CHAPTER 7

OVERSEAS PERSPECTIVES AND DEVELOPMENTS: BRITAIN

In Britain, the law has 'no real concept of the state'. There is 'the Queen's government, local authorities and public corporations, but these sectors of public administration do not form part, as elsewhere, of some generic concept of "the administration" or "the public services"'. Furthermore, '[m]inistries account for only a small part of the decisions that affect individual citizens', and, as in Australia, most common complaints against public bodies relate to "benefits". The majority of these "benefits" in Britain are 'not the direct responsibility of national government' but of a variety of public authorities. The three sectors do not form part of a totality, so that, while in Britain it is possible to talk of "the citizen against authority", it is much more difficult to talk in coherent terms of "the citizen against the state",[1] as Thompson found in Australia.

In grappling more recently with conceptual distinctions between the 'State', the 'Crown' and 'Government', Marshall thought it insufficient to regard the 'State' as 'redundant' simply because the Crown is the 'legal focus of executive authority'. At the same time, the courts have lately stated that the Crown's prerogative powers 'are not in principle unreviewable'.* The word 'State' could properly be applied to the 'whole network of public (as distinct from private or local) authorities ...', but is not part of common parlance in British

*Referring to Council of Civil Service Unions v. Minister for the Civil Service (1986).

public life.[2]

Common law recognises the 'State' externally as the 'organised national community in its relations with other national communities'. Within Britain, by contrast, the law does not confer powers on the State in the form of a 'corporate person'. Parliament has 'almost invariably' vested legal powers and duties in 'ministers of the Crown, ... the Queen-in-Council, ... or particular named persons'. Civil servants receive their orders from ministers and are servants of the Crown; so are ministers. 'The interests of the Crown may differ from the interests of those politicians who are the Crown's ministers and of the government'. Marshall considered that 'there are certainly limits to the obedience which members of the government may command from their civil servants'. Moreover, "the Government" 'as a body exercises no powers',[3] as Mallory noted in Australia. Cornford, on the other hand, believed that the judge's reasoning in the 'Ponting Case' - that the 'policies of the state are the policies of the government then in power' [i.e. in July 1984 when Ponting leaked documents about the Falklands War to a Labour MP] - led to the position that 'the government of the day, the Crown and the state are synonomous'.[4] He doubted if Britain could conduct its constitutional affairs 'with a concept as nebulous as the Crown'.[5]

Along with these complexities at the most elevated and abstract levels of the polity's framework, redolent of those traced in Australia in Chapter 6, there exists the shared tradition 'that a decent distance should be maintained between law and politics ...'.[6] Like Australian commentators, Drewry wrote later that this 'separateness' is a myth, and encompasses 'an ideology of legalism that stresses the moral

supremacy of "clean" law over "dirty" politics'. The myth is strengthened by 'the nervousness of the judges about becoming embroiled in political controversy and the reluctance of reformers to take very seriously the idea of a full-blown administrative court'.[7] Blom-Cooper spoke about judicial reluctance and legalism in England, manifested in 'what in essence often are political decisions dressed up more or less discreetly in legal clothing',[8] and linked them with the 'highly prized virtue of judicial independence'.[9] He perceived courts and public administrators as 'parts of a single civilised system of government (in its widest sense) functioning in harness'. The courts are independent adjudicators but must face the 'political reality that they are arms of established government'.[10]

Westminster lacks, despite calls for one,[11] an Attorney-General's Department of the type present in Canberra, that is, to centralise legal administration in the civil service. The pervasive presence of lawyers in the civil service, due largely to the 'legalistic basis of the modern state', glossed over by conventional wisdom,[12] was outlined by Drewry. While a high proportion of their work is routine, they play an important role in providing 'legal input into policy making and in the process of shaping and drafting Bills'.[13] Contrary to the dictates of tradition, 'some individuals manage to combine successful careers in both' politics and law.[14] Even so, it has been said that the 'spirit of the law is not something that permeates the administrative process in Britain'[15] and calls have been made for more and better legal training in the civil service, not only of lawyers, but also to give other civil servants a greater appreciation of the legal-political framework in which they function.[16]

With regard to formal redress, since Britain lacks an administrative court system, administrative law plays a considerably smaller role there in the redress of individual grievances than in other parts of Europe.[17] There has never been an official inquiry into administrative law per se in Britain.[18] Yet, aside from the areas of delegated legislation, tribunals and inquiries, which were the subjects of earlier official inquiries, a number of others have warranted attention for over twenty years, according to Williams. These include:

> the informal consideration of complaints against the administration; the nature and exercise of informal discretionary power; the proper scope of judicial control of administrative action; the remedies available for judicial control of administrative action; and problems associated with demands for open government.[19]

Williams contended that the courts, confronted by parliamentary sovereignty, and without the authority of a Bill of Rights, 'face an uphill task in the exercise of their supervisory and appellate power', at a time when public administration is increasingly visible and wide-ranging.[20]

There are, however, various 'institutionalised' channels and 'less formal ways' of getting a decision altered. The former lead to parliament, courts and specialised tribunals, ministers on appeal against local government measures, Ombudsmen, etc. The latter include approaches to MPs and local government representatives, 'acting behind the scenes'; assistance from legal advice centres in dealing directly with public bodies; the 'intervention' of numerous voluntary groups that concentrate on the defence of interests; taking direct action such as '"sitting-in" in the offices of decision-makers'. The opportunities for

internal appeal within authorities are few. Most 'ordinary' people, therefore, depend on informal procedures, including communications on the complainant's behalf from an MP or interest group; local publicity about 'bureaucracy'; 'community action in support of an aggrieved person; or simply (and most common of all) attempts at direct persuasion by the individual concerned'.(21) All of these channels for complaint have a familiar ring to an Australian.

Ridley was critical of the 'unrealistic' impression of the use of formalised procedures conveyed by many textbooks, when the actual level is low.(22) This is due to factors such as the design of legislation, enabling regulations to be prepared away from parliamentary scrutiny,(23) in effect applying the 'consistent policy of British Governments to avoid putting themselves under judicial controls whenever possible'.(24)

Even when some judges become more adventurous in probing ministerial powers, according to Ridley, appeals 'must generally be on procedural grounds (how the decision was made) and not on matters of substance (the merits of the decision)', and, moreover, the rules of natural justice that apply are usually restricted to whether the minister heard the parties to the dispute before announcing his decision.(25)

One explanation offered by Ridley for the 'absence of the courts from the everyday protection of citizens in Britain' centred on what he saw as the many disadvantages of judicial review. Its limited scope 'makes it irrelevant' in many instances; judicial interpretation of the law has an 'unpredictable fluidity'; litigation is 'risky and expensive'; complicated law can deter would-be litigants, and much is,

in any event, uncodified; its technical language is 'incomprehensible' to many, if not most, people; case law is important to judicial decisions 'and law reports are even less accessible to the layman than statute law'; solicitors must consult barristers to try and second-guess the court's reaction to a complex case; the 'uncertainty of the law' can lead to a complainant being advised to seek other remedies. Court formality and procedures are also deterrents.[26] In short, 'courts act legally, not politically'.[27]

Not surprisingly, Ridley showed that the situation with regard to administrative law in Britain is attributable to the peculiarities of its political culture. It should be remembered, for example, that parliament existed as a conduit for complaints against government long before democracy was established. The coming of democracy led to the 'responsibility of government to parliament for all its actions, large or small'.[28] The precept of ministerial responsibility to parliament was so powerful that it left no space for the concept of administration 'as an activity separate from policy-making' to develop, 'with governments subject to parliament for the one and to the courts for the other'. As a result, '[p]olitical rather than judicial control is a central feature of Britain's unwritten constitution'.[29]

That constitution does not acknowledge 'an autonomous "administration"'.[30] As a consequence of 'the transfer of executive power and the role of prerogative to ministers', the latter are 'subject only to the will of Parliament'.[31] Democracy, as understood in Britain, therefore, 'means the control of government through the minister-in-parliament - a fact which has hindered the development of other controls which would undermine that relationship'.[32] In view of the

findings in Chapters 5 and 6, the same could be said about Australia.

Furthermore, as Mallory mentioned in Chapter 6, British political thought does not acknowledge 'the philosophy that law has an independent status above the will of parliament'. In contrast to the American model of government, the 'fundamental principle of the British constitution is the sovereignty of parliament'.(33) While this concept does not have a formal echo in Australia, with its written, federal constitution, it does have a resonance in the traditional separation of law and politics.

The role of parliament as 'protector of individual citizens' may have declined, but, Ridley asserted, the 'idea of "political" rather than "legal" protection of citizens against administration is deeply embedded in British political traditions and has imprinted itself on British ways of thought'. Consequently, the role of the courts in this regard has been much smaller than elsewhere, so that, when demands for individual protection increased, 'other, less formal, often more political, techniques' evolved.(34) This pattern of development has fostered less inclination in Britain than elsewhere to regard administrative decisions 'as the application of laws'. Also, a major part of administration functions 'according to procedures that are not fixed in law at all'. The bulk of individuals is, therefore, 'less likely to think of "the law" (i.e. the courts) as a natural channel' for complaints.(35) Thus, rather than regulating 'all sorts of conflict by law', the British probably believe 'that conflicts of interest and disputes involving value judgements do not allow such solutions: the centrality of politics is accepted. This colours the approach to the redress of grievances'.(36)

One example of the effects of tradition put forward by Ridley was the establishment of the Parliamentary Commissioner for Administration (PCA) in the late sixties. The salience of parliament in British political culture is evident in the title of "Parliamentary Commissioner", in being appointed by government but as an agent of parliament and reporting to a parliamentary committee, in lacking independent powers, and in being accessible by the citizen only through an MP.[37] Admittedly, this latter restriction has been 'a matter of controversy ever since', according to a recent incumbent.[38]

The PCA's operations are affected by another aspect of British political culture, stemming from administrative style. In Britain, 'administration has always been considered as an "art" rather than a "science"'. This has resulted in an 'informal and personalised' style, one which approaches decision-making in 'a pragmatic fashion with a wide element of discretion'. Ridley contrasted this with the style of the Germans and French, whose decisions about individual cases are made on the basis of 'deductive reasoning from legal premises: the rules are set out, the fact ascertained and a "correct" conclusion follows'. Where a dispute occurs, it must be due to wrong interpretation of the rules, mistaken facts or a wrongly-drawn conclusion. 'Since these are questions which can be reviewed in an objective manner, the decision-making process lends itself to judicial review'.[39]

Circumstances in Britain, as in Australia, do not lend themselves to judicial review. Reconstituting the 'manner in which a decision was reached' is difficult, since there may be no complete record of the decision-making process involving rules, facts and reasoning. 'More important, such decisions involve the impressionistic assessment of

facts, the application of value judgements and the search for compromise'. Coupled with the lack of a real distinction between policy-making and policy-application, the assumption is that 'individual decisions frequently involve value judgements, thus policy', and value judgements are by nature more "political" than "judicial". 'It is for that reason that ministers ... must in the last resort take responsibility for them'.(40)

What this 'non-formalised character of many administrative procedures' means for the PCA is that he often finds himself functioning 'in an almost indefinable field of standards of "decent behaviour" by officials who are entitled to make decisions on the basis of impressionistic assessments and value judgements'. Since decision-making even for individuals is 'not regarded as a legal-rational process', there is a paucity of published rules '(as distinct from internal guidelines)' setting out how officials are to act 'in assessing a case'.(41) Presumably, this last comment could not be made now about those areas of Commonwealth administration which have felt the effect of cases brought before the AAT.

Officials in Britain are not, in keeping with tradition, 'technical experts' in the areas they administer. 'Their expertise lies in political and administrative sensitivity, and this shapes their approach in individual matters as well as to policy issues'. They function 'on a basis of "feel" for the case rather than formalised procedures, and they search for a "reasonable" rather than a rational solution'. Ridley pointed out that the establishment of an Ombudsman was opposed by officials because they feared it would result in 'a bureaucratisation of administration and an inappropriate pedantry in decision-

making'.[42]

With regard to institutional relationships in Britain, the position remains that all executive powers are conferred on ministers and all administrative acts are 'the acts of individual ministers'. Civil servants are 'the personal, thus anonymous advisers of ministers in the decision-making process. There is a sense, in which, in law', according to Ridley, 'they do not exist at all'.[43]

Robertson helps to clarify this situation. Following on from Ridley's conclusions about the essential informality of public administration in Britain, it can be appreciated that the system of government there is based on what have been described as 'confidential relationships'.[44] Robertson allows this to be taken further in explaining that, when 'a clearly identifiable group of elected representatives takes responsibility for all the actions' of government, the control of administration is linked with political survival.[45] Civil service views are controlled because of the fear that they will become part of the competition for office 'characteristic of a democratic political system and that this may undermine the neutrality which restrictions upon the activities of civil servants are attempting to create'.[46] In other words, it should not be possible for civil servants 'publicly to compete' with ministers for political and public acceptance of their opinions.[47] As in Australia, these concerns coloured the guidance issued to civil servants appearing before parliamentary committees. Guidelines emphasised

> that no indication should be given to Select Committees of the manner in which a minister has consulted his colleagues, since decisions taken by ministers collectively are normally announced and

> defended by a particular minister as his own decisions. Nor should departments reveal at what level a decision has been taken or what advice has been given to ministers.(48)

Not unexpectedly, these considerations flow around the debate about FOI in Britain. As Robertson made clear, that elected group which takes responsibility for all governmental action has 'a strong incentive ... to control the dissemination of information, since no information about their actions will be neutral politically',(49) but will form part of the struggle for office. Indeed,

> the structure of political authority ... makes it difficult, if not impossible, to separate the information which is neutral, of concern only to the individual citizen in his contest with government, and that which may affect the survival of the government.(50)

This implies that neutral information of concern to an individual can only find formal expression in guidelines, rules, etc. related to policy application, in keeping with the thrust of the Commonwealth package.

Survival is of fundamental importance, since, in Britain, as in Australia, 'all activities of the government are matters intimately connected with party'.(51) At the same time, apart from the informal, confidential relationships at the basis of the political system, that 'centralisation of political authority in one body' permits a high degree of secrecy.(52) A long-serving British politician with ministerial experience spoke a relatively short time ago in the context of the FOI debate in defence of the status quo - of safeguarding the centrality of parliament, ministerial responsibility and the 'confidentiality of the [impartial] advice given to Ministers'.(53) True to party-political considerations, his own 'anxiety' has always been

that 'too early' in the decision-making process the minister's opportunity to 'make up his own mind and indeed then to decide what he is going to do' will be removed.[54] Hence, politically speaking, that process, as it relates to the timing of a policy decision, must be protected, even if it can be scrutinised judicially for compliance with, say, natural justice.*

It is apparent that discussion of administrative law in Britain takes place with one eye gazing across the Channel at EEC partners, whose 'alien vices of the droit administratif' were condemned by Dicey many years ago. That condemnation coloured the British approach to administrative law for many years.[55] Much of the present debate focuses on judicial review.

Ridley's stance on court functions was unequivocal: they are 'to ensure the rule of law, which simply means that no citizen may be deprived of his freedom or property except by a decision that falls within the law'.[56] Street warned of problems for British judges if confronted with a written constitution or Bill of Rights. For they would need 'to immerse themselves in major policy questions' when their role has been, thanks in part to self-training, that of the umpire who avoids clashes with the government of the day, cut off from politics whenever possible 'and divesting ... judgments of social, economic, and political references to the utmost'.[57] Yet Street believed that '[t]he political accountability of a Minister is a completely inadequate substitute for the right to take one's case before the courts'.[58]

*Appendix D reproduces a detailed description of the complexities of decision-making in Whitehall.

Elliott argued that many of the constitutional questions to be confronted in Britain now are 'not about individual rights', but 'concern instead the relationship of one institution of government to another ...'. British judges have 'little or no experience' of problems in this area, one 'which they find difficult to squeeze into a system of rights that is still predicated upon the sanctity of the individual'.(59) Other observers interested in a Private Member's Bill of early 1986, attempting to give British citizens 'their own Human Rights Bill', commented that the tradition of the rule of law in Britain allows for judges, without becoming legislators, 'to ensure that, whoever governs Britain rules under, and not outside, the law'.(60)

Ridley expected citizens, in defending their interests, to move in the direction of using 'their own organisations' to facilitate redress of grievances 'through pressure on decision-making authorities', perhaps turning away from their elected representatives, Ombudsmen and the courts.(61) Lord Scarman wrote that three decades of 'social, constitutional, legal, and administrative developments' are swamping the old formations of 'essentially political safeguards and remedies for the citizen and introducing a new world in which there are also legal safeguards and remedies developed judicially and enforced through the courts'. This came about through the 'introduction of judicial review, which was a reform not of the substantive law but of the High Court'.(62)

Blom-Cooper chronicled this 'profound change that has overtaken an important procedural aspect of administrative law' in Britain. It centred on alterations to Order 53 of the Rules of the Supreme Court 'which since 1977 has governed the procedure for applications for the

prerogative orders'.[63] The changes were made by the 'simple expedience of the fiat of judges and officials ...', and 'neither required nor received parliamentary discussion'.[64] The new procedures were subsequently enshrined in section 31 of the Supreme Court Act 1981.[65] Broadly speaking, they enable an applicant for judicial review to 'seek any one or more of the separate' traditional remedies outlined in Chapter 1, that is, 'certiorari, mandamus, prohibition, declaration, injunction and damages'.[66] They have resulted in

> a Crown Law Office list with a rota of assigned judges from the Queen's Bench Division of the High Court ... into which public law cases are generally channelled and where there is a distinctive mode of applying for relief.[67]

Judicial review now permits the court

> to intervene whenever it can be shown that an administrative decision was either (a) wrong in law, or illegal, or (b) was irrational or so unreasonable that no sensible person could have reached it, or (c) was procedurally improper, unfair or failed to observe the rules of natural justice.[68]

In the light of these developments, Boynton's message was clear: 'No public service lawyer can ignore the new procedure', both in terms of his or her authority's 'exercise of a power or duty derived from statute or the prerogative', and how that authority may query administrative decisions of other bodies which it considers to have 'adverse consequences' for itself.[69] Another observer was equally sure that civil service lawyers 'are now very much in the firing line', not only because of the possible reaction of British courts, but also of the European Court of Justice; as well, their advice must be consistent with EEC legislation and the 'policies of the

Court of Human Rights'.[70] This is because Britain is a member of the EEC and a signatory to the European Convention on Human Rights. Community law, as interpreted by the European Court of Justice, is 'supreme over UK law ...',[71] and British citizens may petition the European Commission of Human Rights and appeal from it to the European Court of Human Rights.[72]

Calls were made for more lawyers in the civil service. It was claimed that Britain had 'escaped from the narrow confines of the dichotomy between administrative and judicial decisions'. At the same time, caution was expressed about the vexed question of how far democratically unaccountable judges, neither officials nor 'privy to the secrets of the civil service or ... government', should venture into the 'very difficult grey area' of substance or merit.[73] The 'underlying tension between the unelected judiciary challenging decisions of the elected executive' remains. The review process, Lord Scarman maintained, 'should not interfere with matters of political judgment which were properly matters for the Secretary of State and the House of Commons'.[74]

Nonetheless, the number of applications for judicial review - from 'individuals, trades unions, local authorities and others' - has 'more than doubled in the last five years'. Judicial review is coming to play an expanding role in 'checking the executive, and adjudicating on many different aspects of public administration' in Britain. It has been made clear, however, that courts only review the 'manner in which government decisions are made' - the process - and not the merits of the decision itself. But judicial review is said to be 'still developing'.[75]

Much of what has been brought to light so far in this survey of the foundations of and developments in British political culture is familiar to Australian eyes; in particular, the salience of ministerial responsibility and party-political considerations and their implications for the approach to, and understandings of, public administration in both Canberra and Westminster. The "Westminster connection" obviously exerted a strong influence on the main direction shown to be taken by the Commonwealth's new administrative law in Chapters 3 and 4, that is, towards executive control and an artificial gap between policy and administration, due largely to the reliance on conventions to delineate institutional relationships that insist on governing the political aspects of the policy process.

As for ministerial responsibility, it appears that in Britain, as in Australia, there is a 'new expectation that a minister is answerable for almost anything that happens', according to the then Home Secretary. He claimed also that ministers do have a role in 'managing policy (seeking approval for it, advocating it in public, selling it to vested interests)' and in dealing with 'particular cases that arise out of its execution'. They 'must work at getting value for money' in their ministries; face the 'continuing burden of legislation' and of 'communication' in defending their policies to parliament and media, and in replying to 'an enormous number of letters from MPs and the public'.[76] From this it can be seen that ministers continue to function, in terms of redress, in accordance with Ridley's description, alongside 'new' or re-emergent mechanisms such as judicial review. There is no reason to believe, on the evidence to date, that the situation in Australia is any different.

It is apparent, however, that debate in Britain about administrative law and the relationship between law and politics has a much more "constitutional" flavour than in Australia. Hughes urged a few years ago that, when contemplating change as foreshadowed by the new administrative law,

> we need to understand the inter-connections of the parts, the bits and pieces we are deliberately altering one by one without taking a view of the politico-constitutional system as a whole.(77)

Examination of the constitutional matrices of Australia and Britain bears out this statement.

Looked at from Britain, then, the Commonwealth's new package exhibits some 'noteworthy' features. First and foremost, it is essentially a 'system of administrative law remedies' [emphasis supplied]. Britain's PCA deals with a much smaller number of complaints, firstly because, in line with Ridley, minor complaints tend to be dealt with by MPs 'or directly by the department concerned', and secondly, due to the direct accessibility of the Commonwealth Ombudsman.(78) The Select Committee on the PCA observed that almost eighty percent of cases referred to him, some of which 'may involve apparent injustice', were not investigated, and queried the 'jurisdictional reasons' for this.(79) Cane was surprised at the exclusion of actions of ministers from the jurisdiction of the Commonwealth Ombudsman when, in Britain, some of the PCA's 'most notable successes have involved action taken by Ministers'.(80) Indeed, the only exception to the power of the PCA to obtain disclosure of departmental records 'relates to the documents of the cabinet or cabinet committees'.(81) Overall, in Cane's opinion, the Commonwealth Ombudsman is better able

'to fulfil the role of a citizens' complaints bureau'.[82]

Cane thought the AAT distinctive as a 'general appeals tribunal' compared with the separate tribunals which deal with 'areas of administrative activity' in Britain [emphasis supplied]. This approach has the advantage, 'presumably', that tribunal members have or are able to develop a depth of 'knowledge and expertise in relation to the subject matter of the tribunal's jurisdiction'. To Cane, the main advantage of the AAT seems to lie in its normative effect on the application of particular enactments. He was again surprised that some decisions under the Migration Act are outside the AAT's jurisdiction*, since immigration is a major area of tribunal activity in Britain.[83]

Tribunals there hear more than a quarter of a million cases annually - over one million, if the total includes cases which are withdrawn, settled or handled almost as a formality - six times more than the number of disputed civil cases dealt with at trial before the High Court and county courts together. Growth is not constant for each type of tribunal. They are said to offer a number of advantages over the courts and 'non-independent decision making, particularly in specialist cases'. They can, however, become 'either too court-like or too reminiscent of "palm trees" and too tied to departmental administration',[84] possible tendencies echoed in earlier discussion about the AAT. It has been claimed elsewhere that administrative tribunals in Britain developed to overcome the shortcomings of the traditional courts, and that they have been 'progressively judicialised and subjected to the supervisory jurisdiction of courts',[85]

*Those decisions outside the AAT's jurisdiction are listed in the ARC's Report No.25, op.cit., pp.x-xi.

again echoed in respect of the AAT.

Tribunal procedures are supervised by the Council on Tribunals, set up in 1958 as an 'independent watch-dog'. It publishes an annual report and may produce a special report in circumstances of great importance or urgency. The Council has influenced the various tribunals to operate independently, with "openness, fairness and impartiality"; they should strive to be easily accessible to members of the public, and be 'cheap, swift and free of technicality'. Their future pathway was not expected to be entirely smooth as they aim for balance between efficiency and (independent) fairness.(86)

The legislative basis for the Council on Tribunals is the Tribunals and Inquiries Act 1971. Its members, up to fifteen plus the Secretary of State for Scotland and the PCA ex officio, are appointed by the Lord Chancellor, and it is to the latter and the Secretary of State that it reports. Its annual report is tabled in parliament and published as a House of Commons paper. The Council has been described as 'essentially a part-time supervisory body with a minute official staff'; it meets monthly. In carrying out its role of reviewing the constitution and operation of specified tribunals, it handles complaints about tribunals from members of the public, getting to know 'where the shoe pinches', since it has no power to change a tribunal decision. The Council's most important function, in de Smith's opinion, is consultation with relevant ministers and departments in the preparation of procedural rules for tribunals and inquiries and legislation relating to tribunals. Like the ARC, the Council has experienced difficulties here.(87)

There is a general but qualified statutory duty on tribunals under the Council's supervision to give, on request, reasons for decisions. Although there is no 'common appellate structure', appeal is possible to superior courts on questions of law from most tribunals of last resort. This does not apply in the case of social security and immigration decisions.[88] De Smith considered that the Council on Tribunals should not be regarded as a government department.[89]

Cane recalled that the AD(JR) Act 'simply restates the common law of judicial review'.[90] Another commentator saw 'little point in attempting to codify the existing grounds of review into statutory form' as in Australia, 'because the object of any reform would be change, not the achievement of neatness'.[91] The main changes embodied in the AD(JR) Act, the obligation to give reasons for decisions if requested, and the 'abolition of the technicalities surrounding the common law remedies', were, as noted above, 'achieved by a different route in Britain'. The main difficulty to have emerged from this change, the scope of judicial review, is connected with 'an attempt (which has created great problems)' to define this in terms of the concept of 'public law''.[92]

Elliott believed that the 'necessarily marginal and interstitial efforts at judicial review of government administrative actions was already showing its inexpert character'.[93] Harlow argued that change wrought by the new Order 53 procedure had not provided Britain with an administrative court such as exists in France, since Britain's is a court 'wholly without relevant political and administrative experience whose procedures are not well suited to decision-making in political matters'.[94]

In line with Ridley, the former Treasury-Solicitor pointed out that, despite developments in judicial review, the number of cases brought against central government departments under this procedure 'is not large'; in line with Australian experience, 'far fewer administrators will have had to defend their actions before the courts than will have been subject to Parliamentary Questions or even inquiries by the [PCA]'.[95] Kerry went on to say that 'the possibility of disclosure in litigation has [not] affected the standard or honesty of written minutes and advice in the civil service'. The courts, moreover,

> have been sympathetic to claims for public interest immunity when in the circumstances of the case in question it appears to be justified, particularly where the material relates to advice to ministers on major questions of policy and there is no prima facie indication that it will further the case of the party claiming disclosure ...[96]

Drawing on Chapter 6, the same statement could be made about the AAT and Federal Court in Australia.

Kerry's conclusion was that, because of the changes, there is now within the British civil service an 'increased appreciation of the possible impact of administrative law and judicial review on decision taking', but that it has not resulted in 'any great changes in the general course of administration'.[97] His successor as Treasury Solicitor felt that Kerry 'understate[d] the degree to which concepts of administrative law are infusing the whole spirit of administration'. These now have marked, direct 'short-term effects in individual departments such as the Department of the Environment which has been the subject of long-running campaigns directed by other bodies against it

through the courts'.[98] It should be remembered, however, that, in the words of Rawlings, the 'essentially intermittent emergence of case-law is not conducive to a sustained impact on the conduct of administration'.[99]

While the scope of judicial review in Britain is being linked with the concept of 'public law', under the AD(JR) Act the basic concept is that of 'decisions of an administrative character made under an enactment'. There is a 'suspicion that, so long as a special procedural regime or legislative scheme governs judicial review, much time and energy will be devoted to delimiting its scope'. An acceptance of the value of this effort will depend in turn, Cane thought, upon an assessment of 'how important it is to subject a particular class of activities - basically, governmental administrative activity - to a legal regime different from that which governs the activities of ordinary citizens'.[100]

Meanwhile, the courts must grapple with scope in terms of how far judicial review should extend. Mention was made in Chapter 1 that the distinction between the lawfulness of a decision and its merits can become blurred. 'Reasonableness' seems to play a large part in this. The fact that groups such as trades unions and local authorities are availing themselves of opportunities to challenge executive power in Britain, and that the Department of the Environment, for one, has felt the effect of this, must mean that judges are being thrust into settling matters - on the basis of reasonableness - with policy and even party-political connotations, and bearing upon central-local government relations. This is illustrated in a case in March 1986 when the High Court dismissed an application by Westminster City

Council and others which sought to stop the Greater London Council and two other Labour metropolitan county councils, due for abolition on 31 March, from making grants with their surplus cash. The judge in this case was critical of the 'frequency with which local authorities have recently been resorting to judicial review to sort out their problems'.(101)

In the face of 'tentative' conclusions about the FOI Act, Cane referred to the 'notorious' British Official Secrets Acts which are, 'in spirit, inimical to the thrust' of such legislation. Developments in British common law have, to some extent, broadened the 'old notion of Crown immunity from disclosure of information in the course of litigation into a more general theory of the level of secrecy required by the public interest'.(102) Kirby has remarked that the Australian High Court 'pushed forward' the decision of the House of Lords in one of the landmark cases in Britain, Conway v. Rimmer, 'in a manner conducive to greater openness and accountability and less unexaminable government secrecy'.(103) These common law developments have not, according to Cane, 'lessened the need for comprehensive legislative reform in this area in Britain'.(104)

The value of a public interest defence in relation to disclosure of official information is said to encounter a number of difficulties: the danger that it could be used 'indiscriminately by Crown servants and others seeking to justify authorized communications of official information'; the fact that '[c]onstitutionally, Crown servants are not accountable to the public interest, so any such defence would be contrary to UK constitutional convention'; use could result in 'a disparate interpretation of the public interest and an increase in

executive power, "... the power of non-elected officials to decide what is in the 'public interest'" [emphasis supplied]; the role of the courts in 'balancing public interest factors' would increase, an area in which the courts 'are not likely to intervene'; such a defence in the law would be 'a post facto method of dealing with Crown servants who leak official information (i.e, ... after the event when possible damage to national security, or trust, has already occurred)'.(105)

For the moment, FOI in Britain is entangled in an edifice of national security which is 'well-nigh impregnable even from the assaults both by the Campaign for Freedom of Information and the European Commission, to which UK citizens may have recourse'.(106) The Treasury and Civil Service Select Committee, however, in mid-1986 'tentatively accepted the need for some form' of FOI Act, but did not accept that 'any leak by a civil servant which is designed to frustrate the policies or actions of a Minister' is 'ever justified'. It was felt that those responsible should face either dismissal or internal discipline.(107)

The Campaign for Freedom of Information is an example of developments which Ridley saw becoming more prevalent in modern-day Britain. For over a decade governments and others have wrestled with the rigidities of the Official Secrets Acts(108) which forbid the unauthorised release or receipt of any piece of official information.(109) The latest Campaign, launched in early 1984, displays the increasing 'professionalism' of interest group activity in Britain.(110) It is an amalgam of a large number of national and local organisations with

varying degrees of affiliation, includes an all-party parliamentary advisory committee, a panel of international advisers and many publicly-declared parliamentary supporters, and is directed by a policy-making council and campaign management committee.[111] It has also attracted support from the Opposition party leaders[112] and high-level civil servants, both retired and currently serving.[113] It lacks, however, a large base of individual members,[114] although an opinion poll commissioned by the Campaign - albeit more directly concerned with subject access to personal files - provided evidence for the assertion that a large portion of British people would welcome 'a more open society'.[115] Most importantly, the Campaign has been unable to shift the stance of the Thatcher Government led by a prime minister resolutely opposed to FOI legislation.[116]

All the recent campaigns in Britain to amend the Official Secrets Acts have been played out against a backdrop of national security incidents.[117] The latest enterprise adopted, broadly speaking, a two-pronged approach. On one hand, 'consumerist effort' sought access to files containing information about the 'everyday lives' of members of the public. On the other hand, it tackled weighty issues of state,[118] acknowledging the need for some confidentiality in government, not only in relation to national security, but also to intergovernmental relations, the national economy, law enforcement, commercial dealings, privacy and policy advice. As a matter of principle, it does not condone leaks from the civil service.[119] Civil service support for the Campaign was said to stem from disquiet at the Thatcher style of government.[120]

The failure of the Campaign to bring about a comprehensive FOI Act, as opposed to a series of smaller Bills targetted at local bodies and specific aspects of government such as water authorities,[121] and access to personal files,[122] is a reflection of "Westminster" political culture with its emphasis on parliamentary, party government. So, too, is the 'judicial inclination, in matters relating to national security, to side instinctively' with the executive.[123] Griffith argued that cases of this nature, among others concerning the 'powers of administrative authorities', and exemplified by those heard over recent years, nevertheless brought the judiciary into intimate contact with policy. Moreover, in his opinion, they resulted in flawed judicial decision-making.[124] This is due to 'tradition and practice', including the 'adversarial approach',[125] inhibiting judges in their quest for 'information necessary as a foundation for their proper evaluation of where the public interest lies'.[126]

Griffith did not confine his remarks to extrinsic aids in the form of, for example, Hansard. He urged the appointment of a 'public advocate' who would ensure, only in cases 'where the public interest was or might be seriously affected', that courts were made aware of relevant information and witnesses. Griffith also called for movement towards 'the inquisitorial'. He did not, however, 'want judges to have powers to decide what laws are necessary in a democratic society'. He wanted them to be appropriately equipped in their increasing involvement in decisions on policy issues.[127]

Other observers commented on the adequacy of judicial or legal 'equipment' in respect of the more political realm of adjudication.

Harlow believed that English judges would be able to function effectively in this sphere 'with procedures which more closely resembled those of political and administrative policy-making'. Their use in Royal Commissions, etc. proved this to her satisfaction.(128) Blom-Cooper claimed that, in dealing with social security cases, the courts suffer from a lack of any specialised knowledge of such matters, and are 'ill-equipped to intervene sensitively and appropriately'. Also, the leave requirement enables an 'unsympathetic court to deny applicants access to the seat of justice'. Both factors lead to an 'executive-minded response from the judiciary', to the detriment of the protection of less-privileged members of society 'against the natural, but sometimes over-zealous desire of the Executive to protect public funds'.(129) This limited legal approach is not found, Blom-Cooper pointed out, in the traditional areas of the law: contract, tort and property rights as between individuals. In his opinion, in battling the State, the individual is hampered by an 'inequality of arms'.(130)

This survey has brought to light elements of Britain's constitutional matrix, and shows how important and complex are the interconnections between them; how alterations to one impinge on others. It reveals that long-accepted understandings of how government administration should and does operate in Britain are straining to contain pressures for change which are centred on the subjects listed by Williams at the beginning of this chapter. Those pressures can be summed up as attempts to limit executive power in the home of the "Westminster connection", and the struggle to contain them serves to illustrate how strong that connection is with the constitutional

matrix, and hence political culture and administrative environment surrounding Canberra's new administrative law.

For the survey enables a greater appreciation of the gradual shouldering of the monarchic mantle of formal conflict-avoidance by an elected party executive intent on maintaining rule "from the top down", dominating parliament and public service, brooking as little interference as possible from legal bodies and controlling the flow of information related to programmatic, majoritarian concerns. Hence the insistence on ministerial responsibility and the artificial legalism in the separation of law from politics. Hence the predominance of the political-administrative realm of discourse in the development of the Canberra package. The survey also points to the fundamental importance of the informal workings of public administration, the hidden politics and confidential relationships that, in effect, lubricate the formal workings. Hence the general lack of formally-enunciated rights. Canada, another Westminster-related polity, will now be examined.

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CHAPTER 8

OVERSEAS PERSPECTIVES AND DEVELOPMENTS: CANADA

Like Australia, Canada has a written, federal constitution. Like Canberra, Ottawa grappled with the implications of the "Westminster connection" in introducing the Access to Information (ATI) Act in 1983. Like Britain, Canada has focused on judicial review in debating administrative law.

Canada had already faced constitutional change not experienced in Australia when 'implicit values' became 'explicit rights'[1] in the 1982 Charter of Rights and Freedoms entrenched in the Canadian Constitution. Kirby remarked that Canadian judges are required to enforce the Charter, involving a move away from the traditional role of the judge, which was 'simply to try disputes between citizens or between the State and the citizen', and leading to speculation about the likely scope of the rights enunciated in the Charter. Kirby believed that, 'if judges have to determine what is "due process", they will need a fine grounding in philosophy, political science, not to say economics'. One Canadian judge expected the shift from traditional areas of the law to '"entail more than a little discomfort and dislocation"'.[2]

In Canada, it was expected that entrenchment of the Charter of Rights and Freedoms would have two major impacts on judicial decision-making. Firstly, since it laid down the 'fundamental values' of the Canadian people, it provided 'criteria for judges to apply in resolving statutory ambiguities'. Secondly, and in line with findings about judicial restraint in Australia and Britain, by obliging judges

to monitor legislation to ensure compatibility with those fundamental values, it was said, following on from Kirby, that the Canadian judiciary will be compelled 'to publicly perform a policy-making function' - a function already performed, in Barry's opinion, 'but in a hidden fashion' [emphasis supplied].(3) That is, the judiciary will need 'to acknowledge that it must exercise a discretion - that it always must choose which of several inferences as to legislative intent is the proper one to be drawn'. In this way, 'the courts make policy and such policy-making is unavoidable' [emphasis supplied].(4) Barry admitted that acknowledgement of this policy-making role was outside the 'traditional Anglo-Canadian approach to statutory interpretation ... [which] denies the need for judges to concern themselves with the formulation of policy',(5) as in Australia.

Much comment about this change in Canada focused on statutory interpretation vis-à-vis parliament. This was due to the fact that Canada, like Australia, adopted the concept of the supremacy of parliament over the courts, such that 'the judicial policy-making role must be ultimately subordinate to that of Parliament - the courts cannot oppose Parliament's choice of policy'.(6) Barry envisaged that, instead of posing a threat to the supremacy of parliament, the

> new approach, requiring, as it does, recognition that policy considerations underlie judicial decisions and providing constitutional criteria for the choice of this policy, will strengthen the ability of Parliament to properly control the development of the law [emphasis supplied].(7)

Another commentator pointed out that parliamentary supremacy was 'adapted to Canadian conditions' including 'the country's federal structure'. Hence Canada's 'parliamentary federalism' - a term not

part of Australia's constitutional vocabulary - did not denote parliamentary supremacy in the British sense of 'complete' parliamentary sovereignty.[8] Indeed, as in Australia, the 'federal principle, dependent on law [challenged] the parliamentary principle, dependent on conventions'.[9] Problems inherent in attempts to reconcile these two seemingly contradictory principles surfaced after the Canadian Supreme Court replaced the Judicial Committee of the Privy Council as the final court of appeal for Canada in 1949.[10]

In tracing these problems, Verney wrote about two opposing "logics" which represent the two main strands of political thought in British and American government mentioned in Chapters 6 and 7. These "logics" were drawn out of the decision of Chief Justice Marshall of the US Supreme Court, who, in the landmark case of Marbury v. Madison in 1803 established the principle of judicial review in the US. As Verney said,

> ... Marshall's logic directly challenged the Westminster model. It was a logic that required a constitutional document that could be broadly interpreted by the courts and not left subject to narrow interpretation; it required a Constitution expressing the will of the people of Canada, not the will of the Queen-in-Parliament; and it meant the end of imperial federalism and parliamentary federalism.[11]

Verney maintained that Marshall's logic of 'American constitutional federalism' never really supplanted the '"logic" of imperialism, based ultimately on the supremacy of the British Parliament to whom the Crown was itself subject'. Nor could such a transformation occur while Canada remained a monarchy, with the legitimacy of many of its institutions dependent, not on the will of the Canadian populace, but on the Crown.[12] On its face, the same comment could be made about Australia, and, indeed, about Britain itself.

In the event, the Constitution Act 1982 was, to Verney, an 'interesting' agreement, since it seemed to establish a regime exhibiting features of both legislative supremacy and judicial review.[13] Other observers agreed, although Smith did not believe that entrenchment of the Charter of Rights and Freedoms in the Constitution, and the resultant increased scope for judicial review, 'signals a resolution of parliamentary versus judicial supremacy in favour of the latter'.[14] In her opinion, the 'tension between the court's judicial independence and the claims of the executive' still exists.[15]

Whereas the Canadian Supreme Court itself is now constitutionally entrenched, the federal government retains the power to appoint Supreme Court justices. Furthermore, the Charter contains a provision enabling federal and provincial legislative bodies to 'override' some of its guarantees, namely, those dealing with fundamental freedoms, legal rights and equality rights. Smith discerned a saving grace, in that legislatures which activate this provision are obliged to declare expressly their intention and reconsider the matter every five years. These qualifications may affect the inclination of politicians to resort to it. But its very existence 'strikes an incongruous note and is testimony to the strength of the lingering tradition of parliamentary supremacy'.[16] Only certain democratic, mobility and language rights are beyond the reach of legislative override.[17] Moreover, the Charter's first clause subjects its guarantees to '"such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"', and the Supreme Court must define these limits. Meanwhile, however, it is known

> that they are held to exist, that there is thought to be something higher than, or beyond the Charter's guarantees to which appeal can be made in order to justify their denial or restriction. And the initiative in this regard is secured to governments.(18)

Elsewhere it was said that the 'mere existence' of the override provision 'may encourage the phenomenon of judicial restraint: the other major incarnation of parliamentary supremacy'.(19) In this regard, the President of the LRCC, then on leave from the Supreme Court of Canada, urged 'a broader approach' by judges in 'applying the policy underlying a statute'. In line with Barry, he favoured judges moving away from 'a restrictive interpretation of statutes [which] impedes the legislative will'.(20) They should also look, as they can now in the Commonwealth sphere in Australia, to extrinsic aids such as Hansard in determining the objective of a statute, taking care not to rely 'too heavily on the words of individual politicians, which may not necessarily reflect the will of the entire legislature'. At the same time, parliament could assist 'by inserting in laws a statement of purpose and a section stating the manner in which the act is to be construed', and 'by drafting laws in a simple, comprehensible style'.(21)

A less enthusiastic reaction to change in Canada stemmed from a desire to place judicial review and the 'roles of administrative agencies within a wider institutional and political context'.(22) Thomas hinted at danger if court intervention in the administrative process were to 'undermine the expert judgments of specialized agencies' or 'freeze the agency into a procedural mould which the courts deem appropriate'. In contrast to Barry, he was concerned that, because of the difficulties in drawing the line between 'law, fact and

policy', activist courts 'could easily stray into the policy process', and felt that the Charter of Rights and Freedoms 'may well encourage the courts to challenge bureaucratic decisions more frequently than in the past'.(23)

Thomas referred to earlier advances in judicial review. The Federal Court of Canada was established by the Federal Court Act 1971 mainly 'to supervise', on 'refined and broadened' grounds for judicial review, the affairs of federal administrative agencies. Thomas concluded that the Court had, in general, maintained its traditional rhetoric of self-restraint about not second-guessing the decisions of specialised administrative authorities when non-judicial matters are in dispute. Case law developments appeared, however, to have widened the scope of judicial review, as courts have held that decisions may be reviewed 'when basic fairness has been denied'.(24)

Like Ridley in the British context, Thomas saw disadvantages in judicial review. It is expensive. Citizens do not have equal access to the courts. It has been shown that 'far fewer' administrative law cases involve agencies which interact with lower-income Canadians.(25) Many areas of public administration 'receive little or no supervision through judicial review'. Relatively speaking, few administrative decisions 'are, or are susceptible to being, overturned'. And the 'judicial process is not particularly suited to the review of administrative action'. Justice associated with the relationships between private individuals and public bodies demands 'both an efficient management of public interests and the existence of adequate safeguards for private interests'. The courts as currently structured in Canada,

in Thomas's opinion, do not reflect this basic difference in the roles of the judiciary 'as reviewers of private rights and as reviewers of administrative action'.[26]

There seems to be more emphasis in Canada, then, on judicial review of an administrative decision, rather than judicial review of the decision-making process as in Britain. It can be seen that concentration on judicial review, with its decidedly legalistic overtones, including a stress on written rules, is more likely to throw into relief the position and role of the courts in relation to parliament, both calling up and placing pressure on the traditional separation of law and politics. It can also be appreciated that, in using an extrinsic aid to interpretation such as Hansard, judges would be mindful that legislation, not all of which contains "either/or" criteria, becomes law due to party-political dominance of parliament. These sorts of problems appear to have been avoided in Canberra by the establishment of a general administrative review tribunal - the AAT - able, in theory at least, to lessen "judicial distance".

While there are echoes in Australia of matters connected with changes to Canada's constitutional inheritance, there are strong resonances in discussion of the ATI Act. That Act, together with its companion, the Privacy Act, entered into force on 1 July 1983.[27] In contrast to the ATI Act, privacy legislation was not new in Canada, since the latter had a previous existence as Part IV of the Canadian Human Rights Act of 1977.[28] Nevertheless, the Privacy Commissioner, established under the Privacy Act to deal with complaints by individuals concerning infringements of fair information practices,[29] found

in 1986 that there was 'still widespread invincible ignorance about the Privacy Act'.(30)

Similar sentiments were voiced about the ATI Act by the Information Commissioner, established by that Act to handle access grievances. She found by 1986 a general lack of support for FOI among public servants and a low level of public awareness of the ATI Act; that many insiders and outsiders did not understand the aim of the Act, the need to balance access and privacy rights, and the requirements of third parties and governments. This Commissioner called upon the Canadian parliament to facilitate public education with a view to 'fostering a greater understanding of the delicate balance of competing interests that make freedom of information work'.(31)

Both Canadian Commissioners seemed satisfied with the 'absence of "judicial distance"' and non-adversarial procedures associated with their positions, and thought of themselves as independent of government, having direct access to parliament.(32) In contrast to the situation in Australia, their annual reports are submitted to the Speakers of both Houses of the federal parliament. Their Offices jointly constitute a department for the purposes of the Financial Administration Act, and each Commissioner has the status of a deputy minister, i.e. head, under the Public Service Employment Act.(33)

The ATI Act applies to 136 federal departments and agencies,(34) the Privacy Act to 143 government institutions.(35) The ATI Act does not apply to Crown corporations [i.e. statutory bodies] of a commercial nature, a fact which has attracted criticism,(36) since those bodies are visible features of Canadian public life at both federal and

provincial levels.[37] It has been claimed that government concern to protect the economic viability of Crown corporations is the main argument used against application of the Act to them.[38] The same might be said about the commercial agencies listed in Schedule 2 of the Commonwealth FOI Act.

During debate in the Australian Senate about the 1986 amendments to the Commonwealth Act, Senator Evans said that in Canada during 1985-86, 2,654 requests under the ATI Act were received.[39] The Information Commissioner received 290 complaints.[40] On the other hand, approximately 36,000 Privacy requests were made to government agencies and the Privacy Commissioner received 401 complaints.[41] Thus, in Canada, like Australia, the vast majority of access requests relate to personal information. Unlike Canberra, Ottawa has had a separate Privacy Act to deal with them; also unlike Canberra, the Ottawa Acts allow access complaints to be handled to a large extent by informal, Ombudsman-like procedures.

The 'resolution of the tension between access and privacy values' in Canada, by leaving it to the discretion of public officials[42] rather than judicial review,[43] has caused comment. Under the ATI Act, a broad right of access to government documents is, for the most part, enforceable by the courts. Access to personal information, however, is exempted from this right and resides instead in discretionary powers conferred on agencies by the Privacy Act. McCamus discerned a notable bias in favour of privacy protection in the language of the Canadian Privacy Act in any case, and pointed out that the Information and Privacy Commissioners have been vested with only the

usual recommendatory powers of an ombudsman.[44] Administrative discretion under these circumstances, in McCamus's view, has led to 'undue deference to the privacy value' and has 'substantially undermined the value of the Canadian access scheme'.[45]

This bias towards privacy may mirror Canadian societal values which inform Canada's political culture, in the way that Kirby described in Chapter 6 in relation to Australia and Britain. Canada's parliamentary heritage has certainly figured prominently in reflections on aspects of administrative law. Hubbertz claimed that, frequently in Canadian politics, 'an appeal to Parliamentary tradition may coincide with the interests of a reluctant and cautious government'.[46] McCamus acknowledged in familiar vein that, in a parliamentary, majoritarian system, no Canadian government is likely to pursue vigorously a policy of designing legislation to guarantee effective scrutiny of its own conduct of public affairs.[47]

Bazillion elaborated upon the effects on the ATI Act of the "Westminster connection". He touched on the endemic secrecy attached to cabinet government in Canada, noting the oath of office enjoining ministers not to divulge matters considered by cabinet, and the concomitant dearth of information about the policy process, linked with the parliamentary or public 'test of a government's wisdom' residing in its capacity to have its measures enacted.[48] As in Australia and Britain, the historical development of cabinet government in Canada has resulted in a ministerial monopoly of knowledge about government, and control of the flow of information between government and the public.[49] Public participation in policy formulation has been

restricted, consultative mechanisms notwithstanding.[50] Despite the advent of the ATI Act, the Canadian Official Secrets Act remained in force. By then over forty years old, this legislation, as in Britain, throws a blanket of secrecy over 'virtually all government information'.[51]

Bazillion expected confidentiality to remain a feature of Canadian public life because Westminster-style systems are inherently inhospitable to the FOI principle,[52] as was shown in preceding chapters. Here Bazillion pointed to the arguments put forward by ministers and senior public officials that confidentiality is necessary for the practice of ministerial responsibility, and the 'vested interest' that ministers acquire, once sworn in, 'in the rules and traditions that protect cabinet deliberations from outside scrutiny'.[53]

Cabinet distrust of FOI was blamed in large part for the delay between the introduction of access legislation in mid-1979 and its emergence almost three years later 'in the wake of considerable public pressure'. While proponents of an access law saw no quarrel between the FOI principle and parliamentary institutions, federal and provincial ministers worried about ministerial responsibility, to them a 'pillar' of the existing constitutional arrangements. In the event, as in Australia, the ATI Act perpetuates the confidentiality of cabinet documents, but allows the release, under conditions specified in the Act, of information held by government agencies.[54]

Reminiscent of findings about the Commonwealth FOI Act, the right of access in the ATI Act is carefully defined, and the protection of cabinet documents, law enforcement records and information on federal-

provincial relations 'ensconces residues of Crown privilege in an access statute', testifying 'to the resiliency of political traditions whose tendency has been to strengthen the central executive'.(55) Although the Federal Court is enabled to settle disputes over access to the 'more-or-less conventional government records', the ATI Act keeps a large amount of information bearing on the decision-making process 'absolutely confidential'. To Bazillion, such a conflict between the spirit and letter of the Act has 'general implications' for Canadian political life. This is because the issue of access is connected to parliamentary reform, to ensure that 'government is held accountable to the House, and through it to the electorate at large'. Accountability was said to come about only if there is an uninhibited flow of information within the political system, leading to closer contact between government and the people.(56)

All this has a familiar ring to Australian ears. So, too, does Bazillion's explanation for the 'essence of the Canadian dilemma with respect to FOI': the fact that change implicit in the acceptance of the disadvantages of official confidentiality is inhibited by what he termed 'a few antiquated constitutional practices'.(57) For Bazillion considered, like Thompson in Chapter 6, that parliamentary systems inherited from Britain must address similar problems in dealing with a tradition of administrative secrecy. There was more to the Liberal Government's 'ambivalence' towards FOI, therefore, than 'base motives'. Even with positive intentions, 'no government can clear away so much accumulated debris by legislative fiat'. The shortcomings of the ATI Act result from 'an historical bias against open government', which, after all, is a comparatively recent concept.(58) In other words, the

cluster of values, attitudes and beliefs surrounding the "Westminster connection" has outshone, in both Australia and Canada, the possibilities of change in the direction of a more open style of government supposedly encouraged by federal, written constitutions.

As far as the public service is concerned, responsibility in Canada has been examined in the light of constitutional, legislative and political developments which have affected the 'traditional framework' of public service 'obligations and expectations'. These were 'designed to balance principles of neutrality and anonymity against ministerial responsibility, security of tenure, and advancement through merit'. A new 'reality' means that public servants are now confronted with competing, if not conflicting, 'responsibilities and loyalties originating in constitutional and administrative law, conventions and traditions, professional obligations and training, career aspirations, and personal and community values'.(59)

To Australian eyes, discussion seemed to centre on "modernising" the doctrine of ministerial responsibility to ensure greater public service accountability. It was contended that responsibility for a public servant 'means the obligation to develop and administer policy in a certain manner and to account for one's performance to a specific person or institution' [emphasis supplied].(60) Responsibility "to whom" and "for what" is related to how public officials should conduct themselves, in Langford's opinion.(61)

It was agreed that ministers should have the final say in policy.(62,63) However, bearing in mind the 'collegial atmosphere' of policy-making by ministers and officials, and the fact that public

servants often take 'political decisions virtually on their own through the creation and administration of regulations',[64] it is difficult to define the 'content' of their responsibility,[65] particularly when the 'notion of a dichotomy between politics and administration ... is ... bogus' to Langford,[66] although encouraged by the doctrine of political neutrality.[67]

Anonymity, that other old "Westminster" value, is altering in Canada, as senior officials become more widely known through 'bureaucratic press briefings, appearances before parliamentary committees, commissions of inquiry, and public conferences on policy issues'.[68] The 'commandments of responsible behaviour' in the Canadian public service no longer emanate only from the Westminster model,[69] but from newer values such as 'openness, accessibility and responsiveness to the public'.[70] Rawson submitted that the core elements of responsibility to the public are captured by the words 'accessibility, fairness and efficiency', which are neither 'exhaustive' nor 'mutually exclusive'.[71]

Langford pointed out, again in line with findings about the situation in Australia, that power within the public service

> is too widely diffused in most instances to hold answerable or blameworthy, in any meaningful sense, specific individuals. Not only is power shared within a department through the process of delegation, but it is also shared with central agency bureaucrats, bureaucrats in other line departments, and even more corrosively for responsibility purposes, with public servants in other levels of government.[72]

Despite these difficulties, it was argued that, if public servants possess so much independent power, they must be held 'directly

accountable', especially in view of the realisation that public participation in agenda-setting and policy-making is bound to be 'insignificant'.[73] This 'direct accountability' could take the form of a departmental heads' version of collective ministerial responsibility to the Prime Minister or Premier and Cabinet. It already exists, Langford said, in the accountability of public servants for the exercise of authority delegated by the Treasury Board of Canada. Parliament wants senior officials to appear before it, not merely as specialists supporting the minister, but as 'accounting officers directly responsible' for the administration of their agencies. Moreover, parliamentary agents like the Auditor-General, Ombudsmen, Official Language Commissioners, plus the courts, are also in a legal position 'to demand that public servants account directly for the performance of specific functions' [emphasis supplied].[74] Rawson, on the other hand, asserted that the public official is not directly accountable to the wider community in the 'formal sense', for the public has no immediate authority by which it can impose sanctions on the public service. In true "Westminster fashion", Rawson stated that 'formal accountability' of the public servant is to the minister and the government of the day. It is the government which is in turn accountable to parliament and ultimately to the public in the formal sense.[75]

These complexities of the policy-making process, its administrative environment and constitutional matrix, reflect those examined in earlier chapters. Judging by the thrust of the debate about public service accountability in Canada, mechanisms were being sought to enable officials to be made accountable for their informal, known, but in a sense unknowable, and therefore resented, role in policy-

making. There is quite a difference, however, between having public servants account publicly for their use of financial resources, explaining government policy and commenting on that policy. Formally, officials cannot do the latter in Canada, Britain or Australia.

The LRCC has been examining administrative law in the Canadian context since 1970. In its Working Paper No.25, the Commission acknowledged the 'philosophical and practical disagreements surrounding judicial review'. It recommended 'clarification and broadening' of the grounds of review. It considered that the courts can fulfil an important function '"in supporting a system of checks and balances among branches of government"', believing that they can 'protect basic constitutional values, reinforce procedural safeguards and provide remedies in the event of administrative injustices'.(76)

The LRCC did not recommend locating 'both advisory and adjudicative functions concerning administration in an agency rather than the courts' [emphasis supplied], since this would require a '"radical change in attitudes on the part of government and the legal profession, and perhaps citizens"'.(77) The Commission opted for a council limited to advising on the enactments establishing administrative bodies, and monitoring and advising on the procedures of such bodies; it 'could be consulted on the appointment of members to independent agencies to ensure that professional standards are upheld'. Such a council could report to the Minister of Justice, 'or, as seems more desirable, directly to Parliament'. The LRCC also urged stricter parliamentary supervision of administrative bodies,(78) and called for the strengthening of executive control over agencies, other than those engaged

mainly in the adjudication of quasi-judicial matters. It recommended that ministers be given the authority to issue 'broad policy directives', provided that these are the 'prior subject of open agency hearings and could subsequently be overturned by a negative parliamentary resolution'.(79)

With regard to public involvement in the administrative process, the LRCC recommended improved communications with the public, simplified procedures and the provision of public funds through different mechanisms, to enable relevant interests to be represented at agency hearings. Thomas believed that, despite the need for further debate, the Commission had made 'a valuable contribution' to the process of ensuring that laws function 'as intended with a minimum of waste and delay', ensuring the lawful and sensible use of administrative discretion and strengthening individual confidence in administrative institutions - all 'essential steps to improved accountability within government'.(80)

An assessment of the Supreme Court's enforcement of the Canadian Charter of Rights and Freedoms during the latter's first four years of existence concluded that questions about the 'constitutional protection of human rights' by judicial review remained unanswered.(81) It was considered, however, that the Court, while mindful of the many 'perils and pitfalls' in Charter adjudication, had shown that it accepted the mandate conferred by the Charter. In some of the dozen cases heard, the Court had even struck down laws found to contravene the Charter.(82) It had, therefore, firmly taken up the gauntlet which Kirby and Canadian commentators said was offered by entrenchment, in

contrast to its earlier 'disappointing' performance under the non-entrenched Bill of Rights.(83)

In using the Charter 'to amplify considerably the scope of the common law principles it enshrines',(84) the Supreme Court adopted a "purposive" approach in defining protected rights, examining closely the underlying purpose and intention of guarantees in Charter provisions. Sharpe wrote that this approach is 'a complex, value-laden exercise which draws upon a range of sources in the innovative spirit that the Charter demands'.(85) It was also used, together with the 'structured assessment' of restrictions on protected rights, when defining the valid limits of rights.(86) Whereas the Court spoke about possible threats to the collective interest by the unfettered exercise of individual rights, the 'party seeking to uphold a limitation bears the onus of proof',(87) and the Court 'has yet to accept as valid a limitation on a right which it has found to be protected'.(88)

On aids to interpretation, Sharpe pointed out that the Supreme Court often cited American cases, but has been 'cautious' in using them, and they have 'tended to add more scholarly flavour than influence'. Also, 'an overtly philosophical approach' has been eschewed, but extrinsic evidence has been heeded, if not always taken into account. Nonetheless, the 'traditional tools of judicial reasoning' loom large in the Court's interpretative methods, and Sharpe felt that, when employing these tools, the Court is struggling to harmonise the Charter's summons of a venturous judicial response with the 'limitations and constraints inherent in adjudication'.(89)

Sharpe considered that the most difficult problem for the

Canadian Supreme Court, in view of its 'relatively activist' stance, will be to define the boundaries of judicial review.[90] In one case, all its members agreed that Cabinet decisions, 'even those based upon prerogative powers, were justiciable and not immune from Charter review and that no refuge should be taken in an American style "political question" doctrine'. On the other hand, reasoning pointed towards Court review of Cabinet decisions only where individual rights protected by the Charter could be proven to be infringed by the 'impugned' government action.[91] One Court member, in giving meaning to the phrase "principles of fundamental justice", would not acknowledge a dichotomy between substantive and procedural review, 'characterising that mode of analysis as essentially American'. The principles were said to lie, not in the 'realm of general public policy but in the "inherent domain of the judiciary as guardian of the legal system"'.[92] These and remarks made about '"the spectre of a judicial super-legislature"', the necessity to give '"meaningful content"' to certain Charter provisions 'while avoiding adjudication of policy matters', and to the 'need for "objective and manageable standards"', suggested to Sharpe that the fears of those wary of judicial review should be allayed.[93]

Although relatively few cases concerning the Charter of Rights and Freedoms have been heard to date by the Canadian Supreme Court, the results, as analysed by Sharpe, attest to the ability of a Westminster-related political culture to adjust painlessly to an enlarged scope of judicial review occasioned by newly-enunciated and codified individual rights. The adjustment was rendered painless, however, because change has occurred within, and therefore in keeping

with, Canada's constitutional matrix, that is, bowing towards an executive predominant in policy matters.

Assessments of the ATI and Privacy Acts some three years after their coming into force found 'certain threshold issues ... common to both', in particular their coverage, the extension of access rights and the role of Privacy/Information Commissioners and the courts. With regard specifically to the ATI Act, the 'defensive attitude of government coordinators' was said to hinder effective implementation, while users needed 'to improve the quality of their requests with a planned and systematic focus on the information sought', in order to obtain 'better response'. Fees and procedures were also singled out for comment. The main problem with the Privacy Act was 'the threat to privacy from the race to develop new technology and from the growing use of computer matching for audit and compliance purposes'.(94)

These comments centred on the Recommendations of the Standing Committee on Justice and Solicitor General on the Review of the ATI and Privacy Acts.(95) The Committee reported in March 1987.(96) Broadly speaking, its recommendations were slanted towards widening the scope of both Acts, that is, by enhancing access to government-held information and safeguarding privacy. This would be achieved by extending the reach of each law, greater publicity and use of public interest or 'injury' tests, simplifying procedures, maintaining fees at a minimum, and increased reporting on, and parliamentary overview of, usage. Policy advice and Cabinet records would continue to be protected, but not as rigidly as hitherto. The powers of both Commissioners would be enlarged.(97) If adopted, the recommendations point towards an opening up of Canada's access laws, in contrast to the tightening of Commonwealth administrative law schemes revealed in Chapter 4.

Misgivings were expressed, however, by the Privacy and Information Commissioners at the implications of some of the recommendations for their own operations. The former was particularly worried about resource problems and damage to his office if it came to be perceived as an expanding empire.(98) The Information Commissioner was also concerned about resources,(99) but her major preoccupation was the loss of informality and effectiveness if her office were given binding decision-making powers. This would force her to maintain judicial distance and render her office 'half ombudsman and half administrative tribunal', since, inter alia, 'procedures relating to binding decisions will have to vary from those where recommendations are made'. She would prefer to leave the present two-tier appeals process intact, that is, the Information Commissioner with recommendatory powers only at the first level, and judicial review of government decisions to withhold documents by the Federal Court at the second level, following complaint to, and report by, the Commissioner.(100)

Issues of importance to access laws in both Canada and the US were listed by April 1987 as: the role of the courts; whether the exemption for 'deliberative process' is abused; whether government collects too much personal information; and whether the Privacy Act should be extended to the private sector.(101) The US will now be surveyed.

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