



Judicial Review - what criminal lawyers need to know

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Judicial review – the essentials

What is Judicial Review?

“Judicial review is neither more nor less than the enforcement of the rule of law” – Brennan J ¹

- Judicial review is the review of the legality of decisions
- It is different to merits review (often unavailable in a criminal context)
- It is different to an appeal

¹ Church of Scientology v Woodward (1982) 154 CLR 25, 70 (Brennan J)

“The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to error”¹

- There is a principle of judicial restraint
- However, the courts will not defer to the original decisionmaker (i.e. no *Chevron* here²... or in the U.S.!).

¹ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 271 (Brennan CJ, Toohey, McHugh and Gummow JJ)

² *Minister for Immigration and Citizenship v Yucasan* (2008) 169 FCR 202, [15] (the Court)

Federal jurisdiction – general jurisdiction

- The Federal Court (like the High Court) has jurisdiction in all matters arising under Commonwealth laws, and “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”: Judiciary Act, s 39B.
- The Federal Court does not have jurisdiction to review decisions to prosecute in State courts: s 39B(1B)
- Where a Cth prosecution is before a State Court, the Federal Court will not have jurisdiction to review decisions in connection with the investigation, committal or prosecution, or the issue of search warrants: s 39(1C).

Federal jurisdiction – general jurisdiction

- Where a prosecution is before a State Court, the Federal Court will not have jurisdiction to review decisions in connection with the investigation, committal or prosecution, or the issue of search warrants: s 39(1C).
- This means, for example, that where:¹

A warrant is issued...

and the prosecution is commenced
in a State Court...

then the issue of the warrant cannot
be reviewed in the Federal Court

Federal jurisdiction – the ADJR Act

- The Federal Court and the FCFCA (Div 2) have review jurisdiction under ADJR Act
- However, there's no entitlement to reasons for “decisions relating to the administration of criminal justice”: Sched 2, para (e)
- Also, s 9A contains a sweeping privative clause
- Section 9A broadly prevents review of “related criminal justice process decisions”

State jurisdiction

- The Supreme Court of Victoria has both common law (Order 56) and statutory jurisdiction (Administrative Law Act 1978 (Vic))
- The common law (Order 56) jurisdiction is constitutionally entrenched: *Kirk v IRC* (2010) 239 CLR 531
- Order 56 reviews must be commenced within 60 days

The kinds of error

- Jurisdictional error occurs where the decision-maker exceeds their authority¹
- It is question of the gravity and materiality of the error²
- At the Federal level, prohibition, mandamus and certiorari are *only* available if there's jurisdictional error or (for certiorari) error on the face of the record (injunctions and declarations are more widely available)
- At the State level, prohibition, mandamus and certiorari for jurisdictional error cannot be excluded by statute

¹ *Stanley v DPP (NSW)* (2023) 407 ALR 222, [14] (Gageler J)

² *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123

The kinds of error

- Error of law on the face of the record: this is a non-jurisdictional error for which certiorari will nonetheless issue
- “The record” will include the initiating process, pleadings and orders.¹
- A common law, “the record” does not include the transcript, exhibits or reasons of an inferior court (although reasons may be incorporated by reference). However in Victoria it does include reasons of an inferior court: *Administrative Law Act 1978*, s 10.

¹ *Craig v South Australia* (1995) 184 CLR 163, 180-3 (Brennan, Deane, Toohey, Gaudron and McHugh JJ)

The kinds of error

- Does s 10 of *Administrative Law Act 1978* cause the evidence and transcript to be part of the record? It can: *O'Connor v County Court of Victoria & Anor* [2014] VSC 295, [30] (Kaye J):

“[o]rdinarily, the evidence and exhibits before the lower court are not considered to be part of the record of the court for the purposes of an application for relief by way of certiorari. The evidence and the exhibits may, however, form part of the record, to the extent to which that material is specifically incorporated in the reasons for decision, which, pursuant to s 10 of the Administrative Law Act, are themselves part of the record”

The grounds of review

- Unauthorised decision-making (narrow ultra vires)
- Procedural unfairness (Nb. Not always required, and may be excluded)
- Relevant/irrelevant considerations
- Fettered discretion
- No basis in evidence, or absence of jurisdictional fact
- Unreasonableness
- Inadequacy of reasons

- Remedies: certiorari, and (as we'll come to next) prohibition, mandamus, declarations, injunctions.
- Each are discretionary... and delay may be ground to refuse relief.¹
- Certiorari removes the purported legal consequences of the purported exercise of power.
- So it is only available for decisions that have an “apparent legal effect” at the time the order would be made²

¹ *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, [108].

² *Potter v Tural & Another; Campbell v B.A.H. & Another* (2000) 2 VR 612, [20] (Batt JA)

- Prohibition is granted to restrain a body from exceeding its powers: only available for jurisdictional error;
- Mandamus is granted to command fulfilment of a public duty where a person has wrongly declined to do so. The failure may be actual, or constructive (e.g. an extensive delay). Generally, the order will not mandate any particular decision.
- There are then equitable remedies: injunctions (interlocutory or final) and declarations.

Some pointers on search warrants


- The AFP have a particular procedure for dealing with claims of privilege over material stored on electronic devices.
- The default procedure is that the AFP reviews data and quarantines material that may be subject LPP
- But the Occupier may advise that they instead wish to adopt procedures 2 or 3
- Procedure 2 involves the Occupier providing LPP search terms to the AFP to quarantine material
- Procedure 3 is that the Occupier reviews the materials and advises the AFP which materials are claimed to be LPP
- Disputes may be resolved in proceedings

- VLA grants
- Evidence: affidavits producing the transcript and record (unlike an appeal)
- Re costs: judicial review proceedings are civil proceedings, and so costs will usually follow the event!


Scenarios and questions



Thank you

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