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THE CITIZEN AND ADMINISTRATIVE JUSTICE: REFORMING COMPLAINT MANAGEMENT IN NEW ZEALAND

Mihiata Pirini*

The term "administrative justice", and the notion that administrative decision-making might be subject to a cohesive theory of administrative justice, is relatively new. This article suggests that a greater awareness and understanding of administrative justice is required in New Zealand, and that this will lead to better management of complaints that arise in the process of administrative decision-making. It examines the way complaints are currently dealt with by four complaint-handling bodies and concludes that the process tends to works against the citizen, rather than in their favour. It proposes a new, citizen-focused theory of administrative justice for the handling of complaints that will help strengthen the relationship between New Zealand citizens and the State.

I Introduction

> Anyone who has set out from familiar daily life to tangle with bureaucracy knows that bureaucracy and society are worlds apart. The distance can seem as far as that from the earth to the moon. It is not impossible to get there and back, but surviving the journey requires learning not only a new set of behaviours but a new mode of life.[1]

This article is concerned with bureaucracy in administrative decision-making. In particular, it is about the way that our administrative justice system deals with administrative complaints; and the need for a new theory of administrative justice to ensure that complaint management process meets citizens' needs and values. It is suggested that, rather than citizens having to learn a new set of behaviours, the system itself must adapt.

It is a truism to say that in the overwhelming majority of cases, complaints about an administrative decision will not be the subject of judicial review action. In recognition of this, the

* BA/LLB(Hons), Victoria University of Wellington. This article is an adapted version of a paper submitted in fulfilment of the LLB(Hons) research paper in administrative law. Many thanks are due to Dean Knight for supervising me in my research and writing of the paper.

1 Ralph P Hummel *The Bureaucratic Experience* (3rd ed, St Martin's Press, New York, 1987) at 4.

State offers citizens a wider range of dispute resolution bodies capable of hearing and resolving administrative complaints, such as administrative tribunals and Ombudsmen. Collectively, these bodies create a system of administrative justice which offers citizens a broader range of ways to resolve their grievances against the State and to keep the State's administrative decision-making power in check. The mass of complaints resolved in this manner deserve our attention as much, if not more so, than the few cases which go to judicial review, since complaints resolved outside of the formal court system are equally indicative of points of friction between citizens and the State. Similarly, each of the complaints made in this way potentially represent an opportunity for the State to improve the way complaints are managed and sometimes to improve the initial decision-making process. This article examines four such bodies operating within the field of administrative justice: the administrative tribunal; the Parliamentary Ombudsman; three independent Crown entities; and the internal complaint-handling processes within government agencies.

This article suggests that, while we clearly have the mechanisms of administrative justice that can resolve complaints, we are lacking a cohesive theory of administrative justice which governs the way these mechanisms interact with each other, with citizens and with administrative decision-makers. This means that, in practice, the system operates in a way that does not fully recognise the citizen's experience in the complaint-management process. A new, citizen-focused theory of administrative justice may improve that process for citizens and help ensure that the administrative justice system meets the needs and values of its users.

II Defining Administrative Justice

This relatively new brand of justice has been the subject of increasing inquiry in recent years, particularly in common law countries like Australia and the United Kingdom.[2] A key concern has been to define what administrative justice is, which has proven to be an elusive exercise. Papers from the 1999 Annual Conference of the Australian Institute of Administrative Law note that: "Those seeking a definition of 'administrative justice' will need to recognise that the essence of the concept is tempered by conflicting (and legitimate) interests."[3] Nonetheless, for the administrative justice system to operate effectively it must be underpinned by a defined theory of administrative

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2 For discussions of administrative justice in the United Kingdom, see for example Department for Constitutional Affairs *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243, Office of Public Service Reform, London, 2004); Michael Harris and Martin Partington (eds) *Administrative Justice in the 21st Century* (Hart Publishing, Oxford, 1999) at 85. For discussions in Australia, see John Griffiths "Australian Administrative Law: Institutions, Reforms and Impact" (1985) 63 Public Administration; Sir Anthony Mason "Administrative Review: The Experience of the First Twelve Years" (1989) 18 Fed LR 122 at 131; AN Hall "Administrative Justice before the Administrative Appeals Tribunal – A Fresh Approach to Dispute Resolution – Part 1" (1981) 12 Fed LR 71 at 80.

3 Robin Creyke and John McMillan "Administrative Justice – The Concept Emerges" in Robin Creyke and John McMillan (eds) *Administrative Justice – The Core and The Fringe* (Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1999) at 3.

justice that governs both the design and operation of that system. Moreover, this article suggests that theory of justice should be citizen-focused. Its ultimate aim should be to make the system more responsive to the needs and values of its users, rather than those who work within and run the system.

Administrative justice encompasses not just the resolution of disputes between citizens and the State but also, arguably, the justice that is "inherent" in the primary decision-making process.[4] Discussions on the latter focus, for example, on how we can infuse administrative justice into the primary decision-making process in order to increase the frequency of "right first time" decision-making.[5] However, this article is mainly concerned with points of friction that arise after there has been some kind of breakdown in the initial decision-making process.

A The Importance of Complaints

An administrative complaint occurs when an administrative decision-maker exercises their power in a way that creates a feeling of grievance or unhappiness in the citizen who is affected by that decision. A citizen may have a grievance about the actual decision that was made or the service they received in the decision-making process. This is not uncommon, given the scope and number of administrative decisions being made on topics that are seriously significant to the person affected – decisions, for example, on whether someone is entitled to a passport or student allowance; a tenancy in a State house; for compensation for a personal injury caused by accident; for a pension – and the list goes on.

Administrative complaints are important. First, the ability to complain is important for citizens as it serves a therapeutic or restorative function, regardless of the outcome of their complaint. It allows them to reclaim the dignity they may perceive as having been lost in the primary administrative process; or a chance to "re-insert the self" in that decision-making process.[6] Complaining, therefore, can restore the relationship between citizen and State which was damaged when the initial decision led to a feeling of grievance. Without the opportunity to complain, citizens may lose faith in the ability of the State to make its decisions fairly, taking reasonable account of their needs and circumstances, and may be increasingly discontented and eventually lose respect for

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4 Michael Adler "From Tribunal Reform to the Reform of Administrative Justice" in Robin Creyke (ed) *Tribunals in the Common Law World* (Federation Press, Sydney, 2008) 154 at 155.

5 See for example Martin Partington "Restructuring Administrative Justice? The Redress of Citizens' Grievances" (1999) 52 Current Legal Problems 171.

6 Simon Halliday and Colin Scott "Administrative Justice" (Unpublished paper, Universities of Strathclyde and New South Wales and University College Dublin, 2009) at 13, citing David Cowan "Legal Consciousness: Some Observations" (2004) 67 MLR 67.

government and its laws.[7] In New Zealand, the importance of the right to complain is reflected by the inclusion in our Bill of Rights of a right to judicial review.[8]

Secondly, simply knowing there is a way to complain if necessary can serve to reassure citizens that decisions are being made fairly and properly under the relevant rules.[9] Therefore complaint-management processes are important regardless of the accuracy or otherwise of the original decision. This is particularly important for administrative decisions, which often require the decision-maker to apply his or her discretion to a citizen's personal circumstances and may appear, to the citizen, to be confusing or arbitrary. Knowing that there are complaint procedures available is important in this respect.

In addition, complaints and the way they are managed (whether effectively or ineffectively) can be indicative of a State's commitment to good governance and its responsiveness to its citizens. Poor complaint management may indicate underlying, systemic shortcomings in an administration's accountability, efficiency, effectiveness and the extent it allows the public to be involved in policy development and reviews of its performance.[10] Also, complaints are the sole means by which failures in the initial decision-making process may be discovered (in the absence of State-initiated auditing of decisions). A State that is committed to improving the delivery and responsiveness of its public services will put complaints to good effect by using them to locate and remedy weaknesses in public decision-making.[11]

B A New Theory of Citizen-Focused Administrative Justice

A cohesive and principled theory of administrative justice provides the framework in which administrative complaints can be effectively managed. However, settling on this theory is a value-laden inquiry which requires us to balance two competing values, namely, distributive justice and justice for the individual. Robin Creyk, an Australian commentator on administrative justice, observes that on balance, Australian writers fall into one or the other of these two ways of thinking about administrative justice.[12] Distributive justice demands that resources be allocated efficiently

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7 Norman Lewis and Patrick Birkinshaw *When Citizens Complain: Reforming Justice and Administration* (Open University Press, Buckingham, 1993) at 19.

8 New Zealand Bill of Rights Act 1990, s 27(2).

9 National Audit Office *Citizen Redress: What Citizens Can Do if Things Go Wrong with Public Services* (Comptroller and Auditor-General, London, 2005) at [1] (Executive Summary).

10 Lewis and Birkinshaw, above n 7, at 16.

11 This idea is discussed by Halliday and Scott in the context of improving the justice inherent in the primary decision-making process: Halliday and Scott "Administrative Justice", above n 6, at 13.

12 Robin Creyke "Administrative Justice – Towards Integrity in Government" (2007) 31 Melb Uni LR 705 at 711 ["Towards Integrity in Government"].

and fairly across many areas according to a Weberian model of bureaucratic administration.[13] Individual justice, by comparison, is concerned with achieving justice for the individual in his or her particular circumstances. Individual justice "recognises the incompleteness of facts, the singularity of individual contexts, and the ultimately intuitive nature of judgment"[14] and takes into account the potential impact of decisions and complaints upon the life, liberty and means of the person affected.[15] Because these two values are in competition with each other, in general an attempt to maximise one value will result in a corresponding minimisation in the other.

If our objective is to properly deal with complaints but at the least possible cost to the State, we would prioritise the achievement of distributive justice in our grievance structures and processes. Jerry Mashaw has described this as the bureaucratic rationality model of administrative justice.[16] Administrative justice mechanisms would be tasked with identifying "true" complaints according to basic administrative law principles of legality, fairness and reasonableness. Only "true" complaints give rise to a legal remedy, so only these complaints would progress further through the system. "False" complaints would not.

If, on the other hand, our objective is to ensure that every citizen feels they have been fairly treated, we would prioritise the achievement of individual justice in our grievance structures and processes. This approach is embodied in Mashaw's professional treatment model of administrative justice, which is client-oriented and service-focused.[17] Administrative justice mechanisms would take into account the potential impact of complaints upon the life, liberty and means of the person affected. They would provide those services the client needs to improve his or her wellbeing and regain self-sufficiency, following a failure in the primary decision-making process.

We can determine our objective for the complaint management system by considering the function of complaints. Complaints exist, fundamentally, to improve the relationship between citizens and the State. They cannot do this if the complaint management system does not meet the needs of its users, because citizens will not complain. If the system is not being used, complaints cannot perform the function discussed above – that is, maintaining the relationship between citizens and the State by their restorative and reassurance functions.

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13 Ibid.

14 Ibid at 709.

15 *Re Minister for Immigration and Multicultural Affairs*; *Ex Parte Applicant S20/2002* (2003) 198 ALR 59 at 98.

16 Jerry L Mashaw *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, New Haven, 1983) at 25.

17 Ibid, at 27.

Citizens will stop complaining for a variety of reasons. They may simply be unaware that they can complain or even that they have a complaint, because of a lack of information and education. If they do not trust the system they may be cynical about their chances of getting a favourable outcome.[18] They may find it so complicated to use that they feel a sense of hopelessness at the prospect of complaining. In this respect it is important to remember that complainants face administrative officials who are familiar with the policies and procedures they are applying and, moreover, have access to citizens' personal information.[19] Citizens, in comparison, are on foreign ground and may be feeling particularly vulnerable at having suffered a wrong in the primary decision-making process. All of these things can make citizens less likely to complain and can inhibit the function of complaints, unless otherwise addressed.

The solution, then, is to provide citizens with as much support and encouragement as possible so that they will be more, rather than less, likely to complain. Effective filtering systems will likely be required, as some complaints will require more or less detailed attention than others (for example, some will be more valid than others). But the capacity to complain must be available to everyone, regardless of the quality or nature of their complaint. Hence, in complaint management the most desirable theory of administrative justice is one that treats the individual's needs and values as paramount.

This is clearly an individual-centred theory of justice, but one which need not entirely sacrifice the demands of distributive justice. Aggrieved citizens who have no fora in which to voice their unhappiness produce social unrest and a loss of respect for government and its laws. Taking this approach may require extra time and expense which must come from the public purse. But it is just as much in the interests of the wider public to have an orderly civil society as it is in the interests of the individual complainant to have their complaint properly dealt with. Effective complaint management systems are not just an individual concern. They operate for the common good, because they are central to the smooth operation of the administrative State and wider citizen–State relations.

C Citizens' Needs and Values

Before we can treat citizens' needs and values as paramount in complaint management, we must consider what those needs and values are. First, the system must be well-publicised in a comprehensible way, so that citizens (most of whom are not familiar with administrative law) can understand how and when to approach it to make a complaint. Making a complaint should not be overly expensive or require an unreasonable amount of effort from the complainant. The system

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18 Sandra Koller "Back from the Fringe: What Citizens Expect from Administrative Justice" in Crekye and McMillan, above n 3, 150 at 157 ["Back from the Fringe"].

19 Brian Brewer "Citizen or Customer? Complaints Handling in the Public Sector" (2007) 73 International Review of Administrative Sciences 549 at 551 ["Citizen or Customer"].

must be user-friendly, so that citizens, even those with low motivation, will be willing to go through the process of laying a complaint. Unless an administration is undertaking regular audits of its decision-makers, then complaints are key performance indicators and are the sole indicator of failures in the decision-making process.

The system should take into account the wide variety of citizens' needs. Not all complainants will have internet access, for example, and their unique needs should not be overlooked in an age where information about complaining, and complaint processes themselves, are increasingly electronic-based or require information technology skills. The language used in complaint management should be as simple and comprehensible as possible to the average person. We might rethink, for example, the continued use of the Swedish term "Ombudsman" and whether a more appropriate and widely understood term could be used to describe the Ombudsman's role.

In one important respect, citizens' values are almost diametrically opposed to the values held by the politicians, lawyers and administrators who operate within the system (and who are responsible for its design). According to reports from citizens themselves, citizens place a high value on how they are treated in the course of the decision-making process – a higher value even, in some cases, than what they place on the decision itself. For instance Sandra Koller, principal solicitor at the Welfare Rights Centre in Sydney, quotes a client who received a favourable decision from the Australian Administrative Appeals Tribunal, but who was more pleased with the service she received in the course of the Tribunal's decision-making process:[20]

> I felt that the [Administrative Appeals Tribunal] did their job properly and I say that not because 'I won' but because of the way the report was set out. It was respectful towards answering my … questions, showing me the legislation in the front pages fulfilled one of my needs, which was to understand the law so that I could be made for comfortable with whatever decision was to be made.

Statements made by New Zealand citizens illustrate that they are also primarily concerned with the quality of service they receive from public bodies. A study undertaken in March 2009 on behalf of the State Services Commission explored key factors having the greatest influence on New Zealanders' satisfaction with the public service.[21] The factors most commonly cited by participants were about the service received, not the decision itself – such as whether they felt they were treated fairly; whether staff kept their promises; listened to their circumstances; treated them like an individual and communicated in a clear and simple manner. While the study's participants did want to achieve an outcome, more important to them was how they had been treated during the course of the decision-making process. One client wanted, for example, a demonstration that an agency has

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20 Koller "Back from the Fringe", above n 18, at 157.

21 State Services Commission *Understanding the Drivers: Summary Report* (Wellington, 2009) at 5.

"your best interests at heart. They actually really do care what your problem is … [you are] treated as a human being and not a client or a number."[22]

The citizen's emphasis on service may surprise administrative lawyers, who tend to focus on the legality of decisions and the decision-making process. Perhaps this is a reflection of the preoccupation of some administrative lawyers with judicial review, where the concept of legality is fundamental. But citizens are not concerned solely with legality and, if our complaint system is to be truly responsive to citizens, it should also commit to delivering good quality services.

III Mechanisms of Administrative Justice

This part examines how complaints are currently being dealt with in New Zealand and whether citizens' needs and values are being met. It considers a selection of public bodies (created either by statute or sitting within the executive itself) which are responsible for receiving complaints from the public about an administrative decision or decision-maker: the administrative tribunal; the Parliamentary Ombudsman; three independent crown entities; and internal processes offered by government agencies.

Citizens may also choose to complain in other ways, such as to the media,[23] to a government minister or to their local member of Parliament. These options usually attract more publicity for a citizen's cause but are not without risk to the citizen, because the safeguards provided by the more typical administrative justice mechanisms are absent. At the time of writing, for example, two women complained publicly about the government's decision to cut the training incentive allowance for people on welfare benefits.[24] Paula Bennett, the Social Development Minister, responded by revealing details about how much money the women received in benefit payments.[25] These instances serve to illustrate the importance of independent bodies, like the ones described below, in protecting the interests of citizens who complain against competing pressures from the State.

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22 Ibid, at 9.

23 At the time of writing, the issue of whether Housing New Zealand was entitled to evict tenants from its State houses who had links to the Mongrel Mob was attracting significant media interest. See for example Britton Broun and Tim Donoghue "Housing NZ Wins Fight to Evict Gang Families" (30 September 2009) *Dominion Post* Wellington at A2.

24 This was a complaint about a government's policy decision, rather than an administrative decision, but similar risks could apply to someone who complains about an administrative decision to cut their benefit payments.

25 See for example Derek Cheng "Minister under Fire Again on Privacy" *NZ Herald* (New Zealand, 28 May 2010) <www.nzherald.co.nz>.

A Administrative Tribunals

Administrative tribunals are creatures of statute designed to make first-instance decisions relating to a variety of administrative schemes. However, many perform a dual function by acting as the appellate body that hears complaints arising from those decisions. There are roughly 18 administrative tribunals in New Zealand[26] which hear complaints about administrative decisions (as distinct from the range of tribunals which decide disputes arising between private citizens).

Administrative tribunals operate in a similar manner to a court of law. However, they also differ from a more traditional court of law in several respects: their members are often appointed for their expertise in or knowledge of the administrative area in which the tribunal operates.[27] Also, tribunals tend to have fewer procedural requirements than courts of law and to operate less formally;[28] accordingly, they are better equipped to deal with a number of claimants or complaints within a tighter timeframe. When an appeal to an administrative tribunal is available, therefore, it is usually a more practical and desirable route for a citizen seeking to challenge an administrative decision than an action in judicial review.

B Parliamentary Ombudsman

The Office of the Ombudsman is an independent officer of Parliament, established in New Zealand by statute in 1962.[29] There are presently two Ombudsmen operating in the Office.[30] Their primary function under the Ombudsmen Act 1975 is to investigate complaints about decisions relating to a matter of administration and affecting any person in his or her personal capacity.[31] Citizens can complain to the Ombudsmen about the official actions of most central, local and government agencies, as set out in schedule 1 of the Ombudsman Act 1975.

The Ombudsmen do not have to investigate all complaints they receive. Section 17 of the Ombudsmen Act 1975 sets out several grounds on which the Ombudsmen may choose not to investigate a complaint, including where the person bringing the complaint has an adequate remedy or right of appeal which they have not yet pursued.[32] The Ombudsmen do not have a binding power

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26 This figure is based on the administrative tribunals identified by the New Zealand Law Commission in its 2008 tribunal reform project; *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) at [2.26].

27 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) at 908.

28 Ibid.

29 Parliamentary Commissioner (Ombudsman) Act 1962.

30 Beverley Wakem (the Chief Ombudsman) and David McGee.

31 Ombudsman Act 1975, s 13.

32 Ibid, s 17(1)(a).

of decision, but can make recommendations to an administrative decision-maker as a result of their investigations.

C Independent Crown Entities

Three independent Crown entities are also able to hear complaints about administrative decisions within each of their respective jurisdictions, and provide another possible route for citizens with an administrative complaint. The Health and Disability Commissioner investigates alleged breaches of the Code of Health and Disability Services Consumers' Rights; the Privacy Commissioner investigates alleged breaches of privacy under the Privacy Act 1993; and the Human Rights Commission investigates alleged breaches of the Human Rights Act 1993.[33] They are all created by statute.[34] If a citizen feels an administrative decision-maker has breached any of these standards in making their decision, they may complain to the relevant crown entity.

These entities' jurisdictions go slightly wider in that they may also hear complaints about private bodies. However, a large number of complaints received are about government action and may be about a particular administrative decision. For example, 44 per cent of all complaints made to the Privacy Commissioner in 2008 concerned the government sector.[35]

Like the Ombudsmen, these entities do not have a binding power of decision but are able to make recommendations to the person or entity being complained about and monitor whether these are being implemented.

D Internal Complaint-Handling Procedures

Finally, and increasingly, government agencies themselves – that is, the entity that was ultimately responsible for the decision made – are encouraging citizens to approach them directly with a complaint or a problem. These are designed to be a "first port of call" for citizens with a complaint.

Most have a fixed process by which these complaints are dealt with.[36] These vary in terms of formality: for example, they may simply suggest that the citizen approach them with the complaint initially, or they may have strict statutory procedures which require citizens to apply for a formal

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33 Health and Disability Commissioner Act 1994, s 14; Privacy Act 1993, s 13; Human Rights Act 1993, s 5.

34 Respectively, by the Health and Disability Commissioner Act 1994, s 8; the Privacy Act 1993, s 12; and the Human Rights Commission Act 1977, s 4 (its jurisdiction being continued by s 4 of the Human Rights Act 1993).

35 Marie Shroff, Privacy Commissioner *Annual Report 2008* (2008) at 32.

36 The appendix contains a selection of government agencies who offer internal complaint-handling procedures and gives an outline of how these operate.

internal review of an administrative decision before they can an appeal to an outside body such as a tribunal.[37]

The growth of internal complaint management has been an important part of the development of administrative justice. It represents an initial movement by administrators to rely less on external forms of accountability and to enable the administration to regulate itself from within. It has been pushed along by the emergence of new public management[38] and "green light" theories of administrative law.[39] Today, these processes are offered by most government departments and other administrative decision-makers.

E The Role of Judicial Review

This article does not treat judicial review as a mechanism of administrative justice. First, because it might misrepresent the way the vast majority of administrative complaints are dealt with: that is, between the complainant and the original decision-maker, sometimes with the aid of an external decision-maker such as the Ombudsman.

Secondly, it is still unclear whether the High Court, in its judicial review capacity, is permitted to engage with questions of administrative justice. Administrative justice is concerned with wider questions such as how citizens were treated in the decision-making process, which some believe is not a justiciable issue. This was a view held to by Justice Brennan in the Australian High Court case of *Attorney-General v Quin*:[40]

> The duty and jurisdiction of the courts to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.

In the future, however, this view might become less dominant. Other members of the Australian High Court have expressed different views on the topic.[41] And we might speculate about whether the increasingly flexible application of the merits/review distinction in judicial review may lead to greater engagement by the courts with questions of administrative justice in the future.

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37 For example, if a claimant wants to review a decision made by Work and Income New Zealand, he or she must first apply to have that decision internally reviewed by a Benefits Review Committee under s 10A of the Social Security Act 1964. Similar statutory reviews are undertaken for decisions made by Immigration New Zealand and Veteran Affairs New Zealand: see the appendix.

38 See for example Brian Brewer "Citizen or Customer", above n 19.

39 Carol Harlow and Richard Rawlings *Law and Administration* (Butterworths, London, 1997) at 67.

40 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

41 Creyke "Towards Integrity in Government", above n 12, at 711.

IV The Operation of Administrative Justice in New Zealand

Clearly, our administrative justice system is not lacking the mechanisms to resolve administrative complaints. However, based on analysis of how these mechanisms actually operate and their interactions with each other and with the public,[42] it appears that they do not consistently operate in a way that is conducive to citizens' needs and values – or, at least, the government does not seem to have explicitly considered the issue.

In particular there are three features in the way these bodies operate and handle complaints which favour administrative or legal ways of thinking about complaints. This is what Michael Adler terms a top-down approach towards complaint resolution.[43] If we view the courts in their judicial review jurisdiction as being at the top of the complaint-management system, a top-down approach takes the courts' method of analysing complaints and filters it down through the system, until it reaches the citizen – where little attempt is made to convert that judicial review, administrative law-type language into a language that will be meaningful for non-experts in the area. This places greater value and emphasis on the lawyer's or bureaucrat's understanding of a complaint than the person who actually "owns" that complaint. It requires citizens to learn a new set of behaviours if they want to complain.

A Service-Review Distinction

Most citizens' first port of call with a complaint is the body that made the decision, and accordingly many agencies and government departments offer internal dispute resolution processes. The vast majority of these processes distinguish between complaints about the service a citizen received and the decision itself and direct citizens to take different action according to the nature of their complaint.[44] The citizen is responsible for determining what kind of complaint they have.

To a lawyer or bureaucrat, this distinction probably makes sense. Complaints about the service a citizen received from the decision-maker probably will not and should not go beyond the decision-maker itself, who can probably resolve the complaint by offering an apology. Complaints about a decision, however, may warrant being reviewed or appealed because the decision may have been

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42 The following discussion is based on an analysis of the complaint handling information offered on agency websites and on data and information drawn from annual reports. There are few reliable, New Zealand-based figures about administrative justice and what actually happens to complaints as they proceed through the system. More in-depth data collection would be a desirable precondition to reform in this area, but was not possible within the constraints of this article.

43 Michael Adler "Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice" (2006) 69 MLR 958 at 966 [Adler "Tribunal Reform"].

44 See the appendix for examples of different paths complainants are advised to take depending on their complaint.

wrongly made – that is, it may have been illegal, unfair or unreasonable in judicial review terms. There are, however, problems with dealing with complaints in this way.

First, it assumes that citizens will understand and apply the difference between a complaint about service and a complaint about a decision. Even to an administrative lawyer who is well-versed in these kinds of conceptual differences, the distinction between a complaint about service received and a complaint about a decision itself may not always be clear.[45] Indeed, some complaints may concern both. Citizens who are forced to choose between two options may choose the wrong avenue for their complaint. This in itself is troublesome because, if a citizen's first step is a misstep, there is an increased chance that their complaint will not be resolved. Halliday and Scott cite evidence that, of the small proportion of citizens who actually pursue grievances despite a continuing sense of upset, there is a significant drop-out rate at each subsequent stage of the review process.[46]

To illustrate this, consider a citizen who applies to Housing New Zealand (HNZ) to be a tenant of a State house. HNZ happens to have confidential information about that prospective tenant's history of mental breakdowns, and on that basis refuses her tenancy. While HNZ is entitled under the relevant legislation to have regard to a prospective tenant's mental disability as grounds for refusing them a State house tenancy,[47] in this instance its decision was made on the basis of information not acquired through its own investigation, but through unofficial channels. The citizen feels aggrieved. First, she believes the decision to decline her tenancy is wrong. Secondly, she feels HNZ has acted in a prejudiced and disrespectful manner by sharing confidential and highly personal knowledge between their decision-makers. Finally, she feels that her privacy has been breached.

HNZ is one of the many government agencies that advise complainants to follow a different path depending on the nature of their complaint.[48] To make a complaint about service, she should "let HNZ know" and if it remains unresolved she should write a letter to the housing services manager in her area and give it to her neighbourhood unit. To "[get] a decision … reviewed", she should talk to staff at her neighbourhood unit and then ask HNZ for a review of the decision. But her complaint concerns both the service she received and the decision itself. She is not sure whether she should pursue both avenues simultaneously, but would prefer to deal with one person in respect of what is really one issue. If she complains directly to the Ombudsman in order to bypass this confusion, the Ombudsman may refuse to investigate her complaint under its section 17 discretion. In that case, the Ombudsman will direct her back to the complaint procedures offered by HNZ. The citizen has not had her complaint resolved, and may not bother to complain again. Note that she may also, or alternatively, take a complaint to the Privacy Commissioner (for the misuse of her

45 Adler "Tribunal Reform", above n 43, at 975.

46 Halliday and Scott "Administrative Justice", above n 6, at 18.

47 Housing Restructuring and Tenancy Matters Act 1992, s 61.

48 See Housing New Zealand "Reviewing Decisions and Making Complaints" <www.hcnz.govt.nz>.

confidential information) and the State Housing Appeals Authority, an administrative tribunal that hears appeals from decisions about eligibility for State housing.

Aside from this service-review distinction, at times a government agency's information about how to complain is unclear and difficult to locate.[49] In addition, citizens may also be confused by the fact that some agencies provide different complaint management procedures for particular services. HNZ, for example, directs citizens with complaints about "Suitable Homes" decisions through a separate procedure again.[50]

B Hierarchical Treatment of Complaints

Complaints are processed by these bodies in a hierarchical manner. That is, complainants are routinely recommended by the government agency concerned to first talk to a case manager or the original decision-maker, before taking their complaint to an external body.[51] In this way, very few complaints will reach a "higher" level of analysis (that is, analysis by a tribunal or even the High Court) without first having been filtered through the "lower" echelons of the system (that is, by the decision-maker itself). The complaint only moves higher up the hierarchy if no resolution is reached, and provided the complainant is sufficiently motivated to do so.

It is perhaps not surprising that complaints are dealt with in this manner and in many respects, it makes sense – for example, the person who originally dealt with the complaint might have the prior knowledge and factual information to address the complaint quite quickly and easily.[52] But there are risks in taking a uniformly hierarchical approach towards complaint management. Not all complaints are best dealt with, in the first instance, inside the office of the decision-maker itself. A small class of complaints may need to be addressed at a greater distance from the original decision-maker – complaints, for example, which reveal a grievous failure by the decision-maker to apply the correct law or take into account the correct facts. Such a complaint might be more suitably handled

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49 For example, the Department of Internal Affairs, which processes applications for passports and citizenship, advises citizens on its website who have a complaint to "deal directly with the business unit concerned", but does not state whether service complaints and review-based complaints are dealt with separately nor even whether review procedures are available: Department of Internal Affairs <www.dia.govt.nz>. Meanwhile, complaint information regarding Child, Youth and Family is split between its own website and that of the Ministry of Social Development.

50 Housing New Zealand <www.hcnz.govt.nz>.

51 The appendix sets out the information which is used by government agencies to explain to citizens how their complaints will proceed through the system. It illustrates that these routinely begin by complaining to the decision-maker, and then to external bodies.

52 See for example Peter Cane *Administrative Law* (4th ed, Oxford University Press Oxford, 2004) at 365; Beverley Wakem "Achieving Administrative Justice and Procedural Fairness in Ombudsmen Investigations in Australia and New Zealand" (paper presented to the Ombudsmen Association Conference *The Role of the Ombudsman – Yesterday, Today and Tomorrow*, Melbourne, 2008) at 6.

by an administrative tribunal which can grant remedies to reflect the seriousness of the breach and which demonstrates a higher degree of actual and perceived independence from the decision-maker.[53]

Given that effective complaint management systems act to restore faith in government decision-making, in certain circumstances we are justified in removing review from the hands of a decision-maker at an early stage, in order to uphold the values of independence and fair dealing. Agencies should not apply a rigid policy, nor develop an informal mindset, that complaints cannot proceed past the original decision-maker unless they have exhausted all lower avenues of redress. Despite this, in some cases a formal internal review is a compulsory step for all complainants before they may approach a later review body, such as where the relevant decision concerned a decision about a benefit entitlement made by Work and Income New Zealand.[54]

C A Fragmented and Insular "System" of Justice

Referring to the administrative justice "system" may in fact be a misnomer, since the variety of mechanisms discussed here tend to operate largely in their separate spheres, without an institutional framework that might link them more closely together. This can create inefficiencies in the way complaints are handled and means decision-makers have restricted opportunities to learn from complaints and improve their decision-making.

For example, the Ombudsman's Office holds a wealth of valuable information which could be used to assist agencies in improving their primary decision-making. First, however, the Ombudsman's relationships with these agencies could be further strengthened. For example, the Ombudsman has established an informal, information-sharing relationship with both Immigration New Zealand and the Ministry of Social Development,[55] but it continues to receive complaints about Immigration New Zealand on issues that it has previously investigated and sustained, so the effectiveness of this relationship needs to be reassessed.[56] The Ombudsman could also establish similar relationships with the agencies it receives most complaints about – in the year ending June 2008 these were the Accident Compensation Corporation (124 complaints),[57] the Inland Revenue Department (115 complaints) and the Ministry of Justice (87 complaints). Notably, in 2008 the

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53 Peter Cane observes that one of the potential problems with dealing with a complaint at the source is an appearance of lack of independence of the reviewer from the original decision-maker: Cane, above n 52, at 365.

54 A primary internal review is required by statute: Social Security Act 1964, s 10A.

55 Office of the Ombudsmen *Annual Report 2008* (2008) at 12.

56 Ibid.

57 Ibid, at 24.

Ombudsman's Office was in the midst of improving its communication strategy in a bid to better assist agencies to strengthen their decisions.[58] Further moves in this direction are desirable.

Another illustration of the non-systemic approach to complaint-handling is the absence of clear links between decision-makers and administrative tribunals. It is not clear, for example, whether decision-makers are actively observing the outcomes of complaints made about them to administrative tribunals. A quick survey of four agencies' annual reports and websites did not show whether those agencies were using tribunal decisions as a guide to reforming their complaint management systems. Some of the government agencies' annual reports did not mention the number or nature of complaints made about them, at all.[59] It is also not clear that tribunals are making this information readily available to decision-makers, for example only some tribunals publish an annual report or publicise decisions on their websites. Of those which do, it is not clear whether they actively communicate this information to relevant agencies, for example by extracting key principles from their decisions that might be useful for administrative decision-makers in the future.[60] These kinds of links can both assist decision-makers in improving their decisions; and can prevent "double dipping" when a person makes a complaint to a tribunal as well as the decision-maker.[61] But, perhaps because the administrative justice system is not acting as a system, these links are not strongly made.

Of course, since many decision-makers are now resolving complaints internally, according to a systemic view of administrative justice, links would be made between those complaints and the original decision-making process – for example, agencies could log the number and nature of complaints received; whether they proceed to an external review mechanism or are resolved at the internal stage; and the outcome of the complaint and then draw on that information to improve their primary decision-making. But in the annual reports examined in the writing of this article, internal complaints were not regarded as key performance indicators, but more often as merely fulfilling a procedural requirement.[62] Moreover, the table in the appendix illustrates that agencies do not take a consistent approach towards the presentation of their complaint information or complaint processing, suggesting there is minimal inter-agency knowledge sharing about what works and what does not.

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58 Ibid at 36.

59 This is based on the websites and annual reports of Child Youth and Family, Ministry of Social Development, Department of Labour and Housing New Zealand.

60 This is based on the websites and annual reports of the Legal Aid Review Panel, Removal Review Authority, Refugee Status Appeals Authority, State Housing Appeals Authority, Residence Review Board and Deportation Review Tribunal.

61 Robin Creyke "The Special Place of Tribunals in the System of Justice: How Can Tribunals Make a Difference?" (2004) 15 PLR 220 at 230.

62 Above n 60 and accompanying text.

V Formal Considerations of Administrative Justice in New Zealand

One reason the system is operating in this way may be because of a lack of both official and academic consideration, in New Zealand, of the concept of administrative justice – the result being that we have no normative vision for the operation of administrative justice to guide the design and ongoing reform of our administrative justice arrangements.

Consider, for example, two reports recently released by the State Services Commission and the Auditor-General respectively. We might expect that the Auditor-General or the State Services Commission would explicitly mention administrative justice as part of their functions of monitoring the performance of the public sector[63] and coordinating the activities of departments and other agencies.[64] However, no mention of the term was made in the research programme recently launched by the State Services Commission to examine New Zealanders' level of satisfaction with State services.[65]

In 1999, the Auditor-General carried out a special audit of five services provided by government departments to establish whether their systems and processes were responsive to their clients.[66] The project had worthy objectives, including identifying principles of good client service practice and giving more prominence to client service as an aspect of management. Its focus on client service accords with this article's argument for a more citizen-focused theory of administrative justice. The project could have further advanced administrative justice, however, if it had defined and explored the concept of administrative justice and explicitly located its objectives within a framework of administrative justice.

A key stumbling block for open, government-led discussions of administrative justice may be, in part, that our administrative justice mechanisms are not conceptualised as forming a "justice system". In practice the range of administrative justice mechanisms could work more closely together to resolve complaints and improve primary decision-making, as the discussion above illustrates.[67] Neither do they have shared origins, unlike Australian administrative justice bodies.[68] The impetus for establishing the Ombudsman's Office came from a few influential politicians and

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63 This is a role carried out by the Auditor-General under the Public Audit Act 2001.

64 This is a function of the State Services Commissioner under s 6(a)(iii) of the State Services Act 1988.

65 State Services Commission "New Zealanders' Experience Research Programme" <www.ssc.govt.nz>.

66 Auditor-General *Towards Service Excellence: the Responsiveness of Government Agencies to their Clients* (Wellington, 1999).

67 See the discussion above under Part IV C "A Fragmented and Insular 'System' of Justice".

68 See the discussion below under Part V A "Administrative Justice in Australia and the United Kingdom".

public servants in the 1960s,[69] while our various administrative tribunals have been created on an ad hoc and pragmatic basis, as and when the government of the day felt they were required.[70]

The non-systemic mindset of the government towards administrative justice is also illustrated by our history of suggested reforms. These have focused disproportionately on administrative tribunals and have not considered other administrative justice mechanisms alongside them. The first government inquiry into administrative tribunals was published in 1965 and made only tentative suggestions for reform. "[I]n the field of administrative justice", the Department said, it was "essential to proceed cautiously."[71] One year previously Gordon Orr had published a broader report on our administrative justice arrangements, including a chapter each on the Office of the Ombudsman and judicial review, but his suggested reforms were never adopted.[72]

In a more recent tribunal reform paper titled *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, the government made it clear (as is evident from the title) that it views administrative tribunals to be firmly located alongside the courts and other types of tribunals in our constitutional arrangements. But private tribunals are not concerned with administrative justice and neither, arguably, are the courts.[73] An approach that took a systemic view of administrative justice would view administrative tribunals as being closer in nature to the Ombudsman. The 2004 report had little effect and neither has the more recent tribunal reform programme launched by the Law Commission in 2009.[74] The later reform programme considers administrative tribunals alongside private and regulatory tribunals and recommends adopting largely standardised procedures for all of them.[75] Again, it treats administrative tribunals as being part of a homogenous body of decision-makers, rather than as a mechanism designed to deliver a specialised type of justice between citizens and the State. That reform programme has now also been shelved.[76]

In contrast, clearly the government recognises that criminal justice forms one "system" and that system must be reformed as whole. In 2004 it requested a report on the system of criminal justice in

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69 Bryan Gilling *The Ombudsman in New Zealand* (Dunmore Press, Palmerston North, 1998) at 25.

70 Judge Patrick Keane "Statutory Tribunals in New Zealand - A Jungle of Different Jurisdictions" in Legal Research Foundation *Tribunals Law and Practice* (Proceedings of the Tribunals Law and Practice Conference, Auckland, 19 June 2003) at 2.

71 Department of Justice *The Citizen and Power: Administrative Tribunals: A Survey* (Wellington, 1965) at 4.

72 GS Orr *Report on Administrative Justice in New Zealand* (RE Owen, Government Printer, Wellington, 1964).

73 See the discussion above under Part III E "The Role of Judicial Review".

74 New Zealand Law Commission *Tribunal Reform* (NZLC SP 20, Wellington, 2008).

75 Ibid, chapter 7.

76 The status of the project on the Law Commission's website is listed as closed: Law Commission "Projects List" <www.lawcom.govt.nz >.

New Zealand and how effectively the components of that system work together.[77] A Criminal Justice Advisory Board was set up to advise ministers on issues relating to the criminal justice system. A similar approach could easily be applied to New Zealand's administrative justice system. For example, both Australia and the United Kingdom have a generalist body tasked with overseeing the operation of the administrative justice system: in the United Kingdom, the Administrative Justice and Tribunal Council, which has existed since 2007, and in Australia, the Administrative Review Council.

Nor is administrative justice presented to the public as a unitary system of justice. The Justice Ministry's website offers advice and information for people dealing with the criminal and civil justice systems, but does not mention the existence of an administrative justice system.[78] Accordingly, citizens may not be aware of the range of bodies comprising the system and what kind of complaint qualifies for treatment under that system. And yet, during the course of a lifetime, most people are more likely to be affected by an administrative decision made by the State than by a criminal or civil wrong committed against them by another person.

Finally, there is little critical debate about the system of administrative justice in New Zealand. The concept has almost always been discussed in respect of individual mechanisms, rather than as a system of specialised justice. Sir Robin Cooke used it in a narrow sense to discuss judicial review;[79] the first New Zealand Ombudsman Guy Powles mentioned it in a 1966 article about his jurisdiction[80] and Justice Bruce Robertson used the term in an article on tribunals.[81] There seem to be no New Zealand writers focusing on the system as a whole, although in Australia and the United Kingdom there are several,[82] and these countries have also hosted conferences on the topic of administrative justice.[83]

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77 Mel Smith, Ombudsman *Report of Mel Smith, Ombudsman, Following a Reference by the Prime Minister under section 13(5) of the Ombudsmen Act 1975 for an Investigation into Issues Involving the Criminal Justice Sector* (Wellington, 2007).

78 Ministry of Justice <www.justice.govt.nz>.

79 Sir Robin Cooke "Empowerment and Accountability: The Quest for Administrative Justice" (1992) 18 Commonwealth Law Bulletin 1326.

80 Guy Powles "Aspects of the Search for Administrative Justice with Particular Reference to the New Zealand Ombudsman" (1966) 9 Canadian Public Administration 133.

81 Justice Bruce J Robertson "The State of Administrative Justice in New Zealand" in Council of Canadian Administrative Tribunals Conference Administrative Justice without Borders (Vancouver, 2007) at 2.

82 See for example above n 2 and accompanying text.

83 For example, the International Conference on Administrative Justice (Centre for the Study of Administrative Justice, Bristol, 26-28 November 1997) and *Administrative Justice – the Core and the Fringe* (Administrative Law Forum, Australian Institute of Administrative Law, Canberra, 1999).

A Administrative Justice in Australia and the United Kingdom

New Zealand's lack of consideration of administrative justice can be compared against developments in Australia and the United Kingdom. Governments in those countries are increasingly considering what administrative justice means and are asserting its presence within their administrative arrangements.

For example, in 2004 the United Kingdom Government published a White Paper titled *Transforming Public Services: Complaints, Redress and Tribunals*. The paper includes a chapter on the "Administrative Justice Landscape" and takes as its starting point the notion of citizen entitlement within administrative justice:[84]

> We are all entitled to receive correct decisions on our personal circumstances; where a mistake occurs we are entitled to complain and to have the mistake put right with the minimum of difficulty; where there is uncertainty we are entitled to expect a quick resolution of the issue; and we are entitled to expect that where things have gone wrong the system will learn from the problem and will do better in the future … this is the sphere of administrative justice. It embraces not just courts and tribunals but the millions of decisions taken by thousands of civil servants and other officials.

The National Audit Office has also examined administrative justice, looking at how various administrative grievance mechanisms can be improved to work more in citizens' favour in a 2005 report titled *Citizen Redress: What Citizens Can Do if Things Go Wrong with Public Services*.[85]

Australia's journey towards administrative justice was launched relatively early with the establishment in 1977 of the Kerr Committee,[86] which undertook a wide-ranging consideration of review of administrative decisions. Its report laid the primary foundations for a "bold and imaginative" package of reforms implemented at a federal level between 1975 and 1982.[87] These included the creation of a general appeals tribunal to review a range of administrative decisions on their merits (1975); the creation of an Administrative Review Council, a body designed to monitor and provide advice to the government in relation to Commonwealth administrative review (1975); the appointment of an Australian ombudsman (1976); the enactment of a relatively simple form of procedure for obtaining judicial review of administrative decisions (1977); and the enactment of freedom of information legislation (1982). Today, the Australian experience is labelled "the New Administrative Law" and is said to have produced "a change in the climate and culture of

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84 Department for Constitutional Affairs Transforming Public Services: Complaints, Redress and Tribunals (Cm 6243, Office of Public Service Reform, London, 2004) at [1.5]-[1.6].

85 National Audit Office *Citizen Redress: What Citizens Can Do if Things Go Wrong with Public Services* (Comptroller and Auditor-General, London, 2005).

86 Commonwealth Administrative Review Committee *Commonwealth Administrative Review Committee Report* (Commonwealth Government, 1971).

87 Griffiths "Australian Administrative Law: Institutions, Reforms and Impact", above n 2.

complaining".[88] Importantly, reform stemmed from the report of a single committee with a cohesive vision in mind for the operation of administrative justice in Australia. The approach was intended to be nationwide, comprehensive and appropriate to Australia's circumstances.[89]

VI Implementing a Citizen-Focused Theory of Administrative Justice: Suggested Reforms

Clearly, greater official consideration of the concept of administrative justice is required. At present, our administrative justice system is constructed on the assumption that the way administrators and lawyers think about complaints is to be preferred over the way citizens think about their complaints. Individual justice is not being maximised. But it is unclear that the way the system is currently arranged enables complaints to be resolved efficiently and effectively, so neither is distributive justice really being achieved.

This article has suggested a suitable theory of administrative justice for New Zealand; the following structural reforms are intended to go some way to achieving that theory of justice. They do this by incorporating citizens' needs and desires into the complaint management process and by providing for supervision of that system to ensure that it delivers administrative justice on an ongoing basis. Moreover, in many respects these changes will result in complaints being resolved more efficiently and therefore at less cost to the State.

A Complaints-Based "One Stop Shop"

Since citizens with complaints about administrative action often feel they are in a stressful and vulnerable position, it would be useful for them to have one place they can go when things "go wrong". This could be a "one stop shop" which citizens may approach directly when they have a complaint about an administrative decision or the service they have received from an administrative decision-maker.

This body's overarching function would be to receive complaints from the public and referrals from other complaint handling bodies and direct them to the appropriate place. Such a body would need legal and administrative expertise in order to deal with complaints appropriately, but would also take into account citizens' emphasis on service as well as outcome. In its dealings with the public, this body would not distinguish between complaints about service and complaints about decisions, but would receive complaints of all kinds and make an internal assessment about how the complaints should best be dealt with according to the essence of the complaint. This puts the responsibility for analysing an administrative complaint on to the State, rather than the citizen.

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88 Lewis and Birkinshaw, above n 7, at 24 citing I Thynne and J Goldring *Accountability and Control: Government Officials and the Exercise of Power* (Law Book Company, Sydney, 1987).

89 Creyke "Towards Integrity in Government", above n 12, at 730.

It is possible some citizens would approach this body with complaints about private action which are not within its jurisdiction. In that case it would not be difficult to direct the citizen to deal with the private body concerned or to other advisory bodies such as the Citizens' Advice Bureau. It would be sensible, however, for the one stop shop not to make too sharp a delineation to the public between complaints about private entities and complaints about public entities. First, because this is another "administrative law" distinction that many citizens might find unhelpful. Secondly, that delineation is, as a matter of law, becoming less and less clear as the public/private divide becomes increasingly blurry.

The majority of complaints might be directed to the relevant decision-maker's internal complaint handling process. However, this body would have the discretion to direct complaints elsewhere where appropriate, such as where there is a particular need for independence from the original decision-maker or, in limited circumstances, to accord with citizen preferences.[90] Where complaints have not been heard by the decision-maker and are not directed back to it, the decision-maker should be alerted that the complaint was made; what it concerned; and where it was directed. It is equally important that, where citizens choose to deal directly with the decision-maker and bypass the one stop shop, the one stop shop is made aware that the complaint exists and that it may, eventually, be brought to it if not resolved.

This complaints handling body should be conspicuous, easily accessible and simple to operate. It should provide for the special needs of particular citizens, for example those with no internet access. As a central unit for dealing with complaints, it would be solely responsible for raising awareness in the community and building a strong public presence, especially among target groups of people which are less likely to complain.

B Supervisory Body

If the one stop shop is the public "face" of administrative justice, a supervisory body would be responsible for oversight of the system as a whole. It could coordinate and/or carry out independent auditing of decision-making and complaint management in all sectors of administrative justice. Its role could be undertaken in conjunction with the State Services Commissioner or the Auditor-General, both of whom have an unexplored capacity to contribute to administrative justice.

The supervisory body might, for example, select complaints at random from an electronic database (discussed below) to further investigate why some citizens are motivated to complain; why others are not; and how these citizens felt about the way their complaints were handled. These figures could be analysed to provide useful information about complainants' values and needs.

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90 The concept of resolving complaints in accordance with citizens' preferences and the issues that raises are discussed in Adler "Tribunal Reform", above n 43, at 971.

It could also analyse complaints being made to specific government agencies. If, for example, a particular government agency is prone to complaints being made to it which are withdrawn or not followed up by the complainant, this may indicate failures in its complaint-management processes which the supervisory body would follow up on.

In addition, the supervisory body would be responsible for advising the Minister of Justice on the overall operation of administrative justice, weaknesses in the system, the level of cohesion between the different parts of the system and whether reform is needed. It would have a say on any government reforms involving or affecting administrative justice bodies – such as, for example, the current review of the Privacy Act, which might affect the jurisdiction of the Privacy Commissioner.[91]

The supervisory body could offer training programmes and best practice guides to administrative justice bodies. These might include topics such as how to deal with citizens that have a complaint; the best way to present information about making complaints; and the best way to use and learn from the electronic database. These could be modelled on similar documents provided by the Australian Administrative Review Council.[92]

C Electronic Database

The virtues of an electronic database system that can track complaints have been discussed elsewhere,[93] and such a system could be created relatively easily to facilitate system cohesiveness. This has the advantage of being a relatively fast, inexpensive way to immediately establish a link between the various complaint handling bodies. Complaints would be routinely entered into the database as they are brought by citizens, meaning that is immediately clear if another body is already dealing with the complaint – enabling the Ombudsmen, for example, to quickly see whether or not the complaint has been heard elsewhere and to exercise their discretion under section 17 quickly and with certainty. Some complaints could be "tagged" as they enter the system – for example, complaints that concern the difficult intersection between the Ombudsmen's and the Privacy Commissioner's jurisdictions[94] or complaints that may be within the jurisdiction of a

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91 New Zealand Law Commission *Review of the Privacy Act 1993* (NZLC IP17, Wellington, 2010).

92 Administrative Review Council "Best Practice Guides" <www.ag.gov.au>.

93 See for example Paul Johnson "Electronic Service Delivery: Achieving Accuracy and Consistency in Complex Transactions" (paper presented to the National Conference of Public Administration, Hobart, 25-27 November 1998).

94 The Human Rights Commission's 2008 Annual Report notes there is a "troublesome intersection" between complaints about breaches of the Privacy Act, which are dealt with by the Privacy Commissioner, and complaints about requests for information that have been declined under the Official Information Act, which are dealt with by the Ombudsmen. If an agency is requested by one person to disclose another person's confidential information, the Privacy Act presumes withholding, whereas the Official Information Act presumes disclosure. It is not clear which Act prevails. Thus a complaint may be brought to the Privacy

number of different administrative tribunals. Then it is a case of the bodies that are concerned contacting each other and determining how the complaint should be dealt with. This removes the risk and confusion for citizens of analysing their own complaint and choosing what may be an inappropriate avenue of redress.

Each complaint would be labelled with its status and updated whenever this changed. The database would state who handled the complaint; what the nature of the complaint was (that is, whether it was largely concerned with service, with the decision itself or with a mixture of both); and what the outcome was. If a complaint is withdrawn this could be noted, along with a reason if it is given. Over time a much-needed comprehensive bank of data will build up from these logged complaints, which can be analysed to reveal patterns and failures in complaint handling and areas for improvement. This will be a particularly valuable exercise for decision-makers to participate in, as at present most agencies do not have a consistent approach towards recording, monitoring and utilising the complaints they receive. Any privacy concerns created by the handling of personal complainants' information could be addressed by organising and labelling complaints according to a key which separates information about the complaint from any information which would identify the complainant or their personal information. Only those officials who must have access to this private information would have the authority to do so.

Taking a systemic approach allows governments to focus their attention on bringing about long-term improvements to policies and processes, rather than a short-term resolution of the problems that can arise between individuals and public bureaucrats.[95]

VII Conclusion

While complaints have existed in administrative law for centuries, the concept that governments might also strive to give effect to a cohesive theory of justice in how they deal with those complaints is relatively new in the common law. And yet, from the early vagaries of the development of judicial review to the introduction of tribunals, ombudsmen and now an internal administrative law, it is becoming increasingly clear that a field of administrative justice is emerging. The exact terms and scope of that field are yet to be mapped in concrete detail, but the concept is gaining an increasing level of attention which may see it expand as quickly as has the administrative State itself.

The omission from the New Zealand jurisdiction of a clear theory of administrative justice, or even a preliminary consideration of what the concept means for our governance arrangements, has ramifications for the adequate treatment of complaints under New Zealand administrative law. And

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Commissioner if the information is disclosed and a complaint may be brought to the Ombudsmen if the information is withheld: Human Rights Commission *Annual Report 2008* at 40.

95 Brewer, above n 19, at 554.

yet, when administrative decision-making has a significant effect on individual rights and interests, citizens' rights should become more, rather than less important. Citizens from all walks of life must be able to face the exercise of administrative power and be equipped with tools to do so in a meaningful, informed and collaborative way, no matter what their level of education or socio-economic background. The relationship between citizens and the State does not always run smoothly and a citizen-focused theory of administrative justice recognises that, where friction arises, the primary focus must be on the needs and values of the citizen.

There is still much more to be said in the area of administrative justice, particularly in terms of data gathering, measurement and performance. There is also a pressing need for New Zealand administrators, lawyers and citizens to engage with the debate and even to lead the charge – the unhappy alternative being that justice against the State will be available only to the motivated, the informed and the confident citizen. To allow such a situation to develop would, it is suggested, amount to a failure of the State's legitimate democratic arrangements and would, for citizens, be a particularly personal blow.

We may ask of those tangling with administrative decision-makers to adjust their own behaviour to the system; to learn "a new mode of life" in order to engage with these public decision-makers. Or, we may look to the still-emergent concept of administrative justice to better facilitate interactions between complaint-handling bodies and citizens.

Appendix: Internal Agency Complaint-Handling Processes

Decision-maker	Service complaints	Review-based complaints
Work and Income New Zealand (WINZ)	1. WINZ office manager or MSD 2. Local MP; Minister of Social Development and Employment; Ombudsman; or Privacy Commissioner	1. Complete review of decision form 2. Manager's discretionary review 3. Benefits Review Committee *(section 10A, Social Security Act 1964)* 4. Social Security Appeal Authority *(section 12J, Social Security Act 1964)*
Housing New Zealand (HNZ)	1. Tenancy manager 2. Local Housing Services Manager 3. Regional Manager 4. Director of Operations	1. Ask for explanation from neighbourhood unit 2. Primary internal review by neighbourhood unit 3. HNZ Review Office *(section 62, Housing Restructuring and Tenancy Matters Act 1992)* 4. State Housing Appeals Authority *(clause 5, Housing Restructuring and Tenancy Matters (Appeals) Regulations)*
Immigration New Zealand	1. Branch manager 2. Deputy Secretary, Department of Labour Workforce Group	1. For decisions declining residency, Residence Review Board (unless declined under section 7(1) Immigration Act) *(section 18C, Immigration Act 1987)* 2. For decisions declining a temporary permit, immigration officer *(section 31, Immigration Act 1987)*
Department of Internal Affairs	1. Relevant business unit 2. Department Chief Executive	
Veteran Affairs New Zealand	1. Case manager or manager of corporate services 2. Internal review by General Manager, Veterans' Affairs	1. Primary internal review by War Pensions Claim Panel *(section 15A, War Pensions Act 1954)* 2. Secondary internal review by National Review Officer *(section 15C, War Pensions Act 1954)* 3. War Pensions Appeal Board *(section 16, War Pensions Act 1954)*
Accident Compensation Corporation	1. Relevant person, team leader or branch manager, or customer support service 2. Internal review by Office of Complaints Investigator 3. Privacy Commissioner, Ombudsmen, Health and Disability Commissioner	1. Primary internal review by relevant part of ACC and contemporaneous review by panel at local branch *(section 137, Injury Prevention, Rehabilitation and Compensation Act 2001)* 2. Secondary independent review by Dispute Resolution Services Ltd 3. District Court

Child, Youth and Family	1. Local office or manager 2. Formal internal review *(section 447, Children, Young Persons and Their Families Act 1989)* 3. Review by Chief Executive of Ministry of Social Development's Advisory Panel, with final decision made by Chief Executive 4. Ombudsmen, Office of Children's Commissioner, Social Workers Registration Board		
Studylink	1. Office manager 2. Member of Parliament; Ministry of Social Development and Employment, Ombudsman, Privacy Commissioner.	For decisions on student allowance eligibility reviewable under s 305 Education Act 1989: 1. Choose internal review by Secretary or internal review by Student Allowance Review Body *(section 305, Education Act 1989)* 2. Student Allowance Appeal Authority *(section 304, Education Act 1989)*	For decisions on balance of final student loan: 1. Studylink 2. Student Loan Manager 3. Chief Executive, Ministry of Social Development 4. Disputes Tribunal or District Court