BETTER GOVERNMENT: LEARNING FROM MISTAKES

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This article, delivered in honour of Professor Jack Goldring, deals with the intersection of administrative law and public administration. The same topic was taken up by Professor Goldring in a book co-authored with political scientist Ian Thynne in 1987, *Accountability and control: government officials and the exercise of power*. Their book, one of the first serious works on Australian law and administration, examined the dual role that administrative law can play in providing a redress mechanism for members of the public while kindling improvements in administrative systems and practice. I will examine the same theme from the perspective of my Commonwealth and State Ombudsman experience.

Mistakes that tell a story

Through handling thousands of individual complaints and approaches each year, an Ombudsman office is well placed to identify systemic defects in administrative conduct. These can be taken up either in individual complaint investigations or in broader-scale own-motion investigations initiated by the Ombudsman. The individual complaints provide a window on a broader picture.

There are many celebrated examples of how improvements in government are traceable to individual failures that alerted us to deeper problems. Currently in New South Wales there is a wholesale restructure of water regulation that was triggered by a recent ABC *Four Corners* program that highlighted a few incidents in the Barwon–Darling river system. An earlier *Four Corners* program that highlighted the mistreatment of a young detainee in the Northern Territory resulted in a Royal Commission into juvenile detention in the Territory. Australian immigration administration was completely revamped 10 years ago following revelations about the detention of Cornelia Rau and the deportation of Vivienne Alvarez. A significant shake-up of our security intelligence framework and practices occurred on two occasions following specific incidents that were soon condemned — an armed training exercise by officers at the Sheraton Hotel in Melbourne and the detention of Dr Haneef in Brisbane.

Similar examples can be given of individual mistakes that triggered wholesale review and change in areas as diverse as hospital admissions, airline security, licence processing, police interviewing, quarantine regulation, military discipline and parole processing.

Not all bureaucratic failures trigger a process of review or reform. Some mistakes go unexposed. And, even when exposed, the blameworthy agency may downplay the mistake as merely exceptional or episodic. Sometimes that may be a correct reading — there are indeed ‘oops’ moments in which mistakes occur that were accidental, unpredictable and unavoidable.

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The worry is when this becomes the innate cultural and attitudinal response within an agency to individual mistakes. The hasty response of some agencies is to say that a mistake was unrepresentative and does not pose a greater risk. This is sometimes put arithmetically — that a particular mistake represents only a miniscule fraction of similar decisions that were not questioned or disputed.

The alternative is to pause and ask if there is a lesson to be learnt. Would a better system have avoided the problem that occurred? Was the mistake and its impact inexcusable?

The industry that excels in taking that approach is, not surprisingly, the aeronautics industry. A moment's reflection tells us that so many things could go wrong in the sky. At any given moment there are an estimated 3300 planes in the air moving 660 000 people between 20 000 cities worldwide. And yet we implicitly assume that nothing will go wrong when we board a plane. Our confidence can be traced to the ironclad philosophy in the aeronautics industry that every single error or mistake must be reviewed to assess the risk of systemic failure.

I will now pursue that theme by discussing three different case studies from Ombudsman work over the past year. The case studies are the Centrelink Robodebt controversy, the Operation Prospect investigation into a New South Wales law enforcement episode, and developments in university complaint handling.

Automated decision-making and the Robodebt controversy

We rely on computers to undertake a large proportion of our business and social transactions. We go online to do banking, pay tax, apply for a passport, enrol to vote, plan holidays, purchase tickets, conduct research — and much more.

In many transactions with government there may be no human intervention or evaluation of the information we submitted. Though Australia has among the strictest border controls worldwide, we can leave and re-enter the country through an electronic SmartGate without as much as a 'G'day' or 'See you later'. We can submit our tax return online through an e-tax portal that electronically assesses our tax liability and generates a statement of reasons to explain a decision that we usually accept, whether we understand it or not.

Government agencies have actively embraced computer decision-making as part of a digital transformation agenda. The driving philosophy is that automated decision-making is efficient, fair, accurate, consistent and economical. Legislation expressly authorises at least 11 federal government agencies to arrange for a computer to make a decision that must otherwise be made by an official nominated in the statute.[1] Government decision-making is undergoing a radical transformation.

But what happens if the computer makes an error or a person wants to challenge the computer-generated decision or we have a query but we do not know how to converse knowledgeably with the computer?

Those questions are squarely raised by what was dubbed the 'Robodebt' controversy. The *Social Security Act 1991* (Cth) outlines the circumstances in which a social security recipient may owe a debt to the Commonwealth. One such circumstance is that a person has received a payment at a rate higher than the correct rate because of undeclared income.

In former days Centrelink officers undertook manual comparison of Centrelink and Australian Taxation Office records to identify data discrepancies and, if they found any, to

commence a debt raising and recovery process. This was a resource-intensive exercise, and officers could only investigate roughly 20 000 discrepancies each year. If a discrepancy was discovered, Centrelink could rely on its information-gathering powers to require the client or an employer to provide information. A client who was aggrieved by an adverse decision might individually complain to the Ombudsman, commence internal review proceedings or appeal externally to the Social Security Appeals Tribunal.

In 2016 the Department of Human Services (in which Centrelink is located) launched a new automated system called Online Compliance Intervention (OCI). This system compares a client's Centrelink statement with the employer-reported income data held by the tax office. If there is a discrepancy, the client receives an OCI-generated request to confirm or update their income. The OCI may then compute a new income figure, based on the client's response or lack of response, and generate a debt letter. Overnight, the number of Centrelink debt letters jumped from 20 000 per year to 20 000 per week. The first round of letters went out just before Christmas 2017.

The Commonwealth Ombudsman soon commenced an own-motion investigation after receiving an 87 per cent increase in complaints.[2] The Ombudsman's report in April 2018 identified a number of problems that pointed to larger issues that can arise in automated decision-making. A central problem was a high error rate that was attributable not to the computer program but to how people engaged with the system. If the correct information was entered, the program would accurately calculate if a debt was due. But, if a person misunderstood what was required or made entry errors, the computer would reach the wrong decision. The government subsequently confirmed that 20 000 of the debt recovery notices that were issued to clients were reduced or rescinded on the basis of fresh information.[3]

The Ombudsman found that OCI letters were unclear. Many clients misunderstood how income data was to be entered online. Rigid business rules in the OCI program disadvantaged clients who had not retained historical income records. A statute-authorised 10 per cent recovery fee was automatically applied to any debt that was not properly explained. OCI letters did not provide a contact phone number in the Centrelink compliance team. Clients who called the general customer service line could encounter long delays or receive inadequate advice. Non-government welfare assistance organisations were not adequately forewarned or trained on how to assist clients to enter information into the system. The OCI system rollout was too rapid rather than incremental.

Other commentators (including a Senate committee) queried whether the introduction of an automated system in this manner was in fact unlawful by effectively imposing an onus of proof upon Centrelink clients. The Social Security Act provisions that authorise Centrelink to raise and recover debts implicitly assume a process to establish that a debt is due. But did the OCI process circumvent that requirement and transfer the onus to Centrelink clients to establish that a presumptive debt generated by an automated data-matching process was in fact wrong?[4] As the Ombudsman report noted, the automated OCI system 'effectively shifted complex fact finding and data entry functions from the department to the individual'.[5]

Another side to technology that is illustrated by the Robodebt controversy is how people react when things go wrong. As I noted earlier, in former days the main formal options for an aggrieved party were to individually complain to the Ombudsman or a member of parliament or to initiate internal or external review proceedings. Those options remain, but the immediate response to Robodebt illustrates the scrutiny environment in which agencies now work.

Recipients of Robodebt letters went online to share their experiences and ask questions. One alert observer saw the chatter and created the NotMyDebt website and Twitter hashtags to join the conversations, and they were also taken up on Facebook. What has been described as a 'Robodebt community' arose overnight, comprising Centrelink clients, journalists, lawyers, academics, activists, legal assistance services and advocacy organisations.[6] The communal discussion and shared information alerted many people to the fact of system problems, erroneous results and their review rights. Pressure for an Ombudsman and Senate committee inquiry grew. Changes to the OCI system were quickly implemented by government. There was a surge in legal aid appointments and review applications.

In summary, the work of the Robodebt community showed administrative law at work in a fast-paced, crowd-sourced and social media driven manner. This was perhaps unprecedented, but it is probably prophetic.

Robodebt is also a case study in how technology is changing our understanding of how administrative decisions are made and legal processes are meant to work. We have centuries-old expertise in framing laws and designing administrative programs. But, as Robodebt shows, that provides no guarantee of administrative perfection if either the business rules of an automated system or the user-interface design is not ideal.

These challenges were identified in a landmark report in 2004 by the federal Administrative Review Council,[7] of which the Ombudsman was a member along with representatives of courts, tribunals, government, professional organisations and the community. The Council published a set of Best Practice Principles that were designed to address the very problems that Robodebt exposed. The Council's work was influential, but clearly there is a need for a renewed and intense focus on this issue.[8] One Council recommendation that has not been implemented was the establishment of an independent interdisciplinary advisory panel to ensure that administrative law values are reflected in automated systems.

Operation Prospect: review of covert police investigation

In 2017 the NSW Ombudsman completed the largest single investigation to be undertaken by an Australian Ombudsman — Operation Prospect.[9] This investigation, spanning four years, was into allegations and complaints that were either about or connected to a covert investigation of serious police corruption conducted jointly by the NSW Crime Commission and the NSW Police Force between 1999 and 2001.

As that lengthy timeline indicates, some controversies rage for a long time. It is likely, as years pass and a controversy is unresolved, that they will enlarge by drawing in additional issues and people and fomenting greater bitterness. That is the story of Operation Prospect and the decade-old police corruption investigation that it examined.

The police corruption investigation, named Operation Mascot, followed the Wood Royal Commission into police corruption between 1994 and 1997.[10] The Wood Royal Commission confirmed that systemic police corruption existed and was embedded in New South Wales policing. This was highlighted a couple of years later, in December 1998, when a serving NSW Police Force officer approached the NSW Crime Commission and disclosed his knowledge and involvement in organised crime and corruption spanning over 15 years. He was quickly registered by the Crime Commission as an informant and became a central figure in the Mascot investigation that was established the following month as a joint Crime Commission—police task force.

The Mascot investigation was largely undertaken by the use of concealed listening devices and telephone interception. The listening devices were mostly concealed on the informant or in his briefcase and were activated when he engaged in conversation with fellow officers, frequently about past and sometimes contemporary corruption.

The strategy was highly successful. In 2000 the Mascot investigation was joined by the Police Integrity Commission that conducted both private and public hearings under the auspices of Operation Florida. The combined Mascot and Florida investigations resulted in findings against 27 officers, the prosecution of 13 officers and civilians, disciplinary action against at least 10 officers, and the resignation or dismissal of over 20 officers. The current high integrity of New South Wales policing is heavily based on that work and subsequent reforms.

But there was a problem. Concern surfaced publicly in 2002 that the Mascot investigation may have over-reached. In that year a Mascot listening device warrant became public after inadvertently being served in a prosecution brief that arose from the investigation. The warrant listed 114 people whose conversations could be covertly recorded, including former and serving police officers, a barrister and a journalist. Some people were listed as possible attendees at a retirement function for a police officer suspected of corruption.

Obvious questions were quickly raised in and outside of government. Why was my name on the warrant? Was I suspected of corruption? Is it feasible that scores of attendees at a social function were all implicated in corruption? Was the Supreme Court judge who issued the warrant properly advised and were the rigorous requirements of the *Listening Devices Act 1984* (NSW) followed? How many other listening device warrants were issued? And what became of the recordings and the transcribed conversations?

The internal response at the time to those questions was genuine but, with hindsight, inadequate. Internal briefings prepared for the Minister and the Inspector of the Police Integrity Commission justified the format of the listening device warrant and did not grapple with the larger questions that were being asked. In short, this internal — and guarded — response did not stem a brewing controversy. There was no public reporting on the listening device warrants and the Crime Commission refused to make available to the NSW Police Force the full records the Commission held about the Mascot investigation.

The controversy became a crisis for government in 2012 when roughly 2000 pages of confidential Crime Commission and NSW Police Force records reached the hands of at least eight journalists, parliamentarians and senior officers. It seemed that one or more law enforcement officers had acted on their discontent by leaking the Mascot-related records.

Two other developments played into the controversy. One was that some of the players in the Mascot events had since risen to senior rank in the police force. Three names frequently mentioned in the media were Deputy Commissioner Catherine Burn, who had earlier led the Mascot Task Force; Deputy Commissioner Nick Kaldas, who was suspected of having been investigated and recorded by the task force; and Police Commissioner Andrew Scipione, who was not involved in the Mascot investigations but held senior office when the controversy was developing and was unresolved.

The other development was that the NSW Crime Commission had long been an enigma but was facing questioning on multiple fronts. The Commission was established in 1985 as a criminal intelligence agency to combat drug crime, and its remit was later expanded to organised crime. It was regarded as an effective but highly secretive organisation. The title to one newspaper article was ‘The commission that is a law unto itself ... more secretive than ASIO’.[11] The Commission was headed for 15 years until 2011 by the same

Commissioner — Mr Phillip Bradley. A much-publicised incident in that period was a 19-year jail sentence imposed in 2011 on Assistant Commission Director Mark Standen for drug importation.

A Special Commission of Inquiry into the Crime Commission was established that year, headed by former Supreme Court Justice David Patten. The Patten report recommended extensive changes to the Commission's governance structure and oversight, noting the Commission's 'extraordinary powers', and the 'not inconsiderable criticism' that was summed up in one description of its work as 'the end justifies the means'.[12]

In November 2012, following the unauthorised release of Mascot-related documents, the New South Wales Government asked the NSW Ombudsman to conduct an inquiry into the disputed matters. The inquiry lasted four (long) years. It faced two Legislative Council inquiries, over one million documents were captured, 131 witnesses were examined over 89 days of hearings and interviews, and submissions were received from 35 parties comprising 1626 pages. The report that I tabled in December 2016 was a six-volume, 918-page report.

The report examined in great detail the work of the Mascot Task Force — for example, that it had obtained 475 listening device warrants to record 295 people, and 246 telephone interception warrants to record 95 people. Some of the warrants had a dragnet quality, naming as many as 119 people, many of whom could not possibly have been recorded during the life of the warrant and whose inclusion in the warrant was not explained in any supporting affidavit. The Ombudsman report reached 93 adverse findings against individual officers, the Crime Commission and the NSW Police Force.

The NSW Police Force quickly accepted the findings and made apologies to some officers. Others, including some officers, a former premier and attorney general, and the Crime Commission, rejected the report. Indeed, the Crime Commission handed a scathing response to the media before providing it to me. The Commission said it had done nothing wrong; that criticisms of its processes were 'misconceived', 'illogical', 'bizarre', 'ridiculous', 'patently erroneous' and 'biased'; and that the Commission would not apologise to 15 people as recommended in the report.[13]

I countered three months later with a further special report to the Parliament addressing each of the criticisms but also pointing out that the Crime Commission's hostility fitted a familiar pattern: powerful organisations often resist probing scrutiny of their administration when this first occurs.[14]

The major purpose of the Operation Prospect report was to examine and report publicly on disputed events between 1999 and 2012 that made up this controversy. The report also concluded with some takeaway messages. Two were the need for strict and faithful compliance with statutory requirements governing the use of coercive investigation powers; and the importance of preparing an accurate contemporary documentary record to explain why those powers are being used.

But the most important takeaway message is that deep-seated problems in agency systems are not resolved by assuming they do not exist. The report notes numerous opportunities during the long controversy for senior agency personnel to stand back and say 'Houston, we've got a problem'. The failure to do so led to the controversy expanding, becoming entrenched and bitter and requiring a four-year investigation more than a decade later.

University complaint handling

The growth and refinement of administrative law review in Australia owes much to the work of legal academics. However, at the institutional level universities were distinctly unenthusiastic about administrative law applying to them. In earlier days universities actively resisted the suggestion that they were public authorities that were amenable to external review, reasons requirements and freedom of information. The thrust of the university objection was that they were independent institutions and were self-governing. They claimed to be uniquely different to other public authorities because of the principle of academic freedom and the devolution of academic administration and decision-making to faculties and individual academics.

Soon after the new federal administrative law system commenced in the late 1970s the Australian National University (ANU) — a public authority established by an Act of the Australian Parliament — set upon a course of defensive combat. It was not without irony that the ANU was also the home at that time to many leading administrative law academics and reform proponents, notably Professors Harry Whitmore, Jack Richardson, Dennis Pearce, Leslie Zines and Jack Goldring.

In the first judicial review action brought against the ANU in 1982 under the new *Administrative Decisions (Judicial Review) Act 1977* (Cth),[15] the university successfully argued that the decision to terminate a professor's employment was not reviewable under that Act, as the decision was made under his contract of employment and not under the general statutory powers of the university to manage and appoint staff. The university was similarly successful a few years later in another case in arguing that decisions on promotion were not subject to administrative law review.[16]

The ANU equally resisted applications under the *Freedom of Information Act 1982* (Cth) for access to examiners' reports for honours and doctoral theses, arguing that it would be contrary to the public interest to release those reports to candidates.[17]

The ANU was not alone, of course, in arguing that it fell beyond the realm of administrative law. A leading Australian administrative law case is the 2005 decision of the High Court in *Griffith University v Tang*.[18] The university successfully took a jurisdictional objection to a judicial review action brought by a postgraduate student who had been excluded from her PhD studies.

It was likewise the experience of Australian Ombudsmen that universities resisted external scrutiny long after most other public authorities had accepted that a new age had dawned. The resistance culminated in work undertaken by the NSW Ombudsman between 2004 and 2006 to develop tailor-made guidelines on university complaint handling. The impetus, explained in an Ombudsman annual report, was a rising trend in university complaints from both staff and students, poor complaint handling by universities, and the resource-intensive nature of university complaint processes.[19] The new Ombudsman guidelines were developed in conjunction with New South Wales universities, including a survey and meetings of university staff, student organisations and unions.

The need for tailored guidelines of this nature was soon recognised to be a national need. In 2012 all Australian Ombudsman offices agreed there was a need for harmonised national guidelines. The result was the publication in January 2015 of a document entitled *Complaint Handling at Universities: Australasian Best Practice Guidelines*. The guidelines are explicitly based on an Australian Standard for complaint handling[20] but acknowledge that universities are unique institutions that require tailored guidelines. At the same time,

the guidelines explain why they are necessary to safeguard student interests, correct faulty decisions and improve university services and programs.

Three other developments illustrate how far the university sector has come in embracing the notion that complaint handling can foster a continuous cycle of review and improvement. The first is that the 10 public universities in New South Wales now participate in an annual complaint-handling forum hosted by the Ombudsman's office. The forum provides an opportunity to share experiences and strengthen institutional culture.

The second is that in October 2017 the NSW Ombudsman released a discussion paper entitled *Complaints About the Supervision of Postgraduate Students*. This paper, developed after discussion with New South Wales universities, recognises that refinements can be necessary to deal with particular complaint subsets. The Ombudsman receives a steady number of complaints about postgraduate supervision. A breakdown in the research relationship between a postgraduate student and a supervisor can be more complex, personal and bitterly contested. A common predicament is that both parties strive to make the relationship work, or at least do not confront signs of brewing tension, but in retrospect may become angry and accusatory. The tension inherent in a supervisory relationship is captured in the familiar observation that 'an ideal supervisor is positive, honest, caring, patient and brutal'. The NSW Ombudsman discussion paper explores a range of mechanisms and strategies that universities can put in place to deal with the distinctive issues in postgraduate supervision.

A third development is that all Australian universities are now required by national guidelines to develop complaint and appeal processes for overseas students — who are another distinct subset.[21] An allied development that recognises the vulnerabilities faced by overseas students was the conferral upon the Commonwealth Ombudsman in 2011 of a separate statutory role of Overseas Students Ombudsman.[22]

Conclusion

We strive for administrative perfection — but it is largely an illusory goal.

Australian public administration is already of a high standard, as recognised in international awards and rankings. The quality of New South Wales public administration is confirmed in the annual customer satisfaction surveys that the Customer Service Commissioner undertakes on behalf of government: the customer satisfaction index in 2017 was 79.3 per cent.[23]

No matter how high our standards and practices, things can go wrong. And they can go wrong unexpectedly in ways that were not anticipated or picked up by scenario planning, user testing or risk evaluation. The spectacular examples of institutional malfunction provide a lesson that mistakes can occur at any time and in any organisation. The level of expertise and resources that are thrown into planning a program or designing a product provides no guarantee that problems will be avoided.

In the 10 days following the opening of Heathrow Terminal 5 in 2008, over 42 000 bags went astray and many were never reconnected with their owners. The Australian Bureau of Statistics website for the 2017 Census, which was five years in the planning, was closed on the same day it opened. The Australian Taxation Office website crashed in the week following the end of the 2017 financial year as taxpayers tried to submit returns. The recent recall of Samsung mobile phones due to battery explosion is one of many product recalls that commenced shortly after an item went on sale. The Sydney Olympics ticketing saga was one in a long line of ticketing fiascos that failed to predict consumer behaviour. The

new $500 million St Helena airport that was closed before it was opened due a severe wind shear problem is neither the first nor the last infrastructure humiliation.

There are now sufficient examples of this kind that in June 2017 Sweden was able to open the Museum of Failure. The purpose of the museum is not entertainment as such but to encourage organisations to become better at learning from failure.

The comment is often made to me by agency leaders that their aim is to reach a position that the Ombudsman will no longer receive complaints about their agency. And I reply that a train crash is heading their way. We can minimise mistakes and complaints, but we cannot eliminate them.

The wise strategy is to anticipate that things will go wrong and that people will be unhappy and will complain. Take their feedback seriously. Have a clearly defined procedure that enables people to complain. Make sure that senior officers have visibility of what people are saying. Have an open and inquiring mind to the criticisms that come through the door. Above all, accept that we can learn from mistakes and build stronger systems.

One of Jack Goldring's great strengths was his inquiring nature. Jack was willing to test and dissect any proposition. He constantly took on new challenges, both doctrinally and also institutionally as he moved from one campus to another and from one branch of the legal profession to another. Jack's career spanned work in law schools, law reform commissions, the judiciary, official reviews and community-based organisations. A common belief in each of his pursuits was that law can improve administration. Jack's disposition to draw that connection can be inspiring to each of us.

Endnotes

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