

FUTURE DIRECTIONS 2009 – THE OMBUDSMAN

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Complaint trends

There has been a marked increase across Australia in the workload and output of Ombudsman offices, in both the public and private sector. In the core function of complaint handling, there has been an average increase in complaints and approaches of over 15%. Nearly all offices report that the last year has been their busiest on record.

In 2007-08 the nine public sector Ombudsman offices together received just over 100,000 complaints and inquiries.¹ The industry Ombudsman offices were as busy. The Telecommunications Industry Ombudsman alone received over 200,000 complaints – an increase of over 50%. There was a similar increase in complaints to the Financial Ombudsman Service and some of the Energy and Water Ombudsmen. Combined, the public sector and industry Ombudsman offices are now receiving in excess of 400,000 complaints and approaches annually.

A far greater number of complaints are made directly to agencies. For example, ATO Complaints received close to 28,000 complaints (2008-09), the Centrelink Customer Relations Unit over 53,000 (2007-08), Australia Post Customer Contact Centres 437,000 (2007), and the Department of Immigration Global Feedback Unit nearly 8,000 (2008). Complaint figures on individual topics convey the same picture. The decision of the Government in late 2008 to make a bonus payment to four million Australians (the Economic Security Strategy Payment) generated 156 complaints to my office in a four month period, and over 6,840 requests for review to Centrelink over six months.

The factors at work

Why is complaint handling such big business? And why has it become steadily more important?

¹ The statistics for Commonwealth, State and Territory Ombudsman offices are collected in the *Australasia and Pacific Ombudsman Region Information Manual*, that is available at www.ombudsman.gov.au

Three causes seem to be at work. The first is the seasonal and episodic events that give rise to individual complaints. Straightened economic times are presently a factor in at least some complaints, particularly those to industry ombudsmen offices. Events of that kind are significant, but they are a minor factor in the steady annual increase in complaints. New problem areas continue to arise and it is unlikely that complaints will reduce as times change and events pass. There are deeper causes to consider.

The second complaint stimulus is the increased interaction that people now have with government and big business. On issues as diverse as travel, taxation, financial support, family arrangements, home extensions, medical insurance, banking, phone usage and energy supply, people are in regular contact with government agencies and businesses to obtain a permission, receive a benefit, pay a charge, query a penalty or vary an existing contract or arrangement. There are many more rules being applied, and they are growing in complexity to match the diversity in people's lifestyles and working, family and financial arrangements. Complexity means that more things can go wrong, and more things require clarification. The result is more inquiries and complaints.

The third complaint stimulus is that community expectations have changed. People are less tolerant of mistakes and blunders in decision making and service delivery. We are an educated society and we expect systems to operate smoothly, predictably and competently. We place a high store on the organisational values of accountability, transparency and integrity. People now understand that they have a right to complain if they are dissatisfied or when things go wrong. Technology has also made it easy to complain, and to do so instantly. Not only is it free to complain, no experience is required!

The response of Ombudsman offices

Ombudsman offices have responded to those trends in three ways that I will take up in this paper. The first – at the risk of being self-serving – is by working harder and smarter. There is a heavy reliance on technology in all stages of the complaint handling process – receiving complaints, allocating them for investigation, tracking progress, spotting issues and trends, and monitoring quality standards. More filtering and selection is undertaken of the complaints or issues that warrant investigation. This is a practical necessity, but justifiable also on the basis that better results can be achieved for the public if the serious, recurring or systemic problems are given priority.

A second response is that Ombudsman offices have diversified in the functions they discharge. My own office now describes itself as having five functions:

- Complaint handling remains the core function. Last year we received over 45,000 complaints and approaches, and investigated over 5,000.

- Own motion inquiries that result in published reports have become increasingly important. This year we will publish as many as twenty reports on matters as diverse as visa processing, mail redirection, departure prohibition orders, administrative compensation, executive schemes, heritage protection, use of interpreters, immigration detention, re-raising tax debt, industry grant schemes, postal compensation, disability support, taxation compliance visits, use of coercive powers, and government economic stimulus payments. Each of those reports originated in a handful or more of individual complaints that pointed to a larger issue that needed to be addressed. Each report also culminated in a series of recommendations, accepted by government, that result in measurable improvements to government administration and service delivery.
- Statutory audit activity is also increasing. We inspect the records of law enforcement agencies to ensure compliance with laws relating to telephone interception, use of surveillance devices, controlled operations and access to stored communications. The number of inspections – each resulting in a report to the Attorney-General or the Parliament – has increased from 12 inspections a year four years ago, to 31 in the last financial year. This figure is likely to grow, in part because Parliament is reassured by this intensive auditing that coercive and invasive powers can be entrusted to law enforcement agencies. The compliance auditing role of the office is growing in other areas. We audit complaint handling by the Australian Federal Police and prepare a report to the Parliament.² We recently conducted our first inspection of the records of the Australian Quarantine Inspection Service relating to quarantine investigations. Legislation before the Parliament will require the Ombudsman to review the conduct of each examination conducted by the Fair Work Building Industry Inspectorate.³ The proposal to confer coercive examination powers upon the building industry watchdog is a subject of heated public debate, and the Minister has noted the oversight role of the Ombudsman as an important safeguard to ensure a responsible use of examination powers. Another recent proposal by a parliamentary committee is for the Ombudsman to monitor compliance by Australian Crime Commission examiners with record keeping requirements.⁴
- A secondary purpose of complaint investigations and compliance auditing is to stimulate improvements in public administration. That role is taken up directly in other ways. We recently published a *Better Practice Guide to Complaint Handling*, and were a joint

² See Commonwealth Ombudsman, *Report on Commonwealth Ombudsman's Activities under Part V of the Australian Federal Police Act 1979* (Nov 2008).

³ Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009

⁴ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007* (Sept 2008) Rec 9.

author of two other guides on *Managing Unreasonable Complainant Conduct* and *Automated Assistance in Administrative Decision-Making*. Fact Sheets (that are discussed below) are published on topics such as *Administrative Deficiency*, *Providing Remedies*, *Ten Principles for Good Administration*, and *Complaint Handling*. Three times a year we publish an e-bulletin with case studies of administrative problems and the lessons for government. In the last year the office has made nearly twenty submissions to parliamentary and other inquiries on a wide variety of legislative proposals and Commonwealth administrative practices.

- The office discharges an assortment of other specialist functions. An example is the reports tabled in the Parliament on each person held in immigration detention for two years or more.⁵ Over 560 reports have been prepared, contributing to a reduction over four years from 149 to 26 people detained for more than two years. In response to that change, and at the request of government, the office recently commenced reporting on each person held in detention for six months. These and other specialist functions of the office are captured in the variety of specialist Ombudsman roles, such as Immigration Ombudsman, Defence Force Ombudsman, Law Enforcement Ombudsman, Taxation Ombudsman and Postal Industry Ombudsman. Three other specialist roles currently under discussion in government are Norfolk Island Ombudsman, National Health Practitioners Ombudsman and oversight of a proposed new whistleblower protection scheme.

The third response of Ombudsman offices to the complaint trends that I noted earlier in this paper has been to look ahead, and ask: What are dominant and emerging problem areas in public administration? Are there accountability gaps that need to be discussed? I will note four themes in our work.

Basic administration

The first theme – which is perennial but no less important – is the importance of basic administration. Minor and trifling administrative errors can cause great damage to individuals. This was the topic of a recent Ombudsman Fact Sheet, *Ten Principles for Good Administration*, that drew upon the reports of the office on mistakes occurring in immigration detention. Principle No 1 in the Fact Sheet was that an error as simple as misspelling someone's name, misstating their date of birth, or misfiling their application to an agency, can result in the person being wrongly detained, incurring a penalty, losing or being denied a benefit, or having legal proceedings initiated against them.

⁵ *Migration Act 1958* (Cth) s 486O.

The Ombudsman e-bulletins continue this theme by using simple case studies to illustrate that administrative errors that are small in scale can cause great anguish or disadvantage to individuals. These small incidents also colour the community's perception of the efficiency, professionalism and integrity of government.

Complaints are a reminder of these points and contain a message for all of government. Lessons distilled in the e-bulletins include the need to explain clearly to a person why a debt or penalty is being imposed; do not assume the infallibility of automated systems; depart from standard internal procedures when necessary to achieve a common sense outcome; ensure that a proper delegation is in place and current; check the file for additional information before revoking someone's benefit; hold back on coercive action if other suitable options are available; make sure internal policies are consistent with legislation; and be sensitive to how a letter conveying unwelcome news will be received.

These examples also pose a question for the discipline of administrative law: is it well placed to play a practical role in safeguarding the community and improving public administration? The issues that arise in court and tribunal cases, while important in their own right, are not always typical of the problems that people experience with government. Most of us, for example, do not own a broadcasting licence that is revoked, are not dismissed from employment, nor denied a commercial fishing licence, refused a protection visa, or have parole revoked. On the other hand, most of us do at some time in our lives experience a problem with mail, telephone services, taxation or energy supply. Interestingly, a recent Ombudsman report that attracted considerable media interest was on mail redirection. Not only was this an experience to which most people related, they understood also that a mail redirection problem can lead to a payment notice going astray, personal mail falling into the wrong hands, or a valuable mail order item being lost.

Problems that cross agency boundaries

A second theme that arises frequently in Ombudsman complaints is that government performs weakest when responding to problems that cross the program boundaries or the responsibilities of a single agency. An illustrative example was an investigation by my office into a decision to prohibit a person leaving the country.⁶ The cooperation of three agencies was required to activate the prohibition, record it on a database and check the database before allowing a person to leave the country. It was admitted by the agencies that a mistake occurred in allowing a person to leave with an unpaid debt. Yet three years after the problem

⁶ Commonwealth Ombudsman, *Australian Federal Police and the Child Support Agency - Caught between two agencies: the case of Mrs X*, Report No 14/2009.

arose there is still no agreement as to which agency made the mistake or was to shoulder the burden of a compensation claim.

Similar drawn-out problems have arisen in other complaints. Complainants to the Ombudsman have encountered difficulty in finding mail that passes in turn through the hands of the postal, customs and quarantine services; in clarifying which of the many bodies that operate in an airport is an Australian Government agency that can address their complaint; in choosing the correct agency to handle their compensation claim following a government restructure and distribution of functions among multiple agencies; in getting two agencies to agree that one had misinterpreted a policy supplied to it by the other agency; in reversing a debt imposed by one agency following a computer malfunction in another agency that shared information; and in correcting inaccurate personal information passed by one agency to another.

As those examples suggest, agencies can adopt a siloed mentality when it comes to resolving difficulties that are not strictly of their making. This can border on obstinacy if the remedy to be provided is a financial remedy that will need to be met from the budget of one or other of the agencies. The commitment to a whole-of-government philosophy can be tested when service delivery breaks down.

This issue is taken up in two Fact Sheets recently published by the Ombudsman's office, on *Complaint handling: multiple agencies* and *Complaint handling: outsourcing*. The theme of both fact sheets is that many people look upon government as a single entity, and that the responsibility rests upon agencies to break down barriers and work cooperatively to resolve problems. The same call has been taken up by others. Referring to the tension between the horizontal responsibility of government and the vertical accountability of agencies, Australian Public Service Commissioner, Lynelle Briggs, noted that 'Accountability problems arise when performance managed bureaucracies are asked to work across organisational or jurisdictional boundaries on joint problems that are complex in the sense of being decentralised or ambiguous'.⁷

Providing an effective remedy

A third theme in recent Ombudsman work is the need to provide a suitable remedy to a person who has suffered disadvantage as a consequence of poor administrative practice. Traditionally in administrative law, the concept of a remedy is tied to a court or tribunal order

⁷ L Briggs, 'Contemporary Government Challenges: Delivering performance and accountability and the intersections with "wicked" policy problems' (July 2009). See also Management Advisory Committee, *Connecting Government: Whole of Government Responses to Australia's Priority Challenges* (2004); and APSC, *Policy Implementation Through Devolved Government* (2009).

that quashes an erroneous decision, substitutes a fresh decision, restrains unlawful conduct, mandates lawful action, or declares the law to be applied.

Those remedies have their place, but they are not suited to many of the problems that people now experience in dealing with government. Traditional remedies are ill adapted, for example, to assist a person who is caught by an unintended anomaly in a legislative rule, who has fallen through the cracks of a government program, is confused about the advice received from an agency, is disadvantaged by an agency's delay in addressing their complaint, or is disabled by a physical or mental impairment in understanding or accessing their legal rights. The problem confronting a person in each situation is real, and their enjoyment of legal rights can depend upon an appropriate remedy being found.

The issue is taken up in an Ombudsman Fact Sheet on *Providing remedies*. The fact sheet adopts a more expansive concept of remedy, to include an apology, financial compensation, proper explanation, reconsideration of agency action, and expediting agency action. Those categories are now used by the office as a key performance statistic. In 2007-08 a remedy was recommended by the office in 75% of the complaints that it investigated. This approach to dealing with problems has supplanted the more traditional method of recording whether the investigation has upheld the agency or the complainant. That approach simply does not work anymore in evaluating how complaints against government are handled and resolved.

A remedy that is particularly important is financial compensation where a person has suffered loss or damage as a result of defective administration by a government agency. Payment of administrative compensation in these circumstances can be made under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA), that applies to agencies covered by the *Financial Management and Accountability Act 1997* (Cth). The CDDA scheme is a valuable and important means of securing administrative justice in a complex system in which people rely on government for correct advice, decision making and regulation. The scheme should, however, be better known and better administered. This challenge was addressed in a recent Ombudsman report, *Putting things right: compensation for defective administration* (2009). Problems in CDDA administration highlighted in the report were unhelpful legalism by agencies, a compensation minimisation approach, unsupportive conduct by agencies, delay in deciding claims, and poorly reasoned decisions.

Another remedial topic the office will address in a forthcoming issues paper⁸ is the need for safety net discretion powers to be written into legislation. A common problem now in

⁸ Commonwealth Ombudsman, *Mistakes and unintended consequences: a safety net approach*, Issues Paper, 2010.

government is that legislation that is tightly written with rigid criteria and deadlines can exclude deserving cases and have unintended and unfair consequences. An earlier Ombudsman report on immigration detention drew attention to this problem, in reporting on an instance in which a person was held in detention far longer than necessary because the view was taken by the Department that it had no legal power to set aside a decision that was thought to be lawful though inappropriate.⁹ The issue is also raised in a recent Treasury Discussion Paper, which asked whether the Commissioner of Taxation should have an 'extra statutory concession' power to alter taxation legislation to vary the way it applies to a taxpayer or class of taxpayers, so as to correct an anomaly or defect in the law.¹⁰

Instilling administrative law values in the new style of government

Changes in the structure and style of government inevitably throw up new challenges for administrative law. Two examples that I have taken up in another paper are the practice of outsourcing government service delivery to private contractors, and government reliance upon automated systems to make decisions and deliver services.¹¹ Another example discussed in Ombudsman annual reports is the division of policy and service delivery responsibilities between agencies – the purchaser/provider model, of which Centrelink is an example.¹² Each of those developments throws up novel problems that require both a different understanding of how rights can be infringed and a different approach to resolving problems and finding a remedy.

The issue is also raised in a recent report of the Administrative Review Council on complex business regulation. The report discusses the steps needed to ensure that administrative law values are upheld in the new regulatory framework of government that relies upon self-regulation, co-regulation and 'soft law' rules.¹³

A recent Ombudsman report on Executive Schemes¹⁴ highlights the issue in yet another way. The report points to the trend in government to distribute grants, benefits and compensation under schemes that are based in agency guidelines and policy statements, rather than in legislation. There is increasing use of executive schemes because of the speed with which they can be set up and their flexibility when circumstances change. They are widely used for purposes such as payment of redundancy benefits, emergency financial

⁹ Commonwealth Ombudsman, *Report into Referred Immigration Cases: Other Legal Issues*, Report No 10/2007 at [6.3].

¹⁰ The Treasury, *An 'extra statutory concession' power for the Commissioner of Taxation?*, Discussion Paper, May 2009.

¹¹ John McMillan, 'Ten Challenges for Administrative Justice' (2009) 61 *AIAL Forum* 23.

¹² Eg, Commonwealth Ombudsman, *Annual Report 2006-2007* at 40.

¹³ Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Business Regulation*, Report No 49, 2008.

¹⁴ Commonwealth Ombudsman, *Executive Schemes*, Report No 12/2009.

assistance, drought relief, health payments, LPG conversion, farming restructure, industry incentives and administrative compensation.

The drawback is that the checks and balances that apply to legislation are missing. The rules of executive schemes are not subject to the *Legislative Instruments Act 2003* (Cth), decisions made under the scheme are not appealable to a tribunal, and judicial review is not possible under the *Administrative Decisions (Judicial Review) Act 1977*. Effectively, the right of complaint to the Ombudsman is the only external review and accountability mechanism. The absence of a full range of administrative law controls has meant that scheme rules can be ambiguous and poorly drafted, they are not always published, rule changes are applied retrospectively to reject applications that would otherwise qualify, and different versions of a scheme can be applied inconsistently within agencies.

The Ombudsman report proposes eight best practice principles to address those shortcomings. One of the principles is that agencies should establish procedures for complaint handling and internal review of decisions made under executive schemes.

Conclusion

The Ombudsman is one element only in the administrative law system. However, the complaints received by the office are emblematic of problems that people experience with government and that administrative law is committed to resolving. The overarching objective in all administrative law review is to ensure that individuals have effective access to administrative justice. The approaches and remedies that are needed to fulfil that objective are never static. That is acutely reflected in the experience of Ombudsman offices.