The office of the Administrative Review Council is located at Ground Floor, Robert Garran Offices, National Circuit, Barton, ACT, 2600.
Dear Attorney-General,


The Council’s aim in undertaking this project was to examine issues in relation to the internal review of decisions by Commonwealth agencies, with a view to offering practical assistance to agencies. While the report does not contain formal recommendations to Government, it will be a useful framework for Government agencies in planning new review regimes or in reviewing existing practices.

Yours sincerely,

Bettie McNee
Administrative Review Council

This Report was adopted by the Administrative Review Council on 4 September 2000. The members of the Council at that date were:

Bettie McNee (President)
Justice Deirdre O'Connor
Ron McLeod AM
Professor David Weisbrot
Bill Blick PSM
Christine Charles
Robert Cornall
Robin Creyke
Stephen Gageler
Wayne Martin QC
Patricia Ridley

The Council acknowledges the contribution to this project of Gabrielle Lewis (A/g Director of Research) and Sara Pesenti (Project Officer).
Increasingly, the community expects transparency in decision making, both within and outside government. The Administrative Review Council, with its focus on merits review of decisions, believes that transparency is fundamental to the integrity of decision making processes.

In 1995, the Administrative Review Council published the Better Decisions report on Commonwealth merits review tribunals. In that report, the Council recognised that internal review mechanisms, conducted within agencies, are an important part of the overall merits review system. I am therefore pleased that the Council, in taking forward that earlier work, is now presenting this Report and Best Practice Guide on internal review.

A good system of internal review is one which is transparent in process and affords a quick, inexpensive and independent review of decisions. Such a system is beneficial both to applicants and agencies. Its aim should be to encourage better primary decision making by agencies, and the delivery of a cost effective and time efficient review process to applicants.

The standards contained within the Guide have been formulated on the basis of research and analysis carried out during the project, and the Council hopes that they will afford agencies the opportunity to re-examine their internal review systems. However, agencies with internal review systems differ greatly in terms of their size and nature, as well as in the volume and type of decisions that are subject to review. The Council acknowledges that for some agencies, particularly small ones, it will not be feasible for all standards in the Guide to be adopted.

The Report differentiates between internal review and general complaint handling procedures such as those contained in Customer Service Charters. While the Councilrecognises the value of developing such procedures, the Report and the Guide are specifically focussed on merits review within agencies relating to particular decisions affecting particular applicants.

The Council would like to thank the agencies who participated in the project for providing useful information and valuable insights.

Bettie McNee
President
Administrative Review Council
November 2000
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CHAPTER 1. INTRODUCTION

About the Council

1.1 The Administrative Review Council is an independent statutory body that provides advice to the Attorney-General on administrative law matters. It was established under the Administrative Appeals Tribunal Act 1975 as an integral part of the Commonwealth system of administrative review. Section 51 of that Act sets out the Council’s functions and powers.¹

1.2 Following the twentieth anniversary of its establishment, which was celebrated in 1996, the Council re-examined its priorities and decided to place renewed emphasis on:

- enhancing the accountability of government agencies through improving the quality and processes of primary decision making;
- providing assistance, policy advice and training to people involved in making government decisions and to those affected by such decisions (for example, community organisations); and
- monitoring government policies and the work of decision makers to ensure that their activities and approaches are consistent with the values and principles of administrative law.

1.3 The internal review project has been embarked upon by the Council in line with those priorities.

What is internal review?

1.4 Internal review is 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.

1.5 Internal review can take a number of forms and an agency may have more than one system of internal review. An agency, for example, may administer a number of statutory schemes for internal review as well as having systems for review of various non-statutory decisions. Some agencies have relatively formal internal review systems, while others have less formal systems in place.

1.6 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.² These charters must include details of the agency’s complaints handling processes. 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. While noting that the principles underpinning good complaint handling and internal review may be similar (for example fairness and efficiency), this Report is restricted to a focus on internal merits review of individual decisions.

¹ Section 51 is reproduced in Appendix A.
Why is internal review important?

1.7 The work of the Council supports the two fundamental roles of Commonwealth administrative review, namely:

- enabling people to test the lawfulness and the merits of decisions that affect them; and
- improving the quality, efficiency and effectiveness of government decision making generally.

1.8 In its Report No. 39 Better Decisions: review of Commonwealth Merits Review Tribunals, the Council briefly considered internal review, recognising its important role in contributing to the objectives of the broader merits review system. However, the Council noted that there were disadvantages to internal review and considered that it was important to design internal review processes to gain most of the benefits they allow and minimise the associated risks. The Council saw the advantages as being:

- 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.

1.9 The Council considered that the disadvantages of internal review included:

- it 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.

1.10 The Council concluded that internal review should be encouraged, provided it is relatively timely, free, undertaken by sufficiently independent review officers, and involves an appropriate level of contact between internal review officers and applicants. However, a more in-depth study of internal review was beyond the scope of the Better Decisions report.

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4 The Better Decisions report, paragraph 6.43.
5 The Better Decisions report, paragraph 6.49.
6 The Better Decisions report, paragraph 6.49.
7 The Better Decisions report, paragraph 6.50.
8 The Better Decisions report, paragraph 6.60.
Introduction

1.11 The proposed introduction of the Administrative Review Tribunal will result in fewer layers of review being available to applicants in some areas of decision making. It is therefore timely to focus on making internal review mechanisms as effective as possible.

About this project

Aims of the project

1.12 The aims of this internal review project, as established by the Council, were to:

- describe the background and the practice of internal review in selected Commonwealth Government agencies;
- identify the needs which agencies are seeking to satisfy in their internal review systems; and
- examine the extent to which the internal review systems being used by those agencies meet these needs and the values and principles of administrative law.

Further aims were to:

- develop a best practice guide which will be useful to all Commonwealth Government agencies in examining their own practices of internal review by drawing on the information and experience gained from the above; and
- as a long term objective, work with selected Commonwealth Government agencies to determine how their internal review processes might best be structured to meet their particular requirements.

Methodology underpinning the project

1.13 In November and December 1998, the Secretariat to the Council conducted a series of interviews with 92 officers of five agencies. The questionnaires used were developed with the assistance of Suzanne Roche of National Social Research Pty Ltd. The questionnaires were targeted at three classes of officer: primary decision makers, internal review officers and managers or supervisors of primary decision makers or internal review officers. The officers to be interviewed were selected by the agencies. The numbers were as follows:

- 33 primary decision makers, at Administrative Services Officer Classes 4 and 5, Executive Level 1 and Professional Officer Level 2 levels;
- 33 internal review officers, at Administrative Services Officer Class 6, Senior Officer Grade C and Senior Executive Service (SES) Band 1 levels; and
- 26 supervisors or managers of primary decision makers or internal review officers, ranging through Administrative Services Officer Class 6, Senior Officer Grade C, Senior Officer Grade B, and SES levels.

1.14 It should be noted that the number of officers at each classification level were not evenly distributed. For example, there was only one SES internal review officer.
1.15 Interviews were conducted on a one-to-one basis and generally lasted 30 to 45 minutes. The interview questions put to each class of officer are set out in Appendix B.

1.16 The five Commonwealth agencies involved were:

- Centrelink;
- Therapeutic Goods Administration (‘TGA’);
- Australian Customs Service (‘Customs’);
- CRS Australia (formerly the Commonwealth Rehabilitation Service); and
- Department of Veterans’ Affairs (‘DVA’).

1.17 These agencies were selected because they provide a representative cross-section of Commonwealth agencies undertaking internal review. In particular, the agencies can be roughly grouped into those with regulatory or commercial interests (Customs and the TGA) and those with an emphasis on individual benefit recipients (DVA, CRS Australia and Centrelink).

1.18 It should be noted, however, that there were not equivalent numbers represented from each agency.

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<th>Primary Decision Makers</th>
<th>Internal Review Officers</th>
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<td>Centrelink</td>
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<td>DVA</td>
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1.19 The internal review officers from the TGA and CRS Australia were from the SES, or were senior managers, and have therefore added that perspective as well as the perspective of the internal review officer.

1.20 The survey was not intended to operate as an audit of agency practice. Therefore, the survey results have been used in a generalised way to shed light on internal review practices across the agencies.

**Structure and framework underpinning this Report**

**Structure of the Report**

1.21 The discussion of issues throughout the Report follows a similar format. First, the current thinking, drawn from articles and speeches, is summarised. This is designed to provide an overview of relevant issues, and to give a context to the empirical information. Second, the empirical data drawn from the surveys conducted for the purposes of the project is set out.
Chapter 1 - *Introduction*

Chapter 2 - *Background and Practice of Internal Review* is an initial overview of the background and practice of the internal review systems in the agencies chosen.

Chapter 3 - *Designing an Internal Review System* explores the issues to be addressed by the management of an agency introducing an internal review system, or re-engineering an existing internal review system.

Chapter 4 - *Accessibility of Review* discusses important access and equity issues in relation to applicants for internal review, and how agencies can address these. It also discusses the need for internal review applicants to be made aware of their external review rights.

Chapter 5 - *Process and Practice of Internal Review*. This is a chapter addressing significant issues surrounding how the actual process of internal review is to be carried out, for example the issue of personal contact with applicants.

Chapter 6 - *Management and Support*. This chapter examines issues in relation to the management of an internal review mechanism, for example the training and development of review officers, and the financial management of internal review.

Chapter 7 - *Learning from Review* discusses ways in which internal review can operate to improve primary decision making. It also examines whether internal review is affected by external review decisions.

Chapter 8 - is a *Best Practice Guide* for internal review of agency decision making, which draws on the conclusions reached in Chapters 3 to 7.

1.22 While topics have been included in the chapter which is most obviously relevant, there may be some overlap. For example, issues of accessibility of review are also issues for management.

**Framework of principles**

1.23 The internal review issues explored in each of the chapters are assessed against a framework of principles, drawn from the Council’s dual aims for this project: to identify the needs which agencies are seeking to satisfy in their internal review systems, and to examine the extent to which the systems meet those needs and the values and principles of administrative law. To some extent both aspects overlap. The needs identified by agencies concentrate on outcomes, whereas the values and principles of administrative law are more general and tend to emphasise process.

1.24 The needs that agencies are seeking to satisfy with their internal review systems have been identified by responses to the survey question “Why does your agency have internal review [ie what aims is it seeking to achieve?]”.
**Framework Part 1 - Needs Identified by Agencies**

1. **The need to ensure correct decisions (in individual cases)**

   This was the most commonly identified need among primary decision makers and managers. Similarly, the need to ensure that primary decision makers were abiding by legislation was identified.

2. **The need to improve decision making generally ('the normative effect')**

   The following needs were identified:
   - the need to monitor quality of decisions;
   - the need for consistency;
   - the need to provide feedback to primary decision makers;
   - the opportunity to identify training needs; and
   - the need to monitor policy and legislation and how well they are administered.

3. **The need to provide natural justice to clients**

   This need was commonly raised by survey respondents. Related responses were:
   - the need to overcome the personal biases of primary decision makers;
   - the need for an independent check on primary decision making;
   - the need to provide feedback to the client about why the decision was made; and
   - the need for transparency of decision making.

   Customer service was also identified as a reason for having an internal review system.

4. **Cost-efficiency needs (the avoidance of external review)**

   The most common response by internal review officers was that internal review was quicker and cheaper for the agencies than external review. Other relevant needs identified by survey participants were the need to circumvent the decision going to external review, and the need for risk management.

**Framework Part 2 - Values and Principles of Administrative Law**

The extent to which agencies’ internal review systems met the values and principles of administrative law, was assessed against the following values and principles:

1. **Lawfulness**

   The lawfulness of decisions and processes.
2. **Fairness**

How natural justice is reflected in the process. Relevant issues are impartiality, and whether the applicant has a sufficient opportunity to be heard.

3. **Rationality**

Does the process of internal review make sense?

4. **Openness**

Accessibility of internal review to prospective applicants.

5. **Efficiency**

Testing the idea that internal review is less formal, less costly and quicker than external review. Relevant issues are whether internal review systems are cost-effective for agencies, and whether the process provides quick and timely decisions while maintaining quality.

1.25 The aims of internal review (as identified by agencies), and the values and principles of administrative law, will be used throughout Chapters 3 to 7 as a framework of criteria against which to assess the practices of agencies and to discuss various issues surrounding aspects of internal review. This discussion will in turn inform the identification of “best practice”, expressed in the guidelines set out in Chapter 8.
CHAPTER 2. BACKGROUND AND PRACTICE OF INTERNAL REVIEW IN AGENCIES SURVEYED

The following information about internal review procedures in participating agencies is correct as at December 1998.

Centrelink

2.1 The Commonwealth Services Delivery Agency (Centrelink) administers a wide range of Acts relating to social security payments and the provision of services. Primary decisions are made in customer service centres around the country, using policy guidelines provided by client departments such as the Department of Family and Community Services.

2.2 There is a formalised two-tiered process of internal review. Applicants are advised of their internal review rights in the letter informing them of the original decision. Requests for internal review go to the original decision maker (ODM) for reconsideration, and if not reversed, then to the Authorised Review Officer (ARO). Internal review by the ARO is provided for in legislation. The ARO may set aside, vary or affirm a decision. The Social Security Appeals Tribunal (SSAT), the first tier of external review, is only able to look at a decision if it has first been reviewed by an ARO.

2.3 AROs are usually experienced ODMs, who are specifically delegated to review decisions. They are generally senior to ODMs (AROs are mostly at the ASO6 level, with ODMs mostly at the ASO4 level).

2.4 Historically, AROs were not based in customer service centres, but in area offices. However some AROs have moved back to customer service centres due to recommendations in Dame Margaret Guilfoyle’s Review of the Social Security Review and Appeals System.10

2.5 AROs are encouraged to contact applicants and personally explain decisions. At a minimum, they will advise the client in writing of their decision and of the client’s rights of review and appeal, as this is required by legislation.

2.6 There is generally no need for legal representation for ARO reviews. However, Centrelink will accept the involvement of legal and other representatives, and will provide interpreters if required.

2.7 There are no time limits for requesting an ARO review, but a request for a review of a decision should ideally be made within 13 weeks of receiving advice of the original decision. This is because if the review is decided in the person’s favour, and review has been sought outside the 13 week period, arrears will be backdated only to the date of the request for review, rather than the date of the original decision.11

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2.8 When new evidence is received by an ARO, they will deal with that evidence without referring it back to the ODM. This overcomes subsequent jurisdictional issues for the SSAT and avoids delay.

2.9 AROs receive training which includes the requirements of the legislation and the merits review system.

2.10 AROs are expected to contribute to the improvement of primary decision making, by providing feedback to original decision makers. Feedback mechanisms include sending the file back to the ODM with the result of the reviewed decision. Where the decision has been overturned, the ARO will normally contact the ODM in person to explain why. Where the decision has been affirmed, the ARO does not necessarily include a personal explanation of the decision with the file.

**Therapeutic Goods Administration**

2.11 The *Therapeutic Goods Act 1989* provides for national regulation of therapeutic goods. The Therapeutic Goods Administration (TGA), a Division of the Department of Health and Aged Care, administers the Act. Overall control of the supply of therapeutic goods is exercised through pre-market assessment, licensing of manufacturers and post-market vigilance.

2.12 Primary decisions are made by delegates of the Secretary. The Act requires that the letter communicating the primary decision include information on review rights.

2.13 Reconsideration of the decision by the Minister may be sought under section 60 of the Act. This is required before an application can be made to the Administrative Appeals Tribunal. Most applications for internal review come from organisations. The request for reconsideration must be made within 90 days after gazettal, or after the decision first comes to the person’s notice.

2.14 The request for internal review is sent to the Parliamentary Secretary, who may deal with the review him or herself. However, it is generally dealt with by one of the Minister’s delegates within the Department. The TGA maintains a list of 8 relatively senior persons with delegations from the Minister to undertake internal review. A delegate is chosen to deal with the review who has not been involved in the original decision, and who has the necessary expertise. The TGA Legal Officer is notified of the appeal, and is available to advise the delegate reviewing the decision.

2.15 If a decision is not made within 60 days, the Minister is taken to have affirmed the original decision. The delegate is responsible for communicating the result of the review to the appellant within the statutory time limit, and a copy is also sent to the Legal Officer.

2.16 Internal review is done on the papers, although a reviewer may go back to the applicant if a matter is unclear. Usually, applicants are legally represented.

2.17 Once a review is undertaken, a letter is sent to the applicant with the reasons for the reconsidered decision, and informing them of their AAT review rights. The primary decision maker and the legal area also receive the internal review reasons.
2.18 If an appellant requests the Minister or the AAT to reconsider a particular type of decision (evaluation and registration of therapeutic goods) and provides new information in support of that request, the Minister and the AAT have power to remit the matter to a primary decision maker for a fresh decision.12

**Australian Customs Service**

2.19 Customs administers legislation such as the *Customs Act 1901*. Essentially, all AAT reviewable decisions made under this legislation are amenable to internal review. Many applicants in the internal review process use representatives such as lawyers, customs brokers or accountants, due to the substantial amounts of money at stake.

**Statute-based internal review**

2.20 Section 269SH of the *Customs Act 1901* provides for internal review of decisions involving tariff concession orders. Under this legislation, most decisions must be the subject of an internal review before an application can be made for review by the AAT. Requests by affected persons must be made, in writing, setting out the grounds of objection, within 28 days of the gazettal of the original decision. The CEO of the Australian Customs Service must, as soon as practicable, publicise the request for review through a notice in the *Gazette*.

2.21 The review is conducted by a senior officer in the Tariffs Concessions Section, usually without consultation with the primary decision maker. The review officer can have regard to the material relied on by the original decision maker, plus material produced (by the applicant for reconsideration of the original decision) within 28 days of the gazettal of the original decision.

2.22 Deadlines of 60 or 90 days apply, depending on the kind of decision (failure to make a decision within the deadline is taken to be a decision to affirm the original decision). The results are given in writing to the applicant (including information on AAT review rights) and published in the *Gazette*.

**Non statute-based internal review**

2.23 Internal review of other types of Customs decisions is less formal. For example, there are no time deadlines. Internal review is not required before AAT review is allowed, and new information may be considered at any stage of the process. The procedure for internal review of decisions involving tariff classification advices, and demands for duty where importers pay under protest, is as follows.

2.24 Applicants request a review by the original decision maker, who reconsiders the decision and provides the result and reasons in writing. If the matter remains unresolved after informal discussions with the original decision maker and his or her supervisor, the applicant can request referral to the Manager Tariff in the relevant state, providing further data to support the review. The Manager Tariff also provides the result of the review and reasons in writing.

2.25 If still dissatisfied, the applicant applies to the Director Tariff Classification in Canberra for a final decision. These decisions are binding on all Customs officers. After this,

12 *Therapeutic Goods Act 1989*, section 60A.
the applicant can appeal to the AAT. This will trigger a further informal review by the Customs Legal Unit as cases are not always taken to hearing.

2.26 Similar procedures are followed in relation to review of valuation advices. Other programs have ad hoc internal review arrangements.

2.27 There is no formal legal training for internal review officers. However, regular administrative law training is provided for all decision makers.

2.28 Under the procedures described above, the primary decision maker receives the same letter, detailing the outcome of the review, as the applicant receives after review by the Director Tariff Classification or the Director Valuation. However, review officers generally talk to the primary decision maker in the course of their review.

CRS Australia

2.29 CRS Australia (formerly the Commonwealth Rehabilitation Service) has been part of the Department of Family and Community Services since October 1998 (prior to that, it was part of the former Department of Health and Family Services). It provides rehabilitation services under the Disability Services Act 1986. Clients are usually referred to CRS Australia by a variety of persons and agencies. CRS Australia determines the client’s eligibility for programs. A program consists of a rehabilitation plan with a goal and activities which the client signs. These activities may include, but are not limited to, employment and vocational training, educational courses, mobility and other independent living training, occupational therapy, physiotherapy, speech therapy, counselling, social work services, accommodation, transportation and personal support services.

2.30 New clients receive a brochure detailing rights and responsibilities and outlining the review process. Information on review rights is also contained in letters notifying clients of adverse decisions, such as a decision not to provide a service.

2.31 Under the Act, a person affected by a decision of CRS Australia may appeal to the Secretary of the Department. A person cannot appeal directly to the AAT without first seeking internal review of the decision. The main decisions which form the basis of review are decisions concerning the provision of rehabilitation programs (including eligibility), the content of rehabilitation programs, and the ending of rehabilitation programs.

2.32 That said, it is CRS Australia policy that decisions regarding rehabilitation assistance and programs should, wherever possible, be made after negotiation with the client. This leads to minimal use of internal review mechanisms. Where problems occur, complaint handling procedures are used in preference to the internal review process or the AAT.

2.33 A person has 30 days, from the date on which the decision first came to the notice of the person, to request review by the Secretary or delegate. The Secretary has a discretion to extend this period. The request for reconsideration of the decision must be in writing and must set out the reasons for making the request. Clients are not usually legally represented.

2.34 Officers may informally review a decision but only the Secretary or the Secretary’s delegate can revoke or vary the decision. In reviewing the decision, the review officer will obtain all the relevant facts and information from the client (he or she will generally contact the client during the review) and officers concerned with the case (including the senior
rehabilitation consultant) and check if there has been any misunderstanding. They must ensure that the decision taken has a legal basis and the available evidence supports that decision. The State manager is responsible for internal review. The State Manager has usually risen through the ranks so will be familiar with the requirements of both primary decision making and internal review.

2.35 The delegate or the Secretary will then take action to affirm, vary or revoke the decision. The Secretary or delegate must notify the applicant in writing of the decision, provide reasons and include information on appeal rights to the AAT.

2.36 Primary decision makers receive training in decision making (especially administrative law).

2.37 A collaborative approach is taken to giving feedback to the primary decision maker as to why a decision has been varied or revoked. Because this person will continue to manage the client’s rehabilitation throughout the review process they will, of course, also follow through on the results of the internal review.

Department of Veterans’ Affairs

2.38 The Repatriation Commission is responsible under the Veterans’ Entitlements Act 1986 for granting pensions and other benefits, and providing treatment and other services to veterans.

Compensation claims

2.39 Internal review is not a compulsory step before appeal to the Veterans’ Review Board (VRB). The Repatriation Commission has a discretion to review a decision before an appeal is determined by the VRB under section 31 of the Act. This power is delegated, under section 31, to a number of DVA officers at around the Administrative Service Officer Class 6 level. Information about review rights is provided to applicants when they receive notice of the primary decision.

2.40 A section 31 review can be, and often is, triggered without the individual requesting it. For example, DVA might receive further relevant information after the primary decision has already been made. However, section 31 reviews may be requested by the applicant or his or her representative. If a section 31 review is requested without an application having already been made to the VRB, DVA will ask the applicant to lodge one in order to protect their appeal rights. This is because if the process is lengthy, the time limit on lodging an appeal to the VRB may expire and the applicant will have no further right of appeal in the event that they are dissatisfied with the outcome of the section 31 review.

2.41 In the past, section 31 review powers were used in a limited way. However, as a result of a review of the system in the mid-1990s, section 31 is now used more extensively, with the aim of reducing delays at the VRB and saving resources. Protocols exist between the Department and the VRB to ensure that the VRB knows when a matter is removed from its list of outstanding cases and to prevent a section 31 review being conducted when the matter is listed for hearing at the VRB.

2.42 A section 31 review typically involves a personal discussion between the ex-service organisation (ESO) advocate representing the applicant and a review officer. This may result
in further investigation by the officer, or the ESO having more time to obtain further information. The review officer will then either write to the applicant to say that the officer declines to review the matter (usually providing a brief statement of reasons), or make a formal decision with reasons. In the latter case that decision, if adverse to the applicant, is reviewable by the VRB.

2.43 Some applicants ask for a hearing with legal representation. This is considered inappropriately formal for the internal review stage, although Departmental officers are happy to talk to legal representatives.

2.44 There is no formal mechanism for giving feedback to primary decision makers, and it is possible that the primary decision maker might not be told that the decision has been overturned. The vast majority of decisions overturned are done so on new evidence.

2.45 Individual review officers can speak to primary decision makers about why a decision has been overturned, and there is considerable discussion in offices about cases. However, DVA is unwilling to discourage primary decision makers or take up too much of their time by telling them about all decisions which have been overturned. Instead, the Department follows a quality assurance approach.

**Income support claims**

2.46 The Repatriation Commission may, under section 57 of the Act, review a decision relating to service pensions or income support supplements. This is a compulsory process before any external merits review in the AAT is available (the VRB does not review income support cases). Information about review rights is provided to applicants with notice of the primary decision. Requests by applicants for a section 57 review must be in writing and lodged within 3 months of the decision. The review officer provides a determination in writing with reasons, and information on AAT review rights, to the client.

2.47 Income support cases are generally less complex than compensation cases and it is therefore less likely that an advocate will be involved. Legal representation is rare. Applicants are able to ask for interviews with the Departmental officers, and may bring someone to that interview, but it is an informal process.

2.48 While there may be separate review officers with delegations to undertake section 57 reviews (called service pensions review officers), in some State offices the same review officers may handle cases under both sections 31 and 57. In smaller states, internal review may not form the only task of service pensions review officers. They may also act as quality control officers.

2.49 There is no across-the-board practice about feedback from service pensions review officers to primary decision makers; feedback depends on local practice. There is also no across-the-board training program, although ad hoc arrangements for training have been made.
CHAPTER 3. DESIGNING AN INTERNAL REVIEW SYSTEM

Introduction

3.1 This chapter explores issues that would need to be addressed by an agency either setting up an internal review system for the first time, or re-engineering an existing internal review system. These issues include:

- what decisions should be subject to internal review;
- whether internal review should have a legislative basis;
- whether internal review should be mandatory before external review rights can be exercised;
- how internal review can be set up to ensure that it is sufficiently independent of the primary decision maker, and that applicants perceive it as such; and
- whether there should be more than one layer of review within an agency.

Decisions subject to internal review

3.2 Merits review is a process by which a person or body (for example, a tribunal) reconsiders a decision by ‘stepping into the shoes’ of the primary decision maker. The result of merits review is the affirmation or variation of the original decision. Internal review is merits review which is undertaken by another officer in the same agency, rather than by an external body such as a tribunal. In its publication What decisions should be subject to merits review?, the Administrative Review Council has set out guidelines as to the decisions it believes are appropriate to be reviewed on the merits. In summary, it stated:

As a matter of principle, the Council believes that an administrative decision that will, or is likely to affect the interests of a person should be subject to merits review.13

3.3 The Council identified two types of decisions that, by their nature, are unsuitable for merits review. They are:

- 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).14

3.4 The above principles expressed by the Council should be used by agencies in deciding whether particular types of decisions (whether made under statute or not) are appropriate for internal review. 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

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13 Administrative Review Council What decisions should be subject to merits review?, July 1999, page 5.
14 What decisions should be subject to merits review?, page 7.
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.

1. Agencies should offer internal review for administrative decisions that will, or are likely to, affect the interests of a person.

**Authority to undertake internal review**

3.5 All five agencies participating in this project conducted a statute-based internal review system. As noted in Chapter 1 of this Report, some agencies, such as Customs, may operate more than one system; for example, a statute-based system for some types of decisions, and non-statute based systems of internal review for others.

3.6 The issue has been raised about whether a statute-based internal review system will be more effective than a system without a statutory basis. The most obvious advantage of an internal review system with a statutory basis is that it can give the applicant a guaranteed right to a review.

3.7 There are other advantages in having a legislative framework for internal review. For example, it allows for a formal delegation of power to review officers, and would allow for further detail to be specified, such as the conditions under which review can occur, and the categories of cases amenable to review by a delegate can be delineated.

3.8 Similarly, there may be a need for legislative provisions to clarify the external review position of decisions that have been already subject to internal review. Section 135 of the Veterans’ Entitlements Act 1986 is an attempt to provide such clarification.

2. It is preferable for an internal review system to have a statutory basis.

**Internal review as a mandatory or discretionary precursor to external review**

3.9 A significant issue raised in regard to internal review is whether making it a mandatory precursor to external review is the most effective way of adding value to the administrative decision making process.

3.10 Opponents of mandatory internal review criticise it as a barrier to access to external review rights. The additional number of steps the applicant must proceed through in order to reach finally external review may mean that persons with meritorious cases will fall victim to ‘appeal fatigue’.

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15 It has been argued that section 33 (1) of the Acts Interpretation Act 1901 provides for a general power of internal review. However, Uniway Pty Ltd v Chief Executive Officer of Customs [1999] AATA 208 rejects this argument.


3.11 Further, there may be cases, for instance, where it is clear that a primary decision will not be altered by an agency - such as where the decision is based on an untested agency interpretation of the law. In such a case, mandatory internal review would be a waste of both the applicant's and the agency's time and effort. In this scenario, it may be preferable for internal review to be optional. Alternatively, were internal review to be mandatory, provision could be made for the decision to be “expedited” straight through to external review. Otherwise, the person challenging the decision will be placed under an unnecessary burden and delay with the overall efficiency of the internal review system being compromised.

3.12 The main argument for mandatory internal review is also focused on efficiency; that is, the mechanism provided by the agency should be used by applicants prior to accessing more formal and expensive external procedures. The Council noted in its Better Decisions report that:

In jurisdictions where internal review is a mandatory precondition to seeking external merits review, rates at which review by review tribunals is sought tend to be lower than in other jurisdictions. ¹⁸

3.13 It could also be said that, where mandatory internal review is introduced, there is a greater impetus for agencies to ensure that the internal review processes that they have are effective. If internal review is mandatory, the aim should be that the applicant gains as much in terms of efficiency as the agency does. This will mean that timeliness and impartiality will be important goals.

3.14 A number of different options have been canvassed:

• No mandatory internal review; ¹⁹

• An agency discretion to refer an application directly to an external review tribunal; ²⁰

• A reviewable agency discretion to refer the application directly to an external review body; ²¹ or

• Mandatory internal review systems. ²²

3.15 Some commentators propose that one solution may be to allow applicants to apply to the internal review and external review processes at the same time. ²³ While this scenario has the potential to cause difficulties and confusion, it must be noted that this is the system that

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effectively operates in the veterans’ compensation jurisdiction where veterans are allowed, indeed encouraged, to lodge applications to the Veterans’ Review Board while undergoing an internal review process. However, such a system would require effective liaison between the agency and the external review body.

| 3. The decision as to whether internal review should be mandatory prior to external review is best made on an agency-by-agency basis. An agency that chooses to make internal review mandatory should ensure the internal review system is as worthwhile as possible for the applicant and does not operate as a potential barrier to effective merits review. |

**Location and independence of internal review officers**

3.16 The introduction of the proposed Administrative Review Tribunal is likely to mean that applicants in some areas of decision making will have access to fewer tiers of merits review than previously. In such a case, the need for internal review to be as impartial as possible becomes increasingly important.

3.17 In order to review decisions in an impartial manner, internal review officers require a degree of independence from the makers of primary decisions. The Council, in its *Better Decisions* report, acknowledged that internal review, by definition, cannot be completely independent of the relevant agency. However, it recommended that internal review be undertaken by internal review officers who are sufficiently independent of the agency primary decision makers whose decisions they review. Dame Margaret Guilfoyle, in her *Review of the Social Security Review and Appeals System*, noted that:

> It should be understood that an authorised review officer undertakes a review with delegated power from the Secretary. It follows that the same obligations under the Act are to be observed. The authorised review officers are able to reconsider the decision with independence from the original decision maker; they are not independent of the Secretary.

3.18 This concept of independence, and the desired benefits of internal review systems, proceed upon the basis that:

The Review Officer is a reasonably senior and competent person who has had nothing previously to do with the case, with whom a disgruntled client can talk on the phone, write, or meet in interview. The effect of this is that...you have an independent person available to give a quick review, without any vested interest in the original decision.

3.19 In the *Better Decisions* report, the Council concluded that:

> ...statistics on set-aside rates indicate that internal review can and does involve a genuine reconsideration by agencies of their decisions.

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24 The *Better Decisions* report, paragraph 6.60.
25 The *Better Decisions* report, recommendation 75.
28 The *Better Decisions* report, paragraph 6.60.
3.20 For example, the Department of Family and Community Services 1998-99 Annual Report indicated that 25.5 per cent of decisions reviewed by Centrelink’s Authorised Review Officers in 1998-99 were changed (compared to 27 per cent in the previous year). Similarly, the Australian Customs Service 1998-99 Annual Report reported that four out of twenty decisions internally reviewed were overturned.

**Proximity to primary decision makers**

3.21 Aggregate statistics of overturn rates do not, however, address perceptions of non-independence, which may arise from a general uneasiness with some organisational arrangements. In particular, it is important that agencies are structured so that internal review officers are organisationally distinct from primary decision makers. This should be the structure that is projected to clients of the agency.

3.22 ‘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.

3.23 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, paragraphs 3.34-3.35 and Chapter 7 discuss the ‘normative effect’ resulting from internal review officers giving advice and feedback to primary decision makers. Ideally, this should not amount to the internal review officer taking on a supervisory role in relation to those primary decision makers.

3.24 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.

3.25 The survey addressed the issue of the separation of internal review officers from the primary decision making areas of the agency. A majority of managers indicated that internal review officers operated separately from primary decision makers (although three of these indicated that the separation was organisational rather than physical). This was a majority overall but not necessarily in each agency. The main reason given for separation was that it assisted in maintaining independence for internal review officers. The only reason given for

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lack of separation was the need for internal review officers to be available to help improve primary decision making.

3.26 A majority of internal review officers also reported that there was separation between primary decision makers and internal review officers. Again, this was a majority overall but not for each agency; in some agencies a majority of respondents reported that internal review officers were not separately located.

**Centralisation**

3.27 One way to achieve physical and organisational separation is through centralisation of internal review officers in a relatively small number of locations away from the offices in which primary decisions are made. This is clearly more appropriate for agencies where primary decision making is not already centralised itself.

3.28 Centralisation can have disadvantages. It has been pointed out that where decisions are made in high volume by comparatively junior officers, and where rights subject to disputed decisions may be objectively of little value but subjectively of great value to the individual client, it may be more appropriate for same-day internal review to be available at every decision making location, rather than being centralised. However, the risk associated with this is inconsistency of decision making.\(^{33}\) Council recognised this risk in the Better Decisions report:

> There is also a risk that the quality of internal review will vary between different geographic regions within an agency, resulting in inconsistent and inequitable treatment of similar cases. This can affect the credibility of internal review. This is also a risk with external merits review, although it is much less of a risk because review tribunals are centrally managed and have relatively small staffs and memberships, making it easier for them to maintain quality control and consistency.\(^ {34}\)

3.29 It may also be difficult to centralise the internal review function where the technical expertise to review the primary decisions is only available at the primary decision making location.

3.30 It should be noted that where internal review officers are physically located with primary decision makers, an agency can take active steps to promote independence and minimise the adverse effects of physical proximity. The most important of these will be the need to ensure that the internal review officers are ‘organisationally distinct’ from primary decision makers (as discussed above). However, further examples of methods of promoting independence could include training in the understanding of the internal review officer role for both internal review officers, and the primary decision makers whose decisions they review.

**Culture**

3.31 It should be noted that one difficulty in maintaining a credible organisational separation of review staff from primary decision makers is through staff movements within the department (or even through officers who are performing both a primary decision making


\(^{34}\) The Better Decisions report, paragraph 6.51.
and internal reviewing function). While it would be impractical and undesirable to prevent staff officers from moving through different areas of the department as part of normal career development, it is important that a strong message be sent that the role of review officers is different from that of mainstream operational objectives.35

3.32 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 the general effects of review tribunal decisions on the quality of the agency’s decision making.36

3.33 It must be noted, however, that the aim of achieving a separate internal review culture is only realistic and appropriate where officers undertaking internal review have that role as their sole or primary task.

Normative effect of internal review

3.34 The advantages of physical or organisational separation in promoting impartiality in decision making must be balanced against the role that internal review plays in assessing defects in policy or performance or in providing training and feedback to primary decision makers (see Chapter 7 - Learning From Review). The survey responses from managers below address 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)

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)

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)

3.35 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. 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.

3.36 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.

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.

7. Agencies should take active steps to ensure that the impartiality or independence of internal review officers is not compromised. For example, managers should positively reinforce the role of the internal review officer and the necessity of independence. Both primary decision makers and internal review officers can benefit from a greater understanding of the role of the internal review officer.

8. Where there is physical or organisational separation between internal review officers and primary decision makers, agencies should consider ways in which active steps can be taken to encourage appropriate contact between internal review officers and primary decision makers in order to harness the positive benefits that internal review systems can offer to primary decision making.

### Number of layers of review

3.37 Some commentators note a practice of requesting applicants to discuss the problem that they have with a decision with the primary decision maker before proceeding to the internal review officer stage.

We try to resolve disputes as early as possible - we encourage discussion with the primary decision maker. Only then do we go through the internal review system -

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the Administrative Appeals Tribunal and Federal Court are a last resort. (internal review officer)

3.38 For example, the policy guidelines used by Centrelink officers state:

Customers seeking a review of a decision should begin with the original decision maker, progressing to the next level ONLY when a satisfactory solution CANNOT be found.39

3.39 The administrative reasons for this - such as greater efficiency - are noted. Also, in some agencies it may be considered that this practice encourages the primary decision maker to take more responsibility for their own decisions. Given some of the issues canvassed in Chapter 7 - Learning from Review, this is clearly a valid aim. However, it is worth examining what impact these practices may have on the ability of agencies to achieve other stated aims of their internal review systems (for example, natural justice) and to comply with the values and principles of administrative law (for example, openness and accessibility).

3.40 One issue is that even in agencies where review by the primary decision maker is merely ‘encouraged’ as normal practice rather than made strictly mandatory, applicants may not be aware that (in some cases) they have a statutory right to a review by an independent officer, and may be too intimidated to insist upon their right to choose to bypass this preliminary step.

3.41 Whether review by the primary decision maker is mandatory or merely normal practice, it can form a barrier to appeal. Given that internal review itself is seen by some commentators as a barrier to the potentially more independent mechanism of external merits review, the imposition of a further step of review by the primary decision maker constitutes an additional barrier to external merits review. The imposition of this additional step may discourage some applicants from pursuing their appeal, by causing ‘appeal fatigue’ at an earlier stage of the review process. Review by the primary decision maker is likely to be the least useful step in the review process, as it is relatively unlikely that decisions will be overturned by primary decision makers in the absence of obvious mistakes or new evidence.

3.42 Notwithstanding efforts on the part of agencies to undertake this step with as much speed as possible, there is a risk that the time elapsed between original decision and final resolution will in many cases be increased. Agencies that require or encourage review by the primary decision maker must take responsibility to ensure that the entire process is not lengthened.

3.43 It may also be an unpleasant and unnecessary process for some clients to have to face the original decision maker with whom they may have had a dispute, or by whom they may feel intimidated.40 Where clients have actually applied for internal review, they may feel cheated to discover that the file has been returned to the primary decision maker for review. It may also be the case that the referral of applications for internal review to primary decision makers could lead to confusion on the part of applicants about which stage they have reached in the review process.


3.44 One commentator has suggested that it should be the decision which is referred to the primary decision maker rather than the client. In other words, the file can be reviewed without the applicant’s personal involvement. In this way, the advantages of review by the primary decision maker can be realised while minimising adverse effects on clients.

3.45 However, this would only work effectively in cases where it is unnecessary for the primary decision maker to contact the client. Elsewhere, this Report has stressed the importance of contact between the applicant and those reviewing the decision, in terms of obtaining information, explaining the decision to the applicant and providing the applicant with natural justice. Therefore, this manner of reviewing decisions will be a somewhat problematic compromise in many cases. However, it can be said that it is a process that does not place the onus on the applicant to approach and deal with someone with whom they have already disagreed.

3.46 Of greater concern is the potential for a system developing within an agency such as the following description of student assistance internal review practice in 1989:

On receipt of request for review the decision will be considered by the position which made the primary decision. A letter notifying the result of the review will be prepared by the authorised person and the file then forwarded to the senior authorised person for signature. Thus, although the legislation requires an independent internal review the Department of Education provides nothing of the sort.

3.47 While acknowledging that this is not a description of recent practice, it is worth noting as an extreme example of a procedure which denies applicants their right to genuine review on the merits by a senior officer.

3.48 In some agencies there may be numerous layers of internal review, with decisions being reviewed by progressively more senior officers. The problems associated with this are similar to those associated with compulsory review by the primary decision maker, in terms of probable delay and ‘appeal fatigue’ on the part of the applicant. There is also the possibility of wastage of resources.

3.49 It is preferable to have a simplified structure consisting of one layer of review by a senior officer uninvolved in the primary decision. Agencies should concentrate on making this single layer of review as effective as possible, to ensure that in most cases it is the final review.

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9. It is preferable to have one layer of official review within an agency.

10. It is appropriate to inform clients that where they disagree with a decision, it may be useful to approach the primary decision maker to discuss the decision with them. In agencies where it is the practice for applicants (or their files) to be referred to the primary decision maker after a request for internal review, care should be taken to make clear to clients that this is a choice rather than a requirement.

11. Agencies who choose to make review by the primary decision maker mandatory should monitor affirmation and set aside rates to satisfy themselves that it is a useful step for both the agency and its clients.

12. Agencies who choose to make review by the primary decision maker mandatory should remain aware of the potential negative effects on clients and take active steps to minimise these. For example, agencies should allow only a short period of time for the primary decision maker to reconsider their decision, to ensure that applicants are not inconvenienced. Where a decision is affirmed by the primary decision maker, the decision should proceed automatically to the internal review officer for review.

13. Review by the primary decision maker should never be held out as being review by an internal review officer.
CHAPTER 4. ACCESSIBILITY OF REVIEW

Introduction

4.1 Accessibility is one of the key principles of administrative law against which internal review systems can be measured. Commentators have noted that internal review can form a barrier to external review, since experiencing several layers of review can cause ‘appeal fatigue’. Where access to, or the process of, internal review has been made difficult for either applicants generally, or for particular groups of applicants, they will be less likely to try to access their external review rights. Therefore, in terms of ensuring the quality and accessibility of the overall merits review system, accessibility of internal review is particularly important.

The introduction of the proposed Administrative Review Tribunal is also a relevant factor in that it will reduce the number of tiers of external review available to applicants. This means that issues related to the effectiveness of internal review mechanisms, such as accessibility to applicants, will be of a heightened importance.

4.2 This chapter discusses the accessibility of internal review systems to applicants; in particular, it discusses ways in which access can be affected by:

- the capacity of applicants to access review rights;
- representation of applicants;
- interpretation services;
- time limits on applications for internal review; and
- fees.

4.3 The chapter also discusses the importance of ensuring that internal review applicants remain aware of their external review rights.

4.4 It should be noted that issues of access have a greater relevance to agencies where those affected by decisions are likely to be disadvantaged or have special needs, as opposed to agencies where clients may be corporate bodies or be assisted by a representative or advocate, whether legal or otherwise.

Capacity of applicants to access review rights

Clients suffer a range of physical, educational and emotional disabilities which may restrict the extent to which they can access review rights. (internal review officer)

4.5 In the interviews, it was noticeable that the most common difficulty identified by internal review officers as affecting applicants for internal review was a factor seemingly irrelevant to the nature of the clients: that primary decision makers had relied on the
availability of internal review as an excuse for poor quality primary decision making. This issue is considered in greater depth in Chapter 7 - Learning from Review.

4.6 The next most commonly identified difficulties were that:

- applicants were suffering from ‘appeal fatigue’;
- applicants were poorly educated; and
- applicants were confused about the review process.

4.7 Less common difficulties were that applicants were ageing, or reluctant to write, or affected by the complexity of legislation or time limits.

Many of our clients don’t read, or don’t like reading so tend to want to come into the office to discuss decisions more because of it. (internal review officer)

The education of our clients will impact upon their capacity to access review rights - they are more likely to experience appeal fatigue. (internal review officer)

4.8 The majority of interviewees in all categories indicated that there were no mechanisms for identifying clients with special needs. Where mechanisms existed, the most common was the use, by staff, of their own experience, intuition or training to identify such clients. Usually, agencies appeared to rely upon clients to identify their own special needs.

4.9 The majority of interviewees at the primary decision maker and internal review officer level indicated that additional services were provided for clients with special needs (such as contacting advocates or representatives, interpreters, social workers, liaison officers and so on). However, further research may be needed in order to determine more fully whether particular groups of clients are able to gain adequate access at the outset to internal review mechanisms.

14. Agencies should, as a matter of good administrative practice, consider instituting mechanisms for identifying clients with special needs.

Representation

4.10 This issue is of interest because a number of commentators have raised concerns about the level of representation available to applicants in internal review procedures. The discussion below relates to representatives, including legal practitioners, and also non-legal advocates such as those employed by community groups, welfare rights centres or other organisations.

4.11 Generally, there is no legislative provision for legal representation or other forms of advocacy in most agencies’ internal review structures.

4.12 Agencies may be concerned that applicants being represented will produce a tension between the aim of fairness and efficiency and the risk that internal review will become more formal, legalistic and costly. However, it should be noted that acceptance of the right of applicants to act through a representative does not necessarily imply the right to a formal hearing. In most cases, the right to representation in this context would amount to the
applicant being able to communicate with the agency through a representative (either verbally or by correspondence) and that representative being able to provide information to the agency.

4.13 The right to representation is of particular importance when the applicant is facing educational, language or cultural barriers or is disabled.\(^{43}\) In this context, the right to assistance by a representative is clearly an issue of access and equity, in a similar vein to that of access to interpreters.

4.14 The agency may also benefit by being able to deal with an experienced person with an understanding of the relevant legislation. The aim should be that in most cases, internal review is the final tier of review, and helpful representation of applicants should assist in contributing to as many cases as possible being resolved to the client’s satisfaction, even if an adverse decision is affirmed by the internal review officer. An explanation of why an adverse decision has been made is often sufficient to satisfy the person seeking review; the use of a representative may help ensure the applicant receives a final explanation that is sufficient to satisfy them.

4.15 Some agencies have concerns about privacy issues where applicants are represented by third parties such as welfare rights and community legal services staff.\(^{44}\) Centrelink has resolved this issue by issuing instructions to officers that they can use ‘implied authority’ to provide client information to welfare rights advocates (using ‘call-back’ procedures to verify the identity of advocates).

4.16 In summary, while agencies may have valid concerns about allowing representation of applicants in internal review processes, these concerns may be addressed by agencies and review officers taking responsibility for preventing its abuse and preserving the informal nature of the process. The answer to agency concerns may be in legislative provisions establishing the right of applicants to act through representatives, while giving the agency the discretion to control the level of intervention, and to disallow representation in specified circumstances.

### Interpretation services

4.17 In its *Better Decisions* report, the Council made a number of observations and recommendations about interpretation issues. While in that report the comments were directed at external review tribunals, and there are significant differences between internal and external review fora (for example, the general lack of face-to-face contact in internal review procedures) it is clear that several points made in that context may also apply to internal review processes.

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4.18 Generally, Council took the view that:

Provision of interpretation services, where necessary with non-English-speaking applicants or witnesses, is both an essential tool for the tribunals to carry out their function effectively, and an aid to accessibility. The Council considers that the cost of interpreters should be seen as a necessary tribunal expense rather than as assistance to individual applicants.45

4.19 Of equal importance, is the requirement that internal review staff be fully trained in the skills of working with interpreters. There is anecdotal evidence of a lack of familiarity with the skills of working with interpreters leading to interpreters being encouraged to take on the role of interviewer. In this situation there is a risk that the applicant will not receive adequate information on their situation, the reasons for a decision, or the availability of appeal.46 Similarly, the Council noted the practice of using the language skills of existing staff to conduct tribunal hearings. While the Council supported the appropriate use of such skills, it cautioned against amateur language skills (however fluent) being seen as a substitute for trained professional interpreters.47

4.20 In relation to translation of written materials and documents, which possibly has a greater relevance to internal review processes, the Council took a rather different view:

Translation of documents is very expensive. It would be neither affordable nor reasonable to require tribunals to pay for the translation of information at the request of the applicant. The general rule should be that applicants are entitled to all relevant information in whatever language it is already available, and the choice of arranging for their own translations if they wish. This should not normally be necessary as the significant content of any information will be explained to a non-English-speaking applicant through an interpreter at a conference or hearing. Tribunals should however have the discretion to provide translations where they consider it necessary.48

4.21 In the interviews, only Centrelink and CRS Australia officers mentioned the use of interpreters. This difference may be due to the differences in clientele between the agencies involved in the project.

16. Access to an interpreter for face-to-face or telephone contact between internal review officers and clients should be automatic and the service should be provided free of charge. Where appropriate, internal review officers should be familiarised with the skills of working with interpreters.

Time limits on applications for internal review

4.22 One difference between the different systems of internal review surveyed is the statutory time limits placed on applications for internal review (for example, a requirement to seek review within 28 days of the original decision). The information in Chapter 2 - Background and Practice of Internal Review in Agencies Surveyed showed that among the

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45 The Better Decisions report, paragraph 5.58.
47 Better Decisions report, paragraph 5.64.
48 Better Decisions report, paragraph 5.65.
agencies participating in this report there are variations based both on whether or not there is a
time limit, and the length of the time limits where these exist.

4.23 This issue was highlighted in Dame Margaret Guilfoyle’s *Review of the Social
Security Review and Appeals System*, where it was noted that the social security legislation
contained no time limit within which a person must seek review. It was argued that time
limits should be introduced, because of the practical need for finality and because of
difficulties associated with the maintenance of client records for a number of years.49

4.24 However, such time limits can impact unfairly on disadvantaged clients who may not
be aware of their review rights, or have difficulty in accessing review within the time limits.
One way to reduce the impact of time limits on such groups of applicants is to include in
legislation exemptions which operate to ensure that those affected by special circumstances
are entitled to an extension of the time limit.

4.25 Where time limits on applications for internal review exist, special attention should be
given to considering the most effective way of notifying applicants of their internal review
rights, including time limits.

4.26 One relevant factor is the dates of effect of favourable internal review determinations.
For example, under section 109 of the *Social Security (Administration) Act 1999*, unless
internal review is sought within 13 weeks of the original decision, a favourable internal
review decision can only be backdated to the date of the request for internal review, rather
than to the date of the original decision. The existence of this type of provision (which of
itself provides an effective time limit) may reduce the need for the introduction of strict time
limits within which applications for review must be made.50

17. When decisions about time limits on applications for internal review are made, the
desirability of administrative finality should be balanced against providing individual justice
to applicants. Where appropriate, legislative provisions ensuring the granting of extensions in
special circumstances should be included.

**Fees**

4.27 A feature of internal review is that generally no application fee is required.

4.28 As such, it provides a much cheaper (and thus more accessible) alternative to external
review where application costs are often imposed and where the cost of representation may be
an issue, especially if an opposing agency has directed significant resources to defending its
decision.

4.29 In those jurisdictions where a fee is imposed,51 there has been heavy criticism that this
provides a significant deterrent to applicants seeking review and detracts from the immediate
benefits of an internal review system.52

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Security* August 1997 at 33.

50 Time limits for completing an internal review will be discussed in Chapter 5.

51 Such as, for example, decisions made under the *Freedom of Information Act 1982*. A fee of $40.00 is
prescribed for an application for internal review of decisions made under the Act (regulation 5 of the
Freedom of Information (Fees and Charges) Regulations).
4.30 In its *Better Decisions* report, the Council’s view was that:

It is appropriate that there be no application fee for internal review. Fees for internal review create a barrier to access by clients to internal review, and make only a token contribution to the cost of the review.\(^{53}\)

4.31 Further, it is probably not cost effective to collect small fees, given the associated costs of collecting and accounting.

4.32 In the agencies surveyed as part of this project, internal review was provided to applicants without a fee being imposed.

18. Internal review should be offered free of charge.

**Notification of external review rights**

*Standards for notification of external review rights*

4.33 In the *Better Decisions* report, the Council gave consideration to the amount and clarity of information given to clients about their appeal rights.

The key... is that people affected by administrative decisions are informed by agency decision makers of the making of those decisions and of whatever rights of review are available to them. There is little point in providing review mechanisms if the people those mechanisms are designed to assist are unaware of the existence of the mechanisms or how to make use of them.\(^{54}\)

4.34 These issues are relevant to this project because in cases where agencies offer internal review (particularly where it is a mandatory prerequisite to external review), it will be at the end of an internal review process affirming the original decision that notification of external review rights will become significant to the applicant.

**Codes and guidelines**

4.35 In its *Better Decisions* report, the Council examined the current system of standards for notification of review rights. Under the AAT Act, agencies are obliged to notify those affected by AAT-reviewable decisions of their review rights (unless this obligation is displaced by a specific notification provision in another statute).\(^{55}\) Agency decision makers subject to the obligation in the AAT Act are required to have regard to a Code of Practice (‘the Code’) issued by the Attorney-General governing the content and form of notifications.\(^{56}\)

4.36 The Council believes that there should be a common set of high standards for notification of review rights in all areas of decision making,\(^{57}\) and at all stages of the review

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\(^{53}\) The *Better Decisions* report, paragraph 6.59.

\(^{54}\) The *Better Decisions* report, paragraph 5.9.

\(^{55}\) The *Better Decisions* report, paragraph 5.11.


\(^{57}\) The *Better Decisions* report, paragraph 5.15.
process.\textsuperscript{58} It considers that the AAT Code should be the model, because the standard it imposes is a high one,\textsuperscript{59} but was also of the view that the Code should be reviewed to adopt the highest standards of content and presentation.

4.37 The Bill to establish the new Administrative Review Tribunal currently provides that the President of the Tribunal may issue guidelines to facilitate the notification of decisions and review rights.\textsuperscript{60} The views of the Council, below, about the content of the AAT Code of Conduct, apply equally to the content of the ART guidelines.

4.38 The Code currently lists some standards which should definitely be included in notices, and lists some additional information to which consideration may be given to including. The Council considered that all the standards in the Code should have the same status.\textsuperscript{61}

4.39 The Council was of the view that standards for notification should include:

- How, where and when to contact the review body (locations, hours, address, telephone and facsimile numbers).
- Any time limits for applications and the effect of not meeting them.
- Any cost (if none, then the fact that applications are free), and any provision for refund of fees if the applicant is successful.
- Any provision for fee waivers, expenses or financial assistance.
- An accurate explanation:
  - of the difference between the tribunal and internal review;
  - that tribunals are not courts and do not have a court-like level of formality; and
  - of the options for representation.
- Explanation of any assistance available:
  - from the review body (video, interpreters, child care and so on); and
  - from other sources (including legal aid authorities and non-government organisations).
- An application form should always be enclosed.
- A brief explanation of the person’s right of complaint to the Ombudsman if dissatisfied with any aspect of the agency or tribunal’s handling of their case.\textsuperscript{62}

A brief explanation should also be provided of rights to seek judicial review of administrative decisions.

4.40 In relation to the issue of enclosure of application forms, the Council noted that some problems could arise (for example the sending in of applications for review by those ineligible to have decisions reviewed), but took the view that these problems could be overcome by more sophisticated targeting of intended recipients or through better

\textsuperscript{58} The \textit{Better Decisions} report, paragraph 5.14.
\textsuperscript{59} The \textit{Better Decisions} report, paragraph 5.15.
\textsuperscript{60} Administrative Review Tribunal Bill 2000, section 56.
\textsuperscript{61} The \textit{Better Decisions} report, paragraph 5.18.
\textsuperscript{62} The \textit{Better Decisions} report, paragraph 5.21.
explanations to people of their review rights. It also noted that providing an application form is particularly important when time limits for making an application are short.  

**Clarification of type of review provided to applicant**

4.41 In the *Review of Commonwealth Merits Review Tribunals Discussion Paper*, the Council noted that in a number of situations notification about external review rights was of particular importance.

4.42 One of these was the situation where an application made to an external review agency is referred back to the internal review stage due to the fact that internal review is a mandatory first step in that area. The Council took the view that when an internal review decision is made in these circumstances:

> It is important that applicants are made aware that the decision has not already been externally reviewed, and that they now have that right. Peak welfare bodies have suggested that some individuals, having had their decisions internally reviewed, may sometimes be confused and decline to exercise their rights to external review, thinking that they have already had their case considered by an independent decision maker.

**Advice by internal review officers about external review**

4.43 A further problem recognised by the Council related to:

Anecdotal evidence of internal review officers actively dissuading clients from pursuing review rights, advising applicants that their case is hopeless, or even misleading them.

4.44 The Council went on to note that:

While departmental management would never expressly sanction this behaviour, it can be encouraged or discouraged by organisational culture.

| 19. | Where internal review is mandatory, and applications for external review are referred back to the agency, care should be taken to ensure that applicants understand that external review has not taken place, and that they still have the right to seek external review if they are unhappy with the outcome of the internal review. |
| 20. | Agencies should take care to ensure that internal review officers do not inappropriately discourage applicants from accessing external review rights. |

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63. The *Better Decisions* report, paragraph 5.20.
CHAPTER 5. PROCESS AND PRACTICE OF INTERNAL REVIEW

Introduction

5.1 This chapter explores a number of aspects of the actual practice of internal review. To a large extent, this chapter expands and elaborates upon the internal review topics discussed in the Council’s Better Decisions report, in which the Council concluded, among other things, that internal review should be timely, free and involve an appropriate level of personal contact between internal review officers and applicants.68 This chapter also explores the additional issue of whether internal review officers should be able to consider new information, or only the information that was available to the primary decision maker.

Personal contact with the applicant

5.2 A common criticism of internal review procedures is that they are undertaken by the internal review officer without any personal contact with the applicant - reliance being placed on slow, written and bureaucratic correspondence. As the Council noted in its Better Decisions report:

Often the first opportunity for the applicant to put her or his case personally will not arise until the external review stage.69

5.3 The Council went on to note that:

It is often observed that some cases would not proceed to the external review stage if there were more personal contact with applicants at an earlier stage of the decision making process.70

5.4 Some empirical evidence exists to support this claim, revealing that if an agency’s review officers spoke to the applicant prior to making a decision, there were fewer appeals to external tribunals.71

5.5 It is clear that without an appropriate level of contact with applicants, agencies’ internal review systems may be prevented from satisfying the need for natural justice. However, there is an apparent tension with other principles such as efficiency. That is, one of the strengths of internal review is seen to be the speed and ease with which the process can efficiently satisfy large numbers of clients who might view external review as being too inaccessible.72

68 The Better Decisions report, recommendation 75.
69 The Better Decisions report, paragraph 6.64.
70 The Better Decisions report, paragraph 6.64.
5.6 Nevertheless, most commentators and agencies recognise the desirability of having more personal contact with applicants at an earlier stage of the review process. Even in seemingly straightforward cases where the internal review officer is satisfied he or she has all the relevant information, there is still value in contacting the applicant as it is consistent with the principles of natural justice to give a person an opportunity to have their say (if desired). Similarly, it is good administrative practice to update an applicant on the progress of their application.

5.7 In its *Better Decisions* report, the Council took the view that:

Agencies should continue to explore opportunities for early resolution of issues through personal contact with applicants. In many cases, this could be achieved through telephone contact. At the very least, applicants should regularly be informed of the progress of their application.  

5.8 Similar comments were made by survey participants:

> The whole process of decision making involves the client. It is a core principle. (internal review officer)
>
> We get the papers in, look them over, check computer records, and if necessary ring up and see if the applicant has further information to strengthen their case. I come from the perspective of ‘how can we best assist the person to get the benefit.’ We should come up with the right answer this way. (internal review officer)
>
> The strength of decision making starts with involving the person with whom the decisions are being made. If we stick with this, there is not a lot of review necessary. (manager)
>
> We need more resources—we tend to scan cases rather than conduct an in-depth review. It would be nice to ring every applicant. (internal review officer)
>
> Often applicants expect to be contacted before a review is conducted and are surprised when the review is finished and they get a letter informing them of the result. (internal review officer)

5.9 The survey data revealed an encouraging level of contact between internal review officers and applicants, with a majority of surveyed internal reviewers reporting that they contacted clients as a matter of course. However, this was not the case across all agencies; respondents from two agencies indicated that they did not contact clients as a matter of course. The telephone was by far the most common method for communicating with clients, with 21 out of 22 respondents using it.

5.10 A migration-related submission to the Council’s review of Commonwealth merits review tribunals indicated that, for some applicants, informal telephone contact from internal review officers could be problematic. Such contact was used to gather important information to be relied on in decision making, but calls could occur without warning at times when applicants were not prepared or able to adequately present their case or answer questions.

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73 The *Better Decisions* report, paragraph 6.64.
74 Internal review is no longer practised in the migration jurisdiction.
about it.\textsuperscript{75} Internal review officers need to be careful to exercise an appropriate degree of sensitivity and offer to call back at an agreed time if that may make the process easier for the applicant.

5.11 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.

5.12 All but one internal review officer indicated that clients could contact them if they wished.

5.13 Internal review officers were asked how they communicated their final decision to the applicant. All did so by letter.

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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. \\
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\textbf{New information}

5.14 It has been pointed out that if internal review is to add value to the decision making process, the review officer needs to do more than reconsider the same papers already perused by the original decision maker, as it is only when the review officer has taken additional steps to obtain information and to analyse and to evaluate the information supplied that the aims of the internal review process will be met.\textsuperscript{76}

5.15 Some empirical data exists to support the claim that the receipt of new information is essential to the success of the internal review process. Figures from the Department of Immigration, for example, show that 56 per cent of set-aside decisions made by the then Migration Internal Review Office (MIRO) were the result of new evidence.\textsuperscript{77} The Department of Veterans’ Affairs had also indicated that the majority of changed decisions following section 31 internal reviews are the result of new evidence being presented.\textsuperscript{78}

5.16 The dilemma here is the tension between the aims of fairness and correct decision making, and the aim of efficiency in relation to the amount of time taken in processing the review and the resource cost of such a process. It can be argued that the more thorough the review, and the longer the time period involved, the more likely it is that fresh evidence will emerge. However, investing too much time in the internal review stage could compromise the efficiency aspects of internal review.\textsuperscript{79}

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\textsuperscript{75} Submission of the South Brisbane Immigration and Community Legal Service (Submission number 30) page 7.


\textsuperscript{78} Department of Veterans’ Affairs \textit{Annual Report 1996-97} page 47.

5.17 It may seem more rational for new evidence to be returned to the primary decision maker for consideration, since it was not taken into account in the original decision and therefore does not require ‘reconsideration’ as such. However, this practice would have the potential to complicate the process for the applicant.

5.18 All internal review officers interviewed from all relevant agencies indicated that new information is considered in reviews, although Customs officers noted that under the relevant legislation, they could only consider information provided within 28 days of the original decision being made.80

5.19 The vast majority of surveyed internal review officers indicated that they also actively sought new information, and provided other assistance to applicants to strengthen their applications for internal review. The most common type of assistance provided was the pointing out of obvious gaps or omitted detail in applications for review. Other assistance provided included further investigation of the case, explanations of the review process and explanations of how the claim could be successful.

22. Internal review officers should be able to consider information not available to the primary decision maker at the time of the original decision.

**Timeliness of internal review decisions**

5.20 One of the perceived advantages of internal review mechanisms is the speed with which they can deliver merits review of decisions to applicants who might otherwise experience time-consuming delays were they to pursue their claim through the external review process. Speed is important for agencies as well as applicants, with internal review officers surveyed for this project most commonly responding that their agencies offered internal review because it was quicker and cheaper for the agency than external review.

5.21 However, it is also a common criticism of internal review processes that it takes too long for internal review decisions to be made.

A routine difficulty with internal review is the delay. Some reviews arriving in early December are lucky to be dealt with by March. There is a great backlog in cases. (internal review officer)

Many decisions are now being made late, therefore we need a lot of follow up work. Often making a decision late actually creates more work. We often make decisions in haste which increases the chance of getting things wrong. (primary decision maker)

In the *Better Decisions* report, the Council noted that:

This criticism is particularly relevant in cases where the internal review affirms the agency’s decision: the applicant may view the internal review as being nothing more than an impediment (because of the additional delay and cost) to reaching the external review stage, and this can contribute to ‘appeal fatigue’.81

80 *Customs Act 1901*, section 269SH.
81 The *Better Decisions* report, paragraph 6.55.
5.22 The problem of internal review being seen as an impediment to external review is heightened where internal review is a compulsory step prior to external review - where delay occurs it will certainly cause frustration to those applicants who would have preferred to omit the internal review step.

**Time limits**

5.23 This potential problem of delay is compounded by the fact that, for some agencies, there are no statutory time limits within which internal review officers must make their decisions, even when the right to internal review is specifically provided for in the statute.

5.24 The Council noted, though, in its *Better Decisions* report, that a number of agencies have informal performance standards for timeliness of internal review.  

5.25 For example, the Department of Veterans’ Affairs has a target of 50 days (average) to process an internal review. This target is an upper limit and in 1998-99 the average time taken to process internal reviews was 44 days. Similarly, Centrelink’s internal performance targets for timeliness of internal reviews are that 75 per cent of all reviews should be completed within 28 days, and that 95 per cent of reviews in which the customer has been left with no income as a result of Centrelink actions should be completed within 14 days.  

5.26 The Council noted, in its *Better Decisions* report, that it is aware that one of the reasons for agencies not meeting their internal timeliness targets is that they are not always in control of the process:

> In some cases, delays in internal review may be contributed to by the applicant: for example, the applicant may fail to respond to the agency’s requests for further information.  

5.27 It has been noted, however, that such delays could be minimised through better use of telephone or face-to-face contact with applicants.  

5.28 In the *Better Decisions* report, the Council concluded that:

> As a general principle, time limits should be introduced for internal review, in order to reduce the potential prejudice to clients that can result from lengthy delays in internal review. Generally a 28-day limit would be appropriate, although there may be circumstances in which it would be appropriate to modify this. After the expiry of the time limit, the applicant should be deemed to have applied for external review, and the case should be referred to the relevant review tribunal.

5.29 Under such a system, the agency will have been deemed to have affirmed the decision under review. The disadvantage to this approach is that some applicants may prefer to persist

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82 The *Better Decisions* report, paragraph 6.56.
83 Annual Reports of the Repatriation Commission, the Department of Veterans’ Affairs and the National Treatment Monitoring Committee 1998-99 page 126.
84 Department of Family and Community Services *Annual Report* (1998-99) page 268.
85 The *Better Decisions* report, paragraph 6.56.
87 The *Better Decisions* report, paragraph 6.57.
with internal review rather than proceed directly to external review. This may be particularly so where applicants are unrepresented and unassisted.

5.30 A preferable alternative may be to give applicants the choice of either persisting with internal review, despite expiry of the time limit, or proceeding to external review. As such, the applicant could choose either:

- to request a tribunal to exercise a discretion to proceed with external review, notwithstanding the lack of an internal review decision; or
- to persist with internal review, despite the expiry of the time limit.

Alternatively, the applicant could be given an automatic right to choose to proceed to external review once the time limit on internal review has expired.

5.31 In the Council’s Report No. 37 *Administrative Review and Funding Programs (A Case Study of Community Services Programs)*, the Council recommended that:

> A stop-the-clock mechanism should apply if a department is awaiting information from an applicant for review.88

5.32 An interesting model in this context is the system for Department of Veterans’ Affairs internal reviews under section 31 of the *Veterans’ Entitlements Act 1986*. Under this model, the Department is empowered to conduct an internal review, but only where the time limit for application to the Veterans’ Review Board has not expired, or where application to the Veterans’ Review Board has been made but has not yet been determined. This system does place a clear onus on the Department to conduct the internal review in a timely manner.

23. Agencies that do not have statutory time limits for internal review decision making should consider whether introducing them would improve responsiveness to applicants.

24. Where statutory time limits are decided against, internal timeliness standards are a useful alternative provided they are formulated using an appropriate balance between realism and responsiveness to customers, and that workloads for internal review officers are designed to allow the deadlines to be met.

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88 Administrative Review Council *Administrative Review and Funding Programs (A Case Study of Community Services Programs)*, recommendation 3.
CHAPTER 6. MANAGEMENT AND SUPPORT

Introduction

6.1 This chapter examines issues of particular relevance to those with management responsibility for internal review officers and the overall internal review system. These include:

- financial aspects of the provision of internal review;
- skill building in relation to internal review officers;
- whether internal review officers should specialise in internal review or combine this function with other tasks;
- quality control of internal review; and
- management’s role in promoting the importance of internal review.

Financial aspects of the provision of internal review

Reducing the use of external review

6.2 It is generally considered that the manner in which internal review systems can ‘filter’ cases that might otherwise progress to the more costly external review systems far outweighs perceived problems. Support for the contention that internal review reduces the use of external review is usually measured through the use of appeal statistics.

6.3 In the income support area, in 1998-99, 19.5% of decisions made by Centrelink internal review officers were appealed to the SSAT.\(^9\) By contrast, in the refugee jurisdiction (which does not have an internal review stage) in 1998-99, 76% of onshore protection visa decisions were appealed to the Refugee Review Tribunal.\(^10\) While there are special factors influencing the high rate of appeal in the refugee jurisdiction, figures such as these suggest that the requirement to go through internal review before applying to the external tribunals does, at least in the income support jurisdiction, have some effect on the external appeal rate and hence the workload of tribunals.

6.4 When an internal review system is implemented for the first time, its impact on the workload of an existing external merits review tribunal can be monitored. However, it will not always be possible to infer a causal relationship between the internal review system and any changes to tribunal workload. For example, a 1993 evaluation report on the Social Security Review and Appeals System concluded that:

It is difficult to determine exactly what impact the introduction of Authorised Review Officers had on the workload of the SSAT. Workload and timeliness statistics for the

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\(^9\) Information provided by Centrelink.
\(^10\) Department of Immigration and Multicultural Affairs Fact Sheet “Seeking Asylum within Australia” 12 November 1999.
Tribunal...show variations over time which can be attributed to several factors including changes in legislation as well as policy.\footnote{Department of Social Security Social Security Review and Appeals Evaluation Report June 1993 at 45.}

6.5 However, in the \textit{Better Decisions} report, the Council concluded that:

It seems clear that the volume of applications to review tribunals would be much greater if internal review was not available.\footnote{The \textit{Better Decisions} report, paragraph 6.53.}

6.6 The main benefit of a reduction in caseload for external merits review tribunals is obviously a reduction in the costs associated with the broader merits review system.

At a time when there are repeated calls for fiscal responsibility, internal review reduces the caseload of external review bodies, thus reducing their costs.\footnote{Creyke, R. ‘Sunset for the Administrative Law Industry? Reflections on developments under a Coalition Government’ 87 \textit{Canberra Bulletin of Public Administration} 39 at 47.}

6.7 The significance of this issue may be reinforced when the Administrative Review Tribunal is established, if the different divisions of the Tribunal are each funded separately through the running costs of their corresponding portfolios. In this scenario, monitoring by portfolios of the rate of external review applications in their division is likely to be linked to ongoing efforts by decision making agencies to minimise the number of applications for review.

\textit{Costs of internal review}

6.8 Opinion on the cost-efficiency/cost-reduction benefits of internal review is not unanimous. One commentator has claimed that internal review merely increases the number of appeal processes available to persons affected by administrative decisions and consequently reduces the ability of the merits review system to deliver its dispute-resolving services at reasonable cost and on a timely basis.\footnote{Walsh, Sen P ‘Equities and Inequities in Administrative Law’ (1989) 58 \textit{Canberra Bulletin of Public Administration} 29 at 30.}

6.9 It has also been noted that any savings claimed to result from the introduction of an internal review system must be balanced against the costs of implementing and maintaining the system. For example, setting up a comprehensive internal review process involves the removal of staff from other activities and retraining for their new determinative function.\footnote{Creyke, R. ‘Sunset for the Administrative Law Industry? - Reflections on Developments Under a Coalition Government’ (1998) 87 \textit{Canberra Bulletin of Public Administration} 39 at 47.}

6.10 A further dimension to the issue of cost has been the effect that merits review systems in general can have on the formulation of budgetary expenditure. In addition to the direct costs of using the internal review system per se, the exercise of a power of review has been said to lead to:

A statutory interpretation or a decision based on such an interpretation, not in the expectation of those formulating budgets for expenditure under enactments.\footnote{Nicholson, R. ‘Review of Government Decisions: Limitations to Review’ (1987) 61 \textit{Australian Law Journal} 629 at 632.}
6.11 In other words, a merits review decision that adopts a new interpretation of legislation, for example in granting a benefit, has the potential to result in a level of government expenditure that was not originally envisaged in the introduction of that government program or payment. Obviously, however, this will be dependent on the level of independence that the person or body conducting the review has from the established policy and decision making guidelines of the agency. Consequently, this is more of an issue in relation to external review bodies, as an internal review system is more vulnerable to executive retribution in relation to the cost implications of its decisions.97

6.12 That is, the internal review system provides a more ‘manageable’ system of dealing with what are perceived to be inappropriate policy or decision making processes within the department, which may also lead to resource saving. There is a risk, however, that the system may be ‘managed’ in such a way as to avoid the need to change decisions that are obviously unlawful, in the name of cost saving. It is of course necessary for agencies to administer the relevant statutory scheme as laid down by the Parliament and interpreted by courts.

Measuring the cost efficiency of internal review

6.13 Managers who participated in the survey were asked which factors were relevant in measuring the cost efficiency of the internal review system. Consistent with the aims of internal review as identified by agencies (see Chapter 1 - Introduction), there was a heavy focus on the minimisation of appeals to external bodies (this was the most common answer given by managers).

6.14 The next most common factors mentioned were similar in focus: the provision of cheaper review for applicants and the agencies, and the improvement of decision making and consequent reduction of appeal rates over time.

6.15 Another factor mentioned by several managers was the opinion that internal review was a necessary accountability tool (with the implication that its value could not be measured in strict cost-effectiveness terms). This was reassuring, as there is a risk that the focus on the resource saving aims of internal review systems may detract from the fundamental aims of good administrative practice in providing procedural justice and a review on the merits of decisions in individual cases.

Effect of resource cuts

6.16 The survey asked about resource cuts in an attempt to discern the impact these had on the ability of internal review systems to meet their aims. A majority of primary decision makers, internal review officers and managers agreed with the proposition that resource cuts had affected decision making and review. A greater proportion of managers agreed with this proposition than either primary decision makers or internal review officers.

6.17 Among managers and internal review officers, the most common effect of resource cuts mentioned was workload problems, with experienced officers leaving and others lacking qualifications for the job. The next most commonly mentioned effect was a decline in the quality of decision making at primary decision maker level, particularly with regard to evidence collection and the giving of reasons.

6.18 In general, primary decision makers did not agree that the quality of their decision making had declined, with only two participants mentioning this as an effect of resource cuts. Heavy workload was most commonly mentioned as an effect (identified by eleven officers). Other less commonly mentioned problems were timeliness and fewer checks on their work by quality assurance officers or managers.

6.19 Two internal review officers felt that there could be positive effects from resource cuts, such as increased accountability and more efficient work practices.

No one looks at how the work can be done differently, what can be turfed. They are very reactive about the cuts, whereas accountability can work for you. (internal review officer)

25. Where an agency is affected by resource cuts which may impact upon the quality of primary decision making, the agency should consider ways in which internal review officers can be helped to maintain the quality of the system.

Skill building

6.20 As part of the survey, managers were asked what they looked for in an internal review officer. The most common responses were:

- sound knowledge of the legislation; and
- sound oral and written communication skills.

6.21 Other common responses included:

- being client focussed;
- having good interpersonal skills;
- good analytical and investigative skills; and
- sound knowledge of the subject matter.

6.22 These responses tended to suggest that the aims of agencies’ internal review systems, and the values and principles of administrative law, were being appropriately taken into account in the selection of internal review officers. The only obviously appropriate attributes that were not mentioned by managers appeared to be personal efficiency and fairness, although perhaps agencies considered these to be necessary for all officers and not specific to internal review officers.

Contact and discussion between internal review officers

6.23 Managers were also asked what systems were in place to promote contact, discussion and exchange of ideas between internal review officers. Apart from regular staff meetings, the only other system in place to promote contact, discussion and exchange of ideas between internal review officers was physical location of internal review officers with each other. At least a third of managers did not indicate that any systems were in place to promote contact and discussion. This may be an issue to which agencies may wish to give further attention,
given their stated aims of using internal review systems to provide not only correct decisions in individual cases, but improved decision making overall.

6.24 The survey results revealed a reasonable level of contact and discussion between internal review officers, with twenty-four out of thirty-three internal review officers reporting that they contacted other internal review officers during a review either regularly or sometimes. The most commonly reported reason for doing so was to discuss the application of facts, law or policy. Other reasons included to ensure that review criteria were applied consistently and to discuss trends in internal or external review.

Training

6.25 One potential problem with internal review mechanisms that has been identified is the issue of inadequate training for internal review officers. This view seems to be borne out by the survey results, with most of the internal review officers (at all levels) who were surveyed for this project reporting that they did not receive any professional development training. There were significant differences between agencies in their responses to this question, ranging from unanimity between internal review officers that they received training, to unanimity that they received no training.

Most of the training provided is for primary decision makers and not for end of line training. Training is for implementation of the legislation and not for internal review officers. This seems to show a lack of appreciation of the internal review officer role. (internal review officer)

There is very little training available. Generally, internal review officers just get taught the legislation, but not much specifically on good decision making per se. (manager)

Training is unnecessary for internal review officers because they are experienced decision makers. Instead, we use the mentor system for training. (manager)

6.26 Of those who did receive training, it was most commonly reported that this training occurred less than once a year. Interestingly, the majority of managers surveyed reported offering professional development training to internal review officers.

6.27 In agencies where little or no training is provided 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 of principles of administrative law (lawfulness) may in some cases be jeopardised.

6.28 Where training was received by internal review officers, the most commonly reported subject matter of the training was training specifically related to work subject matter. Less common was training based on understanding the relevant legislation. This is no doubt due to the internal review officers being seen as ‘experts’ on the application of the relevant legislation, but there may be, in some instances, scope for training in this area. In agencies where the legislation administered is frequently amended and increasingly complex, expertise may quickly become outdated.

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.

**Spread of workload/specialisation**

6.29 It has been noted that in some areas, provision of internal review may occur on a less than full-time basis. The obvious risk associated with this is that review officers will have little chance to develop expertise and may lack rigour due to constantly competing demands for the completion of other non-review duties.

6.30 However, in some agencies, the small number of requests for internal review would mean that it would not be feasible to have officers dedicated solely to internal review. There is wide disparity among agencies in relation to the volume of requests for internal review. Within the group of internal review officers surveyed for this project, the number of cases being reviewed per officer varied greatly both across and within agencies, from 0-5 cases per week to more than 20 per week.

6.31 Only internal review officers at the Administrative Services Officer Class 5 level responded to the survey question about whether they performed work other than internal review. Nearly half of them indicated that they did. The type of work varied; the most common being general legal, project or policy work, management work and quality assurance.

6.32 The most common reason given for the performance of other work was that there was not enough demand for internal review. However, another common reason for the performance of other work was a shortage of officers in areas other than internal review.

6.33 It was clear from survey responses in general that some internal review officers were expected to have a role in the training of primary decision makers. Seemingly, where this occurs it is not considered ‘other work’, but is regarded as part of the intrinsic role of the internal review officer. Despite this, it did not appear that many managers considered training ability as a criterion when selecting internal review officers (see the topic *Skill Building* in Chapter 6 - Management and Support).

> Internal review system is a very good process, but costly. It needs to use the expertise of internal review officers more in terms of educating staff. (manager)

> The role of the internal review officer isn’t just to look at the primary decision makers’ decisions. It is also to focus on improving the skills of the primary decision maker. (internal review officer)

6.34 Interviewees were asked what effect the other work performed by them had on their internal review work. It was clear that performing other work was not always a problem; indeed in some cases the ‘other work’ was the major function, with internal review forming only a minor part of the officer’s work. Out of twenty responses, eight were that the other work complemented their internal review work. Seven gave the response that the other work distracted them from their internal review work. Some officers had both positive and
negative reactions to the requirement to do other duties; potential workload problems on one hand were balanced by variety of work on the other.

6.35 Internal review officers were also asked about the administrative support available to them. The most common answers were access to legal advice, access to databases, access to libraries and access to the internet. Again the issue of lack of training for internal review officers raises itself since access to training was far less commonly mentioned and only one officer mentioned access to more experienced staff.

We make lots of discretionary decisions but are given a lot of assistance in making them: internal instructions; the policy guide to the administration of the Act; intelligent information system with commentary on sections of the Act - it is equivalent to an excellent annotated Act. Also, the Social Security Reporter is updated monthly by Welfare Rights on the Social Security Appeals Tribunal and the Administrative Appeals Tribunal cases. The Administrative Law section is also available in the same building. (internal review officer)

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

Quality control of internal review

6.36 The survey for this project attempted to ascertain whether the management of internal review mechanisms included quality control systems to ensure that the internal review system was meeting its aims.

The primary control mechanism is to limit the internal review officers to 5 nationally. There is a centralised management of internal review. (internal review officer)

6.37 Most managers and internal review officers, across all agencies, indicated that their agency had quality control mechanisms for internal review. Commonly mentioned methods included:

- quality assurance processes;
- maintaining statistics of the numbers of reviews, timeliness standards, and the success and failure rate of appeals;
- general scrutiny by management; and
- internal review officers giving feedback to primary decision makers and management.

6.38 Meetings and conferences and the monitoring of complaints to the Ombudsman, local members and other bodies were mentioned less often.

There is no real monitoring of internal review officer decisions in this way. If an outrageous decision is made against the customer, they would complain. If an outrageous decision is made in favour of the customer, you wouldn’t know about it. (internal review officer)
Two thirds of managers indicated that they kept statistics of internal review reversal rates. These statistics were most commonly used to monitor trends, but were also used to:

- assess workload;
- provide feedback as part of an ongoing quality assurance process;
- identify why decisions were set aside;
- identify problems in policy or legislation;
- look for reasons for variations in the set aside rate; and
- identify training needs.

A minority of managers kept statistics about individual internal review officers’ reversal rate of decisions.

**Monitoring external review rates**

One way in which the success of internal review mechanisms can be determined is by monitoring the rates of applications for external review.

The only good test of decision making is how many decisions go on to the Administrative Appeals Tribunal. (internal review officer)

Managers were asked whether rates of application for external review were used in their agency as an indicator of the quality of the internal review process. Nine responded that they were. Among those who did use rates of application for external review in this way, the information was used to identify problems and trends, and to assume there was a problem if appeal rates were high.

However, slightly more than half the managers said they did not use external review application rates in this way. The reasons given for this were that appeal rates were higher in some states due to factors such as the policy of appeal by lobby groups or applicant advocates, or that cases decided in the client’s favour were not picked up in this way.

It could be that some cases never get to review because they have been granted. Many cases decided in customers’ favour are not being picked up by statistics. (manager)

It is true that the use of external review application rates in monitoring the quality of internal review can be problematic, since they can vary for many reasons unrelated to internal review. For this reason, it would be undesirable for the monitoring of external review application rates to be the only quality control system employed by an agency.

I don’t feel as if the agency has any quality control mechanisms. External review acts as quality control. Apart from that, no-one could identify poor case work by the internal review officers. The primary decision makers would complain to the manager if unhappy with an internal review officer’s work. (internal review officer)
6.44 The survey results discussed in this topic do indicate that internal review systems were being monitored to ensure their quality by those with management responsibility for them. However, a majority of internal review officers at all classification levels reported that they were not given feedback about their decision making processes. In relation to those who reported that they were given feedback, the most common sources of the feedback were supervisors, primary decision makers and through the quality assurance process. Most of those who received feedback reported that they found it useful.

29. Quality control systems for internal review should include mechanisms for giving internal review officers regular feedback about their decision making process.

Management’s role in promoting internal review

6.45 The following comment from an internal review officer participating in the survey expresses frustration about management attitudes towards internal review:

There is a lack of appreciation of the internal review officer role. We would be lampooned if we didn’t get it right. Despite this, there is a suggestion of downgrading the internal review officer role. Management doesn’t understand the business of what internal review officers do. A very small amount of all decisions made are challenged. This still does not abrogate management of responsibility for knowing about what internal review officers do. (internal review officer)

6.46 Chapter 3 - Designing an Internal Review System discusses in some detail the need for internal review officers to be allowed independence from primary decision makers and the need for management to send a strong message to the agency as a whole that the role of review officers is different from mainstream operational objectives. The conclusions for that chapter also address the need for managers to explain and positively reinforce the separate independent role of internal review officers.

6.47 In a broader sense, the management of an agency will have the task of deciding whether an internal review mechanism is treated as an important part of the agency’s work and decision making process. The significance an agency attaches to internal review will partly be determined by the volume of requests for review. However, managers in agencies with strong customer service objectives may choose to de-emphasise the practice of internal review, since the existence of such a mechanism contains an implicit acknowledgment that some decisions made by the agency may be wrong. In reality, proper internal review, supported by the agency executive and the relevant Minister, demonstrates a commitment to getting it right.

6.48 Quality assurance systems are sometimes promoted as being a preferable alternative to having an internal review mechanism. Some commentators have noted that it is possible for the aim of improvement of primary decision making to be more effectively and efficiently achieved by replacing internal review mechanisms with quality assurance systems:

Setting up a comprehensive internal review process involves removal of staff from other activities and retraining for their new determinative function. The dilemma in relation
to internal review is whether the additional funds would better be employed in improving primary decision making.\textsuperscript{99}

The path of corporatising makes much of internal review redundant. We would see the quality assurance system involved in dispute resolution. (internal review officer)

If you have other quality systems in place, you don’t necessarily get to the internal review process. You need sufficient systems in place to ensure you meet clients' needs, so they don’t need to go to internal review. (manager)

6.49 The advantage of internal review mechanisms, from an administrative law perspective, is that they provide individual applicants with a right to review of a decision, which can be exercised by choice.

6.50 Further, it must be acknowledged that quality assurance systems may not necessarily detect every error in decision making. For example, the Australian National Audit Office Report on the administration of Special Benefit found that Centrelink’s primary quality checking process over new claim accuracy failed to detect and correct the actual level of errors in assessment.\textsuperscript{100} The audit concluded that the estimated error rate for the entire population of Special Benefit claims (44.5 per cent of claims incorrectly assessed or not fully assessed) was significantly higher than that reported by the quality checking process.\textsuperscript{101}

6.51 Clearly, quality assurance systems have an important role as a management tool for agencies to improve their overall administration. However, internal review remains, and can be seen as, an important complement to these systems in ensuring quality and correctness of decision making in individual cases, and responsiveness to customers’ needs overall. The essential distinction is that internal review mechanisms provide individual applicants with a right to review of a decision, which can be exercised by choice.

6.52 On a similar note, the use of expert decision support systems (or rulebase systems) in public administration is likely to increase in the future. While this should significantly improve the accuracy of primary decision making, and hopefully reduce the incidence of review, it will not diminish the importance of making review rights available.

\begin{quote}
30. Agencies can assist internal review officers by giving status to internal review within the agency. Internal review can be promoted as a complement to other agency strategies addressing quality of decision making and customer service.
\end{quote}


\textsuperscript{100} Auditor-General Audit Report No.20 1999-2000 Special Benefit page 21.

\textsuperscript{101} Auditor-General Audit Report No.20 1999-2000 Special Benefit page 70.
CHAPTER 7. LEARNING FROM REVIEW

Introduction

7.1 The immediate aim of external review of administrative decisions is usually to ensure that justice has been done in the individual case under review. However, it has been recognised that the ultimate aim of the review system must be to improve primary decision making.\footnote{Nicholson, R. ‘Review of Government Decisions: Limitations to Review’ 61 ALJ (1987) 629 at 642.} This aim was also identified by survey participants as one of the needs their internal review systems were seeking to satisfy. The aim of this chapter is to assist agencies to maximise the ability of their internal review systems to improve primary decision making, through discussing the following issues:

- factors which may limit the ability of internal review to improve primary decision making, including:
  - the potential for internal review to have negative impacts on primary decision making; and
  - systemic issues, such as increasing complexity of policy and legislation;
- contact between internal review officers and primary decision makers about specific decisions;
- general feedback and communication; and
- using internal review to detect problems in administration and policy.

7.2 The chapter also examines the effect of external review decisions on internal review.

Factors limiting internal review’s ability to improve primary decision making

The potential for the existence of internal review to have negative impacts on primary decision making

7.3 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.\footnote{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.}

7.4 One commentator notes that while there is no empirical evidence about such a decision making process occurring, it is widely believed to occur.\footnote{Nicholson, R. ‘Review of Government Decisions: Limitations to Review’ 61 ALJ (1987) 629 at 642.} 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)
7.5 Conversely, another commentator has stated that there are very few areas where primary decision makers are directly influenced by concern that their decision will be overturned by a review body. In his opinion, the directions and guidance given to decision makers are emphatically to the effect that they should not try to second-guess what will happen if a decision is taken on review.  

7.6 The survey tested the ‘soft options’ theory by asking primary decision makers whether the prospect of internal review affected the way they make decisions. The results lend some weight to the above view, since around two thirds considered that there was no effect.

7.7 Of the minority that considered that there was an effect, only positive effects were mentioned. For example, taking a beneficial view of the facts if the case was close, and being more thorough in their work, were each mentioned by three respondents. Other effects mentioned were that they were more likely to look at previously decided cases and legislation, that they would not pursue a dispute which would be lost on review, and that they would provide further information to clients.

7.8 Managers were also asked about the same issue. Unlike primary decision makers, slightly more than half did consider that the prospect of internal review had an effect on primary decision making. The most commonly mentioned effect was that there was more of an incentive to make the right decision. Disappointingly, the next most commonly mentioned effect was that the existence of internal review provided an easy option in suggesting an appeal to a client. This problem is discussed in more detail below. Other effects mentioned were:

- that pressure on primary decision makers was eased by the existence of appeal mechanisms;
- taking a beneficial view of facts if the case was close;
- that primary decision making processes would be changed if decisions were constantly overturned;
- the provision of further information; and
- effects on the way the decision was written.

The prospect of internal review probably does not affect the way primary decisions are made as everybody knows the decision is subject to review. They must do it well first off as it is open to review. The culture has changed over the last 15-20 years.  (manager)

7.9 Two of the effects mentioned by managers above, that internal review provided an easy option in suggesting an appeal to a client, and that it eases pressure on the primary decision maker, suggest the emergence of a different effect than that concentrated on by commentators. This is backed up by the comments of some internal review officers, which suggested that, rather than primary decision makers making more generous decisions because of the availability of internal review, the availability of internal review was sometimes used as

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learning From Review

an excuse for less than thorough work or failure to deal properly with a dissatisfied client (for example, by thoroughly explaining the decision or offering to re-examine the case).

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

7.10 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.

Systemic issues

7.11 It is unrealistic to place too heavy a responsibility for improving primary decision making on an internal review system, in situations where poor decision making is due to systemic factors such as lack of training for primary decision makers, and complexity of policy and legislation making correct decisions more difficult. In such scenarios, internal review mechanisms may have a limited ability to have a significant positive impact on the quality of primary decision making as a whole.

7.12 Further, poor primary decision making leading to an increase in requests for review, places pressures on internal review officers that may affect their ability to provide justice in individual cases.
7.13 There were a considerable number of survey responses, particularly from internal review officers, expressing the opinion that the quality of primary decision making was compromised by systemic factors.

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)

It should be noted that survey results for this project regarding primary decision making have been elicited as part of a dialogue about internal review, rather than an as attempt to gauge the quality of primary decision making in participating agencies. Despite this, the above comments are of interest in so far as they illustrate the potential limitations of internal review as a means to improve primary decision making.

31. Agencies should recognise the importance of training for primary decision makers. One area of potential need identified by this project is training in the skills required for client contact and the explaining of decisions to clients. In agencies where the legislation and policy administered by primary decision makers is progressively becoming more complex, training strategies should attempt to recognise and address this.
Contact between internal review officers and primary decision makers about specific decisions

The importance of contact between internal review officers and primary decision makers

7.14 In its *Better Decisions* report, the Council noted that if primary decision makers recognise and accept that tribunal review can make a positive contribution to their decision making, the potential benefits of merits review are more likely to be realised than if external review is viewed as an ‘intrusion’ or threat to the independence of their decision making.\(^{105}\) This problem of primary decision makers being ‘suspicious’ of merits review, or viewing it as an affront to their decision making abilities, has also been noted as being held towards internal review officers.\(^{106}\)

7.15 The Council noted that it is important to create a culture in which it is recognised that a decision being changed does not necessarily mean that the original decision was ‘wrong’, or that it is intended as a criticism of the standard of their decision making.\(^{107}\) It has been noted, for instance, that difficulties the former Department of Social Security had previously experienced due to primary decision makers’ suspicion of internal review officers was overcome to a large extent by the internal review officers explaining to the primary decision makers why the appeal was conceded.\(^{108}\) As previously noted, the overturning of a decision is often due to new information, and it will be reassuring to the primary decision maker to be informed of this.

7.16 It is clear that contact between internal review officers and primary decision makers is important in fostering cultural acceptance of internal review decisions and facilitating the improvement of primary decision making, and the survey for this project attempted to discover the level of such contact.

Survey results about contact between internal review officers and primary decision makers

7.17 Both internal review officers and primary decision makers were asked about contact between them. The majority of primary decision makers indicated that they knew when their decisions were being reviewed. Around two thirds of the internal review officers indicated that they contacted primary decision makers before reviewing the decision either always or regularly.

7.18 Among survey respondents, the most commonly reported reasons for contact between internal review officers and primary decision makers before an internal review were:

- to discuss the facts; and
- to discuss the reasons for the decision.

7.19 Other reasons included:

\(^{105}\) The *Better Decisions* report, paragraph 6.7.


\(^{107}\) The *Better Decisions* report, paragraphs 2.62-2.63, 6.11.

• to discuss the application of the law;
• to clarify an aspect of the primary decision;
• to discuss policy;
• to discuss matters of procedure; for example the way the primary decision maker writes letters, the inclusion of evidence; and
• to present new information and see if the primary decision maker would change their mind.

If I am going to set aside a decision, but have reservations, I will discuss the case with the primary decision maker. Then next time the primary decision maker might seek out the internal review officer’s thoughts. I won’t discuss details of the particular case, just encourage a generic issues discussion. I also explain that if the case comes on review, my view might change. The decision should be better as a result of the discussion, but still might be changed. Geography is not the issue. The issue is building up confidence in the decision making process. (internal review officer)

7.20 Contact with the primary decision maker after making the internal review decision was less frequent, with around a third of internal review officers having such contact either always or regularly, and the remainder sometimes or occasionally. Primary decision makers agreed that they were more likely to be contacted by the internal review officer before the decision was made, than after the decision was made.

7.21 The most common reason for contact after the decision was made was to explain the reasons for the decision. Other reasons for this contact were to explain why the decision has been changed, and to give feedback to the primary decision maker about their decision.

7.22 A strong majority of primary decision makers and internal review officers indicated that primary decision makers received the reasons and results of their decisions that had been internally reviewed. A majority did so by receiving back the file with the internal review officer’s letter to the customer on it.

7.23 These survey results revealed a reasonably high level of contact and communication between internal review officers and primary decision makers about specific decisions, which is encouraging with regard to the facilitation of improvement of primary decision making. Contact after the making of the internal review decision was less frequent. However, if discussion and explanation of the reasons for the likely decision has already occurred prior to finalisation of the decision, then such further contact may not always be necessary.

32. Agencies should encourage internal review officers to contact the primary decision maker in every case under review, whether to raise issues with the primary decision maker prior to the internal review being completed, or to discuss the internal review officer’s decision and the reasons for it.
General feedback and discussion

7.24 In the Better Decisions report, the Council recognised the importance of an effective system of communicating merits review decisions.\textsuperscript{109} This did not mean that a written copy of every decision needed to be sent to every decision maker, merely that:

Each agency’s communication systems should be such that relevant decisions can be brought to the attention of decision makers and policy officers in a timely fashion.\textsuperscript{110}

7.25 The Council noted the potential of computer networks for distributing this information in an effective and timely manner in the form of bulletins, electronic mail, annotated legislation, policy statements, and case digests.\textsuperscript{111}

7.26 It is noted that the utility of access to internal review decisions is different to that of tribunal decisions. Where internal review officers are required to use the same policy guidelines as those used by primary decision makers, the overturning of primary decisions is likely to represent differences in decision making such as the taking into account of new evidence, or the weighting of different factors, than a new and different interpretation of the law.

There are not enough cases so the prospect of an internal review body of law developing is very slim. The prevailing inputs are circumstances of the case and the legislation and policy guidance. (internal review officer)

Mechanisms and systems to promote feedback and discussion

7.27 In the survey, primary decision makers were asked about mechanisms for feeding back general results of internal and external review into their decision making process. Nine out of thirty-three felt there were few if any mechanisms. Among those who felt there were other mechanisms, the most commonly mentioned mechanisms were case reports and computer databases. Others mentioned included hearing from internal review officers, in-house publications, dissemination of information from the legal section, individual files coming back and the quality assurance officer.

I don’t have much time to read emails - I don’t bother looking at them. (primary decision maker)

We don’t hear about the results of reviews. We should be told, otherwise we don’t know when we do things wrong. (primary decision maker)

7.28 Managers were also asked what mechanisms existed for feeding back results of internal review into primary decision making processes. Only two felt there were few such mechanisms in their agencies. The most commonly mentioned were feedback to primary decision makers by internal review officers or management.

7.29 Managers were also surveyed as to what systems, if any, their agencies had to promote contact, discussion and exchange of ideas between internal review officers and primary decision makers. The most common mechanism was officer meetings. Other responses

\textsuperscript{109} The Better Decisions report, paragraph 6.28.
\textsuperscript{110} The Better Decisions report, paragraph 6.28.
\textsuperscript{111} The Better Decisions report, paragraph 6.29.
included the physical location of internal review officers with one another, reports to primary decision makers by internal review officers, internal review officers being outposted to primary decision maker locations, internal review officers assisting in training for primary decision makers, feedback to primary decision makers by internal review officers and an ‘open door’ system.

There is no formal system for ensuring contact, discussion and exchange of ideas between internal review officers and primary decision makers, but everyone is in contact, and discuss the issues informally when the decision comes down. Good management practice is to ensure that all decision making goes back to the primary decision maker. (manager)

Stuff-all! Part of the internal review officer role is to improve decision making processes, but there is no established mechanism for doing this. (internal review officer)

7.30 The survey attempted to determine the level of discussion that occurred about internal review decisions. A majority of primary decision makers (at all classification levels) reported discussing reviewed decisions with other people. Most commonly this was with internal review officers, but it was also common to discuss them with managers or other primary decision makers.

7.31 Finally, the majority of primary decision makers indicated that they did not receive any other general feedback about their decision making process (although this was not the case across all agencies, and there were significant differences between agencies). There were some differences between the classification levels; for example the Administrative Services Officers Class 5 were evenly divided as to whether they received any other general feedback.

7.32 A majority of those who received feedback indicated that they found it useful.

33. Agencies should encourage discussion between internal review officers and primary decision makers at a more general level. The methods for doing so may vary from agency to agency, but one suggestion is regular meetings between internal review officers and primary decision makers.

34. Both internal review officers and managers of primary decision makers should place a priority on giving feedback to primary decision makers about their decision making.

Using internal review to detect problems in administration and policy

7.33 It has been pointed out that internal review can be used in an agency to detect problems in policy and its administration:

Being exposed to review applications gives internal reviewers an opportunity to assess how well the system is working, whether there are defects in policy or performance, and whether legislative or other changes are required, including additional staff training and improved selection processes.\textsuperscript{112}

\textsuperscript{112} Creyke, R. ‘Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government’ 87 \textit{Canberra Bulletin of Public Administration} 39 at 47.
7.34 In Chapter 6 it was noted that two thirds of managers surveyed for this Report kept statistics of internal review reversal rates. These statistics were used, among other purposes, to monitor trends, identify problems in policy and legislation, and identify training needs. It is clear that such statistics, if collected and analysed in a sufficiently detailed fashion, are a useful tool that can be used by agencies to maximise the normative impact of internal review.

7.35 A commentator has noted, however, that the opportunity for internal review to be used to identify necessary changes to policy and legislation may be lost when service delivery functions (including internal review) and policy-making functions are separated into different agencies in a purchaser-provider arrangement. In order to facilitate this benefit of internal review, special structures would need to be put in place to encourage communication of this sort between the agencies.\textsuperscript{113}

7.36 Managers, internal review officers and primary decision makers participating in the survey were all asked what sorts of problems were identified through internal review mechanisms.

7.37 Among managers and internal review officers, the most commonly mentioned problems were lack of evidence, investigation and fact finding by primary decision makers to support their decisions, and lack of understanding among primary decision makers of the legal requirements or policy applying to decisions.

7.38 Primary decision makers were more likely than internal review officers or managers to identify that internal review uncovered problems with the legislation or policy (rather than with the processes of decision making).

7.39 Other problems identified by all respondents included:

- bias on the part of primary decision makers;
- carelessness or not listening properly;
- customers not informed of appeal rights properly;
- poor documentation;
- systems errors;
- that primary decision makers should have the power to vary decisions;
- inexperience; and
- requests for internal review that were really complaints about service.

\textit{I review the same officers so they get continuity of internally reviewed decisions. This is better than just taking the next case. I can more easily find any trends that way or if there are training issues in a particular office. (internal review officer)}

\textsuperscript{113} Creyke, R. ‘Sunset for the Administrative Law Industry? Reflections on Developments under a Coalition Government’ 87 \textit{Canberra Bulletin of Public Administration} 39 at 47.
Only when someone actually mentions a problem does it get looked at. (internal review officer)

35. Agencies should gather detailed internal review data that can be analysed to monitor trends and identify problems.

36. Agencies should encourage internal review officers to communicate with managers of primary decision makers about problems they may have detected with administration and decision making. As far as possible, such problems should be acknowledged and acted upon.

37. Agencies are encouraged to recognise the value of using internal review mechanisms to identify problems in policy and legislation, and should consider formal mechanisms for doing so. This is particularly the case where service delivery is separated from policy-making.

The effect of external review tribunal decisions on internal review

Attitudes towards external review bodies

7.40 The Council’s view, expressed in its Better Decisions report, is that the greater the level of acceptance by agencies of the role of merits review, the easier it is for agencies to reap the positive effects of merits review.\(^{114}\)

7.41 In this context, it is somewhat disturbing that the surveys revealed that a number of officers from the five participating agencies were strongly critical in their attitudes towards external review bodies.

7.42 One criticism was the perception that some tribunals were too generous to agency clients:

   It is biased. This is an applicant’s tribunal. [With the attitude that] ‘Big Government is Nasty.’ (manager)

7.43 Another was that their decisions lacked consistency with each other:

   Different tribunals, different structures - you’ll end up with different decisions. (internal review officer)

   Contradictory case law can be devastating! We have had decisions in different parts of the country relating to [the same subject matter] which clearly scream at each other. (manager)

7.44 They were also criticised for their refusal to follow departmental policies.

   The external review process relies very narrowly on law. It does not focus on the policy. (manager)

7.45 These comments are illustrative of the potential problem described by the Council, whereby agency staff view external review as an ‘intrusion’.\(^{115}\) This scenario was regarded

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\(^{114}\) The Better Decisions report, paragraph 6.7.

\(^{115}\) The Better Decisions report, paragraph 6.8.
by the Council as being not conducive to the full realisation by the agency of the benefits of merits review.\textsuperscript{116}

**Improving agency-tribunal relationships**

7.46 The establishment of the Administrative Review Tribunal may provide a renewed opportunity for positive steps to be taken to improve the relationship between external review bodies and those staff within agencies who have an involvement with the merits review system, and to foster cultural acceptance of the benefits of merits review throughout agencies. The Australian Law Reform Commission, in its *Managing Justice* report, made several recommendations which aim to strengthen the relationship between agencies and tribunals. It pointed out that:

> The Commission does not see placing an emphasis on agency and review tribunal cooperation in administrative decision making as threatening independence, if handled with proper sensitivity. Review tribunals should work with agencies in promoting normative change and enhancing the quality of decision making across the board.\textsuperscript{117}

7.47 In the context of such cooperation between agencies and review bodies, internal review officers should be involved where appropriate, as they have an important role in promoting change and improving decision making.

7.48 One of the sources of frustration on the part of internal review officers towards external review bodies was the issue of tribunals’ use or non-use of policy guidelines. This may indicate a need for agencies to initiate training and discussion around the issues of the use of policy guidelines in decision making, and relevant differences between external tribunal decision making, and decision making within agencies.

**Effect on decision making**

7.49 Internal review officers were asked whether the prospect of external review affected the way they internally reviewed their agency’s decisions. Overall, more than half indicated that there was no effect. Of the minority that did think there was an effect, the most commonly cited effect was that the decisions would be written on the basis that they may go to external review.

7.50 Less commonly mentioned effects were:

- not pursuing a dispute which would be lost on appeal;
- looking at previously decided cases;
- providing further information;
- that pressure on internal review officers was relieved by knowledge of the availability of external review; and
- taking a beneficial view of the facts when the case was close.

\textsuperscript{116} The *Better Decisions* report, paragraph 6.7.
7.51 Managers were also asked the same question. More than half felt internal review decision making was affected by the prospect of external review. The most commonly mentioned effect was that if decisions were constantly changed on external review then internal review decisions would change. Other effects mentioned were similar to those mentioned by internal review officers, but managers also mentioned some additional effects:

- the uncovering of problems in the decision making process or interpretation of policy;
- the encouragement of some cases towards external review as test cases; and
- use of the easy option of suggesting appeal mechanisms to clients.

**Feedback and discussion related to external review**

7.52 A majority of internal review officers indicated that they received the reasons and results of decisions they had internally reviewed and which had been overturned on external review. The most common circumstances in which this occurred was that they would receive copies of the decision of the AAT or other external review body. Usually, the administrative law or legal area of their agency would provide them. Some received the results of the review when the file was returned to them.

7.53 A majority of internal review officers reported that they discussed these overturned decisions with other people, in particular other internal review officers or the administrative law or legal area.

7.54 Internal review officers were asked what other mechanisms existed for feeding back the general results of external review into the decision making process. Around a third answered “very little to none”. In regard to those who felt there were mechanisms for feeding these results back, the most commonly mentioned were dissemination of information by the legal section, through in-house publications, computer databases, case reports, conferences and individual files.

Very little feedback is given. I don’t see a tribunal decision on my cases. (internal review officer)

I don't know of any mechanisms for feeding back the results of external review. (internal review officer)

I am not always informed of when my decision making process is amended due to the outcomes of external review. The decision will go to the manager, but is not always passed down. (internal review officer)

Canberra reluctantly informs us of changes to decision making as a result of external review. Advice from Canberra is slow and sometimes non-existent in regard to policy changes resulting from external review decisions. (internal review officer)

Tribunal decisions do not provide good feedback about process. We have self-managed teams so there is no management feedback. There is only ad hoc talking with colleagues. The most useful feedback is talking to team leaders in the regions. (internal review officer)
We have good links with the Social Security Appeals Tribunal, both formal and informal. Informally, for example, the convenor of the tribunal might contact the coordinator of a particular office or management to discuss a troubling case. There are also occasional liaison meetings with the tribunal and me, plus some internal review officers. (manager)

For maximum effect, the existence of mechanisms for the distribution of information must be coupled with work practices that allow officers the time to read and digest information on a regular basis, and ideally the opportunity to discuss the information with other officers.

7.55 Managers were also asked what mechanisms existed for feeding back results of external review into the decision making process. Only two answered “very little to none”. The most commonly identified mechanisms were case reports, in-house publications, conferences and dissemination of information by legal sections.

7.56 Managers reported that their agencies obtained information about the results of external review of their agencies’ decisions. When asked what significance they attached to these results, the most common answers were that they were important for identifying trends, for examination of policy and for use as precedents.

7.57 Managers were also asked about the potential helpfulness of internal review officers discussing general principles or other matters with external review bodies. Around two thirds agreed that this would be helpful. Again, the establishment of the new Administrative Review Tribunal may provide an opportunity for such practices to be introduced where they do not already exist, while noting the need for due sensitivity with regard to agency-tribunal relationships.

38. Where agencies do not have mechanisms for feeding back the results of external review into decision making, consideration should be given to introducing these.

39. Regular liaison meetings should be held between divisions of the Administrative Review Tribunal and relevant agency staff including internal review officers.
CHAPTER 8.  BEST PRACTICE GUIDE

The following Best Practice Guide and explanatory text are based on research, analysis and discussion in the Administrative Review Council’s Report No. 44 Internal Review of Agency Decision Making (‘the Report’). They are aimed at giving agencies the opportunity to re-examine their internal review systems with a view to improving them.

Designing an internal review system

**Decisions subject to internal review**

1. Agencies should offer internal review for administrative decisions that will, or are likely to, affect the interests of a person.

   Internal review is a form of merits review, and therefore the Council’s guidelines, called *What decisions should be subject to merits review?* will be useful to agencies in deciding whether to offer internal review for particular types of decisions. Broadly, agencies should offer internal review mechanisms for decisions that affect the interests of a person, unless they are legislation-like decisions of broad application, or decisions that automatically follow from the happening of a set of circumstances.

**Authority to undertake internal review**

2. It is preferable for an internal review system to have a statutory basis.

   There are a number of advantages to having a statute-based system. The most important of these is that it gives applicants a guaranteed right to review of the decision affecting them. A legislative framework also allows for a formal delegation of power to review officers, and provides for further detail to be specified, such as the conditions under which review can occur.

**Internal review as a mandatory or discretionary precursor to external review**

In some areas of decision making, it is mandatory to proceed through an internal review stage before the applicant can have the decision reviewed by an external tribunal. While there are efficiency benefits from making internal review mandatory, in some instances decisions are unlikely to be overturned at the internal review stage.

3. The decision as to whether internal review should be mandatory prior to external review is best made on an agency-by-agency basis. An agency that chooses to make internal review mandatory should ensure the internal review system is as worthwhile as possible for the applicant and does not operate as a potential barrier to effective merits review.
Location and independence of internal review officers

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.

By its nature, internal review is part of, and not completely independent from the relevant agency processes. However, the person reviewing the decision can and should be independent of the officer whose decision is under review.

Locating internal review officers closely to the officers whose decisions they review, either physically, or organisationally (ie within the same section), can be problematic. It is important that organisational and workplace arrangements reflect the nature of the internal review task. If not, specific problems may arise, such as internal review officers finding it more difficult to overturn decisions, or applicants lacking confidence that they will receive an independent review from internal review officers that they perceive to be closely associated with the primary decision maker.

Apart from the decision as to where to locate internal review officers, there are other ways in which agencies can ensure internal review officers have an appropriate level of independence.

7. Agencies should take active steps to ensure that the impartiality or independence of internal review officers is not compromised. For example, managers should positively reinforce the role of the internal review officer and the necessity of independence. Both primary decision makers and internal review officers can benefit from a greater understanding of the role of the internal review officer.

However, internal review systems have a role in improving primary decision making. It is important to ensure internal review officers have appropriate contact with primary decision makers.

8. Where there is physical or organisational separation between internal review officers and primary decision makers, agencies should consider ways in which active steps can be taken to encourage appropriate contact between internal review officers and primary decision makers in order to harness the positive benefits that internal review systems can offer to primary decision makers.
### Number of layers of internal review

9. It is preferable to have one layer of official review within an agency.

In some areas of decision making, applicants are compelled to proceed through more than one layer of review. While there may be some administrative advantages for the agency in having a multi-layered review system, there can be negative effects on applicants, such as ‘appeal fatigue’. It is therefore advisable for agencies to have a simple internal review structure and concentrate on making it as effective as possible.

Nonetheless, some agencies may prefer that applicants have their decisions reviewed by the person who made the decision, before they proceed to review by a senior independent person. While this can be a useful step in some circumstances, in others it merely adds to the time and effort that needs to be taken by the applicant to receive an independent review.

10. It is appropriate to inform clients that where they disagree with a decision, it may be useful to approach the primary decision maker to discuss the decision with them. In agencies where it is the practice for applicants (or their files) to be referred to the primary decision maker after a request for review, care should be taken to make clear to clients that this is a choice rather than a requirement.

11. Agencies who choose to make review by the primary decision maker mandatory should monitor affirmation and set aside rates to satisfy themselves that it is a useful step for both the agency and its clients.

12. Agencies who choose to make review by the primary decision maker mandatory should remain aware of the potential negative effects on clients and take active steps to minimise these. For example, agencies should allow only a short period of time for the primary decision maker to reconsider their decision, to ensure that applicants are not inconvenienced. Where a decision is affirmed by the primary decision maker, the decision should proceed automatically to the internal review officer for review.

13. Review by the primary decision maker should never be held out as being review by an internal review officer.
Accessibility of review

14. Agencies should, as a matter of good administrative practice, consider instituting mechanisms for identifying clients with special needs.

15. Agencies should recognise that applicants are entitled to act through representatives. To avoid doubt, agencies should consider the possibility of legislative provisions establishing applicants’ right to representation, and establishing guidelines setting out the circumstances in which internal review officers can manage the level of intervention or disallow representation, with a view to preventing the benefits of internal review from being undermined.

16. Access to an interpreter for face-to-face or telephone contact between internal review officers and clients should be automatic and the service should be provided free of charge. Where appropriate, internal review officers should be familiarised with the skills of working with interpreters.

Internal review mechanisms should be as accessible as possible to applicants, particularly those with special needs. Agencies should examine whether their internal review systems are operating effectively for those with special needs, and should, where appropriate, allow applicants to be helped through the review process by persons such as legal and non-legal representatives and interpreters.

Time limits

Other aspects of internal review systems that may affect the level of accessibility to applicants, include whether applicants should be limited to a set period of time within which to apply for internal review; for example, within 28 days of notification of the relevant decision.

17. When decisions about time limits on applications for internal review are made, the desirability of administrative finality should be balanced against providing individual justice to applicants. Where appropriate, legislative provisions ensuring the granting of extensions in special circumstances should be included.

Fees

18. Internal review should be offered free of charge.

It is generally the case that no fee is charged for internal review. Fees create a barrier to access by applicants to internal review, and are likely to make only a token contribution to the cost of the review.
Notification of external review rights

It is important that internal review applicants remain aware of their external review rights, so that these rights can be exercised if applicants are still unhappy with the outcome of the internal review.

19. Where internal review is mandatory, and applications for external review are referred back to the agency, care should be taken to ensure that applicants understand that external review has not taken place, and that they still have the right to seek external review if they are unhappy with the outcome of the internal review.

20. Agencies should take care to ensure that internal review officers do not inappropriately discourage applicants from accessing external review rights.

Process and practice of internal review

Personal contact with the applicant

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.

Personal contact with the applicant during the review is significant in minimising applications for external review, in providing natural justice to clients, and in providing for early resolution of issues.

New information

22. Internal review officers should be able to consider information not available to the primary decision maker at the time of the original decision.

Internal review is simpler and more effective if all available information can be taken into account by internal review officers in undertaking the review.

Timeliness of internal review decisions

23. Agencies that do not have statutory time limits for internal review decision making should consider whether introducing them would improve responsiveness to applicants.

24. Where statutory time limits are decided against, internal timeliness standards are a useful alternative provided they are formulated using an appropriate balance between realism and responsiveness to customers, and that workloads for internal review officers are designed to allow the deadlines to be met.

Delay in decision making is sometimes considered to be a problem in relation to internal review, despite the fact that one of the advantages of internal review is seen to be its speed in comparison to external review. Agencies should therefore take active steps to ensure that reviews are conducted in as timely a fashion as possible.
Management and support

Financial aspects of the provision of internal review

25. Where an agency is affected by resource cuts which may impact upon the quality of primary decision making, the agency should consider ways in which internal review officers can be helped to maintain the quality of the system.

This is based on research which suggested that resource cuts within agencies can have an adverse effect on internal review and primary decision making.

Skill building

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.

Because internal review officers are often senior and experienced officers, agencies may not place sufficient emphasis on appropriate training and development. However, this should be seen as important, given the importance of the internal review officer role, and the skills required to undertake it.

Spread of workload/specialisation

There are advantages to having internal review officers performing predominantly internal review functions. However, in some agencies it may not be feasible to dedicate a full-time officer to internal review.

The advantages of specialisation include the development of expertise in the conduct of internal review. Conversely, variety of work may provide for development of skills and career path enhancement.

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.

Quality control of internal review

29. Quality control systems for internal review should include mechanisms for giving internal review officers regular feedback about their decision making process.

Research for the Report revealed a number of methods being used by agencies to monitor the quality of internal review in their agency. However, survey responses revealed that some internal review officers were not receiving any general feedback on the quality of their work.
Management’s role in promoting the importance of internal review

30. Agencies can assist internal review officers by giving status to internal review within the agency. Internal review can be promoted as a complement to other agency strategies addressing quality of decision making and customer service.

It is sometimes difficult for agencies to give internal review a high profile, due to the sensitivity of acknowledging agency error. It is also sometimes argued that other systems such as quality assurance make internal review redundant. However, the advantage of internal review is that it gives rights to individual applicants who are unhappy with decisions affecting them.

Learning from review

Research for the Report showed that agencies considered that while it was important that an internal review system ensured correct decisions in individual cases, it was also the role of internal review to encourage an overall improvement in decision making. The following Guidelines are aimed at helping agencies to maximise this “normative” effect:

31. Agencies should recognise the importance of training for primary decision makers. One area of potential need identified by this project is training in the skills required for client contact and the explaining of decisions to clients. In agencies where the legislation and policy administered by primary decision makers is progressively becoming more complex, training strategies should attempt to recognise and address this.

32. Agencies should encourage internal review officers to contact the primary decision maker in every case under review, whether to raise issues with the primary decision maker prior to the internal review being completed, or to discuss the internal review officer’s decision and the reasons for it.

33. Agencies should encourage discussion between internal review officers and primary decision makers at a more general level. The methods for doing so may vary from agency to agency, but one suggestion is regular meetings between internal review officers and primary decision makers.

34. Both internal review officers and managers of primary decision makers should place a priority on giving feedback to primary decision makers about their decision making.

35. Agencies should gather detailed internal review data that can be analysed to monitor trends and identify problems.

36. Agencies should encourage internal review officers to communicate with managers of primary decision makers about problems they may have detected with administration and decision making. As far as possible, such problems should be acknowledged and acted upon.

37. Agencies are encouraged to recognise the value of using internal review mechanisms to identify problems in policy and legislation, and should consider formal mechanisms for doing so. This is particularly the case where service delivery is separated from policy-making.
38. Where agencies do not have mechanisms for feeding back the results of external review into decision making, consideration should be given to introducing these.

39. Regular liaison meetings should be held between divisions of the Administrative Review Tribunal and relevant agency staff including internal review officers.

Research for the Report examined whether external review decisions were having a “normative effect” on internal review decisions. It was noted that some survey responses revealed negative attitudes toward tribunals on the part of agency officers. Such attitudes suggested a need for appropriate contact between tribunals and agency staff involved in the merits review system.
APPENDIX A - FUNCTIONS AND POWERS OF THE ADMINISTRATIVE REVIEW COUNCIL

Section 51 of the *Administrative Appeals Tribunal Act 1975* sets out the functions and powers of the Council as follows:

(1) The functions of the Council are:

   (aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and

   (ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and

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

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

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

   (d) to inquire into:

      (i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and

      (ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and

      (iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction;
and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in respect of the matters referred to in subparagraphs (i), (ii), and (iii); and

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

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

(g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and

(h) to promote knowledge about the Commonwealth administrative law system; and

(i) to consider, and report to the Minister on, matters referred to the Council by the Minister.

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

(3) If the Council holds an inquiry, or gives any advice, referred to in paragraph (1)(ab), the Council must give the Minister a copy of any findings made by the Council in the inquiry or a copy of the advice, as the case may be.
APPENDIX B - INTERNAL REVIEW PROJECT SURVEY QUESTIONS

PRIMARY DECISION MAKER’S QUESTIONNAIRE

1. Are you a primary decision maker? Y N

2. What is your current level?

Aims and Objectives of Internal Review System

The following series of questions are about the aims and objectives of your internal review system and the extent to which you think these aims and objectives are met.

3. Why does your agency have internal review? [Ie what aims is it seeking to achieve?]

4. Are officers in your agency made aware of these aims? Y N

5. Do you think these aims are being met? Y N

6. If yes, what aims is it meeting well?

7. If not, how could this be remedied?

Decision Making Process

8. Please describe a typical decision making process. Please include details of whether based on written application by applicant, whether typically contact applicant or applicant’s representative etc, for which reasons contact applicant etc.

9. Do you have discretion in making decisions? Y N

10. If yes, please describe. [Ie in fact-finding situations, judgement re application of policy to facts etc]

11. How do you usually communicate your decision to the applicant? (How many of the following are applicable):
   • by form letter
   • by letter with individually tailored reasons
   • by telephone
   • in person
Accessibility

12. How do you inform the applicant that they can seek internal review if they are unhappy with your decision?

13. Is there any mechanism for identifying applicants who may have difficulties in seeking a decision? [Eg hearing, sight, ESL, physical, intellectual, ATSI, geographical remoteness] Y N

14. If yes, are there additional services you provide for them? Please describe.

Resources

15. Approximately how many decisions do you make each week? If you cannot say specifically, then please give a range.

16. Do other decision makers have a similar workload? Y N

17. How, if at all, has the decision making system in your agency been affected by resource cuts?

Normative Effect

18. When making a decision, do you usually consider the outcomes of other decisions you and others have made? Y N

Contacting Other Primary Decision Makers

19. Which of the following best describes how often you contact other primary decision makers when making a decision:
   • always
   • most times
   • sometimes
   • occasionally
   • never—please go to next section

20. What do you contact the primary decision maker for?
• to discuss the facts
• to discuss recent decisions
• to discuss application of the law
• to discuss policy
• other (please describe)

Contact with the Internal Review Officer

Sometimes your decisions will be reviewed. Do you know when your decisions are reviewed? Y N

If no, go to next section

21. Does the internal review officer contact you:
• before making a decision? Y N
• after making a decision? Y N

22. What does the internal review officer contact you for? Tell me how many of these are applicable:
• to discuss the facts
• to discuss application of the law
• to discuss policy
• to discuss the reasons for the decision
• other (please describe)

23. How often do internal review officers contact you before making a decision? Which of the following is applicable?
• always
• most times
• sometimes
• occasionally
• never

24. How often do internal review officers contact you after making a decision? Which of the following is applicable:
• always
Internal Review of Agency Decision Making

- most times
- only when the decision is reversed
- when the decision reversed is a significant one
- never
- other. Please describe.

25. Are internal review officers located in a separate part of the agency to primary decision makers? Y N

26. Please describe when, if at all, you are given the reasons and results of a reconsidered decision of yours.

27. With whom, if anyone, do you discuss the reconsidered decision? [Eg manager, internal review officer etc]

28. What other mechanisms exist for feeding back the results of internal or external review into your decision making?

29. How are you informed when your decision making process has been amended due to the outcomes of either internal or external review?

30. Are you given feedback more generally about your decision making process? [Including general discussion of outcomes, about decisions that are not reviewed etc]

31. Is this feedback useful? Please explain.

32. To what extent does the prospect of internal review affect the way you make decisions? Please explain.

33. How, if at all, do you keep up-to-date with recent developments in statute and caselaw? Please explain. Y N

Training

34. Do you receive professional development training specific to decision making in your agency? Y N
35. If Yes, please describe. [Include how often, what areas training covers, whether training helpful etc.]

**Timeliness**

36. What time deadlines, if any, do you have for completing a decision? Y N

37. Are these deadlines difficult to meet? Y N

38. Which of the following best describes how often these deadlines are met?
   - always
   - most times
   - occasionally
   - rarely
   - never

39. Do you know the sort of problems in primary decision making your internal review system picks up? What are they? [Eg poor quality decision making, poor or inadequately thought out policy, poor quality decision making due to problems with the statute/legislation, inadequacies in computerised decision making system].

40. Is there anything you would like to add about your decision making process which has not been covered already?
INTERNAL REVIEW OFFICERS’ QUESTIONNAIRE

1. Are you an internal review officer?  
   Y  N

2. What is your current level?

Aims and Objectives of Internal Review System

The following series of questions are about the aims and objectives of your internal review system and the extent to which you think these aims and objectives are met.

3. Why does your agency have internal review? [Ie what aims is it seeking to achieve?]

4. Is there anything in addition that internal review offers for your applicants?

5. Are officers in your agency made aware of these aims?  
   Y  N

6. Do you think these aims are being met?  
   Y  N

7. If yes, what aims is it meeting well?

8. If not, how could this be remedied?

Internal Review Process

9. What is the source of authority to conduct internal review? [Eg statute, executive authority? If statute, which sections]

10. How do applicants initiate an internal review process? [Eg by standard application form, by own letter informing the agency, orally]

Fees

11. Is there an application fee for internal review or any other mandatory fees?  
   Y  N

If No, please go to next section

12. If yes, how much is it?

13. If an applicant is unable to pay through financial hardship, what, if any, alternative arrangements can be made?
14. Does the agency or other body ever initiate an internal review? Y N

If No, go to Q. 16

15. If yes, by whom, in what circumstances does this occur and how often? [Eg routinely, as a form of quality assurance]

New Information

16. When you undertake an internal review, can you:
   - consider new information provided by the applicant [or do you]
   - only accept information available to the primary decision maker

17. If you do not accept new information, why? [Eg prevented by law, prevented by agency policy etc]

If you cannot consider new information, please go to the next section

18. If you consider new information, which of the following do you do: [Please explain]
   - actively seek information yourself
   - only consider new information if it is brought to your attention
   - other

19. Apart from seeking new information, is there any other way you assist applicants to strengthen their application? [Eg obvious defects easily rectified]

20. Do you contact the applicant or the applicant’s representative as a matter of course? Y N

21. Is the contact by telephone or in person? Please specify which.

22. If yes, which do you contact and why?

23. If no, in what circumstances would you contact the applicant or the applicant’s representative? [Eg to clarify matters, if necessary, if applicant disadvantaged in some other way etc]

24. If your usual practice is not to initiate contact with the applicant or their representative about their application, do they have an opportunity to contact you if they wish? Y N
24A. Do applicants routinely use legal representation? Y N
   If yes, why? [Eg legislation difficult to understand, large commercial interests involved]

25. Have you ever used a third party mediator or some other negotiation technique in the context of an internal review? Please describe the circumstances. [Includes arbitration, conciliation, mediation]

26. Do you tell the applicant the reasons for the decision as well as the decision itself? Y N

27. Which of the following best describes how you usually communicate your decision to the applicant:
   • by form letter
   • by letter with individually tailored reasons
   • by telephone
   • in person

28. Can your decisions be reviewed by the Administrative Appeals Tribunal or some other external body? Y N

29. If yes, when do you inform the applicant of this? [Is there a statutory obligation to inform applicant at a certain time?]?

30. What additional information, if any, is made available to applicants in their preparation for external review? [Eg applicant’s file, history of correspondence, statement of reasons, section 37 T documents (AAT).]

31. In addition to what you have described above, is there anything else involved in your internal review decision making process? [Include extent to which internal reviews involve making discretionary decisions about factual material, require application of statute to facts, involve application of policy guidelines to facts, involve application of office manuals to facts.]

**Accessibility**

32. Are there any routine difficulties applicants have in using internal review?

33. Is there any mechanism for identifying applicants who may have difficulties in pursuing review? Eg hearing, sight, ESL, physical, intellectual, ATSI, geographical remoteness.
34. If yes, are there additional services you provide for them? Are they frequently used? Please describe.

**Resources**

35. Approximately how many cases would you review in an average week? If you cannot say specifically, please give a range.

36. Do other review officers have a similar workload? Y N

37. Which of the following administrative supports do you have:
   • access to a library
   • access to the internet
   • access to database containing the legislation, case law and policy
   • access to legal advice
   • regular training

38. Do you conduct work other than internal review? Y N

**If No, go to Q 42**

39. What is this other work?

40. Which of the following describes why you are given other work: (tick response)
   • not enough demand for internal review to sustain a full time review officer
   • policy of broadening officer’s experience
   • other (please describe)

41. Which of the following best describes how this other work affects you:
   • it complements your internal review work
   • it means you have less time than you would like to spend on internal review
   • it distracts you from internal review
   • other (please describe)

42. How, if at all, has the decision making and review system in your agency been affected by resource cuts? Y N
Normative Effect

43. In making a decision, do you usually consider the outcomes of other decisions you and others have made? [Including internal review decisions, external review, court decisions etc]  
   Y    N

Contacting Primary Decision Maker

44. Do you ever contact the primary decision maker:
   • before making a decision?  
     Y    N
   • after making a decision?  
     Y    N

45. If No, why not?

If you do not contact the primary decision maker, please go to next section

46. What do you contact the primary decision maker for? Tell me how many of these are applicable:
   • to discuss the facts
   • to discuss application of the law
   • to discuss policy
   • to discuss the reasons for the decision
   • other (please describe)

47. How often do you contact a primary decision maker before making a decision? Which of the following is applicable?
   • always
   • regularly
   • sometimes
   • occasionally
   • never

48. How often do you contact a primary decision maker after making a decision? Which of the following is applicable?
   • always
   • regularly
49. Please describe when, if at all, you give the results and reasons of a reconsidered decision to the primary decision maker.

50. Are internal review officers located in a separate part of the agency to primary decision makers? Y N

51. When you make your decisions do you ever speak with other internal review officers? Which of the following is applicable?
   • always
   • regularly
   • sometimes
   • occasionally
   • never

52. What do you speak to them for? Tell me how many of these are applicable:
   • to discuss the facts
   • to discuss application of the law
   • to discuss policy
   • to ensure review criteria are applied equally
   • to discuss trends in external review hearings
   • other (please describe)

53. Please describe when, if at all, you are given the reasons and results of a decision of yours which is overturned on external review.

54. With whom, if anyone, do you discuss the overturned decision? [Eg manager, litigation area etc]

55. What other mechanisms exist for feeding back the results of external review into your agency’s decision making process?
56. How are you informed when your internal review decision making process has been amended due to the outcomes of external review? Can you comment on this? [Includes changes to computerised decision making process etc]

57. Are you given feedback more generally about your decision making process? [Including relating to individual decisions, general discussion of outcomes, processes followed on review, rate of decisions that are not reviewed further, etc]

58. Is this feedback useful? Please explain.

59. To what extent does the prospect of external review affect the way you review decisions? Please explain.

60. When making a decision, how do you identify whether the decision is likely to be significant eg ‘test cases’ that may set precedents at external hearing, decisions that may have political implications etc?

61. How, if at all, are these cases dealt with differently? [Eg discussed with other decision makers before a decision is made, made by higher level decision maker than usually makes these types of decisions, discussed with senior management before a decision is made, involve another officer in drafting statement of reasons]

62. What sort of problems in primary decision making does your internal review system pick up? [Eg poor quality decision making, poor or inadequately thought out policy, poor quality decision making due to problems with the statute/legislation, inadequacies in computerised decision making system]

63. How, if at all, do you keep up-to-date with recent developments in statute and caselaw?

64. How do you deal with contradictory case law, eg from the Administrative Appeals Tribunal?

Training

65. Do you receive professional development training specific to decision making in your agency?  

Y  N

If No, please leave this section.
66. How often do you receive training?

67. What does this training cover? [Eg. Statutory interpretation, evidence recording, use of office manual/guidelines etc]

68. Do you find the training helpful? Y N

69. How could the training be improved? [Ie more practical training, time management etc]

**Timeliness**

70. What time deadlines, if any, do you have for completing a review?

71. Are these deadlines difficult to meet? Y N

72. Are these deadlines met? Tick response
   • always
   • most times
   • occasionally
   • rarely
   • never

**Quality Control**

73. What quality control mechanisms does your agency have for ensuring that the internal review system achieves the aims you identified earlier?

74. Is there anything you would like to add about your decision making process which has not been covered already?
MANAGERS’ QUESTIONNAIRE

1. Do you supervise internal review officers, are you involved at policy level in internal review or are you senior management in the agency? Y N

2. What is your current level?

Aims and Objectives of Internal Review System

3. Why does your agency have internal review? [Ie what aims is it seeking to achieve?] Y N

4. Is there anything in addition that internal review offers for your applicants? Y N

5. Are officers in your agency made aware of these aims? Y N

6. Do you think these aims are being met? Y N

7. If yes, what aims is it meeting well?

8. If not, how could this be remedied?

9. How independent from the agency should internal review officers be in reviewing decisions?

Internal Review System and Process

10. Briefly describe the typical primary decision making process in your agency.

11. Briefly describe the typical process for internally reviewing decisions in your agency.

12. What is the source of authority to conduct internal review? [Eg by statute, executive authority etc]

13. Does the agency or other body ever initiate an internal review? Y N

14. If Yes, by whom, in what circumstances does this occur and how often? [Eg routinely, as a form of quality assurance etc].

15. Are internal review officers located in a separate part of the agency to primary decision makers? Y N
16. If Yes, why?

17. What skills do you look for in an internal review officer?

**Accessibility**

18. Is there any mechanism for identifying applicants who may have difficulties in pursuing review? [Eg hearing, sight, physical, intellectual, ESL, ATSI, geographical remoteness]

19. If yes, are there additional services you provide for them? Please describe

**Resources**

20. Is the direct financial cost of providing internal review within your agency discretely identified? [Global cost] Y N

21. Which of the following factors are relevant in measuring the cost efficiency of the internal review process in your agency. Eg
   - it minimises appeals to external review
   - it improves the quality of decision making and therefore reduces appeal rates over time
   - it provides a cheaper review for applicants and the agency
   - it is a necessary accountability tool
   - it works within a prescribed budget
   - any other (please explain)

22. How, if at all, has the decision making and review system in your agency been affected by resource cuts? Y N

**Normative Effect**

23. Does your agency obtain information about the results of external review of your agency’s decisions? Y N

24. What significance do you attach to these results?

25. What mechanisms exist for feeding back the results of external review into your agency’s decision making?
26. To what extent does the prospect of external review affect the way internal review decisions are made?

27. What mechanisms exist for feeding back the results of internal review into your agency’s primary decision making process?

28. To what extent does the prospect of internal review affect the way primary decisions are made?

29. What systems, if any, does your agency have for promoting contact, discussion and the exchange of ideas between internal review officers and primary decision makers?

30. What systems, if any, does your agency have for promoting contact, discussion and the exchange of ideas between internal review officers?

31. In decision making, does your internal review process identify whether a decision is likely to be significant eg ‘test cases’ that may set precedents at external hearing, decisions that may have political implications, cases involving large sums of money etc?

32. How, if at all, are these types of cases dealt with differently? [Eg discussed with other decision makers before decision is made, made by higher level decision maker than usually makes these types of decisions, discussed with senior management, involve other officer in drafting a statement of reasons etc]

33. What sort of problems in primary decision making does your internal review system pick up? [Eg poor quality decision making, poor or inadequately thought out policy, inadequacies in computerised decision making system etc.]

34. How do you deal with contradictory case law, eg from the Administrative Appeals Tribunal?

35. Would it be helpful for internal review officers to discuss general principles or other matters with external review bodies? Y N

**Training**

36. Do you offer professional development training specific to decision making in your agency to:
• primary decision makers
• internal review officers

37. If No to both, why not? [Eg resource constraints, not enough staff to relieve, unnecessary for the types of decisions]

If No, please go to next section

38. What does the training cover? Are there any areas in which it could be improved?

Management of Internal Review

39. What quality control mechanisms does your agency have for ensuring that the internal review system achieves the aims you identified earlier?

40. What time deadlines, if any, do review officers have for completing a review?

41. Are these deadlines difficult to meet?

42. Are these deadlines met by review officers? Tick response
• always
• most times
• occasionally
• rarely
• never

Statistics

43. Are rates of application for external review used as an indicator of the quality of the internal review process?

44. If yes, in what way?

45. Do you keep statistics of internal review reversal rates?

If no, please go to next section

46. How do you use statistics like this?
47. Do you keep statistics about individual internal review officers’ reversal rate of decisions? Y N

48. If yes, do they help you identify problems in your internal review process? How?

49. Are there any other uses for these statistics? Please describe.

**Principles of Internal Review**

50. Do you have any comments about ways in which your internal review system could be improved?

51. Is there anything you would like to add about your decision making process and system which has not been covered already?
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