

THE IMPACT OF EXTERNAL ADMINISTRATIVE LAW REVIEW: COURTS, TRIBUNALS AND OMBUDSMAN

*Bruce Barbour**

External administrative law review is largely undertaken by three bodies – courts, tribunals and the Ombudsman. We are focusing on each of these today and not surprisingly, I will be talking about the impact of the Ombudsman.

Before doing so, let me say at the outset that I take a very broad view as to what constitutes administrative review – essentially administrative law review is aimed at regulating government decision-making, ensuring accountability of the executive and thereby helping to ensure community confidence in the administration of government.

I do not intend to spend much time discussing courts and tribunals. I shall however discuss some of the obvious differences in what they do and how they do it as compared to an Ombudsman. Not surprisingly, I will rely primarily on references to my own Office.

Firstly, a little about my Office. Over the past few years I have spoken repeatedly about the need to challenge traditional notions about what a public Ombudsman is and does as well as the need to develop more sophisticated and pro-active means of ensuring that agencies within our jurisdiction administer services effectively and fairly. I think it essential that the role performed by my Office reflects and responds to changes in society as well as community expectations. These factors should drive us to constantly review and improve our business.

The number of matters we handle continues to grow. In 2005/06, we received 33,315 matters. Of those, over 23,000 were finalised informally, usually through advice or initial contact with the relevant agency. Over 10,000 were dealt with more formally.

The large number of matters we handle is partially due to the fact that we are no longer dealing with only 'public authorities' but with a broad range of government and non-government bodies, as well as private individuals.

My Office has also moved from solely handling complaints involving administrative 'action' as it did 30 years ago, to dealing with:

- the conduct of police officers, whether on or off duty;
- the review of deaths of certain children and people with a disability;
- inspecting visitable services where children, young people or people with a disability or residents of licensed boarding houses live;
- the way in which allegations of child abuse are handled, and
- the new operation of certain legislation ensuring the powers provided are being exercised fairly and effectively.

* *NSW Ombudsman. This paper was presented at the 2007 AIAL National Administrative Law Forum.*

With such a broad jurisdiction or responsibility, it is essential that my Office operates as more than just a reactive complaints handling body. In order to meet the expectation of those receiving a variety of services, as diverse for example as policing, community services, education and local government, we now:

- audit systems and inspect records;
- conduct own motion inquiries and investigations;
- review investigations conducted by agencies;
- undertake research and project work;
- provide organisation with the opportunity for their staff to undergo training, and
- prepare a range of publications and guidelines on topics such as good administrative practice and complaint handling.

The range of our functions and how we go about them contrasts quite clearly with those of courts and tribunals.

So how are courts and tribunals different from Ombudsman?

Courts are limited in the issues they can address, given their role to adjudicate between disputing parties. Courts operate in an extremely formal manner prescribed by rules and orders and they are not called upon to address systemic issues. They deal only with those matters that are specifically brought to them and in an administrative law context, generally will deal only with specific appeals against individual decisions. Courts are primarily focused on the 'legality' of conduct or the decision the subject of review.

A significant impediment to the impact of courts and litigation for almost all of the community is cost. In August last year, his Honour Wayne Martin, Chief Justice of the Western Australian Supreme Court commented that Australia's legal system –

... is the Rolls Royce of justice systems, but there is not much point of having a Rolls Royce in the garage if you can't afford the fuel to drive it anywhere. You can sit in it, polish it, admire it, boast about it, lend it out to rich friends or hire it out to people who can afford to drive it, but you can't use it for its basic purpose, which is to get you from A to B¹.

Coming to the Ombudsman on the other hand, costs complainants nothing.

Tribunals of course, were initially established to overcome some of the difficulties experienced by those using the court system, to offer the public a quicker, cheaper and more accessible form of administrative law review.

They more so than courts will focus on the merits of a decision, and to some extent similarly to how an Ombudsman might approach an issue. They of course are charged with determining that the correct or preferable decision is reached in the further hope of ensuring that such decisions will translate into better decision-making practice and procedure by the relevant government agency.

However, even with relaxed procedures and a more accessible process, tribunal members and tribunal practice is still criticised for being too legalistic. John McMillan has suggested that tribunals often present 'reasons statements that have been prepared on the assumption that the primary audience for the reasons is an appellate court rather than the parties before the tribunal. A result is that the reasons may take an inordinately long time to prepare and obscure rather than illuminate the tribunal's chain of reasoning.'² Although meant to offer a less formal mechanism for resolving administrative disputes, tribunals are far from lawyer free and often still have a distinctly adversarial feel. And, of course, like courts, tribunals are primarily concerned with individual decisions and disputes.

I think the work performed by an Ombudsman is best described as *complimenting* rather than *competing* with that of courts and tribunals.

Recent research regarding the outcomes expected by complainants has suggested that, for many people, merely obtaining a solution to their problem is not enough. They are seeking an explanation of why the problem arose and what is being done to prevent it happening again. Courts and tribunals may be in a position to provide a remedy, but our Office can reassure individuals that we are seeking to correct the cause of the problem before it affects others.

This is certainly evidenced by the number of people seeking our assistance as opposed to courts and tribunals. In 2005-2006, the Federal Court, Administrative Appeals Tribunal and Administrative Decisions Tribunal combined received 15, 744 new matters.³ In the same period, as I noted earlier, we received over 33,000 matters, as well as conducting additional proactive work.

In thinking about this topic, it seemed to me that the best way to demonstrate the difference in how an Ombudsman Office operates and what impact can be achieved was by way of example. So, what I propose to do is provide some brief examples of our work.

Audit of the NSW Police Force's Implementation of the *Aboriginal Strategic Direction*

Where courts and tribunals are largely restricted to making decisions based upon the information before them, we are able to audit the records of an agency in order to assess their practices and procedures.

Our ongoing audit of the implementation of the NSW Police Force's *Aboriginal Strategic Direction* is a good example of this. The *Aboriginal Strategic Direction* stemmed from the Royal Commission into Aboriginal Deaths in Custody. It was aimed at encouraging consultative, outcome-driven approaches to building better relationships with Aboriginal communities, with the aim of reducing crime and contact with the criminal justice system.

My Office's initial audit took place in 2003 and 2004, and involved:

- reviewing existing projects or initiatives in police local commands aimed at assisting police to work more effectively with local Aboriginal communities;
- meeting with local service providers, key community members, local police commanders and other police officers to discuss practical issues affecting the relationship between police and Aboriginal people;
- giving each command a report card and rating it against the six key objectives contained in the *Aboriginal Strategic Direction*, with recommendations on how the command could perform better, and
- monitoring each command's compliance with our recommendations and the implementation of the *Aboriginal Strategic Direction*.

Each police command was provided with a detailed report, outlining ways in which they could improve their relations with the Aboriginal community. In the special report to Parliament outlining the results of our initial audit, my Office noted that our preliminary recommendations had already yielded some positive results. Local police commanders had become more aware of their responsibilities under the *Aboriginal Strategic Direction*, and had taken steps to implement a number of my office's recommendations.

We are continuing to collect information about the various communities visited as part of our initial audit. This allows us to not only assess the relevance of our recommendations, but

also the effectiveness of the police response. During a follow up visit to one of the rural communities in 2006, we were pleased to find that a number of our recommendations had been adopted, and were having a positive impact upon relations between police and the local Aboriginal community.

In addition to police's interaction with the Aboriginal community, many of the other situations we deal with involve a diverse range of agencies. My Office oversees the work of a large number of these agencies, many of which have overlapping jurisdiction. Good examples of this are cases involving domestic violence. These can often involve the NSW Police Force, Department of Community Services, Department of Housing, and the Department of Education. Unlike other administrative review bodies, we are able to look at the work of all of these groups in a coordinated manner.

In order to best assess situations with multiple agency involvement, I have recently created a Cross Agency Team within the office. The main functions of this team are to:

- direct, coordinate and manage the work undertaken by the Aboriginal Unit and Youth Liaison Officer, both of which take part in direct contact with the community;
- provide other areas of the office with advice and information about significant Aboriginal and youth issues and initiatives;
- conduct projects which cross both agencies and groups within the office;
- provide a 'project management service' to our office in relation to particular cross-jurisdiction or cross-office projects where appropriate, and
- provide advice and information to our office about whole of government initiatives

We have now identified the following priority areas of work for the team, focussing on the needs of vulnerable groups within the community:

- the State-wide response to Homelessness;
- the adequacy of housing and support for people with high needs;
- the impacts of fines on young people; and
- service provision in vulnerable communities, with particular emphasis on how lead agencies are implementing interagency practices

Own motion investigation into the handling of complaints about transit officers by Rail Corporation.

It is not necessary for someone to come to us with a complaint. Frequently my Office utilises its own motion investigative powers.

Our investigation into RailCorp transit officers is an excellent example of this. We became aware of public concerns relating to the conduct of RailCorp transit officers through media reports, discussions with youth advocacy groups, information received through our Aboriginal Complaints Unit's audits, as well as a number of complaints received from members of the public alleging assault and the excessive use of force by transit officers. There are in excess of 600 of these officers, making them a substantial law enforcement entity. To put this in perspective, the ACT only has 620 sworn police officers.

As a result of this information, my Office decided that a broad investigation should be conducted. Making use of our powers under s 18 of the *Ombudsman Act 1974*, RailCorp was provided with a request for information regarding:

- specific powers, duties and roles performed by transit officers;
- recruitment and training of transit officers;

- the procedures for handling complaints about transit officers;
- procedures in relation to records and case management systems; and
- information about complaints received in the period from 1 July 2003 to 20 June 2004

After reviewing the material provided by RailCorp, my Office issued a final report, which outlined a number of recommendations in relation to RailCorp's:

- complaint handling policy,
- discipline policy,
- complaint information system,
- recruitment processes, and
- the use of force and exercise of powers of arrest

We also highlighted the advantages that would stem from the effective and ongoing external oversight of RailCorp's complaint handling procedures.

The response received in relation to most of these recommendations has been positive. Since receiving our report in August 2005, RailCorp have:

- introduced a Complaint Management System;
- established a Transit Officer Professional Standards Unit; and
- drafted Standard Operating Procedures for Transit Officers

We have maintained productive contact with RailCorp throughout this process, and have continued to provide advice and guidance regarding improvements to their systems.

Review of the *Police Powers (Drug Detection Dogs) Act 2001*

A new and very significant function for my Office is the review of certain pieces of new legislation. It is an interesting example of the ever-changing nature of our work and yet another example highlighting the differences between our work and that of courts and tribunals. My Office has been asked to conduct 17 legislative reviews, six of which are ongoing, into a wide range of legislation that provides police with additional, and often potentially intrusive, powers.

My Office recently completed a review of the *Police Powers (Drug Detection Dogs) Act 2001*. This has been a contentious piece of legislation, with both vocal support and criticism. Reverend Ray Richmond, pastor of the Wayside Chapel in Kings Cross, summed up much of the criticism levelled at the Act when he stated that he had 'formed the opinion that the practice [of using drug detection dogs] is intrusive, offensive and ineffective in prosecuting drug dealers above street-level couriers.'⁴

When the legislation was first tabled, the then Police Minister Michael Costa commented that it was 'aimed primarily at detecting and prosecuting persons committing offences relating to the supply of prohibited drugs and plants.' He went on to state that it would allow police to 'target well-known drug dealing areas and break up the trade in prohibited drugs.'⁵

After analysing data collected during a two-year period following the enactment of the legislation, my office found that prohibited drugs were only located in 26% of the searches conducted following a drug dog's indication, calling into question the accuracy of drug detection dogs, as well as the cost-effectiveness of their use. Within this group, the most commonly detected drug (84%) was cannabis. Only one amount of cannabis seized exceeded the prescribed quantity of 300 grams required for a 'deem supply' charge. These

findings clearly brought into question the effectiveness of using drug dogs to target drug suppliers.

As well as examining the strengths and weaknesses of the legislative framework, the report also assessed possible wider impacts of the legislation on the community:

- As one drug educator commented, there is a fear that ‘recreational drug users, concerned about being detected carrying drugs, might resort to taking a larger amount of drugs in one dose rather than staggering their consumption over a longer period.’ There is also some concern that, when confronted with drug detection dogs and large numbers of police, young people may panic and swallow any drugs they may be carrying. During one of our focus groups, a police officer acknowledged this risk, stating that ‘we’ve actually had an ambulance on standby in the area in case there’s an OD which is caused by us going through.’
- The report recognised the possible impact of drug detection dog operations on existing health services for drug users, such as Medically Supervised Injecting Centres, needle and syringe exchange programs, and methadone clinics.
- My Office suggested that the Attorney General’s Department consult with the NSW Police Force and NSW Health to consider the formation of a steering committee to formulate a trial of a pre-court diversion program for those found in possession of small amounts of drugs other than cannabis. This proposal met with initial support, and my office is awaiting advice from the involved parties regarding its implementation.

Alternative methods

As well as audits, investigations and legislative reviews, our office also makes use of many less formal methods to encourage changes to administrative practice. This is yet another area where our work stands apart from that of courts and tribunals

Meetings

This can be as simple as holding meetings.

I often meet with the heads of the various agencies within our jurisdiction to discuss possible problem areas. This can lead to quick and effective procedural change. It is my experience that very few organisations will resist suggestions designed to help them operate more effectively. I also hope that agencies recognise the benefit of changing their approach in order to head off future problems, complaints and possible litigation.

In addition to these informal, ad hoc meetings, myself, my Deputies and Assistant Ombudsman also take part in regular stakeholder meetings with peak agencies falling within our jurisdiction. These allow the opportunity to canvas issues at an early stage. The meetings also help to develop effective working relationships. As we do not have the ability to require agencies to adopt our recommendations, continued contact can assist in persuading agencies that implementation is in their best interests.

In December last year, a roundtable discussion took place involving representatives of 11 peak bodies involved in providing disability services. Some of the key issues discussed were:

- criminal justice issues,
- service access,
- service monitoring; and
- vacancy management

In the same month, my Office also met with various groups involved in out-of-home care. As well as discussing topical issues, the representatives provided outlines of their recent action, as well as highlighting issues affecting them and their clients.

As part of our ongoing review of several increases in police powers, representatives of my Office have met with a wide range of relevant community organisations in order to gauge their response to the changes. This allowed those effected by the legislative changes to voice their concerns, as well as have some of their questions answered in an informal setting.

'Mystery shopper' audits

As well as formal systems audits, my Office also conducts informal and unannounced 'mystery shopper' customer service audits. These allow us to monitor the everyday performance of various agencies, and are aimed at:

- assessing the standard of frontline customer service within organisations whose core business involves a high level of contact with the public;
- highlighting any deficiencies in the level of customer service provided;
- making recommendations for improvement of customer service;
- providing general feedback to the relevant organisation, and
- motivating public sector staff to provide high levels of customer service

Where possible, we make use of existing customer service standards for the agency to provide a customer service benchmark for the relevant agency. These are taken from publications such as guarantees of service, annual reports and codes of conduct.

Training

As I mentioned briefly in my introduction, my Office offers organisations the opportunity to take part in training in order to improve their service provision and complaint handling. In 2006, our staff delivered over 70 training sessions in areas such as:

- best practice in complaints management;
- complaint handling for frontline staff;
- dealing with difficult complainants;
- the art of negotiation, and
- risk management, to name but a few.

I have mentioned these various informal methods of impacting upon administrative decision-making, because their importance and value is not adequately recognised. All are aimed at addressing issues to improve practice and decision-making before problems can progress to complaints. This is clearly beneficial to the community, as well as the agency involved.

Conclusion

Having discussed some of the very positive aspects of the work of my Office, I would like to discuss an area in which I believe we may be failing: public perception and understanding of our role, and the impact we make.

As part of the National Integrity Systems Assessment completed by Griffith University and Transparency International in 2005, public sector agencies in NSW were asked to rank the relative importance of the State's integrity agencies. Our Office was ranked first out of 23 listed organisations. Courts were ranked sixth, and the Administrative Decisions Tribunal

eighth. Despite this level of public sector recognition, many within the community still think of my Office as merely a complaints hotline, if they have any knowledge of us at all! As John McMillan noted in 2003, 'the stature and public profile of an organisation does not necessarily correspond with knowledge of its existence.'⁶

While it is encouraging that the public sector recognise our impact, the same level of understanding does not seem to have passed into the general community. I find this frustrating, as a greater level of public understanding of the scope of our work would lead to increased public confidence and an even greater opportunity to bring about change.

I would like to leave you today with several possible explanations for this lack of knowledge, as well as some tentative solutions.

It may be that a lack of public understanding of our role is due to our success in working quietly to bring about change. I believe that we are at our most effective when we do not have to force an organisation into a corner. The challenge we face is to successfully publicise our achievements while maintaining effective working relationships with the organisations with which we do business.

One way to correct this problem without damaging good working relationships may be to publicise positive changes alongside the agency making them. All too often our public profile seems to be based on negative findings and significant investigations. Whilst these are important and must be brought to public attention, our involvement should not always be seen to be a black mark against an organisation. This form of publicity could improve the public profiles of both our office and the agency involved. The positive outcomes of the RailCorp investigation, which I have already discussed, were outlined in RailCorp's staff magazine *On Track* at the end of last year under the heading *Transits: Embracing Cultural Change*. In order to improve the level of public understanding of our work, this type of positive comment by relevant agencies needs to extend beyond employee-only magazines.

I also hope that our continuing effort in maintaining and diversifying our contact with the public will raise greater awareness of the extent of our impact. In the last few months, members of our Cross Agency Team have:

- given a presentation on creating positive change within communities to youth workers at their national conference
- spoken at the Legal Studies Association Conference, hoping to provide legal educators with a better understanding of our work
- taken part in two separate Aboriginal Men's Group meetings, discussing our role and the complaints process
- given presentations at Good Service Forums in Cowra, Condobolin and Bankstown.

However, even if we are able to effectively publicise our achievements, it is very difficult to 'sell' the role of bodies such as mine when there are so many different organisations operating under the Ombudsman moniker.

Although there seems to be a lack of knowledge surrounding much of our work, there is a general understanding of what the title 'Ombudsman' symbolises. This has meant that the title is often applied to provide oversight bodies with an independent and fair 'feel' or 'look'. A recent example of this is the Federal Government's creation of the Workplace Ombudsman. A release from the Prime Minister's Office announcing the change would seem to suggest that it is merely the Office of Workplace Services renamed.⁷ Although the press release stresses the independence of this body, it is not clear how impartial it would be when government interests are likely to be involved.

Unlike organisations bearing the name Ombudsman, courts and tribunals have a strong level of jurisdictional certainty and public recognition of their role. In recent years, there has been a move to amalgamate tribunals in some jurisdictions, in order to avoid confusion and overlapping functions. This seems in most cases to have strengthened their role and reputation.

When I spoke at this Forum in 2001, I floated the notion of controlling the use of the name 'Ombudsman' through a system of accreditation. I suggested that this in turn could mean that the term Ombudsman could become a 'brand' to signify systemic integrity. However, I ended by recognising that it did not matter what an organisation was called. What is important is how those of us who promote high quality decision-making perform our functions and improve the way agencies within our jurisdiction perform their various roles.

Historically I think most would say that over the past few decades both courts and tribunals have been seen to be and thought of as the pre-eminent external agencies in terms of administrative law review. They are very secure in their practice and procedure. They have built reputations of good standing. They are able to bring to finality issues through determinations, decisions or orders. However, I think it is now time to look at whether in real terms they are making as significant an impact in administrative law as Ombudsman.

I have only briefly touched the surface of what Ombudsman offices are currently involved with. It is, however, very clear that we have a much broader role and mandate than courts and tribunals. We deal with far more individual matters than courts and tribunals. We can work more flexibly and informally, focussing our resources more strategically. We deal with systemic issues, can initiate investigations and review the effectiveness and implementation of legislation. We can also find conduct to be wrong, even if it is in accordance with the law.⁸ In my view, Ombudsmen have a more far reaching influence and impact on government agencies, government decision-making, practice and procedure than courts or tribunals.

Endnotes

- 1 The Hon Wayne Martin, CJ, *Bridging the Gap*, address to the National Access to Justice and Pro Bono Conference, 12 August 2006.
- 2 John McMillan, 'Judicial Review of the work of Administrative Tribunals – How Much is too Much?' (2003) *AIAL Forum* 39, p.28.
- 3 Federal Court of Australia, *Annual Report 2005-06*, p.114. Administrative Appeals Tribunal, *Annual Report 2005-06*, p.126. Administrative Decisions Tribunal New South Wales, *Annual Report 2005-06*, p.51.
- 4 Quoted by Ms Clover Moore MP, NSWPD, Legislative Assembly, 6 December 2001, p.19879
- 5 The Honourable Michael Costa MP, Second Reading Speech for *Police Powers (Drug Detection Dogs) Bill*, Legislative Assembly, 6 December 2001, p.19745
- 6 Address by Professor John McMillan, *Future Directions for Australian Administrative Law*, National Administrative Law Forum, 3-4 July 2003.
- 7 Office of the Prime Minister, *A Stronger Safety Net for Working Australians*, 4 May 2007, http://www.pm.gov.au/docs/20070504_safety_net.pdf (last accessed 25/05/07).
- 8 Section 26(1)(c) of the *Ombudsman Act 1974* (NSW)