Submission to the Administrative Review Council
Consultation Paper on Judicial Review in Australia

July 2011
The Department would like to thank the Administrative Review Council (Council) for the opportunity to provide its submission on the Council's Consultation Paper, 'Judicial Review in Australia' (Consultation Paper). The Department trusts that the Council will find its comments useful.

Migration litigation has long formed the largest administrative law judicial review caseload across the Commonwealth. However, migration litigation has some distinctive features in comparison with the general administrative law caseload. The primary difference is due to the fact that engaging in the litigation process prolongs a client's period of stay in Australia. This, in turn, increases the possibility of a change in personal circumstances that will permit a client to remain in Australia. This can generate a unique incentive to litigate, or seek to delay litigation processes.

DISCUSSION QUESTIONS

The Current System of Judicial Review
As stated in the Consultation Paper, there has been a separate review regime for migration litigation outside of the Administrative Decisions (Judicial Review) Act 1975 (ADJR Act) and section 39B of the Judiciary Act 1903 (Judiciary Act) since the introduction of Part 8 into the Migration Act 1958 (Migration Act) in 1992. This review scheme for migration litigation is now harmonised with the jurisdiction available under section 39B of the Judiciary Act and paragraph 75(v) of the Constitution (see subsection 476(1) and subsection 476A(2) of the Migration Act).

In the migration litigation context, applicants do not currently make applications for judicial review under paragraph 75(i) and paragraph 75(iii) of the Constitution. Rather, applicants almost exclusively make applications under Parts 8 and 8A of the Migration Act.

The jurisdiction of the Courts under Parts 8 and 8A of the Migration Act is aligned with the jurisdiction under paragraph 75(v) of the Constitution. Prior to this alignment of jurisdiction, applications for review were made under both the Migration Act and paragraph 75(v) of the Constitution.

Historically, separate statutory review regimes were developed by successive governments endeavouring to reduce the grounds of judicial review. Whilst these attempts did not achieve the intended result, the current separate regime in the Migration Act provides for efficiencies, and removes incentives to pursue more than one avenue of review.

The Department would urge that any new judicial review scheme should:
- Include the efficient management of migration litigation to discourage unmeritorious litigation;
- reflect the model litigant principles that already require agencies to pursue litigation in a fair and just manner (including in relation to unrepresented litigants); and
- reflect access to justice principles that enable and facilitate access to appropriate review mechanisms.
The Ambit or Scope of Review

Judicial review of reports and recommendations

If judicial review was extended to reports and recommendations by bodies other than the final decision maker, many expert reports used to inform migration decision making could be captured, for example, reports generated by the Medical Officers of the Commonwealth and reports on applicants' English language capabilities.

The review of these reports and recommendations by a court would significantly impede the Department’s capability to conduct efficient decision making and would undermine the administrative certainty necessary to ensure a client’s application could be actioned at all. This problem would be particularly acute if applicants could challenge an assessment or report separately from the final decision itself.

The Courts’ ability to decline to review a particular report or recommendation would not fully address these concerns. This is because requests to review reports or recommendations would still involve applications to the Courts and interlocutory proceedings all of which practically do take time. These additional Court proceedings would contribute to increased costs for the Department as well as the client and would delay a final outcome. It would be difficult to justify these additional costs and delays given that the final decision may also be subject to judicial review.

The Courts have, in limited circumstances, shown a willingness to scrutinise the decisions of independent experts.

Judicial review of subordinate legislation

In terms of subordinate legislation, the Department uses legislative instruments to reflect and administer Government policy. To open these to judicial review is to then open public policy to the Courts. If statutory judicial review were to be extended to cover legislative instruments, it should be confined to ensuring that the instrument was made within power of the enabling legislation.

The Legislative Instruments Act 2003 (Legislative Instruments Act) already has a review mechanism. Legislative Instruments are tabled before parliament and subject to disallowance, unless exempted under section 44 of the Legislative Instruments Act.

Legislative Instruments are used comprehensively within migration programs as a means of specifying matters in order to administer the migration program and reflect Government policy. For example, the Department specifies the occupations that are in demand for the skilled migration program. These occupations are subject to review and are based on recommendations from

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the Department of Education, Employment and Workplace Relations. It would not be beneficial that the administration of this program nor the occupations targeted by Australia be open to judicial review.

Other examples of where the Department uses Legislative Instruments include:
- to set out charges and fees related to applications for citizenship. This enables the Department to alter the charges and fees annually in line with the Consumer Price Index and in consultation with the Department of Finance and Deregulation;
- to specify foreign exchange rates in relation to charges and fees;
- to set out the health requirements;
- to set out the minimum salary level that a visa holder must be paid and ensuring migrant workers are not financially exploited; and
- to specify how and where an applicant may lodge a visa application.

Accordingly, the Department considers that the Legislative Instruments Act provides sufficient mechanisms to ensure that subordinate legislation is subject to oversight and that delegated legislative power is accountable.

**Judicial Review and executive schemes**
The Courts have found that some executive schemes are subject to constitutional judicial review and thus there may be no need to extend the AD(JR) Act to these schemes.

Additionally, judicial review of these schemes may not be appropriate in all circumstances. For example, the Department notes that the Compensation for Detriment caused by Defective Administration (CDDA) discretionary compensation scheme is already open to investigation and recommendations by the Commonwealth Ombudsman. Accordingly, judicial review of this scheme may not be necessary or desirable, given that the CDDA was implemented to enable complainants to seek financial compensation from the Commonwealth without having to start an action in the Courts.

**The focus of the test for judicial review**
As discussed in the Consultation Paper, there would be merit in considering a different focus for the test for judicial review other than the status of the decision maker. An alternative focus could be the nature of the decision itself as this would ensure that a greater number of administrative decisions that affect the rights of individuals are subject to review and thus greater access to justice. However, as discussed below, there would be concerns regarding contract and tendering decisions being subject to judicial review should the test of ‘decisions under an enactment’ be removed. Government contracts are often lucrative and receive bids from large international companies. The Government cannot expect to obtain value for money in a commercial environment where government actions are regulated by additional principles to which the private corporate sector is not subject. The Department’s view is that current regulation is sufficient.
**Justiciability**

The Department would be concerned that the clarity sought from a statutory list of factors limiting the justiciability of a matter may be outweighed by the impact of applications to the High Court challenging the statutory interpretation of the limiting factors. Furthermore, judicial interpretation of the list of factors limiting judicial review may necessitate regular legislative amendments. With the caseload of migration judicial review applications expected to increase in the near future, the need for mechanisms for the Court to resolve cases in a timely way whilst minimising the risk of the system encouraging unmeritorious applications for review is critical. Inclusion of the concept of justiciability under a general statutory review scheme is an unnecessarily cumbersome control mechanism and a list of limiting factors may not produce the expected clarity and efficiencies.

**Exclusions from a statutory judicial review scheme**

Where the general statutory review scheme does not deal with the particular problems of a given caseload, there is justification for decisions being excluded from the AD(JR) Act. There would be significant practical implications should migration decisions be subject to the AD(JR) Act in its current form, namely that applicants potentially have an incentive to use both avenues to litigate that same decision consecutively. Should applicants begin to litigate via both avenues, this would incur significant costs and delays without practical benefit.

We agree with the Consultation Paper’s point about the justification for the exclusion of decisions for which Parliament has provided a comprehensive or nearly comprehensive system of review on the merits in the Federal Court, from the operation of the AD(JR) Act. A comprehensive, established and functioning review system is currently in place for the migration litigation caseload and has been developed to operate efficiently and in response to the unique issues that arise in this litigation. However, if the grounds of review listed in the AD(JR) Act were aligned with the grounds available under constitutional judicial review, the justification for migration decisions being excluded from the operation of this Act would be less clear.

**Decisions made by the Governor-General**

In relation to the discussion of decisions made by the Governor-General in the Consultation Paper, the Department is unsure with which decisions the Council is particularly concerned. The Department would suggest that unless there is a particular practical issue that extension of judicial review would remedy, it may not be necessary to make decisions of the Governor-General subject to judicial review.

**Judicial review of commercial decisions**

As noted in the Consultation Paper, tendering and contracting decisions have not traditionally fallen within the scope of judicial review regimes aimed at the review of administrative decision making. They are, however, subject to the ordinary review mechanisms available for regulating commercial decision making.
A change allowing unsuccessful tenderers to apply for judicial review of an agency's decision, in addition to remedies available through the common law of contracts, would have adverse consequences for all Commonwealth departments. It would likely result in the significant disruption of the Commonwealth's tendering and contracting activities and hamper the ability of the Commonwealth to obtain services in a timely and cost effective way for itself or to provide services to the general public.

Potential service providers to the Commonwealth already have avenues of complaint should they be concerned with the tender process and the decisions made within that process. Firstly, they may make an internal complaint to the tender delegate or contact officer for internal consideration. Secondly, they may lodge a complaint with the Commonwealth Ombudsman who can investigate complaints and make findings and recommendations to the agency on the process that was followed. Whilst the findings and recommendations of the Ombudsman cannot alter the decision made by the agency, they may generate systemic changes to those agency processes. Thirdly, an unsuccessful tenderer may commence litigation against the agency, including on the basis that there is a process contract.

These existing avenues of complaint give an aggrieved tenderer the ability to raise concerns about an agency's decision making without bringing to a stop that decision making process. If judicial review avenues were made available for contracting and tendering decisions, it would mean that an agency's decision could be overturned which, in turn, could halt a tender process. The delays caused by the judicial review process and outcomes would then significantly hamper the confidence with which agencies can enter into tendering processes and further prevent the successful completion of those tendering processes.

Consequently, if judicial review were to be extended to commercial decisions of the government, the Department would recommend that tendering and contracting decisions should not be included in this extension as it would be an unjustifiable cost without any practical gain. Arguably, the best means for excluding tendering and contracting decisions is the current means of restricting reviewable decisions to those made 'under enactment'.

**Grounds of Review**

*Approach to grounds of review*

One of the key potential benefits of a new judicial review scheme would be the possibility of assisting clients to better understand the judicial review process and assist them to make more informed decisions. As discussed in the Consultation Paper, simplified and codified grounds of review may assist this purpose.

However, in the context of migration litigation, if a new statutory review scheme were to be considered, the grounds of review under this scheme should mirror the common law grounds of review so as to avoid the bifurcation of the judicial review process. That is, it should avoid an outcome which would allow an individual to seek review of the same decision under both the
common law and a statutory regime. Bifurcated jurisdiction adds to the workload of the Courts and generates unnecessary cost to government.

Even, if the grounds of review were codified, there will remain the need to understand the case law interpreting and defining the boundaries of the codified grounds.

**Statutory codes of procedure**
The statutory code of procedure in the Migration Act was intended to eliminate the legal uncertainties that flow from the non-codified common law principles of natural justice while retaining fair, efficient and legally certain decision making procedures. The code of procedure has been subject to significant litigation. However, after ten years of jurisprudence the interpretation of the code is fairly settled.

Risks accompany legislative change in the migration litigation sphere, most notably the potential loss of efficiencies gained through established and tested processes, a short term spike in litigation and increased costs. In any event, the code could not simply be removed; it would need to be replaced with some form of guidance for decision makers.

**Right to Seek Judicial Review**
There are particular policy justifications for limitations on standing in the migration litigation context derived from the Department’s practical litigation experience. The Department considers that given it is the clients’ interests that are most strongly affected by migration decisions, and that litigation necessarily involves the examination of private and personal information, only the client, the client’s sponsor or the Minister should have the right to bring proceedings. Accordingly, the Department would have agency specific concerns with an extension of the standing rules in migration litigation similar to those in section 27(2) of the Administrative Appeals Tribunal Act 1975.

**Judicial Review and Reasons for Decisions**
The Department is required under the Migration Act to provide reasons for a number of visa and citizenship decisions, for example section 66(2) of the Migration Act where there is a refusal of a visa application. Under section 66(2) of the Migration Act, the reasons for the decision for refusing a visa application are required to be provided as part of the notification to the client about the outcome of a decision along with other important information. In particular:

- the required criterion of the decision (if relevant to the refusal);
- the legislative basis of the refusal;
- if the decision is reviewable, a statement that it is; and
- how and when the client can apply for review of the decision.

Another example of where reasons are required to be provided as part of the notification to the client is section 127 of the Migration Act which relates to visa cancellation decisions.
However, it may be appropriate for some categories of decisions to be excluded from the obligation to provide reasons. The Department is of the view that there may be legitimate justifications for exemptions from the general right to reasons where the:

- cost of preparing reasons for a decision is disproportionate to any service fees paid to have the matter considered; and
- decision relates to someone who is not physically present in Australia; or
- decision relates to an application made or an action that does not affect the interests of an Australian citizen nor an Australian permanent resident.

Decisions should not be automatically invalidated where there is a failure to provide reasons. To provide administrative certainty, a decision should be valid until it is challenged so that action can be taken on the basis of that decision.

**Availability of Remedies in Judicial Review Proceedings**
As discussed above in relation to the consideration of codification of grounds of review, a statutory remedial scheme may assist clients to better understand the judicial review process and assist them to make more informed decisions by setting out in clear terms what remedies are available to them.

In the migration litigation context, clients have access to merits review as well as judicial review. Judicial review is one component of a framework of safety nets within the administrative decision making system. There is no clear need for further remedies given the flexibility of the current framework to remedy flaws in the decision making process. There are also additional safety nets such as ministerial intervention powers and the CDDA discretionary compensation scheme.

**Court Procedures**
The Department is supportive of any measure that contributes to the efficient management of the judicial review process, especially any processes that may resolve matters as early and quickly as possible.

As suggested in the Consultation Paper, it is possible that a requirement to seek ‘permission’ to apply for judicial review could assist the courts to vet unmeritorious judicial review applications and thus streamline the judicial review process for those cases with merit. However, there is a risk that it may not achieve the anticipated efficiencies for the Courts, and may simply add another procedural layer to current litigation, thus prolonging the judicial review process overall. This would have particular implications for migration litigation.

Additionally, in the Department’s experience, it is unlikely that further requirements on the Courts to consider whether they should exercise discretion to dismiss applications at the earliest opportunity would result in the dismissal of a large number of applications.
In migration matters, the Court has wide powers to give orders and/or directions at the first court date to proceed to an immediate show cause hearing under rule 44.12 of the Federal Magistrates Court Rules.

Under that rule, if the application does not appear to disclose any basis for review, or is clearly based on a pro forma template, the matter may be summarily dismissed at the show cause hearing. The show cause hearing allows the court to dispose of proceedings where there are no reasonable prospects of success. However, if the application does show a basis for review, directions are usually given for the matter to be listed at a later date for a full hearing.

In the Department’s experience, the Court has rarely utilised show cause hearings.

**Additional Statutory Review Mechanisms**

The current statutory review scheme in the Migration Act addresses the unique concerns specific to migration litigation. One of these concerns, as discussed above, is the impact on program integrity of any lengthy delays in review processes and the incentive to prolong litigation. Parts 8, 8A and 8B of the Migration Act contain measures that facilitate the efficient handling of migration litigation and ensure the removal of unnecessary delays in the review process. The timely resolution of cases is the key to minimising the risk that the system itself could encourage unmeritorious applications for review in the migration context.

The efficiencies legislatively provided for in the Migration Act are:

- the harmonisation of the jurisdiction of the Federal Magistrates Court and the Federal Court with the jurisdiction available under section 39B of the Judiciary Act and section 75 of the Constitution;
- channelling first instance judicial review applications to the Federal Magistrates Court by harmonising the jurisdiction of the Federal Magistrates Court with that of the High Court under paragraph 75(v) of the Constitution, and limiting the jurisdiction of the Federal Court to appeals from the Federal Magistrates Court;
- single judge hearings of appeals from the Federal Magistrates Court in the Federal Court;
- the use of time limits (which are extendable in the interests of justice) in the Migration Act to encourage litigation to be lodged in a timely way and also discourage repeat litigation;
- the limitations on standing;
- general mechanisms for discouraging unmeritorious litigation like the obligation not to encourage litigation proceedings where there are no reasonable prospects of success (section 486E of the Migration Act), the ability for the court to make a cost order for encouraging unmeritorious litigation (section 486F of the Migration Act), and a requirement that any lawyer filing a document to commence migration litigation certify that there are reasonable prospects of success (section 486I of the Migration Act);
the prohibition on class actions (s486B of the Migration Act);
summary dismissal powers of the court; and
discouraging judicial review of a primary decision where merits review is available but has not been sought.

If a general, universal statutory review scheme were to be considered, the Department would want to ensure the efficiencies outlined above arising from Parts 8 and 8A of the Migration Act be retained in any new regime.

Some of the measures above may be appropriate for a general, universal statutory scheme but others may not. For example, the prohibition on class actions under section 486B of the Migration Act is practically appropriate for the migration litigation sphere because cases are dependant on the individual circumstances of a client, and it prevents repeat litigation of one applicant’s claim. However, class actions may be an effective and appropriate mechanism which allows cost effective access to justice for multiple applicants where the issues are identical in other administrative law litigation.

In relation to section 44 of the Administrative Appeals Tribunal Act 1975, if the Council recommends that it be retained, the Department would wish to see the exclusion under section 483 of the Migration Act retained also. This would be important, in order to maintain the administrative efficiency described above of channelling first instance judicial review applications to the Federal Magistrates Court.

**Options for Australia**

A new, clearer statutory system that includes migration litigation could address some stakeholder concerns about the largest part of administrative law litigation being exempt from the Commonwealth standard for administrative law review. Consideration of a new judicial review system could also provide an opportunity to consider how existing mechanisms could be refined to further enhance review processes.

However, as discussed above, and in the Consultation Paper, a broader scheme may ultimately not address the specific practical and policy concerns currently dealt with under the review scheme in the Migration Act. Additionally, the introduction of a new statutory scheme carries the risk of a short term spike in litigation and associated increased costs.

Currently, applicants are provided with some information about judicial review in a migration litigation context when they are unsuccessful at the merits review stage. This information is provided by the Migration Review Tribunal, the Refugee Review Tribunal and the Federal Magistrates Court.

The Department notes the Council’s discussion of a non-legislative option to address concerns with the current judicial review system in Australia and supports the preparation of policy principles. These principles could be a useful tool in assessing the statutory scheme in the Migration Act and the Department would value any efficiencies or improvements which could be identified through such an assessment.