

WEEK 1: ADMINISTRATIVE LAW- AN INTRODUCTION

Q: What is Administrative Law?

- It is what the government does
- It includes:
 - o Public law
 - o Control of government action- how we regulate what the government does
 - o Decision-making- including on issues of immigration and taxation
 - o Public institutions- such as courts and tribunals
 - o Legislation and rule-making
 - o Accountability- towards the separation of powers, democracy, gatekeeper of the rule of law, individual rights. Accountability is the fundamental aspect that underpins administrative law.
- control of, and constraints on, government power
- principles governing exercise of powers and discretion by executive in decision making
- provides check on government power → accountability
- protects rights and interests of citizens (including corporations) → administrative justice
- Administrative law is concerned with the executive arm of the government including the agencies and departments.
- There is no overarching legislative scheme
- Many activities we do in our lives are subject, directly or indirectly, to government scrutiny, permit or control. Such activities include obtaining a birth certificate, going to school, getting a driver's license, marrying etc.
- There is a democratic ideal that those who elect the government are entitled to call it to account
- Increased government activity create a demand for increased finding and in turn provides another reason why those who provide that finding through taxes and other charges claim a right to monitor government expenditure
- We have a right to complain against government and to challenge the legality and propriety of government decisions
- With power comes responsibility and accountability

Q: How does government power influence our lives?

- Welfare
- Education
- Transport
- Merits review
- Birth certificate
- Drivers licence
- Examples include:
 - o The Castle
 - o The girl from America with no birth rights
 - o The members of the Bali nine
 - Procedural justice and procedural fairness
 - Rule of law

Q: What is accountability?

There are 4 categories of accountability:

Political accountability- Refer to Sheet #1

- implemented through the parliamentary system and includes parliamentary committees, question time, letters to ministers and ministerial control of and answerability for executive government action (pg4)
- Ministers are responsible for ensuring that the executive branch carries out the policies of the government (pg9)
- Each minister is answerable to the parliament and is accountable ultimately to the electorate for actions taken within the executive branch (pg9)
- Responsible government- **refer to Sheet #1**
 - o One arm is responsible to the other. In this instance, the executive is responsible to the legislature
- **Ministerial accountability-***LECTURE!!!!**
 - o Member of Parliament can be head of a department. Can also have a foot in each arm of government
 - o Doctrine of accountability (ministerial accountability) contains two propositions: (pg11)
 - Ministers are individually responsible to parliament for the affairs of their departments
 - Cabinet is collectively responsible to parliament and the electorate for the conduct of government
 - o Minister is directly responsible to legislature
 - o The effectiveness of ministerial responsibility depends on a series of conditions: (pg11)
 - Ability of MP to question ministers, extract information and on rare occasions, compel an incompetent minister to resign
 - Minister can control his department and is aware of what his officials are up to
 - o **How much control do Ministers have over their departments?**
 - May have thousands of staff
 - Thousands of decisions
 - What decisions should Ministers be accountable for? E.g. only major policy decisions, individual decisions? Should they be responsible for departmental mistakes? I.e. should they have to resign? Should they be responsible where govt services have been contracted out? e.g. running immigration detention centres
- Parliamentary controls***

Financial Accountability-***LECTURE!

- implemented through constitutional and statutory controls on finance which are monitored by the auditor general (pg4)
- Major function of government is to raise and expend money (pg11)
- Financial accountability is the verification of the official use of money drawn from the public account (pg12)
- Accountability for spending public money
- Legislation required to: Impose taxes, Spend money E.g. money can only be paid out of Cth consolidated revenue if Parliament has passed legislation as to how it is to be spent (see Constitution ss 81, 83)

- Verification of how the money is spent → Parliament e.g. parliamentary estimates committees, financial statements within annual reports tabled in parliament
- Parliamentary control of finance occurs in many ways: (pg12)
 - Legislative approval is required for taxation and expenditure
 - Parliamentary estimates committees examine executive activity and government programs on a recurrent basis often by detailed questioning of ministers and public servants appearing before the committees
 - A parliamentary public accounts committee keeps a long term gaze on the financial system
 - The annual reports to parliament of all government agencies contain the financial statements of the agencies
- Parliamentary approval for taxation and expenditure
 - The government are restrained in what they can do
 - Government cannot spend anything unless it goes through parliament. Has to be approved through both the House of Reps and the Senate
- Oversight committees
- Departmental annual reports
- Principal financial monitor of government operations is the auditor-general
 - Independent officer of the parliament who in discharging the functions of the office must have regard to the audit priorities of the parliament determined by the joint committee of public accounts and audit
 - 2 forms of audit carried out by auditor general: (pg12)
 - Audit of financial statements of government agencies to verify whether government money has been used in accordance with a parliamentary appropriation and in compliance with financial legislation
 - Performance audit, which can be a review or examination of any aspect of the operations of a government agency. Can look at efficiency, effectiveness and regularity of government programs concerning their compliance with legislation, their implementation of government policy and their overall value for money

Administrative Law Accountability

- Administrative law mechanisms including courts, tribunals, ombudsman and legislation confers rights on members of the public to access government document (pg4)
- Advantages: independent review, put your case/be involved, better decision-making, govt follows the law (Week 5 onwards)
- Purpose of administrative law is to safeguard the rights and interest of people and corporations in their dealings with government agencies. Does this in 3 ways: (pg13)
 - Review of decision making: confers a right to challenge a government decision by which a person feels aggrieved. Can do this by appealing to an administrative tribunal to review the merits or legality of a decision, applying to a court to undertake judicial review, complaining to the ombudsman or an anti-discrimination or human rights agency, or by seeking internal review within an agency
 - Fundamental
 - 2 types of review- merits review and judicial review
 - Protection of information rights: by freedom of information legislation, which confers a right of public access to government documents, privacy legislation, administrative review legislation, whistle-blower protection legislation which provides protection for disclosing information about unlawful or unethical activity

- Freedom of Information (FOI)
 - Privacy
 - Legislative rights to written reasons
 - Whistle-blower protection
- Public accountability of government processes: anti-corruption agencies, human rights commissions and specialist government inquiries.
 - Other than the review of decisions such as commissions of inquiry, royal commissions, ombudsman, ICAC
- Administrative law values
 - Administrative justice (reviewing of decision making)
 - Due process
 - Procedural justice
 - Executive accountability
 - Good administration
- Administrative review council is the Australian government body that oversees the system of administrative review and makes recommendations for reform. (pg13)
- 3 principles which underpin the administrative law system: (pg14)
 - Administrative justice: philosophy that in administrative decision making the rights and interest of individuals should be properly safeguarded
 - Executive accountability- aim of ensuring those who exercise the executive powers of the state can be called on to explain and to justify the way in which they have gone about their task
 - Good administration- principle that administrative decision making should conform to universally accepted standards such as rationality, fairness, consistency and transparency

What are the values that should guide government administration?

- To act in the best interests of the public
- Transparency
- Administrative justice
- Impartial
- Efficiency
- Accountability
- Integrity
- Equality
- Ministerial responsibility
- Rationality
- Fairness
- Consistency
- Certainty
- Lawfulness
- Safeguard rights
- Honest/un-corrupt
- Effective (achieve legislative/scheme objectives)
- The decay of the doctrine of ministerial responsibility is due to the perception that ministers do not have the capacity to oversee all that is done in their departments or the statutory bodies for which they are responsible. (Sir Anthony Mason pg. 16)

Accountability through Ethics and Integrity- ***LECTURE!!!

- The ethical responsibility of and integrity of government employees play a large role in safeguarding the rights and interests of member of the public including codes of conduct, ethics advisory services, policies on conflicts of interests. These are now embedded in government practice (pg4 textbook)
- Public Service values and the rise of Code of Conducts
- Emphasis on the way that individual behaviour can affect the quality, integrity and accountability of government
- National integrity system/fourth arm of government?***
- Core public service values as recognised by 29 countries include impartiality, legality, integrity, transparency, efficiency, equality, responsibility and justice
- Principles of good public administration embodied in APS values and lie at the heart of the democratic process and the confidence the public has in the way public servants exercise authority when meeting government objectives. (pg19) **Refer to Sheet #6**
- Public administrators are expected to be responsible, responsive and accountable because public service is a public trust and in a representative democracy the public service is not only responsible to the public, but to the public's elected officials. (pg20)
- The most important doctrine in analysing government legal accountability is the separation of powers (pg20)
- There are a number of theories which supplement the separation of powers doctrine including:
 - o National Integrity System: refers to a collection of laws, procedures, practises and attitudes that promote and encourage integrity in the exercise of power in Australian society. In essence an expectation that government should embody both values driven by culture and a rule abiding citizen.
 - o A fourth branch of government: the legislature, executive, judiciary and the integrity or oversight branch. This fourth branch comprises independent statutory oversight bodies such as ombudsmen, administrative tribunals, auditor-general, inspectors-general, privacy and information commissioners, human rights and anti-discrimination commissioners, anti-corruption commissions and public sector standards commissioners. It is a new means of enforcing the rule of law in government, checking the propriety of administrative decision making and controlling government action.
- It is not the purpose of accountability measures to prevent a government from governing. The purpose of such measures is to hold governments, public officials and agencies to account for the manner of their stewardship (pg5)
- It is regarded as a condition of public service, to act in the best interests of the public

Q: Why do we need to hold governments accountable for the exercise of their power?

- 'with great power comes great responsibility'
- Expectations re proper use of power
- Exercise of govt power impacts on people's rights
- 'The executive's application of laws affects the day-to-day lives of individuals more often, and more directly, than the actions of the legislative and judicial branches of government. ... The executive has a unique capacity to affect individuals' (Bannister et al, 4-5)
- Govt spends public money
- Public accountability provides the means for gauging the extent to which the governments institutions and officials comply with the expectations of the public is entitled to have of them
 - o This can be rendered in three different ways:

- To the members of the public directly
- Accountability agencies which act for and on behalf of the public. Examples of these agencies include ombudsmen, the auditor general and parliament exercising their exercising role of scrutiny
- Third is accountability of officers to their superiors and peers who are themselves accountable, directly or indirectly, to accountability agencies (pg5)
- There is no single path to achieve satisfactory level of public accountability (pg6)
 - It can require the obligation to provide information
 - Require a direct and periodic intrusion into the affairs of government for purposes of scrutiny, investigation and review
 - Require the provision of the opportunity to challenge official decisions
 - Require complaint based investigations
 - Require the adoption of procedures which themselves prescribe how officials or agencies can or must act
 - Require formulation of standards by reference to which official conduct and action can be judged
 - Can require the establishment and policing of safeguards against the negligent or intentional misuse of official power, position and resources (pg6)

Q: What are the 3 arms of government?

- Executive (administers the law), legislature (makes the law) and Judiciary (enforces the law)

Separation of powers (SoP)

- Power divided between three arms of government → Check and balance → Ensures one arm does not wield too much power
- Where is the SoP established and how?
 - Constitutionally entrenched at Cth level through ss 1, 61, and 71
- But no strict SoP between Executive/Legislature – Ministers (Executive) must also be a MP (Legislature)
- Focus on maintaining independent judiciary

Q: Who makes up the Executive? Refer to Sheet #2

- Ministers must immediately correct any mistake they have conveyed to parliament and the making of a deliberately misleading statement is considered contempt (pg7)
- Accountability is about requiring a person to explain and justify their actions and decisions and to make amends for any fault or error whether by reversing the decision or paying compensation or even resigning from office

Q: How did Australian Administrative law develop?

- It starts at the reception of English law into the Australian colonies
- A supreme court of judicial review Was a fundamental concept from British colonisation
- **What were the shortcomings of the old, law system of judicial review?**
 - Inflexible
 - Long
 - Too expensive
 - No specialist expertise
 - Technical/complicated
 - Secrecy – problems getting info

Q: Are there any problems with the existing system of admin law?

- The Kerr committee spoke of the need to evolve 'an Australian system of administrative law' that is 'comprehensive, essentially Australian and specifically tailored to meet our own experience, needs and constitutional problems'. The major proposal for achieving that objective was to create a system of courts, tribunals and a general counsel for grievances, all playing separate but overlapping roles
- Administrative justice was regarded as the essential thread in the fabric of a democratic government. The need for this justice arose from the simple fact the government could exercise powers that directly affected people in an individual way. The implementation of this scheme was the main legacy of the Kerr Report

The Kerr Report (1971) and the Bland Report (1973) outline many issues with the current admin law system. These issues pre-empted the reports.

- Too much administrative discretion- leads to arbitrary decision making
- Over reliance on parliamentary and judicial review- no suitable review systems. Courts can't deal with every issues and dispute
- Judicial review too complicated and difficult to access
- Tribunals ad hoc and inexplicably diverse
- Too much secrecy
- Too costly
- Lack of cohesiveness

The outcomes of these reports included:

- *Administrative Decisions (Judicial Review) Act 1977* (Cth) and establishment of the Federal Court
 - o Codified the grounds of review
 - o Codified remedies available
- *Administrative Appeals Tribunal Act 1975* (Cth) (AAT)
 - o Most innovative tribunal at the time
- Administrative Review Council
 - o Operates from Attorney General Department
- The Cth Ombudsman

Later Administrative Reform Outcomes included:

- *Freedom of Information Act 1982* (Cth)
- *Privacy Act 1988* (Cth)

Administrative Law and the Public/Private Divide

- Government services and utilities being provided by private bodies
- Privatisation
 - o The idea that government service is completely taken over by a public entity e.g. Qantas
 - o a function formerly discharged by a government agency will be discharged by a body that is wholly or partly under private ownership, often as a result of a public sale or share float of the government interest e.g. commonwealth bank, Qantas and Telstra (pg30)
- Commercialisation
 - o A body has been given privatised services but government still has some control
 - o Government imposes a private sector business structure on an agency that is owned and controlled by the government. Alternatively, body may be incorporated under the

Corporations Act 2001 (Cth). These bodies would be known as a government business enterprise or GBE. Examples of bodies falling under this category include Australia Post, the Health Insurance Commissions and Defence Housing Authority (pg30)

- Contracting Out
 - o Government services are subcontracted to private bodies
 - o Government service will be delivered to the public by a private sector body. This function will be funded by the government but provided by the private sector. Examples include employment services by job network providers. (pg30)
- A government agency must remain accountable for the efficient performance of the functions delegated to it by government including: (pg32)
 - o Translating broad program objectives into detailed service specifications
 - o Choosing a person to deliver the service
 - o Ensuring that the service required is actually delivered and
 - o Dealing equitably and responsively with clients and the public
- Competitive tendering and contracting (CTC) involves redefining responsibilities and relationships between key stakeholders and introduces a contract service provider. CTC can enhance accountability by requiring contracting agencies to specify clearly the services offered and allocate precise responsibilities between the agency and the contractor for delivery of service. CTC can also require a contracting agency to specify the criteria on which the contractor's performance is to be measured and monitored. A third aspect of accountability is the ability of a person to seek redress where they have been dissatisfied with the service. (pg32)