



THE LAW SOCIETY  
OF NEW SOUTH WALES

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23 June 2011

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Dear Administrative Review Council members

**Re: ARC Consultation Paper on Judicial Review in Australia**

The Law Society's Government Solicitors Committee (the Committee) has reviewed the Administrative Review Council Consultation Paper *Judicial Review in Australia*. Rather than addressing the questions set out in the Paper, the Committee provides the attached comments which it hopes will be of assistance.

The Committee is grateful for the opportunity to contribute to the ARC's review.

Yours sincerely

Stuart Westgarth  
President

## Submission in response to the Administrative Review Council Consultation Paper *Judicial Review in Australia*

The Consultation Paper states that, expressed in its simplest form, the purpose of the administrative law system is<sup>1</sup>:

- to improve the quality, efficiency and effectiveness of government decision making generally, and
- to enable people to test the legality and the merits of decisions that affect them.

The Administrative Review Council has also identified the general principles underlying the administrative law system as lawfulness, fairness, rationality, openness, efficiency and accessibility. The Paper notes that any reforms to judicial review "should be consistent with these principles, recognising that the system as a whole should address all of the underlying principles"<sup>2</sup>. The paper goes on to state that the:

range of review mechanisms available contributes to the efficiency and accessibility of the administrative law system, by providing a range of avenues for people to hold government accountable for its conduct<sup>3</sup>.

The Law Society's Government Solicitors Committee agrees that any examination of judicial review in Australia should be made in the context of the totality of the administrative law system. This includes recognising the contribution of the non-judicial elements of the system, for example, in providing specialist knowledge, reducing costs and complexity and encouraging efficiency in decision making. While more informal than the courts, in the Committee's experience non-judicial administrative law bodies operate with a high degree of accountability, objectivity and independence in the discharge of their functions. In this context, the Committee suggests that any possible reform of judicial review should be considered keeping in mind the proper roles played respectively by the courts, merit review bodies and decision-makers.

In 2001, Justice Sackville of the Federal Court told a conference of the Migration Review Board (MRB) and the Refugee Review Tribunal (RRT) that as a result of the High Court's findings in the case of *Yusuf*, the legislative requirement for the RRT to set out the material facts on which it based a refugee determination could be read so that:

a dissatisfied applicant and a court exercising powers of review could identify the RRT's actual reasons for the decision and the facts it considered material to the decision. The Court could then infer, for the purposes of judicial review, that anything not mentioned in the RRT's reasons had not in fact been taken into account by it. That omission might, however, reveal an error of law, "jurisdictional" error or a failure to take into account relevant considerations on the part of the RRT. By adopting an apparently broad (and in certain respects somewhat surprising) construction of the grounds of review (and the qualifications to those grounds) in s 476 of the *Migration Act*, the High Court actually widened the scope for judicial review in the Federal Court, potentially at least, quite considerably<sup>4</sup>.

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<sup>1</sup> Administrative Review Council, *Consultation Paper: Judicial Review in Australia*, April 2011, p 27.

<sup>2</sup> *Ibid*, p 27.

<sup>3</sup> *Ibid*, p 28.

<sup>4</sup> Justice Ronald Sackville, *Reasoning in Migration Decisions*, Refugee Review Tribunal and Migration Review Tribunal Conference, Grace Hotel, Sydney, Friday 2 November 2001, p 3, viewed at: [http://www.fedcourt.gov.au/aboutct/judges\\_papers/speeches\\_sackvillej3.rtf](http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_sackvillej3.rtf), 31 May 2011.

While acknowledging that he only saw a small, unrepresentative proportion of decisions,<sup>5</sup> Justice Sackville went on to assert that the cases about which he was concerned saw the Tribunal:

(take) a fairly formulaic approach to the assessment of (an applicant's) credibility and, in particular, (place) heavy reliance on the failure of an applicant to make a specific factual claim at the earliest opportunity. There will be occasions when a failure by an applicant to make a claim at an early stage provides a sound enough basis for rejecting aspects or even the whole of his or her account. But sometimes the failure is readily explicable. There can be no substitute for the most careful scrutiny of the individual circumstances of each case and, legislative directions aside, the avoidance of rigid preconceptions as to what is or is not normal behaviour in abnormal situations<sup>6</sup>.

Justice Sackville further acknowledged that the summation of a claim is not necessarily easy, but "unless a decision-maker is able to summarise an applicant's case accurately, he or she may be at risk of not doing the applicant justice"<sup>7</sup>.

The Committee agrees that administrative bodies must avoid using a "sausage factory approach" and missing the critical facts in an individual's case because of the volume of work, or writing sloppy reasons which suggest merit gave way to bias. However, the Committee would also point out the undesirability of a court's review becoming a de facto re-evaluation of the facts of a case, based on the judicial perception of the written reasons. There has been comment that judicial responses to administrative decision making have made some administrators overly cautious and legalistic, to a point where they feel "getting the procedures right becomes more important than getting the decision right"<sup>8</sup>. While this view has not been held by the ARC and neither has it been an overwhelming view in the public service, it does point to an interpretative tension between the Judicial and Executive branches of government.

In the experience of government lawyers, public administration cannot and does not take place in the absence of the law. Indeed, it is so much a part of law that the Commonwealth Ombudsman has suggested that as public demands and expectations have grown, the constitutional architecture has unofficially grown a fourth branch<sup>9</sup>. This fourth branch consists of auditors-general, ombudsman offices, human rights commissions, the RRT and the MRB, amongst others. Strictly speaking, they are part of the Executive, but as Professor McMillan observes:

(Many) do not form part of the legislative or judicial branch of government... The oversight agencies are independent of other executive agencies; indeed, their function is to oversight and investigate complaints against executive agencies. Oversight bodies do not implement the policies and programs of the government in the traditional manner of the executive branch. With courts and tribunals, they enforce the rule of law in government, check the propriety of administrative decision making, safeguard

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<sup>5</sup> Ibid, p 7.

<sup>6</sup> Ibid, p 8.

<sup>7</sup> Ibid, p 7.

<sup>8</sup> Sara Pesenti and Karen Stark (eds), *Admin Review*, No.54, June 2001, p 10, viewed at: [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/\(E24C1D4325451B61DE7F4F2B1E155715\)~adminreview54.pdf/\\$file/adminreview54.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/(E24C1D4325451B61DE7F4F2B1E155715)~adminreview54.pdf/$file/adminreview54.pdf), 28 May 2011.

<sup>9</sup> See John McMillan, *Ten Challenges For Administrative Justice*, Australian Institute of Administrative Law Inc., Forum Papers, January 2010, No 61, p 33, viewed at: <http://law.anu.edu.au/aial/Publications/webdocuments/Forums/Forum61.pdf>, 22 May 2011.

vulnerable citizens against abuse of power, and ensure that remedies are provided to those who are wronged by defective agency action<sup>10</sup>.

Justice Susan Kenny draws a distinction between judicial and other kinds of discretion when she says:

What is distinctive about judicial discretion as opposed to other kinds of discretion is that it is exercised by judges. Because exercisable by judges, the occasions for discretion are controlled by the work judges do and the constraints inherent in their work, including the substantive law and the need to give valid reasons for the making of their decisions.<sup>11</sup>

Consistent with the power exercised by judges, administrative decision-makers are constrained by substantive law and the need to provide valid reasons. It is also important to consider that, for a disturbing number of people, judicial redress is too costly and/or time consuming to be a viable option. Therefore, a Consumer Tribunal or other appeal committee may be a cost effective way of resolving disputes over property, or even ensuring complainants have a roof over their head that night. Administrative law remedies can therefore be argued to offer a measure of justice for those the courts do not reach.

In improving both administrative law and judicial review, the ARC might reflect on its observation that there has been "an increase in the number and powers of government regulators"<sup>12</sup>. One way administrative tribunals, boards and oversight bodies could take advantage of their quasi-judicial flexibility is to work towards a government-wide portal for handling grievances from the public. For example, the Commonwealth Ombudsman has written that:

One option is for agencies that work closely together to set up a special joint complaint handling unit to liaise with clients and investigate matters—a 'one stop shop' approach. Staff of the unit can be authorised to resolve matters on behalf of all the agencies involved, or to refer more complex or sensitive matters to the appropriate line area.

A second option is to set up a central contact point for all complaints. This may be little more than a phone number, mail box or web address. Upon receipt, complaints can be filtered to identify those requiring referral to an agency for a further response or investigation. It will be likely that many complaints can be dealt with promptly, either at the initial contact point or after referral to an agency, especially if the complaint is in the nature of a request for information or clarification.<sup>13</sup>

The value of the "one stop shop" approach has also been recognised internationally, with the House of Commons Public Administration Select Committee calling on the UK Government in 2008:

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<sup>10</sup> Ibid.

<sup>11</sup> The Hon Justice Susan Kenny, *Seeing migration cases through one judge's spectacles*, p 2, viewed at: [http://www.fedcourt.gov.au/aboutct/judges\\_papers/speeches\\_kennyj10.rtf](http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_kennyj10.rtf), 1 June 2011.

<sup>12</sup> Consultation Paper, above n1, p 26.

<sup>13</sup> Commonwealth Ombudsman, *Fact Sheet 7: Complaint handling: multiple agencies*, April 2009, viewed at: [http://www.ombudsman.gov.au/docs/fact-sheets/onlineFactSheet7\\_multi-agency.pdf](http://www.ombudsman.gov.au/docs/fact-sheets/onlineFactSheet7_multi-agency.pdf), 9 April 2011.

(to) explore providing a single point of contact for impartial information about complaints to Government and public services-"Public Services Direct". This service would act as a "one stop shop" for complaints about public services.

In the Committee's view complaints should be handled effectively at the earliest possible point, not least because this is cheaper for all concerned. The Committee says there appears to be a systemic problem with first-tier complaint handling by government organisations and is "disturbed" that so many complaint reviewers described a poor standard of complaint handling.<sup>14</sup>

Some agencies already have memoranda of understanding with related bodies, but it may be desirable to consider making this a standard process across government. As noted by the UK Committee, dealing with requests for review or complaints at an earlier stage is most effective. Formal court processes, by their very nature, do not generally lead to quick resolution.

Finally, the Government Solicitors Committee notes the ARC's concern over the outsourcing of government services to the private sector<sup>15</sup>, an issue which has been discussed by the Committee on more than one occasion. It seems that with an increasing demand on government for services but a likely decrease in the number of PAYG taxpayers over the coming decade, the private sector will increasingly be called upon to do what government cannot sustain through public funds.

To a certain extent, this is already occurring. Electricity providers in NSW are required as part of their licence to agree to have disputes with their customers overseen by an independent Energy and Water Ombudsman. They are also required to provide a percentage of the Ombudsman's operating budget<sup>16</sup>. Similar administrative arrangements could be put in place for other corporatised or privatised services. Section 121 of the *Government Information (Public Access) Act 2009* also requires an agency that enters into a contract with a private sector entity (the contractor) under which the contractor is to provide services to the public on behalf of the agency to ensure that the contract provides for the agency to have an immediate right of access to specified information contained in the records held by the contractor.

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<sup>14</sup> Press Notice 25, Session 2007-08, *PASC calls for one stop shop to make it easier for people to complain about public services*, 24 March 2008, viewed at:

<http://www.parliament.uk/business/committees/committees-archive/public-administration-selectcommittee/>

[pasc0708pn25/](http://www.parliament.uk/business/committees/committees-archive/public-administration-selectcommittee/pasc0708pn25/), 9 April 2011.

<sup>15</sup> Consultation Paper, above n1, p 25.

<sup>16</sup> See generally <http://www.ewon.com.au/>, viewed 1 June 2011.