



**Statutory judicial review – keep it, expand it: Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia, April 2011**

**14 July 2011**

**Alexis Goodstone, Principal Solicitor**  
**Edward Santow, Chief Executive Officer**  
**Elizabeth Simpson, Senior Solicitor**



# Introduction

## The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation. PIAC 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 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; and
- 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
- 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 was the first, and remains 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 the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's experience in Judicial Review

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<sup>1</sup>, review of migration decisions,<sup>2</sup> and electoral issues.<sup>3</sup>

PIAC also recently made a submission to the NSW Department of Attorney General & Justice in response to its Discussion Paper on Reform of Judicial Review in NSW.<sup>4</sup> In that submission, PIAC supported the establishment of a statutory judicial review jurisdiction in NSW, based broadly on the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).

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<sup>1</sup> See for e.g., *Waterford v Commonwealth* (1987) 163 CLR 54; *Re Hounslow and the Secretary, Department of Immigration and Ethnic Affairs* (1985) 7 ALN N362.

<sup>2</sup> See for e.g., *Untan v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1448.

<sup>3</sup> See for e.g., *Save Our Suburbs (SOS) NSW Inc v Electoral Commissioner of NSW* [2002] NSWSC 785; *Robert v Jeffery & 4 Ors* [2003] NSWSC 162; *Borsak v Cheung* [2006] NSWADT 5.

<sup>4</sup> Edward Santow, *Reform of judicial review in NSW: response to Discussion Paper*, NSW Department of Justice and Attorney General (2011) <http://www.piac.asn.au/publication/2011/06/reform-judicial-review-nsw> at 10 May 2011.

## General comments

PIAC welcomes the opportunity to make a submission in response to the Administrative Review Council's Consultation Paper, *Judicial Review in Australia* (Consultation Paper).<sup>5</sup> PIAC commends the Administrative Review Council on the Consultation Paper, which PIAC found to be very well researched and a thoughtful assessment of judicial review in Australia, and particularly the operation of the ADJR Act.

On 24 June 2011, PIAC gave oral evidence to the Administrative Review Council in relation to the current inquiry.<sup>6</sup> This written submission is intended to complement that oral evidence.

In this submission, PIAC has chosen to comment only on specific questions related to areas where it has expertise. In particular, PIAC has focussed on standing, a right to reasons and expanding the coverage of the ADJR Act to include executive schemes. Additionally, PIAC proposes the introduction of a special costs power to remove one of the impediments to public interest litigation.

In summary, PIAC strongly supports the retention of the ADJR Act and considers that a statutory review mechanism is greatly preferable to relying solely on the combination of the Constitution and the common law. Judicial review pursuant to s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) (Judiciary Act) and ss 75(iii) or 75(v) of the *Constitution* is complex and technical.

By contrast, the ADJR Act simplifies access to judicial review and therefore promotes access to justice. PIAC endorses the decision to codify the basic principles of common law judicial review, and PIAC believes that it would be undesirable to repeal the ADJR Act. Moreover, some important aspects of the ADJR Act do not exist in the Constitutional jurisdiction – in particular, a statutory right to reasons.

Broadly speaking, any federal judicial review scheme should be clear, accessible and promote the accountability and transparency of government. A broad and liberal approach to the jurisdiction and scope of the scheme should be adopted, as well as to the grounds of review, right to seek review, obligation to provide reasons and availability of remedies.

Additionally, the ADJR Act should be strengthened and its scope expanded. Liberalising the rules on standing and introducing special costs rules for public interest cases would encourage valuable public interest litigation. 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 government. 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 preserved.

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<sup>5</sup> Administrative Review Council, *Judicial Review in Australia - Consultation Paper*, (April 2011).

<sup>6</sup> This evidence was provided by Gemma Namey (solicitor) and Edward Santow (Chief Executive Officer).

## Comments in response to specific questions

**Question 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?**

Executive schemes are now widely used for a range of purposes, including administrative compensation and the provision of government grants. Decisions made under these schemes affect people's rights and interests in significant ways, and it is artificial and unhelpful for decision making under such schemes to be subject to judicial review regimes that are less open than in respect of administrative decisions made pursuant to legislation. As a matter of policy, the Government should not be able to avoid accountability by establishing schemes other than under an enactment.

The Aboriginal Trust Fund Repayment Scheme (ATFRS) is an example, albeit at the NSW rather than Commonwealth level, of an executive scheme. The ATFRS was established in 2005 to repay Aboriginal people and their descendants money held on trust by the NSW Government. The ATFRS operates under a set of guidelines. The NSW Department of Premier and Cabinet administers the scheme. Decisions of the ATFRS involve significant rights, and while some repayments are modest, others can be in the order of \$40 000 or more. ATFRS decisions are not subject to any form of merits review by a tribunal.

If a similar scheme existed at the federal level, decisions made pursuant to it would be excluded from review under the *ADJR Act*, simply because they were not made under an enactment. There appears to be no good policy reason for this result, considering the significant rights at stake.

Some may argue that the Auditor General plays a role in auditing executive schemes, thereby providing accountability. However, the focus of the Auditor General is on whether government programs are delivered efficiently, not on the fairness of individual decisions. The role of judicial review is to provide a level of accountability and fairness for the individuals whose rights are affected.

In terms of the appropriate test that could be inserted into the *ADJR Act* to cover non-statutory executive schemes, PIAC suggests that consideration should be given to s 4(b) of the *Judicial Review Act 1991* (Qld). It provides:

- (b) a decision of an administrative character made, or proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part)--
  - (i) out of amounts appropriated by Parliament; or
  - (ii) from a tax, charge, fee or levy authorised by or under an enactment.

**Question 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?**

PIAC considers that the existing ADJR Act test for judicial review, which focuses on the source rather than the nature of the power, is flawed because accountability can be lost if government contracts decision making out to a private body. The High Court's decision in *NEAT Domestic Trading v AWB Ltd*<sup>7</sup> indicates that constitutional judicial review will not cover private bodies making decisions under an enactment.

Instead, PIAC supports a public function test in establishing whether an application may be brought under the ADJR Act. Given that the Commonwealth Government, like many other governments, increasingly acts through private entities, it is important that appropriate steps be taken to ensure that accountability is maintained 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.<sup>8</sup> Thus, Parliament should extend the test for judicial review to include decisions by private entities exercising public power.

PIAC supports the adoption of a 'public function' test such as that contained in 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) are exercising power on behalf of the state. PIAC believes that a similar test should be included in the ADJR Act.

**Question 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?**

As discussed above in relation to question 6, there are strong public policy reasons to support preserving judicial review rights where government contracts out a service or decision-making role to a private body.

**Question 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?**

**Test for standing**

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<sup>7</sup> (2003) 216 CLR 277.

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

PIAC submits that the current test under the ADJR Act is too narrow and should be broadened so that organisations can bring proceedings on behalf of aggrieved persons or groups of people. This would facilitate the growth of public interest litigation.

PIAC refers to the arguments it has previously made about the importance of public interest litigation in response to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice.<sup>9</sup> Test case litigation has the capacity to create systemic change for large groups of people without the need for each person to bring a separate legal claim. This promotes access to justice and reduces the costs borne by the justice system. In Australia, test cases that promote the public interest by creating, enforcing or clarifying legal rights must generally be brought by individuals prepared to expend significant financial resources, time and emotional energy on the proceedings. Litigation pursued by individuals may have broad-reaching effects and benefit others. However, test case litigants are often almost crushed in the process. As a public interest legal practice seeking to promote access to justice, enhanced democracy, consumer protection and human rights, PIAC has also witnessed the unfortunate situation where no person is prepared to take on the enormous burden and risk of bringing a legal claim, despite significant numbers of people suffering harm.

The case of *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*<sup>10</sup> is instructive. PIAC acted for Access for All Alliance (Hervey Bay) Inc (AAA), an incorporated association that was established to ensure equitable and dignified access to premises and facilities for all members of the community. In 2005, AAA brought proceedings against the Hervey Bay City Council alleging that a number of bus stops, which had been built or significantly upgraded since the commencement of the *Disability Standards for Accessible Public Transport 2002* (Cth), did not comply with those standards. However, the Federal Court dismissed the proceedings on the basis that AAA did not have standing to commence the proceedings. This decision appears to have inhibited other organisations making complaints about systemic discrimination.<sup>11</sup> Although the AAA case was brought in the context of discrimination law, the same issues arise in the context of the ADJR Act.

The Australian Law Reform Commission (ALRC) has previously recommended that the 'special interest' requirement be removed and replaced with an open standing provision that allows any person to "commence public law proceedings unless any relevant legislation provides otherwise or the litigation would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it as he or she wishes."<sup>12</sup> In its 1996 report, *Beyond the Door Keeper. Standing to Sue for Public Remedies*, the ALRC argued that "Many of the difficulties with the

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<sup>9</sup> Goodstone, A., Banks, R., Hartley, C. and Mawuli, V. *Justice – not just a matter of charity: submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice* (2009) <<http://www.piac.asn.au/publication/2009/05/piac-access-justice-submission>> at 11 May 2011, 22-24.

<sup>10</sup> [2007] FCA 974.

<sup>11</sup> See for eg, NSW Disability Discrimination Law Centre Inc, *Submission: Response to a Strategic Framework for Access to Justice in the Civil Justice System*, (2009) <<http://www.piac.asn.au/publication/2009/12/091130-piac-sub-a2j>> at 11 May 2011. [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(689F2CCBD6DC263C912FB74B15BE8285\)~Su+mission+33+-+NSW+Disability+Discrimination+Legal+Centre.pdf/\\$file/Submission+33+-+NSW+Disability+Discrimination+Legal+Centre.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~Su+mission+33+-+NSW+Disability+Discrimination+Legal+Centre.pdf/$file/Submission+33+-+NSW+Disability+Discrimination+Legal+Centre.pdf)> at 12 June 2011, 8.

<sup>12</sup> See Australian Law Reform Commission, *Beyond the Door Keeper. Standing to Sue for Public Remedies*, ALRC Report 78 (1996) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/78/ALRC78.html>> 11 July 2011 at [1.15].

'special interest' test are a result of the courts trying to apply laws and practices for the protection of private rights to cases having a public element. This approach has produced a cumbersome and confusing mechanism for determining who should be able to commence and maintain public law proceedings".<sup>13</sup>

Standing rules in a number of other jurisdictions (such as South Africa and the United States of America) reflect a more open approach that accommodates the demands for wider public participation in judicial decision-making and for greater access to justice. PIAC considers that the rules of standing should be broadened to allow a wider class of people to bring civil proceedings

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)(EPA Act). 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.<sup>14</sup>

Moreover, to safeguard against misuse of the provision, the ADJR Act 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.

If the ARC were not inclined to recommend the introduction of an open standing provision, PIAC submits that the test for standing contained in s 27(2) *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) in respect of organisations should be used in the ADJR Act. Section 27(2) enables an organisation to bring proceedings provided that the decision being challenged relates to a matter included in the objects of the organisation. While not as broad as the test proposed by the ALRC or contained in s 123 of the EPA Act, PIAC is of the view that this provision would overcome the problems of the existing test thereby encouraging valuable public interest litigation.

## Costs

In addition to the limits that a narrow test of standing can create for test case litigation, the risk of adverse costs orders can also inhibit public interest litigation. PIAC therefore takes this opportunity to raise the issue of costs in relation to public interest litigation.

In PIAC's experience, even where *pro bono* legal representation or representation on a conditional fee basis is secured, many meritorious cases do not proceed due to the risk of an adverse costs order.<sup>15</sup> This is especially the case in matters where there is a great disparity in resources between the applicant and respondent.

PIAC contends that the ADJR Act should include a provision that specifically allows the federal courts 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.<sup>16</sup> PIAC supports such a provision because it would remove a further barrier that inhibits impecunious people, and organisations bringing public interest proceedings,

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<sup>13</sup> Ibid at [4.12].

<sup>14</sup> See for eg, Environmental Defender's Office, *Submission on NSW Government Discussion Paper: Reform of Judicial Review in NSW* (2011) [www.edo.org.au/edonsw/site/pdf/subs/110420judicial\\_review.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/110420judicial_review.pdf) at 6 July 2011, 10-11.

<sup>15</sup> Ibid, p 9.

<sup>16</sup> Australian Law Reform Commission, *Cost shifting – who pays for litigation*, ALRC Report 75 (1995).

from litigating. For further explanation of this proposal, see PIAC's recent submission to the NSW Law Reform Commission.<sup>17</sup>

Another way of alleviating the negative impact of adverse costs orders on public interest litigation, including proceedings seeking judicial review, would be to strengthen the application of Order 62A rule 1 of the *Federal Court Rules* (Cth). Order 62A provides that the Court may, by order made at a directions hearing, specify the maximum costs that can be recovered on a party and party basis. A costs order made pursuant to Order 62A has the potential to remove uncertainty about the level of risk of an adverse costs order from the applicant, thereby allowing the applicant to proceed in cases where they otherwise would not be able to.

The problem with the Order is its infrequent use, due to lack of awareness by practitioners and judges, and in cases where applications have been made, the reticence of judges to make orders limiting costs. In June 2008, in proceedings against Virgin Blue Airlines, PIAC, acting on behalf of two people with disability, succeeded in obtaining 'cost cap' orders in the two sets of proceedings being heard together in the Federal Court.<sup>18</sup>

Amendments to Order 62A should be made so that there is a presumption in favour of limiting costs in 'public interest' matters, where 'public interest' is defined broadly to include all cases that could benefit a class of disadvantaged people, even though they may benefit the applicant as well.

**Question 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)**

PIAC reiterates the comments it made to the NSW Department of Attorney General & Justice on the question of including a right to reasons for decision in a statutory judicial review scheme.<sup>19</sup> 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.

Furthermore, the right to reasons should stay within the ADJR Act in order to maximise consistency and ensure that public law proceedings are as accessible as possible.

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<sup>17</sup> 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](http://www.piac.asn.au/sites/default/files/publications/extras/10.03.03-PIAC_Sub1-NSWLRC_re_Costs.pdf)> at 13 June 2011, 4-7.

<sup>18</sup> *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

<sup>19</sup> Edward Santow, n 4 above, 3.

Finally, PIAC recommends that there should be costs protections for applicants who request reasons. One example of such a provision is section 50 of the *Judicial Review Act 1991* (Qld), which provides:

On an application to the court under part 4 in which the respondent to the application is the person to whom a request was made under section 32 for a statement in relation to a decision, the court--

- (a) may order that the respondent pay the costs of the applicant if the applicant is successful (in whole or part) in obtaining the relief sought; and
- (b) may only order that the applicant pay the costs of the respondent--
  - (i) if the applicant is wholly unsuccessful in obtaining the relief sought; and
  - (ii) if the application--
    - (A) does not disclose a reasonable basis; or
    - (B) is frivolous or vexatious; or
    - (C) is an abuse of the process of the court.

**Question 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?**

Subsection 13(1) of the ADJR Act states:

Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Magistrates Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

PIAC considers that s 13 of the ADJR Act appropriately sets out requirements for statements of reasons.

Much of the case law on what constitutes an adequate reasons statement has been developed in relation to the obligation imposed by section 13 of the ADJR Act.<sup>20</sup> In fact, the scope of the duty imposed by the ADJR Act appears to be the same as that imposed at common law.<sup>21</sup>

A statement of reasons must contain the findings on all material facts, a material fact being a fact that can affect the outcome of the decision. A statement of reasons must refer to the evidence on which each material finding of fact is based, ie detail the evidence that was considered relevant, credible and significant for each material finding of fact. A statement of reasons must also state the actual reasons relied upon by the decision maker at the time of making the decision, ie explain the steps in the reasoning process that led to the final decision.<sup>22</sup> Although the content required in a statement of reasons can change from one context to another, the critical requirements remain the same.

**Question 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?**

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<sup>20</sup> Creyke, R and McMillan, J, *Control of Government Action: Text, Cases and Commentary*, (2<sup>nd</sup> ed, 2009), 1269.

<sup>21</sup> *Ibid*, 1269.

<sup>22</sup> *Ibid*, 1272-3.

In the Constitutional jurisdiction, it is necessary to show jurisdictional error to obtain the writs of prohibition and mandamus, mentioned in s 75(v). Similarly certiorari, an ancillary remedy, is only available where there is jurisdictional error or a non-jurisdictional error of law that is apparent from the face of the record. However, whether an error amounts to a jurisdictional error is a difficult, and at times, uncertain question.<sup>23</sup>

PIAC endorses the current approach in the ADJR Act, which simplifies the issue of remedies and removes the unhelpful common law distinction between jurisdictional and non-jurisdictional error. Retaining a statutory remedial scheme is desirable to ensure that a broad range of remedies is available to applicants for judicial review.

PIAC also supports further consideration being given to the introduction of damages as an ancillary remedy under the ADJR Act. The UK Law Commission's proposal, focussing on a test of 'serious fault', has merit and should be further considered in the Australian context.<sup>24</sup> The introduction of a remedy of damages would fill a gap in the current law, improve government service delivery and, in some cases, compensate individuals in a way that no other remedies can.

**Question 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?**

PIAC considers that there is no justification for having all judicial review matters heard by the Federal Magistrates Court rather than the Federal Court, or for restricting review to a single judge of the Federal Court. Rather, applicants should be able to choose whether to file their matter in the Federal Court or Federal Magistrates Court depending on the complexity of the legal issues involved.

There are currently a number of mechanisms for discouraging unmeritorious claims, including the power to strike out matters that are frivolous, vexatious or an abuse of process as well as powers to order a plaintiff to provide security for costs. Therefore, there is no need to add further mechanisms, such as those applicable in the migration jurisdiction, to the ADJR Act.

Similarly, PIAC considers that the time limits currently contained in the ADJR Act are appropriate and should not be amended to reflect those applicable in the migration jurisdiction. Applications for judicial review outside of the migration jurisdiction are not high in number and, in PIAC's view, judicial review procedures should encourage rather than discourage, meritorious claims. Stricter time limits would have the opposite effect as they would preclude more claims and, as such, PIAC opposes them.

Indeed, PIAC considers that the streamlining measures that apply to migration decisions should be removed, so that judicial review of migration decisions is dealt with in the same way as judicial review generally. PIAC sees no principled justification for administrative decisions made under

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<sup>23</sup> See, eg, Mark Aronson, 'Jurisdictional error without the tears' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 330.

<sup>24</sup> The United Kingdom Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187 (2008) cited in ARC Consultation paper, above n 5, 93.

the *Migration Act 1958* (Cth) to be subject to a different judicial review regime than the vast majority of other administrative decisions made under Commonwealth legislation.

**Question 27: Since judicial review is available via constitutional review, what role, if any, should a statutory review scheme play in the future?**

The High Court's constitutional judicial review jurisdiction cannot be excluded by legislation. The advantages of maintaining a statutory judicial review scheme alongside constitutional review are that the statutory scheme:

- sets out clearly the applicable law in relation to jurisdiction, grounds of review and standing for judicial review applications;
- broadens the availability of, and provides clarity in relation to, remedies for judicial review; and
- incorporates a right to reasons which does not exist at common law.

PIAC further supports reforms that broaden the scope of the ADJR Act, particularly in relation to standing and costs.

**28. What are the reasons for or against relying solely on constitutional judicial review as a general judicial review mechanism for federal judicial review?**

The common law in relation to judicial review is complicated and, as a result, does not sufficiently promote access to justice and therefore government accountability. The ADJR Act was born from a commitment to simplify and build on the common law, in order to facilitate a judicial review process that is accessible and clear. These purposes remain relevant, providing a strong justification for maintaining a statutory scheme.

Further, statutory schemes, unlike the common law, can be amended to reflect changes in the community's expectations of government (eg, adding a right to reasons) and in the nature of government decision making (eg, extending the court's jurisdiction to the decisions of private bodies). Without legislation, constitutional judicial review will simply not provide an appropriately robust and effective system of judicial review.