Who can sue?
A review of the law of standing

PIAC response to ALRC Discussion Paper 61

Andrea Durbach and Amanda Cornwall

PIAC Paper No.21
21 December 1995

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Context of the review

The Discussion paper (DP) argues that the present review comes after ten years in which there has been increased review of government decisions, a greater recognition of the courts as law makers and an increase in public interest litigation. PLAC believes the factors behind these developments need to be examined to set the context for a discussion of the law of standing in Australia and the need for statutory reform. Key factors are:

- the growth of the public interest movement in Australia;
- the changing notion of rights in Australia;
- the changing role of the courts.

Before discussing these issues it is useful to attempt to define public interest litigation.

What is public interest litigation?

One of the most useful definitions of public interest litigation is that offered by Justice Bagwati of the Supreme Court of India.

> [In]... litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective and diffused rights and interests vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing.[1]

Key principles which inform public interest litigation include:

- broadening access to the courts
- facilitation of redress for systemic wrongs and breaches of fundamental rights;
- representation and protection of disadvantaged people
- ventilation of substantive public interest issues which require resolution;
- impact on government policy and commercial practice.

Growth of public interest movement in Australia

The DP 2.18 - 2.19 says that PIL has grown in the past ten years but does not discuss in any depth how and why this has occured. PLAC believes that in discussing factors influencing the growth of public litigation recognition should be given to the role of community legal centres and national public interest groups.

Specialist public interest community legal centres have been pivotal in the development of public interest litigation. Such organisations include the Public Interest Advocacy Centre, Environmental Defenders Office, Communications Law Centre, Aboriginal Legal Centres, the National Childrens and Youth Law Centre, the national network of Disability

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1 The *Judges case*, p192, cited by M Cappelletti in Gomez M "*In the Public Interest: Essays on Public Interest Litigation and Participatory Justice*" Legal Aid Centre, University of Colombia. 1993 at p25

Discrimination Legal Centres and Consumer Credit Legal Centres. Their work includes test-case litigation, lobbying governments for law reform, and policy development which is informed by community consultation and casework.

Important features of these organisations which have made them pivotal to PIL are:

- the fact that they are driven by their respective constituencies; and
- the unique expertise they have developed in areas of law and policy which is usually absent from private practice.

National public interest groups have come to play an unprecedented role in policy development, legislative reform and litigation over the past ten years. Some prominent examples are the Australian Council of Social Service, the Australian Conservation Foundation, the Consumers Federation of Australia and the Consumers Health Forum. The latter two are peak bodies which have been formed since 1985 with substantial operating funds from the Commonwealth government.

Each of these groups have been involved in public interest litigation over the past ten years, pushing the boundaries of the law on standing and the protection against arbitrary or unjust behaviour.

Equally important has been the role of dedicated individuals within the public interest movement, particularly the land rights and environment movements. Without people such as Eddie Mabo many of the public interest test cases conducted in Australia would not have been possible.

Changing notion of rights

Parallel to the development of the public interest movement in Australia has been a change in the notion of rights. The DP 2.13 - 2.14 points to the fact that administrative law reform has created new rights to seek judicial review of administrative decisions over the past ten years. While this is of course correct, the DP fails to give adequate recognition to other factors: the importance of the creation of rights in other areas and new regulatory models which rely on public enforcement.

Parallel to the growth of a public interest law movement in Australia has been the growth of legislated social rights, particularly in the areas of discrimination, consumer protection and environment protection. The relationship between the creation of these rights and standing has been eloquently stated by the American jurist Mario Cappelleti as follows:

> The right of effective access to justice has emerged with new social rights. Indeed, it is of paramount importance among other new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement - the most

> basic 'human right' - of a system which purports to guarantee legal rights.[2]

The DP also fails to give adequate attention to the impact of new public rights created as a result of changes to regulatory structures in many areas. Provisions for any person to initiate proceedings to enforce breaches of the law are now contained in a range of Federal Acts, some of which are set out in DP 3.18. They cover a range of subject areas including consumer protection, ozone protection, privacy, chemicals and motor vehicle standards. Similar provisions are made in State legislation particularly in the environment and planning area.[3] The Industry Commission has also recently recommended extension of standing rights to allow private prosecutions to enforce occupational health and safety laws.[4]

These new approaches to regulation rely on the public in general and especially public interest groups to become part of the apparatus of law enforcement. They reflect a recognition that the government alone is no longer regarded as the sole protector of the public interest and that public rights to enforce the law help keep government agencies accountable.

Role of the courts

The DP 2.7 - 2.12 recognises that Australian courts have increasingly acknowledged their role as law makers. Underlying this development is a recognition that courts, in making law, need to be seen as publicly accountable and responsive to contemporary social values.

The words of Sir Anthony Mason in 1987, are instructive:

> ...we accept that the courts have a responsibility 'to develop the law in a way that will lead to decisions that are humane, practical and just', to repeat the words of Sir Harry Gibbs. Judges do not carry out this responsibility in a vacuum, by shutting their eyes to contemporary conditions. They must have an eye to the justice of a rule, to the fairness and the practical efficacy of its operation in the circumstances of contemporary society. A rule that is anchored in conditions which have changed radically with the passage of time may have no place in the law of today.
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> It is unrealistic to interpret any instrument, whether it be a constitution, a statute or a contract, by reference to words alone, without any regard to fundamental values. By values I mean those that are accepted by the community rather than those personal to the judge.
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> Of course the legal issues for decision in a particular case often do not correspond with the real issues underlying the case as the public sees them. A court must necessarily deal with the legal issues. But undue emphasis on formalism promotes a lack of correspondence between the legal issues and the real issues as the public perceives them. And a similar emphasis on

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2 Cappelletti M quoted in Gomez M ibid. at p 14

3 The most long standing examples are the provisions in NSW environment and planning acts (primarily s123 *Environmental Planning and Assessment Act*) and the Victorian *Planning and Environment Act* s114 - 125.

4 See recommendation 18, *Work, Health and Safety*, Inquiry into Occupational Health and Safety, Industry Commission, November 1995.

> formalism diminishes public confidence in the administration of justice in an age in which confidence in the courts and respect for the law cannot be taken for granted.[5]

As law-makers the courts need to take account of and be responsive to contemporary community values. In doing so, their role is currently limited by the narrow context in which issues may be brought before them - where private interests are at stake. The law of standing should ensure that not only individual private disputes are seen as legitimate subjects of adjudication.

There also needs to be recognition that even in so called private disputes there are always public interest considerations.

> .. a decision which affects the interests of one person directly may affect the interests of others indirectly. Across the pool of sundry interests, the ripples of affection may widely extend.[6]

Consequence of public interest litigation

An important ***consequence of public interest litigation*** has been the broadening the law of standing.

By initiating litigation and intervening in legal proceedings public interest groups and individuals have expanded the boundaries of standing. However, the development of legal principles on the law of standing by the Australian courts has been uneven. The resulting uncertainty on the issue of standing has meant that court time is often taken up with protracted arguments about the capacity of the parties or interveners rather than focusing on the substantive issues.

Pressure from public interest groups has also resulted in statutory provisions for standing in some specific Commonwealth legislation, some of which are mentioned in the DP. Like the rules developed by the courts, these provisions do not reflect any coherent underlying principles. Often they represent no more than the successes of particular interest groups.[7]

Given these developments and the evolving nature of the law of standing, PIAC believes a statutory framework to regulate the law of standing needs to be formulated. Such a framework would provide a coherent and uniform approach to providing access to the courts. It would simplify what is at present a complex and conflicting matrix of rules.

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5 The Wilfred Fullagar Memorial Lecture published in *Monash University Law Review* Vol 13, September 1987, 149 at 158-159

6 Brennan, J per *Re McHatton and Collector of Customs*

7 An example is the injunction provision in the *Endangered Species Protection Act*. In the earlier drafts of the Bill the provision was for any person to enforce breaches of the Act.

Definition and purpose of standing

Definition

The ALRC 27 defined the law of standing as:

> the right of a plaintiff to be considered an appropriate party to instigate the particular proceedings. In ruling on the issue of standing the court makes no decision as to whether the rights, duties or obligations being asserted in the proceedings exist in law, whether the facts alleged are true...The court merely addresses the issue whether a legal remedy should be denied to the plaintiff on the sole ground that he or she is not an appropriate party to have commenced the proceedings.
>
> The court's investigation ... focuses on the nature of the relationship between the particular plaintiff and the particular proceedings.

PIAC has described the law of standing as the 'court bouncer' guarding the door of the court. 'Its job is to make sure that only the appropriately garbed people enter; that only those draped with the requisite degree of 'interest' are allowed to pass through to the spotlight of centre stage.' Our courts however unlike trendy night clubs, should be governed by the politics of inclusion, not exclusion. PIAC believes that the laws of standing should aim to facilitate participation, rather than maintain archaic exclusive practices.[8]

We agree with the statement in the DP 2.1 as to the factors that the law of standing needs to take into account, but have added some qualifications, which are highlighted below in italics.

- The need for a fair, efficient and effective legal system, *in which everyone can participate.*
- The need for accountable government, *including the judiciary.*
- The part that litigation plays *for the benefit of the general community.*

On the third dot point, we agree with the views of John Basten QC about the problems with viewing public interest litigation as only clarifying legal issues (para 3 of his letter to the ALRC, 12 December 1995).

Standing rules should not be a barrier to people being able to initiate legal proceedings. The costs of gathering evidence, of commencing court action, the threat of an adverse costs order, and the delays, uncertainty and complexity that accompany legal proceedings, especially test case litigation, are sufficient deterrents.

Standing in India, North America, England and South Africa

Standing rules in a number of other jurisdictions reflect a more open approach which accommodates the demands for wider public participation in judicial decision-making and for greater access to justice.

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8 *The Standing Barrier*, B. Hounslow, paper to administrative law forum, April 1992

South Africa

Under the new South African Constitution, provision is made for "any person" to apply to a competent court for relief where an infringement of or a threat to any right entrenched in the chapter on fundamental rights is alleged (section 7(4)(a) and (b). "Any person" is defined as encompassing:

(i) a person acting in his or her own interest;
(ii) an association acting in the interest of its members;
(iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
(iv) a person acting as a member of or in the interest of a group or class of persons; or
(v) a person acting in the public interest.

A commentary on this section is attached as Appendix A.

India

The Indian Supreme Court replaced the traditional concept of standing in the early 1980's, opting for a much wider approach. The link between public interest litigation and the new, broad approach to standing is clearly stated by Judge Bhagwati.

> It may therefore be taken as well established that where a legal wrong or legal injury is caused to a person or a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed .. without authority of law or any such legal wrong or ... burden is threatened, and such person or class ... is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court ... and seek judicial redress... [9]

USA

The words of Justice O'Connor of the US Supreme Court in the controversial 1989 abortion case, *Webster v Reproductive Health Services*,[10] offer an appealing rationale for greater public interest contributions to judicial decision-making.

> ... the willingness of courts to listen to interveners is a reflection of the value that judges attach to people. Our commitment to a right to a hearing and public participation in government decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.
>
> ... participation by public interest interveners in litigation creates a moral obligation on their part to respect the outcome.[11]

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9 *S.P. Gupta v Union of India* AIR 1982 (Feb) SC 149, a 188-189.

10 492 US 490 (1989) 522.

11 Quoted from P L Bryden 'Public Interest Intervention in the Courts' (1987) 66 *Canadian Bar Review* 490 in Murray op cit at 252.

In the context of amicus interventions, Rule 37.1 of the Supreme Court Rules which together with Rule 28, regulates intervention by amici in the US Supreme Court, suggests a clear indication of the Court's approach:

> An amicus curiae brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.

Canada

The Supreme Court of Canada has demonstrated "an increased willingness to allow interveners with a status somewhere between that of amicus and the traditional (third or added) party".[12] The commentary on Rule 18 of the Court's Practice of 1994 which permits "any interested person" intervention "upon such terms and conditions and with such rights and privileges as the Judge may determine," states:

> Generally speaking, the Court now favours interventions by public interest organisations. Although there is little jurisprudence, the principle appears to be that an intervention will be accepted if the intervener will provide the Court with a fresh perspective on an important constitutional or public issue. The Court may also grant leave to intervene to enable an interested person to protect a legal interest.[13]

In 1990, in *Rothman's Benson & Hedges v Canada (AG)*, the Federal Court, in considering Federal Court Rule 1611 relating to interventions in the hearing of an application for judicial review, held:

> An organisation genuinely interested in the issue raised and with special knowledge and expertise related to that issue, has the necessary attributes to intervene in public interest litigation.[14]

England

We understand that the English courts have adopted a more flexible approach to standing. We agree with the comments by John Basten QC that consideration of the English cases would be of assistance.

Developments in standing in Australia

The manner in which the DP has addressed the current position on the law of standing in Australia is inadequate. We have not had the time to analyse the development of the law and the principles underlying the various tests ourselves, but we believe it is essential before the ALRC makes recommendations for change. We agree with John Basten's suggestion that the ALRC undertake this work as part of the reference on the law of standing.

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12 ibid at 248.

13 Brian A Crane QC and Henry S Brown QC *Supreme Court of Canada Practice* 1994 at 146

14 Cited in David Sgayias QC et al *Federal Court Practice* 1993 at 777.

It is time, as recommended in the ALRC ten years ago, that suitable techniques are put in place "to allow for the protection of outside interests and to ensure all relevant arguments are put to the courts"[15].

Proposed tests for standing

Test for commencing litigation

PIAC believes that "any person" should be permitted to commence litigation. Standing rules should not be used as a barrier to access to the courts.

If the courts are to be inclusive standing should be open. Other mechanisms, such as costs and judicial discretion to exclude vexatious litigation, are sufficient to deter the meddlers and busy-bodies.

There are public policy benefits in having a court system which facilitates laws being enforced and controversies resolved without the intervention of the State or the need for personal property to be at stake. The only standing rule that would reflect this view is to allow 'any person' to initiate legal proceedings.

Uniformity

PIAC believes the any person test should apply to the full range of legal proceedings. This would ensure uniformity and certainty and allow the law of standing to develop in a consistent manner.

As we mentioned above, many Commonwealth laws now provide for any person to initiate proceedings to enforce the law. This is an effective means of ensuring the objectives of the relevant Act are met. There is nothing in the purpose of those acts or the subject matter they deal with that make this type of standing provision any more appropriate than in other statutes.

However, we recognise that there may some areas of law where the any person test may need to be qualified in the interests of the parties to a particular dispute. Family law is one area in which difficulties with the application of this test may arise.

Qualifications to any person test

Even with any person being able to initiate legal proceedings, the courts will need to *decide whether the applicant is an appropriate party to commence those particular proceedings* (see the ALRC definition of standing).

In doing so it is appropriate for the courts to consider the ability of the applicant to present the case adequately, which may involve public interest considerations. While we believe some guidance should be given to the

15 *Standing in Public Interest Litigation*, The Australian Law Reform Commission Report No. 27 1985 at 158.

courts on these issues, we disagree with the definitions of "capacity" and "public interest litigation" in the ALRC's proposed test.

"Capacity to represent that interest"

The DP 3.36 proposes that an applicant's "capacity" to initiate legal proceedings should be determined in light of factors such as status, experience, motivation, resources.

PIAC believes these factors are inappropriate. The ability of an applicant to present the case adequately should suffice.

The criteria for the appropriate status of an organisation developed in *ACF v Minister for Resources*[16] includes whether the organisation is funded by government for their activities. This is a dangerous criteria because it would exclude many public interest groups with broad community support which deliberately eschew government funding. Some prominent examples are Greenpeace Australia and the Australian Consumers Association.

The membership base and legal status of an organisation has also been used as a bench mark for public interest status with inappropriate results. In *Breen v Williams*,[17] Bryson J determined that PIAC is a private organisation by referring to its memorandum and articles of association. PIAC had applied as amicus in a case concerning patient access to medical records. The court focused on the corporate structure of PIAC, as a company limited by guarantee with a membership limited to a board of directors, rather than on its public interest objectives and historical expertise on the issue.

"Litigation in the public interest"

As with our views on the problems associated with the notion of capacity, PIAC believes the test for public interest litigation is unhelpful and will encourage unnecessary arguments.

In particular, the requirement that the litigation *may reduce the need for further litigation* is inappropriate. A legitimate role of public interest litigation is the creation of new or improved rights or remedies. These may only become apparent after a series of cases. Therefore, the reduction of opportunities for future litigation is not always a feature or benefit of public interest litigation. It should certainly not be used as an indicator of whether a particular proceeding is public interest litigation for the purposes of standing.

Floodgates argument

The floodgates argument is frequently presented as a rationale for restricting access to the courts but has been proven repeatedly to be without substance in practice. Open standing provisions in legislation such as the

[16] (1989) 19 ALD 70.
[17] Ibid

Trade Practice Act and under State environment protection laws have produced no such flood of litigation.

The floodgates argument was also used against the reforms to the *Federal Court of Australia Act (FCAA)* in 1988, based on the proposals of the ALRC Report No. 46. After nearly four years of operation of Part IVA of the FCAA there have been less than 20 applications under the provision - hardly a flood.[18]

The practical considerations which arise in relation to the admission of parties or intervenors can be adequately dealt with by the courts through devising appropriate rules. Rather than simply shutting the door on all amici because of the fear of being overwhelmed the US Supreme Court for example, has established a set of rules for dealing with amicus interventions which provide appropriate controls.

In the words of former Chief Justice Anthony Mason,

> Maybe meddlesome interference by a busybody is a price that we should be willing to pay. After all in other areas of the law the "floodgates" argument has invariably proved to be an ineffectual menace.[19]

Legal aid and Costs

If reforms to the law of standing are to genuinely improve access to the courts, new criteria for the provision of legal aid will be required.

Equally necessary are reforms to litigation costs rules which provide an exemption for public interest litigation. Our views on the ALRC's proposed definition of "public interest litigation" in *Litigation Cost Rules*, Draft Recommendations Paper No. 1, have already been stated.

Intervenors

Purpose of and test for intervenors

The purpose of intervention is to protect the particular interest of the intervenor (DP 4.11). It follows that an intervenor should be required to establish an interest in the substance and outcome of the litigation.

Given that an intervenor becomes a party to the proceedings with all the attendant rights and privileges of a party, PIAC believes that intervenors, other than the Attorney-General, should be able to intervene only with the discretion of the court.

In exercising its discretion, the court should have regard to whether the intervenor has established an interest in the substance and outcome of the litigation. We believe that the requirement of a personal stake is too narrow. It is conceivable that a public interest organisation would wish to

18 For a more detailed discussion of the cases see *Representative proceedings in NSW*, Coalition for Class Actions *1995*

19 The Wilfred Fullagar Memorial Lecture published in *Monash University Law Review* Vol 13, September 1987. 149 at 162

intervene to challenge the evidence and arguments of the parties and exercise its rights of appeal. These opportunities are not covered by amicus curiae interventions.

As with the right to initiate litigation and the right to intervene as amicus curiae, which we discuss below, the court should also have regard to the ability of the intervenor to present a case adequately.

Intervenors and settlements

PIAC endorses the ALRC's suggestion that it is appropriate for a court before endorsing a settlement arising from litigation to allow a person whose interests may be affected by the settlement, to make submissions. PIAC's experience in regard to the litigation and final mediation of over 700 women discriminated against by Australian Iron and Steel supports this view. The complexity of the litigation, the size of the class of persons affected and the different experiences of the individuals within the class and the private mediation of a previously public dispute, meant that many of the women believed that their interests had not been fully considered. This affected the credibility of the final settlement.

Amicus curiae

The need for a statutory framework

Despite the existence of an inherent or implied power of the courts to hear from amici "to ensure that it is properly informed of matters which it ought to take into account when reaching its decision"[20], the Australian courts have had a chequered response to admitting amicus interventions. For a review of the development of amicus procedures in Australian courts, see Appendix B.

The cases illustrate that the courts have been reluctant to invoke this implied or inherent power for a variety of reasons. These have included:

- the perceived inability of the amicus to represent or present the issue before the court;[21]
- the outmoded notion that only government can effectively represent the public;
- the duplication of arguments already raised by the parties to the dispute;
- the potential cost burden to the parties.

PIAC believes that there is considerable value to the courts' accepting amicus interventions. They allow judges to be confident of the social consequences of their decisions, they improve the quality of these decisions and enhance the legitimacy of the courts as law-makers.

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20 Einfeld, J per *US Tobacco Co. v Minister for Consumer Affairs and Others* (1988) 20 FCR 520 at 534

21 See Bryson, J per *Breen v Williams* NSW Supreme Court and the 1988 *US Tobacco case* cited in Appendix B

PIAC therefore supports legislative direction on the use of the friend of the court procedure.

Recommended test

PIAC believes that **any person** should have the right to intervene as a friend of the court. PIAC agrees with the ALRC's view that a potential friend should not need to show an interest in the litigation nor in its outcome. The principal *purpose* of intervention, as distinct from the principal test for intervention should be whether the person is able to assist the court to be properly informed of relevant matters (DP 5.12).

The ability to assist the court should not be narrowly or technically construed. Rather, the potential friend should be able to provide the court with a fresh perspective on a public issue which goes beyond the interests of parties to the litigation.

Framework for amicus

A potential friend should have the right to file a written brief at any stage of the proceedings.

PIAC believes that at the time of filing the brief, the friend should be able to elect whether or not he/she will present an oral submission to the court. If the friend exercises the right to such oral submission, the court may determine the length of the submission and specify the areas on which it requires assistance.

PIAC acknowledges that amicus interventions may unnecessarily prolong proceedings to the detriment of the parties. We therefore support the court having the power to impose court management costs orders where friends fail to comply with the court's directions.

In assessing whether to accept the amicus submission, the court should have regard to the utility and novelty of the issues presented. As previously discussed, we point out the dangers associated with the test as to the capacity of the intervenor to make the submission. We do however acknowledge the need for the courts to have well-informed and coherent presentations which will enhance rather than detract from the quality of their decisions.

Finally, we agree with the recommendation in DP 5.13 that the court should have the capacity to notify individuals and organisations which it considers may wish to provide assistance to the court.