A COMMUNITY LEGAL CENTRE PERSPECTIVE ON ACCESS TO JUSTICE AS IT AFFECTS ADMINISTRATIVE LAW

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Introduction

Mary and I have been invited to speak at this forum so as to describe broadly the areas in which community legal centre clients and the disadvantaged of our society most often come face to face with administrative law, to raise the issues which are of most concern to them, and to offer our perspective on a few improvements to the administrative law process.

The primary motivation for the formation of the legal centre movement 20 years ago was the commitment to building a just and equitable society within the context of a broader social justice agenda. Community Legal Centres (CLCs) now exist in every state and territory, are locally based and provide advice, assistance and advocacy to disadvantaged members of our society. We also conduct legal education and law reform campaigns. Because of the nature of our work CLCs have developed expertise in areas of the law not often practiced by the private profession. CLCs operate both as generalist centres, and as centres that specialist in particular areas such as welfare rights, consumer credit or the rights of the intellectually disabled. CLCs often have a profound effect on the lives of disadvantaged people and communities.

As a generalist centre, Redfern Legal Centre provides assistance to people who are disadvantaged in a wide range of areas. Our clients are commonly disadvantaged because of economic, cultural, linguistic, ethnic, educational or intellectual reasons. Consequently, our clients regularly have dealings with government departments and public sector agencies whether it be in relation to social security payments, immigration status, public housing applications, wage contributions for bankrupts or compensation for victims of crime.

Many of the public sector agencies and tribunals with which our clients come into contact are under federal aegis such as the Departments of Social Security and Immigration. We understand that the focus of the morning's plenary session is on NSW administrative law, and we will attempt to keep this focus, however many of the comments are drawn from the procedures of federal departments and tribunals and equally apply at the state level.

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Scope of "Administrative Law"

"Administrative Law", as it is known, should not be seen in isolation from the range of issues relating more broadly to "civil law". Many of the obstacles an individual faces in seeking justice are common to a number of areas of civil law. Some of these obstacles, which we will outline later, should be seen in this context.

More specifically, the boundaries around the field of law known as administrative law should not be too restrictively drawn. The fragmented nature of administrative law in this country, with its federal and state tiers, large number of government departments and agencies, proliferation of tribunals and their differing procedures and mechanisms for decision-making and review, require that administrative law be widely considered.

Such a broad approach to decision-making and review becomes even more important as we enter a social environment dominated by competition policy. As government moves further to privatise services traditionally provided by the state the issue of protective mechanisms to ensure that individuals receive fair and just determinations from service-providers becomes more acute.

Administrative law has always been concerned with fettering the power of officials entrusted with the task of public administration. When government entrusts the private sector with areas traditionally the responsibility of the state, it must only do so if it retains responsibility for ensuring that systems of review of these decisions be implemented. If for example, the Insolvency and Trustee Service of Australia was privatised, we are faced with the question of what review mechanisms of ITSA determinations should then be put in place. Currently, decisions of the Official Receiver as to the amount of a bankrupt's contribution during the bankruptcy are reviewable by appeals to the AAT.

Whereas at present administrative review is seen as a protection for the individual against, among other things, unjust government determinations, we may need to look in the future to a system of administrative review that is activated not by the nature of the agency (i.e. governmental) but by the nature of the service provided. This is a debate that will gain in importance, one that is not without difficulty, but one which we should keep in mind.[1]

Rights affected initially by the government department

An individual's rights first become affected at the point of initial contact with a particular department or agency. That agency has the power to critically alter that individual's standard of living through its determination. It is crucial that at this level, perhaps more so than the review level, any obstacles lying in the way of an individual's path to a fair and just determination be removed. Irrespective of the financial benefits this may have for government, it importantly engenders in society a confidence in the ability of government agencies to make correct decisions.

Issues of access - factors relating to individual disadvantage

Many of the concerns facing the disadvantaged stem directly from the obstacles they face in accessing justice. Many of these concerns are commonly shared by courts, tribunals and public sector agencies with the power to determine individual rights. Many of our clients are commonly disadvantaged because of:

- the fact that they are from a non English speaking background;
- lack of education;
- cultural differences;

- the fact that they are from low-income groups;
- geographical isolation; and
- intellectual disability.

By way of example, think of a person recently arrived in the country from a state without a welfare system to speak of, and without an effective administrative arm of government. This person not only has language barriers to overcome, but has no real understanding of his or her rights as they relate to a government service. For example, the existence of a right to compensation for victims of violent crime is a right with which people from some cultural backgrounds are unfamiliar.

Others with low educational and literacy levels are similarly disadvantaged in that they may be unaware of their rights not only in relation to the review of certain administrative decisions, but also of the very existence of government services to which they may be entitled.

Commonly, individuals with an unsophisticated understanding of the role of government and the existence of available procedures are disadvantaged in preparing an application for review of a decision, or in writing a letter of complaint to the Ombudsman's office. Though they may have good grounds for a favourable review, or for a comprehensive investigation of their complaint, they may frame their concern in terms of a procedural injustice. Such applications by individuals commonly are not investigated as fully as they should be.

Furthermore, access to justice issues are frequently only approached from a perspective of disputes between parties who are assumed to be relatively equal. This is often not the case. In tribunals which have adversarial-style proceedings, or in situations where the review mechanism has been framed to achieve a particular result, there is commonly a power imbalance between either applicant and respondent, or applicant and the review body itself.

All people have a fundamental right to equality before the law. The right to an effective remedy should not be dependent on access to wealth and social advantage.

Recognition of and response to individuals' disadvantages by departments, tribunals and public sector agencies

The system of administrative law must be sympathetic to individuals who are disadvantaged in these and other ways, and must be capable of compensating for these disadvantages. This can be done in a number of ways.

Communication between courts and tribunals and their users needs to be reviewed.

Simplification of forms and procedures

Forms and procedures need to be simplified. Many forms are not comprehensible to an inexperienced lawyer let alone the public. Documents which fail to communicate either their subject matter or their importance can result in a denial of rights and loss of court or tribunal time. Significantly they also result in a reliance by the general public on the services of lawyers.

Documents and forms should be well designed and in plain English. Process needs to be uncomplicated. This seems self-evident, but the results of a procedure that is, either deliberately or inadvertently, complicated and ambiguous can be disastrous. The Federal Court, in its decision of *Hamilton and McMurray v Minister for Immigration and Ethnic Affairs*,[2] commented, in relation to the Department of Immigration, on "serious deficiencies in the Department's administration, as regards the application of ordinary fairness".

I hesitate to comment in any detail on administrative procedures within the Department of Immigration. It is an area that many of you will be far more familiar with than I. Nevertheless, a number of the facts of this case highlight broader problems in other administrative systems. In this case the applicant needed to make an application for immigration on particular grounds in a very limited time-frame. Among other things the court commented upon:

- the applicant's handicap in having difficulty in receiving legal advice in such a short period while in custody;
- the failure of the detention centre to have copies of the Migration Act and its regulations; and
- the failure of the Department's officers to provide the applicant with:
  - the relevant forms;
  - the full set of corrected documents; and
  - correct advice as to her options.

Justice Burchett commented that:

> People's fundamental liberties should not depend on hazards, or be obliterated by the lack of an appropriate form, or by inability to obtain advice within a bare few days, especially while in custody. And to the extent that strict rules are applied, there should be equal strictness to ensure that the Department provides the necessary information and the means of immediate compliance by those affected.

Role of registries

The registries in the various tribunals should play a significant role in improving community access. At present far too many people expect that, when seeking information from a court or tribunal, they will be treated as a bothersome individual. Lawyers and court and tribunal staff need to have a general awareness of how frightened many people are of legal processes.

Courts and tribunals should adopt a service orientation. Court and tribunal officers could provide a comprehensive service to help the public. This would include, registrars, community assistance officers and interpreters who believe it is their job to assist people to use that court or tribunal. Staff should be trained to recognise and meet the needs of people with disabilities, people from non-English speaking backgrounds and Aborigines.

In local courts, small claims courts and some tribunals many people choose, or are forced, to represent themselves. They are often unaware of the issues and processes they need to consider in deciding how to run their case. They could be assisted by access to advice services, access to court based advisers, and through processes designed to clarify issues for litigants before the hearing.

Operating hours of courts and tribunals

Court facilities and court opening hours should be reviewed with the needs of court users foremost. Services should be provided out of "normal" working hours, facilities for people with disabilities, child care and other identified needs should be provided eg provision of a separate waiting room in the court for women seeking apprehended violence orders.

Interpreters and translators

Interpreters and translators should be provided for all who require them. This seems a statement of the obvious - if English speakers have difficulty with legal English and concepts, then those who don't speak English particularly well are disadvantaged. So, too, are people who

come from countries with very different systems of government and law unless provided with translators and interpreters free of charge.

Access in remote areas

Access to courts, tribunals and government agencies for people living in remote areas could be enhanced by greater use of circuits and technology. Greater use could be made of the telephone, especially in pre-hearing matters. Some tribunals, including the Social Security Appeals Tribunal, currently conduct telephone hearings in suitable matters. Wider use of such technology should be accompanied by work on appropriate procedures to ensure that litigants' rights are not compromised. Research is currently being conducted by the Darwin Community Legal Centre on the experience of litigants of the Social Security Appeals Tribunal whose hearings were conducted by telephone.

Formality

The formality of buildings and interiors assists in making the courts and some tribunals intimidating and inaccessible to many "ordinary" people, as does the formality of dress. Design specifications should be developed with access and user friendliness as a major priority.

Review Processes

In NSW the operation of administrative law is severely fragmented, and seriously inadequate. There is no "judicial review" of administrative decisions other than in the administrative law division of the Supreme Court, nor is there an equivalent to the federal Administrative Decisions (Judicial Review) Act for state bodies. The types of review processes that do exist, both external and internal, are so many, and differ so widely in their procedural mechanisms that it is difficult to comment on them broadly. Almost all public sector tribunals and review processes, however, should have a number of minimum characteristics.

Independence

Of fundamental importance to review mechanisms is an element of independence. For internal review processes, the reviewer should at least be someone other than the person who made the initial decision.

For external review processes there must be independence from the agency that made the decision. The recent Discussion Paper by the Administrative Review Council (ARC) on Commonwealth Merits Review Tribunals notes that:

> [I]ndependence from the agency whose decisions are being reviewed is necessary to ensure credibility in the eyes of people who seek to have agency decisions reviewed.[3]

The ARC went on to say that this independence not only meant that the decision-makers involved in the review are not subjected to undue influence, but that there also be no perception of undue influence. It is critical that the reviewers not be unduly influenced by the government agency, by other reviewers or by tribunal staff.

The criteria of independence should apply to all tribunals. The Residential Tenancies Tribunal (RTT) in NSW is one such tribunal that is commonly perceived to lack this element of independence. The RTT is located in premises shared with the Department of Housing and is accountable to the Minister for Housing. At the same time it is empowered to hear disputes between public housing tenants and the Department of Housing itself. The RTT is not seen to be independent.

In other tribunals, where there are lax or poorly organised procedures for tribunal or

registry staff to follow, the tribunals open themselves to criticisms that communications between registry staff, applicants and decision-makers in some cases leads to unfair decisions.

Representation

The question of representation in tribunals is problematic. Different tribunals take very different positions on the adversarial-inquisitorial spectrum. This is commonly affected by the nature of the tribunal, ie whether it is a review tribunal in the nature of the Social Security Appeals Tribunal, or whether it hears applications on a matter at first instance, like the RTT. Generally, the more adversarial is the approach taken by the tribunal, the more important it is that representation be allowed. It is in adversarial-type proceedings that an individual is more likely to be disadvantaged.

The NSW RRT serves as a good example. It does not generally permit representation. The rationale is that legal representation is expensive and if severely restricted, costs will be minimised and access increased. It is argued that neither party is disadvantaged by this rule because they are treated the same.

The reality is different. Landlords may be represented by the real estate agent who regularly manages their property and the Department of Housing is represented by a departmental officer who is a professional (non-legal) advocate for the Department. While these people are not lawyers they will be more familiar with the law and the tribunal's workings than most lawyers. Tenants appearing before this tribunal must argue their case on a very unequal basis.

Greater use could also be made of lay advocates. Courts and tribunals should allow representation by paralegals such as financial counsellors, and social workers who can establish that their appearance will benefit their client.

Consistency of review bodies' decisions

Crucial to the question of whether individuals have confidence in a tribunal is the ability and willingness of the tribunal to maintain consistency in its decisions. In NSW the Victims' Compensation Tribunal (VCT) has been criticised for failing to maintain consistency in its decisions. In a number of instances appeals from the VCT to the District Court have successfully increased the award for damages for people who have been sexually abused as children. The decisions of the District Court, however, have no precedential value, so that the VCT continues to decide subsequent applications without any reference to the comments of District Court judges.

The means of ensuring consistency in decisions is not always easy. In some instances it will mean that the tribunal itself takes responsibility for ensuring that all members are made aware of tribunal decisions. In other cases it may mean that a set of guidelines, upon which a decision is made, is relied upon and readily available to applicants. The experience of the VCT, however, highlights some of the difficulties associated with attempting to achieve this consistency. The VCT does not have a permanent staff, and its members are made up of a large number of magistrates who from time to time hear applications. The magistrates often bring with them to the VCT their Local Court experience and a background in adversarial processes. This, it has been argued, stands in the way of the "beneficial" intentions of the legislation which set up what was intended to be a non-adversarial user-friendly scheme. This example highlights the importance of proper training for tribunal members and staff.

Speed with which a decision is made

Tribunals have different time-frames within which they attempt to make decisions. Long delays in gathering material, hearing an

application and making a decision often mean that applicants are left in a state of "limbo". As a tribunal decision often has a significant effect on an applicant's future, it is important that tribunals are capable of streamlining their processes to ensure that a decision is made as efficiently as possible.

This need for quick and efficient procedures should stem from the desire to prevent injustice to the applicant through delay. On the other hand, however, in certain situations a procedure which operates too quickly denies the applicant reasonable time to prepare his or her application, and consequently amounts to a procedural inequity. The NSW Tenancies Tribunal makes fast decisions, in some cases giving applicants only 14 days notice of a hearing date. This is an example not of a "streamlined" process, but of a "steamrolling" one. The touchstone must be one of fairness.

Best practice models

The development of best practice models for tribunals could be a way of addressing a great number of the problems arising.

Such models could identify, first when tribunals are an appropriate response to the need to provide a forum to assert rights and resolve disputes and second, the best procedures to be used in various circumstances.

Role of Legal Aid

The provision of grants of aid to disadvantaged individuals seeking to pursue administrative claims is a crucial element in ensuring that all individuals who wish to have a tribunal or court review a determination that has affected them can do so, irrespective of their financial position. The Legal Aid Commission of NSW provides grants of aid in administrative matters, but only in a limited number of cases. The Administrative Law Division of the Commission is limited to providing aid in matters relating to federal administrative law. Even then the list of areas in which aid will be given is not comprehensive. Aid is still not generally available for matters involving the *Student Assistance Act 1973*, the *Citizenship Act 1948*, the *Freedom of Information Act 1982*, and in relation to Comcare matters.

For matters relating to state administrative law, aid is provided under the Commission's civil law policies for "consumers" who are adversely affected by a decision of a government instrumentality. On one hand this reflects the fragmented nature of state administrative law. It also means that each application for aid must be sought on a piecemeal basis. Without clear guidelines as to what matters at state level are aidable, the very process of applying for and receiving aid becomes fraught with unnecessary difficulties.

The Legal Aid Commission, in addition to providing aid in administrative matters, is itself a public sector agency. A decision by the Commission to refuse a grant of aid is a decision with tremendous impact on an applicant's chances of success in a dispute. In many ways just as significant, although not as widely understood, is the existence of the Commission's determinations pursuant to section 46 of the *Legal Aid Commission Act (NSW)*. The Commission is required to make a determination, after the completion of every matter in which a grant of aid has been provided, as to whether the recipient of the aid is able to repay the amount of the grant or is able to make a lesser contribution. It is a term of each grant of aid that the Commission may seek to recover from the applicant the costs and expenses of the legal services provided under the grant, and cannot, due to section 46, decide the amount payable until the end of the case.

Grants of aid from the Legal Aid Commission are not so much grants as loans which the Commission may choose not to call up. Recipients of aid to whom this

is not clearly communicated are under the misapprehension that they are being provided with a free service. It is crucial that all applicants for a grant of aid understand the true nature of the grant to which they are agreeing, before the grant is provided. The failure to do so is a serious obstacle to a fair and just legal system.

Access to Justice Advisory Committee Report

As a final point we believe it is worth keeping at the forefront of this debate a number of recommendations of the Access to Justice Advisory Committee (AJAC).[4]

The AJAC Report released in May 1994 noted that a comprehensive system of review of Commonwealth government decisions has been in place since the 1970s but that state systems fail to provide minimum standards. The Committee took the view that:

> [A]n administrative justice system fails if it does not provide:
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> - a comprehensive, principled and accessible system of merits review;
> - a requirement that government decision-makers inform persons affected by government decisions of their rights of review;
> - a simplified judicial review procedure by comparison to judicial review under the common law;
> - a right for persons who are affected by decisions to obtain reasons for those decisions;
> - broad rights of access to information held by governments; and
> - an adequately resourced ombudsman or commissioner of complaints with a general power to review government action.[5]

The Committee acknowledged that in NSW there is recourse to the provisions of the *Freedom of Information Act 1989 (NSW)* and the *Ombudsman Act 1974 (NSW)*. However it also noted that there is:

- no general approach to merits review;
- no general obligation on decision makers to inform persons affected by decisions of their rights of review; and
- no general right to obtain reasons for administrative decisions.

AJAC recommended that each state consider the comprehensive work of the Electoral and Administrative Review Commission of Queensland on the reform of Queensland's administrative review system and in particular consider:

- the establishment of a general merits review tribunal;
- the provision of a simplified codified judicial review procedure; and
- the imposition of a duty on administrators to provide reasons for their decisions when affected persons request reasons.[6]

The types of decisions that fall under the jurisdiction of administrative law can have a profound effect on a person's life. Very often, the people most affected are those from the poorest and least advantaged sections of the community, in particular

those reliant on state-provided services and benefits for their existence.

From a CLC perspective it is very important that administrative decision making be open, fair, impartial and rational and that it be subject to external review. We have long advocated the establishment of a merits review process. We would like to see similar avenues for redress developed in NSW as exist at the Commonwealth level. While we acknowledge the merits of a number of specialist tribunals, we particularly recommend the establishment of an administrative review tribunal as a matter of urgency. Such a body is essential in order to enhance the "ordinary" person's access to justice.

Endnotes

1 See also Chris Shanahan of Murdoch University, "Revisiting the Three 'Rs', Administrative Review - Crossing the Public-Private Divide", presented at the National Association of Community Legal Centres Conference, August 1994.

2 *Jacqueline Hamilton and Olive Mary McMurray v Minister for Immigration & Ethnic Affairs*, Federal Court of Australia before Davies, Sheppard & Burchett JJ, handed down 26 October 1994 (unreported).

3 "Review of Commonwealth Merits Review Tribunals", Discussion Paper, Administrative Review Council, September 1994, p 61.

4 *An Action Plan*, Access to Justice Advisory Committee, 1994.

5 Ibid, p 323.

6 Ibid, p 333.