

10th Annual Immigration Law Conference

Auckland, 10 August 2012

Presentation by Chief Ombudsman Dame Beverley Wakem

Introduction

In this presentation I'm going to deal largely with current issues and trends in my dealings with complaints about administrative justice and procedural fairness in the relationship between Immigration New Zealand and complainants.

Before I do however, I just want to give you a wider context for that, in terms of the complaints we are receiving about the administrative conduct of New Zealand government agencies as a whole, the complaints handling process and other measures we have in place to deal with these matters.

It's important that we look at the bigger picture, in terms of the current issues and pressures that we are facing overall and the general strategic direction we are taking.

Who is the Ombudsman?

The first issue that I should address is "*Who is the Ombudsman?*"

At first glance, the answer to this seems relatively straightforward. The Ombudsman is an independent Officer of Parliament with functions under various pieces of legislation, including:

- the Ombudsmen Act
- the Official Information Act
- the Local Government Official Information and Meetings Act
- the Protected Disclosures Act; and
- the Crimes of Torture Act.

We also have a role under the United Nations Convention on the Rights of Persons with Disabilities to monitor the implementation of that convention in New Zealand.

Under the Ombudsmen Act, we can investigate complaints about the administrative conduct of state sector agencies, usually where there is no other adequate alternative remedy available. We can make recommendations to state sector agencies when we consider that their conduct is unreasonable or unfair.

However, the question of how our functions should be carried out can be answered in many different ways. The Ombudsman could be a reactive, solely complaints driven organisation, seeking only to handle adequately the complaints that come before us and not "*touting for*

business” in any way. On the other hand, the Ombudsman could be a progressive and proactive organisation, seeking to add value, inform the public and assist in achieving good administrative practice across the state sector, whilst reducing the transactional costs of doing business with us. We have opted for the latter.

Reviewing our purpose and strategic direction

Over the last 2 years, we have re-examined what our purpose and strategic direction should be.

We have reviewed our legislative functions and our increasing areas of responsibility. We have better identified our stakeholders and their expectations. We have asked agencies and complainants what they think of our service. We have considered the current environment that we are operating in. We have examined our current work pressures and considered ways in which our complaint handling process can be improved. We have re-affirmed what we stand for and who we want to be.

In terms of our stakeholders, we note that:

- Parliament expects us to act independently and robustly, and provide timely and reliable reports on the administrative conduct of state sector agencies
- the public needs to know or easily find out about us, what we do, and how and when to approach us
- complainants expect a fast, fair, responsive and accessible service, that effectively resolves their concerns, and
- state sector agencies expect a fair and impartial investigation which assists in improving good administrative practice, as well as effective advice and guidance in relevant areas.

We have surveyed complainants and agencies, to ask what you think of our service. We are using feedback from these surveys to redevelop some of our performance measures through which we report on our effectiveness to Parliament. We are also using your feedback to inform our business planning and strategic direction.

Our most recent survey was held in the 2011-2012 year. We have been able to compare the results of that survey with our previous survey held in the 2008-2009 year.

What we learned was not unexpected. Overall, the way complainants find out about us and interact with us is changing, with increasing use of new technology, including internet and email. 58% of complainants we surveyed in 2011-2012 had visited our website. This accords with a recent nationwide public awareness survey which showed that 77% of people would use the internet to find out what we do.

Expectations of our service are also changing. Complainants expecting a good standard of service before they approached us rose from 88% in 2008-2009 to 92% in 2011-2012. We have been able to meet many of these expectations in terms of the quality of our communication, with 78% of complainants agreeing in 2011-2012 that we are easy to understand. However, there is less satisfaction with our timeliness in responding, with only 56% of complainants agreeing in 2011-

2012 that we are timely. Overall satisfaction with our standard of service has dropped, from 65% in 2008-2009 to 57% in 2011-2012.

The declining satisfaction with our service is a reflection of the current work pressures that we are facing. We normally receive between 8,000 and 9,000 new complaints and enquiries every year. However, in the 2009-2010 year we received nearly 10,000 and in the 2011-2012 year we received over 10,500. While we have managed to increase our throughput to deal with these matters, there has still been an impact in terms of the numbers of complaints and enquiries we have on hand at any one time. This has risen from around 1,000 in 2008-2009 to around 1,700 today. We currently have about 300 complaints on hand that we do not have the resources to immediately process.

Having said that, we keep these under review so that anything that becomes urgent or is urgent can be dealt with.

Complaints received against Immigration New Zealand

In the immigration context, there was a spike in the number of complaints we received against Immigration New Zealand during the 2009-2010 reporting year. In 2008-2009 we received around 200 complaints against Immigration New Zealand. In 2009-2010 we received 295 complaints and in 2010-2011 we received 252 complaints.

Combined with the often complex nature of these complaints, this inevitably gave rise to work pressures in the immigration area. I acknowledge that there have been significant delays in progressing some complaints against Immigration New Zealand. Given the considerable pressures on my Office and the resource constraints that we operate under, current staffing levels do not meet work capacity requirements. This has had an unfortunate impact in the immigration area, which I regret.

By April 2011, the work pressures in the immigration area had resulted in a large backlog of complaints. At that point in time we had 188 Ombudsmen Act complaints against Immigration New Zealand on hand in total, including 117 complaints that we did not have the resources to immediately progress.

In April 2011, I instituted a process of careful review of the immigration complaints on hand and a reallocation of Office resources to address the unacceptable delays that I had noted in this area. At that time, approximately 2.7 Full Time Equivalent operational staff were committed to processing Ombudsmen Act complaints against Immigration New Zealand. I now have approximately 4.2 Full Time Equivalent operational staff doing that work. That represents approximately 20% of the total operational capacity for processing Ombudsmen Act complaints. 11 staff in my Office are now actively engaged in handling complaints against Immigration New Zealand, on either a full time or part time basis.

In overall management terms this is not sustainable – the sector is taking – and has for some time – a disproportionate share of our total resources. Accordingly, we need to, and do, work closely with Immigration New Zealand to reduce the incidence of challenges to their decisions by improving process and practice.

Following the review in April 2011, letters were sent to update complainants on the current status of their complaints, and since then my staff have been systematically working through and reducing the number of Ombudsmen Act complaints against Immigration New Zealand that cannot be immediately progressed. There are now 25 such complaints that I do not have the resources to immediately progress, out of the 182 Ombudsmen Act complaints against Immigration New Zealand that I currently have on hand.

However, the historical backlog of complaints, together with the continuing pressure of new work in the immigration area, means that some ongoing delays are still, unfortunately, inevitable. I must balance the demand for a timely progression of the complaints on hand with the need for me to undertake a full and proper consideration of each complaint, and the capacity and capability of my staff to undertake the work required.

Growing work pressures and the current environment

As well as reviewing the immigration complaints on hand, we have also examined growing work pressures across the Office as a whole. We are receiving increasingly complex and challenging complaints. For example there is increasing pressure on my staff arising from the Canterbury Earthquakes, where complaints and enquiries concerning the Earthquake Commission have risen from 12 in the 2009-2010 year to 443 in the 2011-2012 year. As a result of examining our current work pressures, we have identified a need to develop better and smarter ways to manage our work.

We have also considered the current environment that we are operating in. New Zealanders are facing greater social and economic pressures, and seeking more assistance from us in their interactions with government. State sector agencies are also seeking more advice and guidance from us. Change and reorganisation in both central and local government are placing new demands on us, and the Government has identified one of its four key priorities is “*delivering better public services within tight fiscal constraints*”. In line with this, we have considered how we can best assist state sector agencies to improve their services to the public.

Our purpose and strategic direction

As a result of the review of our strategic direction, we have defined our purpose as the following:

“We investigate, review and inspect the administrative conduct of state sector agencies, and provide advice and guidance, in order to ensure people are treated fairly in New Zealand”.

The overall outcome that we are seeking to achieve is that:

“A high level of public trust in government is maintained”.

One of the impacts we want to have is:

- improved administration and decision making in state sector agencies.

We have identified our main ways to achieve this are to:

- investigate state sector administration and decision making

- provide advice and guidance to improve state sector capability in areas relevant to our role, and
- improve public awareness and accessibility of our services.

Repositioning the Ombudsman

We have used the outcome of this review to begin to reposition the Ombudsman as a:

“modern, independent New Zealand authority, that is agile, proactive and approachable”.

We are setting up new workflow structures that will allow us to more easily move staff resource to an area of identified need. We are establishing formal early assistance and early resolution processes within dedicated teams, with a view to dealing with complaints as effectively and efficiently as possible. We have established new time targets, so that:

- if a complaint is outside our jurisdiction, we aim to advise the complainant within one month;
- if we do not intend to investigate a complaint, or if we can resolve a complaint without investigation, we aim to complete this within 3 months;
- if we investigate a complaint, we aim to complete urgent matters within 4 months and all matters within 12 months.

We will explore in a structured and systematic way opportunities for resolving complaints quickly and without investigation. This includes engaging with state sector agencies at chief executive level to set up effective, agreed procedures for early resolution. We have begun discussions in this respect with Immigration New Zealand.

We are also taking a planned, strategic approach in particular areas, including immigration. In doing so, we aim to identify issues and areas for development and to ensure a consistent and well-managed approach by staff working in each area.

We have begun to collect more detailed data as to the outcome of complaints we have dealt with, so that we can better identify the types of administrative deficiencies we are identifying, as well as the outcomes we are achieving.

We are also examining ways in which we can more effectively contribute to wider administrative improvement in the state sector. We will be promoting and extending our already well-regarded training programme for state sector agencies. We will be increasing our focus on providing advice and guidance to the state sector on legislation, policy and procedural matters both while they are under development, and after they have been implemented. We also intend to make more use of our *“own motion”* powers to initiate investigations ourselves in cases which raise significant or systemic issues. In this respect, I have recently appointed a Senior Advisor who has a specific focus on providing advice on investigations to promote wider administrative improvement.

In essence, we are moving to make our complaints handling process more effective and efficient, and thereby create the resource we need to ensure:

- we can manage the complaints we have on hand, and
- we can identify and address wider issues in a more focused and systematic way.

Ombudsman – fairness for all

The first general evidence you will have seen of our repositioning is:

- our statement of intent for 2012-2015 that was released with the Budget, and
- our new Ombudsman identity and website that launched this Monday.

Our overarching value statement is “*Ombudsman – fairness for all*”. This succinctly captures what we are all about.

Our new website has been designed to both:

- inform the public about our role, when we can help and to make it easy to approach us; and
- provide a platform to build resources and guidance for both the public and state sector.

As well as publishing new case notes, we will also increasingly be publishing new guides and opinions. The aim is to make everyone aware of our standard approach to specific matters, so that it is clear to both state sector agencies and the public what we would expect good administrative practice to look like in particular cases.

Specific approach in the immigration area

In the immigration area, as I have said, we have increased our staff resource dealing with complaints against Immigration New Zealand, in order to address delays and effectively deal with the complaints we have on hand.

We are also introducing different approaches. In the near future, we will be exploring systematic ways to achieve early resolution of new immigration complaints.

In addition, Immigration New Zealand has offered to review the complaints I have under investigation which have not previously been considered under both stages of the CCRP. Using this approach, some of the complaints reviewed by Immigration New Zealand have been resolved. It is also serving to clarify the issues involved in complaints which cannot be resolved. I consider a review at this stage by Immigration New Zealand to be the most timely way to progress these complaints given the current demands on my resources. However, I have not discontinued my investigation of these complaints. In each case, my investigation remains underway and if the matter cannot be resolved by Immigration New Zealand’s review then I will proceed to form an opinion on the matter and so conclude my investigation.

We are also taking a more strategic approach in the immigration area, to identify key issues and the best way to address them. For example, concern has recently arisen about the impact of the current Internal Administration Circular concerning decision making on requests for visas under section 61 of the Immigration Act. You have already discussed the key issues under this heading yesterday.

I will continue to investigate individual complaints in relation to section 61 decisions where appropriate. However, I have also held a series of meetings and exchanged correspondence about the IAC with the former Department of Labour, now the Ministry of Business, Innovation and Employment. The Chief Archivist was also involved in one such meeting in terms of record keeping policies.

I have suggested changes to the current IAC. In essence, while reasons for a decision under section 61 do not have to be made available, I have advised the Ministry that I consider not recording reasons for section 61 decisions at all is contrary to sound administrative practice. Records of decisions need to be made for the purposes of accountability, to promote public trust and confidence in the integrity of the decision making process and to enable verification of what was done. In this regard, I would generally consider a record of a decision under section 61 to be sufficient if it includes:

- brief reasons for the decision made;
- relevant factors taken into account in making the decision; and
- an indication as to whether the reasons are to be made available to a requester.

I am currently awaiting the Ministry's response on this matter.

I will also be producing a new guide setting out my approach to complaints about decisions made by Immigration New Zealand under section 61. I am able to outline here some of the matters that will be covered in this guide.

The fact that a section 61 request has been refused would not, of itself, provide grounds for an investigation under the Ombudsmen Act. Given the very wide discretion conferred by the section, there would need to be something demonstrably unfair about the manner in which such a power was exercised before that exercise could be described as administratively unreasonable. The fact that a person may consider that he or she has good grounds for wishing to remain in New Zealand would not, of itself, necessarily mean that a refusal to grant a visa is unreasonable. In the absence of some demonstrable unfairness, it is unlikely that I would investigate.

In addition, if a section 61 complaint raises service or process-related issues, Immigration New Zealand has confirmed that such issues can be examined under the CCRP. In these circumstances, I would usually suggest that the complainant should go through the CCRP before seeking my assistance. If the CCRP fails to resolve the complaint, the complainant can then approach my Office.

Where there is some demonstrable unfairness, I would be able to consider commencing an investigation. Accordingly, investigations have been made in the following circumstances:

- Where undertakings were given that a request would be considered, or considered in a particular manner, but these undertakings were not honoured.
- Where specific international obligations (notably around human rights) were relevant to the consideration of the section 61 request, but they were not considered.
- Where there were grounds to suggest that in refusing to grant a visa, the officer's actions fell short of the standards that could reasonably be expected of such a decision maker. For example, I would not expect officers to make decisions that:
 - are based on a mistake of fact
 - take into account irrelevant considerations
 - fail to seek comment before relying on potentially prejudicial information of which the requester is unaware, or
 - have disproportionately oppressive consequences for the requester.

I am, of course, aware that a lack of access to the reasons for a decision (whether or not those reasons were recorded) can make it very difficult for a complainant to ascertain whether a section 61 request was refused on reasonable grounds. However, the absence of recorded reasons would not necessarily preclude me from investigating a complaint about the reasonableness of a decision made on such a request, as I have the power not only to require the Ministry's files but also to summon and examine on oath the officer who made the decision.

While I can't investigate a Minister's decision, I can review the adequacy of the advice provided by Immigration New Zealand to the Minister or Associate Minister of Immigration.

Further principles and guidelines on how my Office should deal with such complaints are currently being developed and refined as cases are received.

As well as taking a more strategic approach on key issues that arise, I will also be looking for more issues to investigate, either on complaint or on my own motion, that have the potential to achieve wider administrative improvement.

One current example in the immigration context is my investigation of the implementation of section 35A processes in relation to the residual places policies. This is more commonly known as the PAC case. This investigation considered systemic issues across a number of individual cases. While it has taken a considerable length of time to progress, undertaking this investigation and reflecting on its outcome has assisted in developing much of our thinking in the area of wider administrative improvement.

My investigation examined the implementation of residual places policies in 2004-2005 to enable Pacific residence quotas to be filled. I had received a number of complaints about this matter and I decided to investigate the wider systemic issues involved. After investigating, I formed the opinion that the Department had acted unreasonably. I found the relevant guidance for departmental officers was late and unclear, and inconsistent advice was consequently given to some people. I also noted the creation of, and failure to manage, erroneous expectations that the

policies represented an opportunity for “overstayers” to change their immigration status. Following my investigation, the Department of Labour acknowledged there had been systemic failings.

Since the conclusion of my investigation, I have held ongoing discussions with the Department on the remedies that should be offered to those who were affected by the Department’s deficiencies.

In respect of the complainants who were included in the investigation, the Department agreed to consider the grant of permits under section 35A based on a consideration of the complainants’ current circumstances.

In 2011, the Department also agreed to consider the grant of visas under section 61 to those who had complained to me at a later date and whose complaints were therefore not included in my investigation - subject to certain criteria being met.

However, I have also noted that there may be other people in the relevant Pacific communities who were affected by the deficiencies identified by my investigation, but who did not make a complaint to me. I am currently in discussions with the Ministry as to how to address the concerns of those people, and so achieve “fairness for all”. I expect to conclude those discussions shortly.

I am also considering a number of other immigration related matters with the potential for wider intervention, including investigation of systemic issues.

For example, I am aware of some concerns about the operation of the CCRP process, including concerns that have been raised with me about delays in complaints being processed through the CCRP.

In the majority of cases that I am aware of where a complainant has accessed the CCRP before coming to me, there have been no particular concerns raised with that process. However, I have received some complaints where concerns with the CCRP have been raised, and I am pursuing those individual cases with the Ministry. In addition, I am monitoring any issues arising in this area and I am discussing the CCRP process in a general sense with the Ministry. If necessary, I will consider whether to begin a wider investigation of any systemic issues that I may identify as arising in relation to the CCRP.

However, I will still continue to refer most new complaints to the CCRP in the first instance where that process is available. This is in line with the Ombudsman’s longstanding approach that a complaint should initially be raised with the agency concerned, so that it has an opportunity to consider and, if possible, to resolve the matter. This has the benefit of enabling the earliest possible resolution of concerns, and allows agencies to address any issues that may arise without the need for an Ombudsman’s intervention. My preference is to use my investigative powers to seek any necessary improvements in the CCRP so that I can be sure it functions as an effective first remedy, rather than act to avoid the CCRP process altogether.

Systemic issues may also be addressed through the investigation of individual complaints. One recent example of this is a complaint I investigated about the actions taken by Immigration New

Zealand to inform a complainant in Police custody of his right to contact a lawyer when he was later served with a removal order and detained under the Immigration Act. In that case, I formed the opinion that Immigration New Zealand had acted unreasonably by not ensuring the complainant was advised, when he was served with the removal order, of his right to contact a lawyer about his immigration issues.

The immediate complaint was addressed by my investigation.

However, I also considered that wider issues needed to be addressed in terms of the relevant procedures followed by compliance officers. While this is still under discussion with Immigration New Zealand, it has been agreed that Immigration New Zealand should keep records that detainees have been advised of their right to contact a lawyer.

The investigation of individual complaints may, of course, also have a particular result for the complainant. In the 2011-2012 year, I completed 219 Ombudsmen Act complaints against Immigration New Zealand. In 49 cases, or 22% of the total completed, I either resolved the complaints or formed a final opinion identifying administrative deficiencies by Immigration New Zealand. Remedies obtained by complainants in these cases included:

- the provision of reasons
- a changed decision
- reconsideration of a decision
- an omission rectified
- a financial remedy, and
- an apology.

5 cases also resulted in a change or review of policy, practice or procedure by Immigration New Zealand.

Of the balance of matters which came to the Office:

- There was no investigation undertaken in 139 complaints, including:
 - 86 referred back to the INZ CCRP, and
 - an explanation, advice or assistance provided in another 41 complaints.
- In 15 other cases I formed a final opinion, with 14 where no administrative deficiency was identified and 1 where the issues could not be determined.
- In a further 11 cases, the investigation was discontinued, with 9 where further investigation was unnecessary and 5 were withdrawn.

Whilst one injustice is one too many, it is, in fairness, worth noting that these statistics also show that INZ “gets it right” most of the time.

How can you help?

I have outlined today some of the issues facing my Office and the measures we are taking to ensure:

- we can manage the complaints we have on hand, and
- we can identify and address wider issues in a more focused and systematic way.

There are a few simple things that you can do to help us in this endeavour.

First, don't delay. Raise any concerns you have about the acts and decisions of Immigration New Zealand in a timely manner.

Where you can, try to resolve your concerns by raising them with Immigration New Zealand through the CCRP in the first instance. This includes when your clients are in New Zealand unlawfully. Immigration New Zealand has advised me it is unlikely that someone using the CCRP would be deported. However, if you have reason to believe your clients may be deported while they are using the CCRP, you may make an urgent approach to my Office.

If you are not sure whether to use the CCRP in a particular case, or if you are having problems using the CCRP, you can raise this with Immigration New Zealand or come to my Office. As I have noted above, Immigration New Zealand has clarified that the CCRP can be used for standard of service or process related issues, but not complaints about the merits of the decision.

When you make a complaint to me, it would be helpful if you could:

- provide your client's full name and personal contact details, and Immigration New Zealand client number.
- The full names of any family members included in the Immigration New Zealand applications.
- Whether the matter is urgent. If so, the reasons why.
- Details of your client's immigration history.
- Details of your client's current immigration status. If your client is in New Zealand on a current visa, please advise us what type of visa they are on and when the visa will expire.
- A clear indication of the specific act or decision by INZ that concerns you.
- Full details of your concerns about that act or decision. In particular, why you consider the conduct of INZ is unfair or unreasonable.
- The outcome you're seeking.

- A description of the steps you've taken to resolve the complaint, and whether you are still taking these steps. These might be with Immigration New Zealand through the CCRP, the Associate Minister for Immigration or the Immigration Protection Tribunal.
- Copies of all relevant correspondence and documents.

Remember that before making a complaint you could consider asking Immigration New Zealand for your client's file. You may now request your client's file under the Privacy Act, regardless of whether your client is onshore or offshore. Any queries or concerns about Privacy Act requests can be raised with the Privacy Commissioner.

Conclusion

So in conclusion, how far have we come to achieving our goal of "*fairness for all*"?

I think this is very much a work in progress. There will always be work for the Ombudsman to do.

But we are committed to improving our performance, and that will be a continuous and transparent process from now on.