SUBMISSION BY PAUL HENDERSON PURSUANT TO LCARC DISCUSSION PAPER – "INQUIRY INTO THE ACCESSIBILITY OF ADMINISTRATIVE JUSTICE" ISSUED DECEMBER 2005

Although I practised law as a private practitioner in Queensland for almost a quarter of a century before retiring in 2001, my response is written as a result of extensive dealings in the area of administrative law and remedies for justice seekers.

In my experience, access to administrative justice in Queensland is very difficult which is not aided by an entrenched resistance culture which pervades some portions of all levels of Government and mired by the non separation of powers, incomplete administrative bodies and protocols and by the absence of an overriding protective bill of rights.

Some portions at each level of Government thrive upon the incomplete Queensland administrative justice structure (which routinely appears in other major jurisdictions), as a raison d'etre to stymie an applicant from achieving free unfettered access to administrative justice.

The Queensland Government suffers from the effects of its uncoordinated entities, which act like "independent fiefdoms" [1]

The task is formidable for the Queensland Ombudsman when he strives to achieve a satisfactory and cheap outcome for persons seeking administrative justice.

The fetters are raised at the legislative, executive/ administrative and judicial arms of government.

A. LEGISLATIVE

Many of the systemic problems arise from a unicameral system of parliamentary government, although the same problems do not seem to arise in New Zealand which also has a similar system.

Without an upper House in Queensland to fine tune policy and legislative intent, there is an insufficient set of checks and balances to ensure quality governance.

Many persons used to and still do attempt to achieve administrative justice by lobbying a Member of Parliament. Save as submitted in part C that was the old way of doing things.

It is now unfair to expect MLA's on both sides of the House who have finite time and restricted resources to cater for each grievance adequately, despite their desire to be good representatives of their constituents.

When a person seeking administrative justice wants to obtain details of the policies and pre –legislative intent of Executive Government, a distinct hurdle is placed in his/her way

because the administrative workings of Parliament are not subject to the *Freedom of Information Act 1992*

This does not mean that the average Parliamentary Service employee does not strive courteously to assist most enquirers. My experience has been that they do and in speaking in their defence they seem to be not fully apprised of the impending business introduced by Government members.

One senior staffer told me 'off the cuff' with candour that "anything and everything or nothing can happen in George Street"

The Scrutiny of Legislation Committee ("SOLC") of Parliament should more often seek input from citizens prior to their deliberations and the issue of their alert bulletins just like the LCARC Committee is doing with its discussion papers and reports.

Citizens are presently deprived of an effective opportunity to participate in the deliberations of the SOLC which was established following the enactment of the *Legislative Standards Act 1994.* ("LSA")

Stephen Zifcak [2] enthusiastically proclaimed that the LSA provided citizens with a "mini bill of rights"

But his assessment was soon proved to be unduly optimistic.

LCARC [3] set out to examine the issue of whether or not Queensland citizens should enjoy the enactment of a bill of rights.

I attended a LCARC sponsored public hearing [4] to launch the *Queenslanders' Basic Rights Handbook* which LCARC published in association with the report.

The keynote speaker was former Commissioner Tony Fitzgerald AC. Other audience members were of the calibre and accomplishment of the well esteemed Justice James Thomas (a leading author and commentator on Australian Judicial Ethics) who was still serving on the bench of Queensland's Supreme Court.

The common consensus of the meet was that Queensland did indeed need a bill of rights.

Ministerial response to LCARC 12

The interim response by the Attorney General was tabled [5] but the final Ministerial response was not tabled until 6 years later by another Attorney General [6] No bill of rights has emerged.

B. EXECUTIVE/ADMINISTRATIVE

Victoria [7] and the Commonwealth [8] have administrative review bodies to review administrative decisions on their merits ("merits review")which do not seem to place an intolerable burden on agencies, but Queensland agency decision makers remain resistant to relinquishing their present freedom from supervising watchdogs when issuing decisions affecting citizens' rights.

Presently in Queensland under the *Judicial Review Act 1991* ("JRA") an aggrieved person enjoys a very limited review process (i.e. how the decision maker behaved in his deliberations leading up to the issuance of his decision) ("judicial review"), but not what merit lay in the decision. ("merits review")

As recommended by Commissioner Mr. Tony Fitzgerald in 1989 [9], the Electoral Administrative Review Committee ("EARC") (1991 to 1993) forensically examined the issue of the need for merits review legislation in Queensland.

David Solomon, the final Chair of EARC and his Committee examined the question of the need to introduce a merits review body. The Committee's stirling multi Volume report [10] even provided a draft bill which, had it been adopted could have established a body to provide Queenslanders with a forum for hearing citizens' administrative reviews (as distinct from Judicial reviews) of administrative decisions.

The Parliamentary Electoral and Administrative Review Committee, ("PEARC") [11] placed that Committee's imprimatur on the EARC Report and placed it before the Government of the day, which did not adopt it.

Subsequent Governments have eschewed the need for merits review.

12 years of successive Government intransigence to enact merits review legislation continues to baffle jurists, administrative lawyers, academics and citizens.

Queensland is in urgent need of the enactment of legislation to establish a bill of rights and a merits review body.

Along with the remaining Fitzgerald recommended reforms it should be introduced just as a former Premier promised, "Lock, stock and barrel".[12]

Administrative reform in Queensland since 1991.

After the Fitzgerald inquiry [13] identified deficient "goings on" at all levels of Government in Queensland, citizens warmly applauded the introduction of fairly liberal Judicial Review and Freedom of Information laws, introduced by reformist Attorney General, Dean Wells in 1991 and 1992 respectively.

Unfortunately much assistance and momentum for these enactments was retarded by successive Governments by failing to introduce a Privacy Act and Privacy Commissioner along the lines recommended by LCARC [14]

Gregory Sorensen's [15] submission to LCARC suggested that the existing resources of the then combined offices of Queensland Ombudsman and Information Commissioner Queensland could accommodate a further office of a Privacy Commissioner.

An interim response to the Committee's report was tabled by the Attorney General.[16]

There has not been a final response tabled by any Attorney General.

Instead, the present Government acted contrary to LCARC's recommendations and without any public consultation, took a policy instead of a legislative approach for privacy protection loosely embracing the 6 Federal "information privacy principles"(IPP's") under *The Privacy Act 1988* (Commonwealth).

In so doing it copied an untested South Australian Government model [17], without the establishment of a Privacy Committee like the Privacy Committee of South Australia which is SA's equivalent of the Federal Office of the Privacy Commissioner.

JAG, the administering agency has attempted by internal guidelines, without statutory justification to invoke the *Freedom of Information Act 1992* as an adjunct to the privacy regime and to read "personal affairs" (a narrower concept") in lieu of "personal information" as defined in the 6 Commonwealth Information Privacy Principles (IPP's) on which the scheme was based.

Presently, any Queensland Government entity that disobeys the IPP's or wantonly breaches its own privacy policy faces no direct scrutiny from a supervisory watchdog. A citizen aggrieved by a Queensland agency's breach of his/her privacy rights can only go to the Queensland Ombudsman (non- determinative) or to take prohibitively expensive Supreme Court (determinative) action (except against the CMC).

It has been my experience that Queensland Government entities take maximum advantage of this lack of easily accessed supervision over how they regard or disregard privacy policies or how they deal with the personal information they hold on Queensland's citizens. Citizens' privacy rights are not always respected.

Citizens' use of the *Ombudsman's Act 2001*

As a cheap forum for airing grievances against a Government decision the Queensland Ombudsman is often where an aggrieved person tends to head, often in confusion and despair after being flung from the roundabout carrying many other entities.

But his ability to console a complainant by achieving a just administrative remedy has limitations.

It is often said that the Ombudsman is the "forum of last resort" after all other rights of the complainant have been exhausted.

His decisions are generally non determinative (recommendations only) except for when he makes a finding of serious maladministration against an agency. [18]

A Crown entity does not always co-operate in the investigative process or necessarily accepts the Ombudsman's recommendation.

Citizen's use of the *Freedom of Information Act 1992*

With FOI there was a tremendous initial take up rate of FOI rights by formerly information deprived Queensland citizens. The pace slowed as successive governments raised the barrier for citizen to freely access documents of agencies and statutory authorities and added a draconian system of charging for processing applications.

Citizens' use of the *Judicial Review Act 1991*

Since the enactment of JRA, there has been relatively scant use made of the beneficial provisions of this enactment by persons aggrieved by decisions made by agencies and statutory authorities, despite the favourable costs provisions.

FOI and JRA

Each of these enactments did not entirely meet the expectations of those agitating for its Government to act fully in the public interest, exacerbated by absence of Privacy legislation.

The "public interest" element often conflicts with the machinery of Government, and of course the later must prevail in the interests of good governance as required by the Constitution.[19]

FOI response by Queensland agencies and statutory authorities

For an informative view of the objectives of the FOI act, see the comments of de Jersey J (as he then was) [20]

Some agencies' FOI officers in the first 7-8 years were willing to participate in the ride over the mutual learning curve with an applicant. I met and continue to meet helpful and friendly officers who enjoy the learning experience from effective networking and the exchange of FOI procedural discoveries – local and other jurisdictions.

Some applicants get easily frustrated and aggravated but they should not "shoot the messenger". They should step into the shoes of the agency decision maker on some occasions and *vice versa.*

Inevitably times changed over the years and so did the FOI personnel of most agencies.

The original FOI "purists" in agencies who "rolled up their sleeves", moved away and more frequently they were replaced with sincere, but untrained /inexperienced officers who cause undue delay by re-advancing arguments that had been lost or won before by their predecessors or upheld/rejected upon external review.

After the early years where FOI generally went well, subsequent Governments came and went and in my experience, new FOI officers generally became less inclined to help first time applicants and to exhibit the empathy which the early FOI officers showed.

A lack of appreciation of established Information Commissioner decisions and case law, even by the recently reconstituted Office of the Information Commissioner Queensland itself which was established as a distinct entity away from the Queensland Ombudsman since March 2005, now exacerbates the delay to the timely finalisation of reviews of the contested access decisions of agencies.

But, I am comfortably convinced that most agency FOI officers try their very best as professionals and as individuals, to get a handle on what has now developed into an area of very complex law.

Governments, goaded by the questionable actions of some journalists, almost from the outset started to tinker with the act's exemption schedule which has played havoc on the

continued applicability of many established decisions from the early years under former legally qualified Information Commissioners.

Since the extensive amendment to the original act brought about by the wide ranging *Freedom of Information and Other Legislation Amendment Act 2005,* everyone including access applicants and FOI officers have largely been cast into the roles of the "blind leading the blind" but usually willing to assist each other to restore each others sight.

LCARC recommendation disregarded by 2005 Attorney General

LCARC [21] recommended *inter alia* that:

- the original FOI Act be repealed and that a new fully better drafted and understood FOI act should be enacted in lieu containing all exemptions in one act.
- There should be community consultation before that enactment was introduced
- The offices of the Queensland Ombudsman (Non determinative) and Information Commissioner (merits review determinative) should be severed.

Ministerial response

An interim token response [22] was tabled by the Attorney General

Actual Government response

The LCARC report 32 then lay dormant , unacknowledged and unimplemented for 2 ½ years until the Government in 2004 received an access decision from the Information Commissioner Queensland which it perceived to be adverse to the Government from the then combined Queensland Ombudsman and Information Commissioner Queensland.

Unlike the position in a case [23] where the Government unsuccessfully applied for judicial review to test the decision, the Government obviously decided not to chance it again.

Instead it decided to revive one of the key unimplemented recommendations contained in LCARC 32 – the issue of making the Queensland Information Commissioner into a separate office away from the office of the Queensland Ombudsman.

The LCARC recommendation of separating the Queensland Ombudsman's office, recommended was hastily revived.

The position of an independent Queensland Information Commissioner was advertised in late 2004 and a line manager without legal qualifications or experience was appointed.

Precipitous reaction by Attorney General

After that appointment in March 2005, without tabling the outstanding Ministerial response to LCARC 32 or conducting any Community Consultation process as recommended in that report, the Attorney General [24] introduced a bill which was rushed through parliament to be enacted as the *Freedom of Information and Other Legislation Amendment Act 2005* ("amending act")

This hasty amendment engrafted an unwieldy bundle of little understood amendments on to the original enactment contrary to a specific recommendation by LCARC.

For example, without any regard to the provisions of the *Legislative Standards Act 1994* , *S.114(2)* of the amending act retrospectively blocked existing access applicants from accessing documents they had already applied for from the CMC.

The resultant confusion for everyone including agency FOI officers and access applicants continues.

The process of seeking access to Queensland Government documents has now become very confusing, costly and frequently frustrating.

Journalists' expectations of FOI

FOI applications by journalists, ostensibly not prepared to tolerate lengthy lead times, often lack candour to their readers by failing to explain to them the complexity of laws which are, quite properly meant to strike a balance between several competing interests.

Any Newspaper or TV Journalist expects so demands information immediately to bolster his/her perception of the facts constituting the proposed story. Consistent with his/her perception of their power to influence, he/she cannot understand why he/she can not access it urgently, without showing any empathy for the fact that Government is statutorily obliged properly to balance several competing rights.

FOI was never meant to accommodate such a quick media grab situation. Maligned Governments understandably act defensively to Journalists who "get it wrong".

Open debate about access to Government documents is vital for citizens' understanding a very complex law and journalists could very well assist in allowing the widest gather of different views.

Agency administration of the *Freedom of Information Act 1992*

There are 2 key benefits for Queensland consumers wanting to gain access to information from non exempt Government entities under the act.

1. S.19 of the act allows enquirers to attend the offices of a Government agency or statutory authority to "inspect and purchase "copies of their policies" (defined very broadly)

2. S. 20 of the act allows an access applicant to apply, and by paying a nominal fee to the "principal officer" of an agency or statutory authority or his/her lawfully constituted delegate, for access to documents, subject to certain exemptions set out in the schedule to the act and amending act.

S. 19 requests

A willingness or otherwise to respond properly in terms of the act differs remarkably between agencies. The response incidences are often incongruous.

In my experience, most agencies comply immediately, some require further persuasion that they must produce these policies. In a small number of cases, it has become obvious that an agency has been proceeding for years on an "invent it as it goes" approach to policy and have no written policies for what they say and do at their public registries.

Higher Courts' Registry

Intrigued by the Counter staff's frequent oral representation to customers at the Higher Courts Registry that certain matters were prohibited by "policies", I commenced the practice of asking for written copies of policies whenever oral assertions that some prohibition or another was due to "policy".

When they were unable to produce for me any of these written policies upon my request, I enlivened my right under S.19 of the act to be able to access them.

I have been agitating now, without success for over a year to the Principal Court Administrator of the Higher Courts and his staff to allow me access to all of the written administrative polices from the Courts which he supervises.

I have been also attempting to obtain policies from this agency which cover the administrative policies which bind the administrative as distinct from the judicial functions of judicial officers. Again, no success, rasing the inference that there are no policies.

Magistrates Court and State Reporting Bureau

A similar position exists.

After a year of enquiry that bore no fruit, I have been compelled to take my concerns to the Queensland Ombudsman.

On one occasion last December, an employee of the State Reporting Bureau caused me to be accosted by Court security officers simply because of my attendance at the client service centre to collect ordered documents and to ask lawful questions which a delegate was apparently unwilling or unable to answer.

Statutory Authorities created pursuant to the *Legal Profession Act 2005*

The act created 3 statutory authoritics:

1. The Legal Services Commission
2. The Legal Practice Committee
3. The Legal Practice Tribunal

No matter what representations that I have made to the principal officer of each of these Statutory Authorities about policies over a prolonged period of time, no or no adequate written policies on key functions of their authorities have been produced.

They each seem to ape the "invent it as it goes" approach of the Higher Courts Registry.

In my view the Legal Services Commissioner's published policies on investigation and complaints handling are deficient. The Complaints Handling and investigations policies do not conform to the Australian Standard [25] as do the ones of the CMC and those recommended by the Queensland Ombudsman.

Best Practice

The principal officers of each of these statutory authorities have been unhelpful to me and in some instances have treated me very indifferently.

They ostensibly hold the view that their refusal to respond to general enquiries will result in an enquirer going away, notwithstanding their encounter with persons who will never do that.

Best practice provides that a person receiving an enquiry should furnish a reply. [26]

The Principal of the Legal Practice Tribunal even caused a delegate to write to me asserting that it was "inappropriate" for me to write to him.

Requests for principal officers to justify their actions and policies

Crown entities are obliged to ascertain and obey the law. [27]

All Crown entities must provide a positive authority to justify their actions and their policies.[28]

The Legal Services Commissioner cannot provide me with a positive authority to support his internet proclaimed assertion 22 December 2005 [29] that he was an authorised to go "beyond the statutory provisions "by retrospectively publishing disciplinary cases up to 10 years before the vesting of his statutory power from 1 July 2005.

This unexplained and unlawful decision unfairly oppresses former disciplined legal practitioners who have atoned for their behaviour long ago.

Further, it constitutes the unlawful publication of the personal information which those legal practitioners confidentially entrusted in the Queensland Law Society when they applied for their practising certificates.

The practice is draconian in that it exceeds the provisions relating even to ordinary offenders by the Rehabilitation of Offenders legislation. [30]

He also could not produce for me an FOI or Privacy policy upon request.

As with the Higher Courts Registry, he ostensibly believes that he enjoys a *carte blanche* to do whatever he likes in respect to persons' personal information.

In extensive correspondence I have had with the Legal Services Commissioner since his appointment, I have raised serious issues for which he shows little concern:

1. the conflict potential of his case officers acting also as his legal advisers
2. how some of his policies do not have a statutory basis ,and
3. how some of his actions might be *ultra vires* his statutory powers.

After enjoying the initial co-operation of the Commissioner, his willingness to respond to my enquires waned when he was unable or unwilling to provide me with a positive authority [31] to justify the identified mischief.

The inevitable downside of this "Coriolanus" styled intransigence has started to emerge.

The Achilles heel of the administrative systems of these statutory authorities was recently identified in a part heard case. [32]

Mullins, J observed that the Legal Services Commissioner has been bringing Misconduct charges against Queensland Legal Practitioners accused of offending standards which have no statutory basis in Queensland.

Similarly in a charge brought before the Legal Service Committee by the Legal Service Commissioner against a legal practitioner [33], the Commissioner's bringing of a charge was assessed by a Committee member as a "bit of an overkill"

Nevertheless the hapless legal practitioner who felt constrained to plead guilty to offending a standard that does not exist now faces the retribution of having her mild transgression featured for many years on the Legal Service Commissioner's website. [34]

My appeal to the President of the Legal Services Committee for restoration of commonsense was ignored. **SCHEDULE A**

The unsatisfactory practices of the Legal Services Commission have seeped into the administrations of the Legal Practice Committee and into the Legal Practice Tribunal.

The incompatibility of the standing President of the LPT wearing several hats was amply demonstrated when a District Court judge on Northern circuit [35] perceived when he was faced with a professional allegation against a Legal Practitioner appearing before him that he could not confer with the President of the LPT in his other capacity as Chief Justice for a ruling because of his additional status as President of the LPT.

The President, in his various capacities since 1998 has made public statements which could be perceived as positively or negatively prejudicial to his ability to conduct disciplinary proceedings against Queensland's legal practitioners.

In another case the President disclosed his long standing familiarity with the legal practitioner [36] He proceeded at a later date to adjudicate on the charges brought against the practitioner. [37]

In December 2004 [38] he refused voluntarily to recuse when requested by Counsel for an affected practitioner who alleged that the standing President had made public comment about him.

The practitioner brought an application seeking an order that he recuse which was heard without hearing submissions from the applicant or the respondent.

His recusal speech 25 February 2005 was illuminating. **SCHEDULE B**

My letters of concern to the President of the Legal Practice Tribunal on divers matters including the above have been ignored. **SCHEDULE C**

Access to documents from non exempt Government entities under S. 20 of the Act

With FOI, the act really meant access to 'documents" of an agency, not to "Information" of the agency. This is unlike the position with the *Official Information Act* in New Zealand, where access is allowed to "Information".

Within FOI, since the commencement there has been a great inconsistency of approach between agencies, some offering exceptional assistance and politeness and others consistently exhibiting fear and suspicion and even rudeness about an applicant's possible motives, although the act specifically created no such threshold criteria for applicants to satisfy.

Instruments of delegation

It is most wise for any access applicant to ask the target agency's principal officer to supply a copy of the instrument of delegation signed by that officer in favour of the delegate to evidence the lawful authority of any delegate to bind the principal officer.

In all of my many FOI applications over some 12 years, I have only ever been refused access to these instruments of delegation by the present Integrity Commissioner and by the President of the Solicitors' Complaints Tribunal.

The later ignored my FOI access application altogether although I had paid the full fee with my access application which she has not refunded.

Responsive non exempt Government entities

Education Department

In my experience, the early 1990's FOI officers of the Education Department were the cause for that agency to become the exemplar for how FOI applications should be faithfully processed in Queensland. In my view the Agency still holds that status despite the long since departure of the foundation FOI officers who worked so hard to make the process work in sympathy with the act throughout the 1990's.

Department of Justice and Attorney General

In recent times in the Department of Justice and Attorney General, the appointment of an outstanding FOI Officer (ex Information Commissioner Queensland case officer) to JAG

has added pleasant educative bonuses to conducting access applications and the movement towards a consistent "whole of government" approach.

The dismantling of "whole of Government" FOI unit during the tenure of a previous government [39] has been revived under her stewardship.

Non Compliant non exempt Government entities

The Crime and Misconduct Commission ("CMC")

This agency is the vanguard for demonstrating an uncooperative and resistant response to applications for access under S20 of the act, although it complies admirably under its obligations under S.19 of the act.

I have had several frustrating attempts to have the agency comply with its statutory obligations and for it to provide positive authorities for its numerous unsupported assertions of fact and law.

Recently, I made an application to the CMC for what I considered were routine documents. I submitted the fee of $34.40 not knowing that the fee had increased late last year to $35.25 – an increase of 85 cents.

A paper warfare reminiscent of Leo Tolstoy was launched about the trivial shortfall of 85 cents thereby causing unreasonable delay to the processing of my application for access.

When notified, I tendered the shortfall promptly by way of postage stamps because of the small amount involved.

The agency rejected that tender and returned the payment to me. **SCHEDULE D**

The agency was subsequently unable to produce a written CMC policy consistent with its writer's assertions.

The agency's FOI officer declined my offer to provide him with a positive legal authority which would justify the use of postage stamps for insignificant top up amounts.

In such mild underpayment incidences other agencies such as Justice and Attorney General simply adjust the sum at the processing charges stage.

The inherent fault which I identified here lies in the fact that the agency is not subject to any kind of external administrative scrutiny by the Queensland Ombudsman, Information Commissioner Queensland, or by a merits review body on procedural matters such as this.

Mostly the CMC is immune from most external scrutiny. It is generally immune from providing statements of reasons in most instances and is vastly protected from having any of its decisions questioned.

The agency sometimes takes full advantage of that lack of supervision to oppress persons wanting to access documents or from enjoying statutorily given administrative rights.

When it suits the CMC to accommodate another agenda which has been undisclosed to the applicant, its officers can act unreasonably and cause delay in processing access applications, by raising such trivial points as identified here.

This is despite a "whole of Crown" policy [40] which provides that a Crown entity should "never take technical points".

In a telephone discussion with the writer of the above letter he made the extraordinary assertion to me that the CMC was "independent, not a Crown Entity".

Department of Tourism, Fair Trading and Wine Industry Development

The internal review delegate of the principal officer initially attempted to ignore my appellate right for an enlargement of time under S. S 52 (2) (c) of the *Freedom of Information and Other Legislation Amendment Act 2005.*

When the principal officer relented and appointed her deputy to conduct the internal review, the internal review decision did not cover the subject matter of my actual protest about the inadequacy of the access decision of the initial decision maker and was peppered with wrongful assertions about external review rights.

A protest to the Director General about the unsatisfactory FOI administration in her agency attracted a hostile reaction.

SCHEDULE E

B. Operation of the *Judicial Review Act 1991*

An informative and accurate view of the nature of the JRA appeared in an early unreported decision of the Supreme Court [41]

This case was instructive on the beneficial costs provisions in the act where the wholly unsuccessful applicant was still awarded 50% of its costs against the respondent.

JR bestowed 4 main new benefits:

- Sect 32 *JRA* allows an aggrieved citizen possessing a certain status to ask a decision maker to provide reasons for certain decisions of "an administrative character" within

28 days (or extended with the discretion of the Court) unless an agency is specifically exempted from supplying reasons.

- S.40 (1) JRA gives an aggrieved person the right to apply to the Supreme Court for a statement of further and better reasons when the initial statement of reasons provided to a requester has been alleged to be inadequate. No Court filing fee is payable for Applications for reasons.

- A person denied any statement of reasons upon request can apply to the Court to enforce the obligations of the decision maker. No filing fee is payable for Applications for reasons.

- An aggrieved citizen possessing a certain status ("locus") can apply to the Supreme Court to have a challenged decision reviewed to see if it had been formulated on correct procedural principles.

Agency compliance or otherwise

Many agencies routinely comply with a Request for a statement of reasons, because the JRA obliges them to do so within 28 days of receiving a request (Time might be extended with the leave of the Court but it is discretionary).

But other agencies and statutory authorities trawl around for any reason not to respond.

Yet others delay, hedge and obfuscate. These recalcitrant decision makers sometimes have to be threatened with enforcement proceedings before they will comply with their mandatory statutory duty to reply.

Some agencies are so intransigent that an application to enforce that duty becomes inevitable. Their Solicitors then usually capitulate and provide a statement (of sorts) "on the steps of the Court" to avoid the precedent of a Court ruling.

Non compliant non exempt Government entities

The difficulties to a person seeking access to administrative justice in Queensland seems to be caused mostly when crown entities act as "independent fiefdoms" [42] instead of conforming in every respect to a "whole of government" approach to governance.

Legal Services Commissioner

The Legal Services Commissioner was appointed just prior to the enactment of the *Legal Profession Act 2005* which came into operation from 1 July 2005.

As seen from his lack of positive response to FOI requests, the Commissioner has demonstrated a determination to rule an "independent fiefdom" [43]

Just as with the Information Commissioner Queensland [44] the Commissioner is not legally qualified.

Unlike the antecedent Queensland legal consumer watchdogs, the Legal Ombudsman and the Lay Observer who were both legally unqualified, he refuses to take his legal advice from the Queensland's Crown Solicitor, who is bound to act as a model litigant.

Instead, he takes his advice from a number of legally qualified case officers in his employment who have a potential for a conflict of interest and duty when the Commissioner faces JR review and the case officer (as a witness on material facts) purports to have the carriage of the litigation challenging his own decision.

In none of his decisions does the Commissioner alert complainants to their full appellate rights.

Example 1

Earlier this year a LSC case officer whose decision was challenged by a requester for a statement of reasons (a case officer) told the challenger that it "was not a matter for the Court to decide" **SCHEDULE F**

Example 2

Recently the Legal services Commissioner accused me of "demanding" a statement of reasons when I was exercising my statutorily bestowed right under S.32 of JRA. After the obvious was pointed out to him he failed to retract or to apologise. **SCHEDULE G**

Inadequate responses by some decision makers

Sometimes decision makers provide indistinct or inadequate statements of reasons and fail to provide proper evidence of how a decision was formulated.

A checklist for decision makers should be adhered to when making a decision they hope will be robust from challenge. **SCHEDULE H**

If the statement is inadequate, an aggrieved person has the right to apply to the Supreme Court pursuant to S.40(1) of JRA for an order that the decision maker provide a further and better statement.

In a 1994 JR case [45] an Application was filed in the Supreme Court seeking the provision of a statement of reasons for a transfer decision from decision makers who had constantly asserted that they were not obliged to give such a statement.

On the last working day before the hearing, Crown Law, acting for the decision makers provided a statement of reasons (of sorts) and had ostensibly hoped that the hearing would not proceed and create a binding precedent.

The applicant then amended the application to request a statement of further and better reasons under S.40 (1) of JRA and the hearing proceeded.

Lee, J found that the applicant was entitled to reasons, but that the statement of reasons provided at the last minute was "adequate, if not cryptic" and awarded costs wholly against the decision makers. [46]

The standard *modus operandi* for last minute Crown Law capitulation was again apparent in another case [47]

Moynihan J [48] ordered the decision maker to pay the Applicant's costs.

Confusion about the meaning and effect of JRA

Many persons including decision makers have been slow to appreciate the difference between challenging a decision on process and challenging it on its merits.

Many persons still mistakenly confuse the difference, including some lawyers and even a recent Court of Appeal President [49] told self acting appellants who were refused leave to appeal against an administrative decision of a statutory office holder, that they could go to a single justice to have the "decision reviewed on its merits".

A case summary for the case was inexplicably omitted from the Higher Courts series *QCA Case Summaries* for the month of May 2005 in which it occurred so the public was denied access to the actual *ratio* on the point.

C. JUDICIAL

Equal playing field

The Crown is placed "as nearly as possible" in the same position [50] as a natural person or Corporation when it comes to participation in Court proceedings

Typical JRA proceedings in Queensland's Supreme Court

JRA Administrative justice is open to both citizen and to the Government under JRA.

The Government itself applied unsuccessfully to judicially review an access decision of the Queensland Information Commissioner with which the Crown disagreed. [51]

In JRA cases there are often long winded esoteric tussles between experienced Crown QC's and the applicant's Senior Counsel where the Crown tries to persuade the Court that the aggrieved party's application for judicial review should be characterised as an application for relief "on the merits" of the contested decision – and therefore not reviewable.

The standard "second string in the bow" argument scenario advanced by the Crown's Counsel is to attack the Applicant's "status" to have brought the Application for the Statutory order for Review.

A good example of this scenario was played out recently in a Supreme Court Application for Judicial review [52]

If Crown Counsel successfully persuades the Court under either or both heads, the consequence to the losing aggrieved applicant is usually a staggering legal bill despite the favourable costs provisions contained in the JRA.

For any aggrieved person to challenge a controversial decision on alleged defects in decision making, and to attempt to quash it, the risk of defeat and costs award against the Applicant are high. Only brave hearts or the well cashed up would be likely to attempt a challenge.

Queensland Judicial administration

It is often claimed that the judicial arm of Government is independent. But, in reality, is it?

Disgruntled applicants other than the Government often lash out and many, rightly or wrongly, accuse the trial Justice of pro- Government bias as causing their loss.

There is an almost an inexhaustible fund of whistleblowers with anecdotal evidence who hold that view.

If there is indeed such a thing as judicial bias exercised against persons questioning the Government in Queensland, certain precautions can be taken before and during a hearing, but "after the event" relief is difficult to achieve in Queensland.

Absence of comprehensive policies to cover Judicial Officers acting administratively

Many policies which should prevent justices acting unevenly or unjustifiably are not in written form. The "invent it as it goes" licence they take to them selves is difficult for an aggrieved person to predict.

Caution for the unwary

Since about 1998, the Higher Courts have developed various mechanisms which can have the net effect of disguising what exactly went on in selected judicial hearings, noticeably used when a Crown entity [53] or a judicial officer [54] faces potential embarrassment in a case.

These mechanisms include:

1. Failing to have the State Reporting Bureau ("SRB") record certain proceedings

2. Issuing paper transcripts to "revise" what is actually recorded on the SRB master audio tapes

3. Use of *ex tempore* (AKA From the bench) judgement deliveries [55] as a justification for not publishing an accurate epitome of the reasons for a decision

4. Creation and application of different standards between justices [56]

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5. Instructing SRB not to record submissions on costs or to publish reasons for costs orders. [57]

6. Issuing paper orders that do not exactly correspond with what the judge actually ordered.[58]

7. Not publishing papers orders on the courts internet e search record of filed documents, which may be of embarrassment to certain preferential parties.[59]

8. Failing to publish a judgement or a fulsome or accurate epitome of a judgement on the Judgements Summaries link on the internet, or as an unreported decision.

9. Precipitous destruction and non deposit of SRB master audio tapes with the State Archivist just like stenographers' notes used to be deposited before the advent of tape recordings.

***Ex tempore* and costs judgements**

As outlined above, the Higher Courts act according to unpublished policies of uncertain origin and apparently without statutory justification which shield agencies from adverse publicity by asserting that *ex tempore* decisions and costs orders are not generally publishable.

What can an aggrieved person do to countermand these "mechanisms"?

a. In advance of a Court hearing

1. Before any hearing commences, an applicant should ask the presiding justice/judge for the hearing (including the costs argument) to be recorded.[60] *("UCPR")*

2. If refused, the party should ask for an adjournment so that a formal documentary application can be made.

3. If a certain Justice is biased by any objective standard supported by real evidence/proof, an applicant should first request the Justice voluntarily to recuse

4. If the Justice refuses [61], a party should request an adjournment so that a formal documentary application can be made to seek an order for his/her recusal supported by affidavits exhibiting real evidence of bias and partiality.

b. During the hearing

If a judge makes an overtly offensive remark about a party or about his legal representative in the face of the Court [62] the party or his Counsel should ask the Judge to recuse immediately.

A claim for indemnity for the costs thrown away should be made to the Appeal Costs Fund administered by JAG.

c. After the hearing

Apart from exhausting his/her Court appellate rights i.e. firstly to the Queensland Court of Appeal or to the High Court, an aggrieved person's rights are severely restricted "after the event" because relief against judges is restricted. [63]

However, what a person should do is to order promptly an audio tape dubbed from the master tape of the hearing captured by the State Reporting Bureau , compare it with any paper transcript version and then retain it for future reference.

That audio tape copy should be preserved for posterity because master tapes are presently destroyed instead of being deposited with Queensland State Archives under the Disposal and Retention Schedules of the State Reporting Bureau.

Citizens should agitate to countermand the Judiciary's self created "mechanisms"

Until the parliamentary Judges' Commission's powers have been amplified, citizens should exercise their democratic right to complain to:

1. The Queensland Ombudsman about the "invent it as it goes" approach to policies and procedures presently used by the Court Registries and by judges when they act administratively in Queensland.

2. As far as an activity might constitute alteration or tamper with master tape evidence which is a public record [64], report the alleged transgression to a coercive body, or to the Queensland State Archivist

3. A member of Parliament to agitate for Executive government to introduce further Constitutional legislation expanding the circumstances under which judges can be held accountable.

D. SUMMARY

Fulsome access to Administrative justice in Queensland State Government institutions is presently too uncertain and soured by Government impedance at legislative, executive and judicial levels ; and by Government entities acting as "independent fiefdoms" and acting decidedly in their own interests.

To make the present system work more effectively, it will additionally require:

1. A bill of rights

2. Compulsory imposition of best practice systems on all Government entities.

3. The compilation of compulsory uniform comprehensive policies which conform to statutory instruments within all Government entities.

4. The restoration of the Co-ordinator General's Office for "whole of government" cohesion

5. The amalgamation of the present vast plethora of Queensland Tribunals in to a single merits review Tribunal as was recommended by EARC.

6. A repeal of the current Freedom of Information legislation to be replaced with a self contained act similar to New Zealand's' *Official Information Act.*

7. A Privacy Act and a Privacy Commissioner.

8. Expanded powers for the Parliamentary Judges Commission

9. Radical reform of the Higher Courts' policies, procedures and practices and its management and treatment of parties' personal information.

10. Judicial reform to ensure consistency and equity in judicial standards.

Paul Henderson, 27 March 2006

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1. Mr Peter Ellis (Director General, Premier's Department) as quoted at page 187 in *The Engine Room of Government --The Queensland Premier's Department 1859-2001* [Copyright State of Queensland]

2. Zifcak, Spencer (1993) 18(6) Alternative Law Journal: 'Queensland the new exemplar of democracy'

3. LCARC report 12 was entitled: *The preservation and Enhancement of Individual's rights and freedoms in Queensland – Should Queensland adopt a bill of rights?*

4. LCARC Public Launch, Parliamentary Annexe, 18 November 1998

5. Matthew Foley, Attorney General and Minister for Justice

6. Rod Welford, Attorney General and Minister for Justice

7. Victorian Administrative Appeals Tribunal

8. Administrative Appeals Tribunal (AAT)

9. 3 July 1989. *Report of a Commission of Inquiry pursuant to orders in Council (i) 26 May 1987 (ii) 24 June 1987 (iii) 25 August 1988 (iv) 29 June 1989* ("The Fitzgerald Report")

10. August 1993 EARC: *Report on Review of Appeals from Administrative Decisions* - ISBN 072425676 (4 volume set)

11. 1994- PEARC chaired by Dr. Lesley Clarke, MLA (Barron River)

12. July 1989) Premier Mike Ahern – *ex tempore* television speech whilst accepting the Fitzgerald report from Commissioner Tony Fitzgerald

13. Op. cit.

14. LCARC April 1998

15. Deputy Information Commissioner

16. Matthew Foley, Attorney General and Minister for Justice

17. The *Information Privacy Principles (IPPs) [South Australia]* were based on the organization for Economic and Development 1980 Guidelines Governing the Protection of Privacy and Trans-border Flows of Personal Data, which established the basis for many of the world's data protection regimes.

18. *Wong and Medical Board of Queensland* – Queensland Ombudsman's finding of maladministration against the Medical Board of Queensland. Source: Ombudsman's letter to Wong tabled in Queensland State Parliament pursuant to speech of Dr. Bruce Flegg MLA (Moggill) – 11 November 2004.

19. *Constitution Act 1867* and *Queensland Constitution 2001*

20. *State of Queensland v Albietz ex parte Murphy (1996) QR*

21. LCARC report 32 (December 2001)

22. 9 April 2002 - Attorney General and Minister for Justice

23. *State of Queensland v Albietz ex parte Murphy – Op cit.*

24. - Rod Welford, Attorney General and Minister for Justice

25. *Australian Standard for Complaints Handling AS – 4269/1995* [Currently subject to revision]

26 . *1957 Franks Committee report* on Tribunals for Administrative Justice[United Kingdom]

"*Rethinking the Structure of Administrative Justice in Britain: A Proposed Agenda*" in O Mendelsohn and L Maher (eds) *Courts, Tribunals and New Approaches to Justice: Special Edition of Law in Context* (Monash University)(December 1994)

Code of administrative conduct [All souls' College, University of Oxford-1963]

27 *Eastern Trust Co. v McKenzie, Mann and Co [1915] A C 750 at 759* (Privy Council)

Lessons from Tribunals Chapter 14 in *Shaping the Future: New Directions in Legal Services* (Ed Roger Smith) (1995, Legal Action Group London) pp 246-256

28. Page 9, Lordon, Paul.: *Crown Law* [1990]- Joint publication of the Canadian Justice Department and Butterworths Canada.

29. LINK: http://www.lsc.qld.gov.au/searchReg.htm. The LSC asserted: *We have decided to go beyond the mandatory requirements of the Act. We have included, unless a court or the tribunal or committee makes an order prohibiting publication of the relevant information, the names and relevant details of any legal practitioners a court, the tribunal or the committee finds guilty of either professional misconduct or unsatisfactory professional conduct.*

30. *Criminal Law (Rehabilitation of Offenders) Act 1986*

31. Lordon, Paul : *Crown Law* [1990]- Op. Cit.

32. *Legal Services Commissioner v O'Connor* [Unreported]8666/05 per Mullins, J Acting President Legal Practice Tribunal.

33. *Legal Services Commissioner v Johnson* – Legal Practice Committee (9 November 2005) Peter Cooper (Chair)

34. Link: http://www.lsc.qld.gov.au/SearchResults.asp- Search "Shelley Johnson"

35. *R v Newell* [Indictment 38/2005 – 20 May 2005] per Howell. DCJ – Paragraphs 28-40 of SRB Transcript

36. *Legal Services Commissioner v Zaghini [2005] LPT* – directions hearing 3 August 2005.

"I was at University with him" disclosed Paul de Jersey, standing President LPT.

37. *Legal Services Commissioner v Zaghini* [2005]LPT Op cit - hearing 27 September 2005

38 *Legal Services Commissioner v M V Baker*- OP Cit -Directions hearing 17 December 2004

39. Denver Beanland , MLA - Attorney General and Minister for Justice. Source: Presentation of Gregory Sorensen, Deputy Information Commissioner at public hearing for LCARC report 32 (11 May 2000)

40.. Lohe, Conrad; *The Model Litigant Principles*, Office of State Crown Solicitor 2003.

41. *Concord Data Solutions v Director General of Education* [Unreported][1994] QSC per Thomas SPJ

His Honour's reasons for judgment appear as document 33 on the Court file APN692/93

42. Ellis, P Op cit

43. Ellis, P op cit

44. Appointment of Cathi Taylor, former administrative staffer of Leo Keliher former CEO of the Premier's Department

45. *Henderson v Roger Dennis Scott, Director General of Education and Others* (unreported ex tempore judgment) (15 February 1994) APN 65/1994 QSC per Lee, J

46. Op. cit. – orders on file APN 65/1994 (Documents 39 and 40)

47. *Host v Kennedy, Delegate PSMC and Others* (26 July 1995) (unreported *ex tempore* judgment) (1995) APN 491/95 per Moynihan, J

48. Order of Moynihan,J appears document 15 on the Courts file APN 491/95

49. *Dore v Penny [2005] QCA 150*- 11 May 2005 per Williams, A J- President QCA

50 *Crown Proceedings Act 1980*

51. . *State of Queensland v Albietz ex parte Murphy (1996) QR* OP Cit.

52. *Alliance to Save Hinchinbrook Inc v Cook and Environmental Protection Agency [2006] QSC Cairns 10 February 2006* [Judgment awaited] per Jones, J

53. *Queensland Law Society v Ebbett [2005][File 8333/02] QSC* . A key interlocutory hearing before McKenzie J 17 January 2003 was not recorded.

54. *Legal Services Commissioner v Baker* -Op. Cit- Recusal order of Paul de Jersey, standing President on 25 February 2005 does not appear on the Court file.

53. See 54. Also *Henderson v F N Albietz* (11639/98) (unreported *ex tempore* decision) (July 1999) per Derrington, J .A two hour hearing was not recorded despite the provisions of the *UCPR 1999* and the *Recording of Evidence Act 1962*

55. *Wise V Shad bolt (2005)* - Interlocutory 10 June 2006 per Fryberg J and Judgment and penalty orders in Queensland *Law Society v Ebbett* per Byrne (12 August 2005) were not published until after agitation occurred for their publication in the public interest.

56. *Wise v Shadbolt (2005) – Interlocutory 10 June 2006* illustrated that judicial activism can apply in the QSC. The Justice gave the Shadbolts a vesting order that they had not applied for.[Judicial activism aka intervention.]

Cmf The 2 primary trials of *R v Fingelton* and M/s Fingelton's QCA appeal where no judicial officer resorted to activism (intervention) to protect the liberty of the defendant.

In response to strident criticism of Queensland's Higher Courts by the majority of the members in the High Court when allowing the prominent *Fingelton* v R Appeal, the Queensland Chief Justice Paul de Jersey issued a press release published on 22 June 2005 in the *Courier Mail* denying that Judicial activism(intervention) (which would have assisted M/s Fingelton) operated in Queensland's Courts, notwithstanding cases such as *Wise v Shadbolt*. (Affirmed on appeal 2005 QCA)

57. *Dore v Penny* QCA [11 May 2005] op cit

58. *Henderson v Taylor and Moss* [Application 6205/2005][QSC interlocutory Application 17 February 2006]- The wrongly worded orders of White J dated 3 March , prepared from a draft by Counsel for the respondents were amended to accord with the SRB tape transcription.

58. A. *Legal Services Commissioner v Baker* [Op Cit] Recusal Order 25 February 2005 of Paul de Jersey, President LPT was not published – See Schedule B

B. *McDermott v K D Management Pty Ltd et oths* [DC 4993/1999]: Recusal order 10 April 2000 of Wylie, DCJ was not published – Also See 62.(post)

59. *Legal Services Commissioner v Baker* –op cit - Recusal order 25 February 2005 – See Schedule B

60. *Recording of Evidence Act 1962 ; Uniform Civil Procures Rules 1999*

61. *Legal Services Commissioner v Baker* –op cit – Application by Baker 21 February 2005 [Document 15 on file 9619/04]

62. *McDermott v K D Management Pty Ltd et oths* [DC 4993/1999]. Wylie J DCJ .instantly recused when he was requested by Counsel instructed by the solicitor against whom he had made a gratuitous offensive remark.

63. *Constitution Act 1867* and the *Queensland Constitution 2001* . – Removal from office is only available due to "proven misconduct"

64. *Public Records Act 2001* and the *Recording of Evidence Act 1962*.

SCHEDULE

NO.	DESCRIPTION	STATUS
A.	Letter to Mr. Peter Cooper , Solicitor Standing President of the Legal Practice Committee	Awaiting FOI Release
B.	SRB transcript of recusal order (25 February 2005) by Mr. Paul de Jersey, CJ, standing President of the Legal Practice Tribunal	Awaiting consent of SRB to reproduce
C.	2 Letters to Mr. Paul de Jersey, CJ, the standing President of the Legal Practice Tribunal	Awaiting FOI Release
D.	Letter from deputy Official Solicitor CMC to Paul Henderson	Available
E.	Letter from Director General, Dept of Fair Trading to Paul Henderson	Available
F.	Letter from Legal Services Commissioner to D and F Treacy	Available
G.	Letter from Legal Services Commissioner to Paul Henderson	Available
H.	Checklist for JRA decision makers	Available
I.	News clip from Courier Mail – 22 June 2005 – re Judicial activism in Queensland	Available

Draft suggested Statement of reasons checklist for Qld agency decision makers– Judicial Review Act 1991(Qld) ['act']

REQUIREMENTS	HOW TO COMPLY
Notice in writing of the decision	All aspects of the decision must be clear from the notice. Sections 32 and 40(1) of the *Judicial Review Act 1991* are available for challenging by a person aggrieved by the decision
Contemporaneous notes to be kept by the decision maker	Refer to actual notes made at the time preceding the decision. If a decision is expected to be robust from subsequent Judicial review the decision maker must keep and refer only to notes made contemporaneously *Ex post facto* created notes or those compiled by a person other than a decision maker, with the benefit of hindsight, are insufficient as they may be exposed as offending process during applications for reasons, further reasons or statutory orders for review of the process engaged in formulating the decision itself.
Process	Describe the main steps taken to make the decision. If the decision-making procedure is set out in legislation, check compliance with the requirements.
Findings on any material question of fact	Outline the findings on material questions of fact. A 'finding' on a question of fact is a conclusion reached by the decision maker only. A material question of fact is one necessary or relevant to the decision and includes: • any primary fact which is relevant to reaching the decision; • any conclusion of fact or opinion (an ultimate fact) which is based on the primary fact; • any matters of fact which may have influenced the

	decision. Make sure facts taken into account are relevant and include references to relevant legislation.
Reference to the materia on which the findings of fac were based	Refer to the contemporaneous material on which the findings of fact were based. This means the sources from which the decision maker has obtained the facts on which he/she has relied, and includes documents, oral representations, views of other officers etc. This information does not have to be set out in full, but it must be properly identified and described.
A statement of the reaso s for the decision and the applicant's next administrative review ri hts including to the Queensl nd Ombudsman (a non determinative basis) and to the Supreme Court (a determinative basis) abo t the process used.	The statement should explain why the decision was made. It should show a connection supported by a chain of reasoning, between the findings of fact and the decision. It should contain a logical explanation of the decision, setting out all the steps in the reasoning process, linking the primary facts, the ultimate facts and the actual decision. Reasons should be concrete and specific, not merely a statement or restatement of legislation. Where there is conflicting evidence, or evidence has been rejected or given reduced weight, the reasons for this should be explained.