No 24

QCOSS
queensland council of social service inc
WORKING FOR A FAIR QUEENSLAND

24 March 2006

The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George St
Brisbane Qld 4000

Dear Ms/Sir

Re: Submission by QCOSS and QAILS to the Accessibility of Administrative Justice Discussion Paper.

Thank you for the opportunity to comment on the *Access to Administrative Justice Discussion Paper.* Please find attached a submission by Queensland Council of Social Service Inc (QCOSS) and Queensland Association of Independent Legal Services (QAILS).

The question of access to administrative justice is a serious one for many community organisations, environmental groups, disadvantaged individuals and households. This submission seeks to illustrate that the cost, scope and complexity of the current systems create unnecessary barriers to access.

Please contact Fiona Caniglia from QCOSS (3932 1266 ext. 21, fionac@qcoss.org.au) and Carolyn Grant from QAILS (3392 0644 carolyn_grant@fcl.fl.asn.au) if you require more information or in relation to follow-up discussions. Both organisations are keen to provide additional advice and information if required.

Yours sincerely

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Legal, Constitutional and Administrative Review Committee

THE ACCESSIBILITY OF ADMINISTRATIVE JUSTICE

SUBMISSION BY
QUEENSLAND COUNCIL OF SOCIAL SERVICE (QCOSS) AND
QUEENSLAND ASSOCIATION OF
INDEPENDENT LEGAL SERVICES (QAILS)

March 2006

ACCESSIBILITY OF ADMINISTRATIVE JUSTICE

SUBMISSION BY QCOSS AND QAILS

EXECUTIVE SUMMARY

1. The Queensland Association of Independent Legal Services (QAILS) and the Queensland Council of Social Service (QCOSS) have collaborated in this submission.

2. Information regarding administrative and government decisions is not accessible because the freedom of information regime is expensive, subject to delays, and may discourage alternative forms of access.

3. Costs related to judicial review are too high to make it an accessible avenue for most citizens.

4. Judicial review, whilst important, only addresses the form of decision-making in Queensland. An additional system of merits review, as is in place in many other Australian jurisdictions, is required to address issues of substance.

5. Government information is not readily accessible by many groups.

6. Reasons for decisions could be improved.

7. A diversity of people cannot access administrative justice. As outlined above, the process to obtain information through FOI and the process of reviewing decisions through judicial review are both too expensive and there are also other barriers to access.

8. Timeframes in judicial review are too long.

9. Timeframes in obtaining government information are too long.

10. Standing remains a bar to many issues being reviewed at all.

11. Administrative law is not readily accessed by individuals with interests other than commercial interests because of barriers such as expense.

12. Any review of administrative justice in Queensland MUST include the topic of merits review.

13. A generalist merits review tribunal is recommended because of an array of reasons, including the public interest in having decisions reviewed on their merits, consistency, and costs savings to clients and to government.

SECTION 1: BACKGROUND

1.1 About QAILS and QCOSS

The Queensland Association of Independent Legal Services (QAILS) and Queensland Council of Social Service (QCOSS) have collaborated in this submission because of the high number of clients for whom administrative justice is inaccessible.

QCOSS is the peak body for over 700 welfare and community sector organisations in Queensland. For over 50 years the Queensland Council of Social Service has worked to promote social justice through the elimination of inequity and disadvantage.

QCOSS exists to provide a voice for Queenslanders affected by poverty and inequality and acts as a State-wide Council that leads on issues of significance to the social, community and health sectors. QCOSS works for a Fair Queensland and to develop and advocate socially, economically and environmentally responsible public policy and action by community, government and business.

QAILS is the state based peak body representing the 33 funded and unfunded community legal centres operating throughout Queensland. Community legal centres are independent, community organisations providing equitable and accessible legal services.

Copies of the QCOSS and QAILS Annual Reports are attached to this submission.

QAILS and QCOSS members have experience across a broad range of areas which intersect with administrative law. This range includes:

- **Prisons** – Prisoners Legal Service gives legal advice, assistance and referrals on matters relating to imprisonment;
- **Environment** – Environmental Defenders Office (Brisbane and North Queensland) advises individuals and conservation groups in public interest environmental and planning law;
- **Education** – Youth Advocacy Centre gives advice to young people in relation to education issues including suspension and expulsion;
- **Tenancy** – Tenants Union of Queensland and various Tenancy Advice and Advocacy Services give support and advice to tenants;
- **Disability** – Queensland Advocacy Inc, Welfare Rights Centre, Cairns Community Legal Centre, and the Advocacy and Support Centre provide systemic and individual advice and support in relation to disability matters including disability discrimination;
- **Social security law and family assistance law** – Welfare Rights Centre (Qld) and Townsville Community Legal Service Inc. provide specialist advice about social security and family assistance law.
- **Migration law** – Refugee and Immigration Legal Service (formerly SBICLS), Townsville Community Legal Service Inc. and Central Queensland Community Legal Centre provide specialist advice and representation in the migration law area.

1.2 Consultation process for this submission

Members of QAILS and QCOSS were given an opportunity to raise issues and give case examples relating to the accessibility of administrative justice from their

practices. This was done through written comment and oral communication and has formed the basis for this submission. The organisations involved in the consultation process can be found in the appendix to this submission. The case examples can be identified in the submission by italicised, non-bolded paragraphs.

1.3 Outline of this submission

The submission in the first instance outlines responses to key questions asked in the Discussion Paper. Following this is a section on how the scope of the review could be broadened to consider mechanisms that may improve the access to administrative justice by communities, community organisations and individuals who are disadvantaged. We conclude with recommendations relating to a system of merits review.

SECTION 2: RESPONSES TO ISSUES IN DISCUSSION PAPER

Key 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 amendment of the FOI Act and/or administrative reform necessary?

2.1.1 What are the costs?

Fees are high in many instances and this is a bar to many people accessing the system. For example, the average cost to an individual making a request to the Environmental Protection Agency, under the FOI legislation in the financial year ending 30 June 2004 was approximately $285[1] and costs for an application to the Department of State Development averaged approximately $287.[2] We suggest that these amounts are unaffordable for many people in the community.

2.1.2 Groups which cannot afford access

For individuals living in poverty or who experience multiple barriers to access, FOI costs are prohibitive.

For some young people, who do not have any independent means of support, even small costs can be prohibitive.

For individuals and families on low incomes including pensions and benefits, resources are often completely consumed by basic costs such as food, housing and utilities. It is unlikely that a household on a very low income could generate the resources needed to make an application. For example, the costs of FOI cited above are greater than the fortnightly rate of youth allowance for some young people.[3] We

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[1] Attorney-General's Annual Report on FOI (2004-5), appendices 1.1 and 1.11

[2] ibid

[3] Centrelink, A Guide to Australian Government Payments, 1 January 2006 – 19 March 2006, 11. This indicates the current fortnightly basic rates of youth allowance are:

Single, no children, under 18, at home	$183.20
Single, no children, under 18, away from home	$334.70
Single, no children, over 18, away from home	$334.70
Single, no children, over 18, at home	$220.30
Single with children	$438.50

also note that these costs are more than half the basic rates of Newstart Allowance, Parenting Payment, Age Pension, Disability Support Pension, Carer Payment and others.[4]

There is a cost waiver for people on low incomes, but in many cases these are not the people who are likely to be trying to enforce their rights. It is service providers or advocacy organisations that are trying to access documents on behalf of disadvantaged citizens. QAILS and QCOSS submit that an application on behalf of clients should not incur charges or fees.

The search fees and the copying charges for freedom of information requests can be prohibitive for community groups. Search charges can result in hundreds of dollars even for basic requests. Often the only way that information can be obtained by those interested in the environment or planning decisions for example, is through the freedom of information process. Some of these organisations receive government funding and as a result are often not able to claim that they are exempt from FOI charges. It is difficult to fit within the criteria for exemption regardless of government funding. There is very little opportunity within the system to minimise these costs, for example by allowing parties to uplift documents and send them to professional copying services who can copy at 5 cents a page instead of the government rate which is higher.

QAILS and QCOSS submit that all not for profit organisations should be exempt from search charges for FOI or at the very least there should be no charges where a matter is clearly a matter of public interest.

2.1.3 Other forms of access not encouraged

The availability of the FOI process may have encouraged government departments not to provide information in other, simpler ways. For example, recently a report was on display in a government office under the *Environment Protection and Biodiversity Conservation Act 1999*. When a copy of parts of the report was requested, the individual was told that they would have to apply under the FOI legislation rather than simply obtaining copies then and there. Whilst this was a federal issue, similar situations may occur with respect to state government documents on a regular basis.

2.1.4 Personal affairs exemption for costs

We are concerned that the exemption for personal affairs requests should be observed at all times. We are aware that many who request documents are either:

- Told it will cost too much and are discouraged from applying; or
- Actually charged when it is a personal affairs matter.

Whilst we understand that 'personal affairs' needs to be carefully considered because of its implications in other parts of the *FOI Act*, there must be a concerted effort to ensure that fees and charges are not levied where people seek personal information. For example, people who seek information about institutional care may be charged fees because they seek information that will help them discover part of their life story that has been hidden, and whilst it may not appear to be a part of their personal

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Partnered no children	$334.70
Partnered with children	$367.50

[4] Ibid.

affairs, it is. In effect, in most cases there should be a presumption that a request involves personal affairs and only where it clearly does not should fees be considered.

2.1.5 Philosophy of citizens being able to obtain documents at no cost

It is acknowledged that the amounts recovered by the departments are only a fraction of actual costs in delivering information to applicants. However, as was highlighted in the EARC *Report on Freedom of Information* in 1990, "Access to information as to what decisions are made by government, and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally."[5] Charging fees for FOI access is tantamount to charging fees to vote, at least in the sense that fundamental democratic processes must be readily accessible.

As noted by Rick Snell, the aim of freedom of information legislation is to provide citizens with access to information they have already paid for through taxes etc, and was never intended to work on a full cost recovery basis.[6] Additionally, it needs to be accepted that processes essential to an open democracy should not be structured in such a way as to be revenue-neutral and Government probably needs to accept that the price of democracy is not cheap.

It is acknowledged that providing information to consumes time and other resources. It is submitted that more agencies could be attempting to make the process more streamlined and less labour-intensive, as has been done in Queensland Treasury, as reported in the *Freedom of Information Review*.[7] As at October 2004, approximately half of the state departments were using the new process. The FOI Annual Report for 2004-5 has not been finalised as at 15 March 2006 but when it is tabled in Parliament in May it may shed some light on a change in the costs of retrieving information as a result of the FOIonLINE database and other technological advances.

2.1.6 Recommendations from earlier LCARC report

We note that LCARC produced recommendations in the *Report on Freedom of Information in Queensland* in 2001. In respect of those recommendations that were not implemented, we say:

- Findings 5-10, 165 and 173: It was recognised by the Attorney-General that there should be better coordination of freedom of information throughout government for the sake of consistency. Given that the suggested 'FOI monitor' position or extended powers for the Information Commissioner were not implemented, the government should explain clearly exactly what mechanisms have been put in place to achieve greater consistency.
- Findings 11 and 12: It is not sufficient to say that disclosure of government-held information outside the *FOI Act* can occur. A directive that administrative access should be used if possible is required, as our experience is that alternative access does not occur as readily as it might in some cases. Additionally, confusion over whether FOI or administrative access should occur often leads to delays in processing applications. This can

[5] EARC report, *Report on Freedom of Information*, 1990 at page 181
[6] Rick Snell, *Freedom of Information Review*, Dec 2001, No. 96, 55
[7] Gerry Cottle, *Freedom of Information Review*, Oct 2004, No. 113, 54

become more complicated when dealing with Statutory Authorities or other types of agency which do not neatly fit within existing FOI definitions.

- Finding 14: If there is not to be a central coordinating body, JAG could provide guidelines regarding the type of information that is suitable for routine release outside the *FOI Act*.
- Finding 16: Notwithstanding the fact that disclosure of documents outside the *FOI Act* is contemplated, there needs to be some whole-of-government approach to the attitude of agencies with respect to disclosure, such as would be indicated by a directive from the Premier. For an FOI system to work properly there needs to be cultural acceptance within agencies and leadership must be shown at highest levels to ensure that the cultural shift towards openness and transparency continues.
- Finding 22: Agencies should be required to use the FOIonLine software, rather than invited to use it.
- Findings 39, 43, 55, 56, 59, 61, 65, 69, 74, 82, 93, 94, 95, 99, 142, 143, 157, 158, 163, 180, 184 and 200: JAG was considering drafting guidelines with respect to these findings. We support guidelines being put in place so that a consistent approach can be taken throughout government. The establishment or otherwise of such guidelines is unknown at this stage and government should advise of any guidelines that are in place.
- Findings 51 and 88: The Attorney-General's office should indicate whether or not it has consulted with the Adult Guardian and the Public Advocate in relation to the requirement for written applications for people with a disability, and the outcome of any consultation. Clearly FOI should comply with all relevant disability standards.
- Finding 201: The Attorney-General's office should indicate whether or not the inquiry into the status of information provided to members by constituents and members' communications to ministers, departments and other agencies has established whether an exemption is required or not.
- Findings 219 and 220: We note that the government effectively disregarded the recommendations of the Public Accounts Committee Inquiry into Commercial-in-confidence Claims by Government.

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

2.2.1 General

It is general considered that the Supreme Court is inaccessible to the general public.

Several systemic barriers exist in the area of judicial review:

- The Supreme Court is generally recognised as the most expensive state jurisdiction in terms of filing, schedule of fees and costs etc;

- Judicial review matters, though simplified since the days of prerogative writs, remain among the most complex of matters; and

- The jurisdiction of the Supreme Court in the area of judicial review is not well understood amongst the legal profession, let alone the general public.

We suggest that when faced with a client who may have a judicial review action, most practitioners will warn against taking such action for reasons of complexity and of course on a simple cost/benefit analysis.

We consider that many potential judicial review actions are never brought because of these systemic issues. Therefore, we suggest that the numbers of judicial review matters brought in no way actually reflects the demand or need for access to administrative justice.

2.2.2 What are the issues?

Filing fees themselves are prohibitive, as are the costs of legal representation.

The possibility of adverse costs orders is a real deterrent to commencing action for most individuals, but particularly for community groups and low income households.

2.2.3 What are the costs?

Recent judicial review actions undertaken by the Environmental Defenders Office (North Queensland) have totalled $20 - $25,000, even with much of the legal representation being carried out on a pro bono basis.

In another example, a community group raised the issue of air pollution from the North-South Bypass Tunnel and it was estimated that it would cost $40,000 to $90,000 to take action in relation to this matter.

Even for a simple judicial review application, the costs would not be below $5,000 and more commonly exceed $10,000.

The costs of bringing a judicial review application vary greatly, depending on issues such as complexity, duration, witnesses and the type of evidence required. Likewise, the costs of the Crown, who often brief senior counsel add to the costs risks associated with these matters.

2.2.4 Litigation guardians

A litigation guardian who undertakes court action on behalf of a person with a disability is faced with personal liability for costs. It is difficult for the issues to be heard at all, because a person must first apply to the Guardianship and Administration Tribunal to become the litigation guardian. These extra hurdles and concerns mean that it is more difficult for a person with a disability to access administrative justice using the judicial review process.

Litigation guardians are also required for matters brought on behalf of children. In the same way, guardians are exposed to the risk of an adverse costs order.

2.2.5 Section 49 costs orders

In the ASH case (discussed later in sections 2.3.1, 2.55 and 3.5) in the Supreme Court in Cairns, ASH sought a section 49 costs order under the JR Act. The order was opposed by some of the other parties to the proceedings

but was eventually given. Without such an order, ASH would have been unlikely to pursue the case. Still, this only allows the applicant the "luxury" of not paying the respondent's costs. The community group in this instance is still left with the difficulty of finding lawyers who do the work for free or at a heavily discounted rate.

2.2.6 Model litigant principles

As discussed by Davis,[8] the obligation to act as a model litigant requires governments and agencies to act honestly and fairly in handling claims and litigation by:

- Dealing with claims promptly;
- Paying legitimate claims without litigation;
- Acting consistently in handling of claims and litigation;
- Trying to avoid litigation, wherever possible;
- Keeping costs to a minimum;
- Not taking advantage of a claimant who cannot afford to litigate a legitimate claim;
- Not relying on technical defences unless it would prejudice the government not to;
- Not appealing decisions unless there are reasonable prospects of success or the appeal is justified because of public interest issues; and
- Apologising where government or its lawyers have acted improperly.

QAILS and QCOSS have raised issues and outlined examples that highlight the need to better apply these principles in relation to administrative law, particularly with respect to pre-litigation and negotiation stages. In fact it seems that in some instances, agencies are quite reticent to engage in discussions or negotiations with respect to decisions that have been made, and it is only once litigation is on foot that bona fide discussions occur.

Additionally, we are very concerned that local authorities are probably saved from responding to judicial review matters in the vast majority of cases because of the systemic barriers. Put simply, few individuals commence judicial review actions against local authorities.

2.2.7 In other jurisdictions

There may be other ways of making judicial review more accessible. For example, at a federal level the federal Magistrates Court hears many judicial review type matters and provides a far more affordable option than the Federal Court. There are guidelines between the Federal Court and the Federal Magistrates Court that determine what sorts of matters are heard where.

The AAT is a no costs jurisdiction. This could be replicated in the judicial review jurisdiction of the Supreme Court. At the very least, a presumption that parties bear their own costs as in the Family Court would be a positive start.

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[8] Davis, "Local Governments as Model Litigants", (2005) 10 *LGLJ* 190 at 190, 191

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

2.3.1 Reasons for decisions

Insufficient reasons for decisions are often provided.

> *Part of the Alliance to Save Hinchinbrook's case against the Environmental Protection Agency (discussed earlier in section 2.2.5 and later in sections 2.5.5 and 3.5) was the fact that insufficient reasons for the decision were provided. In particular, one concern of the ASH was the fact that decision makers tend to deal with matters in global terms rather than addressing particular issues and making their line of reasoning clear.*

The Administrative Review Council (ARC) has produced "Practical Guidelines for Preparing Statements of Reasons".[9] There are not any guidelines like this in Queensland though EARC recommended the establishment of an ARC for Queensland.[10]

There is a great variance of decisions in the Small Claims Tribunal (SCT) and little consistency state-wide. As precedents cannot be set in matters other than tenancy matters (and even in those, written reasons are required only in exceptional cases[11] at the discretion of the tribunal), each case must be heard on its own merits and often decisions are made that are not in line with the legislation. It is acknowledged that Parliament did not intend for SCT decisions to be generally reviewable. However, section 19 *Small Claims Tribunal Act* does contemplate review for denial of natural justice or lack of jurisdiction. If a person goes to the judicial review process, there are not any transcripts from the SCT hearing and it is therefore difficult to prove what was said or done at the initial hearing. In addition, Referees in the SCT do not have to give written reasons for decisions, so claimants and respondents alike can be baffled as to why a decision was made. This makes the process difficult for consumers to understand and deal with.

2.3.2 Obtaining information can be difficult

Even young people under an order of the Department of Child Safety need to go through a formal process to receive a copy of their own file. This adds to frustrations when the government already has control in many aspects of that young person's life.

The internet is not an acceptable form of dissemination of information for many disadvantaged people as access to computers is not widespread. Another issue is that people may need access to support and legal expertise to interpret the information in relation to their circumstances while they are in the process of making a decision about their course of action. While information should be on the internet, this doesn't necessarily mean that people are enabled to take a matter further. Additional strategies are needed to overcome barriers to access.

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[9] Available at www.law.gov.au/arc

[10] See note 3 at page 451 regarding establishment of the Queensland Administrative Review Council (QARC)

[11] *Small Claims Tribunal Act 1973* (Qld), section 22A

2.3.3 Earlier submissions with respect to administrative justice

In the EARC report,[12] QAILS submissions were noted with respect to the following matters and QAILS and QCOSS reiterate the importance of those issues:

- Possible advisory role of QARC (paragraph 14.7);
- Benefit of a general merits review tribunal (paragraphs 3.29 and 3.165);
- Cross-vesting of jurisdiction between Commonwealth AAT and state merits review tribunal (paragraph 3.210);
- Benefit of a multi-disciplinary tribunal (paragraph 4.17);
- Legal qualifications not being mandatory for tribunal members (paragraph 4.18);
- Existing arrangements for tenure and independence of members of the Commonwealth AAT (paragraph 4.72);
- Preference for the legislative formula approach with respect to rights of appeal from decisions (paragraph 6.13);
- Exemption of a class of decision from scrutiny of a review tribunal should be avoided (paragraph 6.17);
- "Interests" should be interpreted more widely than mere financial imposition or restriction of personal liberty, when allowing for reviews (paragraph 6.53);
- University decision-makers should be exempt from review (paragraph 6.82);
- Procedure in a merits review tribunal should be informal, flexible and unintimidating to the layperson (paragraphs 7.14 and 7.98);
- Importance of decision-makers providing notice concerning rights to review (paragraph 7.177);
- Appeal process should be limited to internal review, external review, and final independent merits review (paragraph 7.253);
- External review of decisions should be used to improve public confidence in the quality of the primary decision-maker's decisions (paragraph 7.269);
- Timely internal review of decisions is useful (paragraph 7.272);
- "Standing" needs to be viewed in the public interest as well as within the private interest of an individual (paragraph 7.303);
- Early availability of information to a person who wishes to review a decision is of benefit (paragraph 7.377);
- There should not be any filing fees with respect to an application for merits review (paragraph 8.11);
- Access to merits review should not be denied on the basis of lack of financial means (paragraphs 8.71 and 8.72);
- Extra funding is required for Legal Aid and community legal centres, to ensure adequate advice and referral can be given to the community (paragraph 8.77); and
- People in remote areas need special assistance in accessing any tribunal (paragraphs 8.108 and 8.109).

[12] Note 3

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

In short, a diversity of people cannot access administrative justice. As outlined in section 3 of this submission, people with commercial interests are the ones who are accessing judicial review. Other members of the community are not doing so with any great regularity, even where the enforcement of fundamental human rights is dependent on that process.

2.4.1 Which groups have difficulty accessing administrative justice?
Low income households experience difficulty generally accessing administrative justice.

People who attempt to use the system of administrative justice to review decisions are often seen as "troublemakers". Treatment of "persistent" litigants should not be worse than "one-off" litigants.

Litigants in person who are in prison suffer even greater disadvantage in attempting to achieve justice because nothing is achieved easily when someone is in prison.

People with decision-making disabilities have difficulty in accessing administrative justice and it would be of benefit if there was merits review of decisions made under the *Disability Services Act*.

Many people outside metropolitan centres do not have access to free legal advice in respect of administrative justice.

The most vulnerable in the community do not have their basic needs met and may not have the energy pr resources to pursue human or legislative rights, particularly given both the certain and potential costs in doing so.

Community groups which seek administrative review often have difficulties because of the ongoing "standing" issue. These groups miss out on having important issues dealt with by the Courts and bad decisions may be allowed to stand by default (i.e. because there is not anyone eligible to take action).

Many members of the general public are not aware of their rights or of the mechanisms they can use to enforce them. Most people do not know about the freedom of information laws and even fewer know of or understand judicial review.

Adherence to model litigant principles at early stages of discussion is as important as after actions commence, to ensure fair treatment of a diverse range of people i.e. commencing court action really should be a last resort.

2.4.2 Support for individuals wishing to use administrative justice
Community organisations are not well-equipped to deal with enquiries regarding administrative justice. There is simply too much complexity in having different Tribunals for the limited merits review that is available.

Due to the high cost of administrative justice it is not an area into which community legal centres can offer representation and whilst advice can often be given, that advice may be all that happens, unless funds can be found to file matters and have solicitor and counsel appear.

Community organisations, both legal and others, that give support to members of the general public need to be well-resourced in order to effectively deal with situations where review of a government or administrative decision is required.

Key issue 5: Is access to administrative law effective and efficient? Is reform necessary?

2.5.1 Time frames in judicial review

Judicial review matters can often take more than a year to be finalised and this is effectively a bar to justice in some cases.

Even when time frames are shorter than other civil proceedings, they are still often too long to be useful in reviewing decisions. The following case example illustrates that point:

> *Six Year 12 students were excluded from all schools in Queensland by a decision of the Department of Education. The decision was made in June. An application for judicial review was filed in early July. The matter was settled in September prior to a hearing date being obtained. The settlement allowed the young people to return to school. This was over three months after the initial decision. Due to the significant absence from school and missed assessment only one of those students returned to complete Year 12 that year.*

This is an indication that timing can be crucial in respect of many decisions in the lives of those affected.

2.5.2 Time frames in freedom of information

Timeframes for FOI are also too long in many instances. This can be seen by the following case example:

> *Speak Up For Yourself (SUFY), an advocacy group, has found that the time taken to obtain documents is the biggest hurdle to freedom of information requests being useful. Disability Services Queensland recognises the role of informal decision-makers, but the process of obtaining documents through the freedom of information framework still takes a long time. The problem is worse when dealing with other government departments, which do not recognise informal decision-makers and so it is even more difficult to obtain documents regarding a person with a decision-making disability. The documents required are often relating to health care decisions, and if months elapse between a request and obtaining the documents, it is often too late to be of any benefit in the decision-making process.*

2.5.3 Efficiency and effectiveness with respect to prisoners' applications

The *Judicial Review Act* proscribes a 28 day limit to proceed after a statement of reasons is received. Prisoners have time constraints because of the *Corrective Services Act*, regulations, policies and procedures. For example, prisoners serving less than two years are entitled to be considered for conditional release when two thirds of the way through their sentence. If they are to be refused, they are given a "show cause within 21 days" and if this is refused then they are required to ask for a statement of reasons within 28 days of that decision. They then have 28 days to lodge a judicial review application. Compare this to a prisoner who is serving twelve months and is eligible for conditional release after eight months with four months to serve. Potentially three months can pass before the prisoner can lodge the judicial review application.

After the application is lodged normal Court procedures have the potential to delay the matter further. The matter can be heard at the first directions hearing. However it would be unusual for prisoners to have all the documentation they require for the hearing in their possession. Disclosure of documents can delay this process. If a prisoner wishes to prepare argument before the directions hearing, the prisoner is unable to obtain copies of documents under the freedom of information legislation if the documents are used in risk assessment.[13] Documents are not readily available, as all release of prisoners requires risk assessment.

Similarly these mechanisms relate to other decisions affecting prisoners. For example Sentence Management Reviews are conducted on a six monthly basis. It is not unusual for a new decision to be made before the old decision has been reviewed.

Also in relation to prisoners, even if one appeals a transfer decision, the decision is not stayed. Therefore the damage may be done by the transfer occurring before the prisoner can even have the decision reviewed (internally through the General Manager and then the Chief Executive, or externally through the Supreme Court).

2.5.4 Internal reviews

The effectiveness of internal review procedures seems minimal when one looks at numbers of decisions which are varied when reviewed internally i.e. in Queensland in the year 2003-4, of 304 freedom of information decisions that were reviewed internally, approximately 225 of them were upheld on internal review.[14] It is not clear how many of these cases were then reviewed by the Commissioner, and the success or otherwise of that external review.

2.5.5 Standing

One of the elements of any judicial review hearing is proving that the applicant has standing to make the complaint. Standing has been interpreted narrowly with respect to community groups. This means that access to administrative justice is not effective for those groups in public interest litigation. This could be addressed in statute like it has been in the *Nature Conservation Act* so that community groups could automatically have standing in public interest litigation.

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[13] See section 11(E) *FOI Act*

[14] Annual FOI Report 2003-4, appendix 1.9

In fact, rights of third party enforcement have now been included in some new state laws such as the *Water Act 2000*, *Environmental Protection Act 1994*, *Marine Parks Act 2004* and the *Nature Conservation Act* 1992 (amended 2003) and the federal *Environment Protection and Biodiversity Conservation Act 1999*. The public enforcement rights under the *Integrated Planning Act* 1997 (IPA) apply to a wide range of development. However, citizens and groups fail to exercise those rights, even in the cases of flagrant breaches of environmental laws because they cannot raise the funds to go to Court. Environmental cases are often particularly expensive to run because of the cost of necessary expert witnesses.

> *In the ASH case mentioned previously, the EPA recently challenged the basis for standing of the applicant. This is despite the former Attorney-General, Rod Welford indicating to the EDO-NQ after an earlier decision that the Crown would not seek to use standing as a basis for opposing public interest litigation. The EPA's Counsel indicated that the ASH was a professional litigant of some kind. It was stated in the EPA submissions:*
>
> *"The applicant is self appointed and created for the specific purpose of litigating such environmental disputes as the decisions complained of. The applicant is a designer entity purposely created for opposing the decisions (including obviously by litigation) and which is opposed to the proposed development of Hinchinbrook".*
>
> *This was despite the fact that the ASH's aims were to protect the environment including through legal means, and its President and Secretary had over 60 years between them of work in protecting the environment, with the President, Margaret Thorsborne having a trail on Hinchinbrook Island named after her and her late husband. The members of the ASH had worked to protect the environment in a number of ways including representing the ASH views on government committees, lobbying and writing submissions on a number of issues, as well as conducting this litigation. Given the public benefit in having the best decisions made in respect of a world heritage site, it seems unreasonable on the part of the government to rely on an overly legalistic defence of lack of standing.*

Another case example follows:

> *The Cairns and Far North Environment Centre (CAFNEC) were unsuccessful in seeking to challenge a decision of the delegate of the Department of Natural Resources in 2002. The Court found they did not have standing to bring judicial review proceedings. His Honour Judge Jones considered "standing" in the context of the issues to be considered and considered that while the applicant, CAFNEC, was a peak body with a special concern for the environment, it must also be focused on the subject matter of the litigation. He found that the environmental impacts at issue in this case were not major (unlike other environmental cases where standing was granted) and that there would be no long term detriment to the coastal environment or nearby seas from the clearing. Therefore CAFNEC was not a "person aggrieved".*

Time and resources would be saved if the matter of standing for matters of judicial review was definitively resolved through legislative change.

SECTION 3: THE BROADER SCOPE OF ADMINISTRATIVE JUSTICE

3.1 Administrative law in the context of disadvantaged groups

Gilbert & Lane in *Queensland Administrative Law* suggest that:

> ...the *Judicial Review Act* (*JR Act*) owes its existence to a number of factors. First, and probably most important, was the report presented by Mr G E (Tony) Fitzgerald QC (as he then was), as a result of his Commission of Inquiry into Possible Illegal activities and Associated Police Misconduct (the Fitzgerald Inquiry).[15]

QAILS notes that Gilbert and Lane did foresee that the success of the *JR Act*, particularly its impact on public administration via administrative law and governmental practices, would depend on the operation of the *JR Act* and the establishment of jurisprudence, both through the parallel federal jurisdiction and through the decisions of our own Supreme Court.

The same authors suggest that the *JR Act* brought about four major reforms in administrative law in Queensland:

1. One simple originating procedure via the system of statutory order for review;
2. Reform of the prerogative remedies;
3. Duty imposed on decision makers and administrative tribunals for reasons for decision;
   and
4. Reform of costs rules.[16]

It is agreed that the benefits of the *JR Act* have included the four suggested above. Despite this, it is timely to consider whether those benefits have been available to all within the community, and in particular, to those who may be disadvantaged.

QAILS has previously worked to monitor debate and to address issues relating to administrative law in submissions to a range of bodies including EARC and LCARC.

In the QAILS submission to the Senate Inquiry into Legal Aid and access to justice, it was submitted:[17]

> ***Administrative Law***
>
> The area of administrative law is one of the most dynamically changing areas of legal practice and, as a result, related legal needs are always in a state of constant flux. This is particularly notable in relation to migration and social

[15] Gilbert and Lane, *Queensland Administrative Law* looseleaf service, LBC, [1.100]
[16] Ibid, [1.100] – [1.130]
[17] Senate, June 2004, Submission 73, pages 41 - 43

security law where there seems to be a constant Commonwealth revision of the relevant legislation and associated administrative systems, often as a knee jerk reaction to national events. So, for example, massive changes in immigration laws and policies were introduced in recent years in response to perceived (although in QAILS view unfounded) concerns about "the refugee crisis".

Access to legal services in relation to administrative law matters is particularly limited in Queensland. Many Queensland community legal centres (CLCs) undertake some level of administrative law work (advice on freedom of information, judicial review etc). Several CLCs work almost exclusively within the province of administrative law, notably in relation to immigration, social security and prison issues. Without exception, these specialist services are grossly underfunded, a reflection in part of the sometimes "politically unpopular" sections of the population who they service (e.g., refugees, social security recipients and prisoners). Each is mandated to provide "state-wide" services but is barely funded to provide assistance to those in need within the south-east corner of Queensland.

The South Brisbane Immigration and Community Legal Service is funded to provide specific services in relation to immigration matters but is chronically underfunded. That service deals not only with the huge numbers of people requiring advice in relation specifically to migration matters but also the large number of clients referred to it by other CLCs where a client might have a family law matter complicated by migration issues. Outside of the south-east corner of Queensland, QAILS knows of only one free registered migration service offered by a community legal centre (in northern Queensland).

Similarly, the Welfare Rights Centre (Qld) is funded to provide assistance to people in relation to matters arising from social security entitlements but the service is also underfunded. Prisoner's Legal Service has funding barely able to sustain three full time staff members who provide services in every Queensland prison.

Given that so much of what might be loosely termed "administrative law" falls specifically within the legislative mandate of the Commonwealth, QAILS is concerned by the failure of government at that level to properly fund services that are in a position to provide state wide assistance to people in Queensland. Moreover, the area is one which again highlights the concerns associated with a lack of consultation in relation to decisions affecting the justice system. Certainly, organisations such as South Brisbane Immigration and Community Legal Service are well-placed to comment upon the impact of changes in legislation and policy affecting migration matters but are not asked to do so. Even if such invitation to consult was made, the nature of chronic underfunding means that such services would rarely be able to allocate limited resources away from direct client services towards developing comments which, at least in the long term, may provide useful to government in managing legal needs.

The specific areas of practice within administrative law are highly complex and dynamically changing. The staff who work in those areas are very experienced individuals dedicated to working with some of the most marginalised and maligned sections of the population. The gross underfunding of such specialist services constitutes not only a failure to provide adequate support to vulnerable people with genuine legal needs but also constitutes a devaluing of the expertise and dedication of those prepared to provide such services.

Recommendation # 11:

That this Inquiry acknowledges the low levels of funding provided to community legal centres in Queensland in relation to the provision of administrative law legal services.

Recommendation # 12:

That this Inquiry calls upon Commonwealth and state governments to develop funding mechanisms which do not discriminate against CLCs which provide specialist administrative law services because of the unpopular nature of the clients those CLCs service.

The Committee noted these issues in its report and endorsed the QAILS submission,[18] including the above recommendations.[19] More broadly, the most recent QCOSS budget submission included a key theme relating to legal services for disadvantaged Queenslanders. A copy of that submission is attached.

3.2 Scope of decisions under JR Act

It is noted at the outset that the summary of decisions annexed to the Discussion Paper seems to indicate that the majority of those who have made use of the Act have commercial interests and seek review in respect of commercial decisions.

Whether or not the *JR Act* satisfies the core objectives as described by the Electoral and Administrative Review Commission (EARC) remains to be seen. We note that EARC described the two main aspects as:

- Ensuring duties imposed on administrators by Parliament are performed; and
- Ensuring administrators act within the limits of the general law and within statutory limits.[20]

Obviously, QAILS and QCOSS are concerned about whether or not judicial review meets these two aspects with respect to issues other than commercial issues. That is, whether or judicial review effectively protects consumer or individual rights as opposed to commercial interests. QCOSS member organisations and CLCs assist people with day-to-day matters. The position with respect to CLCs has been summarised by QAILS in the supplement to its Annual Report, "What is a CLC?" which can be found attached to this submission.

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[18] Available at www.aph.gov.au/senate/committee/legcon_ctte/index.htm

[19] Senate, June 2004, paragraph 11.48

[20] EARC report: *Report on Judicial Review of Administrative Decision and Actions*, 1993, vol 1, paragraph 1.8, page 3

We do note that on occasion QAILS clients' personal or private interest or the public interest may be in conflict with another's commercial or private interest. Environmental cases are examples where our clients rely on judicial review to protect both their personal or private interests and the public interest, usually against commercial interests of others such as developers or business.

As noted by QAILS in the supplement to its Annual Report 2004-5:

> "The clients of community legal centres are those who are facing injustice, whose legal problem is not profitable, and whose life circumstances are affected by their legal problem."

The disadvantaged in our community generally have more difficulty than business people do, in accessing justice. In addition, the disadvantaged in our community are more likely to have a greater proportion of their day-to-day lives affected by government and administrative decisions. It seems only fair that those most affected by those decisions should have real access to a system of review. Reports on barriers to accessing justice are legion[21] and nothing new can be said by this submission. All of these reports say that there are groups who cannot access justice or the legal system.

Realistically, we are concerned that the current system of administrative justice is one only accessible by those with money.

3.3 General comments on the scope of the Review

QAILS and QCOSS consider that the scope of the inquiry should be expanded in order to properly consider access to administrative justice in Queensland.

More specifically we propose that the current terms of reference are expanded to include the need for a consolidated system of merits review in Queensland.

The Committee's terms of reference include the following statement:

> "This paper refers to *administrative justice* in Queensland. This means rights conferred by Queensland's legislative scheme of administrative law."[22]

QAILS and QCOSS note that this term of reference should be redrafted as follows:

> This paper refers to *administrative justice* in Queensland. This means rights to judicial and merits review conferred by Queensland's legislative scheme of administrative law.

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[21] *Access to Justice: An Action Plan*, Report of the Access to Justice Advisory Committee, Commonwealth of Australia, 1994; *Justice Statement*; Attorney-General's Department, May 1995; Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System*, Second Report, June 1997; Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System*, Third Report, June 1998; Australian Law Reform Commission, *Managing Justice A Review of the Federal Justice System*, Report No 89, 2000; National Association of Community Legal Centres, *Doing Justice: Acting together to make a difference*, August 2003; Law Council of Australia, *Erosion of Legal Representation in the Australian Legal System*, February 2004; Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004

[22] LCARC Discussion Paper: *Accessibility of Administrative Justice*, at page 1.

An expanded definition of administrative justice will allow Queensland Parliament to address the needs of various stakeholders while the current reliance on judicial review seems to more often respond to commercial interests.

One can also observe the importance of using an expanded definition by looking to other jurisdictions. Merits review in other states and territories is conducted as follows:

- New South Wales Administrative Decisions Tribunal (NSW ADT);
- Victorian Civil and Administrative Tribunal (VCAT);
- West Australian State Administrative Tribunal (SAT); and
- Administrative Appeals Tribunal of the Australian Capital Territory (AAT of the ACT)

According to the EARC report, "the rationale for providing a comprehensive system of merits review of decisions includes that merits review:

- Is the most efficient, effective and fair way in which people may be personally involved in the review of an administrative decision;
- Must improve the quality of drafting of administrative powers in legislation, the quality of administrative decision-making, the quality of making and publicising of policy and the quality of merits review generally;
- Adds to and provides openness and accountability of the bureaucracy and reduces the opportunity for public sector abuses or corruption;
- By providing a speedy resolution, not only for citizens but also for companies, will significantly assist in the interaction between business, both large and small, and government;
- May indirectly lead to a strengthening of Parliament vis-à-vis the executive and of accountability generally, which means a strengthening of democratic government in Queensland; and
- Heightens the independence of any review and reduces the number of review bodies and personnel currently associated with review in Queensland".[23]

We agree with EARC's rationale.

3.4 Errors should be rectified through merits review

The Australian National Audit Office (ANAO) produced a series of reports[24] on executive decision-making and suggested that there are a large number of errors in executive decisions at the Commonwealth level and Robin Creyke suggests that a similar situation probably exists in the states and territories.[25] As a result of the high incidence of errors, there is a need for urgent reform to provide a system of merits review across the range of administrative decisions.

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[23] See note 2, vol 1 at xxii

[24] See www.anao.gov.au

[25] Robin Creyke, "Tribunals and Access to Justice", 2002, 2(1) *QUTLJ*, 64 at 67: "If arguably between one in four and sometimes as high as one in two decisions by the executive contain 'actionable errors' which could affect the outcome, there is an urgent need to improve decision-making processes."

This point deserves some explanation in the context of state decisions. At federal level, merits review mechanisms exist to provide review that is, for example, "fair, just, informal, economical and quick".[26]

The legal system in Queensland does not offer a similarly user-friendly system and whilst it may be fair and just, judicial review could never be consider informal, economical or quick. This means that review is not available or accessible for matters that are of a minor nature or where a costs/benefit analysis militates against judicial review action being taken.

At federal level however, a system of review exists for these sorts of matters and a person's rights to review are not measured against the depth of their pockets. We concede that there is an undeniably significant expense associated with providing merits review mechanisms, however we suggest the benefits to the State overall are worth the cost.

3.5 Having decisions reviewed on their merits is in the public interest

A merits review process may enable individuals to address their concerns more directly than through limited administrative law remedies. For example, the concerns of various environmental groups are often not addressed by judicial review. If merits review of decisions of all decision-makers were available, this would assist in ensuring the key issues in dispute were properly ventilated.

> *For example, an environmental group, the Alliance to Save Hinchinbrook (ASH), has brought judicial review proceedings with respect to a decision of the Environment Protection Agency and Queensland Parks and Wildlife Service to approve the building of two rock wall breakwaters into the Hinchinbrook Channel at Oyster Point.[27] In that case, ASH would have liked to be in a position to call evidence about the effect of boat strikes on dugongs in the Hinchinbrook channel but this issue is relevant only to the merits of the decision and as such is not relevant in a judicial review. In the current system, there is not a review forum in which to raise that issue.*

Importantly, the process of merits review requires the review body to "stand in the shoes" of the last decision maker and require the review body to "reach the correct and preferable decision".[28] This means considering issues of process AND substance and not just process as is the case with judicial review. Ultimately, having review of the correctness and legality of decisions is in the public interest so both merits and judicial review should be available.

3.6 Merits review more worthwhile in practical terms

Taking matters through a judicial review process can lead to outcomes that provide no real relief, even if the application is viewed favourably by the court. Judicial review may cause the decision-maker to revisit the decision but the same (or a similar)

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[26] The Social Security Appeals tribunal aims to provide a mechanism of review that is 'fair, just, economical, informal and quick'.

[27] *Alliance to Save Hinchinbrook v Environmental Protection Agency & Ors*, heard in the Supreme Court at Cairns on 9,10 February 2006 but decision reserved.

[28] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577

decision may result from the reconsideration. The party who brought the review proceeding is effectively in the same position that they were in prior to the review.

Merits review is required to make the system work more equitably.

> *For example, there are estimated to be over 6000 people with a disability in Queensland who have "unmet need" and are not receiving the government assistance that they should.*[29]

A system of merits review would create an avenue for people with a disability to question the correctness of decisions that affect their lives, such as the level of support they receive, while judicial review does not offer such an opportunity.

3.7 Current system does not allow review of the substantive issue in many cases

Judicial review, whilst clarifying some process issues, does not assist in the determination of the substantive issue. Whilst very important, judicial review is limited in what it can achieve for all parties concerned.

The substantive issue is often not appellable with respect to tenancy disputes for example. In the ACT, the Territory AAT hears tenancy matters as a merits review body and manages to ensure that lessor and tenant rights are observed, as well as ensuring that natural justice is provided to all parties and, most importantly, that the correct and preferable decision is reached. Similar examples arise in other states. In essence, what makes a merits review system so attractive is that the review is *de novo* and therefore all encompassing, accessible to the public and economical for Government, at least when compared with judicial review in the Supreme Court.

Of course, most administrative appeals are subject of judicial oversight via judicial review as well. For example, at federal level, a decision of the AAT is subject to appeal to the Federal Court on the basis of an error of law, therefore allowing merits review to take its course but to also allow the ultimate decision to be considered judicially if necessary.

SECTION 4: RECOMMENDATIONS FOR MODEL OF MERITS REVIEW

4.1 General

EARC saw the main advantages of a general administrative review body as being:

- Its ability to provide an open, fair, impartial, flexible, quick and cost-effective system of merits review for the community generally and everyone dependent on decision-making by government agencies;
- It makes possible the use of mediation to resolve disputes by agreement before proceeding to any formal determination;
- It would be more accessible to the community (ie. little need for legal representation, simpler than other alternative procedures, faster, cheaper, and more geographically accessible);
- In defined circumstances it could consider and apply government policy;

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[29] ACROD *Unmet Needs Campaign*

- Greater flexibility of membership;
- Consistency of the appeal mechanism and uniformity of procedure; and
- It was the preference of the overwhelming majority of those making public submissions.[30]

There have been indications in the past that the present government was interested in changing the current system and replacing it with a coherent system using a single, generalist jurisdiction tribunal.[31]

4.2 Costs savings for clients

Clients assisted by QCOSS member organisations are nearly always living on low incomes and could not afford to take action under the current system.

Members of many community groups are citizens of modest means who are trying to protect and safeguard the natural environment of their locality. Regional environmental groups often have very low levels of funding, and this funding seems to be decreasing. This means many more environmental issues would be raised if a cheaper review tribunal were available.

> *The Gold Coast Environment Council could not afford to take action in response to the granting of a development licence in an area that would cleave a wildlife corridor. As the situation currently stands, EDO estimates that it would have cost between $30,000 and $50,000 to run a merits review in the courts.*

If there was a tribunal for merits review as there is in Victoria, Western Australia, ACT and New South Wales, such applications would be relatively affordable and the public would have the benefit of having these decisions reviewed.

A generalist Tribunal with merits review powers would be preferable to the current expensive system. The following case example illustrates this point:

> *A public housing tenant was having a dispute with a neighbour. The neighbour made a complaint to the Department of Housing which led to a Warrant of Possession hearing in the Small Claims Tribunal. This hearing was seeking to evict the tenant for allegedly causing a nuisance to another occupier.*
>
> *The tenant attended the hearing with an advocate from the Tenant Advice and Advocacy Service (TAAS). A departmental staff member attended as the lessor. At the hearing the lessor handed up to the Referee an affidavit from the neighbour with the alleged nuisance details. The tenant was not allowed to read the affidavit, as the Department of Housing representative stated they feared for the safety of the neighbour if the information was made known to the tenant. The tenant's advocate objected on the grounds of denial of natural justice in that the tenant did not have the opportunity to view the details on*

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[30] Note 3 at xxiv

[31] Sue Monk, "Tribunal plan to review government decisions", *Courier Mail* (Brisbane), 6 September 2001 as discussed by Robin Creyke, "Tribunals and Access to Justice", (2002) 2(1) *QUTLJ*, 64 at 72

which the cased was based. This was denied and the Referee refused to show the affidavit to the tenant.

Even though this was a relatively clear-cut case of denial of natural justice the tenant chose not to pursue it through judicial review due to costs for the filing fees and counsel, the risk of not being successful due to lack of hearing records and the risk of the being ordered to pay the other party's costs if unsuccessful.

In another case example, a proposed development in the Redland area resulted in land clearing with no buffer zone right up close to a significant bora ring. The bora ring site will be degraded and will not survive. A Green Space Study, as was required by the planning scheme, was not done. However the local environmental group did not have the resources to run a case for a declaration to stop the illegal development approval in time, as they were relying on finding a barrister and expert who could act for close to pro bono fees and could not locate one. The local wildlife group has exhausted all its resources fighting other bad developments in key koala habitat in the Redlands area. The koala is now listed as "vulnerable to extinction" in the SEQ area.

It can be seen that the impact of an inability to review decisions can indeed be large.

4.3 Costs savings for government

The cost of having separate Tribunals is much higher because of the duplication of administrative costs alone. The ARC has written that "there will also be greater scope within a single organisation to rationalise the separate services now provided by the different review tribunals, both to applicants and potential applicants and in support of members and staff."[32]

The ARC report[33] indicates that there are opportunities for savings in having shared overheads amongst Tribunals and it can be extrapolated that having a single merits review Tribunal would be more cost-effective than having several different bodies as is currently the case. In fact, that report made a recommendation for amalgamation of several specialist Tribunals into one general Tribunal with several divisions.[34]

4.4 Timeframes are shorter in a Tribunal setting

In our experience it can take close to a year for a matter to be finalised if the judicial review process is used.

Compare that time frame with the Victorian Civil and Administrative Tribunal (VCAT) time frames: The President of the Victorian Civil and Administrative Tribunal, Justice Stuart Morris, said in a press release on 19 August 2004 that in the 2003-04 year 3,702 planning matters were initiated in VCAT, compared with 3,271 in the preceding year. But the median time from the initiation to the finalisation of planning appeals in 2003-04 was only18 weeks, compared with 22 weeks in the

[32] ARC Report "Better Decisions", Report no 39, 1995 at xi
[33] Ibid at 128
[34] Ibid at 142

previous year and that in the six weeks before the press release, the median time was in fact down to 16 weeks.[35]

4.5 Utility of a tribunal in other states

In 2004-5, 3544 Planning and Environment matters were finalised in the VCAT[36]. This is a substantial number of cases compared with 571 cases disposed of in the Queensland District Court (Planning and Environment jurisdiction) in the same financial year.[37] This indicates that there may be many issues that are not being raised for review in Queensland, and which may be having adverse impact on the environment. While these figures do not enlighten us with respect to the number of matters which would be heard in a merits review tribunal in Queensland, they certainly give an indication of the difference in numbers of matters being heard in this state and in Victoria.

4.6 Tribunal favoured over Supreme Court in other areas of the law

Having a Tribunal instead of or in addition to review in the Supreme Court was recommended by the Queensland Law Reform Commission (QLRC) and has occurred in respect of people with a decision-making disability. The QLRC wrote:

> "Many of the existing procedures require an application to the Supreme Court. This is intended to ensure that the rights of the person who is the subject of the application are protected against arbitrary restriction. However, to a large degree, the potential advantage is negated by other factors.
>
> The expense of making a Supreme Court application is often financially beyond the means of a person with decision-making disability and his or her family or close friends. In addition, people may feel alienated and intimidated by the traditional courtroom atmosphere and the legal culture of adversarial proceedings, and the judge may have little expertise, experience or understanding of the needs of a person with a decision-making disability."[38]

This recommendation by the QLRC led to the Guardianship and Administration Tribunal being convened, which means that people no longer need to access justice through the Supreme Court in most cases. The same could be said for many judicial review matters that are now litigated in the Supreme Court. In addition, reviews of decisions on the merits would also be done by the Tribunal, leading to greater transparency and accountability of government decision makers.

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[35] http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/Media/$file/media_release_20%_slashed_off_planning_appeal_times.pdf, 8/3/06

[36] Victorian Civil and Administrative Tribunal Planning and Environment List Analysis 2001/2 to 2004/5 published 24 August 2005 - http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/Media/$file/media_release_24-8-05_planning_statistics.xls, 8/3/06

[37] District Court Annual Report 2004-5 at page 52, http://www.courts.qld.gov.au/publications/annual/annualDC2004-2005.pdf, 8/3/06

[38] QLRC, R.49, *Assisted and substituted decisions: Decision-making by and for people with a decision-making disability*, 1996 at page 26

4.7 Consistency of review if done in one Tribunal

There are practical concerns in the current system of ad hoc merits review. Each tribunal has different procedures and requirements and this leads to confusion for practitioners and clients.

4.8 Conclusion

There has been much exploration of systems of merits review in Australia, most recently by the Western Australian government in setting up the State Administrative Tribunal. We cannot hope to add to that sort of research in this submission, but have rather tried to raise the issues that need further investigation if Queensland is to follow suit.

APPENDIX

Caxton Legal Centre Inc
Environmental Defenders Office (Qld) Inc
Environmental Defenders Office of Northern Queensland Inc
Prisoners Legal Service
Queensland Advocacy Inc
Queensland Public Interest Law Clearing House
Tenant Advice and Advocacy Service Inner North
Tenants Union of Queensland
Townsville Community Legal Service Inc
Welfare Rights Centre (Qld)
Youth Advocacy Centre