



## ADMINISTRATIVE REVIEW COUNCIL

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11/1539-03

21 April 2011

Ms Toni Dawes  
Committee Secretary  
Senate Standing Committee for the Scrutiny of Bill  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Ms Dawes

Thank you for your invitation to make a submission to the Senate Standing Committee for Scrutiny of Bills' inquiry into its future direction and role. I am replying on behalf of the Administrative Review Council in making this submission to that inquiry.

### **Committee's terms of reference**

The Council considers that the Committee's current terms of reference focus on issues which are central to achieving administrative justice. It is vital to the operation of the administrative justice system that administrative powers are clearly defined, subject to merits and judicial review, and are exercised by decision makers of an appropriate level. The Council also recognises the importance of subjecting exercises of legislative power to parliamentary scrutiny and the valuable role played by the Committee.

The Committee's terms of reference include consideration of whether legislative proposals 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions'. They do not explicitly draw attention to or explain the role of merits and judicial review.

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Colin Neave AM  
Justice Garry Downes AM  
Professor Rosalind Croucher  
Professor John McMillan AO  
Allan Asher  
Sue Tongue

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Roger Wilkins AO  
Andrew Metcalfe  
Glenys Beauchamp PSM  
Dr Melissa Perry QC  
Linda Pearson  
Dr Matthew Groves

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## **Guidelines for judicial review mechanisms**

The Council considers that agencies may be assisted in developing legislation and explanatory memoranda by clearer guidelines about what the Committee considers appropriate in terms of review. In particular, the Council suggests that any such guidelines describe key considerations which the Committee takes into account in deciding when merits or judicial review is required. The Committee may wish to consider providing examples of best practice in explanatory memoranda.

As an example, the Senate Standing Committee on Regulations and Ordinances provides guidelines on the application of the four principles that refine the general requirements from Standing Order 23 under which that Committee operates. Guidelines may provide greater opportunity for the Committee's concerns to be considered before legislation is finalised.

In the preparation of guidelines, the Committee may wish to refer to publications of the Council. The guide — *What decisions should be subject to merits review?* — provides detailed information on when merits review should be available. In relation to judicial review, the Council draws the Committee's attention to its 2006 publication — *The Scope of Judicial Review*. The report discusses the different ways in which judicial review can be restricted, and the limited circumstances in which such restrictions may be justified. Both publications are available on the Council's website at <http://www.ag.gov.au/arc>.

In addition, the Council would support guidelines which explain that:

- the availability of judicial review ensures that the executive government is accountable for the legality of its actions, and
- judicial review for jurisdictional error under s 75(v) of the Constitution cannot be excluded by legislation.

## **Scrutiny of delegated legislation**

The Council notes that the scrutiny of the use of delegated legislation is an important function of the Committee. In particular, the Committee draws attention to the use of Henry VIII clauses that provide for amendment of the parent Act, or of another Act, by subsequent regulations. Since the Council's 1992 Report *Rule Making by Commonwealth Agencies*, the publication and review of delegated legislation has developed significantly, but its volume and diversity has also increased. The Council recognises the ongoing need for the Committee to scrutinise and report to the Senate

on legislative clauses which, among other things, inappropriately delegate legislative power. The Council understands that adverse reports by the Committee can prompt amendments to a Bill to bring a delegation within proper limits, or subject instruments made under a delegation to tabling and disallowance by Parliament.

### **Monitoring of search and entry powers**

The Council notes the Committee's Fourth Report of 2000, *Entry and Search Provisions in Commonwealth Legislation*, and the subsequent Government response.

Recommendation 10 (para.4.76) proposed that fairness in administration required that all occupiers of premises which are to be entered and searched should receive a written document setting out in plain words their rights and responsibilities in relation to the search. The Government agreed in principle with this proposal. Since the Committee's Twelfth Report of 2006, *Entry and Search Provisions in Commonwealth Legislation*, a number of other Commonwealth agencies have been given search and entry powers. The Council would support ongoing monitoring by the Committee of the use of such powers in legislation.

Thank you for providing an opportunity for the Council to respond to this inquiry.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Colin Neave', written in a cursive style.

**Colin Neave**  
**President**