Queensland Government

Department of
Industrial Relations

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

Dear Dr Clark Lesley

I refer to your letter dated 1 December 2005 in relation to the review of the accessibility of freedom of information and judicial review mechanisms in Queensland.

Enclosed please find the department's submission to the committee's discussion paper and review.

Please feel free to contact Philippa Whitman, Lawyer, Administrative Law Unit on 3225 2653, should you wish to discuss any issue relating to the submission.

Yours sincerely

PETER HENNEKEN
Director-General
2/13/2006

Encl (1)

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Key Issue 1: What is the effect, if any, of the fees and charges regime under the Freedom of Information Act 1992 (Qld) on access to information? Is amendment of the FOI Act and/or administrative reform necessary?

This particular agency has a high volume of FOI applications, predominately due to the inherent nature of part of our business in Workplace Health & Safety Queensland and their regulatory functions.

Over the past few years we have noticed an increase in the utilisation of the FOI legislation from bodies such as Loss Adjusters, Insurance Companies and Injury Specialists whose primary business revolves around the collection of facts relating to their client. Due to the lower cost in obtaining this information under FOI legislation, these bodies are obtaining a wealth of information that has been gathered during the course of an investigation. One of our primary reasons for collecting the information in these cases is to identify any breaches which may result in the prosecution of an employer. We are finding this information, when released, is being used for alternative commercial purposes. Although the current FOI legislation cannot prevent these forms of applicants, this department holds the view that the fees and charges should be commensurate with the actual costs incurred.

- Other legislative fee structures, more specifically the Uniform Civil Procedures Rules 1999 (UCPR) Scale of Costs and Fees, have a range of $15.00 to $58.00 per 15 minutes of processing time. In comparison to the FOI scale of $5.20 per 15 minutes, this represents a difference of between 288% and 1115%;

- The FOI processing charge represents only 74% of the actual costs of our base grade Administrative Officer (AO3) within this department's Administrative Law Unit;

- The FOI processing charge represents only 54% of the actual costs of our base grade Decision Maker (AO5) within this department's Administrative Law Unit.

It should be noted that this comparison has been based on non personal applications where there are third party interests involved. It does not take into consideration the costs involved in providing information to personal applicants (or their agents).

It has been previously identified that a considerable amount of processing time is also devoted within each agency to maintain the administrative function required to calculate fragmented fees and charges under FOI. This includes the capital expenditure outlaid in setting up the infrastructure, record keeping systems and the continuing staff's time to calculate the various charges in line with the current legislation. We have previously advocated for a simpler system of having a set amount per page legislated and

consideration should be given to basing this on a more realistic "real" cost basis.

Key Issue 2: Do costs associated with an application under the Judicial Review Act affect genuine challenges to administrative decisions and actins? If so, can this be addressed?

No. The costs associated with a judicial challenge to an administrative decision or action is a reasonable preventative measure to counter premature applications for judicial review.

The focus in the *Judicial Review Act 1991* on a decision made under an enactment excludes from coverage the activity of non-statutory organisations and other advisory bodies. It remains important to differentiate the appropriate exercise of discretion from conduct. Legal process enables the identification with some precision of what is under challenge, the source of the power involved and the appropriate exercise of that power. Whilst alternative less expensive processes might assist in problem solving, the judicial review process is premised on the applicant being able to point to an excess of power.

Alternate court sanctioned dispute resolution mechanisms (such as problem-solving judicial case management) in matters of judicial review run the risk of blurring the principles of the separation of powers. It might violate perceptions of the separation of powers for the judicial branch to tell the executive when to keep its promises. It could be argued that to give such an instruction would be tantamount to the judiciary giving legislative effect to executive statements. The court's rcle is not to determine the case on its merits or to provide alternative dispute resolution mechanism. The court's role is to review the administrative decision made only for contravention of an Act, breach of natural justice or another irregularity.[1] This is the most substantive feature of judicial review – the Act gave the job to the administrator, not the court.

Key Issue 3: Is information relevant to, and about, government decisions and actions adequate and accessible? How can it be improved?

Generic information, agency co-ordination in the provision of information and statutory publications do not appear to adequately explain the methodology of administrative decision making. Statements of reasons are of little solace if an applicant does not understand the underlying principles upon which the decision was based. Information with respect to administrative decision making could be improved by increasing the availability of preliminary advice by the decision making authority about how administrative decisions are considered and how administrative justice mechanisms work.

[1] Judicial Review of Administrative Action, Mark Aronson, Bruce Dyer & Matthew Groves, Third Edition.

Key Issue 4: Can a diversity of people access administrative justice? If not, how can this be improved?

Whilst the court process has a mechanism for dealing with vexatious litigants, administrative decision makers do not have a similar process. Persistent applications to agencies and repeated ministerial correspondence do not represent appropriate access to administrative justice. Administrative mechanisms to deal with frivolous or vexatious applications should be considered.

It is noted that various groups are particularly restricted in gaining access to justice, due to factors such as socio-economic disadvantage, cultural background and remoteness from mainstream legal services. *(Legal and Constitutional References Committee, Legal Aid and Access to Justice, n 47).* In recent times a move towards recognising "unequal treatment" as a ground of review has emerged. Treated in the past as simply an example of unreasonableness, Judicial Review may now be appropriate where a decision maker treated the applicant according to different criteria than were represented, or according to criteria differing from those previously applied to the applicant. Where differences such as cultural background, socio-economic disadvantage, inaccessibility to legal services or intellectual disability factors prevent or give the appearance of preventing an applicant from accessing administrative justice appropriately, there is a risk that decision making could be perceived as amounting to inconsistent treatment and a breach of the general 'abuse of power' ground.

Litigants failing to represent themselves appropriately receive the benefit of judicial concern where it is apparent that they need to obtain legal assistance. There is little provision for support where, in the administrative process, it becomes apparent that an applicant needs assistance, legal or otherwise.

The funding of services provided by community legal centres, migrant centres, disability law centres and services provided by Legal Aid Queensland is an issue of paramount importance. Legal support by volunteers and lawyers offering pro-bono assistance should be encouraged, promoted and rewarded by the State Government, the Queensland Law Society and Queensland Bar Association.

Key Issue 5: Is access to administrative justice effective and efficient? Is reform necessary?

Recent public sector reforms have been designed to make bureaucracy more responsive to clients and citizens. Reform has also focused on new ways to communicate with those external to the public sector, to provide information to them and to deliver services to them. This has focused on government as instigator and the public as recipient. Reform is necessary to develop processes by which external stakeholders access government services – importantly administrative justice procedures.

Improved processes should not diminish the importance of preserving appropriate administrative law mechanisms. Appropriate time limits imposed by the *Freedom of Information Act 1992* and the *Judicial Review Act 1991* and processes promoting procedural fairness and natural justice in administrative decision making should be preserved.