

Your Ref: Inquiry into Federal Judicial Review

Our Ref: Access to Justice / Pro Bono Section & Litigation Rules Section

18 May 2011

Law Council of Australia
19 Torrens Street
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By email: simon.henderson@lawcouncil.asn.au

Dear Bill

INQUIRY INTO FEDERAL JUDICIAL REVIEW

Thank you for your memo of 27 April 2011 inviting the Queensland Law Society to make comments on the Inquiry into the Federal Judicial Review.

This letter has been compiled with the assistance of the Access to Justice/Pro Bono Section and Litigation Rules Section.

The Society generally supports the role of the Administrative Review Council and welcomes ongoing consideration of judicial review and the scope and need for reform.

The Society notes, however, that the report does not indicate any significant issues or burdens that are presently arising. In particular, the number of applications for judicial review under the ADJR appears to be at a steady, and relatively modest, level.

Whilst the Society cannot comment on some of the other specialist tribunals (for example, the Administrative Appeals Tribunal and the Migration Review Tribunal), the Society notes they were introduced to deal with specific issues. The Society recommends that any changes to those structures be approached with caution.

The specific discussion questions are addressed below. We will adopt identical numbering that appears in the Consultation paper:

3. How should statutory judicial review cover subordinate legislation, particularly where an instrument can be characterised as an administrative decision? (page 60)
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The statutory judicial review should not cover subordinate legislation as the Society believes there are adequate protections in place. Such a step could also be in breach of the separation of powers doctrine, and may be constitutionally invalid.
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4. Should judicial review extend to reports and recommendations by bodies other than the final

decision maker, as previously recommended by the Council, or should review extend more broadly? If so, by what means should review be extended? (page 61)

Judicial review should not extend to reports and recommendations by bodies other than the final decision maker. As the final decision has not been made, it would be premature for judicial review to apply to reports and recommendations. This could cause unjustified interference with decision making.

5. Should the *ADJR Act* be amended to include a statutory right to review decisions made under executive schemes for which financial or other assistance is provided to individuals? What examples are there of such schemes which are currently not subject to a statutory right of review? What are the reasons for making them or not making them subject to statutory review? (page 63)

The Society supports the recommendation in 4.19.

6. What is the preferable focus of a test for judicial review jurisdiction — focus on the decision maker, the decision or another criteria — and why? (page 65)

The Society supports the test continuing to focus on the decision. Given the significant level of experience and case law in this regard, changing the focus could have unforeseeable consequences.

7. In what circumstances should judicial review apply to private bodies exercising public power? What is the best method of extending review? What are other accountability mechanisms which might more effectively ensure accountability of private bodies? (page 68)

The Society supports a similar position to that in Queensland, as noted in 4.39.

8. In 1989, the Council recommended including the concept of justiciability in the *ADJR Act*. Would this improve accessibility under a general statutory review scheme? What guidance on the concept of justiciability could be given in a general statutory judicial review scheme? (page 70)

The Society does not support the recommendation to include the concept of justiciability in the *ADJR Act*. It is our view that 'justiciability' is a difficult concept and may function only to complicate cases.

9. In 1989, the Council recommended that limited categories of decision should be excluded from the *ADJR Act*, and that any exclusions should be listed in the *ADJR Act*. When and for what categories of decision are exclusions from general statutory review schemes justified? What is the relationship between general review schemes and specific statutory exclusions, and what restrictions should there be on including exclusions in other statutes? (page 72)

The Society supports the recommendation in 4.56.

12. What are the advantages and disadvantages of different approaches to the grounds of judicial review—common law or codification of grounds and/or general principles? Which approach is to be preferred and why? What grounds should be included in a codified list? (page 79)

The Society does not support a change to the grounds of judicial review.

13. What is the role, if any, for statutory codes of procedure given that they may not provide certainty about what will amount to procedural fairness in a particular case? (page 81)

The Society recommends the implementation of guidelines to add to certainty for the decision maker and affected persons. We consider this may reduce the level of disputes. The Society does not consider that these guidelines be codified.

14. What is the appropriate test for standing in judicial review proceedings? What are the arguments for making standing in judicial review consistent with standing under s 27(2) of the AAT Act, which gives organisations standing if a decision relates to a matter included in the objects or purposes of the organisation? What are other ways to achieve greater recognition of the public interest in judicial review proceedings? (page 85)

The Society supports introducing a broader standing test, similar to the test espoused in 4.103.

Questions 15 – 19

15. Should we have a generalised right to reasons, or is it more appropriate for the right to be included only in specific pieces of legislation? Where should the right be located? At what stage of the decision-making process should a right to reasons for administrative decisions be available and in relation to what range of decisions? (page 90)

16. One of the objectives of this examination of judicial review is to identify all examples of legislation or subordinate legislation that include a specific right to reasons. Are there examples of provisions giving a right to reasons which provide useful illustrations of effective content, timing and form of reasons? (page 90)

17. What, if any, exemptions should there be from any obligation to provide reasons? (page 90)

18. What form should a statement of reasons take when provided on request under general statutory scheme? What other forms do statements of reasons take? (page 91)

19. What other consequences, if any, should there be for of a failure to provide adequate reasons, particularly if there was a general obligation to provide reasons? (page 92)

The Society is not aware of any difficulties with the current regime in relation to the right to reasons.

20. What are the potential restrictions on the availability of remedies under the *Constitution* and the *Judiciary Act*? Do these restrictions, if any, mean a statutory remedial scheme is desirable, and why? (page 93)

The Society believes there is no present justification for extending remedies. Again, doing so could have unintended consequences particularly if parties believe they can obtain damages.

21. What would be the benefits, if any, from extending the various streamlining measures relating to courts—such as time limits and discouraging unmeritorious litigation that apply to judicial review of migration decisions to all avenues for judicial review? (page 98)

The Society understands that the streamlining measures referred to were introduced to specifically address the unique problems that arose in migration matters. Therefore the Society does not consider there would be any benefit in extending those measures to all avenues of judicial review.

22. What further requirements, if any, should be placed on the courts to consider whether they should exercise discretion to dismiss applications at the earliest opportunity? (page 100)

The Society does not believe further requirements are required.
23. What are the benefits of specific statutory appeals as compared to general judicial review? (page 101)
The Society does not believe there is presently any need to introduce a new general statutory review scheme.
27. Since judicial review is available via constitutional review, what role, if any, should a statutory review scheme play in the future? (page 109)
Again, there does not appear to be any justification for changing the present statutory review scheme.
28. What are the reasons for or against relying solely on constitutional judicial review as a general judicial review mechanism for federal judicial review? (page 110)
The Society does not support relying solely on constitutional judicial review, as they may limit and impinge upon a person's ability to obtain access to justice.
30. Given the proliferation of statutory appeals and the declining use of general judicial review mechanisms, what are the advantages, if any, of the Council preparing policy principles to guide a variety of statutory judicial review mechanism, rather than attempting to streamline the range of existing judicial review mechanisms? (page 112) Judicial Review in Australia – Consultation Paper 13
The Society supports the Council's proposal in 5.42 and 5.43.

Thank you for the opportunity to make submissions in this very important area of law.

If you would like to discuss the concepts in this letter further, please do not hesitate to contact our Policy Solicitors Binny de Saram or Louise Pennisi on (07) 3842 5885 or (07) 3842 5872.

Yours faithfully

Raoul Giudes
Vice President