WHO CAN SUE?
a review of the law of standing

The right to be heard by a court or tribunal — the law of standing — is fundamental to an accessible and effective legal system.

The current laws of standing are in need of reform. Restrictive and technically complex, they deny access for many people seeking justice and for groups acting in the public interest.

It is ten years since the Australian Law Reform Commission released its report *Standing in public interest litigation* (ALRC 27). This report recommended changes to the rules concerning who should be able to commence or participate in legal proceedings.

Following a recommendation by the Access to Justice Advisory Committee that the federal Government consider implementing this report, the Attorney-General, Michael Lavarch MP, has asked the ALRC to review its 1985 recommendations in light of subsequent developments in law and practice and recent and proposed reforms to court and tribunal rules and procedures.

In October 1995 the ALRC released a discussion paper *Who can sue? A review of the law of standing* (DP 61) inviting comment on the need for, and possible nature of, reforms to the laws concerning standing, intervention and *amicus curiae* (friends of the court). **Philip Kellow** reports.

Philip Kellow is the Team Leader on the review

The laws concerning standing, intervention and friends of the court are fundamental to an accessible and effective legal system. These laws affect the opportunities the courts may have to develop the law and the amount and nature of information they may possess when making their decisions.

They also affect the extent to which government decision makers are subject to judicial review and determine the range of people and organisations, whether they be government bodies or private persons or institutions, who may pursue or participate in public interest litigation.

However, the ability to commence or participate in proceedings is only one element in access to justice. It must be assessed in the context of a range of factors that contribute to the fairness and effectiveness of the legal system, including the rules on costs, the powers available to courts to manage litigation and alternative methods of resolving disputes.

Who should be able to commence legal proceedings?

The law of standing

The law of standing is the set of rules that determines whether a person is entitled to start legal proceedings.

Questions of standing rarely arise in relation to proceedings that are purely private in nature such as actions for damages or for breach of contract. They usually arise in relation to legal proceedings that have a public element such as those challenging government decisions or seeking to enforce public rights or duties.

The ALRC's recommendations in ALRC 27

In ALRC 27 the ALRC found that existing rules of standing were confused and unduly restrictive. They precluded consideration by the courts of the lawfulness of legislative or government decisions in many public interest matters. The ALRC recommended that the law of standing be broadened to permit any person to commence public interest litigation in the areas where the Commonwealth has constitutional power unless it is shown that the person is 'merely meddling'. Standing would be denied where the person has no personal stake in the litigation and clearly cannot represent the public interest adequately.

Still a need for change

Since 1985 the courts have applied the common law and statutory tests for standing more liberally. However, the ALRC considers that changes still need to be made to these tests. In particular,

- the wide range of tests for standing means litigation is more complex, uncertain, expensive and lengthy than ought to be the case
- the tests are premised on the plaintiff having a personal stake in the subject matter or outcome of the litigation and therefore leave no scope for disinterested but concerned and capable plaintiffs to initiate public interest litigation.

A new test for standing?

In DP 61 the ALRC proposes that the current medley of tests for standing should be replaced by a single test.

It queries whether the 'merely meddling' test it recommended in 1985 is still appropriate and invites comment on a new test which provides that litigation in relation to a matter arising under the Constitution or federal legislation or against the Commonwealth could be commenced by

- a person who is aggrieved by the particular decision or conduct which is the subject of the proceedings
- any other person provided
  - — the litigation is in the public interest
  - — he or she has the capacity to represent that interest.

This approach would ensure that litigation would only be commenced where the proceedings will benefit the plaintiff or the general community if successful.

When should a person be able to participate in legal proceedings?

When proceeding are already underway

There will be situations where a person may wish to participate in proceedings which are already under way. There are two existing procedures which allow third parties to participate — by intervention and as a friend of the court.

Intervention

With the exception of the right of the Attorney-General to intervene in any civil litigation that may affect the prerogatives of the Crown, in Australia the courts have no power to permit a third party to intervene in proceedings except under specific statutes or rules of court.

In general terms DP 61 does not propose any changes to the recommendations made by the ALRC in ALRC 27. The law should be altered to clarify the rights of the Attorney-General to intervene and to give the courts a general discretion to allow a private person to intervene. An intervenor has the same rights and obligations as a party to the proceedings.

The ALRC invites comments on whether people with no personal stake should be entitled to intervene in proceedings (as recommended in ALRC 27) or whether the public interest is adequately protected through intervention by government bodies and the use of friends of the court.

Friends of the court

The courts have a discretion to permit an appearance by a friend of the court. The role of a friend of the court is traditionally limited to assisting the court on points of law which may not otherwise have been brought to its attention. In some jurisdictions the court will accept a written brief rather than oral submissions by a friend. A friend of the court is not a party to the proceedings. In ALRC 27 the ALRC recommended that the court's discretion to permit oral submissions and to accept written briefs from a friend should be given statutory recognition.

The courts have recognised that friends of the court can make a valuable contribution to the development of the law and resolution of disputes.

In particular, friends can help ensure that courts are properly informed of matters which ought to be taken into account when reaching their decisions.

However, it appears that, notwithstanding this recognition and the call in ALRC 27 for courts to make greater use of written and oral submissions by friends of the court, these types of submissions continue to be rarely used in Australia. Accordingly, in DP 61 the ALRC proposes a statutory framework to guide courts, parties and potential friends of the court.

Under the proposed framework, any person (a friend of the court) would have the right to provide the court and parties in particular proceedings with a short written brief setting out matters which he or she considers the court should have regard to when making its decision.

The court would have the power to allow that person to make additional written or oral submissions, subject to such terms and conditions as the court determines, if it is satisfied that they would be useful and different from those of the parties to the proceedings. A friend would not be a party to the proceedings. The framework would help ensure that a court is aware of all matters relevant to particular litigation and is able to obtain further information if necessary.

Final report

Discussion paper 61 paper formed the basis of written submissions and consultations with courts, lawyers and interested groups and individuals during November 1995.

The ALRC is now preparing its final report in light of the responses to DP 61. The report is due by 29 February 1995.

Multiculturalism and the law (ALRC 57) — recent developments

This report, tabled on 28 April 1992, has had subsequent influence in a number of areas of law. The federal government formally responded to the *Multiculturalism and the law* report in its Justice Statement of May 1995. The Government indicated strong support for a majority of the ALRC's recommendations and announced that it would be responding with a range of other initiatives to improve access to justice for Aboriginal and Torres Strait Islander people and people of non-English speaking background.

The *Crimes and Other Legislation Amendment Act 1994* (Cth) implemented the ALRC's recommendations relating to the sentencing of federal offenders, ensuring that an offender's cultural background (among other matters) will be taken into account in sentencing.

The *Evidence Act 1995* (Cth) implemented the ALRC's recommendations that a witness be entitled to give evidence through an interpreter, concerning exclusion of improperly obtained evidence and admission of evidence about an accused's cultural values and practices.

The *Family Law Reform Act 1995* (Cth) implements the ALRC's recommendations specifying that, in considering the welfare of the child, the court should consider the relationship that the child has with each parent or with other persons and the importance of maintaining links with their culture.

The *Racial Hatred Act 1995* (Cth) was enacted in September 1995, implementing the ALRC's majority recommendation that incitement to racial hatred should be unlawful, but not a criminal offence.