

## FUTURE DIRECTIONS IN ADMINISTRATIVE LAW Part 2

*Justice Garry Downes\**

The theme of this 2011 AIAL conference is 'democracy, participation and administrative law' and this plenary session addresses the topic of 'future directions'. My topic is two trends in government service provision that are influencing the institutions of administrative law.

The first is the trend to enhance the accessibility of government services. The second is the need to provide government services more efficiently while maintaining the quality of those services.

I will discuss the impact of these trends on the Administrative Appeals Tribunal, because the Tribunal is the institution with which I am the most familiar. I have little doubt that other institutions are also dealing with these issues.

### **Increasing public access and participation**

A trend that will be apparent to many who work in government and in the field of administrative law is that public expectations are increasing in relation to the ways in which, and the ease with which, the public should be able to access government services and information. Government departments and agencies are exploring how to improve access in various ways.

### ***Regional, indigenous and multicultural Australia***

Historically, certain sectors of society have been more restricted in their ability to access government and its services. Changes are occurring in this area with a view to making government more accessible to more people.

People living in regional areas of Australia cannot easily attend the offices of government institutions, such as the Tribunal, which are based in capital cities. The Tribunal conducts many of its alternative dispute resolution processes and some hearings by telephone. It also travels to regional areas to conduct hearings.

Improvements in telecommunications and technology, including the roll-out of the National Broadband Network, offer additional options for communicating with people in regional areas and, in particular, will help to facilitate more face-to-face communication. I expect that, over time, web-based conferencing will come to be used extensively by the Tribunal, facilitated by faster data transfer speeds.

The *Territories Law Reform Act 2011* has recently implemented arrangements for the Tribunal's jurisdiction to be extended to decisions made under Norfolk Island enactments. Norfolk Island residents will have access to the administrative law mechanisms that are

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\* *The Hon. Justice Garry Downes AM is President of the Administrative Appeals Tribunal. This paper is an extension of the oral presentation made at the AIAL 2011 National Administrative Law Conference, Canberra, 22 July 2011.*

available to residents on the mainland. The Norfolk Island enactments which will be subject to review will be specified in regulations which are yet to be made. Developments in relation to the ways in which the Tribunal can deliver its services will assist the Tribunal to provide high quality review to Norfolk Island residents.

Indigenous Australians are another group who can experience difficulties accessing government services. The Tribunal has recently commenced a project to examine indigenous access to the Tribunal.

Access for people from diverse cultural and linguistic backgrounds has also been an area of focus. The Tribunal has had a policy in place for many years that it will engage an interpreter where a party requires this assistance. The cost is borne by the Tribunal. The Tribunal has recently re-published its brochures and fact sheets in a range of languages other than English.

### ***Simplification***

Access to government services is facilitated by an understanding of government processes. Government is striving to make its processes more transparent and its decisions more understandable to the people affected by those decisions. It does this, in part, through encouraging the use of plain language.

In the court and tribunal context, simplifying processes increases access for self-represented persons. This is particularly important for tribunals with a statutory objective which includes the need to provide a mechanism of review that is economical and informal.

A commitment to simple processes manifests itself in a number of ways. While an application to the Administrative Appeals Tribunal must be in writing, there is no requirement to complete a form. A letter will suffice.

At an early point in the review process, the Tribunal conducts an outreach call to a self-represented party to explain its processes and to facilitate their participation in the review. A conference, the first event in most cases, offers an informal environment for the parties to discuss the case, understand the issues, explore the possibility of agreed resolution and determine what will happen next. Hearings are modified to meet the needs of self-represented parties.

The Tribunal also offers training to its members in decision-writing which encourages the preparation of reasons for decision that are clear and to the point.

Another area where there has been an increase in complexity over time is judicial review of administrative decisions. The Administrative Review Council is currently conducting an inquiry into judicial review in Australia, part of which involves considering whether the system for review could be simplified.

### ***Public consultation***

The ARC's inquiry is an example of another way in which government seeks to promote engagement and participation – through public consultation.

The Tribunal works at a local and national level by meeting with stakeholders such as government agencies and applicant advocacy groups in liaison meetings and other forums. We use these consultations to help identify ways we can improve our operations in different jurisdictions.

### ***Open government***

Members of the public are also increasingly aware of their rights to access government information. One of the most significant recent changes to the Australian administrative law landscape has been the amendments to the *Freedom of Information Act 1982* (Cth), aimed at promoting a culture of openness in government. The amendments changed the objects of that Act and the exemptions under it.

In addition to those changes, amendments which came into force in May introduced the information publication scheme, requiring government agencies to proactively publish information. The Tribunal's contribution to the Information Publication Scheme can be seen on our website.

Publishing more public sector information increases the ability of interested persons to scrutinise and comment on that information. It enhances participation and the functioning of our democratic system of government, key themes of this conference.

### **Increasing quality and efficiency**

Government departments and agencies, including courts and tribunals, have operated for some time in a tight fiscal environment. A range of mechanisms such as the efficiency dividend are used to encourage agencies to undertake their work more efficiently.

This environment challenges institutions such as the Tribunal to work smarter: identifying ways in which its services can be provided more efficiently, without compromising on the fairness and justice of the review process, key elements of the Tribunal's statutory objective.

### ***Appropriate dispute resolution***

The Attorney-General's Department's *2009 Access to Justice Report* emphasised that disputes should be resolved at the appropriate level, and that excessive amounts should not be spent on cases where it is not warranted. Appropriate use of resources means that greater access can be provided to more people.

As a generalist tribunal, the Administrative Appeals Tribunal has learned to be flexible, adjusting its procedures to suit each particular case. A hearing with a self-represented social security applicant looks very different from a multi-million dollar taxation hearing with counsel on both sides.

Making the best use of alternative dispute resolution is an important part of this drive for the appropriate use of resources in resolving disputes.

ADR is a core component of the work undertaken by the Tribunal and is one of our greatest successes. Over the years, the trend has been that only around 20 per cent of applications proceed to a hearing and determination by the Tribunal. The remaining 80 per cent are finalised without a decision on the merits, many resolved by agreement of the parties or withdrawn. Preliminary calculations have these figures at around 19 per cent and 81 per cent for the 2010-11 reporting year.

ADR processes can increase people's sense of engagement and participation, with individuals feeling they have more of a stake in and influence over the decision than is the norm in adversarial litigation.

The hearing and determination of cases remains critical to the development of jurisprudence and the role of the Tribunal in guiding administrative decision-makers on the proper

application of the law. ADR can assist to ensure that hearings are focused on the genuine issues in dispute.

### ***Quality of service***

The Tribunal has recently undertaken a number of initiatives aimed at enhancing the quality of service we provide.

We are in the process of developing a professional development program for our conference registrars, to complement the program that is in place for Tribunal members. It is based on a framework of competencies and comprises a coordinated program of induction, mentoring, peer review, appraisal and continuing professional development.

We have also developed a Practice Manual relating to our major jurisdictions which will be a valuable resource for members and registrars at the Tribunal. The Practice Manual provides a readily accessible overview of law and practice in areas such as practice and procedure, immigration, social security, tax, veterans' affairs and workers' compensation. It includes references to legislation and policy, case law and other resources.

I recently approved a proposal to restructure the Tribunal's principal registry, which included integrating our legal, policy, research and library functions. These areas of the Tribunal are responsible for compiling and disseminating information used by members and staff in their work. We hope to enhance the coordination of these efforts and thereby harness the extensive information that is available, while also allowing Tribunal staff to develop a wider range of skills.

### ***Technology***

The rapid advance of technological innovation also brings great potential for increasing efficiency and reducing costs.

Electronic communication is now the norm for many people, and will be further facilitated by improved channels of communication. Courts and tribunals here and around the world are offering electronic lodgement options. For some of these institutions, electronic files have become the official record. The days of firms wheeling trolleys loaded with documents through the city may soon be over.

Digitisation of information has many advantages, reducing costs in printing, copying, storing and transporting information. In addition to saving money, there are savings for the environment. There is also an enhanced ability to search for relevant information in electronic documents.

Computers can also be used to assist in decision-making. This is occurring more and more at all levels of government. Many decisions relating to social security payments and veterans' entitlements are computer assisted. Immigration decisions are frequently computer aided. More and more decisions are effectively made by a computer acting on data.

While this technology can greatly increase efficiency, it also has its dangers. Some of these were highlighted in the Administrative Review Council's report No 46 *Automated Assistance in Administrative Decision-making* (2004).

The Council's report cautioned against the use of automated systems in decision-making when a discretion is involved. Discretionary decision-making is applying a value judgment, which involves giving weight to complex factors.

Even in less discretionary areas, problems can arise, for example, where the computer is incorrectly programmed. The likelihood of this occurring increases where the question posed by a statute or regulation is complex and involves multiple layers of alternatives. There may be computer programmers who have a good understanding of statutory construction, but I do not think there are many. Difficult problems arise when instructions are being given to the person writing the program. Even more difficult problems arise in later verifying that the program, as written, correctly records the statutory rules.

This major issue is matched by an operational one – namely, ensuring correct data entry. That may seem simple and computers can be programmed to put up a screen to enable a check, but there is nothing like doing a calculation yourself to know if the figures are correct. The more significant problem is checking data after it has been entered and verified and the calculation made. This is, of course, relevant to review, both internal and external. The absence of all the entries on paper makes verification difficult. Systems are required to enable verification that data has been entered correctly and to reproduce records of the processing of the data.

It is inevitable that the use of computers in government decision-making will increase, but we must ensure that it does not compromise good decision-making or impede fairness or transparency.

In this environment of rapid technological change, it is important to try to think ahead as much as possible. The Tribunal has developed an e-services strategy – a comprehensive program to guide the Tribunal towards a suite of integrated technology systems and online services consistent with our objective of providing fair, just, economical and informal review.

The program is currently in its foundation phase and I am very pleased with the direction that we are heading. The kinds of things contemplated in the program include electronic forms, electronic lodgement of documents and an online search facility for information about cases before the Tribunal.

The Tribunal reviews decisions from many parts of the Australian Government. Whole-of-government cooperation on the move to greater use of electronic documents will maximise benefits to government and citizens.

## **Conclusion**

The trend to improving public access to services and participation will undoubtedly continue into the future. It is what people expect from government in our democratic society. Similarly, people expect government to be increasingly more efficient and to provide the best levels of service, and this trend will also continue into the future.

These trends provide challenges for government, including administrative law institutions. These are, however, challenges that institutions like the Tribunal will meet.