LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

The Accessibility of Administrative Justice

April 2008

Report No 64

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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CHAIR'S FOREWORD

Report no 64 concerns inquiries by two committees – the Legal, Constitutional and Administrative Review Committees of the 51st and 52nd Parliaments – regarding the accessibility of administrative justice mechanisms in Queensland. The inquiries commenced in December 2005 with the release of a discussion paper by the former committee, chaired by Dr Lesley Clark MP. They conclude with the tabling of this report to the Parliament.

During the course of these inquiries, the Queensland Government has commenced significant reviews and reforms in specific areas of administrative justice in Queensland. As administrative justice has not been subject to consideration or reform in this way since the early 1990s, it is likely that the committees' inquiries may have generated the momentum for a new wave of administrative justice reform in Queensland.

The committee welcomes developments to increase the accessibility of administrative justice to the people of Queensland. During the course of the committee inquiries, we have heard people's frustration about the frequent opaqueness of the existing administrative law mechanisms, together with the cost and complexity of accessing information and ways of resolving disputes with government.

Significant and substantive administrative justice mechanisms were put in place in the early 1990s with the enactment of the *Judicial Review Act 1991* and the *Freedom of Information Act 1992*. These followed recommendations of the Electoral and Administrative Review Commission and the Queensland Parliamentary Committee for Electoral and Administrative Review. However, additional recommendations of these bodies were not implemented, including recommendations regarding reform of administrative appeals. Just as importantly, in the time since the EARC and PCEAR recommendations, our system of administrative justice has been overtaken by improvements in accountability and access made in other jurisdictions which have not been introduced here.

In this report, the committee has made a small number of high-level recommendations directed to increasing the accessibility of administrative justice in Queensland. Implementation of the recommendations are designed to reduce the incidence of disputes with government and ensure that any disputes arising are resolved more quickly, informally and at a reduced cost to the consumer. We recommend, therefore, that government provide more information to people about what it does, what decisions it makes, how to access administrative justice and how to navigate through the administrative justice mechanisms. We recommend that government, so far as possible, makes good decisions in the first instance and reviews those decisions internally if a complaint is made. Where the right decision may not have been made, it is important that there are mechanisms available allowing people to access the appropriate way to have their grievance resolved – this may be a quick, cost effective method or it may require review of the legality of a decision by the Supreme Court. Crucially, merits review of decisions made by government should be available to the people of Queensland. We recommend also that administrative justice mechanisms extend to public and private bodies performing functions and engaging in activities which are of public interest and concern and involve public funds.

In short, the committee's recommendations aim to assist more people to have their matter heard more quickly without them needing a lawyer.

Our recommendations are based on the invaluable views and information provided to the committees by Queenslanders – those who have had difficulty accessing justice regarding a dispute with government, those who work for organisations seeking to further the public interest and those who work for government agencies. On behalf of both committees, I thank participants in the inquiries for their generous assistance and desire for reform. We are indebted also to people who work in administrative justice agencies in Queensland and in other Australian jurisdictions, together with members of other parliamentary committees of Australian Parliaments, who shared their expertise, knowledge and assistance with members of our Queensland committees.

I thank the many staff of the secretariats of both committees involved during the life of these inquiries. Finally, also, I thank the Chair and members of the committee of the 51st Parliament and my fellow members of the committee of the 52nd Parliament – your interest and dedication to ensuring the accessibility of administrative justice mechanisms for Queensland people has been outstanding.

Mrs Dianne Reilly MP
Chair

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EXECUTIVE SUMMARY

This report to the Parliament on an inquiry into the Accessibility of Administrative Justice sets out the findings of the committee of the 52nd Parliament, based on the information and evidence received by the committees of the 51st and 52nd Parliaments.

The committee has considered administrative law mechanisms put in place following recommendations made in the early 1990s by the Electoral and Administrative Review Commission and the Parliamentary Committee for Electoral and Administrative Review. The committee has reviewed the continuing effectiveness of the *Judicial Review Act 1991* and the *Freedom of Information Act 1992* and the accessibility of the mechanisms provided by that legislation. By way of this 'administrative justice' approach, the committee has considered the availability of information and assistance regarding administrative justice and whether the ways in which matters are dealt reflect the nature of the dispute and what the person in dispute with the public body wishes to achieve.

The report contains committee recommendations directed to ensuring that, in Queensland, administrative justice mechanisms both reduce the incidence of disputes (by, for example, providing people with information about government agencies and the decisions they make) and include mechanisms for resolution of disputes quickly, cost-effectively and to the satisfaction of those involved.

Key elements of the recommendations in this report relate to:

- the availability of information –
  - written advice of decisions to include information about administrative justice mechanisms;
  - guidelines for decision-makers preparing statements of reasons;
  - a single, user-friendly telephone and on-line entry point to access information about administrative justice; and
  - general publication of information by government agencies;
- access for a diversity of Queenslanders –
  - endorsement of the freedom of information principle that rights to access information held by Queensland government should be available to all people, generally; and
  - restrictions on the scope of judicial review being contained in the *Judicial Review Act 1991*, not in individual Acts;
- costs of access under the *Freedom of Information Act 1992* – simplification, consistency and economy of the fees and charges regime;
- costs of access under the *Judicial Review Act 1991* –
  - amendment of the Uniform Civil Procedure Rules to allow for 'early neutral evaluation' of proceedings; and
  - amendment of the Act to make it clear that assistance should be provided to parties litigating meritorious matters including 'public interest matters' by way of costs orders made at an early stage in proceedings;
- efficient and effective access by way of existing administrative justice mechanisms –
  - amendment of the *Judicial Review Act 1991* and *Freedom of Information Act 1992* to extend them to public or private bodies performing functions or engaging in activities which are of public interest and concern and involve public funds;
  - a requirement for annual reporting of contracts entered into by government entities, including contracts with commercial-in-confidence clauses;
  - a directive from the Public Service Commissioner that, where government agencies engage non-government entities to carry out functions prescribed by statute, the terms of contract should give the agency a right of access to documents produced in the course of performing those functions; and
  - apologies by agencies;
- efficient and effective access by way of a general administrative tribunal conducting informal, inquisitorial merits review of administrative decisions; and
- efficient and effective access by way of proportionate dispute resolution.

A ministerial response to this report is required to be tabled in the Parliament by no later than 15 October 2008.

SUMMARY OF RECOMMENDATIONS

Availability of information

1. The *Judicial Review Act 1991* and *Freedom of Information Act 1992* should be amended to require a decision-maker's written advice of a decision or action to include notice of:
   - the right to request a statement of reasons (where applicable); and
   - any other rights to access administrative justice available in the circumstances.

2. The Public Service Commissioner should prepare guidelines to assist decision-makers to prepare statements of reasons. These guidelines should be available generally to all decision-makers who may be required, under the *Judicial Review Act 1991*, to provide a statement of reasons, including those decision-makers beyond the responsibility of the Public Service Commissioner.

3. The Attorney-General and Minister for Justice should ensure that information about administrative justice, including information about rights of access and procedural matters is accessible via a single, user-friendly telephone and on-line entry point. Although accessible via one entry point, the information service should be provided co-operatively and by way of a shared funding between existing organisations, such as Legal Aid Queensland, which currently provide information and advice about administrative justice.

4. The *Freedom of Information Act 1992* should be amended to require every agency to adopt and maintain a scheme which relates to the general publication of information by the agency and is approved by the Information Commissioner.

Access for a diversity of people

5. Consistent with section 4 of the *Freedom of Information Act 1992*, rights to access information held by Queensland government should be available to all people, generally, with exemption provisions balancing competing public interests between access and the protection of certain types of information.

6. Restrictions on the scope of judicial review should be contained in the *Judicial Review Act 1991*, not in other individual Acts in the form of privative clauses.

Costs of access – *Freedom of Information Act*

7. The Attorney-General should ensure the regime of fees and charges in the regulations made under the authority of the *Freedom of Information Act 1992* is:
   - simplified – currently, the administrative burden imposed on agencies by the many facets of the current regime is too great;
   - imposed consistently and uniformly by departments and agencies;
   - without charge for people seeking their personal information;
   - fair – ensuring an application represents a genuine need or interest to access information and, at the same time, does not prohibit people with a genuine need or interest from accessing the information; and
   - relative to costs of delivery –
     - an independent review of the impact of the *Freedom of Information Act 1992* is suggested; and
     - section 108 of the *Freedom of Information Act 1992* should be amended to require the provision of adequate and informative data.

Costs of access – *Judicial Review Act*

8. The Uniform Civil Procedure Rules should be amended to allow for voluntary neutral evaluation in proceedings under the *Judicial Review Act 1991.* The neutral evaluator should seek to identify and reduce the issues of fact and law that are in dispute, including by way of assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings.

9. Section 49 of the *Judicial Review Act 1991* should be amended to make it clear that, to assist parties to judicial review proceedings to litigate meritorious applications, including in public interest matters, the Court is encouraged to exercise the power under the section to make a costs order at an early stage in proceedings.

10. For the purposes of assisting the Supreme Court to reach a determination under section 7 of the *Judicial Review Act 1991* with a greater degree of precision, section 7 should be amended to identify criteria conferring standing.

Efficient and effective access – existing mechanisms

11. Section 8 of the *Freedom of Information Act 1992* and section 4(b) of the *Judicial Review Act 1991* should be amended to extend the application of the Acts to public or private body performing functions or engaging in activities which, although private in character, are also of public interest and concern and involve funds that are provided or obtained (in whole or in part):
    - out of amounts appropriated by Parliament; or
    - from a tax, charge, fee or levy authorised by or under an enactment.

    The broadening of the scope of application of the Act may raise the need for limited amendment to:
    - section 11 of the *Freedom of Information Act 1992* (Act not to apply to certain bodies etc) - for example, to ensure that a private lawyer providing legal aid services was not acting within the scope of that Act; and
    - part 1, division 5 of the *Judicial Review Act 1991.*

12. The Financial Management Standard 1997 should be amended to require annual reporting of contracts, including those with commercial-in-confidence clauses, entered into by government entities. The requirement should be for information regarding:
    - all contracts with private providers, regardless of value; and
    - where commercial-in-confidence clauses are contained in a contract –
        - the accountable officer or equivalent; and
        - the reasons for non-disclosure.

13. The Public Service Commissioner should issue a directive to ensure that, where government agencies engage non-government entities to carry out functions prescribed by statute, the terms of contract should give the agency a right of access to documents produced in the course of performing those functions.

14. Legislative change should provide that an apology by an agency regarding a decision or action affecting an individual does not constitute an admission of liability and will not be relevant to a determination of fault or liability, unless specifically excluded.

Efficient and effective access – review of administrative decisions 'on the merits'

15. A general administrative tribunal should be established:
    - to exercise original jurisdiction and to review, on the merits, administrative decisions –
        - with a minimum of formality;
        - by way of inquisitorial, not adversarial, methods; and
        - using techniques to ensure the proportional resolution of disputes, including by way of 'early-neutral evaluation';

- to amalgamate, co-locate where practicable and standardise the services and adjudicative functions of existing tribunals, boards and other bodies hearing administrative appeals; and
- with evaluation of the administrative and economic impact of the general administrative tribunal by way of an established evaluation framework, enabling statistical and financial reporting to the Attorney-General.

Efficient and effective access – proportionate dispute resolution

16. Administrative justice in Queensland should provide a range of mechanisms to ensure that matters are dealt with in ways which reflect the nature of the dispute and what the person in dispute with a public body wishes to achieve. This should include Ministers ensuring that:
    - departments and agencies give priority to improving first-instance decision-making and reducing error rates, including by way of undertaking relevant training, such as the good decision-making training delivered by the Office of the Ombudsman;
    - departments and agencies have a 'one-door' approach for complaints; and
    - when an individual makes a complaint or appeals, the initial decision is always reviewed by the department or agency, even if internal review is not a statutory requirement in the circumstances.

LIST OF ABBREVIATIONS

ADCQ	Anti-Discrimination Commission Queensland
ADT	Administrative Decisions Tribunal of NSW
ADR	Alternative Dispute Resolution
ARC	Administrative Review Council
CMC	Crime and Misconduct Commission
COAG	Council of Australian Governments
EARC	Electoral and Administrative Review Commission
FOI	Freedom of Information
FOI Act	Freedom of Information Act 1992
GOC	Government owned corporations
HRC	Health Rights Commission
JR Act	Judicial Review Act 1991
LAQ	Legal Aid Queensland
LCARC	Legal, Constitutional and Administrative Review Committee
NPAQ	National Parks Association of Queensland
NRMW	Natural Resources, Mines and Water
OIC	Office of the Information Commissioner
PCEAR	Parliamentary Committee of Electoral and Administrative Review
QAILS	Queensland Association of Independent Legal Services
QCAT	Queensland Centre for Advanced Technologies
QCOSS	Queensland Council of Social Service
QPILCH	Queensland Public Interest Law Clearing House Inc
SAT	State Administrative Tribunal of Western Australia
SOR	Statement of reasons
VCAT	Victorian Civil and Administrative Tribunal
VLRC	Victorian Law Reform Commission

1 THE COMMITTEE

The Legal, Constitutional and Administrative Review Committee is a permanent statutory committee of the Queensland Parliament. It is established by the *Parliament of Queensland Act 2001 (Qld*). The main object of the provisions of the Act regarding parliamentary committees is to enhance the accountability of public administration in Queensland.

The Act also provides that the committee has the following areas of responsibility:

- administrative review reform;
- constitutional reform;
- electoral reform; and
- legal reform.

The committee's area of responsibility regarding administrative review reform includes considering legislation about:

- access to information;
- review of administrative decisions;
- anti-discrimination; or
- equal employment opportunity.

In addition, the *Freedom of Information Act 1992* (Qld), the *Ombudsman Act 2001* (Qld) and the *Electoral Act 1992* (Qld) confer the committee with specific functions.

2 INQUIRY INTO THE ACCESSIBILITY OF ADMINISTRATIVE JUSTICE

2.1 Commencement

In late 2005, the committee of the 51st Parliament resolved to review the continuing effectiveness of Queensland legislation providing access to information and simplified procedures for the judicial review of administrative decisions. In particular, the committee's inquiry would examine the accessibility of the mechanisms provided by that legislation. The committee determined that legislation providing for administrative justice should be examined to ensure administrative justice was accessible to the people who wished to use it and that Queensland people had access to sufficient relevant information and assistance.

Following the dissolution of the 51st Parliament, the new committee of the 52nd Parliament determined to finalise the inquiry into the Accessibility of Administrative Justice and to report to Parliament.

2.2 Scope

The focus of the inquiries by the committees of the 51st and 52nd Parliaments was the continuing effectiveness of statutory mechanisms under the *Freedom of Information Act* and the *Judicial Review Act 1991* (Qld) providing administrative justice in Queensland and, in particular, their accessibility. The committee of the 52nd Parliament broadened the scope of the inquiry to include appeals from administrative decisions in its consideration of administrative justice mechanisms.

The committee of the 52nd Parliament determined that its inquiry should, as a minimum, seek submissions regarding reform of appeals from administrative decisions, so as to inform the Attorney-General and Minister for Justice's review process underway for some years. The committee was mindful of submissions received by the committee of the 51st Parliament, such as the following from QCOSS and QAILS:

> **QAILS and QCOSS**
>
> QAILS and QCOSS consider that the scope of the inquiry should be expanded in order to properly consider access to administrative justice in Queensland.
>
> More specifically we propose that the current terms of reference are expanded to include the need for a consolidated system of merits review in Queensland.
>
> An expanded definition of administrative justice will allow Queensland Parliament to address the needs of various stakeholders while the current reliance on judicial review seems to more often respond to commercial interests.

Accordingly, administrative justice reform issues considered during the inquiries of the committees of the 51st and 52nd Parliaments fell within four general areas:

- costs of access;
- availability of information;
- access for a diversity of people; and
- efficiency and effectiveness of access.

2.3 Inquiry of the 51st Parliament (key issues)

2.3.1 Discussion paper and invitation for public submissions

In December 2005, the committee tabled and circulated a discussion paper *The Accessibility of Administrative Justice*. The committee invited discussion and submissions on the accessibility of the existing administrative justice mechanisms. In this context, the discussion paper identified five key issues. These were:

- What is the effect, if any, of the fees and charges regime under the *Freedom of Information Act* on access to information? Is amendment of the *Freedom of Information Act* and/or administrative reform necessary?
- Do costs associated with proceedings under the *Judicial Review Act* affect genuine challenges to administrative decisions and actions? If so, can this be addressed?
- Is information relevant to, and about, government decisions and actions adequate and accessible? How can it be improved?
- Can a diversity of people access administrative justice? If not, how can this be improved?
- Is access to administrative justice effective and efficient? Is reform necessary?

In relation to each key issue, the discussion paper listed non-exhaustive factors for consideration, to facilitate discussion and responses.

2.3.2 Conference

On 27 April 2006, the committee held a conference at Parliament House on The Accessibility of Administrative Justice. At the conference, members of the public, representatives from Government departments, agencies and government-owned corporations, lawyers and representatives of community organisations discussed with committee members three issues relevant to the inquiry:

- The freedom of information fees and charges regime: How well is it operating? Who should bear the costs?
- Litigation between government and individual – can inequality be minimised?
- Are there corporatised entities which fall between public and private accountability regimes? Should accountability be extended and, if so, how?

At the conclusion of the conference, participants presented and discussed suggestions for reforms to administrative justice mechanisms. These suggestions were posted on the committee's website and are included in this report at **appendix B**.

2.3.3 Public submissions

On 13 June 2006, the committee tabled in the Parliament 35 non-confidential submissions received to its inquiry. Two further submissions, received at a later date, were also tabled in the Parliament. A list of submissions received is contained in **appendix A**.

2.3.4 Dissolution of the committee of the 51st Parliament

On 15 August 2006, the 51st Parliament was dissolved. At that time, the committee had not tabled its report on the inquiry into the Accessibility of Administrative Justice.

2.4 Inquiry of the 52nd Parliament (supplementary issues)

On 11 October 2006, the committee of the 52nd Parliament was established.

The new committee resolved to report to Parliament on the matters considered by the previous committee in its inquiry into the Accessibility of Administrative Justice. In addition, the committee broadened the terms of reference of its inquiry to include merits review of administrative decisions and actions.

Prior to reporting to the Parliament, the committee determined it would consider:

- the submissions tabled by the committee of the 51st Parliament;
- the outcomes of the conference held on 27 April 2006;
- any submissions received on four supplementary issues; and
- findings of its own research and consultation – for example, matters relevant to the inquiry were discussed twice each year at respective meetings with the Ombudsman and the Information Commissioner.

2.4.1 Study tours

The committee considered and discussed matters relevant to the inquiry during a committee study tour in Canberra on 28 and 29 March 2007. Relevantly, the committee met with:

- the Commonwealth Ombudsman and Deputy Ombudsman;
- members of the Democratic Audit of Australia; and
- the Legal and Constitutional Committee of the Australian House of Representatives.

In addition, on 5 and 6 March 2008, some members of the committee discussed matters relevant to the inquiry during a study tour in Melbourne. Committee members met with:

- the Victorian Ombudsman and Deputy Ombudsman;
- representatives of the Victorian Civil and Administrative Tribunal;
- Justice Murray Kellam, initial President of the Victorian Civil and Administrative Tribunal; and
- the Chair, Deputy Chair and secretariat of the Victorian Parliament's Law Reform Committee.

2.4.2 Supplementary issues

In August 2007, the committee wrote to relevant people and organisations, seeking submissions on four issues supplementary to the key issues identified in the discussion paper. These were:

- possible reform regarding administrative appeals;
- possible initiatives regarding the availability of information about administrative justice;
- the scope, if any, for reforms to provide for proportionate dispute resolution in Queensland; and
- the publication of details regarding contracts entered into by public sector agencies.

2.4.3 Meetings regarding inquiry issues

During the inquiry process, the committee or members of the committee discussed matters relevant to the inquiry with:

- the Queensland Ombudsman;[1]
- the Queensland Information Commissioner;[2]
- the strategic reviewer of the Office of the Ombudsman and the Office of the Information Commissioner;[3]
- Justice Stuart Morris, former President of the Victorian Civil and Administrative Tribunal;
- Mr Brian Thompson, Council on Tribunals, United Kingdom; and
- representatives of the Queensland Public Interest Law Clearing House Inc.

2.4.4 Public submissions

The committee received 14 submissions to its inquiry. All except one confidential submission were tabled in the Parliament on 7 December 2007. A list of submissions received is contained in **appendix A**.

2.5 This Report

2.5.1 Committee comments and recommendations

This report to the Parliament on the committee's inquiry into the Accessibility of Administrative Justice sets out the findings of the committee of the 52nd Parliament, based on the information and evidence received by the committees of the 51st and 52nd Parliaments.

In the report, the committee makes recommendations directed to ensuring that, in Queensland, administrative justice mechanisms are accessible, effective and meeting the needs of the people of Queensland. Accordingly, the committee recommends legislative and administrative changes to, in the first instance, help Queensland people avoid administrative justice problems and disputes, and where they cannot, to ensure that mechanisms exist for resolution of the dispute as quickly and cost-effectively as possible.[4]

Accordingly, the committee makes recommendations regarding:

- the availability of information – chapter 4;
- access for a diversity of people – chapter 5;
- costs of access via freedom of information applications and judicial review proceedings – chapters 6 and 7; and
- access via efficient and effective mechanisms, including proposed new mechanisms – chapters 8 to 10.

2.5.2 Ministerial response

Section 107 of the *Parliament of Queensland Act* requires that if a report of a parliamentary committee recommends that the government or a Minister take particular action or not take particular action about an issue, the Minister who is responsible for the issue must provide the Legislative Assembly with a response.

This response is required to set out:

- any recommendations to be adopted and the way and time within which they will be carried out; and
- any recommendations not to be adopted and the reasons for not adopting them.

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1 See LCARC reports nos 57, 58 and 62, available at: www.parliament.qld.gov.au/LCARC.

2 See LCARC reports nos 56, 59 and 63, available at: www.parliament.qld.gov.au/LCARC.

3 See LCARC reports nos 56 and 57, available at: www.parliament.qld.gov.au/LCARC.

4 These aims are similar to aims set out in the United Kingdom Department of Constitutional Affairs White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*, 2004, see: Michael Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 *Modern Law Review* 958 at 964.

Ministerial responses must be tabled within three months after a committee's report is tabled. If for some reason that is insufficient time, an interim response must be tabled within three months and must explain the delay. A final response must then be tabled within six months of the tabling of the committee's report. The Clerk of Parliament tables responses when Parliament is not sitting.

The responses from Ministers to this report will be required to be tabled in July 2008 or in October 2008 at the latest (if an interim responseis not tabled within three months).

3 ADMINISTRATIVE JUSTICE IN QUEENSLAND

3.1 What is administrative justice?

In the discussion paper, the committee defined administrative justice as 'rights conferred by Queensland's legislative scheme of administrative law'. Accordingly, a reference to administrative justice in the discussion paper was a reference to rights, conferred by the *Freedom of Information Act* and the *Judicial Review Act*, to:

- access government-held information where that information relates to an applicant's personal affairs, and to amend or correct that information where it is inaccurate, out-of-date or misleading (*Freedom of Information Act*);
- access information about a government decision and, where that decision affects a person's interests, reasons for that decision (*Judicial Review Act*, Part 4; *Freedom of Information Act*); and
- challenge a government decision to ensure the decision was made according to law (*Judicial Review Act*).

The committee said that:[5]

> The broad purpose of administrative law is to safeguard the rights and interests of people and corporations in their dealings with government agencies. Administrative law balances the provision of justice for the individual citizen against the need for the government to implement the programs and policies for which it has been elected. Together with constitutional law, it makes up a body of law that regulates the relationship between government and citizen.

Although concerned with decisions made by administrators, administrative law encompasses more than a mere set of legal rules applied by the courts in review of administrative decisions. In Australian jurisdictions, administrative law generally comprises a number of the following elements:

- judicial review of administrative action – a procedure by which an applicant seeks court intervention to determine whether administrative action conforms with the powers given to take that action;
- a requirement that reasons be given for many administrative decisions;
- review by an independent tribunal of the merits of many administrative decisions made under statute;
- an Ombudsman to investigate complaints of government maladministration;
- broad rights of access to government-held documents, and a right for an individual to update or correct government-held personal information;
- regulation of the use and storage of information about individuals through legislation relating to privacy and public records; and
- obligations of a substantive and procedural kind to ensure there is accountability for subordinate law making.

In this report, the committee has given a broader meaning to the term *administrative justice* for two reasons. First, in the period of time since the tabling of the committee's discussion paper, the term administrative justice has become more commonly used. The discussion paper, *Reform of civil and administrative justice*, released by the Queensland Government's Department of Justice and Attorney-General, provides an example. It defines 'administrative justice mechanisms' as 'legal processes that provide redress against a decision made by a government entity'.[6]

Second, the inquiry by the committee of the 52nd Parliament was broadened to include in its scope consideration of appeals from administrative decisions. This had been suggested by a number of people who made submissions in response to the discussion paper.

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5 LCARC, *The Accessibility of Administrative Justice*, discussion paper, December 2005, 1, available at: www.parliament.qld.gov.au/LCARC.

6 Queensland Department of Justice and Attorney-General, *Reform on civil and administrative justice,* discussion paper, November 2007, 7.

Therefore, in this report, the committee's use of the term administrative justice equates with the definition of administrative justice used by the United Kingdom's Administrative Justice and Tribunals Council:[7]

> Government regulates various aspects of our everyday lives, making decisions in relation to individual people. 'Administrative justice' includes the procedures for making such decisions, the law that regulates decision-making, and the systems (such as the various tribunals and ombudsmen) that enable people to challenge these decisions.

This broader meaning of administrative justice also gives greater relevance to legislation complementary to the freedom of information and judicial review statutes:

- the *Ombudsman Act 2001*;
- legislative provision, such as in the *Energy Act 2006*, for specialist Ombudsmen;
- the *Anti-Discrimination Act 1991*;
- public sector financial accountability legislation such as the *Financial Administration and Audit Act 1977* (Qld), the Financial Management Standard 1997 (Qld) and the *Government Owned Corporations Act 1993* (Qld);
- the *Whistleblowers Protection Act 1994*;
- the *Public Records Act 2002*;
- the (administrative, not legislative) privacy scheme contained in Information Standard 42 (under the Financial Management Standard); and
- the *Statutory Instruments Act 1992*.

Some further detail regarding the current administrative justice framework in Queensland is set out in section 3.2. Much of this framework results from recommendations for reform made by:

- the Electoral and Administrative Review Commission (EARC);
- the Parliamentary Committee for Electoral and Administrative Review (PCEAR); and
- the Legal, Constitutional and Administrative Review Committee.

Relevant past parliamentary committee reviews of existing administrative justice mechanisms and reviews under way at the time of the tabling of the report are outlined in sections 3.3 and 3.4.

3.2 Current administrative justice mechanisms

Generally, a person with a dispute with a Queensland Government department or agency can utilise one or more of a range of administrative justice mechanisms. These extend beyond the more formal mechanisms of review by a court under the *Judicial Review Act* or by a tribunal under a statutory scheme. These mechanisms are described in Control of Government Action:[8]

> Many of the problems that people encounter in their dealings with government are better or more easily resolved by means other than court or tribunal review. Sometimes that is because of the nature of a problem – lost records, delay, unclear explanation or official rudeness. Other times it is because of the cost, difficulty or time involved in seeking review by a court or tribunal. Problems that beset government decision-making can also be of a kind not easily cured by court or tribunal orders in individual cases.
>
> Parliament and governments have responded by establishing other methods and agencies to control government decision-making. One response is the creation of ombudsman offices, to investigate complaints from members of the public about government administrative action, and to conduct self-initiated inquiries into administrative problems. Similar institutions are the human rights and anti-discrimination offices, that examine both on complaint and of their own motion whether government administrative action complies with human rights and anti-discrimination standards. The work of these external oversight agencies is replicated internally within agencies, by customer complaint and internal review units and procedures, and other facilities for resolution of problems by mediation and alternative dispute procedures. These mechanisms are supplemented by service charters and codes of conduct that define standards for official behaviour in dealing with members of the public. Nor do these mechanisms exhaust the avenues available to

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7 Advancing administrative justice' at http://www.ajtc.gov.uk.

8 Robin Creyke & John McMillan, *Control of Government Action: Text, Cases & Commentary,* LexisNexis Butterworths, Chatswood, 2005, 180 – 181.

> people for questioning and challenging government decisions. There are numerous other formal and informal options that include complaints to members of parliament and to non-government assistance bureaus and legal aid centres, and public advocacy of grievances through the media and other channels.

The main elements of the administrative justice framework in Queensland are outlined below. They are grouped under the three broad purposes administrative justice seeks to address:

- review of decision-making;
- protection of information rights; and
- public accountability of government processes.

3.2.1 Review of decision-making

Departmental and agency complaints handling procedures

In the first instance, a person disputing a government decision or action may contact the relevant department or agency to make a complaint.

Since November 2007, all Queensland Government departments and agencies covered by the *Public Service Act* 1996 should have had in place an effective complaint handling system to provide appropriate ways for the resolution of complaints. This follows a directive issued by the Office of the Public Service Commissioner in November 2006 that required State Government departments and authorities to ensure complaints handling systems meet recognised standards for good complaints handling.[9]

Internal review

The Commonwealth's Administrative Review Council has defined internal review as:[10]

> [A] process of review on the merits of an agency's primary decision. It is undertaken by another officer within the same agency, usually a more senior officer.

In Queensland, internal review may occur due to administrative policy or because it is required, in relation to some administrative decisions, by legislation. The *Freedom of Information Act*, for example, provides that before a decision refusing access to a document can be reviewed by the Information Commissioner, the decision regarding the application for access should be reviewed by a more senior officer than the freedom of information decision-maker.[11]

Ombudsman review

In Queensland, the *Parliamentary Commissioner Act 1974* (Qld) first established an Ombudsman office. The Ombudsman mechanism was consolidated in its present form with the enactment of the *Ombudsman Act*. Under the Act, the functions of the Ombudsman include:

- investigating administrative decisions of agencies;
- considering the administrative practices and procedures of an agency whose actions are being investigated and making recommendations to the agency:
  - about appropriate ways of addressing the effects of inappropriate administrative actions; and
  - for the improvement of practices and procedures; and
- considering the administrative practices and procedures of agencies generally, and assisting agencies to improve their practices and procedures.[12]

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9 See Office of the Public Service Commissioner of Queensland, *Complaints Management Systems*, Directive No.13/06, available at: www.opsc.qld.gov.au.

10 Administrative Review Council, *Internal Review of Agency Decision Making*, report no 44, 2000.

11 Section 52.

12 *Ombudsman Act*, s 12.

Each year, the Queensland Ombudsman receives approximately 7000 complaints about the administrative decisions of Government agencies, including local governments.

The *Ombudsman Act* provides that the Ombudsman is an officer of the Parliament who is to report to Parliament, including by way of reporting to the committee.[13] In this context, an overview of the exercise of Ombudsman functions in 2006-2007 provided to committee by the Ombudsman provides a useful summary of investigations of decision-making and other activities conducted by the Ombudsman:

> Our achievements last financial year included the four major investigations we conducted and reported on to parliament. They were the Miriam Vale IPA investigation, the Daintree River ferry investigation, the coronial recommendations project and the Pacific Motorway investigation. We also finalised a broad review of the regulatory arm of the Environmental Protection Agency and we discussed this investigation in our last annual report, but in March this year we provided a detailed report on the investigation to the director-general containing 151 recommendations. Those recommendations were aimed at improving the effectiveness, consistency and accountability of the agency's practices. The director-general has accepted all of our recommendations and we intend to audit implementation in or after April 2008.
>
> In relation to our complaints role, last financial year we received 7,084 complaints and finalised 7,134. We had 329 open complaints at the end of the financial year, which is the lowest number since 1984 for the office and illustrates the effective processes we put in place for dealing with complaints. We also continued to focus on dealing with complaints in a timely way and finalised more than 98 per cent of complaints within 12 months of receiving them. The proportion of complaints finalised within 10 days of receipt also increased slightly to more than 67 per cent.
>
> In addition to the 151 recommendations arising from the EPA investigation, we made 280 recommendations to other agencies to rectify the effect of poor decisions or to improve their practices and procedures. As stated in my response to the questions on notice, only seven recommendations were not accepted by the agencies concerned and details of these seven appear at page 41 of our annual report, not at page 43 as I have stated in our response to the questions on notice. I just want to correct the record there.
>
> During that period we also dealt with more than 2,300 oral complaints outside our jurisdiction which we referred to other agencies.
>
> In relation to our administrative improvement programs, they received growing recognition throughout the public sector last year. That applied especially to the Good Decisions training program and more than 2½ thousand officers have attended the program since it was launched in July 2005. Last financial year 1,278 officers from 45 agencies attended 74 sessions which we presented. Forty-two of those sessions were delivered outside of the Brisbane area, so it provides a cost-effective training option for regional councils and also for state agencies with regional offices. We continue to receive very positive feedback on the program, with more than 98 per cent of participants agreeing that the course information will assist them in their daily work.
>
> On the subject of complaints management, I have previously briefed the committee on the Public Service Commissioner's directive on complaints systems which he issued in response to a recommendation I made in a report to parliament in December 2005. So we have been providing a lot of help to agencies to comply with the directive through a series of five workshops which were held twice between August and October and also through one-on-one meetings with representatives of particular agencies. We have held 25 of those one-on-one meetings. We will continue to provide assistance of this kind, and later in this financial year we intend to audit agency compliance with the directive.
>
> Also during the last financial year we commenced preparing Tips and traps for regulators. This report discusses the principles of good regulatory practice, it uses case studies based on our investigations to illustrate those principles and also contains numerous recommendations about how agencies can improve their regulatory practices.
>
> One of the other ways we disseminate advice about good decision making is through our newsletters 'State Perspective' and 'Local Perspective', which we launched in June last year. Those newsletters have been well received across state and local government and are currently distributed to more than 900 decision makers three times a year and are read by many more. In May this year we also launched our latest newsletter 'Frontline Perspective', which is targeted for officers whose work involves having direct contact with members of the public.

13 *Ombudsman Act*, ss 11 and 87.

> Last financial year as part of our regional awareness campaign we distributed information packs to public access points across the state such as community centres, council offices, libraries and electorate offices. We also organised community service announcements on local radio and advertised on radio and in local newspapers and also participated in radio interviews.
>
> During our regional awareness campaigns we also promote our toll-free phone number and our web site. Since our web site was launched in December 2005 it has become one of the principal ways people make complaints to us. We received 500 complaints in this way last financial year. We also use the web site to make people aware of our role and to disseminate our publications.[14]

In addition, in Queensland, specialty Ombudsmen roles provide an avenue for the investigation of administrative decisions in specific areas. The *Energy Act 2006* (Qld) established the office of Energy Ombudsman which provides a free and independent dispute resolution service for Queensland's energy consumers.[15] Similarly, the Training Ombudsman was established under the *Vocational Education, Training and Employment Act 2000* (Qld) to investigate complaints from apprentices, trainees, employers and people involved in Queensland's apprenticeship and traineeship system.[16]

Review by the Anti-Discrimination Commission Queensland

The Anti-Discrimination Commission receives complaints from people about issues regarding unlawful discrimination, sexual harassment and public vilification, as provided in the *Anti-Discrimination Act 1991* (Qld). It also informs Queensland people about discrimination issues.[17]

The Commission receives approximately 10,000 phone enquiries each year. About 1000 of these complaints are lodged with the Commission and, in due course, about three in five are accepted as falling within the jurisdiction of the *Anti-Discrimination Act..*

The Commission is an independent statutory body. It has offices in Brisbane, Rockhampton, Townsville and Cairns. The Brisbane office handles about 70% of the complaints received, while each of the regional offices looks after about 10%.

Statutory appeal rights

Queensland legislation conferring a public sector decision-maker with the power to make the decision often confers also the right to appeal against that decision. This appeal may lie, for example, to another office holder within the department or agency or to the Minister. Often the avenue of appeal is to a tribunal.

An administrative tribunal is an independent, statutory body that reviews administrative decisions made by government agencies. Reviews are generally conducted more quickly and with less formality than when a court is hearing an appeal. The tribunal has the power to give fresh consideration to whether an administrative decision was the correct or preferable one in all the circumstances. It considers all available information, even if the information is new and was not known to the original decision-maker. A tribunal which reviews 'on the merits' aims to ensure:

- justice to individual applicants by determining whether an administrative decision was:
  - correct in law;
  - preferable – that is, if there are several decisions that could be right in law, the best one in the particular circumstances is the 'preferable' decision; and
- improvement in future decision-making by agencies in similar circumstances.

14 LCARC report no. 62, Transcript of proceedings, available at: www.parliament.qld.gov.au/LCARC.

15 See: www.ecpo.qld.gov.au/about_eoq.

16 See: www.trainandemploy.qld.gov.au/client/about_us/legislation/ombudsman.

17 See: www.adcq.qld.gov.au.

In 1993, EARC identified 131 existing administrative appeal bodies in Queensland. Although reform to the ad hoc, fragmented tribunal system was recommended by the EARC and PCEAR, the Commission and the parliamentary committee differed in some respects in the content of the reform.

In 1999, in report no 14, the committee recommended government action, in line with the EARC and PCEAR recommendations, 'to rationalise all of the administrative appeal mechanisms in Queensland'.[18] Report no 14 is outlined in section 3.3.

As outlined in section 3.4, the *Queensland* Government's Department of Justice and Attorney-General has conducted a review, *Reform of civil and administrative justice*. Establishment of a general tribunal has been announced by the Queensland Premier. The Department's discussion paper stated:[19]

> Over the years, the number of tribunals and the number of decisions subject to review have increased. Because there is no detailed policy guiding decisions about when a new tribunal is to be established or which existing tribunal should be used, tribunals have been created, and new jurisdictions have been conferred on existing tribunals, without consideration of the system of civil and administrative justice as a whole.
>
> This has created a fragmented system.

Nevertheless, some minor amalgamation of tribunals has occurred in Queensland since the EARC and PCEAR recommendations. Reform in Queensland in the past decade was described in the Department of Justice and Attorney-General's discussion paper:[20]

> The Queensland Government has not implemented a generalist system of merit review, as proposed in the EARC and PCEAR reports. The focus of Queensland's reforms in this area has instead been on improving the quality and efficiency of existing processes rather than developing generic systems.
>
> This approach was supported following a review conducted by the Department of State Development in 1999 that analysed the needs of the business community in appeals from administrative decisions. The review found that business was more concerned with the need for informal, accessible dispute resolution systems with appropriate expertise to meet their particular needs, rather than a single, generalist tribunal or generic systems of practice.
>
> Since then, a number of reforms have been undertaken by the Queensland Government to increase the efficiency and effectiveness of civil and administrative justice mechanisms, and to diminish the complexity and costs of the civil and administrative justice processes.
>
> In 2001, a review of tribunals within the responsibility of the then Department of Tourism, Racing and Fair Trading resulted in the consolidation of a number of tribunals within that portfolio under the *Commercial and Consumer Tribunal Act 2003*.
>
> The Commercial and Consumer Tribunal (CCT) established under that Act has a mixed jurisdiction to resolve disputes between parties, review decisions of agencies and conduct disciplinary proceedings. Since commencement, the CCT has accrued new jurisdictions in relation to architects, engineers, plumbers and drainers, building certifiers and residential services accreditation.
>
> In 2001, the Department of Justice and Attorney-General conducted a review of tribunals within its jurisdiction and this resulted in the co-location of a number of registries. More recently the position of principal registrar, tribunals was established in August 2007 to enhance the service delivery functions of the registries of the Guardianship and Administration Tribunal and the Children Services Tribunals.
>
> The most recent amalgamation process was effected by the passage of the *Land Court and Other Legislation Amendment Act 2007*, which amalgamated the Land Court and the Land and Resources Tribunal. Other tribunals have been abolished as their functions became obsolete or were more effectively and efficiently performed by another body.

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18 At 62.

19 Queensland Department of Justice and Attorney-General, *Reform on civil and administrative justice,* discussion paper, November 2007, [1.3.2].

20 Queensland Department of Justice and Attorney-General, *Reform on civil and administrative justice,* discussion paper, November 2007, [1.4.2 to 1.4.8].

Judicial review

A person aggrieved by a decision of a Minister, public servant or other official may seek judicial review by a court of that decision. The court primarily has power to examine the legality of the manner in which the decision was made. This judicial review must be distinguished from the merits review available by way of the statutory appeal rights identified above, which gives fresh consideration to whether an administrative decision was the correct or preferable one in all the circumstances.

When examining the legality of an administrative decision, the court may provide relief (a 'remedy') if it finds that the decision-maker has, for example: [21]

- acted outside the scope of the power given by Parliament;
- asked the wrong question or misconstrued her/his powers;
- acted for an improper purpose;
- taken into account irrelevant considerations (or failed to take into account relevant ones);
- made a finding in the absence of evidence;
- made a decision no reasonable person could have made; or
- exercised a discretion without regard to the merits of the case.

If the court finds any of these 'grounds of review' made out, it may quash the decision. The decision-maker must then reconsider the matter in accordance with the law as identified by the court. [22]

In his second reading speech regarding the Judicial Review Bill 1991, then Attorney-General, the Hon DM Wells MP, described the proposed administrative justice mechanism in the following way:[23]

> The principal objective of the Judicial Review Bill is to ensure that duties imposed on public administrators by statute or the common law are performed and that public administrators act within the limits of their powers.
>
> Upon enactment, the Bill will confer an important new right on persons aggrieved by administrative decisions and, that is, to obtain a written statement of reasons from the decision-maker. The Bill will also simplify the process for persons aggrieved by administrative decisions to challenge such decisions on grounds of legal error before the Supreme Court.
>
> In performing the functions of judicial review, it is not the court's task to review the merits of an administrative decision. Rather, the court reviews the decision to see if it was within power and to determine whether the requirements of natural justice have been met.
>
> Accordingly, the Judicial Review Bill seeks to reform the law relating to the review by the Queensland Supreme Court of administrative decisions and actions of public officials in Queensland….
>
> The present system of judicial review of administrative decisions and actions is based on the cumbersome and technical procedures for review by way of prerogative writs. These procedures will no longer exist but the Supreme Court will still have the power to make an order, the relief or remedy under which is in the nature of, and to the same effect as, the relief or remedy which could have been granted by means of a prerogative writ….
>
> I am pleased to introduce this Bill to the House today because it provides the average citizen with a simplified means of ensuring accountability and fairness in public administration.

The *Judicial Review Act* came into force on 1 June 1992. A submission to the committee's inquiry from the Bar Association of Queensland described the importance of the administrative justice mechanism provided by the Act.

> **Bar Association of Queensland**
>
> The availability to secure judicial review remedies in respect of administrative decisions forms an important part of our society's matrix of checks and balances against the arbitrary exercise of executive power. In a state which has a unicameral legislature in which the government of the day often enjoys a significant majority the importance of there being other checks and balances in enhanced. It is to the enduring credit of the Queensland Parliament that it

21 See *Judicial Review Act*, ss 20 and 21.

22 The decision maker is usually a different officer within the agency.

23 Hon DM Wells MP, Attorney-General, Judicial Review Bill 1991 (Qld), Second Reading Speech, *Queensland Parliamentary Debates (Hansard)*, 26 November 1991, 3135-3138.

recognised the importance of this by adopting via our *Judicial Review Act 1991* the procedural reforms in respect of judicial review rights effected in the Federal jurisdiction by the *Administrative Decisions (Judicial Review Act) 1977*. It is the experience of members of the Association that the exercise of these rights and the ability to exercise them has improved and continues to improve the quality of public administration in Queensland.

3.2.2 Protection of information rights

Freedom of Information

In Queensland, the *Freedom of Information Act* confers people with three basic rights:

- every person has a general right of access to documents held by government agencies, subject only to specific exemptions necessary to protect public and private interests;
- if information relating to the personal affairs of an individual is incomplete, incorrect, out of date or misleading, that person has the right to seek amendment of those documents; and
- government agencies are required to publish information about their structure and functions, providing the public with knowledge about the organisation of government and its responsibilities and decision-making processes.

The objects of the *Freedom of Information Act*, and the way they are to be achieved, are set out in section 4 of the Act.

4 Object of Act and its achievement

(1) The object of this Act is to extend as far as possible the right of the community to have access to information held by Queensland government.

(2) Parliament recognises that, in a free and democratic society—

(a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and

(b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and

(c) members of the community should have access to information held by government in relation to their personal affairs and should be given a way to ensure the information is accurate, complete, up-to-date and not misleading.

(3) Parliament also recognises there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—

(a) essential public interests; or

(b) the private or business affairs of members of the community about whom information is collected and held by government.

(4) This Act is intended to strike a balance between those competing interests.

(5) The object of this Act is achieved by—

(a) giving members of the community a right of access to information held by government to the greatest extent possible with limited exceptions for the purpose of preventing a prejudicial effect on the public interest of a kind mentioned in subsection (3); and

(b) requiring particular information and documents concerning government operations to be made available to the public; and

(c) giving members of the community a right to bring about the amendment of documents held by government containing information in relation to their personal affairs to ensure the information is accurate, complete, up-to-date and not misleading.

(6) It is Parliament's intention that this Act be interpreted to further the object stated in subsection (1) in the context of the matters stated in subsections (2) to (5).

Everyone can exercise the rights conferred by *Freedom of Information Act* without having to demonstrate a particular need or reason. It is not necessary that an applicant reside in Queensland.

When access is refused, the person who made the decision refusing to grant access must be identified and written reasons for the refusal must be provided. If the applicant wishes to have that decision reviewed, initially, the applicant has a right to ask that that decision be reviewed by a more senior officer than the person who refused access. Where the applicant remains dissatisfied after the matter has been reviewed internally, the applicant may, by right, seek external review by the Information Commissioner.

Information privacy

On 10 September 2001, the Queensland Cabinet approved a privacy scheme for Queensland. This scheme is an administrative process and is regulated by Information Standard 42 – Information Privacy and Guidelines. The privacy scheme regulates how personal information is collected, stored, used and disclosed in the government sector. Information Standard 42 contains principles on which the privacy scheme is based. These are known as Information Privacy Principles and have been adapted from the *Privacy Act 1988* (Cth). The eleven Information Privacy Principles cover the way personal information:

- is collected, stored, used and disclosed; and
- can be accessed, changed and amended where appropriate.

Personal information is defined as any information or an opinion, whether true or not, and whether recorded on paper or in an electronic database, about anyone who can be identified from the information or opinion. For example, personal information includes a person's name, address, age and any physical characteristics, such as height or eye colour and can also include sensitive information such as political loyalty, religious beliefs, medical history or financial details.

Personal information may be contained in (but is not limited to) the following:

- paper records;
- electronic records;
- video recordings;
- photographs; and
- digital images.

Personal information does not include information about a person that is contained in a publicly available publication, such as magazines, books, newspapers, newsletters, annual reports and the Queensland Government Gazette.

Access to public records

The *Public Record Act 2002* (Qld) supports the policy objectives of proper recordkeeping and improved public access to public records. The Act also seeks to strengthen and clarify the roles, responsibilities and rights of government and citizens in relation to public records. It governs the making, managing, keeping and preservation of public records in Queensland.

Public records are the corporate memory of government. As they provide evidence of actions, decisions and communications, they are the basis of government accountability. In this way, the proper management of public records and provision of public access to public records is critical to government accountability.

Under the *Public Records Act,* the framework for classifying restricted access periods for older records in the archival period is aligned with the exempt matter provisions in the *Freedom of Information Act*. However, the *Public Records Act* recognises that the sensitivity of most information declines with the passage of time and that it is appropriate at some point for older records to be available for public inspection.

Statements of reasons for administrative decisions

Sections 20 and 32 of the *Judicial Review Act* provide a person entitled to make an application under the Act with the right to a written statement setting out:

- the material findings of fact on which the decision was based;
- the evidence or other material considered; and
- reasons for the decision.

The right to request a statement of reasons may be exercised even if a person does not intend to commence proceedings under the *Judicial Review Act*.

The importance of the right to reasons was described in the following way by the Hon Justice Brennan, former Chief Justice of the High Court, but then President of the Commonwealth's Administrative Appeals Tribunal: [24]

> The requirement of reasons not only exposes error affecting the decision—it demands of the administrator that [he or she define] to and for [him or herself] the function which [he or she is] appointed to perform.

Public interest disclosures

The *Whistleblower Protection Act 1994* (Qld) protects the disclosure by public sector organisation members of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action. The objectives of the *Whistleblower Protection Act* are to facilitate public interest disclosures by establishing processes by which they can be made, ensuring that they are properly dealt with, and protecting those who make them.[25] It provides a framework for the making of public interest disclosures, the responses made and protects those who make them.

Accordingly, the capacity of Queensland's public sector employees to make public interest disclosures about wrongdoing within their departments and agencies ensures accountability.

3.2.3 Public accountability of government processes

Crime and Misconduct Commission

The *Crime and Misconduct Act 2001* (Qld) confers the Crime and Misconduct Commission with responsibilities to:[26]

- investigate and prosecute major crime;
- raise standards of integrity and conduct in the public sector;
- ensure that any complaint about misconduct in the public sector is appropriately resolved;
- undertake research;
- help to prevent crime and misconduct;
- gather and analyse intelligence;
- confiscate the proceeds of crime; and
- protect witnesses.

The CMC also works with Aboriginal people and Torres Strait Islanders to improve relationships with the police and to prevent crime and misconduct in Aboriginal and Torres Strait Islander communities.

Complaints to the CMC about possible misconduct are generally from the people of Queensland, chief executives of public sector agencies, and the Police Commissioner. All complaints are assessed by the CMC which then monitors how agencies deal with them. In the most serious cases, the CMC will conduct independent investigations itself.

Accountability for subordinate law making

Subordinate legislation is legislation made by the executive government of the state, acting pursuant to an Act of the Parliament. Generally, in Australian jurisdictions, the abuse of the delegated power to make subordinate legislation is safeguarded in four ways:[27]

- the delegate to whom or which the power to legislate is given must be chosen carefully;

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24 The Hon Justice Brennan 'The Future of Public Law – The Australian Administrative Appeals Tribunal' (1979) 4 *Otago Law Review* 286 at 293).

25 http://www.griffith.edu.au/centre/slrc/whistleblowing/pdf/ajb-pidla1006-summary-final.pdf.

26 www.cmc.qld.gov.au.

27 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 3rd edition, LexisNexis Butterworths, Australia, 2005, 1 and 15.

- the form of the empowering provision must be such that it does not allow the making of whatever legislation on a matter seems appropriate to the delegate;
- adequate publicity must be given to delegated legislation – a person must know the law with which he or she must comply; and
- Parliament must ensure that it has appropriate means available to it to review delegated legislation.

In Queensland, these safeguards are provided by provisions of the *Legislative Standards Act 1992* (Qld) and the *Statutory Instruments Act 1992* (Qld).

3.3 Previous inquiries by the committee

Inquiries of relevance to the inquiry into the Accessibility of Administrative Justice have been conducted by committees of previous Parliaments. Reports of these inquiries are available on the committee's website and include:[28]

- report no 9, *Privacy in Queensland*, April 1998;
- report no 14, *Review of the* Report of the Strategic Review of the Queensland Ombudsman, *July 1999*; and
- report no 32, *Freedom of Information in Queensland*, December 2001.

3.3.1 Privacy in Queensland

The committee of the 48th Parliament recommended to the Parliament that a consistent set of information privacy principles, modelled on those contained in section 14 of the *Privacy Act 1988* (Cth), relating to personal information collected and held by Queensland government departments and agencies be implemented in legislation.

3.3.2 Review of the Report of the Strategic Review of the Queensland Ombudsman

In 1999, a committee report regarding a strategic review conducted of the Office of the Queensland Ombudsman considered a strategic review recommendation for 'an overall review of all of the administrative appeal mechanisms in Queensland'. During the course of its inquiry into the strategic review findings, the committee received 'an overwhelming proportion' of submissions supporting the recommendation. The submissions, the committee stated, 'contained a clear message that there is a need to reduce confusion about appropriate appeal avenues and increase uniformity in how review bodies are constituted and operated'.

In its report no 14, the committee of the 48th Parliament changed the emphasis of the strategic review recommendation, however. The committee recommended that what was needed was not another review but for government to make a decision about rationalising the administrative review system of the State and to act upon that decision.

Accordingly, the committee recommended:

> The committee endorses the thrust of recommendation 29. The committee, however, would go further. What is needed is not another review of the State's administrative review system, but a government decision-and subsequent action on-the recommendations that have already been made by EARC and the PCEAR to reform the State's administrative review system. Accordingly, the committee recommends that:
>
> - the government, in the near future, act to rationalise all of the administrative appeal mechanisms in Queensland with a view to streamlining, diminishing the complexity and cost of the administrative appeals machinery, and reducing the burden on the administration, whilst at the same time ensuring that there is no net diminution of the rights of citizens to complain about administrative discretion; and
> - when new public sector developments occur which require an avenue of appeal from administrative discretion, the presumption should be in favour of incorporating the avenue into the functions of the Ombudsman's Office (or possibly a generalist merits review tribunal, should one be established) rather than creating a new single purpose review body.

[28] See: www.parliament.qld.gov.au/LCARC.

3.3.3 Freedom of Information in Queensland

Following a reference from the Queensland Parliament in March 1999, the committee of the 50th Parliament conducted a comprehensive review of the *Freedom of Information Act*. The committee's report no 32 on the review was tabled in December 2001.[29]

In report no 32, the committee assessed whether the *Freedom of Information Act* was achieving the purposes and objects it was designed to achieve, and examined procedural aspects of the Act. The committee observed that: [30]

> In a healthy democracy, citizens should be able to effectively scrutinise, debate and participate in government decision-making and policy formulation in order to ensure government accountability and to make informed choices. Information plays a key role in so empowering the citizen. As noted in the Fitzgerald report: 'Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.'

The committee made recommendations for a range of amendments to the *Freedom of Information Act* to ensure its effectiveness.

Summary of recommendations in report no 32

- The establishment of an independent entity (a Queensland FOI monitor) with the general responsibility of:
  - monitoring the compliance with, and administration of, the FOI regime; and
  - promoting community awareness and understanding of the FOI regime and providing advice and assistance to agencies and members of the public about the regime.
- The development of a whole-of-government strategy to promote the greater disclosure of government-held information outside the FOI Act, including the introduction of administrative access schemes.
- Legislative provisions to facilitate a flexible and consultative approach to processing FOI applications. Such an approach would have the potential to allow better focussed applications, reduce processing time and cost and, at the same time, improve outcomes for applicants.
- The ongoing implementation of practices within the Office of the Information Commissioner to balance the need for legal precision in handling FOI reviews and decisions, with the need for timely and responsive service to the public.
- Mechanisms to require agencies and ministers to focus on the harm which would result from disclosure of a document, rather than on the class of documents to which the relevant document belongs. In relation to the Cabinet exemption, a purposive test was recommended for incorporation into section 36(1) to limit the Cabinet exemption to documents created for the purpose of being submitted to Cabinet.

The Queensland Government's response to report no 32 was tabled on 13 August 2002.[31] The recommendations adopted by the Government were implemented administratively and by amendment to the *Freedom of Information Act* in 2005.

3.4 Current government and government-funded reviews

At the time of the tabling of this report, a number of reviews were underway that related, directly and indirectly, to the issues considered by the committee. These reviews are outlined below.

3.4.1 Review of the Freedom of Information Act

In September 2007, the Premier and Attorney-General and Minister for Justice announced the establishment of a review of *the Freedom of Information Act*. In a submission to the committee, the Attorney-General and Minister for Justice advised:

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29 LCARC, *Freedom of Information in Queensland*, report no. 32, Goprint, Brisbane, December 2001, available at: www.parliament.qld.gov.au/LCARC.

30 LCARC report no. 32, 13, available at: www.parliament.qld.gov.au/LCARC.

31 The government's response is available at: www.parliament.qld.gov.au/LCARC.

Whole of Government sumbission

The review will consider the extent to which the FOI Act provides an effective framework for access to information held by government.

In announcing the review, Government has recognized that, since the enactment of the FOI Act fifteen years ago, the culture within government is now generally more open, with considerable Government information publicly accessible on the internet. However, the review acknowledges there is still scope to improve access to government documents and reduce the time and costs involved in accessing government documents.

The interaction between the FOI Act and Queensland's privacy regime is also an issue that will be considered as part of the review.

The review will be releasing a discussion paper for public consultation in January 2008, on the extent to which the FOI Act provides an effective framework for access to documents held by government.

Following community consultation, the review is to provide a final report to Government with recommendations on changes to Queensland's FOI regime. Any necessary legislative amendments will follow by the middle of 2008.

In January 2008, the review panel published a discussion paper, inviting public submissions by 7 March 2008. On 6 March 2008, the panel held a public seminar in conjunction with the Australian Law Reform Commission. Public submissions to the panel and papers presented at its seminar are available on the panel's website.[32]

3.4.2 Department of Justice and Attorney-General review of civil and administrative tribunals

Following a review by the Department of Justice and Attorney-General, in March 2008, the Premier announced the Queensland Government's intention to establish a civil and administrative tribunal. The newly amalgamated tribunal is to provide a single recognisable gateway to increase the community's access to justice and increase the efficiency and quality of decision-making through an enhanced administrative structure.

The Premier also announced that an independent panel of experts would be established to provide advice to Government on how best to implement the amalgamated civil and administrative tribunal, including:

- the precise scope of the jurisdiction of the new tribunal;
- membership and registry structure; and
- accommodation, information technology and other infrastructure needs.

The terms of reference make clear that the panel's advice to Government is to be informed by views of existing tribunal members and registry staff, representatives of users of tribunals and relevant Government agencies. The Panel will be provided the list of stakeholders who have provided submissions to the review as well as other stakeholders identified as having an interest in the project.

It is the Government's intention to introduce any necessary legislation to implement the new tribunal by March 2009. In order to achieve that timeframe, the Panel will be asked to report to Government in three stages:

- June 2008: report on scope of jurisdiction and initial establishment and implementation arrangements for the amalgamated civil and administrative tribunal;
- October 2008: report on any necessary legislative amendments required to implement the amalgamated civil and administrative tribunal; and
- March 2009: final report detailing full operational implementation requirements.

3.4.3 'Whistling while they work': Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations

'Whistling While They Work' is a three-year collaborative national research project into the management and protection of internal witnesses, including whistleblowers, in the Australian public sector.

32 See: www.foireview.qld.gov.au.

The project is led by Griffith University and jointly funded by:

- the Australian Research Council;
- five participating universities; and
- 14 industry partners including integrity and public sector management agencies.

To date, the study of internal witness management has described and compared organisational experience under varying public interest disclosure regimes across the Australian public sector. It aims to contribute to early detection of workplace misbehaviour and reduce the political, organisational and human costs associated with whistleblowing, by providing managers and integrity agencies with more effective strategies for managing key conflicts. Its findings will inform reviews of existing legislation and identify the regulatory reforms needed to support good workplace practice.

The first report of the study, *Whistleblowing in the Australian Public Sector*, was published in October 2007. Comments on the draft report were sought by 30 November 2007.[33]

3.4.4 Unreasonable complainant conduct project

Offices of the Australian Parliamentary Ombudsman offices are trialling a new approach to unreasonable complaint conduct. The focus of the project is on shifting the culture of complaint handling so that dealing with difficult complainant behaviour is seen as part of the core function of a complaint handling agency. Therefore, such conduct should be dealt with by staff who are well trained, resourced and supported by endorsed official policies and detailed guidelines so they can confidently make decisions regarding their communications with complainants whose behaviour is difficult.

The project aims to:

- minimise the effect of unreasonable complainant conduct on the process of complaint handling and resource management - this will ensure equity in complaint handling by Ombudsman offices;
- minimise staff stress and possible detriment to the interests of complainants who engage in unreasonable conduct; and
- achieve consistency in practice across all Ombudsman offices.

The project has developed a practice manual which contains practical strategies, tips and suggestions to assist the staff of government agencies in their interaction with the small proportion of those whose conduct can be unreasonable.[34]

3.4.5 Relationship of report no 64 to current reviews

During the course of the inquiry into the Accessibility of Administrative Justice by the committees of the 51st and 52nd Parliaments, valuable information and views were provided to the committees. To assist ongoing reviews regarding administrative justice mechanisms, including those identified above, this report sets out detail provided in submissions to the inquiry.

33 See: www.griffith.edu.au/centre/slrc/whistleblowing.

34 See: www.ombo.nsw.gov.au, for example.

4 AVAILABILITY OF INFORMATION

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

4.1 Information as the lynch-pin of the political process

In the discussion paper, the committee noted that the legislative and administrative requirements imposed on the government to provide information, and the information which is otherwise provided to the public by the government, are central to the relationship between the Queensland government and the people.

4.1.1 Freedom of Information Act

Freedom of information legislation is an important component of people's rights to access government-held information. It provides a right of access to government-held information, and a right to amend or correct personal information where it is inaccurate, out-of-date or misleading. It requires the publication by government of information about the way in which it makes decisions.

As described in committee report no 32:[35]

> The essential objective of FOI legislation is to provide citizens with a right of access to government held information in order to enhance democratic and representative government by making government more open, accountable and participatory.

The *Freedom of Information Act* was enacted following reviews of freedom of information and recommendations by EARC and PCEAR. Both bodies noted observations regarding the need for the legislation made in the *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*:[36]

> Freedom of Information Acts, along the lines of the United States model, have been adopted to grant a general right of access to documents held by Government and Government agencies.
>
> The professed aim of such legislation is to give all citizens a general right of access to Government information. Appeals are allowed to an external independent review body when a request for information is refused in whole or in part, or when a person objects to a decision to release information about their affairs, or when the accuracy or completeness of personal information held by Government is disputed by the person it concerns.
>
> The importance of the legislation lies in the principle it espouses, and in its ability to provide information to the public and to Parliament. It has already been used effectively for this purpose in other Parliaments. Its potential to make administrators accountable and keep the voters and Parliament informed are well understood by its supporters and enemies.

EARC's report was tabled in December 1990. PCEAR's report was tabled in April 1991. The *Freedom of Information Act* largely enacted the recommendations made by EARC and the parliamentary committee. It received Assent on 19 August 1992 and commenced in November 1992.

The importance of the availability of government-held information was stated in the report of the Queensland Public Hospitals Commission of Inquiry (the Davies Report).[37] In the context of the provisions for exempt matter in the *Freedom of Information Act*, the matters raised in the Davies report were addressed in a submission from the Queensland Council for Civil Liberties.[38]

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35 LCARC report no. 32 at 4, available at: www.parliament.qld.gov.au/LCARC.

36 Hon GE Fitzgerald, *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 371.

37 Hon Geoffrey Davies AO, *Queensland Public Hospitals Commission of Inquiry – Report*, November 2005, see: www.qphci.qld.gov.au.

38 Exemption provisions were not within the scope of the committee's inquiry but are being considered by the Independent review panel; see section 3.4.

Queensland Council for Civil Liberties

In the Council's respectful view, the Committee's terms of reference missed the opportunity to deal with a fundamental flaw in the *Freedom of Information Act* the consequences of which have been starkly revealed by the recent Public Hospitals Commission of Inquiry Report.

In that Report, Commissioner Davies found, "there was a bipartisan (in the pejorative sense) approach of concealing from public gaze the full waiting list information". The mechanism for doing so was the Cabinet document exemption in the *Freedom of Information Act*.

At paragraph 1.78 of his Report Commissioner Davies ruled that there was "a culture of concealment of practices or conduct which, if brought to light, might be embarrassing to Queensland Health or the Government. This culture started at the top with successive Governments misusing the *Freedom of Information Act* to enable potentially embarrassing information to be concealed from the public".

He went on at paragraph 6.564 to find in respect of elective surgery waiting lists that:-

- In 1997 and 1998 Cabinet under a Coalition Government decided not to disclose to the public statistics which showed the number of persons on elective surgery waiting lists.
- That decision was contrary to the public interest.
- In 1998 and thereafter until 2005 Cabinet under the Australian Labor Party Government decided to disclose to the public the surgery list but not the entire anterior lists and only that disclosure was made.
- To disclose surgery lists but not the anterior list was misleading and was contrary to the public interest.

The committee notes that, although beyond the scope of its inquiry into the Accessibility of Administrative, the issue of matter exempt from the operation of the *Freedom of Information Act* is under consideration by the Freedom of Information Independent Review panel.[39] This includes matter contained in Cabinet documents.

4.1.2 Judicial Review Act

The *Judicial Review Act*, in parts 3 and 4, provides a person with a legal right to a written statement of reasons in relation to an administrative decision affecting him or her. This right is independent of an application for judicial review.

The right to request a statement of reasons was introduced with the enactment of the *Judicial Review Act*, following recommendations by EARC and PCEAR.

EARC made the following observations in its Report on *Judicial Review of Administrative Decisions and Actions*:[40]

In *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, the High Court of Australia rejected the proposition that there is any general duty at common law to give reasons for administrative decisions.

Most citizens would be surprised by this result, and would probably consider that public officials and public bodies, whose salaries and expenses are ultimately paid by taxes and charges on citizens, should be both legally as well as morally obliged, at least when making decisions or exercising powers which adversely affect the interests of individual citizens, to furnish on request an explanation of the reasons for decisions. This would be consistent with community ideals of fair play and of justice being seen to be done. Even though a decision may be perfectly correct, a person refused reasons is likely to be left with a real grievance at not being told why the adverse decision has been made.

The obligation to provide written reasons on request allows a person adversely affected by a decision to see what was taken into account and whether an error was made. The person is then better placed to determine whether to let the matter lie or challenge the decision, and if the latter, to determine the best means to adopt for doing so (for example, whether to use the services of a local Member of Parliament or the Ombudsman or to make a direct appeal to the responsible Minister, rather than the courts).

The EARC report was tabled in December 1990, and the PCEAR report was tabled in June 1991. The Act was passed in 1991 and received Assent on 17 December 1991. The Act then came into force on 1 June 1992.

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39 See section 3.4.

40 EARC, *Report on Judicial Review of Administrative Decisions and Actions*, at paras 11.1-11.2, 11.5.

Sections 32 to 34 of the *Judicial Review Act* are set out below.

32 Request for statement of reasons

(1) If a person makes a decision to which this part applies, a person who is entitled to make an application to the court under section 20 in relation to the decision may request the person to provide a written statement in relation to the decision.

(2) The request must be made by written notice given to—

(a) if the decision was made by the Governor in Council or by Cabinet—the Minister responsible for the administration of the enactment, or the scheme or program, under which the decision was made; or

(b) in any other case—the person who made the decision.

33 Decision maker must comply with request except in certain circumstances

(1) Subject to this section, a person to whom a request is made under section 32 (the ***decision maker***) must, as soon as practicable, and, in any event, within 28 days after receiving the request, provide the statement to the person who made the request (the ***requester***).

(2) If the decision maker is of the opinion that the requester was not entitled to make the request, the decision maker may, within 28 days after receiving the request—

(a) give to the requester written notice of the decision maker's opinion; or

(b) apply to the Court under section 39 for an order declaring that the requester was not entitled to make the request.

(3) If the decision maker gives a notice under subsection (2) or applies to the court under section 39, the decision maker is not required to comply with the request unless—

(a) the court, on an application under section 38, orders the decision maker to give the statement; or

(b) the decision maker has applied to the court under section 39 for an order declaring that the requester was not entitled to make the request and the court refuses the application.

(4) The decision maker may refuse to prepare and give the statement if—

(a) in the case of a decision the terms of which were recorded in writing and set out in a document that was given to the requester—the relevant request was not made within 28 days after the day on which the document was given; or

(b) in any other case—the relevant request was not made within a reasonable time after the decision was made.

(5) If subsection (4)(a) or (b) applies to the decision maker, the decision maker must give to the requester, within 14 days after receiving the relevant request, written notice stating—

(a) that the statement will not be given to the requester; and

(b) the reasons why it will not be given.

(6) For the purposes of subsection (4)(b), a request for a statement in relation to a decision is taken to have been made within a reasonable time after the decision was made if the court, on application by the requester, declares that the request was made within a reasonable time after the decision was made.

34 Content of statement

The statement must contain the reasons for the decision.

4.1.3 Key issues

At the commencement of the inquiry, the committee of the 51st Parliament invited consideration of the following matters:

- the adequacy of written statements of reasons under Part 4 of the *Judicial Review Act;*
- the availability of information and preliminary advice about administrative justice mechanisms;
- information and assistance about procedural requirements;
- government information available free of charge;
- co-ordination between agencies in the provision of information; and
- compliance by agencies with statutory requirements, such as the publication of statements of affairs.

4.1.4 Supplementary issues

When seeking views about supplementary issues, the committee of the 52nd Parliament invited submissions about two possible initiatives regarding the availability of information about administrative justice:

- possible initiatives regarding the availability of information about administrative justice; and
- the publication of details regarding contracts entered into by public sector agencies.

The information and views provided to the committee regarding the key issues and supplementary issues are set out below, together with committee considerations and recommendations.

4.2 Written statements of reasons

4.2.1 Relevant reforms in other jurisdictions

The Commonwealth Administrative Review Council has issued *Practical Guidelines for preparing statements of reasons*.[41] The Guidelines were first published in June 2000 and revised in November 2002. They set out the Administrative Review Council's views on preparing a statement of reasons, given the terms of the relevant Commonwealth legislation and taking into account relevant decisions of courts and tribunals.

The Guidelines aim to help decision-makers to prepare sound reasons for decisions. The importance of a good statement of reasons is explained as follows:[42]

> The requirement to provide statements of reasons, evidence and fact is a fundamental aspect of the Commonwealth system of administrative review.
>
> Statements of reasons provide the person affected by a decision with an opportunity to have the decision properly explained. That person can then decide whether to exercise their rights of review or appeal and, if they do, they can do so in an informed manner.
>
> Disclosure of the reasoning process can also assist decision makers to reflect more carefully on their task and to be more diligent and careful in decision making. Further, the availability of reasons can assist agencies to identify relevant principles and create standards to govern future decision making.

4.2.2 Relevant information and views considered by the committee

Submissions to the committee addressed the adequacy of statements of reasons and the circumstances in which agencies can refuse to provide a statement of reasons.

> **Bar Association of Queensland**
>
> There are uncanny, if not wholly surprising, parallels between Queensland's experience with its modern judicial review system and that of the Commonwealth. One feature of the procedural reforms effected by each system is that it has empowered the weak and those with little to lose to challenge the might of the executive government. Challenges

41 Available at: www.ag.gov.au/arc.

42 Commonwealth Administrative Review Council, *Practical Guidelines for preparing statements of reasons*, 1.

grounded upon the securing of personal liberty are the paradigm. In the Commonwealth sphere they are manifest in a plethora of migration law challenges. In the State sphere that manifestation is to be found in challenges to corrective services decisions.

Caxton Legal Centre

We are aware that decision-makers sometimes fail to give sufficiently detailed reasons for decisions and have observed that this can be particularly problematic in special interest matters (especially environmental cases) where a lack of clear reasons for decisions, or reasons given in global terms only, can make it very difficult for the merit of community-based special interest cases to be assessed and appropriate litigation commenced.

We are aware that the Administrative Review Council (ARC) has produced "Practical Guidelines for Preparing Statements of Reasons". Such guidelines do not exist in Queensland and the introduction of such guidelines hopefully would assist to remedy the current problems faced when decision-makers fail to give adequate and comprehensive reasons for decisions.

Queensland Council for Civil Liberties

The writer's own experience is that the main problem in the Queensland system is that the reasons for decision by decision makers are generally speaking inadequate. It is only when a formal request is made under the *Judicial Review Act* that a proper statement of reasons is provided. The government needs to attend to better training of decision makers who, except for designated FOI officers for example, seem to have no idea of what their obligations are in terms of providing proper reasons. Generally their reasons are perfunctory and obviously "cut and paste" jobs.

QAILS and QCOSS

Insufficient reasons for decisions are often provided.

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

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

QPILCH

Another example of the reduced impact of administrative law relates to the provision of reasons under Part 4 of the JR Act. Section 35 of that Act exempts "confidential information" from an agency's statement of reasons. Confidential information includes personal or business affairs of a person of a confidential nature. The business affairs of government, such as details of a private public partnership, may therefore be exempted. If removal of confidential information would render the statement of false or misleading, then this can result in a refusal of reasons altogether.

A refusal may be appealed to the Supreme Court.

If reasons are refused it is unlikely that an ordinary applicant would be able to understand the grounds for refusal and yet are required to undertake a complex and likely expensive challenge to the courts.

The importance of reasons under the JR Act cannot be underestimated. It provides both a remedy to the applicant and a check and balance on quality government decision making. Further, given the lack of merits review and alternative dispute resolution mechanisms to resolve administrative law disputes in Queensland, reasons of the original decision maker are critical to the success of a judicial review application.

In jurisdictions that do have a general merits review body, reasons of the original decision maker can be obtained under the relevant merits review legislation. Refusal of such reasons is challenged in the less expensive and more user-friendly tribunal.

<u>Sufficiency of reasons under the JR Act</u>

Under s 34, a statement provided by an agency under Part 4 must contain the reasons for the decision, which in turn is defined as:

(a) findings on material questions of fact; and

(b) a reference to the evidence or other material on which the findings were based.

For a lay person, it is difficult to determine whether an adequate statement of reasons has been provided. The duty to give reasons requires the fulfilment of three limbs: reference to the evidence, reference to the findings of fact, and explanation of the reasoning process used. Further, the explanations under each limb must be intelligible to its particular audience, and convey explanation to its audience without vague terms.

Again, a more user-friendly forum for appealing sufficiency of reasons should be made available.

Reasons should include the documents relied upon

Reasons under Part 4 must include reference to the evidence or other material upon which the findings were based, but does not require the decision-maker to supply that evidence. For that, applicants must make an FOI application or else receive the documents in the course of discovery.

Given that the decision maker must refer to the evidence in writing its decision, it should not pose too much of a burden that this evidence be provided to the applicant with the reasons, unless the agency believes the documents are already within the applicant's possession.

In most cases, the applicant will want the documents in support of the reasons, if they do not already have them. Accordingly, these processes should be streamlined in order to save time and money, as well as to enhance accessibility.

Queensland Ombudsman

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

- the findings of fact
- a reference to the evidence or other material upon which the findings are based, and
- 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.

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.

National Parks Association of Queensland

Statements of reason are a minimum requirement for public access to justice. All final decisions of government agencies to adopt a plan, issue a permit, licence, lease, changing zone etc should be supported by a Record of Decision (ROD). The ROD is the entire dossier of documents considered by the decision maker in arriving at a decision. This record should be open access to the public by either posting it on a website or at a minimum by web-publishing an index of the documents that could be obtained under the FOIA. Exempt material would be marked as such in the index or redacted in the final copy posted onto the website. Such open access to the entire record of documents used by a decision maker to arrive at a decision would prevent a great deal of unnecessary litigation under the JRA and unnecessary applications under the FOIA. Potential applicants would be able to see the entire decision record and make an informed opinion about the validity of the decision under the Act without recourse to costly legal discovery. The concept of records of decision open to public view is practised in US law.

4.2.3 Committee comments

It is clear that the provisions of the *Judicial Review Act* which established a right to access written reasons for decision are not operating as anticipated by EARC and PCEAR. The committee notes the suggestion of the that the Public Service Commissioner or other appropriate person or body issue guidelines directed to ensuring that a

person who seeks reasons may be able to understand why a particular decision was made. Similarly, a person should be told, upon request, what information and other factors were considered during the decision-making process.

The committee recommends (**recommendation 2**) that as a matter of best practice, statements of reasons should include copies of relevant documents. It should not be necessary for a person to make a freedom of information application to receive access to these. In addition, the committee suggests that departments and agencies give consideration to providing statements of reasons, including copies of relevant documents, online.

The committee notes that the Commonwealth's Administrative Review Council has issued Practical Guidelines for preparing statements of reasons. In the absence of guidelines issued in Queensland, these would be of assistance to decision-makers, as is the training about good decision-making provided by the Office of the Ombudsman.

In addition, the committee recommends (**recommendation 1**) amendment of the *Judicial Review Act* to require that written advice of a decision for which a statement of reasons may be requested must be accompanied by advice of the right to request reasons. Further, the committee recommends that the advice should extend to notice of any other rights to access administrative justice reasonably available in the circumstances. For example, where internal review of the decision is available, the person should be advised of the right to request review of the decision and given information about how to exercise that right.

4.3 Information and advice about administrative justice mechanisms

The committee's discussion paper observed that, since the 1970s, there has been a doubling in legislation which affects the daily life of Australian people but no corresponding increase in resourcing and funding for legal advice and community education.[43] The Commonwealth Ombudsman had observed that lack of information could inhibit the commencement of legal proceedings to determine or enforce a legal entitlement,[44] and if processes were perceived to be complex and daunting, potential applicants might decide their applications were simply not worth pursuing. Ideally, the level of legislative and administrative regulation of people's lives should be matched by the availability of information about that regulation. People should know, or be able to find out, their rights, what they have to do to exercise them, when they have to do something and where they need to go.

In Queensland, there is no co-ordination of the provision of information regarding administrative justice, although information is frequently given by separate offices and agencies, such as the Office of the Ombudsman and the Courts Registry. Available information of this nature includes information:

- on the Queensland Courts website, such as information sheets about the Registry and the Court of Appeal as well as information about court practice and procedure (see www.courts.qld.gov.au);
- provided by agencies about rights of review regarding a decision refusing access to documents under the *Freedom of Information Act* (see section 34(1)(i));
- provided by the Queensland Ombudsman on its website and in response to telephone inquiries;
- from the Anti-Discrimination Queensland on wallet-sized 'know your rights cards';
- information for freedom of information applicants provided by the freedom of information and privacy unit in the Department of Justice and Attorney-General; and
- on the Information Commissioner website, such as previous decisions of the Information Commissioner and information about making an external review application (see www.infocomm.qld.gov.au).

A previous recommendation for reform was made by the committee of the 50th Parliament – that there be an FOI monitor to enhance the effectiveness of Queensland's FOI regime, including the information available to applicants and agencies.[45] The Government response to that report agreed that there was a need for better co-ordination of

43 Mark Rix and Scott Burrows, 'The foundations of legal citizenship: community law, access to justice and the community legal sector', *Alternative Law Journal*, 30(3), 3 June 2005, p 126.

44 Prof John McMillan, 'The Ombudsman and the Rule of Law', paper presented at ANU Public Law Weekend, Canberra, 6 November 2004.

45 LCARC report no 32, at 30, available at: www.parliament.qld.gov.au/LCARC.

functions in relation to FOI, but that there were a range of agencies providing that function and that the Government was not convinced that it would be appropriate or effective to establish a separate body or for the Information Commissioner to perform these functions.[46]

In its discussion paper, the committee invited submissions about the availability of information and preliminary advice about administrative justice mechanisms.

Then, in seeking submissions about supplementary issues, the committee invited comparison of the availability of information about administrative justice in Queensland with the situation in Britain.

4.3.1 Reform in other jurisdictions

In Britain, the Citizens Advice Service helps people resolve money, legal and other problems by providing free advice and information, and by influencing policymakers. The Citizens Advice Service says it affects people's lives in thousands of different ways. According to its website, the service is:[47]

- a provider of free, independent and impartial information and advice from nearly 3000 locations, helping people resolve nearly 5.5 million new problems a year;
- one of the UK's largest voluntary organisations - Citizens Advice and all bureaux are registered charities;
- made up of a network of Citizens Advice bureaux, with 462 members in England, Wales and Northern Ireland at 31 March 2006;
- a respected source of influence on local and national policy;
- the largest provider of free money advice in the UK;
- an employer and skills training agency with a workforce of over 26,000 people, the majority of these volunteers; and
- well-known by the public, as research conducted by MORI in 2000 indicated that 96% of the public had heard of the service and 41% had used it at some time in their lives.

Similarly, the Association of Citizens Advice Bureaux in New Zealand aims to ensure that people 'do not suffer through ignorance of their rights and responsibilities or of the services available or through an inability to express their needs effectively'. It also has the aim of exerting a responsible influence on the development of social policies and services, locally and nationally. The New Zealand Association provides a free national service of impartial and confidential information, advice and support to all people. There are Bureaux throughout the country. In 2001, they handled more than 500,000 inquiries.[48]

4.3.2 Relevant information and views considered by the committee

Queensland Ombudsman

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.

A case exists for the creation of a central advice-giving body that can:

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

46 The government's response, Tabled 13 August 2002, is available at www.parliament.qld.gov.au/LCARC.

47 See: www.citizensadvice.org.uk

48 See: www.cab.org.nz

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.

Legal Aid Queensland

Legal Aid Queensland currently provides a legal information and legal advice service to Queenslanders on personal legal issues including administrative law. Community legal centres also provide free legal advice to Queenslanders on a range of issues including administrative law. Legal Aid Queensland and the Community legal centres are well placed to provide information regarding administrative justice provided they are adequately resourced for this purpose.

Currently, Legal Aid Queensland provides a duty lawyer and legal services at the Administrative Appeals Tribunal. A generalist and centralised Queensland administrative review tribunal would allow Legal Aid Queensland to provide legal services to Queenslanders more effectively and efficiently and would further enhance Queenslanders access to administrative justice.

Brisbane City Council

There are already a number of sources of information about administrative justice in Queensland.

The Queensland Ombudsman's Office, as an independent complaints investigation agency, is an easily accessible source of advice and information, albeit that it is advice and information of a specific nature.

The Office of the Information Commissioner ("OIC"), the independent review body for certain decisions made under the *Freedom of Information Act 1992*, provides a considerable amount of information to the general public.

Local government also provides information about processes involving recourse to administrative justice, as does Legal Aid Queensland. In Brisbane City Council, for example, call centre scripting allows for an individual's query to be transferred to specialist areas, as does the Council's website. However, there is only so much information that can be provided before local government reaches a point of intervention by prematurely focussing the way a person may be seeking information – which is inappropriate.

A proposed initiative outlined in the paper is to establish something akin to the Citizens Advice Service in the United Kingdom. If that is intended, then the primary question is the role that such a service would play. It is arguably inappropriate that such a service or equivalent have an advocacy role in policy making, if it is created for the purpose of providing information about administrative justice.

A preferable course would be to better advertise the sources of information that already exist, rather than create a new body that (in part) duplicates other functions.

The OIC role and the Ombudsman's role could both possibly be augmented to provide this additional and targeted advice to the general public.

Department of Industrial Relations

Generic information, agency co-ordination in the provision of information and statutory publications do not appear to adequately explain the methodology of administrative decision making. Statements of reasons are of little solace if an applicant does not understand the underlying principles upon which the decision was based. Information with respect to administrative decision making could be improved by increasing the availability of preliminary advice by the decision making authority about how administrative decisions are considered and how administrative justice mechanisms work.

Caxton Legal Centre

In short, we do not consider that sufficient relevant and accessible information about government decisions and actions is available.

Information provision needs to take into account the various ways in which different individuals seek information about such matters – whether it is by telephone or face-to-face contact with departments/authorities (potentially at times requiring on the part of the relevant staff-member special skills for dealing with persons experiencing disadvantage or requiring the services of an interpreter), an internet search, or perusal of published materials.

QPILCH

There is no central resource to help citizens understand the minefield of appeal rights in administrative law. While we accept that specific administrative law remedies will largely depend on the decision in question, there still needs to be better general information available about administrative rights in Queensland, providing guidance to the public on how to approach their problem.

Information regarding "Complaints about Government" on the Legal Aid Queensland website provides a starting point but is by no means comprehensive.

Whole of Government submission

Since the introduction of FOI, the Department of Justice and Attorney-General has been the lead agency for the whole-of-Government co-ordination of FOI in Queensland. Over the years, the Department has provided, to varying degrees, support to agencies and the community on FOI, as well as administering the FOI legislation.

In April 2002, the Honourable Rod Welford, then Attorney-General and Minister for Justice responded to LCARC Report No. 32. That response committed the Queensland Government to implementing legislative and non-legislative initiatives. The non-legislative initiatives related to the whole-of-Government coordination and promotion of FOI in Queensland. The legislative initiatives formed the basis of the 2005 amendments to the Act. A strategic framework for the non-legislative initiatives was prepared by the Department which focussed on four key areas.

The framework includes strategies designed to provide information to agencies, FOI practitioners and members of the public about FOI in Queensland and the assistance available through the Department as lead agency coordinating the whole-of-Government functions of FOI.

Noel Turner

The adequacy of written statements of reasons under Part 4 of the *Judicial Review Act* had no application in my case where a grievance existing since 1978 relating to a supposed unpaid penalty were not supplied at any time to me.

The co-ordination between existing agencies…in the provision of relevant information to me on the issue was less than satisfactory.

The response of Administrative Justice remedies in my case was that SPER [State Penalties Enforcement Registry] at no time assisted me with my complaint and failed to satisfactorily explain to me why it was pursuing me for a supposed unpaid penalty some 24 years after the event.

Judicial review was the only option available considered suitable by me at the time for remedy of my grievance but the later decision of the court in fact showed otherwise.

Bruce Flegg MP, Leader, Queensland Liberal Party

More openness is needed by releasing recommendations, opinions and ideas incorporated into documents need to be released and would help to have a broader more realistic picture of the whole situation being investigated by the applicant. Opinion often forms an integral part of a document. It is often important that the opinion is held even if not universally agreed.

Commission for Children and Young People and Child Guardian

While the Citizens Advisory Board in the UK is an excellent model for delivery of advice and information services, significant resources would be required to develop and implement a similar service delivery model in Queensland. It may be more cost-effective for government to provide additional funding for existing youth services to provide preliminary advice and assistance to children and young people. This funding would need to be accompanied by additional funding for Legal Aid Queensland to allow it to represent children and young people before administrative tribunals under a grant of legal aid.

Environmental Protection Agency

In Queensland, appropriate mechanisms are in place to ensure (a) Government publishes certain information of public interest, (b) people can access information held by Government, and (c) people can access reasons for decisions.

Adequate information about those mechanisms is widely known and readily available.

4.3.3 Committee comments

Generally, unless required by statute or administrative policy, departments and agencies are not required to provide people affected by decisions with advice about available administrative justice mechanisms. While a range of organisations provide valuable information about administrative justice, they do so separately and with little formal co-ordination. Accordingly, it is difficult for Queensland people to know where to go to get the type of information they require. The committee is aware that some people make many attempts to access the information they seek.

The Citizens Advice Bureaux in the United Kingdom and New Zealand provide models for consideration. They indicate effective use of information services by people if they are confident that, in the first instance, they need only call one telephone number or access one website. In Queensland, the use made of the recently-established Health Hotline provides another example.

In the committee's view, many Queensland people who have difficulty access administrative justice at present would be assisted by a user-friendly and centralised information service. This includes people living in regional, rural and remote areas, young people and (with appropriate procedures in place) people whose first language is not English.

The committee recommends that the Attorney-General and Minister for Justice utilise existing information services offered by bodies such as Legal Aid Queensland, the Queensland Ombudsman and the Commission for Children and Young People and Child Guardian to ensure the funding and delivery of a single information service. Queensland people should know that, in the first instance, they need only call one number or access one website to gain the information they need. This should not be the existing Government information line.

The committee suggests that, while the line distinguishing 'information' and 'advice' about administrative justice can be difficult to draw, the focus of the administrative justice information service in Queensland should, in fact, be on the provision of information in the first instance. Where necessary, people requiring legal advice about administrative justice mechanisms can be:

- referred on by the information service to one of the many public and private organisations able to provide assistance of that nature; and
- provided with information regarding existing support services.

4.4 Information and assistance about procedural requirements

4.4.1 Freedom of Information Act

In relation to rights under the *Freedom of Information Act*, the Queensland Government website contains a factsheet, first published in September 2006. The factsheet, *Freedom of Information – Your right to access and amend information held by the Queensland Government*, is available at: www.foi.qld.gov.au.

The fact sheet advises that more information is available from the freedom of information office in the relevant government agency or online. In addition, people are invited to contact the Freedom of Information and Privacy Unit in the Department of Justice and Attorney-General. Contact details are provided.

4.4.2 Judicial Review Act

The Queensland courts' website contains information regarding, Representing yourself in court: www.courts.qld.gov.au The information relates to fees, fee waivers, forms and legislation. It states:

> This website is designed to help self-represented litigants navigate the often complex court system.
>
> However, the information on this website should not be taken as legal advice and you may wish to consult with a lawyer about complex legal matters.
>
> Legal Aid Queensland and community legal centres may be able provide free legal advice about your case (certain conditions may apply).

> As a self-represented litigant, you should familiarise yourself with court etiquette and procedures. The following steps may help you to find the information you need.

The *2006-2007 Annual Report of the Supreme Court of Queensland* advises of Department of Justice and Attorney-General plans to establish:

> a staffed information centre for self-represented litigants within the District and Supreme Court building in the first half of the next reporting year. The centre will operate in association with the civil legal assistance scheme proposed by [the Queensland Public Interest Law Clearing House Inc]. This initiative should improve public access to justice in Queensland.

4.4.3 Reforms in other jurisdictions

In Victoria, Court Network was established in 1980. It is a voluntary, non-legal, court support service operating throughout the State. Approximately 300 trained volunteers provide information, support and referral services to people accused of crime, families who have become secondary victims of crime, adults and children who have been violated or exploited by crime, and litigants who have little or no support.

Court Network is solely concerned with the needs of court users. It assists members of the Victorian community who attend court in the Supreme, County, Coroner's, Family, Children's and Melbourne and district Magistrates' Courts. It also provides services in the regional courts.

Assistance provided to people preparing to attend court includes:

- information about court procedure;
- referral to legal services and community resources;
- assisting in organising interpreters, child care, disabled access;
- arrangements to ensure safety during court
- pre-booking a Networker to provide support on the day.[49]

In Queensland, Court Network now operates in the Commonwealth Law Courts in Brisbane.

4.4.4 Key issue

In its discussion paper, the committee noted that freely-accessible information about rights of access to administrative law mechanisms is of importance, particularly in circumstances where:

- applicants under the *Freedom of Information Act* or *Judicial Review Act* are 'first-time' applicants;
- legislation and/or court procedures are complex; and
- a person is without legal representation.

Accordingly, the committee sought submissions about information and assistance with procedural aspects of administrative justice mechanisms. Submissions received are outlined below.

4.4.5 Relevant information and views considered by the committee

Whole of Government submission

> The whole-of-Government FOI Queensland website (foi.qld.gov.au) provides information for the community on a range of administrative, statutory and court-related access schemes. Most agency websites include information on agency-specific administrative access schemes which can be accessed through the FOI Queensland website. The Department of Justice and Attorney-General plans to provide education to the community about access to Government information generally.
>
> To date, initiatives to improve community understanding of and access to FOI include the launch of the Queensland Government's FOI website (www.foi.qld.gov.au) and the publication of an information brochure on FOI applications targeted at potential applicants (see attached). This brochure is available online as well as through the Department, agencies and 'information access points' in the community, including libraries, community legal centres and electorate

[49] See: www.courtnetwork.com.au

offices of Members of Parliament. The brochure will be available in a range of community languages in 2006. This strategy will assist in broadening the diversity of population groups able to access information about their rights under the Act. Through the FOI Guidelines, agencies will also be encouraged to assist applicants who may be disadvantaged by distance, disability or other communication difficulties

The Department also provides assistance to applicants during business hours via a telephone helpline. Applicants are assisted in understanding the FOI process and given advice on how and where to make applications.

In addition, the Department provides information and advice about the Act to FOI decision-makers and staff working in government departments, authorities and local councils. It conducts training on FOI in both city and regional locations and convenes the State FOI Network and Local Government FOI Network. These networks provide information to practitioners and provide a focus for discussion of issues relating to the application of the Act and FOI processing. The networks invite an officer from the Office of the Information Commissioner to attend each meeting to report on recent external review decisions and procedural aspects of external review.

The Department has also distributed information sheets and practice material to FOI practitioners and the revised FOI Guidelines are scheduled for distribution and publication on the website during 2006. Departmental staff also regularly contribute to community forums and speak at conferences and other engagements to promote community awareness of FOI.

These initiatives are central to improving access to FOI which is important for all Queenslanders and our democratic system of government.

QPILCH

It is important that available review rights are made known to people who are affected by the decision. Without knowledge, people are unable to help themselves. Time limits for appeal also mean that the passing of knowledge must be timely and accurate.

In most cases, a government agency is not required by legislation to notify interested persons of their appeal rights once a decision has been made. It is believed that notification does not occur in many agencies and that existing notification is inconsistent.

Policy should be adopted, in terms similar to section 27A of the *Administrative Appeals Tribunal Act 1975* (Cth), which requires an agency who makes a reviewable decision under that Act to take "such steps as are reasonable in the circumstances to give to any person whose interests are affected by the decision notice, in writing or otherwise:

- (a) of the making of the decision; and
- (b) of the right of the person to have the decision reviewed."

A template could also be developed which would help ensure information given about appeal rights is consistent across agencies. Such reform would be timely, given amendments to the *Local Government Act 1993* (Qld) which required all councils to establish a general complaints process by 1 March 2006 and recent agreement in-principle by the Public Service Commissioner to issue a directive under the *Public Service Act 1996* (Qld) to the same effect for departments and public sector units.

Judicial Review

QPILCH's experience has been that our applicants rarely understand the "grounds of review", how to complete court forms, civil procedure, how to formulate their legal argument or the limited remedies available under the JR Act.

There is little, if any, information regarding the law and process of judicial review provided by government agencies. We also note that such information could be futile in respect of such a legalistic and complicated process.

QPILCH is currently involved in a project with the Supreme Court to devise a pilot which will assist access to the courts in judicial review matters through use of technology. The project is also looking at the information currently available regarding judicial review and may be in a position to formulate a guide to navigate the Court in this area of law.

FOI

QPILCH receives few requests for assistance in relation to Freedom of Information. This could mean that the FOI information available to the public is sufficiently accessible and self-explanatory that people are able to help themselves. It could also mean that existing information allows other free services to quickly and easily help people.

Susan Heal

The Discussion Paper indicates that information for both applicants and practitioners about FOI fees and charges is available on the Information Commissioner's website, as well as from the specialised FOI unit within the Department of Justice and Attorney-General (the 'lead agency', responsible for administering Queensland's FOI legislation).

In my view, the information that is currently available is quite limited in scope and does not address a number of the matters of interpretation that remain unclear.

It would greatly assist both FOI practitioners and members of the community wishing to make applications under the FOI Act if there were more readily available information on the current fees and charges regime that fully explains the proper interpretation and application of the various issues arising in relation to these issues. The availability of such information would assist in ensuring consistency of application of the prescribed fees and charges, and reduce the number of matters proceeding to external review.

Commission for Children and Young People and Child Guardian (2006)

If children and young people are to utilise administrative review processes, it is essential that they are provided with appropriate information by the original decision maker. This information must inform the child or young person that a decision has been made, explain why the decision has been made, explain the likely effect of the decision on the child or young person, notify them of their right to an appeal/review, provide information on how to commence the appeal/review process and advise then of where they can get further advice and assistance. His information should be provided in a way that is understandable to the child or young person, having regard to their age and level of understanding. This will usually require the decision maker to meet with the child or young person rather than providing written information only.

In addition to receiving this information, a child or young person will need specialist legal advice and assistance to enable them to access administrative tribunals.

QAILS and QCOSS

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

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

Commission for Children and Young People and Child Guardian (2007)

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.

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 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.

The Australian Law Reform Commission in its 1997 report Seen and Heard: Priority for Children in the Legal Process (the ALRC report) 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.

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

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 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.

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 NYCLC website www.lawstuff.org.au was visited by 130,199 people between July 2001 and June 2002. However, internet based information does not reach children and young people who do 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 Abused Child Trust, LAQ, and the Youth Advocacy Centre. As the workload of the tribunal has increased the demand for suitable representation has grown.

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.

Caxton Legal Centre

In preparing this response we had cause to search the websites of a range of government departments and it was interesting to note that some government department/authority websites displayed a very prominent and informative section on FOI, while others did not. It is essential that an integrated and consistent approach in the dissemination of information about FOI be adopted within government and we endorse the extensive provision of accessible information and consultation processes concerning FOI.

Anecdotally, it seems that many clients are unaware that there are no fees associated with obtaining personal information, and this is one example of how education through easily disseminated information is important. Of course, the question of 'what is personal information' is not always a straightforward matter and again education and information about these issues needs to be made freely available to the public so that FOI can be used effectively and freely. Inadequate training of staff handing FOI requests can lead to applicants being asked to pay for information, which is really "personal information" and it is important that this issue is addressed through the proper training and resourcing of FOI units.

4.4.6 Committee comments

The committee notes that, too often, Queensland people affected by administrative decisions and actions are not advised of their administrative justice rights - to seek review of the decision made, to access information and to ensure that government processes are publicly accountable. Accordingly, the committee recommends (**recommendation 1**) amendment of the *Freedom of Information Act* and the *Judicial Review Act* to ensure that where a person's interests may be affected by a decision advice is provided about administrative justice mechanisms reasonably available.

However, we note also that, even where people are aware of administrative justice mechanisms, they may require easily-accessible, factual information about the necessary procedural steps. As discussed above, this information is currently provided by a number of different bodies in Queensland. To promote accessibility, the committee recommends (**recommendation 3**) that the information be available via one, user-friendly access point.

4.5 Government information available without charge

Many government agencies provide information free of charge in the form of fact sheets, brochures and other publications, as well as making information available via toll free telephone numbers and the internet. This information is available through 'administrative access schemes'.[50]

In its discussion paper, the committee invited views and information about the availability, without charge, of government information.

4.5.1 Reforms in other jurisdictions

In the United Kingdom, the *Freedom of Information Act 2000* (UK) requires public authorities to adopt and maintain a publication scheme and to publish information in accordance with it.[51]

A review of the *Freedom of Information Act 1982* (Vic) conducted by that State's Ombudsman recommended that the relevant part of the Victorian Act 'be reviewed as a matter of urgency, giving consideration to adopting a system of publications schemes on the model of the United Kingdom FOI Act'.[52]

4.5.2 Relevant information and views considered by the committee

The Law Society of New South Wales

Information on Government decisions and actions are not adequate and often not accessible. This is largely due to the expectations under the FOI Act and other legislation restricting or limiting access. The situation could be improved by making a presumption of access to information held by government in relation to its decisions. This would encourage the publishing of the decision and the reasons for making the decision on a website or be available for access at some public location such as libraries.

Dr Richard Mochelle

Developments in web-based information technology and rapid uptake of this technology by Australians (73% of Queenslanders in 2004 have access to a home computer) have made it economically feasible and imperative to fulfil these rights. While the Queensland government is clearly committed to providing the public with online government information, there remain significant gaps.

Much of what is web-accessible to public servants as 'Insite' information is unavailable to the public. There seems little justification for this in democratic Australia. Cost cannot be used to argue against such provision for once the information is HTML formatted and made available on the Insite service, there would be insignificant or zero cost to make it available to the general public, who are paying for it already.

National Parks Association of Queensland

Open access to spatial data is fundamental to the ability of non-profits to understand what is being done or allowed to be done by governments, and where. Open access to spatial data would also allow NGOs to ground-truth activities or data to provide an independent check on accuracy of government spatial data.

Spatial (or GIS) data area treated to an entirely different regime of secrecy, fees and licences than other government information. No government-sourced information should be treated as a "product" for commercial sale. Citizens have already paid for its production through taxes. This is particularly so for spatial data which can be provided essentially cost-free by posting to websites as for example done by Geo-science Australia. Nowhere is the barrier to public access

50 Separate access schemes operate to provide people involved in court proceedings with access to documents, see: www.foi.qld.gov.au/alternative.

51 See: www.foi.gov.uk.

52 *Review of the Freedom of Information Act - Report of Ombudsman Victoria*, June 2006, at 9, see: www.ombudsman.vic.gov.au.

more evident than in Natural Resources and Mines Dept where NGOs and citizens have to pay a fee of $2000 to get the cadastral database for Queensland for example. All spatial data that is in final form for release should be posted online for easy access. The whole complex "licensing" regime practiced in respect of spatial data would be made irrelevant if this was done. As for other material FOIA exemptions could still apply where disclosure would be likely to result in harm, as for example revealing the nest locations of an endangered bird at risk of poaching.

It is quite unreasonable that the directory of responsible staff in an agency like the Environmental Protection Agency not be posted online for ready reference so that citizens can reach the appropriate responsible person on a specific issue. Universities all have faculty "phonebooks" online, why can't public agencies? The alternative is that citizens are forced to call a central operator and guess at the organisation structure and who might be the person they want to contact.

QAILS and QCOSS

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

QPILCH

It should be remembered by government agencies that information can be given without going through the FOI process. The FOI Act merely provides a scheme for the legal enforcement of the right to access such documents and a framework within which agencies can deal with contentious or ambiguous information requests. It is not intended as an exclusive scheme for public access to and release of government information, or as a replacement for existing administrative access processes. In addition, FOI only applies to access to documents, not other types of information. Therefore, the array of information held by government is, in principle, publicly accessible without going through the FOI process.

FOI officers of government agencies should be trained as to the appropriate use of FOI and to ensure that access, particularly in relation to routine requests, is not hindered by unnecessarily requiring applicants to go through FOI.

Alec Lucke

Information about Government decisions is not adequate. The consultation process is a farce and the weak and disadvantaged are seen as fair game… We need in-depth review of every government agency with a view to greater accountability and a fresh cooperative approach.

Queensland Council for Civil Liberties

In this regard, we note that the Welsh Cabinet now publishes the Minutes Papers and Agendas of its meetings with certain exemptions. We invite you to visit www.wales.gov.uk\orgasnicabinet where the Minutes of the Cabinet can be read and the exemptions are listed.

Whole of Government submission

FOI is but one mechanism for accessing documents held by the public sector. An increasing range of information is available via the extensive public sector web presence. Complementing web publication is a range of additional schemes generally termed 'administrative access', which provide alternatives to FOI. Administrative access schemes provide access for a fee, or at no cost, depending on the information requested. Examples of administrative access schemes include Queensland Health (health records), Queensland Police Service (criminal histories) and Department of Justice and Attorney-General (court transcripts).

There are also access schemes for parties involved in legal processes which provide access to a limited range of documents for particular purposes, for example, under the *Uniform Civil Procedure Rules* or s.134A of the *Evidence Act 1977* (Qld). These mechanisms are potentially more expensive than FOI, with the cost under the UCPR ranging from $15 to $58 per 15 minutes of processing time.

Although there is no cross-sectoral data it appears from anecdotal reports that FOI is increasingly being used to obtain access to information for quasi-legal purposes, for example, by loss adjusters and insurance companies or for pre-litigation purposes such as preliminary conferences in personal injuries claims. In relation to this issue, the Department of Industrial Relations stated that due to the lower cost in obtaining this information under FOI, these applicants can obtain a wealth of information that has been gathered during the course of an investigation.

> Aside from cost, using FOI for these purposes places additional resource demands on agencies and rarely results in the applicant getting all the information they want. It is questionable as to whether FOI is the appropriate process to deal with these circumstances and is an issue that warrants further investigation.

4.5.3 Committee comments

In Queensland, the enactment of the *Freedom of Information Act* and other general developments which have led to easy access to all types of information have changed our ideas about the availability of government-held information. They have also made it more common and easier for government to provide people with information, such as on departmental and agency websites.

In 1990, when recommending the enactment of freedom of information legislation in Queensland, EARC stated:[53]

> [I]nformation is the grist of government processes. The fairness of decisions made by government, and their accuracy, merit and acceptability, ultimately depend on the effective participation by those who will be affected by them. Further, when access to information is denied to the public it is thereby denied its right to exercise control over government. FOI legislation is crucial if access to information is to be obtained, and thereby participation in the processes and control of government is to be achieved.

The committee agrees that access to information held by government and about the exercise of executive functions is an essential element of the system of checks and balances in our Queensland system of representative democracy. However, since its enactment in 1992, the *Freedom of Information Act* appears generally to have operated as a narrow filter controlling the release of government-held information.

In 1992, EARC itself was at the vanguard of the use of technology in the public sector in Australia. The wider use of computer and laser technology, together with the additional advent of the internet as a communication and information-gathering tool some years later by the nature of government-held information changed immeasurably.

Accordingly, EARC and PCEAR recommendations regarding the importance of access to government-held information predated significant changes in the collation, printing and delivery of information. In an age when search engines continually updates and improves its free delivery of information, and the speed of delivery, generally-available information, it seems incongruous that Queensland people are required to make written application and wait at least a month for what is, in very many cases, information which could be published without incident. Similarly, for information to be delivered, in paper form, rather than via digital means – online or via text message – is incongruous also.

In Queensland, some government information is available via 'administrative access schemes'. These access schemes were introduced following a recommendation of the committee in report no 32. The committee recommended the development of a whole of government strategy designed to facilitate the greater disclosure of information outside the *Freedom of Information Act*. Report no 32 stated that the committee's approach was to:[54]

> [M]ake the legally enforceable statutory right of access a (necessary) 'legislative backstop'. The community would not need to rely as much on the statutory right and the formal FOI procedures to obtain the information it desires. Such procedures would largely be reserved for applications for information of more a 'one-off' or personal nature, or for information that is particularly sensitive.

The committee did not propose, at that time, that the strategy have a legislative basis. This was because the committee separately recommended the establishment of an 'FOI monitor' to monitor agencies' compliance with the freedom of infomation regime 'including the release of information outside the Act'. The committee envisaged that the FOI monitor would be responsible for developing and observing the operation of the administrative access schemes then, should legislative amendment be required, this could be recommended by the FOI monitor at a later date.

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53 EARC, *Report on Freedom of Information,* December 1990, [3.36].

54 LCARC, report no 32, 28, available at: www.parliament.qld.gov.au/LCARC.

However, the Government response to report no 32 did not support the establishment of an FOI monitor and the operation of administrative access schemes has not received the oversight anticipated by the committee. Nor have administrative access schemes become established practice as anticipated by the committee's recommendation.

The committee suggests that publication of government-held information should be established practice. Almost all information, 'the grist of government processes', should be available generally, without charge, without the need for a written application and without the need to resort to an application under the *Freedom of Information Act*. Accordingly, rather than wholly discretionary 'administrative access schemes' information should be made available via government policies regarding 'publication'. Delivery of information in this way should be evaluated and improved on a continual basis. Key measures in the evaluation should be whether all Queensland people have an equal right to access to information, irrespective of where they live in Queensland. The use of available technology will be an important element in meeting these measures.

With the focus on general publication of government-held information in this way, the *Freedom of Information Act* should have a far narrower field of operation. It should be the last resort for a person or organisation wanting access and a department making a decision about access.

The committee notes the use of publication schemes in the United Kingdom and the recommendation that the adoption of such schemes be considered in Victoria. In this context, the committee recommends (**recommendation 4**) legislative requirements be inserted in the *Freedom of Information Act* for:

- publication schemes, rather than administrative access schemes; and
- in accordance with those schemes, general publication without charge and via efficient means of delivery of almost all government-held information.

4.6 Agency co-ordination to provide information

The committee invited submissions about the ways in which agencies work together to provide co-ordinated and coherent information.

4.6.1 Relevant information and views considered by the committee

Caxton Legal Centre

As previously noted, some websites are very informative in terms of administrative/FOI processes while others are not. A uniform approach to the way in which government and statutory authorities share such information with the public should be adopted. While there is an increasing level of information available about government/authority decision making processes on the internet – we submit that the internet alone is not an acceptable way of disseminating information on administrative processes. Many of our clients cannot afford computers or internet access and a large proportion of our clients face problems accessing the internet because of illiteracy problems or intellectual disability. Many older clients are simply excluded from the process because they have never been trained in the use of the internet and computers. Information must be disseminated in a wider variety of ways, which take account of the special needs of disadvantaged members of the community.

The Law Society of New South Wales

The better coordination of the functions of agencies to uniform FOI Act procedures is essential. The process of coordination requires the gate keeper, the information Commissioner, to oversee the coordination and report to Parliaments on its progress and identify areas for immediate reform or direction to facilitate uniformity quickly.

Dr Richard Mochelle

Recommendation: a comprehensive, civic information system

Finally, it is recommended that the Commission consider the necessity – in this inquiry or a follow-up inquiry – of creating a comprehensive, civic information system for Queenslanders connecting Federal, State and Queensland Local Government levels that would include similarly formatted presentation of and search provisions for Quasi NGO's, NGOs and community group information.

Where public funding or support is given to any public, semi-public or private organisation, program and staff information should be included on the system – if for no other justification than the public's right to know what its money is contributing to.

All self-funded organisations and groups should be invited to come on board and have their services, projects and contributors publicly acknowledged, identifiable and connectable.

To ensure optimum functionality of the system, all contributors to it will need to comply with information updating and project reporting requirements.

To create a Comprehensive Civic Information System it is recommended that the Commission push for a follow up inquiry or even better, an expert Task Force to examine the technical and cost feasibilities and recommend an implementation plan.

4.6.2 Committee comments

The committee notes the concerns regarding a lack of coordinated delivery of government information stated in submissions received to the inquiry.

Recommendations made in this chapter (**recommendations 1 to 3**) are designed to recalibrate the culture of providing information about government and held by government. Effective implementation of these recommendations will require a whole of Government approach and, where relevant, cross-agency co-operation. Implementation of recommendation 3, for example, allows for like publication schemes to be adopted by different departments and agencies for like information. Further, the committee has suggested that the publication of government-held information should be evaluated and improved on a continual basis. Such evaluation, in order to effect improvement an 'ensure optimum functionality of the system' would necessarily include evaluation of the coordinated delivery of information by agencies.

4.7 Compliance with statutory requirements

In its discussion paper, the committee stated that administrative law mechanisms required the disclosure or publication of information in the following circumstances:

- under a statute, a duty may be imposed on decision-makers to provide reasons for certain of their decisions (see, for example, the *Gaming Machine Act 1991* (Qld));
- on request, a written statement of reasons in relation to an administrative decision - a general duty is imposed on certain administrative decision-makers to provide reasons for their decisions (Part 4 of the *Judicial Review Act* and, in particular, sections 32 and 33);
- a duty imposed by statute on government agencies to publish an up-to-date statement of affairs of the agency each year (Part 2 of the *Freedom of Information Act*);
- a statutory duty of government agencies to make available for inspection and purchase by members of the community copies of its most recent statement of affairs and each of its policy documents (Part 2 of the *Freedom of Information Act*);
- provision of access under the FOI Act to documents of an agency and official documents of a Minister, subject to certain classes of documents - duties on agencies and Ministers to assist a person making an application for access to documents under the FOI Act, and to deal with such an application (Part 3 of the *Freedom of Information Act* and, in particular, sections 21-22 and 25A–27);
- for the annotation or correction of personal records held by the government which relate to an applicant (Part 4 of the *Freedom of Information Act* and Information Standard 42); and
- a statutory duty to make 'public records' available for public inspection (*Public Records Act 2002*).

The committee invited views and information about compliance by agencies with these statutory requirements, such as the statement of affairs. Views and information received are set out below.

4.7.1 Relevant information and views considered by the committee

Natural Resources, Mines and Water

Existing mechanisms, such as FOI, Judicial Review, Annual Reports and Statements of /affairs provide a variety of mechanisms through which members of the public can obtain information about government responsibilities, decisions and actions. Furthermore, the continued growth in the use of new technologies such as the internet has significantly increased the availability of relevant information to the public. For example, information on FOI, Privacy, Judicial Review and the like are available on the NRMW website, while there is a wealth of information available elsewhere (such as internet sites for the Queensland Ombudsman and the Queensland Information Commissioner). While these efforts can always be improved, there has been significant headway made in this regard in the last five years.

Jeff Seeney MP, Leader of the Opposition

With respect to the accessibility of administrative justice, some general issues of concern to the Queensland Coalition are:

- the unworkable state of Queensland's *Freedom of Information* (FOI) laws. The findings of the Davies' Commission of Inquiry of a 'culture of concealment' within the Queensland Government appear to have made no practical difference to the application and administration of those laws. The *Freedom of Information Act 1992 (Qld)* is framed and applied in favour of government, meaning that applicants frequently suffer considerable expense and delay, only to be ultimately denied the information sought; and
- lack of consistency and meaning in the reporting of government information, particularly in the Budget Ministerial Portfolio Statements and the annual reports of government agencies.

Queensland Ombudsman

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.

Gold Coast City Council

It is considered that the general community now has numerous access points to information relating to the decisions and actions of local government.

It is considered that the requirements for publishing of the Statement of Affairs could be reviewed in light of the quantity of information already available to the community on websites and through other publications. (e.g. Annual Report, Corporate Plan)

The Law Society of New South Wales

The publication of statements of affairs by agencies is a useful and constructive process in the administration of agencies. They have the opportunity to market their levels of excellence and mechanisms of operation. The identification of goals and objectives assists staff identify a common purpose for the agency and to know how each part operates for the benefit of the whole agency. The statements could be enhanced by the making of assessments in clear terms of the performance of the agency in administering programs and expenditure against budget. Statements need to be more than a revamped version of the agency's annual report to Parliament. They need to be useful documents about management and administration of the agency and provide clear expressions of programs and their performance. This includes information that is readily available and information that would be subject to access procedures under the FOI Act. Internal administrative arrangements can be better explained and described for applicants seeking access to information.

Brisbane City Council

Under the *Freedom of Information Act 1992*, Council is required to publish a very detailed statement of affairs, which sufficiently answers the need for the public to have adequate and accessible information relevant to government decisions and actions. Additionally, most agencies are, like Council, eager to use websites (as well as more traditional means) to inform the public about activities, policies, and decisions.

Somewhat ironically, the protection of personal privacy has resulted in a need for Council to make FOI applications to other agencies, in order to obtain evidence to enable enforcement action to commence. There needs to be a mechanism to allow for more co-ordination between agencies, so as to ensure timely release of information.

4.7.2 Committee comments

Again, in respect of compliance by departments and agencies with statutory requirements for the disclosure or publication of information, the committee notes that recommendations (**recommendations 1 to 4**) in this chapter are designed to strengthen the existing culture of providing information about Government and held by Government.

4.8 Committee recommendations - availability of information

Recommendation 1: The *Judicial Review Act 1991* and *Freedom of Information Act 1992* should be amended to require a decision-maker's written advice of a decision or action to include notice of:

- the right to request a statement of reasons (where applicable); and
- any other rights to access administrative justice available in the circumstances.

Recommendation 2: The Public Service Commissioner should prepare guidelines to assist decision-makers to prepare statements of reasons. These guidelines should be available generally to all decision-makers who may be required, under the *Judicial Review Act 1991*, to provide a statement of reasons, including those decision-makers beyond the responsibility of the Public Service Commissioner.

Recommendation 3: The Attorney-General and Minister for Justice should ensure that information about administrative justice, including information about rights of access and procedural matters is accessible via a single, user-friendly telephone and on-line entry point. Although accessible via one entry point, the information service should be provided co-operatively and by way of a shared funding between existing organisations, such as Legal Aid Queensland, which currently provide information and advice about administrative justice.

Recommendation 4: The *Freedom of Information Act 1992* should be amended to require every agency to adopt and maintain a scheme which relates to the general publication of information by the agency and is approved by the Information Commissioner.

5 ACCESS FOR A DIVERSITY OF PEOPLE

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

5.1 Existing rights of access

5.1.1 Freedom of Information Act

Under the *Freedom of Information Act*, 'a person' can seek access to documents.[55] This right of access is 'to the world at large' and is not dependent on establishing any special need or interest. The *Freedom of Information Act* further provides that 'a person' who has had access to a document containing information regarding his or her personal affairs (even if access was other than via the *Freedom of Information Act*) is entitled to apply to amend that document if it is inaccurate, incomplete, out-of-date or misleading.[56]

EARC, in its report, noted that people under age 18 and people with disabilities should be entitled to exercise rights under freedom of information legislation. Submissions had been received on this issue from the Youth Advocacy Council Inc and the Queensland Advocacy Incorporated. EARC recommended that:[57]

> all applicants (including bodies corporate and unincorporate) should have the right to access government-held information, irrespective of age, legal status and place of residence or of incorporation.

It further recommended that applicants should not be required to state a motive for seeking access.[58]

In 2003-2004, the Information Commissioner Queensland's annual report stated that freedom of information external review applicants 'come from every part of society' and applications are made by:

- politicians;
- journalists;
- citizens groups;
- public servants;
- businesses;
- people who have made complaints to a government or regulatory body;
- people seeking access to their own or a relative's medical records;
- prisoners;
- people who seek documents for use in legal proceedings; and
- people seeking information about a government decision that has affected them.[59]

5.1.2 Judicial Review Act

Under the *Judicial Review Act*, 'a person aggrieved' by an administrative decision or action may seek relief. 'A person aggrieved' is itself defined, in effect, to mean a person whose interests are or would be adversely affected by the decision in question.[60] A person who is 'interested in' a decision under review may also apply to the court to be made a party to the application.[61] 'Interests' to which the *Judicial Review Act* refers include legal, proprietary

55 *Freedom of Information Act*, s 21.
56 *Freedom of Information Act*, s 53.
57 EARC, *Report on Freedom of Information, December 1990,* 18.
58 EARC, *Report on Freedom of Information, December 1990,* 151.
59 Information Commissioner, Annual Report 2003-2004, 8, see: www.oic.qld.gov.au.
60 *Freedom of Information Act*, ss 7, 20, 21, 22 and 44. See *North Queensland Conservation Council Inc v Executive Director, Queensland Parks & Wildlife Service* [2000] QSC 172 at paras 32 – 38.
61 *Judicial Review Act*, s 28.

and financial rights as well as intangible rights such as interest in personal reputation and business or commercial reputation.

This follows a recommendation by EARC for an expanded definition of 'person', including an unincorporated association, body or organisation.[62]

5.1.3 Key issues

In its discussion paper, the committee considered Supreme Court proceedings under the *Judicial Review Act* between 1995 and the end of October 2005. In these matters, applicants included public sector employees, primary producers, landholders, prisoners, environmental organisations, citizens' collectives and students.

During this inquiry, the committee invited submissions about whether a diversity of people could access administrative justice, including submissions about:

- people who may have difficulty accessing administrative justice
- factors which may affect access to administrative justice by those people (socio-economic disadvantage, cultural background, remoteness from mainstream legal services)
- persistent applications to courts
- persistent applications to agencies

The information and views submitted to the inquiry are set out below.

5.2 Access difficulties – groups of people

In its discussion paper, the committee invited discussion regarding factors which may affect particular groups of people accessing administrative justice.

5.2.1 Reforms in other jurisdictions

In 2004, during an inquiry into Legal Aid and Access to Justice, the Senate Legal and Constitutional Committee was provided with evidence suggesting that 'various groups are particularly restricted in gaining access to justice, due to such factors as socio-economic disadvantage, cultural background and remoteness from mainstream legal services'.[63]

Key groups identified as having difficulty accessing administrative justice include:

- women;
- Aboriginal peoples and Torres Strait Islanders;
- people living in regional, rural and remote areas;
- migrants and refugees;
- homeless people;
- people suffering from mental illness; and
- young people.

In its report, the Senate committee observed that a civilised society is obliged to provide its citizens with access to justice, but most particularly 'those who are already disadvantaged'.[64] Such an implied right to access justice is not recognised in law, however.[65]

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62 EARC, *Report on Freedom of Information, December 1990,* 80.

63 Legal and Constitutional References Committee*, Legal Aid and Access to Justice*, report, June 2004, at xvi, available at www.aph.gov.au/senate/committee/legcon_ctte.

64 Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, at xv.

65 *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44.

5.2.2 Relevant information and views considered by the committee

Bar Association of Queensland

The Committee has identified in its discussion paper classes of people who may have difficulty in securing access to administrative justice – women, Aboriginal and Torres Strait Islanders etc. the experience of members of the Association is that such classes of person do experience such difficulty. To those listed by the Committee the Association would add those for whom English is a second language. More generally though, Australians on average incomes find it difficult to access administrative justice. Some forms of civil litigation are not foreclosed to the average Australian because it is practicable to undertake them on a speculative basis, most notably in relation to personal injuries suits. That is infrequently the case in relation to public law litigation. Further, even where some forms of legal aid are available to the disadvantaged, e.g. to Aboriginal and Torres Strait Islanders, a lack of awareness either of basic civil rights or even of that availability of legal aid may inhibit access to administrative justice.

Access to administrative justice is enhanced not just by the provision of legal aid but also by civic education, starting at primary school.

Natural Resources, Mines and Water

NRMW has no evidence to indicate any specific groups are denied or constrained in their ability to access administrative justice. Indeed, the use that NRMW's client base (which is geographically dispersed and drawn from diverse socio-economic and cultural backgrounds) makes of those mechanisms is indicative of its accessibility.

Aboriginal peoples and Torres Strait Islanders

Department of Aboriginal and Torres Strait Islander Policy

Because of the continuing disadvantages experienced by many Aboriginal and Torres Strait Islander Queenslanders, barriers of cost and procedural complexity are important factors in limiting their participation in democratic processes, including their access to freedom of information and judicial review processes.

Caxton Legal Centre

Some of our clients from the Aboriginal and Torres Strait Islander (ATSI) community have become embroiled in complex disputes with government and without the aid of community legal centre representation they would have had little or no prospect of successfully resolving their claims. Cultural sensitivity training should be made mandatory across government to help minimize ongoing problems faced by ATSI clients when dealing with government departments and administrative law processes.

Commission for Children and Young People and Child Guardian

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.

Prisoners

Department of Corrective Services

There are a number of other avenues available within the correctional system that offenders might utilise if dissatisfied with outcomes or decision making processes. Every centre has at least two official visitors, one of whom is a practicing lawyer. Where offender populations include members from key groups one or more of the official visitors, where possible, identify with that key group, such as Aboriginal people or Torres Strait Islanders. Official visitors visit each centre regularly and any offender may utilise their services.

Offenders may also seek the assistance of the Ombudsman who has wide ranging powers to investigate activities within the Department. There are also a number of lawyer groups who provide services to offenders such as Prisoners' Legal Service, Legal Aid Queensland and various Aboriginal and Torres Strait Islander legal services.

Queensland Ombudsman

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 if Prisons also has a major role in ensuring that prisons are administered correctly. We have had several meetings with the Chief Inspector of Prisons to ensure we avoid unnecessary duplication of 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.

Caxton Legal Centre

We are aware that because of the obvious constraints placed on them prisoners find it extremely difficult to initiate and sustain administrative review processes. We are also aware that the Prisoner's Legal Service, nevertheless, has undertaken a significant amount of judicial review casework on behalf of the prison population. Indeed, Appendix B demonstrates that prison-related judicial review cases form a substantial proportion of judicial review cases.

Providing solicitors with instructions from prison is extremely difficult. As stated numerous times, such work is complex, time consuming and risk-laden in terms of costs orders. There is clearly a significant need for access to justice in this particular area of administrative law and proper funding for representation (particularly by the Prisoners' Legal Service) in this area of law is especially important if genuinely diverse access to administrative law processes is to be ensured.

Section 11E of the FOI Act provides that prisoners, convicted of certain serious offences, are not entitled to access information in relation to their risk assessment.

This section was introduced by amendment to the Act in 2005. The explanatory memorandum says (at 4 and 7):

This may raise issues regarding consistency with fundamental Legislation Principles in that these offenders are not entitled to receive personal information about themselves. However, it is considered that the public interest outweighs this right of offenders. The public interest being served is the security and good order in corrective services facilities and public safety, as a result of fully informed decisions being made. These decisions impact upon the safety of staff, offenders and the community with the management of offenders in corrective services facilities as well as the release of offenders into the community.

This limitation of access is to ensure that information can be freely provided, can be objective and can be given without fear of reprisal.

However, it is wondered why prisoners have to be singled out, when it would appear that the same outcome is achieved by application of s 42 (Matter relating to law enforcement or public safety).

Children and young people

Commission for Children and Young People and Child Guardian

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.

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 impact upon their

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

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

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.

The charter was released in 2002. It specifically provides that children and young people are to participate in government administrative decisions 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;
- ensuring that processes to challenge decisions are available and accessible for young people.

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

Older people

Caxton Legal Centre

In our experience, age, ethnicity and gender also impact on access to administrative law processes for a variety of reasons. We have observed through our extensive work with older people and with victims of family violence that older people and women in abusive family situations do not have the confidence required to initiate and sustain complex legal actions involving government departments or other relevant bodies. We understand from colleagues working with younger people that they sometimes face similar difficulties. Migrants from non-English speaking backgrounds do not have access to sufficient support from interpreters to deal extensively with government departments and the legal process, and many simply do not understand that administrative law remedies are available. Some clients would require a litigation guardian to be appointed before they could take such action and other clients would require the support of the Adult Guardian in order to institute proceedings. These are additional impediments faced by already disadvantaged clients wishing to freely enforce their rights.

People with a disability

Commission for Children and Young People and Child Guardian

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.

People with mental illness

Queensland Ombudsman

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.

Rural and Regional Queenslanders

Queensland Ombudsman

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.

People from culturally diverse backgounds

Queensland Ombudsman

We have:

- Developed a brochure in partnership with our 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.

5.2.3 Committee comments

Section 4 of the *Freedom of Information Act*, which sets out the objects of the Act and how they are to be achieved, provides that it is in the public interest for rights to access information held by Queensland government under the Act to be available to all people, generally. However, section 4 also acknowledges that public interests in access compete with public interests in the protection from disclosure of certain types of information.

Almost without exception, in the *Freedom of Information Act*, the public interests in the protection from disclosure of information held by the Queensland Government are stated and accommodated in the provisions regarding exempt matter.

However, the committee notes a number of submissions regarding section 11E of the *Freedom of Information Act*. This provision, located in the part of the Act regarding agencies excluded from the operation of the Act, excludes prisoners or their agents from using the Act to access documents regarding risk assessment documents. The committee suggests that this provision, inserted by amendment to the Act in 2005, does not sit well within part 1 division 4 of the Act.

The committee's recommendation (**recommendation 4**) affirms the principles set out in section 4. The accessibility of administrative justice is compromised if a particular group of people in the community are excluded from the general legislative right to access information held by Government.

The committee will write to:

- the Minister for Police and Corrective Services and the Attorney-General and Minister for Justice, noting the committee's recommendation and pointing out the inconsistency between section 11E and section 4 of the *Freedom of Information Act*; and
- the Chair of the Queensland Parliament's Scrutiny of Legislation Committee, noting the committee's recommendation.

5.3 Access difficulties - factors affecting access

In its report on *Judicial Review of Administrative Decisions and Actions*, EARC recommended a statutory obligation to provide written reasons for administrative decisions be included in judicial review legislation in Queensland. EARC had recommended further that the following practice be adopted as a matter of government policy:[66]

> If a government agency to whom a request for a statement of reasons is made, suspects that the first language of the person making the request may not be in English, the agency should have available, and should include with the statement of reasons, information in each of the major community languages about where translation services may be obtained.

In its discussion paper, the committee invited discussion regarding factors which may affect people accessing administrative justice.

66 EARC, *Report on Freedom of Information, December 1990*, at 122.

5.3.1 Reforms in other jurisdictions

The factors identified by the Senate Legal and Constitutional Committee's inquiry which restricted access to justice for particular groups in the community were 'such factors as socio-economic disadvantage, cultural background and remoteness from mainstream legal services'.[67]

5.3.2 Relevant information and views considered by the committee

The committee received the following submissions on factors affecting access to administrative justice.

Environmental Protection Agency

The issues surrounding access to administrative justice are the same as those that surround access to justice generally.

There has been a trend by Government to take steps to increase the ability of people that may have socio-economic or other disadvantage to access justice.

Sources of advice on issues of Administrative Justice should be written in plain English.

Gold Coast City Council

Council believes there is currently nothing preventing any member of the community gaining access to administrative justice through the *Freedom of Information Act*.

Council receives applications from a diverse range of the community…Not all applications are in fluent English, verbal or written, and every endeavour is made by all the FOI staff to assist these applicants to ensure they are not disadvantaged.

The Law Society of New South Wales

It is a common law right of all persons to access administrative justice. However, the cost of exercising this right limits the ability of individuals to use administrative justice. Avenues in the law to limit access to information under the FOI Act and to limit access to justice under the *Vexatious Proceedings Act 2005* (Qld) should contain the relatively small number of persons making access that is restricted. Most potential litigants would find it difficult to access administrative justice because of the costs involved. This could be due to reasons of the administration of justice, the type of matter for judicial review and the level of review required before settlement is achieved.

Alec Lucke

As a person from a group who has exhausted every avenue of administrative justice I have to say that conspiracy and political intervention flourishes. If you are in conflict with the Government and they may lose, they will legislate. …senior people within departments will tell you you cannot beat them, legal advice warns against trying. So called independent bodies like the Ombudsman – must be exactly that – fearless and passionate, but Cabinet appoints and calls the tune. The system of administrative justice in Queensland is hopelessly compromised. Gaining access is not helpful if the system fails you.

QAILS and QCOSS

In short, a diversity of people cannot access administrative justice. As outlined in section 1.3 of this submission, people with commercial interests are the ones who are accessing judicial review. Other members of the community are not doing so with any great regularity, even where the enforcement of fundamental human rights is dependent on that process.

Low income households experience difficulty generally accessing administrative justice.

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

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

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

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67 Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, at xvi.

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

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

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

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

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

Recommendations from earlier LCARC report

Findings 51 and 88: The Attorney-General's office should indicate whether or not it has consulted with the Adult Guardian and the Public Advocate in relation to the requirement for written applications for people with a disability, and the outcome of any consultation. Clearly FOI should comply with all relevant disability standards.

Brisbane City Council

The services provided by Legal Aid Queensland and by community legal centres are of great assistance to those who choose to access administrative justice.

Sadly, Council has had experience with persons who are mentally ill, who suffer from a personality disorder, or who have an ulterior motive or an improper purpose, abusing or attempting to abuse the system. Currently, checks and balances within the administrative and judicial systems themselves are generally insufficient to ameliorate that problem.

Office of the Information Commissioner

During the conduct of an external review, applicants can communicate with this Office via telephone, facsimile, email or post. Telephone calls to the Office from outside Brisbane metropolitan area can be made via the Smart Service Queensland number at the cost of a local call.

Most applicants for external review do not retain legal representation. In 2004-2005, approximately eight per cent of external review applicants had legal representation and many of these were companies or other organisations with a commercial interest in the outcome of the review.

Department of Industrial Relations

Recent public sector reforms have been designed to make bureaucracy more responsive to clients and citizens. Reform ahs also focused on new ways to communicate with those external to the public sector, to provide information to them and to deliver services to them. This has focused on government as instigator and the public as recipient. Reform is necessary to develop processes by which external stakeholders access government services – importantly administrative justice procedures.

Improved processes should not diminish the importance of preserving appropriate administrative law mechanisms. Appropriate time limits imposed by the *Freedom of Information Act 1992* and the *Judicial Review Act 1991* and processes promoting procedural fairness and natural justice in administrative decision making should be preserved.

Caxton Legal Centre (2006)

While it may appear that a bare requirement for an FOI application to "be in writing" facilitates a person's access to the FOI process, in our experience clients are often poorly equipped to draft their own FOI requests and most importantly, tend not to have the skill required to appropriately limit the nature of the request in order to make the process inexpensive and expeditious. We consider that where ever possible, information kits (including example forms) and forms which include example grounds should be made accessible within all government departments.

Last year we had cause to assist a client who sought assistance to obtain certain information under his freedom of information rights. After discussing his finances, it appeared clear that our client (a Centrelink beneficiary) had no savings to pay any FOI fees without experiencing genuine financial hardship. He was experiencing extremely poor health and was very stressed when he attended to seek legal advice about the matter. (After undertaking an internet search to ascertain what was required in relation to making an FOI application to the relevant body, we telephoned the relevant body on behalf of our client, only to be told emphatically by the telephonist that FOI was not available. After

we explained that her employer's website in fact specified that FOI was available, she made further enquiries and apologised for her error.) We assisted our client to draft up his written request for FOI and sought a fee waiver for him on the basis of financial hardship. (Because of the time delays involved in getting the material he required, our client then had to seek a 3-month adjournment of a hearing in the AAT.) What might otherwise have appeared to be a relatively straightforward FOI process, in fact, was not. We mention this case example simply to illustrate the obstacles – including the financial obstacles - faced by clients considering FOI action.

Within the last week we have advised another client who sought assistance in responding to an FOI application to the Department of Housing. Our client's sole source of income was a disability benefit and the nature of the dispute had greatly stressed our client. The client had received a very detailed letter from the Department outlining which documents would/would not be released. Our client appeared confused by the complexity of the content of the letter and needed help wording the request for a review. Our client appeared not to have a very clear understanding about FOI purposes and processes and we consider that, had the client obtained some clear guidance from the department at the outset, then the need for a review may have been eliminated. Again, this anecdote is included to demonstrate the fact that FOI processes are often quite inaccessible for disadvantaged self-represented persons.

Commission for Children and Young People and Child Guardian

An agency or department can deny access to a document if they consider that access is not in the best interests of the child or young person. 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.

Determining a child's capacity and what is in his or her best interests is a complex exercise. 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 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.

Caxton Legal Centre (2007)

In our experience, administrative processes associated with government and reviews of government decisions are complicated and elitist. Accordingly, we do not believe that a diversity of people actually obtain access to administrative justice.

As previously noted, our clients tend to experience high levels of disadvantage. Many of our clients are illiterate or have poor literacy skills and many have had very limited education. This means that they are not generally equipped to engage in complex interactions with government, which require strong reading and writing skills and good communication abilities. As already noted, the figures provided in the discussion paper reveal high levels of representation in judicial review cases by senior counsel. Our clients, even the most capable clients, typically would be overwhelmed when dealing with senior counsel, an additional obstacle to self-representation. People like those in our client group do not appear to be represented in the statistics profiling judicial review cases. (It should be noted that our clients typically are unable to afford even initial advice by solicitors let alone ongoing legal representation at the highest level.)

A lack of ability to read, write or articulately express oneself verbally about complex issues and a lack of finances to fund representation in such processes clearly impacts on the level of diversity of people who can actually access administrative law processes.

Improving the situation described above would require a huge injection of resources to ensure that individual government departments and associated authorities employ sufficient staff to deal with administrative enquiries from disadvantaged clients. If a requirement for initial consultation and or mediation with individuals querying government records or decisions were to be introduced, the affected departments etc. would need to be properly funded to ensure that the people employed to undertake such work have appropriate skills and training.

Geographic location can also be a real barrier to access to justice and people in rural areas find it particularly difficult to deal with such issues, partly because they may not have access to local solicitors and even if they do, their local general practitioners may not have the relevant expertise to act in administrative law matters.

The lack of meaningful levels of legal aid and lack of administrative law expertise amongst general legal practitioners exacerbates this problem.

Privative clauses

A factor affecting access to administrative justice mechanisms is the existence of a 'privative clause' in legislation. A privative clause is a parliamentary attempt to deny the courts a central function of their judicial role – it attempts to prevent courts pronouncing on the lawfulness of administrative action. In short, such clauses are intended to prevent use of the *Judicial Review Act*.

Privative clauses in Queensland legislation were addressed in a number of submissions received.

Legal Aid Queensland

An area of particular concern to Legal Aid Queensland has been the active steps taken by the government to deny prisoners access to administrative review of decisions affecting them. Prisoners are one of the groups in our community most vulnerable to government abuse of power. The new *Corrective Services Act 2006* has significantly curtailed the capacity of prisoners to gain information about administrative decisions that affect them and to engage in judicial review of those decisions.

The *Corrective Services Act 2006* abolished judicial review in relation to decisions concerning prisoner classification and transfer. In its Alert Digest that dealt with the Corrective Services Bill 2006, the Scrutiny of Legislation Committee queried:

…whether the absence, or limited nature of, avenues of review provided in relation to a range of significant administrative decisions affecting prisoners, and the general absence of express obligations to accord natural justice, are reasonable in the circumstances. (Alert Digest, Issue No. 4 of 2006 11-12)

Judicial Review provides a means of questioning the absolute authority of prison officials and the way they exercise this authority. It requires government officers to make reasonable decisions based on reasonable and relevant considerations and to adopt fair processes when making these decisions. To remove this accountability and external scrutiny of decision-making in the closed environment of a prison is dangerous, and invites abuses of power.

Queensland has seen the consequences of a closed, unaccountable prison system in the 1988 report of the Kennedy Inquiry into prisons in Queensland. It would be unfortunate if we failed to learn from these past institutional failures and allowed a culture and climate to develop in our prisons today that would permit a repetition of the abuses of power that were endemic in the past.

Caxton Legal Centre (2007)

We note also that prisoners' administrative law rights are to be further curtailed by the introduction of the Corrective Services Bill 2006. Clauses 17, 66, 68 and 71 remove the right of a prisoner to seek judicial review of security classification decisions and transfer decisions. In its place, the bill provides for an internal mechanism of merits review of such decisions and complaints may be raised with an official visitor for investigation.

The reasons behind this are stated in the Explanatory Memorandum as follows:

Arguably the removal of this avenue of review will adversely affect the rights and liberties of prisoners. However it is widely accepted that the rights and liberties normally enjoyed in the community must be significantly curtained in the prison environment… Any possible breaches must be balanced against the safety of the community and staff and the security and good order of corrective services facilities. In order to protect the safety of the community and properly implement the sentencing court's order of imprisonment, it is necessary for correctional authorities to be able to determine the type of accommodation and supervision that is necessary for each prisoner.

… It is not appropriate for prisoners to attempt to influence their placement within the correctional system and the level of supervision that they are subject to by challenging security classifications or transfer decisions.

5.3.3 Committee comments

In given circumstances, it is possible that removal of rights to access to courts may be justified by significant legislative objectives.

In relation to privative clauses, EARC had noted that:[68]

> There is no constitutional guarantee of the availability of judicial review of government action in Queensland, as there is in the Commonwealth Constitution. Parliament, as the supreme law-making body in our democratic system, should in theory have the ability to pass legislation excluding an area of Executive operations from judicial review by the Supreme Court, provided its intention is made perfectly clear. Yet there is a certain inconsistency in Parliament passing a law, with which the Executive is intended to comply, while at the same time enacting a privative clause to deny a citizen the opportunity to pursue a remedy through the court system in the event that the Executive fails to comply with the law.

The committee, by way of recommendation (**recommendation 6**) reaffirms this principle. The committee will write to:

- Ministers with portfolio responsibility for legislation containing privative clauses drawing recommendation 6 to their attention; and
- the Chair of the Queensland Parliament's Scrutiny of Legislation Committee, noting the committee's recommendation.

5.4 Persistent applicants to courts

The committee's discussion paper noted that some people make frequent and persistent use of administrative justice mechanisms in Queensland. This may be because they:

- have a genuine grievance which has not been resolved;
- do not understand whether administrative justice can provide the resolution they seek;
- have an ulterior motive of causing waste and inconvenience; and/or
- suffer from a mental illness or a personality disorder.

Responding to persistent applications may consume substantial court and agency resources. Persistent applications may also divert resources and affect the accessibility of administrative justice for others.

In relation to judicial review applications, the *Vexatious Proceedings Act 2005* (Qld) operates to limit the access to judicial review of a vexatious litigant. The *Vexatious Proceedings Act* replaced the *Vexatious Litigants Act 1981* (Qld) and enacted new provisions to prohibit or limit legal actions brought by vexatious litigants or persons acting to assist with vexatious litigants. The major reform from the previous legislation was to allow orders made, and legal actions brought in courts and tribunals outside Queensland, to be taken into consideration by the Supreme Court in determining whether an appropriate order should be made under the Act.

The *Vexatious Proceedings Act* was enacted followed consideration of a nationally consistent approach to legislation to deter and curtail the activities of vexatious litigants the forum of the Standing Committee of Attorneys-General. The Model Vexatious Proceedings Bill 2004 was developed by a working party. The Queensland legislation implemented the model bill.

The Explanatory Notes to the legislation describe a vexatious litigant in the following way:[69]

> A vexatious litigant is a person who demonstrates particular behaviours in the pursuance of legal actions through the courts. These behaviours include taking legal action without any reasonable grounds, a repetition of arguments which have already been rejected, disregard for the court's practices and rulings, and persistent attempts to abuse the court's processes. The consequences of pursing such actions include wastage of public resources and the harassment and annoyance of defendants in litigation that lacks a reasonable basis.

68 EARC, *Report on Freedom of Information, December 1990,* 65.

69 Vexatious Proceedings Bill 2005 (Qld), *Explanatory Notes*, 1.

5.4.1 Reforms in other jurisdictions

Prior to the tabling of this report, committee members discussed with the Law Reform Committee of the Parliament of Victoria an inquiry that committee had commenced into vexatious litigants. The terms of reference for the Victorian committee's inquiry were:

> for inquiry, consideration and report no later than 4 December 2008 on the effect of vexatious litigants on the justice system and the individuals and agencies who are victims of vexatious litigants — and, the Committee should:
>
> a) inquire into the effectiveness of current legislative provisions in dealing with vexatious litigants;
>
> b) make recommendations which better enable the courts to more efficiently and effectively perform their role while preserving the community's general right of access to the Victorian courts.

The inquiry by the Victorian committee followed the defeat, in the Victorian Parliament's Legislative Council of a bill enacting recommendations of the Victorian Law Reform Commission. The VLRC proposed to broaden the standing requirement in Victoria that 'vexatious litigant' orders be made on application by the Attorney-General only to include applications by the Victorian Government Solicitor, the Prothonotary of the Supreme Court and the Principal Registrar of the County Court. Further, with the court's leave, standing was to extend also to a person against whom another person had instituted or conducted vexatious proceedings, or to a person with a 'sufficient interest' in the matter.

5.4.2 Relevant information and views considered by the committee

Queensland Council for Civil Liberties

Firstly we address the question of vexatious applications. In our view, vexatious applications for Judicial Review are adequately dealt with by costs orders and by the *Vexatious Litigants Act*.

Provision is made in respect of querulous litigants before the Supreme Court through:

- Section 48(1) of the JR Act, which empowers the court to stay or dismiss an application if it considers that it would be inappropriate for the claim to proceed, there is no reasonable basis for the claim, the claim is frivolous or vexatious or the claim is an abuse of the process of the court;
- Section 49(1)(d) of the JR Act, which enables any party to apply to the court at any stage of the proceedings for an order that another party indemnify the applicant in relation to costs incurred in the review application on a party and party basis;
- The ability for a respondent party to apply for security for costs under general law;
- The newly *enacted Vexatious Proceedings Act 2005* (Qld) which enables people with sufficient interest to apply for orders to stay proceedings, prohibiting a person from instituting proceedings or proceedings of a particular type or other order the court considers appropriate.

The real question is whether this group, who may have genuine grievances or may be suffering from mental illness, is getting due access to administrative justice.

Of course, there may be litigants who do not want to be and cannot be helped. The legislative provisions outlined above exist for just such cases.

5.4.3 Committee comments

The committee notes the range of measures, identified in the submission from the Queensland Council for Civil Liberties, available to assist persistent applicants to courts and to allow courts to manage the demands of persistent applicants. The committee observes also that the range of recommendations made in this report, including for a user-friendly centralised information service and early neutral evaluation in judicial review proceedings and regarding costs orders in judicial review proceedings should ensure effective and timely information, assistance and relevant orders are given to all applicants for judicial review and, at the same time, that wastage of public resources and the harassment and annoyance of defendants in litigation are minimised.

5.5 Persistent applicants to agencies

The committee's discussion paper invited submissions regarding persistent applicants to agencies.

5.5.1 Reforms in other jurisdictions

A central feature of the unreasonable complainant conduct project of Australian Parliamentary Ombudsman offices is to shift the focus away from a difficult person to the person's conduct. The joint project has produced an *Unreasonable complainant conduct: interim practice manual*.[70]

The project has identified a number of trigger behaviours and organised these into five broad conduct categories, with the defining characteristic being that the conduct is unreasonable. The five categories are:

- unreasonable persistence;
- unreasonable demands;
- unreasonable lack of cooperation;
- unreasonable arguments; and
- unreasonable behaviour (anger, aggression, threats).

This allows the formulation of a number of specific strategies to enable Ombudsman staff to better manage, in each case, the response to a complainant whose conduct becomes unreasonable. In this context, the website of the Office of the New South Wales Ombudsman states:[71]

> It must be emphasised that the mere fact that a complainant is persistent, makes demands, or may be angry does not mean that their conduct is unreasonable in most circumstances. Unreasonableness requires the conduct to go beyond the norm of situational stress that many complainants experience and can be identified using objective measures. It is our experience that only a very small percentage of complainants display such unreasonable conduct, nevertheless, dealing with them consumes a disproportionate amount of resources.

In relation to applicants who suffer from a mental illness or a personality disorder, the committee notes the wider usefulness in public sector agencies of a publication from SANE Australia, *A Guide to Mental Illness for Electorate Offices*. The Guide was developed in consultation with staffers in Federal electorate officers to help those staffers 'to help others by providing tips on good communication, information about mental illness and treatment, details of what services are available, and what to do in a crisis'.[72]

5.5.2 Relevant information and views considered by the committee

Natural Resources, Mines and Water

However, mechanisms that effectively limit those who pursue repeated, vexatious, and unmeritorious applications would be welcomed. While only small number of clients pursue such actions, those who do can have a disproportionate impact on agency activities.

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.

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70 A joint project of the Australian Parliamentary Ombudsman, *Unreasonable complainant conduct: interim practice manual*, August 2007.

71 See: www.ombo.nsw.gov.au.

72 SANE Australia, *A Guide to Mental Illness for Electorate Offices*, produced for the Janssen-Cilag Rethink initiative, 2005.

Ombudsman

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 impact by liaising with other complainants entities by asking complainants to explain what they have done about their complaint before we consider taking it up.

QAILS and QCOSS

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

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

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

Whole of Government submission

The issue of frequent and persistent users of administrative justice mechanisms has been raised from time to time. Paragraph 9.2 of the Discussion Paper refers to the new s. 29B of the Act which allows an agency, in a limited number of circumstances, to refuse to deal with an application for the same documents which have been previously requested. This new provision is framed to stem abuse by a small number of people of the rights conferred by the Act which has the potential to divert resources away from other FOI applications and more generally from other government priorities.

Historically, the Information Commissioner had the power to refuse to deal with all or part of an application if the commissioner was satisfied that the application was frivolous, vexatious, misconceived or lacking substance. This remains the position, however, in addition, a new provision6 provides that the Information Commissioner may also, on her own motion or on application by one or more agencies, declare that a person is a vexatious applicant.

Queensland Council for Civil Liberties

In relation to the *Freedom of Information Act* we believe the changes implemented by the 1995 Amendments of the *Freedom of Information Act* are sufficient to deal with frivolous or vexatious applications.

Sections 29 (Refusal to deal with application—agency's or Minister's functions), 29B (Refusal to deal with application—previous application for same documents) and 96A (Vexatious applicants) of the FOI Act would appear to adequately deal with the problem outlined in the discussion paper in relation to persistent FOI applicants.

Dr Richard Mochelle

The prospect of rendering the public service transparent as recommended here may raise concerns that public officers will be subjected to time wasting communication from unreasonable, mischievous, and ignorant citizens. The public service will always have to deal with difficult people and protocols will always be needed to manage their concerns effectively and respectfully.

Consider that information opacity itself generates a flow of distracting communication that a transparent system would reduce. Furthermore, nuisance inquiries may be passed up and down chains of responsibility wasting the time of numbers of staff, whereas an open system will allow citizens to gain hawk-eye overviews and target 'the right person' in the first place so as to allow inquiries to be handled more efficiently

Whether information open or closed systems generate greater volumes of distracting communication is possibly a moot issue that warrants experimental research.

Gold Coast City Council

It should be noted that Council has a number of persistent applicants who are very well aware of their rights pursuant to the FOI Act… While Council acknowledges that the FOI Act has been amended to include the right to refuse applications for documents that have already been addressed, these applicants are sufficiently skilled in the workings of the FOI Act to reword their application to include just one document that was not previously addressed.

Caxton Legal Centre

We appreciate that there are certain vexatious and unstable individuals who may be prone to misusing FOI processes, thus placing a burden on public service resources and staff. However, it is critically important that a system which is designed to benefit the whole of our community is not derailed by a fees regime covertly designed to limit vexatious FOI applications. Ultimately, FOI was never intended to be a self-funded 'utility' and the cost of operating an efficient and effective FOI system is simply one of the costs which the government should bear on behalf of the whole community. We have previously recommended that there should be early and active engagement between departments and individuals regarding FOI processes, and we submit that time invested at the early stage of enquiries and applications could assist to minimise the conflicts which might otherwise spiral into 'vexatious' applications.

5.5.3 Committee comments

As in relation to persistent applicants to courts, in relation to persistent applicants to agencies, the committee observes that the range of recommendations made in this report should ensure effective and timely information and assistance. In addition, the committee notes the availability of resources to assist agencies to respond appropriately to people whose complaints or communications with an agency impose unreasonable demands or stress. These include, but are not limited to the unreasonable complainant conduct project of Australian Parliamentary Ombudsmen, resources available from organisations such as SANE Australia and workplace training regarding complaint management, such as the training delivered by the Queensland Ombudsman.

The committee notes that, to date, improvements in the capacity of agencies to provide assistance to persistent applicants have taken place without significant imperical research.

5.6 Committee recommendations – access for a diversity of people

Recommendation 5: Consistent with section 4 of the *Freedom of Information Act 1992*, rights to access information held by Queensland government should be available to all people, generally, with exemption provisions balancing competing public interests between access and the protection of certain types of information.

Recommendation 6: Restrictions on the scope of judicial review should be contained in the *Judicial Review Act 1991*, not in other individual Acts in the form of privative clauses.

6 COSTS OF ACCESS – *FREEDOM OF INFORMATION ACT*

Key issue: What is the effect, if any, of the fees and charges regime under the *Freedom of Information Act* on access to information and the amendment of documents? Is amendment of the *Freedom of Information Act* and/or administrative reform necessary?

6.1 Fees and charges regimes since 1992

The current freedom of information costs regime is the third since 1992. The costs regime is established in regulations made under the *Freedom of Information Act*. The regulations are made by Governor-in-Council.

First, the charges for freedom of information recommended by EARC and endorsed by PCEAR operated for nearly a decade. EARC's recommendations are set out below.

> The Commission recommends that:
>
> (a) the charging regime for FOI legislation should comprise:
>
> (i) no application fee, irrespective of the character of information sought;
>
> (ii) no charges of any kind in respect of documents containing information which relates to the personal affairs of the applicant;
>
> (iii) for documents containing information which does not relate to the personal affairs of the applicant, a sliding scale of photocopying charges. The first 50 pages to be supplied free of charge, the next 150 pages to be supplied at a charge of $1.00 per page, and thereafter, a charge of $2.00 per page should be levied;
>
> (iv) in respect of information that is not available in discrete form in documents of the agency and the agency could produce a written document by the use of computerised, sound, or other equipment, it should be at the discretion of the relevant agency to levy a 'reasonable' charge, having regard to the actual cost incurred by the agency in producing the written document and the public interest in accessing government information;
>
> (v) in respect of information provided in a non-documentary form, it should be at the discretion of the relevant agency to levy a 'reasonable' charge, having regard to the actual cost incurred by the agency in supplying the information and the public interest in accessing government information;
>
> (vi) FOI legislation should not place a cap on the charges which may be levied;
>
> (b) FOI legislation should not provide for the waiver or reduction of charges;
>
> (c) FOI legislation should not:
>
> (i) levy a charge for the making of an application for internal review;
>
> (ii) levy a charge for the making of an application for external review;
>
> (d) FOI legislation should contain a provision which allows government agencies to refuse to deal with a request which would substantially and unreasonably divert the resources of government agencies;
>
> (e) review of such a refusal should be by way of internal review and then to the Information Commissioner; and
>
> (f) FOI legislation should not contain a provision which allows government agencies to refuse to deal with a request which is intended to engage them for an ulterior purpose.

A second fees and charges regime was established by the *Freedom of Information Amendment Act 2001* which commenced on 23 November 2001. Applicants seeking access to documents concerning their personal affairs were not liable to an application fee or to charges for accessing such documents.

For access to documents not concerning an applicant's personal affairs, the application fee increased slightly (to $34.40) and, for the first time, charges were introduced for the time agencies spent processing such applications and supervising the inspection of relevant documents. These 'time spent' charges were incurred when the time an agency spent processing non-personal affairs applications and providing access to relevant documents exceeded

two hours. If the total time exceeded two hours, all the time (including the first two hours) was included. The charges consisted of $5.10 per quarter hour spent searching for or retrieving documents, deciding an application and providing supervised access to the documents. Other charges included:

- 20 cents for each black and white A4 photocopied page; and
- an amount not more than the actual cost an agency incurred in providing access in another form.

For the application fee to apply, an applicant needed only to seek access to one document which did not concern his or her personal affairs.[73] Charges could be waived where an applicant was in financial hardship (held a concession card, or was a non-profit organisation in financial hardship).

The *Freedom of Information Act* was amended in 2005 in a number of respects affecting the way that fees and charges were administered by departments and agencies. The amendments did not affect the amount charged, however. The amendments were described in the submission received from the Attorney-General and Minister for Justice:

> **Whole of Government submission**
>
> In 2005, there were a number of amendments to the Act affecting fees and charges. Consistent with the 2001 amendments, there was no change to the principle that information relating to an applicant's personal affairs is available under the Act for no cost.
>
> The 2005 amendments standardised procedures applying to fees and charges and encouraged applicants to carefully consider the particular terms of their request. Applicants are routinely advised that they may tailor their applications so as to reduce potential charges. Other 2005 amendments related to assistance to applicants, waiver of charges, transferred applications, vexatious applicants and misplaced documents.

Third, the Freedom of Information Regulation 2006 that came into force, on 27 November 2006 established the current costs regime. It requires payment of:

- an application fee of $36.00 for access to a document that does not concern the applicant's personal affairs (this fee applies if the applicant needs only to access one document that does not concern their personal affairs);
- 20 cents per page for black and white photocopies;
- a processing charge of $5.40 per 15 minutes (or part thereof) spent searching for or retrieving a document –
  - this applies if the time spent searching or retrieving a document exceeds 2 hours, if so, all the time is charged, including the first two hours; and
  - this charge will not be imposed for time spent searching if the document is not found in the place where it ought to be located, or the filing system does not indicate where it should be found;
- a charge of $5.40 per 15 minutes (or part thereof) for time of an officer spent supervising the inspection of a document;
- charges for other forms of access at an amount that reflects the actual cost of access; and
- a deposit of 25%, if payable under section 35B(6) of the Act.

Waiver is available still upon demonstration of financial hardship, as in the previous regime.

6.1.1 Key issues

The committee's discussion paper contained available statistics from freedom of information annual reports, and a table comparing access costs regimes in other Australian jurisdictions.

In the context of the effect, if any of the costs of freedom of information on the accessibility of administrative justice, the committee suggested that factors for consideration included:

- processing charges (impact of introduction, amount, whether applicants are encouraged to specify information they require, appropriateness of two-hour threshold, effect on timely release of information);
- assistance provided by agencies to applicants (consultation with applicants to reduce charges);

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73 *Re Stewart and Department of Transport* (1993) 1 QAR 227 at 268-269.

- agency filing systems (effect of processing charges, safeguard on access charges regarding documents lost or misplaced);
- access charges (possible capping, internal reviews of decisions on charges, accuracy of preliminary assessments);
- quantum of access charges for different classes of information/applicants (e.g. commercial information, public interest applicants);
- deposits (possible refunds, consistency in requirement for payment of deposit);
- reduction or waiver of charges (circumstances in which available, application process);
- review of decisions regarding FOI fees and charges;
- the reporting requirements contained in section 108;
- benefits/deficiencies of current regime; and
- fairness/efficiency of current regime.

6.1.2 Conference discussion

One discussion topic considered by participants in the committee's conference was: The freedom of information fees and charges regime:

- How well is it operating?
- Who should bear the costs?

The information and views provided to the committee in respect of each of these factors are set out below. One committee recommendation, together with relevant committee comments, is set out at the end of the chapter.

6.2 Reforms in other jurisdictions

The *Freedom of Information Act 2000* (UK) came into force on 1 January 2005.

The United Kingdom's *Freedom of Information Act 2000* exempts public authorities from complying with a request for information if the estimated cost of doing so would exceed an appropriate limit prescribed by regulation.[74] The appropriate limit is currently £600 for central government authorities and parliament and £450 for any other public authority including local authorities, police, the health service and education.[75] When estimating the cost of disclosing information, a public authority may only take account of the costs it reasonably expects to incur determining whether it holds the information, locating the information, retrieving the information and extracting the information. Staff time is estimated at a rate of £25 per person per hour regardless of the actual cost. Public authorities may disclose information that exceeds the appropriate limit and may charge fees for such disclosure.[76] The maximum fee in these cases is a sum equivalent to the costs the authority was entitled to take into account in calculating whether the appropriate limit was exceeded plus the costs of informing the requester whether the information is held and communicating the information to the requester.

The only fee a public authority may impose for requests that do not exceed the appropriate limit is a sum equivalent to the total costs the authority reasonably expects to incur in informing the requester whether it holds the information and communicating the information to the requester. This can include costs of reproducing the document and postage but may not include costs associated with staff time spent locating, retrieving or extracting the information. Thus, 'the fees that can be charged are much more restricted than when the appropriate limit is exceeded, with the public authority bearing the majority of the costs of the request.'[77]

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74 *Freedom of Information Act 2000* (UK) s. 12.

75 *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (UK) regs. 3 – 7, see: www.opsi.gov.uk/si/si2004/20043244.htm.

76 *Freedom of Information Act 2000* (UK) s. 13.

77 United Kingdom, Department of Constitutional Affairs, *Guidance on the application of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* at 3.1.

According to the guidelines produced by the United Kingdom Government's Department of Constitutional Affairs:

> Authorities can develop their own policies on charging fees below the maximum, with the discretion to charge a lower fee or waive fees altogether. This would need to be properly thought through on the principles of good policy-making. It is recommended that authorities should publish their policies on charging as an aid to applicants, and ensure that all staff are aware of the policy and know how to apply it consistently. Authorities cannot develop fees policies that would lead to them charging more than the maximum allowed for in the fees.
>
> Authorities can charge for the actual costs incurred [in reproducing and communicating the document], but charges are expected to be reasonable. For example, in most cases, photocopying and printing would be expected to cost no more than 10 pence per sheet of paper.

The UK Government had committed to review the fee regime after the first 12 to 18 months of operation of the Act. In 2006, Frontier Economics was engaged to carry out an independent review of the operation of the Act. Four key objectives were to:

- assess the cost of processing FOI requests across the public sector;
- include an assessment of the pressure points in respect of the different activities that need to be undertaken in processing a request and the different levels of engagement required (eg senior management involvement);
- model a system for assessing the impact of processing FOI requests in the wider public sector (ie in local government, police etc); and
- analyse how different options for amending the FOI fee regime would impact on the costs of operating FOI across the different parts of the public sector.

The Frontier Economics review 'found that a small percentage of requests and requesters were placing disproportionately large resource burdens on public authorities.'[78]

In response the Government announced that it was considering:

- including reading time, consideration time and consultation time in the calculation of the appropriate limit above which requests could be refused on cost grounds; and
- aggregating requests made by a person or persons apparently acting in concert, to each public authority for the purpose of calculating the limit.

The Government consulted on these proposals during 2006 and 2007 issuing a draft regulation, explanatory note, partial regulatory impact assessment as well as a document summarising responses to the consultation.[79]

The House of Commons Constitutional Affairs Committee, which had published a report on freedom of information in June 2006, expressed concern 'that the Government was planning to introduce a new FOI charging regime, despite the evidence from [the committee's] inquiry that such a change was unnecessary and potentially damaging.' The Committee examined the Government's arguments and concluded that there was insufficient evidence to justify change.[80]

The Government responded to the Committee's recommendations by announcing that it had 'decided to make no changes to the existing fees regulations, but to deliver a package of measures to make better use of the existing provisions to improve the way FOI works.' It also indicated that the majority of respondents had opposed the proposals during the consultation process. [81]

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78 United Kingdom, Department for Constitutional Affairs, *Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007*, Consultation Paper 28/06, 14 December 2006 at 3. See: www.justice.gov.uk/publications/cp2806.htm.

79 See: www.justice.gov.uk/publications/cp2806.htm.

80 United Kingdom, House of Commons, Constitutional Affairs Committee, *Freedom of Information: Government's proposals for reform*, 2007, HC 415 at 3. See: http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/415/415.pdf.

81 United Kingdom, *Government response to the Constitutional Affairs Select Committee Report: Freedom of Information: Government's proposals for reform*, October 2007, at 4. See: www.justice.gov.uk/publications/response-to-casc.htm.

6.3 Application fee

6.3.1 Relevant information and views considered by the committee

Whole of Government submission

Introduction of processing charges for FOI - 2001

[A] feature of the 2001 amendments was the requirement to provide written notice to applicants of the estimated charges for which they would be liable. This process provided applicants with the opportunity to consult with the agency to discuss how their application might be amended to reduce the charges. The amendment was consistent with recommendations made in the LCARC Report on *Freedom of Information in Queensland* (Report No. 32, December 2001) and restated in the Discussion Paper, that there should be 'a flexible and consultative approach to processing FOI applications….to allow better focussed applications, reduce processing time and cost, and, at the same time, improve outcomes for applicants.'

No upfront payment of charges for FOI applications

Application fees for non-personal applications are payable at the time an application is made but in general, processing charges are not required until access to the information is provided to applicants. The Act does allow agencies to require a deposit if it is 'considered appropriate'. If a deposit is required, it must be 25% of the estimated charge.

Caxton Legal Centre

In our experience, even a $34.40 application fee can be a significant deterrent to our clients taking steps to exercise their freedom of information rights in appropriate circumstances. Larger deposits are simply prohibitive for such clients and, of course, the additional fees charged for long searches are a real disincentive to many clients to begin the FOI process – particularly for our clients who generally have no capacity to make such payments.

Where costs are to be incurred, it is critical that any preliminary assessments of costs made are accurate so that assessments are not used (either deliberately or unintentionally) to discourage worthy FOI applications. It is important that a review process to consider any costs charged remains possible.

The discussion paper notes that despite the steady increase in the number of applications for FOI access, there has been "no significant effect on applications for access or amendment caused by the current fees and charges regime". What is not clear from the tabled statistics is whether or not the demographic of applicants includes a broad cross-section of the community and indeed, the discussion paper goes on to acknowledge that no data is currently collected to show "the number of applicants who, once receiving a preliminary assessment of charges, do not pursue their applications." In order to accurately assess the true impact of fees and charges on individual use of FOI processes, such data should be collected and we support any amendment of the FOI Act that would facilitate the capturing of such data.

QPILCH

For non-personal information, there is an application fee of $35.25, followed by a processing fee of $5.20 per 15 minutes, but only if processing exceeds 2 hours. Prior to processing, the agency must provide a preliminary assessment notice advising of expected charges and may request payment of a 25% deposit. The applicant has an opportunity to refine their request to reduce charges. The final processing charges incurred cannot exceed the preliminary assessment. Copies of documents are 20c each. There is no fee for internal or external review.

Although the charges apply to non-personal information only, information falling within this category may still be relevant to individual rights. For example, a policy document not publicly available but which was used by the agency in determining their decision in respect of an individual will incur a fee. It is therefore important that fees do not unduly hinder access.

According to the 2003-04 FOI Annual Report, at the state and local level:

- There were 12,288 access applications (out of which 7,050 or 57.4% were applications for non-personal information
- The number of applications had increased by 9.6% from the previous year
- The largest identifiable type of application was to the police at 21.4%
- There were no instances of disciplinary action arising from the administration of the Act
- Number of documents considered were 1,280,439. Of these, access was given in full to 1,070,923 (83.6%), in part to 91,559 (7.2%) and refused to 117,957 (9.2%).

- Fees and charges to the sum of $379,586.30 was received, or approximately $53.84 per non-personal access application. Overall, this means the government recouped about 30c for each document it reviewed (both personal
  and non-personal).
- There were 352 decisions given for internal review
- There were 287 applications for external review.

The Law Society of New South Wales

The free access to personal information would not necessarily constitute the majority of applications made under the FOI Act. Nonetheless this approach should continue to ensure that accurate information is held by government agencies on individuals. Other legislation dealing with crime or counter terrorism would operate in some circumstances involving agencies holding personal information that cannot be accessed.

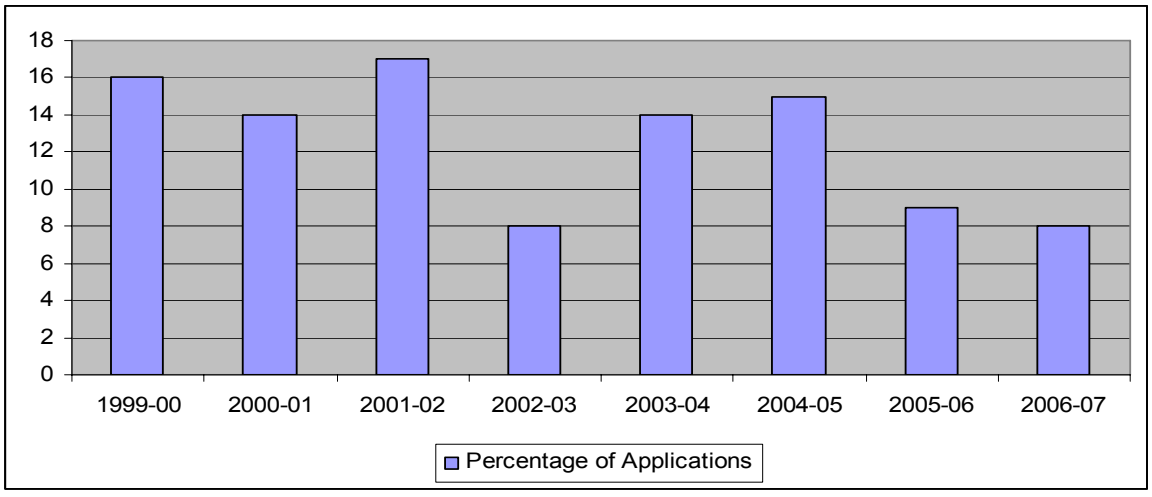
Robin Gilliver

At present no charge is made for applicants seeking information on personal affairs. Such applications may be just as costly as any other type. The committee may wish to consider whether it should recommend a form of charging for the processing of applications dealing with personal affairs.

The Act allows for the Commissioner to declare a person a vexatious applicant. Falling short of this, some agencies have to deal with constant personal affairs applications that, while not necessarily vexatious, are time consuming and expensive. Perhaps an initial application may continue to be cost free, and after that costs are levied unless the agency chooses to waive them or the applicant successfully appeals to the Commissioner.

6.4 Different access and processing charges for different classes of information or applicants

The discussion paper reviewed the number of public interest applications, by journalists, lobby/community groups and politicians. The table below shows the number of applications deemed to be public interest applications within the last eight reporting years.



6.4.1 Relevant information and views considered by the committee

National Parks Association of Queensland

NPAQ recommends fee waivers for bona-fide non-profit, public interest, non-government organisations (NGOs). A process should be permitted whereby NGOs can apply to the Information Commissioner to be classified as a non-profit or charity acting in the public interest. Once classification is approved, all fees for FOIA requests would be waived including application fees. Public interest non-profit NGOs are the backbone of a democracy and the major vehicle through which citizens can act to seek redress for poor or unlawful government decisions. The US law of the same name has just such a provision and it is very successful in delivering greater access to justice. Concerns about "frivolous" or excessive FOIA applications have been shown to be unwarranted.

Fees and manpower to fill FOIA requests would largely be obviated if government enshrined in legislation a program with deadlines for web- publishing ALL non-exempt documents leading to a decision when a decision has been reached. There is no restriction imposed by technology in this respect. Fast electronic scanners and software for complex electronic filing of large volumes of documents are all available. To the extent that information is posted online, FOIA requests for searches and making hardcopies, and appeals for review of FOIA decisions would become largely unnecessary.

Caxton Legal Centre

Incorporated community-based-non-profit organisations face similar difficulties when making FOI applications. Should the government decide to introduce different classes of fees for different classes of applicants, we consider that the public interest organisations and community-based-non-profit organisations (such as community legal centres) should be entitled to obtain fee waivers or pay the minimum fees determined.

Simon Baltais

It is unfortunate that information now costs, at times beyond the means of those who are most capable of maintaining democracy, the community group. Economic rationalism or be it cost recovery has impeded the ability of the community groups to scrutinize controversial matters, thus unable to discuss the same and ultimately uphold democracy in some instances.

The author noted with a number of FOI applications involving contentious public interest issues that they were subject to surprising FOI costs if pursued. These costs represented a considerable percentage of those organizations (applicant) revenue stream and yet these organizations were not considered to be exempt from FOI costs as enunciated under the financial hardship clauses of the FOI Act. To accommodate these costs the community group would have to divert funds away from community projects and free public services. The result of these significant costs was the applicant withdrew the FOI applications.

The author recommends that community organizations with a genuine interest in public interest issues be exempt from FOI costs, with the exception of perhaps the initial application fee. Conditions could be set on the number of documents provided freely and or upon the number of FOI applications that can be made per year without incurring costs.

Logan City Council

Currently the FOI Act exempts concession card holders from processing charges for non-personal application.

This needs to be considered as:

- Census information indicates that we have an ageing population and with this increase comes a greater percentage of the population being eligible for this discount.
- It can be open to abuse by having a concession card holder lodge the application on behalf of another person who would normally be required to pay the processing charges.
- There is no incentive for the concession cardholder to limit the scope of their application, once they pay their application fee there are no additional charges. This can lead to misuse of public resources.

Gold Coast City Council

Current experience has shown that the processing and photocopy charges are not a deterrent for many law firms who consider that $20.80 per hour for a Council officer to photocopy documents, and the 20 cents per A4 page, is cheaper than their attendance to inspect the documents and frees up their officers to perform other duties. Also, it is not easy to resource the copying of documents and to continue to provide FOI services to other applicants within the stipulated time frames.

In addition, a concern that exists, in respect to the waiver of the processing charges on the grounds of financial hardship, is that such provisions are open to abuse. An example of possible abuse would be where organisations are using members who are eligible for waiver of charges on the grounds of financial hardship (e.g. pensioner concessions) to make the FOI application thereby avoiding payment of any associated charges.

In some instances the applications lodged by these organisations are all encompassing and extremely time consuming (although not sufficiently so to be eligible for refusal) and staff find it extremely frustrating that this loophole has not been addressed.

Department of Corrective Services

Almost all applications in the last three years for the release of information under the *Freedom of Information Act 1992* were from offenders seeking information that was considered related to their personal affairs. Consequently that information was made available without cost to the applicant. Hence the financial burden of compliance rests with this Department. Therefore a fees restructure unless involving the introduction of a fee for access to material containing personal affairs, would not impact on the vast majority of applicants applying to this Department for access to information.

Department of Industrial Relations

This particular agency has a high volume of FOI applications, predominately due to the inherent nature of our business in Workplace Health and Safety Queensland and their regulatory functions.

Over the past few years we have noticed an increase in the utilisation of the FOI legislation from bodies such as Loss Adjustors, Insurance Companies and Personal Injury Specialists whose primary business revolves around the collection of facts relating to their client. Due to the lower cost in obtaining this information under FOI legislation, these bodies are obtaining a wealth of information that has been gathered during the course of an investigation. One of our primary reasons for collecting the information in these cases is to identify any breaches which may result in the prosecution of an employer. We are finding this information, when released, is being for alternative commercial purposes. Although the current FOI legislation cannot prevent these forms of applicants, this department holds the view that the fees and charges should be commensurate with the actual costs incurred.

- Other legislative fee structures, more specifically the Uniform Civil Procedure Rules 1999 (UCPR) Scale of Costs and Fees, have a range of $15.00 to $58.00 per 15 minutes of processing time. In comparison to the FOI scale of $5.20 per 15 minutes, this represents a difference of between 288% and 1115%;
- The FOI processing charge represents only 74% of the actual costs of our base grade Administrative Officer (AO3) within this departments Administrative Law Unit;
- The FOI processing charge represents only 54% of the actual costs of our base grade Decision Maker (AO5) within this departments Administrative Law Unit.

It should be noted this comparison has been based on non personal applications where there are third party interests involved. It does not take into account consideration of the costs involved in providing information to personal applicants (or their agents).

QAILS and QCOSS

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

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

For individuals and families on low incomes including pensions and benefits, resources are often completely consumed by basic costs such as food, housing and utilities. It is unlikely that a household on a very low income could generate the resources needed to make an application. For example, the costs of FOI cited above are greater than the fortnightly rate of youth allowance for some young people. We also note that these costs are more than half the basic rates of Newstart Allowance, Parenting Payment, Age Pension, Disability Support Pension, Carer Payment and others.

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

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

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

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

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

Bruce Flegg MP, Leader, Queensland Liberal Party

The fees for non-personal application in some instances would restrict people from submitting an application for financial reasons.

As most applications would be non-personal this would impact greatly and restrict applicants from lower socio economic environments to gain access to the information they require.

In regards to reform of the FOI Act there probably needs to be a section that encompasses and considers financial hardship.

Caxton Legal Centre

We agree that the use of FOI for commercial gain should not be subsidised by public funds, however, the discussion paper does not give any examples of when and how often this occurs. Any measures taken to limit such activity should not, in turn, affect ordinary appropriate FOI applications, which are being made in the public benefit or in the democratic spirit of the FOI regime. We agree that it is important for applicants to "limit the scope of their applications and to be specific in terms of the information they are seeking," however, we consider that this same outcome could be achieved with appropriate education and early consultation between parties.

QPILCH

The current fee regime ensures that requests for personal information under FOI do not incur a charge. This is consistent with the idea that citizens should have a right to documents used by government to make decisions which affect them and to ensure that they are true and correct.

The discussion paper reports that the fees and charges regime introduced in late 2001 resulted in a decline in public interest applications. This type of application should be encouraged as it is an essential part of democracy, increasing government accountability by facilitating scrutiny of government action.

Further, the lack of fee waiver in public interest applications hampers the policy reform function of community legal centres and other community organisations. While most of these organisations are resource limited, they are not sufficiently poor to come within the financial hardship provisions.

The legislation should be amended to allow fee waiver in circumstances where the matter is in the "public interest". While a fundamental concept of FOI is to allow access to documents without the applicant having to demonstrate a particular need or reason, on balance, it is better to have to demonstrate a 'public interest' for the purposes of fee waiver than to have to have access deprived because of cost.

How 'public interest' should be defined is the subject of further research. Policy should be implemented to ensure consistent application of this criterion. Further, regard should be had to the experience of the Commonwealth, Victoria, ACT, NSW and Tasmania which have implemented public interest fee waiver/reduction criteria.

Queensland Ombudsman

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 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 maters 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.

Whole of Government submission

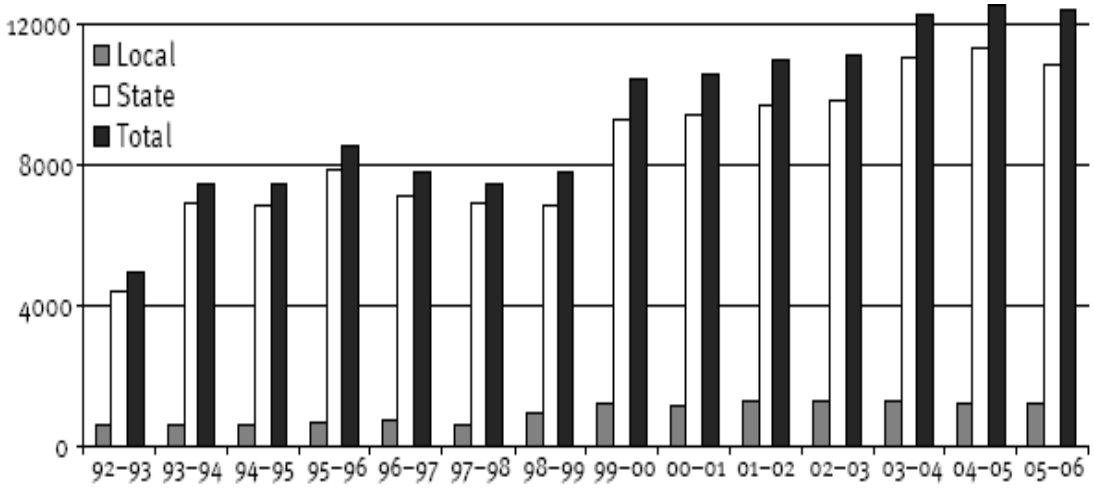
Close to 50% of FOI applicants seek access to information about their personal affairs, for which no application fees or charges are payable. Accordingly, cost is not an issue for these applicants.

In any given year personal applications comprise close to 50% of all applications. Local Government receives around 10% of all FOI applications which is a higher proportion of non-personal applications. Conversely, some agencies receive a higher proportion. For example, the Department of Child Safety states that up to 90% of its applications are personal.

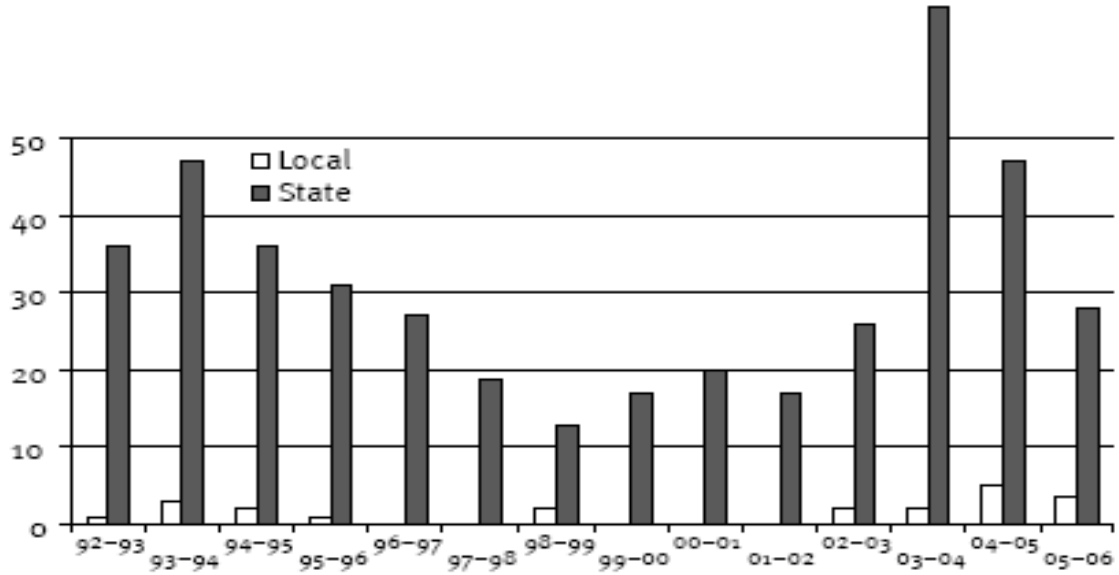
6.5 Processing charges

Charges for the 'processing' of applications were introduced in November 2001. The graphs below indicate the number of applications received from the commencement of the *Freedom of Information Act* until 2005-2006.

Access applications received under the *Freedom of Information Act*: 1992 - 1993 to 2005 - 2006



Applications to amend documents received under the *Freedom of Information Act*: 1992 - 1993 to 2005 - 2006



6.5.1 Relevant information and views considered by the committee

Alec Lucke

The estimate of charges for FOI may inhibit the applicant and force a reduction to the amount of material sought. Where there is a dispute about the amount of documentation available the applicant has little option but to accept that certain documents may not exist or cannot be located.

Gold Coast City Council

The introduction of processing charges has certainly created more paperwork for the council as the bulk of applications received are of a non-personal nature and the majority of those exceed the initial free two-hour processing period.

On occasion, the processing charges regime has affected the ability of this agency to provide a timely response. This is particularly evident when there are public holidays included in the permitted time period and with the stopping/starting of the clock.

There is also some confusion with respect to the difference between an application fee, a processing charge and a charge for a photocopied document.

Environmental Protection Agency

Since the introduction of the fees and charges, FOI applicants are more likely to negotiate the scope of their requests if it is clear that this will reduce the overall time and costs associated with the processing of their applications.

Minister for Natural Resources, Mines and Water

The processing charges levied under the FOI Act encourage applicants to limit the terms of their applications, and to identify more clearly the documents to which they seek access. This contributes to the efficiency and responsiveness of the FOI process. Therefore, in this regard, the charging regime has had a beneficial impact on the administration of FOI in Queensland.

Furthermore, after some initial teething difficulties, the charging regime has been bedded down and is operating well. Also, the evidence available to NRMW does not indicate that the charging regime has had a significant effect on members of the public's willingness to pursue FOI requests. Indeed, NRMW's workload has remained relatively constant at approximately 250 applications for each of the last four years.

However, the charging regime has added significantly to the complexities involved in processing FOI requests. For example, distinguishing between personal and non-personal affairs documents as the basis of a processing charge can be laborious and time-consuming. While this is an acceptable cost for personal/non-personal applications, the introduction of different fee structures for different categories of documents would likely impose a very heavy burden on the resources of agencies which deal with FOI requests. This effect would potentially be multiplied by the fact that documents often contain matter of differing types. Determining the predominant nature of a mixed-type document would potentially be very time consuming and complex.

The Law Society of New South Wales

The effect of the fees and charges regime together with other qualitative costs impedes access to information held by government. The associated administrative processes of each agency can also compound the costs of access to deter access to information. The costs to citizens to access information, including information about themselves, will depend on each person's concern about the information to be accessed and their relative levels of income and wealth. The lower the level of fees and charges the better the level of access. The pricing regimes for fees and charges are only one aspect of the monetary costs of access. The fees and charges as shown [in] the discussion paper show that monetary costs can mount where search time involves more than 2 hours. Also, photocopying charges can become expensive where many pages are involved.

The 2 hours time constraint relies on the efficiency of agencies to locate the relevant information and examine it for purposes of exceptions, copying and then arrange for its delivery. The costs associated with the time to search for the information are not "economically based" costs. There is no incentive to use economic costs. The concept of "user pays" for costing purposes is also no "economic cost".

Brisbane City Council

The fees and charges regime appears to have little or no impact on access to information and amendment of documents. Application numbers to Council for FOI remained constant despite increases in fees, and few have been deemed withdrawn due to non-payment. There have been no applications made to Council to amend documents since the commencement of the legislation.

Robin Gilliver

While I support the principle of allowing an agency to recoup some of the cost of administering FOI, there are still some teething problems with the charging regime.

[An] issue with charging that warrants examination is the scope within the Act for which a processing levy may be made. In [an example given] a processing charge was levied in part to cover the cost of drafting the decision letter and statement of reasons (2 hours). This gave rise to a strange situation where a member of the public has a right to seek access to documents relating to the operation of the agency. Access to all of the documents is declined, but the applicant is nevertheless asked to pay for the privilege of being given written reasons why no access will be granted. It is difficult to believe the Legislature envisaged this situation. There is, of course, no incentive to pay in such circumstances unless the applicant wants to push on with an internal review. It is also interesting to speculate on the public relations consequences of an agency seeking to collect their debt through the courts.

Clarification might be given in the Act, though preferably by policy, on those elements of the discovery and processing operation that should attract a charge. A case could be presented that the decision letter and the statement of reasons are an obligation of the agency once it has accepted the application fee; originally the application fee would have covered this part of the process.

Queensland Council for Civil Liberties

The Committee has produced some interesting statistics on the effect of changes in 2001 to increase the fees payable. The Council notes from this, a number of things:-

- The statistics do not identify whether there has been a change to the number of people withdrawing their applications, following the giving of a cost estimate.
- The change in fees certainly seems to have reduced applications for review.
- The table on page 11 would seem to support the case that the increase in fees caused a problem, particularly in the context of public interest applications.

QAILS and QCOSS

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

Susan Heal

<u>The two-hour threshold</u>

Since the introduction of time-based processing charges in 2001, the FOI Act has contained a provision whereby such charges are not imposed if the time spent processing the application is less than a prescribed limit. However, there are several factors which lead to a lack of uniformity in the application of that provision.

The 2001 amendments specified that the time-based charges were not payable where the total amount taken was '2 hours or less'. However, the 2005 amendments substituted a new version of section 8, which lacks internal consistency. The heading of the section says 'less than 2 hours'; the body of the section says '2 hours or less', leaving it unclear what happens when processing time is exactly 2 hours.

In addition, the application of this provision depends on an individual FOI decision-maker's interpretation of exactly which aspects of processing an application comprise chargeable time, and experience suggests that there is wide variation in how individual officers are interpreting the relevant provisions.

<u>Decision-making</u>

Further subjectivity is introduced as a result of the vague language in Item 1, Part 1 of the Schedule to the FOI Regulation, which provides that the time based charges are payable for time spent in 'making, or doing things related to making a decision on an application for access'. I am not aware of any detailed guidance that assists understanding the intended scope of that provision.

Is the phrase 'making a decision' intended to relate only to time that is directly referable to the ultimate decision, or does it also include time spent making any of the other decisions that are made in the course of processing an FOI application (e.g. a decision re: substantial diversion of resources per section29; a decision that an application fee is payable but remains unpaid per section 25A(3))? From discussions with other FOI decision-makers, it is apparent that there is wide variance in their understanding of the specific tasks which are considered to be chargeable, or non-chargeable, to the access applicant.

There is a further issue concerning the two hour time threshold, in that its applicability results in the non-imposition of only the time-based processing charges, with any applicable access charges (for the cost of photocopies or other forms of access) still being payable. This can result in situations where the time-based charges are not imposed, pursuant to the two hour threshold, but the agency is still required to collect the access charges (which may be minimal, where only a few pages of material are being released, or the release is in electronic form with minimal associated cost). I am aware that in such circumstances, some agencies adopt a common-sense approach of not requiring payment of such access charges as the administrative cost of collecting and processing such payment vastly exceeds the amount due. However, at present, there is no provision in the FOI Act which technically permits that approach.

It would be helpful if consideration could be given to introducing a specific provision in the legislation, or promulgation of interpretive guidelines that agencies are required to follow, which addresses this situation.

Comparison with other jurisdictions

While the information in the comparative table re FOI fees and charges in other Australian jurisdictions is interesting, it is difficult to draw firm conclusions based on such comparison because of some significant differences in the specific language of the legislative provisions, or guidance that has been issued regarding the proper interpretation/application of the relevant provisions.

An example of this is the time-based charge for processing (or 'dealing with') an application. In South Australia, advice provided by the state's FOI 'lead agency' at a 2005 forum of FOI practitioners indicated that agencies could charge for time spent numbering documents and preparing document schedules, but could not charge for internal consultations within an agency, or for obtaining legal advice or drafting the access decision. In Western Australia, the time-based processing charge (for 'dealing with an application') does not include time spent searching for documents.

Cairns City Council

The impact of introduction [of processing charges] is still being accommodated by system changes at Council. To date officers implementing the current regime have used informal approaches to applicants about the size of the search and likely costs as the means of narrowing the search. This is now being formalised to letter form. The two hour threshold appears appropriate for applications of a public interest or commercial in nature (including applications for the purpose of litigation). Insufficient data is available to determine whether the two hour threshold is appropriate for personal applications.

Capping of all types of application would be inappropriate. From the information held by Council to compile the 2004 - 2005 Annual Report under s108 of the Act: 50% of applications were obviously for commercial or public interest purposes; of those 52% involved 50 or more documents; 44% required copies of 50 or more pages and 18.5% incurred charges for time in excess of 2 hours (and only one of this last category was for public interest purposes). Of all other applications in that period (i.e. that were not obviously for commercial or public interest purposes) only 28% involved 50 or more documents; 28% required copies of 50 or more pages and 7.8% incurred charges for time in excess of 2 hours. The current regime requires officers undertake the search for documents to estimate the charges. This is non value adding work and regarded as a deficiency. It also reduces the transparency of charging as fees cannot be estimated up front.

Caxton Legal Centre

We consider that the two hour threshold before charges apply is not equitable, especially given that a modest FOI request may still take some hours to organise. We note that the discussion paper does not state the average time taken to process applications. Further data should be collected about the average processing time for applications and we consider that the first free search period should apply universally and not be removed once an applicant's search exceeds the set time period. It seems wholly inequitable that a scenario involving two equally worthy applicants could result in one party paying nothing because their search involves 1 hour and 55 minutes of processing time and that a similarly placed individual whose search takes 2 hours 15 minutes has to pay for the first 1 hour and 55 minutes as well as the next 20 minutes. If a time limited free threshold is to be maintained we support an equal free time period for all applicants.

If fees are to remain as they are (or to increase) we support the introduction of a fees cap – especially in public interest FOI inquiries. The recent debacles experienced within the Queensland Health Department demonstrate the importance of government accountability and openness to public scrutiny and unlimited fee schedules could hinder appropriate investigations concerning the conduct of government departments and officials.

Queensland Ombudsman

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 standardized, 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 to 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 time than an estimated 2 hours. However, it would still allow for charging for the most time consuming applications.

Whole of Government submission

The introduction of processing charges does not appear to have lead to a decrease in the number of non-personal applications.

Introduction of processing charges for FOI - 2001

The Act and the *Freedom of Information Regulation 1992* (the Regulation) were amended in November 2001 to introduce, in relation to non-personal affairs applications, charges for processing applications and supervising inspection of documents. At that time, the Explanatory Notes for the *Freedom of Information Amendment Bill 2001* stated that the amendments:

...balance(d) the objects of the Act with the resource implications for the community of providing access to non-personal affairs information to well-resourced applicants who would have no difficulty in paying reasonable fees and charges.

In the second reading speech which introduced these amendments, my predecessor, the Honourable R J Welford MP, then Attorney-General and Minister for Justice, noted that their passage would bring Queensland into line with all other Australian jurisdictions. In relation to the legislation prior to the amendments, he commented that:

The current charging scheme creates a perverse incentive for people to make large scale or voluminous applications or embark on commercial research or fishing expeditions at unjustified public expense…

The production of processing charges will require applicants to reconsider wide and all embracing applications...At present there is no incentive for applicants to confine their applications to the documents they actually require. As a result, some applicants have had not even bothered to collect the documents or pay the costs incurred…

The Department of Transport has commented that:

The introduction of processing charges has encouraged most applicants to be more specific with their request for information. This has been a two-fold benefit with the applicant only seeking access to documents pertinent to their issue and the agency saving time in the retrieval and processing of information.

Year	Sector	Personal		Non-Personal		Total	
		Number	%	Number	%	Number	% of Total
1999-2000	State	4,623	49.8	4,663	50.2	9,286	**88.91**
	Local	178	15.4	980	84.6	1,158	**11.09**
Total		**4,801**	**45.96**	**5,643**	**54.04**	**10,444**	
2000-2001	State	5,283	56.1	4,141	43.9	9,424	**89.25**
	Local	153	13.5	981	86.5	1,134	**10.75**
Total		**5,436**	**51.49**	**5,122**	**48.51**	**10,558**	
2001-2002	State	5,237	53.9	4,471	46.1	9,708	**88.20**
	Local	199	15.3	1,101	84.7	1,300	**11.80**
Total		**5,436**	**49.38**	**5,572**	**50.62**	**11,008**	
2002-2003	State	5,362	54.3	4,510	45.7	9,872	**88.85**
	Local	204	16.5	1,035	83.5	1,239	**11.15**
Total		**5,566**	**50.09**	**5,545**	**49.91**	**11,111**	
2003-2004	State	5,046	45.8	5,983	54.2	11,029	**89.75**
	Local	192	15.3	1,067	84.7	1,259	**10.25**
Total		**5,238**	**42.62**	**7,050**	**57.38**	**12,288**	
2004-2005	State	5,215	46	6,119	54	11,334	**90.28**
	Local	175	14.3	1,045	85.7	1,220	**9.72**
Total		**5,390**	**42.93**	**7,164**	**57.07**	**12,554**	

Trends for non-personal applications

It is difficult to assess from raw application data the impact of the introduction of processing charges in 2001. An analysis of the raw data reported under s.108 of the Act reveals that there has been an increase in the number of applications for non-personal information since the introduction of the charges scheme:

Year	Non-personal applications received by State Government agencies
2000-2001	4,141
2001-2002	4,471
2002-2003	4,510
2003-2004	5,983

An alternative view of the raw data is by a linear trend on expected application numbers, based on the 1997-98 to 2000-01 figures, in comparison to the number of actual applications received. On this view, it appears that for a period of 18 – 24 months after the introduction of charges, the number of State Government applications did not reach the level that would have been expected had the processing charges not been introduced (see attachment 1). This slowing down in applications received was short-lived with the increase in applications received by 2004-05 virtually mirroring the decrease previously experienced. At 2004-05, the number of applications received is slightly higher than the number of expected applications had processing charges not been introduced. The figures for the coming few years will indicate whether or not this trend will continue.

The trend for Local Government presents a different picture (see attachment 2). The four years prior to the introduction of fees showed a significant steady increase in the number of applications. From the time that processing charges were introduced, the rate of actual applications in this sector slowed in comparison with the number of applications that may have been expected had no charges been introduced. The number of applications in the Local Government sector has been relatively stable for the past four years.

Of course, in the absence of controlling for other influences on application numbers, no conclusions can be safely drawn in respect of the impact of the introduction of processing charges on application rates.

Bar Association of Queensland

The present, time based search fees have about them an open-ended quality that is not conducive to efficient public record keeping. Equally, a regime based wholly on fixed fees may overcharge or discourage an access seeker to the detriment of the public interests described in the preceding paragraphs. A useful compromise between these ends would be to have a fee regime which provided for a time based access fee regime subject to a capped maximum, with that maximum, in turn, able to be increased for cause on application by an agency to the FOI Commissioner and on notice to the FOI applicant. Apart from agency cost implications, whether such an increase was warranted might be subject to a public interest and FOI applicant's ability to pay test. A benchmark for the capped maximum might be the filing fee to initiate a claim in the Supreme Court. Such a correlation would recognise that, in contemporary Queensland society, the public importance of a right of access under FOI was such that the premium put on the exercise of that access right was, save in those cases of a demonstrated and truly exceptional burden on public funds, no higher than that put on access to our State's superior court.

6.6 Assistance provided by agencies to applicants

6.6.1 Relevant information and views considered by the committee

Brisbane City Council

In circumstances where an applicant's request is couched in very wide terms eliciting many possible documents in response, Council invites applicants to 'refresh' their applications to enable the scope of the application to better reflect the information sought, and thereby limit the exposure to charges. Approximately 75% of the work involved in an FOI application is done by the time of an estimate of charges can be given, so this process is of major benefit to the applicant but of little benefit to Council.

Environmental Protection Agency

Since the introduction of the fees and charges, FOI applicants are more likely to negotiate the scope of their requests if it is clear that this will reduce the overall time and costs associated with the processing of their applications.

Robin Gilliver

The charging regime in place is open to potential abuse by an agency to discourage any applicant. This danger, I am sure, was seen from the outset by the framers of the revised legislation, hence the protections built into the Act.

As a specific example, I can refer to an application made to a North Queensland agency. I sought access to documents already in existence produced over the period 2001 to mid-2005, maybe 35 pages in total. The pre-existence of the documents was stated in the application. The agency's initial processing cost estimate was $9811. The FOI coordinator then invited me to revise the scope of the request in order to reduce the cost. After I had re-emphasised that the documents I wanted already existed, the new cost estimate was an acceptable $175.

There are protections in the legislation over charging but applicants not familiar with the operation of the FOI Act will stand little chance against an agency determined to not grant access, and creating an unreasonably high processing estimate at the outset will almost certainly deter most applicants.

An obligation on an agency to make a serious effort to decide whether the documents sought under an application will be declared exempt before the processing charges are estimated and the deposit collected. I wonder what the agency would do if I had agreed to pay the original estimate of $9811 and at the end of the exercise it still decided to refuse access totally. (A visit to the court using Judicial Review might result.) An agency, in my view, has a duty of acre to assess the likelihood of total or substantial denial of access before it collects the processing deposit. There will, of course, be situations where you cannot know what the discovery process may produce though usually an experienced FOI officer will have a good idea of how much material may have to be withheld.

Caxton Legal Centre

We strongly support the subject agencies being required to provide assistance to individuals making FOI applications – particularly early on in the process when consultation and refining of the description of materials sought through FOI can greatly limit both the costs incurred by the applicant and the time required to comply with FOI requests.

Queensland Ombudsman

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 the applications and in relation to communication with applicants more generally, could also lead to fewer internal and external reviews.

Whole of Government submission

<u>Introduction of processing charges for FOI - 2001</u>

The introduction of processing charges in 2001 was accompanied by a requirement for agencies to consult with applicants so that FOI applications can be targeted to minimise costs.

FOI applications which seek access to voluminous quantities of documents have caused serious problems for the administration of FOI.

<u>Assistance to applicants</u>

Some applicants are unclear on what documents to ask for and where they may be located.

Section 25A of the Act requires agencies to assist an applicant to make an application in a form which complies with the Act. In practice, agencies are generally proactive in assisting applicants to make their requests in terms that are effectively targeted and clear. The recommended approach by the lead agency encourages communication with applicants at the early stages of the FOI process. This promotes efficient processing and has consequential cost savings to applicants.

Agencies also confer with applicants where the agency intends to refuse access under s.29 of the Act. Most commonly, agencies consider refusing access where the terms of the application are so broad that to process the application would substantially and unreasonably divert agency resources. Section 29A recasts the pre-amendment obligations found in the former s. 28, namely to consult the applicant before refusing to deal with the application under s. 29.

Transfer

Transferred applications must now be treated as fresh applications by the transferee agency. This means that an applicant for non-personal documents is liable for an additional application fee for the part of the request which is transferred to another agency. This is intended to reduce the instances of applicants trying to avoid multiple application fees by only lodging one application for documents obviously held by a number of agencies. FOI Guidelines will recommend that agencies consult with applicants in these circumstances to determine whether they wish the transfer to proceed. This will avoid applications being transferred to a number of agencies (and costs incurred) without the applicant's consent.

6.7 Agency filing systems

6.7.1 Relevant information and views considered by the committee

Brisbane City Council

Realistically, current fees and charges do not in any way adequately recompense Council for the time expended by staff in locating and copying documents. The sifting of documents is a task undertaken initially by an experienced administrative officer, who in turn assists Council's FOI officer. Given the importance of the provision of this information, and the need to carefully distinguish between personal affairs information and other information, it is not appropriate that a junior member of staff undertake these tasks.

Queensland Council for Civil Liberties

It is clear in the submission to the Council that a substantial alteration in the fees regime must result in reduced applications and hence reduces accountability. In this regard, we note the substantial paper of Mr Alistair Roberts where the author makes the following telling observation:-

In Canada a substantial proportion of costs associated with the administration of FOI laws are associated with weaknesses in methods of records management or are driven by government's own demand for services in the system, i.e. by pressure from the government, to determine a basis upon which the information should be withheld. The Council sees no reason for assuming that that proposition does not apply in Queensland.

Susan Heal

The amount of time actually spent in searching for or retrieving a document should be readily ascertainable, but an element of subjectivity is introduced by the provision for adjustment of that amount where a document is not found in the place where it ought to be filed.

Whole of Government submission

Locating documents and misplaced documents

The Discussion Paper raised the issue of 'agency filing systems (effect of processing charges, safeguard on access charges regarding documents lost or misplaced)'. The Regulation prohibits agencies from charging an applicant for time spent searching for or retrieving a document which has been misfiled. This measure removes any penalty that may have been incurred by the applicant as a result poor filing practices.

Locating documents is becoming easier with the move towards electronic documents records management systems (EDRMS). Some agencies already have sophisticated EDRMS and the State Government is currently sponsoring a whole-of Government EDRMS project which is developing standardised document records management systems. One of the expected outcomes of this project is that agencies with EDRMS should have increased capability in the areas of locating and retrieving documents which are the subject of FOI requests.

Technology may reduce costs

Many agencies have adopted electronic processing through redaction software, an initiative developed for Queensland FOI by the Queensland Treasury FOI Unit. This software enables applications to be processed electronically, with documents being scanned into a computer and marked up on screen. The technology also allows agencies to provide electronic access to documents, for example on CD or USB drive which has the potential to reduce access charges. For example, copies of hundreds of pages of hard copy documents provided at a cost of 20 cents per page can be supplied on CD for the cost of the CD. Some agencies using redaction software report increased efficiencies in FOI processing which has the flow on effect of reducing processing charges for applicants.

The Department of Transport commented that, given the range of access options available to applicants, capping of access charges does not appear to be necessary.

Anecdotal feedback from some applicants, particularly regular users of FOI, supports the option of being provided with electronic access to documents. Agencies are increasingly opting to also store documents electronically, which results in savings in paper usage and archive storage space.

6.8 Reduction or waiver of charges

Currently, under the Freedom of Information Regulation 2006, fees may be waived where:

- the grounds of financial hardship are made out by the applicant holding a concession card (a health care or pensioner concession card issued under the *Social Security Act 1991* or by the Department of Veterans' Affairs).
- organisations are non–profit organisations, such as a charity, church or environmental protection society. Any waiver in this circumstance will rest upon an assessment of the amount of the charges in relation to the organisation's funding.

6.8.1 Relevant information and views considered by the committee

The Law Society of New South Wales

The avenue for waiving of charges would necessarily be limited as shown in the discussion paper to cases of financial hardship, holding of a concession card and limited non-profit organisations. While this is a limited avenue to reduce monetary costs the determination of hardship still requires time and discretion with the possibility that no hardship is held to exist. Better criteria need to be formulated to assist the decision-maker as well as the applicant.

QAILS and QCOSS

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

Susan Heal

Waiver of Charges

When the processing charges regime was introduces into the FOI Act in 2001, the explanatory notes and Hansard debate indicated that the purposes of introducing such charges were to ensure that persons who were seeking access to information concerning their personal affairs could still do so without charge, and that those who were financially capable of making a contribution to the cost of processing non-personal FOI applications should be required to do so (with special provision being made to protect those individuals who were in genuine hardship).

At the time of its introduction in 2001, the fees and charges regime in Queensland's FOI Act was described in Parliament as being 'the most generous in Australia'. However, a review of the comparative table set out in Appendix A of the discussion paper would appear to indicate that, as least as far as the availability of waiver of charges is concerned, that is not the case.

Circumstances in which waiver is available

The FOI Acts in other Australian jurisdictions variously provide for waiver of charges in a broader range of circumstances than that recognised under Queensland's FOI Act:

- Financial hardship established by other means (i.e. a person who does not hold a concession card of a specific type, but can establish they have an equivalent level of financial need to the level established for entitlement to a pension or benefit under such cards);
- A general discretion for FOI decision-makers to waive or reduce FOI charges;
- Waiver on grounds that disclosure would be in the public interest.

Queensland's FOI Act provides only two circumstances in which processing and access charges will be waived on grounds of financial hardship.

In relation to individuals, it appears that the underlying rationale for prescribing the specific types of concession cards is that each of them is means-tested, and thus establishes the financial need of the holder. However, there is at least one sub-category of Centrelink concession card (the 'blind pension') which is not means-tested, and therefore bears no relationship to the holder's financial means. In addition, the sole prescribed criterion is unduly restrictive, as there are other identifiable categories of individuals who, although able to establish their impecuniosity by any generally accepted standard, would not be entitled to a waiver of charges because of their ineligibility to hold a concession card of the prescribed types (e.g. minors, persons who reside outside Australia, prisoners).

In December 2005, the FOI Act was amended by introducing a new definition of 'holder'. This had had the effect of broadening the scope of the entitlement, so that it now covers not only the individual to whom the concession card is issued but also any other person who is named on the card (i.e. dependents of the cardholder), provided that such other person would be qualified to be named on the card if the card were issued at the time it is being relied upon as evidence of financial hardship.

The revised definition of 'holder' would arguable come into play where an individual seeking waiver of charges on grounds of financial hardship lodges as evidence of their financial hardship a concession card on which they are listed as a dependent, but the respondent agency is aware that the individual's present circumstances (e.g. imprisonment or detention in a psychiatric facility) may render them ineligible to be considered a dependent of the card-holder.

I query whether FOI decision-makers in Queensland agencies are in a position to determine whether an individual would be 'qualified to be named' on a concession card issued by Centrelink or the Department of Veteran's Affairs, under the very complex legislation governing the issuance of such cards. As an example of this complexity, the 'guide to Social Security Law' available on the website of the Commonwealth Department of Family and Community Services contains a flowchart which demonstrates the complexities of determining whether an individual who is 'in gaol or psychiatric institution because of criminal charges' is entitled to a social security pension or benefit.

Special Mechanism applying to departments

A provision in the FOI Act that has received little attention is the special mechanism that governs the determination of applications for charge waiver that are made to departments.

When the processing charges regime was introduced in 2001, the FOI Act provided that all charge waiver applications made to departments, whether lodged by individuals or non-profit organisations, had to be referred to the Department of the Premier and Cabinet for determination by the 'prescribed person' within that department. By an amendment that came into force in late 2005, that mechanism has been altered so that now it only applies to charge waiver contentions lodged with departments by non-profit organisations.

I have never been able to find any explanation of the rationale for the introduction of this special mechanism applying only to departments, while all other agencies subject to the FOI Act (local governments, public authorities) have always been able to make their own decisions on all charge waiver contentions. The process imposes an additional administrative burden on departmental FOI staff in terms of having to prepare and forward all relevant documentation to the Department of the Premier and Cabinet, and then subsequently convey the prescribed person's decision to the applicant, along with the details of their applicable review rights. I note that because the decision of the prescribed person is, for the purposes of review, taken to be the decision of the principal officer of the department concerned, this creates separate review paths for waiver applications dealt with by departments (which proceed directly to external review) and those dealt with by non-departments (which go through internal review, unless the decision was made by the agency's principal officer).

Very little information is available publicly on the operation of this specialised regime. The decisions of the prescribed person are made available only to the respondent department, thus providing no general guidance for agencies or the public on the interpretation of the relevant provisions.

Provision permitting an applicant to seek charge waiver before notification of liability for charges

When the FOI processing charges regime was introduced in 2001, there was no provision which permitted an access applicant to contend for waiver of charges (on grounds of financial hardship) prior to the receipt of a notice from the agency concerned confirming that charges were payable, and setting out the applicant's options in terms of a response to that notice.

The 2005 amendments to the FOI Act introduced a new provision which permits an individual to contend for waiver of charges on grounds of financial hardship before they have been given a preliminary assessment notice.

The stated rationale for this new provision is that if the concession card is acceptable, and the applicant is therefore entitled to a waiver of all processing and access charges, it relieves the agency of the administrative burden involved in preparation of a preliminary assessment of charges notice in a situation where there will ultimately be no charges payable.

While that may well be a valid consideration, the new mechanism imposes a different administrative burden (i.e. preparing a decision on the waiver contention, and dealing with any review arising out of that decision), when there may well be no charges payable because the application can be processed in less than 2 hours). Consideration should be given to the possible introduction of a provision to address this scenario.

Potential for abuse of waiver provisions

The FOI Act provides that where a non-personal FOI application will attract processing charges, the applicant is to be provided with a preliminary assessment of those charges (unless they have contended for waiver of charges at the outset). In response to a preliminary assessment notice, the applicant can elect to pay the charges and proceed with the application, can negotiate with the agency in order to reduce the charges, or can withdraw the application.

An applicant may lodge a non-personal application which is extremely broad in scope, covering many thousands of documents, which would attract a considerable level of processing and/or access charges. Under the present regime, there is nothing to stop an applicant who receives a substantial preliminary assessment notice from simply withdrawing the application, and finding a concession card-holder who will re-lodge the application in their own name (in which case, all charges must be waived, thus negating any incentive for the applicant to renegotiate, or better, define, the scope of the application).

I am aware of one overseas jurisdiction in which the prospect of such abuse of the charging regime has been specifically recognised, and addressed. *The Freedom of Information Act 1997 (Fees) Regulations 2003*, made under Ireland's *Freedom of Information Act 1997*, make provision for waiver of charges for a 'medical card holder' and a 'department of a medical card holder', but the definitions of those categories (in section 1(5) of the Regulation) provide that the person seeking such a waiver must be a person who, in the opinion of the head of the respondent agency, is not applying 'on behalf of some other person who, in the opinion of the head, is seeking to avoid the payment of a fee…'

Caxton Legal Centre

Caxton Legal Centre Inc has been engaged in a number of test cases involving government departments where FOI has been required and we have observed, first hand, the importance of FOI in the democratic processes. We are also aware of public interest test cases brought by other community legal centres and understand the importance of FOI in safeguarding the community's best interests.

We consider that the fees associated with freedom of information applications can be a serious discouragement to clients (both individuals and community organisations) in seeking access to justice. It is vital that access to one's own personal information remains a free FOI process and we consider that entitlement to fee-waivers for all other matters, on the grounds of financial hardship is important in ensuring access to justice for worthy clients.

QPILCH

Currently, fee waiver is only available for processing charges (not the application fee) and only where the applicant holds a concession card or is a non-profit organisation in financial hardship.

Whole of Government submission

Charges must be waived if an individual or a non-profit organisation can demonstrate financial hardship.

For individuals, financial hardship is defined to include applicants who hold specified concession cards. There is no provision allowing a decision-maker to exercise discretion to waive charges in circumstances other than those specified in the Act. Certainty and consistency in decision-making is ensured by specifying in the Act which concession cards are accepted as proof of financial hardship for individuals. This minimises delays in processing which may occur whilst determining the waiver application.

Furthermore, amendments to the Act made in 2005 allow departmental staff to determine whether an individual is in 'financial hardship' and thus qualifies for waiver of fees under the Act. Previously this decision was made by the Department of the Premier and Cabinet for all departments. Removal of this administrative step may provide a benefit to applicants in that decisions about financial hardship for individuals will potentially be made in a shorter period.

6.9 Review of decisions regarding freedom of information fees and charges

Part 5 of the *Freedom of Information Act* provides for external review of decisions made under the Act to be undertaken by the Information Commissioner.

6.9.1 Relevant information and views considered by the committee

Office of the Information Commissioner

There is no fee or charge for an external review conducted by this Office.

In conducting eternal reviews, staff of this office endeavour to achieve informal resolution of the matters in dispute and this minimises the cost burden to all parties. During informal resolution, applicants frequently are referred to Information Sheets and past decisions of the Information Commissioner on topics relevant to their external review, and these are available at no cost either accessed directly from the Office website or mailed to the applicant. Information on a range of FOI matters is also available at no cost from the Department of Justice and Attorney General's website: www.foi.qld.gov.au

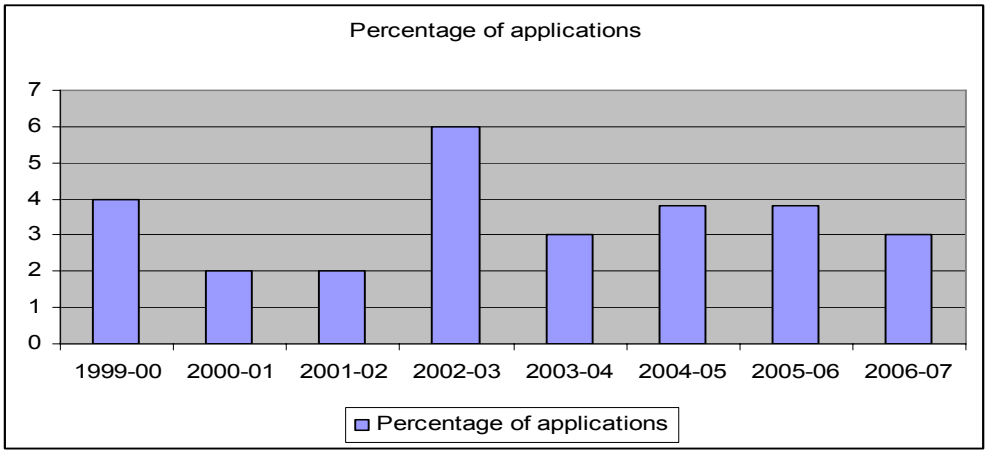
Clearly, a lengthy delay in obtaining documents to which an applicant is entitled under the FOI Act can represent significant costs to the applicant.

In the Office of Information Commissioner Annual Report 2006 – 07, Commissioner Taylor notes that for this year the Office received 264 applications for external review. Although there is no charge for an external review, each participant included in the review must bear their own costs of the external review. This includes any legal advice that they choose to obtain and the cost of photocopying documents, obtaining evidence, writing and sending letters etc.

A further measure was the number of applications for external review that were in relation to fees and charges associated with the original application. This number of these external review applications since 1993 is contained in the table below.

Of the 264 external review applications in 2006 – 2007, 3% were in relation to fees and charges. In the previous reporting period this was 3.8%. The majority of these fees and charges related applications regarded whether an application fee was due by the applicant and whether the information requested was categorised as information concerning personal affairs.

The number of external review applications relating to fees and charges



Caxton Legal Centre

It is critically important that no-cost internal and external FOI review processes remain in place. Our organisation has had cause to rely on these review processes on a limited number of occasions and this has assisted us in our endeavours to properly represent our clients. Certain individual employees in government departments who have control over the release of information sometimes have a vested interest in not releasing certain documents, and without access to some form of second-tier accessible and affordable review mechanism, individuals can be prevented from obtaining proper access to justice.

Queensland Ombudsman

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.

6.10 Reporting requirements contained in section 108

The discussion paper noted that following the tabling of its report on *Freedom of Information in Queensland*, the committee of the 50th Parliament corresponded with the Attorney-General regarding his responsibilities under section 108 of the *Freedom of Information Act*. In particular, the committee recommended that the agencies should be required to provide information concerning:

- the number of applicants who, once receiving a preliminary assessment of charges, do not pursue their applications;
- the amount of fees collected by agencies for Freedom of Information applications;
- categories of information requested for access or amendment; and
- the types of information routinely published by agencies and provided, free of charge, to the public.[82]

Section 108 was amended with the introduction of the *Freedom of Information and Other Legislation Amendment Act 2005* (Qld).

6.10.1 Relevant information and views considered by the committee

Susan Heal

It is difficult to really ascertain how well the current regime is functioning, as the reporting requirements under section 108 of the FOI Act do not include any reporting on certain aspects (e.g. applications for waiver of charges on grounds of financial hardship). In addition, what is reported is just raw figures, without any real quality control mechanisms in place to ensure that agencies are consistently interpreting and applying the statutory provisions under which the relevant charges are calculated.

QPILCH

It is difficult to assess the appropriateness of the fee structure without further data such as:

- How much time and money is spent by government in responding to FOI applications;
- How many people decide not to continue once receiving their preliminary assessment?

Amendments to the FOI Act in 2005 created a new requirement on agencies to report annually on how many preliminary assessment notices and how many final assessment notices were given, which would effectively inform us as to how many people decided not to continue once receiving their preliminary assessment.

Whole of Government submission

The only data required to be collected by agencies is that specified under s.108 of the Act, which forms the basis of the Attorney-General's Annual Report to Parliament. That data collected covers matters such as the number of applications made and the exemptions relied upon in processing applications. Other information which might assist in understanding the impact of the processing charges scheme is not routinely collected, for example:

- the number of applications withdrawn after the issue of preliminary assessment notice
- the number of applications the terms of which are reduced after the issue of preliminary assessment notice

82 LCARC, report no 32, 9; available at: www.parliament.qld.gov.au/LCARC.

- the level of use of other schemes providing access to information, either administratively or under legislation such as the *Coroners Act 2003* (Qld).

Asking agencies to record information of this type on an ongoing basis may not be cost effective. The benefit of collecting useful data in relation to the administration of the Act needs to be balanced against placing an undue burden on agency FOI staff.

Commission for Children and Young People and Child Guardian

It is currently difficult to assess the level of children and young people's access to information under the *Freedom of Information Act 1992*. 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.

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.

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.

6.11 Benefits/deficiencies of current regime

Fees and charges are a means of obtaining a contribution from the users of freedom of information legislation to the costs of its administration.[83] Many of the issues and conflicts surrounding discussion about fees and charges stem from differing ideas about who should bear these costs. No Australian jurisdiction has adopted a full cost recovery approach.

A regime of fees and charges in respect of access to or amendment of government-held information must seek to strike therefore a balance between:

- the principles of openness and accountability which underlie the operation of the freedom of information legislation, such as stated in the objects of the *Freedom of Information Act*;[84] and
- the cost of administering freedom of information which impacts on public revenue and diverts public funds away from other programs.

The committee's discussion paper set out the common arguments supporting each of these views.

A substantially government funded regime of FOI administration	FOI applicants bearing at least part of the costs incurred by agencies in dealing with applications
Open access to information is consistent with the spirit and objects of FOI legislation.	FOI is a government service for which the user should pay.
FOI is a cost of democracy which should be borne by governments in the same way as the courts or electoral systems.	There is some deterrence from using FOI as an alternative to legal discovery processes or for voluminous, frivolous and repetitious requests.
Agencies and departments will be encouraged to develop and maintain effective record keeping thereby enhancing accountability and open government.	People who use FOI for commercial gain should be required to bear the costs of obtaining information and should not be subsidised by public funds in their endeavours to do so.

83 Australian Law Reform Commission/Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982,* report no. 77, AGPS, Canberra, 1995, at 180.

84 *Freedom on Information Act*, s 4.

A substantially government funded regime of FOI administration	FOI applicants bearing at least part of the costs incurred by agencies in dealing with applications
Fees and charges regimes have the potential to be used by agencies to discourage applicants.	Applicants have an incentive to limit the scope of their applications and to be specific in terms of the information they are seeking.
The imposition of fees and charges may create inequities between those who can afford to pay and those who cannot.	
The benefits of FOI may be shared by the whole community. These benefits include accountable government, administrative improvements such as better record management systems and better decision making, and a more informed electorate.	

6.11.1 Relevant information and views considered by the committee

Whole of Government submission

Over the last four years, the total amount collected in fees and charges for State and Local Government has increased steadily.

Year	Total Application Fees $	Processing and Access Charges $	Non-personal Applications $	Average per Non-personal Application $	Total $
2001-2002	136,668.30,	112,425.21	5572	20.17	249,093.51
2002-2003	144,336.81	173,767.44	5545	31.33	318,104.25
2003-2004	175,611.67	203,974.63	7050	28.93	379,586.30
2004-2005	177,657.37	219,149.58	7164	30.58	396,806.95

Table 3 shows that the average cost to an applicant for processing and access charges has remained relatively stable in the last three years at approximately $30 per application. In the year that the processing charges were introduced (2001-2002) the average cost was $20.17. It appears from the data that the introduction of the processing charges added around $10 to the cost of a non-personal application. Of course, these figures include applications for which no charges were payable on the basis, for example, of the time taken to process the application falling below the 2 hour threshold. Unfortunately, the data is not collected in a form that isolates those applications, however, statistics on the numbers of preliminary and final assessment notices issued will be collected during the next s. 108 reporting period. This should provide more meaningful data in relation to the average cost to applicants for access under the Act.

Cost of FOI to applicants compared to costs recovered by Government

There is no cross-sectoral data on the actual costs of administering FOI. In 2002-2003, State Government departments and agencies received 5362 personal FOI applications and 4510 non-personal FOI applications, with the total cost to departments and agencies estimated at $9,294,935.20. In the same period, the revenue derived from fees and charges payable under the Act for State Government departments and agencies was $251,091.84. This obvious discrepancy demonstrates that fees and charges are not intended to recoup the costs of administering the Act.

The Department of Industrial Relations estimated that, based on non-personal applications where third party interests were involved, FOI processing charges represented only 74% of the actual costs of a base-grade administrative officer (AO3) or 54% of the actual cost of a base-grade decision-maker (AO5).

Queensland Rail commented that 'it is far more expensive to administer FOI than the revenue received'.

Natural Resources, Mines and Water

The processing charges levied under the FOI Act encourage applicants to limit the terms of their applications, and to identify more clearly the documents to which they seek access. This contributes to the efficiency and responsiveness of the FOI process. Therefore, in this regard, the charging regime has had a beneficial impact on the administration of FOI in Queensland.

Furthermore, after some initial teething difficulties, the charging regime has been bedded down and is operating well. Also, the evidence available to NRMW does not indicate that the charging regime has had a significant effect on members of the public's willingness to pursue FOI requests. Indeed, NRMW's workload has remained relatively constant at approximately 250 applications for each of the last four years.

However, the charging regime has added significantly to the complexities involved in processing FOI requests. For example, distinguishing between personal and non-personal affairs documents as the basis of a processing charge can be laborious and time-consuming. While this is an acceptable cost for personal/non-personal applications, the introduction of different fee structures for different categories of documents would likely impose a very heavy burden on the resources of agencies which deal with FOI requests. This effect would potentially be multiplied by the fact that documents often contain matter of differing types. Determining the predominant nature of a mixed-type document would potentially be very time consuming and complex.

Robin Gilliver

It appears that a new complication in the FOI process is concern over privacy issues. There seems to be a growing point of tension between supposed rights of privacy of people paid from the public purse on the one hand and the rights of the public to have access to information about the agency in which those people are employed. This may be complicating the consultation process within agencies and adding to the processing time and costs - for both agencies and applicants.

Department of Industrial Relations

It has been previously identified that a considerable amount of processing time is also devoted within each agency to maintain the administrative function required to calculate fragmented fees and charges under FOI. This includes the capital expenditure outlaid in setting up the infrastructure, record keeping systems and the continuing staff's time to calculate the various charges in line with the current legislation. We have previously advocated for a simpler system of having a set amount per page legislated and consideration should be given to basing this on a more realistic 'real' cost basis.

Queensland Council for Civil liberties

The Council stands firmly in favour of the position that FOI must be a substantially government funded regime.

The Committee's own paper indicates that the cost recovery is only a small proportion of the actual cost. However, in the 2001 report the Committee reported that the cost of FOI in 1999/2001 was a mere $7.5m By way of contrast, the Council observes that the cost to the government of its means of propaganda such as advertising, publishing, printing, public relations, public affairs must be considerably more than $7.5 million or the current costs of FOI. Of course, the difference is that in the former category the government controls the information and in the latter it does not.

In our view then there should be no change to the existing arrangements for fees and charges for FOI except perhaps to reduce them. Given that that is not likely to happen we would oppose any change to the regime that would increase the costs of FOI applications.

QAILS and QCOSS

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

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

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

QPILCH

[I]t seems that the current fee structure achieves the appropriate balance between the right to information and costs to government. It should also be noted that, based on the information provided at Appendix A of the discussion paper, Queensland's fees are generally on par if not cheaper than other jurisdictions around Australia.

Queensland Ombudsman

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 ensuring charges for non-personal affairs applicants are not unreasonable.

Bar Association of Queensland

The Committee's discussion paper neatly highlights the conflicting considerations that are at large in relation to fees for FOI requests that do not relate to the personal affairs of an applicant – set the fee too high and the public interest served by openness in government is a chimera; set the fee too low or not at all and hazard the circumstance, unpredictable in nature or extent, that limited public resources will be consumed in the satisfaction of such an FOI request to the detriment of the opportunity cost of the agency's use of those funds.

Time has not yet eroded the memory of a system of government in our State where FOI was not possible at all, which system was shown to be conducive to official corruption. Realistically exercisable freedom of information access rights are part of the price that we as a society pay to minimise the prospect of a repetition of that experience. Official corruption lurks in dark corners of public administration. Exposed to the light of public scrutiny a facilitated by FOI it either withers and dies or never takes root in the first place. The same is the case with inefficient or insensitive public administration practices. The benefits that access under FOI brings are real but do not lend themselves to precise quantification. Further, the very existence of an enforceable right of access, even if but infrequently used, can by the unpredictability of that use, act as a deterrent to corruption or poor public administration.

6.12 Fairness/efficiency of current regime

6.12.1 Relevant information and views considered by the committee

QAILS and QCOSS

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

- Findings 5-10, 165 and 173: It was recognised by the Attorney-General that there should be better coordination of freedom of information throughout government for the sake of consistency. Given that the suggested 'FOI monitor' position or extended powers for the Information Commissioner were not implemented, the government should explain clearly exactly what mechanisms have been put in place to achieve greater consistency.
- Finding 22: Agencies should be required to use the FOIonLine software, rather than invited to use it.
- Findings 39, 43, 55, 56, 59, 61, 65, 69, 74, 82, 93, 94, 95, 99, 142, 143, 157, 158, 163, 180, 184 and 200: JAG was considering drafting guidelines with respect to these findings. We support guidelines being put in place so that a consistent approach can be taken throughout government. The establishment or otherwise of such guidelines is unknown at this stage and government should advise of any guidelines that are in place.

Jeff Seeney MP, Leader of the Opposition

The independence of the public service, and the education and resourcing of FOI officers to enable the efficient, fair and proper handling of applications.

Gold Coast City Council

There is some confusion with respect to the difference between an application fee, a processing charge and a charge for a photocopied document.

Bar Association of Queensland

The present, time based search fees have about them an open-ended quality that is not conducive to efficient public record keeping. Equally, a regime based wholly on fixed fees may overcharge or discourage an access seeker to the detriment of the public interests described in the preceding paragraphs. A useful compromise between these ends would be to have a fee regime which provided for a time based access fee regime subject to a capped maximum, with that maximum, in turn, able to be increased for cause on application by an agency to the FOI Commissioner and on notice to the FOI applicant. Apart from agency cost implications, whether such an increase was warranted might be subject to a public interest and FOI applicant's ability to pay test. A benchmark for the capped maximum might be the filing fee to initiate a claim in the Supreme Court. Such a correlation would recognise that, in contemporary Queensland society, the public importance of a right of access under FOI was such that the premium put on the exercise of that access right was, save in those cases of a demonstrated and truly exceptional burden on public funds, no higher than that put on access to our State's superior court.

The Law Society of New South Wales

The comparison … of Queensland and other jurisdictions demonstrates the concerns of COAG to establish a best practice regulation approach across all jurisdictions. LCARC has the opportunity to lead other jurisdictions in making uniform the legislative requirements for access information held by government across all agencies in Queensland and for all other States and Territories.

While the constitutional institution of parliaments is similar across all jurisdictions the administration of government varies considerably. Better administration of government is needed to make it easier for Australian citizens, no matter where they reside, to access information in any jurisdiction. The focus needs to be the opportunity of access to government information and not on raising revenue or to deter access.

The arrangements for access charges with capping proposals, internal reviews, quantum for different classes, deposits, refunds, reductions or waivers and reviewing decisions adds to the complexity and hence the costs of access. These processes should be uniform and supported with explanations to assist the applicant to make a sensible and useful application. Where further research is needed the applicant should be assisted to make these researches using indexes or other search facilities available to the agency. Such facilities could be available on the internet or intranet depending on the type of information being made available. Applicants would be assisted by all agencies adopting the same search facilities and mechanisms so that once an applicant knows the system the applicant can access information no matter where it is held.

There should be measures for providing for costs of access, reductions and waivers to accommodate each case. However, the Act needs to ensure uniformity and reduced responsibility on agency staff to make qualitative decisions about a person's application. Clear criteria and guides need to be available to assist the staff of agencies. The better approach is to make sure the Act is sufficiently clear so that applicants can read their responsibilities under the Act to gain access to information. This is the best approach as the costs to applicants is less than the costs of agencies to identify the relevant information required to determine if that information would be available in whole or in part and for the applicant to be informed of the reasons if only part of the information is available.

Queensland Council for Civil Liberties

It is clear in the submission to the Council that a substantial alteration in the fees regime must result in reduced applications and hence reduces accountability. In this regard, we note the substantial paper of Mr Alistair Roberts where the author makes the following telling observation:-

Public officials divert requests for information that would once have been handled informally into the FOI system. In the submission to this Committee in its review of the Freedom of Information Act *dated 28 May 1999, the Council suggested that one mechanism to reduce this would be to extend the immunity contained in Section 102 of the Act to any officer exercising a delegation under Section 33, who releases a document other than under the FOI Act provided the document would not have been exempt had it been requested under the FOI Act. That suggestion was not taken up by the government.*

Susan Heal

<u>Effect of FOI fees and charges on the amendment of documents</u>

The FOI Act provides that there are no fees or charges payable for a personal FOI access application under Part 3 of the FOI Act, or for an application to amend 'personal affairs' documents under Part 4 of the Act. This is consistent with statements that have repeatedly been made since the introduction of Queensland's FOI Act in 1992 that individuals

should be able to gain access to information held by government concerning their own personal affairs, and ensure the accuracy of such information, free of charge. On that basis, it would appear at first blush that the FOI fees and charges regime would have no effect on the amendment of documents.

However, one of the statutory prerequisites to an application for amendment of documents under Part 4 of the FOI Act is that the applicant has previously had access to the document, whether or not such access was under the FOI Act.

As long as the applicant is able to obtain access to the document under FOI, or under an alternative administrative access regime which does not involve any cost to the applicant, then there should be no costs involved in such access (or any subsequent amendment application). But if the document in question is subject to an alternative access regime established by an agency, where that access is subject to a fee or charge (as provided for in section 22(a) of the FOI Act), then the agency may refuse access under FOI and require the person to seek access to the document in question under the alternative scheme, and pay the costs associated with access under that scheme.

I am aware of several agencies that have established such alternative access schemes with associated fees or charges, which extend to documents that arguably would be characterised as 'personal affairs' documents under FOI. One example of such a scheme is the Queensland Ambulance Service's scheme for accessing ambulance reports.

Requiring individuals to obtain access to such documents under such alternative arrangements, with associated costs, significantly undermines one of the fundamental principles underlying the FOI regime; namely, that access to 'personal affairs' information should be free of charge.

The mandatory application fee for non-personal FOI applications

In the 2002 report on FOI in Queensland, the committee has previously reviewed issues concerning the prescribed application fee for non-personal FOI access applications, and recommended that consideration be given to amending the FOI Act so that the fee should not be payable for applications relating to a deceased close relative of the applicant, or where information about a close relative who is still alive is significant to an applicant. This recommendation was not accepted by the government and the 2005 amendments to the FOI Act include a new provision (section 35C(1)) which explicitly states that an application fee may not be waived.

However, it appears that some agencies are ignoring that statutory requirement and waiving the mandatory non-personal application fee in certain circumstances (e.g. in the type of circumstances raised by the committee in its 2002 report). This can be readily demonstrated by analysing the figures reported in the FOI Annual Reports prepared by the Department of Justice and Attorney-General under section 108 of the FOI Act…

It is essential that the fees and charges regime be consistently applied, as the current lack of uniformity among agencies is confusing for applicants and makes it difficult for agencies who are complying with the strict terms of the legislation to justify their position, both to applicants (who often state that they have not been required to pay the prescribed fee fro similar types of non-personal applications made to other agencies), and in unwarranted review applications brought by applicants because of discrepancies in approach.

Whole of Government submission

The amount recovered by agencies in fees and charges is only a small proportion of the total cost of implementing FOI.

The application fee and processing and access charges are increased annually in accordance with the policy that ties government charges to the Consumer Price Index.

The access charge for providing photocopies of documents to applicants was reduced in 2002 from 50 cents to 20 cents per page. In 2006, it remains at 20 cents per page.

6.12.2 Committee comments

The submissions received by the committee called for simplification of the current multi-layered regime of costs for access to documents under the *Freedom of Information Act*. Such a complex regime, with many different administrative considerations, imposes far greater an administrative burden on departments and agencies than the original regime recommended by EARC and PCEAR. Unfortunately, the complexity of the current fees and charges legislation may have led also to a lack of uniformity between agencies in determinations regarding fees and charges.

The committee notes that full cost recovery will never be possible. Freedom of information, that is, access to government-held information, will always occur at a cost to government. Accordingly, any regime of costs set by legislation will have an element of artificiality.

However, in the committee's view, the ideals must be for the freedom of information fees and charges regime to be:

- without charge for access to a person's own personal affairs information;
- fair, with costs ensuring an application represents a genuine need or interest to access information, while at the same time, not prohibiting people with a genuine need or interest from accessing information; and
- relative to the reasonable costs associated with applications for information.

The independent economic review of the United Kingdom freedom of information legislation conducted by Frontier Economics provided the United Kingdom Government, its Parliament and parliamentary committees, departments and agencies and the people of the UK with valuable information. The committee notes that the report was considered by the House of Commons Constitutional Affairs Committee prior to a finding that change to the existing costs regime was not justified economically.

In Queensland, the committee has not had the benefit of information from an independent economic review.

The committee recommends (**recommendation 7**) that the Attorney-General ensure simplification of the regime of costs under the *Freedom of Information Act* so as to reduce the current administrative burden. Personal information should continue to be available without charge.

In addition, we recommend an independent economic review of the impact of the *Freedom of Information Act*. An economic review will provide valuable data to inform legislative developments regarding the Act. Finally, the committee recommends that section 108 of the *Freedom of Information Act* be amended to require the provision of adequate and informative data, with the requirements for data to be determined following the independent economic review.

6.13 Committee recommendations – costs of freedom of information access

Recommendation 7: The Attorney-General should ensure the regime of fees and charges in the regulations made under the authority of the *Freedom of Information Act 1992* is:

- simplified – currently, the administrative burden imposed on agencies by the many facets of the current regime is too great;
- imposed consistently and uniformly by departments and agencies;
- without charge for people seeking their personal information;
- fair – ensuring an application represents a genuine need or interest to access information and, at the same time, does not prohibit people with a genuine need or interest from accessing the information; and
- relative to costs of delivery –
  - an independent review of the impact of *the Freedom of Information Act 1992* is suggested; and
  - section 108 of the *Freedom of Information Act 1992* should be amended to require the provision of adequate and informative data.

7 COSTS OF ACCESS – *JUDICIAL REVIEW ACT*

Key issue: 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?

7.1 Current costs of judicial review proceedings

Proceedings brought under the *Judicial Review Act* are heard in the trial division of the Supreme Court. Costs associated with judicial review proceedings generally include filing and other court fees and the cost of legal advice and representation.

To make application in the Supreme Court for a statutory order of review under Part 3, or a review under Part 5, of the *Judicial Review Act* it is necessary to pay the court filing fees associated with commencing such an application:

- $483, where there is only one applicant and the applicant is an individual, or where there is more than one applicant and all applicants are individuals;
- $938, in any other case.[85]

The Queensland Courts' website advises people who are representing themselves:

> You can apply to the court to be exempted from paying court filing fees if you are experiencing financial hardship.
>
> The court registrar may, by order, exempt you if they believe it is fair, reasonable and justified.
>
> This exemption can be approved quickly and without extensive investigation.
>
> If your request for an exemption is refused, you will have to pay the appropriate fee when you lodge the court documents initiating your proceedings.

In its *Report on Judicial Review of Administrative Decisions and Actions*, EARC noted that many submissions it received reflected 'general community concern at the costs of litigation: that access to the courts is being priced beyond the means of the average citizen, and is readily available only to those disadvantaged who meet the stringent means tests for legal aid, and the wealthy, or well resourced organisations'. Accordingly, EARC recommended 'the enactment of a provision conferring on the Court a discretion to make special orders as to legal costs, on the application of a party, at an early stage in judicial review proceedings'.[86]

7.1.1 Key issues

In the context of the effect, if any of the costs associated with judicial review applications on the accessibility of administrative justice, the committee suggested that factors for consideration included:

- alternate and less expensive processes (alternate dispute resolution, alternative methods of case management such as problem-solving judicial case management);
- legal representation (assistance required by litigants in person, ways in which an apparent high level of unmet demand for legal assistance might be met);
- section 49 costs orders (width of discretion for appropriate costs orders, legislative guidance regarding the courts' discretion, 'upfront' orders for 'public interest' applicants);
- standing and costs;
- public interest matters (costs funding); and
- model litigant principles.

85 Uniform Civil Procedure (Fees) Regulation 1999 (Qld), schedule 1.

86 EARC, *Report on Judicial Review of Administrative Decisions and Actions*, December 1990, 104.

7.1.2 Conference discussion

One discussion topic considered by participants in the conference regarding the Accessibility of Administrative Justice was: Litigation between government and individual – can inequality be minimised? Matters discussed at the conference are set out in **appendix B**.

The information and views provided to the committee in written submissions in respect of each of these factors, together with committee considerations and any committee recommendations are set out below.

7.2 Costs associated with judicial review proceedings generally

7.2.1 Reforms in other jurisdictions

Submissions to the inquiry outlined reforms in other jurisdictions regarding the costs of judicial review proceedings incurred by some applicants.

QAILS and QCOSS

[A]t a federal level the federal Magistrates Court hears many judicial review type matters and provides a far more affordable option than the Federal Court. There are guidelines between the Federal Court and the Federal Magistrates Court that determine what sorts of matters are heard where.

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

QPILCH

A recent introduction to some federal jurisdictions has been fee exemption in circumstances where the person has been granted legal aid, under a legal aid scheme or service established under Commonwealth, State or Territory law, or approved by the Attorney-General.

The procedure for waiver is that the community legal centre provides a "notice of exemption" on their letter head, which is presented with a completed standard fee waiver form to the court registry who will then grant the fee exemption.

Clients are only eligible for exemption where the centre is providing legal advice, acting on behalf of, or representing the client. Further, the exemption is only valid for the specific fee for which exemption is sought. If a further fee is payable, then the client will need to reapply for the exemption.

7.2.2 Relevant information and views considered by the committee

Bar Association of Queensland

The Association does not perceive any particular access difficulty in respect of the exercise of judicial review rights stemming from Supreme Court filing fees. Availability of representation is a constraint on access to justice generally, not just in respect of the exercise of rights of judicial review.

Court fees must be set high enough to give pause for thought to the zealot or the vexatious but not so high as effectively to deny an ability to exercise what is nominally a birthright, access to equal justice according to law before an independent judiciary. The notion, evident to an extent in the fees and charges regime applicable to the Federal Court of Australia and the Federal Court of Australia and the Federal Magistrates' Court, that a court is a costs centre available on a user pays basis, does violence to this birthright.

QAILS and QCOSS

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

Several systemic barriers exist in the area of judicial review:

- The Supreme Court is generally recognised as the most expensive state jurisdiction in terms of filing, schedule of fees and costs etc;
- Judicial review matters, though simplified since the days of prerogative writs, remain among the most complex of matters; and
- The jurisdiction of the Supreme Court in the area of judicial review is not well understood amongst the legal profession, let alone the general public.

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

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

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

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

Natural Resources, Mines and Water

The costs of pursuing actions under Judicial Review are no different than are attracted to any action before the courts. Further, Judicial Review is often an option that is available after less costly options have been pursued (such as internal review).

Alec Lucke

The effectiveness of judicial review has to be questioned as it is not cost effective. Judicial Review serves only to allow the government to argue that they provide a means by which a challenge can be mounted against an administrative decision. In actual fact there is no merits review and judicial review provides no guidance of the matter disputed.

Cairns City Council

Council does not have enough data to comment due to low numbers of judicial review applications involving Council in last 6 years. However, Council is concerned that these applications are dealt with in the Supreme Court at a level of expense, degree of formality and in a long list of cases before that jurisdiction that anecdotely is not warranted by the nature of decisions challenged. For example in the last 6 years Council has been involved in 3 judicial review applications - 2 being public interest cases regarding development (ordinarily dealt with at District Court level) and 1 a dangerous dog order review (more appropriately at Magistrates Court level).

Queensland Ombudsman

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

QPILCH

For impecunious but meritorious applicants, these fees can prove an insurmountable barrier to accessing administrative justice.

Individuals may apply to be exempt from paying a filing fee (but not the Appeal Costs Fund Fee) if, having regard to the individual's financial position, it is clearly in the interests of justice to exempt the individual from payment of the fee. Application is made by way of affidavit and the decision is made by the Registrar summarily.

A fact sheet regarding the exemption of fees is provided by the courts on their website and at the court registry. However, it is difficult to know whether prospective litigants are made aware of this option when they file and, if not, whether this affects the number of applications made.

A prescribed form for the waiver of fees, as is provided in several Federal jurisdictions, would assist in the publication of fee waiver provisions as well as assist applicants in applying for fee waiver, rather than having to draft an affidavit.

Whether fee waiver will be granted is within the discretion of the Registrar.

It would be useful to have defined circumstances in which fee waiver must be granted. For example, where the person:

- has been granted legal aid or community legal centre assistance for the proceeding
- is the holder of a health care, pensioner concession, seniors health, or other Commonwealth health concession card
- is serving a sentence of imprisonment or is otherwise lawfully detained in a public institution
- is a child under the age of 18 years
- is in receipt of youth allowance, Austudy payment or ABSTUDY benefits.

While these are issues the registrar of Queensland already considers and would likely justify a grant of fee waiver, taking discretion away in these specific circumstances will allow quicker processing, simpler application procedures and increased certainty.

It would be of assistance to Legal Aid Queensland, CLCs and their clients if [a fee exemption] procedure was adopted in the Supreme Court of Queensland.

The fee waiver procedure described only applies to individuals. Everyone else is required to pay $910 to file a judicial review application.

Non-profit organisations are often well placed to bring judicial review matters in the public interest. However, given the limited resources of most organisations, the filing fee, notwithstanding the potential for cost orders, may mean the end of proceedings.

Accordingly, there needs to be consideration of fee waiver or reduction provisions in the case of non-profit incorporated associations pursuing judicial review in the public interest.

While generally not an issue, the inability to waive the Appeal Costs Fund Fees can impose an additional barrier for those whom payment of $18.40 is an impossibility. The specific example we have in mind is prisoners.

There should be consideration of whether this fee should be waived in certain circumstances.

Caxton Legal Centre

Because our clients are usually financially disadvantaged, the costs and fees associated with the Supreme Court and judicial review applications are a real disincentive to our clients taking action in this arena. At the very least, we consider that entitlement to a waiver of filing fees on the grounds of financial hardship assists in ensuring access to justice for worthy clients.

The filing fee in Supreme Court cases is significant ($455-$910) and many of our clients are simply unable to pay such a fee. The Uniform Civil Procedure Rules (see Rule 971) currently provide for exemptions to be granted relieving an applicant from paying the Supreme Court's filing fee. However, as things stand, an applicant seeking such an exemption currently needs to file a supporting affidavit on this point together with their application and then needs to appear in the court on the issue. Therefore, applicants are faced with a complex process at the very outset of proceedings just to obtain a filing fee waiver, and for many – especially self-represented litigants, this complexity will act as a real deterrent against them even beginning an application.

A waiver form such as the one used in the family court (see copy and information attached) is a relatively simple way of obtaining a waiver and arguably could be easily adapted for use in the Supreme Court. In family law matters, clients either simply sign (by swearing or affirming) the relevant form and provide a copy of their social security card or set out another reasonable case showing their financial circumstances of hardship. This process may require some 'discretion' to be exercised at the registry but in our submission would assist in the processing of applications, and would provide financially disadvantaged individuals with greater access to justice.

7.2.3 Committee comments

The committee notes that the Uniform Civil Procedure Rules provide for an applicant experiencing financial hardship to be exempted from paying filing fees for an application under the *Judicial Review Act* where the court registrar believes that such an exemption would be fair, reasonable and justified. Submissions to the committee's inquiry suggested that the court registrar's exercise of discretion would be assisted by specified circumstances in which a fee waiver should be granted, including where the applicant is being assisted by Legal Aid Queensland. The committee suggests that consideration be given to the amendment of the Uniform Civil Procedure Rules to effect such reform. This would provide people wishing to apply for a fee waiver with a greater indication as to the likely success of an application for exemption from fees.

7.3 Alternate and less expensive processes

Alternative processes used within or outside courts for the resolution or determination of disputes are generally referred to as 'alternate dispute resolution' (ADR). The Federal Government established the National Alternative Dispute Resolution Advisory Council to provide policy advice on ADR. It defines ADR as:[87]

> processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.

ADR processes include negotiation, mediation, evaluation, case appraisal and arbitration. They may be utilised in administrative disputes in a variety of ways:[88]

> A formal determination by a court or tribunal, or an investigation and recommendation by an ombudsman agency, is not the only means of achieving administrative justice. Mediation and other forms of alternative dispute resolution (ADR) are increasingly being adopted as a method of resolving disputes, including with government. Where there is in existence an extensive tribunal review process, operating in a relatively informal manner, there may be less justification for use of alternative processes, but in areas of government where redress is provided predominantly through litigation, ADR may have a greater role to play.

Part 4 of the Uniform Civil Procedure Rules provides for mediation and case appraisal processes.

Mediation is defined by the National Alternative Dispute Resolution Advisory Council as:[89]

> a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

The Uniform Civil Procedure Rules require parties to act reasonably and genuinely in mediation and to help the mediator to start and finish the mediation within the relevant time.[90]

Case appraisal is defined by the National Alternative Dispute Resolution Advisory Committee as: [91]

> a process in which a third party (the case appraiser) investigates the dispute and provides advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

The case appraisal process provided for in the Uniform Civil Procedure Rules is more formal than mediation. The case appraiser may exercise inquisitorial powers.[92] If an election to proceed to hearing is not made by one of the parties, the parties are taken to have consented to the case appraiser's decision being binding on them.[93] The decision becomes final and binding.[94]

7.3.1 Reforms in other jurisdictions

In New South Wales, part 7B of the *Supreme Court Act* provides for mediation and neutral evaluation. Section 110K allows the Court to refer, either with or without the consent of the parties, proceedings other than criminal proceedings for mediation or neutral evaluation.

87 See: www.ag.gov.au/agd/WWW/disputeresolutionhome.nsf.
88 Robin Creyke & John McMillan, *Control of Government Action: Text, Cases & Commentary,* LexisNexis Butterworths, Chatswood, 2005, 107.
89 See: www.ag.gov.au/agd/WWW/disputeresolutionhome.nsf.
90 See Rule 325.
91 See: www.ag.gov.au/agd/WWW/disputeresolutionhome.nsf.
92 See Rule 337.
93 See Rule 343.
94 See Rule 341.

The National Alternative Dispute Resolution Advisory Committee defines early neutral evaluation as:[95]

> a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a neutral third party who makes a determination as to the key issues in dispute, and most effective means whereby the dispute may be resolved, without making any determination as to the facts of the dispute.

At the time of the tabling of this report, the Law Reform Committee of the Parliament of Victoria was finalising an inquiry into Alternative Dispute Resolution. The scope of the Victorian Committee's inquiry included consideration of access to justice in civil disputes. The Chair and Deputy Chair of the Victorian committee kindly discussed the published material considered during the inquiry with members of the Queensland committee during a meeting in Melbourne.

7.3.2 Relevant information and views considered by the committee

The Law Society of New South Wales

The costs of judicial review compound the costs of seeking access under the FOI Act. Any challenge to administrative decisions and actions should be assisted by the applicant being able to assess for themselves the likelihood of success of judicial review in their case. Necessarily, judicial review of administrative decisions is little different from any other judicial action. The costs associated with matters in a court concern the legal issues of a matter and not necessarily the administrative issues leading to judicial review. The alternative review mechanisms as identified under key issue 2 should be used in matters of judicial review of administrative issues as they would be used for other court matters.

The appraisal of judicial review for administrative matters should recognise that it would need to examine the entirety of the processes and administration of the courts and not be confined to one aspect of judicial review. The costs of judicial review apply to all matters and not just to judicial review of administrative matters. This is a larger project that would appear to be beyond the scope of the current review. Nonetheless, it is an opportunity for recommending a broader review of judicial processing and procedures to follow on from the success of the Uniform Civil Procedure Rules 1999.

Caxton Legal Centre

We believe that judicial review needs to be simplified, but not at any cost. If the Supreme Court is to retain jurisdiction in judicial review cases, we believe that there should be two tiers in the judicial review process – like that in the federal jurisdiction where both the Federal Court and the Federal Magistrates Court have powers to deal with federal judicial review matters and guidelines determine which matters are heard in which court. The Federal Magistrates Court is more affordable and is therefore a more accessible forum, and the sharing of this jurisdiction would appear to make administrative justice in federal matters more accessible and effective.

A similar option might be possible in Queensland if the Magistrates Court could be vested with additional powers to deal with judicial review. Given the ramifications of complex or important judicial review cases, it seems desirable that certain judicial review cases should still be heard in the superior courts and certainly, if the Magistrates Court were vested with judicial review powers, it would be extremely important for Magistrates to be properly trained in this field. Indeed, under such an arrangement it may be more appropriate to designate specialist magistrates to deal with administrative low matters – such as has occurred with the appointment of specialist family law magistrates in the past. If such a scheme were introduced, both the magistrates and judges would need to be granted power to remit cases to the move appropriate forum, as happens where the Federal Court remits matters back to the Federal Magistrates Court. Accordingly, such a scheme at a state level would enable complex cases to be determined in the Supreme Court and less complex matters to be determined in the Magistrates Court. The amount of money involved in a dispute should not be the sole determining factor about jurisdiction because decisions in certain cases have the potential to affect vast numbers of people. Referral of cases should be dependent on complexity, quantum and importance.

Environmental Protection Agency

The availability of, or a requirement to seek ADR, case management review applications, or attend pre-hearing conferences may increase the number of matters resolved by consent and consequently reduce the legal costs associated with an application.

The court has a very broad discretion in relation to costs, which supports the ability to make genuine challenges.

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95 See Rule 341.

Caxton Legal Centre

The costs associated with judicial review, as previously noted, are a real barrier to people enforcing their rights in this area. In our experience, Legal Aid is rarely granted in this area. The 'working poor' and social security beneficiaries are therefore rarely going to be able to afford to fund judicial review applications. Given the difficulties obtaining pro bono representation, which is so limited in its availability, such clients simply do not have access to administrative law remedies.

The discussion paper mentions the possibility of "capping" costs which can be awarded against the Legal Aid Commission (as is the case in NSW) as a way of enabling legal aid cases to be run in this jurisdiction and we agree that capping the awards of costs which can be awarded against legal aid might be a useful amendment. If such an approach were to be adopted, we submit that the same rule should apply to community legal centres, although we submit that a cap of $5,000 is too high.

The Section 49 costs orders which are available under the *Judicial Review Act* may well have been intended to assist individuals to obtain access to justice in this area of law but we note that the discussion paper comments that few such orders have actually been made. In our experience, the threat of costs is a major factor in causing our clients to abandon pursuit of legal claims in court – as was recently demonstrated by a client in one of our general civil law cases who terminated his case even though we considered that he had reasonable prospects and had secured the pro bono services of an extremely experienced counsel. If such section 49 orders were made with more regularity to ensure that impecunious clients are only exposed to their own costs, this may encourage clients to pursue their claims. Any amendment to the Act facilitating more common use of section 49 to protect worthy but impecunious or public interest applicants should be considered.

In relation to QPILCH's 2002 submission to the former Attorney General, which is discussed on page 19 of the Discussion Paper, we support the "development of a policy …that enables the courts to waive fees in public interest and pro bono litigation in Queensland" as well as a costs regime that "clearly limits costs, undertakings as to damages and security for costs against public interest litigants."

Commission for Children and Young People and Child Guardian

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 an 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 and Young People & Child Guardian Act 2000*. 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.
- Under the *Child Protection Act 1999* (CPA) a child or a parent can apply to have the CST for a review of the following decisions:
  - in whose care to place a child under a child protection order granting the Chief Executive custody or guardianship;
  - not informing the child's parents of the person in whose care the child is and where the child is living; and
  - 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.

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.

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.

Caxton Legal Centre

We appreciate that there is some risk that unmeritorious applications may be brought if the process is too simple and inexpensive, however, one option to guard against this (requiring a minor amendment to Rule 576 of the Uniform Civil Procedure Rules) might be for the Court, on its own motion, to be able to dismiss an application at a directions hearing. (This is a possible alternative to the court using its powers to declare someone a vexatious litigant, however, both powers should be exercised cautiously when dealing with disadvantaged people who are often the most likely to be exposed to unfair treatment while at the same time being the least capable of explaining and arguing their position in formal adjudicated disputes).

As to the issue of judicial review only being available in the Supreme Court, our other major concern is that it is simply impossible, in our experience, for self-represented litigants to appear in such matters because of the complexity involved with judicial review applications. The fact that there may be low numbers of judicial review applications does not mean that there is no real need for judicial review. In our experience a costs analysis ultimately leads to many clients who might otherwise want to bring a judicial review application to simply not take steps to enforce their rights.

The enormous costs associated with Supreme Court litigation are well known and we consider that the filing fees and costs associated with judicial review are, in reality, a serious discouragement to clients seeking access to justice in the field of administrative law. Based on our observations, counsel's fees for the settling of initial documents and initial appearance/s could easily be $2,500 and low income earners, in our experience, rarely have the capacity to afford such outlays, let alone filing fees and their own solicitor's costs. Furthermore, given that the existing administrative law remedies evolved out of the older, extremely complicated prerogative writs, judicial review remains a complex and highly specialised area of legal practice.

Department of Industrial Relations

Alternate court sanctioned dispute resolution mechanisms (such as problem solving judicial case management) in matters of judicial review run the risk of blurring the principles of the separation of powers. It might violate preconceptions of the separation of powers for the judicial branch to tell the executive when to keep its promises. It could be argued that to give such an instruction would be tantamount to the judiciary giving legislative effect to executive statements. The court's role is not to determine the case on its merits or to provide alternative dispute resolution mechanism. The court's role is to review the administrative decision made only for contravention of an Act, breach of natural justice or another irregularity. This is the most substantive feature of judicial review – the Act gave the job to the administrator, not the court.

Bar Association of Queensland

The institution of proceedings founded upon a confusion between judicial review and review on the merits consumes limited judicial and equally limited public legal resources in the cost of responding to those proceedings.

Our judicial system is predicated upon the dispensing of justice according to law by an independent judiciary assisted in that task by the legal representatives of each party. In general, it works well in that circumstance. Further, such a system is cost effective to society. The 'user pays' element is provided not by excessive court fees and charges but by the cost of legal representation incurred by the parties. Under that system a judge cannot be both independent adjudicator and advisor to either party. The inquisitorial alternative of an 'investigating judge' would require a massive increase in the public funding of the judicial branch.

Sometimes, lurking and perhaps not articulated, in the generality of a litigant in person's dissatisfaction with an administrative decision is an arguable administrative law error ground. In such cases the judiciary and the respondent government official and agency are put in a difficult position. For the judge to identify the error at the hearing is to depart to some degree from the role of independent adjudicator. If only so identified at the hearing a ready answer otherwise available to a respondent either in law or by the adducing of evidence may not immediately present itself whereas on reflection or with advance notice it might. It is the experience of members of the Association that such situations do arise in judicial review cases conducted by litigants in person. The case cited by the committee in its discussion paper, *Stephenson v Corrective Services Commission* exemplifies this.

Queensland Ombudsman

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.

7.3.3 Committee comments

Currently, in the absence of a statutory right to external review of an administrative decision, an application under the *Judicial Review Act* may be the only administrative justice mechanism available for a person who disputes such a decision. In this report (**recommendation 15**), the committee recommends the establishment of an administrative tribunal with general jurisdiction to review administrative decisions. The Queensland Premier and Attorney-General and Minister for Justice have indicated an intention to establish such a tribunal. Accordingly, in future, some matters currently proceeding to judicial review in the Supreme Court will be heard by a general tribunal reviewing the 'merits' of decisions.

In relation to those matters for which judicial review, that is the review of the legality of the administrative decision, remains the only administrative justice mechanism available, the committee notes the judgment of Lord Woolf CJ in *Cowl v Plymouth City Council* [2002] 1 WLR 803 at 803. In his judgment regarding an application for judicial review brought against a local government authority by seven residents in a residential care home in the United Kingdom, Lord Woolf CJ, in the House of Lords, referred to the importance of parties to judicial review proceedings 'coming to a sensible conclusion as to how to dispose of the issues which divide them:

> The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation wherever this is possible. Particularly in the case of these disputes both sides must be now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.
>
> Today sufficient should be known about alternative dispute resolution to make the failure to adopt it, in particular when public money is involved, indefensible.

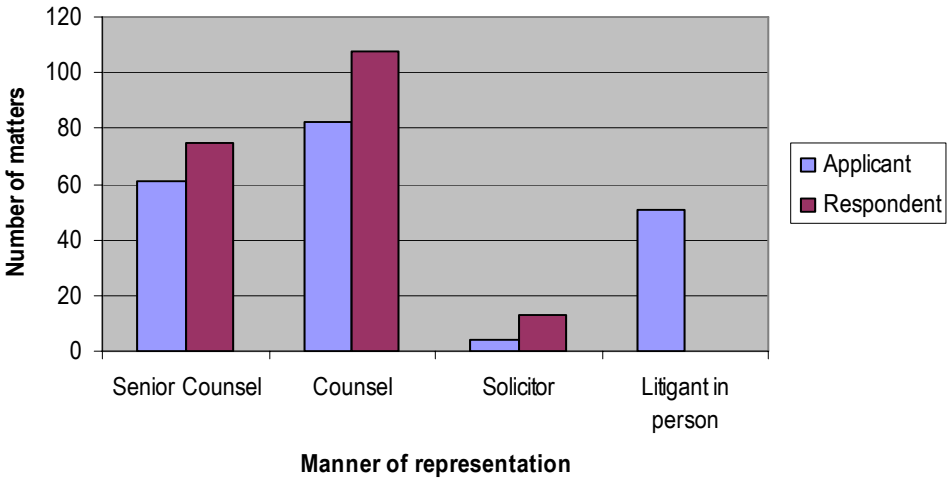
The committee considers that, 'to meet the needs of parties and the public and to save time, expense and stress', the scope of alternative dispute resolution methods available to parties to judicial review proceedings should be extended to include early neutral evaluation. Mediation and case appraisal are currently available under the Uniform Civil Procedure Rules. However, judicial review matters often involve an individual and a public sector agency. Mediation, in which the mediator is a neutral third party, may not be the most appropriate ADR method in these circumstances. Similarly, the formality of the case appraisal process and its determinative outcome is not the most appropriate method for the resolutions of such disputes either. The committee suggests the availability of early neutral evaluation for these matters.

7.4 Legal representation

Prior to the tabling of the discussion paper, the committee researched judgments in the Supreme Court of Queensland regarding proceedings under the *Judicial Review Act* for which judgment was entered between 1995 and the end of October 2005. This research was summarised in the discussion paper. The graph below indicates the numbers of these matters in which the applicant and respondent to proceedings were respectively represented by the most senior of the following:

- senior counsel;
- counsel;
- a solicitor;
- the applicant themselves ('litigant in person').

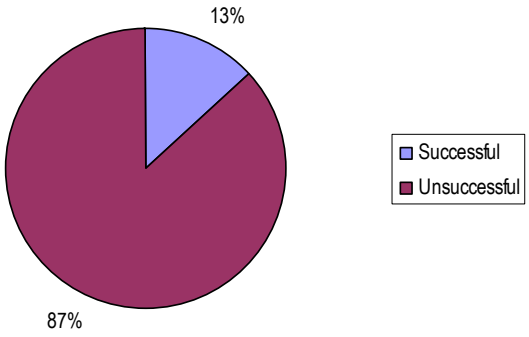
Representation of parties in judicial review proceedings (1995-2005)



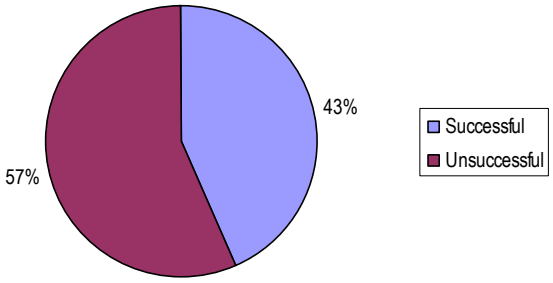
Accordingly, the respondent, a public sector department or agency always had legal representation. A significant number of applicants were self-represented.

The graphs below indicate a greater success rate for applicants who had legal representation when compared to applicants who were self-represented. Research in other Australian jurisdictions also indicates that legal representation may be more likely to lead to resolution by consent rather than by determination.[96]

Success of judicial review proceedings (applicants in person)



Success of judicial review proceedings (applicants legally represented)



Research conducted by the committee, also set out in its discussion paper, indicated that issues raised in unsuccessful applications by litigants in person had included:

- the jurisdiction of the Public Sector Appeal Tribunal;
- whether the availability of appeal to the District Court excluded a prerogative order;
- whether a statement made in Parliament can be the subject of judicial review;
- review of a decision of a parole board not to grant parole;
- review of a refusal of the Queensland Building Tribunal to entertain an application for compensation;

96 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, report no 89, January 2000, 7.

- the jurisdiction of the Anti-Discrimination Commission Queensland;
- review of refusals to grant remission of a prison sentence;
- whether a section 49 costs orders should be made (section 49 costs orders are discussed in section 7.5);
- review of a decision of the Information Commissioner denying access to a document;
- whether a statement of reasons should have been provided in respect of an administrative decision;
- whether a 'vexatious litigant' should be granted leave to institute proceedings;
- review of a decision on a prisoner's security classification;
- whether a decision was made 'under an enactment' or of a managerial nature;
- whether payment to members of a high school P&C association was contrary to the constitution of the association;
- whether a decision regarding reinstatement involved jurisdictional error;
- review of a decision of a Magistrate regarding domestic violence orders; and
- whether a decision by the Premier to introduce legislation to Parliament was a 'decision made under an enactment'.

In respect of self-represented litigants in the Court of Appeal, the 2006-2007 Annual Report of the Supreme Court of Queensland states:[97]

> Cases involving self-represented litigants sometimes take longer to hear and determine because the standard of preparation and presentation can be poor and the litigants may be unable to clearly articulate the real points of the case. The outlines of argument of self-represented litigants may be filed late and are sometimes not served on the respondent. This results in case management, court mentions, adjournments, wasted court time and unnecessary costs…
>
> These litigants continue to place a heavy burden on registry staff. They require more staff time, attention and support despite the availability of detailed information sheets. Registry correspondence on the files of self-represented litigants is approximately three times the norm.

In Queensland, Legal Aid Queensland (LAQ) provides people who need legal assistance but cannot afford to pay a private lawyer with aid for legal representation. The aid is provided through LAQ's own solicitors and through private solicitors. However, as noted by EARC in 1991, funding provided by federal and state governments is dispersed in accordance with the *Legal Aid Act 1997* (Qld) and is largely consumed by criminal law and family law matters.

The 2006-2007 Annual Report of LAQ advises:[98]

> We conducted a civil law review in 2005–06 and implemented a number of its recommendations in 2006–07. These included developing a screening tool to identify whether clients have additional civil law needs and establishing a Brief Services Unit to provide extra help to civil law clients.
>
> The Brief Services Unit bridges the gap between advice and casework and complements the work of our FACT and the Civil Justice Practice. The unit targets clients who have difficulty progressing legal matters on their own and focuses on areas that have a significant impact on the client's financial or social circumstances, like housing, debt and consumer issues, welfare benefits, employment, and access to community services such as health and education.

Further, the 2006-2007 Annual Report of the Supreme Court of Queensland advises that the Department of Justice and Attorney-General:[99]

> is planning to establish a staffed information centre for self-represented litigants within the District and Supreme Court building in the first half of the next reporting year. The centre will operate in association with the civil legal assistance scheme proposed by [the Queensland Public Interest Law Clearing House Inc]. This initiative should improve public access to justice in Queensland.

97 See: www.courts.qld.gov.au.

98 At 47, see: www.legalaid.qld.gov.au/Publications/Reports/Annual+Report.htm.

99 See: www.courts.qld.gov.au.

7.4.1 Reforms in other jurisdictions

In June 2004, the Senate Legal and Constitutional Committee tabled its report, *Legal Aid and Access to Justice*.[100] In that report, the Senate committee recommended that the federal government commission research into certain areas including the delivery of legal services for key groups of people, such as women requiring legal services in immigration and refugee law, human rights law, civil and administrative law.[101]

Section 47 of the *Legal Aid Commission Act 1979* (NSW) limits to $5000 the costs recoverable against the NSW Legal Aid Commission in any one proceeding (or to $5000 for each party which has, in the view of the Commission, a separate interest in the proceeding). The liability of the NSW Legal Aid Commission is reduced further in certain circumstances prescribed by section 47.

7.4.2 Relevant information and views considered by the committee

QAILS and QCOSS

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

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

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

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

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

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

Commission for Children and Young People and Child Guardian

Children and young people are not bringing proceedings under the JRA. Of the 208 applications brought between 1 February 1995 and 31 October 2005 only one may have been brought by a child or young person [*Johnson (by litigation guardian) v Spence* QSC 324]. The issue for the committee to investigate is the barriers to children and young people using the JRA.

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. A parent or guardian would usually be the litigation guardian. 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 cots 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.

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100 Senate. Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, report, June 2004, available at: http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf.

101 Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, at para 4.123.

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 brought 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 the government establish a state funded litigation guardian.

Queensland Council for Civil Liberties

Self represented litigants:

- may not have had the benefit of any legal advice as to the merits of their matter,
- are likely to have provided court documents which insufficiently pleaded their case,
- are likely to have put before the court issues irrelevant to the consideration of judicial review, and
- are likely to have placed significant administrative and other burden on the court and the other side.

There is unlikely to be a legislative solution for this problem. Rather, it is something that will require a combination of free legal services, social services and court policy and procedure reform. Many would-be self represented litigants may benefit from a merits review tribunal which affords, through conciliation conferences, the opportunity for the applicant to discuss his or her issues with the agency in a structured way. Further, a service like the Citizens Advice Bureau in England could be considered, which has had great success in diverting people from the courts by simply providing these people with time, experience and an explanation of the legal merits of their case.

The Law Society of New South Wales

Where access to administrative justice is possible litigants should be assisted to have their matter dealt with in the best context available, including having legal representation. It may be appropriate to consider a mechanism to assist potential litigants access the appropriate level of justice for their matter thus reducing the information costs of accessing administrative justice. Also, cases that raise significant legal issues with wide ramifications for legal interpretation and application should be supported financially with legal representation to achieve the objective of judicial interpretation of those issues for wider application in the community. This would be a public interest test concept for determining appropriate matters to access administrative justice where it would otherwise fail to achieve that access.

The process of review by the courts must be applied to the review of administrative issues. This includes legal representation as the court processes are usually beyond persons who are not legally qualified to deal with litigation. Self-represented litigants must be discouraged as this tends to waste the court's time and add to the cost of review. Consequently, the comments, under key issue 1, to keep administrative review within the administrative review processes of the Executive is paramount. Only pertinent administrative law issues should come before the courts for judicial review under the *Judicial Review Act.*

Brisbane City Council

Council's recent expressions of judicial review applications have involved requests for review of decisions made in the course of major commercial transactions. Applications to review decisions relating to the award of tenders, or to apply for the taking of land under the *Acquisition of Land Act 1967*, are some examples of this. In these cases, the applicants have been sophisticated operators, with the benefit of expert legal advice.

Judicial Review applications in minor matters are in fact quite infrequent. For example, it is relatively uncommon for Council to receive an application to review a decision with respect to a dangerous dog declaration, possibly due to the availability of an internal review process under the relevant local law.

Department of Corrective Services

Most applications for judicial review of decisions by Departmental officers are brought by self represented litigants who are incarcerated. Some applications are misconceived because they seek to review decisions that are not amenable to review under the *Judicial Review Act 1991*. Irrespective the Department must expend funds defending itself or its officers draining resources that might be put to good use in other areas.

The Department is aware that lack of funds may deter some prisoners from challenging decisions through the Court processes. The Department believes that a better solution is for increased internal review processes.

Bar Association of Queensland

The challenging of decisions on administrative law error grounds is necessarily a subject calling for particular technical expertise on the part of both the person presenting the case and the person adjudicating it. There is a sharp distinction between the review of a decision on administrative law error grounds and review on the merits. In the Association's experience that distinction is rarely understood by laypersons in the absence of careful explanation by a trained profession. Even amongst general legal practitioners that distinction is not always appreciated. It is not just a matter of history that the jurisdiction to grant judicial review remedies is vested in the superior courts. It is in those courts and in those who regularly appear before them that the requisite expertise reposes.

Securing that expertise in representation comes at a cost, as does the provision of other professional services in our society. The public interest in the adequate provision of professional services in health has been a matter of particular controversy in recent times. The detriment to society in the absence of adequate provision for civil legal aid funding is more subtle but no less real. The ability for any citizen to appear for himself or herself before our courts is an important right.

There are particular challenges for a Parliament committed to the preservation of the rule of law and the prevention of the vices that were exposed by the Fitzgerald Inquiry. The provision of civil legal aid in respect of judicial review matters may serve both to encourage some such litigation that would not otherwise occur but at the same time it should discourage other such litigation by the highlighting of the aptness or otherwise of judicial review as a remedy for a perceived wrong. One means therefore of enhancing access to administrative justice is via the provision of legal aid to serve that end.

Caxton Legal Centre

In our experience, it is simply beyond the ability of our general client group to successfully run judicial review cases as self-represented litigants and it is interesting to note the high proportion of senior counsel appearing in judicial review cases. Appendix B of the Discussion Paper, demonstrates that a large number of judicial review applications relate to commercial interests, as opposed to the sorts of matters encountered by our clients as outlined earlier. Of some 212 cases listed in Appendix B, only 2 involve cases relating to council animal disputes, 1 relates to a community organisation, a couple relate to education issues and none appear to relate to housing provision. Having regard to the sorts of enquiries we receive relating to administrative law, it would seem that clients such as ours simply do not take their cases through the judicial review process. In our experience Legal Aid is very rarely given in such civil law disputes and any grants of aid in such cases would be exceptional ones.

The 'unbundling' approach to obtaining legal representation, which is common in family law matters (that is, where clients seek legal assistance at critical stages of a case, such as in the drafting of an application or settlement of orders and during actual court hearings) arguably is not an appropriate practice in judicial review cases and we surmise that many legal practitioners would be hesitant to expose both their clients and themselves to adverse costs orders, which might ensue in poorly managed 'unbundled' cases proceeding in the Supreme Court. Despite the attempt to simplify the law with the introduction of statutory orders for review under the *Judicial Review Act* (Qld) 1991, we consider that judicial review remains inaccessible because of its highly technical nature and because it is conducted in the very formal arena of the Supreme Court, with its various rigid listing and appearance practices and constraints imposed by the Uniform Civil Procedure Rules (Qld) 1999.

QPILCH

A separate but no less important question is who on a practical level can access administrative justice. Access can be barred, other than by legislation, through lack of knowledge, lack of representation, fear of costs orders and security for costs.

One point we have not raised is the lack of coordination in providing free legal assistance to minority groups and disadvantaged people in civil law, and in particular, administrative law matters. Currently, there exists very few free legal services for people seeking administrative justice.

Most community legal centres do not have the resources to take on casework and of these few will have the expertise to help in administrative law matters.

QPILCH's referral services are limited to the capacity and willingness of its members to take on matters on a pro bono basis. The complexity and size of judicial review means that they are generally unattractive to our member firms and barristers. Further, many of our members are conflicted out of providing representation against government agencies.

Currently, legal aid for civil law matters is restricted and its priorities do not include administrative justice. In fact, since 1993, legal aid for civil law services has declined. Attempts through programs such as the Civil Law Legal Aid Scheme have failed to stem the demand for civil law assistance. It is now recognised that the gap between those eligible for legal aid and those who can afford private services is growing steadily. Steps have to be taken to redress this problem.

LAQ is currently undergoing extensive review of its civil law services. In July 2005, QPILCH made a submission to LAQ's civil law review. We recommended a number of measures to address the growing need, including:

- Establish a mechanism to coordinate all free and low cost civil legal services in Queensland for greater efficiency and effectiveness of existing civil law services.
- Enhance speculative law services and identify barriers to them.
- Creation of two new civil law funds (1) for special public interest cases and innovative service delivery projects, and (2) to fund important public interest environmental cases.

These measures would go some way to enhancing access to the courts in the administrative law area. The recommended funds are essential for the growing section of the community who are not eligible for legal aid (roughly with an annual gross income of up to $20,000) and cannot afford private legal services (roughly those with annual incomes of less than $60,000).

As stated earlier, it is virtually impossible to successfully seek judicial review without the assistance of legal representation. The statistics provided by the discussion paper refer to a 13% success rate in self-represented matters as compared to a 43% success rate in those proceedings where the applicant was legally represented.

It is important that gaps in free legal services are addressed to ensure that access is available to all and not only those who are able to understand and afford it. It is also important that any implementation is approached in an holistic and coordinated way, so as to maximise resource sharing and effectiveness.

Queensland Ombudsman

Of equal and if not greater importance [than filing fees] 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 ost straight forward 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.

7.4.3 Committee comments

The committee notes that in New South Wales, the *Legal Aid Commission Act* has been amended to limit the costs recoverable against the Legal Aid Commission and that this allows legal centres to conduct meritorious litigation without the concern of having to pay the costs of the other party if the litigation is unsuccessful. However, the committee is of the view that, in Queensland, as currently provided in the *Legal Aid Act 1997*, it is incumbent upon the Queensland Government to allocate appropriate funding to LAQ for it to meet its statutory responsibilities and for LAQ to determine which matters should receive publicly funded legal assistance.

In this report, the committee has recommended (**recommendation 8**) the use of early neutral evaluation in judicial review proceedings. Further, it is suggested that amendment, of either the Uniform Civil Procedure Rules or the *Supreme Court Act 1995*, allow the evaluator in such proceedings to certify that a party to proceedings evaluated would benefit from publicly funded legal assistance.

7.5 Costs orders

7.5.1 Section 49

The Supreme Court's general power to award costs arises at common law and under the Uniform Civil Procedure Rules. Ordinarily, costs will follow the event so the successful party will be awarded costs.

However, section 49 of the *Judicial Review Act* makes specific provision for the Supreme Court to order a party to a review application to:

- indemnify another party against the costs related to that application from the time at which the costs application was made; or
- bear only his or her own costs regardless of the outcome of the proceedings.

In this paper, such an order is referred to as a 'section 49 costs order'. Any party to a review application may apply for a section 49 costs order. Section 49 of the *Judicial Review Act* provides:

Costs—review application

(1) If an application (the costs application) is made to the court by a person (the relevant applicant) who—
  (a) has made a review application; or
  (b) has been made a party to a review application under section 28; or
  (c) is otherwise a party to a review application and is not the person whose decision, conduct, or failure to make a decision or perform a duty according to law, is the subject of the application;

the court may make an order—
  (d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or
  (e) that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.

(2) In considering the costs application, the court is to have regard to—
  (a) the financial resources of—
    (i) the relevant applicant; or
    (ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
  (b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
  (c) if the relevant applicant is a person mentioned in subsection (1)(a)—whether the proceeding discloses a reasonable basis for the review application; and
  (d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c)—whether the case in the review application of the relevant applicant can be supported on a reasonable basis.

(3) The court may, at any time, of its own motion or on the application of a party, having regard to—
  (a) any conduct of the relevant applicant (including, if the relevant applicant is the applicant in the review application, any failure to prosecute the proceeding with due diligence); or
  (b) any significant change affecting the matters mentioned in subsection (2);

revoke or vary, or suspend the operation of, an order made by it under this section.

(4) Subject to this section, the rules of court made in relation to the awarding of costs apply to a proceeding arising out of a review application.

(5) An appeal may be brought from an order under this section only with the leave of the Court of Appeal.

(6) In this section—

review application means—
  (a) an application for a statutory order of review under section 20, 21 or 22;[102] or
  (b) an application for review under section 43; or
  (c) an appeal to the Court of Appeal in relation to an order made by the court on an application mentioned in paragraph (a) or (b).

[102] Section 20 (Application for review of decision), 21 (Application for review of conduct related to making of decision) or 22 (Application in relation to failure to make decision)

7.5.2 Legislative history

In his second reading speech regarding the Judicial Review Bill 1991, the Hon DM Wells MP said of section 49:[103]

> The Bill also provides that the Supreme Court has a discretion to make special orders as to legal costs, on the application of a party, at an early stage in the proceedings. For example, the court may order one party to indemnify the other party or that one party is to bear only that party's costs of the proceedings, regardless of the outcome of the proceedings. This provision will assist less wealthy parties who have a meritorious case but are afraid of losing the application and therefore paying the legal costs of both parties to the proceedings.

A provision equivalent to section 49 had been recommended by EARC in its 1990 report, *Judicial Review of Administrative Decisions and Actions*. In an address to a public seminar held by EARC the then Federal Court justice, Justice Pincus, had made the following suggestions:[104]

> We have with us, always, the poverty-stricken litigant. We have the wealthy litigant. The most important litigant, in a sense that he or she has the worst problem, is the ordinary person who has something substantial to lose. What may be lost if a suit fails is a house, the party's main asset. Your house can be lost as a result of a case against the government which takes, say a week and then goes to the Full Court. The Court may ultimately decide, contrary to the litigant's own advice, that the case has no substance and the applicant has to pay costs.
>
> To make this system work, you should give power to the Court to make at least a provisional costs order, right at the outset. The judge in some circumstances may think it is right to order that, whatever the result, the applicant will not have to pay the costs of the case. If the applicant misbehaved later then that licence to litigate free of risk as to costs, so to speak, would be withdrawn, the withdrawal order operating only from the time at which it is made.
>
> More generally, the Court needs to have wide powers to consider and make orders about costs at the outset, so that meritorious cases can be pursued without the uncertainty as to the costs outcome which presently besets even the worthy applicant, bringing a claim in the public interest.

7.5.3 Key issue

In its discussion paper, the committee stated that its consideration of judgments in judicial review matters indicated that section 49 costs orders had rarely been made. In those judgments, the Supreme Court judgments had relied upon more narrow constructions of section 49, regarding section 49 as essentially a restatement of the courts' common law powers relating to costs.

7.5.4 Relevant information and views considered by the committee

Bar Association of Queensland

> The prospect of an adverse costs order has a chilling effect on all civil litigation where a costs power exists, not just judicial review litigation. A unique, Queensland modification of the Federal judicial review model is to be found in s.49 of the *Judicial Review Act*. This section modifies the usual 'costs follow the event' rule that ordinarily attends the exercise of a discretionary power to award costs in civil litigation. The Committee has, in its discussion paper, highlighted some of the relatively few cases that have examined in detail the meaning of this section. In the Association's experience, s.49 is under utilised to serve its intended end of allowing the funding in the public interest of litigation to resolve controversies of public importance. A recent example of the utility of the section is provided by *Meizer v Chief Executive, Dept of Corrective Services & Anor* [2005] QSC 351. That case resolved significant issues relating to whether prisoners had a right to participate in prison programs and to what was embraced by the notion of a 'decision under an enactment'. Though he dismissed the prisoner's application, Douglas J made an order under s. 49 of the *Judicial Review Act*, remarking:
>
> *"[14] these applications were treated as being of some general importance, likely to affect many applications that might be made by prisoners. The matter was adjourned to enable the applicant to be represented properly. He applicant is a long-term prisoner with extremely limited financial resources. This appears to be one of the first occasions that this court has been requested to consider the effect of the decision in* Griffith University v Tang *on the ability fo prisoners to seek judicial review of decisions of the Department of Corrective Services. It seems appropriate to me, therefore, to*

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103 Judicial Review Bill 1991 (Qld), Second Reading Speech, *Queensland Parliamentary Debates (Hansard)*, 26 November 1991, 3138.

104 EARC, *Judicial Review of Administrative Decisions and Actions*, December 1990, [10.14].

order, pursuant to s. 49 of the Judicial Review Act*, that the respondent indemnify the applicant in relation to his costs properly incurred I the review application in respect of the respondent's application pursuant to s. 48 of the* Judicial Review Act*."*

In other cases, where it has been obvious that a judicial review case has been brought for humane, if ultimately unsuccessful, reasons s. 49 has been utilised so as to make no order as to costs.

At present, s. 49(2) offers limited guidance as to factors pertinent to the exercise of a benign costs discretion. There is undoubted utility in the retention of a discretion that is ultimately open-ended sop as to accommodate exceptional cases or those with unique and unpredictable qualities that may arise in the future. The Queensland Public Interest Law Clearing House (QPILCH) has in the past suggested that further legislative guidance might nonetheless be given in relation to costs in judicial review cases. The Association supports this suggestion, as experience to date does disclose a degree of reticence on the part of both the judiciary and the legal profession to utilise s. 49. The Association understands that QPILCH utilises guidelines to determine which cases ought to attract the limited legal aid funds available to it. Such guidelines might provide useful inspiration for the amendment of s. 49 so as more precisely to serve the ends of promoting in the public interest the judicial resolution of controversies of public importance.

There can also be a public importance in the judicial resolution of administrative injustice even though the impact of the case is confined to one individual. Australians [place much emphasis on an individual having a 'fair go'. That popular phrase neatly summarises the key features of procedural fairness – an opportunity to be heard before an unbiased decision-maker in respect of any issue adverse to interest before a decision is made. Those who have not secured such procedural fairness will probably secure a costs order on a judicial review application in any event. However, there are cases where, even though such a finding is not made, the applicant had reasonable grounds for the bringing of the challenge and its adjudication by an independent judiciary serves the socially useful result of defusing that individual's perception of administrative injustice. Yet whatever palliative effect such an adjudication has can be undone by the imposition of a costs order. At present, the tendency is for costs to follow the event in such cases with the judiciary then leaving to the executive the making of a value judgment as to whether the resultant costs order should be enforced. Yet a member of the executive whose administrative competence has been under question may be ill placed to exercise that benign discretion. The Committee may well consider that some further amendment of s. 49 is necessary to accommodate such cases by expressly identifying that as a basis upon which no order as to costs might be made.

Queensland Council for Civil Liberties

The Council has no doubt that judicial review applications are effected adversely by the costs to the applicant.

The Council accepts that it appears that Section 49 has not achieved its purpose.

The Council has reviewed the paper by QPILCH dated 7 March 2005. The Council agrees that the prospect of an adverse costs order is a deterrent to those bringing judicial review applications in public interest cases. In the Council's view the Rules of Court should be changed so that in public interest cases a costs order is made against the applicant only if the Court finds the application to have been either frivolous or vexatious. In terms of determining whether or not an application is in the public interest, the Council is happy to have inserted into the rules for the guidance of the Court the criteria set out in pages 38 and 39 of the QPILCH paper.

Of course, the Court should retain the power to make costs order in relation to the respondent on the ordinary principles.

However, in the Council's view the fundamental problem for any applicant is not the prospect of a costs order, which in our view ought to be restricted as discussed above, but the actual costs of bringing the application. In the Council's view that could only be adequately addressed by an increase in the legal aid budget. The Council has for many years expressed its concern about the inadequacy of legal aid in this State. We call upon the government to establish a legal aid section dedicated to the funding of public interest judicial review applications.

Brisbane City Council

The Supreme Court was established to try serious and complex matters, where the Court's time is extremely valuable, and access to the Court comes at a cost. There seems to be no reason why an applicant for judicial review should be financially advantaged (in terms of removal of exposure to costs) as compared to any other litigant.

Judicial Review applications are the final 'link' in a long chain of reviews, particularly for Council where the General Complaints Process will exist as a mandatory system to review administrative decisions, together with Council's informal processes and processes incorporated into local laws. As there will be many prior opportunities to resolve matters, Court hearings for judicial review should now become even more infrequent.

Department of Industrial Relations

The costs associated with a judicial challenge to an administrative decision or action is a reasonable preventative measure to counter premature applications for judicial review.

The focus in the *Judicial Review Act 1991* on a decision made under an enactment excludes from coverage the activity of non-statutory organisations and other advisory bodies. It remains important to differentiate the appropriate exercise of discretion from conduct. Legal process enables the identification with some precision of what is under challenge, the source of the power involved and appropriate exercise of that power. Whilst alternative less expensive processes might assist in problem solving, the judicial review process is premised on the applicant being able to point to an excess of power.

Caxton Legal Centre

We note that "standing" can be an effective bar to community groups seeking administrative review, especially in relation to important public interest matters. We endorse the submissions made by the Queensland Association of Community Legal Centres (QAILS) and QCOSS in this regard.

As they note, standing has traditionally been interpreted quite narrowly in relation to community groups. This results in community groups wishing to engage in public interest litigation on behalf of their own constituency and/or the community at large being excluded from administrative law processes. Accordingly, access to administrative justice is often denied to those groups involved in public interest litigation. Standing should be interpreted more broadly in order to facilitate public interest litigation being undertaken. A broader definition of standing could be specifically created and endorsed by statute and as such, this could be incorporated in the *Judicial Review Act*.

QAILS and QCOSS

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

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

In the *ASH* case in the Supreme Court in Cairns, ASH sought a section 49 costs order under the JR Act. The order was opposed by some of the other parties to the proceedings but was eventually given. Without such an order, ASH would have been unlikely to pursue the case. Still, this only allows the applicant the "luxury" of not paying the respondent's costs. The community group in this instance is still left with the difficulty of finding lawyers who do the work for free or at a heavily discounted rate.

In the *ASH* case, the EPA challenged the basis for standing of the applicant. This is despite the former Attorney-General, Rod Welford indicating to the EDO-NQ after an earlier decision that the Crown would not seek to use standing as a basis for opposing public interest litigation. The EPA's Counsel indicated that the ASH was a professional litigant of some kind. It was stated in the EPA submissions:

"The applicant is self appointed and created for the specific purpose of litigating such environmental disputes as the decisions complained of. The applicant is a designer entity purposely created for opposing the decisions (including obviously by litigation) who are opposed to the proposed development of Hinchinbrook".

This was despite the fact that the ASH's aims were to protect the environment including through legal means, and its President and Secretary had over 60 years between them of work in protecting the environment, with the President, Margaret Thorsborne having a trail on Hinchinbrook Island named after her and her late husband. The members of the ASH had worked to protect the environment in a number of ways including representing the ASH views on government committees, lobbying and writing submissions on a number of issues, as well as conducting this litigation. Given the public benefit in having the best decisions made in respect of a world heritage site, it seems unreasonable on the part of the government to rely on an overly legalistic defence of lack of standing.

Another case example follows:

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

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

Caxton Legal Centre

Because of the high costs associated with the jurisdiction, we have concern about judicial review only being available in the Supreme Court. The risk of an adverse costs order clearly is always a consideration for lawyers and clients, and based on our experience of our volunteer lawyers' advices to clients, we know that clients are regularly advised that judicial review is 'not a commercially viable option'.

We are aware from anecdotal evidence that once an application for judicial review is threatened or commenced, the offending government department or statutory body will often suddenly take steps to address the problem which has precipitated the judicial review action. In this context, judicial review seems a most cumbersome and time-consuming avenue to pursue to obtain relief – even though it is, of course, helpful when problems are resolved by sudden department action.

QPILCH

QPILCH has previously prepared a research paper on the topic of costs in public interest proceedings in Queensland, which among other issues, looked at the issue of costs in judicial review matters.[20] For the sake of clarity, we briefly repeat the arguments and suggestions made in that paper and include some new ones.

The general rule about costs is that costs follow the event.[21] This poses a significant deterrent to those seeking remedy before the courts who, apart from their own legal costs, may be faced with a crippling order to pay their opponent's costs should they fail.

Costs orders are discretionary. As discussed in our research paper, there have been instances where the court has exercised its discretion to depart from the general rule as to costs and order each party bears its own costs where the circumstances of the case justify it.[22] "Public interest" has been mentioned as a factor to consider in such departure. Unfortunately, the case law is by no means settled and it is difficult to assess which way the court will ultimately go.

The JR Act, in an attempt to discourage unnecessary litigation while providing an incentive for legitimate claims to proceed, specifically provides under s 49 that upon application of any party at any stage, the court may order:

- That another party indemnify the relevant applicant for its reasonable costs incurred on the standard basis from the time of the costs application (s 49(1)(d));
- That each party bear its own costs of the proceedings (s 49(1)(e)).

The section goes on in s 49(2) to list the factors the court must have regard including the financial resources of the applicant, the public interest and the merit of the originating application.

The practical application of s 49 has been less noteworthy. As stated by the discussion paper, s 49 costs orders have rarely been made and "the Supreme Court's approach appears to have construed section 49 narrowly". Further, it is our experience that at least some community legal centre practitioners feel that application under s 49 is a waste of time.

We would like to draw LCARC's attention to *Green v Queensland Community Corrections Board* (unreported, 14 December 2004, Supreme Court of Queensland, Douglas J) in which QPILCH was directly involved. In that case, a prisoner sought judicial review of the decision of the respondent to decline to him post prison community based release. Instead, the respondent proposed the applicant first spend time in an open custody environment, a proposal the applicant contended would put him at a safety risk because of assistance he had previously provided prison authorities. He had been placed into protective custody and continued to be assessed as needing protective custody because of the assistance he had provided. After the court determined that there was no ground of review, the

respondent sought its costs. The applicant asked that each party bear its own costs on the basis that: the matter concerned issues of safety which would impact on others coming before the Board in years to come; the applicant had been incarcerated for 14 years and had no assets; and given his age, it was not in the public interest that he leave prison with a significant debt. Despite this, the court awarded costs to the respondent.

A solution for this problem is to remove the bulk of administrative law disputes from the courts and put them into more cost effective jurisdictions, such as a generalist merits appeals tribunal. However, until that happens, and for those matters which will still proceed to judicial review, the following are some suggestions for reform.

A preliminary costs hearing

Costs in judicial review applications should be made a preliminary issue that needs to be dealt with before the substantive matter can proceed.

By "dealing with the costs issue", we mean:

- An agreement as to costs (including agreement that costs will be dealt with at a later date); or
- Having a preliminary hearing or summary judgment on the papers regarding costs.

This will force parties to consider the issue of costs early on, irrespective of someone making an application under s 49, and will relieve the burden of having to decide whether making a s 49 applications is worthwhile.

In some jurisdictions, the starting point for costs is each party bears its own costs, with costs only being awarded if the matter was frivolous or vexatious or a party has incurred costs because the other side defaulted in a procedural requirement.

This sort of approach may be appropriate for judicial review proceedings.

Mitigating the effects of costs orders

Another approach to costs orders, instead of trying to prevent them, is to try and mitigate their effect through funding and other means.

Costs protection certificates

A recent article in the New Law Journal proposed the introduction of "costs protection certificates" for individual litigants in relation to public interest administrative justice proceedings in England.

This was consequent on the observation of:

- The increasing difficulty in obtaining legal aid for civil litigation and the recognition of a "disenfranchised" class of people: middle income and not eligible for legal aid services for whom administrative justice is practically unattainable.
- Although orders similar to s 49 of the JR Act are available in public law litigation, such orders are made "only … in the most exceptional circumstances where stringent criteria have been met".

A "costs protection certificate" would be issued, upon application, by the English Legal Services Commission (their legal aid) and would have the sole purpose of limiting or extinguishing the claimant's liability for costs. The applicant would have to provide evidence of means and staggered thresholds could apply. The merits of the case would be relevant. On the other hand, a cost-benefit analysis would have little weight as the LSC would not be funding the proceedings itself. A substantial fee would be payable on application, "both to discourage vexatious applications and to fund, in part at least, the costs of the scheme."

A Queensland certificate could also include the requirement that the public authority pay some or all of the costs or limit the extent of the costs payable by it.

Costs funding

Another complement to law reform would be the provision of costs funding in public interest cases. As an example, the *Appeal Costs Fund Act 1973* (Qld) establishes a fund to which a party to an appeal proceedings (on a question of law) may apply if costs are ordered against them and for which an indemnity certificate is granted by the court.

Governmental policy not to enforce costs orders

It is suggested that government should instead be encouraged, or at least be given mandate, not to pursue costs or enforce costs orders in circumstances where the applicant is poorly resourced and litigation has been bona fide and in the public interest. Further, a direction that an agency, as a general rule, not appeal costs orders may be appropriate.

Alternatively, instead of costs decisions being made by the agencies themselves, they could be made by the Attorney-General or Governor-In-Council, who can objectively weigh the competing considerations and who are directly responsible to the Queensland public.

Security for costs and undertakings as to damages

A brief mention should be made about security for costs and undertakings as to damages as barriers to access.

There are no specific provisions under the JR Act in relation to these issues.

Under r 670 of the UCPR, the court may award security for costs upon application by the respondent if it considers appropriate. Rule 671 provides considerations the court must take into account and rule 672 sets out considerations the court may take into account. Considerations under rule 672 include:

- the merits of the proceeding
- the genuineness of the proceeding
- whether the plaintiff is effectively in the position of a defendant
- whether an order for security for costs would be oppressive
- whether an order for security for costs would stifle the proceeding
- whether the proceeding involves a matter of public importance
- the costs of the proceeding.

Undertakings as to damages, unless there is a good reason not to, will be a precondition to the court granting interim or interlocutory relief. See rule 264 of the UCPR. The court may consider matters referred to in relation to security for costs and whether such an order is otherwise reasonable in all the circumstances of the matter.

A prime example of what issues these orders can raise is *Central Queensland Speleological Society v Queensland Cement and Lime Pty Ltd* [1989] 2 Qd R 512. In that case, an environmental group sought an injunction restraining the respondent corporation from destroying caves which were, it was alleged, of importance to endangered species and contrary to the *Fauna Conservation Act 1974* (Qld). In order to preserve the caves until the final hearing, the environmental group sought an interlocutory injunction. The injunction was refused on the basis that the group did not have standing and could not give an undertaking as to damages. While special leave to the High Court was granted, the respondent corporation gave an undertaking not to destroy the caves prior to the final hearing, making it unnecessary for the issue to continue. The respondent corporation then applied for security for costs. The environmental group could not give the security and the matter was struck out by the Queensland Supreme Court. The caves were subsequently destroyed by the respondent.

If reform is made to the existing costs regime in judicial review matters such that no costs are payable, then there is little danger of security for costs barring access. Notwithstanding, we suggest reform similar to that outlined above in relation to costs orders in the context of undertakings as to damages and security for cost to prevent undue restriction of public interest litigation.

7.5.5 Committee comments

It is necessary that the Supreme Court's power to award costs operate within a wide discretion. However, it is clear that the enactment of section 49 of the *Judicial Review Act* has not led to costs orders of the nature envisaged by EARC. Nor has it led to orders being made at an early stage in proceedings as envisaged by EARC. One reason for this may be that the bill to enact the *Judicial Review Act* was not accompanied by Explanatory Notes. At that time, it was the exception, rather than the rule, for legislation introduced into the Queensland Parliament to be accompanied by Explanatory Notes.

The committee believes, as did EARC and PCEAR, that the risk of adverse costs orders deterring meritorious applications under the *Judicial Review Act* should be minimised.

Accordingly, the committee recommends (**recommendation 9**) that section 49 of the *Judicial Review Act* be amended to clarify that the court's discretion under section 49 should be exercised to minimise the risk of adverse costs orders deterring meritorious applications under the Act, including those regarding 'public interest matters'. The Explanatory Notes to the amending bill should provide an indication of the legislative intention in this regard.

7.6 Standing and costs

'Standing' means the right to commence or participate in legal proceedings in a court. Under section 7 of the *Judicial Review Act*, 'a person who is aggrieved by a decision' to which the *Judicial Review Act* applies may apply for a relief. A 'person aggrieved' is defined, generally, as a person whose interests are, or would be, adversely affected by the decision in question.

In Australian jurisdictions generally, cases in which standing is in dispute raise issues of both a practical and philosophical kind. The philosophical issues include, but are not limited to, the extent to which the law should limit the class of people with standing to initiate legal proceedings to challenge the validity of government decisions and actions.

Some practical concerns with liberal standing have been described in the following way:[105]

> Our open standing rules have allowed many speculative and expensive challenges to be launched by impecunious persons or hollow associations, deliberately chosen as the front-runners for larger groups in an attempt to make costs orders futile. These litigants may press for full discovery, which is very expensive – sometimes with the aim of checking the accuracy of earlier FOI access.

In 1991, EARC considered the test enacted in section 7 of the *Judicial Review Act* provided an appropriate test of standing as it is non-exhaustive, leaving room for judicial development.

Such judicial development was acknowledged by Chesterman J in *Nth Qld Conservation Council Inc v Executive Director, Qld Parks & Wildlife Service*:[106]

> The test for determining who has standing to challenge the decision of a government or public authority has been considered frequently in recent years. It is, I think, possible to discern some relaxation in the strictness with which the test was earlier applied. There appears to be a greater readiness on the part of courts to permit challenges to the decisions of executive government. A second general observation is that the formulation of the test does not allow any very precise understanding of what criteria confer standing. It is clear that if the decision affects some proprietary or financial interest the person affected would be recognised as an appropriate challenger. Beyond that the test provides no specific guidance.

In addition, a wider approach to standing can, for the purposes of review of decisions made under individual acts, be conferred by statute. In Queensland, an example is section 140 of the *Marine Parks Act 2004* (Qld). The law regarding standing and section 140 of the *Marine Parks Act* were discussed in the judgment of Jones J in *Alliance to Save Hinchinbrook* [2006] QSC 84:

> The applicant's right to seek this review is challenged by the respondents. The question of whether an organisation such as the applicant in this case has a "special interest" has been considered in a number of cases. I agree with the remarks of Chesterman J that a comparison of a particular interest is a "barren exercise". But his consideration of a number of cases leads to the following statement:
>
> The purpose of the proceedings is to test the lawfulness of the decision. They will not directly affect any legal rights or proprietary interests... Another point of significance is that if [the applicant] does not have standing to test the validity of the permit no-one else will have and the decision, which may be quite unlawful, will go uncorrected. [the applicant] has an interest in efficient government but it has an equal interest in lawful government.
>
> In *Save Bell Park v Kennedy* Dutney J discussed the above remarks and the decision of the High Court in *Allan v Transurban City Link Limited* and said:-
>
> The applicant, despite its short existence, appears on the evidence to be the recognised body in the Emu Park community involved in the preservation and protection of Bell Park and its surroundings. It is difficult to imagine any other group or other individual having standing if the applicant is denied the right to pursue this matter. The applicant has, in my view, a genuine desire to test the validity of decisions affecting its area of specific community activity. It thus, cannot in my view, be said to have an interest which is merely intellectual or emotional as such interests are now

105 Justice Keith Mason (Supreme Court of New South Wales), 'Sunrise or Sunset? Reinventing Administrative Law for the New Millennium', transcript of speech to the 2000 Administrative Law Forum, 15 June 2000, available at: http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_mason_150600.

106 [2000] QSC 172 at [8].

understood nor is the proceeding an abuse of process." The fact that a particular group of individuals or an incorporated association takes up a cause does not mean there will automatically be standing. Much depends on the circumstances of the case. As Stephen J said in *Onus* (supra) –

"As the law now stands it seems rather to involve in each case a curial assessment of the importance of the concern which the plaintiff has with the particular subject matter and the closeness of that plaintiff's relationship with the subject matter."

As to that curial assessment, I note that the *Marine Parks Act 1982* provides for public consultation when defining a marine park (s 13) and Regulation 9AA, in certain circumstances, requires public notification of requests for permission to use the parks and a consideration of public submissions before permission is granted. Consequently the legislature's contemplation of public involvement in the process gives some indication of the breadth of interests which would be considered.

The applicant has, since its incorporation, actively campaigned to protect the environment of the Hinchinbrook area of the Marine Park. Even before that incorporation, the members of the organisation were personally involved in similar activities. I am satisfied that the persons with concerns about the effects of the proposed development have rallied to support the applicant. The applicant is the peak organisation to raise concerns and it does so with a genuine desire to ensure protection of the environment. It has contributed significantly to the public debate on issues relating to the environment in this area… By reason of those facts, the applicant is entitled to test the validity of that decision. No other group or individual is identified as having an equivalent position to do so. The local authority is directly involved in facilitating the project and cannot independently represent the public interest.

The standing of persons who show a genuine concern with the environment and play a role in its protection has, in legislation enacted since the institution of these proceedings, been recognised in the *Marine Parks Act 2004*. Section 140 provides:-

"140(2) An individual is taken to be a person aggrieved by the decision, failure, or conduct if –

- The individual is –
- an Australian citizen; or
- (ii) ordinarily a resident of Australia, and
- (b) at any time in the 2 years immediately before the decision, failure or conduct, the individual engaged in a series of activities in Australia for the protection or conservation of, or research into, the environment."

Whilst no similar provision is present in the *Marine Parks Act 1982* pursuant to which this project was considered, I take the view that the new enactment is an affirmation of the fact that a person genuinely engaged in activities of the kind mentioned ought to be seen as a "person aggrieved" for the purpose of that statute.

The history of the applicant's activities, the extensive nature of the submissions made by the applicant and its members and its recognition as a peak organisation, persuades me that the applicant does have standing to bring these proceedings. The applicant's involvement in this specific project goes beyond a 'mere emotional or intellectual concern'. It is the appropriate organisation to ensure the accountability of the decision-maker. I am satisfied therefore that the applicant is 'an aggrieved person' within the meaning of the term for the purposes of the JRA.

7.6.1 Relevant information and views considered by the committee

Environmental Protection Agency

Standing is already very broad given the judicial interpretation of 'a person aggrieved'. Any further broadening of the definition may lead to an increase in speculative or vexatious challenges to Government decision-making and adversely impact on Government.

Bar Association of Queensland

Under the regime replaced by the *Judicial Review Act* questions of standing in respect of the mounting of certain public law challenges could be resolved by the provision of a 'fiat' (permission) from the Attorney-General allowing the bringing of a realtor action. The granting of such a fiat also served the useful purpose of offering an assessment of whether there existed an arguable basis of challenge. These days, the more overtly politically partisan role apprehended to attend the office of Attorney-General would present particular difficulties for the granting of such a permission to the institution of a challenge to the government decision.

More liberal standing tests have to some extent diminished the importance that an Attorney's fiat had under the earlier regime. However, they have not diminished the utility of there being some form of filtering of cases coming forward for judicial review. Federally, a response to a volume of perceived spurious judicial review challenges has been the enactment of Part 8B of the *Migration Act 1958*, allowing for the awarding of costs against legal practitioners where there is no reasonable prospect of success. While extreme examples of such cases make such a measure superficially attractive, there are many others where reasonable prospects, like beauty, lies I the eye of the beholder and where those prospects are more readily seen in hindsight than in prospect. The not uncommon phenomenon of majority decisions in public law cases in the High Court highlights why that is so. Further, it is possible under the general law in extreme cases of litigation instituted without reasonable cause to secure a costs order against a non-party.

Queensland Council for Civil Liberties

In our view, this issue once again goes back to a question of funding the Legal Aid office to ensure that there are adequate resources for public interest cases to be conducted in this State. In a society it is fundamental Government to be held accountable. The Government should consider setting up a specialist section in the Legal Aid Office to deal with these applications in-house if necessary.

Another option would be to fund a Community Legal Centre to deal with these matters.

Simon Baltais

With respect to challenging flawed government process under Judicial Review it is considered a risky fruitless exercise given the problems of 'standing' for community groups and excessive costs and personal risk (court costs) associated with this judicial process.

7.6.2 Committee comments

The committee notes that section 7 of the *Judicial Review Act* was recommended for enactment by EARC as it was considered to provide for a non-exhaustive test of standing, with room for judicial development.

In the period since the EARC recommendation and the enactment of the *Judicial Review Act*, judicial development has relaxed somewhat the strictness with which the test was earlier applied, as observed by Chesterman J in *Nth Qld Conservation Council v Executive Director, Qld Parks and Wildlife Service*. However, as also observed by Chesterman J, a difficulty arising out of a generally worded, non-exhaustive test of standing is that 'the formulation of the test does not allow any very precise understanding of what criteria confer standing'.

The *Judicial Review Act* should strike an appropriate balance between allowing for judicial development of the test of standing and legislative indication of the circumstances in which courts should be ready to permit challenges to the decisions of executive government. Recent consideration of section 7 of the *Judicial Review Act* in Supreme Court judgments suggests the Court might be assisted by guidance regarding the 'interests' which, adversely affected, give rise to standing. In the committee's view, the scope of the test in the Act should continue to allow for judicial development. At the same time, however, insertion in section 7 of inclusive criteria conferring standing might assist the Court to determine standing with a greater degree of precision. Drafting of the criteria could be informed by judicial determinations regarding section 7.

Accordingly, the committee recommends (**recommendation 10**) that section 7 of the *Judicial Review Act* be amended. The amended section should include criteria conferring standing. The criteria should assist the Supreme Court to reach a determination under the section with a greater degree of precision.

7.7 Public interest matters

Under the *Judicial Review Act*, one consideration to be taken into account by a judge deciding an application for a section 49 costs order is 'whether the proceeding involves an issue that affects, or may affect, the public interest'. There is no clear definition in legislation or case law of what constitutes the 'public interest'. Guidance provided by the courts indicates that a matter is in the public interest if it involves an issue of general importance or the elucidation of some point of principle or construction, or if it affects in some way the public interest in addition to the personal rights or interest of the relevant applicant.

In *Cairns Port Authority v Albietz*, Justice Thomas made the following observation regarding section 49:[107]

> An obvious example calling for the exercise of this particular power is the case of an impecunious applicant who applies for an indemnity at an early stage of proceedings in which a public authority may obtain the benefit of a test ruling or clarification of some point of practice or of public importance.

In its report, EARC stated that its recommended provision had:[108]

> the potential both to assist the litigant who is neither very poor nor very rich but who has a strong case to argue, and to encourage public interest litigation, provided some reasonable basis for the application is disclosed. Where judicial review proceedings have the potential to clarify a point of law of public importance, or relate to a large scale enterprise or activity of general public concern, there may be a public benefit in the litigation proceeding irrespective of whether the claim succeeds or fails, provided that it is reasonably arguable. It may be sufficient for the purposes of a public interest group determined to clarify a point of law which it considers to be of public importance, to secure an order that each party pay its own costs of the proceedings regardless of the outcome, and the Court may be prepared to make such an order if satisfied of the public interest element and that the basis of the application though not strong, is reasonably arguable. On the other hand, a public interest group which considers it has a very strong case may seek an order for indemnity as to its costs at an early stage. A sufficient filter remains in the Court's discretion to refuse an order if satisfied that there is simply no reasonable basis for the review application.

EARC made reference to a report of the Australian Law Reform Commission which stated in relation to public interest matters:[109]

> the public benefit stemming from a public interest claim is not necessarily dependant on the success of the claim. Particularly when it is in the nature of a 'test case', benefit may flow simply from the fact that a point of law has been resolved one way or the other. If the claim fails, this may be an indication that the law is defective in some respect; it will have been beneficial to the public to highlight this and pave the way for legislative reform.

However, in its discussion paper, the committee stated that its consideration of judgments in judicial review proceedings between February 1995 and October 2005 indicated that matters within a wide definition of 'public interest' litigation had more commonly attracted a 'no costs order', leaving costs to lie where they fell.[110] *South East Queensland Progress Association v Anghel*, for example, concerned a decision of a Minister to approve the construction of a standard gauge rail link to Fisherman Islands. An application for review was brought by South East Brisbane residents who lived along the route. In that matter, on appeal, the Court of Appeal made the equivalent of a 'no costs order'.[111]

In 2002, QPILCH made a submission to a former Attorney-General regarding costs and fees in public interest litigation.[112] In its submission, QPILCH recommended that the exercise of the courts' discretion to award costs in public interest litigation should be different to practices adopted in litigation about private interests and, on this basis, proposed:

- that the Government move towards adopting a policy which would lead to either amendment of the Uniform Civil Procedure Rules (which are the rules which govern court proceedings) or development of specific legislation to implement a regime that clearly limits costs, undertakings as to damages and security for costs orders against public interest litigants;
- for a trial period, a temporary system based on that adopted in California (discussed below), be adopted in Queensland as a way of determining the impact of such an approach and gauging the views of the community;[113] and

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107 *Cairns Port Authority v Albietz* [1995] 2 Qd R 470 at 475.

108 EARC, *Judicial Review of Administrative Decisions*, 101 to 102.

109 EARC, *Judicial Review of Administrative Decisions*, 102, referring to ALRC report no 27, 172-3.

110 LCARC, *The Accessibility of Administrative Justice*, discussion paper, 19, available at: www.parliament.qld.gov.au/LCARC; see, for example, *Ford v Legal Aid Commission of Queensland* (unrep, QSC, 16 May 1997, per Ambrose J).

111 *South East Queensland Progress Association v Anghel* (unrep, QCA, 28 June 1994).

112 QPILCH, *Costs and fees in public interest litigation*, submission to former Attorney-General, 5 February 2002, available at: http://www.qpilch.org.au/publications.htm.

113 QPILCH further submitted that if there is a concern about industry acceptance of such a pilot, the Government could lead the way by limiting costs awards in all public interest cases in which the State of Queensland is a party (Note 112 at 3).

- the development of a policy (rather than an incremental case by case approach) that enables the courts to waive fees in public interest and *pro bono* litigation in Queensland.

The QPILCH recommendation was not implemented. In March 2005, QPILCH released a research paper, *Costs in Public Interest Proceedings in Queensland*.[114] Suggestions for reform made in that paper included:

- the enactment of clear legislative guidance regarding the courts' discretion as to costs;
- the adoption of a more considered approach to the relationship between standing and costs;
- costs funding in public interest matters;[115]
- changes to the practices adopted under the government's 'model litigant' principles.

7.7.1 Reforms in other jurisdictions

The Californian Code of Civil Procedure alters the general costs rule and provides that, in addition to a power to order that a successful plaintiff's costs of legal representation be paid by unsuccessful defendant/s, a court may make an order relieving an unsuccessful public interest litigant of liability for the costs incurred by a public agency in the defence of the action.

Provision 1021.5 of that Code, Attorney fees in cases resulting in public benefit, provides:

> Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:
>
> - a significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large class of persons;
> - the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; and
> - such fees should not in the interest of justice be paid out of the recovery, if any.
>
> With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefore, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefore under Part 3 of Division 3.6 of Title 1 of the Government Code.

Attorney's fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in *Serrano v Priest*, 20 Cal. 3d 25, 49.[116]

The Californian Appellate Court has said that 'The fundamental objective of this statute is to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees to those who successfully bring such suits'.[117] In *Press v Lucky Stores Inc* (1983) 34 Cal 3d 311, for example, the plaintiffs were held to have conferred a substantial benefit on the general public in challenging a supermarket's practice of not allowing petition signatures to be collected on supermarket property.

In its judgment regarding an appeal about the denial to a plaintiff of attorney fees under section 1021.5, the Californian Appellate Court observed that:[118]

> The trial court, in considering fee awards to private litigants on the facts and record applicable to each particular case, must carefully walk the line between unreasonably transmuting section 1021.5 into an unwarranted cornucopia of attorney fees for those who intervene in, or initiate litigation against, private parties under the guise of benefiting the public interest while actually performing duplicative, unnecessary, and valueless services, and providing appropriate

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114 QPILCH, *Costs in Public Interest Proceedings in Queensland*, research paper, March 2005, available at: http://www.qpilch.org.au/publications.htm.

115 The provision of financial assistance to a litigant is a way of increasing access to justice, but has traditionally been strictly prohibited at common law: see *Fostif Pty Ltd v Campbell's Cash and Carry Pty Ltd* [2005] NSWCA 85; and 'Litigation Funders: White Knights or Bounty Hunters?' (2005) 79 ALJ 339.

116 This provision was added to the Civil Code in 1977, and amended in 1993.

117 *Mandicino v Maggard* (1989) 210 Cal App 3d 1413, 1416.

118 *Baxter v Salutary Sportsclubs, Inc* (2004) Cal App 4th, 28 September 2004, referring to *Committee to Defend Reproductive Rights v A Free Pregnancy Center* (1991) 229 Cal App 3d 633, 643-644.

compensation under that statute in cases where the colitigating private party does render necessary, significant services of value and benefit to the public.

7.7.2 Relevant information and views considered by the committee

QPILCH

Access to justice is fundamental to any justice system. While the framework is in place to provide access to administrative justice, it is essential to review and reflect how accessible this system actually is to the whole community.

One of the key issues regarding access is standing.

Section 21 of the FOI Act provides for open standing in relation to the access of documents of government.

To seek reasons or review under the JR Act, an applicant must show that they are a "person aggrieved". This is defined under s 7 as a person whose interests are adversely affected by the decision, failure or conduct.

The interpretation of "person aggrieved" has had a varied history. Early High Court authority required the presence of some advantage should the applicant succeed or some disadvantage if he or she failed, more than a mere intellectual or emotional concern.34 The application of this "special interest" test continued until Bateman's Bay Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247 (Bateman's Bay), where 3 of 5 judges of the High Court suggested that the test for standing should be liberalised to a question of whether "the proceedings should be dismissed because of the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process". Querulous litigants would be deterred by an adverse costs order should they fail.

In Queensland, Justice Chesterman in *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 (the NQCC Case) applied the following test in determining the applicant had standing:

The plaintiff should have standing if it can be seen that his connection with the subject matter of the suit is such that it is not an abuse of process. If the plaintiff is not motivated by malice, is not a busy body or crank and the action will not put another citizen to great cost or inconvenience his standing should be sufficient.

The judge noted however that it would have been found the applicant had standing even if the "special interest" test had been applied.

The NQCC Case has been considered in 3 subsequent cases.

In *Save Bell Park Group v Kennedy* [2002] QSC 174, Dutney J held that the plaintiff did have standing, by finding that it did have a "special interest" in that it was not "merely intellectual or emotion" nor was it an "abuse of process".

On the other hand, the *NQCC* Case was criticised by the Supreme Court of the ACT in *Save the Ridge Inc v Australian Capital Territory* [2004] ACTSC 13 at [18], which said it went "far beyond that adopted in any of the earlier authorities". Notwithstanding, the plaintiff in that case was found to have demonstrated a sufficient special interest.

Lastly, in *BHP Coal Pty Ltd & Ors v Minister for Natural Resources and Mines & Anor* [2005] QSC 121, the *NQCC* Case was merely cited as one of a number of cases for the proposition that the term "person who is aggrieved" should be given a broad construction.

Lack of clarity makes it difficult to pursue "public interest" matters, particularly by non-profit organisations which can not be seen to be directly affected by the decision.

There are several suggested solutions to this issue.

One way is through amendment of the JR Act and adopting the tests provided by *Bateman's Bay* or the *NQCC Case*.

Another way, proposed by the Australian Law Reform Commission in 1996, is to implement a new general test for standing allowing any person to commence public law proceedings unless:

- Relevant legislation provided a clear intention to the contrary; or
- It would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of the person having a private interest in the matter to deal with it sufficiently or not at all.

Thirdly, under s 7(1)(g) of the *Attorney-General Act 1999* (Qld), the Attorney-General has the power to "grant fiats to enable entities, that would not otherwise have standing, to start proceedings in the Attorney-General's name" to, broadly speaking, uphold the public interest. In practice, the Attorney-General's fiat is rarely granted. Consideration could be had to amending this provision to enhance the opportunity for public interest litigants to obtain the Attorney-General's fiat and avoid issues of standing.

As an alternative to legislative reform, policy could be implemented (or the model litigant principles amended) which provides that generally, government will not challenge the standing of an applicant except in exceptional circumstances.

National Parks Association of Queensland

NPAQ feels that the costs of bringing suit under the JRA provide a significant barrier to public interest non-profit groups trying to protect the public interest against poor government decisions or inaction. Filing fees are unreasonably high especially for small community groups, and could be entirely obviated if agencies were required to publish records of decision.

We believe that all public interest non-profit groups should enjoy free representation and exemption from court fees and costs regardless of the outcome, unless it could be clearly shown that the case was brought vexatiously or frivolously.

Bar Association of Queensland

Attention has been drawn in the discussion paper to the phenomenon of public law litigation instituted as a result of liberalisation of standing tests burdening administrators with the costs of general discovery applications. Historically, discovery was only available exceptionally and by leave in relation to the former, prerogative writ based, judicial review regime, but the position under judicial review legislation is that the rules of court providing for discovery, or disclosure, apply just as much to litigation under those statutes as they do to any civil litigation. When it is recalled that judicial review is concerned with the procedure by which an administrative decision came to be made and with the true meaning of the statutory power concerned, not with the merits of the decision, and especially that the test for disclosure is the 'directly relevant' test, the scope for disclosure is limited in judicial review cases. Further, judicial review legislation confers upon most persons affected by administrative decisions a right to require the provision of reasons in which the material before the decision-maker is identified. Respondents to judicial review applications frequently voluntarily prepare such materials in the form of an agreed bundle of documents. If disclosure as of right were confined to the identification of that material with further disclosure being available only by way of leave that, in the Association's opinion, would answer the identified concern as to costs while at the same time not diminishing the rights of an applicant.

7.7.3 Committee comments

As discussed above, the committee believes, as did EARC and PCEAR, that the risk of adverse costs orders deterring meritorious applications under the *Judicial Review Act* should be minimised. Accordingly, the committee recommends (**recommendation 9**) that section 49 of the *Judicial Review Act* be amended to clarify that the court's discretion under section 49 should be exercised to minimise the risk of adverse costs orders deterring meritorious applications under the Act, including those regarding 'public interest matters'. The committee suggests that the Explanatory Notes to the amending bill will further provide an indication of the legislative intention in this regard.

7.8 Government as model litigant

The Queensland Government as 'model litigant' flows from the idea that, when involved in litigation, public agencies should act with complete propriety, fairly and in accordance with the highest professional standards. Expectations of public sector litigants derive from the fact that the lawyer's client is not an individual citizen but all Queensland people, a client of whom the community expects high standards and whose ultimate objective is that justice be done.[119]

[119] Model litigant principles were discussed by the Crown Solicitor in *The Model Litigant Principles*, paper presented to Legal Manager's Breakfast Briefing, June 2007.

At the time of tabling and publication of the committee's discussion paper, although the State of Queensland had traditionally acknowledged it should act as a model litigant, there had been no formal statement of those principles.

The Queensland Government has now formalised principles which are stated to:[120]

> reflect the community's and the courts' expectation that the State conduct itself in a manner that exemplifies the principles of justice. In other words, the power of the State is to be used for the public good and in the public interest, even in litigation.

The website of the Department of Justice and Attorney-General contains the following statements:[121]

> These principles have been issued at the direction of Cabinet. The power of the State is to be used for the public good and in the public interest, and not as a means of oppression, even in litigation. However, the community also expects the State to properly use taxpayers' money, and in particular, not to spend it without due cause and due process. This means that demands on the State for compensation for injury or damages should be carefully scrutinised to ensure that they are justified.
>
> The principles will be kept under review and amended from time to time with the approval of the Premier and the Attorney-General, or, if significant amendments to the principles are proposed, with the approval of Cabinet.
>
> It should also be noted that the principles are not intended to be applied rigidly and do not override any legislative requirement or authority concerning an agency's functions.
>
> 1. The State and all agencies must conduct themselves as model litigants in the conduct of all litigation by adhering to the following principles of fairness:
>
> - acting consistently in the handling of claims and litigation
> - dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation
> - endeavouring to avoid litigation, until other means of resolving a dispute are exhausted or impractical
> - where it is not possible to avoid litigation, keeping the costs of litigation to a minimum
> - paying legitimate claims without litigation, including making partial settlements of claims, or interim payments, where liability has been established and it is clear that the State's liability is at least as much as the amount to be paid
> - not seeking to take advantage of an impecunious opponent
> - not contesting matters which it accepts as correct, in particular by:
>   - not requiring a party to prove a matter which the State knows to be true
>   - not relying on purely technical defences where the State will suffer no prejudice by not doing so
>   - not contesting liability if the State knows that the dispute is really about quantum
> - not instituting and pursuing appeals unless the State believes that it has reasonable prospects for success, or the appeal is otherwise justified in the public interest.
>
> 2. The State must behave as a model litigant in the conduct of all litigation, including significant litigation, by adhering to the following principles of firmness:
>
> - appropriately testing all claims
> - contesting all spurious or vexatious claims
> - claiming legal professional privilege where appropriate
> - claiming public interest immunity to protect confidential information such as Cabinet papers in appropriate cases
> - seeking security for costs where appropriate and pursuing costs when it is successful in litigation, which will assist in deterring vexatious proceedings from being instituted against it
> - relying on available statutes of limitation, which have been enacted to protect a defendant from unfair prejudice
> - acting properly to protect the State's interests.

120 See: www.justice.qld.gov.au

121 See: www.justice.qld.gov.au

7.8.1 Relevant information and views considered by the committee

Bar Association of Queensland

In the experience of members of the Association, some 'filtration' of ill-considered judicial review applications either before their inception or at an early point after filing is achieved by the exercise of responsible and diplomatic liaison with applicants, or as the case may be, their legal representatives, by Crown Solicitor and his staff and by a prudent disposition on the part of client departments and agencies not to seek costs on return for the prompt discontinuance of proceedings. Such cases fall outside the list of judicial review cases that have progressed through the courts that appears in the discussion paper. Likewise, there are other cases where the provision of candid, frank advice as to prospects from the Crown Solicitor, sometimes with the assistance of advice from the Bar, leads to the vacation of a decision either upon complaint by letter or shortly after proceedings are instituted.

Queensland is well served by a Crown Law Office that undertakes such a role as a matter of course and as a matter of professional pride. That role, often unseen by the Courts and the general populace, can and does diffuse conflict and save public money. It is a role that needs to be encouraged. To discharge it adequately requires the support not just of the Attorney-General (usually found in Queensland) but of the whole of the Ministry for the principle that there is utility in a Crown Law Office that is never a mere cipher for other departments or agencies of State but rather the source of frank, independent legal advice.

To some extent, the Australian Government Solicitor discharges a similar role federally, but the scope for such independence and the benefits that brings is challenged by treating public legal advice as a commodity open for tender by departments and agencies. The experience of members of the Association is that there is a tendency where that occurs for some firms to become reticent about the provision of advice that may contradict sincerely held points of view within departments deciding tenders. Similar challenges are presented where departments or agencies maintain in0house legal advisers who seek to conduct litigation without the referral of it to the Crown Law Office.

Caxton Legal Centre

Adherence to the model litigant principles at an early stage of discussion in administrative law disputes is critical. In our experience, the government is often far from being the true model litigant. We were recently involved in a Court of Appeal hearing involving the Commissioner for Children. We were successful in our claim but that case involved significant time, resources and costs for our organisation. Had the model litigant principles been vigorously observed, that case may well have been satisfactorily settled at a much earlier point in time.

QAILS and QCOSS

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

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

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

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

7.8.2 Committee comments

The committee notes and welcomes the formal adoption of model litigant principles in Queensland. The publication of the principles increases the accessibility of administrative justice.

The committee suggests that the observance of model litigant principles encourages legal practitioners in the public sector to remember that they are acting within a system of parliamentary government. Litigation conducted by them is on behalf of all Queensland people.

7.9 Committee recommendations – costs of judicial review proceedings

Recommendation 8: The Uniform Civil Procedure Rules should be amended to allow for voluntary neutral evaluation in proceedings under the *Judicial Review Act 1991.* The neutral evaluator should seek to identify and reduce the issues of fact and law that are in dispute, including by way of assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings.

Recommendation 9: Section 49 of the *Judicial Review Act 1991* should be amended to make it clear that, to assist parties to judicial review proceedings to litigate meritorious applications, including in public interest matters, the Court is encouraged to exercise the power under the section to make a costs order at an early stage in proceedings.

Recommendation 10: For the purposes of assisting the Supreme Court to reach a determination under section 7 of the *Judicial Review Act 1991* with a greater degree of precision, section 7 should be amended to identify criteria conferring standing.

8 EFFICIENT AND EFFECTIVE ACCESS – EXISTING MECHANISMS

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

8.1 Current mechanisms

There have been many developments in administrative law in Queensland since EARC's recommendations for administrative justice reform were made in the early 1990s. A greater range of mechanisms now facilitate review of decision-making, protection of information rights and the public accountability of government processes. In addition, since the early 1990s:

- the relationship between government and the people of Queensland has changed;
- government has assumed new roles and responsibilities in new areas;
- public administration has undergone business-oriented reform;
- governments now challenge the advice provided by the public administration; and
- the work performed by the public administration has changed in nature and is more oriented towards policy and incentives.

From the perspective of people who access administrative justice mechanisms, it is important the mechanisms provide:

- a right to access administrative justice to resolve a genuine grievance; and
- resolution of grievances in a timely way.

8.1.1 Key issues

Accordingly, the committee's discussion paper invited submissions on issues affecting the accessibility of administrative justice including:

- the complexity and changed nature of government;
- the interrelationship of the *Freedom of Information Act* and *Judicial Review Act* with other administrative law mechanisms;
- the response of administrative justice 'remedies' to grievances;
- time limits imposed by the *Freedom of Information Act*; and
- time limits imposed by the *Judicial Review Act* .

8.1.2 Conference discussion

One discussion topic considered by participants in the conference regarding the Accessibility of Administrative Justice was: Are the corporatized entities which fall between public and private accountability regimes? Should accountability be extended and, if so, how? Matters discussed at the conference are set out in **appendix B**.

8.1.3 Supplementary issues

Then, in relation to four areas of reform implemented in other jurisdictions, the committee invited views as to whether, in each case, similar reform should be introduced in Queensland, either in whole or in part. Three of those areas of reform related to the effectiveness and efficiency of administrative justice mechanisms:

- appeals from administrative decisions;
- proportional dispute resolution; and
- publication of details regarding contracts entered into by public sector agencies.

The first two issues are considered respectively in chapters 9 and 10. The third is considered below.

8.2 The complexity and changed nature of government

In Queensland, some government services are delivered to the public by a private sector body under a contract entered into with a government agency. Examples include disability services and rubbish collection. This means that the service is paid for by the government but provided by the private organisation.

In its discussion paper, the committee noted that the complexity and changed nature of government today may mean that the administrative law mechanisms put in place in the early 1990s are no longer as appropriate or effective as they were then; for example, in all Australian jurisdictions, administrative law has struggled to explain clearly why some governmental activities of a purely commercial nature escape judicial review. Contemporary concerns include:

- the appropriate application of administrative law mechanisms to corporatised and privatised government services, government services which have been contracted out, and subordinate legislative acts;
- the interrelationship and overlap of administrative law mechanisms;
- the nature of 'decisions';
- finding the appropriate remedy for any given governmental error; and
- the extent to which the courts can or should police the exercise of executive power, including the way in which this power is conferred on the executive by the legislature.

8.2.1 Relevant information and views considered by the committee

Environmental Protection Agency

While the present system of administrative justice is operating effectively, given the ever-changing nature of government, it is considered that regular reviews need to occur.

Natural Resources, Mines and Water

NRMW's experience is that administrative justice in Queensland functions relatively efficiently and effectively, and is generally in line with other Australian jurisdictions.

The Law Society of New South Wales

The progressive developments since 1990 as described in the discussion paper, to enhance the efficiency of access to administrative justice must continue, and not be allowed to recede. The momentum must continue and reform applied to change the culture to one providing information rather than concealing it. This will require reform within the legislature to change current norms and to free up information to make it available through the administrative processes of the Executive agencies at least costs to themselves and to public seeking access to the information.

Queensland Council for Civil Liberties

It is often said that in the context of competitive tendering contracting arrangements, there is no need for administrative law style accountability arrangements because the process of the market will ensure accountability. In our view whilst there is some merit in that proposition it does not tell the whole story. There are two problems with that view. The first is a simple problem of market failure such as where there are in fact only a small number of competitors. This is a very real concern in the case of big infrastructure projects where given large sums of money involved, the payoffs from corruption are like to be large and hence the temptation proportionately greater. But in those large infrastructure projects, the number of competitors is usually very small may be 2 or 3.

Even in the case of smaller markets where the number of competitors may indeed be large, governments have to have regard to issues which are not encapsulated in market signals. That is why we have a democracy. While efficiency is no doubt an important aim it is not in a democracy an end in its own right. Other issues including fairness come into play.

In addition, when services are being delivered by a government which is democratically elected, the citizens are entitled to know whether or not their monies are in fact being properly spent.

In the Council's view, the present exemption in relation to business affairs or commercial in confidence information is far too wide. It needs to be narrowed considerably.

The Senate Finance and Public Administration Committee in its *Contracting out of government services second report* observed that "only relatively small parts of contractual arrangements will be generally commercially confidential." In fact, the evidence to that Committee was that confidentiality provisions are inserted into the contracts more often at the request of the public service than the private sector.

The Australian Council Auditors-General in its *Statement of Principles: Commercial Confidentiality and the Public Interest* November 1997 referred to the need to make a distinction between confidentiality during the process of tendering and the final document.

As Seddon says:

One of the claims made in favour of the contractualisation of government is that the very process of planning and drafting a contract enhances accountability because it forces government agencies to specify with some precision what was previously unspecified or at best the subject of perhaps vague public service guidelines or directions … It is therefore odd that the terms of the contract are hidden and the very benefits claimed for contracting out cannot be assessed.

Mr Seddon concurs with the Senate Committee when he observes "most of the information in government contracts is mundane and in no way sensitive."

That this is the case, would appear to be supported by the American experience. The Council of Auditors-General noted that in California once a finalised agreement has been reached, the final agreement is able to be released publicly. We see no reason why a similar principle could not be applied here.

The Council is attracted to the views of Chris Finn where Mr Finn says:-

Commercial information is overprotected from disclosure under contemporary FOI legislation. This overprotection is evident quite apart from democratic arguments that the "public right to know" may override established commercial interest. Viewed solely in economic terms, the existing levels of protection for business information appear hard to justify. FOI legislation should be redrawn so that business information is only protected where its release will cause demonstrable harm to the competitive process itself. It should not be sufficient to justify exemption, as is currently the case, either that the material is of a commercial nature or that its release will cause some harm to the individual enterprise.

At the very least, the FOI Act ought to be amended to provide that to justify a nondisclosure, as Moira Paterson says there must be some risk of harm to the financial affairs of the government agency. There must be a harm which outweighs the democratic interest in government accountability.

In the case of information supplied voluntarily in confidence, a similar test needs to be applied. It needs to be demonstrated that disclosure information will cause harm to the position of the confidant or prejudice to the future supply of information and that there is no countervailing public interest in disclosure.

Bruce Flegg MP, Leader, Queensland Liberal Party

The issue of access to documents forming part of a cabinet submission needs also to be addressed.

QPILCH

As identified by the discussion paper, the Queensland government has been host to an increasing use of corporatisation, privatisation, outsourcing and private public partnerships in an effort to make government services more efficient.

As a consequence, judicial review, freedom of information, the ombudsman and other administrative law safeguards have been ousted from their traditional roles.

This concern was expressed by Kirby J in his dissenting judgment in *NEAT Domestic Trading Pty Ltd v AWB Ltd*:

This appeal presents an opportunity for this Court to reaffirm that principle in circumstances, now increasingly common, where the exercise of public power, contemplated by legislation, is "outsourced" to a body having the features of a private sector corporation. The question of principle presented is whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules.

It was held by the High Court in *NEAT* that even though the written approval of AWB (International) Ltd was a statutory condition which had to be satisfied before the authority established by the *Wheat Marketing Act 1989* (Cth) might give its consent to the bulk export of wheat, this was not a decision "under an enactment" and not reviewable under the ADJR Act. Rather, the power of AWB to give approval was derived from its incorporation under the Corporations Law of Victoria and not judicially reviewable.

Similarly, private bodies carrying out public functions avoid the obligations imposed by the *Freedom of Information Act*. Documents held by government will also be excluded, if they fall within the exemptions relating to trade secrets, business affairs or research or matters communicated in confidence.

Recognition of these issues is starting to occur.

In 1998, the Administrative Review Council produced a report based on the fundamental principles that:

- Government should retain accountability in relation to services it pays contractors to provide to third parties
- Contracting out should not reduce the rights of the public to seek redress if affected by actions of a contractor.

It recommended reforms including: the availability of external merits review where contractors exercise statutory powers; the availability of judicial review of contractor's decisions; the extension of the role of the Ombudsman so that it applies to contractors; and amendment of the FOI Act to allow access to relevant contractor documents.

It is our view that a holistic approach needs to be undertaken to ensure that emerging, corporate manifestations of government are captured by administrative law mechanisms. This means amendment of overarching legislation, such as the FOI Act*, Judicial Review Act* and *Ombudsman Act*, rather than ad hoc amendment in relation to specific government agencies as issues arise.

Queensland Ombudsman

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.

8.2.2 Committee comments

The committee notes the views and information provided in submission regarding the need for both government accountability and rights to access to administrative justice mechanisms regarding public services delivered by private bodies. Since the administrative law reforms recommended by EARC and PCEAR in the early 1990s, it has become increasingly common for public power to be exercised, and public services to be delivered, by bodies having the features of those in the private sector.

Generally, as indicated in the submissions and at the committee's conference in the Accessibility of Administrative Justice, in our system of representative democracy, private sector accountability mechanisms are regarded as insufficient in these circumstances. The committee's view also is that, so far as reasonable, the norms and values of administrative justice should apply. In this context, the committee notes that the same approach was adopted by the Queensland Parliament when it enacted the *Corrective Services Act 2006* (Qld). Under this Act, engaged service providers, that is the providers of private prison services, are subject to provisions of the *Freedom of Information Act*, the *Crime and Misconduct Act*, the *Judicial Review Act* and the *Ombudsman Act*.

The committee recommends (**recommendation 11**), therefore, that section 8 of the *Freedom of Information Act* and section 4(b) of the *Judicial Review Act* be amended to extend the application of the Acts to public or private body performing functions or engaging in activities which, although private in character, are also of public interest and concern and involve funds that are provided or obtained (in whole or in part):

- out of amounts appropriated by Parliament; or
- from a tax, charge, fee or levy authorised by or under an enactment.

The committee is conscious that implementation of recommendation 11 may require additional amendment of the respective Acts. However, this should be limited to ensuring, for example that a private lawyer providing legal aid services did not have to respond to applications made under the *Freedom of Information Act*.

8.3 Contracts for provision of public services

8.3.1 Recommendation for reform by Queensland parliamentary committee

In November 2002, the Public Accounts Committee of the 50th Parliament reported to the Parliament following an inquiry regarding information required to assess government financial management. The committee report recommended that the Premier and Minister for Trade direct all Queensland public sector entities, through the appropriate Minister, to develop and adopt guidelines in relation to commercial-in-confidence consistent with principles set out in the report, including that:

- the general principle is that information should be made public unless there is a justifiable commercial or legal reason for it not to be; and
- contracts that include commercial-in-confidence provisions should be publicly identified together with a specification of which provisions have been withheld from public scrutiny.

The Government's response to the report of the Public Accounts Committee did not support the recommendations.[122]

8.3.2 Reforms in other jurisdictions

An Order of the Australian Senate, made in June 2001, required Ministers to table letters of advice that all agencies which they administered had placed on the internet by the tenth day of the Spring and Autumn sittings of Parliament, lists of contracts providing for consideration to the value of $100 000 or more.

The list was to include all contracts that had not been fully performed and any other contracts entered into during the previous 12 months, and to indicate, amongst other things, whether the contracts contained any confidentiality provisions.

The Order was informed by three reports of the Senate Finance and Public Administration References Committee tabled in June 2000, September 2001 and December 2002, as well as a report of Australian National Audit Office (ANAO). The general principle underlying each report was that information in government contracts should not be protected as confidential unless there is a good reason to do so. In its report, the ANAO developed criteria to assist agencies in determining whether information in contracts should be treated as confidential.

The ANAO report also provided guidance on a possible new framework for dealing with the issue of confidentiality in contracts and disclosure of contractual information to parliamentary committees.

The Government agreed to comply with the spirit of the Order and advised that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements or a confidentiality undertaking that had been given. Agencies' compliance would be progressive as agencies refined arrangements and processes to meet the requirements.

122 The Government response is available at: www.parliament.qld.gov.au/PAC

In New South Wales, a private members' bill was introduced in 2006 with the object of amending the *Freedom of Information Act 1989* (NSW) so as to:

- insert into that Act a section that requires details of major contracts entered into between the Government and the private sector to be published on the internet within 90 days after they have been entered into;
- define the expression 'commercial-in-confidence provisions' for the purposes of the proposed section; and
- ensure that the published details of any such contract do not have to include the commercial-in-confidence provisions of the contract, and that those provisions are not subject to the public rights of access conferred by Part 3 of that Act.

The bill was passed and received Assent on 4 December 2006.

8.3.3 Supplementary issue

When seeking submissions supplementary issues, the committee invited views regarding the adoption in Queensland of initiatives to require the publication of details regarding contracts entered into by public sector agencies.

8.3.4 Relevant information and views considered by the committee

Auditor-General of Queensland

A fundamental component in maintaining the confidence of the public in Government service delivery is transparency of arrangements. Commercial-in-confidence clauses restrict access to certain information. Instances where commercial-in-confidence clauses have been used include where it is considered that disclosure may adversely affect an organisation's competitive strategy, or for incentive schemes, where there is concern the public will be disadvantaged by the disclosure of this information. However a balance is required between these principles to ensure that pubic trust and confidence is not jeopardised.

In determining the information that should be released to the public and what should remain commercial-in-confidence, the benefit to the community of being provided with this information versus the benefit to the administration of the specific program in not disclosing this information, should be evaluated. These matters should be resolved through disclosure I the public interest unless there are compelling reasons not to do so. As a minimum standard, sufficient information should be disclosed as a basis for Parliamentary scrutiny.

Information should be made public unless there are justifiable reasons in the public interest for withholding such information. Adherence to minimum standards of disclosure could promote greater accountability, transparency and public trust in the process and the outcomes achieved and inherently in the State's public sector institutions. Minimum standards of disclosure could be set down in a policy to be issued by the Government which would be binding on Government entities entering into contracts and agreements with the private sector.

Sufficient guidance should be issued to support such a policy. This guidance should incorporate criteria allowing Government entities to make informed, consistent and transparent judgements about the circumstances for use of commercial-in-confidence clauses.

An issue for consideration is the timing of the disclosure of information. In some instances the value of maintaining confidentiality erodes with the passage of time. Information which may need to be treated as confidential during certain transactions may be able to be released publicly once the transaction has been completed or after a period of time has elapsed.

Appropriate levels of disclosure could be achieved through use of the *Financial Management Standard 1997* to require publication, for example in the entity's annual report and on its website, of details of contracts entered into by Government entities with private providers which contain commercial-in-confidence clauses.

The reasons for information being deemed as commercial-in-confidence and not disclosed publicly (for example, to protect intellectual property rights or competitive advantage) should be documented. Any requirements for disclosure of commercial-in-confidence information or justification for the use of commercial-in-confidence clauses in contracts involving the public sector should be consistent with existing legal obligations.

For the Parliament and the public to be assured that commercial-in-confidence clauses are being used by Government entities only where necessary without unjustifiable diminution of transparency and accountability, the decision making process must be open to scrutiny by the Parliament and public. Contracts could make provision for access to contract-related information by the Parliament and its committees as is the case in the Commonwealth Government.

In summary, consideration should be given by the Committee whether it is in the public interest for the Government to issue a policy on commercial-in-confidence matters, balancing the need for transparency, accountability and the public interest with commercial imperatives. In the context of existing legislation (for example, FOI) this policy should be predicated on the basis that conflicts between commercial imperatives and transparency and accountability should be resolved in the public interest.

Such a policy could include or be supported by clear and appropriate guidelines to assist officers in the discharge of their obligations when dealing with commercial-in-confidence matters. This should include criteria for the appropriate classification of information as commercial-in-confidence.

Consideration should be given to the disclosure of contracts with commercial-in-confidence clauses in the annual reports and websites of Government entities, possibly through amendment to the Financial Management Standard. This should include –

- Disclosure of all contracts entered into by Government entities with private providers, regardless of value, which contain commercial-in-confidence clauses, and
- Where commercial-in-confidence clauses are used, the accountable officer, or equivalent, document the reasons for non-disclosure.

QAILS and QCOSS

The writer has some familiarity with Commonwealth government contracts which usually provide dispute resolution procedure clauses which compel the providers to establish some sort of dispute resolution procedure initially between the contractor and the customer. The Committee's attention is drawn to the Report of the Senate Committee on *The contracting out of government services* where the Committee cites evidence from Dr Seddon that where contract disputes are settled without going to litigation, the settlement generally favours the contractor.

There are three fundamental problems with contract based dispute resolution procedures the:-

- Customer is of course not a party to the contract.
- Amounts involved are usually so small as to make litigation uneconomical.
- Remedies provided to the government are either potentially unenforceable or of no benefit to the customer.

Contractual remedies usually involve either the termination of the contract or some form of liquidated damages. Termination of the contract is obviously a very harsh remedy which in the writer's experience, departments are reluctant to use because it will disadvantage many people who depend on the service provider. That is especially so in the remote areas..

Liquidated damages also cause legal difficulties in that if they are classified by the Courts as a penalty they are unenforceable. Certainly in numerous judgement the Courts have given governments latitude when it comes to striking down liquidated damages causes as penalties. However, assuming that the liquidated damages clause is not a penalty the person that is entitled to the money is the government and not the customer.

In Queensland it might be possible using Section 55 of the *Property Law Act* to give customers of government funded service providers a direct right to claim liquidated damages. That is an issue which would require further legal consideration. However even if that is possible it is unlikely to be an economic proposition for ordinary citizens to seek to recover through litigation any liquidated damages that would be considered valid by the Courts.

Of course, the customers might be said to have the option of taking their business elsewhere. Once again, issues of market failures arise. This is hardly an option for persons in isolated communities or where there are costs involved in changing suppliers (be they monetary or otherwise).

No doubt the Senate Committee was correct in its view that citizens making use of private service providers should not have any lesser rights than citizens making use of government service providers.

The Council certainly thinks that a relatively simple and cheap mechanism should be made available.

The Senate Committee recommended that the jurisdiction of the Commonwealth Ombudsman be extended to cover contract service providers at least on a trial basis.

It is our view the Committee should consider recommending something similar for Queensland. Alternatively it could recommend the establishment of some other body or Tribunal specifically designed to provide rights of redress for consumers who have complaints against Queensland government service providers.

Queensland Council for Civil Liberties

This heading raises complex issues brought about by the change in nature of the government with the increasing contracting out of government services.

We would start by making the historical point that the so called "contracting state" is not new. In many respects it is something of a return to the state of affairs prior to the 19th century. When you consider the pre 19th century experience the need to ensure that accountability mechanisms remain strong and effective is very clear. For example, the dockyards and service providers to the Royal Navy were so notoriously corrupt and inefficient it is startling that Admiral Nelson managed to put to sea let alone win the Battle of Trafalgar.

The New South Wales Independent Commission against corruption has previously noted that contracting out creates increased or changed opportunities for corruption in the contracting process. For this reason there need to be steps taken to ensure that this process is opened up to examination.

In the Council's view one area where this could be achieved is by a significant narrowing of the Commercial in Confidence Exemption contained in the *Freedom of Information Act.*

The New South Wales Law Society

It is clear that access to information relates to information held by government agencies. The resort to corporatise agencies or their businesses may be seen as a measure to circumvent the need to comply with the FOI Act and to some extent the Judicial Review Act. The definition of a government agency must not only refer to agencies of the executive but to all organisations that are owned by the government or where Ministers or their delegates including public servants are directors or shareholders/members or both. If the government wishes to avoid widening access to include these other organisations, the alternative is to privatise these organisations and allow the market to discipline their performances including where appropriate reporting to the Australian Stock Exchange or other exchanges.

Rockhampton City Council

Rockhampton City Council provides a statement in their General Conditions of Contract that all parties to the contract will comply with the requirements for commercial-in-confidence and the protection of intellectual property (this is a standard clause in all Australian Standard contracts).

When formulating the tender documents, the Procurement Unit provides a statement in the Preamble to the Tender Conditions that:

"The Conditions of Tender have been prepared in accordance with the obligations of the Principal contained in AS 4120, Code of Tendering, which sets out the ethics an obligations of the Principal and Tenderer throughout the tendering process."

Clause 8 of the AS4120 – 1994 deals with Confidentiality and states that :

"All information provided between the Tenderers and the Principal shall be treated as confidential information. Both the Tenderer and the Principal shall undertake to maintain that information as confidential and commercial in confidence."

This clause is also repeated in the RCC Tender conditions.

The Procurement Unit agrees with the points made by the former Premier Peter Beattie that all Contracts (and associated Tender Submissions) should be treated as commercial in confidence and that divulging this information publicly does not add value to the process. In some cases it can be demonstrated that it has a detrimental effect on open and fair competition in the tendering process. In a recent example, a local Tenderer's submitted price was 4.9% higher than the non-local Tenderer's price (allowing for the 5% Local Preference the local Tenderer wins). It would appear that the Local Tenderer may have based their new tender on the knowledge gained from the public opening the year earlier.

Brisbane City Council

This is an important issue for Council, as contracts may contain 'commercial-in-confidence' information of both the public sector entity and the other contracting party.

'Commercial-in-confidence' information of both parties may not necessarily be neatly contained in a few discrete provisions or areas within a contract but may be contained in a number of provisions or areas throughout a contractual document, making it difficult to specifically identify provisions which are to be withheld as being 'commercial-in-confidence'.

Even if specifically identified 'commercial-in-confidence' provisions were excluded, to take public sector entity contracts publicly available may reduce or inhibit the ability of public sector entities to negotiate favourable contractual provisions. This would be due to the possibility that other customers and competitors of the contractual party may be able to scrutinise the agreement with the public sector entity.

Such public scrutiny is not imposed on private sector entities.

Public sector entities should not be placed in a weaker position than those with whom the public sector entity needs to contract with in the commercial arena.

Given the large number of contracts entered into by Council through its various divisions and business units, it is a burdensome requirement to continually produce and maintain a list of all contracts over $100,000 and specifically identify the 'commercial-in-confidence' provisions that will be withheld.

Council does not support the publication of details, but supports the release of information at an indicative level – e.g. Council purchased a specified number of buses at a specified cost from a named source. Such release of information already occurs.

QPILCH

Accountability of and accessibility to a public agency are vital to the operation of a representative democracy. Decisions that are taken to affect the members of the public should be open for review by those members. In recent times there have been numerous moves by the government to allow public agencies to mask their actions behind legal technicalities. One such method has been the use of commercial-in-confidence ("CIC") to allow governments to escape public scrutiny by withholding relevant documents as being confidential information within the commercial agreement, as part of a contracting out of services or private/public partnership arrangements.

CIC refers to arguments put forth by parties with commercial interests to argue for non-disclosure of information because of its business and thus potentially sensitive nature. However, the lack of legally defined boundaries has led to the mistaken belief that any information of a business nature is sensitive and therefore should be withheld.

QPILCH has recently assisted an environmental group which attempted to gain information about a property development, which involved a corporation and local authority partnership. Access to information normally available through the planning process was circumvented on the basis that *any* information may be detrimental to the business venture. It is all-encompassing exclusions such as this that possesses the greatest danger to accountability and accessibility.

The potential problems of the widespread use of CIC have prompted moves to introduce legislation in other states that will restrict the use of CIC by government. Even in Queensland, there have been reports that have raised similar concerns and have sought to make recommendations regarding the use of CIC by the government. The Legislative Assembly of Queensland Public Accounts Committee report examined and recommended changes to the secrecy that surrounds financial arrangements between governments and the private sector. The committee put forth several recommendations for the governance of CIC.

These recommendations attempt to reverse the current system by making the first assumption one of accessibility and transparency, with only well-justified information being able to be classified as CIC. As stated by the Auditor-General of Queensland, there are no specific guidelines to determine what material should appropriately be classified as CIC.

The government of New South Wales has proposed a segmented system that allows for businesses to maintain a certain amount of commercialism and yet entitles the public access to information. The table below shows the level of disclosure dependent on the size of the project:

Project size	**Level of disclosure**	**Agency's responsibility:**
$0 to $100,000	Schedule 1 Items	Disclose on request
$100,000 and above	Schedule 1 Items	Disclose routinely
$5M and above involving private sector financing, land swaps, asset transfers and similar arrangements	Schedule 1 and 2 Items	Disclose

While this suggestion is worthy of consideration, we would recommend greater research before introducing such a regime.

Queensland Ombudsman

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 to the PAC in which I stated:

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 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 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.

Whole of Government submission

The [Independent review of the *Freedom of Information Act*] clearly encompasses the issues raised in your Supplementary Issues Paper about the publication of details regarding contracts entered into by public sector agencies. I therefore do not propose to provide any further information your inquiry on this issue.

8.3.5 Committee comments

The committee notes the submission from the Auditor-General of Queensland regarding the importance of transparency of arrangements regarding Government service delivery.

The committee has considered the various models for requiring disclosure of information regarding contracts for the provision of public services. In Queensland, the committee recommends (**recommendation 12**) a minimum requirement of disclosure by way of annual reporting, as regulated by the Financial Management Standard. Accordingly, the requirement to report will be government by the *Financial Administration and Audit Act 1977* and the Financial Management Standard 1997.

The committee suggests, however, that annual reporting of contracts for the provision of public services should be the minimum. Additional reporting should take place also via department and agency websites.

In addition, the committee recommends (**recommendation 13**) that the Public Service Commissioner should issue a directive to ensure that, where government agencies engage non-government entities to carry out functions prescribed by statute, the terms of contract should give the agency a right of access to documents produced in the course of performing those functions.

8.4 A right of access to resolve a genuine grievance

Commonly, a grievance relates to procedural issues such as delay, misleading advice or lost records, rather than to the substantive correctness of an administrative decision or action. In these circumstances:[123]

> Rarely will the remedy for such a grievance be the reversal of a decision by a determinative decree, or a declaratory, mandatory or injunctive order of the kind granted in judicial review. Oftentimes the more appropriate and accepted remedy is an explanation or apology. Those remedies do not find a niche in rule of law theory, but nor should their importance be overlooked in evaluating how to civilise a system of government and make it attuned to its accountability and responsibility to the public.

8.4.1 Reforms in other jurisdictions

In New South Wales, the *Civil Liability Act 2000* (NSW) provides that, in most circumstances, an apology does not constitute an admission of liability. It further states that an apology will not be relevant to the determination of faut or liability.

In May 2007, the New South Wales Ombudsman published, *Apologies – a practical guide*. The guide states that the reasons for apologies are to:[124]

- satisfy the needs of people who experience harm;
- satisfy the needs and responsibilities of those who caused the problem; and
- protect the public interest and ensure good administrative practice.

8.4.2 Relevant information and views considered by the committee

QAILS and QCOSS

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

Noel Turner

The purpose of the Fitzgerald Inquiry was to examine activities of the State of Queensland and its agencies and amongst other things, to make recommendations for the remedy of Administrative Justice deficiencies and injustices.

The purpose of the *Judicial Review Act 1991* was not sufficient to remedy or resolve my grievance because it confines the Supreme Court of Queensland to considerations of law and does not invest the Court with powers to gather information regarding the facts and related facts from Government and its Agencies by investigation, order and direction.

The model for a State Institution dedicated to seeking facts, related facts and information including matters of law with powers of investigation, order and direction as well as access to forensic skills to undertake its commitments will be an Office of Review of Administrative Actions which will have a statutory foundation and accountable to the Parliament of Queensland.

The Official Reviewer will have Deputy and Assistant Official Reviewers with staff to operate specialist sections of investigation, information gathering and compliance matters relating to facts and as well the origin of facts which will be critical to the consequences of Government Corporate business practices with regard to the cost-effectiveness and risk management as is contained in Section 10 of the Discussion Paper.

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123 Prof John McMillan, 'The Ombudsman and the Rule of Law', paper presented at the ANU Public Law Weekend, Canberra, 6 November 2004, 9.

124 See: www.ombo.nsw.gov.au.

Aggrieved persons should be entitled to make complaint to local Agencies of the Office of Review at a standard one-off fee for service and not subjected to the prohibitive fees of financing a Supreme Court Action.

The content of the legislation as the foundation for the operation of Freedom of Information, The Queensland Ombudsman and Judicial Review structures in Queensland at present makes each of those structures inadequate to achieve a just remedy to grievances regarding potential and probable injustice caused by administrative action.

The failure of the legislation in each case by failing to authorise each of the structures to be empowered to interlink with each other and as well share information with each other on related facts, investigate and ascertain material facts relevant to the grievance and in turn provide the information to the aggrieved person adds to the inadequacy.

The failure of the legislation in each case by failing to empower the structures to issue orders and directions for the overcoming of delay and adversity in the resolving of grievances further adds to the inadequacy.

Caxton Legal Centre

We have recently successfully assisted two clients to obtain 'blue cards' from the Commissioner for children. These clients had to wait 13 and 19 months respectively to obtain decisions about whether or not they would be granted blue cards. This issue genuinely affected their employment options but because the department was not required to make a decision within a set period of time (even though our clients would only have had 28 days to appeal the decisions once they were made) the matters were left in limbo for a most unacceptable level of time. Ultimately, it appeared that our letter confirming that we would have no option but to take action for judicial review lead to a resolution. As mentioned earlier, we are aware of other instances where government departments have responded to resolve matters only once applications for judicial review have been filed. This is clearly a most cumbersome way to pressure government organisations to carry out their duties. Government officials should be required to have to make decisions in a timely way.

Queensland Ombudsman

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.

Ian Timmins

It would seem that the FOI legislation may not accept that a third party can legally represent another, and thus facilitates restriction on release of personal information to that third party.

My experience with FOI applications to the Ombudsman was that every single of several applications which involved documents was rejected, quoting [section 39] of the Act to justify their decision. They even used a barrister to reject my first application, possibly to try to give more weight to their decision. He went on to say in part "*…release of the report could reasonably be expected to inhibit the future flow of information in relation to this and other investigations*." In other words, agencies are protected by the Ombudsman so that future cooperation is not jeopardised.

However, in every single case their initial rejection was overturned when I appealed, but it allowed them to delay releasing the information, and additional costs of both time and money for me. So in my case the perception is that the Ombudsman abuses this right to try to prevent the public making applications under FOI.

8.4.3 Committee comments

The committee notes the legislative reform in New South Wales to allow for apologies to be made without constituting an admission or giving rise to liability. The NSW Ombudsman's practical guide observes that, 'An apology is the superglue of life. It can repair just about anything.' In the context of administrative justice, the ability to apologise provides people and agencies in the public sector with the ability to respond effectively and appropriately where decisions or actions, or the failure to decide or act, may have caused harm. The committee notes that the Ombudsman's guide states:[125]

125 See: www.ombo.nsw.gov.au.

> When things go wrong, public sector agencies and their staff should accept responsibility and take 'ownership' of the problems they are responsible for. This is what good management practice dictates, ethical conduct requires and the public expects…
>
> If public sector staff make full apologies this:
>
> - ensures that staff and their agencies are held properly accountable for their actions
> - ensures proper transparency in public administration
> - is the appropriate ethical and moral response where an action or inaction has caused harm.

The committee recommends (**recommendation 14**) that in Queensland legislative change should occur to provide that in most circumstances an apology by a public agency does not constitute an admission of liability and will not be relevant to the determination of fault or liability.

The committee notes matters raised in the submission from Mr Ian Timmins regarding access under the *Freedom of Information Act* to information regarding the personal affairs of a deceased person. In this context, the committee notes that the Victorian Ombudsman's review of the Victorian freedom of information legislation led to a recommendation for the definition in the *Human Tissue Act 1982* (Vic) to be inserted in the *Freedom of Information Act 1984* (Vic). As the Independent Review Panel is giving consideration to the extent to which the Queensland legislation provides an effective framework for access to information held by government, the committee refers this matter to the panel for their consideration. The committee notes also the need for legislative reform to ensure the any legislative reform ensures observance of the genuine intent of a deceased person regarding access to information regarding his or her personal affairs.

8.5 Timeliness

8.5.1 Judicial Review Act

In its report, *Judicial Review of Administrative Decisions and Actions*, EARC observed that:[126]

> In judicial review proceedings, a substantially shorter time than would apply to ordinary civil proceedings is justified, since it will generally be to the advantage of applicants to correct expeditiously the adverse effect to their rights or interests, and in many instances, the outcome of the challenge can directly or indirectly affect the rights or interests of third parties, and the course of government administration (and indeed in some cases may have consequences for government budgeting).

Time limits applying to applications under the *Judicial Review Act* are:

Action	Provision	Time limit
Statutory orders of review (Part 3)		
Application for a statutory order of review of a decision, conduct related to the making of a decision, or the failure to make a decision.	Section 26	For a written decision given to the applicant – application must generally be made within a period commencing when the decision was made and extending for 28 days after the 'relevant day' (generally the day on which a statement of reasons for the decision was given to the applicant). The reasons may be given with the decision, in response to a request for the reasons under section 32, or following a decision but in the absence of a request under section 32 (for the 28 days to apply, the reasons must be provided within 28 days of the decision). Otherwise, time begins to run from the time the applicant is notified that he or she was not entitled to make the request for reasons or that the reasons will not be given, or when the court makes an order declaring that the applicant was not entitled to a statement of reasons. In any other case, the 28 day period begins from the day on which the decision was given to the applicant.
Order of the court on application for a statutory order of review.	Section 30	No time limit.

126 EARC, *Report on Judicial Review of Administrative Decisions and Actions*, [9.20].

Action	Provision	Time limit
Reasons for decision (Part 4)		
A person who makes a request for a statement of reasons must be provided with the statement. Alternatively, if the decision-maker believes the person is not entitled to make the request, the decision maker must notify the person accordingly or apply to the court for a declaration to this effect. The time limit also applies in the event an exception applies under the Act with the consequence that certain information need not be included in a statement or, if the statement would be false or misleading if it did not include the information, the statement need not be given. See sections 35 (for information relating to personal or business affairs of a person other than the person making the request) and 36 (for information covered by a certificate of the Attorney-General).	Section 33(1),(2) Section 37	Within 28 days after receiving the request. If this timeframe is not complied with, the person making the request may apply to the court for an order requiring the decision maker to give the statement within a specified period.
A decision maker may refuse to prepare and give a statement of reasons if, in the case of a written decision give to the person making the request, the request was not made within the specified timeframe.	Section 33(4)	If request not made within 28 days after the day the decision was given. In any other case, the decision maker may similarly refuse if the request not made within a reasonable time after the decision.

8.5.2 Freedom of Information Act

Time limits set by the *Freedom of Information Act* are:

Action	Provision	Time limit
Access to documents (Part 3, division 1)		
Notifying applicant that application received.	Section 27(1)	As soon as practicable, but not later than 14 days after receipt.
Notifying applicant of decision whether or not to grant access. If timeframe not complied with, application taken to be refused, subject to section 27(5A).	Section 27(5) (see also ss 27A and 27B)	In most cases, 45 days. Additional 15 days where consultation required on application regarding disclosure of matter of substantial concern.
If agency or Minister intends to refuse access on basis that work involved in dealing with application(s) would substantially and unreasonably divert agency resources or interfere substantially and unreasonably with Minister's performance of functions, agency or Minister must first provide applicant with notice of intention to do so and provide applicant with a consultation period with a view to making an application overcoming the concerns.	Sections 29A (applications for access) and 54C (applications for amendment of information)	Consultation period ends 21 days after notice given to applicant. Applicant's failure to consult means application taken to be withdrawn. Agreement may be reached as to appropriate period for deciding the application.
Time limit for access to document by applicant, where access granted.	Section 31A	Within 60 days of notice being given to applicant (or any additional period allowed by agency or Minister). Entitlement to access the documents then ends.
Transferred applications Where application for access or amendment of information is transferred to another agency.	Sections 26 and 54A	Immediate notice must be given to applicant of the transfer. Application taken to be received by the agency to which it is transferred on the earlier of the transfer day or 14 days after receipt by the original agency.
Internal review (Part 3, division 4 and Part 4, division 2)		
Application for internal review of a decision relating to access or a decision relating to amendment of information.	Sections 52(2) (decision relating to access) and 60(2) (decision relating to amendment of information).	Must be lodged within 28 days after day on which written notice of decision given to applicant (or within further time agency's principal office or Minister allows).
Deciding application for internal review.	Sections 52(6) and 60(6)	Within 28 days after receipt (otherwise original decision taken to have been affirmed).
Application for amendment of information (Part 4)		
A person who has had access to a document containing information relating to the person's personal affairs may	Part 4	No time limit.

Action	Provision	Time limit
apply for amendment of any part of the information the person claims is inaccurate, incomplete, out-of-date or misleading. Similar provision is made for applications by relatives for the amendment of information about the personal affairs of a deceased person.		
Time within which decision on application to be made.	Section 57	As soon as practicable after, but within 30 days after, receipt of application (otherwise application taken to be refused). See section 31 for deferral of access in certain circumstances.
External review (Part 5)		
Application for external review of decision by Information Commissioner.	Section 73(1)	Must be made within 28 days from day on which written notice of the decision is given to the applicant (or within a longer period allowed by the Information Commissioner). Internal review procedure must first be followed.
Applications where decisions delayed (i.e. where, because timeframes have not been met, an agency's principal officer or a Minister is taken to have made a decision under a particular provision of the FOI Act).	Section 79	Information Commissioner may, on application of the agency or Minister, allow further time to the agency or Minister to deal with the application
Decision of Information Commissioner.	Section 89	No time limit.
Requirement for agency or Minister to provide additional statement where Information Commissioner considers original statement of reasons for decision inadequate.	Section 82	Additional statement must be provided as soon as practical, but within 28 days.
Where a certificate has been given in respect of certain exempt matter (cabinet matter, executive council matter, matter relating to law enforcement or public safety, matter relating to national or State security) and the Information Commissioner makes a decision that there were no reasonable grounds for the issue of the certificate, the Minister must notify the Information Commissioner that the certificate is confirmed, otherwise the certificate ceases to have effect.	Section 84	Minister must provide confirmation within 28 days after the Information Commissioner's decision is made, table a copy of the confirmation within five sitting days after it was given and provide confirmation to the applicant.
If an agency or Minister gives a notice under section 35(2) in relation to access to a document containing certain exempt matter (cabinet matter, executive council matter, matter relating to law enforcement or public safety, matter relating to national or State security) – the notice may neither confirm nor deny the existence of that type of document and state that, assuming the existence of the document, it would be an exempt document- and the Information Commissioner is satisfied that the document concerned does not contain the particular exempt matter, a copy of the decision must be given to the applicant.	Section 87A	Notice must be given to the applicant only if, at the end of 28 days after the decision is first given to the agency or Minister, the Information Commissioner has not been notified that the agency or Minister has applied for a statutory order of review under the *Judicial Review Act*. Further, agency or Minister must comply with the direction only if, at the end of 28 days after the decision is given to the agency or Minister, the agency or Minister has not applied for judicial review.
Statement of Affairs (Part 2)		
Agency must publish an up-to-date statement of the affairs of the agency.	Section 18	Each year.
If person serves on an agency's principal officer a written notice that, in the person's opinion: • the agency has failed to publish a statement of affairs, as required; or • a statement of affairs that the agency has published does not comply with the FOI Act, the principal officer must decide whether or not the person's opinion is correct and notify the person accordingly.	Section 20	Within 21 days of receiving the notice.
Process for assessment of charges (Schedule 4)		
If an applicant has been given a preliminary assessment notice in relation to a processing charge or an access charge in relation to their application, the applicant must do one of the following (whichever is applicable) within the required timeframe otherwise their application will be taken to be withdrawn.	Schedule 4, item 2	Within 30 days (or the further period the agency or Minister allows): • if an original deposit is required, the applicant pays the original deposit and agrees to pay the original charge; • if an original deposit is not stated, the applicant agrees to pay the original charge; or

Action	Provision	Time limit
		• the applicant gives an objection notice.
If new preliminary assessment notice is issued stating that the original charge was wrongly assessed and should be reduced, the applicant must then, within 30 days, pay the new original deposit and agree to pay the new original charge / agree to pay the new original charge otherwise the application will be taken to have been withdrawn. Applicant may also apply for external review of the new preliminary assessment notice.	Schedule 4, item 4	Within 30 days or the further period the agency or Minister allows after the new notice is issued, otherwise the application will be taken to be withdrawn.
If agency or Minister decides that the contention rased in the objection notice should be rejected, the agency or Minister must notify the applicant accordingly. Procedure for internal review then applies.	Schedule 4, item 7	Notice must be given within 30 days after applicant gives agency or Minister the objection notice, otherwise deemed rejection.

The Information Commissioner annual report 2003-04 indicated that, of 287 applications for external review in that year, 40 related to a deemed refusal to grant access.[127] A 'deemed refusal' refers to a failure to respond to an application for access within the relevant time.

Amendment to the *Freedom of Information Act* in 2005 extended the period, from 14 to 28 days, within which an agency must make a decision on an application for internal review of a decision. The Information Commissioner has said of this amendment, 'I strongly encourage agencies to take advantage of this change and ensure that internal review decisions are rigorous, with clear and well-documented reasons and made within the timeframe under the FOI Act.'[128]

In November 2007, the Queensland Parliament passed the *Judicial Remuneration Act 2007*. Provisions of this Act amended the *Freedom of Information Act* to allow agencies to continue to deal with freedom of information applications out of time. The amendments were directed to the situation where, having received an application for access to information under the *Freedom of Information Act*, an agency or Minister continues to deal with the application following expiry of the statutory time limit for dealing with an application. Under the *Freedom of Information Act*, prior to the amendment, if an agency or Minister had not decided an application and notified the applicant accordingly within the relevant period (in relation to many applications, 45 days), the *Freedom of Information Act* provided that the application was deemed to have been refused. In these circumstances, agencies and Ministers adopted the administrative practice of making decisions outside the relevant period.[129]

8.5.3 Key issue

In its discussion paper, the committee stated that while speed should not be an end in itself, administrative law recognises that justice delayed may in fact be justice denied. For example, a failure to resolve an application for judicial review of a decision regarding the release of a prisoner prior to the expiration of his or her sentence would deny the applicant the remedy sought.

8.5.4 Relevant information and views considered by the committee

Caxton Legal Centre

It appears that some government departments have difficulty in complying with the time constraints for FOI document provision and we appreciate that it is a very difficult task for certain under-resourced sections of the public service to meet their obligations. However, given the objectives of the FOI legislation including the focus on government accountability and serving the public interest, we consider that all FOI units/sections within departments should be properly resourced. Our Centre was recently involved in a major case where important documentation was not released in a timely fashion and this necessitated our applying to the Information Commissioner for a review, the outcome of which was the ultimate provision of the documents required. Nevertheless, this caused our organisation significant additional work and delayed preparation on an important case. We consider that priority must be given to

127 Information Commissioner, *Annual Report 2003-2004*, 30; see: www.infocomm.qld.gov.au.
128 Office of Information Commissioner, *Annual Report 2004-2005*, 2; see: www.infocomm.qld.gov.au.
129 Explanatory Notes, page 2.

the timely release of application and that this requires proper resourcing by government of FOI units/workers in all government and associated departments/bodies.

Ian Timmins

Agencies regularly ignore the legislated time requirements, knowing that since there are no penalties for them in doing so, and given the enormous waste of time and money the public would face in taking the matter to court, they have absolutely no fear of ignoring the Act. [S]ome documents I requested on 17/6/97 were not provided until 27/2/03, nearly six years after my FOI application was lodged.

Referring to section 73(1)(d), it specifically states that an [external review application] can only be made to the Information Commissioner within 28 days "*from the day on which written notice of the decision is given to the applicant…*"

Now if the agency fails to communicate the decision of their internal review, hence making it a deemed rejection, there is no rejection in writing. So under the Act there is no way to make an application for external review by the Information Commissioner.

Brisbane City Council

One area where reform is needed is to the time limits that apply within legislation. Time limitations within FOI legislation are generally appropriate for both applicant and agency, although different time limits need to be imposed on external review. If, due to a backlog, a letter from the Information commissioner is sent about a matter occurring or correspondence produced many months previously, Council officers will need sufficient time to reassess the matter so that Council may meaningfully respond.

On the other hand, time limits for commencing judicial review actions seem reasonable. As an applicant for a statutory order of review is not limited to the grounds set out in the application but may apply to the court to amend the grounds, there seems to be no injustice that the period to lodge an application remains at 28 days after the 'relevant day'. This ensures a swift entry onto court lists, enabling the parties to agree a subsequent timetable with the court.

There could, however, be a potential prejudice to the decision-maker if an applicant wishes to commence an application 'out of time'. One final point is that an application for a statutory order of review should not be able to be commenced until after a statement of reasons has been delivered.

QAILS and QCOSS

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

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

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

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

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

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

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

judicial review application. Compare this to a prisoner who is serving twelve months and is eligible for conditional release after eight months with four months to serve. Potentially three months can pass before the prisoner can lodge the judicial review application.

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

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

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

Caxton Legal Centre

The short time period allowed for the lodgement of judicial review applications is a particular problem in this area of law. The 28 day time limit allowed for the filing of a judicial review application is often wholly unreasonable because many of our clients are not able to obtain legal advice on the issue until after the 28 days has expired, especially clients living in rural areas and clients who require assistance in order to travel to appointments. We recently encountered a case where a person involved in a Tribunal decision received a decision just before the Christmas period and this greatly reduced that person's opportunity to obtain prompt legal advice on the issue. We are also aware that the short time period causes particular problems for prisoners. A lack of particularly in the provision of reasons by a decision-maker can make it particularly difficult for a judicial review applicant to properly frame his/her/its case and yet while seeking further information about a case, an applicant will have no choice but to file an application which may be premature or may later require further amendment.

While an applicant can seek leave to file out of time, this is always fraught with risk. We submit that the *Judicial Review Act* should be amended to allow more time for the filing of applications. A three month time period would be more reasonable in many cases. (While it is possible for an applicant to seek leave to file out of time, this involves a separate application to the court, which is costly and there are no guarantees of success. We consider it would be preferable to simply extend the time period for filing rather than force clients to have to bring an additional application before the Supreme Court.)

We understand from colleagues that judicial review cases usually take at least a year to resolve and this adds to the costs and stressors on clients. If a proportion of cases could be diverted to the Magistrates Court these time periods could be shortened.

QPILCH

Under the JR Act, a statutory order of review under Part 3 must be made within 28 days of written notice of the decision. If application under Part 4 for reasons is made, then the time limit is effectively extended to 28 days after reasons for the decision have been given. If no written notice of the decision is given, then the applicant has a "reasonable time" within which to make the application.

If all time limits are complied with, an applicant may have up to 84 days within which to file an application for statutory order of review under Part 3.

Timeline	Event
Day 1	Notified in writing of the decision
Day 28	Statement of reasons requested under Part 4
Day 56	Statement of reasons provided
Day 84	Application for Statutory Order of Review filed

An application for review under Part 5 of the JR Act must be filed within 3 months after the day on which the grounds for the application arose.

An explanation of the timeframes imposed was provided in EARC's "Report on Judicial Review of Administrative Decisions and Actions" (1990) Report No. 5. Primarily, EARC determined that the example set by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be followed. It then said:

In judicial review proceedings, a substantially shorter time than would apply to ordinary civil proceedings is justified, since it will generally be to the advantage of applicants to correct expeditiously the adverse effect to their rights or interests, and in many instances, the outcome of the challenge can directly or indirectly affect the rights or interests of 3rd parties, and the course of government administration.

The 3 month time frame for Part 5 applications was justified because it was consistent with the effective time limit for bringing proceedings under Part 3, namely 84 days.

We believe that the 28 day time frame is too short for access by disadvantaged members of the community who may be poorly educated, experiencing financial hardship and/or have mental health issues. By only allowing 28 days within which to commence proceedings ignores the difficulty many people face when seeking free or low cost legal assistance in what is normally a referral process.

Further, the "effective" time limit of 84 days is dependent upon each event taking place at the very end of their respective time limits. In most cases, the 84 days will be truncated – to as short as 28 days if a statement of reasons is given with notification of the decision or no request for reasons is made at all.

We suggest that the time limit under Part 3 of the JR Act be expanded to 3 months from the date written notice of the decision is received or 28 days from the date a statement of reasons are provided (whether pursuant to application under Part 4 or otherwise) whichever is later. This will also allow for consistency between Part 3 and Part 5 applications.

Of course, extension of time provisions should continue to cater for extraordinary circumstances.

Transfer of FOI Applications

Section 26 of the FOI Act allows an agency to transfer an FOI application made to it to another agency if more appropriate. The other agency must consent to the transfer. The purpose of the provision is to assist in streamlining requests for FOI documents, particularly where application has been inadvertently made to the wrong agency.

There are no provisions guiding an agency's discretion to grant or withhold consent to the transfer. As it stands, it appears the agency can refuse the transfer without reason, requiring the original agency to write to the applicant rejecting the request and forcing the applicant to reapply to the appropriate agency, wasting time and resources.

It should only be with good reason that the agency can refuse consent to a transfer, particularly in light of amendments made in 2005 which enabled the transferred application to be treated as a fresh application and the transferee agency to charge the application fee.

8.5.5 Committee comments

In relation to the *Freedom of Information Act*, as the Independent Review Panel is giving consideration to the extent to which the Queensland legislation provides an effective framework for access to information held by government, the committee refers the timeliness of agency's responses to applications and of external review to the panel for their consideration.

However, the committee suggests that, as for the finding of the Victorian Ombudsman in his review of the Victorian freedom of information legislation, delay appears to be an issue in Queensland. Committee recommendations regarding general publication of government information may assist in reducing the burden on agency freedom of information decision-makers. It is suggested, though, that multiple and/or complex requests for information are part of general flow of work for departments. To meet these requests, agencies should adequately resource freedom of information units.

While the intention of the amendment to the *Freedom of Information Act* effected by the *Judicial Remuneration Act 2007* may have been to assist agencies, the committee suggests that the uncertain wording of the amendment may have created instead uncertainty as to agency responsibility where the relevant time limit has not been met.

In relation to the *Judicial Review Act*, the committee has recommended (**recommendation 2**) that the Public Service Commissioner prepare guidelines to assist decision-makers to prepare statements of reasons. These should address the need for timely responses to requests for reasons. In addition, committee recommendations in

this report, for example, regarding proportionate dispute resolution, are directed to promoting the efficiency of administrative justice mechanisms. A general result of the implementation of the recommendations should be for people aggrieved by government decisions and actions to receive timely responses.

8.6 Committee recommendations - efficient and effective access via existing mechanisms

Recommendation 11: Section 8 of the *Freedom of Information Act 1992* and section 4(b) of the *Judicial Review Act 1991* should be amended to extend the application of the Acts to public or private body performing functions or engaging in activities which, although private in character, are also of public interest and concern and involve funds that are provided or obtained (in whole or in part):

- out of amounts appropriated by Parliament; or
- from a tax, charge, fee or levy authorised by or under an enactment.

The broadening of the scope of application of the Act may raise the need for limited amendment to:

- section 11 of the *Freedom of Information Act 1992* (Act not to apply to certain bodies etc) - for example, to ensure that a private lawyer providing legal aid services was not acting within the scope of that Act; and
- part 1, division 5 of the *Judicial Review Act 1991.*

Recommendation 12: The Financial Management Standard 1997 should be amended to require annual reporting of contracts, including those with commercial-in-confidence clauses, entered into by government entities. The requirement should be for information regarding:

- all contracts with private providers, regardless of value; and
- where commercial-in-confidence clauses are contained in a contract –
  - the accountable officer or equivalent; and
  - the reasons for non-disclosure.

Recommendation 13: The Public Service Commissioner should issue a directive to ensure that, where government agencies engage non-government entities to carry out functions prescribed by statute, the terms of contract should give the agency a right of access to documents produced in the course of performing those functions.

Recommendation 14: Legislative change should provide that an apology by an agency regarding a decision or action affecting an individual does not constitute an admission of liability and will not be relevant to a determination of fault or liability, unless specifically excluded.

9 EFFICIENT AND EFFECTIVE ACCESS – REVIEW OF ADMINISTRATIVE DECISIONS 'ON THE MERITS'

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

9.1 Merits review and judicial review compared

In a paper presented in the People's Republic of China in November 2006, Australian Administrative Law, Justice McClellan, Chief Judge at Common Law, Supreme Court of New South Wales, provided the following explanation of the distinction between judicial review and merits review:[130]

> Judicial review is concerned with the legality of administrative decisions, and is the sole province of the courts. Merits review is concerned with the substance of a decision and is carried out by various review bodies. The distinction between judicial review and merits review is the consequence of the doctrine of the separation of powers, which is enforced more strictly in Australia than in most other common law jurisdictions…
>
> Review on the merits is concerned with whether a legally sound decision was the "correct and preferable" one. Merits review is the sole responsibility of the executive, because the person or tribunal conducting the review "stands in the shoes" of the original administrative decision-maker. Administrative tribunals are not bound by strict rules of evidence and seek to provide a less formal atmosphere than the courts. If the reviewing body would have made a different decision, then that decision will be substituted for the original decision…
>
> Judicial review has been described in the following terms:
>
> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative error or injustice, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."
>
> The fundamental principle of judicial review is that "all power has its limits," and when administrative decision-makers act outside of those limits they may be restrained by the judiciary. Judicial review does not prevent wrong decisions, it instead prevents them from being made unjustly. It does not matter whether the judge who is reviewing the decision would him or herself have arrived at a different conclusion to the administrative decision-maker. The decision will only be interfered with if there was some illegality in the process by which it was made. The jurisdiction of the court is confined to quashing the decision and remitting the matter back to the original decision-maker for determination in accordance with the law. This may not always be satisfying – either for individual judges or for the party seeking relief – but it is often the unfairness in the making of a decision, rather than the decision itself, that causes people the greatest distress.

In Queensland, to date, rights to administrative review have been conferred in piecemeal fashion. Generally, this has occurred in parallel with the development of the modern State and the growth of regulation. Rights have been conferred according to the legislative policy objectives of departments.

A person's right to appeal against an administrative decision is conferred currently by individual statutes which also set out the nature of the appeal right in each case. There are hundreds of these appeal rights in Queensland legislation. In relation to other decisions, there may be a right to internal review of a decision, or no specific right conferred. Under some statutes, the right to appeal may lie to a tribunal. Where merits review is not available, a person's recourse is to the courts via judicial review.

In most Australian jurisdictions, reform of ad hoc appeal rights has led to the establishment of a generalist merits review tribunal to replace many of the administrative tribunals earlier established by individual statutes. A general right to appeal administrative decision lies to these tribunal. However, despite EARC recommendations made in 1993 supported by PCEAR, there has been no generalist tribunal in Queensland to date. A recent Queensland Government announcement regarding reform is outlined in section 9.2.3.

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130 Justice Peter McClellan CJ at CL, 'Australian Administrative Law', paper presented, International Symposium, Hangzhou, People's Republic of China, 2.

9.2 Previous suggestions for reform

A submission received from the Queensland Ombudsman provided a summary of past recommendations regarding reform of administrative appeals in Queensland.

Queensland Ombudsman

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

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.

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.[131] 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". 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.

As at 1 January 1992, 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 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.

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".

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.

131 EARC, *Report on Appeals from Administrative Decisions*, 1993.

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

In 1999, the Legal, Constitutional and Administrative Review Committee of the 49th Parliament recommended the EARC and PCEAR recommendations be revisited.

Prior to commencing its inquiry into The Accessibility of Administrative Justice, the committee of the 51st Parliament wrote to the Attorney-General and Minister for Justice to inquire about reform. In a letter dated 24 August 2004, the then Attorney-General replied that the matter was under review by the Department of Justice and would be the subject of forthcoming legislation.

Due to the anticipated introduction of legislation providing for reform regarding administrative appeals, the terms of reference for the inquiry into The Accessibility of Administrative Justice by the committee of the 51st Parliament included judicial review (an inherent and statutory power of the Supreme Court to examine the legality of the manner in which an administrative decision was made) but not review on the merits.

9.2.1 Review by the committee

In November 2006, the committee of the 52nd Parliament wrote again to the Attorney-General and Minister for Justice seeking his advice as to any proposed reforms. In a letter dated 28 March 2007, the Attorney-General and Minister for Justice advised:

> While no reforms in this area are currently underway, in 2007, I expect to consider a range of options for reform of administrative review arrangements. Should the Government decide to progress reform in this area, I will ensure that LCARC is consulted about the preferred reform options available.

The committee of the 52nd Parliament broadened the scope of the inquiry to include appeals from administrative decisions in its consideration of administrative justice mechanisms.

The committee of the 52nd Parliament determined that its inquiry should, as a minimum, seek submissions regarding reform of appeals from administrative decisions, so as to inform the Attorney-General and Minister for Justice's review process underway for some years.

The committee invited submissions regarding reform of administrative appeals in Queensland.

9.2.2 Reforms in other jurisdictions

Tribunal reforms implemented in other jurisdictions were described in the submission received from QPILCH.

> **QPILCH**
>
> Generalist merits review bodies exist federally and in Victoria, ACT, NSW, and Western Australia.
>
> Victorian Civil and Administrative Tribunal
>
> The Victorian Civil and Administrative Tribunal (VCAT) was established in 1998 and consisted of the amalgamation of the Victorian Administrative Appeals Tribunal and a number of small tribunals[132] into what is commonly referred to as a 'super-tribunal'. It has three divisions:
>
> - Civil Division: exercises jurisdiction over disputes between individuals
> - Administrative Division: conducts merits review of government decisions
> - Human Rights Division: hears issues of discrimination and guardianship
>
> VCAT operates through the use of lists, each specialising in a particular type of case. The area of the list and its respective legislation (if any) will determine the powers that the VCAT will have with regards to the case at hand. The general operation of the lists is governed by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

132 W Martin, 'The Development of State Tribunals' 84 (2004) *Reform,* 19.

VCAT has proven to be one of the most efficient merits review systems in the country. it processes a caseload of approximately 90,000 with a budget of $20 million. This has proven to be extremely cost efficient at approximately $220 per case.

State Administrative Tribunal of Western Australia

The State Administrative Tribunal of Western Australia (SAT) was established in 2005 by the *State Administrative Tribunal Act 2004* and the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (Conferral Act). It takes an informal and transparent approach and is divided in to four streams that allow for different procedures to be implemented to each individual case. These streams are:

- Human Rights: decisions about guardianship and discrimination and also reviewing decisions of the Mental Health Review Board
- Development and Resources: reviewing decisions by government bodies
- Vocational Regulation: dealing with complaints about occupational misconduct
- Commercial and Civil: deciding upon commercial and personal matters.

The objectives of the SAT are:

- to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;
- to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and
- to make appropriate use of the knowledge and experience of Tribunal members.

Administrative Decisions Tribunal of NSW

Administrative Decisions Tribunal of NSW (ADT) was established in 1997 to provide independent external review of administrative decisions. Overall, the tribunal is governed by the *Administrative Decisions Tribunal Act 1997* (NSW). However, there are 6 divisions incorporating various topics that are governed by numerous external statutes. These are:

- General Division: reviewing decisions concerning Freedom of Information, Privacy and Personal Information, Security Industry, and Transport Industry, including the Guardianship and Protected Estates List
- Community Services Division: hears administrative decisions made in the Community Services sector.
- Revenue Division: hears applications for review of various State taxation decisions.
- Legal Services Division: hears complaints referred under the *Legal Profession Act 2004* against legal practitioners and licensed conveyers.
- Equal Opportunity Division: deals with complaints of unlawful discrimination
- Retail Leases Division: hears claims by parties to retail shop leases made under the *Retail Leases Act 1994*.

9.2.3 QCAT for Queensland

On 12 March 2008, the Premier announced that a general civil and administrative tribunal would be established in Queensland:[133]

A recent review by the Department of Justice and Attorney-General found that the system of civil and administrative justice in Queensland is inefficient and fragmented, reducing the community's access to justice at the tribunal end.

There are approximately 26 different bodies in Queensland performing civil and administrative appeal and review justice functions. These include bodies such as the Film Appeals Tribunal, the Animal Valuers Tribunal, the Veterinary Tribunal, the Racing Appeals Tribunal, the Nursing Tribunal, the Small Claims Tribunal, the Anti-Discrimination Tribunal and the Fisheries Tribunal. The list goes on and on. Each one of these serves a valuable purpose and provides an avenue for justice to Queenslanders in different specialist areas. However, the system is confusing.

133 Hon AM Bligh MP, Premier, Public Sector Reform, Ministerial Statements, *Queensland Parliamentary Debates (Hansard)*, 12 March 2008, 712-713; Hon KG Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, Queensland Tribunals – Amalgamation, *Queensland Parliamentary Debates (Hansard)*, 12 March 2008, 716.

My government will establish one single gateway for members of the public to access justice. We will consolidate the back-of-house functions of these tribunals and harness the specialist legal knowledge of each of the various members of the tribunals and amalgamate them into the new Queensland Civil and Administrative Tribunal.

Former Justice the Hon. Glen Williams will oversee the creation of the tribunal including the scope of jurisdiction, membership and registry structure, accommodation, information technology and other infrastructure needs. He will be assisted by respected lawyers Julie-Anne Schafer and Peter Applegarth in his task. It is our intention to have the new tribunal up and running during the second half of 2009. As well as making our system of justice easier, more accessible and more user friendly we expect to significantly reduce court costs and generate significant savings and improved services for taxpayers.

9.2.4 Relevant information and views considered by the committee

Views and information provided to the committee is set out below under the following headings:

- merits review compared to judicial review;
- cost effectiveness;
- timeliness;
- access for a diversity of people;
- benefits from amalgamation; and
- suggested model.

Merits review compared to judicial review

National Parks Association of Queensland

Judicial review could also be streamlined and unnecessary litigation avoided by providing a tribunal-review layer between the decision maker and the courts. Applicants could appeal to this tribunal to review a decision or uphold it. If applicants are still unsatisfied with the tribunal decision, they could then have recourse to the courts for redress.

QPILCH

LCARC has emphasised the unique position of administrative tribunals that bestows upon them the ability to review an administrative decision on the basis of whether it was correct and preferable in all the circumstances. In contrast with judicial review, which assesses the procedure that was taken in making the decision, administrative review tribunals may make a new decision by considering all available information, even that which was unknown to the original decision-maker.

While there have been some improvements with the introduction of the *Ombudsman Act 2001* (Qld), allowing the Ombudsman to take a role in assisting public sector agencies, it appears that the situation has changed little since 1993. If anything, there have been several more administrative review bodies, rationalisations and pieces of legislation dealing with administrative review and imposing more limitations on judicial review.

However, despite the vast number of decisions which must be made by government agencies everyday, there is often no external, independent body to which aggrieved persons may apply for merits review. In these cases, a person may make a complaint to the Ombudsman who has investigative powers and can make recommendations, but not binding decisions. The only other alternative is judicial review through the Supreme Court - a time consuming, legalistic, expensive and complicated process which can remedy procedural breaches rather than considering the merits of the decision. Our experience from the self-representation project and UK research shows that the earlier a problem is addressed, the more likely it will be solved and the less likely it will turn into costly litigation.

QAILS and QCOSS

We agree with EARC's rationale.

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

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

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

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

Having decisions reviewed on their merits is in the public interest

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

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

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

Merits review more worthwhile in practical terms

Taking matters through a judicial review process can lead to outcomes that provide no real relief, even if the application is viewed favourably by the court. Judicial review may cause the decision-maker to revisit the decision but the same (or a similar) decision may result from the reconsideration. The party who brought the review proceeding is effectively in the same position that they were in prior to the review.

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

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

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

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

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

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

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

The Queensland Law Society

Presently, judicial review of administrative decisions is limited to review of the decision-making process and does not address the unjust or unreasonable outcomes. In Queensland many complainants lack standing to raise significant issues of concern through judicial review.

The Queensland Law Society contends that an additional system of merits review, as is in place in many other Australian jurisdictions, is required to address issues of substance related to administrative decisions.

Cost effectiveness

QPILCH

A key issue for consideration is the cost of establishing a Queensland generalist tribunal either alone or in conjunction with existing specialist tribunals.

On its face, a new generalist system will be more expensive in the short-term than doing nothing. However, the cost of doing nothing has also not been assessed.

The cost of a new system can be mitigated by incorporating a new over-arching system that incorporates the existing specialist tribunals with resulting cost-savings and effectiveness. A revamped system will improve accountability and will likely outweigh initial outlays.

While it was estimated by EARC in 1993 that the cost of establishing a generalist review body in Queensland would be over $8 million, the report also concluded that after the costs had been absorbed, there would be a reduction in the overall costs of the system.

The improvement in efficiency of the current merits review system will be great enough to justify the initial costs. A singular register of reviewed decisions and one statute for the general governance of the tribunals would clarify the process of seeking review for the greater public. A potential shared registry could also reduce costs to governments and consumers.

Greater coherence and accessibility to the public should be a central concern in any merits review reform. A generalist review system would be able to review a wider array of cases than just the combined total of the specialist tribunals. This would put greater pressure on public authorities to ensure that correct procedure is followed. Unlike the Ombudsman which currently looks after a significant proportion of complaints, decisions by the tribunal would be binding on the decision-maker. This would improve the public perception of the tribunal and its independence as well as ensuring accountability of decision making.

While other states have implemented generalist tribunals, VCAT has been shown to be the most efficient model. This system would increase efficiency, public accessibility and organisation of merits review cases.

QAILS and QCOSS

Costs savings for clients

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

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

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

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

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

A public housing tenant was having a dispute with a neighbour. The neighbour made a complaint to the Department of Housing which led to a Warrant of Possession hearing in the Small Claims Tribunal. This hearing was seeking to evict the tenant for allegedly causing a nuisance to another occupier.

The tenant attended the hearing with an advocate from the Tenant Advice and Advocacy Service (TAAS). A departmental staff member attended as the lessor. At the hearing the lessor handed up to the Referee an affidavit from the neighbour with the alleged nuisance details. The tenant was not allowed to read the affidavit, as the Department of Housing representative stated they feared for the safety of the neighbour if the information was made

known to the tenant. The tenant's advocate objected on the grounds of denial of natural justice in that the tenant did not have the opportunity to view the details on which the cased was based. This was denied and the Referee refused to show the affidavit to the tenant.

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

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

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

Costs savings for government

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

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

Timeliness

QAILS and QCOSS

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

Compare that time frame with the Victorian Civil and Administrative Tribunal (VCAT) time frames: The President of the Victorian Civil and Administrative Tribunal, Justice Stuart Morris, said in a press release on 19 August 2004 that in the 2003-04 year 3,702 planning matters were initiated in VCAT, compared with 3,271 in the preceding year. But the median time from the initiation to the finalisation of planning appeals in 2003-04 was only18 weeks, compared with 22 weeks in the previous year and that in the six weeks before the press release, the median time was in fact down to 16 weeks.

Access for a diversity of people

Commission for Children and Young People and Child Guardian

Queensland's current approach of conferring appeal rights under individual statutes and creating a large number of specialist tribunals makes it difficult for children and young people to readily access review processes. Children and young people usually lack the specialist legislative knowledge required to determine if they have a right to have a particular decision reviewed. Additionally, each individual tribunal has its own processes and procedures, some of which may encourage children and young people to apply and some of which may not. For example, proceedings in the Children Services Tribunal are less formal than proceedings in the Magistrates Court.

Legal Aid Queensland

For some time now, Legal Aid Queensland ha supported the creation of a Queensland Consumer and Administrative Tribunal along the lines of the Victorian Consumer and Administrative Tribunal. This would provide a "one stop shop" for most personal matters which are important to citizens. The tribunal would operate without the need for legal representation in most matters. Currently Queensland has a proliferation of tribunals and it is very difficult for an individual to know where to go to have their legal rights determined. A tribunal would provide an accessible mechanism for citizens to seek merits review of administrative decisions of government.

The Queensland Law Society

Community groups in Queensland have also raised concerns about the efficacy of the present administrative law system, including the lack of available information regarding administrative and government decisions, the costs and limitations of judicial review.

QAILS and QCOSS

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

Benefits from amalgamation

QAILS and QCOSS

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

"Many of the existing procedures require an application to the Supreme Court. This is intended to ensure that the rights of the person who is the subject of the application are protected against arbitrary restriction. However, to a large degree, the potential advantage is negated by other factors.

The expense of making a Supreme Court application is often financially beyond the means of a person with decision-making disability and his or her family or close friends. In addition, people may feel alienated and intimidated by the traditional courtroom atmosphere and the legal culture of adversarial proceedings, and the judge may have little expertise, experience or understanding of the needs of a person with a decision-making disability."

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

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

Thomas J Mahon

The adage "after all is said and done, there is usually more said than done" is clearly the situation in Queensland legal matters, supported by the following facts supplied by LCARC.

Commonwealth Legislation commenced 1976 followed by similar legislation in the ACT and two other States.

EARC in 1993 identified 131 appeal bodies in Queensland.

PCEAR recommended that merit review reform take place slowly! Thirty one (31) years after the Commonwealth Legislation commenced, Queensland is no further advanced.

These matters were revisited in 1999 and 2004 when the Minister for Justice advised inter alia, "the matter is under review" and "would be the subject of forthcoming legislation."

The committee in November 2006 sought advice from the Minister for Justice who took five months (28th March 2007) to advise that "while no reforms in this area are currently underway in 2007…"

The Queensland Government recently moved with what could be described as "lightening speed" to reduce some 156 Local Government Councils to 72 by urgent Legislation but after 31 years, is still talking about Administrative Justice.

The remedy is at hand. Stop the talk and commence the implementation. If the Commonwealth, ACT, New South Wales and Victoria have implemented appropriate Legislation, are Queensland citizens condemned to a second rate Legal system.

The Queensland Law Society

The Queensland Law Society supports the adoption of a state based administrative appeals tribunal in Queensland.

In a similar manner to that which was canvassed and adopted in Western Australia, the society supports the adoption of such a tribunal in order to advance the public interest and improve public decision making. Merits review has the potential to steadily improve the quality and consistency of administrative decision making in this jurisdiction.

In the past in Queensland the need for a state-based generalist merits review tribunal ahs been identified in order to broaden the reach of administrative remedies, simplify procedures and enhance access to administrative justice.

Recommendations for a merits review body to be established in Queensland were first made in the Fitzgerald Report in 1989. The report of the Queensland Electoral and Administrative Review Commissions (EARC) in 1993 commented that existing review rights were not comprehensive; there lacked a widespread system of internal review by agencies and certain decisions were excluded from judicial review and from review by the Ombudsman. As Kirby J stated in 1997, "If it were left to the courts, at the behest of individual citizens, to enforce the law in the nooks and crannies of public administration, many with complaints would be bound to be disappointed."

EARC noted the ability of a general administrative review body to provide an open, far, impartial, flexible, quick and cost-effective system of merits review.

Jeff Seeney MP, Leader of the Opposition

The Queensland Coalition prima facie supports any initiative which would genuinely enhance government accountability and transparency, and which would improve access to administrative justice in this State. The Coalition has long been concerned by the culture of concealment and secrecy affecting the Executive branch of the Queensland Government, in particular, which is unfortunately entrenched by the lack of genuine, independent avenues of appeal against government decision-making.

Legal Aid Queensland

The need for a generalist state based administrative appeals tribunal has been well documented in pervious reports, namely, EARC, Report on Appeals from Administrative Decisions, 1993, PCEAR, Report on Appeals from Administrative Decisions, 1995, and LCARC, Review, 1999. LCARC considered the current system on Queensland was burdensome, costly, confusing, unwieldy and wasteful and concluded that a government response was "long overdue". Legal Aid Queensland shares this view.

Legal Aid Queensland supports the adoption of a state based administrative appeals tribunal in Queensland. Like the Queensland Law Society, Legal Aid Queensland supports the establishment of a general administrative review body that would provide an open, fair, impartial, flexible, fast and cost-effective system of merit review.

The Queensland Ombudsman

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:

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

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.

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.

Commission for Children and Young People and Child Guardian

A consolidated tribunal could potentially make review processes more accessible for children and young people. However, specific strategies would need to be implemented to ensure that a consolidated tribunal was accessible to children and young people. Such strategies should include: a service charter and/or service delivery standards that include engagement with children and young people; appropriate performance measures to assess access by children and young people over time; providing that applications from children and young people do not have to be made in a prescribed form; and providing tele-links through local Magistrates Courts so that children and young people in rural and remote areas can access the tribunal.

Further, members of any consolidated tribunal would need specialist knowledge and skills to effectively and expeditiously deal with cases in which they must determine the best interests of a child and young person. This expertise could be provided by people within a specialist division of the tribunal, similar to the Discrimination and Guardianship Division of the Victorian Civil and Administrative Tribunal. Currently the 28 members of the Children Services Tribunal include lawyers with expertise in mediation and children's matters, indigenous representatives, child psychiatrists, a paediatrician and other professional members with extensive expertise of the child protection system, as well as a young person. Panels are constituted for each case having regard to the issues in the case.

Brisbane City Council

Council officers have some degree of difficulty on commenting on this issue, given the large number of administrative tribunals in existence, many of which have little or no relevance to local government. Council officers do not have a sense of how the tribunals operate, nor a sense of the extent of the problem.

It may be that there are very specialised tribunals performing very specialised functions, and it is important that relevant experts deal with the circumscribed issues that come under the jurisdiction of the relevant specialist tribunal.

In that regard, before Council can meaningfully comment further, more information would be needed.

QPILCH

Specialist tribunals are often developed in a reactive way and lack a consistent pattern of decisions that were reviewed and do not usually take proactive steps to respond to the needs of users. There are usually no common procedures between the different tribunals and it has been criticised that specialist tribunals "duplicate resources premises and infrastructure".

It has been argued that Queensland does not need a generalist tribunal as Queenslanders have strongly embraced alternative dispute resolution systems, as compared with their interstate counterparts. However, while the current system may be beneficial to some, it is not so for many individuals who lack the power in any mediation process. Administrative justice must be seen to be just. A crucial aspect of negotiating an outcome is having both parties on equal footing. This may be feasible with regards to a large corporation or government agency but not so for an individual who seeks a review. Thus, a generalist review body is just as necessary in Queensland as in other states.

From these observations, the need for a generalist merits review tribunal in Queensland is clear. The benefits of implementing such a design include:

- improved access to merits review of administrative decisions
- simplification of processes by collapsing numerous review bodies into a single review body – a one-stop shop- which also results in resource sharing and other efficiency gains
- a more user-friendly system of decision-making
- greater efficiency and speed in dealing with cases when problem is first identified
- improved capacity to deal with self-represented litigants
- more informal procedures with greater focus on balanced alternative dispute resolution
- (in some cases) the use of non-legal decision-makers with expertise in particular areas
- the capacity to better meet the public's expectations of an independent and impartial review of administrative decisions
- improvement of administrative decision-making at a primary level
- reduction in unmeritorious or misguided judicial review applications.

<u>Suggested model</u>

QPILCH supports the establishment of an administrative review system in Queensland. We suggest establishment of a generalist tribunal with several specialist tribunals including:

- Anti-Discrimination Tribunal
- Queensland Children Services Tribunal
- Queensland Guardianship and Administration Tribunal

[Other] tribunals could remain as specialist tribunals under the organisational umbrella or be incorporated into the generalist review tribunal, depending on the requirements for members to have specialist knowledge and skills in dealing with the matters before them.

Queensland Ombudsman

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 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.

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.

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 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.

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.

Caxton Legal Centre

Our clients periodically complain about the Small Claims Tribunal and assert that they have been denied natural justice in their hearings. For example, a number of clients have advised us that the Referee refused to allow them to see material provided to the Tribunal by the other party, and a number have asserted that the Referee refused to read their material. Our clients are typically complaining about problems which may not involve a lot of money, but which may be profoundly affecting their personal situations, such as fencing disputes with neighbours.

We acknowledged that Parliament did not intend to provide any appeal avenues against the decisions of the Small Claims Tribunal, although section 19 of the *Small Claims Tribunal Act 1973* (Qld) contemplates review for want of jurisdiction or denial of natural justice. There are no transcripts from the Small Claims Tribunal hearings and this makes it difficult to prove what has occurred at a hearing and the fact that Referees do not have to provide written reasons for their decisions makes it confusing and difficult for individuals who wish to have the decisions reviewed.

Given that such hearings often involve relatively small amounts of money, (say $750.00 involved in the building of a fence - though such amounts are not small amounts for our clients), the costs involved in taking action for judicial review in the Supreme Court are simply prohibitive when case prospects are assessed on a cost/benefit basis. We submit that some other form of review is desperately needed in this arena. We are aware that the Tenants' Union of Queensland has observed that its clients sometimes face similar problems in relation to the tenancy disputes that are heard in the small Claims Tribunal.

If our recommendation for a two-tiered judicial review forum is not adopted, some alternative arrangement could be considered for the review of Small Claims Tribunal decisions by a panel of 3 magistrates or a District Court Judge. At the very least, this problem needs to be carefully considered and remedied.

9.2.5 Committee comments

The committee welcomes the announcement by the Premier and the Attorney-General and Minister for Justice of a new Civil and Administrative Tribunal in Queensland.

As noted in this report, committees of successive Parliaments have both written to Attorneys-General and made recommendations about the need for reform in this area. In the period since the EARC and PCEAR reviews, significant reform has taken place in other jurisdictions, but only minor steps have been taken in Queensland.

A general right to have the merits of administrative decisions and actions reviewed will be a key plank in administrative justice in Queensland. The committee trusts that the information received by the committee, together with its recommendation (**recommendation 15**), will assist the QCAT panel in its important task.

9.3 Committee recommendation – review of administrative decisions on the merits

Recommendation 15: A general administrative tribunal should be established:

- to exercise original jurisdiction and to review, on the merits, administrative decisions –
  - with a minimum of formality;
  - by way of inquisitorial, not adversarial, methods; and
  - using techniques to ensure the proportional resolution of disputes, including by way of 'early-neutral evaluation';
- to amalgamate, co-locate where practicable and standardise the services and adjudicative functions of existing tribunals, boards and other bodies hearing administrative appeals; and
- with evaluation of the administrative and economic impact of the general administrative tribunal by way of an established evaluation framework, enabling statistical and financial reporting to the Attorney-General.

10 EFFICIENT AND EFFECTIVE ACCESS - PROPORTIONATE DISPUTE RESOLUTION

10.1 What is proportionate dispute resolution?

Proportionate dispute resolution is 'the idea that the ways in which cases are dealt with should reflect the nature of the dispute and what the person in dispute with the public body wishes to achieve'. It:

> seeks to find ways of combining the strengths of [administrative justice] measures so as to give people real choice and a genuinely responsive service. It aims to 'turn on its head the Government's traditional emphasis first on courts, judges and court procedure, and second on legal aid to pay mainly for litigation lawyers… 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, provide tailored solutions to resolve the dispute as quickly and cost effectively as possible.

10.1.1 Reforms in other jurisdictions

In 2004, the British Secretary of State for Constitutional Affairs and Lord Chancellor presented to the British Parliament a White Paper, Transforming Public Services. The White Paper stated that:

> We are all entitled to receive correct decisions on our personal circumstances; where a mistake occurs we are entitled to complain and to have the mistake put right with the minimum of difficulty; where there is uncertainty we are entitled to expect a quick resolution of the issue; and we are entitled to expect that where things have gone wrong the system will learn from the problem and will do better in the future.
>
> With this aim, the White Paper looked at the administrative justice system as a whole and set out proposals to improve the entire end-to-end administrative dispute resolution process. The proposals were to:
>
> - re-design decision-making systems in government service delivery organisations to minimise errors and uncertainty;
> - ensure an individual was able to detect when something had gone wrong;
> - remove disproportionate barriers of cost, speed or complexity from the process for putting things right, while ensuring that misconceived or trivial complaints could be identified and rooted out quickly; and
> - ensure that necessary changes fed back into decision-making systems to prevent error and uncertainty in future.

10.1.2 Supplementary issue

The committee invited submissions about the supplementary issue of the scope, if any, for reforms to provide for proportionate dispute resolution in Queensland.

10.1.3 Relevant information and views considered by the committee

Corrective Services

The *Corrective Services Act 2000* makes provision for the internal review of a number of decisions regarding prisoner management. Internal reviews permit not only a review of the merits but the ability to introduce fresh, relevant information. This is a more cost effective mechanism for reviews than the judicial system which examines the decision making process without regard for the merits.

The Department has recently undertaken a process of reviewing the *Corrective Services Act 2000*. Extensive internal and external consultation has occurred. It is envisaged that there will be a new *Corrective Services Act* in operation later this year. It is anticipated that the new Act will place emphasis on the availability of internal review for decision making processes.

In addition it is worthwhile to note that the Department is developing a new nmanagement system to deal with complaints in an open and accountable way.

Caxton Legal Centre

We do not believe that access to administrative justice is currently effective and efficient. In our experience, few legal practitioners practice in this area on a regular basis and legal aid is very rarely granted to deal with such cases. The problem is further complicated because so many Tribunals are subject to judicial review and arguments about relevant issues often become extremely technical. Tardiness and a lack of transparency and accountability in government/authority decision-making processes are a particular problem, and complaints processes are slow-moving. Unfortunately, affected parties are faced with the dilemma of pursuing remedies that are complex, time-consuming, drawn out, costly and sometimes ineffective. Many of these problems have already been canvassed earlier in this submission.

Commission for Children and Young People and Child Guardian

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.

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.

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. 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.

Whole of Government submission

I would like to emphasise Government's commitment to the goals which underpin the current legislative and structural arrangements in relation to judicial review.

Importantly, those affected by administrative decisions have the right to be advised in a timely way of the reasons for those decisions and to have decisions with which they disagree formally reviewed. Independent external review is available through the Ombudsman and, if misconduct is alleged, the Crime and Misconduct Commission. It is important that persons who are unsuccessful through external review process have the private right to choose whether or not to have the matter heard by the court. By making decision-makers accountable, original decision making and the processes supporting decisions are improved and the potential for dispute is minimised.

The *Judicial Review Act 1992* is only part of the Government's commitment to ensuring that individuals have appropriate opportunities for the review of the administrative decisions affecting them. Due to previous reforms in this area, considering the processes for the review of administrative decisions is a necessary part of developing the legislation authorising such decisions to be made.

Section 4 of the *Legislative Standards Act 1992* sets out the fundamental legislative principles for Queensland legislation. These include that legislation has sufficient regard to rights and liberties of individuals. Examples in subsection (3) of factors relevant to whether legislation has sufficient regard to rights and liberties of individuals include whether the legislation:

"(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice;".

Section 23(1)(f) of that Act requires the explanatory notes to include "a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency".

This law-making framework ensures proper review of issues relating to the review of administrative decisions by the Scrutiny of Legislation Committee and the Parliament.

As part of the policy development process or the review of existing administrative arrangements, merits-based review of administrative decisions, where appropriate, may be implemented as a more effective and efficient alternative to judicial review. For example:

- under *Transport Operations (Passengers) Act 1994*, an aggrieved person to apply for review to an independent review panel; and
- under the *Child Protection Act 1999* and the *Adoption of Children Act 1964*, aggrieved person has a right of review in the Children's Services Tribunal.

Commission for Children and Young People and Child Guardian

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.

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; and
- An inquisitorial and collaborative (rather than adversarial) process in which their views and wishes are considered.
- 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 fro children and young people; and
- A method of implementing the principles of the Queensland Youth Charter.

Queensland Ombudsman

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 1990's. 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 costs 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 give 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 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 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 Complainants 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 judgments 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.

10.1.4 Committee comments

In considering the accessibility of administrative justice in Queensland, the committee has given consideration to the continuing effectiveness of the freedom of information and judicial review mechanisms implemented following recommendations of EARC and PCEAR in the early 1990s. It has considered also the need for action regarding EARC and PCEAR recommendations for reform to provide a general right to access merits review of administrative decisions.

A focus of the committee's inquiry has been ways to combine the strengths of these mechanisms, together with other administrative justice mechanisms such as Ombudsman review to ensure that the people of Queensland have 'real choice and a genuinely responsive service'.

The committee hopes that a major effect of the implementation of the recommendations in this report, together with the recommendations of other significant administrative justice reviews underway, will be to ensure proportionality of administrative justice mechanisms in Queensland – that everyone can easily access information about government, particularly regarding decisions affecting their interests; that the right decisions are made in the first place; and, if not, that there are no disproportionate barriers in terms of cost, speed or complexity, to putting things right or removing uncertainty. The consequential benefits to government agencies are increased efficiency and effectiveness and that misconceived or trivial complaints are identified and resolved quickly.

Accordingly, the committee recommends (**recommendation 16**) that, with the aim of increasing the accessibility of administrative justice, the principles of proportionate dispute resolution be adopted in Queensland.

10.2 Committee recommendation - proportionate dispute resolution

Recommendation 16: Administrative justice in Queensland should provide a range of mechanisms to ensure that matters are dealt with in ways which reflect the nature of the dispute and what the person in dispute with a public body wishes to achieve. This should include Ministers ensuring that:

- departments and agencies give priority to improving first-instance decision-making and reducing error rates, including by way of undertaking relevant training, such as the good decision-making training delivered by the Office of the Ombudsman;
- departments and agencies have a 'one-door' approach for complaints; and
- when an individual makes a complaint or appeals, the initial decision is always reviewed by the department or agency, even if internal review is not a statutory requirement in the circumstances.

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

	REPORTS	DATE TABLED
1.	Annual report 1995-96	8 August 1996
2.	Matters pertaining to the Electoral Commission of Queensland	8 August 1996
3.	Review of the Referendums Bill 1996	14 November 1996
4.	Truth in political advertising	3 December 1996
5.	The Electoral Amendment Bill 1996	20 March 1997
6.	Report on a study tour relating to the preservation and enhancement of individuals' rights and freedoms and to privacy (31 March 1997—14 April 1997)	1 October 1997
7.	Annual report 1996-97	30 October 1997
8.	The Criminal Law (Sex Offenders Reporting) Bill 1997	25 February 1998
9.	Privacy in Queensland	9 April 1998
10.	Consolidation of the Queensland Constitution – Interim report	19 May 1998
11.	Annual report 1997-98	26 August 1998
12.	The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?	18 November 1998
13.	Consolidation of the Queensland Constitution: Final Report	28 April 1999
14.	Review of the *Report of the strategic review of the Queensland Ombudsman* (Parliamentary Commissioner for Administrative Investigations)	15 July 1999
15.	Report on a study tour of New Zealand regarding freedom of information and other matters: From 31 May to 4 June 1999	20 July 1999
16.	Review of the Transplantation and Anatomy Amendment Bill 1998	29 July 1999
17.	Annual report 1998-99	26 August 1999
18.	Issues of electoral reform raised in the Mansfield decision: Regulating how-to-vote cards and providing for appeals from the Court of Disputed Returns	17 September 1999
19.	Implications of the new Commonwealth enrolment requirements	2 March 2000
20.	The Electoral Amendment Bill 1999	11 April 2000
21.	Meeting with the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations) regarding the Ombudsman's *Annual Report to Parliament 1998 – 1999*	19 April 2000
22.	The role of the Queensland Parliament in treaty making	19 April 2000
23.	Issues of Queensland electoral reform arising from the 1998 State election and amendments to the *Commonwealth Electoral Act 1918*	31 May 2000
24.	Review of the Queensland Constitutional Review Commission's recommendations relating to a consolidation of the Queensland Constitution	18 July 2000
25.	Annual report 1999-00	19 July 2000
26.	The *Report of the strategic management review of the offices of the Queensland Ombudsman and the Information Commissioner*	19 July 2000
27.	Review of the Queensland Constitutional Review Commission's recommendation for four year parliamentary terms	28 July 2000

	REPORTS	DATE TABLED
28.	The prevention of electoral fraud: Interim report	14 November 2000
29.	Annual report 2000-01	2 August 2001
30.	Progress report on implementation of recommendations made in the *Report of the strategic management review of the offices of the Queensland Ombudsman and the Information Commissioner*	8 August 2001
31.	Review of the Members' oath or affirmation of allegiance	25 October 2001
32.	Freedom of Information in Queensland	20 December 2001
33.	The Electoral (Fraudulent Actions) Amendment Bill 2001	27 March 2002
34.	Meeting with the Queensland Ombudsman – 12 April 2002	14 May 2002
35.	Annual report 2001-02	23 August 2002
36.	The Queensland Constitution: Specific content issues	27 August 2002
37.	Meeting with the Queensland Ombudsman – 26 November 2002	12 December 2002
38.	Meeting with the Queensland Ombudsman – 29 April 2003	6 June 2003
39.	The role of the Queensland Parliament in treaty making – Review of tabling procedure	17 July 2003
40.	Annual report 2002-03	21 August 2003
41.	Review of the Queensland Constitutional Review Commission's recommendations regarding entrenchment of the Queensland Constitution	27 August 2003
42.	Hands on Parliament – A parliamentary committee inquiry into Aboriginal and Torres Strait Islander peoples' participation in Queensland's democratic processes	11 September 2003
43.	Meeting with the Queensland Ombudsman (25 November 2003) and final report on implementation of recommendations made in the *Report of the strategic management review of the offices of the Queensland Ombudsman and the Information Commissioner*	17 December 2003
44.	Meeting with the Queensland Ombudsman - 11 May 2004	17 June 2004
45.	Annual Report 2003/2004	19 August 2004
46.	A preamble for the Queensland Constitution?	30 November 2004
47.	Meeting with the Queensland Ombudsman – 23 November 2004	21 December 2004
48.	Publication of Committee Proceedings – 22 February 2005	10 March 2005
49.	Meeting with the Queensland Ombudsman (24 May 2005); meeting with the Queensland Information Commissioner (24 May 2005); and report on matters raised in a Ministerial Statement by the Premier and Minister for Trade on 23 March 2005	9 June 2005
50.	Constitutional and Other Legislation Amendment Bill 2005 (Qld)	28 September 2005
51.	Annual report 2004/2005	30 September 2005
52.	Meeting with the Queensland Ombudsman; Meeting with the Queensland Information Commissioner – 29 November 2005	21 December 2005
53.	Meeting with the Queensland Ombudsman; Meeting with the Queensland Information Commissioner – 23 May 2006	14 June 2006
54.	Annual Report 2005/2006	10 August 2006
55.	*Voices & Votes* – A parliamentary committee inquiry into young people engaging in democracy	10 August 2006
56.	Report on the Review of the Strategic Management Review Report – Office of the Information Commissioner, April 2006; Report on the 2005-2006 Annual Report of the Office of the Information Commissioner	12 December 2006

	REPORTS	DATE TABLED
57.	Report on the Review of the Strategic Management Review Report – Office of the Ombudsman, April 2006; Report on the Annual Report of the Office of the Ombudsman	12 December 2006
58.	Meeting with the Queensland Ombudsman – 22 May 2007	12 June 2007
59.	Meeting with the Queensland Information Commissioner – 22 May 2007	12 June 2007
60.	Annual report 2006/2007	28 August 2007
61.	*Hands on Parliament*, interim evaluation of the implementation of recommendations made following a parliamentary committee inquiry into Aboriginal and Torres Strait Islander peoples' participation in Queensland's democratic processes – November 2007	14 November 2007
62.	Meeting with the Acting Information Commissioner on 13 November 2007	7 December 2007
63.	Meeting with the Queensland Ombudsman on 13 November 2007	7 December 2007

PAPERS	DATE TABLED
Truth in political advertising (Issues paper)	11 July 1996
Privacy in Queensland (Issues paper)	4 June 1997
The preservation and enhancement of individuals' rights and freedoms: Should Queensland adopt a bill of rights? (Issues paper)	1 October 1997
Upper Houses (Information paper)	27 November 1997
Inquiry into issues of Queensland electoral reform (Background paper)	25 November 1999
The role of the Queensland Parliament in treaty making (Position paper)	25 November 1999
Freedom of Information in Queensland (Discussion paper)	8 February 2000
Four year parliamentary terms (Background paper)	11 April 2000
Review of the Queensland Constitutional Review Commission's recommendations relating to a consolidation of the Queensland Constitution (Position paper)	27 April 2000
Inquiry into the prevention of electoral fraud (Issues paper)	8 September 2000
The Queensland Constitution: Specific content issues (Issues paper)	18 April 2002
The Queensland Constitution: Entrenchment (Proposals for Comment)	27 August 2002
Hands on Parliament - A Parliamentary Committee Inquiry into Aboriginal and Torres Strait Islander Peoples' Participation in Queensland's Democratic Process (Issues paper)	12 December 2002
A preamble for the Queensland Constitution? (Issues paper)	17 June 2004
Voices & Votes – A Parliamentary Committee Inquiry into Young People's Engagement in Democracy in Queensland (Discussion paper)	8 July 2005
The Accessibility of Administrative Justice (Discussion paper)	1 December 2005
Hands on Parliament: Interim Evaluation of the implementation of recommendations made following a Parliamentary Committee Inquiry into Aboriginal and Torres Strait Islander People's Participation in Queensland's Democratic Processes (Consultation Paper)	5 April 2007
The Accessibility of Administrative Justice	

APPENDIX A: SUBMISSIONS RECEIVED

Submissions received in response to discussion paper

SUB NO:	SUBMISSION FROM:
1	A Hadaway
2	Mr Ken Smith (Director-General, Department of Education and the Arts)
3	Mr Simon Baltais
4	Dr Martin Taylor (Executive Coordinator, National Parks Association of Queensland Inc)
5	Mr Alec Lucke
6	Mr Chris Rose (Chief Executive Officer – Logan City Council)
7	Mr Ian Timmins
8	Dr Warren Hoey (Director-General, Dept of Aboriginal and Torres Strait Islander Policy)
9	Ms Brenda Webber – (Freedom of Information Decision-maker, Gold Coast City Council)
10	Mr James Purtill (Director-General, Environmental Protection Agency)
11	Ms Lynne Summers
12	Mr Henry Palaszcuzk MP (Minister for Natural Resources, Mines and Water)
13	Ms June McPhie (President – The Law Society of New South Wales)
14	Mr Billy Tait – Confidentiality requested
15	Mr Val Manera (A/Auditor-General – Office of the Auditor-General of Queensland)
16	Ms Jude Munro (Chief Executive Officer – Brisbane City Council)
17	Mr Bradley Duke (Deputy CEO/ Director Corporate Services – Rockhampton City Council)
18	Dr Clare Rudkin and Mr Ian Dunkley
19	Ms Robin Gilliver
20	Mr Frank Rockett (Director-General – Department of Corrective Services)
21	Ms Cathi Taylor (Information Commissioner – Office of the Information Commissioner)
22	Mr Peter Henneken (Director-General – Department of Industrial Relations)
23	Mr Michael Cope (President – The Queensland Council for Civil Liberties)
24	Ms Karen Walsh (President – QCOSS) and Ms Rosslyn Monro (Co-Convenor – QAILS).
25	Mr Paul Henderson
26	Mr John G Tusler
27	Ms Elizabeth Fraser (Commissioner – Commission for Children and Young People and Child Guardian)
28	Ms Susan Heal
29	Mr Noel Turner
30	Mrs Robyn Nargar (Manager – Legal Services, Cairns City Council)
31	Ms Ros Williams (Caxton Legal Centre Inc.)
32	Dr Bruce Flegg MP (Deputy Leader of the Liberal Party/ Shadow Minister for Health)
33	Mr Tony Woodyatt (Coordinator – Queensland Public Interest Law Clearing House Incorporated (QPILCH))
34	Mr David Bevan (Queensland Ombudsman)
35	Hon Linda Lavarch MP (Attorney-General and Minister for Justice) – providing whole-of-government response
36	Mr Peter Lyons QC (President, Bar Association of Queensland)
37	Dr Richard Mochelle (Visiting Fellow, Key Centre for Ethics, Law, Justice & Governance, Griffith University)

Submissions received in response to supplementary issues

SUB NO:	SUBMISSION FROM:
1	David Cotterill
2	Mr Thomas J Mahon
3	Ms Megan Mahon (President, Queensland Law Society)
4	Mr Bradley Duke (Chief Executive Officer, Rockhampton City Council)
5	Mr Jeff Seeney MP (Leader of the National Party and Queensland Opposition)
6	Ms Jenny Hardy (Chief Executive Officer, Legal Aid Queensland)
7	Mr Glenn Poole (Auditor-General of Queensland)
8	Mr Barry Salmon (Acting Commissioner for Children and Young People and Child Guardian)
9	Ms Jude Munro (Chief Executive Officer, Brisbane City Council)
10	Mrs Heather Lucke (Secretary East End Mine Action Group Inc)
11	Queensland Public Interest Law Clearing House Inc (QPILCH)
12	Mr Alex Lucke (Research and Communications Officer, East End Mine Action Group)
13	Mr David Bevan (Queensland Ombudsman)
14	Hon Kerry Shine MP (Attorney-General)

APPENDIX B: CONFERENCE OUTCOMES

THE ACCESSIBILITY OF ADMINISTRATIVE JUSTICE CONFERENCE PARLIAMENT HOUSE, 27 APRIL 2006

TOPIC A (TABLE 1)	**THE FOI FEES AND CHARGES REGIME: HOW WELL IS IT OPERATING? WHO SHOULD BEAR THE COSTS?**

Issues discussed:

- Fees and charges have brought a change in attitude: lengthy application process, no encouragement for discussion between applicants and agencies/departments. Need for close consultation with applicants regarding fees and charges; consistency in such an approach.
- Better coordination and consultation needed throughout the process to make it more effective and efficient.
- FOI can be very resource intensive and applicants don't necessarily achieve the outcomes they seek. Regime can never recoup the cost of administering FOI.
- Fees and charges regime has become difficult to understand. Difficult to locate information on the regime. Greater information needed on administrative access schemes.
- Charges are avoided by applications being made through concession card holders.
- Considerable work is involved in agencies and departments getting to the stage of estimating charges.
- Two hour threshold: doesn't provide much time.
- No discretion in fees and charges regime, although in certain circumstances some agencies do not impose fees and charges (without a legislative basis for doing so).
- Should taxpayers be responsible for funding access to information by media outlets, for example, where commercial gain is associated with that information?
- Possible lack of understanding by community groups of FOI generally, fees and charges and the waiver provisions.

Recommendations for reform:

1.	All agencies and departments to adopt process of consulting with applicants throughout the FOI process, including in relation to fees and charges –mandatory consultation, backed up by clear guidelines and training.
2.	FOI coordinators should be empowered to provide further information to facilitate the application process and assist applicants in achieving the outcomes they seek.
3.	Charges for public interest applications should be capped at a reasonable amount.
4.	Greater encouragement for applicants to consider access mechanisms other than FOI, and more information needs to be available on these alternatives.
5.	Greater information needed on FOI generally, including the fees and charges regime, particularly through agency websites. Information in statements of affairs can be outdated.
6.	Upgrade needed of public service records management systems.

TOPIC A (TABLE 2)	**THE FOI FEES AND CHARGES REGIME** **HOW WELL IS IT OPERATING?** **WHO SHOULD BEAR THE COSTS?**

Issues discussed:

- Relationship between two hour time limit and photocopying charge.
- Aggregate of fees and charges.
- Scale of costs – capping, 20c/page – fair and appropriate level?
- Types of applicants – individuals and entities.
- Complexity of the legislation and the process – results in difficulty in communicating the process to applicants.
- Waiver of fees for "hardship".
- Government record keeping processes.
- Two hour search threshold.
- Lack of guidance to agencies in the interpretation of chargeable time – lack of consistency across agencies.
- Fees and charges are additional for other processes eg. application for waiver.
- Personal and non personal dichotomy – can charge for one and not the other.
- Focus groups to explore and address community concerns.
- "Personal affairs" information - need to explain - "one document rule".

Recommendations for reform:

1.	Review and reassess whether 20c/page photocopying charge is an appropriate rate.
2.	Review and reassess the class of people for individual financial hardship with the dual aim of promoting fairness and greater clarity and consistency for FOI decision-makers.
3.	FOI Act / policy guidelines should confer administrative discretion on decision-makers to reasonably waive or reduce charges.
4.	The section 108 report should require information about waiver of charges.

TOPIC B (TABLE 1)	LITIGATION BETWEEN GOVERNMENT AND INDIVIDUAL – CAN INEQUALITY BE MINIMISED?

Issues discussed:

Working with individuals – complaints management systems and early in-house resolution before judicial review proceedings begin:

1. Corrective Services Bill 2006 and prisoner's access to review mechanisms;
2. Empowerment in complaints management – making decisions and negotiating;
3. Access to justice and information – cultural differences in pursuing complaints;
4. Appropriate jurisdiction for judicial review – does it have to be the Supreme Court?
5. Determinative merits review in judicial review;
6. Providing sufficient and comprehensive statement of reasons for decisions, and building relationships between individual and department;
7. Recording reasoning at the time of the decision making, rather than after the event as part of good administration;
8. Lower Courts perhaps determining whether statement of reasons meet an agreed legislative standard of adequacy.

Costs in judicial review proceedings:

1. Costs of judicial review – recognition of public interest cases in legislation;
2. Defining the 'public interest' – whose role is this? Guidelines? Criteria of s.49 of *Judicial Review Act*?
3. Greater use of s.49 JR Act at first directions hearing for public interest matters;
4. Regulations outlining relevant considerations for costs indemnity;
5. Pre-trial conferencing.

Timing:

1. 28 days to lodge judicial review application – discretion to extend time;
2. Standardisation and publication of rights in terms of judicial review;
3. Length of actions – turn-around time from lodging to decision;
4. Current mechanisms within the system are sufficient to regulate timing and conduct of judicial review cases – government departments must ensure that JR cases are given priority.

Community education and support:

1. Administrative Law Clinic at QPILCH – funding;
2. Community knowledge of appropriate resources in conduct of administrative law matters (such as QPILCH or advocacy services);
3. Would greater education result in greater numbers of actions?
4. Central body/service to make a complaint about government? Greater role for the Ombudsman? "Complaints Queensland"?

Recommendations for reform:

1.	• Uniform complaints handling/management process at departmental level, extending the work of the Ombudsman's Office in this area. Should be seen as a prestigious position within the department. • Whilst delegating judicial review to lower Courts has been suggested, there is not uniform agreement on this subject. • Consistent and adequate statements of reasons for decisions/constructing a written decision – perhaps a checklist for departmental use?
2.	• Greater application of s.49 of the JR Act at an early state, ie. first directions hearing for matters and in relation to the fees and costs. • Procedural reform in terms of purpose of first direction hearing to involve some form of an honest ADR with a view to avoiding the necessity for a hearing. • Specification of public interest criteria (QPILCH have guidelines).
3.	• Discretion to extend lodging of application after 28 days is sufficient in present regime. • Departments/Crown Law should ensure that JR actions are given priority for either hearing or resolution.
4.	• Greater publicity for administrative law resources for individuals to access. • Recognition and resourcing for the current role of the Ombudsman in providing a centralised body to receive complaints about the government and refer as necessary. • Require an essential component of each department to manage complaints. • Greater resourcing of Legal Aid and community legal centres for the provision of advice to citizens regarding administrative law remedies.

TOPIC B (TABLE 2)	LITIGATION BETWEEN GOVERNMENT AND INDIVIDUAL – CAN INEQUALITY BE MINIMISED?

Issues discussed:

- Pre-litigation stages – statement of reasons for initial decision, internal review mechanisms, ADR case management, early conciliation and compulsory conferences to hear grievances and air viewpoints in early stages.
- Channelling of certain types of grievances to compulsory ADR.
- Necessity of early intervention to deal with grievance before reaching litigation.
- Availability of general procedural advice for complainants to instigate review.
- Approach of Health Rights Commission re complainant discusses issues and options with HRC staff as initial step.
- Problems with FOI – cost prohibitive, complex process, departments channel release decisions to FOI commissioner rather than making determination internally.
- Need for third party review of grievance/issue by external/independent body (eg. Community Legal Centre, QPILCH) so complainant feels they have been listened to and that they have received an independent impartial review of their complaint.
- Accessibility of rural and remote people to mediation options – eg. using teleconferencing.
- Statement of reasons – set out reasons for decision, review mechanisms, very formal document, formality of statement hampers understanding by applicant.
- Need to extend timeframe for statement of reasons (SOR generally must be sent to applicant within 28 days from time decision made) to enable parties to attend conference to air issues before SOR is prepared.
- Use of duty lawyer to advise applicant on administrative law issues before conference.

Recommendations for reform:

1.	Early intervention, pre-statement of reasons mandatory conference and other pre-litigation resolution strategies.
2.	Enhance access to administrative justice for people in remote and rural areas.
3.	Standardisation of timeframes for issuing of statement of reasons with flexibility to alter timeframes by consent of both parties.
4.	Reallocate resources towards early resolution rather than litigation.

TOPIC C	ARE THERE CORPORATISED ENTITIES WHICH FALL BETWEEN PUBLIC AND PRIVATE ACCOUNTABILITY REGIMES? SHOULD ACCOUNTABILITY BE EXTENDED AND, IF SO, HOW?

Issues discussed:

- Government owned corporations- businesses consider that there is a need for more information.
- Government incentives program.
- Openness of information- lack of understanding with some members of the public that where certain bodies can't permit access to documentation, the entity isn't the sole party involved in the determination- lines blurred between private and public sector.
- Inconsistencies in the scrutiny available to public and private entities: eg Qld Law Society- unique entity- yet anyone can apply under FOI processes for public or membership documentation pertaining to the society. QLS is subject to full accountability.
- Extension of public accountability can be a positive thing - organisations which receive public funding ought to be accountable, efficient and effective. Should the threshold test be whether a body receives public funding?
- Distinction between public and private interest in determining whether information should be in the public arena. It is always a risk that the person seeking it has a private reason which cannot be tested by the FOI process. GOCs have competitors and don't wish to divulge information to competitors at whim. A process where information is 'forced out' or where everything is made public isn't the solution.
- However - some GOCs may not take a reasonable approach and may be too selective.
- Public interest monitors- scope for an independent model to consider whether due process has been followed. Could the auditor general's model be expanded to enable this to occur?
- Concerns that we could end up with a model which would have to understand the business side implicitly to be able to fulfil this role, thereby perhaps undermining their impartiality.
- Could the GOC model be changed completely, for example by forming a board accountable to the public as opposed to the shareholder, completely responsible for ensuring service?
- There's accountability through the Parliament for GOCs. However - some officers are scathing of the current regime.
- Should the FOI regime apply to private, not for profit organisations?
- Local government model in Qld v GOCs- what is the essential difference? Argument that GOC provides an essentially commercial service as distinct from a taxing exercise.
- How should organisations which have a public advantage and deliver essential services be oversighted?
- GOCs need a tailored form of oversight.

Recommendations for reform:

1.	Implement institutional arrangements tailored for specific industries to provide a level of confidence to the community that the business is operating appropriately.
2.	Analyse on an industry-by-industry basis whether the current regimes are sufficient.
3.	Update and review accountability mechanisms to ensure that they are still timely, appropriate and worthwhile.
4.	Designate an entity (such as the auditor general) on an ongoing basis to examine whether mechanisms in place are sufficient, plus ministerial responsibility.