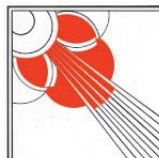


MAINTAINING TRANSPARENCY AND ACCOUNTABILITY  
IN E-GOVERNMENT:  
SOME CHALLENGES FOR INVESTIGATORS, ADMINISTRATORS  
AND CONSUMERS

Presented to the Commonwealth Ombudsman's 30<sup>th</sup> Anniversary  
Seminar, Improving administration: the next 30 years

By John T D Wood  
Director, Baljurda Comprehensive Consulting Pty Ltd  
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## Introduction

There can be no doubt that the citizenry is facing a rapid change in the way in which it interacts with its Government. Not only are the laws, rules, regulations, and guidelines governing programmes becoming more numerous and complex, but they are also subject to almost continuous change. This poses challenges for the citizen in keeping up to date, and for public servants in administering an ever-changing environment. Into this landscape has emerged the wonder of technology.

There is no doubt that technology has made a huge contribution to improving public administration, but we must remember that the nature and form of this technology has almost entirely been designed by IT specialists and bureaucrats, not by the consumers of government services.

Importantly it has been introduced at the initiative of government NOT consumers, and there has thus been an inbuilt imbalance in the IT characteristics. In other words, it is primarily for the convenience of government service providers.

We know that E-Government, in its various manifestations, is here to stay; and we know that as consumers we will increasingly have no option but to participate or not receive our entitlements.

That trend started when it was determined that you had to have a bank account if you wanted to receive social security benefits. We are now facing having a smart card if we want to access Medicare or a range of health and social welfare services, and that will require nearly 17 million Australians to register, and to provide a variety of proof of identity documents to prove we are who we say we are.

Did consumers demand this new approach? No, the Government did, quoting improved consumer convenience and, by the way, a major reduction in fraud.

Changes in circumstances are now batch processed by computers and automatic determinations of eligibility or entitlements are made and communicated by computer-generated correspondence. And mistakes are made, but consumers cannot query computers.

Customers are encouraged to make queries through call centres to save money in dealing with correspondence or clients appearing in person at counters. And mistakes are made, but often there is no record of what advice was given orally to the client.

As John McMillan said at a forum earlier this year:

Those computer-related errors always cause annoyance to the public, even anger. Sometimes the outcome is far worse. An information technology error can mean that a person is wrongly stripped of their government welfare benefit, is landed with a debt to a government agency, or is not recognised as a citizen or visa holder and then placed in immigration detention.

In short, the accountability of government in upholding the law and respecting rights can depend not just on how laws are drafted, or the effectiveness of courts and tribunals in reviewing government decisions. It can depend also on how computers are programmed and managed.<sup>1</sup>

That was the reason behind the Better Practice Guide on Automated Decision-Making that is designed to ensure decision-making carried out by or with the assistance of automated systems is consistent with the admin law values of:

- Lawfulness
- Fairness
- Rationality
- Openness (or transparency)
- Efficiency.

I think that there are other matters to consider.

### **Maintaining transparency and accountability**

Let me suggest that part of the attractiveness of automated systems is being able to identify common denominators applying to an agency's customers, i.e. the common criteria that can be used. My question, and the one that external reviewers should ask, is 'What is the capacity of automated systems to consider *all the circumstances* applicable to a decision making context?'

Can an automated system discern that some other circumstances may apply to an individual's circumstances? Without regular periodic contact with consumers, it cannot. I believe that fundamentally government and its agencies will not understand and act on this until they get better – much better and very quickly – at involving consumers in decision making by understanding them as its owners.

The essence of all this is, of course, good administrative practice addressed to consumers. In this context I would like to refer to what I consider to be the excellent Six Principles of Good Administration developed by the UK Ombudsman in 2006-7. These were developed through a consultative process, and against a background of increased use of ICT in public administration.

Here they are:

#### Principles of Good Administration

Good administration by a public body means:

##### **1. Getting it right**

- Acting in accordance with the law and with due regard for the rights of those concerned.
- Acting in accordance with the public body's policy and guidance (published or internal).
- Taking proper account of established good practice.
- Providing effective services, using appropriately trained and competent staff.
- Taking reasonable decisions, based on all relevant considerations.

## **2. Being customer focused**

- Ensuring people can access services easily.
- Informing customers about what they can expect and what the public body expects of them.
- Keeping to its commitments, including any published service standards.
- Dealing with people helpfully, promptly and sensitively, bearing in mind their *individual circumstances* (emphasis added).
- Responding to customers' needs flexibly, including, where appropriate, co-coordinating a response with other service providers.

## **3. Being open and accountable**

- Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.
- Stating its criteria for decision making and giving reasons for decisions.
- Handling information properly and appropriately.
- Keeping proper and appropriate records.
- Taking responsibility for its actions.

## **4. Acting fairly and proportionately**

- Treating people impartially, with respect and courtesy.
- Treating people without unlawful discrimination or prejudice, and ensuring no conflict of interests.
- Dealing with people and issues objectively and consistently.
- Ensuring that decisions and actions are proportionate, appropriate and fair.

## **5. Putting things right**

- Acknowledging mistakes and apologising where appropriate.
- Putting mistakes right quickly and effectively.
- Providing clear and timely information on how and when to appeal or complain.
- Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.

## **6. Seeking continuous improvement**

- Reviewing policies and procedures regularly to ensure they are effective.
- Asking for feedback and using it to improve services and performance.
- Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.<sup>2</sup>

Therein lie the essential elements that must be at the heart of the business case that informs and drives E-Government.

### **The Access Card for health and social services**

In considering the consumer and privacy implications of the proposed Access Card, our Taskforce has made a range of comments and recommendations that we believe need to be addressed if this aspect of E-Government is to serve its role effectively. Of particular note, I believe, are our views that consumers must be thoroughly informed of what is required of them in each step of the process; and of what the implications are for their privacy. Bear in mind that this proposal brings together biometric photographs, proof of identity documents, signatures, and other personal data. Consequently there is a highly valuable collection of information that would be of immense value to criminal interests, and to security and intelligence bodies.

As a result the Taskforce, in its considerations, has put a high emphasis on security of databases, on significant penalties for abuse of the system, on audit trails, on authorities required for access to the system, and on complaint and redress mechanisms for consumers – including an Access Card Ombudsman.

I mention this approach, because it is an attempt to put the interests of the consumer at the forefront of concern, rather than that of government agencies.

Bear in mind that this work is being carried out against a background of increased sharing of data and information between agencies, and at a time that has been characterised by national security concerns.

The question of how the rights of individual Australians are to be respected, protected and safeguarded is central to the public debate about the introduction, the acceptability and the future of the proposed Access Card for health and social security benefits.

Throughout its processes of public consultation and the gathering of submissions this point has been made to the Taskforce. It is clear from the whole tone of the recent report by the Senate Committee on Finance and Public Administration, and from the debate which preceded this in the House of Representatives, that this is also a matter requiring resolution.

#### ***Guiding principles***

From various reports that we considered, the Taskforce has established a set of ten principles, which it has sought to incorporate into its current recommendations. These are:

1. The basis for determining whether or not a decision should be subject to review is that the decision will or could “affect the interests of a person”<sup>3</sup>
2. Any review mechanism should be “fair, just, economical, informal and quick”<sup>4</sup>
3. Any internal review system should have a statutory basis<sup>5</sup> and required to publish an annual report of their activities<sup>6</sup>
4. It is desirable that there be only one layer of internal review<sup>7</sup>
5. That while the internal reviewer must be kept organisationally distinct and separate from the primary decision maker,<sup>8</sup> and must at the same time be supported in a positive sense by managers,<sup>9</sup> it needs to be recognised that they are not, nor seen to be, independent of the Secretary<sup>10</sup> and act with the Secretary’s delegated authority subject to the provisions and requirements of the relevant Act.

6. Any internal review process needs to be :
  - easily accessible<sup>11</sup>
  - easily understood and transparent<sup>12</sup>
  - conducted with due regard for people with special needs, and assisted by representatives or interpreters where required<sup>13</sup>
  - one which allows the reviewer(s) to take into account the most contemporary material available to them, including material that may not have been available to the original decision maker<sup>14</sup>
  - free.<sup>15</sup>
7. Time limits should be specified for the processes involved in conducting internal reviews (lodgement, decision etc) and where this is done, there should be a preference for arrangements which favour obtaining the most just outcome for the individual as against the administrative or financial convenience of the Department.<sup>16</sup>
8. The highest level of training must be provided to officers undertaking review responsibilities with provisions for regular updating of their skills.<sup>17</sup>
9. The Department must ensure that customers are made fully aware of their review and appeals rights<sup>18</sup>, which should be promoted actively<sup>19</sup> and monitored closely.<sup>20</sup>
10. In order to be effective, any review and appeals system must ensure that not only are applicants aware of their rights but that they are reassured that *“that they will not suffer any adverse consequences for appealing and that the appeals process will not be overly onerous or time consuming, that is, experiencing so called ‘appeal fatigue’.”*<sup>21</sup>

We have sought to incorporate these ten principles into any recommendations, which we have developed about future review and appeals mechanisms for the Access Card system. By drawing on the well-established and accepted work of the Administrative Review Council we have also grounded any of these recommendations within the existing and accepted structures already to be found in Australian public administration.

### **What else?**

When we talk about transparency, it is my contention, that any agency using automated systems to make decisions must, at the time of informing the consumer of the decision, provide them with the relevant data and parameters – in a comprehensible format - that was used to arrive at the decision. In other words, the consumer must be able to determine for themselves whether information used in coming to a decision was correct.

If it is NOT, then the consumer should be able to either:

- Correct the information online; or
- Speak directly to a person who is capable of correcting the matter on the spot.

In cases where an automated decision is adverse to the person, an obvious solution would be to require that no final decision is made without human intervention. There is an example of this in the Immigration field, where Australia allows for automated decision-making where direct human intervention is not required. There is a caveat on this provision in that electronic decisions can only be approval decisions (with applications that are likely to be declined referred to an individual decision-maker). The Minister for Immigration has the right to override any decision made electronically.

As Peter Shergold said in opening the AIAL Conference in July 2003:

Expert legal systems have some distinct advantages. Properly administered and employed, they can help to ensure consistent and accurate decision-making. The decision-maker can be taken through all the elements necessary to make a proper decision. Additionally, the potential for consideration of irrelevant factors can be limited, removing opportunity for decision-making that is inadvertently wrong-headed or biased. A statement of reasons can be generated by the system outlining at every step how information has been employed to reach a decision, providing a useful tool in reviewing decisions. It can also significantly reduce the costs of decision-making.<sup>22</sup>

What about discretionary decisions? While it is technically possible to automate the exercise of discretion, the Administrative Review Council concluded that this is undesirable. It would erode the fundamental principles that a decision-maker must personally exercise discretion, must not act under dictation and must not inflexibly apply a policy or rule. Shergold agreed:

However, the use of these systems also raises challenges. For example, it would be inappropriate for an expert system to incorporate rules that narrow the discretion available to a decision-maker under a piece of legislation. Careful system design is crucial. The perceived saving in costs and other benefits offered by an expert system must not remove discretion from the administrative decision-making process in its desire to make the 'legislation fit the system'.<sup>23</sup>

There is no doubt that as governments develop online means for accessing their services, the bias will continue to be on convenience for the providers. The challenge will be to ensure that those who are not computer literate, or who have some form of limiting disability are not further discriminated against.

John T D Wood  
Baljurda Comprehensive Consulting Pty Ltd  
Ombudsman, Consumer and Accountability Consultancy  
*baljurda@ozemail.com.au*  
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<sup>1</sup> 'Accountability of Government' keynote address by Prof John McMillan, AboveBoard Accountability Forum, ANU, Canberra, 12 May 2007

<sup>2</sup> Parliamentary and Health Service Ombudsman, *Principles of Good Administration*, HMSO, London, 2007

<sup>3</sup> *Internal Review* report, recommendation 1

<sup>4</sup> Administrative Review Council : *Better decisions : Review of Commonwealth Merits Review Tribunals*, Report no. 39, 1995 p. 182 [hereafter *Better Decisions* report] report recommendation 3. This express formulation is found in the *Social Security (Administration) Act 1999* at section 141 defining the "objectives" of the Social Security Appeals Tribunal.

<sup>5</sup> Administrative Review Council : *Internal Review of Agency Decision Making* Report no. 44, November 2000. [hereafter *Internal Review* report] recommendation 2. See also Administrative Review Council : *What Decisions should be subject to Merit Review?* at Para 2.1

<sup>6</sup> *Better Decisions* report recommendation 70

<sup>7</sup> *Internal Review* report recommendation 9

<sup>8</sup> *Internal Review* report recommendation 4

<sup>9</sup> *Internal Review* report recommendation 7

<sup>10</sup> *Review of the Social Security Review and Appeals System. A Report to the Minister for Social Security* undertaken by Dame Margaret Guilfoyle, August 1997, [hereafter *Guilfoyle Report*] page 31

<sup>11</sup> *Guilfoyle Report* page 38

<sup>12</sup> *Better Decisions* report recommendations 14 and 15

<sup>13</sup> *Internal Review* report recommendations 14, 15, 16; *Better Decisions* report recommendation 64

<sup>14</sup> *Internal Review* report recommendation 22 and *Better Decisions* report recommendation 12

<sup>15</sup> *Internal Review* report recommendation 18

<sup>16</sup> *Internal Review* report recommendation 17

<sup>17</sup> *Internal Review* report recommendation 26; *Better Decisions* report recommendation 6: *Centrelink's Review and Appeals System* undertaken by the Australian National Audit Office, Report no. 35, 2004/5 [hereafter *ANAO 35*] report recommendation 9

<sup>18</sup> *Better Decisions* report recommendation 52

<sup>19</sup> *Better Decisions* report recommendation 71

<sup>20</sup> *ANAO 35* report recommendations 1 and 6

<sup>21</sup> *ANAO 35* report at paragraph 14. See also comment by the Commonwealth Ombudsman in relation to Centrelink review processes : "The Ombudsman is concerned that this review process sometimes leads to

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*customers experiencing appeal fatigue.” Annual Report 2004/5, chapter 4*

<sup>22</sup> Shergold, Dr Peter, '*Administrative Law and Public Service*', Australian Institute of Administrative Law Opening Address, 3 July 2003 at:  
[http://www.pmc.gov.au/speeches/shergold/administrative\\_law\\_2003-07-03.cfm](http://www.pmc.gov.au/speeches/shergold/administrative_law_2003-07-03.cfm)

<sup>23</sup> Op. cit.