

problem areas in government decision making

The central purpose of complaint handling is to resolve the particular grievance at hand, but that is only part of the function. Complaints about a government service or program can typify a more systemic difficulty, which affects many other people. It is therefore generally accepted within government—especially within agencies with a large service-delivery role—that complaint handling is an integral and valuable function of an agency. Dealing with problems can provide valuable intelligence not only on how a program is operating, but also on areas of potential difficulty.

External complaint handling by agencies such as the Ombudsman is part of a continuous loop of organisational learning from experience. There can also be added insight from external complaint handling, when problems arising across government come to notice. Difficulties faced by people in one area of government are often faced in other areas.

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From year to year, the Ombudsman’s office has sought to draw attention to these general problem areas in government decision making that invite a general response. Issues that have been taken up in previous annual and special reports of the Ombudsman are the need for improvement in internal complaint handling, recording oral advice to the public, and paying compensation for defective administration.

This report takes up a few problem areas identified in the course of complaint handling and investigation during 2003–04. The way these problems manifest can vary from agency to agency, yet they remain issues of concern. The Ombudsman’s office will continue to pay special attention to these issues in 2004–05.

RECORD KEEPING

If an agency is called on to explain or justify its actions, the written record will be the key to doing so. An investigation by the Ombudsman’s office will often focus heavily on scrutinising the written record. Inadequacies in the record trail are therefore a matter of special concern to this office. General problems with record keeping that were identified during the year included the effectiveness of agency systems for registering correspondence and papers, repeated requests by agencies for information already provided, and the quality of agency documents.

As a matter of good administrative practice, a relatively detailed record should be kept of any significant meeting between an agency and an individual. Ideally, the record should be agreed between the parties to avoid any future dispute about precisely what was said and agreed.

This point was illustrated by one case handled during the year, in which millions of dollars were potentially riding on the outcome. Our investigation did not uncover sufficient evidence to challenge the agency’s account of the meeting—the most plausible explanation was that this was at best a misunderstanding on the part of the complainant—but we were able to impress upon the agency that the importance of the meeting should have been reflected in the way it was minuted. If nothing else, it would then be easier to deal with any future complaint.

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We have been critical of agencies in the past for reaching decisions based on the presumption that the absence of information on the agency’s

electronic system is evidence in itself that no such information was provided. Regrettably, complaints of this nature continue to be received, even in agencies that now require an electronic notation of every contact with a customer. An area of particular difficulty is that people often feel that they raised more issues with an agency than the record suggests. Another area of concern is the quality of record keeping in relation to decisions on compensation for detriment caused by defective administration.

We do, on the other hand, appreciate the reasons sometimes given by agencies for not keeping a more elaborate record, especially of oral advice. They include lack of time, the pressure to attend to the next customer, that the information sought was so general as not to warrant recording, or that it is staff practice to record only the primary issues discussed with a client.

We accept that recording of oral advice is a complex issue. Record-keeping requirements for oral advice should not inhibit an agency's capacity to provide prompt, efficient service. To record all oral advice in detail would be an unreasonable and excessive burden. Yet these realities of administrative practice should not overshadow the extent to which this problem cannot be ignored. People rely on government for accurate advice; the receipt of, or eligibility for substantial benefits can sometimes hinge on the advice that is given. Government itself accepts that providing advice is one of its functions. It is correspondingly important to perform that function with an understanding of the expectations to which it gives rise, and of the standards that must be observed.

Numerous complaints were received during the year about agencies making continual requests for the same information. One complainant reported he had been asked more than eight times for his wife's tax file number, even though he had already provided it on several occasions. Another general problem area was that a medical certificate that a benefit recipient was required to lodge was lost or missing. It was clear that the certificate had been received, as payment of the benefit had continued. However, the absence of the certificate on the file meant that no alteration was made to a condition imposed on the recipient to report or

attend an information session, with the result that an administrative breach was recorded against the person.

On other occasions we were told that a customer file was missing and was therefore not accessible for review by Ombudsman staff. In some instances this problem originated from off-site records management and batch filing practices. Related problems were that files did not contain documents that should have been there, that files were lacking in chronology, that inadequate folioing meant that the adequacy of record keeping could not be scrutinised easily, and that numerous files on an individual were held in different locations. For these and other reasons we regularly ask to see the agency file when investigating a complaint.

'The accuracy or quality of agency advice ... is a recurring theme ...'

GIVING ADVICE

The accuracy or quality of agency advice—oral advice particularly—is a recurring theme in many of the case studies and the discussion elsewhere in this report. Typical complaints received by the office during the year were those alleging incorrect advice about how the assets test affects eligibility for social service benefits, whether a voluntary cessation of work to undertake university study will lead to a reduction in child support payments, the requirements to be met for a visa of a particular subclass, and the tax treatment of eligible termination payments.

The issues on which people turn to government agencies for advice can be matters of great importance in how they structure their lives and finances. They can also be complex issues, on which people rely heavily on agencies for correct advice. When the advice is given orally, and—as it increasingly is—by a call centre officer, the difficulty of the issue is apparent.

Dealing with complaints about inaccurate advice is similarly challenging for the Ombudsman's office. It is necessary first to resolve whether inaccurate advice was given. This can be especially difficult if the advice was given orally,

if there is no written record, or if there are conflicting written accounts kept by the complainant and the agency.

There is also the issue of remedy. In some cases it is possible to unscramble the problem, and to put the complainant in the position they would have been in had accurate advice been given (or understood). At other times an apology will suffice. In more serious cases there may be irremediable detriment to a person who has followed advice, and questions of compensation or remission of penalties will need to be addressed. It then becomes all the more important to clarify just what was said and when and by whom.

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Disputes about the accuracy of advice will never go away, but they can be minimised. The development of appropriate strategies has been a central concern of the Ombudsman's office, shared by agencies. The issue was earlier taken up by this office in the publication *Oral Advice—Clients Beware*; it will be a topic of renewed attention in 2004–05.

We accept that it is not always feasible to keep a written record of all advice, particularly advice of a general nature given by a call centre handling millions of calls each year. Nevertheless, we revisit this issue regularly with agencies, and generally take a hard-headed approach in querying whether it is as difficult as sometimes claimed to make a brief contemporaneous written record. Electronic coding of the nature or category of advice given is one way of partly addressing the issue.

Other strategies adopted by agencies can also be effective in minimising difficulty. One is to have supplementary written information such as brochures and pro forma letters that can be sent to inquirers, who can then reconsider or confirm their understanding of an issue. Another approach is to adopt greater caution in giving oral advice, and to alert a person to the need to explore other means and sources of advice (such as written publications, a professional adviser, or the tax ruling system). Yet another strategy noted in the Ombudsman's

2003 report into complaint handling by the Australian Taxation Office is the 'one plus one' policy. If a tax officer cannot resolve a taxpayer's inquiry in the first instance, rather than simply passing them on to someone else, the tax officer makes contact with other tax officers on behalf of the complainant to identify a person who can respond to the inquiry.

DEALING WITH THE EXCEPTIONAL

A purpose of legislation is to lay down common rules that govern access to or termination of government benefits and concessions. The common rule will usually deal adequately with the generality of situations to which it applies, but there can be unexpected cases where an exception to the rule is required.

Complaints to the Ombudsman are more likely to deal with the exceptional case, or with the alleged failure of an agency to permit an exception to be made to the common rule in a particular case. Our experience in handling complaints points to two matters of general principle. The first is that it is important for legislation to anticipate the exception. This can be done in different ways, notably by a 'hardship' provision or a 'safety net discretion' in the legislation. Safety net provisions are those that allow the decision maker the ability to correct anomalies or unintended consequences.

We encounter instances in which legislation that is increasingly specific and complex in format does not contain provisions of this kind. In these instances, an agency may be unable to respond adequately to an acknowledged case of hardship or unforeseen difficulty.

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A second general principle is that legislative provisions accommodating the exceptional or the unforeseen should be administered by an agency in a manner suiting that objective. While agencies are understandably alert to the danger that an exception can expand and overtake the

common rule, it is equally necessary for agencies to be flexible and open-minded in accepting that exceptional situations should be responded to when they arise.

The following examples illustrate in different ways how exceptional problems can arise or may need to be dealt with.

The first example is from the migration legislation, which has a highly specific set of rules to govern eligibility for and renewal of visas. In circumstances encountered by the Ombudsman's office, an onshore applicant for renewal of a visa may be ineligible because of circumstances beyond their control. A common reason is that the time limit for applying for or seeking renewal of the visa has expired during the period that the person was awaiting a decision in an appeal case. In limited circumstances, the Minister has a personal and non-reviewable power under the legislation to grant a visa to a person who otherwise does not qualify. However, a familiar scenario encountered by our office is that a person may have no practical option other than to leave the country to lodge a fresh application for a visa.

The second example comes from legislation governing eligibility for social service benefits. The legislation contains a formula by which the existing assets of a person can be relevant in deciding their eligibility or ineligibility for a benefit. An asset can be disregarded on hardship grounds spelled out in the legislation. In some cases brought to the office, we have been critical of decision makers for taking an unduly narrow stance in applying the hardship provisions. While acknowledging that subjective judgment necessarily has a part to play in applying hardship provisions, we have noted on occasions that merit review tribunals have similarly been critical of decision makers for the same reason.

The third example illustrates the way that legislation is read and applied will sometimes influence whether exceptional difficulties can be taken into account. In one instance about which complaints were received, a person's eligibility for a benefit could depend on the 'base year' they had nominated. The agency initially declined to allow any subsequent alteration to the base

year, claiming that it had no discretion under the legislation to allow alteration or correction of mistakes. The agency relented when we pointed out that other details given by the person in their application indicated that the year had been incorrectly recorded. In effect, viewing the application as a whole, a correction should be made to validate the intent of the applicant.

The same contention has been accepted by an agency in another situation, where money paid by a person and to be credited to their account in a particular year had not been passed on by an intermediary (their employer) until a later year. Our point was that it was consistent with and would validate the intent of the legislation to treat the money as having been given to the agency at the time the payee had done all that was required of them.

REVIEW OF AGENCY DECISIONS

There is now an extensive system for review of decisions made by Australian Government agencies. The review body in some instances is an external tribunal, in others an internal review unit, and in a growing number of instances both an external and an internal review body. Much work has been done in Australia by bodies such as the Administrative Review Council in refining the principles for independent review of agency decisions.

The value of review mechanisms is repeatedly seen by the Ombudsman's office; indeed, we often decline to investigate if a complainant has not first exercised a right of review. On the other hand, we receive complaints each year that point to the need for close scrutiny of the operation and adequacy of review mechanisms. There is no theme consistently emerging, other than the importance of ensuring that review mechanisms are well structured and integrated with other decision making in the agency.

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The following examples are illustrative of problems seen by the Ombudsman each year.

An example from the migration legislation illustrates the irregular situation that can arise when not all aspects of a decision are reviewable. There are numerous conditions to be satisfied by a person in order to be granted a visa of a particular class. A decision that an applicant fails to meet some of these conditions is appealable to the Migration Review Tribunal or the Refugee Review Tribunal. A decision that an applicant fails to meet some other of the conditions can result in the application being classified as 'invalid'. Though not appealable, an applicant may be able to reodge the application once the deficiency has been remedied.

On the other hand, there can be a negative outcome if, by this time, the applicant is unable to meet some other condition for the visa when making a fresh application. (For example, the applicant has passed a specified age or does not have a recent educational qualification.) Such may not be the case if the decision was appealable to a tribunal, since some features of the decision may be 'preserved' pending resolution of the appeal. (Some decision makers have responded to this problem by informally reconsidering the initial assessment that an application was invalid. While beneficial, this still lacks the quality of independent review, namely, that the right is exercisable by all on defined criteria and is properly recorded.)

We see examples pointing the other way, in which the conferral of rights of review can be disadvantageous in a practical sense. Applicants in the social security stream have the opportunity to seek internal review by an Authorised Review Officer (ARO), and external review by the Social Security Appeals Tribunal and the Administrative Review Tribunal. To facilitate speedy and informal review of decisions, steps have been taken at an executive level for original decision makers to reconsider their own decisions before review by an ARO. We have questioned the practical benefit of this initiative. We found that only a small percentage of decisions were overturned upon reconsideration, and complaints to our office suggest that the additional level of review can cause 'review fatigue' for applicants.

A different issue in relation to review of decisions is that we have detected a disconformity in some areas of decision making (such as debt waiver) between the approaches taken by decision makers and external review tribunals. This is not a new issue; over time, senior agency officers have occasionally and publicly defended their reluctance to give effect to a line of tribunal decisions of which they disapprove. Even so, it is a problem that should not be dismissed lightly. For example, some complaints that we have investigated highlight that in debt waiver cases primary decision makers have sometimes been concentrating too narrowly on the legitimacy of a debt being raised. They have not been dealing with the additional question (taken up by tribunals applying the statutory criteria) of whether there are special circumstances that warrant a discretionary waiver.

An undesirable consequence, when there is a disconformity between the approaches at primary and review levels, is that the outcome for a person can depend unduly on whether or not they seek review. The different levels of decision making and review should operate compatibly as part of a coherent system.

Another perennial issue in relation to the appeal system concerns the approach that should be adopted by an agency when it is faced with conflicting tribunal decisions and legal opinions, and resolution of the disagreement by legislative action or judicial review is still some time away.

This issue arose during the year in relation to the question of whether import approval could be given by the Department of Transport and Regional Services (DOTARS) for vehicles already physically landed in Australia. Several complainants, who had been refused import approval by DOTARS, pointed to their different expectation and to the disconcerting and expensive range of options they faced (re-exporting the vehicle, crushing it, abandoning it, or having it impounded).

Pending resolution of an appeal initiated by DOTARS to resolve the issue, we held lengthy and cooperative discussions with them to explore options for addressing and minimising the problem. Options included facilitating discussion between complainants and DOTARS, expediting the hearing of the appeal, examining payment of compensation,

exploring options for legislative change, and developing internal complaint-handling procedures. (The upshot is that the Full Federal Court held that import approval could be granted under existing legislation: *Minister for Transport and Regional Services v Marra* [2003] FCAFC 294.)

SCHEMES ESTABLISHED BY EXECUTIVE ACTION

Many government schemes and programs are established by executive rather than legislative action. An example given in the 'Looking at the agencies' chapter is the GEERS scheme administered by the Department of Employment and Workplace Relations, for payment of redundancy benefits. There are advantages to an agency in schemes of this nature, principally in the flexibility for the agency in establishing, altering, redefining and dismantling the scheme as circumstances require.

Yet that flexibility poses risks to the enjoyment of rights by members of the public. We have received a small number of complaints dealing with a few different executive schemes, and perceive some areas of common concern. One is that the criteria of entitlement are not necessarily as clear or ascertainable in an executive-based scheme as in a legislation-based scheme. This is particularly a problem if the internal agency documents that constitute the scheme are in a state of flux, or different decision makers are applying different versions.

A related problem that we dealt with, involving an executive program for disaster assistance, was that a restructure of the program did not deal with the transitional problem of applications that had been lodged but not determined at the time the program was restructured. A complainant to our office had his application rejected for failure to meet the new criteria. We pointed out to the agency that if the scheme had been established by legislative action it was unlikely that Parliament would have agreed to a restructure that did not make favourable allowance for applications lodged but not determined. The agency agreed and approved the grant.

Another difficulty with schemes based in executive action is that there is usually a reduced range of

review and appeal rights. For example, the appeal jurisdiction of the Administrative Appeals Tribunal is conferred by legislation only. The right to complain to the Ombudsman is ordinarily the only external review option. We point out to agencies that it is important when establishing executive schemes to build an internal review framework into the schemes.

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OTHER ISSUES

Other problem areas in agency administration that we have noted during the year, which will receive close attention by the Ombudsman's office in 2004–05, are discussed briefly below.

Agency complaint handling

A consistent theme in Ombudsman reports is that the integrity and professionalism of complaint handling within agencies is a key element of an administrative justice system. Whether there is effective internal complaint handling can have a measurable impact on the number and seriousness of complaints coming to the Ombudsman and the time taken to resolve those complaints. Our general experience is that internal complaint handling is of distinct benefit to agencies, in terms of their accountability and responsiveness in service delivery, and their policy development and organisational learning.

For this reason the Ombudsman's office works closely with agencies to assist them to develop and improve complaint-handling processes and structures. During the year we worked with a number of agencies in training, development and consultation about complaint handling. In particular we worked closely with the Australian Taxation Office, Centrelink, the Child Support Agency and DOTARS.

Compensation for defective administration

Some mention is made in the 'How the Ombudsman helped people' chapter of the role played by the Ombudsman in investigating complaints about

failure of claims under the scheme for Compensation for Detriment Caused by Defective Administration (CDDA).

We received numerous complaints during the year, relating to a few different agencies, about CDDA claims. Among the matters complained about were inconsistency between agencies in making CDDA decisions; lack of experience of CDDA decision makers; rejection of CDDA claims at an inappropriate level in the agency; reluctance to talk directly to the claimant in examining a claim; a tendency without proper investigation to prefer an agency's version of events to a claimant's; failure to address the core issues underlying a claim; undue delay (of between 6 and 18 months in one agency) in deciding CDDA claims; and inadequate reasons explaining why a claim had been rejected.

Apologising for agency error

One of the more common remedies that the Ombudsman's office suggests to agencies is to apologise to a complainant for a difficulty that arose. This can often be an adequate remedy, for instance, where the matter complained about was an agency letter that was unnecessarily threatening or demanding in tone.

Some agencies will readily accept the need to apologise, whereas others can be more reluctant. One obstacle we encounter at times is a misplaced concern that an apology will be construed as an admission of liability should legal action ensue.

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Our general point in raising this issue is to draw attention to the role that an apology can play. Too often we find that an agency is reluctant to offer an expression of regret, or in the event that an acknowledgment is forthcoming, that the quality

and content of the apology is meaningless. We would like to see more agencies taking the initiative to offer an apology as a possible remedy without having to be prompted or goaded into doing so by the Ombudsman's office.

Persistent complainants

We note in the 'Challenges in complaint handling' chapter that we are taking up the problem posed by complainants who are persistent and inflexible beyond any reasonable limit. We are aware that this can also be a problem for agencies, and we have generally been supportive of steps taken by agencies to address the problem.

'We are taking up the problem posed by complainants who are persistent and inflexible beyond any reasonable limit.'

An example is a draft plan adopted by Centrelink in 2003, outlining the manner in which staff should deal with difficult and persistent customers. The focus in the draft Centrelink plan is heavily on one-on-one interaction and on nominating a specific case officer to manage an individual's needs. By nominating a point of contact, the individual is less likely to become frustrated at repeatedly having to tell their circumstances and may develop a relationship of confidence with the individual officer dealing with their complaints. The strategy is aimed at correctly capturing the issues raised by the individual and not allowing old or exhausted issues to keep resurfacing. There is a strong focus on finalising outstanding issues, reporting in writing, and closing the issue to further discussion. This approach can avoid duplication of work and instruction, and reduce miscommunication or misinterpretation.

We have sometimes shared with agencies our own experience and strategies. For example, at times we have felt the need to restrict a complainant to communicating with the office in writing, and on other occasions to explain that subsequent correspondence will be read and filed but may not be answered if no new issue is raised.

FEATURE

corporate communication, information and outreach team

The Corporate Communication, Information and Outreach Team located in Canberra supports the core business of the office, providing an integrated and coordinated approach for corporate communication, information management and outreach activities. The Team consists of the Chief Information Officer and two staff.

Key responsibilities and activities include developing and maintaining the office's internet and intranet websites; managing corporate information in electronic and hardcopy forms; coordinating content, design and printing of publications (for example, the Commonwealth Ombudsman and ACT Ombudsman annual reports); producing brochures, posters and corporate stationery; supporting outreach activities; responding to information requests; and facilitating the flow of information between the office and the general community, government agencies, Parliament and the media.

During the year, the Commonwealth Ombudsman was exempted from having to use the Australian Government logo and given authorisation to continue to use the office's logo. Subsequently, the Team worked on refreshing our logo and corporate branding to ensure consistency, and has gradually applied this to corporate stationery, signage and publications. Significant progress was achieved in revising and updating the office's Complaint



Investigation Guidelines, which will be adapted for online use in the new complaints management system. The Team also coordinated a client satisfaction survey of 2,000 complainants, which provided the office with valuable benchmark data for assessing how well complainants think we are doing our job.

In conjunction with the Information Technology Director, the Team researched web content management systems and options for website redevelopment, specifically targeting the online complaint function.

In the coming year, we will develop and implement an enhanced outreach program to rural and regional Australia. The Ombudsman received additional funding for the office's outreach program in the 2004–05 Budget, and new positions were created throughout Australia, including an Outreach Manager based in Canberra.