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Dr Lesley Clark, MP
Chair
Legal Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE. QLD. 4000

Dear Dr Clark

Re: The Accessibility of Administrative Justice

I refer to your letter of 1 December 2005 to the Secretary of the Law Society of New South Wales.

Your Discussion Paper on the Accessibility of Administrative Justice was referred to the Litigation Law and Practice Committee of this Law Society for scrutiny. I enclose with this letter the submissions of that Committee.

Thank you for providing the Law Society of New South Wales with the opportunity of making a submission on the Discussion Paper.

Yours faithfully,

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President

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The Law Society of New South Wales

Litigation Law & Practice Committee

Submission in response to the
Discussion Paper of the Legislative Assembly of Queensland
Legal, Constitutional and Administrative Review Committee
on

The Accessibility of Administrative Justice

The approach taken in this submission is to focus on broader issues within the scope of the inquiry as given in the *Discussion Paper* and to comment on the key issues and topic points raised by the Legal, Constitutional & Administrative Review Committee (LCARC). In particular, there is opportunity for LCARC to recommend further changes in the administration of justice and access to information held by government recognising recent COAG decisions.

Right of access supported by a presumption at law

The Litigation Law and Practice Committee (the Committee) submits that the concept of administrative justice, as applied to access to information held by the Executive Government, needs to recognise not only that there is a right for Queensland citizens to government held information, but also that there is a presumption to access under law. This approach is the next step in the review of access to information legislation to ensure that the right of access is upheld. It will require a review of government machinery, practices and procedures including the legislative process itself to ensure that the presumption can operate.

A presumption of access to government held information would uphold the right of citizens to such information. It would discipline the behaviour of government agencies to ensure their management processes are efficient to minimise the costs of access to information to themselves and those seeking access. Exceptions under the *Freedom of Information Act 1992* (Qld) (***FOI Act***) must be clearly expressed and clear guidance needs to be given in subordinate legislation or in administrative procedures to ensure that exceptions are administered to enhance access.

The costs of access include fees and charges that can inhibit initial access processes while further costs of complicated access arrangements, including mechanisms for recording, storage, and indexing of information making it difficult to identify the required information, lack of knowledgeable services, time delays in accessing relevant information including time spent assessing the application of exceptions. These prohibitive costs impede access.

A presumption of the right of access to information held by an agency would require the agency to publish or have available its information for general access. Access could be available through the internet or intranet services provided by the agency. This would mean that for new information, timeliness of making the information available would be critical for its access. Politicians and their advisers could have access to information held by an agency as a matter of course within the operations of the agency and not necessarily resort to access arrangements under the FOI Act. Better informed politicians, be they government or opposition members, would enhance democratic and representative government. This would mean that government decisions and processes including Cabinet documents would be

available. The availability of Cabinet documents has become a mechanism used by the New Zealand Government, particularly in relation to corporate and financial industry matters.

The quality of information held by government would be enhanced as citizens would be able to correct inaccurate information, provide fuller and further information on issues and broaden the sources of information for government. A more involved community would become evident as more citizens are involved. This environment for enhancing the quality of information held by government by improving access would bring a new era into representative government and the notion of governing.

This approach to the review of the FOI Act is not unreasonable but feasible in the context of the recent COAG meeting of 10 February 2006 which demonstrated a cooperative approach by the Commonwealth, States and Territories with local governments to support national competition principles that generally "focus on outcomes that are good for people and the economy." (Department of Premier and Cabinet, *A Third Wave of National Reform: A New National Reform Initiative for COAG* (The proposals of the Victorian Premier), August 2005).

Avoiding unnecessary compliance costs under legislation is a major issue for governments by "maximising the efficiency of new and amended legislation" is the approach taken by COAG (*Communique* 10 February 2006, Attachment B: National Competition Policy Review). This will enable best practice regulation by providing better opportunities for benchmarking, measuring and reporting on regulation generally. Better access to government held information would enhance this decision of COAG (*Decision 5.3*) to adopt a common framework.

The judicial review process under the Judicial Review Act 1991 should also be reviewed in the light of the recent COAG decisions. Further, the strategic review of the Office of Information Commissioner referred to at paragraph 4.3 of the *Discussion Paper* should adopt the gate-keeping mechanisms for best practice regulation (*Decision 5.1(a)*).

Key Issue 1

The effect of the fees and charges regime together with other qualitative costs impedes access to information held by government. The associated administrative processes of each agency can also compound the costs of access to deter access to information. The costs to citizens to access information, including information about themselves, will depend on each person's concern about the information to be accessed and their relative levels of income and wealth. The lower the level of fees and charges the better the level of access. The pricing regimes for fees and charges are only one aspect of the monetary costs of access. The fees and charges as shown in Appendix A of the *Discussion Paper* for Queensland show that monetary costs can mount where search time involves more than 2 hours. Also, photocopying charges can become expensive where many pages are involved.

The free access to personal information would not necessarily constitute the majority of applications made under the FOI Act. Nonetheless this approach should continue to ensure that accurate information is held by government agencies on individuals. Other legislation dealing with crime or counter terrorism would operate in some circumstances involving agencies holding personal information that cannot be accessed.

The 2 hours time constraint relies on the efficiency of agencies to locate the relevant information and examine it for purposes of exceptions, copying and then arrange for its delivery. The costs associated with the time to search for the information are not "economic based" costs. There is no incentive to use economic costs. The concept of "user pays" for costing purposes is also not "economic cost".

The avenue for waiving of charges would necessarily be limited as shown in the *Discussion Paper* to cases of financial hardship, holding of a concession card and limited non-profit organisations. While this is a limited avenue to reduce monetary costs the determination of hardship still requires time and discretion with the possibility that no hardship is held to exist. Better criteria need to be formulated to assist the decision-maker as well as the applicant.

The comparisons shown in Appendix A of Queensland and other jurisdictions demonstrates the concerns of COAG to establish a best practice regulation approach across all jurisdictions. LCARC has the opportunity to lead other jurisdictions in making uniform the legislative requirements for access information held by government across all agencies in Queensland and for all other States and Territories.

While the constitutional institution of parliaments is similar across all jurisdictions the administration of government varies considerably. Better administration of government is needed to make it easier for Australian citizens, no matter where they reside, to access information in any jurisdiction. The focus needs to be the opportunity of access to government information and not on raising revenue or to deter access.

The items set out under Key Issue 1 show a complex arrangement for making fees and charges or the potential for complexity. The arrangements for access charges with capping proposals, internal reviews, quantum for different classes, deposits, refunds, reductions or waivers and reviewing decisions adds to the complexity and hence the costs of access. These processes should be uniform and supported with explanations to assist the applicant to make a sensible and useful application. Where further research is needed the applicant should be assisted to make these researches using indexes or other search facilities available to the agency. Such facilities could be available on the internet or intranet depending on the type of information being made available. Applicants would be assisted by all agencies adopting the same search facilities and mechanisms so that once an applicant knows the system the applicant can access information no matter where it is held.

The FOI Act needs to provide for the mechanisms as identified under Key Issue 1. There should be measures for providing for costs of access, reductions and waivers to accommodate each case. However, the Act needs to ensure uniformity and reduced responsibility on agency staff to make qualitative decisions about a person's application. Clear criteria and guides need to be available to assist the staff of agencies. The better approach is to make sure the Act is sufficiently clear so that applicants can read their responsibilities under the Act to gain access to information. This is the best approach as the costs to applicants is less than the costs of agencies to identify the relevant information required and to determine if that information would be available in whole or in part and for the applicant to be informed of the reasons if only part of the information is available.

The review of administrative decisions and actions should ideally be handled by the Executive.

The reporting requirements of the Attorney-General and the Information Commissioner could be made more efficient by requiring only one report. It is more likely that the responsibility for reporting by the Information Commissioner would be the better approach as this responsibility would or should include the collection of relevant data that can be published in the Parliament. Rationalising the reporting requirements must not be an excuse to relinquish the responsibility to publish relevant and current information but rather enhance the quantity and quality of information about the operation of the FOI Act. The FOI Act should be more prescriptive about the contents of reporting and to encourage more rather than less information.

Key Issue 2

The costs of judicial review compound the costs of seeking access under the FOI Act. Any challenge to administrative decisions and actions should be assisted by the applicant being able to assess for themselves the likelihood of success of judicial review in their case. Necessarily, judicial review of administrative decisions and actions is little different from any other judicial action. The costs associated with matters in a court concern the legal issues of the matter and not necessarily the administrative issues leading to judicial review. The alternate review mechanisms as identified under Key Issue 2 should be used in matters of judicial review of administrative issues as they would be used for other court matters.

The process of review by the courts must be applied to the review of administrative issues. This includes legal representation as the court processes are usually beyond persons who are not legally qualified to deal with litigation. Self-represented litigants must be discouraged as this tends to waste the court's time and add to the costs of review. Consequently, the comments under Key Issue 1 to keep administrative review within the administrative review processes of the Executive should be paramount. Only pertinent administrative law issues should come before the courts for judicial review under the Judicial Review Act.

The appraisal of judicial review for administrative matters should recognise that it would need to examine the entirety of the processes and administration of the courts and not be confined to one aspect of judicial review. The costs of judicial review apply to all matters and not to just judicial review of administrative matters. This is a larger project that would appear to be beyond the scope of the current review. Nonetheless, it is a opportunity for recommending a broader review of judicial processing and procedures to follow on from the success of the *Uniform Civil Procedure Rules 1999*.

Key Issue 3

Information on government decisions and actions are not adequate and often not accessible. This is largely due to the exceptions under the FOI Act and other legislation restricting or limiting access. The situation could be improved by making a presumption of access to information held by government in relation to its decisions. This would encourage the publishing of the decision and the reasons for making the decision on a website or be available for access at some public location such as libraries.

It appears from the *Discussion Paper* concerning the discussion of an FOI monitor that access to information under the FOI Act is treated as another intervention process into the administration of government that needs attention. It is not a discussion about making sure that information is recorded, stored and made

available as a matter of course in a uniform measure across all agencies. The culture seems to support the obverse approach to information access, i.e. to conceal information and make it difficult or costly to access it. The coordination of access to information across all agencies should obviate the need to delay access on the basis that the information held is owned by another agency. All information, irrespective of ownership or portfolio responsibility, should contain authorisations or other approval mechanisms to allow the information to be made available under the FOI Act unless there are clearly strong reasons that it not be released. The Committee submit that restriction must be subject to regular review and its status reassessed. Where, for example, information held by a Queensland agency becomes publicly available in another jurisdiction, then that information should be made available for access in Queensland.

The better coordination of the functions of agencies to uniform FOI Act procedures is essential. The process of coordination requires the gate-keeper, the Information Commissioner, to oversee the coordination and report to Parliament on its progress and identify areas for immediate reform or direction to facilitate uniformity quickly.

The publication of statements of affairs by agencies is a useful and constructive process in the administration of agencies. They have the opportunity to market their levels of excellence and mechanisms of operation. The identification of goals and objectives assists staff identify a common purpose for the agency and to know how each part operates for the benefit of the whole agency. The statements could be enhanced by the making of assessments in clear terms of the performance of the agency in administering programs and expenditure against budget. Statements need to be more than a revamped version of the agency's annual report to Parliament. They need to be useful documents about the management and administration of the agency and provide clear expressions of programs and their performance. This includes information that is readily available and information that would be subject to access procedures under the FOI Act. Internal administrative arrangements can be better explained and described for applicants seeking access to information.

Key Issue 4

It is a common law right of all persons to access administrative justice. However, the cost of exercising this right limits the ability of individuals to use administrative justice. Avenues in the law to limit access to information under the FOI Act and to limit access to justice under the *Vexatious Proceedings Act 2005* (Qld) should contain the relatively small number of persons making access that is restricted. Most potential litigants would find it difficult to access administrative justice because of the costs involved. This could be due to reasons of the administration of justice, the type of matter for judicial review and the level of review required before settlement is achieved.

Where access to administrative justice is possible, litigants should be assisted to have their matter dealt with in the best context available, including having legal representation. It may be appropriate to consider a mechanism to assist potential litigants access the appropriate level of justice for their matter thus reducing the information costs of accessing administrative justice. Also, cases that raise significant legal issues with wide ramifications for legal interpretation and application should be supported financially with legal representation to achieve the objective of judicial interpretation of those issues for wider application in the community. This would be a public interest test concept for determining appropriate matters to access administrative justice where it would otherwise fail to achieve that access.

Topic 5

The progressive developments since 1990 as described in the Discussion Paper to enhance the efficiency of access to administrative justice must continue and not be allowed to recede. The momentum must continue and reform applied to change the culture to one of providing information rather than concealing it. This will require reform within the legislature to change current norms and to free up information to make it available through the administrative processes of the Executive agencies at least cost to themselves and to the public seeking access to the information.

It is clear that access to information relates to information held by government agencies. The resort to corporatise agencies or their businesses may be seen as a measure to circumvent the need to comply with the FOI Act and to some extent the Judicial Review Act. The definition of a government agency must not only refer to agencies of the Executive but to all organisations that are owned by the government or where Ministers or their delegates including public servants are directors or shareholders/members or both. If the government wishes to avoid widening access to include these other organisations, the alternative is to privatise these organisations and allow the market to discipline their performances including where appropriate reporting to the Australian Stock Exchange or other exchanges.

The resolution of grievances should have the objective of resolving the matter in favour of the applicant unless there is a clear reason for not doing so. This determination must be made as quickly as possible with minimum procedure. Hence, resolving these matters within the administrative context rather than a judicial forum is critical to effective resolution. Short time frames need to be imposed. This should concentrate the decision-maker's mind on the task with the understanding that the presumption of access is paramount in the decision-making process.

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