

DOORS CLOSING, DOORS OPENING: LESSONS FOR THE ART

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Tribunals are encouraged to report on their methods so that best practice can be established.¹ There is little written on the mechanics of ending or establishing a tribunal² but the recent experience in closing the Immigration Review Tribunal (IRT) and establishing the Migration Review Tribunal (MRT) has some useful lessons for the proposed federal Administrative Review Tribunal (ART) which are worth recording. For the purposes of this paper I tried to separate issues surrounding closure and opening but they are inevitably intertwined. For example, information which is disseminated has to cover both subjects and the new organisation must have links with the old.

Closure issues

A main issue faced when closing a tribunal is the challenge of keeping the core tribunal business going, that is, reviewing applications while members face perhaps losing their jobs and staff face significant organisational change. While such change is now commonplace and accepted in the public sector close attention must be paid to its planning and management.

The old adage that you can never overdo the provision of information was borne out in the IRT experience and has been noted in Canada.³ Clients as well as members and staff of the old tribunal need information. Anyone who has been involved in national information dissemination campaigns will attest to the need to carefully plan a strategy maximising the use of available funds. Letters must be sent to review applicants explaining the change and information must be provided internally. At times of change rumours abound, particularly if jobs and status may be lost. After the legislation establishing the MRT was introduced there was a need to report any developments. Ideally, a regular newsletter and constant face to face internal and external meetings should occur. Planning for the new tribunal should be transparent. If information is dispersed as soon as it is available, a degree of trust may be developed.

The MRT head was appointed five months before start up to work solely on the establishment of the new body. Senior staff straddled both organisations and a trial of the proposed MRT case management system was run in the IRT. An Acting Principal Member took over the running and closure of the IRT. An ART head would need to work closely with the heads of existing tribunals to ensure a smooth transition to the new body.

The impact on the lives of members and staff of the old tribunal is significant. This is particularly so if there is to be no presence for the new tribunal in places where it existed previously. Even if the function is to continue and staff have an expectation of securing a position in the new organisation, there is uncertainty. Members lose office when a tribunal is

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1 "Best Practice in Administrative Justice" Canadian Council of Administrative Tribunals 10-12 October 1999.

2 Brian P. Goodman "The Winddown of a Tribunal" *Administrative Agency Practice* (1995) 1 *Administrative Agency Practice* 79-87; Justice Murray Kellam "The Victorian Civil and Administrative Tribunal – The First Days" (1998) 18 *AIAL Forum* 31-35.

3 Goodman *ibid.*

replaced by another. The Minister wrote to each IRT member detailing the arrangements. The provision of workforce re-entry programs is of assistance. Experienced human relations staff are invaluable.

The finalisation of cases before members of the old tribunal must be carefully managed. For example, the timing of limiting further hearings to enable the completion of writing decisions on matters already heard, must be monitored.

An organisation needs to mourn its passing. Many people have devoted many hours to assisting review applicants, conducting reviews, promulgating procedures and contributing to organisational life. A history, which celebrates the highlights of the organisation, would be useful.

Opening issues

In establishing any new organisation certain key issues must be addressed. Early planning and consultation are essential. The following ten key issues emerged in establishing the MRT.

A most important step is to put someone in charge of the set up as soon as possible who has a stake in the consequences. While many aspects of tribunal management are similar to the management of other bodies, particularly other statutory authorities, there are specific skills required. An independent mind and spirit is obviously essential but it must be tempered with an understanding of the realities of government. The place of tribunals in relation to government, courts, applicants' advisers and review applicants is unique. Obviously an awareness of the difficulties some face in gaining access to justice is desirable. An ART head will have an interesting role in relation to several departments, which have been involved in developing the tribunal proposal.

The information technology to be applied by a new tribunal is fundamental to its efficient operation. It not only facilitates case management, reporting on case flows and encouraging productivity but also enables sound knowledge management which is of increasing importance in any organisation. The introduction of new computer hardware and software into the IRT had been delayed pending the introduction of the MRT so it was necessary to do a complete upgrade at the same time as ensuring year 2K compliance. If the divisions of an ART are to link, produce comparable data and share resources such as filing systems and library catalogues a first step is to link computer systems. Adequate and appropriate links to departments, which take account of outsourcing arrangements, must also be established.

The MRT needed a strong emphasis on information support for members and staff with up-to-date relevant information on desktops. All key databases available including LEGEND (the Department's compilation of legislation and policy) were required. It was decided to establish an intranet to capture all information and make it readily accessible to all members and staff. MARTIE, as it is known, allows the tribunal's statistics, procedures, corporate documents to be readily accessible. Importantly, it also has an "expert system" on which are entered all Federal Court decisions and remittals, related articles and guidance on certain aspects of regulations. The system can be quickly word searched. Also linked to MARTIE are the library catalogue system, HORIZON, and the TRIM record of administrative files.

Such knowledge management is not just about toys for the computer buffs. It is an integral part of achieving quality decisions that are consistent across the country. Migration law changes rapidly through regulation changes, Federal Court decisions and policy changes.

Information about current law has to be harnessed and quickly disseminated. Often in a tribunal information of wider relevance can be lost onto an individual case file or into a member's mind when it would be invaluable to the rest of the organisation. The MRT does not have the advantage of counsel appearing before it to present the law or argue approaches.

It often has a departmental file and an unrepresented review applicant and must find all relevant law for itself. It was a selection criterion for appointment to the MRT that members have the capacity to use information technology.

The selection of the best available members is a key to a good tribunal. There were several hundred applications to the MRT for a limited number of positions. Shortlisting, interviewing and referee checking must be carefully done. Ideally, psychological testing, which is being considered in law firms⁴, would occur. It is fairer to both the job applicant and the organisation if material detailing the nature of the work and the expectations of members is provided. The proposed MRT performance agreement for members and code of conduct were distributed to applicants for MRT member positions. Similarly applicants for staff positions also received information.

The fourth issue is training of members and staff. There are general areas of training for tribunal work such as conducting hearings, weighing evidence, using interpreters and writing reasons for decisions. Specific training is needed in legislation and procedures and the context in which the tribunal works. Ideally, training would occur before the doors of a new tribunal open. In Canada, the Council of Administrative Tribunals organises general training for federal and provincial tribunals which has proved very successful. Here the Australian Institute of Judicial Administration and the Administrative Review Council have organised some useful training days but a more structured approach is needed. It would be very useful to have a body to organise training for federal and state tribunals, drawing on the skills of academics, practitioners and tribunal members. There would also be advantage in some aspects of the training being offered to primary decision-makers.

Information dissemination is critical if a new organisation is to begin and sustain smooth operations. New forms and brochures must be devised and disseminated together with community information. Key stakeholders must be kept informed through seminars and meetings. While the internet is a useful tool it doesn't reach the "information poor" who include many applicants to tribunals. Helpful, knowledgeable counter and switchboard staff are invaluable. A 1300 number operating for extended hours and answered by a live person has proved useful in the MRT.

A sixth step is to develop and consult on draft procedures before testing and disseminating them. The MRT had to implement several new procedures including providing an applicant an opportunity to comment on adverse information (Migration Act section 359A) and handing down of decisions (section 368B). A new case management system was also introduced which involves case officers undertaking a first examination of the file, drawing together the facts of the case, the relevant law, key issues, information that may lead to the decision going against the review applicant and recommending action to progress the case. The case then goes to the member to decide on further action and ultimately make the decision. Staff are involved in such a way in other jurisdictions such as Canada⁵ and it allows for more efficient, economical and consistent case processing. Early signs in the MRT are that the model works well.

⁴ Rebekah Dooley "Psychological Testing in the Selection Process" *Australian Legal Practice* October 1999,2.

⁵ Pierre Gosselin "Best Practises in Administrative Tribunals" note 1,11.

Adjusting accommodation to meet the needs of a new organisation takes planning, consultation and time. The MRT needed to refit offices in Canberra, Sydney and Melbourne to cater for additional staff and members. There was a 50% increase in staff with the increase in the number of applications for external review due to the absorption of the internal review function (formerly performed by the Department). Five staff from the Migration Internal Review Office (MIRO) in the Department of Immigration and Multicultural Affairs (DIMA) office in Melbourne joined the tribunal.

The transfer of cases from the old tribunal to the new must be handled speedily and accurately. Review applicants calling for information on their case need answers from the first day of operation of the new tribunal. The MRT received 2427 cases from MIRO and 2314 from the IRT. Between June and August, the first three months of the new tribunal, 1431 applications were received.

Arrangements with the departments from which cases are appealed must be put in place. Overseas posts in DIMA needed early information about the new arrangements. MIRO had previously provided a filter in most cases coming before the IRT which meant that the departmental files were gathered and the departmental position on a case was generally well presented. In addition the MIRO offices provided a contact point for the tribunal which was lost. The latter issue is an example of the “consequential” which flow from the abolition of a body and need to be thought through.

The final step, and one of the most important, is to ensure that normal public sector operations continue while a myriad of additional administrative tasks are undertaken. Above all, staff must be considered and valued as important members of the team. Their certified agreement and other arrangements must be addressed in an open and consultative manner. Appropriate financial systems must also be put in place in accordance with legislative and other requirements. The MRT operated for a month before coming under the Financial Management Accountability Act arrangements. Other agencies in the public and private sector must be advised of the changes.

Conclusion

As I have explained, the establishment of the MRT was not simply a “rebadging” of the IRT. Similarly if an ART is established it will not be simply the AAT “taking over” the “other” tribunals. It is an opportunity to adopt best practice in tribunal decision making and management. It will be important to value the work of all tribunals and plan their amalgamation carefully. It would be in everyone’s interests if the departments whose decisions will be reviewed approach the new tribunal in a spirit of cooperation, recognising the contribution a good tribunal can make to improving primary decision making and policy formulation.

The external life of a tribunal reflects its internal life. If the principles of openness, accountability, natural justice and respect are applied routinely in a tribunal’s internal dealings it is easier to translate them into service to the public. “A well tempered tribunal is one where there is relative consistency in organizational ethic, and one in which all members are generally committed to that ethic”.⁶ When a new tribunal is established this ethic needs to be clearly defined and enunciated from the very start.

⁶ Roderick Macdonald “Global Law, Local Practices or Local Law, Global Practices” note 1,14.