Commonwealth OMBUDSMAN

Submission by the Commonwealth Ombudsman

A STRATEGIC FRAMEWORK FOR ACCESS TO JUSTICE IN THE FEDERAL CIVIL JUSTICE SYSTEM

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Background

These comments respond to the September 2009 Report by the Access to Justice Taskforce on *A Strategic Framework for Access to Justice in the Federal Civil Justice System.*

Introduction

Membership of the Australian community carries with it rights and obligations. Enjoyment of those rights and a fair meeting of those obligations must be claimed, asserted and sometimes contended for. Where rights cannot be claimed, and where obligations fall on those who are simply unable to avoid them, a society cannot claim to be either just or fair.

A critical issue is that there is a gulf between the position of an individual or a small business on one side and government or large business entities on the other. The latter have extraordinary resources of money and information that can be deployed against the former. Another critical issue is that the sharp end of the justice system, the judicial process, costs participants heavily in time and money – most do not have the money or the time, and few have the expertise or determination to run a contested litigation process. For most, an informal resolution will be more accessible, quicker and better able to be adapted to the specific matter and the kind of resolution that might be achieved. This applies to agencies and businesses, just as it does to individuals.

We note the Report's recognition that, for most people, justice must happen long before they reach a court or tribunal, but suggest that, for the most part, conventional interactions between Government and the individual are not primarily characterised by the characteristics of justice that they demonstrate[1]. With that said, every time a dispute is avoided through good administrative processes, the net result, in terms of cost and relationship, is likely to be better than any resolution of a dispute.

We recognise, however, that judicial processes must have a central place. There are variations in the extent to which even routine disputes can be resolved by other processes. The figures provided show very good results for family dispute resolution, yet this is an area which will produce some of the most determined litigation because of the interests at stake. Purely monetary matters are probably more amenable to resolution than those that involve family or personal issues.

The rule of law is protected and advanced when those who are dissatisfied with some decision or action:

- have opportunities to achieve resolution of their dispute through a credible and impartial process
- even if no remedy is provided, can be reassured by such a process that the decision or action was lawfully and properly made or taken. Their suspicions about the motives of individuals can be settled and they can see that their cases are applications of general law, rather than specific and arbitrary acts.

[1] Rather, they are merely transactions in which, say, tax is assessed and paid or a pension or a visa is granted or refused. The person will, or may, engage with an element of the justice system after that step.

The goal of the justice system can never be to make happy everyone who deals with it. It has done its work if, on a reasonable and objective assessment, it has been fair and has done its best to resolve the matter before it or to refer that matter to a more appropriate body. The experience of this office (and probably many others) is that there will always be a core of people who will determinedly resist finality in their disputes, and there is not much to be gained from designing systems around this small minority. All that can often be achieved is to manage their behaviour.

Who and what is the Ombudsman

The office of Commonwealth Ombudsman was created under the *Ombudsman Act 1976*, as one of the elements of the "new Administrative law" movement of the 1970s. The office has retained its core, but has also moved far beyond the Kerr Committee expectations of a "general counsel for grievances". It is one of the central elements of the justice system for those dealing with Commonwealth agencies, operating as a both an investigative and oversight body and as a referral agency that helps members of the public to find the best way of advancing their concerns.

The Ombudsman's office in 2009:

- remains small enough to be led by a single generalist Ombudsman, yet has sufficient staff expertise and a management structure to take on a wide range of geographically diverse roles[2]
- conducts several thousand investigations following receipt of approximately 20,000 complaints[3] a year. Although the office has extensive powers to require information, most investigations are conducted cooperatively and informally, with extensive use of telephone and e-mail communications to speed the process
- conducts and reports on a number of own motion investigations into significant or systemic issues in administration
- oversights sensitive and intrusive actions, mostly in the law enforcement area but including immigration detention
- fosters a culture among agencies of dealing responsively with complaints and service delivery issues.

The Ombudsman and Access to Justice

The Commonwealth Ombudsman's office is a mechanism that provides access and reduces the power, resource and information imbalances between government agencies and the individuals with which they interact.

The service provided by the Ombudsman is free to complainants, independent and efficient. Its very independence can lead some complainants to assume that it might be acting on behalf of agencies, because it is not acting on their behalf. Equally, some agencies have made the reverse comment. The Ombudsman is not a representative or an advocate, other than for a generalised public interest in high quality public administration.

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[2] The Commonwealth Ombudsman is also the Defence Force Ombudsman, the Taxation Ombudsman, the Immigration Ombudsman, the Law Enforcement Ombudsman and the Postal Industry Ombudsman, as well as the ACT Ombudsman.

[3] In the other cases, the Ombudsman would usually suggest that a matter be resolved first with an agency or that it could more appropriately be handled through a review process.

The Ombudsman investigation work has led to agencies improving access to justice. For example, the Ombudsman's *Better Practice Guides* recommend the approach that agencies should take in dealing with complaints and making decisions. The office endorses agency approaches that avoid dispute in the first place, at least as much as it presses for effective resolution of the disputes that arise.

The Commonwealth Ombudsman scheme has been used as a model for similar schemes for specialist dispute resolution. For example, a number of industry ombudsmen such as the Telecommunications Ombudsman have been established and the Parliament has established the Fair Work Ombudsman. The downside to this is that the term "ombudsman" can sometimes become a shorthand for dispute resolution, even where the mechanism lacks critical powers or independence.

The Ombudsman conducts outreach activities to ensure that barriers to access to justice is limited. For example, the Ombudsman has conducted outreach to indigenous and migrant communities, and at universities. The Ombudsman ensures that, where interpreters are used, that this is done appropriately and effectively. We note with approval the Taskforce's recognition of the Ombudsman's public report on the *Use of Interpreters*.

For its own part, the Ombudsman's office maximises access by lowering the barriers to people communicating with the office and making a complaint. A member of the public:

- can contact the Ombudsman by telephone, SMS, e-mail, through the website at www.ombudsman.gov.au, letter or by visiting an office. The Ombudsman Act has specific provisions to facilitate contact by prisoners and detainees
- has some protection against proceedings for things said in good faith to the Ombudsman, and has the additional protection of legislation that requires investigations to be conducted in private
- can expect a response as quickly as can be provided by streamlined processes that favour informality. Even if the Ombudsman's office cannot assist, it will commonly suggest a useful alternative
- can be confident that, if a Commonwealth law enforcement agency is conducting some kind of covert operation[4], the Ombudsman's office will check that it does so lawfully
- will face no fees or charges as a result of complaining to the Ombudsman.

Relations with other forms of justice

The Ombudsman's office recognises its place within a justice matrix.

It encourages agencies and their clients to resolve matters by high quality internal complaint and review processes. This settles many matters, and greatly refines the field of concern in others.

It has jurisdiction to investigate the actions of other oversight agencies, for example, the Privacy Commissioner, but generally takes the approach that the special role, powers and expertise of such agencies should be respected. The Ombudsman's office is not generally in the business of second-guessing specialists in their areas of

[4] For example, telecommunications interception, of which the person would not be aware, and would therefore, be unable to complain.

expertise. To do so can reduce finality in administration and interfere with way in which oversight agencies establish their priorities and policies. The office's own actions can be subject to scrutiny by those agencies as warranted. The office will often refer complainants to one or more of these bodies as a better path to resolving a specific problem[5].

The Ombudsman has jurisdiction to investigate the actions of the administration of Commonwealth courts. It is, however, not authorised to investigate the actions of judges or of court officials exercising powers of a court or taking action of a judicial nature. Subject to the qualified immunity in s 33 of the Ombudsman Act, a person may take action in a court against the Ombudsman. This has occurred occasionally in the context of judicial review of investigation decisions, but the result is often costly and disappointing for the applicant. As with other oversight agencies, it is difficult to escape the impression that much of this activity is driven by concerns wider than the issue under review.

The Ombudsman has jurisdiction over Commonwealth tribunals[6] but makes a point of avoiding any investigation that amounts to a review of a decision made or an inquiry into the conduct of a tribunal member dealing with a matter. There are more appropriate processes to deal with these matters and, in the case of decisions that have exhausted the power of the tribunal, there is seldom a remedy the Ombudsman can usefully recommend.

Responses to specific recommendations

The Ombudsman's office will deal with only some of the recommendations made in the Paper.

Chapter 5

The Ombudsman's office endorses consideration of access to justice issues in policy development and administrative scheme design. The principles listed in the chapter are probably sufficient. We observe that scalability is critical - individual decisions relating to large numbers of people should be reviewable through internal processes and then through zero-cost, low-formality mechanisms. In that way, expensive external review will seldom be needed.

(5.2) We endorse the collection of data to assess the impact of changes, but suggest that the experience of courts and tribunals needs to be balanced against the experience of administering agencies and other oversight bodies, each of which will draw its own lessons. In many well-managed systems, the only cases to be considered by courts and tribunals are the exceptional ones, from which it may be unsafe to draw general lessons.

Chapter 6

(6.1) We endorse any step to ensuring that those who seek information, or to complain or to apply for review should be able to do so. A long history of dealing with complaints about agency advice causes us to recognise that an inappropriate

[5] Sometimes this is done under a specific power in s 6 of the Ombudsman Act; on other occasions, the office decides not to investigate for other reasons, but tells the person about the options.

[6] Other than the AAT, whose Registrar is however an Ombudsman Act prescribed authority

first point of contact is unlikely to have or provide comprehensive and reliable information. The best objective may well be referral and this could be followed up by the agency or by the caller.

(6.3) We endorse a common referral database, but recognise that any entity will inevitably have more detailed information than will be appropriate for inclusion in a public referral document, even if the latter provides a good general, first-call response. The best answer is always to get the person in touch with someone who can assist.

(6.4) We endorse improving access among groups not always reached by general programs. The Administrative Review Council reported on this in relation to members of multicultural communities some years ago. Any strategy to improve access needs to recognise that there can be cultural as well as linguistic obstacles.

(6.5) In endorsing cooperation with indigenous bodies, we note the work done by this office in relation to administrative issues arising from the NT indigenous intervention.

(6.6) We note that the report refers to the Ombudsman's recommendations on access to translators and interpreters. We note as well as this that providing information in a range of community languages can reduce barriers and improve knowledge.

(6.7) We endorse any move to providing people who need integrated services with what they need in a coordinated way that avoids imposing multiple demands and tests and that has similar schemes for review throughout. Any multi-agency administration involves specific challenges for Ombudsman, for example, in the areas of developing contracts, assigning responsibility and working up contact arrangements.

Chapter 7

(7.1) We endorse the growth of the industry ombudsman concept where there is an activity which affects individuals and which relates to an activity conducted wholly or substantially in the private sector. We would, however, caution that the ombudsman "brand" needs to be protected against being associated with consumer dispute resolution schemes that are of a different character. That is, they may lack independence or the power to require information.

(7.5) We recognise the value of ADR in many areas. It may be less useful where first, there is a core question of statutory application and secondly, there is limited likelihood that an ADR outcome will be the end of the matter. We note that there are already some requirements to consider ADR in the *Legal Services Directions.*

Chapter 8

(8.9) We endorse any proposal that would enable self-represented litigants to receive an early and objective assessment of their cases and any the practical steps to be undertaken. External assistance, if accepted, would be of great value in dealing with court processes.

(8.12) Given the costs and unavoidable disappointment of litigation, we endorse any step to give courts a process to deal, quickly and fairly, with unmeritorious claims or claims made for collateral purposes, such as causing harassment. A costs order is

of no value against a determined but impecunious litigant making an ill-founded application.

Chapter 10

(10.1) This office is in the business of improving the quality of the way Commonwealth agencies do their work. We endorse improvements of the kind contemplated, but note that different administrative schemes may require different treatment and levels of detail in statements and records of decision.

(10.2). See 10.1.

(10.3) Information about adverse decisions should also include information about review options. It may be helpful if an agency can identify the extent to which an adverse decision is required by law, whether it was based on a particular finding of fact or whether it followed from the application of a policy.

(10.4) See 10.1.

(10.5) An agency cannot determine which of its decisions will be subject to review and may find it impossible to assess in advance whether the circumstances are such that the fee, once imposed would be refunded. The proposal, in effect, subjects agencies to a waivable costs penalty in the AAT that does not apply to other penalties. It provides a disincentive to agencies to make proper but adverse decisions. We oppose this proposal. An option may be to impose a fee of some kind if, say, the AAT finds that an agency has sought to defend a decision and either the decision was manifestly wrong or the agency has behaved unconscionably in defending the decision.

(10.6) We endorse the need for agencies to take court and tribunal decisions and Ombudsman recommendations into account in making policy and administrative changes. This office commonly reviews what has happened six months after making a recommendation under s 15 of the Ombudsman Act or after advising an agency that its actions suggest an administrative deficiency[7]. It is small enough that its staff can note and follow up repeated instances of the same apparent failures. As well, it is common practice that when making recommendations in relation to a particular complaint, that we ask agencies what action they will take to ensure that it does not happen again.

The results of investigations can lead the Ombudsman to consider own motion investigations of what appear to be systemic issues.

(10.7) This office conducts regular client surveys. As is probably the case with many other agencies, it can be difficult to isolate positive or adverse opinions about our process and service from disagreement with the outcome of complaints.

[7] The office has a less formal process than s 15 reports to identify and record, after investigation, any apparent administrative deficiency.