# Response of the Queensland Ombudsman to the Discussion Paper dated December 2005 issued by the Legal, Constitutional and Administrative Review Committee titled "The Accessibility of Administrative Justice"

## Key issue 1 – FOI Costs

Obviously accessibility would be maximised if access were free. However, given that it is not, the challenge is to achieve a balance between the competing objectives of:

- obtaining some cost-recovery for agencies and limiting abuse by applicants making frequent vexatious applications, and
- allowing free and fair access by people to their own personal affairs material and ensuring charges for non-personal affairs applicants are not unreasonable.

The following issues arise:

### 1. 2 hour threshold

Currently, under FOI Regulation 8 fees are not payable if the agency can deal with the application in under 2 hours.

Agency filing systems are not standardised, so, in the interests of applicants, the legislation should be predicated on the lowest common denominator, rather than assume that the systems are similar and reasonably efficient. On that basis, an increase in the two-hour threshold may be warranted until such time as the standards of file management policy, technology and implementation have universally increased to a level at which it may be possible the reduce the 'free' threshold for processing hours again.

The threshold timeframe should be set at a level at which most agencies should, with effective filing and administrative systems, be able to process the majority of applications within that timeframe. This would reduce the level of cost recovery, but would also save processing costs for agencies who have to assess fees, provide preliminary assessment notices and process payments etc for matters taking more than an estimated 2 hours. However it would still allow for charging for the most time consuming applications.

### 2. Assistance to applicants

A greater obligation could be placed on agencies to proactively assist applicants. It is possible that the likelihood of applicants being appropriately and effectively consulted in relation to varying the scope of their applications, i.e. in order to obtain the documents they seek at a minimum or reduced cost, is primarily dependent on the personality and communication skills of the particular agency's FOI Coordinator, and the volume of cases per FOI decision-maker within the agency.

Some agencies have highly motivated staff and good practices in this regard, while others do not. Emphasizing the obligations of agencies to be proactive in consulting applicants about the scope of their applications, and in relation to communication with applicants more generally, could also lead to fewer internal and external reviews.

### 3. Reviews of decisions relating to fees and charges

It is important that internal and external review rights be available for fees and charges decisions. There will always be cases where agencies make mistakes, and this should be capable of review.

### 4. Different charges according to type of information and applicant

This proposal may have merit as a method of reducing charges for a small category of applicants.

However, currently the process can be complicated enough if an agency wishes to claim that some of the information applied for does not relate to the 'personal affairs' of the applicant. The process would be further complicated if the agency also had to determine if e.g. an applicant fell within a category such as 'public interest applicant'. Many applicants would claim that they were accessing the information in the public interest e.g. to expose a systemic wrong or corruption. It would be a complex task to define the boundaries in this regard between an individual applicant acting for him/herself and one claiming to be acting in the public interest.

In addition it is arguable that some of those high user applicants by whom the largest fees are currently paid, e.g. the Leader of the Opposition and journalists, are public interest applicants.

It would, I suggest, complicate matters even further to have to decide if an applicant was seeking a specified type of information, and what charge to apply if the one application sought various types of information.

**Summary re key issue 1**

- Increase 2 hour fee free threshold
- Provide greater assistance to complainants to vary their applications so as to avoid high fees and charges
- Maintain availability of reviews in relation to fees and charges decisions
- Varying fees and charges according to type of applicant and type of information sought would be difficult.

## Key issue 2 – Judicial Review Costs

Filing fees of $445 (in most cases) could be a barrier to persons of limited means, particularly when the best outcome that they can hope to achieve in many cases is an order that the decision in question be reconsidered, with the same outcome possible.

However of equal if not greater importance in this regard are the costs of legal representation, which the evidence in the discussion paper would suggest is closely related to successful outcomes.

Legal representation is necessitated by the legality of JR proceedings, particularly the citation and discussion of case law, which would be beyond the average applicant except in the most straightforward cases.

It is noted that JR cases have to be brought in the Supreme Court. Presumably this is because the statutory order of review introduced by the Act was meant to be a continuation or a replacement of a number of the pre-existing prerogative writs which were previously the exclusive preserve of the Supreme Court.

Be that as it may, many potentially judicially reviewable decisions involve relatively small amounts or issues that do not require the level of legal expertise which resides in the Supreme Court. Perhaps the lower courts could be given jurisdiction to hear matters, on a sliding scale of some sort similar to civil proceedings.

In this regard it is noted that many administrative decisions can already be appealed to the Magistrates and District Courts under specific pieces of legislation. In essence there is often not a lot of difference between a decision which is appellable to a Magistrate or District Court and a decision in respect of which somebody seeks judicial review.

Given that legal costs are an issue, particularly in the Supreme Court, the situation may be alleviated if after an application is lodged the applicant could seek to have the matter discussed at a compulsory conference presided over by a judge or registrar before it is set down for trial. The filing fee would deter frivolous applications but substantial legal costs may be avoided and the system made more accessible if the parties can attempt to resolve their issues at an early stage before committing to significant extra costs.

In saying this I am aware of the provision for beneficial costs orders. This should obviously remain but may need to be augmented by other initiatives also designed to strike a fair balance between accessibility and demand on court resources.

It might also be possible to require that, except in urgent or special circumstances, applications for an order for review can't be made until the applicant has given the agency a reasonable opportunity to provide a statement of reasons under s.34 and to resolve the matter directly. This may lead to a reduction in the number of decisions which subsequently become the subject of an application for review.

**Summary re key issue 2**

- judicial review at a lower level than the Supreme Court
- greater use of pre-hearing conferencing
- requirement that applicant raise the matter with the agency before instituting legal proceedings.

## Key issue 3 – Adequacy and accessibility of information about government decisions

- **Statements of Reasons**

According to s.34 of the JR Act, statements of reasons must contain:

(a) the findings of fact
(b) a reference to the evidence or other material upon which the findings are based, and
(c) the reasons for the decision.

However this requirement can be met without actually explaining to the person affected why a decision was made in a particular way.

To illustrate this point I use the following hypothetical example:

> A professional registration board rejects an application from an individual for registration in a certain profession. The applicant then seeks a statement of reasons for that decision.
>
> Under the relevant requirements, to qualify for registration, an applicant has to demonstrate 5 years continuous experience in a specified field or an "equivalent field". The applicant in this case does not have 5 years experience in the specified field, but claims 5 years experience in an equivalent field, and produces considerable evidence to demonstrate the claim.
>
> The board also receives reports from its own staff which it takes into account in making its decision.
>
> When asked for a statement of reasons for its decision, the board could meet the requirements of s.34 in the following way:
>
> (a) Findings of fact – "At the relevant time the applicant did not have 5 years experience in the specified field, and the field in which the applicant had experience was not an equivalent field."
> (b) Evidence upon which the findings were based – The material prepared by agency staff and the material submitted by the applicant are simply listed without comment or discussion – [this is common practice.]
> (c) Reasons for the decision – "Under the XY Act an applicant is not eligible for registration unless he or she had 5 years experience in the field of ..... or an equivalent field."

It might be argued that this example is extreme or the statement would be ruled invalid on appeal. However I am not aware of the existence of any guidelines to assist persons preparing Statements of Reasons and, from our experience, the standard of such reasons are quite variable throughout the public sector.

Indeed quite often agencies don't record their reasons for making a decision, or decisions are made by composite bodies such as boards where the individual members may have different reasons for arriving at the same conclusion.

Although the adequacy of statements of reasons is not often raised with my Office, and there appear to be few cases in the courts on the point in recent years, statements of reasons should be required to contain specific explanation as to why the evidence put forward by the applicant was not accepted (or why other evidence was accepted in preference to it).

The dearth of JR cases on the point is not surprising because few people would want to incur the costs involved in making an application to the Supreme Court merely with the prospect of obtaining better reasons for a decision.

I don't think the current s.34 necessarily achieves the purpose of enabling the public to understand why a particular decision was made against them, and it could be improved by amendment to the JR Act or by guidelines issued by an appropriate body such as the Public Service Commissioner.

- **Information about Administrative Justice Mechanisms**

The Ombudsman's Office receives thousands of calls each year from citizens asking how to go about having their widely ranging concerns and complaints looked at. Many of these matters are outside the Ombudsman's jurisdiction, but there isn't any other contact point or "clearing house" where the public can quickly obtain reliable advice as to how to effectively raise and resolve their concerns.

The size and influence of government continue to increase, to the point that administration of the state and local government sectors is extremely diverse and at times complex. The average citizen often does not even know where to direct their concern, let alone how to go about resolving it.

In its report on the Review of Appeals from Administrative Decisions, the Electoral and Administrative Review Commission (EARC) drew attention to what it saw as a plethora of review bodies and mechanisms in Queensland, and suggested that this would confuse the public.

This confusion could be reduced by requiring agencies, when communicating a decision to which an appeal right attaches, to advise people in writing of the existence of that appeal right.

In fact I have promoted this view through the Ombudsman's Complaints Management Project (CMP), and extended it to advising of non-statutory internal review rights as well. Automatic advice of statutory appeal rights is already required in certain situations (e.g. town planning) but is not a universal statutory requirement. Lack of knowledge of an appeal right is a barrier to accessing that right.

However, many decisions and actions of government agencies do not give rise to clearly defined appeal rights or internal reviews. This suggests that a case exists for the creation of a central advisory body that can:

- assist the public to navigate the bureaucratic maze, and
- relieve agencies of having to field inquiries, "direct traffic", and generally deal with matters that are not within their areas of responsibility.

With an appropriate increase in resourcing, the Ombudsman's Office, which has a broad profile as a general government complaints handling body, could provide such a service.

Apparently this concept was mooted in New South Wales some years ago, under the concept of *Complaints NSW*, but did not proceed. [The National Integrity Systems Assessment report, recently published by Griffith University and Transparency International, refers to this at page 87.] In both Queensland and New South Wales the situation is addressed to some extent by the fact that review bodies such as the Ombudsman can refer matters to other agencies and vice versa. However, better coordination is required.

Alternatively, each agency could appoint information officers, or invest existing information officers with the responsibility, to field inquiries from the public on any aspect of the agency's operations, in particular, what rights of access and review citizens may have in respect of information held and decisions made by that agency.

- **Statements of Affairs**

Statements of Affairs are worthwhile, but they assume people know that they exist, where to find them and what they contain. Even then, the information they are required to contain is general and often does not advance the public's knowledge about government decisions and actions in any significant way.

**Summary**

- The contents of statements of reasons need to be more clearly defined to ensure that decision-makers know that the statements have to deal meaningfully and directly with the precise reasons for a decision being made
- In recognition of the size and complexity of public administration, a public body needs to take on the role of acting as a central "clearing house" to advise the public on where to take their problems with government administration
- Alternatively agencies could appoint information officers with the role of directing the public as to the appropriate means of addressing their concerns
- Agencies should be required to advise members of the public of appeal and formal internal review rights when advising of adverse decisions
- Statements of Affairs should be examined to ascertain if they are achieving any significant purpose.

## Key issue 4 - Diversity of access

With its modest budget the Ombudsman's Office attempts to do whatever it can to provide access to its services to the following disadvantaged groups:

- **Prisoners**

The main disadvantaged group that may need access to our services is prisoners. With the cooperation of the Department of Corrective Services (DCS) we provide a confidential "phone link" service whereby prisoners can phone the Ombudsman's Office directly from prison free of charge.

We also visit prisons regularly to receive and resolve complaints and inspect various registers and records.

As part of our Complaints Management Program mentioned above we are assisting DCS to implement a complaints management system that, amongst other things, will cater for illiterate prisoners.

At the same time we are conscious that DCS also has a number of official visitors who can receive complaints from prisoners regarding prison administration, and the recently appointed Chief Inspector of Prisons also has a major role in ensuring that prisons are administered correctly. We have had several meetings with the Chief Inspector to ensure we avoid unnecessary duplication in carrying out our respective roles.

These initiatives are important, given that prisoners' access to the Judicial Review Act is about to be abolished by legislation presently before the Parliament.

- **Rural and regional Queenslanders**

To ensure citizens in rural and regional Queensland are not disadvantaged, we advertise our services in, and visit, those areas and provide a toll free number on which people can contact us. With modern telecommunications, distance from Brisbane is not the disadvantage it once was.

As mentioned above, we also provide an advisory service to the public through our intake section whereby persons calling about matters that are not within our jurisdiction are redirected to the appropriate area.

- **Ethnic groups**

We have:

- Developed a brochure in partnership with other complaint agencies entitled "It's OK to complain – Your rights are our concern". This brochure has been translated into 12 languages and is available from our website.
- Participated in a campaign on ethnic radio which targeted a range of audiences including women and young people.
- Participated in community events such as NAIDOC Week and Multicultural Week.
- Implemented a project to provide more appropriate information about our Office's services to indigenous prisoners.

We would like to do more, but that is not possible within existing resourcing.

- **Other groups**

Other groups in the community may have difficulty accessing administrative justice (e.g. the mentally ill), but specific agencies have been created to assist those persons e.g. the Office of the Adult Guardian and the Public Advocate.

- **Persistent complainants**

A relatively small number of complainants can, on occasions, consume disproportionate resources, having regard to the level of seriousness of their complaint. These complainants can be categorised as follows:

- Unreasonably persistent, in the sense of not accepting the decision-maker's determination;
- Unreasonably demanding, in the sense of demanding priority or a particular course of action by the decision-maker;
- Unreasonably aggressive in language or manner.

The Ombudsman Act authorises the Ombudsman to dismiss complaints considered to be "frivolous or vexatious", although this expression is not necessarily coterminous with the above categories.

The Ombudsman's approach to dealing with unreasonably persistent complainants is to apply its review policy. Under the policy, an officer of the same or higher level to the decision-maker, who was not involved in the original decision-making process, reviews the files. Only one level of review is permitted and complainants are advised of this if they challenge the outcome of the review.

It is submitted that this is a useful model for public sector agencies. In cases where the complainant remains dissatisfied after internal review by the agency, the agency should refer the complainant to an external review agency such as the Ombudsman.

In relation to aggressive complainants, officers are entitled to expect reasonably courteous behaviour just as complainants have a right to expect such behaviour from officers. Where a complainant acts in an unduly aggressive manner, officers should have the right to terminate the contact (whether it be by telephone or in person) and advise the complainant that future communications will be in writing only.

Although forum shopping can be a problem, we try to minimise its impact by liaising with other complaints entities by asking complainants to explain what they have done about their complaint before we consider taking it up.

**Summary re key issue 4**

- Many groups would have problems seeking to access JR
- The Ombudsman provides special assistance to certain groups to the extent financially possible
- Agencies should have in place clear policies for dealing with persistent and difficult complainants.

## Key issue 5 - Effectiveness and efficiency of access

- **Corporatisation**

It is undesirable that Government Owned Corporations (GOCs) should be outside the public sector accountability regime. I am aware of the arguments that GOCs compete in the market place with the private sector who are not subject to public sector accountability requirements, but some GOCs do not really have a significant private sector competitor, and even if they do, competition does not address the types of complaints that the public may make about them.

Further, GOCs are publicly owned, often provide essential services to the public, and have the advantages that flow from being associated with the public sector. Therefore they should accept some degree of public sector accountability. Certainly the public see them as publicly owned and expect therefore to be able to complain to the government about them.

I accept that an Ombudsman should not look at commercially competitive activity or commercial policy decisions, and the GOC Act currently excludes them, but any extension of that exclusion is unnecessary and inappropriate.

A related issue is the impact on accountability of outsourced government activities. Outsourced activities are still subject to the Ombudsman Act but the extent is not entirely clear.

- **Public Interest Disclosures/whistleblowing**

The Whistleblowers Protection Act largely leaves it to individual agencies to receive, investigate and deal with public interest disclosures and to protect whistleblowers against reprisal. There appears to be a fair degree of variation across the state and local government sector as to how well agencies are performing these functions.

The matter is currently subject to consideration by an Inter-departmental Committee led by the OPSME. We are participating in that review and have recommended that the Ombudsman be given a monitoring role in relation to PIDS that do not involve official misconduct (disclosures involving official misconduct are monitored by the CMC) to ensure that agencies deal appropriately with PIDS and take any measures needed to protect whistleblowers.

- **Apologies**

Agencies may be more prepared to resolve public complaints if the situation in New South Wales were replicated here, whereby the law provides that agencies can apologise for actions and decisions without the apology being taken as an admission of error or liability on their part.

A related provision in Queensland's Civil Liability Act 2003 is too narrow as it provides protection only in respect of "expressions of regret" to the extent that they do not involve an admission of liability.

- **Comparison of administrative justice mechanisms**

With the advent of the FOI Act and the Judicial Review Act in particular, the situation regarding access to administrative justice has improved markedly since the early 1990s. These Acts ameliorated a pre-existing culture of secrecy and arbitrary decision-making, but have not eradicated it.

As has been noted in this paper, the Acts have also brought with them the problem of cost, in particular the cost of processing FOI applications and the cost of making judicial review applications.

Various options can be suggested to address these cost problems, but it is submitted that the most cost effective option for administrative review is the Ombudsman concept because of its flexibility, user friendliness, non legalistic approach, ability to deal with underlying issues that gave rise to the decision complained about and ability to tailor solutions to particular circumstances.

As suggested in the NISA report (p.95) it could be that a two-tier system of administrative review is emerging in Queensland:

- determinative administrative review for those who can afford to pursue a matter through the courts, and
- recommendatory administrative review through an Ombudsman for those who can't.

The main criticism levelled at the Ombudsman concept is the lack of determinative power. However, my personal experience is that the Ombudsman's recommendations are accepted by agencies in the great majority of cases.

Although the public's access to avenues for administrative review has made public sector decision-makers more careful and more accountable for their decisions, it may be more cost-effective to put greater effort into improving the standard of decision-making and complaints handling in the public sector. This will reduce the need for reliance on mechanisms such as the Judicial Review Act after the event.

My Office is currently conducting two proactive projects aimed at prevention rather than cure.

Firstly we are delivering a program called the Good Decisions Training Program to public sector officers at both State and local government level. This training covers the fundamental (and some not so fundamental) aspects of making good administrative decisions, including how to effectively communicate a decision to those affected by it. More than 1,000 State and local government officers have attended training sessions.

The second project is the Complaints Management Project which aims to equip agencies with good internal complaints management systems so that if complaints are made about their actions or decisions they are able to effectively resolve those matters with a minimum of formality and cost, to the satisfaction of all concerned and without unnecessary recourse to outside bodies.

The strategy behind these projects is that if more decisions can be made properly in the first place, and more complaints about decisions can be handled properly

internally, there will be less need for complaint mechanisms such as the JR Act (and to some extent the FOI Act).

The Supreme Court does not, and cannot be expected to, dispense administrative justice in a significant proportion of the complaints about the multitude of decisions made by public sector decision-makers every day. This is highlighted in Appendix B of the Discussion Paper which reports that 208 Supreme Court JR judgements were handed down between 1995 and 2005. In the same period the Ombudsman's Office has received and dealt with thousands of complaints about decisions and actions of government agencies.

I believe the current trend is towards less formal mechanisms and the Ombudsman is an important part of any solution.

**Summary re key issue 5**

- GOCs should not be totally beyond the reach of public accountability
- Whistleblowers require special attention, given the lack of uniformity across agencies regarding the recognition, assessment, investigation and resolution of public interest disclosures
- Agencies should be able to offer an apology to a complainant without that being taken as an admission of liability
- It is as important (and probably more cost-effective) to improve the standard of decision-making and internal review in agencies as it is to address problems with the FOI and JR Acts, as improvements to the former will reduce the need for access to the latter
- Enhancements to the jurisdiction and resourcing of the Ombudsman Office should be considered as an alternative to reliance on expensive court based remedies.

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