejecting the Continental system of administrative law as described and developed by Mr Bouchard, we must be careful to acknowledge the inherent limitations of the common law system. This paper provides a compelling account of those limitations.

— *Michael Bowman*