

# problem areas in government decision making

9

CHAPTER 9

PROBLEM AREAS IN GOVERNMENT DECISION MAKING

A feature of the Ombudsman's previous two annual reports has been a chapter of the same title, looking at general problem areas that were identified during the investigation of individual complaints. This is an exercise, in a sense, in joining the dots. A problem faced by a person in one area of government can be common to several agencies.

Some recent projects in the Ombudsman's office that are described in other chapters—the adoption of a new complaints management system and a new work practice manual, and the creation of the Public Contact Team—were designed to harness the ability of the office to identify general problems and cross-agency issues.

Among the problem areas discussed in previous annual reports were record keeping; the accuracy and quality of agency advice, especially oral advice; the need for 'hardship' provisions and 'safety net discretions' in complex statutory entitlement schemes; oversight of decisions made under non-statutory schemes; unexpected problems that can arise in automated decision-making schemes; and people falling through the cracks (or over the edge) of government programs.

This year we look at a different selection of general administrative problems. The problems were not necessarily caused by government agencies, or even a consequence of sloppy administration. Mostly they stemmed from the sheer complexity of legislation and administrative schemes, especially when applied to the different circumstances of thousands of government clients. The changing face of government, as programs and structures evolve to deal with new social challenges, also give rise to unexpected problems. Sometimes government agencies are slow to adapt to unanticipated issues, do not communicate effectively with clients, or fail to recognise the administrative burden that government requirements can impose on people.

'The problems ... mostly stemmed from the sheer complexity of legislation and administrative schemes ...'

The diversity of problems and causes illustrates the challenge faced by government, and taken up by the Ombudsman's office, in identifying the problems that people encounter in their dealings with government.

## ADMINISTRATIVE IRRITANTS

Many of the problems that people experience with government are not major in themselves, but cause irritation as they can add to the stress of daily life and often seem avoidable. Examples are delay in being served at a government counter or in having a telephone call answered; being sent the wrong form by a government agency; calling an agency and being told that the contact person has now left or has changed; or receiving a government letter that is not easy to understand, has a harsh tone or is outdated because of some other development. Problems of this kind will possibly increase over time, because of the frequency and variety of ways that people now interact with government, the growth in size of government agencies and the pressures on people's time.

We do not always investigate these irritations, because they usually pass or can be taken up directly with an agency. However, complaint letters and telephone calls to the office are sprinkled with administrative irritations that arise during people's interaction with government. Government agencies should always try to reduce or eliminate administrative burdens when planning and delivering services. Following are some examples of where agencies have considered this.

In March 2006, we published a report into the Australian Taxation Office's (ATO) administration of

the Superannuation Co-contribution Scheme. We recognised and praised the ATO's attempts to reduce the administrative burden on taxpayers who benefit from this scheme. The ATO does not require an application process, and instead automatically assesses entitlement to the co-contribution when a taxpayer, who makes a contribution and satisfies all the eligibility criteria, lodges their tax return.

Although this minimisation of interaction between the ATO and the taxpayer advantages taxpayers, it increases the burden on the agency to ensure that taxpayer expectations are adequately managed through publicity campaigns. Our report on the co-contribution scheme, based on complaints we had received, suggested that the ATO may need to explore new ways of encouraging taxpayers to clarify their understanding and seek additional information where necessary.

In an example of a different kind, the ATO contacted our office before implementing a strategy to contact small business debtors at home in the early evening, when other attempted contact had been unsuccessful. The ATO recognised that this method of contact may increase complaints, and therefore briefed our office on the reasons behind the strategy so that we could respond to any contacts from this group. The planning that went into this strategy seems to have been successful in averting too many complaints.

Centrelink has also recognised the potential to reduce the impact of its administrative processes on customers. Many people transfer from another Centrelink payment on their age pension qualification date (63 years for women and 65 years for men). From April 2006, Centrelink implemented new procedures to streamline the transfer process for these people.

A transferee is sent a Transfer to Age Pension Review form, pre-populated with the information Centrelink held about them before their age pension qualification date. Information is provided that explains the advantages and disadvantages of transferring to the age pension and the taxation implications of the different payment. This reduces the administrative burden on the claimant, and allows them to make an informed choice about transferring or remaining on their previous payment (where possible). It also gives them an opportunity

to check that the information Centrelink holds about them is accurate and to provide any additional information about their circumstances.

## COMPLEXITY

Many of the complaints we receive stem from the complexity of legislation and government programs. Complexity can adversely affect people in different ways:

- a person might not understand what they have to do to obtain a government benefit
- advice given by an agency can be misunderstood, or not answer a person's unique or specific query
- a person might structure their affairs on a mistaken understanding of how a program applies to them
- someone can 'fall through the cracks' between government programs that do not interact seamlessly
- through confusion and inactivity, someone might fail to take a necessary action and be penalised for not doing so.

Many adverse consequences cannot be reversed, either because the damage has already occurred, or there is no discretion in the law to overturn the result. Nor does it seem likely that there will be any reduction in this complexity over time and a return to an era of fewer and simpler rules.

The Ombudsman's office carries out its complaint investigation role against this backdrop of complexity. The challenge is to develop government systems with an eye to this inevitable complexity and to build in ways of responding to the problems that people unexpectedly encounter. We mentioned different ways of doing this in previous annual reports. They include agencies paying administrative compensation to unwitting victims of administrative error; writing safety net discretions into statutory schemes to deal with the unanticipated consequences of laws; and providing simple remedies, such as an apology, when things go wrong.

Another important response is for agencies to have effective systems for internal review and complaint handling. On the one hand, this can enable a person

to seek relief and assistance from an agency at an early stage and by an informal and flexible process. On the other hand, internal complaint handling can provide an agency with an early opportunity to learn of problems that are arising in the administration of its programs.

These points are illustrated in the following discussion of the important role that complaint handling can play in two areas of growing complexity in government—the administration of taxation laws, and airport management and security vetting.

### Administration of the tax legislation

In March 2006, the Ombudsman made a submission to the Joint Committee of Public Accounts and Audit (JCPAA) regarding the administration of the tax legislation. Since the role of the Taxation Ombudsman was vested in our office in 1995, we have received approximately 22,000 complaints about the ATO. Coupled with our own motion investigations, this has given us some insight into the difficulties that taxpayers experience with the existing system.

Many of the tax complaints we receive relate to the complexity of the legislation. Because modern commercial activities and financial transactions are complex, there has to be some degree of complexity in the tax law. In our submission to the JCPAA we argued that this places an additional responsibility on the ATO to ensure that the underpinning administrative processes are as simple as possible. Further, it is important that effective review and complaint mechanisms are available to aggrieved taxpayers and that the ATO recognises its responsibility to educate taxpayers to navigate this complexity.

**‘Many of the tax complaints we receive relate to the complexity of the legislation.’**

We found that the ATO offers several review options that work well for most taxpayers. Similarly, an accessible internal complaints system complements our role and reflects the ATO’s commitment to complaint resolution. The ATO has also been proactive in making documents such as

the Compliance Program and tax rulings available on its internet site to assist in strengthening understanding of the legislation and supporting policies. This framework means that sometimes our role is to explain the law, rather than actively investigate a complaint.

### Complaint management in airports

During the year, we noted an increase in complaints about aspects of airport administration. Two factors seem to lie behind this trend. One is the larger number of organisations, government and non-government, that have a role in providing services at airports and managing the flow of passengers and goods. A great range of activities take place at airports, and some government functions are outsourced to private sector organisations. The other factor is the heightened security measures at airports that bring passengers into contact with uniformed and non-uniformed public servants and private contractors. Security vetting can also be a cause of frustration for passengers, particularly if they are delayed or miss a flight.

The Ombudsman decided to respond to this increase in complaints about airport administration by conducting an own motion investigation into the accessibility of complaint channels available to passengers. Among the issues that warranted investigation were whether the complaint mechanisms of individual agencies were adequate, whether those mechanisms were sufficiently integrated with each other, and whether there was a danger that people with genuine problems would fall between the boundary lines of different complaint schemes.

Our initial survey of complaints suggested that passengers could find it difficult to complain about the conduct of an official at an airport. Some passengers had difficulty in identifying the organisation for which an official was working or the particular official involved. The similar appearance of some uniforms, combined with the stresses experienced by passengers, could lead to misidentification.

Even if a passenger were able to identify the official and their organisation, the appropriate complaint channel was not always apparent. There was little information posted in airports to make

passengers aware of their right to complain or the manner in which a complaint should be made. Given these issues, a passenger may not always complain to the correct authority in the first instance.

A further issue of concern was that the government agencies involved in airport administration did not appear to work as collaboratively as they might. For example, complaints incorrectly received by one department were not necessarily forwarded to the correct agency, increasing the risk of complaints being overlooked.

In investigating this issue, we focused on bringing together the agencies involved in airport administration and encouraging them to work towards a common approach in addressing the problems faced by dissatisfied customers. We promoted the development of a simple, accessible complaint-handling mechanism across all agencies or, failing that, complementary, seamless processes for transferring misdirected complaints. The project also provides an opportunity to test whether the complaint-handling mechanisms used by agencies meet a common benchmark, such as the new Australian Standard on complaint handling (AS ISO 10002–2006).

*'... we focused on bringing together the agencies involved ... and encouraging them to work towards a common approach ...'*

We invited representatives from the various agencies involved with airport administration to attend a workshop and discuss an issues paper prepared by our office. From those discussions we developed an interim report that will be sent to relevant agencies for comment early in 2006–07. The report will be published once comments are received from the agencies.

### **ADMINISTRATIVE DRIFT**

A common cause of complaint to the Ombudsman across all areas of jurisdiction is agency delay in making a decision or resolving a matter. The Ombudsman has taken up this issue in reports and submissions to parliamentary committees, drawing

attention to the problem of delay in areas such as Defence investigations, FOI processing, immigration detention management, and determination of veterans' claims. However, the problem of delay is more widespread, and occurs in most areas of administration.

The label 'administrative drift' appropriately describes what occurs, because delay often results from a matter drifting far beyond anyone's expectation. Some of the reasons are familiar and pervasive—a file being given a lower priority than other matters or being put aside in the 'too hard' basket to be looked at later; responsibility for a decision passing from one officer to another; or one aspect of a case being reconsidered or referred for advice before a final decision on the whole case is made.

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As those examples show, delay can stem from many different causes. It sometimes arises from a short-term resource deficit in an agency, but more commonly it results from the lack of a binding process or clear strategy within agencies to ensure that delay does not occur. The strategies that can be used to prevent delay can be as varied as the causes themselves. However, the more important point is that each agency should have one or more strategies to deal with the kinds of delays that occur in its administrative processes. In short, there should be a clear agency policy on avoiding administrative drift. The following examples from recent experience in the Ombudsman's office illustrate a few different strategies that have been successfully used in different areas of government.

One effective means of avoiding delay can be a system of internal and external complaint handling. Experience suggests that any complaint from a member of the public about delay in their case, made either to the agency itself or to the Ombudsman, usually has some impact in triggering the agency to take action to resolve the matter or hurry it along.

Another effective, though indirect, means for controlling delay is to hold regular meetings to

consider all cases that have been unresolved for a prescribed period of time. This can occur within agencies, but equally can occur between an agency and an oversight body such as the Ombudsman. For example, a series of meetings between the Ombudsman's office and the Department of Veterans' Affairs (DVA) to discuss unresolved complaints to the Ombudsman resulted, over ten months, in the number of DVA cases open for more than six months dropping (despite an increase in DVA complaints over that period).

A different strategy again is to have an early assessment procedure for cases that run the risk of being delayed. We were recently informed by the Department of Defence of a new procedure it had adopted to reduce delay in resolving Redress of Grievance (ROG) cases (which had been targeted in a joint report by the department and the Defence Force Ombudsman as a major problem). Now, the commanding officer to whom a ROG is submitted must, within five days, submit a written plan to the department's Fairness and Resolution Branch in Canberra, setting out the issues and explaining how they are to be handled.

We adopted a similar process this year for early assessment and case management of complaints, to handle the 30,000 or more approaches and complaints that come to the Ombudsman's office each year. Matters reaching the office fall into five different categories. Staff in the Public Contact Team handle simpler matters, described as category one matters; an investigation officer generally handles category two matters; and an executive level officer, a senior assistant ombudsman or a deputy ombudsman supervises more complex matters (categories three to five). An investigation plan is prepared for any case designated as category three or above. There is a two-monthly reconsideration of every case opened for more than six months.

Periodic review of unresolved cases can be brought about in other ways too. A new function conferred by statute on the Ombudsman's office in 2005 is to review the case of any person who has been in immigration detention for two years or more (cumulatively), and to do a further review each six months if the person remains in detention. When this function commenced in July 2005, 149 people had been in detention for more than two years,

with the longest period of detention being more than seven years. At 30 June 2006, 66 people had been in a detention facility for more than two years, while 30 people had been housed in alternative detention arrangements. Many factors lie behind that change, but as a generalisation it can be said that the mechanism of an automatic two-year review has been instrumental in bringing many unresolved cases of detention to a conclusion. In some instances a person was granted a visa of some kind, while in other instances action was taken for a person's removal from Australia.

In discharging this reporting function, the Ombudsman's office has focused on whether the Department of Immigration and Multicultural Affairs (DIMA) is taking effective action to resolve a person's detention. The stumbling block can vary from case to case—for example, identifying a person or obtaining travel documents from another country. Unexplained inactivity or ineffective action by DIMA to resolve a person's detention has been a key factor taken into account by the Ombudsman in deciding whether to recommend to the minister that a person be granted a visa to be released from detention or be placed in community-based detention.

It should be noted that some statutes seek to pre-empt delay by prescribing a time period for making a decision. An example is the *Freedom of Information Act 1982*, which provides that an FOI request must be decided within 28 days, and internal review of an FOI denial must be completed within 30 days. Failure to comply with either time limit is deemed a refusal, which can be the subject of a review application. The FOI time limits have not been entirely successful in preventing delay, but they provide a clear statutory benchmark for applicants, agencies and the Ombudsman.

## UNHELPFUL LEGALISM

Australian Government administration is bound by a large and growing volume of complex legislation. Lawyers and legal considerations will therefore have a role in resolving many disputed issues. Given that all administrators have a duty to act lawfully, they will often need legal guidance.

On the other hand, there is a growing risk that in the complex legal environment of government, legal

approaches will overshadow the important role of administrative discretion and judgment in finding a practical resolution to problems. Although lawyers can make a positive contribution to administrative decision making, this does not mean that the more lawyers involved, the better the decision-making process.

The Ombudsman's office has often had cause to criticise unnecessary or unhelpful legalism by agencies. When agency lawyers become closely involved in deciding how to respond to the Ombudsman's office, there is a greater chance that jurisdictional and technical issues will be raised. Such issues include the scope of the Ombudsman's jurisdiction to investigate, the relevance of the *Privacy Act 1988* to disclosure of information to the Ombudsman's office, the legal obstacles that would confront the agency in varying the decision about which a complaint has been made, or the broader ramifications for the agency of varying that decision. Those issues all have a role to play, but when they become the focus of discussion between the Ombudsman's office and an agency, more time can be spent discussing how to address a complaint than the complaint itself. The attention given to finer points and procedural issues can be at the expense of the whole picture and a discussion of outcomes and solutions.

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There is a danger of a trend towards unhelpful legalism. There has been a steady increase in the number of lawyers in and outside government; all aspects of government are regulated to a greater extent by laws of increasing complexity; and legal considerations are intertwined with other social trends, such as an emphasis on risk management and human rights protection.

It is not easy to reduce the emphasis that agencies (and society generally) put on legal solutions and approaches. In a system based on the rule of law, there is no alternative to acknowledging and dealing with relevant legal issues raised in complaints or by agencies.

Nevertheless, our experience is that there is much to be gained by a readiness to stand back from any problem and to put legal issues to one side while discussion proceeds on other aspects of the problem. Sometimes, for example, a person's complaint about the correctness of a decision might in fact stem from some other dissatisfaction with an agency. Or there may be an acceptable way of working around the problem, or finding a remedy that will satisfy the complainant (such as an apology, a conciliation meeting, or payment of administrative compensation).

We have also found that some agencies are more likely than others to emphasise legal issues and limitations. Conversely, some agencies have been prepared to change their style of response to the Ombudsman's office when we have been critical of a trend towards legalism in the agency. This experience suggests that there is scope for agencies to adjust the emphasis they put on legal considerations in deciding how to resolve problems encountered by members of the public.

Similar concerns have at times been expressed by the Ombudsman's office to lawyers who have complained, either personally or on behalf of clients. Sometimes we find that lawyers' advocacy of complaints can be unduly strident or too focused on legal niceties. This can impede rather than assist the sensible and effective resolution of a complaint.

## OTHER ISSUES

### Documentary proof of an issue

A person's entitlement to a benefit or concession will often depend on whether they can satisfy an agency that they meet eligibility criteria. To assist applicants, the agency will sometimes specify what evidence will satisfy the criteria. While this can be useful guidance, there is a risk over time that agency officials will accept proof only in that manner, when in fact there is scope for flexibility.

Some complaints we received during the year arose from agencies requiring specific documents to be lodged in order to prove an issue. In some cases the agency was inflexible and would not accept alternative documents that proved the issue to an equal standard. In other cases, the agency insisted on a specific document being provided, even though

it was impossible for the person to provide the document and it had not been required on previous occasions in relation to the same issue. Some people caught in this situation have been unable, without the intervention of the Ombudsman's office, to persuade the agency to accept alternative evidence.

### Thoroughness of internal review

Most agencies offer a person dissatisfied with a decision of the agency an opportunity to have the decision reviewed by a more senior officer. It is important that the internal review process provide a genuine opportunity to correct any errors in the original decision. Some complaints this year illustrated that this is not always the case.

In one complaint investigation, we found factual errors in a decision that had not been picked up during an internal review process that confirmed the decision. The errors were apparent on the file and had not been clarified even though there had been subsequent discussion of the case between the agency and the applicant for review.

In another case, an agency had refused to consider fresh evidence or information during the internal review process. The justification given by the agency was that it regarded internal review primarily as a means of ensuring quality and consistency in agency decision making. The agency changed its approach after we pointed out that this was contrary to accepted notions of internal review (as, for example, spelt out in the Administrative Review Council publication, *Internal Review of Agency Decision Making*, Report No 44, 2000).

Though agencies have considerable latitude in defining the scope and procedure for internal

review, an agency should clearly spell out in advance any departure from accepted notions. A person seeking internal review should do so with a proper understanding of what they can expect.

### Intelligibility of letters

The intelligibility and adequacy of government letters is a frequent complaint issue. Some of the problems we have encountered are described in the 'Looking at the Agencies—Centrelink' section of Chapter 7, where we report on issues we have taken up with Centrelink in the context of its Letters Improvement Project. Generally, the problems we note in government correspondence fall mainly into three categories.

- There are deficiencies in the explanation provided to a person about how a decision was reached. For example, a letter may not adequately explain the reason for suspending a payment or the information that was included in an assessment. Unless the person seeks further information, they will not be in a position to evaluate whether the decision was correctly based, or an application for review should be made.
- Information about review rights is not communicated consistently in written correspondence. Review rights are given more prominence in some letters, but in others the information is included in the text on the back of a letter and is more easily overlooked.
- Standard text is sometimes not tailored to the circumstances of the recipient. Standard text can be advantageous in maintaining the consistency and quality of correspondence, but it should not do so at the expense of accuracy and relevance.