SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

FROM: Public Interest Law Clearing House (Vic)
Federation of Community Legal Centres (Vic)
Victorian Council for Civil Liberties

Introduction

In responding to the request by the Australian Law Reform Commission (ALRC) for preliminary input into its inquiry on standing we seek to draw attention to an increasingly common development in the law, namely the removal of the right to judicial review of government decision making.

This submission argues that fetters to judicial review, particularly in areas which impact in a significant way on classes of people, or for that matter on the entire community adversely affect the prospects of public interest litigation to such an extent that they should be considered.

These developments relate explicitly to the Inquiry's Terms of Reference in (b) because they are developments which seriously affect 'the capacity and right of persons to be heard in courts and tribunals exercising federal jurisdiction'.

Standing and Public Interest Litigation

The terms of reference require the ALRC to re-examine the recommendations and draft legislation contained in the ALRC 1985 Report on *Standing in Public Interest Litigation* (ALRC 27) amongst other things, 'in the light of subsequent developments to law and practice and recent and proposed reforms to court and tribunal rules and procedures.'

The recommendations of ALRC 27 were confined to proceedings that have a 'public interest' element and those over which the Commonwealth had constitutional power to legislate.

'Standing' refers to the ability of a court or tribunal to recognise a person's right to institute or maintain proceedings before it.(1) The broad rational behind widening the rules of standing is to enable individuals or organisations to commence proceedings or participate in proceedings in cases of 'public interest'. By either conducting a 'test' case or by participating in an ongoing case, the opportunity arises to raise matters of broad public concern or draw the court's attention to the larger ramifications of a decision that the original parties to a case may have overlooked.

Against this is the need to balance the rights of parties to an action, and the need to ensure the courts do not become over burdened by the procedure or litigation. It therefore follows that the widening of the standing rules should relate to proceedings before appellate courts only, ie, those courts capable of making laws and it is those cases in which social, policy, cultural or economic factors are relevant to a decision.(2)

Jurisdiction of the Supreme Court - Victoria

It is somewhat ironic that as the ALRC examines the laws that 'guard the gateways to the court' (3), the jurisdiction of the Supreme Court in Victoria is regularly being excluded in legislation by the Victorian Government.

Between November and December 1992, the Victorian Government enacted five statutes limiting the jurisdiction of the Supreme Court. In 1993 that list numbered at 32 and in 1994 the number was 27.(4) From January 1995 to date, ten pieces of legislation contain clauses to alter or vary section 85 of the Constitution Act 1975 to either prevent the Supreme Court from entertaining an action or awarding compensation. This practice is not unique to the present state government, as the previous administrations regularly did the same.

The jurisdiction of the Supreme Court is defined in Section 85 of the Constitution Act 1975. This Act is a comprehensive piece of legislation containing the law relating to the Constitution of Victoria. It is this Act which accords constitutional status and protection to the Supreme Court. Any legislative provision which seeks to alter the operation of Section 85 requires passage through both Houses of Parliament by absolute majorities (the entrenchment procedure). In addition, section 4D(b)(i)(ii) and (iii) of the Parliamentary Committees Act 1968 requires that the Scrutiny of Acts and Regulations Committee (a bi-partisan parliamentary committee) to examine each proposed amendment to Section 85 and assess whether it is 'appropriate and desirable' in all the circumstances.

Ouster Clauses

There are a number of different types of clauses employed to oust the Supreme Court's jurisdiction. The privative clause is one which precludes or restricts judicial review of an inferior tribunal by the Supreme Court. There are also clauses which vest powers in Ministers and others to make decisions which affect the rights of people and corporations in conjunction with the limitation or removal of the Supreme Court's jurisdiction to review such decisions. There are also clauses which confer on government bodies, individuals and corporations immunity from the consequences of their actions and consequently the jurisdiction of the Supreme Court is removed or limited.(5)

In its Annual Report 1994, the Supreme Court notes (after a discussion as to the meaning of 'rule of law'):

> 'In some instances, by conferring complete immunity from suit and excluding or limiting the court's jurisdiction, the legislation deprives citizens of the remedy of compensation and other remedies to which they would otherwise have been entitled under the law and confers privileges on those thus protected which are not enjoyed by members of the community generally. This does not reflect equality. Arguably, such legislation is contrary to our understanding of the rule of law.' (6)

In its Report, the Supreme Court also criticises the effectiveness of the safeguards such as the Scrutiny of Acts and Regulations Committee. The Court points out that the Committee can report that a change to Section 85 is not 'desirable or appropriate' or not report at all but the legislation can still pass both Houses without debate on the question.(7) Indeed, the Scrutiny of Acts and Regulations Committee made five adverse reports on statutes

enacted in 1993 and four adverse reports in 1994 where their concerns were not accepted and the Bills were not subsequently amended.(8)

The Scrutiny of Acts and Regulations Committee has recently published a discussion paper on Section 85 of the Constitution Act 1975 and although finding that the majority of clauses were 'appropriate and desirable' in the circumstances, commented as follows:

> 'To abolish causes of actions and remedies normally available to individuals and thus restrict access to the Supreme Court is a serious matter. The Committee has some concerns about the general overuse of the express declaration provisions in this respect. The Committee is concerned that officers, out of caution, are giving drafting instructions to always incorporate Section 85 clauses. There is therefore, a very real possibility that the Supreme Court's jurisdiction may be eroded unnecessarily. It is incumbent on a Committee whose fundamental task is to protect 'rights', to draw attention to this matter. The Committee is of the view that very careful consideration should be given to whether the insertion of such a clause is appropriate, necessary or indeed desirable in the first instance.'(9)

The Legislation:

- **Victoria**

An example of an ouster clause is section 27 City of Melbourne Act 1993 (Vic):

> "No proceedings-
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> (a) seeking the grant of any relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto, or the grant of a declaration of right or an injunction; or
> (b) seeking an order under the Administrative Law Act 1978-
>
> may be bought against any person in respect of, or calling into question, any action taken or purported to be taken pursuant to sections 7(1), (2), (3) or (4), 14 (3) or 20(1) of this Act."

This is a privative ouster clause that prevents judicial review of Orders in Council made to set up the reconstitution of local councils. These orders related to the appointment of Commissioners and the setting of municipal boundaries.(10) This Act was part of a package of legislation that reformed the system of local government in Victoria.

The Australian Grand Prix Act 1994 section 50 limits the jurisdiction of the Supreme Court so that it is unable to entertain actions about, amongst others, the standard of restoration of the area after the end of the race period, and more significantly, in respect to section 46:

> The committee of management or a member or employee of the committee is not liable for any loss or damage arising principally because of works or any thing done, by the Corporation in accordance with, a licence or other authority conferred or purporting to be conferred on the Corporation by or under this or any other Act or law.

The Education Act 1958 was amended by the Education (Amendment) Act 1993 which inserted a new section 81A:

> 'It is the intention of this section to alter or vary section 85 of the **Constitution Act 1975** to the extent necessary to prevent the Supreme Court from-
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> a)...;
> b)...;
> c) entertaining any action in which a decision or purported decision of the Minister to discontinue or continue any State school is sought to be challenged, appealed against, reviewed, quashed or called into question on any account;
> d) entertaining any application for an order in the nature of prohibition, certiorari, or mandamus or for a declaration or injunction or for any other relief in respect of a decision or purported decision of the Minister to discontinue or continue any State school;
> e)entertaining any action with respect to the liability of the Crown or its servants or agents, the State, the Minister or a council constituted under section 13 to a relevant person within the meaning of section 21B on the premises of a State school in circumstances in which no duty of care is owed to that person under section 21B.'

This provision not only removes an individual's right to appeal against or seek judicial review of the government's actions but it also ousts the Supreme Court's power to entertain any action at all in respect to compensation.(11)

- **Commonwealth**

Similar moves to limit judicial review have occurred with increasing frequency at a Commonwealth level.

The Federal Government has amended the Migration Act 1958 numerous times in the last five years in response to specific High Court decisions. Amendments to the Act have resulted in the exclusion of appeal rights in the refugee determination process. The ability to review decisions on the basis of a denial of natural justice and the right to a fair hearing are no longer relevant appeal grounds.

The Government's latest response to the High Court's decision in Teoh sets out to override the Court's recognition of the 'legitimate expectation' that Australia's international treaty obligations will be a consideration in bureaucratic decision making.

The Administrative Decisions (Effect of International Instruments) Bill 1995 seriously undermines the prospect of bringing public interest litigation by its exclusion of 'legitimate expectations' relating to an area of law, namely international treaty law which has the potential to affect the public interest most.

Conclusion

When the ALRC reviews the developments in the law since 1985, the legislative context in which judicial review of government policy and decision making is being prevented is relevant. Redefining the rules of standing in public interest cases where either judicial review or prerogative remedies are sought will not assist litigants who are denied access to

the courts in the first place. This in turn affects the appellate jurisdiction of the High Court as its ability to hear and determine appeals from state supreme court decisions becomes irrelevant if those courts cannot be accessed in the first instance.

Although it is acknowledged that the state situation in Victoria is not a specific consideration within the ALRC's terms of reference, the potential effect of similar 'ouster' clauses at a federal level should be considered by the ALRC in its philosophical consideration of the laws of standing.

In examining the possibilities of changes to legislation and practice associated with standing in public interest litigation the ALRC should take into account the increasing restraints placed upon the community to bring before the courts the very forms of public interest litigation in which a more accessible and open approach to standing would be potentially useful.

Any attempts to codify the court's role in accrediting friends, or in hearing particular interventions might also consider the potential to promote a guarantee of the right to access those courts.

Even if not politically possible, attempting to promote a recognition of the right to judicial review, particularly in matters of public interest should be considered by the ALRC.

Footnotes:
(1) Aronson,M and Franklin,N Review of Administrative Action The Law Book Company, 1987 p411
(2) Roxon,N and Walker,K Female Friends...Alternative Law Journal Vol.19, No3, June 1994 p113
(3) Kirby MD foreword to Five Years in the Ring....Redfern Legal Centre Publishing 1987
(4) Scrutiny of Acts and Regulations Committee, Discussion Paper No.1 Section 85 of the *Constitution Act* 1975, May 1995
(5) Supreme Court of Victoria Annual Report 1994 pp14&15
(6) ibid p. 16
(7) ibid p. 20

(8) Scrutiny of Acts and Regulations Committee First Annual Report April 1994 and Second Annual Report March 1995
(9) Scrutiny of Acts and Regulations Committee Discussion Paper No.1 p.123
(10) Foley,C. Section 85 Victorian Constitution Act 1975...Monash University Law Review [Vol 20, No1 '94]
(11) Rayner M 'The case of the vanishing court' Eureka Street August 1994 Volume 4 Number 6 p. 25