Administrative Review Council’s inquiry into judicial review in Australia

Submission from the National Security Law and Policy Division (NSLPD) and International Crime Cooperation Division (ICCD) areas of Attorney-General’s Department

Background:

National Security Law and Policy Division (NSLPD):

The availability of judicial review is of interest to a number of laws administered by or of potential relevance to NSLPD, including:

- Security assessments made under the ASIO Act 1979
- Authorisations (or refusals) under the Plastic Explosives provisions in Division 72 of the Criminal Code
- Decisions to issue control orders (Div 104) and preventative detention orders (Div 105) under the Criminal Code
- Decisions relating to issuing non-disclosure or witness exclusion certificates under the National Security Information (Criminal and Civil Proceedings) Act 2004
- Decisions to list, or applications to de-list, terrorist organisations under Division 102 of the Criminal Code
- Decisions concerning national security exemptions under the Freedom of Information Act 1982 and Archives Act 1983, including if the Attorney issues a public interest certificate to prevent disclosure of certain evidence in those hearings
- Decisions to give unfavourable criminal history advice under the AusCheck Regulations 2007
- Decisions relating to grants in the Countering Violent Extremism program
- Decisions made under the proposed Victims of Terrorism Overseas Assistance Scheme

International Crime Cooperation Division (ICCD): is responsible for international cooperation in criminal matters and related policy issues. It is the Australian Central Authority for mutual assistance, extradition and the international transfer of prisoners, including casework and policy development in these areas. The availability of judicial review is relevant to a number of laws administered by ICCD, including:

- Extradition Act 1988
- International Transfer of Prisoners Act 1997
- Mutual Assistance in Criminal Matters Act 1987

(see Attachment A for more information).
DISCUSSION QUESTIONS

The current system of judicial review

1. How are applicants making use of review rights under s 39B(1A)(c) of the *Judiciary Act 1903*, s 75(iii) and/or s 75(i) of the *Constitution*. In what way, if any, do these avenues offer a broader scope for judicial review than the other avenues of judicial review? (page 46)

*ICCD:*

_Extradition Act_

_Incoming requests_

There are three main decisions made under the Extradition Act once a request for extradition has been received from an extradition country (other than New Zealand). Firstly, the Minister for Justice (or Attorney-General) decides whether to accept the request (s 16). Secondly, if the Minister accepts the request, a magistrate decides whether the person is eligible for surrender to the country (s 19) and finally the Minister decides if the person should be surrendered to the country (s 22).

As decisions made under the Extradition Act are excluded from the operation of the ADJR Act, the only mechanism for judicial review of decisions made by the Minister (under s16 and s 22) is under s 39B (1A)(c) of the Judiciary Act or 75(v) of the Constitution.

Decisions of a magistrate as to whether the person is eligible for surrender to a country (s 19) are subject to statutory review under s 21 of the Extradition Act.

_Outgoing requests_

The Attorney-General or Minister for Justice decides whether to make an outgoing extradition request. As decisions made under the Extradition Act are excluded from the operation of the ADJR Act, this decision is subject to judicial review under s 39B or s 75(v).

_Extradition Act – Extradition between Australia and New Zealand_

There is a separate extradition process for all extradition requests between Australia and New Zealand. The ‘backing of warrants scheme’ between Australia and New Zealand is administered by police forces and prosecuting authorities in Australia and New Zealand with no executive involvement. Decisions of Commonwealth law enforcement agencies to request surrender from New Zealand are judicially reviewable under s 39B(1A)(c) of the Judiciary Act.

2. What are other examples of statutory judicial review? What are the appropriate policy reasons for having a statutory appeal or review mechanism as opposed to relying on general judicial review mechanisms? What characteristics should such a scheme have? (page 52)

*ICCD:*

_Extradition Act_

_Incoming requests (other than from New Zealand)_
Decisions of a magistrate as to whether a person is eligible for surrender to a foreign country (s 19) are subject to a statutory review scheme under s 21 of the Extradition Act. Review under s 21 of the Extradition Act allows the Federal Court (or State or Territory Supreme Court) to conduct a rehearing of the matter.

**Incoming requests from New Zealand**

Decisions to issue a warrant for a person to be surrendered to New Zealand are currently made by a State or Territory Magistrate. Review of a magistrate’s decision to issue a surrender warrant is governed by a statutory review process under section 35 of the Extradition Act.

Review under s 35 of the Extradition Act allows the Federal Court (or State or Territory Supreme Court) to conduct a rehearing of the matter and take into account new evidence. On an appeal from this decision, the Full Federal Court may only have regard to the material that was before the court that conducted the review.

**Review mechanisms under Australia’s extradition law**

Australia’s extradition legislation has been the subject of comprehensive review. In 2005, a discussion paper was released for public consultation which canvassed fundamental reforms to Australia’s international crime cooperation laws including to the mechanisms for review of decisions made under those laws. Exposure drafts of a proposed *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill* were released for public consultation in 2009, and again in January 2011. The feedback received from the discussion paper and the exposure drafts of legislation has informed the development of the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (the Bill). The Bill was introduced into Parliament on 6 July 2011.

**Streamlining the extradition process**

It is important that extradition processes are as streamlined as possible to facilitate expeditious resolution of extradition cases and thereby reduce the time spent in custody in Australia by a person subject to extradition. As such the 2005 discussion paper considered a proposal to consolidate decision making under the Extradition Act and adopt a single judicial review mechanism. However, upon release of an exposure draft bill, concerns were raised by stakeholders about the practical implementation of such a mechanism and although the proposal was ultimately not pursued, other proposals directed at streamlining the extradition process were put forward in the Bill.

The Bill as introduced contains proposed amendments to streamline the early stages of the extradition process. Currently, dual criminality and ‘extradition objections’ are factors which must be considered by the Attorney-General when deciding whether to accept an extradition request. Once the Attorney-General accepts an extradition request, a magistrate conducts extradition proceedings, and is required to consider these factors again. The Bill as introduced would remove the current duplication in the functions performed by the Attorney-General and the magistrate. The relevant factors would continue to be considered by a magistrate when conducting extradition proceedings under s 19 of the Extradition Act and
the Attorney-General would also continue to consider extradition objections in deciding whether to surrender a person following a magistrate’s determination that a person is eligible for surrender (s 22 of the Extradition Act).

**The ambit or scope of review**

3. How should statutory judicial review cover subordinate legislation, particularly where an instrument can be characterised as an administrative decision? (page 60)

[No comment]

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)

[No comment]

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)

**NSLPD:**

*Building Community Resilience grants program*

Building Community Resilience (BCR) grants programs are a type of an executive scheme as defined by the Commonwealth Ombudsman.\(^1\) They are non-statutory decisions to provide financial grants to community organisations. The BCR grants program is not subject to judicial review. However, grant administration is governed by significant legislative and policy frameworks to ensure procedural fairness of the decision to award funding. For example under the **Financial Management and Accountability Act 1997** (FMA Act), grants management is subject to an accountability framework for the proper use and management of public money, public property and other Commonwealth resources\(^2\).

In practice, once funds are allocated, there may be some difficulty in reviewing decisions where the funding agreements are already in place and expenditure has occurred in reliance on those agreements.

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)

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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)

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)

**NSLPD:**

In discussing this issue, the paper notes that courts have developed the concept of justiciability to signify areas of executive action or legislation that are not appropriate for judicial determination. This addresses the concept of separation of powers. The paper raises the question as to whether a decision is justiciable if it has a close relationship to national security or was made in the conduct of international relations.

There are some national security decisions that are of a nature that are appropriately not justiciable, as they are decisions that affect the national interest and are appropriate decisions to be made by the executive. This would include decisions to deploy the Australian Defence Force in relation to war or to provide assistance in natural disasters, decisions to provide aid to foreign countries, and decisions as to national intelligence priorities. A common argument in relation to this issue is that assessment of what is in the national interest or what is relevant for national security is a matter for the executive rather than the courts, and the probability of a court overturning the judgment of the executive as to the relevance or importance of such considerations is minimal. Grounds of judicial review could still be made out, but what is ‘relevant’ and ‘irrelevant’ would be determined by the nature of the national interest in question, and it would be difficult to prove in practice that the executive decision or action involved an incorrect assessment of that relevance. Another argument, is that such concerns are simply outweighed by the need for swift and decisive action to protect the national interest.

While some national security matters are arguably considered non-justiciable, not all national security matters will be of this nature. Courts have held that in relation to decisions that affect individual rights, such as some security assessment decisions, these decisions are reviewable. However, while reviewable, courts have noted that there may be limitations on the extent to which procedural fairness obligations are owed, as procedural fairness may be owed only in so far as would be consistent with the requirements of national security.\(^3\) There may be other practical limitations in relation to the use of classified information in proceedings in order to meet the requirements of national security.

Therefore, while it would seem appropriate for some national security or international relations decisions to be non-justiciable, there could be difficulties in providing a broad-based exclusion on the basis of all national security decisions. However, it may be difficult

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\(^3\) Leghaei v Director General of Security [2005] FCA 1576.
to articulate in legislation the 'bright line' between non-justiciable and justiciable national security decisions.

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)

**NSLPD:**

Sch 1 exclusions from ADJR Act apply to:

- Decisions under ASIO Act, Intelligence Services Act, IGIS Act, TIA Act. These are matters of national security, and the exclusions are based on the fact that decisions made under those Acts are likely to be made on the basis of sensitive classified information, and with regard to operational matters not appropriate for public dissemination. Where appropriate, those Acts may contain mechanisms to provide appropriate review or notification requirements, which have been developed to balance the interests of national security with procedural fairness.

- Decisions made by the Attorney-General under section 104.2 (control orders) and all decisions made under Division 105 (preventative detention orders) of the Criminal Code. It is appropriate that these decisions are excluded from review due to their security nature. There are requirements in ADJR Act that are not suitable in the context of a security environment and this is consistent with existing exemptions for decisions that relate to criminal proceedings and specific exemptions for decisions made in relation to ASIO questioning and detention warrants.

- Decisions to prosecute an offence. Decisions to prosecute, or not to prosecute, are appropriately made having regard to a range of factors, including the public interest, resources, and other considerations. It would not seem appropriate for such decisions to be generally subject to judicial review. The decision to prosecute is also tested through the trial process, in relation to the strength and sufficiency of evidence.

- AAT decisions required to be conducted by Security Appeals Division (ASIO security assessments). This exclusion is on the basis that there is a separate mechanism for review of security assessment decisions, through a merits review process in the Security Appeals Division of the AAT. This merits review process has been specifically designed to balance security interests and individual rights.

**ICCD:**

It is important that extradition processes are as streamlined as possible to facilitate expeditious resolution of extradition cases and thereby reduce the time spent in custody in Australia by a person subject to extradition. Streamlined extradition processes also assist Australia to fulfil its international obligation to secure the return of alleged offenders to face justice in the country in which the alleged offence was committed without undue delay, subject to the exercise by the person sought of his/her rights to seek review of and/or to
appeal extradition decisions. The ability to seek review under the ADJR Act as well as under s 39B and/or the Constitution would work against these objectives. Further, persons sought for extradition are already able to, and do, avail themselves of rights of review and appeal in respect of decisions made at every stage of the extradition process. Accordingly, the fact that the ADJR Act does not apply to extradition matters does not deny persons sought for extradition adequate rights of review/appeal. It is our view that decisions made under the Extradition Act should continue to be excluded from the application of the ADJR Act.

10. What decisions of the Governor-General — statutory and non-statutory — should be subject to judicial review? (page 73)

[No comment]

11. What commercial decisions of government should lie outside the scope of judicial review and how is this best achieved? (page 73)

[No comment]

Grounds of review

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)

[No comment]

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)

NSLPD:

Courts have held that in the national security context, the obligation to provide procedural fairness may arise, but only in so far as would be consistent with the requirement to provide procedural fairness. The procedural fairness obligations will vary depending on the facts and circumstances in each case, including the effect of a decision on a person’s rights and interests, and the national security considerations applicable in each case. Therefore, it would be very difficult to capture this balancing act within statutory codes of procedure. Attempting to do so could run the risk of creating codes of procedure that may not be appropriate due to national security considerations in a particular case, or, on the other hand, codes of procedure that lessen the procedural fairness obligations that would otherwise be reasonable in a particular case.

Right to seek judicial review
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)

**NSLPD:**

The idea of ‘open standing’ or at least ability of interested organisations to have standing to challenge decisions raises a number of complex issues. Legislating for ‘open standing’ without the appropriate, carefully considered safeguards could result in an increase in legal proceedings. To avoid unwarranted challenges to decisions, arguably there needs to be some special interest or impact on the person or organisation seeking to challenge the decision.

An example of decisions that could potentially affect a broader section of the public in some cases is decisions to list terrorist organisations under the Criminal Code. Arguably, a person should not need to be an identified member of the organisation to challenge the decision, but it would also not be in the public interest, nor an appropriate use of court time, for decisions to be challenged by persons or organisations that would not be impacted in any way by the decision. One concern that has sometimes been raised in relation to review of listing decisions is whether people may be reluctant to seek review of the decision for fear of this drawing interest from authorities that they are connected with the terrorist organisation. Therefore, there may be some merit in representative groups having capacity to challenge decisions, providing there is some real connection between the group and the decision, and that the action taken is supported by members of those representative groups.

**Judicial review and reasons for decisions**

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)

**NSLPD:**

If consideration is to be given to a general right to reasons, it will be necessary to address how to deal with cases where reasons may be based upon classified material. Presently, legislation dealing with decisions that could be made on the basis of classified material or national security considerations contains mechanisms to balance the need to protect classified information with procedural fairness. For example, under Division 104 of the Criminal Code an interim control order must set out a summary of the grounds on which the order is made, but the summary is not required to include any information if disclosure of that information is likely to prejudice national security. Similarly, under the Australian Security Intelligence Organisation Act 1979, there is a mechanism enabling the Attorney-General to certify that withholding a notice of an adverse security assessment, or disclosing the statement of grounds contained in the security assessment, would be prejudicial to the
interests of security.\(^4\) Also, the ASIO Act only requires notification and statement of grounds to be provided to a person who is an Australian citizen, permanent resident, or special category or special purpose visa holders.\(^5\)

Another factor to consider in relation to a general requirement to provide a statement of reasons, particularly if this were required at the time the decision was made rather than on request, is how this might apply to decisions of a more public nature that could affect a number of people. For example, decisions to list terrorist organisations under the Criminal Code could potentially affect a number of people. There could be practical difficulties in providing a statement of reasons directly to the group. For example, if the group is not overtly represented in Australia. The current practice with such listings is for the Attorney-General to issue a public ‘statement of reasons’, which is published on the Australian Government’s national security website. This provides transparency and a means for those affected members of the public to have access to the reasons for decisions. However, there is also the possibility that such a decision may need to be made on the basis of classified information, so this is not a mandated legislative requirement.

**ICCD:**

AGD maintains the view that there should be no general right to be provided with reasons for a decision which might have any application in the extradition context. The extradition process is governed by a comprehensive and specifically focussed legislative framework which does not include any requirement for the Minister to give reasons for his/her decisions under the Act. This is appropriate in circumstances where decisions by the Minister to accept an extradition request or to surrender a person may involve sensitive matters concerning Australia’s international relations, law enforcement and/or security.

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)

**NSLPD:**

As noted above, when it comes to national security matters, there may be a need to balance procedural fairness obligations with the need to protect classified material. Therefore, any requirements for providing a statement of reasons should take account of the possibility that it may not be appropriate to take a standard approach in every case.

There may be some argument in favour of providing general guidance on the appropriate content of reasons for decision, but arguably it might be preferable for this to be expressed as best practice principles. The risk with having rigid requirements as to the form of reasons for decision is that they may not adequately take account of each specific case. In some cases, it could even result in reasons for decision not being as comprehensive or helpful as they otherwise might have been.

\(^4\) *Australian Security Intelligence Organisation Act 1979*, s 38(2).

\(^5\) Ibid, s36(b).
17. What, if any, exemptions should there be from any obligation to provide reasons? (page 90)

NSLPD:

Question 17 asks whether there should be any general exemptions from the obligation to provide reasons. The paper notes at 4.124 the possibility of removing the exemptions contained in Schedule 2 of the ADJR Act, as “... the availability of a statement of reasons is a de facto pre-condition to accessing judicial review – without it, the applicant is unlikely to be able to understand whether the decision was made lawfully”.

Schedule 2 includes exemptions from the requirement to provide reasons for:

- decisions of the Attorney-General to give:
  - notice under section 6A of the National Security Information (Criminal and Civil Proceedings) Act 2004, or
  - a certificate under section 26, 28, 38F or 38H of that Act

- decisions in connection with the investigation, committal for trial or prosecution of persons for any offences against a law of the Commonwealth or of a Territory, including the issue of search warrants and seizure warrants.

It would appear that the rationale for some of the exclusions under schedule 2 is that there are other mechanisms to examine and test the legality of such decisions, such as through the court process in relation to criminal investigations. Further, there would likely be operational considerations in the context of the investigation or prosecution of offences that might be relevant. Such decisions may need to be made quickly; there are already established criminal law processes and procedures; and there is a possibility that providing reasons for decision might disclose sensitive operational information that could tip off others or alert persons to a confidential source of information. Therefore, any proposal to remove some of the current exemptions from schedule 2 of the ADJR Act would need to be carefully considered.

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)

NSLPD:

As noted above, decisions in the national security context will often have to balance the need to protect sensitive information with procedural fairness obligations. There should therefore be scope to potentially have classified and unclassified statements of reasons in relation to national security decisions, as well as the possibility that in some cases it may not be appropriate to provide even a summary of reasons without prejudicing national security.

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

Care should be taken in legislating for the consequences of failure to provide adequate reasons. It would need to be clear that what is adequate may depend on the circumstances in a particular case. In relation to national security decisions, reasons may appear less than adequate to an individual affected by the decision because they do not disclose classified material that has been relied upon in making the decision. However, when balanced against the need to avoid prejudice to national security, such reasons may be adequate in the circumstances.

**Availability of remedies in judicial review proceedings**

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)

[No comment]

**Court procedures**

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)

[No comment]

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)

[No comment]

**Additional statutory review mechanisms**

23. What are the benefits of specific statutory appeals as compared to general judicial review? (page 101)

**NSLPD:**

Specific statutory appeal mechanisms may be appropriate to deal with special circumstances applicable to certain decisions. Such appeal mechanisms may enable a more streamlined approach, and a process that is effectively equipped and experienced to deal with the particular circumstances. For example, there is a statutory appeals process for seeking merits review of security assessment decisions in the Security Appeals Division of the AAT. This enables such hearings to be heard by members of the AAT with experience in handling security matters, and also enables special rules of procedure to apply, which have been designed to balance the interests of security with the individual’s appeal rights. While
this is a statutory merits review process rather than judicial review, these same considerations could potentially apply to other contexts.

24. What benefits do government agencies responsible for statutory review schemes find that those statutory schemes give? Do agencies believe these benefits could also be achieved through a general statutory review scheme and why or why not? (page 101)

[No additional comment – see response to q23]

25. Section 44 of the AAT Act establishes a statutory appeal right which applies to decisions in many jurisdictions. Are there any examples of cases where an applicant has been unsuccessful in an application for review because of discrepancies between the jurisdiction of the Federal Court under s 44 of the AAT Act and under the ADJR Act? (page 102)

[No comment]
26. The Council has previously recommended that s 44 be retained. What reasons are there for retaining or removing s 44 of the AAT Act? (page 102)

[No comment]

**Options for Australia**

27. Since judicial review is available via constitutional review, what role, if any, should a statutory review scheme play in the future? (page 109)

[No comment]

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)

[No comment]

29. What information should be provided to applicants about constitutional judicial review in the Australian federal jurisdiction if there is no general statutory review scheme? Which bodies are most appropriate to provide this information? (page 110)

[No comment]

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)

**NSLPD:**

An advantage of providing policy guidance rather than major legislative reform is that this approach may be more suitable in addressing the unique requirements in relation to decisions involving national security considerations. General principles could guide the development and review of statutory appeals mechanisms applicable to specific contexts.
Extradition Act - extradition is the process by which one country apprehends and sends a person to another country to face criminal charges or serve a sentence. The Extradition Act sets out a number of mandatory requirements which must be met before Australia can make or accept an extradition request. Decisions, made by the Minister for Justice under the Act, are excluded from the operation of the ADJR Act (see paragraph (r) of Schedule 1 of the ADJR Act). Decisions under the Extradition Act 1988 are subject to judicial review under s39B of the Judiciary Act 1903 and s75(v) of the Constitution.

International Transfer of Prisoners Act - The International Transfer of Prisoners (ITP) Scheme allows people imprisoned in a foreign country to apply to transfer to their own country to serve the balance of their sentence, provided certain conditions are met. Decisions of the Australian Minister for Justice made under the International Transfer of Prisoners Act 1997 (Cth) (ITP Act) are reviewable under the ADJR Act, including decisions to deny consent for a prisoner to transfer to or from Australia to serve the remainder of their sentence under the ITP Scheme, unless the exceptions under sections 13A and 14 of the ADJR Act apply.

The main grounds for excluding review under these sections would be if the review required disclosure of personal information about the prisoner (if the applicant was someone other than the prisoner) or the disclosure of information was against the public interest as it would prejudice the security or international relations of Australia.

Although prisoners are informed of their right to apply for review on the ITP website and in ITP Information Packs, there have been no applications for review under the ADJR Act since the ITP Act came into operation. This may be because the ITP Scheme is a consent based scheme, requiring not only the consent of the relevant countries and/or states and territories but also the consent of the prisoner. Prisoners are also entitled to reapply for transfer at any time.

Mutual Assistance in Criminal Matters Act - Mutual assistance is a formal government-to-government process for obtaining and providing information and evidence for the purposes of criminal investigations and prosecutions. The mutual assistance process is also used to recover the proceeds of crime. Judicial review of decisions made under the Mutual Assistance in Criminal Matters Act 1987 is available under the ADJR Act, s 39B of the Judiciary Act 1903 and s 75(v) of the Constitution. Reviewable decisions include decisions to make a request to a foreign country (for example where a suspect or alleged offender in Australia seeks review of a decision to seek evidence from a foreign country that would assist the investigation/prosecution).