

## SHOULD 'INCONSISTENCY' OF ADMINISTRATIVE DECISIONS GIVE RISE TO JUDICIAL REVIEW?

*Emily Johnson\**

In a recent Federal Court case,<sup>1</sup> an asylum seeker and her two daughters sought judicial review of a decision by the Refugee Review Tribunal (RRT) that upheld a decision not to grant them protection visas. The applicant's younger sister had been granted a protection visa by the (differently constituted) RRT. Review was sought on the grounds that an unfair and inconsistent decision had been made. The Court, after considering the relevant authorities, concluded that there was no ground of review and indeed no inconsistency that would indicate arbitrariness in the RRT's decision. This follows many decisions by Australian courts and tribunals recognising that consistent administrative decision-making is desirable and that inconsistent decision-making can be indicative of arbitrariness but denying that this gives rise to a duty of consistent decision-making, or a ground of judicial review for inconsistency.

This article considers whether inconsistency of administrative decisions, by primary decision-makers and merit review tribunals, *should* give rise to a ground of judicial review in Australian administrative law. Recently, comments were made by Lord Dyson in the UK Supreme Court<sup>2</sup> about a duty of consistency. In addition, the Australian Administrative Review Council's recent consultation paper sought views on the ambit of a statutory judicial review scheme in this country.<sup>3</sup> This article considers that there could be significant benefits to a ground of review for inconsistency both in terms of good administration and individual justice outcomes. However, for a number of reasons that centre on the conflicts between good administration and individual justice, it does not recommend that inconsistency should be recognised as a ground of review in its own right. The conflicts include the potential impacts on flexibility and responsiveness of the policy process, on other grounds of review, particularly for exercising 'fettered' discretion, and on the implications of the fundamental shift it would reflect in judicial review in Australia.

Underpinning and informing this argument is consideration of the use of 'soft law' by executive governments, including its prevalence, its status and the accountability issues to which it gives rise. In this context, the impact that a judicial review ground for inconsistency would have on soft law is focused on improving bureaucratic decision-making and policy processes by the executive, arising from increased scrutiny of soft law by the judiciary.

### **Consistency as a principle of administrative law and how to achieve it**

Principles of consistency, equality and predictability are fundamental to the rule of law, requiring that laws must be applied equally, and precedent must be followed, absent a justifiable reason.<sup>4</sup> Similarly, consistency is central to the idea of administrative justice, at

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*Emily Johnson is a Juris Doctor student at the University of New South Wales. Her article is a revised version of the essay written for the Advanced Administrative Law course run by Greg Weeks, to whom she would like to express her gratitude for his guidance and extensive comments. She would also like to thank Professor Aronson for his helpful comments.*

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least to the extent that it is widely recognised as an administrative law 'value'. It allows people to order their affairs and is a defence against claims of abuse of power by government decision-makers. The perception of inconsistent decision-making is 'not merely inelegant; it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice'.<sup>5</sup>

However, the widely held view in Australian case law is that, while 'consistency may be an important element of good administrative decision-making, each case must be considered in the context of its individual circumstances'.<sup>6</sup> Australian courts and tribunals have recognised 'the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case'.<sup>7</sup>

Accepting that consistency is desirable and inconsistency is generally to be avoided in administrative decision-making, some discussion is required of how consistency may be achieved in the exercise of discretionary decision-making.

Administrative decision-making is increasingly complex, with competing factors such as budgetary limitations and notions such as the 'public interest' to be taken into consideration. The migration regime, for example, is 'fraught with factual uncertainty and legal difficulty' and decision-makers must deal with high-volume case loads.<sup>8</sup> To deal with this complexity, the legislature often provides for the exercise of discretion by ministers, their delegates and tribunals. Legislation governing migration, taxation, environmental planning, social security and many other fields of government activity authorises discretionary powers that can impact greatly on individuals' rights and interests, such as granting or denying visas, licences and payments. Australian taxation law, for example, included almost 500 administrative discretions when analysed in 2007.<sup>9</sup>

No longer thought of in Diceyan terms as necessarily leading to the exercise of 'arbitrary power', discretion is now recognised as necessary although it is still treated with some caution in administrative law.<sup>10</sup> Thus, the executive is entitled to develop and implement policies which guide the exercise of a discretion conferred by statute. Policy guidelines, or 'soft law', promote fairness through predictability, consistency and often distribution of limited resources.<sup>11</sup> Indeed, by adopting policies and making them available, decision-makers may improve the transparency and accountability of the exercise of discretion.<sup>12</sup>

The principles relating to the lawfulness of soft law were summarised by Gleeson CJ in *Neat Domestic Trading Pty Ltd v AWB Ltd*:<sup>13</sup>

There is nothing inherently wrong in an administrative decision-maker pursuing a policy, provided the policy is consistent with the statute under which the relevant power is conferred, and provided also that the policy is not, either in its nature or in its application, such as to preclude the decision-maker from taking into account relevant considerations, or such as to involve the decision-maker in taking into account irrelevant consideration.

However, it does not necessarily follow that there is a duty to apply soft law. The seminal judgment on the role of policies in guiding statutory discretion, *Drake (No 2)*,<sup>14</sup> is a well-known case involving an ultimately unsuccessful challenge to the Minister's decision to order the deportation of Drake, who had been convicted of drug offences. The Minister, and the Administrative Appeals Tribunal (AAT), had applied the relevant ministerial policy in the exercise of a discretion under the *Migration Act 1958* (Cth) and found that, within the parameters of the policy, it was in the best interests of Australia to uphold the deportation order.<sup>15</sup>

The relevant principle enunciated by Justice Brennan is that the duty of the AAT is to make the 'correct or preferable' decision on review of a decision by the Minister. While the AAT could apply or decline to apply any policy in reviewing the merits of the decision, '[o]ne of the factors to be considered in arriving at the preferable decision in a particular case is its consistency with other decisions in comparable cases, and one of the most useful aids in achieving consistency is a guiding policy'.<sup>16</sup>

Given that there is no duty to apply soft law, Australian courts would be unlikely to find that a duty of consistency is owed by administrative decision-makers. Nevertheless, obiter comments of Tobias JA in the NSW Court of Appeal have indicated that encouraging consistency is 'properly related to the context of administrators called upon to make what are truly administrative decisions'.<sup>17</sup>

This position may be seen as a step towards the UK position in the recent decision by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department*,<sup>18</sup> in which a majority of the court found a duty to apply policies consistently, arising from the principles of equality, non-discrimination and lack of arbitrariness. In that case, the decision related to the detention of two foreign nationals prior to their deportation. At issue was whether an unpublished policy, imposing a 'near blanket' ban on the release of foreign nationals who had been sentenced for any of a wide range of offences, could be applied when it was in direct contrast with published policies stating that there was a presumption in favour of release prior to deportation in such cases. The court found that it could not. Furthermore, the 'near blanket' policy was unlawful for the fetter on discretion that it imposed. Although this case concerns a policy applied consistently (indeed, almost uniformly), the court's remarks on the duty, not only to comply with a published policy, but to apply it consistently,<sup>19</sup> are germane to this discussion. The decision also raises a conflict between a potential duty of consistent decision-making and the duty to exercise unfettered discretion.

Since the decision in *Drake (No 2)*, soft law has proliferated and, while it may be a useful means of achieving consistency, soft law decisions may be seen to lack the accountability of those made under delegated legislation or regulations adopted or prescribed by statute.

### **Soft law and accountability**

Soft law, also known as 'fuzzy law' and 'grey-letter law', refers to a range of instruments including guidelines, policies, standards, codes and directives used by governments to implement statutory discretion.<sup>20</sup> For the purposes of this discussion, soft law does not include subordinate legislation, by-laws, or codes or standards that are adopted by legislation and have legislative force as a result. The development of soft law has been prolific; an empirical study in 1997 found that 30,000 codes were in existence in the business and regulatory environment alone.<sup>21</sup>

Given its prevalence and consequently its influence as 'the principal administrative mechanism used to elaborate the legal standards and political and other values underlying bureaucratic decision-making',<sup>22</sup> soft law is rightly raising eyebrows amongst administrative law academics for the 'accountability deficit' that it has created.<sup>23</sup> There is a scale of accountability in terms of 'policy processes' used to develop soft law from development by departmental officials, to ministerial policies tabled in parliament, from no consultation to full consultation processes, and from internal to publicly available policy documents. What is important, in terms of the principles espoused in *Drake (No 2)* regarding a duty on tribunals to apply it, is not how or by whom soft law is made but the intended behaviour-changing effect and weight given to policies.<sup>24</sup> Generally, however, the weight given to ministerial policies is considered to be significant.<sup>25</sup>

Soft law is outside the ambit of the *Legislative Instruments Act 2003* (Cth) and as a result is not subject to any of the accountability mechanisms applying to delegated legislation, including the requirements for consultation,<sup>26</sup> public accessibility, parliamentary scrutiny and ‘sunsetting’ (automatic repeal after ten years).<sup>27</sup> Decisions are only reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) if the policy is directly authorised by statute, which is generally not the case for soft law. Such decisions have been considered in Australian judicial practice not to constitute decisions ‘made under an enactment’ as required to bring them within the reach of the *ADJR Act*.<sup>28</sup>

### ***Failure of soft law to achieve consistency***

A discretionary power conferred on a minister may in practice be exercised by a ‘small army’ of decision-makers, depending on the caseload. Where a discretionary power is wide, it is natural that different decision-makers, even when presented with the same or similar facts, may arrive at different conclusions.<sup>29</sup> However, courts have been reluctant to interfere with the exercise of discretionary power conferred by the legislature on the executive, as expressed by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*:<sup>30</sup>

It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set the limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

In *Segal v Waverley Council*<sup>31</sup> the NSW Court of Appeal held that consistency in administrative decision-making, which was pursued through the application of planning principles by decision-makers, would not necessarily result in different decision-makers reaching the same outcome, particularly where the decision involved a ‘value judgment of a particularly subjective kind’.<sup>32</sup>

In that case, two neighbouring families, the Darlings and the Segals, each proposed to build a garage that would affect a sandstone retaining wall, deemed by the local environment plan to be a landscape heritage item. Both applications to Waverley Council were refused and both neighbours appealed for merits review to the Land and Environment Court. The Darlings’ appeal was rejected by Commissioner Moore. However Commissioner Watts subsequently granted consent for the Segals’ development proposal. No reasons were given by Commissioner Watts for his departure from the decision of Commissioner Moore. Waverley Council’s subsequent appeal to the Land and Environment Court was upheld by Lloyd J,<sup>33</sup> against which the Segals appealed to the NSW Court of Appeal on the ground that, inter alia, his Honour erred in finding that Commissioner Watts was bound to consider the earlier decision of Commissioner Moore in light of the principle of consistency in administrative decision-making.<sup>34</sup>

The Court of Appeal stopped short of upholding a duty of consistency, but Tobias JA added:<sup>35</sup>

[t]hat is not to say that it was not desirable for Commissioner Watts to have referred to [Commissioner Moore’s] decision given the somewhat unique circumstances under which the two decisions were made: on the contrary, his doing so may well have avoided the present appeal.

The outcome of the decision in *Segal* was to uphold the exercise of independent discretion rather than importing the doctrine of ‘precedent’ into administrative or tribunal decision-making, particularly by a ‘quasi-judicial tribunal’ such as a Commissioner of the Land and Environment Court.<sup>36</sup> The results for the Segals and the Darlings were substantively inconsistent but equally valid. This is not to say that the result was not ‘inelegant’.<sup>37</sup>

It should be acknowledged that there are other methods for achieving consistency in decision-making, such as the use of information technology, agency training and oversight. In addition, a duty to give reasons<sup>38</sup> helps to guard against arbitrary decisions and reliance on erroneous notions, and ensures that decision-makers 'pay close attention to the individual circumstances of each case'.<sup>39</sup> While it is not the focus of this article, tribunals may also develop their own strategies for avoiding the sort of inconsistency evident in *Segal*. The decision in *Drake (No 2)* and subsequent practice indicates that tribunals will seldom depart from the requirements of executive soft law absent compelling reasons.

In summary, consistency in administrative decision-making is desirable but not currently mandated in Australian administrative law. It is largely pursued through soft law, which is an effective mechanism insofar as it is flexible and need not go through parliamentary processes but as a result lacks accountability safeguards. Furthermore, while it may improve consistency, the application of soft law by different decision-makers to different cases does not ensure consistency.

### **Inconsistency – a ground of judicial review?**

The purpose of a system of judicial review of administrative decisions in the Australian system of government is twofold. First, it is to ensure accountability of the executive branch of government by allowing the judicial branch to scrutinise decisions in order to safeguard individual rights (or interests) against adverse government action.<sup>40</sup> In this regard it is closely connected with the doctrine of the 'rule of law' and other public law principles leading to an expectation that, secondly, judicial review will result in 'broader systemic improvements in the quality and consistency of government actions'.<sup>41</sup> The standard indicator that the rule of law is absent is that decision-making is (or looks to be)<sup>42</sup> arbitrary.<sup>43</sup>

Given the views expressed by the judiciary and academics referred to in this article, that inconsistency in decision-making may be indicative of arbitrariness at worst and poor administration at best, it is arguable that it should give rise to a ground for judicial review as 'equality of treatment under the law is an ingredient of modern concepts of justice and the rule of law' particularly where it intersects with individual rights, interests and obligations.<sup>44</sup> In considering whether inconsistency should be an independent ground of review, three key impacts of such a ground are considered: first, the impact on the duty of administrative decision-makers to exercise unfettered discretion; secondly, the impact on individual justice; and thirdly the (indirect) impact on 'good administration', namely the policy process and the practice of decision-making.

### ***Existing grounds of judicial review for inconsistency***

The notion of 'inconsistency' already has a limited role in judicial review. Grounds arising from application of a policy, where the policy is inconsistent with statute or precludes a decision-maker from taking into account a relevant consideration may all accommodate elements of inconsistent decisions. In particular, however, inconsistency which can be characterised as *Wednesbury* unreasonableness, for unjustified, unequal treatment and inconsistency resulting in disappointment of a legitimate expectation, holds some potential, albeit limited, for inconsistency to expand into a free-standing ground of judicial review.<sup>45</sup>

Few cases have successfully met the high threshold test developed at common law requiring 'a similarity, if not a virtual duplication of circumstances and conditions to establish the basis for a complaint of inconsistency'.<sup>46</sup> The ground was successfully argued in the Full Court of the Western Australian Supreme Court in *Dilatte v MacTiernan*,<sup>47</sup> where the relevant Minister had refused an appeal against a decision not to grant permission to the applicants for an extension to their house. The decision was not only contrary to a decision of the previous

Minister, it was also contrary to the recommendations of the Town Planning Appeal Committee.

In reaching his conclusion, Malcolm CJ commented that the doctrine of *ultra vires* can be invoked in circumstances of unreasonableness where the cases indicate 'inconsistent and capricious' decisions which bring decision-making into disrepute for arbitrariness.<sup>48</sup> His Honour indicated that some sort of duty of consistency can arise where a planning authority is dealing with successive or concurrent applications relating to the same parcel of land. However, the failure to establish the ground in numerous taxation cases involving discrimination between taxpayers indicates it does not apply to all inconsistencies and courts will determine when there are sound administrative or policy reasons to allow or disallow a successful argument on these grounds.<sup>49</sup>

In contrast, a duty of consistency was not contemplated in terms of 'unreasonableness' in *Segal*, but rather in terms of the 'public interest'<sup>50</sup> of consistent decision-making and the requirements of judicial comity in following earlier decisions absent sound reasons. Although Tobias JA rejected the notion of a ground of review for inconsistency, in *obiter* he remarked that seeking consistency was the proper domain of administrative decision-makers and is at the very least desirable. These different results indicate that the law is far from settled on when inconsistency may deliver the type of 'inelegant' results referred to by Brennan J in *Drake (No 2)*. Despite Tobias JA's comments about the 'unique circumstances' of the case and the desirability of consistent decision-making, it is unlikely that, had *Wednesbury* unreasonableness been argued as a ground for judicial review, it would have been accepted. The difficulty of establishing invalidity based upon *Wednesbury* is well understood and it would by no means be certain that such a claim would succeed, especially where the inconsistency was not internal but with the decision of another decision maker and was otherwise free from jurisdictional error.

Review for the substantive disappointment of a legitimate expectation has been described in England as 'the most fertile ground for the development of protection from inconsistent decisions'.<sup>51</sup> In that jurisdiction, the doctrine of legitimate expectation has extended from a procedural to a substantive ground of review.<sup>52</sup> However there is little judicial support for such an extension at Australian common law.<sup>53</sup> The dogmatic, albeit 'porous and ill-defined',<sup>54</sup> distinction between merits and judicial review perpetuates the reluctance of courts to see substantive fairness as being relevant to anything but the merits of a decision, and thus unsuitable for judicial review. As Gleeson CJ remarked in *Lam*, the nature and scope of judicial review is informed by the separation of powers doctrine enshrined in the Australian Constitution. This prevents the courts from intruding on the executive function of administration,<sup>55</sup> particularly where to do so would achieve no more than impose legally irrelevant judicial notions of what comprises good administration on the executive.

While *Wednesbury* unreasonableness and the disappointment of legitimate expectations therefore offer limited support for the development of inconsistency as a ground of review, limitations on the exercise of 'fettered' discretion appear to stand in direct contrast to the proposal.

If judicial review remedies were available for demonstrable inconsistency in administrative decision-making other than on the basis of *Wednesbury* unreasonableness, it is probable that a court would be required to enquire into the consequences of that inconsistency. There is a very great risk that this would become a de facto inquiry into the substance of the applicant's complaint and, as such, an impermissible excursion into the merits of both the decision subject of the application and potentially prior decisions with which it was inconsistent. The likelihood of inconsistency being approved as a ground of review in Australia at present on that basis is minimal.<sup>56</sup>

### ***Duty to exercise unfettered discretion***

The current position in Australia is that inconsistent treatment of people in similar positions does not constitute legal error or jurisdictional error but, rather, that 'decision-making should focus on individual merits of the case and not be fettered by general policies or the pursuit of consistency for its own sake'.<sup>57</sup> To this end, the *ADJR Act* prohibits the exercise of discretion 'at the behest of another person' or without regard to the individual merits of the case.<sup>58</sup> These grounds are technically separate but are often argued together, along with 'failure to consider relevant matters', where it appears that a policy has been applied inflexibly. The *ADJR Act* provisions reflect the common law principle, informed by the separation of powers doctrine, that the executive cannot fetter discretion through non-statutory rules conferred by the legislature.<sup>59</sup> However, it has also been recognised that in some discretionary exercises, such as calculation of profits for nursing homes,<sup>60</sup> uniformity is paramount to fairness between the subjects of decisions, justifying fettering discretion with soft law.<sup>61</sup>

The Administrative Review Council (ARC) recently invited submissions in response to a consultation paper on judicial review. A number of submissions recommended a reformulation of section 5(2)(f) of the *ADJR Act* which currently provides for a ground of judicial review in relation to 'an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case'. Aronson<sup>62</sup> and Weeks<sup>63</sup> both recommended a reformulation of that ground to something like 'applying a rule or policy that unlawfully (or invalidly)<sup>64</sup> purports to narrow the breadth or content of an applicable discretionary power'. This recommendation was not accepted by the ARC, which concluded that the courts are currently dealing satisfactorily with issues associated with the use of discretion and soft law by decision-makers. It was however noted in the final ARC report on the consultation that an amendment of section 5(2)(f) may be warranted in the future.<sup>65</sup> If the proposal by Aronson and Weeks were accepted, this may have the effect of decreasing the strict application of the rule against fettering discretion and forging the path for the development of inconsistency as a ground of judicial review.

It is argued by Aronson, Dyer and Groves that a blanket rule against fettering discretion is 'increasingly out of step with a perfectly respectable and alternative vision of good government', which is to develop quasi-legislative policy, or soft law, in a manner which takes into account the process of making policies on the basis of 'comprehensive rationality' whereby a range of factors are considered by policy makers underpinned by policy goals and ways of achieving them.<sup>66</sup> They suggest that if courts could modify the rule against fettering, in light of the high volume of cases administrative departments are required to handle, that may open the way for courts to give more force to soft law.<sup>67</sup>

Aronson et al refer to a 'trickle of cases', which can be expected to increase in recognition of the demands of complex and high-volume government decision-making, where the court has apparently accepted modification to the 'non-fettering' rule, including *Minister for Immigration and Multicultural Affairs v Jia*.<sup>68</sup> While the question in that case was on actual or perceived bias in light of comments the Minister had publicly made on radio in relation to the AAT's decision not to cancel Jia's visa on character grounds and the Minister's anticipated response to that decision, the court considered in obiter that the Minister could develop a policy and apply it in relation to the 'character test' without necessarily considering each case afresh.<sup>69</sup>

However the 'perfectly respectable and alternative vision of good government' proposed may be seen by others as having the effect of subordinating individual justice to a principle of 'horizontal equity' with accountable decision-making or 'good administration'.<sup>70</sup> Any proposal for reform that may shift the balance of administrative justice away from individual rights towards the interests of good government must be approached with caution, if not suspicion,

given the potential that would follow for soft law to have normative force despite the absence of accountability in its formation.

### ***Individual rights and interests of good administration***

One of the potential advantages of a ground of review for inconsistency must be to uphold individual rights and interests where there is some contention that discretion has been exercised in an arbitrary or discriminatory way. In many cases, it has been claimed that inconsistent decision-making has led to an unfair result for the applicant.<sup>71</sup> However a ground of review for inconsistency would represent a shift away from the 'classic model' of judicial review, concerned primarily with the procedural protection of rights and legal interests<sup>72</sup> towards a model of judicial review concerned primarily with good administration.

The tension was expressed extra-judicially by Justice Brennan in 1986:<sup>73</sup>

The primary purpose of judicial review may be stated under Lord Diplock's broad headings: it is the safeguarding of individual interests against affection by illegal or irrational administrative action or by administrative action taken without proper procedures. The tension between the purpose of safeguarding individual interests and the purpose of defining principles to govern administration produces some uncertainty in the scope of judicial review. There has to be a composition between flexibility and certainty in the law, and the law is not settled.

The interests of good government and individual justice are sometimes at odds. Thus, while Deane J expressed the view in *Nevistic v Minister for Immigration and Ethnic Affairs* that although consistency 'may properly be seen as an ingredient of justice, it does not constitute a hallmark of it',<sup>74</sup> Flick J further stated in *SZMIP* that 'a like result reached upon the basis of factually diverse materials may be the hallmark of *injustice* and not justice'.<sup>75</sup> Decisions can be 'consistently wrong and consistently unjust'.<sup>76</sup> This has been said of the extensive use of 'character tests' in the immigration context, for example.<sup>77</sup>

However, there may be a role for judicial review in rectifying 'systemic failures' of bureaucracy.<sup>78</sup> It appears that the case for developing a ground of judicial review for inconsistency is equally, if not more, concerned with good administration as it is with individual justice. For example, Aronson suggests that the ground would allow courts to 'explore the possibilities of giving more force to non-statutory guidelines' indicating an underlying need to address systemic issues through judicial review.<sup>79</sup>

Based on the assumption that a ground of review for inconsistency must necessarily impose a duty of consistency on decision-makers (at least to the terms of any operative soft law), two key impacts that such a ground of review may have on good administration are, first, a more formalised and accountable policy process, arising from increased judicial scrutiny of soft law; and secondly, changes to bureaucratic decision-making that result in a higher level of consistency in administrative decisions. For each of these, however, there are potentially both positive and negative impacts on individual justice as well as the imperatives of the executive government to deliver responsive and flexible policy outcomes.

### ***Accountability in the policy process and bureaucratic decision-making***

Judicial scrutiny of decisions made under soft law, resulting from a ground of judicial review for inconsistency, would arguably go towards addressing the 'accountability deficit' of soft law by giving courts access to the 'lush field of policy'.<sup>80</sup> However, this benefit must be weighed against the desirability of policy that is flexible and responsive to individual circumstances, from which exceptions can be made in the interests of individual justice and which allow decision-makers to balance a range of factors. There may indeed be an



expectation that policy shifts will follow from changes at the political level, such as a change of government.

It has been argued by Sossin and Smith that soft law should be treated as 'law' and thus amenable to judicial review, if it has the effect of exerting 'significant influence' in the exercise of discretion by administrative decision-makers. By emphasising the treatment of soft law as a species of law, they suggest that change would be required to the way soft law rules are formulated including, for example, minimum standards to be established for the development of soft law guidelines and policies across the executive arm of government.<sup>81</sup> Accountability of policy processes could be improved by introducing a positive mandate to develop guidelines where discretion is to be exercised; publication of guidelines unless contrary to the public interest; procedures to ensure that guidelines comply with statutory standards and purposes as well as (in the Canadian context) the *Canadian Charter of Rights and Freedoms*; and a mandate for written reasons for departure from the guidelines.<sup>82</sup> These safeguards are necessary, since:<sup>83</sup>

Difficulties arise when manuals which are treated as 'law' remain 'soft', in the sense that they cannot be enforced against the will of the party to whom discretionary decision-making power has been granted. In other words, the central problem with soft law is its asymmetrical operation.

A preference for this approach is also reflected in the obiter comments of Lord Walker's judgment in *Lumba*.<sup>84</sup>

Decisions are taken by a small army of officials at different levels, and they need guidance in order to achieve consistency in decision-making. Members of the public, or those of the public liable to be affected, should know where they stand, and so they are entitled to know, at least in general terms, the content of the official policies.

In addition to increased accountability of the policy process, Sossin has suggested that judicial scrutiny of soft law decisions may also improve bureaucratic decision-making by 'shining a spotlight on a corner of bureaucratic processes which too often is left in the shadows'.<sup>85</sup> One wonders, however, whether this will be a practical outcome if the court lacks the power to invalidate soft law, as it would have in regard to 'hard law'.

There is scant information on the impact that judicial decisions have on agency decision-making in Australia. One empirical study, by Creyke and McMillan,<sup>86</sup> sought to address the lack of knowledge of the impacts of judicial review decisions at an individual and systemic level by tracking the outcomes of all Federal Court of Australia decisions in favour of applicants (individuals seeking review of decisions made against them) over a ten-year period. The findings were mixed. In more instances than they had expected, the authors reported finding that agencies had responded to the court's criticisms by changing their policies and procedures and remaking the particular decision in favour of the applicant. However there were also many instances of agencies making no change, either to the individual decision or to their policies, following an adverse finding through judicial review.<sup>87</sup>

Although policies and rules may be implemented to guide discretion to benefit government 'managerialism', one of the key principles underpinning this approach is the 'justice advantage which flows from the administration exercising its powers in a consistent way', particularly where a high volume of cases must be considered by a number of (or many) different decision-makers.<sup>88</sup>

While enhanced accountability of decision-making under soft law and improved systems of consistent bureaucratic decision-making are potential benefits of the development of a judicial review ground for inconsistency, other perceived benefits of policy, as opposed to

law, as a framework for administrative decision-making, such as flexibility and responsiveness, may be compromised.

As Cane said:<sup>89</sup>

fair administrative decision-making requires a balance to be struck between generality and consistency on the one hand, and specificity and individualisation on the other. Rules, principles and guidelines facilitate consistency; and the power to depart from such rules, principles and guidelines, and to apply them flexibly, facilitates individualised justice.

In a sense, one may conclude on the basis of that passage that little has changed since *Drake (No 2)*: for justice to be done relies on a balance being struck between consistency and flexibility.

Furthermore, as seen in the US context, an approach to policy development that mandates involvement of interest groups, giving rise to an entitlement to participate in 'rule-making', or policy processes, can lead to increased litigation by interest groups, with the effect of reducing flexibility and responsiveness of policy.<sup>90</sup> If consistency as an element of good administration is the objective, there are other, more direct and effective ways of achieving this than through judicial review.

### **Alternatives to judicial review**

One of the hurdles to proposing a ground of review for inconsistency is defining the scope of such a ground. Decisions made by governments are often polycentric in nature, involving sensitive decisions about the distribution of scarce resources and competing interests and they may not be suitable for judicial review. Another consideration is that ensuring the exercise of unfettered discretion may be more important where an individual's rights and interests are at stake. Although, again, defining exactly when that may be is also a difficult task, particularly in the absence of constitutionally enshrined or legislated human rights in the Australian legal system at the Commonwealth level.

As a final consideration in the development of a ground of review for inconsistent decision-making, brief note should be made of the effectiveness and appropriateness of alternative mechanisms to judicial review in light of the above difficulties. An inconsistent decision may indicate discrimination, for example, whereby a complaint to the Australian Human Rights Commission may produce a positive substantive outcome for individuals subject to discriminatory decisions. More widely available is the possibility of complaining to various Ombudsman's offices, which have, in many jurisdictions, had a strong focus on good administration<sup>91</sup> and have a record of obtaining positive outcomes or systemic change in Australia despite having no power to make binding declarations of right.

Of particular importance is the ability of Ombudsmen to provide recommendations to an agency before a final 'decision' has been made, for example, where complainants may have concerns about their treatment or access to natural justice. The NSW Ombudsman, Bruce Barbour, has commented that Ombudsmen have a far greater impact than courts on administrative decision-making and individual outcomes because of their mandate to deal with systemic issues, initiate investigations, review the effectiveness and implementation of legislation and find conduct to be 'wrong', even if it is in accordance with the law.<sup>92</sup>

### **Conclusion**

This article has argued that, in considering a proposal that inconsistency of administrative decision-making *should* give rise to judicial review, it is important to take into account the

ongoing (and overlapping) tensions in Australian administrative law between a duty to exercise unfettered discretion and the desirable goal of consistent decision-making; the purpose of judicial review in safeguarding individual rights and interests versus defining principles of good administration; and the accountability deficit of soft law versus the ability of the executive to develop and apply policy flexibly and responsively.

The strongest arguments in favour of judicial review remedies being available where there has been demonstrable inconsistency in administrative decision-making are that it would bring soft law instruments under judicial scrutiny, increasing the accountability of government for its decisions; and that it could produce more favourable and seemingly just outcomes for applicants, such as those in *SZMIP* and *Segal*. However, it has been argued that such a ground of review would represent a fundamental shift of the balance in administrative law from safeguarding individual rights to the development of principles of 'good administration'. The benefit of such a shift may be to improve policy processes and bureaucratic decision-making (although not necessarily). The dangers of this approach include removing flexibility from the policy process and mandating consistency even where it may be 'wrong or unjust'.

It is concluded that if one of the primary purposes (if not outcomes) of a ground of review for inconsistency would be to create a duty of consistency and reduce flexible and responsive policy processes, any proposal for the development of a judicial ground of review for inconsistency should be approached cautiously. While there may be merit in reducing the high threshold test of unreasonableness for unjustified unequal treatment that already exists, or extending legitimate expectation to substantive fairness to make these grounds of review more readily available to people who have had an inconsistent decision made against them, those proposals are quite distinct from the development of an independent ground of review which would have the potential effect of the judiciary usurping the power of the executive to make decisions that often require a complex balance of interests, policy goals and resources.

#### Endnotes

- 1 *SZMIP v Minister for Immigration and Citizenship* [2009] FCA 217.
- 2 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 265 [26] per Lord Dyson.
- 3 Administrative Review Council, *Judicial Review in Australia* (Consultation Paper, April 2011).
- 4 Karen Steyn, 'Consistency – A Principle of Public Law?' (1997) 2 *Judicial Review* 22, 22.
- 5 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 639 (*Drake (No 2)*).
- 6 *Ibrahim v Minister for Immigration and Multicultural Affairs* (2000) 63 ALD 37, 41 [15].
- 7 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 70, per Bowen CJ and Deane J.
- 8 John McMillan, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases* (Report No 11, 2007, Commonwealth Ombudsman) 2.
- 9 Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 3rd ed, 2012) 368.
- 10 *Ibid*, 368-9.
- 11 Peter Bayne, 'Administrative Law' (1993) 67, *Australian Law Journal* 214, 216.
- 12 The decision in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, for example.
- 13 [2003] 216 CLR 277, 289 per Gleeson CJ.
- 14 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.
- 15 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 637-8.
- 16 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 643.
- 17 *Segal v Waverley Council* (2005) 64 NSWLR 177, 191 [51].
- 18 [2012] 1 AC 245, 265 [26] (*Lumba*).
- 19 *R (Lumba) v Secretary of State for the Home Department* [2011] 1 AC 245, 265 [26] per Lord Dyson.
- 20 Creyke and McMillan, 2012, above n 9, 671-2.
- 21 Australian Government, *Grey-Letter Law* (Report of the Commonwealth Interdepartmental Committee on Quasi-regulation, December 2007) 32. It should be noted, however, that this figure includes legislative and quasi-legislative codes which would not be considered soft law.
- 22 Lorne Sossin and Charles Smith, 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867, 871.

- 23 For example, Robin Creyke, "'Soft Law' and Administrative Law: a New Challenge" (2010) 61 *AIAL Forum* 15; Robin Creyke and John McMillan, 'Soft Law versus Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (2008) 377. Some of the practical consequences of the 'accountability deficit' are explored in Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1.
- 24 Although following *Drake (No 2)* there was some debate about whether the duty of tribunals to follow policy only applied to ministerial policy: Andrew Edgar, 'Tribunals and Administrative Policies: Does High or Low Policy Distinction Help?' (2009) 16 *Australian Journal of Administrative Law* 143, 143.
- 25 *Hneidi v Minister for Immigration and Citizenship* (2010) 182 FCR 115, 121 [49] (*Hneidi*).
- 26 Although this may make little or no practical difference; see *Legislative Instruments Act 2003* (Cth) s 19.
- 27 *Legislative Instruments Act 2003* (Cth), Parts 3-6.
- 28 Creyke, 2010, above n 23, 19. Creyke notes that in some instances the *Judiciary Act 1903* (Cth) may provide an avenue for judicial review.
- 29 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 639, Brennan J.
- 30 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-41.
- 31 (2005) 64 NSWLR 177 (*Segal*).
- 32 *Segal v Waverley Council* (2005) 64 NSWLR 177, 201 [96].
- 33 'Class 1' merits reviews such as those heard by Commissioner Watts and Commissioner Moore can be challenged on an error of law before a Judge in the Land and Environment Court.
- 34 *Segal v Waverley Council* (2005) 64 NSWLR 177, 184, [29].
- 35 *Segal v Waverley Council* (2005) 64 NSWLR 177, 192, [56].
- 36 Clifford Ireland, 'Planning Merits Review and the Doctrine of Precedent' (2007) 27 *Australian Bar Review* 231.
- 37 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, (*Drake (No 2)*).
- 38 Section 13 of the *ADJR Act* allows any person entitled to make an application to the Federal Court or the Federal Magistrates Court for review of a decision to request a written statement about the reason for the decision, with some exceptions. Section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) entitles a person affected by a decision to obtain reasons for that decision, with some exceptions.
- 39 McMillan, 2007, above n 8, 10-13.
- 40 Peter Cane, 'Understanding Judicial Review and its Impacts', in Marc Hertogh and Simon Halliday *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004) Chapter 1, 15, 16.
- 41 Administrative Review Council, *Judicial Review in Australia* (Consultation Paper, 2011) 7.
- 42 'Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, **suggesting** an arbitrariness which is incompatible with commonly accepted notions of justice.': *Drake (No 2)* (1979) 2 ALD 634, 639 (Brennan J) (emphasis added).
- 43 See eg Trevor Allan's entry on the rule of law in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (2008) 1038.
- 44 *Nevestic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325, 334 (Deane J).
- 45 It is beyond the scope of this article to give thorough consideration to all grounds of review. These two are thought to give rise to review for inconsistent decisions and so are considered here.
- 46 *Dilatte & Anor v MacTiernan* [2002] WASCA 100, [66] (*Dilatte*).
- 47 [2002] WASCA 100.
- 48 *Dilatte* [2002] WASCA 100, [58]-[61]. Malcolm CJ's use of the concept of disrepute is similar to the reasoning of Brennan J in *Drake (No 2)* at 639.
- 49 For example, *Federal Commissioner of Taxation v Swift* (1989) 18 ALD 679.
- 50 The Commissioner was required to consider the 'public interest' by section 39(4) of the *Land and Environment Court Act 1979* (NSW).
- 51 Steyn, 1997, above n 4, 26.
- 52 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
- 53 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 21 [65]-[67].
- 54 Chief Justice Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724, 733.
- 55 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 24 [76].
- 56 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
- 57 Creyke and McMillan, 2012, above n 9, 827.
- 58 *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(2)(e) and 5(2)(f).
- 59 Creyke and McMillan, 2012, above n 9, 677-8.
- 60 *Alexandria Private Geriatric Hospital Pty Ltd v Blewett* (1984) 56 ALR 265, 291.
- 61 Bayne, 1993, above n 11, 218.
- 62 Mark Aronson, Submission No 1 to Administrative Review Council Consultation Paper, *Judicial Review in Australia* (2011) 4.
- 63 Greg Weeks, Submission No 8 to Administrative Review Council Consultation Paper, *Judicial Review in Australia* (2011) 6.
- 64 Weeks recommended the wording 'unlawfully' whereas Aronson recommended the wording 'invalidly'.
- 65 Administrative Review Council, *Federal Judicial Review in Australia* (Report 50, September 2012) 139.

- 66 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) 306.
- 67 *Ibid*, 162.
- 68 (2001) 205 CLR 507.
- 69 Aronson, Dyer and Groves, 2009, above n 65, 309.
- 70 Creyke and McMillan, 2012, above n 9, 680.
- 71 For example, *SZMIP v Minister for Immigration and Citizenship* [2009] FCA 217; *Segal v Waverley Council* [2005] NSWCA 310; *Hneidi v Minister for Immigration and Citizenship* (2010) 182 FCR 115, 117.
- 72 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?', (2005) 12 *Australian Journal of Administrative Law* 79, 96-97.
- 73 Justice Brennan, 'The Purpose and Scope of Judicial Review', (1986) 2 (2) *Australian Bar Review*, 93.
- 74 (1981) 34 ALR 639, 647.
- 75 *SZMIP v Minister for Immigration and Citizenship* [2009] FCA 217 [30] (emphasis added).
- 76 *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325, 335 (Deane J).
- 77 Susan Harris Rimmer, 'Dangers of Character Tests Under Australian Migration Laws' (2010) 17 *Australian Journal of Administrative Law* 229.
- 78 Cane, 2004, above n 40, 32.
- 79 Aronson, Dyer and Groves, 2009, above n 65, 162.
- 80 Justice Brennan, 'The Purpose and Scope of Judicial Review', (1986) 2 (2) *Australian Bar Review*, 93, 110.
- 81 Sossin and Smith, 2003, above n 22, 891-893.
- 82 *Ibid*, 893.
- 83 Greg Weeks, 'The Use of Soft Law by Australian Public Authorities: Issues and Remedies' (Paper presented at the Practice and Theory of Soft Law Academic Symposium, Peking University Soft Law Centre, 9 July 2011).  
[http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Weeks\\_SoftLaw\\_%20Australia.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Weeks_SoftLaw_%20Australia.pdf), 3.
- 84 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 307 [190].
- 85 Lorne Sossin, 'The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada', in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Dimensions* (Cambridge University Press, 2004) Chapter 5, 129, 157.
- 86 Robin Creyke and John McMillan, 'Judicial Review Outcomes – an Empirical Study' (2004) 11(2) *Australian Journal of Administrative Law* 82.
- 87 Robin Creyke and John McMillan, 'The Operation of Judicial Review in Australia' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Dimensions* (Cambridge University Press, 2004) Chapter 6, 161, 176.
- 88 Aronson, Dyer and Groves, 2009, above n 65, 162.
- 89 Peter Cane, 'Merits Review and Judicial Review – The AAT as Trojan Horse' (2000) 28 *Federal Law Review*, 213, 236.
- 90 Martin Shapiro, 'Judicial Review and Bureaucratic Impact: The Future of European Union Administrative Law', in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004) Chapter 9, 251, 252-3.
- 91 European Ombudsman, *The European Code of Good Administrative Behaviour* (2005, Office for Official Publications of the European Communities); McMillan, 2007, above n 8; UK Parliamentary and Health Services Ombudsman, *Principles of Good Administration* (2009).
- 92 Bruce Barbour, 'The Impact of External Administrative Law Review: Courts, Tribunals and Ombudsman', (2008) 57 *AIAL Forum*, 50. 59.