

**QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE
INCORPORATED**



**Submission to the Legal, Constitutional and
Administrative Review Committee**

on its

**INQUIRY INTO THE ACCESSIBILITY OF
ADMINISTRATIVE JUSTICE- SUPPLEMENTARY
ISSUES**

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About QPILCH

QPILCH is a not-for-profit non-government incorporated association bringing together private law firms, barristers, community legal centres, law schools, legal professional associations, corporate legal units and government legal units to provide free and low cost legal service to people who cannot afford private legal assistance or obtain legal aid. QPILCH coordinates referral to members for pro bono legal services in public interest matters and provides direct services – advice, assistance and representation support - through targeted projects, including the Homeless Persons' Legal Clinic, the Administrative Law Clinic, and the Consumer Law Advice Clinic.

QPILCH was established in June 2001 as an initiative of the legal profession and commenced services in January 2002.

QPILCH is a member of the Queensland Association of Independent Legal Services, affiliated with the National Association of Community Legal Centres, and is a member of the PILCH network.

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INTRODUCTION

Why is QPILCH making this submission?

Administrative law, the law which ensures the legality and propriety of government decisions and actions, obviously has a strong public interest element. Given that QPILCH sets out to assist disadvantaged people who are unable to help themselves in public interest issues, an inquiry into the accessibility of administrative justice falls squarely within our role.

In 2006, QPILCH made a submission to LCARC in relation to accessibility of administrative justice, focusing on the key areas of the effect on fees and charges under the FOI act and of proceedings under the *Judicial Review Act 1991* (Qld), accessibility of information about government decisions and the costs of proceedings under the Effectiveness and Efficiency of Access to Administrative Justice. QPILCH has also previously submitted reports to LCARC in relation to costs and fees in public interest litigation, which included proceedings for assistance in judicial review¹.

We have an ongoing interest in administrative justice, demonstrated by the existence of our Administrative Law Clinic which was established in 2004 to help us to develop expertise and to assist in addressing the demand for free legal services in administrative law.

Other projects being undertaken by QPILCH of relevance to access to administrative justice are:

- the eCourts Project, in conjunction with the Prisoners Legal Service, Townsville Community Legal Service, Supreme Court of Queensland, Crown Law and Legal Aid Queensland, to explore using technology to enhance access by community legal services to the courts in judicial review matters;
- the Self-Representation Project, in conjunction with the QUT Law School, to research the motivation and impact of self represented litigants before the Court of Appeal, with a view to implementing services to assist such litigants in preparing for their cases.
- With funding from the Department of Justice, we have commenced a Self-Representation Civil Law Service to provide advice and assistance to litigants-in-person in the trial divisions of the Supreme and District Courts (including applicants for judicial review).

¹ QPILCH “Research paper – Costs in Public Interest Proceedings in Queensland” (7 March 2005), www.qpilch.org.au

RESPONSE TO FOUR SUPPLEMENTARY ISSUES

ISSUE 1: APPEALS FROM ADMINISTRATIVE DECISIONS

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.

Background

Administrative law in Queensland is a mishmash of internal review, external review by courts and ad hoc tribunals, review by the Ombudsman and judicial review.

As far as we are aware, the last comprehensive analysis of administrative review in Queensland was in the Electoral and Administrative Review Commission's (**EARC**) "Report on Review of Administrative Decisions" (1993) Report No. 3. This review stated that in Queensland at that time:

- Appeal rights were available for 2000 administrative decisions.
- These rights were found in 474 legislative provisions by which:
 - 271 made 11 courts the review body
 - 96 made 48 different ministers or officials the reviewer
 - 107 made 72 specialist tribunals the review body.
- Appeals went to 131 different review bodies.
- About 2600 administrative decisions were not subject to any right of appeal.

EARC's 1993 report also commented that existing review rights were not comprehensive in that they lacked a widespread system of internal review by agencies and certain decisions were excluded from judicial review and from review by the Ombudsman. The report's overarching theme was the need for the rationalisation of review rights in Queensland.

Current framework

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.²

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

² For instance see the *Corrective Services Act 2006*(Qld)

experience from the self-representation project and UK research³ 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.

Specialist tribunals are often developed in a reactive way and lack a consistent pattern of decisions that were reviewed⁴ 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”⁵.

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 counterparts⁶. 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.

Comparative models

Generalist merits review bodies exist federally⁷ and in Victoria⁸, ACT⁹, NSW¹⁰, and Western Australia.¹¹ Recommendations for a like body to be established in Queensland

³ Buck, T. (November 2005). ‘Administrative justice and alternative dispute resolution: the Australian experience’. Department of Constitutional Affairs Research Series 8/05

⁴ Creyke R “Tribunals and Access to Justice”[2002] QUTLJ 4

⁵ Creyke R “Tribunals and Access to Justice”[2002] QUTLJ 4

⁶ Creyke R “Tribunals and Access to Justice”[2002] QUTLJ 4

⁷ *Administrative Appeals Tribunal 1975* (Cth)

⁸ *Victorian Civil and Administrative Tribunal Act 1998* (Vic)

⁹ *Administrative Appeals Tribunal Act 1989* (ACT)

¹⁰ *Administrative Decisions Tribunal Act 1997* (NSW)

were first made in the Fitzgerald Report in 1989¹², and later in 1993¹³, 1995¹⁴ and 1999¹⁵. Two previous¹⁶ Attorneys-General have expressed interest in the idea. To analyse the applicability of such a system to Queensland, it is pertinent to examine a few of the interstate models.

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 tribunals¹⁷ 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).

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 into four streams that allow for different procedures to be implemented to each individual case¹⁸. 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:

¹¹ *State Administrative Tribunal Act 2004* (WA)

¹² "Report of Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct" (1989) at p 129

¹³ Electoral and Administrative Review Commission, "Report on Review of Appeals from Administrative Decisions" (1993) Report No. 3 at para 2.154

¹⁴ Parliamentary Committee for Electoral and Administrative Review, "Report on Review of Administrative Appeals From Administrative Decisions" (1995) at p 11

¹⁵ Legal, Constitutional and Administrative Review Committee, "Review of the Report of the Strategic Review of the Queensland Ombudsman" (1999) Report No. 14, Recommendation 22

¹⁶ Former Attorney-General, the Honourable Rod Welford MP, cited in Creyke R "Tribunals and Access to Justice"[2002] QUTLJ 4; the Hon Linda Lavarch MP, reported in *The Courier-Mail* 26 September 2005, Cole M "One-stop shop bid to end legal maze".

¹⁷ W Martin, (2004) "The Development of State Tribunals" *Australian Law Reform Commission Reform Issue* 84 p19

¹⁸ http://www.sat.justice.wa.gov.au/A/about_sat.aspx?uid=5793-8155-0296-7651

- (a) to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;
- (b) to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and
- (c) to make appropriate use of the knowledge and experience of Tribunal members.¹⁹

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*.

Cost

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 system²⁰.

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.

¹⁹ section 9, *State Administrative Tribunal Act 2004* (WA)

²⁰ Electoral and Administrative Review Commission, *Report on Review of Appeals from Administrative Decisions* (1993) Vol 1, paras 64-66, 68.

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.

Model

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

The following tribunals (and others not included here) 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. The three tribunals above are ones in our view that require special and distinctive jurisdictions and public awareness,

- Queensland Building Tribunal
- Queensland Commercial and Consumer Tribunal
- Queensland Industrial Relations Commission
- Queensland Information Commissioner
- Queensland Liquor Appeals Tribunal
- Queensland Property Agents and Motor Dealers Tribunal
- Queensland Racing Appeals Authority
- Queensland Retirement Villages Tribunal

ISSUE 2: AVAILABILITY OF INFORMATION ABOUT ADMINISTRATIVE JUSTICE

Of the 248 referrals which have been made to QPILCH members since inception to June 2006, 59 have been administrative law matters.²¹

In response to a growing demand for free services in administrative law, QPILCH established with Bond University an Administrative Law Clinic in August 2004. The clinic is run by 6 senior law students under the supervision of a solicitor and gives advice and minor assistance in judicial review, Administrative Appeals Tribunal (Cth), social security appeals, freedom of information and other administrative law matters. In addition to the 59 referrals to member firms, the clinic has assisted 64 clients up to 30 June 2007. These have been mostly complex cases that have been received by referral from other

²¹ This includes matters concerning judicial review, constitutional issues, freedom of information, discrimination, guardianship and administration and immigration/refugees.

agencies. QPLICH does not advertise our services because we work to capacity without the need to advertise.

Information is critical, but given the complexity about many administrative law issues, access to advice, assistance and representation is also crucial. While a good system of administrative review is relatively simple and accessible by all citizens, there will always be cases that require legal interventions. We strongly urge the committee to recommend to government that funds be made available for legal advice and assistance in administrative law.

It is noted that there was little public awareness of the different levels of review available and this results in “a merits review system which is uncertain and unsatisfactory for persons seeking to take advantage of such appeal rights as they might have²²”. Our research has shown that many people cannot access information and they need assistance to understand the forms and processes involved in courts and tribunals.

Another problem is the absence of a centralised source of information providing an overview of administrative review rights. While the internet has made the dissemination of information easier and more widely accessible, many agencies refrain from providing a clear picture of the rights of appeal that are available²³.

ISSUE 3: PROPORTIONAL DISPUTE RESOLUTION

Traditionally, resolving a dispute between parties occurs in structured settings, either in courts, tribunals or in sectors of alternative dispute resolution. The idea of proportional dispute resolution steps outside of this arena and enters the real world where the problems are experienced²⁴. In a ‘prevention is better than cure’ approach, proportional dispute resolution aims to develop policies and services that will attempt to avoid legal disputes and problems from escalating in the first place²⁵. Where issues arise, it attempts to provide tailored solutions to resolve the disputes as quickly and economically as possible²⁶. It is hoped that this system of dispute resolution will be able to avert problems before they occur and also to ensure that small problems between individuals do not end up inside a courtroom at far greater expense.

The concept of averting problems is especially important with regards to government agencies. As a collective body of individuals who are in control of a group of people or a commercial sector, government bodies should not be quick to enter into legal battles with citizens. They should instead opt to investigate and correct problems either before they occur or immediately when they are noticed.

Alternative dispute resolution (“ADR”) has expanded exponentially in the past decades. As this expansion continues, concerns emerge as to the extent of the shift towards

²² Electoral and Administrative Review Commission, *Report on Review of Appeals from Administrative Decisions* (1993) Report No.3, page 14

²³ Woodyatt, T. (2006) *Submission to the Legal, Constitutional and Administrative Review Committee on the Inquiry into the Accessibility of Administrative Justice*. QPILCH submission. 6 April 2006

²⁴ British Secretary of State for Constitutional Affairs and Lord Chancellor, (2004) *Transforming Public Services: Complaints, Redress and Tribunals*, <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>

²⁵ Ibid

²⁶ Ibid

interest-based dispute resolution²⁷. That is, there is the possibility that “important questions of legal principle may be suppressed in an ADR-friendly environment”²⁸. However, it is important not to discount the benefits of ADR. Where ADR is successful and cases can be solved at any early stage, judicial resources are freed to be applied to cases that advance resolution of public interest issues²⁹, cannot be resolved by mediation, or require what a court does best, finally determine a dispute or issue justly and fairly. It is a challenge to the processes of administrative justice to ensure that significant legal rights are not endangered by the promise of expedition and cost-saving of ADR³⁰.

Proportional dispute resolution may be a mechanism to better categorise cases into their most beneficial routes of appeal. Trevor Buck (2005) suggests that there should be a system that is sufficiently sensitised to identifying appropriate routes of dispute resolution in their *individual contexts*³¹. The Civil Justice Review (2003) stated that “the means of resolving a dispute should be proportionate to the nature of the dispute in terms of its value, complexity and importance to the disputants”³². It is important for the system to be able to gauge the individual circumstances within which the dispute arises. Without this sort of insight, ADR may be forced upon disputants prematurely, before they are ready to settle, and result in an increase in costs as another layer will be added to the parties’ dispute resolution process³³. By assessing the individual case and deciding on those unique facts which avenue of resolution is appropriate, greater justice can be achieved.

ISSUE 4: PUBLICATION OF DETAILS REGARDING CONTRACTS ENTERED INTO BY PUBLIC AGENCIES

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.³⁴ 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 withheld³⁵.

²⁷ Buck, T. (November 2005). ‘Administrative justice and alternative dispute resolution: the Australian experience’. Department of Constitutional Affairs Research Series 8/05

²⁸ Ibid at page vii

²⁹ Ibid

³⁰ Ibid

³¹ Ibid at page vii

³² Civil Justice Review (2003) Federal Civil Justice System: strategy paper, December 2003, Barton (ACT): Attorney-General’s Department.

³³ Ibid at 133

³⁴ Paterson, M. (2004) ‘Commercial in Confidence and public accountability: Achieving a new balance in the contract State’ 32 Australian Business Law Review 315

³⁵ Ibid

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 government³⁶. 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 report³⁷ 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:

1. Information should be publicly available

- *All information should be publicly available unless there is a justifiable reason to withhold it*
- *The provisions of a contract that are under commercial-in-confidence should be identified so that other provisions may be released*
- *Taxpayers should not have to rely on provisions in the Freedom of Information Act to access information for the purpose of scrutinising government financial management.*

2. Accountability and public interest should prevail

- *The information needs for public accountability and public interest should take precedence.*
- *Agencies should give reasons as to why it was determined that public interest is served when information is classified as commercial-in-confidence.*
- *There should be other accountability mechanisms in place where there is information that is classified as commercial-in-confidence.*

3. Commercial sensitivity of information decays with time.

- *Agencies should develop a protocol for a method of public disclosure and a time period within which this must take place, for example publication on the agency's website within 30 days of signing.*
- *The duration of commercial-in-confidence provisions should be explicitly considered when a contract is being written.*
- *The time period that the information is deemed commercial-in-confidence should be disclosed together with an explanation for the time period chosen.*
- *Contracts that are commercial-in-confidence should be subject to regular review to ensure the conditions justifying confidentiality remain valid.*

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,

³⁶ *Government (Open Market Competition) Bill 2002* (NSW); second reading at <http://www.parliament.nsw.gov.au/prod/parlment/HansArt.nsf/V3Key/LC20020828013>

³⁷ *Legislative Assembly of Queensland Public Accounts Committee: Commercial-in-confidence arrangements. NOVEMBER 2002 REPORT NO. 61*
<http://www.parliament.qld.gov.au/PAC/view/committees/documents/PAC/reports/PACR061.pdf>

there are no specific guidelines to determine what material should appropriately be classified as CIC³⁸.

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 information³⁹. 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.

³⁸ Auditor-General of Queensland, Report No 2 2000-2001; as cited in Legislative Assembly of Queensland Public Accounts Committee: Commercial-in-confidence arrangements. November 2002 Report No. 61

³⁹ NSW provisions: MEMORANDUM NO. 2000 – 11: Disclosure on Information on Government Contracts with the Private Sector

http://www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/2000/m2000-11.htm