

Grounds to challenge administrative decisions possibly made under the Education (General Provisions) Bill, 2006.

Widespread concern has been expressed about the impact of the above proposed legislation on students, and their rights and opportunities to gain an education. The concern takes the form that the powers contemplated are too wide and leave little protection for students.

This paper is intended to be a guide, not a formal advice, as to when it might be possible to challenge a decision made under any power included in the draft Bill should it eventually be passed into law.

FREE advice and assistance can be given to students, who consider they have been unfairly treated, by a youth legal service, amongst others.

South West Brisbane Community Legal Centre, 28 Wirraway Parade, Inala (Phone 3372-7677) has recently established a Youth Solicitor project. The primary focus of this project is to assist young persons between 10 and 17 who may find themselves in trouble with the police or similar authorities. Help, though, can also be extended to any young person who might feel that they have been unfairly treated as a result of this new legislation.

It is important to note at this stage that a decision that is reasonable, made “on its merits” after all procedures have been correctly followed, and all requirements met, may be very hard to overturn. On the other hand if a decision is unfair, there are effective means of invalidating it.

Invalidating factors

The classic statement of what may allow a decision to be overturned was made by the eminent English judge, Lord Pearce. He said:

“There may be an absence of those formalities or things which are condition precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. *Any* of these things would cause its purported decision to be a nullity.” (writer’s italics).

Obviously, if the decision maker strays outside the limits of what the Act of Parliament allows, the decision is unlawful and invalid. If that happens it is fairly easily identified and can found a successful challenge.

“Privative” clauses

Sometimes legislation includes what are called “privative clauses” and these appear as limitations on the right to review any administrative action. The clauses are typically phrased as “final”, “is satisfied”, “in the opinion of”, “conclusive” and so on. In reality they are largely ineffective, and a student considering a challenge should not be deterred.

Some particular grounds for setting aside a decision

Denial of natural justice

The rules of natural justice are twofold:

- a. The right to be heard, and
- b. Obvious impartiality by the decision maker.

The right to be heard is the theme of what is called “due process of law.” It requires, in essence, that a person who could be “aggrieved” (= unfavourably or adversely affected) by a decision must be given adequate details of any adverse allegation against him or her, and indeed any relevant fact or allegation that could lead to an adverse decision being made. It must be given in a timely fashion to allow the person against whom an adverse decision might be made sufficient time to make representations to counter it, and put his or her case to the decision maker as to why the eventual decision should be made in his or her favour.

Good examples of this are found in Sections 28-30, 39-42, 46, 65-69, 161-167, 177-183, 188-200, 211-220, 225-230, all of Part 4, Sections 341-346, 349-358, and Chapters 15 and 16 of the Bill. In fact the Bill is heavily loaded with requirements as to adequate notice, and procedures to be followed.

There is an old saying that justice must not only be done but must appear (or “be seen”) to be done. It is sometimes expressed a person may not be a “judge in his own case.” Put more simply, this is a rule against bias by the decision maker, and, perhaps even more importantly, against any reasonable apprehension of bias, whether or not there be any actual bias at all.

The High Court of Australia put it this way:

“The requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public the tribunal...may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds.”

That is a mouthful, but in simple terms it means that any appearance of bias, or potential self-interest, by a decision maker or person exercising any authority of any kind, if it is reasonable and not fanciful, will probably result in the decision being overturned.

In practice, the bar has been raised well above “reasonably” and any decision maker will normally excuse him or herself, and be keen to do so, if there is the slightest possibility of a conflict or personal interest, and properly so. So, if there has been any bad blood at all between the decision maker and the person eventually aggrieved, or any perceived favouritism, or personal or family connection, or any possible self-interest, *any of those* will usually be sudden death to the decision, so to speak.

Acting under dictation

It is also fatal to the decision if the decision maker does not make a decision at all, either because of an inflexible application of a policy or rule, or because he or she has, in effect, abdicated his or her discretion to make a decision in the belief that another person or authority must be followed. This sometimes called acting under dictation.

It is perfectly normal and legitimate for a decision to be made in accordance with a government policy or rule in an ordinary case, the invalidating factor arises if the policy or rule is followed in every case, and no *decision* is made in a special case, where a departure from an otherwise rigid rule may be warranted.

Irrelevant facts being taken into account, and/or relevant facts not being taken into account.

It is also a ground to challenge a decision if facts are taken into account which should not have been or are not taken into account which should have been. If it can be shown that irrelevant material influenced, or could have influenced, the decision unfavourably to the student, then either situation, and most certainly both, will allow a successful challenge.

Effect of a successful challenge

The High Court of Australia held in *Dixon v The Commonwealth* that a successful challenge to a decision renders it “invalid and ineffective.”

It is important to note that a successful challenge will not reverse the decision, by itself, although that will usually be the eventual result. It is still be quite open for another decision maker to be appointed to reopen the whole process, and do it properly this time. That may not necessarily lead to a reversal, and this needs to be understood and taken into account. Generally, though, it will, if the original decision maker got it wrong enough to lead to its overturning.

Avenues of review

The first avenue through which to seek a review of an unfavourable decision should be to approach the decision maker him or her self, to point out the error, or invalidating factor, and ask it be corrected. There is a prescribed procedure in the Bill, on a number of occasions, for this to be done. That usually works, and the chance of it working is increased dramatically if it be carefully and accurately drafted and well argued. Hence, a student in this situation might well think his or her interests are best served by seeking the free legal advice similar to that mentioned above.

If the legislation sets down a specific second method of review, (and there are some prescribed, and indeed the Bill also does provide for Appeals to the District Court in some cases,) then the legislated process must be exhausted before what should be the next logical step is taken.

If a court process is legislated, any review must be on appeal to that court, or on further appeal to a higher court still. Legal assistance should be sought in all court procedures.

Excepting court processes, if, and not until, any laid down review process is exhausted and then unsuccessfully, the Ombudsman may be then become involved and a complaint can be made to that office. Under the Ombudsman Act, 2001, the Ombudsman must investigate a genuine complaint and has extensive powers to do so. Under that Act privative clauses are of no effect. He can rectify any difficulty. He has power over a Department and this includes the Department of Education. No appeal can be made from a Court decision to the Ombudsman.

While the Ombudsman does not operate like a Court, the better prepared the complaint is, and the better specified the grounds of complaint are drafted, the much better the chances will be of success.

The earlier legal help is sought, then the more likely any grievance will be rectified whether through a court process, or an administrative review process, as applicable to the particular case.