ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) BILL 1977

Bill presented by **Mr Ellicott**, and read a first time.

Second Reading

Mr ELLICOTT (Wentworth—Attorney-General) (5.35)—I move:

That the Bill be now read a second time.

This is a very significant measure. The purpose of this Bill is to reform the law relating to the review by the courts of administrative actions of Commonwealth ministers and officials. The Bill is a further step in the on-going review of Commonwealth administrative law that began with the establishment of the Administrative Review Committee—the Kerr Committee—in 1968 by the then Attorney-General. The proposals by that Committee have so far resulted in the establishment of the Administrative Appeals Tribunal and the Administrative Review Council and the enactment of the Ombudsman Act. Both the Administrative Appeals Tribunal and the Administrative Review Council are in operation; the Commonwealth Ombudsman has been appointed and it is expected that he will take up his office about the end of June.

The present law relating to the review by the courts of administrative decisions is in a most unsatisfactory state. A great deal has been written about the shortcomings of the present procedures and it is not, I think, necessary for me to elaborate on these deficiencies in the present context. The law in this area is clearly in need of reform—indeed, it could be said to be medieval—and simplification and to be put into statutory form. What the present Bill seeks to do is to establish a single simple form of proceeding in the Federal Court of Australia for judicial review of Commonwealth administrative actions as an alternative to the present cumbersome and technical procedures for review by way of prerogative writ, or the present actions for a declaration or injunction.

Before I proceed to say something about the details of the Bill, it may be useful to set these proposals in the context of the machinery for review already embodied in the Administrative Appeals Tribunal and Ombudsman Acts. It is very important that we get this in focus. The Administrative Appeals Tribunal is empowered to review on the merits any decision of a Minister or official acting under a statutory power if, but only if, the relevant legislation provides for an appeal to the Tribunal. The Administrative Appeals Tribunal Act does not confer a general right of appeal against decisions by ministers, officials and statutory bodies. Where, however, an appeal lies to the Tribunal, the Tribunal may review on the merits the decision appealed from and substitute its own decision.

The Commonwealth Ombudsman is not restricted to the review of decisions taken in the exercise of statutory powers. He is empowered to investigate complaints against decisions of Commonwealth officials and statutory bodies, whether taken under statutory power or in the ordinary course of administration. He is excluded from reviewing actions by Ministers, but he may investigate a recommendation made by a department to a Minister. He will not be concerned directly with reviewing the merits of the decisions or action of officials where no element of maladministration is present and, in particular, he will not be empowered to substitute his own decision for that under review. He may only recommend corrective action where he thinks there has been maladministration. No doubt in many cases his decision will lead to review.

Judicial review by the Federal Court of Australia will not be concerned at all with the merits of the decision or action under review. The only question for the Court will be whether the action is lawful, in the sense that it is within the power conferred on the relevant Minister or official or body that prescribed procedures have

been followed and that general rules of law, such as conformity to the principles of natural justice, have been observed. The court will not be able to substitute its own decision for that of the person or body whose action is challenged in the court. It will be empowered to enjoin action or to quash a decision it finds unlawful and to direct action to be taken in accordance with the law. It will also be able to compel action by a person or body who has not acted, but who ought to have done so.

It will thus be seen that the 3 avenues of review, appeal on the merits to the Administrative Appeals Tribunal, investigation by the Commonwealth Ombudsman, and judicial review by the Federal Court of Australia, provide different approaches to the remedying of grievances about Commonwealth administrative action. Each has its own place in a comprehensive scheme for the redress of grievances.

Apart from the technical limitations of the present law for judicial review under the prerogative writs, a person who is aggrieved by a decision usually has no means of compelling the decision-maker to give his reasons for the decision or to set out the facts on which the decision is based. Lack of knowledge on these matters will often make it difficult to mount an effective challenge to an administrative decision even though there may be grounds on which that decision can be challenged in law. Accordingly, one of the principal elements of the present Bill is a provision that will require a decision-maker to give to a person who is adversely affected by his decision the reasons for that decision and a statement of findings on material questions of fact, including the evidence or other material on which those findings were based. There is already a like provision in the Administrative Appeals Tribunal Act in respect of decisions from which an appeal lies to the Tribunal.

A draft of the present Bill was considered in detail by the Administrative Review Council, and the comments and recommendations of the Council have been embodied in the Bill that is now before the House.

I turn now to a description of the contents of the Bill. It provides for review by the Federal Court of Australia of decisions of an administrative character under an Act of the Parliament, a Territory ordinance or regulations or rules made under such an Act or ordinance. It also provides for the review of conduct engaged in or proposed to be engaged in for the purpose of making a decision to which the Bill will apply. Decisions made by the Governor-General under statutory authority are to be excluded, and there is provision for regulations to be made excluding classes of decisions from the scope of the Bill. The present law provides only a limited scope for review of the exercise of statutory powers by the Governor-General acting with the advice of the Federal Executive Council. Where the exercise of such a power is *prima facie ultra vires*, the courts can grant appropriate relief. But it appears doubtful whether the courts will inquire into the grounds on which advice is tendered to the Governor-General. It will still be open, in any case where such a decision is made in excess of statutory authority, for the existing remedies to be applied, but it has not been considered appropriate that the court should be empowered to inquire into the proceedings of the Federal Executive Council in the manner provided for in the present Bill. Specific provision is made in the Bill for the court to make an order requiring a decision to be made where there has been a breach of duty to make a decision to which the Bill applies.

The grounds of review are set out in clauses 5 and 6 of the Bill. Clause 5 applies to a decision that has been made and clause 6 applies to conduct engaged in or proposed to be engaged in for the purpose of making a decision to which the Bill applies. Conduct includes the taking of evidence or the holding of an inquiry or investigation. The grounds of review specified are those that have been developed by the courts. To avoid stultifying further development of the law by the Federal Court of Australia, each of clauses 5 and 6 contains the comprehensive ground that the decision made or proposed to be made would be otherwise contrary to law.

Clause 11 of the Bill provides for an application for review to be made in the manner prescribed by Rules of Court and for the time within which it may be made. An application for review under the Bill may be made by any person who is aggrieved by a decision. This term is defined in sub-clause 3 (4) to include a person whose interests are adversely affected by the decision or would be adversely affected by a proposed decision. These provisions relating to the standing of a person to challenge Commonwealth administrative action may need to be reviewed when the Australian Law Reform Commission presents its report on the law of standing. The Commission currently has a reference from me on the subject. Clause 13 provides that a person who is entitled to apply for a review of a decision may obtain from the decision-maker written reasons for the decision, including findings on material questions of fact. I

have already referred to the importance of this provision. No longer will it be possible for the decision maker to hide behind silence.

Clause 14 empowers the Attorney-General to give a certificate that the disclosure of information would be contrary to the public interest on a ground specified in that clause. These grounds cover those under which a claim of Crown privilege may be made before the court in judicial proceedings. The effect of such a certificate is that the information to which it relates need not be included in a statement under clause 13. Subclause (4) of clause 14 specifically provides, however, that the clause is not to affect the power of the court to make an order for the disclosure of documents or to require the giving of evidence or the production of documents to the court.

The powers that the court may exercise on an application for an order of review are set out in clause 16. The court may quash or set aside the decision or part of the decision, refer the matter back to the decision maker for further consideration subject to such directions as the court thinks fit, make an order declaring the rights of the parties in respect of which the order relates, or direct any of the parties to do or refrain from doing any act or thing where the court considers this necessary to do justice between the parties. Where there has been a failure to make a decision, the court may make an order directing the making of a decision but not, of course, the making of a decision of a particular kind.

The Bill is intended to provide a comprehensive procedure for judicial review of Commonwealth administrative action taken under statutory powers. Clause 9 of the Bill is intended to ensure that this jurisdiction is exclusive of the jurisdiction of State courts. The Judiciary Act has long embodied the policy that actions of Commonwealth officers should not be subject to review by way of mandamus or writ of prohibition in State courts—section 38 of the Judiciary Act. The clause further makes it clear that actions of the Federal judiciary are not to be subject to review in State courts. The jurisdiction of State courts to grant *habeas corpus* is not to be affected. Parliament cannot legislate, of course, to remove the powers of judicial review given to the High Court by the Constitution—section 75 (iii). It is expected, however, that the procedures provided for by this Bill make resort to the existing procedures for judicial review unnecessary except where a review is sought of decisions excluded from review under the present Bill or otherwise in special circumstances. Most of the prerogative writs are granted on the discretion of the court and one would imagine that the High Court, faced with an application for a prerogative writ under section 75 (iii), would give careful consideration to the situation in which an application could have been made to the Federal Court under these provisions.

Clause 10 of the Bill preserves any other right of review of Commonwealth administrative decisions. In particular, paragraph 10 (1) (b) provides that the Bill is not to affect the powers of the Commonwealth Ombudsman. The Government also has 2 further measures in hand as part of the program of reform of administrative law. These are a Bill to set down standard procedures for Commonwealth adjudicative tribunals, in line with the recommendations of the Kerr Committee, and a Freedom of Information Bill, which will entitle persons to have access to documents in the possession of Commonwealth agencies, subject, of course, to certain exceptions designed to protect the public interest in the confidentiality of certain documents and proceedings. Both Bills are in the course of drafting and I would hope to be able to introduce the Freedom of Information Bill before the end of the present sittings of the Parliament. The other Bill, which sets down standard procedures, will certainly be introduced before the end of this year. I commend the Bill to the House.

Debate (on motion by **Mr Lionel Bowen**) adjourned.

1977

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) BILL 1977

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the Honourable R.J. Ellicott, Q.C.)

12626/77 Cat. No. 77 4158 9—Recommended retail price 35c

Administrative Decisions (Judicial Review) Bill 1977

Introductory Note

The Bill will provide procedures for the judicial review of administrative decisions made by Commonwealth Ministers and officials under statutory authority. Jurisdiction under the Bill will be exercised by the Federal Court of Australia.

2. The provisions of the Bill are based on the recommendations made in the Report of the Commonwealth Administrative Review Committee (the Kerr Committee Report of August 1971) and the Report of the Committee of Review of Prerogative Writ Procedures (the Ellicott Committee Report of May 1973).

3. In reviewing administrative discretions, the Court will not be concerned with the merits of the action under review. It will be concerned only with the question whether the exercise of the discretion is contrary to law or not. The grounds on which the Court may hold a decision or an administrative action to be contrary to law are set out in clauses 5 and 6 of the Bill. Where a ground on which a decision or action may be impugned is made out, the Court will have power to make an order of an appropriate kind. It will also have power to order a person under a duty to make a decision and who has failed to do so to exercise his power but will not be able to direct the making of a decision with particular effect.

.../2

4. The procedures and remedies available under the Bill will be much simpler than those now available under the procedures for the granting of prerogative writs. The Bill specifically preserves the operation of remedies, whether by way of review by a court or appeal to a tribunal, under other laws.

5. The Bill contains provisions entitling a person who may apply to the Court for review of a decision to obtain reasons for that decision.

6. The Bill empowers the making of regulations excluding from review by the Court under the provisions of the Bill classes of decisions specified in the regulations.

7. References herein to 'Kerr' followed by a number are references to the paragraph so numbered in the Report of the Kerr Committee. Likewise, references herein to 'Ellicott' followed by a number are references to the paragraph so numbered in the Report of the Ellicott Committee.

Clause 1: Short Title.

8. This clause provides for the short title of the Bill.

Clause 2: Commencement.

9. Clause 2 provides that the Act is to commence on a date to be fixed by Proclamation.

Clause 3: Interpretation.

10. This clause provides for the interpretation of certain words and phrases used in the Bill.

.../3

11. In particular, attention is invited to the following definitions contained in sub-clause 3(1):-

(i) 'decision to which this Act applies' is defined as meaning a decision of an administrative character made, proposed to be made or required to be made under an enactment, other than a decision of the Governor-General or a decision exempted under the regulations. The phrase includes decisions in respect of which the person empowered or required to make the decision has no discretion in the matter.

Decisions of the Governor-General under statutory powers are not to be reviewable under the Bill. The grounds on which such a decision is reviewable under the present law are limited, and it has not been thought appropriate to make any change in the present law. To the extent to which the present law would permit such a decision to be reviewed under the existing procedures and an existing remedy to be granted, that law will continue to apply. (Kerr 265; Ellicott 32).

The provision for exclusion of classes of decision by regulation has been included so as to allow detailed consideration to be given to the question whether the exercise of any, and if so what, statutory powers should not be reviewable by the Federal Court of Australia. (Kerr 265; Ellicott 27).

(ii) 'duty' is defined to include duty imposed on a person in his capacity as a servant of the Crown. Under the existing law the writ of mandamus would not lie to compel performance of a duty required to be performed by a servant of the Crown in his capacity as such servant. The Bill would permit the Court to make an order compelling performance of such a duty, provided that a plaintiff having the necessary standing to sue could be found - see sub-clause 3(4) and sub-clause 7(1). (Kerr 265; Ellicott 25).

(iii) 'enactment' means an Act, a Territory Ordinance or an instrument made under an Act or Ordinance and includes a part of an enactment. Thus the Bill would apply to persons exercising powers under laws of the Territories. The Territory Supreme Courts would continue to have such jurisdiction as they now have to review the exercise of such powers.

(iv) a failure to make a decision is to include a refusal to make a decision; cf. clause 7 of the Bill, which provides for remedies where there has been a failure to make a decision.

12. Sub-clause 3(2) gives an extended meaning to references in the Bill to the making of a decision. The purpose of so extending the meaning of the term is to comprehend within the scope of the powers to be conferred

on the Court any exercise of, or any failure to exercise, a statutory power.

13. Sub-clause 3(3) provides that where an enactment makes provision for the making of a report or recommendation prior to the making of a decision under an enactment, the making of the report or recommendation is to be deemed to be the making of a decision. Thus such a report or recommendation would be subject to review under the Bill although perhaps not subject to review under the existing law. (Kerr 253; Ellicott 31).

14. Sub-clause 3(4) is significant in relation to the standing of a person to seek review under the Bill. Clauses 5, 6 and 7 provide that an application for an order of review may be made by a 'person aggrieved'. The effect of this sub-clause is to make clear that the term is intended to include any person whose interests are adversely affected by the decision, a failure to decide, or the action in question. (Kerr 254).

15. Sub-clause 3(5) would extend the scope of the power to make an order of review in respect of conduct engaged in for the purpose of making a decision to the doing of any act or thing preparatory to the making of the decision. It is to include the taking of evidence or the holding of an inquiry or investigation, whether or not such preparatory conduct takes place pursuant to a statutory power.

16. Sub-clause 3(6) provides for the postal service of documents, statements or notices. The time of the posting of a document, statement or notice is to be deemed to be the time of furnishing of that article or the giving of notice to a person for the purposes of the Bill.

Clause 4: Act to operate notwithstanding anything in existing laws.

17. Clause 4 provides that the Bill is to have effect notwithstanding anything in any other Act. This clause will override the so-called privative clauses in existing legislation, which might otherwise have the effect of excluding the jurisdiction to be given to the Federal Court of Australia under this Bill. (Kerr 260; Ellicott 19).

Clause 5: Applications for review of decisions.

18. A person aggrieved by the making of an administrative decision to which the Bill is to apply is to be entitled to apply to the Federal Court of Australia for an order of review in respect of that decision. As to the meaning of the phrase 'a person aggrieved', see note on sub-clause 3(4) above. The grounds on which he may make such an application are set out in sub-clause 5(1). The grounds are more extensive than those proposed by Kerr 258; c.f. Ellicott 39-43.

19. The grounds of review are intended to comprehend all grounds on which an injunction or a writ of mandamus, certiorari or prohibition, or a declaration might be obtained under the existing law. The grounds are in some cases, and in other cases may be, more extensive than those on which relief

.../7

can be obtained under the existing law. For example, under the existing law, a decision may be quashed under a writ of certiorari on the basis of an error of law only where there is an error of law on the face of the record. Paragraph (f) of the sub-clause provides as a ground of review that the decision involved an error of law, whether or not the error appeared on the face of the record. This both extends the scope of review and does away with some uncertainty about what constitutes a record for the purposes of the present law.

20. Not all of the grounds would be applicable in the case of every 'decision', particularly having regard to the extended meaning given to the term 'the making of the decision' by sub-clause 3(2).

21. The grounds specified are not intended to be mutually exclusive; the same fact situation may come under a number of grounds.

22. Particular comments on particular grounds of review are made below:

(a) That a breach of the rules of natural justice occurred in connexion with the making of the decision. What is required by the rules of natural justice depends on the circumstances of a particular case or the way in which a particular statutory power is framed. For example, a decision-maker may not be required to give an opportunity to be heard to a

.../8

person against whom he proposes to decide adversely unless it appears from the statute, expressly or by implication, that the person has a right to be heard. The rule that no man may be a judge in his own cause may not apply if it appears from the statute in question that the decision-maker is empowered to make a decision even though he has an interest in the outcome of the decision. Broadly speaking, the rules of natural justice require that a person have an adequate opportunity to put his case, whether at an oral hearing or otherwise; that all parties to a matter be heard or their arguments considered, where a decision has to be made between competing interests; that a person should not be a judge in his own cause; that a person against whom an adverse decision is to be made should be informed as fully as possible of anything alleged against him; and, broadly stated, that the decision-maker must act fairly and without bias.

(b) That procedures that were required by law to be observed in connexion with the making of the decision were not observed. This ground appears self-explanatory.

(c) That the person who purported to make the decision did not have jurisdiction to make the decision. An example of this ground would be where the power to make a decision was vested in a tribunal required

.../9

to be constituted in a particular way, and the tribunal was not constituted in that manner. Or it might be that the statutory power could be exercised only on the happening of a certain event, and that event had not occurred.

(d) That the decision was not authorised by the enactment in pursuance of which it purported to be made. This ground is self-explanatory.

(e) That the making of the decision was an improper exercise of power conferred by the enactment in pursuance of which it was purported to be made. What is an improper exercise of power is spelt out in sub-clause 5(2).

(f) That the decision involved an error of law, whether or not the error appears on the face of the record. As noted above, this ground removes the uncertainty surrounding the existing ground of error of law on the face of the record, by doing away with the need for the error to appear on the face of the record, whatever the record of the proceedings might be in the particular case. What is now intended is that a plaintiff has only to show that in fact the decision-maker erred in law in reaching his decision.

(g) That the decision was induced or affected by fraud. This ground is self-explanatory. It might be noted that fraud would include, for instance, falsification or suppression of evidence at a hearing.

(h) That there was no evidence or other material to justify the making of the decision. As to the

.../10

inclusion of this ground, see Ellicott 43. As to the scope of this ground, see sub-clause 5(3). The inclusion of this ground as formulated may have the effect of widening the grounds on which the courts would grant relief in Australia. The formulation is intended to embody the reasons for decision of the House of Lords in the Tameside case (1976) 3 W.L.R. 641.

(i) That the decision was otherwise contrary to law. This paragraph has been included so as to permit the possibility of judicial development of additional grounds of review and to ensure that no existing ground has been excluded.

23. Sub-clause 5(2) spells out what is intended by an improper exercise of power. The sub-clause is intended to set out the existing law. Paragraph (j) is open-ended to allow for judicial development of the law.

24. Sub-clause 5(3) sets out the scope of the 'no evidence' ground specified in paragraph (h) of sub-clause 5(1). This ground is not intended to go so far as to allow the Court merely to substitute its own view of the facts. For the ground to be made out, there must either have been no evidence or other material on which a conclusion as to the existence of a certain fact could reasonably have been arrived at, or else there must have been a mistaken reliance on a state of facts that did not exist.

.../11

25. As to the orders the Court may make in respect of an application for an order of review under clause 5, see sub-clause 16(1).

Clause 6: Applications for review of conduct related to making of decisions.

26. Clause 6 makes similar provision to clause 5, but with respect to conduct engaged in or proposed to be engaged in for the purpose of the making of a decision. (Kerr 255). See also sub-clause 3(5).

27. As to the orders the Court may make on an application made under clause 6, see sub-clause 16(2).

Clause 7: Applications in respect of failures to make decisions.

28. This clause provides for a person aggrieved by the failure to make a decision to which the Bill applies to apply to the Federal Court of Australia for an order of review in respect of that failure. This clause applies only in relation to those decisions where a person has a duty to make the decision. (Kerr 259; Ellicott 51).

29. Under sub-clause 7(1) the order of review may be sought in respect of the failure to make a decision, where no statutory time limit is prescribed, on the ground that there has been an unreasonable delay in making the decision.

30. Where a statutory time limit for the making of a decision is prescribed, sub-clause 7(2) provides for the review of the failure to make such a decision where the

.../12

person having a duty to make that decision remains under that duty notwithstanding the expiration of the statutory time limit.

31. As to the orders that may be made in respect of an application made under clause 7, see sub-clause 16(3).

Clause 8: Jurisdiction of Federal Court of Australia.

32. This clause vests jurisdiction in the Federal Court of Australia.

Clause 9: Limitation of jurisdiction of State courts.

33. The purpose of this clause is

(a) to provide that the supervisory jurisdiction of the Federal Court of Australia over Commonwealth administrative action under Commonwealth enactments is exclusive of the jurisdiction of State courts; and

(b) to ensure that a State court may not, whether by the grant of an injunction or otherwise, exercise a supervisory jurisdiction over a Federal court.

34. It has always been the policy, as expressed in the Judiciary Act, that a State Supreme Court should not have jurisdiction to grant a writ of prohibition or mandamus against an officer of the Commonwealth. State courts have been invested with jurisdiction under the Judiciary Act to grant injunctions against officers of the Commonwealth. Whatever might have been the reason for investing State courts with that jurisdiction in the past it is considered

that, with the establishment of the Federal Court of Australia as a court to exercise jurisdiction in special areas of federal jurisdiction and the enactment of a comprehensive scheme of judicial review, it is now appropriate that judicial review of Commonwealth administrative action should be vested primarily in a Federal court.

35. The original jurisdiction of the High Court under the Constitution in respect of the grant of injunctions or writs of mandamus and prohibition against officers of the Commonwealth is not affected.

36. The jurisdiction of the State courts to grant habeas corpus in respect of a person held in custody under a purported exercise of Commonwealth power is to be retained.

Clause 10: Rights conferred by this Act to be additional to other rights.

37. Paragraph (a) of sub-clause 10(1) provides that the rights of judicial review to be conferred by the Bill are in addition to, and not in derogation of, other rights of review, judicial or otherwise.

38. Paragraph (b) of sub-clause 10(1) provides that the rights of judicial review to be conferred by the Bill are to be disregarded for the purposes of sub-section 6(3) of the Ombudsman Act. That sub-section provides as follows:-

"Where the Ombudsman is of the opinion that the complainant has or had a right to cause the action to which the complaint relates to be reviewed by a court or by a tribunal constituted

by or under an enactment but has not exercised that right, the Ombudsman shall not investigate, or continue to investigate, as the case may be, the complaint unless the Ombudsman is of the opinion that, in all the circumstances of the case, the failure to exercise the right is not or was not unreasonable."

Paragraph (1)(b) thus ensures that the Ombudsman is not excluded from investigating a complaint because there is a right of review under this Bill of the decision complained of.

39. The purpose of sub-clause (2) is to prevent unnecessary duplication of review proceedings in any case where review has been sought both under the Bill and under some other law. The review under another law may be either judicial review by a court, or by an administrative body. The sub-clause is also intended to discourage resort to the Federal Court of Australia under the Bill where other adequate remedies are available. Thus, for example, if an order for review were sought in the Court in respect of a decision of the Commissioner of Taxation in an income tax matter, the Court could decline to exercise jurisdiction on the ground that adequate remedies are available by way of appeal under the Income Tax Assessment Act. (Ellicott 33).

Clause 11: Manner of making applications.

40. This clause provides for the making of applications to the Federal Court of Australia for orders of review.

41. The manner of making applications for an order of review and other applications to the Court is to be as provided by Rules of Court. The service of copies of documents lodged with a Registry of the Court under the Bill is to be provided for in Rules of Court. Strict compliance with Rules of Court made for the purposes of this clause is not required.

42. An application for an order of review is to set out the grounds of the application. The applicant is not to be limited to the grounds set out in his application, but if he wishes to rely on any other grounds the Court may direct the amendment of the application.

43. Except as regards a decision by way of report or recommendation, an application in relation to a decision shall be lodged within the prescribed time or such further time as the Court allows. Sub-clause 11(3) sets out the manner in which the prescribed time is to be determined in relation to a particular decision. The reason for excluding decisions by way of report or recommendation from the requirement to comply with the prescribed time limits is that the periods fixing the time limits commence from the happening of events that are not appropriate in the case of a report or recommendation.

44. Provision is also made under clause 11 for the amendment of documents lodged with a Registry in connexion with an application to the Court. The Court is to be empowered to permit a document to be amended and may, if it thinks fit, direct a document to be amended in a manner

specified by the Court. (Kerr 267).

Clause 12: Application to be made a party to a proceeding.

45. This clause provides for intervention in proceedings under the Act by a person having an interest in a matter under review. The Court may, in its discretion, grant an application to be made a party to proceedings, with or without conditions, or it may refuse the application. It will be a matter for the Court to determine, in any particular case, whether the person concerned has a sufficient interest.

Clause 13: Person entitled to apply for review of decision may obtain reasons for decision.

46. Sub-clause 13(1) provides that a person entitled to make an application to the Court under clause 5 for review of a decision may request a person who has made a decision reviewable under the Bill to furnish him with a written statement setting out the findings on material questions of fact, with reference to the evidence or other material on which those findings were based, and giving the reasons for the decision. Such a request is to be made, by notice in writing, to the person who made the decision within the prescribed period. The prescribed period within which a request for reasons may be made is set out in sub-clause 13(7). The request must be made within 28 days of the date on which the person making the request was furnished with the terms of the decision. The person making the decision is required, subject to sub-clause 13(3), to furnish the information within 14 days of the request being made. (Kerr 266; Ellicott 34-38).

47. However, by virtue of sub-clause 13(3), the person

.../17

making the decision may instead apply to the Court, within a period of 14 days from receiving a request, for an order declaring that the person who made the request for the information was not entitled to make the request. Such an application would involve a determination as to whether the person requesting the information was an aggrieved person for the purposes of clause 5 of the Bill. Sub-clause 13(3) thus provides a summary procedure whereby a decision-maker could seek redress against a vexatious request for the reasons for a decision by a person not affected by that decision.

48. Sub-clause 13(4) provides that the person who made the decision will not be required to furnish a statement before the Court gives its decision on the application under sub-clause (3). Where the Court makes an order declaring that the person who made the request was not entitled to make it, the person who made the decision is not required to furnish a statement. If the Court refuses the application, the person who made the decision is to prepare and furnish the statement within 14 days after the Court's decision.

49. Sub-clause 13(5) empowers the Federal Court of Australia to order that further and better particulars be given in respect of a written statement furnished in response to a request made under sub-clause 13(1).

50. Clause 13 is not to apply in relation to a decision that may be reviewed under the Administrative Appeals Tribunal Act 1975. That Act contains its own provisions for

.../18

the furnishing of reasons for decisions reviewable by the Tribunal.

51. Sub-clause 13(6) provides that a statement or further statement furnished under clause 13 is to be deemed to be part of the record of the decision for the purposes of an application under clause 5 for an order of review in respect of a decision. This provision ensures that such a statement, being thus part of the record of the decision, may be taken into account in an application for review of the decision for an error of law appearing on the record - cf. paragraph 5(1)(f).

Clause 14: Certain information not required to be disclosed.

52. Sub-clause 14(1) would empower the Attorney-General to certify that the disclosure of information concerning a specified matter would be contrary to the public interest:-

(a) by reason that it would prejudice the security, defence or international relations of Australia;

(b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or

(c) for any other reason specified in the certificate that could form the basis for a claim by the Crown in the right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

53. Where the Attorney-General so certifies, the

.../19

decision-maker is relieved from the obligation under clause 13 to supply in a written statement the information to which the certificate relates (sub-clause 14(2)). In this event, the decision-maker will be required to notify in writing the person requesting the statement (sub-clause 14(3)).

54. The provisions made by this clause are not, however, to affect the powers of the Court with respect to the discovery of documents, the taking of evidence or the production of documents to the Court. Any claim of Crown privilege in proceedings before the Court is still a matter for the Court to determine. (Kerr 266 and 344; Ellicott 36).

Clause 15: Stay of proceedings.

55. Where an application is made to the Court under clause 5, the making of the application is not to affect the operation of the decision or action taken to implement the decision. However, the Court is to be empowered, by virtue of clause 15, to suspend the operation of a decision or stay any proceedings under the decision.

Clause 16: Powers of the Court in respect of applications for order of review.

56. This clause empowers the Court to make appropriate orders on an application for an order of review.(Kerr 263, 267).

57. Sub-clause 16(1) sets out the orders that may be made on an application for an order of review of a decision. The Court may quash or set aside the whole or part of the decision, refer the matter back to the decision-maker, make a declaratory order, or direct a party to do or to refrain from

.../20

doing any act or thing.

58. Sub-clause 16(2) sets out the orders that may be made on an application for an order of review in respect of conduct. The Court may make a declaratory order, or direct a party to do or refrain from doing any act or thing.

59. Sub-clause 16(3) sets out the orders that may be made on an application for an order of review in respect of the failure to make a decision. The Court may direct the making of a decision, make a declaratory order or direct a party to do or refrain from doing any act or thing.

60. Sub-clause 16(4) would give the Court power to revoke, vary or suspend the operation of any order made under clause 16.

Clause 17: Change in occupancy of office.

61. Clause 17 makes provision for the case where a person, in performing the duties of an office, has made a decision in respect of which an application may be made to the Court and that person has since ceased to hold the office.

Clause 18: Intervention by Attorney-General.

62. The Attorney-General is to be entitled to intervene in proceedings brought in the Court under the provisions of the Bill. This provision will enable the interests of the government to be protected in proceedings so brought in the Court. (Kerr 269).

.../21

Clause 19: Act not to apply in relation to certain decisions.

63. As previously stated in relation to sub-clause 3(1), regulations may be made declaring that the Act is not to apply to a class of decisions specified in the regulations. The regulations are to apply only to decisions made after the regulations take effect.

64. The Kerr and the Ellicott Committees both recognised that there may be some administrative decisions which should not be subject to review, e.g., the exercise by Ministers of discretions relating to defence, national security, relations with other countries, criminal investigation, the administration of justice and the Public Service. The Ellicott Committee also suggested that decisions relating to employment, for example, might be excluded. (Kerr 265; Ellicott 22-30)

Clause 20: Regulations.

65. This clause provides for the making of regulations.

Printed by Authority by the Acting Commonwealth Government Printer

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) BILL 1977

(Amendments to be moved on behalf of the Government)

(1) Clause 3, page 1, lines 13 to 15, omit " or a decision that is included in a class of decisions that are declared by the regulations to be decisions to which this Act does not apply ".

(2) Clause 11, page 8, lines 16 to 18, omit " (other than a decision by way of a report or recommendation) that has been made, including a decision ", substitute " that has been made and the terms of which were recorded in writing and set out in a document that was furnished to the applicant, including such a decision ".

(3) Clause 11, page 9, after sub-clause (3), insert the following sub-clauses:—

" (3A) Where—

(a) no period is prescribed for the making of applications for orders of review in relation to a particular decision; or

(b) no period is prescribed for the making of an application by a particular person for an order of review in relation to a particular decision,

the Court may—

(c) in a case to which paragraph (a) applies—refuse to entertain an application for an order of review in relation to the decision referred to in that paragraph; or

(d) in a case to which paragraph (b) applies—refuse to entertain an application by the person referred to in that paragraph for an order of review in relation to the decision so referred to,

if the Court is of the opinion that the application was not made within a reasonable time after the decision was made.

" (3B) In forming an opinion for the purposes of sub-section (3A), the Court shall have regard to—

(a) the time when the applicant became aware of the making of the decision; and

250/4.5.1977—11196/77

(b) in a case to which paragraph (3A) (b) applies—the period or periods prescribed for the making by another person or other persons of an application or applications for an order or orders of review in relation to the decision,

and may have regard to such other matters as it considers relevant.".

(4) Clause 13, page 9, line 36, omit " within the prescribed period ".

(5) Clause 13, page 9, line 41, omit " sub-section (3) ", substitute " this section ".

(6) Clause 13, page 10, after sub-clause (4), insert the following sub-clauses:—

" (4A) A person to whom a request for a statement in relation to a decision is made under sub-section (1) may refuse to prepare and furnish the statement if—

(a) in the case of a decision the terms of which were recorded in writing and set out in a document that was furnished to the person who made the request—the request was not made on or before the twenty-eighth day after the day on which that document was so furnished; or

(b) in any other case—the request was not made within a reasonable time after the decision was ~~given~~,

and in any such case the person to whom the request was made shall give to the person who made the request, within 14 days after receiving the request, notice in writing stating that the statement will not be furnished to him and giving the reason why the statement will not be so furnished.

" (4B) For the purposes of paragraph (4A) (b), a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was ~~given~~ if the Court, on application by the person who made the request, declares that the request was made within a reasonable time after the decision was ~~given~~.".

(7) Clause 13, page 10, lines 31 to 34, omit sub-clause (7).

(8) Clause 19, page 13, lines 12 to 14, omit sub-clause (1), substitute the following sub-clauses:—

" (1) The regulations may declare a class or classes of decisions to be decisions that are not subject to judicial review by the Court under this Act.

" (1A) If a regulation is so made in relation to a class of decisions—

(a) section 5 does not apply in relation to a decision included in that class;

(b) section 6 does not apply in relation to conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision included in that class; and

(c) section 7 does not apply in relation to a failure to make a decision included in that class,

but the making of the regulation does not affect the exclusion by section 9 of the jurisdiction of the courts of the States in relation to such a decision, such conduct or such a failure.".

Printed by Authority by the Acting Commonwealth Government Printer

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) BILL 1977

(Additional Amendments to be moved on behalf of the Government)

(1) Clause 3, page 2, line 4, after "Act", insert "other than the Commonwealth Places (Application of Laws) Act 1970".

(2) Clause 3, page 2, line 7, before "an Act", insert "such".

(3) Clause 9, page 7, line 1, omit "section 39 of the Judiciary Act 1903", substitute "anything contained in any Act other than this Act".

1977

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) BILL 1977

(Amendments to be moved on behalf of the Government)

(1) Page 4, clause 5, line 4, after " it ", insert " was ".

(2) Page 11, clause 13, lines 32 to 35, leave out sub-clause (8).

Printed by Authority by the Acting Commonwealth Government Printer

200/24.5.1977—11196/77

1977

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) BILL 1977

SCHEDULE OF THE AMENDMENTS MADE BY THE SENATE

No. 1—Page 4, clause 5, sub-clause (1), paragraph (d), line 4, after " it ", insert " was ".

No. 2—Page 11, clause 13, sub-clause (8), lines 32 to 35, leave out the sub-clause.

J. R. ODGERS,
Clerk of the Senate

The Senate,
Canberra, 30 May 1977

Printed by Authority by the Acting Commonwealth Government Printer
1,550/30.5.1977—11196/77