QUEENSLAND
ombudsman

Response of the Queensland Ombudsman to the

Supplementary Discussion Paper dated 17 August 2007 titled

"The Accessibility of Administrative Justice - Supplementary Issues"

issued by the Legal, Constitutional and Administrative Review Committee (LCARC)

October 2007

Table of contents

Issue 1. Appeals from administrative decisions

Essentially, the issue for consideration is whether Queensland should establish a generalist merits review tribunal similar to the Commonwealth's Administrative Appeals Tribunal (AAT).

History

The need for reform of Queensland's administrative decision appeals system was first identified in the Fitzgerald Report:[1]

> There is no general process of independent determinative external review of administrative action in this state. Reliance must be placed upon the extremely cumbersome judicial procedures to achieve any review of administrative action.[2]

Mr Fitzgerald called for a system to be adopted in Queensland under which (among other things) administrative decisions were reviewed on their merits by an external independent review body.

The Electoral and Administrative Review Commission (EARC) then conducted a comprehensive analysis of the adequacy of administrative review provisions under Queensland legislation. In 1993, EARC recommended the establishment of a new generalist review tribunal in Queensland with the aim of streamlining the administrative review process.[3] EARC recommended that some of the over 130 individual tribunals and administrative review bodies that it had identified be retained, but that the functions of most be transferred to the new generalist tribunal.

In its report, EARC described the current Queensland position as "wholly inadequate".[4] The inadequacies identified by EARC included:

- the absence of appeal rights for most decisions in significant areas of public administration (EARC identified about 2,600 administrative decision-making powers with no corresponding merits review rights);
- inconsistent selection of decisions for which appeals are provided;
- comparative inaccessibility to citizens of many of the appeal rights;
- lack of uniformity in the procedures of review bodies.[5]

As at 1 January 2003, EARC identified 131 review bodies able to review about 200 decisions under 474 legislative provisions providing for review of administrative decisions. EARC found that there were significant variations in the rules of the various bodies and persons to which review powers had been conferred. Substantial differences existed in the rules of hearing, procedures, costs, notice requirements, legal representation and requirements to give reasons for decisions.

Importantly, EARC also noted that the wording that granted a right of appeal often varied dramatically across statutes. It was of the view that of the then existing

---

[1] *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, GE Fitzgerald QC Commissioner, 1989

[2] page 128

[3] *Report on Appeals from Administrative Decisions*, EARC 1993

[4] EARC 1993, para 2.11

[5] EARC 1993, paras 2.11*ff*

administrative appeals provisions, 40% made it unclear whether the right being conferred was a full right of review on the merits of the case, or some other limited scope of review.

EARC reached the following conclusion in support of its recommendation for the establishment of a generalist tribunal:

> There is no scheme or pattern, and no sense of a guiding principle in the distribution of existing appeal rights, the nature and scope of the appeal right conferred, the constitution and procedures of the appeal body and so forth.[6]

All Queensland government agencies (except Treasury), supported a rationalisation of administrative appeals practices and procedures and considered that a system of merits review would provide "an objective, authoritative and independent means of ensuring fair and equitable application of statutory provisions".[7]

However, the comprehensive scheme envisaged by EARC was opposed by the Queensland Ombudsman (then known as the Queensland Parliamentary Commissioner for Administrative Investigations) on the basis that the scheme really amounted to the creation of an alternative Ombudsman. Opposition also came from the Queensland Parliamentary Committee for Electoral and Administrative Review (PCEAR). While in general agreement with EARC's conclusion on the need to reform substantially Queensland's system of merits review, PCEAR was concerned at the proposed workload of the new tribunal and recommended that reform take place slowly, with a gradual movement from existing review bodies to the tribunal. It raised the possibility of the introduction of a two-tier system of appeals. The first tier would operate as a filter mechanism and would have two separate components:

- a general trial division; and
- specialist external review tribunals in high-volume areas of dispute.

The second tier would consist of a higher level within the general review body and would hear difficult cases, as well as appeals from the first tier.[8]

To date, no action has been taken to implement the reports of either EARC or PCEAR.

The experience in other jurisdictions[9]

(a) Commonwealth

The Commonwealth AAT commenced operation in 1976 as a generalist tribunal replacing many of the specialist tribunals that had been established earlier on an ad hoc basis. Its jurisdiction has grown steadily and now extends to the review of administrative decisions under approximately 400 different Commonwealth enactments. An important change in the 1980s was the creation of a number of specialist tribunals in high-volume areas such as social security. The rationale behind these specialist tribunals was that they would be the principal review body and that they could proceed in a more informal and expeditious manner than might otherwise occur in the AAT.

---

[6] EARC 1993, para 2.20
[7] EARC 1993, para 2.27
[8] *Report on Review of Appeals from Administrative Decisions*, PCEAR 1995
[9] see discussion in *Control of Government Action*, Creyke & McMillan, 2005 at p.120*ff*

In 1995, in response to the growth of the AAT's jurisdiction and a concern that it was becoming unwieldy, it was recommended by the Administrative Review Council (ARC) that the existing Commonwealth review tribunals be amalgamated into a new tribunal, to be called the Administrative Review Tribunal, incorporating two tiers (similar to the model endorsed by PCEAR in Queensland). The first tier was to be divided into a number of divisions (roughly corresponding with the existing specialist bodies) which would conduct an initial review of decisions in a quick, informal and flexible setting. The second tier was to be an appeal tier.

While the Commonwealth Government accepted the ARC's plan and introduced relevant legislation, it was not passed by the Senate and has not been reintroduced. Nevertheless, the plan provides an interesting reflection of perceived problems with the AAT as it has grown, i.e., that it is regarded as being too slow, formal, legalistic, inflexible and adversarial in its approach to conducting reviews.

(b) New South Wales

The Administrative Decisions Tribunal (ADT) was finally established in NSW in 1997, the creation of a generalist merits review procedure having first been recommended in 1973. Some of the reasons for its eventual establishment were stated to be the costly proliferation of tribunals and the absence of consistency in tribunal procedures (the same problems noted by EARC in its report on the situation in Queensland).

While there are many similarities between the AAT and the ADT, there are also important differences. In some areas, the ADT exercises original jurisdiction (such as anti-discrimination). There are also numerous provisions in the ADT Act designed to encourage less formal processes, such as preliminary conferences, mediation and appointment of assessors.

(c) Victoria

The Victorian AAT was established in 1984 and was replaced in 1998 by the Victorian Civil and Administrative Tribunal (VCAT). Like the ADT, VCAT is a composite body with two divisions, for civil and administrative jurisdiction. It is headed by a judge of the Supreme Court, but also emphasises the use of informal resolution procedures, such as compulsory conferences and mediation.

(d) Australian Capital Territory

The ACT established an AAT in 1989, based upon the Commonwealth model. However, the ACT also has a range of other disciplinary-specific tribunals which are not linked by an appeal right to the AAT.

(e) Western Australia

In 2005, after many reviews and studies, a State Administrative Tribunal was established to replace much of the existing appeals system. The conclusion reached by all those studies and reviews was the same as reached by EARC in Queensland, namely, that the existing appeals system was *"uncoordinated, marked by a proliferation of tribunals, boards and public officials, with no uniformity of procedures, and no discernible theme concerning decisions that are reviewable and those that are not."*[10]

[10] see Creyke & McMillan, page 125

Similarly to NSW and Victoria, the SAT has both an original jurisdiction in civil matters and an administrative review function, and there is an emphasis on fairness, flexibility, speed and lack of expense.

(f) South Australia

The Administrative and Disciplinary Division of the South Australian District Court performs general merits review. The number of Acts that have designated decisions that can be appealed to the Court is growing, although the greater proportion of merits review function is still performed by specialist tribunals. The Court is not bound by the rules of evidence and can use different forms of alternative dispute resolution.

(g) Tasmania

In 2001, in response to repeated calls for reform of the administrative appeals framework, Tasmania created an administrative appeals division of the Magistrates Court, rather than a separate tribunal. Many specialist review bodies continue to exist.

(h) Northern Territory

No generalist merits review tribunal exists in the Northern Territory. There was a recommendation made in 1991 by the NT Law Reform Committee for a generalist merits review tribunal to be established, but it was not implemented.

In 2004, the NT Law Reform Committee again recommended the immediate establishment of a general merits review tribunal similar to the Commonwealth and Victoria. It found that a "statutory labyrinth" effectively deprived the ordinary citizen of the means to challenge an administrative decision by a simple, direct and inexpensive process. The Committee considered that the system of administrative appeals tribunals set up by the Commonwealth and relevant states had proved successful in providing citizens with an inexpensive, quick review and determination of decisions which affect them personally.[11]

My position

I support the immediate establishment of a generalist merits review tribunal in Queensland. As the NT Law Reform Committee observed in its report, the path has now been well laid out by the Commonwealth AAT and has been followed (to a greater or lesser degree) by all other states and territories except for Queensland and the Northern Territory. The reforms that have taken place in those other jurisdictions have clearly been successful in affording justice to thousands of applicants by providing review on the merits of administrative decisions which have affected them, and have also played a significant role in improving administrative decision-making throughout the various governments.

In short, I am unable to identify any compelling argument against the same reform occurring in Queensland that would outweigh the significant advantages that would be brought about by introducing a central system of merits review by an independent tribunal with determinative powers, namely:

[11] see *Report on the Review of Administrative Decisions and an Administrative Tribunal*, Northern Territory Law Reform Committee Report No. 29, September 2004

- the provision of a quick, accessible and relatively inexpensive (compared to judicial review) method of administrative challenge;
- enhancements in the quality and fairness of decision-making; and
- improved administrative accountability.

It is clear that many of the inefficiencies and inadequacies in the current system that were identified by EARC in 1993 (and by all other similar studies and reviews conducted in other states over the past 20 years) continue to exist and no doubt have worsened in the intervening 14 year period due to the establishment of more individual tribunals and more ad hoc and disparate remedies being provided for in a myriad of new Acts. The lack of uniformity in review arrangements and the consequential confusion about a citizen's rights of review are significant factors in depriving citizens of the basic right to seek review of administrative decisions by a simple and direct process. There is an urgent need to co-ordinate, in practice and procedure, the administrative appeals system in Queensland.

As noted above, in response to EARC's 1993 report, the then Parliamentary Commissioner for Administrative Investigations, Mr Fred Albietz, opposed EARC's recommendation to establish a merits review tribunal on the basis that it was tantamount to creating an alternative Ombudsman. However, the experience in other jurisdictions over the intervening years demonstrates that the two frameworks can exist comfortably together, with each offering alternative and complementary means of administrative redress and enhancing, rather than competing with, the work of the other. Therefore, I am firmly of the view that there is room, and a need, for both a general merits review tribunal and an Ombudsman.

As was mentioned in PCEAR's 1995 report, the core functions of a merits review tribunal and an Ombudsman are quite different. A merits review tribunal examines an individual decision and decides whether that decision is right or wrong. It hears argument and receives evidence that is confined to that narrow purpose. It then prepares a decision or judgement that responds to the central contentions of both parties, often making a ruling that becomes a precedent for cases of a similar kind.

Like a tribunal, an Ombudsman will often review the merits of a decision the subject of a complaint. In doing so, an Ombudsman may choose to proceed in much the same manner as a tribunal or may (and almost always does) proceed more informally. In fact, Ombudsmen are empowered to follow any procedure they consider appropriate, subject to the requirements of their governing legislation (for example, to give natural justice).

The key distinction between an Ombudsman and a tribunal is that the Ombudsman does not usually have determinative powers to alter an administrative decision, but has recommendatory powers only.[12] However, this does not limit an Ombudsman's effectiveness as, in the great majority of cases, recommendations are followed by the agencies to which they are directed (in Queensland, in more than 95% of cases).

Another important distinction is that an Ombudsman's investigative power is much broader than that of a tribunal. An Ombudsman can undertake own motion investigations. Furthermore, when investigating a complaint, an Ombudsman may focus not only on the merits of the complaint but on much broader systemic issues of

[12] Some Parliamentary Ombudsmen in Australia also have a role as private industry ombudsmen in respect of which they have determinative powers

defective administration. Such an investigation may extend to a general review of an agency's administrative procedures, practices, capabilities, efficiency, communication and accountability.

One has only to look at some of my recent reports to Parliament to appreciate how much broader the Ombudsman's functions are than a tribunal's, and the differences in the processes followed; see for example:

- The Pacific Motorway Report (March 2007)
- The Miriam Vale IPA Report (December 2006)
- Baby Kate Report (October 2003)

These reports are available on my Office's website at *www.ombudsman.qld.gov.au.*

The *Ombudsman Act 2001* also gives the Ombudsman the following broad function:

> 12 Functions of ombudsman
>
> The functions of the ombudsman are –
>
> ...
>
> (c) to consider the administrative practices and procedures of agencies generally and to make recommendations or provide information or other help to the agencies for the improvement of the practices and procedures; ...

In the discharge of this function, my Office:

- provides training for officers of agencies on good decision-making and on how to deal effectively with complaints;
- encourages and assisting agencies to improve their systems for dealing with complaints; and
- reviews the procedures and practices of agencies with regulatory responsibilities.

These significant differences demonstrate why there is a need to have both an Ombudsman and a general system of external merits review by a tribunal.

> It is a central feature of administrative law systems in Australia that they create alternative and overlapping mechanisms by which a member of the public may challenge a decision - judicial review, merits review, and administrative investigation.[13]

The NT Law Reform Commission reached a similar conclusion following an examination of the roles of the Ombudsman and a merits review tribunal:

> There is no conflict between these functions, and both are important modifiers between the bureaucracy and the citizen. Consequently, both should continue as parallel remedies for the citizen.[14]

While I am fully supportive of the creation of a merits review tribunal in Queensland, I take this opportunity to note that I agree with some of the criticisms that were levelled at EARC's recommendations by my predecessor, Mr Albietz. In particular, I am

[13] PCEAR 1995, page 100
[14] page 12

opposed to those recommendations that I consider would result in blurring the distinction between the functions of the proposed tribunal and the functions of my Office. Those recommendations were also rejected by PCEAR in its report.[15]

Specifically, I do not consider that it would be appropriate to impose a statutory duty upon the tribunal and my Office to co-ordinate our respective review processes or to transfer files and exchange information. That would be an attempt to assimilate our roles in a way which I would regard as being undesirable in principle in that it would inappropriately confuse the role of an administrative body with the role of an officer of the Parliament. I am not aware of any similar requirement being imposed on Parliamentary Ombudsmen in other Australian jurisdictions. Moreover, such a requirement may also discourage agencies and external bodies and persons from co-operating with the Ombudsman's informal requests for information.

That said, I can envisage circumstances where it may be appropriate to share information with the tribunal if I consider the particular circumstances warrant it. It may therefore be prudent to include a provision in the Ombudsman Act that permits the Ombudsman to release information to the tribunal if the Ombudsman considers it appropriate. The Act was amended in 2005 to give the Ombudsman a similar power to provide a report to the State Coroner.[16]

The PCEAR recommended that arrangements between my Office and the tribunal should have the aim of reducing the prospect of objectors attempting to use both my Office and the tribunal simultaneously, without the consent of both. I point out that any potential duplication of work is prevented by my Office's practice[17] of considering whether a complainant has or had a right of review by a tribunal when determining whether or not to investigate a complaint.

Nor do I consider that it would be appropriate to confer upon the tribunal a general advisory role on government administration. In my view, that role sits more comfortably with an Ombudsman who works co-operatively with government agencies to improve government decision-making and administration.

Lastly, I note that these recommendations by EARC were made well before the enactment of the Ombudsman Act, which now recognises the Ombudsman's broad role (referred to above) to help agencies to improve their decision-making and administrative practice.

The Appropriate Model

I support EARC's fundamental recommendation to create a new and separate generalist tribunal, which would be broad ranging in its jurisdiction. Following the experience in other jurisdictions, I consider that there should be an emphasis on fast, inexpensive and flexible alternative dispute resolution methods, such as preliminary conferences, mediation, appointment of assessors, etc.

EARC recommended that, when the tribunal commenced operation, it should be empowered and fully resourced to exercise, to the greatest extent possible, the full range of its initial proposed jurisdiction. EARC also recommended that most appeals should be to the tribunal, with only a small number of the then-existing appeal bodies to be retained.

---

[15] PCEAR 1995, pages 100-101
[16] Section 57A
[17] See ss.23(1)(d) and (e) of the Ombudsman Act

PCEAR, however, recommended that a slower, more progressive approach be taken, with consideration given to the introduction of a two-tier system (as described above), similar to the structure that was recommended for the Commonwealth AAT in 1995.

It appears that the two-tier model was suggested for the Commonwealth because it had undergone significant growth in the nearly 20 years since its inception and the volume of work it was handling put it in danger of becoming unwieldy and inefficient. The introduction of two tiers was seen as a way of streamlining its operations and improving its efficiency.

On the other hand, NSW, Victoria and WA appear to have successfully established single-tier tribunals. The problems experienced in the Commonwealth may not arise if a single-tier model were to be established here. Furthermore, while there are undoubted advantages to a two-tier system, a potential disadvantage is that it could encourage the existence of too many specialist tribunals, which is precisely why the current system is in need of reform.

In any event, I do not consider that debate about the internal framework of a new tribunal in Queensland should be a reason to delay its establishment. In my view, the tribunal should be established as a matter of urgency, initially with limited powers of review, but with more and more granted as it develops experience. As the PCEAR pointed out, it took many years for the Commonwealth AAT to evolve to its current level of jurisdictional responsibilities.

Summary

In summary:

- Queensland and the Northern Territory are the only jurisdictions that have not introduced some centralised system of merits review of administrative decisions;
- the current ad hoc, disparate system is inefficient, inadequate and unfair;
- There is an urgent need to co-ordinate, in practice and procedure, Queensland's administrative appeals system;
- A general merits review tribunal should be established as an additional avenue for affording citizens administrative justice;
- The tribunal's role will not adversely affect the functions and operations of the Queensland Ombudsman but will complement them;
- Persons wishing to challenge administrative decisions should be free to choose to seek an investigation by the Ombudsman or to apply to the tribunal for review of the decision;
- The roles and procedures of a tribunal and an Ombudsman are different and should not be assimilated.

Issue 2. Availability of information about administrative justice

The issue for consideration is whether it is appropriate to introduce reforms to provide for a central body that will co-ordinate the provision to citizens of information about administrative justice. The Committee referred to the work performed by the Citizens' Advice Bureau in Britain.

Previous submission

In my submission to the 51st Committee dated 10 April 2006,[18] I noted that my Office receives many calls each year from citizens asking how to go about having a wide variety of complaints and concerns examined, many of which are not my jurisdiction. I observed that the administration of government has grown so complex that the average citizen does not know where to direct their concerns, far less how to go about resolving them.

I stated that the problem could be alleviated to some extent simply by requiring agencies, when communicating a decision to which an appeal right attaches, to advise the recipient in writing of the existence of that appeal right.

However, quite apart from introducing that specific reform, I was of the view that better co-ordination of advice to citizens was required generally, and that a case existed for the creation of a central advisory body that could:

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

I stated that, with an appropriate increase in resourcing, my Office would be an appropriate body to provide such a service.

Britain's Citizens Advice Service

The Citizens Advice Service was established in Britain to help people to resolve their legal, money and other problems by providing free, confidential and independent advice and information from over 3000 locations across Britain (including in bureaux, GP surgeries, hospitals, colleges, prisons and courts). It handles nearly 5.5 million problems each year.[19]

Citizens Advice, and each Citizens Advice Bureau, are registered charities, run by a total of over 20,000 trained volunteers. Citizens Advice supports the bureaux with an information system, training and other services. It also maintains a comprehensive information and advice website that receives over 600,000 visits per month.

The Citizens Advice Service website states that their advice helps people resolve their "debt, tax, benefits, housing, legal, discrimination, employment, immigration, consumer and other problems, and is available to everyone regardless of race, gender, sexuality, age, nationality, disability or religion". Advice is available face-to-

[18] see pages 5-6
[19] see the Citizens Advice website at *www.citizensadvice.org.uk*

face and by telephone. Most bureaux offer home visits and some also provide email advice.

Citizens Advice is a well-known and well-respected charity in Britain and has a strong influence on the formation of both local and national social policy.

Discussion

While there was no direct request contained in the Supplementary Discussion Paper, I am proceeding on the basis that, by virtue of having referred generally to the work of the Citizens Advice Service, the Committee is interested in receiving comment about whether a similar initiative would be of benefit in Queensland.

The Citizens Advice in Britain is a large organisation, operating within a national framework, and with an extremely broad focus upon assisting citizens to resolve all manner of problems, not just those arising from some dealing or interaction with a government department. It clearly offers a valuable service to citizens as a well-recognised "first port of call" when attempting to resolve virtually any problem.

While that breadth of focus may be justified in Britain having regard to the population and the national framework within which the service operates, it is questionable whether such a broad-ranging scheme is warranted in Queensland. The focus of my comments on this issue is therefore limited to whether citizens in Queensland would be better served by having a central body that can advise them, in the context of their dealings with state and local government bodies, what their rights are, how to exercise those rights, and where they need to go.

I reiterate my view (expressed in my earlier submission) that such a central "clearing house" is needed in Queensland so that advice to citizens about their administrative justice rights can be co-ordinated. At this stage, there is insufficient information available to justify the cost and associated administrative and legislative provision involved in establishing a new body to provide this service. It is also impossible to estimate at this time the number of inquiries that could reasonably be expected to be received by such a body each year (at least in the initial stages).

As I have said, my Office, with its broad role of providing an independent and free service for reviewing complaints about state and local government agencies, would be an appropriate body to provide such a service, subject to appropriate additional resourcing. As I noted in my submission dated 10 April 2006,[20] my Office is already providing this service on an informal, ad hoc, basis in any event. In fact, in 2006-2007 my Office referred 4626 citizens to the appropriate complaint bodies.

If my recommendation is adopted, the situation could be reviewed after, say, two years, and an informed assessment made of the number and types of inquiries received, and for any need for amendment to the scheme.

Moreover, the experience in Britain seems to suggest that many inquiries can be dealt with online, by providing a comprehensive website that contains practicable, reliable and current information in the form of fact sheets, FAQs, links and details of other relevant sources of information. Such a website could be established and maintained by my Office.

[20] see page 5

Summary

In summary:

- Agencies should be required, when communicating a decision to which an appeal right attaches, to advise the recipient of the existence of that appeal right;
- There is a need in Queensland for a central body to co-ordinate the provision of information to citizens about administrative justice arising from interaction with state and local government bodies;
- While undoubtedly important, it is a relatively narrow role that does not justify the establishment of a new and separate body;
- The role would sit comfortably with the work performed by my Office and would require only a modest increase in resourcing;
- A comprehensive website would assist in answering many of the inquiries made by citizens about their rights and how to exercise them.

Issue 3. 'Proportionate dispute resolution'

The issue for consideration is whether reform is needed to Queensland's administrative justice system so as to improve the dispute resolution process and provide for proportionate dispute resolution.

What is it?

The term 'proportionate dispute resolution' was discussed in a broad and wide-reaching White Paper that the British Secretary of State for Constitutional Affairs and Lord Chancellor presented to the British Parliament in 2004 titled *Transforming Public Services.* The purpose of the paper was to discuss ways in which to transform civil and administrative justice and the way that people deal with legal problems and disputes.

> Our strategy turns on its head the Department's traditional emphasis first on courts, judges and court procedure, and second on legal aid to pay mainly for litigation lawyers. It starts instead with the real world problems people face. The aim is to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place; and where they cannot, provides tailored solutions to resolve the dispute as quickly and cost effectively as possible. It can be summed up as Proportionate Dispute Resolution.[21]

The broad aims of the review were:

- to minimise the risk of people facing legal problems by ensuring that the framework of law defining people's rights and responsibilities is as fair, simple and clear as possible, and that agencies make better decisions and give clearer explanations;
- to improve people's understanding of their rights and responsibilities, and the information available to them about what they can do and where they can go for help when problems do arise;

[21] see page 6

- to ensure that people have ready access to early and appropriate advice and assistance when they need it, so that problems can be solved and potential disputes nipped in the bud before they escalate into formal legal proceedings;
- to promote the development of a range of tailored dispute resolution services so that different types of dispute can be resolved fairly, quickly, efficiently and effectively, while also providing cost-effective court and tribunal services for those cases where a hearing is the best option for resolving the dispute.

Discussion/Role of my Office

Many of the reforms I have discussed in response to the first two key issues above would serve to address some of the concerns identified in the British review. For example, a central plank of the proposed British reforms is to establish a new organisation which in effect comprises a unified tribunals' service (replacing the existing fragmented system of tribunals). The role of this new organisation would be to promote proportionate dispute resolution in central government by "resolving disputes in the best way possible and stimulating improved decision-making so that disputes do not happen as a result of poor decision-making".[22] There is a particular emphasis on the new organisation employing alternative dispute resolution methods such as mediation and negotiation to try to resolve disputes before having to resort to more formal legal procedures.

Similarly, in Queensland, the establishment of an independent merits review tribunal would provide a cheaper, faster, more efficient and more accessible method of challenging an administrative decision than by judicial review. The informal dispute resolution procedures that the tribunal would follow in the initial stages of a hearing would assist to meet the need for a flexible, user-friendly approach to resolving disputes.

In addition, there would be the option for complainants to bring their problem to my Office for resolution, to make use of the flexible and tailored dispute resolution methods employed by my officers.

Secondly, the introduction of a requirement on agencies, when communicating a decision to which an appeal right attaches, to advise the recipient of the existence of that appeal right, would serve to improve and clarify people's understanding of their rights and what other action they can take.

Thirdly, the establishment of an independent central contact point (such as my Office) where citizens can obtain advice, in the context of their dealings with state and local government bodies, about what their rights are, how to exercise their rights and whom to contact would assist people to understand more clearly their rights and responsibilities at an early stage of a potential dispute.

As to the important need to improve government decision-making, the British proposal is that its new organisation (which is intended to operate as much more than a traditional merits review tribunal) will have the duty to publish its views and analysis of decision-making and will consider how government and other decision-makers should reply to these reports. In addition, it is intended that the new organisation will enter into agreements with the various decision-making departments which feed into it, setting out how together they intend to improve the end-to-end process.

[22] see p.25 of the White Paper

In my view, the role that the British government has in mind for its new organisation would not appropriately be given to a traditional merits review tribunal of the type under consideration in Queensland. In its review, the PCEAR specifically rejected EARC's recommendation that the proposed tribunal be given a wide systemic advisory role and powers of recommendation, on the basis that to do so would blur the distinction between the role of a merits review tribunal and the role of the Ombudsman (as discussed above). In my opinion, a normative effect on agency decision-making will arise simply as a consequence of establishing an independent tribunal which has determinative powers to review decisions on their merits. It is not necessary to broaden the tribunal's role in improving decision-making by empowering it to advise agencies on specific decision-making defects, although such matters could appropriately be discussed in particular decisions.

Moreover, as mentioned above, the Ombudsman has a specific statutory function to help agencies to improve their decision-making and administrative practice. I have described above the main activities my Office is undertaking in discharging this function.

As to the role of my Office generally in improving public service delivery, I note that the White Paper offers the view that government has much to learn from the success of ombudsman schemes, particularly the idea of flexible dispute resolution with a view to providing a tailored service to the public. With specific reference to the Parliamentary Ombudsman, the Paper says that:[23]

> The Parliamentary Ombudsman ought naturally to be an integral component of attempts to plan and to improve public service delivery. The Ombudsman's aim is a service that should have as its core purpose the flexible and timely resolution of complaints which it achieves by securing appropriate outcomes for individual complainants and by providing authoritative recommendations, where appropriate, to those bodies which are the subject of complaints. By doing so, it should also contribute to efforts to improve complaints handling and to modernise public services.

It is clear that the Queensland Ombudsman's role for improving administrative practice is considerably greater than the role summarised in the above passage. That said, most Ombudsmen (at least in Australia and New Zealand) take a proportionate dispute resolution approach to the complaints they receive. My Office deals informally with the great majority of complaints it takes up. That means that my officers informally contact agency officers to obtain records and other information and may try to negotiate an outcome acceptable to both parties. However, in more serious disputes, we may:

- require an agency to formally respond to the complainant's allegations or other issues we have identified during our investigation;
- electronically record interviews with an agency's officers or with other persons;
- attend an agency's premises to review files in order to identify systemic deficiencies.

If necessary, the Ombudsman can use compulsory powers to obtain documents or examine witnesses but I have not had to use those powers as no agency has refused to provide information relevant to an investigation my Office has conducted.

[23] see page 16

It is also of relevance here that the Ombudsman Act[24] requires the principal officer of an agency to give the Ombudsman reasonable help in the conduct of a preliminary inquiry.

Summary

In summary:

- The various reforms I have proposed under issues 1 and 2 would assist greatly in improving the end-to-end administrative dispute resolution process, starting from establishing a central body that will co-ordinate the provision of information to citizens about administrative justice issues arising from their interaction with state and local government bodies, through to providing the option of administrative review by a generalist merits review tribunal, as well as access to informal dispute resolution processes.
- The Queensland Ombudsman's Office plays a valuable role in assisting to promote proportionate dispute resolution in Queensland through its work in improving agency decision-making, complaint handling and administrative practice generally, as well as the tailored, informal dispute resolution processes that it adopts in its investigative work.

Issue 4. Publication of details regarding contracts entered into by public sector agencies

The issue for consideration is whether, with respect to claims of commercial-in-confidence, the government should develop and adopt guidelines relating to the disclosure of contracts entered into by the government with a private sector body consistent with the principles outlined in Recommendation 1 of the Public Accounts Committee's report, *Commercial-in-confidence arrangements*, November 2002 (No.61). The central principles are as follows:

- information should be made public unless there is a justifiable commercial or legal reason for it not to be;
- contracts that include commercial-in-confidence provisions should be publicly identified together with a specification of which provisions have been withheld from disclosure;
- the party requesting commercial-in-confidence should be identified, should justify the request and demonstrate how its commercial interests may be harmed by disclosure;
- the need for public accountability and public interest should take precedence;
- performance milestones for incentive packages should be published annually together with each organisation's progress in achieving them;
- agencies should develop a protocol for a method of public disclosure and a time period within which this must take place;
- the duration of commercial-in-confidence provisions should be explicitly considered when a contract is being written;
- the time period for which the information is deemed commercial-in-confidence should be disclosed together with an explanation of the time period chosen;
- claims for confidentiality should be limited to essential items and tailor-made clauses should be drafted rather than widely drawn standard clauses;

[24] see s.22(2)

- there should be a distinction between information that the government agency requires to be kept confidential, and information that the private sector organisation requires to be kept confidential.

Government response

The Government rejected the PAC's recommendations on the following grounds:

- a whole-of-government response to commercial-in-confidence arrangements was already being developed by the Department of the Premier and Cabinet;
- any information that would undermine a company's competitive position or undermine a public sector agency's ability to negotiate the best deal for Queensland taxpayers would not be released;
- disclosing incentives that are paid to companies in order to lure their business to Queensland will "ratchet" up the level of future assistance and undermine the ability of Queensland to attract national and international investment and jobs;
- the level of disclosure by the government of commercial information is already greater than in other states;
- GOCs operate in a commercial environment and requirements for disclosure could have an adverse impact on their commercial interests and their ability to operate commercially;
- to "tinker" with the cabinet exemption provision contained in s.36 of the *Freedom of Information Act 1992* so as to exempt contracts and instead insert a commercial-in-confidence regime consistent with the PAC's recommendations would weaken the cabinet process as well as cabinet's ability to make informed decisions and closely scrutinise proposals.[25]

Discussion

I support the recommendations made by the Public Accounts Committee (PAC) in its report.

The use of commercial-in-confidence clauses in contracts between public sector agencies and private sector organisations has had little impact on the operation of the Ombudsman Office because s.45 of the Ombudsman Act provides that no obligation to maintain secrecy or other restriction on the disclosure of information applies to the disclosure of information relevant to a preliminary inquiry or an investigation by my Office. I am nevertheless concerned that there is an over-use within government agencies of confidentiality clauses in contracts and a general misunderstanding of the concept of "commercial-in-confidence" and the type of information that it properly covers. It seems that broadly-worded confidentiality clauses are routinely included in government/private sector contracts to cover a range of information that is not confidential in nature, but which, for some reason, either the agency or the private sector entity considers should be kept secret.

I made a detailed submission (dated 9 April 2002[26]) to the PAC in which I stated:[27]

> Undoubtedly, the use of broad-based commercial in confidence clauses in contracts to which the government is a party has the potential to unnecessarily restrict access to information that ought legitimately to be available to the Parliament, to

[25] see the ministerial statement made by the then Premier, the Hon PD Beattie, on 3 December 2002

[26] At that time I was also the Queensland Information Commissioner

[27] see page 4

accountability agencies and to members of the public; in the interests of holding the various agencies of the executive government accountable in respect of their performance of functions on behalf of the public of Queensland.

I stated in the introduction to my submission that I supported the Auditor-General's call for more openness and accountability regarding the details of contracts entered into between government agencies and private sector organisations because:

- government agencies must be able to disclose information about the terms of agreements and the performance of agreements in order to be directly accountable to the citizens of Queensland;
- accountability agencies must be able to obtain information about the terms and performance of agreements, and must be able to use such information in reports to complainants, the Parliament and the public; and
- information held or obtained by government agencies should be regarded as an asset or resource of the people of Queensland.

I **enclose** a copy of that submission for the Committee's consideration.

I also expressed concern that there was no consistency across government or even within agencies on how and when information should be treated as commercial-in-confidence. I note that the then Premier stated that a whole-of-government response to this issue would be developed, but I am not aware of that having occurred.

Like the PAC, I consider that the starting principle should be that information should be made public unless there is a justifiable commercial or legal reason for it not to be. Secondly, any claim for confidentiality should be limited to the essential information (that is genuinely confidential) the subject of the claim and the clause in question should be drafted as narrowly as possible. Lastly, it is clear that commercial sensitivity decays with time. Accordingly, I support the PAC's recommendation that a time limit should apply to a claim for confidentiality and that the claim should be lifted, and the information disclosed, after the requisite time has passed.

Summary

In summary:

- I support the PAC's recommendation to develop and adopt guidelines to apply to the whole of government in relation to commercial-in-confidence claims, consistent with the principles set out in Recommendation 1 of the PAC's report;
- There is evidence that the concept of commercial-in-confidence is widely misunderstood and that contractual confidentiality clauses are overused and drafted too widely;
- I consider that the adoption of the PAC's principles across government will aid in enhancing the government's accountability to the public regarding the entering into and performance of contracts between the government and private sector organisations;
- Finally, as the Victorian Auditor-General stated in his May 1996 Report on Ministerial Portfolios *"the issue of commercial confidentiality and sensitivity should not override the fundamental obligation of government to be fully accountable at all times for all financial arrangements involving public moneys".*