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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) AMENDMENT BILL 2013

EXPOSURE DRAFT

EXPLANATORY STATEMENT

Circulated by
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Introduction

This explanatory statement relates to the Administrative Decisions (Judicial Review) Amendment Bill (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview

Currently the ability to bring an action for judicial review under the *Administrative Decisions (Judicial Review) Act 1989* (the ADJR Act) is limited to 'persons aggrieved'. The Bill removes the concept of a 'person aggrieved' and creates open standing, with two exceptions, as recommended by the Australian Law Reform Commission in report no 78, *Beyond the Door-keeper: Standing to Sue for Public Remedies* (the ALRC Report)**.**

As the Commission said in that report "the importance to our legal system of government accountability should not be compromised by placing arbitrary limits on standing." Put another way, the rule of law should not be jeopardised by artificially limiting who can seek judicial review of government action.

The Bill responds to this concern and provides that any person may bring an action for judicial review unless:

- the law under which the decision was made expressly prevents the person from making the application; or
- the bringing of the action would be contrary to the public interest because it would unreasonably interfere with the ability of someone with a private interest in the subject matter of the application to deal with it differently or at all.

Providing open standing for judicial review is a significant reform and while a number of jurisdictions have enacted expanded standing provisions in different contexts no other Australian jurisdiction has comprehensively tackled the issue of access to judicial review.

The Bill deals with an important principle and is a holistic response to a broad issue rather than to any particular case. The Bill greatly simplifies what has become a very complicated area of law. Removing the current test for standing will mean that legal challenges focus on the substantive issues and the administrative decision in question rather than the constructed issue of whether or not the case can be brought by the particular applicant.

The primary argument used to oppose the introduction of open standing is the claim that it will "open the floodgates" and that the courts will be inundated with unmeritorious claims by 'busy bodies' or used for commercial and anti competitive ends rather than legitimate review of the legality of decisions.

It is important to note that to date cases on standing have mostly "involved interests shared by a large number of people other than the plaintiff."[1] Those wishing to test the current law and expand its reach have been concerned about collective community interests rather than abusing legal process to protect their private commercial interests.

In other instances where particular enactments allow open standing for the decisions made under those Acts the experience has not been that it has "opened the floodgates". For example in NSW Section 123 of the *Environment Planning and Assessment Act 1979* provides that:

> "Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."

In what is undoubtedly one of the most controversial areas of government decision making, the cases before the NSW Land and Environment Court have consistently been relatively modest in number and legitimate claims about the application of the Act rather than vexatious abuses of court processes. To this end the former Chief Justice of the Land and Environment Court has said:

> "It was said when the legislation was passed in 1980 that the presence of section 123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited."[2]

Further, Court Procedures Rules give the Courts a range of powers to manage proceedings before the Court and ensure that vexatious claims are not allowed to proceed and that the conduct of the parties during the litigation can be taken into account when awarding costs.[3]

The 'floodgates' issue was considered by the ALRC as well as the NSW Law Reform Commission, both found that the argument had no merit.[4]

The issue of access to judicial review was also considered by the WA Law Reform Commission which supported the ALRC recommendations.[5]

Human Rights

The Bill generally promotes access to justice and the protection of the public interest in ensuring the lawfulness of government decision making. However the Bill potentially engages the right to privacy (protected by section 12 of the *Human Rights Act 2004*). The Bill allows any person to challenge the legality of government decisions, potentially those decisions may relate to an individual (as opposed to a corporation) and what might arguably be a largely private matter may be litigated. It is important to note that there is a significant public interest involved and that the Bill provides that decisions may not be challenged where

[1] Douglas, 'Uses of standing rules 1980-2006', (2006) 14 AJAL 22 at 34.
[2] Cripps J, "People v The Offenders", Dispute Resolution Seminar, Brisbane 6 July 1990.
[3] Court Procedures Rules 2006, rules 425, 1147, 1754, 3566, 6720.
[4] Australian Law Reform Commission in report no 78, Beyond the Door-keeper: Standing to Sue for Public Remedies [at 4.37-42] and NSW Law Reform Commission Report 92 (1999) - Review of the Anti-Discrimination Act 1977 (NSW) at [8.14 - 8.15].
[5] Western Australian Law reform Commission Report 95, Judicial Review of Administrative Decisions (2002).

it would not be in the public interest to allow the person to make the application because it would unreasonably interfere with the ability of someone who has a private interest in the subject matter of the application to deal with it differently or at all.

In the context of the reform where there is an intersection between private and public interests that will vary depending on the particular decision being challenged and there are an enormous range of administrative decisions that may be subject to review, it is difficult to articulate the exact nature of the right being limited. Further it will vary depending on whether a decision is effectively being challenged on an unsuccessful applicant's behalf or a decision that primarily affects only the individual's rights is being challenged.

An administrative decision that might be subject to review (effectively not an application prohibited by new section 4A(b)) will most likely not substantially involve particularly personal information and the limitation on a person's privacy is likely to be far less than for example from a right to enter a person's home or share private information about a person. To this extent the practical extent of the limitation is limited.

Any limitation that does arise comes about out of necessity to give effect to the intention and purpose of the Bill; to protect the rule of law and ensure the legality of government decisions. There is no alternative means of achieving this and the limitation on the right is limited to the greatest extent possible.

Notes on Clauses

Clauses 1 to 3 Name of the Act, Commencement and Legislation amended
These are preliminary clauses setting out the name of the amending Act, the Act amended and the commencement date. Note that as an amendment bill, section 89 of the Legislation Act provides for the repeal of the Act the day after the commencement day.

Commencement of the new Act is proposed to be the day after notification day. In effect this will mean that any decision made within the 28 days (see section 10(2)) prior to the notification of the Act will be able to be the subject of an application for review of the decision by any person, subject to the new section 4A (see clause 6).

Clause 4
This clause is required because the current note to section 2 of the Act concerning the application of the dictionary and signpost definitions uses as example of a definition that will no longer exist because of the changes proposed in the Bill. The clause substitutes an alternative example to illustrate the operation of signpost definitions.

Clause 5
The current section 3B defines who is a 'person aggrieved'. The Bill proposes to remove the concept of aggrieved persons and replace it with open standing with some exceptions (see clause 6 below).

Clause 6
This clause inserts a new section 4A that sets out who may bring an application for review under the ADJR Act. Effectively the clause creates open standing, imposing 2 limitations on that standing as proposed in the ALRC report. The limitations are:

- when the Act under which the decision was made prevents the person from challenging the decision; or
- when it would not be in the public interest to allow the person to make the application because it would unreasonably interfere with the ability of someone who has a private interest in the subject matter of the application to deal with it differently or at all.

In relation to new sub section (1)(b), there is a recognition that there is a significant public interest in allowing people to control matters where they have a private interest. In effect this means that for example if a person applies for a permit to do something and it is declined the person that applied should be able to control how or if the matter is pursued further. A determination will very much depend on the particular circumstance and nature of the particular decision in question. It may also be the case that there are competing interests both private and public. The provision adopts the position advocated by the ALRC as a reasonable means of balancing those interests and leaving sufficient space for the Court to make a determination based on the particular facts of the case before it.

Clauses 7-10
These clauses are consequential on the clause 6 removal of the requirement for a person aggrieved to be able to bring an action under the ADJR Act.

Clause 11
This clause changes the requirements for other parties to join in applications for review in the Supreme Court. This will mean that any person who was eligible to bring an action may also be joined as an additional party to the action.

Clause 12
This clause inserts a new section 19A that will allow other persons to intervene in matters before the Court. The Court will have a discretion to allow interventions. In exercising that discretion the Court must have regard to a three specific factors set out in the Bill. Additionally the Court may also have regard to any other matter that the court considers relevant.

In granting leave to intervene in the matter the Court may also impose conditions on which leave is granted.

The clause also provides that there is no review available for the Court's decision on whether or not a person is given leave to intervene. The intention of the Bill is to allow people to participate in public interest matters and ensure the legality of government decisions in an efficient manner. It would be inconsistent with this aim if matters were effectively allowed to be delayed for significant periods while interlocutory decisions were appealed.

Clauses 13 and 14
Again these clauses are consequential on the clause 6 removal of the requirement for a person aggrieved to be able to bring an action under the ADJR Act.