



Law Reform Commission of Western Australia

REPORT

ON

**JUDICIAL REVIEW OF
ADMINISTRATIVE DECISIONS**

PROJECT NO 95

December 2002

The Law Reform Commission of Western Australia

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Executive Summary

The Attorney General has asked the Law Reform Commission of Western Australia to inquire into the deficiencies of the current law relating to the judicial review of administrative decisions. We were asked to make recommendations with respect to the reform of:

the substantive grounds upon which the lawfulness of an administrative decision might be challenged;

the practices and procedures pertaining to judicial review of administrative decisions including the appropriate extent of the jurisdictions of the various courts of the state to entertain challenges to the lawfulness of administrative decisions; and

the law governing the extent to which Western Australians are entitled to obtain a statement of reasons for an administrative decision.

The Commission has found that there is a definite need for reform in this area of law. We base this conclusion on our own research and on the submissions we have received in response to our Discussion Paper. The need for reform is indicated on the grounds that the current procedures pertaining to judicial review are complex and highly technical. Some of these complexities stem from unnecessary inconsistencies in procedures between prerogative and equitable remedies. In addition, we consider that there are defects in the existing substantive law and that it is a deficiency in current law that there is no general entitlement to written reasons for administrative decisions.

In order to formulate the recommendations contained in this Report, the Commission has examined the reforms to the substantive and procedural law with respect to judicial review that have been instituted or recommended in other jurisdictions. Those jurisdictions include the other Australian states and territories, England, New Zealand, South Africa and some Canadian provinces.

Broadly speaking, the Commission recommends that reform be introduced with the enactment of legislation substantially similar to the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*. The key procedural features of this option include the creation of a new procedure and the abolition of a number of the old remedies. There would, however, be provision allowing the grant of a remedy on any ground that would have been available under the abolished writs to ensure there is not a diminution of access to judicial review. The procedures under the new Act would be substantially simpler than the current procedures available to an applicant.

This avenue for reform provides for the codification of the grounds of review alongside a general ground of review to ensure that legal development is not stifled. The grounds in the Act would be virtually identical to the grounds in the Commonwealth Act to ensure that the case law that has developed in the Federal jurisdiction will be available to aid in the application of the law in Western Australia.

Acknowledgements

The Commission gratefully acknowledges the dedicated work of its former Chairman, Wayne Martin QC, and of Chris Dent in the preparation of this Report and the Commission's earlier Discussion Paper on the topic.

CHAPTER 1

Introduction

The Reference

The Law Reform Commission of Western Australia (“the Commission”) has again been asked to make recommendations with respect to the reform of the law relating to the judicial review of administrative decisions. The relevant sections of the terms of reference are set out in the Executive Summary and need not be restated here. It is sufficient to note that the terms of reference are broad. The terms cover the substantive grounds of review, the practices and procedures pertaining to judicial review, and the law relating to the provision of statements of reasons for administrative decisions.

The Commission received a similar reference more than 20 years ago and made recommendations on the reform of the procedural aspects of judicial review, and the provision of statements of reasons.¹ It is timely to review the field generally again, particularly having regard to the substantial development of this area of law in the Commonwealth sphere under the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the “ADJR Act”). It is also timely given the Western Australian Government’s announced intention to reform the law relating to the review of administrative decisions on their merits by the creation of the State Administrative Tribunal (the “SAT”).

What is “Judicial Review of Administrative Decisions”?

An academic treatise upon the precise ambit and scope of what is meant by the expression “the judicial review of administrative decisions” is beyond the scope of this Report. However, because it is an expression that is much better known to lawyers than to others, it is appropriate to briefly identify what the expression means, and therefore what this Report is about.

What is an Administrative Decision?

The phrase “administrative decision” has two components. “Administrative” usually refers to the maker of the decision. Therefore, “administrative decision” usually means a decision made by a public official. The class of decision makers that are covered by this area of law is one of the elements that needs to be addressed in the context of reform, and will, therefore, be discussed in more detail later.

When we use the word “decision” in this Report, we are not referring only to “decisions” in the manner that term is ordinarily understood. Often the term is used to mean a final determination or adjudication. However, in this area of law, we can include within that expression all acts and omissions or conduct engaged in prior to the making of such a determination. Again, the extent of what is classed as a “decision” needs to be reformed and will, therefore, be discussed later.

¹ Law Reform Commission of Western Australia, *Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons*, Project No 26 (II) (1986).

What is Judicial Review?

The judicial review of administrative decisions is a compendious description of the process whereby a court determines whether or not decisions having an administrative character comply with the requirements of the law. The process includes the remedies the court should provide in consequence of any non-compliance with the law.

The law relating to “judicial review” includes both the “substantive” law and the “procedural” law. The substantive law governs the acts or omissions in question and the grounds upon which the court can review those acts or omissions to determine whether or not they comply with the law. The procedural law includes the practices and procedures of the court in undertaking such a review, together with the remedies available to a court in the event the law has been contravened.

It is important to emphasise that the judicial review of administrative decisions is concerned only with the legality of those decisions. Judicial review is not concerned with the general merits of the decision under review, in the sense of whether the decision was the correct or preferable decision. The court will only be concerned with factual issues to the extent that a breach of the law is said to have occurred in the determination of the facts. Further, in conducting a judicial review, the court will only consider policy to the extent that it is said that the application of any particular policy contravened the law. If the decision maker complied with the law in arriving at his or her conclusion, the court has no power to intervene.

What is Merits Review?

Judicial review is, therefore, very different to the review of administrative decisions on their merits. “Merits review” will not ordinarily be concerned with the legality of the decision under review because, unlike a court, the jurisdiction of the merits reviewer to intervene is not dependent upon the establishment of legal error. The merits reviewer will be concerned with the identification of the legal principles governing the decision under review. The primary focus of merits review, however, will be other factors relating to the decision under consideration. These other factors include the identification of relevant facts relating to the decision, the elucidation of any policy or policies appropriately applied in the administration of the power being exercised in the making of the decision and the application of that policy or policies to the facts as determined.

Distinction in Outcome between Merits Review and Judicial Review

The contrast in the powers available to a merits reviewer as compared to a judicial reviewer reflects the fundamental difference in the functions being undertaken by those reviewers.² After completing a review on the merits, it is usual for the merits reviewer to have power to substitute his or her decision for that of the original decision maker. By contrast, if a court arrives at the conclusion that an administrative decision has been made in contravention of the law, its powers will generally be limited to the making of declarations or orders giving effect to that conclusion and setting aside the decision under review. The usual result of such a conclusion is that the decision has to be made again by the decision maker, but this time according to the law as

² For an in depth discussion of the difference between the powers of merits and judicial reviewers see Roger Douglas and Melinda Jones, *Administrative Law* (4th ed, 2002).

declared by the court. In this way the court confines itself to the determination of whether or not the law has been contravened and does not usurp the administrative powers and functions of the decision maker.

Review of Decisions in Western Australia currently

In Western Australia, merits review is currently undertaken by a diverse range of bodies, such as the Town Planning Appeals Tribunal and the Land Valuation Tribunal. In addition, the power to review on the merits a diverse range of administrative decisions is conferred upon the courts – generally the Local Court, the Court of Petty Sessions, the District Court and, very occasionally, the Supreme Court. This merits review function has in the past been reposed in the courts largely because of the lack of a general merits review tribunal in Western Australia that is capable of conducting merits review in a broad range of subject areas. That omission is to be remedied by the creation of the SAT, consistent with earlier recommendations of this Commission.³ The recently published review of the Taskforce on the establishment of that Tribunal provides a very helpful analysis of the current avenues for merits review.⁴

In Western Australia, the judicial review of administrative decisions is undertaken in the Supreme Court of Western Australia. Parties seeking judicial review generally invoke one or other of two separate areas of jurisdiction of the Court. The first is the jurisdiction of the Court to grant prerogative remedies. Prerogative remedies involve the Court's exercise of powers delegated to it by the Sovereign in relation to the direction of the actions of administrative officials, and the remedies granted by the Court are granted in the form of writs issued in the name of the Sovereign.⁵ The other jurisdiction commonly invoked is that of the Court relating to the grant of the remedies of injunction and declaration.

It should be noted that a commentator upon the earlier Discussion Paper drew the Commission's attention to the decision in *Bond v Larobit*.⁶ In his judgment in this case Justice Owen argued that declaratory relief is not an equitable remedy. The Commission accepts this argument. However, given the substantive similarities between declaration and the equitable remedies the Commission, for the purposes of this Report, will bracket them together under the term "equitable remedies".

The substantive rules of law governing the grant of the prerogative remedies differ markedly from the rules governing the grant of the equitable remedies. The procedures of the Court in its prerogative jurisdiction are fundamentally different to its procedures when exercising equitable jurisdiction. Those differences derive from the historical development of the two areas of

3 *Review of the Civil and Criminal Justice System in Western Australia*, Project No 92 (1999) Recommendations 371–72. These recommendations referred to the body as the Western Australian Civil and Administrative Tribunal.

4 Western Australian Civil and Administrative Review Tribunal Taskforce, *Report on the Establishment of the State Administrative Tribunal* (2002) (hereafter "the SAT Report").

5 The grant of remedies by, and delegated powers from, the Sovereign goes back to the sixteenth and seventeenth centuries. For a general discussion, see J. H. Baker, *An Introduction to English Legal History* (3rd ed, 1990) 164–173.

6 (1992) 6 WAR 489.

jurisdiction rather than from substantive reasons of policy relating to judicial review. The differences themselves provide one justification for the reform of the law relating to judicial review. This proposition will be developed further in the next chapter.

Prerogative and Equitable Remedies

The prerogative remedies all bear Latin titles, which is a reflection of their antiquity.⁷ The three most commonly utilised are *mandamus*, *prohibition* and *certiorari*. The remedy of *mandamus* is, very generally speaking, available to compel the performance of a public duty. The remedies of *prohibition* and *certiorari* are available to ensure that decision makers exercise their powers according to law. The distinction between *prohibition* and *certiorari* is that the former is available to prevent such a decision maker from exceeding the law before he or she has done so. However, *certiorari* is available to correct a contravention of the law after it has taken place.

The remedy of *habeas corpus* is seldom utilised but nevertheless profoundly significant to the liberty of the individual, because it is available to determine the legality of the detention of any person. When the remedy is invoked, the person in detention must be brought before the court and the lawfulness of that detention justified to the satisfaction of the court. It has a long constitutional history and its availability reflects the importance attached to the liberty of the individual in our society.

The last prerogative remedy is that of *quo warranto*. This remedy is available to prevent somebody from wrongly usurping or occupying a public office. It is seldom used and of limited practical significance.

The two other non-statutory remedies available within the sphere of judicial review are the injunction and the declaration. The remedy of injunction is available to restrain a person from committing an unlawful act. It may be granted either on an interim basis, to protect rights and interests pending a final judicial determination of the issues, or on a permanent basis, after the determination of those issues.

The remedy of declaration enables the court to declare that a decision, act or omission was unlawful and of no legal force or effect. Although there are no judicial powers of enforcement attaching to such a declaration, the making of the declaration in itself will preclude a decision maker from lawfully enforcing or otherwise taking any action in reliance upon a decision which the court has declared to be unlawful. Where the decision maker is a public official, it can be confidently expected that he or she will comply with the law as declared by the court, without the need for specific powers of enforcement.

⁷ It is not necessary or desirable to provide a lengthy dissertation on the scope and availability of the prerogative and equitable remedies in this Report. A brief description of the remedies is provided to assist the reader without legal training. For more detailed information on the remedies standard administrative law texts such as Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) will be useful.

Structure of this Report

The next chapter in this Report will explain the need for reform of the law relating to judicial review. It will do so briefly as the Commission considers the need for reform to be relatively self-evident. Chapter Three will then provide a brief overview of options for reform that have been considered and/or implemented by the Commonwealth of Australia, the other states and territories of Australia, New Zealand, England, Canada and South Africa. That chapter is not, however, intended to be exhaustive or comprehensive. The purpose of this review of other jurisdictions is to identify the principal considerations which have been evaluated by the Commission in arriving at its recommendations in relation to reform in Western Australia. Those recommendations are detailed in Chapter Four, the final chapter of this Report.

CHAPTER 2

The Need for Reform

It is the Commission's view that the need for reform is relatively self-evident. A brief description of the current law and procedure governing judicial review of administrative decisions in Western Australia are included here to demonstrate that need. The law and procedure governing judicial review are essentially non-statutory, and are derived from the principles of common law and equity which the colony of Western Australia inherited from England. That portion of the law relating to judicial review has been subjected to robust academic and judicial criticism for a very long time. Recognition of its defects has led to reform in the United Kingdom, New Zealand, most Canadian jurisdictions, and every Australian jurisdiction other than Western Australia and the Northern Territory.

The body of non-statutory law which currently governs judicial review in Western Australia is fraught with technicality and is unnecessarily complicated. The procedural difficulties with which it is beset betray its origins in antiquity. One area of complication arises from the fundamental differences between the procedures and principles that govern the grant of the prerogative remedies and those that govern the grant of the equitable remedies. These differences exist only by reason of the historical development of the non-statutory law of England many centuries ago and, therefore, have no relevance to contemporary Western Australian conditions.

Prerogative Remedies

The need for reform of the prerogative remedies is succinctly summarised by the following passage which describes the condition of the prerogative remedies prior to procedural reform in the United Kingdom. As such, it accurately describes the current condition of the prerogative remedies under Western Australian law:

The aggrieved citizen who wanted to have set aside an unfavourable decision rendered against him by a public authority could apply for a prerogative order of *certiorari*. If he wanted the authority to perform a duty he could apply for the prerogative order of *mandamus*; and if he wanted to prevent it from exceeding its jurisdiction the remedy of *prohibition* (another prerogative order) was available. The applicant, however, could not get sight of the relevant files of the authority nor could he cross-examine its witnesses. The general rule was that discovery of documents and interrogatories were not available and that evidence was confined to affidavit material. Different time limits applied in relation to each remedy. If the applicant applied for the wrong remedy, the whole proceedings would fail and he would have to start again (if still in time). The Court had no power to award the right remedy.⁸

8 Committee of the JUSTICE – All Souls Review of Administrative Law in the United Kingdom, *Administrative Justice – Some Necessary Reforms*, Report (1988) para 6.3.

These various defects prompted the eminent American scholar Professor KC Davis to observe:

Either Parliament or the Law Lords should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinkers to prevent them from rising again.⁹

Inconsistency between Prerogative and Other Remedies

One of the strongest arguments for reform is to be found in the fundamental inconsistencies between the two bodies of law that govern judicial review in Western Australia – that is to say, the prerogative remedies and the remedies of declaration and injunction. The inconsistencies pervade almost every aspect of the proceedings, from commencement to completion of the appellate process. These inconsistencies will be discussed in turn.

Standing

The rules governing the standing required to commence proceedings seeking prerogative relief differ from those governing the standing required to seek equitable relief and arguably differ as between the different prerogative remedies.¹⁰

Time Limits

The *Rules of the Supreme Court 1971* (WA) specify different time limits for the commencement of proceedings for different forms of prerogative relief, and they are generally relatively short.¹¹ By contrast, there is no express or specific time limit for the commencement of proceedings for equitable relief. The *Limitation Act 1935* (WA) also does not specify an express time within which proceedings must be brought.

There are, however, two discretionary limits. First, there are general equitable principles which give the Court a discretion to refuse relief in the event of undue delay. Second, the Court will generally apply a time limit to a claim for equitable relief analogous to that which would govern an application for relief at common law so that, in the case of claims for declaration and injunction, the particular period may vary depending upon the most analogous common law remedy. The uncertainty governing the time within which proceedings must be commenced is obviously unsatisfactory.

Application Procedures

Applications for prerogative relief must be commenced by an Originating Motion for the grant of an Order Nisi to Review, which is returnable before a single judge of the Supreme Court. The judge will usually hear and determine the application without hearing from the party against whom the remedy is sought. This is intended to be a filter on unmeritorious applications, but its capacity to achieve that objective is severely limited by the fact that there is a right of appeal against the refusal of an Order Nisi. Such an appeal will be heard by the Full Court, which is essentially the same

9 Quoted in D. Mullan, 'Reform of Judicial Review of Administrative Action – The Ontario Way' (1974) 12 *Osgoode Hall Law Journal*, 125, 134.

10 For a discussion of the different tests of standing, see the Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) paras 89–128.

11 For example, *Rules of the Supreme Court 1971* (WA) Order 56 rule 11 provides for a time limit of six months for the writ of *certiorari* whereas Order 56 rule 27 states that an application for a writ of *mandamus* must be made within two months.

court to which the Order Nisi would be returned if granted. By contrast, applications for equitable relief are commenced by writ and proceed without need for the grant of leave by the Court.¹²

Applications for prerogative relief proceed without pleadings. However, an applicant for equitable relief must plead a Statement of Claim, and a defendant opposing such relief must file a Defence. The procedures of the Court permit parties to seek particulars of those pleadings.

Interlocutory Procedures

Generally speaking, an applicant for prerogative relief is not entitled to discovery nor is such an applicant permitted to issue interrogatories which must be answered by the party against whom relief is sought. By contrast an applicant for equitable relief will generally have full access to the ordinary interlocutory procedures of discovery and interrogatories.

The evidence adduced in an application for prerogative relief will generally be by way of affidavit, and will not ordinarily be the subject of cross examination. By contrast, the evidence adduced in support of an application for equitable relief will generally take the form of a witness statement verified by the witness in the witness box, who is then subject to cross-examination on his or her evidence.

Determination of Application

As already noted, an application for prerogative relief is heard in the first instance by a single judge, but, if leave to proceed is granted, it will be heard and determined by the Full Court, consisting (usually) of three judges. By contrast, claims for equitable relief are heard and determined by a single judge of the Court.

Appeal Procedures

Because claims for prerogative relief are heard and determined by the Full Court, the only avenue of appeal is by way of application for Special Leave to Appeal to the High Court. By contrast, either party to a claim for equitable relief can appeal as of right from the decision of the single judge who decided that claim. An appeal can be made to the Full Court, which will ordinarily comprise three judges.

“The Record”

The differences between the two bodies of law are not entirely procedural. For example, applicants for the grant of the prerogative remedy of *certiorari* must establish that the error of law upon which he or she relies can be shown from the “face of the record”. However, the High Court has ruled that the “record” for this purpose is essentially limited to the document recording the decision itself. Therefore, other materials which record the processes or activities of the decision maker cannot provide the basis for application for the grant of *certiorari*, even if the other materials demonstrate an error of law.¹³ Similarly, in *Ainsworth v Criminal Justice Commission*¹⁴ the High Court held that an applicant for *certiorari* who complained that his reputation had

12 Order 56 of the *Rules of the Supreme Court 1971* (WA) covers applications for prerogative relief whereas equitable relief is an aspect of the general procedures and covered under provisions such as Order 5 (Writs of Summons) and Order 58 (Proceedings by Originating Summons).

13 *Craig v South Australia* (1995) 184 CLR 163.

14 (1992) 175 CLR 564.

been damaged by the report of a commission of inquiry could not be granted the remedy. The Court ruled that ‘there being no legal effect or consequence attaching to the report, *certiorari* does not lie’,¹⁵ but nevertheless the applicant did have sufficient standing to obtain the grant of a declaration.

Summary of Need for Reform

The two sets of remedies govern precisely the same area and there is no rational or logical basis for the fundamental differences in both procedure and substantive law which divide the two jurisdictions. The undesirability of the existence of parallel, but inconsistent, bodies of law governing the same area was the subject of the following observation from the noted English commentator, Professor SA de Smith, as long ago as 1957:

Until the legislature intervenes, therefore, we shall continue to have two sets of remedies against the usurpation or abuse of power by administrative tribunals – remedies which overlap but do not coincide, which must be sought in wholly distinct forms of proceedings, which are overlaid with technicalities and fine distinctions, but which could conjointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action.¹⁶

Based on the reasons contained in this chapter, the Commission *recommends* that the law relating to the judicial review of administrative action in Western Australia be reformed. Our recommendation is supported by the submissions received in response to the Discussion Paper. None of the commentators argued against the idea of reform in this area and most were supportive of the options for reform advanced in the Discussion Paper. The need for reform of the prerogative and equitable remedies has been recognised by the implementation of reforms of various kinds in the vast majority of those jurisdictions, which inherited the remedies from England, and in England itself. The next chapter will examine some of the reforms which have been proposed and/or implemented in those jurisdictions.

Statements of Reasons

The Commission was also asked in the terms of reference to examine the law in relation to provision of reasons for administrative decisions. Currently in Western Australia, there is no common law duty on an administrative decision maker to give reasons when she or he makes a decision.¹⁷ In addition, there is no general statutory obligation for the decision maker to provide statements of reasons, although the Report of the Taskforce on the establishment of the SAT has recommended the creation of a right to a statement of reasons for all decisions which might be reviewed by that Tribunal.¹⁸ Our examination of the reforms in other jurisdictions in Chapter Three will include an assessment of reforms with respect to the provision of reasons.

15 (1992) 175 CLR 564, 581 (per Mason CJ, Dawson, Toohey and Gaudron JJ).

16 Report of the Committee on Administrative Tribunals and Enquiries (UK) (1957, CMND 218) Minutes of Evidence, Appendix I, 10.

17 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

18 SAT Report, above n 4, 140.

CHAPTER 3

Reforms and Proposed Reforms Elsewhere

In this chapter we look at reforms to judicial review that have been proposed or implemented in other comparable jurisdictions within Australia and elsewhere. This review is not intended to provide a comprehensive or exhaustive guide to the law of judicial review around the world. The purpose of the review is to identify particular aspects of reforms that have been proposed or implemented in other places and that have assisted the Commission in formulating its recommendations for reform in Western Australia.

Australian Federal Jurisdiction

The reforms in the federal jurisdiction have been the most thorough in Australia. The Commonwealth Parliament enacted the ADJR Act as part of a package of legislative reforms relating to administrative law. The package also included the *Administrative Appeals Tribunal Act 1975* (Cth), which created a general merits review tribunal, the *Ombudsman Act 1976* (Cth), which created the office of Ombudsman to investigate defective administration, and the *Freedom of Information Act 1982* (Cth), which created a general right of access to documents held by Commonwealth agencies. Despite the breadth of these reforms, there have since been proposals for further reform in this area of law. This section will focus on the provisions in the ADJR Act and the reforms proposed by the Administrative Review Council ("the ARC").

Administrative Decisions (Judicial Review) Act

The Commission does not feel it is necessary in this Report to provide a treatise upon the particular terms, operation and effect of the ADJR Act. Readers interested in that subject will find ample information upon it in any of the standard texts or loose-leaf services relating to Australian administrative law.¹⁹ Reference will, however, be made to particular provisions of the Act insofar as they bear upon particular options for reform which are considered in the next chapter.

For present purposes it is sufficient to note that the ADJR Act conferred jurisdiction upon the Federal Court to review decisions of an administrative character made under Commonwealth legislation. The grounds upon which review by the Federal Court is to be conducted are specified by the Act.²⁰ The Act also specifies the powers of the Court when conducting such review.²¹ The procedure to be adopted by the Court in conducting such

19 For example, Aronson and Dyer, above n 7 and Law Book Company, *Laws of Australia*, Vol 2 Administrative Law.

20 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 6.

21 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16.

review is a single uniform procedure, initiated by the lodgement of an application for review.²²

The Act also confers upon persons whose interests are affected by decisions to which the Act applies a general right to a statement of reasons for such decisions.²³

The jurisdiction of the Federal Court under the ADJR Act complements the jurisdiction conferred upon it pursuant to section 39B of the *Judiciary Act 1903* (Cth). That provision gives the Court concurrent jurisdiction to that which is entrenched in the High Court pursuant to section 75 of the Commonwealth Constitution. In other words, the Federal Court has the jurisdiction to entertain proceedings by way of application for the grant of *mandamus*, *prohibition*, or an injunction against an officer of the Commonwealth. The jurisdiction of the Federal Court is invoked with the use of a single, simplified form of proceeding – that is to say, an application.

The ADJR Act has been in operation for over 20 years. There have been a number of academic commentaries upon the effect of the Act,²⁴ and again, it is beyond the scope of this Report to attempt to provide a comprehensive review of the Act in operation. For present purposes, it is sufficient to note that litigation under the Act has become the predominant source of jurisprudence relating to judicial review in Australia. The exercise of jurisdiction by the Federal Court pursuant to the Act, and the occasional review of the Federal Court's decisions by the High Court, have given rise to a developed and coherent body of law which complements and elucidates the statutory provisions themselves.

Administrative Review Council

The operation of the Act has been reviewed from time to time by the ARC, which has issued three reports in relation to the Act. In the first of these reports, the ARC considered and rejected a proposal that would require an applicant under the Act to obtain the leave of the Court to proceed. The ARC did recommend that the Act be amended to confer a general discretion upon the Court to refuse to hear an application for review.²⁵ A Bill going somewhat further than that recommendation was defeated in the Senate in 1988.²⁶

22 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 11.

23 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13. The Act, however, contains a mechanism for the exclusion of particular classes of decisions from either the Act generally or the obligation to provide reasons, by way of specification in Schedules to the Act: s 13(11).

24 See for example, Peter Bayne, 'The Court, the Parliament and the Government – Reflections on the Scope of Judicial Review' (1991) 20 *Federal Law Review* 1 and John McMillan, 'Developments under the AD(JR) Act: The Grounds of Review' (1991) 20 *Federal Law Review* 50.

25 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act – Stage One*, Report No 26 (1986) Recommendation 1. It was further recommended that this discretion be exercisable at any stage of the proceedings and should be exercised at the outset of proceedings wherever appropriate, *ibid* Recommendation 1(5).

26 The Administrative Decisions (Judicial Review) Amendment Bill 1987.

In its Report No 32,²⁷ the ARC made a number of recommendations for the amendment of the Act, including:

- the extension of the operation of the Act to decisions of an administrative character not made under legislation but which relate to the use of funds authorised or appropriated by the Parliament;²⁸
- the extension of the Act to decisions of the Governor-General;²⁹
- a repetition of its earlier recommendation to the effect that the Court have a general discretion to refuse relief;³⁰
- that the Act should be amended to specify that conduct is reviewable under the Act whether it is by the person who is ultimately to make the decision or some other person – so that reports and recommendations are included within the scope of the Act;³¹ and
- that the Act ought be amended to exclude from its operation decisions or conduct that are not justiciable.³²

In its Report No 33, the ARC reviewed the operation of those provisions of the Act relating to the entitlement to reasons.³³ The ARC found that the number of requests for such statements was relatively low, and much lower than opponents of the creation of the obligation had forecast.³⁴ The ARC recommended the repeal of those portions of the Act which enabled classes of decision to be excluded from the obligation to state reasons.³⁵

Australian State and Territory Jurisdictions

A number of the states and territories have either enacted reforms since the ADJR Act, or reform bodies within the states and territories have recommended reforms to the administrative law in that jurisdiction. These reforms and recommendations will be examined in this section.

Queensland

Queensland is unique in Australia in that a major review of this area of law has been conducted from which legislative reforms flowed. Both the review and the reforms will be looked at here.

27 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989).

28 Ibid Recommendation 1.

29 Ibid Recommendation 2.

30 Ibid Recommendation 15.

31 Ibid Recommendation 17.

32 Ibid Recommendation 16. In addition, there were various recommendations with respect to the particular classes of decision that ought be included or excluded from the operation of the Act: Recommendations 3–12.

33 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statement of Reasons for Decisions*, Report No 33 (1991).

34 Ibid paras 156–64. Statistics available on the topic suggest that this observation remains true: see for example, Administrative Review Council, *Annual Report No 22 (1997–1998)* Appendix 1. This is the last Annual Report of the ARC that included such statistics.

35 Administrative Review Council, Report No 33, above n 33, Recommendations 11–12. The ARC made further recommendations with respect to the detailed provisions of the Act relating to statements of reasons, for example Recommendations 1–10, 13–26.

Electoral and Administrative Review Commission

In 1990 the Electoral and Administrative Review Commission of Queensland ("the EARC") published a report dealing with the review of the law relating to judicial review in Queensland.³⁶ Speaking very generally, the thrust of the report was to recommend the enactment in Queensland of an adaptation of the ADJR Act, but with the retention of the common law and equitable forms of relief with a simplified procedure. The EARC recommended the adoption of the grounds of review specified in the ADJR Act,³⁷ together with the test of standing specified in the ADJR Act.³⁸ The EARC also recommended the extension of the Act to include decisions of the Governor,³⁹ and the adoption of a modified rule relating to the costs of proceedings under the proposed Act.⁴⁰

The EARC Report also included a recommendation for the creation of an entitlement to reasons, in similar terms to that created by the ADJR Act.⁴¹

Judicial Review Act

The recommendations of the Commission were essentially implemented by the enactment of the *Judicial Review Act 1991* (Qld) (the "JR Act"). That Act is based upon the ADJR Act. In addition, as recommended by EARC, the operation of the Act extends to decisions of an administrative character made by officers or employees of the state or a local government authority under a non-statutory scheme or programme involving public funds.⁴² The Act also covers decisions of the Governor.⁴³ The Act picks up the recommendation of the ARC, extending the operation of the Act to reports or recommendations made prior to the making of a decision, if such reports or recommendations are made pursuant to an enactment.⁴⁴

Part 5 of the Act expressly preserves the jurisdiction of the Court to grant relief in the nature of the prerogative remedies of *mandamus*, *prohibition* or *certiorari*. Such relief is not granted in the form of the prerogative writs, but by way of relief or a remedy which is in the nature of, or to the same effect as, the prerogative remedy.⁴⁵ The Act also expressly preserves the jurisdiction of the Court with respect to equitable remedies, and provides that the remedy of injunction is to be granted in lieu of the remedy of *quo*

36 Electoral and Administrative Review Commission, *Report on Judicial Review of Administrative Decisions and Actions* (1990). This report is a most informative and helpful review of the various issues which are also pertinent to the review of the law of Western Australia. We would commend the report to any reader who wishes to undertake a more detailed analysis of the issues.

37 Ibid para 5.69.

38 Ibid para 8.35.

39 Ibid para 6.41.

40 Ibid para 10.43.

41 Ibid para 11.65.

42 *Judicial Review Act 1991* (Qld) s 4(b). More specifically, the Act applies to the decisions made under a scheme or programme involving funds that are provided out of amounts appropriated by the Parliament or from a tax, charge, fee or levy authorised by or under an enactment.

43 The Act does not include specific provisions for the inclusion of decisions made by the Governor. However, s 32(2) makes provision for requests for reasons for decisions of the Governor in Council and s 53 details the role of the relevant Minister with respect to applications for the judicial review of decisions by the Governor in Council.

44 *Judicial Review Act 1991* (Qld) s 6.

45 *Judicial Review Act 1991* (Qld) s 41(2).

warranto, which is abolished.⁴⁶ The Act also embraces the recommendation of the ARC relating to the conferral of a general discretion to dismiss proceedings upon the Court.⁴⁷

In contrast to the ADJR Act, the Queensland Act makes special provision for the costs of the parties to proceedings under the Act. The provision provides a power to order that a party bear only their own costs of the proceedings, regardless of the outcome.⁴⁸ In addition, in proceedings to compel the provision of a statement of reasons, an applicant shall only be ordered to pay the respondent's costs if the application failed and did not disclose a reasonable basis for making the application.⁴⁹

The Commission has only been able to obtain a limited amount of material relating to the operation of the JR Act, although we have reviewed a large number of cases decided under the Act. That review suggests that the Act has not given rise to any particular difficulties or problems, and falls well short of suggesting that the obligation to provide reasons has imposed a significant or intolerable burden upon administrative decision makers.

Victoria

In Victoria, legislative reform was instituted prior to the ADJR Act coming into operation. More recently, a review of possible further reforms was conducted.

Administrative Law Act

The *Administrative Law Act 1978* (Vic) makes specific provision for the judicial review of decisions of a "Tribunal" as defined by that Act.⁵⁰ The Act does not alter the substantive law relating to that judicial review, but essentially provides a simplified and uniform procedure, which is by way of application to the Supreme Court.⁵¹ The Act does not apply to certain decisions of the Victorian Civil and Administrative Tribunal, unless the Court is satisfied that that Tribunal had no jurisdiction or denied natural justice to a party to the proceedings before the Tribunal.⁵²

46 *Judicial Review Act 1991* (Qld) s 42.

47 *Judicial Review Act 1991* (Qld) s 48.

48 *Judicial Review Act 1991* (Qld) s 49(1)(e).

49 *Judicial Review Act 1991* (Qld) s 50(b).

50 *Administrative Law Act 1978* (Vic) s 3.

51 *Administrative Law Act 1978* (Vic) s 4.

52 *Administrative Law Act 1978* (Vic) s 4(3).

Victorian Attorney- General's Law Reform Advisory Council

In 1999 the Victorian Attorney-General's Law Reform Advisory Council ("VAGLRAC") published a report relating to judicial review in Victoria.⁵³ The report identifies four different possible models for reform, and a number of possible variations on those models. The preferred model was one which involved the abolition of the prerogative remedies and the conduct of judicial review by way of a statutory remedy based on the remedy for declaration.⁵⁴

In relation to standing, the report recommended that the test be expressed in terms of whether the applicant has a sufficient interest in the matter to which the applicant relates, or whether the application is justifiable in the public interest.⁵⁵ In relation to the time for commencement of proceedings, the report recommended that proceedings not be barred by the effluxion of time.⁵⁶ The court should, however, be given a power to decline to entertain an application if there has been undue delay and the court considers that the grant of relief would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person, or would be detrimental to good administration.⁵⁷ The report recommended the term "undue delay" be defined as a period of 60 days after receipt of a statement of reasons.⁵⁸

The report recommended the specification of statutory grounds for review, modelled on the ADJR Act.⁵⁹ It also recommended that a "common law clause" be included.⁶⁰ This clause would cover any ground of review upon which a court might make a declaration otherwise than under the Act, so as to embrace any changes in the general law which occur independently of the Act.

The report did recommend some specific variations to the grounds of review specified in the ADJR Act. The suggested variations included that there be no equivalent to the ADJR Act ground relating to challenge on the ground of jurisdictional error⁶¹ and that the grounds should not distinguish between jurisdictional and non-jurisdictional errors of fact.⁶² The report also recommended that an express proviso to the effect that error of law need not appear on the record of the decision be contained in the proposed Act.⁶³ A further recommendation was for the inclusion of a ground permitting the court to review a material finding of fact on the basis that the person

53 Peter Bayne, *Judicial Review in Victoria*, Victorian Attorney-General's Advisory Council Expert Report No 5 (1999) (hereafter the "VAGLRAC Report"). As with the review undertaken by the Queensland EARC, the VAGLRAC Report is a very helpful review of the issues which arise in relation to the reform of the law pertaining to judicial review in Western Australia. It too, is commended to any reader who wishes to undertake more detailed research on the subject.

54 Ibid Recommendation 1.

55 Ibid Recommendation 6.

56 Ibid Recommendation 8(i).

57 Ibid Recommendation 8(ii).

58 Ibid Recommendation 8(iii).

59 Ibid Recommendation 11.

60 Ibid Recommendation 12.

61 Ibid Recommendation 15.

62 Ibid Recommendation 14.

63 Ibid Recommendation 19.

exercising the power failed to have regard to evidence or other material to which a person exercising the power or function in a reasonable manner would have had regard.⁶⁴

The report made a number of other recommendations. These included the adoption of provisions equivalent to those in the Queensland legislation relating to the court's general discretion to refuse relief and in relation to costs.⁶⁵ A provision was also proposed to the effect that if the only ground established is a technical breach and the court finds that no miscarriage of justice has occurred then the court may refuse relief and validate the decision or action that was subject to review.⁶⁶ It was also recommended that the proposed legislation contain a provision repealing any state legislation which would limit the operation of the proposed Act, other than legislation specified in a schedule to the Act.⁶⁷

In addition, the report included a recommendation for the creation of a general entitlement to reasons.⁶⁸

Australian Capital Territory

In 1989 the legislature of the ACT enacted the *Administrative Decisions (Judicial Review) Act 1989* (ACT). It is very similar to the Commonwealth ADJR Act. The variations and modifications from the Commonwealth Act are essentially limited to those necessitated by the different areas of decision making that are covered by the ACT legislation.

New South Wales

Reform in New South Wales has been limited to procedural reform. Under Rule 55 of the *Supreme Court Rules 1970* (NSW), proceedings for relief by way of prerogative remedy are to be commenced by summons, so that many of the procedural anomalies that pertain to those remedies are thereby eliminated. The *Administrative Decisions Tribunal Act 1997* (NSW) does, however, provide a general entitlement to reasons for decisions that are reviewable under that Act.⁶⁹

South Australia

Reform in South Australia is similar to that which has occurred in New South Wales. That is, there has been procedural reform by way of simplification of procedures in the Rules of Court.⁷⁰ However, there is no general entitlement to reasons for decisions made pursuant to South Australian statutes.

Tasmania

Recently legislation has been enacted in Tasmania to reform the law relating to the judicial review of administrative actions. The *Judicial Review Act 2000* (Tas) is substantially based on the Commonwealth ADJR Act. Two significant differences are that the Tasmanian Act applies to a decision of the

64 Ibid Recommendation 17.

65 Ibid Recommendations 24, 26.

66 Ibid Recommendation 25.

67 Ibid Recommendation 9.

68 Ibid Recommendation 27.

69 Section 49(1) of the *Administrative Decisions Tribunal Act 1997* (NSW) provides a right to reasons only for decisions reviewable under the Act.

70 Rule 98 of the South Australian *Supreme Court Rules* includes the procedural reforms.

Governor⁷¹ and the prerogative writs of *mandamus*, *prohibition*, *certiorari* and *quo warranto* are expressly abolished.⁷² Other aspects, such as the grounds for review, are substantially similar to the ADJR Act.

Northern Territory

The Northern Territory Law Reform Committee released its *Report on Appeals from Administrative Decisions* in 1991.⁷³ That report was concerned with merits review rather than judicial review, but it did recommend a general entitlement to reasons, irrespective of whether there was a right to seek merits review. The specific recommendations relating to that right to reasons were very similar to the rights embodied in the ADJR Act.⁷⁴

Western Australia

In 1986 this Commission recommended procedural reform to the prerogative remedies.⁷⁵ Essentially the recommendations were for the creation of a simplified and flexible procedure which resulted in a hearing before a single judge of the Supreme Court. It was recommended that all such proceedings should be commenced within six months from the date when the grounds for action arose, but with a power in the Court to extend time in an appropriate case.⁷⁶ The Commission also recommended the conferral of a general discretion to dismiss proceedings upon the Court.⁷⁷ The Commission recommended against any special costs rule.⁷⁸

Significantly, the Commission also recommended the statutory creation of a general entitlement to reasons, modelled very much upon the entitlement created by the ADJR Act.⁷⁹

International Jurisdictions

A number of other countries have also undertaken reforms, or have had reforms recommended by reform bodies, in the area of judicial review of administrative decisions. Again, this section will provide a brief overview of the reforms either implemented or recommended.

England

In England there have been a number of reviews of judicial review procedure and a certain amount of legislative procedural reform.

Instituted Procedural Reform

There is no general entitlement to reasons for administrative decisions in England, although under the *Tribunal and Inquiries Act 1958* (UK) some public bodies are obliged to provide reasons.⁸⁰ The reform of judicial review

71 The *Judicial Review Act 2000* (Tas) s 9 states that the Act binds the Crown and s 41 requires that the respondent to an application for an order of review that relates to a decision of the Governor-in-Council, be the Minister administering the enactment under which the decision was made.

72 *Judicial Review Act 2000* (Tas) s 43. The writ of *scire facias* is also abolished.

73 Northern Territory Law Reform Committee, *Report on Appeals from Administrative Decisions*, Report No 14 (1991).

74 *Ibid* Recommendations 16–19.

75 Law Reform Commission of Western Australia, Project No 26 (II), above n 1, Recommendations 1–4.

76 *Ibid* Recommendations 6, 8.

77 *Ibid* Recommendation 7.

78 *Ibid* Recommendation 13.

79 *Ibid* Recommendation 14.

80 For example, under s 12 of the *Tribunals and Inquiries Act 1958* (UK), tribunals are required to state the reasons for their decisions.

in England has essentially been procedural, having been undertaken in the first instance by amendments to the *Rules of the Supreme Court 1965* (UK), which were later ratified by the *Supreme Court Act 1981* (UK). Under that Act, applications for prerogative relief are to be made in accordance with the Rules by a procedure to be known as an application for judicial review.⁸¹ The Act requires the grant of leave for such an application to be made.⁸² The Court is also empowered to refuse leave or relief if the Court considers there has been undue delay in making the application.⁸³ The particular procedure governing applications for review is specified in Order 53 of the *Rules of the Supreme Court 1965* (UK).

Reviews by the Law Commission

The English position appears to be based largely upon the recommendations made by the Law Commission in its 1976 report *Remedies in Administrative Law*. The Law Commission issued a further report in 1994 entitled *Administrative Law: Judicial Review and Statutory Appeals*. Certain recommendations were made for alterations to procedure.

It was, for example, recommended that there should continue to be a filter on applications by some form of leave mechanism.⁸⁴ It was also recommended that standing to bring an application be defined by reference to the decision under review having an adverse effect upon the applicant, or alternatively the Court considering it to be in the public interest for the application to be made.⁸⁵ It was further recommended that there be a time limit of three months for the commencement of applications for judicial review and that, even within that period, there be a discretion to refuse relief if the application was not sufficiently prompt and the delay had caused substantial prejudice.⁸⁶

Review by “Justice”

In 1988 the Committee of the Justice – All Souls Review of Administrative Law in the UK published its report *Administrative Justice – Some Necessary Reforms*. In that report, abolition of the requirement for leave was recommended,⁸⁷ as was the time limit of three months for commencement of applications for judicial review.⁸⁸ Other recommendations included a more liberal availability of interlocutory procedures such as discovery and interrogatories⁸⁹ and the specification of the grounds of review.⁹⁰

81 *Supreme Court Act 1981*(UK) s 31(1).

82 *Supreme Court Act 1981* (UK) s 31(3).

83 *Supreme Court Act 1981* (UK) s 31(6). The Court can refuse leave or relief only if the “undue delay” would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

84 Law Commission, *Remedies in Administrative Law*, Report No 73 (1976) Recommendation C; *Administrative Law: Judicial Review and Statutory Appeals*, Report No 226 (1994) para 3.5. In the latter report, the Law Commission recommended that the filtering process be known as the “preliminary consideration” rather than the “leave” stage: *ibid* para 5.8.

85 Law Commission, Report No 226, *ibid* para 5.20.

86 *Ibid* para 5.26. A judicial power to extend the time period of three months was also recommended.

87 Committee of the JUSTICE – All Souls Review of Administrative Law in the United Kingdom, above n 8, Recommendation 6.3.

88 *Ibid* Recommendation 6.5.

89 *Ibid* Recommendation 6.6.

The report also recommended the creation of a general entitlement to a statement of reasons for decisions.⁹¹

New Zealand

Procedural reform was implemented in New Zealand pursuant to the terms of the *Judicature Amendment Act 1972* (NZ), by which applications for judicial review are brought in a single form of procedure known as an application for review.⁹² The substantive law pertaining to judicial review was not altered, and no attempt was made to codify that law. The operation of the statutory procedure was reviewed by the Law Commission of New Zealand in a recent Study Paper.⁹³ A number of options for further reform were considered in that paper; although, as it was a Study Paper no recommendations were made.

Canada

Various law reform bodies in the Canadian provinces have provided useful models for changes to the area of administrative law. Some of these proposed reforms will be examined here.

Manitoba

In 1987 the Law Reform Commission of Manitoba published its report on judicial review. The report included a recommendation for the creation of a single statutory remedy in relation to decisions of an administrative character, although it recommended that the expression “administrative character” be defined very broadly.⁹⁴ The Manitoba Commission also recommended the codification of the grounds of review by reference to the existing common law grounds, essentially by reference to the model found in the ADJR Act.⁹⁵

The Commission recommended no fixed limitation period⁹⁶ and that, where the sole ground for relief established was a defect in form or technical irregularity, the court be empowered to refuse relief if satisfied that no substantial wrong or miscarriage of justice had occurred.⁹⁷ The Commission also recommended the abolition of the remedy of *quo warranto*, but in its place proposed that the court be empowered to grant relief in the nature of injunctive relief.⁹⁸

90 Ibid Recommendation 6.7. The report specifically commended the ADJR Act as an appropriate model.

91 Ibid Recommendation 3.1.

92 *Judicature Amendment Act 1972* (NZ) s 4.

93 Law Commission (New Zealand), *Mandatory Order Against the Crown and Tidying Judicial Review*, Study Paper No 10 (2001).

94 Manitoba Law Reform Commission, *Administrative Law: Judicial Review of Administrative Action*, Report No 69 (II), Recommendation 2. Recommendation 5 stated that the ‘phrase “decision of an administrative character”... be defined broadly in the Act to include the doing of any act or thing, whether in the exercise of a discretion or not, and whether characterised as judicial, quasi-judicial, administrative, legislative or otherwise’.

95 Ibid Recommendations 10, 11.

96 Ibid Recommendation 24.

97 Ibid Recommendation 41.

98 Ibid Recommendations 42, 43. In other words, the reforms are substantially the same as those adopted in the Queensland JR Act.

Alberta

In 1984 the Institute of Law Research and Reform of Alberta issued its report on possible reforms with respect to judicial review. It recommended a single procedure for all applications for judicial review, to be implemented by way of amendment to the Rules of Court.⁹⁹

Ontario

In 1968 the McRuer Inquiry into Civil Rights recommended the adoption of a single form of procedure for judicial review in Ontario.¹⁰⁰ That recommendation was implemented by the enactment of the *Judicial Review Procedure Act 1971*.¹⁰¹ The reforms effected by that Act are essentially procedural. However, the *Statutory Powers Procedures Act 1990* does require that any tribunal exercising statutory powers must provide reasons for its decision if requested to do so by one of the parties.¹⁰²

British Columbia

In 1974 the Law Reform Commission of British Columbia issued its report entitled *Procedure for Judicial Review of the Actions of Statutory Agencies*. It recommended a single procedure for all forms of judicial review, to be implemented by way of revision of the Supreme Court Rules.¹⁰³ It did not make recommendations with respect to amendment to the substantive law pursuant to which such review was to be conducted.

South Africa

The South African *Promotion of Administrative Justice Act 2000* constitutes a more sweeping reform of administrative law and the judicial review of administrative action than any other reform proposed or reviewed in this chapter. For example, it is expressly stipulated in the Act that any administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair, with the minimum requirements of procedural fairness included in the Act.¹⁰⁴ Obligations are also imposed upon administrators to determine whether or not to hold a public inquiry and the factors that are to be taken into account in making that determination are specified.¹⁰⁵

The grounds for judicial review of any administrative decision are codified in terms which generally reflect the common law grounds for review.¹⁰⁶ The Act also provides that such proceedings must be instituted without reasonable delay and not later than 180 days after the date upon which the applicant became aware of the administrative decision under review.¹⁰⁷ The remedies available to the court or tribunal conducting judicial review are specified.¹⁰⁸ These remedies include the power, in exceptional cases, to substitute its

99 Institute of Law Research and Reform (Alberta), *Judicial Review of Administrative Action – Application for Judicial Review*, Report No 40 (1984) Recommendation 2.

100 Royal Commission, *Inquiry into Civil Rights*, Procedural Law of Judicial Review Recommendation 1.

101 The relevant provision is now contained in s 2 of the *Judicial Review Procedure Act*, RSO 1990.

102 *Statutory Powers Procedure Act*, RSO 1990, s 17.

103 Law Reform Commission of British Columbia, *Procedure for Judicial Review of the Actions of Statutory Agencies*, Report No 17 (1974) Recommendations 1–3.

104 *Promotion of Administrative Justice Act 2000* s 3.

105 *Promotion of Administrative Justice Act 2000* s 4.

106 *Promotion of Administrative Justice Act 2000* s 6.

107 *Promotion of Administrative Justice Act 2000* s 7.

108 *Promotion of Administrative Justice Act 2000* s 8.

decision for that of the administrator. In addition, a general entitlement to reasons for decisions is included.¹⁰⁹

It is significant that the Minister responsible for the administration of the Act is obliged under the Act to make regulations relating to a number of administrative procedures. The listed procedures include those to be followed by designated administrators and the procedures to be followed in connection with public inquiries. Perhaps most significantly of all, the Minister is also obliged to make regulations relating to a code of good administrative conduct, which is intended to provide administrators with practical guidelines and information aimed at the promotion of efficient administration and the achievement of the objects of the Act.¹¹⁰

Conclusion

As can be seen from this chapter, there have been many reforms to the conduct of judicial review, both within Australia and within the common law world. The reforms that have been either instituted or recommended indicate that reform is desirable. The reforms also provide useful alternatives upon which we can base our recommendations for change to the judicial review of administrative decisions in Western Australia.

109 *Promotion of Administrative Justice Act 2000* s 5.

110 *Promotion of Administrative Justice Act 2000* s 10.

CHAPTER 4

Recommendations for Reform in Western Australia

In this chapter we will set out the various issues that we have considered in relation to the possible reform of judicial review of administrative decisions in Western Australia. The various factors we identified in Chapter Two as giving rise to a need for reform establish an overwhelming case for the reform of the procedures governing judicial review. That conclusion is reinforced by the observation that in almost every jurisdiction which we have reviewed in Chapter Three, reform of at least the procedure governing judicial review has been recommended or implemented. In addition, as noted earlier, those that responded to the Discussion Paper expressed support for the need for reform and many commentators expressly endorsed all the options for reform advanced in that paper.

A number of other issues need to be addressed before the detail of reform is considered. These issues relate to:

- whether substantive reform of the law should be instituted at the same time as procedural reform;
- whether any new statutory remedy should replace, or be provided in addition to, the existing prerogative and equitable remedies; and
- whether the Commonwealth ADJR Act provides a suitable model of reform to adopt in Western Australia.

Substantive Reform

As was seen in Chapter Three a number of the jurisdictions surveyed have implemented reforms to the substantive law. The manner in which reforms are instituted is usually through the “codification” of the grounds as they previously exist under the common law. That means the complexities of judicial language are reduced to a simplified, more general list of the grounds upon which judicial review of an administrative decision may be based.

Arguments for Substantive Reform

In the Commission’s view there are three substantial arguments in favour of extending the proposed reforms beyond mere procedure to embrace the substantive law governing judicial review.¹¹¹ The first argument is that there are deficiencies in the existing law. One example is the archaic and, in our view, unjustifiable requirement that the relevant error of law be demonstrated by reference only to the face of “the record” for the purposes of some forms of relief. Accordingly, the advantage of extending the reform to embrace the substantive law is that such deficiencies can be removed.

¹¹¹ A number of commentators supported each of these arguments for reform. Others simply articulated that the Commonwealth or Queensland Acts, with their substantive reforms, provided appropriate models for reform.

The second argument in favour of extending reform to the substantive law is the general benefit of statutory prescription of the substantive law. That is, if the grounds of review are codified, both decision makers and persons affected by administrative decisions have ready access to a clear statement of the grounds which might be relied upon to seek a review of administrative decisions.¹¹² This has an intangible educative and informative benefit which it is difficult to estimate but which is nevertheless, in the view of the Commission, significant.

The third argument in favour of extending reform to embrace the substantive law is the advantages which are thereby created of harmonising state law with Commonwealth law. That is, there would be benefits to having similar grounds of review in Western Australia to those which exist in respect of Commonwealth administrative decisions. The most obvious advantage to this would be to enable courts in this state to take the substantial body of jurisprudence which has been developed under the ADJR Act and bring it to bear under state law.

Arguments against Substantive Reform

Two main arguments can be advanced against the statutory specification of the grounds of review. The first is that statutory prescription of grounds might be expected to give rise to difficulties of statutory interpretation and protracted legal debate about the precise meanings of the terms which the legislature has used. The second is that such codification might stifle the development of the law.

With respect to the first argument, the Commission is of the view that this is not likely to be a significant problem. Experience under the ADJR Act suggests that no significant difficulties of interpretation were encountered in the operation of that Act. Further, if the terminology used in that Act were embraced under state law, the developed body of jurisprudence relating to the grounds of review under that Act would eliminate any substantial uncertainty or ambiguity with respect to the scope of those grounds.

In terms of the second argument against codification of the grounds of review, once again the Commission is of the view that there does not appear to have been any stifling of legal development under the ADJR Act. This may well be the consequence of the generality of the language which has been used in that Act. For example, one of the statutory grounds of review specified in that Act is 'that a breach of the rules of natural justice has occurred'.¹¹³ The Act does not define what the rules of natural justice are, and accordingly the ambit and content of those rules are left to be filled by the general law as enunciated by the courts from time to time. There is thus ample scope for judicial development of the substantive law relating to natural justice within the statutory ground of review.

Further, any possible limitation upon the development of the law by a statutory prescription of the grounds of review can be eliminated by the provision of a statutory ground which enables those developments to be

112 This point was discussed in more detail in the VAGLRAC Report, above n 53, paras 1.17–21.

113 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(a).

taken into account. It is arguable that provisions such as section 5(1)(j) of the ADJR Act which provides, as a ground of review, ‘that the decision was otherwise contrary to law’, would achieve this objective. Further, concerns with respect to stifling the development of the law would be entirely eliminated if there was provision for the granting of a remedy that would have been available if the reforms that not been instituted.

After weighing these various considerations, the Commission *recommends* that the reform of the law relating to judicial review of administrative decisions in Western Australia should be in the form of legislation that includes both the procedures to be adopted by the court or courts conducting such reviews, and the substantive law to be applied in the conduct of such reviews.¹¹⁴

Possible Abolition of the Existing Remedies

The next issue to be addressed is whether a statutory remedy should be provided in addition to the existing common law and equitable remedies, or alternatively whether it should be provided in substitution for those remedies, which should, therefore, be abolished.

On the one hand the creation of an additional statutory remedy, with a different form of procedure and statutory grounds of review alongside the existing, more technical remedies could be said to exacerbate the inconsistencies and confusion which we identified as giving rise to the need for reform in Chapter Two. However, many of those difficulties could be avoided if the court was obliged to refuse prerogative or equitable relief in certain circumstances.

An alternative would be to abolish the prerogative writs while incorporating a “sweeper” clause into the reforming Act. This clause would give the court the power, on an Application for Review, to grant any remedy on any ground that would have been available had the prerogative writs not been abolished.¹¹⁵ This would preserve any protections offered by the prerogative writs while simplifying the procedures for review and minimising the chance of any confusion produced as a result of the retention of the older forms of review.¹¹⁶

One writ that stands as separate to the other prerogative writs is that of *habeas corpus*. There are strong reasons for maintaining this writ despite the abolition of the other prerogative writs. The writ has provided a very important source of protection for the individual against the excessive or improper use of the very considerable power of government. This view was strongly endorsed by one commentator. As we have noted, the remedy of

114 It was suggested by one commentator that much reform could be undertaken through a modification of the Rules of Court. Such recommendations have been made in the past, including by this Commission (above n 1, para 4.20), unfortunately with little progress being made.

115 It is recognised, however, that the Tasmanian legislation does not include such a “sweeper” clause, despite the abolition of the prerogative writs.

116 The commentators that directly addressed the issue of the prerogative writs were evenly divided as to whether the writs should be retained. The most common reason given for the retention of the writs was as to ensure no protections offered by them were lost as a result of the reforms.

habeas corpus has been a vital bastion for the protection of individual liberty for many centuries.¹¹⁷

In addition, the application of the writ is not limited to the judicial review of administrative decisions. *Habeas corpus* may be used in circumstances where it is important for a person to be physically brought before the court; these could include scenarios involving child custody disputes in family law. Given the breadth of application of the writ, the Commission does not consider it wise to abolish *habeas corpus*. The Commission therefore *recommends* the abolition of the writs of *mandamus*, *certiorari*, *prohibition* and *quo warranto*.

The abolition of the prerogative writs does not require the abolition of the remedies of injunction and declaration.¹¹⁸ These remedies continue to be used as effective mechanisms for the correction of public wrongs.¹¹⁹ The Commission *recommends* that there be included a statutory provision requiring the court to refuse declaratory or injunctive relief unless satisfied that the proceedings could not have been brought by way of the statutory remedy, or that bringing the proceedings by way of the statutory remedy would not have been a reasonable course to follow.

While the procedures for the granting injunctions and declarations do not suffer from the same level of complexity as the prerogative writs, any differences between these procedures and the procedures applying for the statutory remedy should be minimised. The Commission, therefore, *recommends* that the procedures for invoking declaratory and injunctive relief be reformed to conform as closely as possible to the procedures applying to the statutory remedy.

It is the view of the Commission that the diversity of the circumstances that might give rise to an application for judicial review under the existing remedies is such that it would be very difficult to be satisfied that any new statutory remedy would completely cover all those circumstances unless and until there had been a reasonable period of operation and experience of the new statutory remedy. Accordingly, Commission *recommends* that the basic structure of the reform should take the form of the creation of a new statutory remedy and the institution of a clause enabling the grant of any remedy on any ground that would have been available had the prerogative writs not been abolished.

117 Many of the jurisdictions surveyed in Chapter Three specifically considered the issue of the writ of *habeas corpus*. Many considered the procedure too important to risk losing. Therefore, it was recommended that this particular writ be treated differently to the others. For example, the Alberta Institute of Law Research and Reform considered that the writ be included under a new reformed procedure but that the old procedure be preserved so that none of the existing protections would be inadvertently lost: above n 99, 43.

118 No commentator suggested the abolition of the remedies of injunction or declaration.

119 See for example, *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247 and *Yougarla v Western Australia* (1999) 21 WAR 488.

Adoption of the Commonwealth Act

As has already been noted, the Commission sees considerable merit in adopting, as far as possible, the provisions of the ADJR Act which govern the judicial review of administrative decisions made under Commonwealth legislation. This section will highlight two of the significant advantages that the Commission sees in following the Commonwealth path.

There is the obvious advantage in uniformity of the substantive law governing judicial review of administrative decisions, irrespective of whether or not those decisions are made under state or Commonwealth law. The Commission cannot presently see any compelling reason why the substantive law governing administrative decisions generally, or the availability of judicial review of those decisions, should depend upon whether or not those decisions are made pursuant to Commonwealth or state law. The precise delineation of areas of administration between the Commonwealth and the states and territories is not a matter of profound significance to many Australians, and the nature and content of the remedies available to an aggrieved citizen should not depend upon that delineation.

There is another significant advantage in the adoption of the ADJR Act. Litigation under that Act is now the predominant source of the general body of law relating to judicial review in Australia. The enactment of Western Australian legislation which follows, as far as possible, the terminology used in the Commonwealth Act will enable that body of law to be applied directly to litigation under the state Act. This would clarify the operation and effect of the Western Australian Act and reduce the scope for protracted controversy about the precise meaning of the terminology used in the state Act.

The Commission's views on this topic are reinforced by the observation that in three of the four Australian jurisdictions where reform of the substantive law of judicial review has been considered (Queensland, Tasmania and the ACT), the ADJR Act has been substantially adopted, and in the fourth (Victoria) that course has been recommended. One commentator directly advocated the adoption of the model of the ADJR Act and another advocated the adoption (with modifications) of the Queensland JR Act. The Commission considers it appropriate to use the ADJR Act as a basis for reform and incorporate other reforms as necessary, with particular attention being paid to the Queensland Act.

Accordingly, the Commission *recommends* that the reform should substantially follow the provisions of the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*. Some modifications to the content of the Act will be necessary to take advantage of the lessons of the Queensland JR Act and the other reforms discussed in Chapter Three.¹²⁰

120 One modification that was suggested by a commentator was the greater use of plain English. Given the nature of the law in this area, to "translate" the language to plain English could radically modify the words and lead to a greater divergence from the Commonwealth Act. Such a degree of divergence is not, in the Commission's view, desirable.

Grounds of Review

The Commission is of the view that the interests of consistency between the state and Commonwealth statutes suggest there should be no differences in the statement of grounds beyond those which are absolutely necessary. The Commission therefore *recommends* that the grounds of review should be specified in the proposed Act and should follow as closely as possible the terminology used in the *Administrative Decisions (Judicial Review) Act 1977*.

Some changes, however, were suggested in the Discussion Paper and others were put forward by commentators. It was suggested in the Discussion Paper that, if it was thought necessary, out of an abundance of caution, to extend the general ground beyond that provided by section 5(1)(j) of the ADJR Act to ensure that developments in the common law are embraced under the statutory remedy, the Commission would endorse such a departure from the ADJR Act grounds. This suggestion was given some support in the submissions. Arguments against the codification of the grounds of review rest, in part, on a fear of a stifling of development in this area. The Commission *recommends* that there be statutory provision for a ground of review intended to embrace any development in the non-statutory grounds of review. This Recommendation is in line with the “common law” clause in the VAGLRAC Report discussed above.

The Discussion Paper highlighted that the Commission does not favour the suggestions in the VAGLRAC Report in relation to changes to the grounds of review as they appear in the ADJR Act, in particular, the removal of the words “whether or not the error of law appears on the record of the decision”.¹²¹ Essentially that is because the Commission favours the view that the removal of the requirement that error of law appear on the face of the record be explicit in the statutory remedy. That is, the removal should be spelt out more strongly in the Act rather than just appearing under the grounds of review. No commentators made reference to any reform based on this point and therefore the Commission’s position is unchanged.

Other suggestions put forward by commentators included additional grounds of review covering “perverse or illogical reasoning” and “misrepresentation”. The Commission considered these possibilities but decided that the former did not add significantly to the existing ground of unreasonableness. The inclusion of a ground of “misrepresentation” may lead a court of review to address the facts that the decision was based upon and therefore adopt a process of merits review rather than judicial review. Perhaps a more significant reason for not adopting these suggestions is the desire to limit the departures from the existing statutory grounds to those that are obviously necessary for reform in Western Australia.

Ambit of Conduct Subject to Judicial Review

As we have observed, one of the issues that has arisen under the ADJR Act is the restriction of its operation to “decisions under an enactment”. Decisions made in the exercise of administrative powers which do not have a statutory base are therefore excluded from the operation of the Act. A number of commentators considered that this limitation is too restrictive. The ARC has

121 Above n 53, Recommendation 19.

recognised this deficiency and made a recommendation for its removal.¹²² This recommendation has been acted upon by the legislature of Queensland extending the operation of the JR Act to decisions of an officer or employee of the state or a local government authority involving public funds. The commentators who dealt with this point agreed with the position.¹²³ The Commission therefore *recommends* that the ambit of the statutory remedy should extend to decisions or conduct of an administrative character made under or pursuant to Western Australian legislation or to decisions of officers or employees of the state or a local government authority involving public funds.

The ARC also recognised a deficiency under the Commonwealth Act in that it does not apply to decisions of the Governor-General.¹²⁴ The form of the ADJR Act probably reflects what was perceived to be the law prior to the decision of the High Court in *FAI Insurances Ltd v Winneke*.¹²⁵ It does not represent the current position under the general law of Australia, as enunciated by the High Court in that decision. Further, the non-applicability of the statutory remedy in a state context to the decisions of the Governor, would overlook the fact that decisions of the Governor made on matters of administration are, by constitutional convention, made upon the advice of the responsible Minister. This convention means that such decisions of the Governor are, in a very real and practical sense, regarded as the decision of the responsible Minister.¹²⁶ For these reasons the Commission *recommends* that the statutory remedy apply to the decisions of the Governor. Further, in relation to requests for reasons for such a decision, or proceedings for judicial review, the appropriate respondent is the Minister responsible for the relevant area of administration.

Linked to the potential review of decisions of the Governor is the possibility of the judicial review of the exercise of prerogative and constitutional powers.¹²⁷ The Commission is of the view that if the exercise of such powers falls within the other requirements for justiciability under the reforms (such as a decision being made under an enactment) there is little reason why the exercise should not be subject to judicial review. If all of the Commission's recommendations are adopted then the court hearing an application for review of such conduct may exercise its discretion and dismiss the application.¹²⁸

122 ARC, Report No 32, above n 27, Recommendation 1.

123 One commentator went so far as to suggest that there should be no jurisdictional limit of "decision under an enactment". The Commission considers that such an extension may open the application of judicial review uncomfortably wide.

124 ARC, Report No 32, above n 27, Recommendation 2.

125 (1982) 151 CLR 342.

126 Most commentators who addressed the ambit of conduct subject to review agreed with the options recommended in the Commission's Discussion Paper. Only one commentator argued that the decisions of Cabinet (and therefore some decisions of the Governor-in-Council) should be excluded from review.

127 The potential review of the exercise of these powers was raised by one of the commentators.

128 See below for the discussion of discretionary powers of the court.

The Commission has also given consideration to limitations upon the operation of the statutory remedy imposed by the decision of the High Court in *Australian Broadcasting Tribunal v Bond*.¹²⁹ In that decision the High Court held that the ADJR Act only applied to decisions which had the character or quality of being final in nature. While the Commission can see some merit in an argument to the effect that the operation of the statutory remedy should not be thus constrained, on balance, the Commission considers that there are risks attached to any statutory modification of the decision in *Bond's* case. One such risk is that, if the requirement that decisions that can be made subject to judicial review have the character of being final or determinative is removed, then judicial review proceedings may be used as a tactical means to frustrate or delay the administrative process of arriving at such a decision.¹³⁰ This risk is substantially reduced if the court does have a discretion to dismiss application. That is, it would be open for a court to decide that if the applicant retains an opportunity for a hearing before the decision maker prior to the final decision having been made then the application for judicial review should not be heard.

It would be possible, however, to modify the definition of reviewable "conduct". One commentator suggested that much of the damage associated with an adverse decision made by a decision maker arises at an earlier stage of the process than the final decision. If "conduct" was defined to include recommendatory decisions made as necessary steps towards the making of a final decision then the potential applicant's interests may be protected before the final decision is made.¹³¹ This would only be practical if the discretion to refuse relief is included in the reforms. The Commission therefore *recommends* that the definition of "conduct" include reference to a preliminary or recommendatory decisions if this decision is sufficiently connected to the final decision.

Two commentators raised one specific class of decisions for exclusion from the reach of any new statutory remedy, decisions to prosecute. The Commission notes that the Commonwealth, Queensland and Tasmanian legislation excludes these decisions from review. The inclusion of decisions to prosecute could impose significant burdens on the administration of criminal justice. The Commission therefore *recommends* that decisions to prosecute be excluded from review.

Government Business Enterprises

The Commission has also given consideration to the extent to which the statutory remedy should apply to the decisions of Government Business Enterprises (GBEs) – that is to say, agencies of the state that carry on commercial activity. On the one hand, the availability of the statutory remedy in respect of such agencies could be said to put them at a significant commercial disadvantage in their competitive activities by subjecting them to

129 (1990) 170 CLR 321.

130 This risk was specifically raised in a practical sense by one commentator.

131 The defining of "conduct" to include "decision" reflects the observation of Toohey and Gaudron JJ that the distinction between "decision" and "conduct" in the ADJR Act is not clear and 'cannot be explained simply by reference to procedure on the one hand and substance on the other': *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 379.

a possible burden to which their private enterprise competitors are not subject. On the other hand, some GBEs provide services in monopoly or near monopoly conditions, in circumstances in which the non-provision of those services can have very important consequences for an individual. In certain circumstances, such individuals should have access to the courts if the agency acts unlawfully.

The Commission is of the view that it is not desirable to state a single or inflexible rule in relation to the applicability of the statutory remedy to GBEs, beyond stating, as one commentator did, that GBEs should not, by reason of that fact alone, be excluded from the operation of the Act. Rather, that the preferable approach is to consider particular enterprises for exclusion from the operation of the Act by way of a schedule to the Act, on a case by case basis. This position was endorsed by commentators on this point. For the Commission to undertake this very substantial task at this stage would significantly delay this Report.¹³² The Commission considers, therefore, that the Government is better placed to assess the applicability of judicial review to individual GBEs.

Procedural issues

There are a number of specific procedural issues that need to be discussed in terms of formulating a statutory framework for the reform of the law relating to judicial review of administrative decisions. These issues include detailed procedural concerns such as time limits, leave and costs and the wider interaction with the proposed merits review tribunal.

Privative Clauses

Privative clauses are those provisions of other legislation which seek to restrict or inhibit the capacity of the court to review a particular class of decision. Their existence is inconsistent with the statutory remedy which the Commission recommends. Under the ADJR Act, there is express provision for classes of decision to be excluded from the operation of the Act by inclusion in a schedule to the Act.¹³³ Therefore, any reader of the Act can tell whether the Act applies to a particular decision without having to go to another statute. At the same time, the ADJR Act expressly provides that any provision of any other Act which would preclude the application of the ADJR Act to a particular decision or class of decisions is of no force or effect.¹³⁴

The Commission favours this approach. The new statutory remedy should be of universal and general application, save for particular classes of decision which are expressly enunciated in a schedule to the Act.¹³⁵ The Commission, therefore, *recommends* that a provision be included whereby all existing privative clauses at the time of enactment are nullified except for those specifically preserved in a schedule to the Act.¹³⁶ It is beyond the

132 Particularly given, in the words of one commentator, the 'delicate issues' involved.

133 Section 3 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) defines "decision to which this Act applies" to mean a 'decision of an administrative character... other than a decision by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1'.

134 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 4.

135 This position was accepted by all commentators who directly addressed this issue.

136 *Judicial Review Act 1991* (Qld) s 18.

scope of this Report to attempt to identify those classes of decision. This is essentially a matter that should be determined by Government in the event that Government accepts the general desirability of enacting a new statutory remedy of the kind that the Commission recommends.

Time for Commencement of Proceedings

The ADJR Act provides a particularly short time within which proceedings must be commenced, namely, 28 days from the provision of notice of the decision which it is sought to review, or provision of a statement of reasons in relation to that decision, whichever is the later.¹³⁷

The Commission's general views in relation to limitation periods are set out in its report *Limitation and Notice of Actions*.¹³⁸ On the one hand, the specification of strict limitation periods for the commencement of proceedings has the capacity to create injustice, but on the other hand delay in the commencement of proceedings can itself be a source of injustice. It is the Commission's view, reflected in its report that the balance between those competing considerations is not best struck by the imposition of an arbitrary and inflexible time limit. Instead, the balance is best achieved through the prescription of a time within which proceedings ought to be commenced, but with a judicial capacity to extend that time for good cause, and in circumstances which such an extension would not cause undue prejudice or hardship.

The Commission favours the adoption of this approach in relation to the statutory remedy it recommends. Whilst the Commission can see a definite advantage in encouraging the prompt commencement of proceedings for judicial review, it is strongly of the view that the period of 28 days specified under the Commonwealth and Queensland Acts is too short, and generally has the consequence of necessitating applications for extension of time which consume limited judicial resources. Commentators suggested that a 60 or 90 day limitation period would be appropriate. However, the Commission considers that even this may be too restrictive given the diversity of circumstances under which applicants may pursue judicial review. The Commission is of the view that the balance to which we have referred is best struck by requiring, and therefore it *recommends*, that proceedings for judicial review be commenced as soon as reasonably practicable and in any event within six months of notification of the decision under review.

The Commission, in addition, considers that even the flexibility contained within this recommendation will not always advance the cause of justice for either the applicant or the respondent. Accordingly, the Commission *recommends* that there be provision for the court to extend that period if satisfied that such an extension would not be likely to cause substantial hardship to any person or substantially prejudice the rights of any person or be detrimental to good administration. Conversely, if the proceedings are not commenced as soon as reasonably practicable, there should be power in

137 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 11(3).

138 Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Project No 36 (II), (1997).

the court to dismiss the proceedings even if brought within six months, if the court is satisfied that the delay in commencement of proceedings would be likely to cause substantial hardship to any person or substantially prejudice the rights of any person or be detrimental to good administration.

Standing to Commence Proceedings

The Commission has given particular consideration to the comprehensive review of the law relating to the standing required to commence proceedings by the Australian Law Reform Commission (“ALRC”) in its report on this area of law.¹³⁹ Without going through the various arguments addressed in that very helpful and informative paper, the Commission is of the view that the interests of consistency with the ADJR Act favour the adoption of the terminology used in that Act to define standing – namely, that standing is limited to “a person whose interests are affected”.¹⁴⁰ The Commission *recommends* that any person whose interests are affected by the conduct or decision under review should have standing to seek relief under the proposed statutory remedy.

However, the Commission does see considerable force in the arguments advanced by the ALRC to the effect that limiting the right to commence proceedings to persons whose interests are affected might produce an unfavourable result. For example, an administrative decision which affects the entire community, but does not affect any person or group of persons within that community to any greater extent than any other, can be placed effectively beyond legal challenge unless the Attorney-General is prepared to grant his or her *fiat* to enable proceedings to be brought in his or her name (a relator action).¹⁴¹ The Commission agrees with the ALRC’s view to the effect that the availability of a relator action is not an adequate protection of the public interest in the lawfulness of administrative action which may have a profound effect upon the community as a whole, particularly in circumstances of a conflict of interest where it is a decision of the Government that is being challenged.¹⁴²

The Commission is of the view that a small departure from the language of the ADJR Act is necessary. The Commission, therefore,¹⁴³ *recommends* that a person whose interests are not affected by the conduct or decision under review should have the power to commence or continue proceedings under the proposed statutory remedy with the leave of the court. Such leave should be granted if the court is satisfied that it is in the public interest for the proceedings to be commenced or continued. The Commission is not inclined to favour any attempt to specify the aspects of the public interest which might justify the grant of such leave in the legislation, but rather favours leaving the issue in the general discretion of the court.

139 Australian Law Reform Commission, Report No 27, above n 10.

140 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1) in conjunction with s 3(4).

141 See generally Australian Law Reform Commission, Report No 27, above n 10, Chapter 4 for a discussion of the role of Attorneys-General in public interest litigation.

142 This is consistent with the recommendation of the English Law Commission, Report No 226, above n 84, para 5.20.

143 The commentators on this point were evenly split between those who supported the small extension and those who were opposed.

General Requirement for Leave

The Commission has expressed its view as to the general undesirability of requirements for leave to commence proceedings in its review of the civil and criminal justice system in Western Australia.¹⁴⁴ In general, such requirements are only productive of wasted time and resources and are a quite ineffective means of filtering out inappropriate applications. That objective is, in the Commission's view,¹⁴⁵ much more effectively achieved by the conferral of discretions to refuse relief and powers to dismiss proceedings that have no significant prospect of success or are otherwise an abuse of process. As noted in the preceding paragraph however, the Commission does support the view that an applicant whose interests are not affected by the decision under challenge should be obliged to satisfy the court that the proceedings are in the public interest. The Commission *recommends* that there should be no general requirement for the grant of leave to commence proceedings pursuant to the proposed statutory remedy

Interim Relief

It is the Commission's view that there is no good reason why the general powers of the court with respect to the preservation and protection of the rights and interests of parties to litigation by way of interim orders should not extend to the statutory remedy which it recommends.¹⁴⁶ The Commission, therefore, *recommends* that the court should have all its usual powers with respect to the preservation and protection of the rights and interests of the parties to proceedings for judicial review by way of interim orders.

Interlocutory Procedures

In addition, the Commission's view is that there is no good reason why procedures such as interrogatories and discovery should not apply with respect to applications for judicial review. This view was supported by the two commentators who raised the importance of discovery in the carriage of cases by counsel. The Commission *recommends* that the usual interlocutory procedures will be available to parties to proceedings for judicial review.

Powers of the Court

There are two broad options for reform in terms of the power of the court. The court could simply review the decision and return it to the decision maker if the one of the grounds of review was established. Alternatively, the court could substitute its own decision if the decision subject to review was not made in accordance with the law. It is the Commission's view that the powers conferred upon the Federal Court under the terms of the ADJR Act are sufficient and should be adopted in the state Act.

The Commission is not attracted to the provision of the South African *Promotion of Administrative Justice Act 2000* which enables the court to substitute its decision for that of the decision maker, even though that power is only to be exercised in exceptional circumstances.¹⁴⁷

144 Law Reform Commission of Western Australia, Project No 92, above n 3.

145 No submissions were received that dealt expressly with this point; therefore, the Commission's view is unchanged from that contained in the Discussion Paper.

146 Only one commentator considered this issue. The submission contained the suggestion that the Supreme Court's current powers be extended to include a power to make interim declarations. This reform if enacted would be a major departure from existing powers. Such change would have significant consequences, both substantive and procedural. The Commission is therefore not prepared, at this stage, to recommend its adoption.

147 *Promotion of Administrative Justice Act 2000* s 8(1)(c)(ii)(aa).

The Commission favours the view that it is important to maintain the distinction between the judicial function, which is limited to the review of the lawfulness of administrative action, and the administrative function. The sole commentator on this point agreed that the court should not have the power to substitute its decision for that of the decision maker. It is, in any event, open to argument as to whether or not the conferral of such a function upon a state court might infringe the requirements of the Federal Constitution in relation to such courts as enunciated by the High Court in *Kable v Director of Public Prosecutions*.¹⁴⁸

The Commission, therefore, *recommends* that the powers of the court in conducting judicial review under the remedy proposed should be the same as those conferred upon the Federal Court conducting a review pursuant to the terms of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Damages

The question of whether or not a court should be empowered to award damages to a successful applicant for judicial review, and the circumstances in which such a power might be exercised, give rise to complex questions of a general policy nature. The policy concerns include the appropriate balance between the entitlement of the citizen to compensation for losses he or she has suffered on the one hand, and the protection of the collective interests of the community as a whole by protecting the financial resources of the state, on the other.

The Commission's view is that this subject does not fall within the scope of its existing terms of reference and any investigation of the subject would, in any event, substantially delay completion of the Commission's terms of reference. The one commentator who did touch on this area addressed the procedural, rather than the substantive, aspects of the award of damages in judicial review applications. Given this lack of support for substantive change, the Commission is not inclined to make any recommendation on this subject.

Justiciability

The Commission has noted the recommendation of the ARC to the effect that an express provision be inserted in the ADJR Act relating to non-justiciable decisions.¹⁴⁹ However, the Commission agrees with the view expressed in the VAGLRAC Report to the effect that such a provision would essentially do no more than restate the general law in any event and is unnecessary.¹⁵⁰ The one commentator who addressed the question of justiciability considered that a general discretion to refuse relief is an alternative option. The Commission therefore *recommends* that the legislation proposed need not contain any express provision relating to the justiciability of proceedings.

148 (1996) 189 CLR 51. The issue, which for Justice Gaudron was integral to the final decision of the High Court, was whether or the Commonwealth 'Constitution impliedly prevents the Parliament of a state from conferring powers on the Supreme Court of a state which are repugnant to or inconsistent with the exercise by it of the judicial power of the Commonwealth' (1996) 189 CLR 51, 100. As there is a separation of powers in the Commonwealth Constitution between the judicial and administrative functions of the federal government, it is arguable that the conferral of administrative power on the Supreme Court, even in exceptional circumstances, would be inconsistent with the Court's role in the Australian judicial hierarchy.

149 Administrative Review Council, Report No 32, above n 27, Recommendation 16.

150 VAGLRAC Report, above n 53, paras 3.29–32.

Discretionary Refusal of Relief

As has been noted, the ARC recommended some time ago that the Federal Court be given a general discretion to refuse relief, and to dismiss proceedings prior to their conclusion in appropriate circumstances.¹⁵¹ Although that recommendation has not been adopted at the Commonwealth level, it has been embodied in the Queensland JR Act.¹⁵² The Commission is of the opinion that there is much to be said in support of such a power. Such a discretion would assist in the efficient operation of the Act. The discretion could, as highlighted above, be used to prevent the use of judicial review as tactic of frustration in a decision making process and would limit the potential for meddling by an applicant with an insufficient interest in a decision. In addition, the commentators who considered such a discretion argued for the granting of the power to the courts. Accordingly, the Commission *recommends* that the courts should be given a general discretion to refuse relief and to dismiss proceedings prior to their conclusion in appropriate circumstances. Appropriate circumstances could, for example, include where there are other avenues of redress available to the applicant.

One commentator further suggested that there could be a requirement for the court to consider the use of this discretion early in the process. As a matter of practicality the Commission considers it likely that the court would address this question early in order to preserve the court's resources.

As has also been noted, in a number of jurisdictions it has been recommended that there be an express power to refuse relief in the event that the only ground established is one of form or technicality that has not resulted in substantial prejudice to the applicant for review.¹⁵³ The Commission sees considerable weight in the argument for the conferral of such a power, and is therefore *recommends* that the court be given an express power to refuse relief in the event that the only ground of review established is one of form or technicality that has not resulted in substantial prejudice to the applicant for review.

Costs

While the Commission is of the view that established principles relating to costs should apply equally to proceedings for judicial review, it is also inclined to the view that the public aspect of such litigation does justify some limited departure from those general rules. In particular, the Commission is attracted to the provisions in relation to costs of the Queensland JR Act that we noted in Chapter Three and which received the support of the VAGLRAC Report.¹⁵⁴ The provision grants the court a power to order that each party bear their own costs of the proceedings, irrespective of whether the application for judicial review was successful. This provision did receive support from the one commentator who considered the issue of costs. Accordingly, the Commission *recommends* that the legislation should contain provisions relating to the costs of proceedings that are essentially the same as those adopted in the *Judicial Review Act 1991* (Qld).

151 Administrative Review Council, Report No 26, above n 25, Recommendation 1.

152 *Judicial Review Act 1991* (Qld) s 48.

153 See for example VAGLRAC Report, above n 53, Recommendation 25 and Manitoba Law Reform Commission, Report No 69, above n 94, Recommendation 41.

154 VAGLRAC Report, above n 53, Recommendation 26.

Which Court or Courts should have Jurisdiction?

The nature of the issues involved in judicial review, particularly having regard to their potential public importance, is such that, in the view of the Commission, those issues should be determined in the Supreme Court. The Commission has given consideration to whether there ought be an express power in the Supreme Court to remit matters to the District Court in an appropriate case, but is not attracted to such a provision.

Remission to the District Court would not generally involve any cost savings for the parties, because the scale of costs in the District Court is essentially the same as that applicable in the Supreme Court. Nor would remission be likely to result in any saving in the time taken to determine the proceedings, because it is not possible to predict with any confidence that the proceedings could be heard any sooner in the District Court than in the Supreme Court. The Commission has also given consideration to the possibility of conferring an express power to remit applications for review to the Local Court. The Commission, however, is not inclined to support such a recommendation, because of its view that the complexity of the issues that are likely to arise in judicial review proceedings, and their potential ramifications for public administration, render it inappropriate that they be dealt with in the Local Court.

Commentators on this point agreed that the Supreme Court was the appropriate forum to hear applications. One commentator did consider that a certain flexibility could be gained if there was the capacity to refer cases to the District Court. For the reasons outlined above, the Commission does not consider that there would be significant potential savings with respect to time or costs. The Commission therefore *recommends* that jurisdiction to conduct judicial review proceedings should be vested in the Supreme Court of Western Australia only.

The Commission has also given consideration to the question of whether applications for judicial review ought be heard and determined by a special division of the Supreme Court. However, the Commission is not inclined to think that there is anything peculiar to judicial review proceedings which would necessitate the creation of a specialist division of the Court, particularly in a context in which the Supreme Court has not generally favoured the creation of such divisions. Support from the submissions was received on this point. The Commission also notes that in other jurisdictions where specialist divisions have been created to deal with judicial review proceedings those divisions have been either disbanded or recommended for abolition.¹⁵⁵

State Administrative Tribunal

The Commission also gave consideration to the question of the extent to which the actions and decisions of the proposed merits review tribunal, the SAT, should be subject to any new statutory process of judicial review. On the one hand, SAT should be subject to the same legal obligations as any

155 For example the Administrative Division of the Supreme Court of New South Wales was abolished by the *Courts Legislation Further Amendment Act 1998* (NSW) and the abolition of the specialist division of the New Zealand High Court has also been recommended: Law Commission (New Zealand), *The Structure of the Courts*, Report No 7 (1989), paras 465–74.

other administrative body. On the other hand, it would be undesirable for any general statutory remedy to cut across any specific mechanisms for judicial review created by the SAT Act itself – such as that recommended by the Taskforce on the establishment of SAT, namely, a right of appeal to the Supreme Court on questions of law, subject to the grant of the leave of the Court.¹⁵⁶

If the Commission's recommendation with respect to the discretion of the court to refuse to entertain an application for relief were adopted the possibility of problems arising from overlapping remedies would be greatly reduced. That is, the court could consider that any right of appeal from a decision of the SAT would be sufficient in many cases and exercise its discretion to dismiss an application for judicial review in such circumstances.¹⁵⁷ Commentators agreed that a discretion to refuse relief from bodies such as the SAT would be an effective mechanism for dealing with the issue of overlapping remedies. The Commission is therefore not inclined to make any recommendations with respect to excluding the SAT from the operation of any Act arising from these recommendations.

Statements of Reasons

The Commission has dealt with this subject at length before.¹⁵⁸ In the 1986 report the creation of a statutory entitlement to reasons in the terms upon which that entitlement is to be found in the ADJR Act was recommended.¹⁵⁹ Such a recommendation is entirely consistent with the Commission's views in relation to judicial review generally. In addition, a requirement for the provision of reasons received very strong support from commentators with no commentator arguing against a general entitlement to reasons for decisions. Therefore, the Commission is not inclined to depart from, and indeed reiterates, its earlier recommendations on this topic, and *endorses* the reasons stated in its 1986 report in support of that recommendation.

Similarly, the Commission in 1986 made specific recommendations in relation to those classes of decisions to which the obligation to provide reasons ought not to apply.¹⁶⁰ This was accepted by a number of commentators, with some advancing particular classes of decisions as exempt classes. The Commission is of the view that, in general, the 1986 recommendations are pertinent to contemporary conditions. However, it is recognised that it would be appropriate to review those classes of decisions in a contemporary context if government indicates its acceptance of the general proposition that there ought be a general entitlement to reasons.

The Commission's attention was drawn to the potential difficulties that could arise from concurrent obligations to provide reasons. That is, some entities such as the SAT are already or, as proposed, would be under a statutory obligation to state reasons. It would obviously be undesirable to burden such entities with more requirements than entities that do not already have a

156 SAT Report, above n 4, 153–54, para 102.

157 This consideration could apply to any merits review body that included a statutory right of appeal.

158 Law Reform Commission of Western Australia, Project No 26 (II), above n 1.

159 Ibid paras 6.15–16.

160 Ibid paras 6.17–19.

statutory obligation to provide reasons. The Commission *recommends* that the obligation to provide reasons under the proposed legislation would not apply to entities which have an independent statutory obligation to provide reasons.

Time within which Reasons Should be Sought

The considerations set out above with respect to the time within which proceedings should be brought are not necessarily applicable to the specification of the time within which an application should be made for reasons, because the same risk of injustice does not follow from an inability to obtain reasons. Further, if reasons are to be provided within a short period of the decision, the reasons are much more likely to reflect the true reasons for the decision rather than a retrospective recreation of them. Accordingly, the Commission is inclined to recommend that the provisions of the ADJR Act¹⁶¹ should apply to the entitlement to reasons which it is inclined to support. That is, the Commission *recommends* that any request for a statement of reasons should be made within 28 days of notification of the decision, but that there should be a power in the court to extend that time in an appropriate case.

Prescribed Standards for Public Inquiries

The Commission has given consideration to the provisions in the South African *Promotion of Administrative Justice Act 2000* requiring the promulgation of regulations stipulating the procedures to be followed by administrators, a code of good administrative conduct and the procedures to be followed in connection with public inquiries.¹⁶² It is, however, perhaps arguable as to whether these matters fall within the Commission's terms of reference. Whatever be the true position in relation to the proper ambit of the Commission's terms of reference, the Commission is not presently disposed to recommend the adoption of a similar approach in Western Australia, notwithstanding our enthusiasm for the laudable objectives of transparency and consistency which such an approach would promote. On balance, the Commission is of the view that the necessary and appropriate variance and diversity in conduct and procedures appropriately adopted in respect of the very wide and diverse range of administrative decisions made pursuant to the law of Western Australia preclude, in a practical sense, the stipulation of specific codes of conduct and procedures, unless those codes are expressed in such general terms as to be of limited assistance.

161 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(2) requires applications for reasons to be made within 28 days of notification of the decision.

162 *Promotion of Administrative Justice Act 2000* s 10. Such a code of conduct has been proposed elsewhere. See for example, Committee of the JUSTICE, *Administration Under Law*, Report (1971) Recommendation 1.

APPENDIX I

Recommendations for Reform

1. The law relating to the judicial review of administrative action in Western Australia be reformed (p 9).
2. The reform of the law relating to judicial review of administrative decisions in Western Australia should be in the form of legislation that includes both the procedures to be adopted by the court or courts conducting such reviews, and the substantive law to be applied in the conduct of such reviews (p 24).
3. The writs of *mandamus*, *certiorari*, *prohibition* and *quo warranto* be abolished (p 25).
4. There be included a statutory provision requiring the court to refuse declaratory or injunctive relief unless satisfied that the proceedings could not have been brought by way of the statutory remedy, or that bringing the proceedings by way of the statutory remedy would not have been a reasonable course to follow (p 25).
5. The procedures for invoking declaratory and injunctive relief be reformed to conform as closely as possible to the procedures applying to the statutory remedy (p 25).
6. The basic structure of the reform should take the form of the creation of a new statutory remedy and the institution of a clause enabling the grant of any remedy on any ground that would have been available had the prerogative writs not been abolished (p 25).
7. The reform should substantially follow the provisions of the Commonwealth *Administrative Decisions (Judicial Review) Act 1977* (p 26).
8. The grounds of review should be specified in the proposed Act and should follow as closely as possible the terminology used in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (p 27).
9. There be statutory provision for a ground of review intended to embrace any development in the non-statutory grounds of review (p 27).
10. The ambit of the statutory remedy should extend to decisions or conduct of an administrative character made under or pursuant to Western Australian legislation or to decisions of officers or

- employees of the state or a local government authority involving public funds (p 28).
11. The ambit of the statutory remedy should extend to decisions of the Governor (p 28).
 12. The definition of "conduct" include reference to a preliminary or recommendatory decision if this decision is sufficiently connected to the final decision (p 29).
 13. The legislation should make provision for the exclusion from review of decisions to prosecute (p 29).
 14. That a provision be included whereby all existing privative clauses at the time of enactment are nullified except for those specifically preserved in the Schedule to the Act (p 30).
 15. The proposed legislation should specify that proceedings under the Act must be brought as soon as reasonably practicable and in any event within six months of the notification of the decision under review (p 31).
 16. The court should be given power to extend the period within which proceedings must be commenced if satisfied that such an extension would not be likely to cause substantial hardship to any person or substantially prejudice the rights of any person or be detrimental to good administration. The court should also be given power to dismiss proceedings even if they are brought within six months of notification of the decision under review. Such dismissal would be available if the proceedings are not brought as soon as reasonably practicable and if the delay in commencement of proceedings would be likely to cause substantial hardship to any person or substantially prejudice the rights of any person or be detrimental to good administration (p 31).
 17. Any person whose interests are affected by the conduct or decision under review should have standing to seek relief under the proposed statutory remedy (p 32).
 18. A person whose interests are not affected by the conduct or decision under review should have the power to commence or continue proceedings under the proposed statutory remedy with the leave of the court. Such leave of the court should be granted if the court is satisfied that it is in the public interest for the proceedings to be commenced or continued (p 32).
 19. There should be no general requirement for the grant of leave to commence proceedings pursuant to the proposed statutory remedy. (p 33).
 20. The court should have all its usual powers with respect to the preservation and protection of the rights and interests of the parties to proceedings for judicial review by way of interim orders (p 33).

21. The usual interlocutory procedures will be available to parties to proceedings for judicial review (p 33).
22. The powers of the court in conducting judicial review under the remedy proposed should be the same as those conferred upon the Federal Court conducting a review pursuant to the terms of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (p 34).
23. The legislation proposed need not contain any express provision relating to the justiciability of proceedings (p 34).
24. The courts should be given a general discretion to refuse relief and to dismiss proceedings prior to their conclusion in appropriate circumstances (p 35).
25. The court should be given an express power to refuse relief in the event that the only ground of review established is one of form or technicality that has not resulted in substantial prejudice to the applicant for review (p 35).
26. The legislation should contain provisions relating to the costs of proceedings which are essentially the same as those adopted in the *Judicial Review Act 1991* (Qld) (p 35).
27. Jurisdiction to conduct judicial review proceedings should be vested in the Supreme Court of Western Australia (p 36).
28. The Commission adopts and reiterates the recommendations contained in its 1986 report with respect to the creation of a general entitlement to reasons for decisions, and as to the classes and categories of decisions to which the obligation to provide reasons ought not to apply (p 37).
29. The obligation to provide reasons under the proposed legislation would not apply to entities which have an independent statutory obligation to provide reasons (p 38).
30. Any request for a statement of reasons should be made within 28 days of notification of the decision, but there should be a power in the court to extend that time in an appropriate case (p 38).

APPENDIX II

Submissions

The following individuals and organisations contributed to Project No 95 by making submissions upon an earlier Discussion Paper:

Administrative Review Council

Barker, ML, QC (Barrister; now the Hon. Justice Barker, Supreme Court of Western Australia)

Burton, RH (Magistrate)

Forest Products Commission (Western Australia)

Institute of Public Administration Australia – Western Australian Division

Johnson, I (Acting Assistant Commissioner, Strategic & Corporate Development, Western Australian Police Service)

Johnston, PW (Senior Lecturer, University of Western Australia Law School)

Keating, N (Policy and Legislation, Office of the Director of Public Prosecutions)

Law Society of Western Australia

Meadows, RJ, QC (Solicitor General)

O'Donnell, D (Ombudsman of Western Australia)

Owen, the Hon. Justice NJ (Commissioner, The HIH Royal Commission)

Schoombee, Dr H (on behalf of the Western Australian Bar Association (Inc))

Skipper, M (Chairman of Stewards, Western Australian Trotting Association)

Stokes, RN (Secretary, Western Australian Planning Commission)

Western Australia Trotting Association

Glossary

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| ADJR Act | <i>Administrative Decisions (Judicial Review) Act 1977</i> (Commonwealth). |
| ALRC | Australian Law Reform Commission. |
| ARC | Administrative Review Council. |
| <i>Certiorari</i> | A prerogative remedy issued by a court to quash an administrative decision on the ground of an error of law, sometimes limited to errors appearing “on the face of the record”. |
| Declaration | A remedy issued by a court that declares that an act or omission was unlawful and of no legal effect. |
| Discovery | The pre-trial procedure available to parties in civil proceedings which enables them to compel others to make available a list of documents in their possession. |
| EARC | Electoral and Administrative Review Commission (Queensland). |
| Equitable remedies | Remedies available that originally arose from the Courts of Equity such as injunction. |
| <i>Habeas corpus</i> | A prerogative writ that compels the production of a prisoner before the court. A writ used to verify the authority of the detention. |
| Injunction | A court order which either restrains a party from doing, or compels him or her to do, a particular thing. |
| Interlocutory procedures | The various steps which take place between the commencement of a case and trial; matters incidental to a case and not finally determinative of the outcome. |
| Interrogatories | A form of discovery that involves one party asking another party specific questions relating to the proceedings before the court. |
| JR Act | <i>Judicial Review Act 1991</i> (Queensland). |
| Judicial Review | Review of legal determinations, including governmental determinations by the courts. |
| Justiciability | Capacity of a particular administrative decision or action to be reviewed by a court. |
| Leave | Permission – as in “leave of court is required to commence an action”. |

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| <i>Mandamus</i> | A prerogative remedy issued by a court to compel a public official to exercise a power in accordance with her or his public duty. |
| Merits review | Review of administrative decisions based primarily on the facts and policies that supported the decisions. |
| Prerogative writs/remedies | Procedures requiring the proper administration of justice by those individuals and bodies having the power to administer it. The writs include <i>certiorari</i> , <i>prohibition</i> , <i>mandamus</i> , <i>quo warranto</i> and <i>habeas corpus</i> . |
| Privative clauses | A provision in an Act purporting to preclude judicial review of a decision made under the Act. |
| <i>Prohibition</i> | A prerogative remedy issued by a court forbidding a specified act or omission. |
| <i>Quo warranto</i> | A prerogative remedy issued by a court to prevent a person from wrongfully usurping a public office. |
| SAT | State Administrative Tribunal (proposed). |
| Standing | The capacity and right of a person to commence proceedings before a court. |
| VAGLRAC | Victorian Attorney-General's Law Reform Advisory Council. |