

TEN CHALLENGES FOR ADMINISTRATIVE JUSTICE

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More than thirty years have passed since the major planks of Australian administrative law – the Administrative Appeals Tribunal (AAT), *Administrative Decisions (Judicial Review) Act 1977* (ADJR) and Ombudsman – were put in place. There have been changes in the meantime, such as the enactment of freedom of information and privacy legislation, the creation of new tribunals and oversight agencies, the introduction of a different scheme for judicial review of migration decisions, and the growth in activity and importance of the High Court's constitutional writ jurisdiction.¹

Even so, the major themes and architecture of Australian administrative law have not changed. We still write and talk about it as a system based around external scrutiny of administrative decision making by courts, tribunals, ombudsmen and through freedom of information legislation. The list of underlying values and objectives of administrative law remain much the same: those commonly mentioned are legality, rationality, impartiality, fairness and transparency.

The theme of this paper is that there has been a dramatic change over the last thirty years in how laws and programs administered by government affect members of the public. This is necessarily relevant to administrative law, since the abiding concern of administrative law is to ensure that individuals receive appropriate consideration and protection against adverse government action. The concern, in short, is to uphold administrative justice. Taking stock of the changes in government should, therefore, be a pre-eminent concern.

How well is administrative law coping after more than thirty years development? Are administrative law standards, review mechanisms, remedies and values, well-adapted to ensuring justice for individuals in their dealings with government? Is a fresh approach required?

This paper addresses those questions by posing ten challenges to administrative justice in contemporary government. The challenges are drawn from the experience of my own office in dealing annually with over 40,000 people who approach the office, leading to approximately 4,500 investigations. The paper ends by discussing the role that Ombudsman offices, complaint handling and other mechanisms can play in addressing the challenges to administrative justice.

Ten challenges

1. Complexity

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¹ Eg, *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

Many of the problems that people encounter with government stem from the sheer complexity of government programs. The simple (and unsurprising) truth is that people do not understand the finer details of 8,000 pages of taxation legislation, 130 immigration visa categories, or family tax benefit and child support schemes that require people to make a forecast or estimate of uncertain future events such as their income, work commitments and family care arrangements. Nor do people expect that their issue or problem will require them to deal with multiple government agencies or programs: an income tax return, for example, can be relevant variously to a person's taxation obligations, Centrelink entitlements, child support liability and public housing eligibility.

One result is that people get confused about government requirements and their legal obligations. In complex systems people make wrong choices, they break the rules, and they fall between the cracks of different programs. People rely heavily on government for advice about what to do, and they often ask the wrong question or misconstrue the answer.

Getting it wrong can cause frustration and irritation. Or worse, it can result in administrative penalties or loss of entitlements.

How should administrative law address this issue of complexity, which is an element of so many of the problems that people encounter in their dealings with government?

2. Administrative penalties

Breaching or failing to comply with the rules of government can attract an administrative penalty. For example, incorrect information in a taxation return can be penalised at the rate of 25%, 50% or 75% of the tax owing. Breaching an activity agreement under Welfare to Work can result in a suspension of income support benefits for eight weeks. Failing to discharge a child support liability can result in an order prohibiting a person from departing the country. Under many government programs there is an increased charge or on-the-spot fine for failing to lodge an annual return on time.

This new trend in government, towards regulation by administrative penalty, was studied in a report in 2002 by the Australian Law Reform Commission (ALRC), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*. The ALRC noted that 70% of the penalty provisions in Commonwealth legislation were criminal penalties (a fine or imprisonment), 12% were civil (such as a damages award or restraining order) and 17% were administrative (a taxation penalty, licence or benefit suspension, or immigration detention fee).² And yet, to take welfare regulation as an example, while 2,881 people were prosecuted for welfare fraud in a particular period, 200,000 people had their benefit suspended for breaching an activity test requirement – one eighth of all recipients. Nor should it be forgotten that the tight rules, procedural safeguards and review processes that must be followed in applying a criminal penalty do not usually apply to administrative penalties.

² Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95, 2002.

Administrative law can review a penalty in an individual case, yet that only occurs intermittently, and often cannot undo the personal harm suffered from a benefit suspension or departure prohibition. Is more needed?

3. *Consequences that cannot be undone*

Many of the difficulties that people encounter with government cannot be repaired within the rule framework applying to their matter. Even where a government agency has erred by giving incorrect advice or mishandling a person's case, there may be no discretion in legislation to accept a late visa application, backdate a social support entitlement to the qualifying date, or allow customs clearance for an item that was wrongly brought into the country.

Another obstacle to undoing an adverse consequence can be that the consequence is one step removed from the original problem. A postal delivery failure by Australia Post can mean that a person is not informed of a motor traffic penalty or a share purchase option, or does not receive their passport. A person can lose a benefit or incur a liability because of an administrative error occurring in a transaction between an agency and the person's lawyer, migration agent, employer or spouse. Or, to give a particular example that my office recently dealt with, the eligibility of a disabled person to receive a sales tax deduction on a motor vehicle purchase can rely, in turn, upon a medical assessment by their private doctor, the evaluation of that assessment by a government claims officer, the lodgment of the sales tax exemption claim by the car retailer, and the acceptance of that claim by the taxation office. A simple administrative error at any stage of the process may not be simple to repair.

What remedy should administrative law provide in those instances?

4. *Delay and administrative drift*

Probably the most frequent complaint that people make against government is that it is too slow in making a decision, deciding an application or resolving a problem. Sometimes the criticism is misplaced because of an unavoidable delay by an agency in obtaining information from a third party, or because of inherent complexity in a decision. Frequently, however, the criticism is justified. Common causes of delay are inefficiency, misplaced priorities within government, movement of difficult files from one officer to another, or failure to shift a difficult file to a suitably experienced officer. The Ombudsman's office has coined the term 'administrative drift' to describe this problem.³

Administrative drift can be frustrating to government clients but it can also cause great damage. An apt example is that the initial detention of Cornelia Rau was legally justified, according to the Palmer Report,⁴ because the officers properly formed a reasonable suspicion on the scanty information then available that she was an unlawful non-citizen. But the scandal exposed by the Palmer report was that ten months elapsed, in the face of mounting evidence to the contrary, before Ms Rau was correctly identified as an Australian permanent resident. Similarly, the wrongful removal from Australia of Vivian Alvarez, an

³ Eg, Commonwealth Ombudsman, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases*, Report No 11/2007 at 14.

⁴ *Report of inquiry into the circumstances of the immigration detention of Cornelia Rau*, 2005, at p 26.

Australian citizen, would have been a different story had it not taken 22 months to unravel the mystery of her whereabouts.⁵

Can administrative law play a constructive role in combating and reducing delay, both in individual cases and systemically?

5. Poor decision making and human frailty

Defective administrative decision making is frequently detected and corrected by courts, tribunals and ombudsmen. The defects include misinterpreting legislation, incorrectly analysing information or evidence, wrongly arresting or detaining people, and inappropriately applying penalties.

Administrative law review enables those errors and mistakes to be corrected in individual cases. However, this review activity cannot alleviate the underlying problem that mistakes happen frequently and in the best administrative systems staffed by the most competent administrative officers. It is routine that officers misfile documents, confuse two dates or names, overlook deadlines, wrongly address letters, or give confidential information to the wrong people.

It is human to err, but it should never be forgotten that simple errors can have dramatic consequences. To repeat an example given earlier, a postal delivery error can mean that a person does not receive their passport in time for a scheduled business or family trip, or does not receive legal documents by a critical date. Australia Post does excellent work in handling over 60 million postal articles each year, but the overall success of this function should not distract attention from the need to have systems and remedies for dealing with occasional and simple mistakes that can cause great inconvenience or damage.

The same is true of other areas of government. Many of the cases of wrongful immigration detention examined by the Ombudsman's office stemmed from simple identification or record keeping errors.⁶ Publicity has recently been given in other cases to the great trauma and damage that can be caused by inadvertent mistakes: examples include the wrong coffin being brought home in the Jacob Kovco case; withdrawal of a murder charge in Victoria because DNA samples were contaminated; and economic and other hardship being suffered by many thousands of people following the release of a single strain of the equine flu virus from a government quarantine station.

A core role of administrative law is to correct mistakes made in individual cases. Has the nature of this challenge changed: does the growth in the size and complexity of government mean that mistakes can occur more easily, more frequently, at more stages of an administrative process, and cause greater damage?

6. Computerisation

⁵ Commonwealth Ombudsman, *Inquiry into the circumstances of Vivian Alvarez matter*, Report No 3/2005.

⁶ Eg, Commonwealth Ombudsman, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases*, Report No 11/2007 at 4-5.

Technology has improved the speed, accuracy, consistency, transparency and reliability of decision making. It also throws up unique challenges to administrative justice. A problem highlighted in the reports of my office on wrongful immigration detention was that officers uncritically accepted erroneous information retrieved from an information technology system, or drew the wrong conclusion when information about a person could not be found on the system.⁷

Poor system design, development or implementation also causes administrative errors. A deficient information technology system can obstruct storage of relevant information, make it harder to retrieve vital information, incorrectly merge unrelated information, miscalculate a person's entitlements or liability, send letters to the wrong people or addresses, or despatch confusing and contradictory demands. Hundreds and even thousands of people can be simultaneously disadvantaged by a single computer error. By way of illustration, a police officer with faulty judgment can wrongly penalise a driver for driving through a red light, while a faulty camera can penalise thousands of drivers.

Computerisation also heightens the risk that the vast storehouse of confidential information held by government can be misused. Confidential information is within a keystroke of most officers, and it may be difficult to trace who accessed information and what they did with it. The damage that can be caused by a single lapse is also far greater. An example is the recent incident in the United Kingdom when a junior officer downloaded on to two CD discs, that were then posted and lost in the ordinary mail, the names, addresses, birth dates, national insurance numbers and bank account details of 25 million Britons.

Computerisation presents challenges for administrative law that were unknown in earlier days.⁸ What response is now required?

7. Executive power⁹

There has been a steady trend in government to using executive or non-statutory power to underpin service delivery, regulation and benefit allocation.

The Financial Case Management Scheme that provides emergency financial assistance to Centrelink clients, whose benefit payments have been suspended due to activity agreement breaches, is created by executive action. So too is the General Employee Entitlements and Redundancy Scheme that provides redundancy and other benefits to employees injured by a corporate collapse. Another example is the Scheme for Compensation for Detriment caused by Defective Administration, which authorises payment of administrative compensation to members of the public who are damaged by defective government administration.¹⁰ Other government activities that rest on executive power include contracting, equipment procurement, disaster relief, industry incentives, business grants, skills assessment and

⁷ Ibid at 10-11.

⁸ See Administrative Review Council, *Automated Assistance in Administrative Decision Making*, Report No 46 (2004).

⁹ This issue was later taken up in a Commonwealth Ombudsman report, *Executive Schemes*, Report No 12/2009.

¹⁰ See Commonwealth Ombudsman, *Putting things right: compensating for defective administration*, Report No 11/2009.

accreditation, job seeker assistance, carer payments, water licence buy-backs and energy efficiency rebates.¹¹

The move away from statutory to executive schemes is partly a response to the growing size and complexity of government and the preference within government for schemes that are flexible, responsive and simple to establish, change and dismantle. Doubtless another and less laudatory reason is that decisions made under executive schemes are not subject to review by tribunals or under the *Administrative Decisions (Judicial Review) Act 1977*. For practical purposes, the Ombudsman is the only administrative law agency that can review decisions made under executive schemes.

This limitation on external review and appeal is a central concern, since decisions made under executive schemes are often indistinguishable in importance and effect from decisions made under statutory schemes. Other problems of an administrative justice nature arise also. Under executive schemes it can be harder for a member of the public – and, indeed, for government decision makers – to ascertain the rules of the scheme, especially if those rules undergo constant change. There is a risk that the rules will not be as well drafted as legislative rules and, in addition, they are not subject to parliamentary scrutiny, disallowance or publication under the *Legislative Instruments Act 2003* (Cth).¹² The fact that the rules are interpreted and applied by the officials who drafted them also introduces a subjective element that can thwart predictability and objectivity in decision making.

Administrative law is premised on the exercise by government of powers that are conferred by statute. How should administrative law adjust to a new world in which government relies increasingly on executive power to underpin regulation, benefit distribution and service delivery?

8. Outsourced service delivery

Many government functions – including functions once thought to be core or inalienable government functions – are now discharged by non-government bodies under contract from government. The functions include prison management, airport security, benefit distribution, water and electricity supply, public transport, event management, health assessment, skills appraisal and job selection.

Government outsourcing throws up numerous challenges to traditional administrative law. The service delivery standards are likely to be set out in a contract rather than in legislation

¹¹ Recent examples at the national level include the Australian Government Disaster Recovery Payment, Australian Apprenticeship Incentives Program, Rural and Regional Skills Shortage Incentive Payment, Equine Influenza Business Assistance Grant, Commercial Horse Assistance Package, Equine Workers Hardship Wages Support, LPG Vehicle conversion scheme, Environmental Management Systems Incentive Program, Tobacco Package Restructuring Grant, Murray Darling Basin Irrigation Management Grant program, Exceptional Circumstances Exit Grant, Carer Adjustment Payment, the Department of Immigration Complex Case Support scheme (providing assistance to refugee placements), and the F-111 Deseal/Reseal scheme (providing health compensation to Defence employees).

¹² For a discussion of the problems, see Commonwealth Ombudsman, *Executive Schemes*, Report No 12/2009; and J Nicholson, 'After Burn: the devastating repercussions of an F-111 cleaning program are still being felt', Australian Parliament, *About the House* (Sept 2008) at 38-41.

or an executive policy document. Those standards may offer less protection to the public than if the function was discharged by government. The staff of the non-government service provider, who are applying the standards, may not be as well trained in public law values or may be more focussed on the commercial imperative.

Disputes about service delivery may be harder or more complex to resolve, especially if the dispute resolution mechanism is unknown, underdeveloped, or divided between the government and non-government parties.¹³ Resolving a person's problem with a service provider can become confused with or overshadowed by issues of contract and relationship management between the government agency and the non-government service provider.

The division of responsibility between government and non-government parties can also mean that no one is well placed to address a person's grievance in a timely or effective manner. The information relevant to a problem or a person's circumstances may be distributed between the parties, so that no-one sees the full picture. Similarly, the non-government party may lack full access to government data bases.

Administrative law, once again, is premised on the exercise of public sector power by government agencies. Judicial and tribunal review and freedom of information rules do not generally apply to decisions made by non-government bodies on behalf of government.¹⁴ How does administrative law deal with this change?

9. Multiple agency action

A marked feature of contemporary government is that many different agencies can be involved in making a single decision or providing a service.

A decision to approve a visa application can rely upon health, security and skills assessments that are undertaken by other government or non-government agencies. Payment of a social support benefit requires a payment by a government agency into a private bank account that can be accessed by the recipient. Foreign postal articles can pass through the hands of postal, quarantine, customs and law enforcement agencies. The purchaser/provider model adopted within government means that a service delivery agency (such as Centrelink) delivers payments and services on behalf of other government departments that retain policy responsibility for the particular legislation or program that is being administered. Debt collection is usually outsourced, meaning that a private entity enforces a debt that is raised by a government agency.

It can be difficult for a member of the public to know which agency bears responsibility for either a decision or an error that occurred in service delivery. The situation will worsen if the agencies are equally uncertain and the client or their complaint is shuffled from one agency to another. An illustrative example investigated by my office is that the cooperation of three agencies was required to prevent a person from leaving the country without settling a child

¹³ The issues are partially addressed in Commonwealth Ombudsman Fact Sheet 6, *Complaint handling: outsourcing*.

¹⁴ An amendment to the *Ombudsman Act 1976* s 3BA in 2005 conferred jurisdiction on the Commonwealth Ombudsman to investigate complaints against government service providers, that is, services provided to the public under contract with a government agency.

support debt. One agency had to activate the prohibition, another had to record it on a database, and a third had to check the database before allowing a person to leave the country. The agencies were quick to admit that a mistake occurred in allowing a debtor to leave the country, but after three years of haggling the agencies could not agree as to which agency made the mistake and should provide a remedy.¹⁵

Traditional administrative law review works best when an identifiable decision maker makes a discrete and challengeable decision. Many decisions are not of that kind. Has administrative law adjusted to this change?

10. The diversity of the client population

The shorthand description of administrative law has never changed: its purpose is to safeguard the rights that people and corporations have in relation to government. Yet the composition of the community and the way that people are affected by government decisions has changed markedly over the years, and will continue changing.

Compared to the position two decades earlier, a much larger proportion of the population are now wage earners and pay taxes and claim a growing range of deductions and rebates. The mix of taxpayers has changed, and includes a higher proportion of women, youth, contractors and small businesses. A different and larger range of government benefits and entitlements are available to the public, with the result that a higher proportion of the population receive social security assistance. Personal and business travel is more common, and with it immigration visa processing and border control. Government agencies deal more often now with people suffering mental illness, or with poor language or communication skills.

People's personal and financial circumstances have become more varied and complex. The nuclear family has increasingly given way to different family patterns, parenting commitments and living arrangements. The pattern of people's work and income derivation is vastly different. Superannuation and financial retirement planning is more a part of people's lives.

The occasions on which people interact with government has also changed. Applications for building approval and land development increase every year. There are more planning and environmental restrictions on what property owners and occupiers can do. Approval to import or export goods, or to undertake international transactions, is needed more often. In short, government regulation now controls or touches all areas of corporate and business endeavour.

Those changes and many others are reflected in complex laws that are administered by government agencies. There has been a dramatic growth in the volume of daily transactions between government and the public. To give but one example, in the Australian Government Human Services portfolio (including Centrelink, Medicare, the Child Support Agency, CRS

¹⁵ See Commonwealth Ombudsman, *Australian Federal Police and the Child Support Agency, Department of Human Services: Caught between two agencies: the case of Mrs X*, Report No 14/2009

Australia and Australia Hearing) there were on average on each day in 2009, 361,000 face-to-face contacts, 221,000 phone calls, 400,000 letters, and 70,000 online transactions.¹⁶

Every transaction by a person with a government agency or service provider can potentially throw up a unique administrative law issue. Is administrative law evolving to respond efficiently and appropriately?

Responding to the challenge of securing administrative justice

The ten challenges outlined in this paper demonstrate the need for a vibrant system of administrative law that can safeguard people in their dealings with government. External review by courts, tribunals, ombudsmen and other review and oversight mechanisms has not dwindled in importance.

On the other hand, the current challenges to administrative justice are qualitatively and quantifiably different to those that predominated when the administrative law system was devised over thirty years ago. Different in every way are the face of government, the programs it administers, the responsibilities it discharges, the way that functions are performed, the interaction between government and the community, and community expectations of government. A different administrative law response is now required.

Judicial – and, to a lesser extent, tribunal – review of individual administrative decisions has always been the keystone of administrative law. Their importance is undiminished, though review of individual decisions through adjudication of disputes can only directly address a couple of the challenges mentioned earlier. Faulty decision making can still be corrected from one case to the next and, through this process, general guidance can be provided on the correct interpretation of legislation and the principles of good decision making. Judicial and tribunal review can also shape thinking and behaviour in specific areas of government administration, and occasionally highlight problems that stem from delay, computerisation and administrative penalties.

More is needed. The quest for administrative justice now requires a fresh approach and response. One problem mentioned already is the jurisdictional problem: courts and tribunals (unlike the Ombudsman) cannot generally review decisions made under executive power or by non-government agencies, or administrative actions that have not crystallised into a decision. Beyond that limitation is the even greater challenge of dealing with complexity, delay, computerisation, administrative penalties, cross-agency activity and the diversity of human problems. Allied to that is the need for administrative law to influence all areas of government and to reach all sectors in the community.

This paper will outline five changes that must underpin a new approach. The discussion will focus on external measures, rather than upon internal improvements in staff training, internal review and internal monitoring and quality review.

1. Complaint handling

¹⁶ The Hon Chris Bowen, Minister for Human Services, 'Service Delivery Reform: Designing a system that works for you', Address to the National Press Club, Canberra, 16 Dec 2009.

There is, firstly, a need for broad based complaint handling through Ombudsmen and similar oversight agencies. Complaint handling is an efficient, low-cost, flexible means of handling the individual difficulties that people encounter with government. It can respond to problems that involve more than one agency, that cross program boundary lines or that arise in outsourced service delivery. Minor administrative errors can be addressed, as well as serious abuse of power. Individual complaints commonly point to more systemic problems in government administration that can then be investigated and corrected before they worsen.

Complaint handling has grown in importance in the last thirty years. The principles of effective complaint handling are spelt out in an Australian Standard and in the better practice guides published by Ombudsman and other offices.¹⁷ It is perhaps the major way that the grievances of members of the public are raised with and settled by government agencies. Upward of 500,000 complaints are received annually by public sector and industry ombudsman offices. Agencies also commit considerable resources to complaints, by establishing their own internal complaint units and by responding to the investigations conducted by external oversight agencies.

A perennial disparagement of complaint handling is that it can only result in a recommendation and not a binding determination. The importance of that point has been greatly overstated. There is a very high rate of acceptance of Ombudsman recommendations by agencies. Furthermore, many investigations do not result in a recommendation that is comparable to the order of a court or tribunal. The most common recommendations are that an agency provide more assistance or a better explanation to a member of the public, that the agency apologise, expedite the resolution of a person's application, revise its application forms, rewrite its administrative procedures, provide better training to agency decision makers, establish better protocols for handling cross-agency issues, or obtain independent legal advice on a disputed issue.

Recommendations of those kinds are often what is needed to provide a practical remedy to a person or to improve administrative standards to reduce the risk of future error. Moreover, those recommendations often require discussion and analysis with agencies, and could not practically be fashioned into a binding Ombudsman determination. The Ombudsman does have the added advantage of being able to follow up to ensure that an agency is taking appropriate action in response to a recommendation. This power – to select the issue to pursue – is denied to courts and tribunals that can deal only with issues that litigants raise before them.

2. Remedies

A point just made warrants separate emphasis. Traditional administrative law remedies – substitution of a new decision, a declaration of the law or the rights of the parties, a direction to an agency to reconsider a matter, an injunction to restrain unlawful action, or a mandatory order to compel an agency to act lawfully – are essential at times to safeguard a person's interests. However, those remedies are no longer adequate to deal with many of the problems that people encounter in dealings with government.

¹⁷ Eg, Australian Standard AS ISO 10002-2006, 'Customer Satisfaction—guidelines for complaints handling in organisations'; Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*.

Sometimes the only remedy that is either needed or effective is for an agency to provide a person with a better explanation of how complex laws or agency requirements apply in their case. An apology may be what a person most wants if they feel wronged by an agency. Action by an agency to expedite a matter that has been delayed can effectively resolve many grievances. Conversely, the remedy needed may be the agreement of an agency to suspend or postpone adverse action while an issue is reconsidered (such as the proposed imposition of a penalty, recovery of a debt, or termination of an arrangement). Yet another way of resolving a problem is for an agency to agree to a 'work around', for example, to consider a fresh application from a person or to provide assistance of a different kind.

A trend in Ombudsman complaint handling is to promote this broader concept of remedy to assist members of the public who suffer disadvantage as a consequence of poor administrative practice.¹⁸ One or other of those remedies was recommended by the Commonwealth Ombudsman in 75 per cent of the complaints investigated in 2008-09.

Financial remedies have also become steadily more important. The thrust of many complaints is that a complainant suffered financial damage as a consequence of maladministration or through acting on incorrect agency advice. Judicial and tribunal review cannot provide compensation as a direct remedy. Compensation is now available through an executive scheme, the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA scheme). Under this scheme Australian Government agencies can pay compensation on a discretionary basis to individuals or groups who have suffered loss as a result of poor administration. Thousands of payments are made each year, ranging from smaller payments of a hundred dollars, to larger payments in the millions.

The Ombudsman's office plays a large role in making recommendations for CDDA payments and in scrutinising agency compensation decisions.¹⁹ This is important, as decisions made under the CDDA scheme (an executive scheme) are not appealable to the AAT or reviewable under the ADJR Act.

Financial remedies are also important where an agency has imposed a penalty or raised a debt against a person. This is a common occurrence, and lies behind many complaints in areas such as taxation, immigration, social security and child support. A remedial issue that receives regular attention in Ombudsman oversight work is the need for agencies to consider waiver and write-off of debts and penalties, under the *Financial Management and Accountability Act 1997* ss 34 and 47 and specific waiver powers conferred by legislation upon agencies.

3. Highlighting systemic problems

It has always been an objective of administrative law to stimulate better decision making beyond the matter under review – or, as it is sometimes put, to have a systemic impact in improving the quality of administrative decision making.²⁰ This is important because an

¹⁸ See Commonwealth Ombudsman, *Providing Remedies*, Fact Sheet No 3.

¹⁹ See Commonwealth Ombudsman, *Putting things right: compensating for defective administration*, Report No 11/2009.

²⁰ This issue is taken up in J McMillan, 'Can Administrative Law Promote Good Administration?', paper delivered as The Whitmore Lecture – 2009 to the Council of Tribunals, NSW Chapter.

agency error that occurred in one case is likely to be repeated in other cases. In a court or tribunal action, the order or decision will apply directly only to the parties to the action. The ruling can have a wider precedential effect, but there is no formal mechanism for either ensuring or evaluating if that occurs.

Ombudsman offices deal with that challenge by devoting more attention to conducting own motion investigations that result in published reports. My own office now aims to publish at least twenty reports a year. Some of the issues noted earlier in this paper – agency reliance on executive schemes, payment of administrative compensation, debt waiver and write off, unintended legislative consequences, wrongful immigration detention, postal delivery failures, administrative penalties, grant administration, and delay in freedom of information decision making – have recently been taken up in own motion reports.

A report typically commences with a handful of complaints that illustrate the nature of a problem, and then examines the administrative failures that gave rise to the problem and the reforms needed to avoid it recurring. An extensive dialogue is usually undertaken with agencies during the preparation of reports, so much so that agencies frequently correct the underlying problems before the reports are finalised. Six months after a report is published, the agency is asked by the Ombudsman to explain the steps taken to implement the report recommendations.

Another technique that is now widely used by Ombudsman offices to improve the quality of administration is to monitor and audit agency action and to conduct inspections. For example, my office conducts routine (including unannounced) inspections of immigration detention centres, we audit police complaint handling and quarantine investigations, and we regularly inspect the records of law enforcement agencies to ensure compliance with laws relating to telephone interception and electronic surveillance. Monitoring, auditing and case sampling are effective both in picking up hidden problems and in reminding agencies that their administration is under constant scrutiny.

4. *Cultural and attitudinal change*

The theme of this paper is that administrative law needs a rethink if it is to secure administrative justice for the public in relation to government. My abiding concern is that the changes and challenges discussed in this paper are not fully recognised, and that the discipline is too deeply rooted in traditional theories and experience. I will take as an example an assessment made of the role of the Ombudsman institution in the most recent textbook on administrative law to be published in Australia:

[O]n the spectrum between internal and external accountability mechanisms, the ombudsman is perceived as being closer to the former than the latter pole. ... The emergent picture is of an institution kept on quite a short leash, its continued flourishing perhaps unduly dependent on the good opinion of the very agencies it oversees. ... [T]he location of the ombudsman firmly within the executive branch, and the ongoing, interactive relationships of trust and cooperation that underpin ombudsmen's success, seem antithetical to concepts of the rule of law on which legal accountability of government is traditionally based. ... [This suggests] that the ombudsman's role is less constitutionally significant than that of bodies, such as

courts and tribunals, that maintain greater distance from government and are better equipped to 'keep it honest'.²¹

I hope I am mistaken, but I fear that that stereotype is widely held and taught in Australian law schools. It reflects a view of the Ombudsman role – and, more generally, of accountability and the impact of administrative law – that has not moved in over thirty years. It takes no account of the dramatic change that has occurred in the way that government actions affect the public and can be remedied.

Nor does it comprehend the way that Ombudsman offices and other executive oversight agencies relate to government and impact upon it. Many Ombudsmen in Australia have a relatively high public profile that derives from their forthright public criticism of agency maladministration. To use my State Ombudsmen colleagues as an example, they have received extensive media coverage for their scathing criticisms of prison administration, child welfare protection, police watch-houses and freedom of information administration, to name but a few areas. Speaking personally I know that none of them has hesitated to express a view that is unwelcome to government and that many have encountered direct agency displeasure at the stance they have taken.

To suggest that executive oversight agencies are institutionally incapable of holding government to account is to ignore history. The role that administrative law can play in securing administrative justice will be hampered if we adhere to time-worn stereotypes of accountability and independence.

5. *Re-thinking the constitutional framework*

One way of stimulating a cultural change in administrative law is to rethink our constitutional understanding of the role of oversight agencies. There are now a great many independent agencies that are created by statute to oversight the decisions and actions of executive agencies. The list includes auditors-general, ombudsmen, privacy commissioners, human rights and anti-discrimination commissioners, public sector standards commissioners, inspectors-general and corruption commissions.

Most of those agencies (the auditor-general excluded) were created in the last thirty years in response to the changes in government and in public expectations outlined in this paper. It is conventional, for the want of any different constitutional classification, to classify them as executive agencies. Self-evidently, they do not form part of the legislative or judicial branch of government.

But is it time to rethink traditional constitutional theory? The oversight agencies are independent of other executive agencies; indeed, their function is to oversight and investigate complaints against executive agencies. Oversight bodies do not implement the policies and programs of the government in the traditional manner of the executive branch. With courts and tribunals, they enforce the rule of law in government, check the propriety of administrative decision making, safeguard vulnerable citizens against abuse of power, and ensure that remedies are provided to those who are wronged by defective agency action.

²¹ P Cane & L McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (OUP, 2008) 269-271.

An alternative constitutional theory would take stock of this change and look at how our system has evolved over the past thirty years. It is perhaps time to acknowledge that we now have a fourth branch of government – the oversight, review and integrity branch.²² It would enhance administrative justice to readjust our constitutional theories to take account of this new and effective system for control of government action.

²² This is further discussed in J J Spigelman, 'Jurisdiction and Integrity', AIAL National Lecture Series, 2004; and J McMillan, 'The Ombudsman and the Rule of Law' (2005) 44 *AIAL Forum* 1.