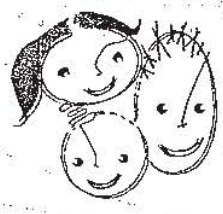

commission for
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and child guardian

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No 27

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28 MAR 2006
LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEE

Telephone: (07) 3247 5525
Reference: TN88775

Ms Kerry Newton
Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
Brisbane QLD 4000

Dear Ms Newton

The Accessibility of Administrative Justice

Thank you for providing the Commission for Children and Young People and Child Guardian with the opportunity to make a submission on the above discussion paper. I enclose a copy of our submission.

If you have any queries please do not hesitate to contact Lone Keast, Manager Policy on (07) 3247 5509.

Yours sincerely

E Fraser

Elizabeth Fraser
Commissioner for Children and Young People and Child Guardian

No 27

RECEIVED
29 MAR 2006
LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

Commission for Children and Young People and the Child Guardian

Submission to the Legal, Constitutional and Administrative Review Committee on "The Accessibility of Administrative Justice" Discussion Paper December 2005

Summary

The Commission for Children and Young People and the Child Guardian (the Commission) aims to promote and protect the rights, interest and well being of all Queenslanders under 18. The Commission has analysed the issues raised in the Discussion Paper with these aims in mind. As well as discussing the five issues raised in the Discussion Paper, the Commission has also raised other issues which affect children and young people's access to administrative justice.

The need for a litigation guardian and a lack of access to legal representation mean that children and young people cannot bring proceedings under the *Judicial Review Act 1991* (JRA). Children and young people prefer to use *ad hoc* review processes that are cheaper and are more youth focused.

Reform is required to give children and young people access to an effective and appropriate method of merits review. The Commission proposes that this can be achieved by providing that administrative decisions made in relation to children and young people, which are presently reviewed under the JRA, are instead reviewed by the Children Services Tribunal (CST).

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?

It is currently difficult to assess the level of children and young people's access to information under the *Freedom of Information Act 1992* (FOIA). Without adequate data categorised by age it is difficult to determine i.) if children are making applications; ii.) if they are not, whether it is because of fees and charges; and iii.) whether departments and agencies deny access on the basis that it is not the child's best interests.

1.1 The effect of fees and charges

No data is currently collected or published on:

- the number of enquiries made by children and young people;
- the number of applications made by or on behalf of children and young people;
- what documents those applications seek access to;
- on what grounds those applications are refused; or

- how many of those applications are subject to internal and external review[1].

It is **recommended** that the above statistics be collected and published so that an accurate assessment of children and young people's access to information can be made and any necessary reforms developed.

1.2 Determining a child's best interests and capacity

An agency or department can deny access to a document if they consider that access is not in the best interests of a child or young person[2]. In deciding whether to give a child or young person access an agency or department must consider whether they (a) have the capacity to understand the information and the context in which it was given and (b) can make a mature judgment about what is in his or her best interests[3].

Determining a child's capacity and what is in his or her best interests is a complex exercise. Some statutes provide lengthy criteria to be considered in determining these issues[4]. The FOIA provides no criteria for departments or agencies to apply. Consequently FOI officers who are inexperienced in dealing with young people may find "best interests" a difficult concept and access may be denied on the basis of an inaccurate and ill-informed opinion.

It is **recommended** that the Committee investigate current departmental and agency practices and procedures for assessing the best interests and capacity of children and young people. It is further **recommended** that the Committee explore whether the FOIA should be amended to provide criteria for assessing capacity and best interests. And in addition the FOI and Privacy Unit in the Department of Justice and Attorney General should issue FOI guidance and training to practitioners on the issue.

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?

Children and young people are not bringing proceedings under the JRA. Of the 208 applications bought between 1 February 1995 and 31 October 2005 only one may have been bought by a child or young person[5]. The issue for the Committee to investigate is the barriers to children and young people using the JRA.

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[1] Refer to Annual Report 2003-4 Freedom of Information Act 1992 and Annual Report 2004-5, Office of the Information Commissioner Queensland.
[2] Refer to s.50A (3) of the FOIA.
[3] Refer to s.50A (4) of the FOIA.
[4] For example, see s.68F of the *Family Law Act 1975* which identifies a list of matters that the court must consider when determining what is in the child's best interests in relation to custody disputes.
[5] Johnston (by litigation guardian) v Spence [2002] QSC 324.

2.1 Obstacles to children accessing Judicial Review proceedings

In Queensland children and young people under 18 are treated as being under a legal incapacity and cannot institute proceedings under the JRA themselves. They may only bring proceedings by a litigation guardian[6]. A parent or guardian would usually be the litigation guardian[7]. A litigation guardian who is not a solicitor must be represented by a solicitor. Accordingly a child, even through his or her litigation guardian, cannot appear in person and must obtain legal representation.

The litigation guardian is responsible for the costs of the proceedings. Funding is not available from the Civil Law Legal Aid Scheme to cover the legal costs of the guardian. A guardian would either have to fund the case themselves or find a solicitor willing to conduct the case on a 'no win, no fee' basis or provide pro bono representation.

In the event that a child plaintiff was unsuccessful, the litigation guardian would be ordered to pay the costs of the successful respondent. A costs order after lengthy trial proceedings in the Supreme Court would be extremely expensive. Most litigation guardians would not be willing to risk family assets when the outcome of proceedings can never be guaranteed.

In theory, an order under s.49 of the JRA would provide a way for a litigation guardian to limit his or her liability to pay the respondent's legal costs. In practice, s.49 costs orders are rarely made and the section has been narrowly construed by the Supreme Court. There are no reported cases in which a guardian has bought an application under s.49 and the application of the section to a guardian is untested.

It is **recommended** that the Supreme Court have capacity to waive the need for a litigation guardian for proceedings under the JRA or that government establish a state funded litigation guardian.

2.2 Alternative review processes

A number of pieces of legislation provide *ad hoc* processes under which decisions relating to children can be reviewed. The available data indicates that these are used far more frequently by children and young people than proceedings under the JRA.

The most significant processes for which data is available are:

- The complaint and investigation powers of the Commission under part 3 of the *Commission for Children & Young People & Child Guardian Act 2000* (CCYPCGA). Only complaints received from children in the child safety or juvenile justice system can be investigated. In 2004/5 2,632 complaints were received by the Commission and 1,576 complaints cases were opened.

[6] Refer to rule 93(1) of the Uniform Civil Procedure Rules 1999 (UCPR).
[7] Refer to the exceptions provided in rule 94(1) of UCPR.

- Under the *Child Protection Act 1999* (CPA) a child or a parent can apply to the CST for a review of the following decisions:

    1. in whose care to place a child under a child protection order granting the Chief Executive custody or guardianship[8];
    2. not informing a child's parents of the person in whose care the child is and where the child is living[9]; and
    3. refusing to allow, restricting or imposing conditions on contact between the child and his or her parents or another member of the child's family[10].

    Of the 189 applications commenced in the tribunal in 2004/5, 60 concerned the first type of decision and a total of approximately 60 applications related to the second and third type of decisions. 68 applications were made by parents, 2 were made by children and a further 11 were made on behalf of children[11].

Compared to the JRA, these two processes are easier for children and young people to access and are more effective and efficient for them to use.

2.3 Decisions with internal review processes that are also reviewable under the JRA

Some acts provide an internal review process for decisions which are also reviewable under the JRA. The issues are to what extent the internal review processes are used; whether they make proceedings under the JRA unnecessary or whether there is a need for an effective external review which children and young are currently denied.

For example, processes for reviewing decisions to suspend or exclude a child from school are provided under the *Education (General Provisions) Act 1989* (EGPA). Those processes are that:

- a school principal's supervisor can review the principal's decision to suspend a student for more than 5 days The supervisor can affirm or vary the original decision or set aside the decision and make a new one[12].
- the Chief Executive of the Department of Education can review a decision to exclude a student. In some cases the Chief Executive will be reviewing his or her own decision. The Chief Executive can affirm or vary the original decision or set aside the decision and make a new one[13].

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[8] Refer to s.86 (2) of the CPA.
[9] Refer to s.86 (4) of the CPA.
[10] Refer to s.87 (2) of the CPA.
[11] Refer to the Children Services Tribunal Annual Report 2004-2005.
[12] Refer to s.32 of the EGPA.
[13] Refer to s.38 of the EGPA.

In state schools in 2004/5 3,159 students were subject to suspensions of more than 5 days and 787 were excluded. No data is provided on the number of internal reviews conducted[14]. These numbers suggest that there would be a significant demand for an effective external review. This seems to be acknowledged in the consultation draft of the Education (General Provisions) Bill 2006, which provides that an excluded student can appeal to a Magistrates Court.

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

Children and young people require information to be provided in an understandable way that is appropriate for their age and their capacity. They also require specialist legal advice and assistance. The state government has recognised these needs in the *Queensland Youth Charter*.

3.1 Lack of information and engagement

3.1.1 Lack of a statutory obligation to provide child friendly information

Part 4 of the JRA places no obligation on decision makers to provide reasons in a form which is understandable to children and young people, even where a child is the primary receiver of the information.

Under the EGPA students are provided with letters setting out the reasons for their suspension or exclusion and notifying them of their right to make a submission against the decision. But there is no statutory requirement that the letters are understandable to the student. The pro-forma letters that are provided (copies of which are attached) are legalistic and would be incomprehensible to most students. Most students are also unlikely to be able to meet the five school day time limit for appealing.

3.1.2 The Queensland Youth Charter

The charter was released in 2002. It specifically provides that children and young people are to participate in government administrative decision making and reviews. Government is to engage children and young people by:

- explaining processes or proceedings in a meaningful, accessible and relevant manner;
- establishing practices and procedures which recognise the different needs of young people;
- providing support for young people's well being before and after proceedings; and
- ensuring that processes to challenge decisions are available and accessible for young people.

[14] Refer to p114 the Department of Education and the Arts Annual Report 2004-5.

It is recommended that the principles contained in the charter be used to guide the further development of the FOIA, the JRA and administrative processes.

3.1.3 Aboriginal and Torres Strait Islander children and young people

Specific strategies need to be developed to provide information to and engage with Aboriginal and Torres Strait Islander children and young people. Information on and access to review processes must be provided in a culturally responsive way. Effective strategies are required to overcome the community's distrust of the legal system and government.

The Department of Aboriginal and Torres Strait Islander Policy have a protocol on consulting and negotiating with Aboriginal people and a guide on proper communication with Torres Strait Islander people. The Department of Justice and Attorney General has also produced a handbook on Aboriginal English in the Courts.

3.1.4 Children and young people with a disability

Strategies will also need to be developed to provide information to and engage with children and young people with a disability. The right of people with a disability to access information is protected by the *Queensland Disability Services Act 1992.* The Disability Services Bill 2005 provides that disability services are to be designed and implemented so that people with a disability are encouraged to participate in the planning and operation of services, can raise grievances about services and can access independent advocacy[15].

3.2 The need for advice and assistance

The Australian Law Reform Commission in its 1997 report *Seen and Heard: Priority for Children in the Legal Process* (the ALRC Report)[16] noted that even where there is a reasonable standard of service for children and young people, advocacy "humanises the bureaucracies". It assists children and young people, to navigate the complex maze of processes to gain access to services[17].

Children and young people require individual advocacy to challenge decisions and use review processes. In 2003 the NSW Law & Justice Foundation undertook public consultations on disadvantaged people's ability to access legal services. The Foundation identified that the following barriers prevented children and young people accessing legal assistance:

- lack of specialist legal services for young people;
- lack of awareness of rights and legal entitlements;
- reliance on adults to mediate their access to legal services;
- fear of being disbelieved or not taken seriously by service providers;
- most solicitors lack skills in dealing with children and young people;

[15] Refer to s.22, s.32 and s.33 of the Disability Services Bill.
[16] ALRC 84, 19 November 1997.
[17] Refer to para 5.30

- intimidating and formal atmosphere of many legal services; and
- lack of information strategies which specifically target children and young people[18].

LAQ and other individual advocacy services give priority to children and young people in the juvenile justice, child safety or family law systems. Consequently there are few services for those seeking to challenge administrative decisions. The services that are available from LAQ and non-government organisations provide preliminary advice and assistance and do not provide representation.

Non-government service providers (such as the National Children's & Youth Law Centre (the NCYLC) and the Administrative Law Clinic run by the Queensland Public Interest Law Clearing House and Bond University) survive on minimal funding from the commonwealth and state governments and rely upon volunteers and pro bono support from the legal community[19].

A number of non-government services provide web-based information for children and young people. There is a significant demand for such information. For example, the NCYLC website www.lawstuff.org.au was visited by 130,199 people between July 2001 and June 2002[20]. However, internet based information does not reach children and young people who not have access to a computer.

In the CST children and young people have separate legal representation. But the Tribunal relies upon pro-bono representation from organisations such as the Abused Child Trust, LAQ and the Youth Advocacy Centre. As the workload of the tribunal has increased the demand for suitable representation has grown[21].

It is **recommended** that sufficient funding be provided to LAQ and non-government service providers to allow them to provide children and young people with advice, assistance and representation in review processes, including proceedings in the CST.

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

3.1 Children's lack of participation in decision making

It is a well recognised principle that children and young people, subject to their level of capacity, have the right to participate in decision making processes which affect them[22].

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[18] Refer to the Executive Summary of Stage 1 of Access to Justice and Legal Needs.
[19] Refer to the 2004-5 Annual Report of the Queensland Public Interest Law Clearing House.
[20] The NCYLC Annual Report 2002-3, p.6.
[21] Refer to p.15-16 of the Tribunal's Annual Report 2004-5.
[22] See the decision of the House of Lords in Gillick v. West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402 and the *Queensland Youth Charter*.

The ALRC Report highlighted that children and young people are an important client group of federal, state and territory government departments and agencies. State government services are provided to them across numerous departmental portfolios. In many areas children and young people are the predominant clients and decisions are made which have a huge impact upon their welfare, prospects and quality of life.

The ALRC found that frequently children and young people "are the passive recipients of decisions made on their behalf by powerful adults"[23]. In a survey of children involved in welfare proceedings the ALRC found that 62% did not known what was happening and 78% felt they did not have enough say in the decision that was made[24].

More recently the NCYLC have highlighted the issue of lack of participation for children and young people subject to suspension and exclusion decisions[25].

It is **recommended** that departments and agencies implement the best practice model of engagement for children and young people set out in the *Queensland Youth Charter*. The minimum standard expected is that the views of children and young people are considered. Best practice requires that children and young people are engaged in decision making processes.

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

The Commission proposes that administrative decisions made in relation to children and young people, which are presently reviewed under the JRA, are instead reviewed by the CST.

5.1 The benefits for children and young people

The proposal would provide children and young people with access to:

- a expeditious merit review process in which their best interests and welfare is the paramount consideration[26]; and
- an inquisitorial and collaborative (rather than adversarial) process in which their views and wishes are considered.

5.2 The benefits for government

The proposal would provide government with:

- a method of enhancing service delivery to children and young people by promoting the cooperative resolution of issues with a focus on achieving the best outcome for children and young people; and

[23] Refer to para 5.24.
[24] Refer to para 5.29.
[25] The NCYLC Annual Report 2002/3, p.18.
[26] Refer to s.7 of the CSTA.

- a method of implementing the principals of the *Queensland Youth Charter*.

5.3 Further issues to be addressed

As well as considering the resource implications of the proposal, government would also need to address the following issues:

- The need to provide children with separate legal representation. At present the tribunal relies upon pro bono legal representation.
- The expansion of the tribunal into regional, rural and remote areas to provide access for children in these areas.
- The time frame in which applications to the tribunal are completed. At present the tribunal aims to complete cases within a period of three months. But in 2004-5 only 46% of matters were finalised within this time.

Attachment 4
Sample Letter 1

Date

Student's Name
Address
SUBURB Q 4xxx

Dear **Student's Name**

Re: Your Suspension Pending Exclusion from School Name

I have recommended to my supervisor **Principal's Supervisor's Name and Position** that you be excluded from **School Name/all Schools in District Name permanently/stated period of time** under Section 34 of the *Education (General Provisions) Act 1989*. The principal's supervisor will notify you of the decision in writing within twenty school days.

The grounds for this suspension with a recommendation to exclude are... ***(please outline reasons why the student is suspended; refer to Section 33 of the Act)***

In making my recommendation I considered the following information:

-
-
-

On the basis of this information, I decided that the facts are:

-
-
-

I made the recommendation for the following reasons:

-
-
-

While you are suspended you will take part in an alternative education program that has been organised for you. **Case Manager's Name and Position**, on telephone **Telephone** from **Location** has been appointed as your case manager and will contact you as soon as possible to arrange the program.

You may appeal (called a submission) against my recommendation to **Principal's Supervisor's Name, District Name, Address (Phone)**, stating the reasons for the appeal and providing any supporting facts. Information about what a submission is, and how to go about making one, is on the attached sheet.

The submission must be made within five (5) school days. You may contact the principal's supervisor before that date and request a longer period in which to make the submission if required.

Any information you provide in this submission will be used by **Principal's Supervisor's Name and Position** to review my decision, and may be passed on to other relevant officers at the district office or this school. If you decide to subsequently appeal at a higher level (eg:

Director-General of Education or appeals court), your information may be passed on to other officers within Education Queensland.

You should contact **Name** on **Phone** to discuss anything you do not understand in this letter.

Yours sincerely

Principal's Name
Principal
School Name

Att.

Attachment 4
Sample Letter 2

Date

Parent(s) Name
Address
SUBURB Q 4xxx

Dear **Mr/Ms Parent Name**

Please find attached a copy of the letter sent to **Student's Name** concerning a notice of suspension with a recommendation to exclude from **School Name/all Schools in District Name permanently/stated period of time.**

The principal's supervisor **Principal's Supervisor's Name and Position** will notify you of the decision within twenty school days.

While **Student's Name** is suspended, **he/she** will take part in an alternative education program that has been organised for **him/her. Case Manager's Name and Position**, on telephone **Telephone** from **Location** has been appointed as **Student's Name's** case manager and will contact you as soon as possible to arrange the program.

The attached information explains how you may make a submission against the decision.

Any information you provide in this submission will be used by **Principal's Supervisor's Name and Position** to review my decision, and may be passed on to other relevant officers at the district office or this school.

If there is anything you do not understand in this letter, please contact me.

Yours sincerely

Principal's Name
Principal
School Name

Att.