1. Key Points

- The existence of a statutory entitlement to written reasons for decision is likely to focus the decision maker's mind on his/her obligation to make lawful and accountable decisions.

- Extending judicial review jurisdiction to decisions by government officers or agencies, non-statutory decisions and subordinate legislation, would vastly improve an individual's access to justice where procedural fairness had not been followed or an officer had acted beyond powers.

2. Introduction

The Legal Aid Commission of New South Wales ("Legal Aid NSW") is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also manages the funding of a number of services provided by non-government organisations, including 36 community legal centres.

The issue of judicial review mainly arises within our civil law practice. The civil law practice provides assistance in relation to issues such as loss of home, consumer protection (including tenancy matters), social security entitlements, migration, guardianship, war veterans’ entitlements, human rights and public interest environmental matters.

Many of these types of matters require Legal Aid NSW to seek a review of an administrative decision made by government or statutory authority, or tribunal.
3. Response to Discussion Paper

3.1 Is there a need for reform?

The current common law jurisdiction has various limitations and could be vastly improved through the establishment of a statutory judicial review jurisdiction. Even though the current model has its benefits—including the large number of grounds upon which an application for judicial review may be made—the development of a statutory jurisdiction would provide the public with greater access to judicial review in appropriate circumstances.

For example, Legal Aid NSW represents clients who wish to challenge a decision made by Housing NSW. Under the current system, the Housing Appeal Committee (HAC) reviews Department of Housing decisions but its recommendations are not binding on Housing HSW. HAC decisions are binding only in relation to the appellant.

In addition, there is no formal right to review after HAC, and it is yet to be determined whether a HAC decision could be reviewed under the common law. There is also no right to reasons for decision under the Housing Act 2001.

A scheme similar to the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act) would, at the very least, provide some access to judicial review. More importantly, it would promote a culture in which reasons were given for administrative decisions.

In a recent speech delivered at the Sydney College of Law, the Hon. Justice Garry Downes AM highlighted three important benefits of the ADJR Act¹:

1. it has cast a bright light over administrative decision-making;

2. it has imposed an obligation to give reasons which will aid an application for common law judicial review as well as ADJR Act review; and

3. it has given much greater discretion in the remedies that may be granted than the common law does.

The introduction of a statutory scheme in New South Wales could be expected to deliver similar outcomes to those identified by Justice Downes.

3.2 Creating a statutory right to reasons

It is not unusual for Legal Aid NSW to assist disadvantaged clients whose interests are affected by administrative decisions, but who have no right to receive a statement of reasons for decision. This is often coupled with no right to seek merits review of the decision.

Although such applicants are entitled to seek judicial review of the decision in the Supreme Court, the absence of a statement of reasons for original decision makes it impossible in almost all cases for Legal Aid NSW to determine whether or not such an application would be meritorious.

Even though the Court has the power to direct a person or body, whose decision has been challenged, to provide a statement of reasons for decision, this does not assist clients of Legal Aid NSW, for the following reasons:

- The Court can only make such a direction after an application for review has been made. Applicants must therefore make the difficult decision to initiate complex and potentially costly litigation without any assurance of its prospects of success. This is likely to dissuade many applicants from testing the lawfulness of the administrative decision, as many lack the means to do so.

- Legal Aid NSW will not make a grant of aid unless it is satisfied, *inter alia*, that the matter has reasonable prospects of success. This would not normally be possible in the absence of a statement of reasons for decision.

- A statement of reasons which has been produced some time after the initial administrative decision was made, and while an application for judicial review is pending, may be unreliable. See comments by the Full Court of the Federal Court in *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 298 at [64] and [67]:

> There are obviously dangers in relying upon any statement of reasons, produced long after a decision is taken, as accurately reflecting the matters that most influenced the decision-maker at the time the decision was made. … there is great force in the adage that justice must not only be done, but seen to be done … [The applicant] … will inevitably feel that a statement of reasons, provided after the decision has been challenged, may have been tailored in order to render those reasons immune from review.

The absence of any obligation to provide a statement of written reasons for decision, combined with the lack of merits review, mean that the administrative decision-making process lacks transparency. The existence of a statutory entitlement to written reasons for decision is likely to focus the decision maker’s mind on his/her obligation to make the decision according to law. Such an obligation will assist in promoting higher quality administrative decision making.
3.3  Categorisation of decisions

Paragraph 7.7.2 of the Discussion Paper suggests that the categories of decisions that should arguably be immune from judicial review be, “decisions where there is neither a right to a benefit nor a duty on the decision maker to consider conferring a benefit”. Legal Aid NSW is concerned this categorisation may be too limiting. This issue was among the matters recently considered by the High Court in *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41 (11 November 2010).

In that matter, the decision-making process purported to be non-statutory but the decision made could be used to assist the Minister for Immigration in determining a valid protection visa application (a power conferred on the Minister by the *Migration Act 1958*). The Minister had no duty to consider whether or not to exercise this power. The Commonwealth submitted the decision makers had no procedural fairness obligations because the power being exercised was not a power to destroy, defeat or prejudice a right; it was merely a discretionary power to confer a right.

The High Court did not accept this argument and held the decision directly affected the applicants’ rights and interests. It held the applicants did not have a right to a particular outcome. Nor was there a right to have the Minister decide to exercise the power, nor to exercise power in the applicant’s favour if the administrative decision maker made a favourable recommendation. The Court held, however, that “steps taken to inform the consideration of exercise of power” must be “procedurally fair and proceed by reference to correct legal principles” [para 38].

3.4  Creating a NSW statutory judicial review

The Discussion Paper makes no mention of the Administrative Decisions Tribunal (ADT) in New South Wales. Legal Aid NSW solicitors often make applications to ADT and are therefore quite familiar with this scheme and jurisdiction. The ADT is a valuable aspect of the review process because of the accessibility of this jurisdiction. For many Legal Aid NSW clients, seeking a review via the Supreme Court will not an option because of cost and jurisdictional issues, even if an ADJR model were enacted in New South Wales. It will be important in the enactment of any ADJR model to avoid reducing the role and functions of the ADT.

In the Federal sphere, applications for judicial review may be made to the Federal Magistrates Court or Federal Court. The availability of a lower court is an attractive option because it helps to deal with matters expeditiously and to keep costs down. Consideration should be given to creating a similar alternative at the State level by conferring jurisdiction on the Local and/or District Courts.

3.5  Non-statutory decisions

Legal Aid NSW supports extending a statutory judicial review jurisdiction to decisions outlined in paragraphs 10.2.1- 10.2.5. Legal Aid NSW often assists clients who have been determinately subject to a decision made by a government or statutory body based on a blanket policy not explicitly authorised by legislation. Such decisions can have serious and detrimental consequences for the person concerned.
4. Conclusion

Thank you for the opportunity to provide these comments. If you require further information, please contact: Samantha Lee, Solicitor, Legal Policy Unit, (02) 9219 5776.