No 23

QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

G.P.O. Box 2281 Brisbane 4001

The Chair
Legal Constitutional & Administrative Review Committee
Parliament House
George Street
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Dear Madam

The Accessibility of Administrative Justice

Thank you for the opportunity to make a contribution to this Review.

As we hope you will appreciate the Council is a voluntary organisation. The writer of this submission has been pressured by a number of personal and professional commitments over the last few months which has affected his capacity to attend to this matter.

Issue 1.

What is the effect, if any, of the fees and charges regime under the *FOI Act* on access to information and the amendment of documents? Is an amendment to the *FOI Act* and/or administrative reform necessary.

The Council stands firmly in favour of the position that FOI must be a substantially government funded regime.

On page 12 of its discussion paper, the Committee lists four arguments in favour of applicants bearing the costs of FOI applications.

1. That FOI is a government service for which the user pay – this is a fundamental nonsense. FOI is no more a government service than elections are. It is part of the process of accountability and democracy.
2. Imposing charges would deter the use of FOI as an alternative to legal discovery or for voluminous, frivolous and repetitious requests – We are not aware of any evidence that FOI is used excessively as an alternative to legal discovery. The Council invites the Committee to arrange for statistics on this issue to be produced. But in any event the Council remains steadfastly behind the fundamental principle

of FOI that the purpose for which documents are requested should be irrelevant. Once the purpose for which the documents are requested becomes the subject of investigation, then in the Council's view that will be the end of FOI. Voluminous, frivolous and repetitious requests are now adequately dealt with in the legislation, particularly as a result of the amendments passed in 2005.

3. People who use FOI for commercial gain should not be subsidised by public funds – Once again we invite the Committee to call for and produce statistics supporting the proposition that a substantial portion of the cost of FOI is being incurred for profit making purposes. In any event, once again, the Council is of the view that any change to the FOI regime which introduces the purpose of the applicant as a relevant factor is a slippery slope down the slide towards destroying the regime.
4. Imposing a cost regime will give applicants an incentive to be specific - Once again, in the Council's view this is adequately achieved by the regime which is already in place relating to voluminous requests.

The Committee has produced some interesting statistics on the effect of changes in 2001 to increase the fees payable. The Council notes from this, a number of things:-

1. The statistics do not identify whether there has been a change to the number of people withdrawing their applications, following the giving of a cost estimate.
2. The change in fees certainly seems to have reduced applications for review.
3. The table on page 11 would seem to support the case that the increase in fees caused a problem, particularly in the context of public interest applications.

It is clear in the submission to the Council that a substantial alteration in the fees regime must result in reduced applications and hence reduces accountability. In this regard, we note the substantial paper of Mr Alistair Roberts[1] where the author makes the following telling observations:-

1. In Canada a substantial proportion of costs associated with the administration of FOI laws are associated with weaknesses in methods of records management or are driven by government's own demand for services in the system, i.e. by pressure from the government, to determine a basis upon which the information should be withheld. The Council sees no reason for assuming that that proposition does not apply in Queensland.
2. Public officials divert requests for information that would once have been handled informally into the FOI system. In the submission to this Committee in its review of the *Freedom of Information Act* dated 28 May 1999, the Council suggested that one mechanism to reduce this would be to extend the immunity contained in Section 102 of the Act to any officer exercising a delegation under Section 33, who releases a document other than under the *FOI Act* provided the document

[1] *Limited Access: Assessing the health of Canada's Freedom of Information Laws* April 1998 found at HTTP://qsliver.queensu.ca\sps\

would not have been exempt had it been requested under the *FOI Act*. That suggestion was not taken up by the government.

The Committee's own paper indicates that the cost recovery is only a small proportion of the actual cost. However, in the 2001 report the Committee reported that the cost of FOI in 1999/2001 was a mere $7.5m By way of contrast, the Council observes that the cost to the government of its means of propaganda such as advertising, publishing, printing, public relations, public affairs must be considerably more than $7.5 million or the current costs of FOI. Of course, the difference is that in the former category the government controls the information and in the latter it does not.

In our view then there should be no change to the existing arrangements for fees and charges for FOI except perhaps to reduce them. Given that that is not likely to happen we would oppose any change to the regime that would increase the costs of FOI applications.

Cabinet Document Exemption

In the Council's respectful view, the Committee's terms of reference missed the opportunity to deal with a fundamental flaw in the *Freedom of Information Act* the consequences of which have been starkly revealed by the recent Public Hospitals Commission of Inquiry Report.

In that Report, Commissioner Davies found, "there was a bipartisan (in the pejorative sense) approach of concealing from public gaze the full waiting list information". The mechanism for doing so was the Cabinet document exemption in the *Freedom of Information Act*.

At paragraph 1.78 of his Report Commissioner Davies ruled that there was "a culture of concealment of practices or conduct which, if brought to light, might be embarrassing to Queensland Health or the Government. This culture started at the top with successive Governments misusing the *Freedom of Information Act* to enable potentially embarrassing information to be concealed from the public".

He went on at paragraph 6.564 to find in respect of elective surgery waiting lists that:-

1. In 1997 and 1998 Cabinet under a Coalition Government decided not to disclose to the public statistics which showed the number of persons on elective surgery waiting lists.
2. That decision was contrary to the public interest.
3. In 1998 and thereafter until 2005 Cabinet under the Australian Labor Party Government decided to disclose to the public the surgery list but not the entire anterior lists and only that disclosure was made.
4. To disclose surgery lists but not the anterior list was misleading and was contrary to the public interest.

In its submission to this Committee dated 28 May 1999, this Council said:

The Council submits that the section should be repealed and replaced with one that reflects the view of the Legal and Constitutional Committee of Victoria in 1989. That committee concluded that the only documents which should be protected are those which, if disclosed would undermine the unity of cabinet. On the basis of this principle the committee considered that the cabinet documents exemption should only extend to:

1. Documents recording cabinet decisions;

2. Documents submitted by a Minister to cabinet for its consideration but only if:

   a) those documents were brought into existence for the purpose of submission to cabinet; and

   b) were prepared by the Minister or on the Minister's behalf at his or her express direction.

The Council says that in addition the exemption should only apply to documents containing opinions or advice as is the case in Tasmania. Cabinet documents containing only factual information should be disclosed unless to do so would disclose a deliberation or decision of cabinet that has not been officially published.

We call upon the Committee to recommend to the government that the *FOI Act* be amended along these lines.

In this regard, we note that the Welsh Cabinet now publishes the Minutes Papers and Agendas of its meetings with certain exemptions. We invite you to visit www.wales.gov.uk\orgasnicabinet where the Minutes of the Cabinet can be read and the exemptions are listed.

Issue 2:

Do costs associated with an applications under the *Judicial Review Act* effect genuine challenges to administrative decisions and actions? If so, can this be addressed?

The Council has no doubt that judicial review applications are effected adversely by the costs to the applicant.

The discussion paper focuses on the issue of costs orders which may be made against the applicant.

The Council accepts that it appears that Section 49 has not achieved its purpose.

The Council has reviewed the paper by QPILCH dated 7 March 2005. The Council agrees that the prospect of an adverse costs order is a deterrent to those bringing judicial review applications in public interest cases. In the Council's view the Rules of Court should be changed so that in public interest cases a costs order is made against the applicant only if the Court finds the application to have been either frivolous or vexatious. In terms of determining whether or not an application is in the public interest, the Council is happy to have inserted into the rules for the guidance of the Court the criteria set out in pages 38 and 39 of the QPILCH paper.

Of course, the Court should retain the power to make costs order in relation to the respondent on the ordinary principles.

However, in the Council's view the fundamental problem for any applicant is not the prospect of a costs order, which in our view ought to be restricted as discussed above, but the actual costs of bringing the application. In the Council's view that could only be adequately addressed by an increase in the legal aid budget. The Council has for many years expressed its concern about the inadequacy of legal aid in this State. We call upon the government to establish a legal aid section dedicated to the funding of public interest judicial review applications.

Issue 3:

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

The writer's own experience is that the main problem in the Queensland system is that the reasons for decision by decision makers are generally speaking inadequate. It is only when a formal request is made under the *Judicial Review Act* that a proper statement of reasons is provided. The government needs to attend to better training of decision makers who, except for designated FOI officers for example, seem to have no idea of what their obligations are in terms of providing proper reasons. Generally their reasons are perfunctory and obviously "cut and paste" jobs.

Issue 4:

Can a diversity of people access administrative justice? If not, how can this be improved.

Firstly we address the question of vexatious applications. In our view, vexatious applications for Judicial Review are adequately dealt with by costs orders and by the *Vexatious Litigants Act*. In relation to the *Freedom of Information Act* we believe the changes implemented by the 1995 Amendments of the *Freedom of Information Act* are sufficient to deal with frivolous or vexatious applications.

In our view, this issue once again goes back to a question of funding the Legal Aid office to ensure that there are adequate resources for public interest cases to be conducted in this State. In a society it is fundamental Government to be held accountable. The Government should consider setting up a specialist section in the Legal Aid Office to deal with these applications inhouse if necessary.

Another option would be to fund a Committee Legal Centre to deal with these matters.

Issue 5:

This heading raises complex issues brought about by the change in nature of the government with the increasing contracting out of government services.

The Council has not has yet formulated a clear view on all of these issues. We note that this discussion paper is the beginning of a process. We might seek to make further submissions on this topic at a later stage.

However, we would start by making the historical point that the so called "contracting state" is not new. In many respects it is something of a return to the state of affairs prior to the 19th century. When you consider the pre 19th century experience the need to ensure that accountability mechanisms remain strong and effective is very clear. For example, the dockyards and service providers to the Royal Navy were so notoriously corrupt and inefficient it is startling that Admiral Nelson managed to put to sea let alone win the Battle of Trafalgar.

The New South Wales Independent Commission against corruption has previously noted that contracting out creates increased or changed opportunities for corruption in the contracting process.[2] For this reason there need to be steps taken to ensure that this process is opened up to examination.

In the Council's view one area where this could be achieved is by a significant narrowing of the Commercial in Confidence Exemption contained in the *Freedom of Information Act.*

Commercial in Confidence Exemption

It is often said that in the context of competitive tendering contracting arrangements, there is no need for administrative law style accountability arrangements because the process of the market will ensure accountability. In our view whilst there is some merit in that proposition it does not tell the whole story. There are two problems with that view. The first is a simple problem of market failure such as where there are in fact only a small number of competitors. This is a very real concern in the case of big infrastructure projects where given large sums of

[2] New South Wales, Independent Commission against Corruption. *Contracting for Services: A Probity Perspective* 1995 pp3-4.

money involved, the payoffs from corruption are like to be large and hence the temptation proportionately greater. But in those large infrastructure projects, the number of competitors is usually very small may be 2 or 3.

Even in the case of smaller markets where the number of competitors may indeed be large, governments have to have regard to issues which are not encapsulated in market signals. That is why we have a democracy. While efficiency is no doubt an important aim it is not in a democracy an end in its own right. Other issues including fairness come into play.

In addition, when services are being delivered by a government which is democratically elected, the citizens are entitled to know whether or not their monies are in fact being properly spent.

In the Council's view, the present exemption in relation to business affairs or commercial in confidence information is far too wide. It needs to be narrowed considerably.

The Senate Finance and Public Administration Committee in its *Contracting out of government services second report* observed that "only relatively small parts of contractual arrangements will be generally commercially confidential.": In fact, the evidence to that Committee was that confidentiality provisions are inserted into the contracts more often at the request of the public service than the private sector.

The Australian Council Auditors-General in its *Statement of Principles: Commercial Confidentiality and the Public Interest* November 1997 referred to the need to make a distinction between confidentiality during the process of tendering and the final document.

As Seddon says[3]:

> One of the claims made in favour of the contractualisation of government is that the very process of planning and drafting a contract enhances accountability because it forces government agencies to specify with some precision what was previously unspecified or at best the subject of perhaps vague public service guidelines or directions ... It is therefore odd that the terms of the contract are hidden and the very benefits claimed for contracting out cannot be assessed.

Mr Seddon concurs with the Senate Committee when he observes "most of the information in government contracts is mundane and in no way sensitive."

That this is the case, would appear to be supported by the American experience. The Council of Auditors-General noted that in California once a finalised agreement has been reached, the final agreement is able to be released publicly. We see no reason why a similar principle could not be applied here.

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[3] *Commercial in Confidence and Government Contracts* 11 Public Law Review 255

The Council is attracted to the views of Chris Finn[4] where Mr Finn says:-

> Commercial information is overprotected from disclosure under contemporary FOI legislation. This overprotection is evident quite apart from democratic arguments that the "public right to know" may override established commercial interest. Viewed solely in economic terms, the existing levels of protection for business information appear hard to justify. FOI legislation should be redrawn so that business information is only protected where its release will cause demonstrable harm to the competitive process itself. It should not be sufficient to justify exemption, as is currently the case, either that the material is of a commercial nature or that its release will cause some harm to the individual enterprise.

At the very least, the FOI Act ought to be amended to provide that to justify a nondisclosure, as Moira Paterson[5] says there must be some risk of harm to the financial affairs of the government agency. There must be a harm which outweighs the democratic interest in government accountability.

In the case of information supplied voluntarily in confidence, a similar test needs to be applied. It needs to be demonstrated that disclosure information will cause harm to the position of the confidant or prejudice to the future supply of information and that there is no countervailing public interest in disclosure.

Grievance procedures

The writer is not familiar with standard Queensland government contracts with service providers. The writer has some familiarity with Commonwealth government contracts which usually provide dispute resolution procedure clauses which compel the providers to establish some sort of dispute resolution procedure initially between the contractor and the customer. The Committee's attention is drawn once again to the Report of the Senate Committee on *The contracting out of government services* where the Committee cites evidence from Dr Seddon that where contract disputes are settled without going to litigation, the settlement generally favours the contractor.

There are three fundamental problems with contract based dispute resolution procedures the:-

1. Customer is of course not a party to the contract.
2. Amounts involved are usually so small as to make litigation uneconomical.
3. Remedies provided to the government are either potentially unenforceable or of no benefit to the customer.

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[4] Quoted in Rick Snell *Commercial in Confidence – Time for a Rethink?* 102 Freedom of Information Review 67 at 69

[5] *Commercial in Confidence & Public Accountability: Achieving a new balance in the contract state* (2004) 32 ABLR 315

Contractual remedies usually involve either the termination of the contract or some form of liquidated damages. Termination of the contract is obviously a very harsh remedy which in the writer's experience, departments are reluctant to use because it will disadvantage many people who depend on the service provider. That is especially so in the remote areas..

Liquidated damages also cause legal difficulties in that if they are classified by the Courts as a penalty they are unenforceable. Certainly in numerous judgment the Courts[6] have given governments latitude when it comes to striking down liquidated damages causes as penalties. However, assuming that the liquidated damages clause is not a penalty the person that is entitled to the money is the government and not the customer.

In Queensland it might be possible using Section 55 of the *Property Law Act* to give customers of government funded service providers a direct right to claim liquidated damages. That is an issue which would require further legal consideration. However even if that is possible it is unlikely to be an economic proposition for ordinary citizens to seek to recover through litigation any liquidated damages that would be considered valid by the Courts.

Of course, the customers might be said to have the option of taking their business elsewhere. Once again, issues of market failures arise. This is hardly an option for persons in isolated communities or where there are costs involved in changing suppliers (be they monetary or otherwise).

No doubt the Senate Committee was correct in its view that citizens making use of private service providers should not have any lesser rights than citizens making use of government service providers.

The Council certainly thinks that a relatively simple and cheap mechanism should be made available.

The Senate Committee recommended that the jurisdiction of the Commonwealth Ombudsman be extended to cover contract service providers at least on a trial basis.

It is our view the Committee should consider recommending something similar for Queensland. Alternatively it could recommend the establishment of some other body or Tribunal specifically designed to provide rights of redress for consumers who have complaints against Queensland government service providers.

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[6] For example, *Clyde Bank Engineering & Ship Building Co Ltd v. Don Jose Ramos Yzquierdo Y Castaneda & Ors* [1905] AC pages 10 – 11 especially

We trust this is of assistance to you in your deliberations

Yours Faithfully,

Michael Cope
President for and on behalf of
The Queensland Council for Civil Liberties

24 March 2006