The Contracting Out of Government Services
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3 Review of Import Control and Customs By-Law Decisions, 1979
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The office of the Administrative Review Council is located at Ground Floor, Robert Garran Offices, National Circuit, BARTON, ACT, 2600.
25 August 1998

The Hon Daryl Williams AM QC MP
Attorney-General and Minister for Justice
Parliament House
CANBERRA ACT 2601

Dear Attorney-General


Yours sincerely

Professor Marcia Neave
Administrative Review Council

This report was adopted at a meeting of the Administrative Review Council held in Canberra on 24 July 1998. The members of the Council at the date of that meeting were:

President

Professor Marcia Neave (President)

Ex-officio members:

Justice Jane Mathews (President of the Administrative Appeals Tribunal)
Alan Rose AO (President of the Australian Law Reform Commission)
Ron McLeod AM (Commonwealth Ombudsman)

Other members

Jill Anderson
Bill Blick PSM
Tony Blunn AO
Christine Charles
Professor Ian Lowe
Wayne Martin QC
Stephen Skehill
Helen Williams AO

The Council acknowledges the contribution to this report of Philippa Lynch (Director of Research), Sue Bromley (Deputy Director of Research) and Gabrielle Lewis (Project Officer).
Section 51 of the *Administrative Appeals Tribunal Act 1975* sets out the functions and powers of the Council as follows:

(1) The functions of the Council are:

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body;

(b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review;

(c) to inquire into the adequacy of the law and practice relating to the review by the courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice;

(d) to inquire into the adequacy of the procedures in use by tribunals or other bodies engaged in the review of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in those procedures;

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted;

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to make recommendations to the Minister as to ways and means of improving the procedures for the exercise of administrative discretions for the purpose of ensuring that those decisions are exercised in a just and equitable manner.

(2) The Council may do all things necessary or convenient to be done for or in connection with the performance of its functions.
EXECUTIVE SUMMARY

The Administrative Review Council is an integral part of the administrative law system and acts as an advocate for its values. Administrative law is designed to ensure that public administrators act fairly, lawfully, rationally, openly and efficiently in their dealings with the community. It complements the systems of ministerial accountability and Parliamentary oversight through which Government is accountable to the Parliament and the electorate.

In recent years, changes in public sector administration have resulted in increased reliance on contractors to provide services to the public. Although this contracting out process may result in more effective and efficient service delivery, at lower overall cost to the taxpayer, it also creates challenges for administrative law. When government activities and services are contracted out, neither administrative law nor private law may be adequate to deal with the issues that may arise in the new relationships between the government agency which purchases the services, the private sector contractor which provides them and the members of the community who receive the service or who might otherwise be affected by the actions of the contractor.

The delivery of government services by contractors, and the consequent ‘privatising’ of the relationship between service providers and members of the public, has the potential to result in a loss of the benefits which the administrative law system provides for individuals. In turn, this may affect the efficiency and quality of government administration. Further, since a contractor’s connection with government will be governed by contract, the accountability mechanisms traditionally provided by ministerial responsibility and Parliamentary oversight may no longer be as effective.

The Council considers that the contracting out of government services should not result in a loss or diminution of government accountability or the ability of members of the public to seek redress where they have been affected by the actions of a contractor delivering a government service.

To achieve this result, the Report contains recommendations relating to the contracting out process, and the application of private law and administrative law in situations where services are provided by contractors.

The preservation of accountability and avenues of redress can be achieved through a mix of public and private law mechanisms. Such a mix ensures that government agencies and contractors retain a degree of flexibility in arranging their relationships. This flexibility can be used to ensure that the interests of the government agency, the members of the community and contractors are protected in any contracting out arrangement. It can also enhance the systems of Parliamentary oversight.
The Report covers four main areas:

- the obligations of agencies in relation to contract drafting, management and monitoring, and in relation to the recording of information about contracts;
- maintenance of access to information about contracts by the Parliament, the Auditor-General and members of the community;
- ensuring the adequacy of arrangements to handle complaints about contractors and to resolve disputes involving the provision of compensation for loss or damage; and
- the rights of individuals to review decisions made by contractors that affect them.

Contracts

Agencies will need to consider four broad issues when preparing contracts:

- the scope of the service to be provided by the contractor and how it is to be provided;
- who is responsible when things go wrong and what obligations they have to fix the problem;
- the information to which service recipients and other members of the public are entitled and how they are to be given access to that information; and
- how the contractor’s performance is to be evaluated and reported.

Agencies will need to keep (and obtain from contractors) relevant information about the management and monitoring of contracts so that the effectiveness of the delivery of particular services can be evaluated. Agencies also need to ensure that sufficient information about contracts and contractors’ performance is available for the Parliament and the Auditor-General to be able to fulfil their oversight functions.

Access to Information

Because documents of the kind which would previously have been held by government agencies may now be held by contractors, there is potential for a diminution or loss of accountability both in relation to the services provided to individual recipients and in relation to broader questions of public interest.

Where service delivery is contracted out, the Council recommends that the Freedom of Information Act 1982 should be amended to provide that all documents that are in the possession of the contractor and relate directly to the performance of the contractor’s obligations under the contract shall be deemed to be in the possession of the government agency, so that people may seek access to them under the Act. The public’s right to access must be balanced against the contractor’s interest in maintaining confidentiality. The majority of the Council believes that the existing exemptions in the FOI Act should be maintained. Four members of the Council recommend that changes to the exemptions are necessary to ensure that the interest
of contractors in keeping documents private is balanced against public interest considerations which may favour disclosure.

Complaints and Compensation

Recipients of contracted out services may have access to a range of complaint-handling mechanisms provided by contractors, industry schemes and government agencies. The Council sees a number of benefits in service recipients having access to a range of avenues of complaint. In particular, in any contracting out arrangement, the government agency should satisfy itself that the contractor will be able to deal with complaints properly.

Service recipients should also be able to complain to the Commonwealth Ombudsman. Investigation and oversight by the Ombudsman ensure that agencies retain responsibility for the proper management of their contracts and that persons affected by the activities of contractors have an accessible avenue of redress.

The Council also recommends that, in line with existing arrangements, agencies should be able to make payments to people who have suffered minor loss or damage as the result of the actions of a contractor.

Review

Contractors may be able to exercise decision-making powers, either under legislation or under non-statutory arrangements, including decisions that relate to a person’s eligibility to receive a service.

Where a contractor exercises statutory decision-making powers, the Council recommends that the decisions of the contractor should be subject to merits review and agencies should ensure that the contractor is required under the terms of the contract to give effect to any decision taken by a merits review tribunal reviewing the contractor’s decision.

Where there is a change in the way in which a service is delivered, either from a statutory to a non-statutory basis or from a government agency to a contractor, existing rights of access to judicial review or merits review should not be lost or diminished.
RECOMMENDATIONS

Recommendation 1
Agencies should be required to keep relevant information relating to the management and monitoring of contracts such as will enable the evaluation of the effectiveness of the delivery of particular services. Such information should include details about the performance standards required of contractors, the actual performance of contractors and the number and types of complaints received by the agency and the contractor. The information kept by agencies should be publicly available. Agencies should include provisions in their contracts to ensure that they are able to comply with this recommendation.

Recommendation 2
Agencies should include provisions in their contracts that require contractors to keep and provide sufficient information to allow for proper Parliamentary scrutiny of the contract and its management. The information required to meet this need will vary from contract to contract according to a number of factors including the value of the contract, the nature of the service to be delivered under the contract and the characteristics of the service’s recipients.

Recommendation 3
Agencies should include provisions in contracts which require contractors to provide sufficient information to the agency, to enable the Auditor-General to fulfil his or her role as the external auditor of all government agencies.

Recommendation 4
Agencies should consider when letting a contract whether it would be appropriate to require the contractor to agree to the Auditor-General carrying out a performance audit of their performance under the contract.
Recommendation 5
When preparing contracts, agencies need to be satisfied that contractors will be able to deal with complaints properly. Contractors’ complaint-handling procedures should normally satisfy the standards identified by Standards Australia including the recording of complaints and their outcomes. Where the contractor is a small business, simpler complaint-handling procedures may be appropriate. Agencies should also consider what information they should require from contractors about complaints to ensure that contractors’ performance can be properly monitored.

Recommendation 6
Where an industry-based complaint mechanism is in place, people with a complaint about a contracted service should have the option of using that mechanism rather than complaining to the relevant agency or to the Commonwealth Ombudsman. Where appropriate, the Commonwealth Ombudsman should be able to refer a complaint about a contractor to the industry body in the first instance.

Recommendation 7
Industry groups, contractors, service recipients, peak organisations and government agencies should work together to develop industry-based complaint-handling systems that comply with benchmarks identified in *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*.

Recommendation 8
Agencies should be responsible for ensuring that service recipients are made aware of all of their avenues of complaint, either by providing this information directly to service recipients or by requiring contractors to do so.
Recommendation 9
Members of the public who have a complaint about a government contractor should be able to make the complaint to the Commonwealth Ombudsman.

Recommendation 10
The jurisdiction of the Commonwealth Ombudsman should extend to the investigation of actions by a contractor under a government contract. The Ombudsman should also be able to deal with contractors informally to resolve complaints under the Ombudsman Act 1976. Any statutory extension or clarification of the Ombudsman’s jurisdiction should recognise that government agencies retain responsibility for proper management of their contracts.

Recommendation 11
In dealing with complaints against contractors the Ombudsman should have the same powers to obtain information and documents from government contractors as he or she currently has in respect of agencies under investigation.

Recommendation 12
Where the Ombudsman is unable to resolve a complaint about a contractor informally, the Ombudsman should be able to make a formal report to the agency, the Prime Minister and the Parliament about the complaint.

Recommendation 13
It would be appropriate and desirable for agencies to draft contracts in such a way that contractors would be contractually obliged to act on the recommendations of the Ombudsman.
Recommendation 14
The option of complaining to the Ombudsman should be in addition to avenues of complaint which should be provided by the contractor and any complaint-handling mechanisms provided by government agencies or industry arrangements. The Ombudsman should have a discretion to redirect complainants to contractors, industry-based complaint-handling schemes or the agencies where appropriate.

Recommendation 15
The Freedom of Information Act 1982 should be amended to provide that all documents in the possession of the contractor that relate directly to the performance of the contractor's obligations under the contract would be deemed to be in the possession of the government agency.

Recommendation 16
The Freedom of Information Act 1982 should be further amended to require contractors to provide these documents to the government agency when an FOI request is made.

Recommendation 17
All agencies involved in contracting out should regularly provide training to staff on the meaning and operation of the FOI Act and in particular the meaning and application of the exemption provisions.
Recommendation 18
The Council reiterates the recommendation in the FOI Report for the establishment of an FOI Commissioner who would be able to assist agencies in dealing with FOI requests relating to contracted out services. In the absence of an FOI Commissioner, the Attorney-General’s Department should issue guidelines to government agencies on how the exemptions in section 43 and 45 should be interpreted and applied by government agencies.

Recommendation 19
Guidelines should be developed and tabled by the Attorney-General setting out the circumstances in which Commonwealth agencies will treat information provided by contractors as confidential.

Recommendation 20
Where a contractor exercises statutory decision-making powers that would be subject to merits review if the decision were made by an agency officer, the decisions of the contractor should also be subject to merits review.

Recommendation 21
Where a contractor is to exercise statutory decision-making powers, agencies should ensure that the contractor is required under the terms of the contract to give effect to any decision of a merits review tribunal reviewing the contractor’s decision.

Recommendation 22
The Administrative Decisions (Judicial Review) Act 1977 should extend to include a decision of an administrative character made, or proposed to be made, by an officer under a non-statutory scheme or program, the funds for which are authorised by an appropriation made by the Parliament.
Recommendation 23
Where there is a change in a service from a statutory scheme to a non-statutory scheme, access to effective merits review of decisions relating to that service should not be lost or diminished.

Recommendation 24
Where services are delivered under a new non-statutory scheme, the agency should ensure that effective merits review of decisions under that scheme is available where appropriate.

Recommendation 25
Agencies should consider when contracting out a service, whether legislation should, in appropriate circumstances, provide third parties with the ability to enforce particular terms of the contract. Any contractual remedies so provided should not detract from other remedies such as complaint-handling mechanisms and should not relieve the agency from responsibility of enforcing the contract itself.

Recommendation 26
Agency heads should be empowered under the existing arrangements for the Chief Executive’s Instructions to be able to make payments to people who have suffered loss or damage as a result of the actions of a contractor where as a matter of common sense either the contractor or the agency is liable for the damage.

Recommendation 27
The Ombudsman should monitor claims and payments under the scheme.
**Recommendation 28**

As a general rule, where an agency’s contract involves the provision of services, the agency should develop effective mechanisms for obtaining information from service recipients, either directly or through community groups or peak organisations, which can be used in defining the service.

**Recommendation 29**

Agencies should require contractors to keep and make available records to enable the agencies’ accountability for management of the contract to be maintained.

**Recommendation 30**

As a general rule, where an agency’s contract involves the provision of services, the agency should develop effective mechanisms for obtaining information from service recipients, either directly or through community groups or peak organisations, which can be used to monitor and evaluate the performance of particular contractors.
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