BUILDING SECURE COMMUNITIES: DELIVERING ADMINISTRATIVE JUSTICE IN PUBLIC HOUSING

Kathleen McEvoy*

Public housing and housing assistance in Australia is primarily provided by the States and Territories, largely funded by the Commonwealth. Public tenancies do generate some income, but as most tenants of public housing are social security beneficiaries[1] most receive significantly rebated rents, and this income does not address the costs and debts of public housing authorities, which therefore remain heavily dependent on Commonwealth funding. Public housing assistance is, however, not limited to the provision of housing itself. The range of benefits provided by public housing throughout Australia extend to any decisions relating to housing: they include not only the provision of housing but also the determination of general eligibility for public housing, as well as categorisation of housing entitlement, allocation of housing, and the type and location of housing. Public housing services also extend to financial and other support to access private rental, the provision and support for housing services in remote communities, home ownership support, especially for low income earners, and homelessness support.

These decisions are made by public officers in public housing agencies across Australia. Their decisions entail the distribution of and determination of eligibility for resources that are both scarce – and very strictly rationed by eligibility rules – and valuable. Allocation of these assets and resources can have a significant impact on the lives of the recipients. It enables them to obtain housing, avoid homelessness, live together as a family, have consistent access to medical and education services and employment opportunities. These are essential characteristics which create communities and enable the development of social and economic capital for both the present and the future for the whole Australian community. This is an essential and public aspect of the provision of government assistance.

Access to secure and affordable housing is acknowledged and protected as a fundamental human right in a number of international conventions to which Australia is a party.[2] Secure housing is not only important as a matter of security and place but also provides a basis from which an individual can secure employment; a fixed address for the purposes of receiving social security entitlements; a setting for the enjoyment of family and community life and all this entails (including the right to vote); and a basis for the pursuit of education and related activities. Its importance can hardly be overstated as a foundation for the establishment of healthy and productive individuals and civil communities. All or any of the decisions of public housing providers will impact significantly on fundamental aspects of an individual's life and circumstances. The importance of getting these decisions "right" cannot be overstated, and delivering administrative justice in this respect should be a fundamental concern that goes far beyond any narrowly conceived notion of "good administration".

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* *Kathleen McEvoy is the Associate Dean (Learning and Teaching) Faculty of the Professions, University of Adelaide, seconded from the Law School, University of Adelaide. She is also the Presiding Member of the South Australian Housing Appeal Panel, but the opinions expressed in this paper are her own and not the views of the Panel. Much of the information relating to Housing Appeals processes in other States and Territories was provided by those appeal bodies at the Third National Housing Appeals Conference, Adelaide, April 2010. This paper was presented at the 2010 Australian Institute of Administrative Law Forum, Sydney, 23 July 2010.*

Public housing in Australia

Creyke and McMillan[3] suggest that "a unique feature of Australian history is that the community… came to rely on the government to provide public services and, as a consequence, to be involved in many aspects of communal life". They quote W K Hancock's early history, *Australia* (1930), in which he comments that "the prevailing ideology of Australian democracy features 'the appeal to government as the instrument of self realisation'".[4] They suggest that the extensive nature of government control in Australia "has led to a demand for heightened scrutiny of government, consistent with the democratic ideal that those who elect the government are entitled to call it to account". They conclude, "in short, with power comes responsibility and accountability".

The reliance on government services is as strong and entrenched in relation to the provision of housing benefits as it is in relation to the other services identified (transport, education, income support, allocation of land). It is only very recently that there has been a significant move away from the direct provision of public housing and public housing support by the state. A proposal to "privatise" the provision of a proportion of public housing support, to be managed by and through private agencies (community housing providers) has only found a significant public commitment in the 2009 Commonwealth/State National Affordable Housing Agreement,[5] which "aims to ensure that all Australians have access to affordable, safe and sustainable housing that contributes to social and economic participation".

The provision of public housing, and government support for accessing the private rental market, has been a very important aspect of community services provided by States and Territories in Australia, particularly since the second half of the twentieth century.[6] The widespread development of public housing at that time was an important aspect of State economic development, as well as a response to both returning servicemen requiring housing and to the rapidly expanding immigration program following the Second World War. On both bases it enabled significant settlement and development, especially in areas away from capital cities, and enhanced the establishment and development of regional centres. Subsequently, however, the provision of public housing throughout Australia has been focussed on welfare provision and, more recently, stocks of public housing have been significantly reduced. Now, increasingly, publicly funded housing is managed and made available through private providers such as housing associations.

The widespread provision (and often, expectation) of public housing, expanding more broadly into housing related services, means that many millions of Australians are and have been affected by government decisions about eligibility and availability of public housing services and support. These decisions, no less than those concerning social security benefits or tax assessments or any other form of government decision which impacts on the lives and circumstances of individuals, should be open to scrutiny and review. These are public decisions, with public as well as personal consequences, made according to principles of public policy developed by government. These are the types of decisions which are at the heart of the merits review processes described, promoted, developed and, finally, entrenched, first at Commonwealth level but then throughout Australia in the decades following the Kerr Report of 1971.[7] This process of merits review is not, however, as developed and entrenched in respect of public housing services decisions as it is in relation to most other areas of government decisions, nor, perhaps, is it as effective.

The imperative for review

In all Australian States and Territories formal processes for the review of administrative decisions made with respect to the provision of public housing and public housing support have been established, commencing in the early 1990s.[8] This paper considers the extent and nature of the administrative justice in public housing which is provided by these

processes. The provision of "public" and "social" housing and housing support is in a state of flux in Australia and it is questionable whether the existing review processes are appropriate or able to deliver administrative justice in either the present or a new housing provider environment. In considering the nature and operation of review structures throughout Australia, applicable in respect of public housing decisions, and the manner and extent to which they form part of the delivery of administrative justice, the paper considers whether administrative justice is, or can be, delivered through existing structures in the emerging new forms of provision of public housing.[9]

The management of public housing funding from the Commonwealth has been governed through successive Commonwealth State Housing Agreements, from the first in 1945, to the last in that form which expired at the end of 2008. A significant feature of these Agreements, from 1989, was a Commonwealth condition of funding that each State or Territory establish a process to review decisions of the housing provider funded pursuant to the Agreement. Until the end of 2008, all States and Territories were required by successive Commonwealth State Housing Agreements, as a condition of Commonwealth housing funding, to ensure that:

> Arrangements are in place for recognition of consumer rights and responsibilities, details of which are publicly available, and an identified process to action consumer complaints and review decisions. These arrangements will apply equally to State government service providers and to non-government service providers who receive funding under this Agreement.[10]

Terms in previous Agreements had been more explicit: in the 1989 Agreement (which applied from August 1990), Part IX Clause 29 provided as follows:

> A State shall ensure that, by way of user rights and participation:
> (a) Applicants for, and recipients of, housing assistance, shall have access to:
> (i) Information about available housing assistance and its current policies on the assistance, tenancy conditions and appeal mechanisms. In providing this information, a State shall have particular regard to the special needs of people with limited abilities in relation to literacy, comprehension and command of English; and
> (ii) An independent appeal mechanism, agreed by the minister and the state Minister, from decisions as to the provision by the State for housing assistance to be funded under this agreement… .

Following the establishment of this broad principled requirement, a report was commissioned to evaluate various approaches to public housing review and to establish a set of core principles to govern such mechanisms. A very detailed report[11] proposed a three tiered level of review, two internal and the third an independent external review process. The first level was envisaged as very informal, a "counter" review; the second was a formalised decision making level within the agency, removed from the management context of the original decision makers; and the third level was an independent statute based independent review body, essential for "the delivery of real redress". Accessibility, redress and accountability were presented as the three core principles for an effective review system. How the public housing review bodies have addressed these principles has been reconsidered since the Kent Report,[12] and it is clear that these principles have been sought to be realised in different ways in the intervening 20 years.

The requirement for a review process for housing decisions reflected the processes becoming more commonplace at that time in respect of review of administrative decision making (especially Commonwealth),[13] and also recognised the importance of housing as a central factor for both social and economic development, and the impact which decisions concerning housing can have on the lives of individuals. With the expiry of the requirement to have a review process in place as a consequence of receipt of Commonwealth funding, the "requirement" for a review process must be established from some other source.

In all Australian jurisdictions there now exist bodies for the review of public housing assistance. These were all established prior to the change in the terms of the housing funding agreement in 2008, and no doubt rely now on a general governmental commitment to the value of administrative review as an aspect of democratic accountability and established public sector practices. The institutional arrangements of these bodies are various, although they share some features, generally involving a relatively informal internal review process followed by a more formal review, sometimes involving a hearing, by a body which, from jurisdiction to jurisdiction, varies in its powers and degree of independence. Public housing tenancies are, in general, subject to residential tenancies legislation; this governs the landlord tenant relationship but not the housing provider administrative decisions about the distribution of public assets according to public policy or legislative principles. The bodies that review public housing assistance are concerned with administrative decisions about eligibility for and distribution of these benefits, not the application, use and operation of the benefits once received.

"Public" housing is increasingly provided also by "social housing" providers, these are community housing and housing associations which enter into agreements for the delivery and management of housing to disadvantaged groups and individuals. The decisions made by these housing providers are also, essentially, public housing decisions, but the arrangements for the review of those decisions is significantly less developed than the review arrangements for public housing agency decisions, and review of these decisions brings its own difficulties.[14] This paper does not focus on this sector of public housing.[15]

Review of public housing decisions in Australia

Delivery of housing services is essentially a State or Territory matter in Australia. It is not entered into directly by the Commonwealth, except in respect of the provision of rent assistance through Centrelink.[16] Accordingly, it is for the States and Territories to establish processes for the review of the administrative decisions made in the course of the delivery of those housing and housing related services. These processes vary considerably between jurisdictions, though there are some common elements, including internal and local review within the decision making agency; generally a lack of formal determinative capacity; and generally no independent external appeal process. Some jurisdictions have hearings where the applicants for review are able to attend and present their case, in others the review is essentially paper based.

In each State and Territory there is specific legislation governing residential tenancy arrangements.[17] This legislation applies to tenancies where the landlord is a State or Territory agency and governs the landlord/tenant relationship, prescribing the rights and responsibilities of landlords and tenants and providing means of resolving disputes concerning those rights and responsibilities. In some jurisdictions this legislation is exercised through a specialised court or tribunal.[18] In each jurisdiction, however, a distinction is clearly made between the regulation of this relationship, based on legislatively or contractually established rights and responsibilities, and the possibility of review of the housing services administrative decisions made by a public agency. The former attracts the application of the relevant legislation and (generally) litigious action before the designated tribunal which will apply legislatively defined principles; the latter involves the considerations of administrative review relating to the application of policy and issues of process. Where there are formalised processes, either in legislation or policy, the review process does not provide either an alternative or a supplement to the determination of rights under residential tenancies (or other) legislation.[19] The administrative review process is clearly presented as separate and different.

South Australia

The only legislatively established system for external and independent review of public housing decisions is in South Australia. Amendments to the *South Australian Housing Trust Act 1995* in 2007 established the Housing Appeal Panel[20], which was empowered to decide if a matter under review "is correct and preferable after taking into account any policy that applies in the relevant case and such other matters that appear to the Appeal Panel to be appropriate in the circumstances".[21] The Housing Appeal Panel is also empowered to consider community housing decisions under section 84 of the *South Australian Co-operative and Community Housing Act 1991.*[22]

Section 32B of the *South Australian Housing Trust Act 1995* established the Panel and its general powers and jurisdiction. Section 84(a1) of the *South Australian Co-operative and Community Housing Act 1991* directs that appeals under that Act are to be made to the Panel. Section 32B(13) empowers the Presiding Member of the Panel to establish procedures for hearing appeals, and section 32D(6) requires that the Panel must provide a written statement of its decision and the reasons for it to both the applicant and the housing agency. There is no avenue for appeal from any of the decisions of the Panel other than that it is, of course, subject to judicial review.

The Panel can review any "reviewable decisions", which include any application for housing assistance; for priority housing; for rent or bond assistance or concessions; or "with respect to any matter arising under an agreement where the SAHT [the South Australian Housing Trust] is landlord"; with respect to decisions about housing needs or position; or that "affect a tenant of SAHT".[23] Some decisions are, however, specifically excluded: these include complaints about the content of policy; complaints about staff; complaints concerning matters which are the subject of proceedings before the South Australian Residential Tenancies Tribunal; and disputes between neighbours.[24]

The Panel members are appointed by the Minister for a term not exceeding three years. Members are eligible for reappointment and are entitled to remuneration allowances and expenses. They are removable from office for the usual statute based reasons. Panel members are protected from civil liability in the exercise of their or the Panel's functions.[25]

Hearings before the Housing Appeal Panel are preceded by an internal review of the decision[26] conducted by the housing agency, Housing SA. Housing SA produces a written statement setting out both the background and circumstances of the decision under review, and the outcome of the review and the reasons for it. This is required to be provided to the applicant[27] and this written statement becomes the basis of the housing agency's case, should the matter proceed to a review before the Panel. Housing SA policy has been developed to manage the internal review process, and sets time limits of 28 days within which the review is to be completed and the applicant advised of the outcome. If this time limit is not complied with the matter can proceed directly to the Panel. The administration of the internal review is managed by a body separate from Housing SA, the Public and Community Housing Appeal Unit, which is also the administrative unit for the Panel.

The process for a review of a decision is that the applicant lodges an appeal form, either in person or online with the Unit or at a Housing SA office. Appeal forms are available from Housing SA offices, the Appeal Unit, or from the Housing SA website. The internal review is conducted on paper, by three senior Housing SA officers, who review the appeal form and an "appeal statement" generally prepared by the original decision maker. If the decision under review is upheld (the appeal is unsuccessful) the applicant is invited by the Appeal Unit to proceed to a hearing before the Panel. Matters do not proceed automatically to a further hearing; some applicants choose not to so proceed but, if they do, a hearing is arranged. Relevant material from the Housing SA file is collated by the Appeal Unit with any

materials the applicant has provided; this is provided to the applicant, the Housing SA representative to attend the hearing, and the Panel members. The Housing SA file is available to the Panel at the hearing. The arrangements for the hearing are generally made through discussion with the applicants to assist their attendance and it is rare for an applicant not to attend. Telephone hearings are facilitated where appropriate. One or two representatives from Housing SA will also attend the hearing to present the Housing SA case and discuss the issues with both the applicant and the Panel.

The Housing Appeal Panel sits generally as a Panel of three[28] and provides consensus Panel decisions with written reasons; these are provided within 14 days of the decision being made (and generally on the day of the hearing).[29] Hearings are conducted in private, with both parties given notice of the hearing. Hearings rarely proceed ex parte and applications are almost never determined on the papers alone.[30] An applicant may have legal or other advocates at the hearing, although this is not common. The applicant does not give evidence on oath and, if witnesses attend, arrangements are made concerning their role in the hearing as agreed by the applicant or as seems appropriate to the particular matter. "Witnesses" are commonly brought to hearings as supporters, rather than independent witnesses. Applicants put their cases to the Panel and are questioned by the Panel. Cross questioning and discussion is permitted (indeed encouraged), but the Panel does not encourage or engage in cross examination. It is quite common for a negotiated outcome to be arrived at, either with respect to the specific decision under review, or as to future actions that either the appellant or the housing authority might take.

Decisions of the Panel are determinative. The Panel has the power to "confirm vary or revoke" the decision under review, as well as to make incidental or ancillary orders, or to refer the matter back to Housing SA with suggestions.[31] In making its decision, the Panel is not strictly bound by Trust policy: "the question to be determined by the Appeal Panel in a particular matter is whether the decision that has been made is correct and preferable after taking into account any policy that applies in the relevant case and such other matters that appear to the Appeal Panel to be appropriate in the circumstances'.[32] Capacity to depart from government policy and guidelines in determining on appeal if the impugned decision is "correct and preferable" clearly sets the Panel apart in function from the role of the primary decision maker and makes its independence clear,[33] although clearly the Panel's role is not to disregard policy and guidelines in reviewing a decision but rather, where appropriate, to take "other matters" into account as well in identifying the correct and preferable decision in the particular matter.[34]

Australian Capital Territory

The *Housing Assistance Act 2007* (ACT) governs the provision of public housing in the ACT. The Act establishes the position of Commissioner for Social Housing,[35] who administers "programs and funding arrangements for delivering housing assistance in the ACT".[36] The primary program governing the provision of housing assistance is the *Housing Assistance Public Rental Housing Assistance Program 2008*, ('the Program'), established pursuant to section 19(1) of the *Housing Assistance Act 2007.* Decisions for housing assistance (essentially housing rental assistance (the provision of housing) or rent rebate),[37] are formally made by the Commissioner pursuant to that Program. The Program sets out the eligibility criteria for assistance[38] and, generally, prescribes the arrangements for the operation of the housing assistance available, including needs criteria; rent and rent rebates; reassessment of applications; transfers of tenants; and some aspects of the tenancy agreement to be entered into. Clause 31 of the Program addresses review of decisions, which are formal requests for review to the Commissioner.[39]

Appeals are made directly to Housing ACT, with appeal ("request") forms available from the agency or its website.[40] There are two levels of review, both within Housing ACT. Not all

decisions of Housing ACT are subject to appeal, only housing assistance matters and some tenancy matters, including market rent increases,[41] the issue of a notice to remedy or vacate, and tenant maintenance charges. Other tenancy matters are heard by the ACT Residential Tenancies Tribunal. There are time limits for making appeals: 28 days from the receipt of notification of the decision, either of the primary decision (for first level reviews)[42] or from the first review decision (second level appeals).[43] Housing ACT has a discretion to consider appeals lodged outside these time frames; the decision to refuse to extend the time limit is a decision subject to appeal to the ACT Civil and Administrative Appeals Tribunal ('ACAT') (also to be lodged within 28 days of that decision). Where a decision has been confirmed following first level review (i.e. the appeal is unsuccessful), the appellant must decide if the appeal is to be taken to the second level and must lodge another application for review within 28 days, unless appeal relates to a notice to vacate, in which case an unsuccessful first level review will automatically proceed to the second level review.

A first level appeal is considered by a single Housing ACT officer through a review of the decision. Notification of the outcome of the review must be provided in writing within 28 days of the completion of the review.

Second level reviews are conducted by the Housing Assistance and Tenancy Review Panel ('HATRP') (an "advisory committee established by the housing commissioner for this purpose").[44] This is an internal panel comprising senior Housing ACT officers; it meets privately and makes its decisions on the basis of the written information provided by the appellant and the agency. There is no opportunity for oral hearings or appearance before the Panel. The Panel makes a recommendation to the Commissioner for Social Housing who makes the formal decision and notifies the appellant within 28 days of the decision (cl 32(10) program). That notification must also inform the appellant of any further rights of appeal, to ACAT or the ombudsman or elsewhere.[45]

It is possible to appeal further from HATRP to the ACAT.[46] The ACAT can review any decision of Housing ACT under the Public Rental Housing Assistance Program which has proceeded through the first and second level internal review process. However, the ACAT jurisdiction does not include decisions concerning tenancy matters such as eviction, rent arrears, repairs, security, noise and nuisance. None of these matters is subject to the internal review process as they are within the jurisdiction of the Residential Tenancies Tribunal.

An unsuccessful appellant who has been through the two internal review processes of Housing ACT has 28 days to lodge an appeal with the ACAT. Lodgement and exchange of documents is generally followed by a preliminary conference and a directions hearing, and then the hearing of the appeal. A formal Statement of Facts and Contentions, and a Witness List and witness statements are required prior to the hearing. The hearing is relatively informal and generally open to the public. Decisions of the ACAT can be appealed on points of fact or law to the Appeals President under Part 8 of the *ACAT Act* and, in some circumstances, the Appeals President will refer the matter to the Supreme Court. There is a right of appeal to the Supreme Court of the ACT on matters of law from the ACAT.[47]

ACT legislation and administration also operates in the context of the ACT *Human Rights Act 2004*. While this Act does not necessarily override other ACT legislation, all policies and legislation must be interpreted and applied ("so far as is possible to do so consistently with its purpose") in accordance with the human rights principles.[48] This principle applies in respect of all functions of a public nature performed by a public authority,[49] and it is clear from the Act that these roles and functions include the role of the Commissioner, Housing ACT, HATRP, and the provision of services pursuant to the Program.

Northern Territory

The Northern Territory Housing Appeals Mechanism ('NTHAM') was established in 2005 to enable adverse Departmental public housing decisions to be reviewed; it oversees internal review of housing decisions, and provides executive support to other aspects of the review process. Three levels of appeal are established. In the first instance (1st Tier Appeal), Departmental housing staff automatically review all adverse decisions prior to notification of the decision. Subsequent to the notification of the adverse decision, an appeal can be lodged seeking review[50] with an internal body, the Northern Territory Housing Internal Review Panel, which consists of three senior staff members not involved in the original decision. The third level of review is conducted by the Northern Territory Housing Appeal Board, a body external to the Department, and comprising three members of the community appointed by the Minister. A further application for this level of review must be made within 28 days of receiving the notification from the Internal Review Panel. The Minister has appointed 14 members to the Board, some in regional areas, who have a broad range of expertise, including law, social work, and in community organisations. Two Board members are public housing tenants. The Board makes recommendations concerning the decision under review to the Executive Director of the Department, who makes the formal and final decision. There is no legislative basis for the Board's establishment or, indeed, for any part of the review process.

The review process as operated by the Board is for the purpose of determining if the relevant Departmental policy has been correctly identified, interpreted and applied. To assist with this process, the Departmental Manager of the Complaints and Appeals Unit attends all meetings of the Board to advise on policy. Face to face hearings are conducted, often with the assistance of an interpreter (provided by the Appeals Mechanism). The Appeals Unit's primary focus is on whether the process has been equitable and the appellant's circumstances have been fairly considered, and if the requirements of procedural fairness were met in making the decision. Decisions of the Board are subject to scrutiny by the NT Ombudsman, this is reported [51] to be largely negative, on the basis of lack of procedural fairness in the review process, and lack of reasons provided by the Board in its recommendations.

The establishment of a new model for review of public housing decisions is currently under consideration in the Northern Territory, in response to perceptions of a number of systemic issues with the present review process. Concerns include those expressed by the Ombudsman; limited departmental review policy and procedures; issues relating to organisational culture within the Department, especially with respect to internal reviews and the implementation of review outcomes; and perceptions of independence in respect of the third tier appeal process. This last concern arises both from possible or apparent conflict of interest of Board Members drawn from small communities (especially in regional areas), where local people are frequently well known to each other, as well as the need to establish appropriate locations for hearings in places which are perceived by the applicants for review to be free of apparent association with the housing agency.

The proposal is for a more streamlined two tier review process, with a first level regional (internal) review, followed by an external review by a Territory Housing Appeals Board. It is expected that the new process will be in place in 2011.

Queensland

The *Housing Act 2003* (Qld) provides for the review of certain decisions relating to the provision of public housing assistance. For individuals seeking housing support, decisions concerning eligibility for public housing or the type or location of housing to be provided, are open to review.[52] Where such reviewable decisions are made, they are required to be

provided in writing, with information concerning the right to review and how that review might be sought.[53] The application for review is made to the chief executive (the formal decision maker); it must be made within 28 days of the notification of the decision (the time can be extended) and in an approved form, including "enough information to enable the chief executive to decide the application".[54] Section 67 of the *Housing Act* enables the chief executive to deal personally with the application for review but provides that if this does not occur, the application for review must be not be considered by the person who made the original decision, or by a person less senior than the original decision maker. The review must be completed within 28 days and may result in the original decision being confirmed, amended or substituted with another decision. The applicant for review must "immediately" be advised of the review decision and the reasons for it. These review provisions do not apply in respect of community housing disputes; these are addressed by the Community Housing Standards and Accreditation Unit, which can receive complaints concerning the provision of community housing services where they are provided by a housing provider accredited under the *Housing Act*.

The Queensland Housing and Homelessness Services sits within the Department of Communities. The Complaints and Review Branch[55] includes the Housing Appeals and Review Unit, which administers the review processes established for the purposes of the reviews envisaged by section 67 of the Act. The Branch reports directly to the Director General of the Department (the "chief executive") through recommendations concerning the matter appealed, rather than to the service units within the Department from which the decisions which are the subject of reviews come.

The Housing Appeals and Review Unit administers not only the "legislative appeals", which include the reviewable decisions identified by the *Housing Act*, but also "administrative appeals", which involve most other Departmental decisions concerning housing issues and are subject to review as a matter of Departmental policy rather than due to the legislative requirements of the Act. These matters include decisions penalising applications when an offer of housing has been refused by an applicant; rent assessment, rent arrears or debt review processes; eligibility for bond loans or housing loans; property management issues (such as maintenance); and tenancy management decisions (which can include behaviour and eviction processes). Some housing decisions cannot be appealed to the Unit: matters within the jurisdiction of the Queensland Civil and Administrative Tribunal (including eviction and rent recovery proceedings already commenced); Government policy; disputes with neighbours; and issues relating to community housing providers.

An appeal seeking review of a "legislative" decision is required to be made within 28 days of notification of the decision, on a prescribed Appeal Application form. Where a review is sought of an "administrative" decision, appeals will be considered if received within 12 months of the original decision date (or longer depending on the circumstances). The application is then dealt with, "on the papers", by the Unit. There is no hearing, although there may be some contact with the applicant. The Unit then makes a recommendation concerning the application for review to the chief executive, who formally makes the decision in "legislative" cases. The only applicable external review is through the Ombudsman's Office.

The process of review is that the Unit requests an internal review from the Housing Services Office where the original decision was made, by an officer of a similar or higher level than the original decision maker. Following this review, a recommendation concerning the decision will be provided to the Unit with any supporting documentation. After considering this recommendation, the Unit makes a formal recommendation to the delegate of the chief executive. The same process applies whether the matter is a "legislative" appeal or an "administrative" appeal, except that in the latter case, the recommendation is made to the Manager of the Housing Appeals and Review Unit, who makes the final decision.

The Unit is able to recommend a change of decision (in the case of "legislative" review), and to change decisions directly (in the case of "administrative" review) even where this is not the recommendation of the Housing Services Office. The only possibility of external review for a dissatisfied applicant after the review process has been completed is through the Queensland Ombudsman's Office, but the nature of any further review on this basis is, of course, limited by the Ombudsman's jurisdiction.[56]

There are approximately 65,000 public housing tenancies in Queensland. On average, there are approximately 440 appeals ("legislative" and "administrative") per annum.[57] Since September 2009, a new process introduced by the Housing Services Office[58] has led to a significant increase in applications for review. The Housing Appeals and Review Unit's view is that the process has engendered better decision making by the Housing Services Office, including more detailed and thorough explanations of processes, and decisions being communicated to applicants for service - the "normative effect" of an effective review process.[59]

Victoria

In Victoria, reviews of housing services decisions are undertaken by the Housing Appeals, Complaints Management and Home Finance Review Office, based within the Housing and Community Building Division of the Department of Human Services.[60] The function of review was established in 1993. It deals with approximately 115 appeals each month. On average, since the establishment of the office, about 1,500 appeals per annum have been lodged with the Office. Over this time, 59% of the total appeals lodged have resulted in a changed decision, including through the provision of new information enabling new assessments to be made.[61] From 2008, the Office has also dealt with "complaints" as well as appeals and, from 2009, also deals with complaints from tenants of community housing organisations.

Appeals against Office of Housing decisions are made on an appeal form available from the Office or online. Appeals can relate to decisions concerning allocations, including eligibility; rental rebate assessments; "car parking matters"; and requests for special maintenance, but not matters within the jurisdiction of the Victorian Civil and Administrative Tribunal ('VCAT'), including evictions, rent arrears recovery and tenant responsibility charges.

In the first instance (1st level review"), appeals are dealt with at the local decision level by Housing Office staff. If the appeal is not approved (i.e. the decision remains unchanged), the appeal is automatically transferred to 2nd level appeal. This review is conducted by the Housing Appeals Office. The review can be conducted "on the papers" (the information on the website assumes this, advising applicants that "following a thorough investigation of the matters you have raised … you will be sent a letter advising you of the outcome"); in practice, all applicants are contacted directly for a telephone or face to face discussion of the appeal, which may be through a "home visit". All applicants have a right to use an advocate in both the lodgement of the appeal and in any discussions. The Housing Appeals Office will also negotiate with the Housing Office; this may resolve the appeal. If new information has become apparent or available it will make arrangements for further assessments taking that information into account, or the Appeals Office can take it into account directly. If the Appeals Office is of the view that the assessment at 1st level review is incorrect, it can return the matter to the Housing Office for reassessment. If this reassessment still maintains the original decision and this is supported by the Appeals Office, a recommendation supporting the decision (and rejecting the appeal) is made by the Manager of Housing Appeals, the applicant is notified. If the Appeals Office is of the view that the appeal should be successful, a detailed recommendation is prepared for the Director Public Housing and Community Building for endorsement, and the applicant is notified that the appeal has been successful. There is an expectation that the Director will accept the recommendation.

Housing Office decisions can also be reviewed by the Ombudsman's Office or the Equal Opportunities Commission, but such reviews are necessarily limited in their scope by the jurisdiction of those agencies.

Housing Victoria has a waiting list of about 40,000 applications, and in 2008 – 2009 received 15,974 new applications (including transfers). The Housing Appeals Office receives about 1,500 appeals per year.

New South Wales

New South Wales has an administratively established Housing Appeals Committee ('HAC'), situated within the housing agency, Housing NSW, since 1995.[62] It has jurisdiction over both public and community housing as its decisions affect both social housing tenants and applicants for housing assistance, with recommendatory powers. The jurisdiction does not overlap that of the Consumer Trader and Tenancy Tribunal (landlord and tenant matters), the NSW Ombudsman (complaints of maladministration) or the Registrar for Community Housing (housing provider operations).

There is no legislative framework for the HAC, which is structured as a Ministerial Advisory Committee with recommendatory powers. There have been several internal reviews recommending a legislative framework for the HAC, provision of determinative powers and a broader jurisdiction but these proposals have not been acted upon. Despite the established and apparently entrenched and effective operation of the HAC, issues periodically arise about its powers and independence.

The HAC operates broadly as an administrative review agency. The HAC comprises an Executive Chairperson and a panel of 15 members appointed by the Minister in Cabinet, with a range of expertise including housing, social welfare, psychology, law and experience with other dispute resolution bodies. Hearings are conducted before the Panel (of two or three members), attended only by the applicant (with an advocate and /or support persons), who speaks with the Committee in person. There is no representative from the housing provider at the hearings. The applicant is not provided with material from the Housing NSW file (which is available to the Committee members), unless the applicant obtains this information through formal Freedom of Information processes. Recommendations can be for full or part change of a decision by the housing provider and are documented in detailed reasons for the decision, which are provided to both the applicant and the housing provider.

Under departmental policy, all original decisions are required to be in writing and to advise of the right to appeal against the decision. The First Level Appeal is activated by the lodgement of a formal appeal form which triggers an internal review within the housing provider by a more senior officer than the original decision maker. The HAC does not manage or oversee this first level review. A report of this internal review is sent to the applicant with advice about the HAC and an appeal form. The applicant has three months to lodge an appeal, but a hearing is likely to be arranged within four weeks and completed within a further two weeks. The applicant is advised in writing of the outcome of the review.

Housing NSW manages about 130,000 tenancies and community housing in NSW has about 13,000 tenancies, expected to grow to 30,000 by 2017. In 2008 – 2009, 511 appeal applications were received by the HAC (a 17% increase on the previous year). In the same period, Housing NSW had 2,615 first level appeals (32% led to a change of decision at this level). 395 appeals were heard by the HAC about Housing NSW decisions, with 20 appeals in respect to community housing applications or tenancies. HAC recommended a change of decision in 46% of appeals.[63] These recommendations are made directly to the housing provider. In 2008 – 2009 housing providers agreed with 94.5% of HAC recommendations, 9 matters in total (one was a community housing matter).

In 2008-2009, 47% of all appellants were born in a non-English speaking country; interpreters were used in 22% of appeal hearings; there were face to face hearings in 85% of cases; 30% of applicants were over 55; 8% over 70; and applicants overall were mainly single people or single parent families. The majority of appeals related to metropolitan applicants (331 of 395 appeals) and were mainly self referred (not through an advocacy or support agency).

Tasmania

In Tasmania (with 11,500 public housing properties) there is an administratively established Housing Review Committee which receives applications for review of Housing Tasmania decisions and makes recommendations to the Director on the outcome of the decision appealed. The details of the appeals process are described in the Housing Tasmania Policy "Customer Feedback and Review".[64] This policy deals with complaints as well as appeals.

An applicant for housing services may appeal to the Committee using a Housing Review application form, which is specified in the Policy as only available from the housing provider on request: "the HRC form can only be offered to a client by the operational policy team".[65] It is not available on the website. Decisions that may be appealed include eligibility decisions (for housing and for transfer), housing need assessment categorisation, and vacation maintenance charges. Applications must be made within 12 months of the notification of the decision appealed against, and the Committee process is expected to be completed within 30 working days of the lodgement of the application for review.

The Housing Review Committee consists of three members, one a Senior Housing Analyst from Housing Tasmania, who has management of the Customer Services Hotline and Housing Review Committee, and two community members appointed by the Minister. The Committee was established in September 1990 and is administratively, rather than legislatively, based.

The appeal process has three levels. The first is an informal internal review. The second is through the Customer Services Hotline, which will investigate "a complaint" and report back to the applicant within 48 hours and provide an appeal form. The third level is to the Housing Review Committee. A response to the appeal is sought from the housing agency and this, as well as the application and information from the applicant's Housing Tasmania file, is considered by the Committee. The Committee meets monthly and its meetings are attended by Housing Tasmania officers to advise on policy or any other matters on which the Committee requires advice. The Committee makes its decision on the papers and does not conduct any hearing or inquiry process. The Committee can recommend to the Director of Housing Tasmania that the decision under review be upheld or overturned, on the basis of whether the correct policies and procedures were applied. An applicant who is still unhappy is advised that he/she may contact the Ombudsman.

Western Australia

The public housing review process in place in Western Australia is the third incarnation of a process for this purpose. The current process has been in place since November 2009, following a review established in 2008 and an extensive Discussion Paper published in October 2009, prompted in part by recommendations made by the Equal Opportunity Commission to improve the transparency and effectiveness of the appeals system.[66] The Terms of Reference for the Review included an evaluation of the Appeal Mechanism's effectiveness, cost-efficiency, fairness and transparency in resolving appeals; the scope of appealable decisions; achieving accessibility and simplicity of process for the appellant, without prejudicing principles of natural justice and transparency in the appeals process; the adequacy of processes, procedures, policies and guidelines; the adequacy of monitoring

systems to ensure fairness and transparency of process; and ensuring implementation of the Housing Appeal Mechanism's decisions.

The Review considered the operation of the Housing Appeals Mechanism, which had replaced the Homeswest Appeals Mechanism. Both these bodies had been established pursuant to Department of Housing Policy which required that policy be applied in a fair and equitable manner, in a transparent manner, and that officers would be accountable for their decisions. The newly established Housing Appeals Mechanism is administratively established pursuant to these same principles.

The former Housing Appeals Mechanism operated with a three tier process: internal review prior to finalisation of the standard decision making process, prior to the notification of the decision to the applicant for housing assistance; a review by a Regional Appeals Committee, consisting of a senior Departmental officer and an appointed community representative, following the receipt of an appeal request within 12 months of the notification of the original decision; and a third level of review by the Public Housing Review Panel, generated by a further request for review within 60 days of notification of the Regional Appeals Committee. At the second level, the applicant was encouraged to attend a hearing before the Committee, and a Homeswest representative could attend at the discretion of the Committee. At the third level, there was no automatic right of the applicant to attend a hearing.

The Review Panel comprised three members with a rotating Chairperson, and a hearing was within the discretion of the Panel. The Panel was required to make its decision within 30 days of the lodgement of the appeal.

The review of the system concluded that the appeal system operated more as a "second opinion" process than a true review process: the Review's focus was on an appeal system concerned not with merits but rather process review. The Review proceeded on the basis that the proper purpose of the Housing Appeals Mechanism was administrative review, rather than dispute resolution. Dispute resolution was characterised as merely resolving a dispute, rather than identifying errors or failures in the decision making process, thus limiting the value of the appeals process in improving service, and encouraging value based application of policy rather than focussing on sound process. In addition, the Public Housing Review Panel was seen as inefficient and time consuming, contributing both to imposing a significant onus on applicants for review, and in lengthening the period within which appeals were dealt.

In November 2009, a new Housing Appeals Mechanism commenced operation.[67] The Public Housing Appeals Panel, the third level of appeal, was abolished. The first tier of the old appeals process was absorbed into the ordinary decision making process as a normal aspect of good administrative practice rather than as a separate aspect of an appeals process. Notifications of any unfavourable decisions are required to include information about the right to appeal and an appeal form. An application for appeal goes to internal review by a senior departmental officer, who makes a decision concerning the application. The decision can be declined as ineligible for appeal, or can be overturned as incorrect; the applicant is to be advised of the outcome within 30 days of the lodgement of the appeal. If the decision is upheld (i.e. the appeal is unsuccessful), it is automatically referred to an external Regional Appeals Committee.

This Committee comprises one person from the Department of Housing (a senior Departmental officer not involved in the decision) and one or two independent community members. The members are appointed by the Regional Manager following "consultation with local community agencies representative of the Department's customer base. Members will be selected on the basis of demonstrated qualifications, experience, skills and abilities

and/or interest in the fields of community welfare, public housing and/or cultural and Aboriginal affairs."[68] There is no central Housing Appeals Unit but rather a Regional Appeals Coordinator in each region; a Regional Appeals Committee is established in each region across the State. Applicants are able to attend an arranged hearing and bring an advocate or supporters if they wish; hearings are usually held in Departmental premises in the region nearest to the applicant's home (other than appeals against priority decisions, which are heard in the region where the applicant is seeking housing). Telephone hearings are available. The Committee has the power to directly change a decision or substitute a decision. It appears that the Appeals Committee is required to notify its decision to the applicant in writing within one month of the lodgement of the appeal application and to provide information, in the case of an unfavourable decision, concerning further action that might be available to the applicant for review. Applicants are generally referred to the Ombudsman's Office or the Minor Disputes division of the Magistrate's Court but, again, recourse to further "review" is limited by the jurisdiction of those agencies.

In WA, there are approximately 39,000 tenancies, many in regional areas, and many involving aboriginal tenants. The new process does not presently include community housing but it is planned in the future to include this sector. In the period since its inception to March 2010, 638 appeals have been received, the greatest number being with respect to tenant liability, closely followed by priority housing decisions. Of these appeals, 175 decisions were overturned at Level 1 on procedural fairness grounds; at level 2, 49% of appeals have been unsuccessful, with 36 % successful.

It appears[69] that at this early stage there are some teething problems for the new process, including issues of conflicts of interest for Regional Committee Members, timeframes for appeals, and what constitutes appealable matters. Region based appeals can make it difficult to avoid conflicts of interests in small communities and, indeed, to obtain community membership of the Appeal Panels, partly because of the wider general familiarity with community members in regional communities and also because of the transient populations in remote areas. It is often the case that a community member may know a party to the appeal, but that there is no alternative member available to be scheduled for the hearing.

Delivery of administrative justice in public housing?

What do the details of these review processes identify about the delivery of administrative justice in public housing in Australia? While there are commonalities among these processes there are also wide variations. It is clear that there is not only one way to deliver administrative justice in this area and, indeed, the variety of circumstances in which public housing assistance is provided across Australia suggests different models and processes may well be appropriate.

However, are there certain fundamentals without which administrative justice cannot be said to be delivered? Any consideration of a base line which effectively enables administrative review must include the following: the independence of the review process; the credibility of both the process and the review body, which must also incorporate a consideration of the expertise of the review participants, so that its decisions are accepted and respected by both the housing agency and the applicant for review; and perhaps, above all, the accessibility of the process.[70]

Independence

Most of the review processes do not demonstrate independence from the housing agency whose decisions are reviewed. Since the formalised inception of a system of administrative review in Australia,[71] the "background assumption" is that "merits review tribunals should operate as an external check on the administration, free from the influence and control of

those being checked".[72] Cane and McDonald recognise that although independence is a central concern in considering the effectiveness of merits review bodies, this is not a simple concept and independence may depend on cultural practice and expectations as much as on institutional design.[73] However, they identify two central factors: "one between the making and review of administrative decisions, and the other between internal and external review of decisions. Both of these are striking features of the review bodies described above, which operate in respect to public housing decisions in Australia, which rely heavily on internal reviews as an essential aspect of the review process and all of which refer to the "independence" of an "external" review process.

Clearly government officials who make governmental administrative decisions are not "independent": "[w]hile we might expect that a senior official in the Department who conducts an "internal" review of the decision to exercise "independent" judgment, we would not expect that judgment to be unaffected by governmental policies or roles".[74] On the other hand, where a review is "external", with the implication of being at arms length and independent, the review itself should be independent and not part of or aligned with the agency whose decisions are subject to review. The assumption is that, without arms length review, the review process is not truly credible because it lacks independence, or the perception of independence.

As well as establishing the base for an independent and effective review process, external review has also been invested with the role of generating normative change in decision making bodies: that is, identifying and feeding back to the decision makers systemic issues relating to their decision making, thereby enabling better decision making practices and policies to be developed in the agencies. This is enabled by the monitoring of decisions made through the review process; the giving of reasons for review decisions; and interpreting policy and principles applied as part of the decision making process. This is a valuable aspect of a review process from the point of view of administrative justice in both the broad and the personal sense. Individuals can come to expect a better decision making process and better decisions; decision making bodies improve their accountability through that improved process.

However, it is not just external review which can be used to improve decision making processes. It is reasonable to suggest that internal review processes may also have this normative effect, especially if pursued seriously and consistently. Indeed, this may be a more effective way in which to improve decision making rather than relying on the sporadic effect of appeals proceeding to a hearing and decision. Further, if the purpose is to improve decision making, perhaps better resources, improved recruitment processes and training, and improved management processes by the agencies might have a quicker more effective and lasting impact.[75] So while many of the public housing assistance agencies do not appear to have an independent external review agency, establishing this might not be the only or even the best way to improve their decision making. Certainly they all have internal review processes.

How do the public housing review bodies across Australia measure up in terms of independence? The lack of a legislative basis for the review bodies is a common feature. Most[76] are established on an administrative basis, generally pursuant to policies of the housing agency. South Australia[77], Queensland[78] and the ACT[79] have legislation providing for the review of public housing assistance decisions but only South Australia has a legislatively established review body specifically for this purpose. In the ACT, the ACAT is empowered to hear "housing assistance matters" but in reality this is the least accessible level of review, and the least utilised.

Most of the review bodies do little to even suggest independence from the decision making agency, even in their "independent" or "external" level of review. The ACT model, the

Housing Assistance and Tenancy Review Panel, is established pursuant to delegated legislation[80] and comprises senior Housing ACT officers. In Western Australia and Tasmania, there is a third level of review presented as independent; however, in each case this review panel is presided over by an agency officer and comprises community members selected and appointed by the agency. In Victoria, the only review process is internal, albeit within a separate office; and in New South Wales, the Housing Appeals Committee is situated within the housing agency and is essentially a Ministerial Advisory Committee. In the Northern Territory, there is a separate external review body with members appointed by the Minister, but all meetings of the Board are attended by an agency officer to advise on policy. In South Australia, there is an external and independent body, legislatively secured. Its members are appointed by the Minister and have statutory protections for their appointment.

Those review processes without an external or independent element often refer applicants at the end of the process to other agencies, as providing another level of review or appeal. Most commonly these references are to the local Ombudsman's Office.[81] The Ombudsman's Office generally operates on the basis of a complaint, rather than an application for review, and the role of the ombudsman is not the same as merits review and nor is it accompanied by the same powers to change a decision.[82] Under these circumstances, the Ombudsman's Office does not provide an appropriate "external review" for the purpose of addressing these applications.

Another indication of the independence of the review bodies is revealed by their powers. Few of these review bodies – even those formally part of their departmental structures – have determinative and, therefore, final powers. The South Australian Housing Appeal Panel does. However, in the ACT, Northern Territory, Victoria, New South Wales, Tasmania, and Queensland (with respect to "legislative" reviews, although it can make determinative decisions in relation to "administrative" reviews) the review body can only make recommendations to the housing agency that a decision be changed. In Western Australia, the review body (chaired by a senior executive of the agency) can change decisions.

Legislative security, determinative powers, and external and independent membership, are all significant features of an effective and independent review mechanism upon which the delivery of administrative justice depends. However, it is clear that independence is not found only in formal institutional structures. A culture of independence can be generated even without this institutional structure and protect and promote the delivery of administrative justice. If the practice consistently applies over a period of years, that recommendations of a review body are always accepted and applied by the housing agency, this clearly militates against the weakness of a lack of determinative powers. This appears to be the case in New South Wales, where the Housing Appeal Committee operates within Housing NSW, with recommendatory powers only, but nevertheless is regarded as credible and independent by both the agency and applicants and is well supported to continue operating on this basis. The converse can also be the case: if "independent" appointments are made without reference to merit, or the "independent" review body is not provided with sufficient or appropriate resources to function as such, an independent review process provides neither of those features.

Credibility

An effective review process – one that does deliver administrative justice - must have credibility in the eyes both of the applicant seeking review, and the agency whose decisions are subject to review. The issue of credibility is closely tied to that of independence but also goes beyond this. Credibility might be dependent on the expertise of those conducting the review: if they are not knowledgeable, professional or competent, or if they behave in a partial manner, or appear to do so, this undermines the credibility and authority of the

review. Such considerations raise a range of issues: the conduct of hearings; the provision of procedural fairness; the capacity of the reviewer; and the selection and training as well as the ongoing conduct of the members of the review body.

Credibility might also be dependent on the way in which the review body is structured and formally operates. A review body purporting to be independent, yet situated physically within, or co-located with, the agency being reviewed,[83] is not likely to be viewed with confidence as independent. Credibility and, therefore, acceptance of its decisions or recommendations, might be enhanced from the perspective of the agency where the review is internal; the agency might be significantly more accepting of a changed decision, as it remains "in house" and probably is made by a senior officer of the agency who will be accepted as knowledgeable and competent, and the agency might well take any lessons to heart. From the perspective of the applicant, this is less likely to engender confidence. Without this confidence, is the review effective?

No jurisdiction prescribes qualifications for membership of the review panels (except of course where they are internal and departmentally based). Where appointments are made by the Minister, merit should be the basis of the appointment as it is for Ministerial appointments to any body: governments have an interest in the quality and effectiveness of the work done by their appointees. Ideally, an appointment process will be at arms length and on the basis of skills, knowledge, capacity and experience.

The management of the review process is also a central aspect in establishing its credibility and the effective delivery of administrative justice. The central concern here must be that of procedural fairness, without which it is unlikely there can be either actual or perceived administrative justice. A hearing is, of course, not a prerequisite to delivering procedural fairness but without it this can be much more compromised and difficult. Some form of hearing in person, with the support of a friend or advocate, is a central feature of about half of the public housing review processes,[84] but in the other systems the review is conducted "on the papers". Even where there is a hearing there can be significant limitations: in New South Wales, for example, the applicant attends a hearing but is not provided with a copy of the documents available to the HAC, on the basis that these papers will include material from the applicant's Housing NSW file, these are only available to the applicant pursuant to a freedom of information request. Where there is a paper review, the reviewers may seek a response to the application from the agency, but not make that response available to the applicant for comment.[85]

The issue of conflict of interest is a difficult and prevalent one in these review bodies. The conflict is unavoidable where the review is only internal. In one sense this is presented as a strength of the process; a senior and experienced officer brings a fresh eye and independent judgment to bear in reviewing the decision, with enough knowledge of policy and the decision making process and the operational environment in which the decision must apply to make an effective review. If there is no further review level, this, despite its possible value, is insufficient to deliver procedural fairness. In some circumstances however, this apparent bias is exacerbated by the way in which "independent" review bodies are structured or their members selected, where members are appointed, or advised, or the review body chaired, by the agency.[86]

Accessibility

The last and perhaps most difficult issue relevant to the evaluation of the effectiveness of these review processes in delivering administrative justice in public housing is that of access. Institutional structure, the provision of procedural fairness and the credibility of the process all impact on accessibility: a process lacking a structure or practice enabling it to engage in effective review or lacking in credibility will not provide access to administrative

justice, nor is it likely to be used to do so. Far more fundamentally, access is about information, knowledge, capacity, support and culture.

By definition, applicants for public housing assistance are generally from marginalised groups, frequently lacking the educational or social opportunities, or the physical or intellectual capacities, to access services easily. Public housing also is increasingly required to focus its services on significant sub groups of marginalisation: refugees, indigenous people, released prisoners, victims of domestic violence, homeless people and people with multiple disabilities. These are not individuals who are able to easily access information; present a coherent argument; present themselves to a government agency to argue about a decision; or know where to look for the most effective assistance or support. It is likely to be the case that most of the established review agencies (and the housing agencies themselves) deal daily with individuals from these groups, who have been able to access the review process, possibly with other support and assistance they have been able to access. This, however, does not mean that the issue of access for these groups is not an issue for the delivery of administrative justice. A number of the review bodies do not operate by way of a hearing. While, of course, an oral hearing is not a prerequisite to the provision of procedural fairness, it must often be the case that actually telling their story is the only effective way many applicants will have of being heard.

In respect of some review agencies, it is difficult to obtain even basic information concerning the review process or how to make an appeal. Websites can be very difficult to navigate, and then only provide skeletal information and support. Websites are not accessible to everyone – many are excluded by lack of availability, lack of familiarity with technology, or language. Increased reliance on websites often means lack of hard copy information and forms, and reliance on internet based resources often means hard copy material is overlooked in regular updating. In some agencies information concerning the right to appeal is not openly available or promoted.[87] Only a few jurisdictions require that all decisions must be provided in writing and, at the same time, provide information on the right to appeal.[88] Where there is no such formal requirement in legislation or policy, this type of information access can depend very much on an agency culture accepting the review process. This may vary, not only between jurisdictions but also between offices within the same agency. Availability of the details of the policy against which the decision has been made is also variable. Generally, the agency's policies are available only internally[89], and may not be provided with the decision (especially if the decision is not in writing!). While the existence of detailed policy, much of which has developed alongside (and perhaps as a response to) the development and operation of public housing review processes, has assisted both good decision making and greater transparency in decision making. In the absence of information about the details of the policy, it is difficult for most applicants to mount an argument on appeal that is other than a "second opinion" argument and this is generally not the core of the issue a review body needs to consider. All agencies have information, where available, provided in a number of different languages, and all appeal bodies, where a hearing is provided, have provision for interpreters to be available at hearings.

However, information about a service, however extensive and well explained, even where generally available, is not the same as access to that service. To achieve a correlation between the two requires significant priority and administrative commitment and support for the review processes, better embedding it in public housing service culture. It is only by enabling access that administrative justice has any opportunity for real delivery.

One of the fundamental difficulties for administrative review of public housing services is that no matter what the quality of the review process, access to that process is largely regulated by the service provider, the housing agency: this is the case whether the review process is "independent" or not. This can be contrasted with, for example, social security services provided through Centrelink, which are often directed to many of the same beneficiaries as

those applying for housing services. In the case of Centrelink, however, legislation requires formal advice of the review process with every decision and, in addition to a far more formalised and single central agency, there is a dedicated and publicly resourced (however limited the resources might be seen to be) community legal centre for the support of Centrelink applicants seeking review of decisions available through the Welfare Rights Centre.

Tenants of public housing agencies often face restrictions which do not apply to private tenants and home owners, in particular in relation to their conduct. Behaviour is often an issue in their tenancies: disruptive and disturbing behaviour, or conduct not easily understood, is often associated with mental illness, social isolation and exclusion, cultural differences, and disabilities. Often public housing tenants are subject to special arrangements relating to conduct that can make their tenancies more fragile or more likely to be terminated. These particularly marginalised people can face public housing decisions that may not apply to other tenants and which can impact disproportionately on their security of tenure or capacity to obtain or maintain housing. A very low income, coupled with disability, mental illness or social exclusion, can place a tenant at a very high risk of breaching a term of a tenancy agreement, and the circumstances of such a tenant are that they are very likely to be homeless and at severe risk if the tenancy is terminated. In addition, public housing agencies have access to the most personal of details of their applicants. The need for administrative justice, to access an independent and effective review process, is acute for these applicants; the need of the broader community to be confident that the most vulnerable members of the community are being provided with fair and proper decisions is similarly acute. How else do we achieve a civil society?

Support services available to public housing applicants are generally limited. Each jurisdiction has a service providing tenancy advice and advocacy support to public housing tenants and applicants for housing assistance.[90] Some are relatively well funded and supported and provide quite extensive services ranging from training and advocacy to publications and research.[91] The advocacy services do not always extend to appearing at hearings before review bodies (although of course this is not the only context in which advocacy is of value). However, where there is no or a limited hearing process there is correspondingly limited opportunity for an advocate to provide those services.

Conclusion

Decisions concerning public housing assistance are government decisions which have the highest order impact on the lives of those to whom they relate. They are also decisions determining the distribution of significant public assets, the consequence of which can have far reaching consequences for the stability and development of communities. They are decisions which are generally made on the basis of developed but not always public, policies and guidelines.

These are the decisions which form the core of those ripe for merits review. This is the process developed in the Australian administrative law system to deliver administrative justice. Merits review enables an accessible means of ensuring accountability of government, monitoring and, perhaps, of improving decision making by government, and getting decisions changed so that they reflect and make operational the governmental policies and principles according to which they should be made.

The review processes for the review of public housing assistance risk falling short of the ideals of independence, credibility and accessibility in every Australian jurisdiction. Their effectiveness depends not on an established institutional process but, in many cases, on the hope of the skill, goodwill and commitment of those providing the review services, and on a culture of support within the agency provider.

These hopes are not a sufficient basis for the delivery of administrative justice, which is why, of course, formalised, external and independent review bodies have been established in respect of most other governmental administrative decisions. How do we build secure communities without such a process in relation to public housing?

Endnotes

1 All housing assistance programs throughout Australia have income and asset tests for eligibility for receipt of services, and all now essentially provide services to people who do not have paid employment.
2 See for example, the *Universal Declaration of Human Rights* Art. 25; *Covenant on Economic, Social and Cultural Rights* (ICESCR) Art. 11; and the *Convention on the Rights of the Child* (CRC) Art. 5(e).
3 *Control of Government Action*, Robin Creyke and John McMillan, Butterworths, 2005
4 Above n3, p3
5 See <http://www.facs.gov.au/sa/housing/progserv/affordability/affordablehousing/Pages/default.aspx>, accessed 13 July 2010
6 For a history of the purpose, establishment and operation of public housing in South Australia, see Susan Marsden, *Business, Charity and Sentiment: The South Australian Housing Trust 1936 – 1956*, Wakefield Press, 1986. The South Australian Housing Trust has elements peculiar to South Australia, but many of the concerns and activities which directed its establishment are common to all the public housing providers across Australia. The Trust's operational identity is Housing SA. See also, Dewar M, *Darwin – No Place like Home: A History of Australia's Northern Capital in the 1950s through a study of housing,* National Archives of Australia, 2008, a history of public housing in the Northern Territory; and *Cornerstone of the Capital: a History of Public Housing in Canberra*, Wright B, ACT Housing, 2000. See also Hayward D, *The Reluctant Landlords? A History of Public Housing in Australia,* 1996, Vol 14(1), pp5 – 35, Urban Policy and Research.
7 Commonwealth Administrative Review Committee Report Parliamentary Paper No 144, 1971 ("the Kerr Report"). For brief accounts of the development of the merits review systems in Australia, see Creyke and McMillan, above n 3, and *Principles of Administrative Law: Legal Regulation of Governance*, Peter Cane and Leighton McDonald, OUP 2008.
8 The earliest formal public housing review processes were established in South Australia in 1991 and in Victoria in 1993.
9 See http://www.communityhousing.sa.gov.au/site/page.cfm?u=432#e626 (accessed 11 July 2010) for a Discussion Paper, *A New Vision for Community Housing for South Australia,* which outlines many of these developments and likely changes. In the 2009 Nation Building Economic Stimulus Plan, the Commonwealth Government provided a total of $5.238 billion for the construction of social housing, essentially for housing administered by the not for profit community sector in the period 2008/09 – 2011/12: see http://www.economicstimulusplan.gov.au/housing/pages/housing_social.aspx and http://www.economicstimulusplan.gov.au/housing/pages/default.aspx (accessed 11 July 2010).
10 See clause 2(7) of the 2003 Agreement. Previous Commonwealth State Housing Agreements had included the same provision and it was pursuant to these provisions in successive Agreements that public housing appeal and review processes were established. The 2003 Agreement expired on 31 December 2008 and was replaced by the National Affordable Housing Agreement from 1 January 2009, which does not include any equivalent provision and is a very different type of document. This Agreement sets out a framework for the governments to work to ensure "all Australians have access to affordable, safe and sustainable housing that contributes to social and economic participation".
11 *House Rules: Decision and Appeal Rights in State Housing Authorities*, Colin Kemp and Associates, Mary Perkins and Department of Community Services and Health, 1990, Australian Government Publishing Service, Canberra (the "Kent Report").
12 See *Are we There Yet? Appeal Mechanisms in State Housing Authorities,* National Shelter 1997; and Peter Sutherland, *State Housing appeals: An ACT Perspective*, AIAL 1994.
13 See above n 7.
14 Review processes for these housing providers were required by the terms of the 2008 Agreement: see above n 10.
15 See Kathleen McEvoy and Chris Finn, *Private Rights and Public Responsibilities: the Regulation of Community Housing Providers*, (2010) 17 A J Admin L 159
16 *Social Security Act 1991* (Cth) Part 3.7, payable to most non home owner recipients of social security benefits whose rent is above the threshold rent level, and who do not pay "Government rent" (see section 1070C): that is, it is not available to tenants of public housing, although it is available to tenants in community housing. See also <http://www.centrelink.gov.au/internet/internet.nsf/payments/rent_assistance.htm> accessed 10 July 2010. Decisions concerning rent assistance eligibility, grant and rate are subject to external review through the Social Security Appeals Tribunal and the Commonwealth Administrative Appeals Tribunal.
17 *Residential Tenancies Act 1995 (SA); Residential Tenancies Act 1997 (ACT); Residential Tenancies Act 1987 (NSW); Residential Tenancies Act 1999 (NT); Residential Tenancies and Rooming Accommodation*

Act 2008 (Qld); Residential Tenancy Act 1997 (Tas); Residential Tenancies Act 1997 (Vic); and *Residential Tenancies Act 1987 (WA).*

18 In SA, NSW and the ACT this jurisdiction is conferred on a specialist tribunal, in Victoria in the general administrative tribunal VCAT and, elsewhere, it is exercised in small claims jurisdictions.

19 For example. section 32D(3)(b) of the *South Australian Housing Trust Act 1995 (*SA)

20 An earlier Panel (the Public Housing Appeal Panel, to which the Housing Appeal Panel is the direct successor) was administratively established in South Australia, in 1993, to hear appeals concerning decisions of the South Australian Housing Trust and made recommendations concerning these decisions to the Minister of Housing: see Kathleen McEvoy, *Regulation of Public Tenancies: Disputes and Administrative Review*, in *Responsive Jurisdictions for Changing Times*, ed. Terry Burke, Centre for Urban and Social Research, Swinburne University of Technology, 1998. In 2007, the jurisdiction was legislatively established by amendments to the *South Australian Housing Trust Act 1995 (SA),* and the Housing Appeal Panel was established to exercise powers of review with determinative authority.

21 See section 32D(4) of the *South Australian Housing Trust Act 1995 (SA)*.

22 Section 84(1)(ii) *Co-operative and Community Housing Act 1991 (SA).*

23 The South Australian Housing Trust is the "principal property and tenancy manager of public housing in the state", with additional functions relating to access to affordable housing and housing support, as well as the regulation of community housing providers and private rental housing standards. "Housing SA" is the business arm for delivery of social housing functions, situated within the Department of Families and Communities: see *Triennial Review of the South Australian Housing Trust Final Report,* March 2010.

24 See section 32A(1) of the *South Australian Housing Trust Act 1995(SA)*.

25 See section 32B (2) – (10) of the *South Australian Housing Trust Act 1995 (SA)*. Members of the Panel currently include lawyers, public health policy administrators, academics and social workers and, in the past, the Panel has comprised a similar cross section, generally drawn from professional occupations, and often persons with dispute resolution or other review experience. The process of appointment has generally been through advertising for expressions of interest, interviewing shortlisted applicants and recommending appointments to the Minister, who takes the nominations to Cabinet. The Panel members are not appointed to be available on a full time basis and generally the Panel is scheduled to sit about one day per week, hearing both public and community housing appeals.

26 See section 32C of the *South Australian Housing Trust Act 1995(SA)*.

27 ibid

28 The Panel can sit with two members only (see section 32B(12)) but this is not the general practice.

29 See section 32D(6) of the *South Australian Housing Trust Act 1995(SA)*.

30 The only circumstances in which this occurs is where there is a determination that the matter is clearly outside the Panel's jurisdiction and so will not proceed to a hearing, or where an urgent Interim Order is required: see section 84(7) *South Australian Co-operative and Community Housing Act 1991 (SA)*

31 See section 32D(5) of the *South Australian Housing Trust Act 1995(SA)*.

32 Section 32D(4) of the *South Australian Housing Trust Act 1995(SA)*.

33 See Pearson L, "The Impact of External Administrative Law Review: Tribunals" [2007] UNSWLRS 53, 57

34 In South Australia there are approximately 45,000 public housing premises available. As at 30 June 2009, there was a "waiting list" of approximately 27,000: see *Triennial Review of the South Australian Housing Trust Final Report,* March 2010, above n 23. These figures include community housing premises and applicants, and applicants for Aboriginal public housing. In 2009-2010, 438 appeals were lodged with the Appeal Unit, an increase from 363 in the previous 12 month period. Of these, 194 decisions were upheld, and 148 overturned (others were altered or withdrawn or otherwise resolved). 121 matters (about 28%) proceeded to hearing before the Panel, and of those, approximately 40% of the decisions were changed or overturned - that is, the appeals were successful. These external review numbers and outcomes have been relatively consistent for a number of years.

35 *Housing Assistance Act 2007* (ACT) section 9.

36 *Housing Assistance Act 2007* (ACT section 11(1)(a).

37 *Housing Assistance Public Rental Housing Assistance Program 2008*, Cl 5.

38 See cl. 19 of the Program.

39 See cl. 31(1) of the program.

40 These are forms approved by the Commissioner – see cl 31(3) of the program.

41 These decisions are specifically not appealable in South Australia.

42 See cl 31(2) of the Program.

43 See cl 31(6) of the Program.

44 See cl 31(7) of the Program.

45 See cl 31(10) of the Program.

46 See cl 32 of the Program.

47 Housing ACT has nearly 12,000 properties, representing approximately 8% of all housing stock, with more than 11,000 tenancies. Housing ACT received 2,272 applications for housing assistance in the 2008/2009 year. In 2008 -2009, Housing ACT conducted 540 first level reviews; 56 second level reviews; 2 matters appealed to the ACAT; and 1 matter to the ACAT Appeals President. From 2009 - 31 March 2010, there were 384 first level reviews; 22 second level reviews; and 2 matters appealed to the ACAT.

48 See section 30 *Human Rights Act 2004* (ACT).

49 See ss 40 and 40A *Human Rights Act 2004*.

50 The appeal form is not available from the fact sheet on the website nor is there detail concerning the operation or membership of the Appeal Panel << http://www.territoryhousing.nt.gov.au/public_housing>> accessed 10 July 2010
51 National Housing Appeals Conference, Adelaide, April 2010, Northern Territory Presentation
52 See section 63(a) *Housing Act 2003* (Qld)
53 See section 64 *Housing Act 2003* (Qld)
54 See section 65 *Housing Act 2003* (Qld)
55 The Complaints and Review Branch deals with complaints and reviews across the Department and includes, as well as the Housing Appeals and Review Unit; the Disabilities and Communities Complaints Unit; the Child Safety Complaints Unit; the Disabilities and Communities Compliance Investigation Unit; the Case Review Unit (Child Safety); and the Matters of Concern Review Unit.
56 *Ombudsman's Act 2001* (Qld): see in particular section 12(b), which empowers the Ombudsman to make recommendations concerning appropriate ways of addressing the effects of inappropriate administrative actions, or for the improvement of the practices and procedures. Section 7 includes the "making of a recommendation" as an "administrative action" which can be the subject of a complaint under the Act.
57 National Housing Appeals Conference, Adelaide, April 2010, Queensland Presentation
58 The introduction of the "Client Uptake and Assessment Process" was designed to increase consistency in decision making in identifying eligible households; to determine a "point in time" level of needs though a housing needs assessment; and to match eligible households to appropriate housing assistance products, to meet their needs.
59 National Housing Appeals Conference, Adelaide, April 2010, Queensland Presentation
60 See <http://www.housing.vic.gov.au/applying-for-housing/appealing-a-decision/housing-appeals>, accessed 10 July 2010.
61 Housing Appeals, Complaints Management &Home Finance Review Office Annual Report 20008/2009.
62 See website, <<http://www.hac.nsw.gov.au/>>, accessed 10 July 2010. This is an extensive and informative website, providing clear, detailed and easily accessible information about the HAC and its operations. The website stands alone from that of the Department, despite the HAC being part of the Department.
63 Housing Appeals Committee, NSW, *Overview of 2008/09*
64 See << http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0017/25631/FCT_-_HT_Customer_feedback_Nov_09_v1.2.pdf>> accessed 11 July 2010
65 See page 3, policy, <<http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0017/25631/FCT_-_HT_Customer_feedback_Nov_09_v1.2.pdf>> accessed 11 July 2010.
66 See << http://www.dhw.wa.gov.au/Files/AppealsMechanism_Discussion_Paper.pdf>> accessed 10 July 2010
67 See << http://www.dhw.wa.gov.au/404_444.asp>> accessed 10 July 2010
68 Department of Housing Appeals Mechanism Policy, Guidelines and Practice cl.8.2
69 National Housing Appeals Conference, Adelaide, April 2010, Western Australian Presentation
70 See Kerr Committee Report 1971, n 7; Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39, 1995. See also discussion by Pearson L, *The Impact of External Administrative Law Review: Tribunals*, n 33.
71 Merits review tribunals have been in existence in Australia since the 1920s, but it was the Kerr Report of 1971 that focussed on the distinction between judicial and merits review: see *Principles of Administrative Law: Legal Regulation of Governance*, Peter Cane and Leighton McDonald, above n 7, at 217.
72 Above n 7, at p217.
73 Above n 7, at pp223-224
74 Above n 7, at pp223-4
75 See above n 7 at p248.
76 Victoria, New South Wales, Western Australia, Tasmania and Northern Territory
77 Part 3A *South Australian Housing Trust Act 1995* (SA).
78 See section 63(a) *Housing Act 2003* (Qld), although this applies to only a limited number and type of housing decisions. Review of other housing assistance decisions is administratively based.
79 Cl 31 of the *Housing Assistance Public Rental Housing Assistance Program 2008*, established pursuant to section 19(1) of the *Housing Assistance Act 2007* (ACT)
80 See cl 31(7) of the *Housing Assistance Public Rental Housing Assistance Program 2008*
81 Queensland, Victoria and Western Australia all specifically refer applicants to a possibility of some form of further review by the Ombudsman's Office. The actions of the review body in the Northern Territory are open to scrutiny by the Ombudsman's Office. For issues of maladministration, the actions of the housing providers throughout the States and Territories would all come within the jurisdiction of the Ombudsman, but this is rarely the basis for applications for review.
82 See the discussion of the Ombudsman as a process of accountability and its limitations in *Principles of Administrative Law: Legal Regulation of Governance*, Peter Cane and Leighton McDonald, above n 7 at pp258 – 271; and Creyke and McMillan, above n 3, at pp181-210.
83 In WA, hearings to review Homeswest decisions are conducted in the Homeswest premises. In the NT, finding neutral locations for appeals hearings has been a significant issue in regional areas.
84 South Australia, New South Wales, Western Australia, the Northern Territory and, in practice, Victoria.
85 This occurs in Tasmania
86 Western Australia, Tasmania and the Northern Territory

87 The Tasmanian process is perhaps the least well set out in its literature or on its website, and its appeal forms (on which an application for review is required to be made) are specified as only to be provided directly by an agency officer.

88 Decisions that attract a "legislative appeal" in Queensland are required to be given in writing; in NSW all decisions are required to be provided in writing with information about review; and in Western Australia all unfavourable decisions must be provided in writing with information concerning review.

89 In NSW, the policies are published on the HAC website, but this is not commonly the case. Tasmanian policies are also available online, but not easily accessible. In SA, Housing SA policies are not publicly available on line, and in practice not easily available outside the agency.

90 See general discussion on these issues in *A Better Lease on Life – Improving Australian Tenancy Law*, National Shelter Inc, April 2010

91 In Victoria, NSW, Queensland, Tasmania and the ACT these are Tenants' Unions. In South Australia, the support service is Tenant Information and Advocacy Service, operated through Anglicare, and in WA and NT, a Tenants' Advice Service. Other than in SA, these services are funded from the interest on private rental bonds held during the course of a tenancy. Throughout Australia, State and Territory Fair Trading or Consumer Affairs Departments provide advice to private tenants on tenancy matters. This advice is not generally available to public tenants who, essentially, need to rely on Tenants' Unions or the equivalent, or on the service provider.