About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority established under the Legal Aid Act 1978 (Vic) and is empowered to provide assistance notwithstanding that the interests of the assisted person are adverse to the State or Commonwealth. The provision of legal aid makes possible access to justice, which is central to the rule of law and a critical element of a well-functioning democracy.

Judicial review plays an important role in Australia’s system of government as a means of ensuring the accountability of public officials for the legality of their actions. VLA’s 2011-2014 Strategic Plan confirms that our public benefit derives in part from the role VLA plays in quality assuring the actions of government agencies. This is contemplated in s 5 of the Legal Aid Act which states that VLA does not represent the Crown, confirming that where the lawfulness of government actions is called into question our independence to provide services that seek to uphold the rights of citizens against government should be unfettered.

VLA has considerable experience in providing assistance to vulnerable and disadvantaged clients seeking judicial review of administrative law decisions. This includes assistance in numerous Commonwealth judicial review proceedings, including proceedings in the Federal Magistrates’ Court, the Federal Court, and the High Court.¹

At the federal level, VLA is committed to working in the social security jurisdiction, creating a specialist social security practice in 2006. We are the largest provider of legal assistance services in relation to social security administrative review in Victoria. We provide assistance to clients with administrative reviews of Centrelink decisions, and assistance with social security prosecutions. Assistance with social security matters is a Commonwealth priority, identified in the National Partnership Agreement on Legal Assistance Services (NPA). VLA also provides assistance to clients seeking judicial review from the Social Security Appeals Tribunal of decisions made by the Child Support Agency in relation to child support assessments.

Our Migration Program works with vulnerable non citizens, providing legal advice and advocacy at tribunals and courts, including the High Court. The program makes significant contributions to community legal education and law reform in collaboration with the community legal sector.

¹ See, for example, the following decisions of the High Court:
Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka (2001) 206 CLR 128
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
VEAL v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88
MZXOT v Minister for Immigration & Citizenship (2008) 233 CLR 601
The current system of judicial review

As recognised by the Productivity Commission, ‘the civil justice system sustains and fosters social stability and economic growth’\(^2\). The design of Australia’s administrative law system should reflect the purposes of the system: to improve the quality, efficiency and effectiveness of government decision making generally, and to enable people to test the legality and the merits of decisions that affect them. \(^3\) In this respect, judicial review has a critical function, as articulated by Justice Brennan:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly\(^4\)

To this effect, judicial review has an important role in upholding the rule of law, and facilitating ‘broader systemic improvements in the quality and consistency of government actions’\(^5\) by highlighting areas for improvement in primary decision making, thereby promoting efficiency and equity. As discussed in *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, ‘a focus on correct and preferable primary decision making is an important mechanism for improving access to justice’. \(^6\)

There is a tension in the judicial review system between, on the one hand, the importance of having a transparent and well-understood legal system and, on the other hand, the importance of having a system which provides appropriate scrutiny on government decisions. For various reasons, the law relating to judicial review is well beyond the scope of understanding of most Australians, let alone vulnerable people contesting migration or social security decisions.

In *M61*, the High Court held that because the Minister for Immigration and Citizenship had decided to consider the grant of a visa “in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations”, the processes taken in respect of each such person were steps taken “under and for the purposes of the Migration Act”, and that “because making the inquiries prolonged the plaintiffs’ detention … those who made the inquiries were bound to act according to law, affording procedural fairness”. \(^7\) This is an example of the way in which Constitutional review rights are being used by applicants for judicial review of government decisions.

*M61* also illustrates the anomalies created by the use of *sui generis* statutory regimes for administrative decision making and judicial review. The applicants in *M61* were effectively seeking judicial review of a decision to refuse a protection visa, but exercised

\(^3\) Administrative Review Council, Judicial Review in Australia Consultation Paper, p 27
\(^4\) *Church of Scientology v Woodward* (1982) 154 CLR 25, at 70 per Brennan J
\(^5\) Administrative Review Council, Judicial Review in Australia Consultation Paper, p 27
judicial review rights arising out of s75 of the Constitution. A person who is not an ‘offshore entry person’, and is seeking review of a decision to refuse them a protection visa, exercises rights of judicial review modified by the Migration Act 1958 (Cth). For example, a person in the latter position could seek to review a decision for failure to comply with a statutory code for procedural fairness, where a person in the former category enjoys procedural fairness rights unaffected by statute. The case of M61 is an example of the unwillingness of the High Court to allow decisions of the executive to be made without the prospect of judicial scrutiny as to whether its decisions have been made according to law, and with the observance of the principles of procedural fairness, the rules that need to be followed by decisions makers to ensure a fair and proper process that is more likely to result in a correct decision.

VLA recognises that there may be sound policy reasons for different judicial review rights in different areas of law, or in respect of different government decisions. However, in VLA’s view, there is often no clear basis in policy for the use of a sui generis judicial review regime. Generally speaking, VLA takes the view that a broad statutory right of judicial review, along the lines of that set out in the Administrative Decisions (Judicial Review) Act 1977 (Cth), should be the default position in respect of judicial review rights.

The ambit or scope of review

In respect of the Council’s questions relating to the ambit or scope of review, VLA notes that visa applications often depend, in part, on the provision of reports by bodies other than the Department of Immigration and Citizenship. By way of example, security risk assessments of visa applicants are provided by ASIO,8 criminal histories are provided by the Australian Federal Police and health checks conducted by Health Services Australia,9 are often requisite conditions on the grant of a visa. In such circumstances of the ‘outsourcing’ of parts of the decision making process by the primary decision maker, it is appropriate that judicial review extend to such reports and recommendations.10

Our experience in representing clients seeking assistance through the Commonwealth’s Compensation for Detriment caused by Defective Administration Scheme (CDDA Scheme) is that decisions under the CDDA Scheme can be highly variable.11 Judicial review of such decisions would tend to promote consistency in terms of process and principles applied, and thus is desirable.12

The Council recognises that there is a trend towards the ‘outsourcing’ of government functions. For this reason, it is appropriate to focus judicial review on the decision,
meaning that where the decision involves the exercise of public power, judicial review should be available.\textsuperscript{13}

In relation to the question of the exclusion of decisions from general review schemes, VLA refers to its comments above in relation to anomalies created by the \textit{sui generis} scheme in relation to migration decisions.\textsuperscript{15}

\textbf{Grounds of review}

In relation to the question of the place of statutory codes of procedure, VLA notes the anomalies created by the codes of procedure in the \textit{Migration Act}. The creation of such schemes tends to create new technical arguments about the interpretation of the code, and risks the caprice of varying standards of procedural fairness.\textsuperscript{17}

\textbf{Right to seek judicial review}

Where government decisions are made without adherence to proper process or governing law, there is a public interest in their review. For that reason, judicial review plays an essential role in ensuring responsible government. The essence of the judicial function in public law cases is threefold: judges can impartially and skilfully interpret legislative rules; by doing so independently of the other arms of government they can bolster community confidence in the administration of the law; and they can check the misuse of authority by the other arms of government.\textsuperscript{18}

\textbf{Judicial review and reasons for decisions}

Generalised rights to reasons for decision, such as that contained in \textit{s13} of the \textit{Administrative Decisions (Judicial Review) Act}, or in \textit{s28} of the \textit{Administrative Appeals Tribunal Act}, are capable of being adapted to the particular exigencies of providing reasons in respect of any of the wide range of judicially reviewable government decisions. Therefore, such general rights to reasons for decision should be kept as wide as possible. However, VLA takes the view that there might be reasons for provisions to be kept or created in respect of particular decisions, which create a wider right to reasons for decision, or mandate the provision of written reasons. See, for example, \textit{s236} of the \textit{Social Security (Administration) Act 1999}, which requires written decisions in respect of social security decisions.\textsuperscript{19}

\begin{footnotesize}
\begin{enumerate}
\item This pertains particularly to \textbf{questions 6 & 7} in the Council’s paper
\item This pertains particularly to \textbf{question 9} in the Council’s paper
\item See, for example, \textit{Muin v Refugee Review Tribunal} (2002) 190 ALR 601; \textit{SAAP v Minister for Immigration and Multicultural and Indigenous Affairs} (2005) 215 ALR 162; \textit{Minister for Immigration and Citizenship v SZKTI} [2009] HCA 30
\item This pertains particularly to \textbf{question 13} in the Council’s paper
\item This pertains particularly to \textbf{question 15} of the Council’s paper
\end{enumerate}
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Accepting that “reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error”, VLA takes the view that where there is a statutory right to reasons for decision, those reasons should reflect the basis on which the decision is made. That being so, the inference ought be able to be drawn from reasons for decision, as in respect of decisions under s430 of the *Migration Act*, that they reflect the material taken into account by the decision maker.

**Court procedures**

In VLA’s view, the provisions in *Part 8B* of the *Migration Act* have had a chilling effect not only on the commencement of judicial review proceedings, but on the provision of legal assistance and advice in respect of such assistance in circumstances where it could be interpreted as encouraging a person to commence or continue litigation. This is regrettable, from the point of view of access to justice, and provisions of this sort should not be reproduced in other legislation.

**Additional statutory review mechanisms**

Statutory review mechanisms such as that under s44 of the *Administrative Appeals Tribunal Act* add little, in terms of access to rights of review, as long as a broad general right of judicial review is maintained. Anomalies might be created in the migration jurisdiction, for example, if an AAT decision relating to an aspect of the Minister’s delegate’s decision on a protection visa application is reviewable under a different regime to that which applies to an RRT decision in respect of a different aspect of a decision on a protection visa.

**Options for Australia**

VLA believes that judicial review is poorly understood by the public at large. Community legal education in relation to judicial review rights is warranted, irrespective of whether those rights are set out in the *Constitution*, or in a statutory scheme and we recommend that appropriate funding be provisioned to ensure a properly resourced community education strategy.

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22 This pertains particularly to question 19 of the Council’s paper.

23 This pertains particularly to question 21 of the Council’s paper.

24 This pertains particularly to question 23 of the Council’s paper.

25 This pertains particularly to question 29 of the Council’s paper.