

EXCLUDING OR LIMITING THE RIGHT TO JUDICIAL REVIEW¹

LDAC continues to provide advice on the importance of retaining the right to seek judicial review of decisions made under legislation. In this reporting period, this issue arose with the Christ Church Cathedral Reinstatement Bill and the Electoral (Integrity) Amendment Bill in particular.

Judicial review is the means by which courts fulfil their constitutional role of ensuring public powers are exercised in accordance with law. The possibility of judicial review provides incentive for decision-makers to take into account appropriate matters and follow proper process. Legislation removing the right to judicial review could be seen to immunise unlawful exercise of power from judicial scrutiny. For this reason, legislation attempting to oust judicial review is, in practice, narrowly interpreted by courts and rarely achieves its objective.²

Often the reason given for seeking to include restrictions on judicial review is to prevent frivolous and ultimately unsuccessful court challenges causing unacceptable delays and frustrating the overall policy objective behind a Bill. But LDAC's view is that removing or restricting the right to judicial review is rarely a proportionate response to the perceived risk.

LDAC considers the better way to reduce litigation risks is to ensure the legislation itself is clear about what it does and does not authorise. Where proper process has been followed and the legislation is clear, the High Court ought to be able to be relied upon to deal expeditiously with any judicial review application.

In the case of the Christ Church Cathedral Reinstatement Bill, LDAC's External Subcommittee expressed concern about procedural restrictions placed on judicial review. The Bill required any application for review to be made within 28 days. The subcommittee noted that, although the High Court could extend the deadline, a person was required to apply for an extension before the end of the 28-day period.

While the subcommittee understood the desire for certainty and the restrictive clause was preferable to a total ouster, it remained unconvinced that the restrictions were a proportionate response to the perceived risk. It submitted that, at the very least, the courts should be given a general discretion to allow late claims. The subcommittee noted that the 28-day restriction could be viewed as simply a bright-line articulation of the court declining relief where there was unexplained delay in bringing proceedings.

In the case of the Electoral (Integrity) Amendment Bill, the ability of parliamentary members expelled from their party to seek judicial review of that expulsion was emphasised by the

¹ This passage is taken from the 2018 LDAC Annual Report (at page 9). Excluding or limiting the right to judicial review was one of the "issues of note" during the 2017 – 2018 year.

² *Legislation Guidelines*, chapter 28.1, "[b]ecause ouster clauses undermine fundamental principles of constitutional law, the courts give them a narrow interpretation to preserve their ability to review decisions in at least some circumstances. As a result, ouster clauses may not be fully effective even if included."

Attorney-General in his advice that the Bill was consistent with the right of those members to freedom of expression and association. That being so, the External Subcommittee submitted that the Bill ought to be amended to make it clear that the Parliamentary Privilege Act 2014 would not be a barrier to the availability of that judicial review. LDAC maintains the view that legislation should not remove the right to apply for judicial review. Restrictions placed upon the right should be rare and limited to cases where finality is critical and be proportionate to that objective. The committee intends to provide further education to departments on the actual risks associated with judicial review.

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