28 April 2011

Director
Legislation, Policy & Criminal Law Review Division
Department of Attorney General & Justice
GPO Box 6
Sydney NSW 2001

By email: lpd_enquiries@agd.nsw.gov.au

Dear Director,

Reform of judicial review in NSW: response to Discussion Paper

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to contribute a submission in response to the NSW Department of Attorney General & Justice's discussion paper, 'Reform of Judicial Review in NSW' (Discussion Paper). PIAC is also grateful to the Department for granting a short extension for this submission.

As set out in greater detail below, PIAC supports in principle the establishment of a statutory judicial review jurisdiction in NSW, based broadly on the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). Due to other competing commitments, this submission is relatively brief, addressing only the following issues:

- the need for a judicial review statute in NSW;
- a statutory right to reasons;
- the tests that should apply for standing and justiciability under a proposed NSW judicial review statute; and
- special powers regarding the award of costs in judicial review proceedings.

However, PIAC is available to provide further input in relation to this prospective reform.

Background to this submission

PIAC is an independent, non-profit law and policy organisation. It works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and

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- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC is the only broadly-based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from, inter alia, the NSW Department of Trade and Investment, Regional Infrastructure and Services (formerly Industry & Investment NSW) for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program.

In its legal practice, PIAC has extensive experience in administrative law generally, and in judicial review more specifically. This experience spans the NSW and Commonwealth jurisdictions, and includes areas such as freedom of information (in NSW, the *Government Information (Public Access) Act 2009*), discrimination, Stolen Wages and other abuses of government power.

Need for reform of judicial review in NSW

Question 1 of the Discussion Paper asks, in essence, whether there are problems with judicial review in NSW, and if so, what issues need to be addressed and how.

PIAC submits that the current judicial review regime in NSW, which relies heavily on the common law, is unnecessarily complex and creates barriers that inhibit access to justice. For example, the existence of different standing rules in respect of the various prerogative writs complicates judicial review litigation, without providing any clear public policy benefits. Similarly, the absence of a statutory right to reasons in respect of administrative decisions forces those who are affected by such decisions to rely on a number of more limited rights that are far from comprehensive in their scope.[1]

Moreover, the blurring of the line between public and private action, such that private entities now frequently perform functions of a public nature, can reduce the level of accountability that is available for action taken on behalf of the NSW government. This general phenomenon is an increasingly common feature of modern democratic government in Australia and abroad. While concerned that private entities should only act on behalf of government in appropriate circumstances, PIAC recognises that it would be pointless to object to all forms of government outsourcing arrangements, public-private partnerships, privatised public services etc. Instead, PIAC submits that the corollary of a government engaging in such practices is that it must ensure that its administrative law regime includes adequate safeguards to ensure that accountability is maintained. In short, sole reliance on a common law judicial review regime is insufficient to achieve this goal in a modern democratic system of government.

A statutory right to reasons

Question 2 of the Discussion Paper deals with the right to reasons. PIAC supports the advent of a statutory right to obtain reasons in respect of administrative decisions. While recognising that there are sound policy reasons in favour of people being entitled to reasons for administrative decisions that affect them, the High Court has clearly stated that it is the role of the legislature, and not the judiciary, to establish such a right in law.[2]

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1 See, eg, NSW Supreme Court Practice Note (CL) cl 23, which authorises a judge to require a decision maker to "furnish to the plaintiff within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact, referring to the evidence or other material on which those finds were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision".

2 *Public Service Board v Osmond* (1986) 159 CLR 656.

As a general principle, a right to reasons promotes good government decision making by enhancing the transparency of the decision-making process, and requiring those exercising public power to explain the lawful basis for their use of that power. Moreover, unless a person understands the basis of a decision that affects them, the person cannot be expected to be confident that the decision complies with the law. By creating a right to reasons, exercisable *before* a person decides whether to commence legal proceedings, it will remove from the court system a significant number of otherwise unmeritorious judicial review applications, because potential litigants will have a clearer sense of the relative merits of their case.[3]

In terms of how a statutory right to reasons should be expressed, PIAC endorses the wording of s 13 of the ADJR Act, and the similar provisions in the *Judicial Review Act 1991* (Q) and the *Judicial Review Act 2000* (Tas).

A new statutory judicial review regime for NSW

The remaining Questions in the Discussion Paper ask, essentially, whether a new statutory regime for judicial review should be established and, if so, how it should be drafted.

As noted above, PIAC supports a new statutory judicial review regime, modelled broadly on the ADJR Act. While we concede that it would be possible to achieve many of the specific objectives of a statutory regime by amending various other Acts and quasi-legislative instruments (eg, practice directions), such tinkering would do little to simplify the process of judicial review. If anything, it would exacerbate the arcane nature of this area of legal practice. By contrast, a single statute, dealing comprehensively with judicial review, would be easier to understand and to apply in practice.

While generally supportive of the ADJR Act model, there are a number of elements that PIAC proposes should be changed in any NSW judicial review statute.

Standing

PIAC submits that there should be a clear test for standing, and that the rules on standing should apply equally for all of the remedies available under the proposed Act. There is no reason in principle for differential rules to apply depending on whether one is seeking, for example, an order in the nature of mandamus or certiorari.

PIAC supports a liberal approach to the question of standing. Ideally, PIAC recommends the adoption of a provision along the lines of s 123 of the *Environmental Planning and Assessment Act 1979* (NSW). This provision provides for open standing. While such an approach was originally considered radical and liable to open the floodgates to frivolous or vexatious litigation, this has not proven to be the case in practice. On this issue, PIAC endorses the submission of the Environmental Defender's Office, which clearly explains how such concerns about open standing have proven unfounded in the sub-species of administrative law (namely environment and planning decisions) where this provision has been operating for almost 20 years.[4]

This provision has been crucial in making administrative justice more readily available for people subject to that jurisdiction. Moreover, to safeguard against misuse of the provision, the judicial review statute could expressly provide the court with a discretion to refuse standing where the application for judicial review is apparently frivolous or has no basis for establishing a prima facie case.

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3 A similar point is suggested at [7.3] of the Discussion Paper.

4 Environmental Defender's Office, Submission in response to the Discussion Paper, 19 April 2011, www.edo.org.au/edonsw/site/pdf/subs/110420judicial_review.pdf, at 10-11.

If the NSW Government were inclined not to adopt open standing, PIAC at least submits that a single test apply irrespective of the remedy or remedies sought by the applicant.[5] Again, a more liberal approach to standing, such as that proposed by the Australian Law Reform Commission,[6] would be preferable to the current common law rules.

Removing the 'made under an enactment' criterion

PIAC submits that the ADJR Act test, requiring that judicial review only be available in respect of administrative decisions *made under an enactment*, ought not to be imported into any NSW judicial review regime. Instead, judicial review should be available in respect of administrative action whose source of power is statutory or otherwise. In this regard, PIAC endorses the reasons in the submission of Mr Greg Weeks of the University of New South Wales.[7]

A public function test

PIAC supports a public function test in establishing the justiciability of an application brought under the proposed NSW judicial review statute. As discussed above, given that the NSW government, like many other comparable governments, increasingly acts through private entities, it is of great importance that appropriate steps be taken to ensure that this does not reduce accountability in respect of the exercise of public power.

Unlike the United Kingdom, the Australian courts have not sought to address this phenomenon by adapting the common law to allow judicial review where non-government entities exercise a public function.[8] PIAC supports the adoption of a 'public function' test based on a provision such as s 4 of the *Charter of Human Rights and Responsibility Act 2006* (Vic). That provision makes clear that while the Charter is in principle limited to government action, it extends to non-government entities to the extent that they exercise functions "of a public nature … on behalf of the State or public authority". This extends the reach of the Charter in an appropriately modest way: the Charter does *not* apply to any private entity that happens to have a contract with the state, but it *does* apply to private entities that (pursuant to a contract or otherwise) is exercising power on behalf of the state.

Special powers regarding costs

The Discussion Paper canvases the possibility of the courts being empowered to make special costs orders in judicial review matters.[9] While supportive of the power in relation to costs in tribunal proceedings put forward in the Discussion Paper, PIAC proposes that a broader costs power be given to the courts exercising NSW judicial review jurisdiction.

That is, PIAC proposes that a NSW judicial review statute include a provision that specifically allows the court to make orders that protect litigants bringing action in the public interest from an adverse costs order. In 1995, the Australian Law Reform Commission proposed the introduction of a public interest costs rule.[10] PIAC supports such a provision because it would remove a further barrier that inhibits especially impecunious people from accessing justice. For further

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5 Of course, any such provision should be careful not to restrict availability of the writ of habeas corpus in respect of which open standing has long been available at common law.

6 See Discussion Paper at [8.13].

7 See Greg Weeks (Lecturer, University of New South Wales), Submission in response to the Discussion Paper, 11 April 2011 at 1-2.

8 Compare *R v Panel of Take-overs and Margers; ex parte Datafin Plc* [1987] QB 815 with *NEAT Domestic v Australian Wheat Board* (2003) 216 CLR 277.

9 See Discussion Paper at [8.6.3] and Question 4(c).

10 Australian Law Reform Commission, *Cost shifting – who pays for litigation*, ALRC 75 (1995).

explanation of this proposal, see PIAC's recent submission to the NSW Law Reform Commission.[11]

Once again, PIAC thanks the Department for the opportunity to comment on the Discussion Paper. PIAC is available to provide further input into this reform process if that would be of assistance.

Yours faithfully

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[11] Alexis Goodstone, *PIAC Submission: A public interest approach to costs*, NSW Law Reform Commission Inquiry http://www.piac.asn.au/sites/default/files/publications/extras/10.03.03-PIAC_Sub1-NSWLRC_re_Costs.pdf at 4-7.