ADMINISTRATIVE REVIEW COUNCIL - CURRENT PRIORITIES

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What I want to do is talk about three projects. The first project we have been looking at is administrative review and funding programs and I want to talk about that in some detail. The second project is that on government business enterprises and I want to pass relatively quickly over that for reasons which will become obvious, I think to all of you. Then I want to talk about our environmental decisions project and AAT review and finally, I would like to just draw your attention to the fact that the Minister has given us a reference on tribunals generally. I would like to acquaint you with the terms of that reference and tell you the sort of things we are hoping to do and who we are hoping to hear from. ...

Administrative review and funding

If I can go to the first one, which is the one I find most interesting, that is the project on administrative review and funding programs. The Council decided to look at the funding programs administered by the former Department of Health, Housing, Local Government and Community Services. ...

We determined to take the programs administered by that portfolio as a case study of funding programs and the kind of principles which should be directed to review of funding programs generally. We hope that we can develop principles which are applicable across the board. As is probably fairly obvious, under the funding programs administered by that particular department, the Commonwealth provides funding or services both to individuals directly and indirectly to States and non-government organisations who direct the money and services to other organisations and individuals.

The project itself really concerns two broad areas. The first is the right of consumers to complain about decisions made by service providers. The second is the right of the service provider to complain about the level of funding that the provider has received.

From our perspective, the most exciting area is probably the area governing consumers. The Council has taken the view, and this goes back to the subject if you like of the pamphlet that you received about this talk, that to maintain the distinction between government providers and non-government providers of services, when the money in the end comes from the Commonwealth Government, is artificial. In effect, if a consumer gets poor service because he or she has got it through some intermediary it makes no difference - it is still a poor service and the government is still paying for that service. One can, as it were, follow from the source of the funding to the quality of the service and say it is reasonable to have a level of review of the quality of that service in relation to whatever is supposed to be provided.

We are looking at things like children's services programs, rehabilitation services, Commonwealth community

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housing programs and residential care and came up with probably the fairly obvious view that one thing everyone more or less agreed upon was that consumers should have a chance to go to an outside body to complain about the sort of service they were receiving. In the past, service providers have said, it is sufficient if, for example, there is a complaint about meals in child community services or a complaint about meals in aged care services or a complaint about the kind of training one is receiving under a rehabilitation service, that the complaint be made to the service provider and the service provider could deal with it. Almost everyone from those representing the service providers to those representing consumers agreed that that was insufficient. In the end you need to have someone outside the service provider to arbitrate between the consumer and the provider of services.

So then the problem was really what sort of matters should you be able to complain about. It is the old peas principle if you like. If you are sitting in an aged care home and you think that the quality of your meal is insufficient, should you have a right to complain about that or should it be something which we all think of as more serious - sexual harassment or something like that? The Council came to the view that you could not distinguish between the level of complaints. It was the peas principle that has to apply; in other words, a consumer in receipt of a government funded service should be allowed to complain about anything. That is principle number 1.

Principle number 2 was that, in order to allow consumers to at least have some reasonable expectation of what they could receive, (by reasonable expectation I mean, have an expectation that was at least realistic in general terms) the service provider should be encouraged to provide user rights charters. Of course, to all of you here, that probably sounds fine. But as you all know, there are definite problems attached to user rights charters because some are generally expressed and others express only aspirations. Others attempt to descend to the level of particularity and are included in legislation and the like. The Council's view was that in the end, the object should be at least to articulate what it was the provider was supposed to be doing and to articulate in general terms what the obligations of the service provider were and what avenues for review or what avenues for complaint there were.

If you were sitting in an elderly people's home, you should know what you could do to complain about it, to whom you should go to complain about it and that that complaint should be dealt with within a reasonable to time. Added to that, you should be assured that confidentiality of your complaint would be maintained and that you would not suffer from reprisals. Reprisals were, we heard from almost every group consulted, the major thing which deters most people from complaining. This, I think, fits in with all our experiences. The object of any such user rights charter would be to articulate those principles and safeguard them.

If one then moves one step further, one says, well one can come and complain about anything, one can complain by reference to a set of charters, what next? Almost every group consulted suggested that before you can get to an external review body, you needed to have a degree of internal review by the service provider. In other words, if you are going to complain about the fact that your meals are no good, you should first of all go to the home that it

is supposed to be looking after you and is supposed to be providing you with those services.

In some cases, that kind of internal review mechanism is not realistic. For example, if your complaint is one about sexual harassment, you may not want to make that complaint within the organisation concerned. The Council acknowledged in that sort of case, you should have the right to go directly to an external reviewing body. It is here, having arrived at principles with which no-one would today disagree, one reaches a real problem. Once you are in the area of non-government bodies, who should be the appropriate review mechanism? The Australian Law Reform Commission (ALRC) would seem to favour some kind of complaints body. The mechanism for giving it power should either be voluntary or should be imposed through some sort of legislative background. However, the ALRC is not necessarily committed to that position at present and the Council has tended to prefer a different option. The Council has tended to take the view that the most appropriate body would be the Ombudsman and this, for the following reasons. First, the Ombudsman is already there, so the cost of setting up a complaints body is negligible. Second, the Ombudsman herself has said that she is anxious to bring functions of the Ombudsman's office into the next century and not have it caught up in this century - so she is keen, if you like, to take the Ombudsman's office into the question of systemic problems and also, in our case, into the area of inquisitorial inquiry this would involve a change in her operation.

The third reason why we were keen to adopt the Ombudsman as the appropriate body was that the Council could see that that would assure consumers that there was a degree of objectivity and distance between the Department who was the funder of the service provider, the service provider itself and the man or woman in the street. It seemed to the ARC that the Ombudsman today is regarded as a fairly impartial and objective body to review a complaint and that advantage should be capitalised upon.

The Council, I might add, is not yet entirely committed to that view either. Its ultimate conclusion is yet to be reached. The ultimate conclusion will be reached after consultation with peak organisations and advocacy groups as well as after further discussion with the ALRC.

In turn, this reflects a different approach by law reform agencies. I think from the point of view of the Council, it puts greater emphasis on consulting those bodies interested in the mechanism rather than on simply recommending reform for reform's sake. In this project, we issued an issues paper, then consulted with interested persons in all the major capital cities and got to the point of issuing what is called a final report subject to advice. The advice will be whether in relation, for example, to the body in question it should be the Ombudsman or some other more discrete body. The ultimate report should be presented to the Minister for Justice in July this year.

You get to the point where you say, 'Well, there must be some external review body and it is either the Ombudsman or some other mechanism', and you ask yourself, 'what sort of power should that body have?' The obvious powers I think in this context would be investigatory and recommendatory. I would be interested to get your opinion on it. In our view, there must be a power to refer complaints and findings on complaints to the Department. So the Department, when it is involved in

making its final funding allocations, whether it be on a continuing basis or on a once only basis, will bear in mind that a responsible body has found that there have been certain bad practices occurring within the applicant's domain.

Some suggestion has been made that the 'big stick' should be heavier than that and that there should be a power for such a recommendatory body to, for example, ask the Minister to table a complaint in Parliament. To date, I think most submissions which we have received have been inclined to say 'no, that's too heavy a stick'. They suggest that for the complaints mechanism to work, at least as much as possible on a mediatory rather than on an adversarial basis, you want service providers to feel that when they come to a complaints body, the complaint is capable of a reasonable solution and the end result will be a reasonable one, at least so far as they are concerned - but there is a problem there.

The final problem, which I am sure would have escaped no-one, is that this may mean, in part, the Commonwealth transgressing on the State fields.

The ARC is a Commonwealth body - it is looking at the destination of Commonwealth funding but as most of you would be aware (those of you who are involved at least in the area of Commonwealth grants to State entities), in the end what the ARC is recommending is that State bodies act in a certain way. You might well say, 'Well, realistically how can we hope to go anywhere and in any event, haven't we got some kind of constitutional or other problem?'. We have responded that we think that it would be appropriate for there to be minimum standards. We would call for these minimum standards to be either incorporated into the legislation which makes the funding available (that is, that there be a condition of the grant) or they be included into funding agreements between Commonwealth and State - much as the housing agreement, for example, does today. We have gone one step further - we do not, I think from our point of view, think that it is appropriate to tell States what to do, nor do we think it is appropriate to encourage duplication of processes. The model which the ARC would advocate is that of the minimum standard. The Commonwealth Government should prescribe minimum standards and say to State Governments they may use their own complaints review entities. For example, if a State has its own Ombudsman, that Ombudsman should have the carriage of complaints from service providers. That may not appeal to all people, but the real concern underlying the Council's view is that (1) the system has to be meant to work and (2) we don't want over-duplication of resources.

So far as we are concerned, on the level of consumer rights in relation to non-Government organisations, we would recommend quite substantial changes. The end result should be that some person who is either in an aged person's home or child care centre or is in rehabilitation training or any other like program, should be assured that they know what the quality of the service is that they expect to receive, the person to whom they can complain if it is not adequate and, in the end, that they can go outside the service provider to an independent body and have that complaint heard, subject to requirements of confidentiality and in the knowledge that ultimately something can be done about it. That, from our perspective, is quite a major step forward in the area of consumer rights.

In the other area of the project on funding decisions, I think the Council is probably not going to recommend quite so radical a change. When I talk about funding I mean the decision of the Commonwealth Government to grant some money or some source of money to a service provider or group of service providers. The problem which we face is that in any review, one pre-supposes that there may be a decision to re-allocate funds.

The Government may give more to the applicant who is complaining about lack of funds and take away from others who have already received it because, as we all know, there is a finite pool of funds and it can only be distributed to a certain extent. What the Council has termed 'polycentric problems' then arise. This grand name simply means that you give to one and take from another. In this context, it has been said by most service providers, peak organisations and consumer groups that too much review will actually not only be unnecessary, but will lead to a degree of disjunction in the funding process which will be positively adverse. The Council has, to some extent, tended to back away from the notion that there should be further changes to review of funding allocations. When I say further changes, there are already mechanisms to review funding in certain contexts. We are not saying that that should be diminished - we are simply saying that, in general there is probably no call to extend it.

What we have recommended, and I think will continue to recommend in the final report, is that criteria for funding and government policy should be made very clear at the outset. If funding is to be determined on a predetermined needs analysis, that analysis should be made available to all applicants. The process of decision making should be made abundantly clear to everyone, including the timetable under which decisions are made. This is perhaps quite a radical step in that all applicants, whether successful or unsuccessful, should receive an explanation as to why their application was not granted or was granted - it probably will not concern those to whom it was granted. That, at least from the point of view of peak organisations, is quite a significant step. To date, you can be told 'No, you cannot have your money', and you do not know why - which of course means that you don't know where you stand for future allocations.

The other matter, which is perhaps not of concern so much to lawyers but certainly of concern to those involved in funding allocation processes is that service providers and consumer organisations should be involved in the process throughout.

What I have described applies to once off funding. So far as on-going funding is concerned, and this is a particular problem which arises under particular programs, the Council has recommended that any decisions affecting on-going funding be reviewable. But that really reflects the present position.

Then one comes to removal of funding. In relation to that, as a practical matter, the Department in this case, would not recommend 'defunding' unless the organisation has failed to meet the terms upon which the grants were made or unless the Government changes priorities for funding. The Council has taken the view that in the former case, review should be allowed. In the latter case, it would be obviously undesirable because it would involve that whole concatenation of circumstances that we have loosely called 'political' in the past (but which probably needs to be more clearly articulated) and which involves policy decisions made by the

Minister of the day, with the approval of the Parliament of the day.

That, in substance, reflects the work of the Council in relation to funding decisions. If you go back to the original thesis, if you like, which was suggested in the pamphlet on this talk, the stress is not upon judicial review in that context. It is upon getting external review right - which does not necessarily mean review by the Administrative Appeals Tribunal or any other like Tribunal. It may mean the development of a different set of review guidelines. When you stop and look at the proposed reviewing body, you may say, 'Well, isn't the Ombudsman a fairly conservative choice', or 'isn't a complaints body a fairly conservative choice'. I should add in relation to that, both the ALRC and the Council I think, and certainly the Council has suggested that if it is the Ombudsman, the Ombudsman should work with those people who are involved in the service industry. That is, there should be peer representation of service providers and public advocacy groups. There should be at least a reasonably representative group of people advising the Ombudsman at the time of the nature of the complaint, whether the complaint is well founded and what sort of steps could realistically be taken to cure the complaint. In that context I think that would require a different development in the administrative law context, at least from the Council's point of view.