

Law Council of Australia
Answer to Question on Notice
14 February 2014

The Law Council took a question on notice about the availability of judicial review of the Minister's discretionary power to grant a visa.

In answer, the Law Council endorses the views on this matter set out by the Senate Scrutiny of Bills Committee in its Alert Digest 9/2013 (11 December 2013) on the Bill, at pages 30-31, extracted here:

Transferring the determination of 'complementary protection' obligations from a statutory basis to a non-statutory administrative process may also have important consequences for the availability of judicial review. Although the High Court's jurisdiction under section 75(v) of the *Constitution* would continue to be available in principle (assuming that the relevant decision-maker was an 'officer of the Commonwealth'), in practice the non-statutory nature of the decision-making process may diminish its effectiveness in ensuring legal accountability.

If the new administrative process for decision-making foreshadowed in the explanatory memorandum is linked to the exercise of the Minister's personal and non-compellable intervention powers to grant a person a visa under the *Migration Act* (see sections 195A, 351, 391, 417, 454 and 501J), the scope for judicial review will depend on whether the Minister has made a decision to consider the exercise of these powers in a particular case. If the Minister refuses to even consider the exercise of these powers, the result is likely to be that judicial review would in practice be unavailable. Further, even if judicial review is available the Minister could not be compelled to exercise these powers and questions may arise as to the utility of declaratory relief. (For example, by a *writ of mandamus*: the High Court considered these powers under the Migration Act in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.)

As noted above, the explanatory memorandum suggests that the Australia's obligations under the CAT and the ICCPR may be fulfilled through 'pre-removal assessment procedures' as an alternative to the exercise of the Minister's personal and non-compellable intervention powers under the *Migration Act* (see page 2 of the explanatory memorandum). However, the explanatory materials do not contain details about what this process would involve. Assuming the ultimate source of power exercised is non-statutory Executive power, then questions may arise as to how effective judicial review of its exercise would be. The 'constitutional writs' (such as *mandamus*) are available only on the basis of jurisdictional errors and, typically, such errors are identified by reference to the statute under which a decision is made.