QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE INCORPORATED

Submission to the Legal, Constitutional and Administrative Review Committee

on the

INQUIRY INTO THE ACCESSIBILITY OF ADMINISTRATIVE JUSTICE

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What is QPILCH?

The Queensland Public Interest Law Clearing House Incorporated (QPILCH) is a non-profit community based legal service that coordinates the provision of pro bono legal services in public interest matters. QPILCH also provides direct services through targeted projects, including the Homeless Persons' Legal Clinic, the Administrative Law Clinic, and the Consumer Law Advice Clinic.

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.

As pointed out in LCARC's discussion paper, QPILCH in 2002 made a submission to the Attorney-General in relation to costs and fees in public interest litigation, which included proceedings in judicial review. A later, more detailed research paper was prepared on the same topic and presented to the Legal, Constitutional and Administrative Review Committee in June 2005.[1]

Of the 208 referrals which have been made to QPILCH members since inception, 48 have been administrative law type matters.[2] A further 15 out of 26 have been referred to non-members and other community legal centres.

In response to a growing demand for free services in administrative law matters, QPILCH established the Bond University 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, social security, freedom of information and other administrative law matters.

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;

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

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

- 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.

Structure of this submission

This submission is divided into 3 sections.

Section 1 outlines the background and framework within which this inquiry is being conducted and notes the need for a generalist merits appeals tribunal in Queensland before significant improvement in accessing administrative justice can be achieved.

Section 2 responds to the key issues outlined by the LCARC discussion paper.

Section 3 summarises the recommendations put forward by this submission.

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Section 1: Administrative Law in Queensland

While LCARC's inquiry focuses on review of the freedom of information and judicial review regimes, it is necessary that these mechanisms are not looked at in isolation but are assessed within the wider context of administrative justice in Queensland

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**) Issues Paper No. 14 in 1991 entitled "Appeals from Administrative Decisions", later supplemented by Issues Paper No. 18 of the same name in February 1992.

Those papers, later summarised in EARC's "Report on Review of Administrative Decisions" (1993) Report No. 3, state 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.

The review was a mammoth task including examination of at least 1500 pieces of legislation, 500 appeal rights, 5000 administrative decision-making powers and 150 review bodies both in Queensland and in other jurisdictions.

EARC's 1993 report also commented that existing review rights were not comprehensive in that there lacked a widespread system of internal review by agencies and certain decisions were excluded from judicial review and from review by the Ombudsman. It noted that there was little public awareness of the different levels of review within the legislation "resulting in a merits review system which is uncertain and unsatisfactory for persons seeking to take advantage of such appeal rights as they might have" (at p 14). The report's overarching theme was the need for the rationalisation of review rights in Queensland.

Current framework

It would appear that the situation has changed little since 1993. If anything, we would expect there to be even more administrative review bodies and pieces of legislation dealing with administrative review.

It also continues to be doubtful that many Queenslanders know about the administrative law mechanisms which exist in Queensland. While the internet has made the dissemination of information easier and more widely accessible, many public agencies still do not provide a clear picture of what rights of appeal are available from their decisions. There is certainly no centralised source of information providing an overview of administrative review rights that we could find.

There have been some improvements. For example, with the introduction of the *Ombudsman Act 2001* (Qld), the Ombudsman has taken on the role of assisting public sector agencies to improve their decision-making practices, including internal complaint processes.

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.

Need for a generalist merits review tribunal

From these observations, the need for a generalist merits review tribunal in Queensland is clear. Although specifically excluded from the scope of LCARC's inquiry, many of the key issues outlined in the discussion paper would be addressed by the implementation of such a tribunal. We should also remember that review of FOI and judicial review legislation is only one part of a larger framework and can therefore only achieve limited success in enhancing access to administrative justice.

Benefits include:

- improved access to merits review of administrative decisions
- simplification of processes by collapsing numerous review bodies into a single review body, 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
- improved capacity to deal with self-represented litigants
- more informal procedures with greater focus on 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.

Generalist merits review bodies exist federally[3] and in Victoria[4], ACT[5], NSW[6], and Western Australia.[7] Recommendations for a like body to be established in Queensland were first made in the Fitzgerald Report in 1989[8], and later in 1993[9], 1995[10] and 1999[11]. Both the previous[12] and current[13] Attorney-Generals have expressed interest in the idea.

[3] *Administrative Appeals Tribunal 1975* (Cth)
[4] *Victorian Civil and Administrative Tribunal Act 1998* (Vic)
[5] *Administrative Appeals Tribunal Act 1989* (ACT)
[6] *Administrative Decisions Tribunal Act 1997* (NSW)
[7] *State Administrative Tribunal Act 2004* (WA)
[8] "Report of Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct" (1989) at p 129
[9] Electoral and Administrative Review Commission, "Report on Review of Appeals from Administrative Decisions" (1993) Report No. 3 at para 2.154
[10] Parliamentary Committee for Electoral and Administrative Review, "Report on Review of Administrative Appeals From Administrative Decisions" (1995) at p 11
[11] Legal, Constitutional and Administrative Review Committee, "Review of the Report of the Strategic Review of the Queensland Ombudsman" (1999) Report No. 14, Recommendation 22
[12] Former Attorney-General, the Honourable Rod Welford MP, cited in Creyke R "Tribunals and Access to Justice"[2002] QUTLJ 4
[13] Attorney-General and Minister for Justice, the Honourable Linda Lavarch MP, was reported in a newspaper article as proposing a one-stop shop for complaints about government decisions. Cole M "One-stop shop bid to end legal maze" (26 September 2005) Courier Mail at p8.

We appreciate an important issue is the cost of establishing such a tribunal. However, we contend that resulting cost-savings and effectiveness will outweigh initial outlays.

Section 2: Responses to Key Issues

Key Issue 1: The effect of fees and charges under the FOI Act on access to information and the amendment of documents.

Summary
- Appropriateness of FOI fees and charges should be reviewed once data has been collated and analysed regarding (a) how much time and money is spent by government in responding to FOI applications and (b) how many applicants decide not to continue once receiving a preliminary assessment notice.
- Fee waiver for FOI should include a "public interest" exception.

Application fees and processing charges

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.

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.

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[14] 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.

Once this information has been obtained, then a more meaningful comment can be made as to whether reform is necessary. However, based on the above figures it 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.

Fee waiver

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.

The discussion paper reports that the fees and charges regime introduced in late 2001 resulted in a decline in public interest applications.[15] 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

[14] *Freedom of Information and Other Legislation Amendment Act 2005* (Qld), s 54
[15] Discussion paper at section 7.1.3

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 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.

Key Issue 2: Costs associated with proceedings under the *Judicial Review Act 1991* (Qld)

Summary

- There should be a prescribed form to apply for Supreme Court filing fee waiver (rather than by affidavit).
- There should be circumstances in which fee wavier must be granted (eg, where the applicant holds a concession card).
- Fee waiver should be granted where applicants are funded by legal aid or assisted by a community legal centre.
- There should be provision for fee waiver or reduction in the case of non-profit organisations pursuing judicial review in the public interest.
- There should be allowed waiver of Appeal Costs Fund Fees where the circumstances of the applicant justify it.
- The law in relation to costs in judicial review needs to be reformed, for example:
  - make costs a preliminary issue that needs to be dealt with before the substantive matter can proceed
  - prima facie, each party bear their own costs.
- Solutions to mitigate the impact of costs orders should be implemented, including:
  - implement costs protection certificates which limit the applicant's liability for costs or requires the public authority to pay some or all costs
  - liberalise litigation funding
  - amend the model litigant rules to reflect government practice not to apply for or enforce cost orders in certain circumstances.
- Similar measures in relation to security for costs and undertakings as to damages should be implemented to prevent these orders from restricting public interest litigation.

Filing fees

Currently, in order to commence judicial review proceedings in the Supreme Court, applicants must pay:

- Fee for filing an originating application
  - For an individual - $455.00
  - Otherwise - $910[16]

[16] *Uniform Civil Procedure (Fees) Regulation 1999* (Qld), s 3(1), sch 1 item 1.

- Appeal Costs Fund Fee - $18.40[17]

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.[18]

Information and process

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.

Circumstances for fee waiver

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 (see next section)
- 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.[19]

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.

[17] *Appeal Costs Fund Act 1973* (Qld) s 10(a), *Appeal Costs Fund Regulation 1999* (Qld), s 4(1), sch 1.
[18] *Uniform Civil Procedure Rules* (Qld), r 971
[19] These circumstances have been taken from the exemptions which apply to the Federal Court of Australia under the *Federal Court of Australia Regulations 2004* (Cth), Sch 3, s 1. Similar exemptions also apply in the High Court (*High Court of Australia (Fees)Regulations 2004* (Cth), r 9), Federal Magistrates Court (*Federal Magistrates Regulations 2000* (Cth), rr 8 and 9), Family Court (*Family Law Regulations 1984* (Cth), r 11*)* and the Administrative Appeals Tribunal (*Administrative Appeals Tribunal Regulations 1976* (Cth), r 19).

Fee waiver where the applicant has been granted legal aid or community legal centre assistance

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 jurisdictions are:

- The Family Court of Australia, paragraphs 11(7)(c) of the *Family Law Regulations 1984* (Cth)
- The Federal Magistrates Court, paragraph 8(1)(a) of the *Federal Magistrates Court Regulations 2000* (Cth)
- The Federal Court of Australia, paragraph 1(1)(a) of Schedule 3 to the *Federal Court of Australia Regulations 2004* (Cth)
- The High Court of Australia, paragraph 9(1)(a) of the *High Court of Australia (Fees) Regulations 2004* (Cth).

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.

It would be of assistance to Legal Aid Queensland, CLCs and their clients if such a procedure was adopted in the Supreme Court of Queensland.

Fee waiver for non-profits

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.

Waiver of Appeal Costs Fund Fees

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.

Representation

Clearly, people without legal representation are placed at a serious disadvantage when pursuing judicial review. The availability of representation for impecunious applicants is discussed in more detail under "Key Issue 4: Diversity of access" below.

Costs orders

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[23], 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)).

[20] QPILCH "Research paper – Costs in Public Interest Proceedings in Queensland" (7 March 2005), www.qpilch.org.au
[21] *Uniform Civil Procedure Rules 1999* (Qld), r 789
[22] See, eg, *Oshlack v Richmond River Council* (1998) 193 CLR 72; *Ruddock v Vardalis (No. 2)* (2001) 115 FCR 229
[23] Electoral & Administrative Review Commission "Report on Judicial Review of Administrative Decisions and Actions" (1990) at par 10.23

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.

Prima facie, each party bears its own costs

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.[24]

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.[25]

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".[26]

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.

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[24] See, eg, *Guardianship and Administration Tribunal Act 2000* (Qld), s 165 in relation to appeals to the Supreme Court

[25] J Beagent and J Hickman, "Costs protection certificates—bridging the funding gap", (2005) 155 *New Law Journal* 1914 (vol 155, no 7205, 16 December 2005).

[26] (2005) 155 *New Law Journal* 1914 at 1914, citing *Goodson v HM Coroner for Bedfordshire & Luton* [2005] EWCA Civ 1172 at [27] per Moore-Bick LJ (Ward and Chadwick LJJ agreeing) (internal quotation marks omitted).

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

Finally, the discussion paper mentions the model litigant principles and the potential for reform. In relation to costs, it says the State:

- Should pay legitimate claims
- Is entitled to seek security for costs where appropriate
- Should act properly to protect the States' interests

And in addition

- The State will generally seek to pursue costs when it is successful in litigation, which will assist in reducing the potential for vexatious proceedings to be instituted against it.

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 *Uniform Civil Procedure Rules 1999* (Qld) (**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.

Key issue 3: Is information relevant to and about government decisions and actions adequate and accessible?

Summary

- A less expensive and more user-friendly forum is needed to which applicants can appeal refusal and/or sufficiency of a statement of reasons requested under Part 4 of the JR Act.
- A statement of reasons under Part 4 of the JR Act should include provision of the documents relied upon in making the decision.
- Further education of government agencies is needed to ensure that FOI is not improperly used and that access is not hindered by unnecessarily requiring applicants to go through FOI.
- More information about administrative law rights and remedies should be made available to the public.
- Policy should be implemented such that government agencies consistently notify interested persons about their appeal rights once a decision has been made.
- More information regarding the law and procedure of judicial review should be made available to the public.

Appealing refusal of reasons under the JR Act

Part 4 of the JR Act is an invention of statute to allow an aggrieved person to see how a decision was made and assess whether to challenge the decision. There is no common law right to reasons for an administrative decision.

An agency can refuse reasons if:

1. the decision is not a decision to which Part 4 applies, in that the decision is not:
    - final or operative
    - of an administrative character
    - made under an enactment.[27]
2. the applicant does not have standing in that they are not a "person aggrieved"[28]
3. the application for reasons is made out of time;[29]
4. where removal of confidential information or information contrary to the public interest (which are not required to be in a statement of reasons) would render the statement false or misleading.[30]

A refusal may be appealed to the Supreme Court.

If reasons are refused, particularly under 1, 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.

Sufficiency of reasons under the JR Act

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;
> as well as the reasons for the decision.

[27] *Judicial Review Act 1991* (Qld), s 4
[28] *Judicial Review Act 1991* (Qld), s 7
[29] *Judicial Review Act 1991* (Qld), s 33
[30] *Judicial Review Act 1991* (Qld), ss 35, 36, 37

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.[31]

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.

Education of government agencies regarding FOI

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.

[31] *Lek v Minister for Immigration, Local Governemnt and Ethnic Affairs* (1993) 45 FCR 418 at 428 and *Dornan v Riordan* (1990) FCR 564 at 568.

Information about administrative law rights and procedure

Generally

As stated above in section 1, 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.

Appeal rights once a decision has been made

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.[32]

We note the Complaints Management Project currently being undertaken by the Ombudsman will go some way to addressing this issue[33].

[32] Queensland Ombudsman "Complaints Management Project - Phase 1 Report" (2005), www.ombudsman.qld.gov.au.
[33] http://www.ombudsman.qld.gov.au

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.

Key Issue 4: Diversity of access for a range of people

Summary

- Standing under the JR Act needs to be clarified, either through legislative reform or policy.
- The availability of free or low cost legal services available for administrative law issues needs to be improved.
- Administrative rights for prisoners have been unjustifiably curtailed by s 11E of the FOI Act and introduction of *Corrective Services Bill 2006* which removes prisoners' rights to judicial review of classification decisions and transfer decisions.
- Vexatious and querulous litigants are adequately dealt with by the current legislative regime.

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.

Standing

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".[35] 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. [36]

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.

[34] *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493
[35] at [39] per Gaudron, Gummow and Kirby JJ
[36] at [12]

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[37], is to implement a new general test for standing allowing any person to commence public law proceedings unless:

(a) Relevant legislation provided a clear intention to the contrary; or
(b) 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.

Barriers to access - representation

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.

These issues and possible solutions have been largely canvassed above.

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 matters

[37] "Beyond the Door Keeper. Standing to Sue for Public Remedies" (1996) ALRC Report 78

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.

Access for particular groups

Prisoners

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), which exempts documents from disclosure if they can be reasonably expected to:

- Endanger a person's life or physical safety
- Result in a person being subjected to a serious act of harassment or intimidation;
- prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety; or
- prejudice a system or procedure for the protection of persons, property or environment; or

A review of FOI legislation of other Australian jurisdictions failed to turn up any similar provisions.

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 removes 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.

This and the earlier quotation in relation to s 11E of the FOI Act are disingenuous as they do not tell the whole story. It is well recorded that the classification and transfer systems

are used for purposes other than their statutory intention. There are many instances where transfers in particular are used for disciplinary or punishment purposes, carried out arbitrarily, even capriciously. Access to the courts in these circumstances was hard won. Courts traditionally restricted access to the courts in internal matters, resulting in a closed system acknowledged for its many abuses. The courts eventually adopted the principle that prisoners would only lose those rights that were necessarily curtailed by imprisonment.

Judicial Review and FOI are indispensable external mechanisms for opening the prison system to scrutiny and so should be removed only where it is established by prison administrators that continued access to them is harmful to others. The explanatory memoranda do not justify their removal.

The inclusion of a merits review regime in relation to these decisions is welcome. However, it should not be at the expense of judicial oversight. Internal oversight is no substitute for external review. If prisoners are using the courts to air vexatious claims in these areas, there are other ways to control that problem, rather than removing legitimate claims of right.

Persistent litigants

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.

Similarly, 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.

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.

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.

Key Issue 5: Effectiveness and Efficiency of Access to Administrative Justice

Summary
- A centralised, independent merits review tribunal should be established.
- Administrative law legislation needs to be amended to ensure its reach extends to contemporary, corporate manifestations of government.
- Time limits under Part 3 of the JR Act should be extended to 3 months from the date written notice of the decision is received or 28 days after a statement of reasons is provided, whichever is later.
- There should be criteria which government agencies must consider in deciding whether to consent to the transfer of an FOI application under s 26 of the FOI Act.

Merits review

We feel that the biggest barrier to efficiency and effectiveness of access to administrative justice in Queensland is the lack of a centralised, independent merits review tribunal.

The cost of court proceedings means that judicial review is often out of reach for the average person. Further, judicial review can only offer the limited remedy of returning the matter for reconsideration by the original decision-maker. It cannot review the evidence put before the original decision maker and substitute its own decision. Judicial review should only be a remedy of last resort, but in many cases, people are given little choice but to pursue it.

Merits review offers a cheaper, more comprehensible process, interposing a much-needed dispute resolution phase between the original decision maker and the courts. In addition

to the advantages stated above in Section 1, establishment of a generalist merits review body:

- will decrease the gap between the number of people contemplating and those actually commencing judicial review applications and
- will, because of the process undertaken at the merits review stage such as the gathering of relevant documents and the tribunal's decision, assist proceedings before the court, particularly where the person is self-represented.

A merits review system should also ensure that form should not outweigh substance. A less formal structure should enable people unversed in legalism to air their concerns and grievances without undue weight being placed on narrow technicalities.

Privatisation of government

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*[38]:

> 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.

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

[38] (2003) 216 CLR 277 at 300 [67]–[68]; [2003] HCA 35. See also *Griffith University v Tang* (2005) 221 CLR 99 at 133 [100] per Kirby J; [2005] HCA 7

removal of confidential information would render the statement of false or misleading, then this can result in a refusal of reasons altogether.

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[39] or matters communicated in confidence[40].

Recognition of these issues is starting to occur.

In 1998, the Administrative Review Council produced a report[41] 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.

In NSW, a bill has recently been introduced which has the object of amending the *Freedom of Information Act 1989 (NSW)* so as:

> (a) 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, and
> (b) to define the expression "commercial-in-confidence provisions" for the purposes of the proposed section, and
> (c) to 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.[42]

We also note that the recent Corrective Services Bill 2006 (Qld), proposes to make engaged service providers subject to provisions of the *FOI Act 1992*, the *Crime and Misconduct Act 2001*, the *Judicial Review Act 1991* and the *Ombudsman Act 2001*.

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.

[39] *Freedom of Information Act 1992* (Qld), s 45
[40] *Freedom of Information Act 1992* (Qld), s 46
[41] "The Contracting Out of Government Services" (1998) ARC Report No. 42
[42] Explanatory note to the Freedom of Information Amendment (Open Government-Disclosure of Contracts) Bill 2005 (NSW)

Time frames

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. (See table below)

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.

Section 3: Summary and recommendations

This paper commenced with an overview of the administrative law framework in Queensland and commented on the overall need for the establishment of a generalist merits review tribunal.

In response to the key issues, the recommendations put forward by this submission are:

Key issue 1: In relation to fees and charges under the FOI Act

1. Appropriateness of FOI fees and charges should be reviewed once data has been collated and analysed regarding (a) how much time and money is spent by government in responding to FOI applications and (b) how many applicants decide not to continue once receiving a preliminary assessment notice.
2. Fee waiver for FOI should include a "public interest" exception.

Key issue 2: In relation to costs associated with proceedings under the JR Act

3. There should be a prescribed form to apply for Supreme Court filing fee waiver (rather than by affidavit).
4. There should be circumstances in which fee wavier must be granted (eg, where the applicant holds a concession card).
5. Fee waiver should be granted where applicants are funded by legal aid or assisted by a community legal centre.
6. There should be provision for fee waiver or reduction in the case of non-profit organisations pursuing judicial review in the public interest.
7. There should be allowed waiver of Appeal Costs Fund Fees where the circumstances of the applicant justify it.
8. The law in relation to costs in judicial review needs to be reformed, for example:
    (a) make costs a preliminary issue that needs to be dealt with before the substantive matter can proceed
    (b) prima facie, each party bear their own costs.
9. Solutions to mitigate the impact of costs orders should be implemented, including:
    (a) implement costs protection certificates which limit the applicant's liability for costs or requires the public authority to pay some or all costs
    (b) liberalise litigation funding
    (c) amend the model litigant rules to reflect government practice not to apply for or enforce cost orders in certain circumstances.
10. Similar measures in relation to security for costs and undertakings as to damages should be implemented to prevent these orders from restricting public interest litigation.

Key issue 3: In relation to information relevant to and about government decisions

11. A less expensive and more user-friendly forum is needed to which applicants can appeal refusal and/or sufficiency of a statement of reasons requested under Part 4 of the JR Act.
12. A statement of reasons under Part 4 of the JR Act should include provision of the documents relied upon in making the decision.
13. Further education of government agencies is needed to ensure that FOI is not improperly used and that access is not hindered by unnecessarily requiring applicants to go through FOI.
14. More information about administrative law rights and remedies should be made available to the public.
15. Policy should be implemented such that government agencies consistently notify interested persons about their appeal rights once a decision has been made.

16. More information regarding the law and procedure of judicial review should be made available to the public

Key issue 4: In relation to diversity of access

17. Standing under the JR Act needs to be clarified, either through legislative reform or policy.
18. The availability of free or low cost legal services available for administrative law issues needs to be improved.
19. Administrative rights for prisoners have been unjustifiably curtailed by s 11E of the FOI Act and introduction of *Corrective Services Bill 2006* which removes prisoners' rights to judicial review of classification decisions and transfer decisions.
20. Vexatious and querulous litigants are adequately dealt with by the current legislative regime.

Key issue 5: In relation to effectiveness and efficiency of access to administrative justice

21. A centralised, independent merits review tribunal should be established.
22. Administrative law legislation needs to be amended to ensure its reach extends to contemporary, corporate manifestations of government.
23. Time limits under Part 3 of the JR Act should be extended to 3 months from the date written notice of the decision is received or 28 days after a statement of reasons is provided, whichever is later.
24. There should be criteria which government agencies must consider in deciding whether to consent to the transfer of an FOI application under s 26 of the FOI Act.