NSW Law Reform Commission

Appeals in administration – Survey of recommendations

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PART I

INTRODUCTORY

1. ***Purpose of this paper.*** The report of this Commission on Appeals in Administration,[1] with its annexures, covers 548 typed pages. The present paper gives a summary of the recommendations and states in a less formal way the considerations which led to those recommendations. Except as regards the recommendations, this paper is not a summary of the report: it is an independent statement. If we appear to speak with two voices, this paper must yield to the report. We do not attempt to state here the effect of all the provisions of the draft bills set out in the report.

2. ***Terms of reference.*** Our terms of reference were -

> "To consider whether a right of appeal should be granted from decisions of administrative tribunals and officers, and whether, in this regard, it may be desirable to appoint an Ombudsman; and in particular to deal with the following:
>
> > (a) the effect of any such proposals upon judicial review including the "Prerogative Writs" and "Crown Privilege"; and
> >
> > (b) the form of any legislation which may be proposed for consideration by the Government".

3. ***Conclusions in brief.*** Briefly, our conclusions are these-

(a) Should a right of appeal be granted from decisions of administrative tribunals and officers?

> Yes, but excepting some decisions. There should be a Public Administration Tribunal, empowered to set aside the official action of a public authority where the official action is beyond power or is harsh, discriminatory or otherwise unjust. The Tribunal should also be empowered, as a separate jurisdiction, to entertain appeals in specific cases in matters of public administration.

(b) Is it desirable to appoint an Ombudsman?

> Yes.

(c) What effect would these proposals have on judicial review?

> None, except that the jurisdiction of the Tribunal would overlap that of the Supreme Court on judicial review. In some cases an aggrieved person could choose to go to the Tribunal where in the like case today he would have no redress except by judicial review in the Supreme Court.

(d) What effect would these proposals have on Crown privilege?

> None, except that a claim of Crown privilege would not avail against the Ombudsman.

(e) What form should the legislation take?

> Draft Bills form part of our report.[2]

(f) Incidental matters-

> (i) Some existing rights of appeal to courts and other bodies should be changed into rights of appeal to the Tribunal.
>
> (ii) There should be a Commissioner for Public Administration. His functions, which would be continuing ones, would include the, appraisal of the procedures of public authorities and of the means of obtaining reconsideration of their official actions.
>
> (iii) There should be an Advisory Council on Public Administration. This Council would assist the Commissioner on matters within his functions.

4. ***Standards of administration.*** We refer often to cases where something goes wrong in public administration, or where a citizen thinks that something has gone wrong. We do so because of the nature of the problems before us. In the overwhelming majority of cases things do not go wrong and are not thought to have gone wrong. Without an acknowledgment such as this, our preoccupation with things going wrong might lead a reader to think that we have a poor opinion of public administration in New South Wales. We do not. We do no more. than recognize that human institutions, even the best of them, sometimes go wrong.

5. ***Meaning of expressions.*** We use the word "Bill" to describe our formulations of our recommendations in the shape of legislation. These are, of course, not "Bills" in any parliamentary sense. They are no more than a means of specific statement of our recommendations, and a means of giving effect to the closing words of our terms of reference.

In describing the effect of our recommendations we sometimes speak as if the legislation which we suggest were in force. We do so for the sake of brevity: otherwise the discussion would be cluttered with hypothetical and conditional expressions. It is not for us to say whether our recommendations will be implemented wholly or in part.

We use the word "citizen" when speaking of a person dealing with a public authority or affected by something done by a public authority. It is a convenient word to mark the relationship of such a person to a public authority. It does not carry any notion that our recommendations are concerned only with residents of New South Wales or with Australian citizens. In the sense in which we use the word "citizen", the relationship which we have mentioned may be enjoyed or suffered by any person, including a corporation, and including another public authority.

We use "Advisory Council" to mean the proposed Advisory Council on Public Administration, "Commissioner" to mean the proposed Commissioner for Public Administration, and "Tribunal" to mean the proposed Public Administration Tribunal.

PART II

THE BACKGROUND AND THE PROBLEM

6. *The number and importance of the powers of public authorities.* State legislation gives countless (or at least uncounted) powers to public authorities to affect the position of the citizen. Each year's legislation adds to these powers. Other powers of public authorities arise by the common law, independently of legislation. The variety of these powers is enormous. They touch the citizen from birth until death; they may permit or deny him an education; they may permit or deny him his chosen livelihood; they may dictate the way his house is to be built; they may deprive him of his house. There is scarcely any field of human activity which is not in some way open to aid or hindrance by the exercise of power by some public authority.

7. *Guiding propositions.* There are some propositions which, when stated, are both elementary and self-evident. But they are the key to much of what we recommend in our report. Prefaced in each case by such a qualification as "in general", the propositions are-

> (a) Society should see to it that a citizen does not suffer illegal, harsh, unfair or otherwise unjust treatment at the hands of a public authority.
>
> (b) A citizen who thinks himself ill-used by a public authority should be able to put his case before someone whose function it is to listen to complaints.
>
> (c) The person to whom complaint is made should be in a position, if the public authority has gone wrong, to do something towards putting things right, either positively by legal sanction, or at least by persuasion.
>
> (d) Where an official action is in fact correct, but bears the appearance of injustice to a citizen who suffers by it, it is a worthwhile objective to see to it that the citizen is told why the action has been taken so that, although his suffering may not be relieved, he can at least see that it is not caused by injustice.

8. *Problems of application.* The difficulty is in giving due effect ,to the qualification "in general". No two minds will agree in all the ramifications. But most would concur in saying, towards one extreme, that there should be no procedure to deal with a complaint that the Governor should have dismissed, but did not dismiss, his Executive Council. Again, towards another extreme, most would agree that there should not be an elaborate appellate procedure in case, in an isolated instance, a bus conductor fails to allow an old-looking child to travel on a child's ticket for a one section bus trip. There is, we believe, a wide range of official actions regarding which general consensus is possible on the question whether redress should be open to an aggrieved citizen. There is another wide range of official actions regarding which Government, performing its duty to govern, can make a decision on that question and give effect to its decision. We therefore think it possible to set up a system which will give substantial effect to the propositions in paragraph 7.

9. *Present avenues of redress generally.* But before going to our Recommendations for change, we look at the present avenues of redress in case of an official action which seems to be wrong. These avenues are numerous. Without attempting to be exhaustive, the citizen may complain to some superior authority in the hierarchy of government, he may complain to his member of Parliament, he may enlist the aid of some association such as a trade union or a professional association to complain or perhaps take offensive action on his behalf, he may gain publicity for his grievance in the newspapers, or on radio or television, he may take his grievance to the Supreme Court for legal remedy, or he may have open to him some statutory means of reconsideration of his case, by appeal or otherwise.

10. *Judicial review.* We discuss later in this paper[3] judicial review in the Supreme Court. As a means of controlling public authorities, judicial review is a basic part of our constitution, but it is not intended to secure and, we think, ought not to be expected to secure, general correctness in public administration.

11*. Statutory rights of appeal, etc.* There is a great array of special statutory provisions for appeal from, or other reconsideration of, official actions. Sometimes there is an approach to one or other of the ordinary courts; sometimes to a specialized tribunal having a continuing existence and a continuing function in a specialized field, sometimes to a tribunal set up for the particular case, sometimes to a Minister of the Crown. These are but examples. Often these special provisions work well enough. They allow redress, however, only as regards narrow classes of official action: they leave untouched vast fields where the law provides no means of redress. They represent the sum of a multitude of particular arrangements made by Parliament: they do not flow from an integrated consideration of the principles on which the law should permit or deny reconsideration of an official action. These statutory provisions are not in themselves enough to put right what may go wrong in public administration generally, nor would any practicable multiplication of their number have that effect.

12. ***Ministerial responsibility.*** The individual and collective responsibilities of Ministers of the Crown to Parliament provide an essential means of redressing wrongs occurring in public administration. But to take up the time of Parliament, and of Ministers and their advisers, in reviewing the multitude of single instances where citizens may complain of the conduct of public authorities is impracticable in the complexity of present-day society.

13. ***Members of Parliament: redress for constituents.*** Complaint by a citizen to his member of Parliament is another valuable means of redress. But a member of Parliament is a busy man and, in the case, of a member who is not one of the ministry, he has inadequate means of finding out the facts and the reasons of policy or other reasons which lie behind an official action. Many a citizen will hesitate to seek the aid of his member: this for a variety of reasons: one is the existence of known differences in political loyalties. And the taking up of the grievances of a constituent is a voluntary matter for the member. Although a valuable means of redress, it is not and cannot be the full answer to the problem of dealing with the grievances of the citizen.

14. ***Redress within the administration.*** Complaint to some superior in the hierarchy of government is, of course, a means whereby innumerable official actions may be brought under review and, if error has occurred, correction made. But the citizen has, as a rule, no right to have his grievance entertained. And, however well the superior may do his duty, a citizen whose complaint is rejected may come away with the feeling, not that he has suffered no wrong, but that the administration has closed its ranks in order to frustrate him. Again, this means of redress, valuable and essential though it is, is not enough to ensure the fact, and the appearance, of correctness in administration.

15. ***Unofficial publicity and pressure.*** The citizen aggrieved by the conduct of a public authority may enlist the aid of some association such as a trade union or a professional association, or he may enlist the aid of publicity in the press, or on radio or television. Such means are valuable means for seeing to it that grievances come to the personal attention of those in authority. But there are features which disqualify them from consideration as sufficient means for ensuring correctness in public administration. First, a citizen cannot insist that they be used on his behalf and they can be used or abandoned for reasons unrelated to his interests or the interest of society at large. And it is quite wrong that the outcome of a citizen's transactions with a public authority should depend, not upon the law and just administration, but upon the amount of noise made, or the degree of pressure brought to bear, by his champion.

16. ***Insufficiency of the present avenues.*** We have considered what we believe are the main avenues of redress open to the citizen who complains of the conduct of a public authority, and have given reasons for thinking that none is sufficient in itself. But are they sufficient in combination? We think not. Is there a real need for yet more institutions for the redress of grievances? We think that there is. Judicial review is directed to other problems, existing statutory appeals leave vast areas of public administration untouched, the other means all involve discretions without duty to the aggrieved citizen. As regards the generality of official actions, the citizen may suffer by unlawfulness, harshness and unfairness at the hands of public authorities, and -there is no one whose function it is to investigate his complaints and with power, by legal sanction or by persuasion, to see that things are put right.

PART III

THE SOLUTION PROPOSED

DIVISION 1.-*General*

17. *Brief description.* In brief, our recommendations are that an Ombudsman be appointed, that a Public Administration Tribunal be established, that a Commissioner for Public Administration be appointed, and that an Advisory Council on Public Administration be established. The first two of these, the Ombudsman and the Tribunal, would be concerned with particular cases where it is alleged that something has gone wrong in public administration. The second two, the Commissioner and the Advisory Council, would be concerned with the review and improvement of the laws and procedures relating to the taking of official actions affecting the citizen, and relating to the righting of things going wrong.

DIVISION 2.-*The Ombudsman in Outline*

18. *His functions.* In broad description, an Ombudsman is a man in high public office who has the functions of receiving the complaints of citizens about the conduct of public authorities, investigating the conduct complained of and, if he thinks that the conduct was wrong, recommending that correction be made. The existence of an Ombudsman opens to the citizen an informal way in which, without expense to him, he can complain about the conduct of a public authority. Some conduct will be excluded from investigation by the Ombudsman. Otherwise he has a discretion and will, it is to be expected, decline to pursue complaints which appear to be clearly without substance. Where he does investigate, he will do so in private. He will (subject to stringent obligations of secrecy) have full access to information and records in the possession of public authorities. In some cases his investigation will show that a complaint is ill-founded: his explanations to the complainant, and his report, will help to remove a sense of grievance, and to vindicate the public authority. In other cases he will find that a complaint is well founded. He cannot, however, direct that redress be given: his function is to persuade. His most useful work, in cases where he finds that something has gone wrong, will be by persuasion behind the scenes. He is given means whereby he can fortify his persuasion: he may issue for publication reports of miscarriages in administration. His published reports will attract political sanctions where, his recommendation being disregarded, wrong conduct of a public authority goes unredressed. It is to be expected that this means of fortification will be a reserve power, not often used. Where he finds that things have gone wrong, he may not only attempt to see that redress is given in the case under complaint, he may also recommend changes in the law and procedure, with a view to the better handling of similar cases in the future.

19. *Matters fit for investigation.* The Ombudsman will be an appropriate official to deal with cases that are unfit for the more elaborate methods, and the legal sanctions, of the courts, existing appellate bodies, or the new Tribunal. He would be a proper recipient of complaints about, amongst other things, rudeness, delay, partiality, harshness, and failure to give reasons. It would be open to him to investigate in cases where there is other means of redress. He might do so, for example, where the complainant does not want to incur the trouble and expense of a formal appeal, but wishes to be satisfied that the public authority has given a fair consideration to his representations and has not misconceived the relevant law.

20. *Utility.* We believe that an Ombudsman has a useful part to play in dispelling imaginary grievances, obtaining redress where a grievance has substance, and pointing out possible improvements in the relevant laws and procedures. The mere existence of an external critic in the shape of the Ombudsman should tend to improve standards of administration.

21. *Objections to his appointment.* It may be objected that the existence of an Ombudsman will impede public business. Public authorities will, it may be said, be excessively cautious so as to reduce the likelihood of error. Records will be made and kept which would otherwise be unnecessary. Submitting to an investigation by the Ombudsman will itself be troublesome and time consuming. In all these ways administration will be made slower and more expensive. There is substance in these objections. Their weight, however, is a matter of judgment on which minds will differ. The important thing is to have the right man as Ombudsman. If the right man is found, he will see to it that his activities do not impede, but promote, efficient administration. In our view, these objections ought not to stand in the way of the establishment of the office of Ombudsman.

DIVISION 3.-*The Public Administration Tribunal in Outline*

22. *Function on inquiry.* The Public Administration Tribunal would have two quite different functions. In the first place, it would hold inquiries into official actions and have power to set aside things done which go beyond the lawful powers of the public authority or which are harsh, discriminatory or otherwise unjust, and to direct what should be done in place of an official action set aside. This function on inquiry will be appropriate in cases where a public authority is required or permitted to apply considerations of policy in deciding to take, or not to take, some official action.[4] To give another example, the function of the Tribunal on inquiry will also be particularly

appropriate where there is a refusal to perform a simple public duty, for example, to issue a licence on payment of a fee, and less formal means of complaint have failed.

23. ***Utility of the function.*** We think that the function of -the Tribunal on inquiry will be a useful one. It will cover a multitude of cases where an official action may cause real loss or suffering to a citizen and the law today gives no right, or an unsatisfactory right (e.g., judicial review), to have the official action reconsidered.

24*. Existing courts inappropriate.* We think that it is not appropriate to give to the Supreme Court or any other existing court the function of the Tribunal on inquiry. We think so because this function is an administrative function rather than a judicial function as ordinarily understood: particularly is this so where questions of policy arise and where directions have to be given on what is to be done in place of an official action which is set aside. A further reason for setting up the Tribunal with this function rather than giving the function to an existing court is that the Tribunal will have wider resources of knowledge and experience than an ordinary court. It will have amongst its members men with knowledge and experience in government and administration, and other specialized fields, as well as lawyers. Again, public administration is itself a special field: the Tribunal should develop its own expertness in this field and thus tend to give more satisfaction than a court with the greater part of its work in other fields. Finally, it is better for the maintenance of the traditional role of the Supreme Court, and other ordinary courts, that they should not be concerned with matters involving the application of Government policy.

25. ***Function on appeal.*** The appellate function of the Tribunal, as distinct from its function on inquiry, will be for cases requiring a judicial determination such as would be given in an ordinary court. We contemplate that it will be given jurisdiction in particular statutory appeals, perhaps at the expense of the ordinary courts, in cases where it is advantageous to have the wider knowledge and experience (particularly in government and administration) which will be available amongst the membership of the Tribunal.

DIVISION 4.*-The Commissioner for Public Administration and the Advisory Council on Public Administration in Outline*

26. ***General.*** The Commissioner for Public Administration and the Advisory Council on Public Administration are required for several purposes. These can be considered in relation to the Commissioner alone, because the Council will be simply advisory to him.

27. ***Rationalization of appeals.*** We have noted[5] the scattered, diverse and incomplete nature of the existing rights of appeal from, and other statutory means of review of, the official actions of public authorities. We contemplate that one of the tasks of the Commissioner will be to examine in detail the powers exercised by public authorities and to recommend changes with a view to ensuring that rights of appeal are given where appropriate and that the Tribunal or some other court or body be given jurisdiction on appeal. Only in such a way as this can an integrated and rational system of appeals be put in place of the present situation, which is the result of many years of piecemeal legislation for particular classes of official action.

28. ***Jurisdiction of the Ombudsman and the Tribunal.*** The Commissioner will also be concerned, in our contemplation, with making recommendations on the classes of conduct which should be excluded from investigation by the Ombudsman, on the classes of official action which should be excluded from inquiry by the Tribunal, on the cases in which a person affected by an official action should be entitled as of right to an inquiry by the Tribunal, and on the cases where there should be a right of appeal to the Tribunal.

29. ***Laws and procedures on administrative powers.*** The Commissioner will also be concerned, in our contemplation, with making recommendations directed towards seeing that the laws governing the exercise of powers by public authorities are, consistently with the efficient achievement of their objects, framed in a way which affords fairness to the citizen both in substance and in procedure.

30. ***Appointment and establishment justified.*** These purposes of the Commissioner and of the Advisory Council are purposes the promotion of which ought, in our view, to be amongst the objectives of good government. The task is a continuing one. Its performance as regards existing public authorities will take years. And every year new public authorities are set up and new powers are conferred. We do not think that these purposes will be achieved unless permanent arrangements are made such as the appointment of the Commissioner and the establishment of the Advisory Council.

PART IV

THE OMBUDSMAN IN DETAIL

31. *The right man must be chosen.* The office of Ombudsman calls for a man of unusually high calibre. He must be respected by public authorities. He must deserve and receive the support of Parliament and of Ministers of the Crown. He must be sensitive to the problems of the administration. He must be compassionate and patient with the problems of the citizen. He must use his powers of public criticism with restraint. When occasion demands, he must be explicit and firm in criticism.

32. *The Bill generally.* The laws of other countries governing the appointment and functions of an Ombudsman differ from country to country. The proposals embodied in the draft Bill in our report[6] draw on the experience of other countries, but do not wholly follow the laws of any other country. In some respects our proposals are innovative.

33. *Appointment and tenure of office.* The Ombudsman would be appointed by the Governor for a term of office not exceeding 7 years.[7] The law would not prescribe any specific qualifications for office, but members of Parliament would not be eligible.[8] The Ombudsman would have, during his term of office, security of office equivalent to that of a Judge of the Supreme Court,[9] but would cease to hold office on reaching 65 years of age.[10]

34. *Right to complain.* Any person might complain to the Ombudsman about the conduct of a public authority.[11] There is no formal requirement that the complainant have any interest in the conduct of which he complains; but lack of interest in the complainant might lead the Ombudsman to refuse to investigate.[12]

35. *"Public authority".* This expression is defined so as expressly to include, amongst others, the Governor, any Minister of the Crown, any officer of the public service, and any statutory body representing the Crown.[13] The content of the expression may be enlarged (but not confined) by regulations made by the Governor.[14]

36. *Discretion to investigate; excluded conduct.* In general, the Ombudsman would have a discretion to investigate, on complaint or of his own motion, any conduct of a public authority.[15] But the draft Bill has a schedule of classes of conduct which he may not make the subject of an investigation,[16] and items may be added to the schedule or dropped from it by proclamation of the Governor.[17]

37. *Persons to be heard.* Provision is made for notification to interested persons of a decision to make an investigation,[18] and for allowing them to make submissions to the Ombudsman.[19]

38. *Privacy.* The Ombudsman would make his investigations in private.[20]

39. *Getting the facts.* The Ombudsman is given power to obtain information and documents from public authorities.[21] He is also to have the powers of a Royal Commissioner as regards a public authority and any other person.[22] The Ombudsman may exercise his powers notwithstanding any privilege or duty of secrecy of a public authority, and notwithstanding the Crown privilege discussed later in this paper,[23] but he may not seek information on documents relating to confidential proceedings of Cabinet,[24] and his powers would yield before the ordinary privileges of persons who are not public authorities.[25]

40. *Consultation with the Minister.* The Ombudsman is obliged, on request by the appropriate Minister of the Crown, to consult with him on the conduct the subject of the, investigation.[26]

41. *Adverse report generally.* Where the Ombudsman finds that ,the conduct under investigation is wrong, he is to make a report accordingly, giving his reasons.[27] In this paper we refer to such a report as an adverse report. The report need not be adverse to the public authority in the sense of attributing wrongdoing to him. It may for example be based on an opinion that the law needs changing, or that administrative procedures need changing.[28] In an adverse report, the Ombudsman may recommend remedial action, not only as regards the particular conduct investigated, but also as regards the handling of similar cases in the future. He may, in particular, recommend changes in the laws and procedures relevant to the class of conduct in question.[29]

42. *Adverse report: distribution.* Where the Ombudsman makes an adverse report he must in some cases give the report to the appropriate Minister of the Crown,[30] and in other cases to the "head" of the public authority.[31] Where he is required to give an adverse report to the head of the public authority, he may also give a copy to the appropriate Minister[32] and he may, in any case, give a copy to the complainant (if any)[33] and to the public authority to whose conduct the report relates.[34]

43. ***Consequent action: default report.*** The Ombudsman may require that he be told of action taken in consequence of an adverse report.[35] If he, is not satisfied that sufficient steps are taken in due time he may make a report for presentation to Parliament.[36] We shall refer to such a report as a default report.

44. ***Special report.*** The Ombudsman may also, at any time, make a special report, for presentation to Parliament, on any matter arising in connection with the discharge of his functions.[37]

45. ***Publication.*** The Ombudsman may, in a default report or in a special report, recommend that the report be made public forthwith.[38] If he does, the Minister may make the report public before it is presented to Parliament.[39]

46. ***Annual report.*** The Ombudsman must make an annual report for presentation to Parliainent.[40]

47. ***Acting Ombudsman, staff, delegation.*** Provision is made for the appointment of an Acting Ombudsman,[41] for appointing a staff,[42] and, to a limited extent, for delegation of powers to his officers.[43]

48. ***Secrecy.*** Stringent obligations of secrecy are imposed on the Ombudsman and his officers.[44]

PART V

THE PUBLIC ADMINISTRATION TRIBUNAL IN DETAIL

DIVISION 1.-Introductory

49. *General: membership.* The second new institution whose establishment we recommend is a court.[45] We propose that it be named the "Public Administration Tribunal". It will consist of a President and eleven or more other members.[46] The President must be a judge of the Supreme Court,[47] and at least one other member must be a holder of judicial office.[48] The other members win be persons with special knowledge or experience in government, administration, the law, the public service, commerce, industry, or any branch of the social sciences or any other science.[49] A member's duties may be full-time or part-time.[50] Special appointments may be made for particular proceedings.[51]

50. *Constitution for particular matters.* The Tribunal may, in general, be constituted by any one or more members for any matter coming before it.[52] But the Bill requires or enables a special constitution for some matters.[53] Further provision for the manner of constitution of the Tribunal for particular matters may be made by the regulations.[54]

51. *Questions of law.* In many cases the Tribunal may be constituted for proceedings before it, by one or more members not all of whom are judges. This calls for special provision for the determination of questions of law. Under the Bill the question of law may be determined by the Tribunal as at first constituted,[55] or by the Tribunal reconstituted by one or more members who are judges,[56] or by the Supreme Court on stated case.[57]

52. *Inquiry and appeal generally.* The functions of the Tribunal will be of two kinds. Functions of one kind will arise in inquiries, in which the Tribunal may, in general, review any official action of a public authority. Functions of the other kind will arise in appeals in specific types of case where a right of appeal is given by Parliament. The functions in inquiries and on appeal are markedly different and we shall deal separately with each.

DIVISION 2.-*Inquiries*

53. *General scheme.* The general scheme of the functions of the Tribunal as regards inquiries is this. Where a person claims to be adversely and substantially affected by an official action of a public authority, he may, after giving the public authority an opportunity to further consider the matter, request the Tribunal to, inquire into the official action. The Tribunal may thereupon inquire into and, if ground is shown, set aside the official action and direct the public authority to take some other action. We go on to elaborate and qualify this description of the general scheme.

54. *"Official action".* The concept of an "official action" is basic to the scheme. Briefly, an "official action" is a thing done or left undone by a public authority, a thing which has some effect on the legal rights of a person.[58] Subject to the requirement that it must affect legal rights, "official action" is a very extensive concept. Unless limited, it would be too extensive. The means of limitation are these. First, our draft Bill has a schedule in which classes of official action are specified and these are excluded from inquiry by the Tribunal:[59] these excluded classes embrace, for example, the making of regulations by the Governor,[60] and the giving of a judgment by a court.[61] Second, the Governor is authorized to make regulations specifying classes of official action which will be "eluded from inquiry by the Tribunal:[62] these regulations are subject in the usual way to disallowance in Parliament.[63] So far we have dealt with official actions which by their general nature ought not to be subjected to inquiry by the Tribunal. But there may be an official action which by reason of its own facts and circumstances ought not to be inquired into by the Tribunal: there may for example be overwhelming considerations of secrecy or urgency. The Bill therefore authorizes the Governor to direct that there shall be no inquiry into a specified official action.[64] The direction must be by order published in the *Gazette,*[65] so that its existence will be known. The order may be disallowed in Parliament.[66]

55. *"Public authority".* "Public authority" expresses another basic concept. It too is an extensive concept. It is defined at length in the Bill.[67] It embraces persons having public office, great or humble. Where the activities of the Tribunal are to be confined, the confinement will be accomplished by reference to "official action",[68] not by reference to "public authority".

56. *Person affected.* Another basic concept is that of a person "affected" by an official action. A person is affected only if the official action affects his legal rights.[69] This is an important restriction on approach to the Tribunal for an inquiry. Although an objector may request an inquiry on a mere claim that he is thus affected by an official action,[70] the Tribunal may decline to inquire on the ground that he is not so affected,[71] and the Tribunal may not set aside an official action unless satisfied that the objector is so affected.[72] Thus a landowner in the

path of a proposed highway may have a standing to request an inquiry into some official action taken in implementation of the proposal: a person having only an aesthetic interest would not.

57. *The Attorney-General as objector.* The Bill makes the Attorney-General a competent objector in relation to any official action within the jurisdiction of the Tribunal on inquiry.[73] The Attorney-General need not be personally affected. What we have said in relation to a person affected[74] does not apply to him.

58. *Notice of objection.* The Bill requires that an objector must, before requesting an inquiry, give notice of objection to the public authority.[75] The purpose of this is to give the public authority a chance to reconsider the official action and perhaps to meet the objection, before the machinery of the Tribunal is invoked.

59. *Inquiry as of right.* Where the Attorney-General is objector, or in cases prescribed by the regulations where any person affected is objector, the Tribunal must inquire into the official action in question.[76] We include this regulation-making power in contemplation that it will be exercised after considering recommendations made by the Commissioner.[77]

60. *Discretionary inquiry.* Except as just mentioned,[78] the Tribunal has a discretion to hold or not to hold an inquiry pursuant to a request by an objector.[79] In exercising this discretion, the Tribunal must take into consideration-

(a) the public interest;

(b) the extent to which the objector is affected by the official action;

(c) the nature, constitution, special knowledge and experience of the public authority;

(d) the importance, complexity or difficulty of any matter the subject of -the objection;

(e) where money or other property is involved, its amount or value or estimated amount or value;

(f) whether the Ombudsman has investigated the official action or, if not, whether the case is more fitted for investigation by the Ombudsman than for inquiry by the Tribunal;

(g) the nature and extent of any means of appeal from, or other review of, the official action, otherwise than under this Part;

(h) whether there is a reasonable case for inquiry; and

(i) such other matters as the Tribunal thinks relevant.[80]

61. *Preliminary decision.* Upon receiving a request for an inquiry, the Tribunal will make a preliminary decision whether to hold an inquiry or not.[81] The Tribunal will, in general, reach this preliminary decision without hearing the parties.[82] It will notify the parties of its decision.[83] If the decision is against holding an inquiry, the objector has a right to be heard on an application for review of the preliminary decision.[84]

62. *Procedure generally.* In an inquiry, the Tribunal will follow less formal procedures than does an ordinary court. It will not be bound by the laws of evidence,[85] it may limit the examination of witnesses (including cross examination),[86] and it may adopt its own ways of gathering information.[87] An inquiry will be a true inquiry, with the Tribunal taking the initiative, not merely adjudicating upon what is put before it by the parties.

63. *Privacy and publicity.* In general, inquiries will be conducted in private,[88] but the final decisions of the Tribunal and its reasons for decision will be made public.[89] These arrangements may be altered by order of the Tribunal, in some cases with the consent of the parties and in some cases without consent.[90]

64. *Policy: its relevance.* The Bill breaks new ground in requiring the Tribunal to take into account matters of policy.[91] The policy may be either Government policy or the policy of the public authority whose official action is under inquiry or the policy of another public authority. We propose this because commonly a public authority is, by law, required or entitled to take into account matters of policy. If the, public authority whose official action is under inquiry were so required or entitled, but the Tribunal were not so required or entitled, it would lead to the outcome of inquiries departing from the course of administration intended by Parliament.

65. *Policy: scheme generally.* The scheme we propose as regards matters of policy is this. Where a statement of policy is put before the Tribunal, the Tribunal must decide whether, and to what extent, the policy is within power conferred by Parliament or otherwise by law.[92] To the extent to which the policy is within power, the

Tribunal must take the policy into account.[93] Where the policy is Government policy, the Tribunal must take it into account by giving effect to it.[94] Where it is the policy of a public authority, but not Government policy, the Tribunal is not bound to give effect to it, but must have regard to it.[95]

66. ***Bad policy.*** One ground for allowing an objection to an official action is that, the public authority not being bound to take the official action, the official action is harsh, discriminatory or otherwise unjust.[96] But such an official action may have been taken pursuant to a policy which the Tribunal is bound to give effect to, but which is itself harsh, discriminatory or otherwise unjust. A bad policy may thus have a bad official action. We think that the remedy for a bad policy as the kind described must be a political one, not one to be sought in the Tribunal or in any other court. Apart from the ventilation which the matter may have in the course of an inquiry,[97] the President of the Tribunal must send a copy of any statement of policy to the Commissioner for Public Administration,[98] and the Commissioner must give particulars of such a statement in his annual report to Parliament.[99]

67. ***Grounds for allowance: going beyond powers.*** Two kinds of vice in an official action give a case for allowance of an objection by the Tribunal. First, there is the simple case where the official action is beyond power.[100] The public authority has gone beyond its allotted function, it has done something not authorized by Parliament or otherwise by law. This case is similar to the main ground of judicial review in the Supreme Court.[101]

68. ***Harshness, discrimination, other injustice.*** The second kind of vice is not directly concerned with power. It arises where the official action, even if within power, is not mandatory on the public authority, and is harsh, discriminatory or otherwise unjust.[102] We have referred already to the possible impact on this case where the official action is taken pursuant to a policy which is itself harsh, discriminatory or otherwise unjust.[103]

69. ***Remission for reconsideration.*** Where the Tribunal is satisfied that there is a case for allowing an objection to an official action, the Tribunal must, on request by the public authority, remit the official action to the public authority for reconsideration.[104] On so remitting the official action, the Tribunal may give directions to the public authority, including directions on matters of law or fact.[105] The Tribunal must, before deciding whether to allow the objection, take into account what the public authority has done on the reconsideration.[106]

70. ***Allowance of objection generally.*** Where there is a case for allowing an objection, and effect has been given to any request for remission for reconsideration, the Tribunal has a discretion whether to allow or disallow the objection.[107] The allowance of an objection is of a declaratory character: it does not of itself affect the official action, but is the foundation for orders setting aside the official action and directing what is to be done.

71. ***Setting aside for excess of power.*** Where an objection is allowed on the ground that the official action is beyond power, the Tribunal may set aside the official action and any consequential act done by the public authority.[108] Subject to any terms that may be imposed, an official action set aside on this ground will be treated as if it never had any operation.

72. ***Setting aside for harshness and so on.*** Where an objection is allowed on the footing that the official action is harsh, discriminatory or otherwise unjust, the Tribunal may again set aside the official action, and any consequential act of the public authority, but may do so from the beginning or from some later date.[109] The difference between the present case and the case where the official action is simply beyond power is that in the present case the official action is valid in law until made invalid by order of the Tribunal: here there is more room for the preservation, or protection, of things done in consequence of the official action. For example, some one may have made an entry on land in reliance on the official action: it may be that he ought to be relieved from any possible liability for trespass.

73. ***Remission for action.*** Upon setting aside an official action, the Tribunal may remit the matter to the public authority with directions for further action.[110] These directions may include directions to take any action which the public authority might have taken instead of taking the official action under inquiry.[111]

74. ***Terms.*** These orders following on the allowance of an objection may be made on terms or conditions.[112]

75. ***Question of law for the Supreme Court.*** There is no general provision for appeals from the Tribunal in an inquiry, but there is provision for the determination of questions of law by the Supreme Court on stated case. The Tribunal may state a case in the course of the inquiry or at its conclusion and the Supreme Court may direct the Tribunal to state a case at the conclusion of the inquiry.[113]

76. ***Costs.*** The Bill gives no power to the Tribunal in an inquiry to order one party to pay the costs of another. Where holding an inquiry the Tribunal is part of the administrative process. There win be much to be said for and against allowing an objection. We think it unfair to make the loser pay costs. An objector could not know how much an inquiry might cost him. The fear of a ruinous order for costs would too often deter the citizen from approaching the Tribunal.

DIVISION 3.-Appeals

77. *General scheme.* Part IV of the Public Administration Tribunal Bill deals with appeals to the Tribunal as distinct from inquiries. It is, as we recommend it, only a framework, in the sense that our recommendations do not include any provision whereby any appeal would lie to the Tribunal. Our proposal is that Parliament should, from time to time in the future, confer a right of appeal to the Tribunal in Acts dealing with particular fields of public administration. Some of these new rights of appeal would take the place of some existing rights of appeal to the courts or other tribunals. Others of these new rights of appeal would be given where there is now no right of appeal. Specific recommendations on these matters would be part of the function of the Commissioner for Public Administration.[114]

78. *Other Acts to supplement the Bill.* The appeal provisions of the Bill are expressed briefly. We contemplate that there will be a variety of appellate business and that the Bill will be supplemented by the other Acts giving appellate jurisdiction to the Tribunal in particular classes of case. Such an Act might enable the Tribunal to make orders for costs.

79. *Nature of appeal: further appeal to the Supreme Court.* Subject to what other Acts may say,[115] an appeal to the Tribunal would be by way of rehearings and the Tribunal would have the powers of the person whose decision is under appeal.[117] There is a further appeal to the Supreme Court on questions of law,[118] in some cases only by leave of the Supreme Court.[119]

DIVISION 4.*-General*

80. *Contempt.* The Tribunal is empowered to punish contempt in the face of the Tribunal or in its hearing and contempt by disobedience to an order of the Tribunal or other misconduct relating to an order or warrant of the Tribunal.[120] These powers are exercisable only by a member who is a judge.[121] There is an appeal to the Supreme Court.[122] There is a saving of the powers of the Supreme Court and of the law for the prosecution and punishment of contempt on indictment.[123]

81. *Regulation of procedure.* The Governor is empowered to make regulations relating to the practice or procedure of the Tribunal.[124] We propose this arrangement rather than that the members of the Tribunal or some of them be empowered to make rules of court, because the proper working of the Tribunal will, at first anyway, be a matter of special importance to the Government. We would expect, however, that in due course the Tribunal would be given its own rule-making powers.

PART VI

THE COMMISSIONER FOR PUBLIC ADMINISTRATION IN DETAIL

82. *Functions.* We recommend the appointment of a Commissioner for Public Administration. His primary function would be to review the law relating to public authorities and the powers exercisable by public authorities.[125] He would do so upon terms of reference given to him by the Minister.[126] He would also be chairman of the proposed Advisory Council on Public Administration.[127]

83. *Appointment and tenure of office.* The Commissioner will be appointed by the Governor for a term not exceeding seven years.[128] He would compulsorily retire at the age of 65 years[129] and would cease to hold office in any of a number of events commonly enumerated in legislation establishing senior public offices.[130] His duties would take up his full working time.

84. *Objects of reviews.* We contemplate that the objects of reviews made by the Commissioner would include-

(a) seeing that the laws relating to public authorities, while remaining fit for the purposes for which those laws are made, are adapted so as to disturb as little as possible the interests of the citizen;

(b) seeing that the procedures of public authorities, especially in cases where persons affected have a right to be heard, or should have such a right, are fair and are not unnecessarily divergent;

(c) deciding what conduct of public authorities should be excluded from investigation by the Ombudsman, and what official actions should be excluded from inquiry by the Tribunal;

(d) deciding in what cases it should be mandatory on the Tribunal to inquire into an official action on request by a citizen affected by the official action;

(e) deciding what appellate jurisdiction should be conferred on the Tribunal.

85. *Powers on inquiry.* The Commissioner would have, for the purposes of his inquiries, the powers of a Royal Commissioner.[131]

86. *Reports.* The Commissioner must make reports on his work under references made to him, and he must make an annual report.[132] These reports are to be made to the Minister for presentation to Parliament.[133]

PART VII

THE ADVISORY COUNCIL ON PUBLIC ADMINISTRATION IN DETAIL

87. *General.* We recommend the establishment of an Advisory Council on Public Administration. This Council would bring to the aid of the Commissioner, by recommendation on subjects touching the work and activities of the Commissioner, the benefit of wide experience in and knowledge of matters under his responsibility. The Commissioner would need to do, or to have done, much laborious basic work, but his task is so wide-ranging and calls for so much in the way of value judgment, that, in our view, he should have the advantage of the general knowledge and experience of the Council.

88. *Composition.* The Advisory Council on Public Administration would be a part-time body consisting of-

(a) the Commissioner for Public Administration (chairman);

(b) the Ombudsman;

(c) the President of the Public Administration Tribunal;

(d) a member of the Public Service Board;

(e) three other members with special knowledge of or experience in public administration or public law.[134]

The members mentioned in paragraphs (d) and (e) would be appointed by the Governor, those mentioned in paragraph (e) for terms not exceeding 3 years.[135]

89. *Functions.* The functions of the Council will be to make recommendations to the Commissioner on matters relating to the work and activities of the Commissioner.[136] The Council may do so of its own motion or on reference by the Minister or by the Commissioner.[137]

PART VIII

JUDICIAL REVIEW

90. *No recommendation for change.* Our terms of reference require us to give consideration to the law relating to judicial review. We think that the law on this subject should not be changed by Parliament at present.

91. *Meaning of "judicial review".* "Judicial review" in this context refers to the longstanding powers of the Supreme Court now exercised by orders of prohibition, *mandamus* or *certiorari.* Judicial review also embraces the powers of the Supreme Court exercised by injunction or declaration of right, in proceedings brought for the purpose of putting in question something done or intended by a public authority.

92. *Purpose.* Judicial review is concerned to see that a public authority does its public duty, does not go beyond its powers, follows fair procedures, and does not act upon a manifest error of law. Once it appears that the public authority is acting within its powers, the Supreme Court is not concerned to see that the public authority is right on the facts, nor is it concerned with the harsh exercise of a discretion.

93. *Criticisms of the law.* The law relating to judicial review has been much criticised. The remedies are restricted in many ways, which we do not specify here. And, having regard to the limitless variety of functions given to public authorities, it is to be expected, and it is the fact, that the outcome of proceedings for these remedies is often unpredictable. Proceedings for these remedies share with other proceedings in the Supreme Court the problem of expense, a problem aggravated in the eye of the citizen by the deep purse of many public authorities. Finally, in general, judicial review is destructive rather than constructive: the Supreme Court can stop what is wrong, but it cannot put itself in the place of the public authority and do what it thinks the public authority ought to have done.

94. *Reasons for not recommending change.* Should there be a legislative attempt to reform the law relating to judicial review in the Supreme Court? We think not, or at least not now. The basic difficulty lies in the variety of functions of public authorities, and the limitless number of ways in which legislation can confer powers on public authorities. Parliamentary prescription of the powers generally of the Supreme Court on judicial review would carry with it too great a risk of confining the development of the law by the ordinary processes of the courts. In this field there is today a rapid development of the law in the courts: it is better, for the present, to let this development run its course.

95. *Unlimited functions of judicial review.* The criticism of judicial review that it is in general destructive and not constructive is valid as far as it goes, but it is rather a perception of the limited function of judicial review, not a ground for change in the law. The Supreme Court is rightly concerned to see that a public authority keeps within its powers, but performs its public duties. It is unfitting that the Supreme Court should take to itself powers which Parliament has entrusted to a specialized public authority.

96. *Impact of the Public Administration Tribunal.* We say a word more about the powers of the Supreme Court on judicial review to insist that a public authority follows fair procedures, and to set aside things done under a manifest error of law. The historical development of the principles of judicial review is obscure, but it is probably right to say that review addressed to these matters arose in order to fill a void, arose, that is to say, to control serious injustices in cases where the law furnished no other means of control. The Public Administration Tribunal, part of our recommendations, would furnish another and more extensive means of control. For the present we think it safer to allow an overlapping jurisdiction in these matters, in the Supreme Court and in the Tribunal. Experience may show that the Tribunal can safely take the place of the Supreme Court as regards these grounds of review. However, we cannot envisage circumstances in which it would be right to take away from the Supreme Court its jurisdiction on other grounds to require a public authority to perform its public duty and to see that a public authority does only those things which Parliament has authorized it to do.

PART IX

CROWN PRIVILEGE

97. ***No recommendation for change.*** Our terms of reference require us to give some consideration to the law relating to Crown privilege. We think that the law on this subject should not be changed by Parliament at present.

98. ***Description: the former problems generally.*** The Crown may object to the disclosure in a court of a fact or a document on the ground that the disclosure is against the public interest. The objection is soundly made where, for example, the disclosure would imperil the defence of the country. When our terms of reference were given to us there was uneasiness about the law governing this privilege and the practices which had developed around it.

99. ***Conclusiveness of Ministerial claim.*** In the first place, it was said to be the law that, upon a Minister of the Crown claiming the privilege, the court had to prevent the disclosure, without concerning itself with the question whether the claim was well founded. It was seen that the doctrine was being pressed too far when it emerged that the Crown had asserted this conclusive effect so as to withhold production, in a criminal prosecution, of a statement of the accused, furnished to the Crown by the solicitor for the accused.[138]

100. ***Mistaken disclosure.*** In the second place, on the view that it was open to the Court to determine the validity of the Crown's objection to disclosure, there was the difficulty that the court might reject the objection and permit the disclosure without the Crown having an opportunity to take the question to a higher court. There was a risk here of serious harm to the public interests.[139]

101. ***Problems now met.*** These problems have now been met by the courts.[140] We think that there is now no need for Parliamentary intervention in this field.

102. ***Crown privilege and the Ombudsman.*** Our recommendations concerning the Ombudsman include a recommendation that his powers on investigation should prevail over Crown privilege. He is a high officer of government who investigates in private: he should be relied upon to exercise a sound discretion, on his own motion or on appropriate request, so as not to make public those matters which ought in the public interest to be kept secret. The Bill, however, would not permit him to investigate confidential proceedings of Cabinet or of a committee of Cabinet.[141]

FOOTNOTES

1 L.R.C. 16, 14th December, 1972.

2 See Part VIII of the report. The Bills are the Commissioner for Public Administration Bill, the Public Administration Tribunal Bill and the Ombudsman Bill.

3 Part VIII.

4 See paragraphs 64-66.

5 Paragraph 11 above.

6 Part VIII.

7 Ombudsman Bill, s. 6 (2).

8 S. 6 (10).

9 S. 6 (6).

10 S. 6 (4).

11 S. 11 (1).

12 S. 12 (4) (b) (vi).

13 Ombudsman Bill, s. 5 (1).

14 S. 5 (1), 38.

15 S. 12 (1).

16 S. 13 (1).

17 S. 13 (2).

18 S. 15.

19 S. 23.

20 S. 16.

21 S. 17.

22 S. 18.

23 Part IX.

24 Ombudsman Bill, s. 21.

25 S. 20.

26 S. 24.

27 Ombudsman Bill, s. 25 (1).

28 Ss. 5 (2), 25 (2) (d).

29 S. 25 (2) (d).

30 S. 25 (3) (a), (b).

31 S. 25 (3) (c). Unless otherwise prescribed by the regulations, "head" means the appropriate departmental Under Secretary: s. 5 (1).

32 S. 25 (4) (b).

33 S. 25 (4) (a).

34 S. 25 (4) (c).

35 S. 25 (5).

36 S. 26.

37 S. 30 (1).

38 S. 30 (2).

39 S. 30 (3).

40 Ombudsman Bill, s. 29.

41 S. 7.

42 S. 31.

43 Ss. 8, 9.

44 Ss. 33, 34.

45 Public Administration Tribunal Bill, s. 6 (2).

46 S. 6 (1).

47 S. 10 (1).

48 That is, a judge of the Supreme Court or of a District Court, or a member of the Industrial Commission or of the Workers' Compensation Commission: ss. 5 (1), 6 (1) (b).

49 S. 6 (1) (c).

50 S. 6 (4).

51 S. 6 (1) (d).

52 S. 13 (1).

53 S. 51 (punishment for contempt), s. 69 (questions of law), s. 71 (2) (enforcement of orders).

54 S. 13 (1).

55 Public Administration Tribunal Bill, s. 69 (4).

56 S. 69 (5).

57 Ss. 68 (b), 69 (8) (d), (9).

58 Public Administration Tribunal Bill, s. 5 (2), (3).

59 S. 16 (b).

60 Schedule, paragraph 3.

61 Schedule, paragraph 1 (d).

62 Public Administration Tribunal Bill, Ss. 16 (c), 80.

63 Interpretation Act, 1897, S. 41.

64 Public Administration Tribunal Bill, S. 26 (1).

65 S. 26 (1).

66, S. 26 (5).

67 S. 5 (1).

68 See paragraph 54.

69 S. 5 (5).

70 Ss. 17 (2), 21 (1).

71 S. 30 (b).

72 S. 34 (3).

73 S. 17 (1).

74 Paragraph 56.

75 Public Administration Tribunal Bill, ss. 18, 22.

76 S. 25 (1), (2) (a).

77 See paragraph 28.

78 Paragraph 59.

79 Public Administration Tribunal Bill, s. 25 (2) (b).

80 Public Administration Tribunal Bill, s. 30.

81 Public Administration Tribunal Bill, s. 28 (1) (b).

82 S. 28 (2).

83 S. 28 (1) (c).

84 S. 29.

85 Ss. 38 (1) (a), (d), (e), 39 (a).

86 S. 39 (b).

87 S. 38 (1) (a), (g), (h).

88 S. 41 (1).

89 Public Administration Tribunal Bill, s. 41 (3), (6).

90 S. 41 (1), (4).

91 S. 32.

92 S. 32 (1), (3).

93 Public Administration Tribunal Bill, s. 32 (1), (3).

94 S. 32 (1).

95 S. 32 (3).

96 Public Administration Tribunal Bill, s. 34 (1) (a).

97 See paragraph 63.

98 Public Administration Tribunal Bill, s. 77 (2).

99 Commissioner for Public Administration Bill, s. 13 (4).

100 Public Administration Tribunal Bill, s. 34 (1) (b).

101 See paragraph 92.

102 Public Administration Tribunal Bill, s. 34 (1) (a).

103 See paragraph 66.

104 Public Administration Tribunal Bill, s. 35 (1).

105 S. 35 (2) (a).

106 S. 35 (3) (b).

107 S. 34 (1).

108 S. 36 (1) (b).

109 Public Administration Tribunal Bill, s. 36 (1) (a).

110 S. 36 (1) (c).

111 S. 36 (2).

112 Public Administration Tribunal Bill, ss. 5 (6), 36 (3).

113 Ss. 42, 68, 69.

114 See paragraph 28.

115 Public Administration Tribunal Bill, s. 44.

116 Public Administration Tribunal Bill, s. 45 (b).

117 Public Administration Bill, s. 46 (a)

118 S. 48 (1).

119 S. 48 (2).

120 S. 50.

121 S. 51.

122 S. 57.

123 S. 58.

124 S. 80 (c).

125 Commissioner for Public Administration Bill, s. 6 (1) (a).

126 S. 6 (1).

127 S. 7 (2).

128 Commissioner for Public Administration Bill, s. 4 (2).

129 S. 4 (6) (g).

130 S. 4 (6).

131 Commissioner for Public Administration Bill, s. 6 (2).

132 S. 13 (1)-(3).

133 S. 13 (5), (6).

134 Commissioner for Public Administration Bill, s. 7 (1).

135 S. 7 (1) (d), (e).

136 S. 9 (1).

137 S. 9 (1).

138 *Ex parte Brown; re Tunstall* (1966) 67 S.R. 1.

139 *Ex parte Attorney-General; re Cook* (1967) 69 S.R. 247.

140 *Ex parte Brown; re Tunstall* (above); *Ex parte Attorney-General; re Cook* (above); *Conway v. Rimmer* [1968] A.C. 910.

141 Ombudsman Bill, s. 21.