

Administrative deficiency

December 2009

Section 15 of the *Ombudsman Act 1976* (Ombudsman Act) lists the grounds on which the Ombudsman can formally make a report to an agency, and ultimately to the Prime Minister and Parliament. Only a small number of reports are made each year to agencies, and more rarely to the Prime Minister or Parliament.

Most complaints to the Ombudsman can be resolved informally, and without the need to reach a firm view on whether an agency's conduct was defective. This reflects the emphasis of our work on achieving remedies for complainants, and improving agency complaint-handling processes and public administration generally.

Instances nevertheless arise in which administrative deficiency should be recorded and notified to an agency. This helps draw attention to problems in agency decision making and processes, and feeds into the systemic work of the Ombudsman's office.

The purpose of a finding of administrative deficiency is not to reprimand the agency concerned. The individual findings are not separately published in the same way that reports under s 15 are usually published. Rather, the individual findings are aggregated as part of the statistics that are published each year in the Ombudsman's annual report. This provides agencies and the public with a statistical profile of the complaints received each year by the Ombudsman's office and the office's view of how those complaints were resolved. They also provide the Ombudsman's office with a guide to possible systemic issues that warrant further consideration.

The term 'administrative deficiency' is not defined—or even specifically referred to—in the Ombudsman Act. It is a phrase used by the Ombudsman's office when referring to agency action that is assessed as being 'deficient' for a reason specified explicitly or implicitly in s 15 of

the Act. Other Ombudsman offices use similar reporting terms, such as 'agency defect', 'adverse finding', 'complaint sustained' or 'maladministration'.

Categories of administrative deficiency

The Ombudsman's office applies 15 categories of administrative deficiency that fall into two groups: administrative deficiency in an individual case, and administrative deficiency in the agency or system of government.

There is overlap between those categories, and some agency errors can fall into more than one category. An error is recorded only once in the most appropriate category, unless an investigation exposes multiple weaknesses in an agency's administration.

Not every minor administrative error is recorded as administrative deficiency. The prime focus of the Ombudsman's office is upon whether an error was inexcusable, caused disadvantage to a member of the public, or reveals a weakness in agency administration that should be addressed.

Administrative deficiency in an individual case

Unreasonable delay

An agency took too long without good cause to make a decision or take an action

Examples: unreasonable delay in processing a person's application, responding to an enquiry or implementing a decision; failing to comply with FOI statutory time limits in handling a person's FOI request; failing to meet time frames published in the agency's service charter in responding to a person's request.

Inadequate advice, explanation or reasons

A reasonable person could not easily understand the advice, explanation or reasons given by an

agency, either directly to the person or in an agency publication

Examples: giving a person incomplete, incorrect, misleading or confusing oral or written advice; refusing to provide a written explanation for a decision; providing a statement of reasons that contains an error or contradiction or does not deal with a critical issue in the decision.

Procedural deficiency

The procedure adopted by an agency in an individual case was flawed

Examples: not recording oral advice given to a person on an important issue; not answering a person's request for information or advice; inefficient handling of a person's application or enquiry; not consulting appropriately with a person before making a decision; failing to keep a person advised of progress on a matter; failing to advise a person of an agency requirement; failing to implement a decision, or to implement a decision correctly; failing to deal adequately with a person's complaint; inadequate internal review of a disputed decision.

Human or factual error

The integrity of an agency process was impaired by an avoidable error or mistake by an officer

Examples: entering incorrect information on a person's file; misreading or misunderstanding the facts or data in making a decision; basing a decision on faulty information; inadequate assessment of evidence submitted by a person; losing or misfiling a person's application or documents; giving the wrong application form to a person; sending personal information to the wrong address.

Legal error

An agency made a probable legal error that could lead to its decision or action being set aside as unlawful by a court on a ground listed in s 5 of the Administrative Decisions (Judicial Review) Act 1977, or on some other basis

Examples: misconstruing or misapplying legislation; making a decision without a proper delegation; not giving a person prior notice of adverse action against them (ie, breaching natural justice); basing a decision on an irrelevant consideration, or failing to consider a relevant matter as required by legislation; breaching the terms of a contract; conflict of interest in a tendering process.

Unprofessional behaviour by an officer

The standards of professional behaviour expected of officials in dealing with the public were not observed

Examples; rudeness, discourtesy or unhelpful or disrespectful behaviour in dealing with a member of the public; failing to honour a promise or commitment given to a person; imprudent disclosure of confidential or private information to an unauthorised recipient.

Breach of duty/misconduct by an officer

Evidence of misconduct or unprofessional behaviour by an officer is serious enough to warrant referral by the Ombudsman to an agency head under s 8(10) of the Ombudsman Act

Examples: dishonesty; harassment; serious conflict of interest; improper use of official information or agency property; other activity in breach of the APS Code of Conduct (see Public Service Act 1999 s 13).

Unreasonable, harsh or discriminatory action or decision

The decision or action of an agency seriously flouted the principles of good administration

Examples: the agency decision or action was irrational, capricious, excessive, inequitable, contrary to reason or good sense, or in breach of the sex, race or disability standards in anti-discrimination legislation; a decision maker disregarded the severe impact that a discretionary decision could have on a person; a person was treated inconsistently and less favourably than others, without explanation or justification; a change in agency rules was applied retrospectively to deny a person a benefit.

Administrative deficiency in the agency or system of government

Legislation: unreasonable or harsh impact or unintended consequence

A complaint has highlighted a legislative anomaly that the Ombudsman should draw to the government's attention

Examples: complex legislation has an unexpected or unexplained operation that disadvantages a person or class of persons; legislation has a disadvantageous impact on one class of persons as against another, without apparent justification; legislation imposes a condition or requirement for accessing a benefit or concession that is harsh or

difficult to meet; an apparent error or oversight in legislation disadvantages a person or class of people.

Government or agency policy: unreasonable or harsh impact

A complaint has highlighted a defect in government or agency policy or an executive scheme

Examples: a grant scheme administered by an agency is poorly drafted and unreasonably disadvantages some people; the rules of entitlement in an executive scheme, or the administrative requirements for lodging an application, are discriminatory, unfair, unnecessarily onerous or difficult to meet; an arbitrary cut-off date is imposed for lodging applications; the agency rules on selecting people for audits can operate unreasonably.

Flawed agency processes or systems

A complaint has highlighted an inherent or systemic weakness in agency processes or systems

Examples: there is a programming error in the agency's automated system; the agency website is dysfunctional; a public access counter is not open during business hours; the agency contact number is incorrect or not answered; misleading or inconsistent guidance is given in agency publications or on the agency website; agency template letters are incorrect; there is no agency system for complaint handling.

Resource deficiency in agency

A complaint has highlighted a resource deficiency in an agency that impairs the agency's ability to discharge its statutory functions or meet its policy commitments to the public

Examples: an agency cannot process applications, respond to enquiries or finalise internal reviews within a reasonable timeframe; there is an unacceptable backlog in the agency in investigating and resolving complaints to the agency.

Inadequate knowledge/training of agency staff

An administrative deficiency in a particular case occurred more through a systemic weakness in staff skills than through the lack of competence of the individual decision maker or contact officer

Examples: staff are not properly trained to understand or apply legislation administered by

the agency; repeated data entry or retrieval errors by staff indicate skill weaknesses; the manuals or guidelines provided to staff are inadequate or poorly drafted.

Australian Government programs: deficiency arising from their interaction

The programs administered either within an agency or by two or more Australian Government agencies are not as integrated or coordinated as they could be

Examples: unreasonable delay occurs in making decisions that require input from multiple agencies; the complaint handling procedures of multiple agencies that jointly administer a program are poorly integrated; blockages occur between agencies in exchanging information that is required for decisions to be made; different information is required by two or more agencies to substantiate a similar issue; an agency provides incorrect advice about the rules or requirements of another agency.

Commonwealth/State responsibilities: cross-jurisdictional difficulties

The programs administered by Australian Government and State agencies are not as integrated or coordinated as they could be, and an Australian Government agency is partly at fault

Examples; an Australian Government agency relied uncritically on a questionable medical or other assessment by a State officer; an Australian Government agency delegated responsibility for undertaking an activity to a State agency, without adequate care and oversight; there was inadequate preparation for undertaking a joint Commonwealth-State regulatory task; Australian Government and State agencies have not concluded a memorandum of understanding for discharging a joint function.

Recording administrative deficiency

The practice followed in the Commonwealth Ombudsman's office is that a finding of administrative deficiency can only be recorded after investigation and with the approval of a Senior Assistant Ombudsman, Deputy Ombudsman or the Ombudsman.

The intention to record administrative deficiency is always notified to an agency, sometimes by letter, but also by email when there is a less formal style of investigation. An explanation is given

as to why it is intended to record a finding of administrative deficiency. The amount of detail in the explanation will vary depending on the seriousness, significance and contentiousness of the case.

If an agency disagrees with a proposed recording of administrative deficiency, the matter is considered further by the relevant Senior Assistant Ombudsman or, if necessary, a Deputy Ombudsman or the Ombudsman. The decision to record administrative deficiency rests with the Ombudsman's office, and ultimately the Ombudsman, and does not require the concurrence of an agency. The Ombudsman is not inclined to engage in a protracted or adversarial process to reach consensus on whether such a finding is appropriate.

The categories of administrative deficiency cover a broad spectrum. Some are of a more serious nature—for example, breach of duty/misconduct by an officer; legislation that is unreasonable or has a harsh impact or unintended consequence. A process that is suitably rigorous is followed before a finding of that kind is made.

Some other categories cover less serious errors or oversights in agency administration that warrant being recorded either as a guide to administrative improvement or to acknowledge the problem that led to a person complaining to the Ombudsman.

Recording administrative deficiency focuses on the past conduct of an agency—not on the agency's response to the investigation. Even though an agency has readily admitted that an error occurred and has acted promptly to correct the error, it may still be appropriate to identify the deficiency in the agency's processes, as highlighted by the complaint to the Ombudsman's office.

As a general rule the Ombudsman's office only makes a single recording of administrative deficiency in respect of any one complaint. If an error can be recorded under more than one heading—for example, unreasonable delay may stem from a resource deficiency in an agency—the most suitable heading will be chosen. Occasions nevertheless arise in which there are multiple separate errors in an agency's processes, and it is appropriate to record more than one finding—for example, a lost document, and misinterpretation of legislation.

Government service providers

The Ombudsman's jurisdiction extends to the actions of government service providers. The actions of a service provider can lead to administrative deficiency being recorded against an agency. This involves additional considerations, such as whether the agency was aware of the problem and took steps to resolve it, or reasonably should have been aware of the potential for the problem to arise.

More information?

If you would like copies of other Commonwealth Ombudsman fact sheets, more information about the work of the Ombudsman's office, or a more detailed briefing for agency staff, please contact the Director Public Affairs.

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The Ombudsman has offices in:

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