RESPONSE TO INITIAL COMMENTARY ON THE *BETTER DECISIONS* REPORT

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The purpose of this article is to explain the ways in which the Administrative Review Council ('the Council') considered, in its recent report entitled *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39) ('the report'), some of the issues that appear to have attracted most initial interest.

Judgment of current tribunal performance

Some of the early commentators on the report have seen the proposals for structural change as a vote of no-confidence in the specialist tribunals. expressed most bluntly as a prescription for an Administrative Appeals Tribunal ('AAT') takeover of those tribunals. On the other hand, there has been criticism of some recommendations as threatening the high standards and credibility of the AAT itself.

The Council saw its conclusions and recommendations in the report as representing a fresh start - as a means of incorporating the best features of all the current tribunals. It is recognised in the report that the AAT and the specialist tribunals have particular strengths and limitations, arising either from their statutory structure and processes or from the ways in which they have chosen to perform and manage their review functions. The AAT, whilst it has made significant innovations in recent years. remains in some ways too formal and legalistic, and could benefit from exposure to some of the procedural approaches pioneered in the specialist tribunals. Equally, the specialist tribunals can perhaps draw from the AAT's positive experience to date of alternative dispute resolution techniques and, at the same time, usefully adopt a more legalistic and adversarial approach in appropriate cases (a minority of their caseloads).

The emphasis throughout the report is on flexibility - on allowing tribunals to identify and apply the most appropriate process for each individual review case. The Council expects, and trusts, tribunal management to be able to approach that task without allowing an inappropriate cultural role or approach to predominate. The specialist tribunals - and the various specialist Divisions and the General Division of the proposed Administrative Review Tribunal (ART) - would continue to emphasise informality and short time frames.

The second-tier Review Panels of the proposed ART would place more emphasis on establishing suitably authoritative decision-making panels, and

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on giving particularly careful and comprehensive treatment to the more significant cases that should form their staple diet.

Loss of informality and speed

One potential disadvantage of the Council's proposals - of which the Council was aware - is the risk that the present system of speedy and informal review of most income support decisions by the Social Security Appeals Tribunal ('SSAT') could be threatened by the proposed structural changes. Both the proposed merger of the SSAT with the new ART and the proposed removal of the as-of-right appeal to a second tier of review are seen as contributing to this risk. It has been suggested, for example, that the perceived need to restructure the system of review for veterans' compensation decisions - on the basis that the Veterans Review Board is not (for reasons outside its control) functioning as an effective tier of review - has led the Council to propose changes to the SSAT-AAT relationship. It is suggested that this relationship, with which there is no complaint, is to be altered purely for the sake of administrative neatness.

The Council recognised the general satisfaction with the two-tier system of external review in the social security area, but felt that it involved unnecessary duplication of review proceedings for the more than 1,000 cases that proceed to the AAT each year. The Council considered that it would be possible to retain the informality and speed of the SSAT (whether it remains separate or becomes a specialist Division of the ART) whilst at the same time limiting the right of further review to cases which fall within the three grounds set out in Chapter 8 of the report.

The most commonly cited reason for needing to retain the as-of-right second tier of review is that, if that right is removed, agencies are likely to insist on being represented at first-tier hearings. It should be noted that the Department of Social Security stated in its submission to the Council that it would not automatically seek to appear in first-tier and second-tier tribunal hearings, and that the Department of Immigration and Ethnic Affairs does not routinely participate through an appearance in Immigration Review Tribunal or Refugee Review Tribunal proceedings, despite the fact that those hearings are the final ones on the merits of individual cases. Furthermore, in the report, the Council emphasised the discretion of tribunals - subject always to the rules of procedural fairness - to manage review proceedings as they see fit, and at the same time exhorted agencies to avoid appearing in hearings in routine cases (for broader reasons going to access to tribunals).

As well as being confident that the pressures for greater formality can be resisted, the Council also defends the principle of consistency between jurisdictions in relation to tiers of review. This is more than just a seeking of administrative neatness - it is difficult to justify as-of-right access to a second-tier of review in one jurisdiction but not in another on either equity or efficiency grounds. As the Council states in paragraph 8.92 of the report, if the *only* reason for a second tier of external review 'as-of-right' is to give another opportunity to make a 'preferable' decision, then why not a third or further opportunity?

Independence

There is apparent concern in some quarters that the net result of the Council's recommendations would be to reduce the independence of tribunals from government. This is the reverse of the Council's intention. The only proposal that could perhaps be seen as directly reducing independence is the Council's preference for fixed-term renewable appointments over tenured or fixed-term non-renewable appointments (the last option being one that it had previously

espoused). This concern is perhaps associated with the emphasis in the report on external review as a part of the executive arm of government rather than the judiciary, and on concerns about performance, productivity and efficiency issues.

These emphases do no more than dispel unhelpful misconceptions about the true nature and role of external review tribunals. A clear acceptance of the propositions that review tribunals form part of the administrative decision-making machinery and that they must be accountable for their use of the resources provided to them clears the way for attention to be focussed on the factors that can and do influence the actual and perceived independence of tribunals. These factors include the administrative, staffing and financial links between tribunals and departments, the transparency of the process for selection and appointment of members and the quality of tribunal decisions. The mechanisms whereby agencies respond to tribunal decisions also affects the credibility of tribunals, particularly in the eyes of people who use them regularly. In these areas, the Council's recommendations are designed both to bolster actual independence and to reduce the potential for perceptions of interference in their operations.

Tenured appointment to retirement age can act as a guarantee against threats to independence. However, tenure is not a substitute for independence of character in the individual member. To appoint all 500-plus tribunal members on tenure would not be possible or desirable - it would represent too great a financial liability and too great a restriction on the flexibility needed to maintain a membership with the skills and experience to operate effectively in a constantly changing environment (in which members have to 'step into the shoes' of decision makers in assessing facts and exercising discretions, as well as be aware of the relevant law). One suggested alternative - to appoint only some senior members on tenure (as in the past) - would entrench a two-class membership which the Council considered undesirable.

The Council was aware that renewable appointments create the possibility of members being influenced (including in undesirable ways): however, the Council diverged from its previous position on the basis that, on balance, tribunals should not arbitrarily have to lose the experience of the best of their members if those members are prepared to stay for another term. In addition, the Council considered that the risk of undue influence upon tribunals and their members could be addressed in other ways.

The Council is confident that the other measures it recommends, particularly the overhaul of the process for the selection and appointment of members, will lead to a substantial net increase in the actual and perceived independence of tribunals. At the same time, because the credibility of tribunals in the eyes of their users and potential users is essential to their ability to provide effective external review, the Council will remain vigilant in relation to these sensitive issues.

Qualifications for membership

It has been suggested that the checklist of core skills and attributes in Chapter 4 of the report is an unrealistic 'wish list' and that it undervalues legal qualifications. The Council had no desire to denigrate the valuable contribution that lawyers have made over the years to the establishment and maintenance of high standards of external merits review. However, it deliberately tried to distinguish between a range of necessary legal knowledge and skills on the one hand and the possession of formal legal qualifications on the other. It also tried to emphasise the importance of other skills, such as communication skills, which traditional legal education may give but

does not guarantee. The Council fully expects that qualified lawyers will continue to make up a substantial proportion of tribunal membership, but they will have been appointed, like all other members, on a merit-based assessment of their competence against publicly-stated functional criteria, rather than because a legal qualification is assumed to automatically bring with it the same package of skills, experience and competencies.

The Council makes it clear in Recommendation 31 that more work needs to be done in developing core skills and experience criteria to be used in the selection and performance appraisal of members. The precise criteria used and their relative weight may well vary between different tribunals or divisions. The list in paragraph 4.12 of the report is intended as a starting point for this further work. If the list sounds demanding, that is deliberate - tribunal decision making is a high-level function, with major consequences for individuals and businesses. Members are well remunerated and, in exchange, it is reasonable to expect the highest standards of competence and sensitivity.

Cross-membership

It has been suggested that the Council's proposal for cross-membership between divisions of the new ART is inappropriate and would dilute the quality of tribunal decision-making. The Council considered but disagreed with such suggestions, noting that there are numerous instances of successful cross-membership, not only between Commonwealth tribunals, but also between Commonwealth and State tribunals. This cross-membership brings great benefits in terms of exposure to different experience and perspectives. The Council would expect a member to be appointed to more than one Division only where the member clearly met any Division-specific selection criteria and where the relevant Division Heads were satisfied that the member could successfully combine the different duties.

The Council was concerned to avoid any perception of some members being 'second class', and this is one reason why it envisages Review Panels being drawn from the ranks of the more experienced members of the ART Divisions, and that those members would continue to serve on first-tier panels in addition to performing Review Panel duties.

Effect of costs powers

In Recommendation 21 the Council proposes that tribunals should be able to make costs awards in specific circumstances. Some commentators have seen this as a recipe for greater formality and legalism, with 'parties' being overcautious and more likely to resort to legal advice and representation. As already stated above, this criticism undervalues the ability of tribunals to manage cases so as to resist any such tendency. It also overlooks the Council's intention, spelt out in paragraph 3.161, that the costs power should not be used to penalise unrepresented applicants: rather, it would be designed to serve primarily as a sanction against the infrequent cases of time wasting or other abuse of process by agencies or representatives.

Relationship between recommendations

The report makes it clear that the recommendations in Chapters 3-7 of the report can and should be implemented whether or not the structural changes proposed in Chapter 8 are also accepted. Many of the earlier recommendations are already in the process of adoption by one or more of the review tribunals, and those recommendations can continue to be implemented without waiting for the process of further consideration and consultation which the major structural changes warrant. The Minister, in launching the report in September, accepted this phased approach to

consideration and implementation of the report's proposals.

What is perhaps less clear from the report is that the proposals in Chapter 8 for limitations on the rights of review, with new grounds for discretionary 'second-tier' review, could be separated from the proposed new tribunal structure involving the ART. This has been pointed out by at least one commentator.

While the Council feels that the maximum benefit of all the Chapter 8 changes would flow from their implementation as part of a package, it agrees that there is no reason why the changes to appeal rights could not be introduced within the existing tribunal structure featuring the AAT and the separate specialist tribunals.