COMMENTARY

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Peter Johnston concludes that there are two trends emerging in the direction tribunals might take. One is towards large-scale general review tribunals, the other towards the adoption of court-based procedures of merits review.

Like him, and others such as Professor Julian Disney, who was quoted in the paper, I agree that both of these trends are to be resisted, and for the reasons that they have given. Broadly these reasons are: (a) that there is a risk that some of the major benefits of tribunals, namely, accessibility, specialised expertise, diversity and innovation will be lost; and (b) the forecast changes may not bring the benefits in terms of efficiency and economy that are suggested or, if they do, there may be better ways of achieving the same results without the risks.

My commentary is very much from a practical perspective, that of a lawyer whose practice has mainly been with people who are amongst the least powerful and most vulnerable. It is, therefore, a very "bottom up" perspective: that is, "how will this work for the people on the ground?"

The paper quotes the Commission on Government in Western Australia as proposing a large generalist review tribunal to replace the "plethora of specialist tribunals that currently exist ...". This is an often repeated phrase (along with "the proliferation of specialist tribunals") used by some politicians and administrators to press their view that a multiplicity of such tribunals is inefficient and confusing. It is very much a "top down" view, that does not show much understanding of the users of tribunals: the people for whom specialist tribunals are an important avenue to justice and redress.

If a person has a problem with social security entitlements, it is absolutely no source of confusion that, in addition to a Social Security Appeals Tribunal, there is also an Immigration Review Tribunal, a Medical Disciplinary Tribunal and a Guardianship Board. On the contrary, the person is likely to be pleased that there is a body that understands the intricacies and nuances of the social security system and how it affects its users; and might think it quite inefficient to have to train the same people also to understand a multiplicity of other specialised areas.

In fact, if there are efficiencies, economies and reductions of confusion to be had, they may come from a different approach altogether. That is, rather than making the avenue and vehicles for redress for administrative grievances more centralised, formal and remote from those who are aggrieved (the necessary consequences of either of the

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trends identified), it is surely better to bring it closer to those affected — and closer to the place where, and time when, the decisions are made.

The decision-making agencies themselves are specialised, so it makes sense that the vehicles for redress should also be specialised and as close to the point of decision as possible. They should also start well below the level of a tribunal. From a top-down perspective, tribunals may seem informal, accessible and unintimidating, but from the bottom up they are as unfamiliar and terrifying for most consumers as any court.

The approach I am suggesting is a quick "continuum of redress" from an internal complaints and review mechanism within the decision-making agency, through to an external, independent complaints investigation and review body — a specialised ombudsman — and finally, a specialised adjudicative tribunal, closely linked to the latter, to deal with cases that require adjudication, with ready access to the investigative materials that the latter has gathered. This is already done to varying degrees in a number of areas with significant success, minimum expense and considerable consumer satisfaction. The last-mentioned, significantly, is because consumer representatives were involved in the design as well as the implementation of the schemes, including representation on the tribunal.

One example is the insurance industry, where there are two separate, specialised schemes; one for general insurance and one for life insurance. In each case, the grievances that cannot be resolved at the individual company level go through to an independent "secretariat" managed by a Board with industry and consumer representation. The secretariat operates like an ombudsman, reviews the materials on which the decision was made, hears from the consumer and often negotiates or brokers a revised or even reversed decision informally between the parties. If that is unsuccessful, that is, if the consumer is still not satisfied, the secretariat passes the case on to a tribunal (panel), appointed and overseen by an independent Board (the Insurance Industry Complaints Council), with industry, consumer and government representation. The panel itself has industry and consumer representation with a senior legal (sometimes former judicial) presiding member.

Another example is the scheme with which I am associated, the New South Wales community services complaints, appeals and monitoring system (sometimes called the CAMA system — a loose anagram drawn from the Community Services (Complaints, Appeals and Monitoring) Act, 1993). This scheme covers all community services in New South Wales, including child protection services, care of state wards and people with disabilities, home care services, child care services, and refuges, both state o privately run, the latter if state-funded.

Again, services are obliged, as a condition of funding, to establish interna complaints-handling systems. If these are unsuccessful in resolving particula complaints, consumers can go to an external, independent Commission for informa resolution, investigation or formal conciliation. There is then a Community Service Appeals Tribunal to hear appeals from a limited number of defined decisions. At thi stage unresolved complaints do not automatically go through to the tribunal, but, i statutorily defined cases, including cases where the Commission's forma recommendations are not implemented, the complainant can apply to the tribunal t convert the recommendation into an order. Again, the scheme is overseen by a counc with wide representation that includes consumers, and the tribunal also has consume representation.

From a "bottom up" perspective, these schemes have the benefits of accessibility, specialised expertise and understanding of the issues, quick resolution in most cases and minimal expense and formality. The vast majority of grievances are resolved long before they get to the panel/tribunal level and, importantly, even if a consumer does not get what he or she wants, the fact that an independent body has reviewed the decision and explained that it was properly made is often enough.

From a decision-maker's or administrator's perspective, the quick, informal resolution of complaints is efficient and economical. The specialised expertise of the reviewing bodies means that their decisions are usually respected. There is also, arguably, a more efficient normative or corrective element in the decision-making process because this comes not only from the decisions of the tribunal, but also from the monitoring role of the Commission. Monitoring involves identifying patterns of complaints and grievances, and using other techniques to collect information and make observations about the performance of the decision-makers from a consumer perspective. This is also an important and extremely valuable loop in the quality assurance and continuous improvement mechanisms which are so much a part of modern administration and managerialism.

From society's perspective, such specialised and localised schemes of merits review provide an inexpensive and effective mechanism for resolving disputes that is not only what consumers prefer, but also is most likely to produce improvements in the quality of decisions made at the service level. A final advantage is that such schemes deal with a dilemma that was not mentioned in the paper, but which is discussed increasingly in administrative law circles: that is, what to do about the fact that more and more government activities are being performed by non-government bodies through privatisation, contracting out and the like. As is clear from the examples that I have given, the schemes can readily translate into or embrace the private sector.

Someone suggested during this conference that administrative lawyers are going to have to "brush up" on their contract law as consumers increasingly receive what were traditionally government services from non-government, private agencies. I would like to suggest that there is also an opportunity to overcome some of the limitations inherent in contract and tort remedies for consumers, by introducing to the private sector and commerce, at least in these "contracting out" areas, the increased consumer accountability mechanisms that the principles of administrative law have to offer.

The provision of services such as insurance, banking and finance, private hospitals and nursing homes involve decisions and the exercise of discretions that are very similar to and have as great an impact as those involved in the provision of government pensions and benefits or accommodation in public hospitals, institutions or group homes for people with disabilities. The right to merits review of these decisions and the other mechanisms of administrative law could and should be applicable, regardless of who provides them.