'Internal Review of Administrative Decisions'*

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"80% of all decisions reviewed are affirmed. The primary decision maker doesn't understand why they get it right, though. They have no understanding of the legislation. No responsibility is accepted by management for quality of decision making at primary decision maker level. Even though decision making is the bread and butter of the agency, no emphasis is put on skills for doing this well. (internal review officer)"

"Quality in primary decision making is going down as more experienced people are leaving, leaving more work to the internal review officers. We are also getting more complex cases to review because primary decision makers don't know how to deal with them properly anymore. (internal review officer)

"There is a complexity of legislation and policy - many times staff don't even know what the law is. (internal review officer)

"The legislation is getting more complex and there are more appeals. (internal review officer)

"If laws were easier to understand, and more user friendly, primary decision makers would understand sections of the Act. Even the Guide to the Act is confusing. Making these changes may result in fewer appeals to internal review officers. (primary decision maker)

"Primary decision makers are making quicker decisions while things are becoming more complex. (internal review officer)

"Generally, reviews happen because of lack of training. People are pushed into making decisions that they are not trained for. Lack of time and a lack of feedback compounds this problem. (primary decision maker)

"We are asking people to make the most important decisions in the organisation when they are not at the correct level. New products are being offered to clients and we are unsure as to what resources will be given to deal with it. (internal review officer)[1]"

My discussion will focus on various aspects of internal review, particularly on those matters covered by the Administrative Review Council in its recent Report on *"Internal Review of Agency Decision Making."*[2]

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[1] Quotes taken from Administrative Review Council - *Internal Review of Agency Decision Making – Report to the Attorney-General* – Report No. 44, November 2000, paragraph 7.13

[2] Ibid

What is Internal Review?

> "… a process of review on the merits of an agency's primary decision. It is undertaken by another officer within the same agency, usually a more senior officer."[3]

To some extent, the Council's project continued enquiries undertaken in the *Better Decisions* Report.[4] In that report Council recognised the importance of internal review to the administrative review system. The Council touched briefly on some internal review related issues, however, the focus of that project was on the tribunal or external review system. Nevertheless, Council made the following observations:

> "… internal review can have both a positive and a negative effect on external review. For applicants, internal review has the potential to be a relatively quick and easily accessible form of merits review. It can be an effective means of satisfying the large number of clients who would like the agency's decision to be reviewed. If internal review were not available, these clients would be likely either not to seek any form of merits review or to use external review processes, which are often more expensive and time consuming for both the applicant and the agency. For agencies, internal review can also be a useful quality-control mechanism, particularly as it gives them an early opportunity to identify and correct systemic problems with their own decision-making processes.
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> "However, internal review also has disadvantages. Because internal review is undertaken by officers of the same agency who made the original decision, it is viewed by some applicants merely as a barrier to the effective final resolution of their case, introducing delays (and, in some cases, additional cost) without delivering a truly impartial and objective reconsideration of their case."[5]

In its *Internal Review* report, the Council considered that it was important to design internal review processes to gain most of the benefits they allow and minimise the associated risks. It summarised the advantages and disadvantages as follows[6]:

Advantages:

- a quick and easily accessible form of review which can efficiently satisfy large numbers of clients who might otherwise :
  - not take up external review rights (because of perceived barriers); or
  - unnecessarily pursue the more resource and time-consuming external processes (with internal review acting as a filter);
- a useful quality control mechanism, wholly "owned" by an agency, with the best chance of feeding back and influencing primary decision making.

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[3] Ibid, para 1.4
[4] Administrative Review Council - *Better Decisions: Review of Commonwealth Merits Review Tribunals* – Report No. 39, September 1995.
[5] Ibid, paras 6.49 & 6.50.
[6] *Internal Review* – op. cit. paragraphs 1.8-9

Disadvantages:

- acting as a barrier, introducing lengthy delays and deterring clients from reaching a genuinely independent review body;
- the risk of capture by the agency culture, resulting in few variations of original decisions;
- inconsistent treatment of clients in different geographic areas or regions.

Why Have Internal Review?

To some extent this question should not be limited to "internal". It is a form of merits review of administrative decisions. Merits review is review of decisions, standing in the shoes of the decision maker, generally exercising all the powers of the decision maker. The objective of merits review is to make the "correct or preferable decision."[7] Therefore, if it is important to have review, it is probably important to have internal review. The Council stated:

> "In general, where a form of external merits review is available, it is to be expected that internal review will be offered as a means of minimising the need for large numbers of tribunal decisions. However, if no external merits review is available, it may still be appropriate for internal review to be offered, with a view to minimising the number of applications for judicial review."[8]

The Council's view on when merits review is appropriate is set out in its 1999 publication "*What Decisions should be subject to Merits Review*."[9] In particular, the Council stated:

> "As a matter of principle … an administrative decision that will, or is likely to affect the interest of a person should be subject to merits review."[10]

However, the Council recognised that some decisions are unsuitable for merits review.[11] They include:

- legislation-like decisions of broad application (which are subject to the accountability safeguards that apply to legislative decisions); and
- decisions that automatically follow from the happening of a set of circumstances (which leaves no room for merits review to operate).

Basis for Internal Review

If internal review is a form of merits review, on what basis does an internal review officer act?

Some internal review schemes have a statutory basis; some do not. The Council took the view that it "is preferable for an internal review system to have a statutory basis".[12]

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[7] *Drake v Minister for Immigration and Ethnic Affairs* 2 ALD 60 at 68 (per Bowen CJ and Deane J)
[8] *Internal Review* – op. cit. paras 3.3 & 3.4
[9] Administrative Review Council - *What Decisions should be subject to Merits Review?* – July 1999
[10] Ibid, p. 5
[11] Ibid, Chapter 3
[12] *Internal Review* – op. cit. p. 16

There are several advantages to this approach:

(a) the source of the power to review a decision is clear;
    - arguments about whether the original decision is *functus officio* do not arise;
    - the legality of an "interference" with the decision of a validly authorised delegate does not arise;
(b) the purpose of the internal review action is clear;
    - providing a specific delegation for the internal review officer clearly positions the process as merits review, with a source of power independent of the primary decision maker;
    - this reduces confusion with other management activities which involve monitoring or auditing of decisions, or specific avenues for individually to pursue concerns through complaints handling systems or client service charters (see discussion below);
(c) the applicant has a clear and certain right to apply for review (carrying with it a right to be informed of the existence of that right and how to exercise it).

Importantly, any statutory scheme would/should also set out important procedural matters, such as what to do with new evidence; is internal review mandatory, or does the applicant have the right to proceed directly to external review? is legal or other representation permissible and if so to what extent? what time limits apply? Confusion over such matters is often cited in criticisms of internal review regimes, and a statutory scheme would provide certainty.

Source of power to review - *functus officio*

The *functus officio* issue is an interesting question. In the absence of a specific statutory power, can an agency lawfully review its own decisions?

The answer will be that in many cases it can; and indeed such a general power is arguably consistent with the objectives of good administration. See for example Lord Reid's statement in *Ridge v Baldwin*[13]:

> "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid."

However, such a proposition needs to be balanced. See Brennan J, in the AAT decision *Re Adams and the Tax Agent Board*[14]:

> "An administrative body cannot lawfully exercise authority merely because it is of the opinion that it has the authority. Its opinion is not the charter of powers and discretions."

Further, jurisdiction to review cannot be ongoing; certainty has its virtue. See the comments of Mason CJ in *Australian Broadcasting Tribunal v Bond* that for both merits and judicial review, a reviewable decision is:

[13] [1964] AC 40, at page 79
[14] (1976) 1 ALD 251 at 254

> "…a decision having the character or quality of finality, an outcome reflecting something in the nature of a determination of an application, inquiry or dispute or, in the words of Deane J, [in *Director-General of Social Services v Chaney* (1908) 31 ALR 571 at 590] 'a determination effectively resolving an actual substantive issue.'
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> "To interpret 'decision' in a way that would involve a departure from the quality of finality would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process."[15]

The scope of a decision maker's power to review a decision was recently considered (in the context of statutory tribunals) by the full Federal Court in *Bhardwaj*.[16] That case concerned a decision of the Immigration Review Tribunal to revoke its earlier cancellation of a student visa. The IRT had contacted the applicant advising him of the date of the hearing. The evening before the hearing the applicant's representative faxed the tribunal confirming his client's intention to appear and produce evidence, but stated that the applicant was sick and unable to attend and requested another hearing date. The fax was not brought to the attention of the Member, who found against the applicant on the material before it (ie without evidence from the applicant). This decision was certified and communicated to the parties. However, following the decision the applicant made representations to the IRT, which agreed to reconsider its decision and based on evidence of the applicant revoked its cancellation of the visa.

Following the revocation of the cancellation, the Minister appealed to the Federal Court under Part 8 of the *Migration Act 1958*. At first instance the Court (Madgwick J) dismissed the appeal, referring to the judgment of Hill and Heerey JJ in *Comptroller-General of Customs v Kawasaki Motors*[17] (1991) 32 FCR 219:

> "It would in our opinion be strange if an administrative order remained valid until set aside by an order of a court even though the decision-maker did not seek to uphold the order. Courts have long recognised the rule of policy that there is public interest in the avoidance of litigation and the termination of litigation by agreement when it has commenced. The argument that disputed orders could not be treated, by agreement of all concerned, as void would directly conflict with that rule. Parties would be forced into pointless and wasteful litigation."

His Honour concluded:

> "Whichever way one analyses it, it seems to me that the Tribunal does have a power, albeit unarticulated in express statutory language, to reconsider a decision at least in circumstances where: in coming to that decision it has by its own mistake failed to accord an applicant a fundamentally important right; the error is not in dispute between the interested parties; and the error is material to the case before it. Such a power does not infringe upon the doctrine of *functus officio*, which still operates as a general rule under the Act. To the extent that

[15] (1990) 170 CLR 321 at 336-337
[16] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 61 ALD 577.
[17] (1991) 32 FCR 219 at 229-230

> such circumstances may be considered an exception to the *functus officio* rule, such an exception is necessary to allow the Tribunal to fulfil its primary purpose under the Act: affording fairness to applicants and coming to the best reasonably possible decision in their cases."[18]

The majority of the full Court (Beaumont, Carr JJ) supported this conclusion. In particular, they accepted that section 33(1) of the *Acts Interpretation Act 1901*[19] provided a power for the Tribunal to review its original decision. Their Honours stated:

> "In any event, the particular circumstances of the case indicate, in our view, that within the meaning of s 33(1) of the *Acts Interpretation Act*, the "occasion" "requires" that both the power and the duty of the Tribunal to review the matter should be exercised and performed at the time when the Tribunal was made aware that, in purportedly making its September decision, it had proceeded, in ignorance, upon the false assumption that the respondent had elected not to ask for an oral hearing."[20]

However, it might not always be so clear. An earlier AAT decision, *Uniway v CEO of Customs*,[21] concerned a claim for diesel fuel rebate under the *Customs Act 1901*, which was rejected in August 1995. The applicant was notified of his rights to apply for review by the AAT, but he did not do so. Some 2 years later (May 1997), following a Federal Court decision in an unrelated matter which the applicant considered would apply favourably to the facts of the their case, the applicant sought an internal review of the decision. The Collector undertook such a review but decided the Federal Court decision did not apply and rejected the application. The Collector's response also included a paragraph advising of right of appeal that decision to the AAT. The applicant did appeal, but the Collector then argued that the Tribunal had no jurisdiction, as the original decision was 2 years old and the applicant was out of time. The applicant submitted that section 33(1) of the *Acts Interpretation Act 1901* provided a general power to re-decide issues "from time to time". However, the Tribunal held:

> "Section 33(1) of the *Acts Interpretation Act* is a general provision permitting the continuing exercise of a statutory power (in this case to determine a rebate entitlement) from time to time, that is, in relation to successive applications lodged by successive applicants. It does not authorise, in relation to the same applicant, the power to assess a rebate as payable and then later to reassess the rebate as not being payable or vice-versa."[22]

Similar concerns were raised in *Bhardwaj* in the dissenting judgment of Lehane J, who considered that on its proper construction the *Migration Act* evidenced a contrary intention to the application of section 33(1), based on the following factors:

> "In my opinion, the present statutory context does so [ie reveal a contrary intention]. It is one, which, plainly, places a high value on certainty. There are

[18] *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806, per Madgwick J, paragraph 27.
[19] Section 33(1) of the *Acts Interpretation Act 1901* provides "Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."
[20] 61 ALD 577 at 587.
[21] [1999] AATA 208, also noted in 55 ALD 314
[22] Ibid, paragraph 18

> strict time limits, detailed provisions governing the conduct of review proceedings and precise requirements as to the way in which the Tribunal is to record its decision and the reasons for it and is to notify and publish its decisions. There is then a limited form of judicial review, for which application may be made only within a time limit of twenty-eight days, which cannot be extended. It would, in my view, be incongruous with that scheme for the Tribunal to have, in relation to a particular application for review, a power from time to time, as occasion requires, to make (and revoke) decisions."[23]

I note that this decision is now under consideration by the High Court, following the grant of special leave to appeal on 20 February 2001. In any event, it supports the view that a Best Practice internal review scheme should, wherever possible, have a clear statutory basis.

The Purpose of Internal Review

In the course of its inquiry the Council spent a great deal of time investigating how internal review systems work within agencies, and sought to distinguish it from other complaint handling systems.

As stated before, internal review is review on the merits. Accordingly, the internal review officer is not limited to the information before the primary decision maker; paraphrasing Bowen CJ, and Deane J, in *Drake*[24]:

> "The question for the determination of the [internal review officer] ~~Tribunal~~ is whether that decision was the correct or preferable one on the material before the [internal review officer] ~~Tribunal~~." (amendments added)

Indeed, the Council concluded that:

21. Agencies should encourage internal review officers to attempt to contact all applicants as a matter of course. Internal review officers should be allocated enough time per review for this to be possible.[25]

Internal review and technology

The question arises as to how internal review might be conducted as agencies increasingly employ expert systems such as rulebased technology to support decision making. Agencies employing rulebase systems include the Departments of Veterans' Affairs and Defence, Comcare, Environment Australia, the ATO, Centrelink and FaCS.

Rule-base systems have been described as a means of automating logic:

> "They automate the structural logic of sets of rules (such as legislation)... Rulebase systems … automate the process of investigating those rules, asking appropriate questions of the user to find out whether the facts required exist in

[23] *MIMA v Bhardwaj* (2000) 61 ALD 577, at 588-589. His honour also relied on Federal Court decisions *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 28 ALD 480, *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532.
[24] 2 ALD 60 at 68
[25] *Internal Review*, op cit, page 37

> the immediate case. They can apply the rules to determine a conclusion: whether the legislation applies. They can explain which rules apply: how the legislation covers or excludes the immediate case."[26]

However, the use of these systems raises a number of questions. Can a credible internal review can be conducted using the rule-base system used to arrive at the primary decision? For example, if the review process is limited to the logical investigation dictated by the expert system as was used in the primary decision, what does internal review add? (The answer might well be that it is more valuable, as the reviewer is not looking for simple slips or errors, but can focus on substantive issues). Alternatively, what protocols might be required for the use of expert systems on internal review? I understand that in the Department of Veterans' Affairs, even though IROs can have access to their Compensation Claims Processing System, the practice appears to be that they do not rely on the system for the conduct of an internal review, at least not to the same degree as primary decision makers.

Complaint handling

Internal Review is not quality assurance or complaints handling.

In 1997 the Government announced a decision to introduce service charters across agencies. Agencies which have direct dealings with the public are required to prepare and report on Client Service Charters.[27] These charters must include details of the agency's complaints handling processes.

To some extent, complaint handling systems are similar to internal review. Both are activated by applicants dissatisfied with their dealings with the agency, and both are directed (in part at least) to improving the agencies' performance and in doing so make it more accountable. The principles underpinning good complaint handling and internal review may be similar (for example fairness and efficiency). However, they are not the same. Importantly, complaint handling gives no specific enforceable rights to applicants, which is the heart of administrative decision making, and administrative review:

> "…Complaint handling is a broader concept than that of internal review. Complaint handling can encompass issues of service delivery and process, whereas internal review involves reviewing a particular decision on the merits, with the possibility of a changed outcome."[28]

To some extent the distinction harks back to the very conception of the administrative law system. Complaint handling schemes suffer from the deficiencies the Kerr Committee identified in relation to the then common law systems of review of administrative decisions government decision making; that is:

> "The basic fault of the entire structure is…that review cannot as a general rule…be obtained 'on the merits' – and this is usually what the aggrieved citizen is seeking."[29]

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[26] Peter Johnson, Softlaw, *Electronic Service Delivery: Achieving Accuracy and Consistency in Complex Transactions*, IPAA paper, November 1999

[27] Department of Finance and Administration, *Client Service Charter Principles*, June 2000, page 6.

[28] *Internal Review*, op cit, paragraph 1.6

[29] *Report of the Commonwealth Administrative Review Committee 1971*; Parliamentary Paper No. 144 of 1971 (referred to as the "Kerr Committee Report") paragraph 58

Those comments are appropriate here.

Organisationally distinct – credibility of Internal Review

The ARC concluded that internal review officers should be organisationally distinct from primary decision making:

4. At all times, agencies should explore avenues to ensure that internal review officers are organisationally distinct from primary decision makers.

5. As far as possible, internal review officers should not be located in close physical proximity to primary decision makers whose decisions they review, as this can affect perceptions of independence.

6. As far as possible, agencies should ensure that the roles of supervisor and internal review officer are not blurred. The internal review role preferably should not be undertaken by the immediate day-to-day supervisor of the primary decision maker. Similarly, internal review officers should not be expected to take on the day-to-day supervision of primary decision makers.[30]

The Council described this concept in the following terms:

> " 'Organisationally distinct' refers to a situation where, within the structure of the agency, internal review officers are kept separate from the primary decision makers whose decisions they review. Examples of ways in which this can be achieved include: having internal review officers in physically separate locations, not having internal review officers as part of the same team as primary decision makers, or supervised by the same manager, having the salaries of internal review officers funded from a separate part of the organisation, and having appropriate protocols in place with a view to maintaining an arm's length relationship."[31]

Council considered this was an important cultural issue, and one which should be projected to clients of the agency. In this regard, Council's reasoning in *Better Decisions* is apt here.

> "In the Council's view, it is important that agencies are organised so that internal review officers are distinct from primary decision makers. There are several reasons for this. If internal review is seen as a truly distinct aspect of agency decision making, that will help to promote within internal review sections the culture that their role is to undertake a genuinely fresh reconsideration of decisions. It will also give internal review the credibility within agencies necessary to enhance its normative effects. However, this does not mean that internal review officers should be totally isolated from primary decision makers and other agency staff. For example, it may often be appropriate for internal review officers to communicate with primary decision makers for the purpose of clarifying aspects of their decisions."[32]

[30] *Internal Review* op cit, page 22
[31] Ibid, paragraph 3.22
[32] *Better Decisions*, op cit paragraph 6.62

Clearly, the level of organisational distinction from primary decision making can affect how the internal review regime is perceived, and therefore how effective it is in acting as a filter to costly external review. In this regard, I would refer to the general comments of Kirby J that:

> "If the appearances are just, and the procedures manifestly fair, the likelihood is that just and fair conclusions will follow. As well, appearances affect the confidence of the community in the decisions of those who exercise power on the community's behalf."[33]

Involving applicants

As stated, one of the main advantages of internal review is its ability to efficiently review decisions which might otherwise proceed to costly external review. However, for this to be maximised, applicants should have some ownership in the process. Engaging applicants in the process creates a sense of understanding of the process, and therefore confidence in the justice of its outcomes. Otherwise:

- applicants who remain dissatisfied may be forced to proceed to external review; or
- applicants with meritorious claims may withdraw out of frustration or appeal fatigue.

Neither result benefits effective administration.

The objective of the conduct of an internal review, and its outcome – ie. the decision and its reasons - are that a person can say:

> "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether the decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."[34]

In this regard, I note that the majority of participants in the Council's project indicated they contacted applicants in the course of their review, and that this was identified as Best Practice by the Council. The most common reason for contacting clients was to request further information. The next most common reason was to discuss the application for review. Other reasons mentioned were to ensure clients were more informed of the issues involved, to tell them of the decision so they could have their say, and to ensure they had a good understanding of the system. The Council recommended that Internal Review Officers (IRO's) should attempt to contact all applicants.[35]

Competing functions of review officers

An important aspect of the culture of internal review is that agency managers see internal review as important in its own right. Even though it involves experienced senior staff

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[33] *Minister for Immigration and Multicultural Affairs v Jia; Re Minister for Immigration and Multicultural Affairs*, [2001] HCA 17 (29 March 2001), at paragraph 136.
[34] *Ansett Transport Industries v Wraith* (1983) 48 ALR 500 at 507 per Woodward J (see generally ARC *Practical Guidelines for Preparing Statements of Reasons* and the associated *Commentary*, June 2000)
[35] *Internal Review*, op cit, paragraphs 5.9-11 and Recommendation 21, page 37

overseeing the initial product of possibly less expert front line officers, it is not primarily a management function.

In the *Internal Review* report, the Council addressed the issue in the following terms:

> "Tensions may arise between two roles being performed, where the internal review officer role is given to the immediate day-to-day supervisor of the relevant primary decision makers. Staff management involves a close ongoing relationship, including the need for supervisors to support and motivate staff, whereas the focus of internal review is the reconsideration of the facts, law and policy aspects of a particular case. For example, an internal review officer may feel less able to overturn a decision of a person they supervise. On a similar note, … the 'normative effect' resulting from internal review officers giving advice and feedback to primary decision makers … should not amount to the internal review officer taking on a supervisory role in relation to those primary decision makers.

"In *Better Decisions*, the Council considered that proximity to primary decision makers poses real risks to the independence of internal review officers:

> '...if internal review officers have close links with the decision makers whose decisions they review, there is a danger that those internal review officers will lose the objectivity required for undertaking internal review effectively. (The *Better Decisions* report, paragraph 6.61.)' "[36]

While internal review is not management, it is clear that internal review officers, being senior experienced officers expert in policy, law and operational issues are too valuable a resource to be under used. Comments during the consultation process reflected this, and the survey responses refer to issues raised by the (sometimes) competing objectives of internal review systems:

> "Internal review officers are required to do more than just internal review—there is also feedback and training. So you need to balance independence with these other functions. (manager)

> "Internal review officers spend a minimum of one day a week in the primary decision making area. There are balancing considerations here. They need to be independent, to answer customer complaints of independence, but also need to be responsible for improving primary decision making. (manager)

> "I don't think they need to be very independent at all. Our Area has devolved all internal review officers back to the regions. The internal review officers who work 2 days a week from this office have worked fantastically well. They are available, accessible, can identify primary decision maker training needs, liaise with staff. We need internal review officers to be there to add to training. They should be incorporated, at least partially, with the structure. (manager)

[36] Ibid, paragraphs 3.23-24

> "It would be nice to have an internal review officer on the spot. At the moment, we are not able to get advice from them. Also, staff need to see how the internal review officer works: they are role models to staff. (manager)
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> "Having an approachable internal review officer makes a big difference. I am lucky to have an approachable internal review officer from whom I can get advice. (primary decision maker)"[37]

Culture and training

Fostering an independent and "organisationally distinct" internal review structure does not (solely) depend upon centralisation or physical separation. Indeed, centralisation can have its disadvantages.[38] Issues such as training and culture will be important. In particular, because of the competing demands on internal review officers the Council argued that without appropriate training and support for internal review officers:

> "…the ability to meet the aims of internal review systems (such as correctness of decision making, and cost-efficiency), and the values and principles of administrative law (lawfulness) may in some cases be jeopardised."[39]

Such support included not only portfolio or subject matter specific training, but also broader professional development, contact with other internal review officers and adequate time to complete each review properly:

26. Agencies should develop appropriate training strategies for internal review officers. The specific areas of training need will differ on an agency-by-agency basis.

27. Agencies that do not already have in place mechanisms to promote contact and discussion among internal review officers should consider doing so.

28. Regardless of whether internal review officers perform only internal review, or other tasks as well, agencies should ensure workload is such that internal review officers have adequate time and support to review each case with rigour and have appropriate contact with applicants.

Another way appropriate independence may be achieved is through high level recognition of the independence of the *role* of internal review, wherever the person performing that role might, physically be located. In this regard the Council considered:

> "… that the promotion of an appropriate culture within internal review sections would be greatly assisted if formal responsibility for internal review lay with a senior agency executive, such as a deputy secretary. That effect would be strengthened if the role of that senior departmental executive was combined with formal responsibility for overseeing the promotion within the agency of

[37] Ibid, paragraph 3.34
[38] *Internal Review*, paragraphs 3.28-29 noted that for high volume decisions of subjectively great value to the individual client, same-day internal review available at the decision making location may be more appropriate (although note the risks of inconsistency); and that it may be difficult to centralise where the technical expertise is only available at the primary decision making location.
[39] Ibid, paragraph 6.27

> the general effects of review tribunal decisions on the quality of the agency's decision making."[40]

Such an arrangement would also demonstrate an agency's commitment to getting it right.

One comment made during the consultation processes is a good example of how the cultural aspects of being organisationally distinct can affect outcomes. As some of you may know, Centrelink has undergone a process of moving its centralised Authorised Review Officers (ARO's) out to Customer Service Centres. This was said to provide:

> "… a more personalised service to customers who request a review of a decision. This has also enabled ARO's to provide more direct coaching assistance to original decision makers in making the correct decision on the customer's entitlements, particularly where the customer's circumstances and/or policy and legislation are complex."[41]

The point that interested me was that during consultation on the ARC's report, a senior Centrelink officer noted that when the function was centralised the AROs tended to work very closely with the legal branch, whereas at the CSCs the focus was on the customer. In essence, they had one eye on the legal process, so that by the time an issue came up on internal review the analysis and review were coming from the perspective of defending the decision (including conceding on matters that were not defensible) rather than being seised with the objective of impartially arriving at the correct or preferable outcome. This anecdote is not evidence, but did resonate with my own experience as a legal adviser in Government agencies.

The normative effects of internal review

The normative effect of administrative review has been a key feature of the (new) admin law package since its introduction. The effect was identified in the original Kerr report. In particular, in rejecting suggestions that increased scrutiny would lead to inefficiency, the Kerr Committee noted:

> "It does not follow that a more comprehensive review of …decisions will lead to inefficiency in the administrative process …Indeed the very existence of machinery for review …<u>is likely to produce a greater efficiency and correctness in the making of those decisions</u>."[42]

The normative effect was recently described by the President of the ARC in the *2001 Blackburn Oration* as being the general objective of the administrative review system to continuously improving the standard of decision making at the primary decision, internal review, and tribunal levels.[43]

In its report the Council noted responses by primary decision makers and managers who saw benefits in internal review officers being available to lead and assist primary decision makers, who are usually more junior less experienced staff. This is the flip side of being

[40] *Better Decisions*, op cit, paragraph 6.63
[41] Centrelink Annual Report 1999-2000, page 50
[42] Kerr Committee Report; paragraph 12
[43] ARC website : law.gov.au/arc

"organisationally distinct." Internal review officers need to **be** part of the normative process – improving the quality of decision making by primary decision makers as well as their internal review colleagues, as much as they need to benefit **from** it in relation to tribunal and court decisions etc:

> "The fear expressed is that the "normative effect" may be lost when the internal review function becomes too-far divorced from the policy-making and primary decision making function of an agency.[44] The Council noted this risk:

However, this does not mean that internal review officers should be totally isolated from primary decision makers and other agency staff. For example, it may often be appropriate for internal review officers to communicate with primary decision makers for the purpose of clarifying aspects of their decisions.[45]

> "Effective avenues of communication will be critical in successfully directing the benefits and experience of internal review officers to the overall improvement of the agency's performance."[46]

Again a balance is essential, as one of the criticisms of internal review identified in the Council's project was the potential for negative impact on primary decision making.

> "A criticism of internal review, and of the merits review system in general, is that it can encourage primary decision makers to exercise 'soft' options in order to avoid the likelihood of a review of the decision; for example, by deciding to grant a benefit, against better judgment, to a claimant who might otherwise appeal.
>
> "One commentator notes that while there is no empirical evidence about such a decision making process occurring, it is widely believed to occur.[47] There was some anecdotal evidence gleaned from the surveys which suggests this practice is not unknown.
>
> "Some people don't like making adverse decisions—the customer gets mad, it creates more work, and an internal review officer may become involved. It is easier to just not make an adverse decision. (primary decision maker)"[48]

This is not a universally accepted view, and survey results during the project, while not quantitatively rigorous, did not uniformly support the soft option theory. However, to the extent that it is a problem, I wonder whether it can properly be considered to be a problem of internal review. Rather, it is likely that a range of factors are involved, and the comments put to the Council perhaps illustrate this:

> "The system is flawed from the initial stages because the primary decision makers use the internal review officers to pass hard decisions to. Sometimes

[44] Creyke, R. 'Sunset for the Administrative Law Industry? - Reflections on Developments Under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39 at 47.
[45] The *Better Decisions* report, paragraph 6.62.
[46] *Internal Review*, op cit, paragraphs 3.35-36
[47] Sassella, M. 'Administrative Law in the Welfare State - Impact on the Department of Social Security' (1989) 58 *Canberra Bulletin of Public Administration* 116 at 119.
[48] *Internal Review*, op cit, paragraphs 7.3-4

> the customer is encouraged to challenge a decision even when they know the internal review officer will confirm the decision. It gives a false hope to the customer. (internal review officer)
>
> "Generally there is enough time at the internal review level to take the time needed to make decisions properly. This is not the case at primary decision maker level—they often just pass things on to the internal review officer because they can't be bothered explaining decisions properly. (internal review officer)
>
> "Sometimes the process is not clear to clients and they get angry and go off on tangents. Often the first time a decision is explained to a client is at the internal review officer level. (internal review officer)
>
> "We are trying to ensure cases come to review for the right reasons. The affirmation rate is quite high, so review may be avoidable, if the decision could be better explained. There is scope for developing a greater partnership between the primary decision makers and internal review officers. (manager)
>
> "Explanations of how decisions are reached is done poorly at primary decision maker level. The main role of the internal review officer is to explain how decisions are reached. (internal review officer)"

In particular, the responses above indicate strong anecdotal evidence of a problem in relation to primary decision makers' lack of personal contact with clients, and their ability and willingness to provide proper explanations of decisions to clients. The surveys indicated that the vast majority of primary decision makers surveyed informed applicants of their decisions by letter, and that these letters contain information on internal review rights. Internal review may therefore occur simply because the client has not had personal contact with the decision maker and has not had the decision properly explained. To the extent this occurs, systems of internal review risk failure in meeting their aims of improving decision making and providing natural justice for clients. Efficiency aims are also jeopardised if cases are referred unnecessarily to internal review.[49]

[49] Ibid, paragraphs 7.9-10