DEVELOPMENTS IN ADMINISTRATIVE LAW

Ron Fraser*

Government initiatives, inquiries, legislative and parliamentary developments

New Council of Australasian Tribunals

On 7 June 2002 the Commonwealth Attorney–General announced the establishment of the Council of Australasian Tribunals "to bring together a diverse range of Commonwealth, State, Territory and New Zealand tribunals in a forum that allows them to share ideas, experiences and working methods". Following recommendations from the Administrative Review Council (ARC) and the Australian Law Reform Commission, the ARC was requested by the Attorney–General to play a lead role in establishing the Council. Its activities have been described in its recent Report on the Council of Australasian Tribunals (October 2002).

Some 30 tribunals are members of the Council. The inaugural meeting of the Council was held on 6 June 2002. It was agreed that the Council would operate through a federal structure, comprising a National Council, State and Territory Chapters, and New Zealand Chapters. Presiding members of participating tribunals are eligible to take part in the National Council. Members of tribunals are entitled to be members of State, Territory and New Zealand Chapters of the Council, and membership is also open to practitioners, academics, and other interested persons.

The Chair of the Council is to be a presiding member of a tribunal, and secretariat support is expected to come from the Chair's registry. There is also a Deputy Chair and an Executive Committee comprising the heads of the Chapters. The inaugural chair is the Hon Justice Murray Kellam, President of the Victorian Civil and Administrative Tribunal. For further information see the Council's website at: www.coat.gov.au (***Commonwealth Attorney-General's News Release***, 7 June 2002).

Western Australian proposal for a State Administrative Tribunal

The final report of a Taskforce, appointed by the Attorney–General of Western Australia to develop a model of a civil and administrative review tribunal, has recommended that a State Administrative Tribunal (SAT) be established to assume relevant functions of a wide range of tribunals, courts, boards, Ministers and officials with administrative review and appeals functions and some other adjudicative functions. The Taskforce was chaired by Mr Michael Barker QC, then chair of the WA Chapter of the AIAL, who has since been elevated to the WA Supreme Court bench. The report was the culmination of a series of reports by various bodies dating back to 1982, the most recent of which, the 1999 WA Law Reform Commission report on civil and criminal justice, had recommended a tribunal with a wide range of functions. The WA Attorney–General has announced that Cabinet has endorsed in principle most of the recommendations of the report, but that the Government is still

* *Information Access Consultant, Canberra; former Principal Legal Officer, Information Access, Attorney-General's Department, Canberra.*

receiving public feedback on the report (*Hansard*, Legislative Assembly, 10 September 2002).

The recommended tribunal is modelled closely on the Victorian Civil and Administrative Tribunal and the New South Wales Administrative Decisions Tribunal, and adheres to the general model for administrative review provided by the Commonwealth Administrative Appeals Tribunal. The Taskforce stressed the importance of an independent, judicially led tribunal, with full-time, part-time and sessional members appointed for between seven years (the President) and five years (all other members). It considered the SAT would replace the existing *ad hoc* system with a one-stop tribunal in place of a variety of tribunals and other bodies. Among the other benefits of establishing the SAT mentioned in the report were the development of an independent and impartial system, better and more consistent decision making, greater accessibility and service to the public, a wide range of expert and experienced members, economies of scale, and more effective and systematic recruitment and training of members.

Excluded from the SAT's proposed jurisdiction are liquor licensing, industrial relations and workers' compensation appeals. A significant feature of the SAT's jurisdiction is the inclusion of the disciplinary functions of various professional and occupational boards and other bodies, and of the functions of a number of tribunals and boards that make primary administrative decisions of a personal, commercial or equal opportunity nature. Nearly all existing administrative review functions will be assumed by the SAT except for some ministerial appeals requiring political or policy judgment by the government of the day. The Taskforce rejected the recommendation of the 1996 Commission on Government that all administrative decisions should be subject to review: the government and Parliament should decide on a case by case basis what other existing administrative decisions should be subject to review, and should consider at the outset whether new decision-making powers should be subject to review. The Taskforce recommended that, at least initially, some existing original and other decision-making bodies not be included in the SAT, including the Assessor of Criminal Injuries Compensation, the Information Commissioner and the Small Claims Tribunal. However, by majority the Taskforce recommended that the SAT, rather than the Supreme Court, should hear FOI appeals from the Information Commissioner, subject to appeal on questions of law from the SAT to the court by leave of the court. The Taskforce also recommended that, while the Guardianship and Administration Board and the Mental Health Review Board should remain as separate tribunals, they should be aligned with the SAT by co-location and shared membership. (***Western Australian Civil and Administrative Review Tribunal: Taskforce Report on the Establishment of the State Administrative Tribunal*****,** May 2002)

Commonwealth Act limiting procedural fairness in migration matters

The Commonwealth Parliament has passed the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (assented to on 3 July 2002) which seeks to limit the operation of procedural fairness in relation to what the Minister for Immigration and Multicultural and Indigenous Affairs called "codes of procedure" contained in the *Migration Act 1958* (Cth) dealing with visa applications, visa cancellations, revocations of visa cancellations, and the conduct of reviews by the merits review tribunals. The Act was designed to make clear that those codes "exhaustively state the requirements of the natural justice or procedural fairness hearing rule". The intention of the Bill was to reverse the effect of the decision of the High Court in *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 601 that there could still be a breach of the common law requirements

of the natural justice hearing rule "even where a decision maker has followed the code in every single respect". In the Minister's view, the *Miah* decision also led to legal uncertainty as to the procedures necessary for a lawful decision. The Act contains a clause providing that the amendments made by the Act are not to be taken to limit the scope or operation of the privative clause in s 474 of the Migration Act. Many submissions to the Senate Legal and Constitutional Committee's inquiry had opposed the Bill. The Labor Party sought to defer the Bill as premature pending the decision in *NAAV* (see below under heading "Judicial review"), while the Greens and Democrats opposed the Bill. (For the Minister's Second Reading Speech see *Hansard*, House of Representatives, 13 March 2002, pp 1106–7, and debates in the House of Representatives and the Senate on 26 and 27 June respectively. See also *Report of the Senate Legal and Constitutional Legislation Committee on Inquiry into the Migration Legislation Amendment (Procedural Fairness) Bill 2002*, tabled on 5 June 2002.)

Judicial review

High Court finds asylum seekers denied procedural fairness

In decisions in associated appeals, the High Court found that the Refugee Review Tribunal (RRT) denied procedural fairness to two Chinese-Indonesian asylum seekers seeking review of refusals to grant them protection visas. The denial of procedural fairness constituted jurisdictional error, and the Court granted prohibition, certiorari and mandamus. The litigation was conducted on the basis of the law in force in 1998 (compare above for the *Migration Legislation Amendment (Procedural Fairness) Act 2002*.). It was the practice of the Department of Immigration and Multicultural and Indigenous Affairs (the Department) to electronically send copies of documents (Part B documents) from the Departmental CISNET database to a computer server in the RRT, rather than sending them in the form of paper documents. In these matters the documents, which related to the relevant country of origin of asylum seekers, had been referred to in the decisions of primary decision makers. The electronic material was subject to updating and amendment on a regular basis. Other documents were available from libraries to which members of the RRT had access.

While the court as a whole did not consider it appropriate or necessary to decide whether this practice complied with the then ss 418(3) and 424(1) of the *Migration Act 1958* (Cth) (the latter has since been repealed), Gleeson CJ, Gaudron and McHugh JJ considered the practice satisfied the statutory requirement to "give" the documents to the RRT. However, Kirby J held there was a legally significant failure to comply with the statutory requirements that might affect future cases; the legislative scheme required the movement of identified relevant documents, not mere provision of access to an intangible database. The evidentiary foundation for review should not involve materials more limited than those available to the primary decision maker.

A majority of judges (five in *Muin* and four in *Lie*) decided that the plaintiffs had been disadvantaged through being misled as to the materials before the RRT by statements that it would receive and look at all material used in the primary decision; they would otherwise have presented their cases differently by drawing attention to the documents. Chief Justice Gleeson and McHugh J dissented on this issue in both cases, while Callinan J did not consider the adverse decision in *Lie* was affected by the denial of procedural fairness. Four judges (Gleeson CJ, Gaudron, McHugh and Kirby JJ) also found that Muin had been denied procedural fairness by the failure of the RRT to inform him of specific information it had received concerning a change in 1998 in Indonesian government and Army attitudes towards

protection of nationals of Chinese descent. This was significant adverse evidence to which he had a right of reply (Kirby J). Justices Hayne and Gummow JJ considered there was no requirement to inform Muin of this specific piece of information. Justice Callinan was not convinced the material in question was "decisive" or that it was of such a kind that its use would not reasonably have been expected by the plaintiff.

The court was careful to note that while the two matters were part of representative actions, its decisions related only to the circumstances of these two matters. Lawyers in the first case claimed in the media that over 7,000 other refugee appeals to the RRT could be affected by the same defect as in this case. Government ministers have denied that there is any necessary implication that a large number of other cases are affected. (***Muin v Refugee Tribunal & ors, Lie v Refugee Tribunal & ors* (2002) 190 ALR 601**)

Full Federal Court rules on Migration Act privative clause (s 474)

A five member bench of the Full Court of the Federal Court has given judgment in five different appeals raising questions concerning the interpretation and effects of the privative clause contained in s474 of the *Migration Act 1958* (the Act). Divergent views had been expressed on the issues by single judges of the court in a large number of cases. Section 474 was introduced in the legislative package enacted in the aftermath to the *Tampa* incident (see *Migration Legislation Amendment (Judicial Review) Act 2001*). Section 474(1) applies to all decisions under the Act or regulations that are not specifically excluded. It declares that a relevant decision is final and conclusive, must not be challenged, appealed against, reviewed, quashed or called in question in any court, and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. It was common ground on the part of all judges that such a clause does not mean what it says, and that its application is to be interpreted in the light of the "*Hickman* principle" enunciated by Dixon J in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 and referred to in a number of subsequent High Court cases. Justice Beaumont noted that only the High Court could reconsider the *Hickman* principle.

A majority of the court (Black CJ, Beaumont and von Doussa JJ) endorsed an approach that left little room for judicial review of decisions to which s 474 applies. On that view the effect of the privative clause is to implicitly change the substantive meaning of the Act so that the jurisdiction and power of decision makers are expanded, except where provisoes to the principle apply (see below). This view resulted in rejection of one appeal by an asylum seeker where the applicant (NAAV) claimed a denial of procedural fairness, although Wilcox and French JJ held that the obligation of natural justice had not been specifically excluded by the legislation and that, unlike many of the other traditional grounds of judicial review, it was not excluded by s 474. However, the Chief Justice joined the minority (Wilcox and French JJ) to find against the Minister in two other matters (*Turcan* and *Wang*). The court rejected the remaining two appeals on other grounds.

The majority also held that in the face of s 474(1), it was not open to an applicant to obtain review on the ground of absence of procedural fairness where what was complained of did not come within the three principal provisoes of the *Hickman* principle. Wilcox and French JJ held that the obligation of natural justice had not been specifically excluded by the legislation and that, unlike many of the other traditional grounds of judicial review, it was not excluded by s 474.

None of the three provisoes to the *Hickman* principle acknowledged by the Minister in the Parliamentary debate on the relevant Bill was held by any judge to apply in any of the matters (i.e. decision not made in good faith, decision not reasonably capable of reference to the relevant power, and decision not related to subject matter of legislation). All judges also agreed that, read according to the *Hickman* principle, s 474 was not constitutionally invalid as it did not operate to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution. Where they differed was over the scope of a fourth proviso expressed in some of the authorities as arising where "inviolable limitations or constraints" were exceeded. Justice von Doussa (Beaumont J and Black CJ essentially agreeing) considered s 474 as the leading provision where it was inconsistent with another provision of the Act, and that consequently very few limitations on power were jurisdictional in kind justifying review unless one or more of the above three provisoes applied.

Justices French and Wilcox held that a privative clause such as that in s 474 operates only on "valid decisions", and not where a limit or condition is necessary for the effective exercise of a power. It could not immunise otherwise invalid decisions from judicial review, and there were no cases under Commonwealth law where it had had that effect. Section 474 had to be read with the whole of the Act and "not as a later addition which transforms otherwise invalid decisions into valid decisions". Despite his narrower view on the *Hickman* principle, the Chief Justice agreed with Wilcox and French JJ in two appeals that an "inviolable limitation" had been exceeded in relation to a cancellation of a visa and the revocation of a cancellation. Justices Wilcox and French doubted that the new privative clause in s 474 would have the intended result of reducing litigation and delay, the former noting the effects of the clause in diminishing the rule of law and suggesting that leave of the court to bring an appeal, and better legal advice to applicants concerning the limited scope of judicial review, would have more success.

Any appeals in these matters may be overtaken by the proceedings mentioned in the next item. (***NAAV v Minister for Immigration & Multicultural & Indigenous Affairs, and related matters*, [2002] FCAFC 228**, Full Federal Court, 15 August 2002; see also David Bennett, "Privative Clauses – Latest Developments" (2002) 34 *AIAL Forum* 11.

High Court reserves judgment on challenges to s 474 of Migration Act

In two matters heard together by the High Court on 3–4 September 2002, the court was presented with three different approaches to the "*Hickman* principle" (see preceding item). The Commonwealth Solicitor–General, Mr Bennett QC, argued that the Minister had been correct in stating in his Second Reading Speech that s 474 should be read according to *Hickman* and its settled provisoes, exclusive of any "inviolable limitations" proviso, giving decision makers wider lawful operation for their decisions and narrowing the grounds of challenge in the courts. There was a settled construction of words in the High Court which the legislature had adopted and Parliament should be taken to have used the words in the sense applied by the court. In any case, the Minister's second reading speech stated clearly what was intended by s 474.

Mr Basten QC, counsel for the prosecutors in the first case (identified by the media as Mrs Bakhtiari and family) contended on the basis of "*Hickman* and its progeny" that the effect of a general provision such as s 474 "cannot override express specific constraints contained in the legislation". It was not necessary to abandon *Hickman* properly understood, which at one level was only "authority for the proposition that if the Parliament appears to speak with two

voices, the Court must seek to reconcile its statements". Counsel in the second case, Mr Colquhoun-Kerr, argued that s474, whether read literally or purposively, was completely invalid because it was directly inconsistent with the conferral of original jurisdiction on the High Court under s 75(v) of the Constitution where mandamus, prohibition or an injunction is sought against an officer of the Commonwealth. Nothing in *Hickman* prevented this conclusion, and no decision of the court had upheld such a privative clause. Counsel also challenged the absolute time limit of 35 days for applying to the High Court contained in s 486A of the Migration Act, on the ground that, by purporting to exclude the discretion of the court to allow an application outside time, it was inconsistent with the grant of jurisdiction in s 75(v) of the Constitution.

The court reserved its decision on both matters. (***Ex parte Applicants S134/2002 v Minister for Immigration & Multicultural & Indigenous Affairs & Refugee Review Tribunal*, S134/2002; and *Plaintiff S157/2002 v Minister for Immigration & Multicultural & Indigenous Affairs*, S157/2002)**

Habeas corpus – Federal Court orders release of detainee awaiting removal to country of origin

On 15 August 2002, a single judge of the Federal Court (Merkel J) ordered release from detention of a Palestinian who had not succeeded in his claim for refugee status. The initial decision to detain him was made because there seemed no realistic prospect of being able to return him to his place of origin in Gaza. The applicant had requested on 5 December 2001, under s 198 of the *Migration Act 1958* (the Act), that he be returned to the Gaza Strip. The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) had been unable to obtain permission for the applicant to enter any country in the region from which he could have returned to Gaza. DIMIA continued to detain him in the Woomera Detention Centre, where he suffered anxiety and depression and attempted self-harm.

His Honour held, consistently with decisions of the Privy Council, the English High Court and the US Supreme Court, that ss 196 and 198 of the Act – concerning detention of non-citizens without visas and removal "as soon as reasonably practicable" of unlawful non-citizens who requested removal – did not authorise indefinite detention. The power of detention was limited to the period during which the Minister is taking reasonable steps to secure removal and removal is reasonably practicable in the sense of there being a real likelihood or prospect of removal in the reasonably foreseeable future. There was insufficient evidence before the court to show such a real prospect or likelihood of removal in that timeframe. The provisions of the Act only prevented release of a person lawfully detained. Similarly, the privative clause in s 474 could not operate to prevent habeas corpus if the statutory authority for detention had ceased.

The court held it had no discretion to refuse an order for release, but even if it did it would not have been appropriate in this case. "Unlawful non-citizens" had a lawful entitlement under the Convention on the Status of Refugees 1951 and 1967, enacted into Australian law, to claim refugee status as persons who are "unlawfully" in the country in which the asylum application is made. In a related action, his Honour rejected the Minister's request for a stay of proceedings pending an appeal. There was no evidence of a real or likely risk of abscondment, and the interests of the Minister were protected by agreed reporting conditions.

A little over two weeks later the applicant was again taken into detention. The Minister presented evidence that circumstances had changed so that there was now a reasonable likelihood of removing the applicant from Australia in the immediate future. Justice Merkel ruled on 6 September that in those circumstances the Minister could again exercise the power to detain the applicant in order to arrange for his removal, although the court's previous orders had provided a way of achieving this without detention. The Minister's office advises that Mr Al Masri has been returned to Gaza. (***Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2002] FCA 1009, [2002] FCA 1037,** both 15 August 2002 and **[2002] FCA 1099,** 6 September 2002, Merkel J. A Full Court of the Federal Court has reserved its decision on an appeal in this matter.)

Habeas corpus – Federal court interlocutory order to release asylum seeker claiming his detention was unlawful

In a decision raising some of the same considerations as those in *Al Masri* (see preceding item), Merkel J made an interlocutory order for the release of an Afghani applicant for refugee status who claimed that he was being detained unlawfully. The claim was based on the existence of a signed but not dated document which took the form of a decision to grant a temporary protection visa. The applicant argued that it either constituted an immediate decision to grant a visa or, alternatively, that it was subject to a condition which had been met shortly afterwards. The Minister for Immigration and Multicultural and Indigenous Affairs argued that the document was only a draft decision. He also contended that the court was precluded by provisions in the *Migration Act 1958* (the Act) from granting an interlocutory order for release.

The court found that the privative clause in s 474(1) of the Act had no application, and that the provisions of ss 196(1) and (3) did not preclude review of unlawful detention. The court had power under s 23 of the Federal Court of Australia Act 1976 to grant an interlocutory injunction in appropriate circumstance. There was a consistent and well established line of authority that had not construed the discretionary or the mandatory detention provisions in the Act as expressly or impliedly denying the s23 power in a case where the applicant is challenging the legality of his detention. The court concluded there was a serious question to be tried and that the balance of convenience supported an interlocutory order for release on specified reporting and other conditions. It took account of the deprivation of the applicant's liberty and the resulting detrimental effects on him, and the absence of any evidence supporting a real risk of abscondment. (***VAFD v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2002] FCA 1062**, Federal Court, 27 August 2002).

Administrative review and tribunals

Report of UK Review of Tribunals by Sir Andrew Leggatt

Australians may be interested in the report of the UK Review of Tribunals appointed by the Lord Chancellor in May 2000. Conducted by Sir Andrew Leggatt, a former Lord Justice in Appeal, the Review reported in March of 2001. The Review was required to report on the delivery of justice through tribunals concerned with disputes both between citizens and the state and between other parties. A central aim was to ensure a coherent structure, together with the courts, for the delivery of administrative justice. The review concerned 70 different tribunals responsible for dealing with nearly one million cases a year; professional disciplinary bodies were not part of the Review.

The Review presented a package of connected recommendations for implementation in several stages. The chief features of the recommendations were:

- the establishment of a Tribunals Service within the Lord Chancellor's Department to provide administrative support to tribunals.

- Bringing existing tribunals together within a coherent and independent Tribunals System grouped by subject-matter into Divisions, together with an appellate Division to hear appeals on points of law, with a further such appeal to the Court of Appeal. The System would be headed by a High Court judge acting as Senior President, and each Division would be headed by a President who is normally a judge.

- Strong emphasis on the independence of tribunals from relevant departments or agencies, and funding of tribunals by sponsoring departments in proportion to the number and type of cases their decisions generate.

- Members of tribunals to be appointed by the Lord Chancellor after relevant consultations for terms of from 5 to 7 years, with renewal for such periods being automatic except for an age qualification of 70 years and provision for specified grounds for non-renewal. There was a strong emphasis on the need for improved training at all levels for tribunal members, and for measuring performance.

- Creating a Tribunals Board to provide advice, recommendations and monitoring concerning matters relating to members and rules of procedure.
- Designating the Council on Tribunals to act as "the hub of the wheel that is the Tribunals System". It would play an oversight and monitoring role, as well as a consultative role on relevant new legislation, and would make reports to the Senior President of the System, to a Select Committee of Parliament and to the public. So far as possible, the Model Rules of Procedure prepared by the Council should form the basis for the procedures of all tribunals.

- An emphasis on the promotion of user-friendly procedures and practices to enable unrepresented users to participate effectively and without apprehension. The Review looked to the Tribunals System to achieve a new culture of informality, simplicity, efficiency and proportionality.

- Emphasising the importance of the interface between agencies, users and tribunals, with an expectation that tribunals would provide consistent decisions and promote remedies for systemic problems in agency decision-making.

The Lord Chancellor's Department has set up a Tribunals for Users Programme (TUP) to respond to the Leggatt Report. It has developed and analysed a number of reform options which are currently before the British Government. The TUP informs *AIAL Forum* that other existing tribunal modernisation projects are continuing alongside or in conjunction with those generated by the Review. (***Tribunals for Users – One System, One Service: Report of the Review of Tribunals by Sir Andrew Leggatt***, delivered March 2001, published August 2001, available from the Review website at: www.tribunals-review.org.uk/leggatt.htm)

(See also above, '"Western Australian proposal for a State Administrative Tribunal".)

Ombudsman

Scope of the Ombudsman's power to investigate administrative action

Section 12(1) of the *Ombudsman Act 1978* (Tas) (the Act) provides that, subject to the Act, the Ombudsman may investigate "any administrative action" taken by or on behalf of a public authority and may investigate all circumstances surrounding that action. Ombudsman legislation in other Australian jurisdictions is substantially similar. In an action brought by the Tasmanian Anti-Discrimination Commissioner (the Commissioner) against the Acting Tasmanian Ombudsman, Justice Crawford of the Tasmanian Supreme Court ruled that it is "*any* administrative action taken by or on behalf of a defined public authority that may be investigated", not merely action that could be described as "maladministration". That term is not used in the Act although it was referred to in the Minister's Second Reading Speech. In his Honour's view the applicant's argument, that the Ombudsman's jurisdiction was confined to cases of maladministration, confused jurisdiction to investigate with the possible outcome of an investigation the Ombudsman has jurisdiction to carry out. His Honour applied the view expressed in a line of Victorian cases that identified administrative action with the performance of the executive function of government, and the view of the New South Wales Court of Appeal in *Botany Council v The Ombudsman* (1995) 37 NSWLR 357 that the Ombudsman's powers, conferred by beneficial legislation, were extremely wide and should not be read down by the court.

The case arose out of disputes between the Commissioner, Dr JA Scutt, and the Tasmanian Director of Public Prosecutions, Mr TJ Ellis, concerning the Commissioner's investigation of two complaints of discrimination. The Director complained to the Ombudsman concerning a number of matters, including the Commissioner's interpretation of s 61 of the *Anti-Discrimination Act 1998* (Tas) concerning representation of respondents, and her failure to communicate with the Director as legal representative of the relevant authorities. The Ombudsman found against the Commissioner on a number of the complaints. The Commissioner challenged the Ombudsman's jurisdiction during the investigation, as provided for by the Act, and as a result the court had jurisdiction to consider her application. However, the court had no jurisdiction to determine whether the opinions reached by the Ombudsman after investigation fell within the statutory provisions relating to maladministration. (***Anti-Discrimination Commissioner v Acting Ombudsman*** **[2002] TASSC 24**, 9 May 2002, Crawford J)

Freedom of Information

Report of Canadian Task force on Access to Information

A Task Force appointed by the Canadian Government in August 2000 reported in June 2002 on its review of the working of the federal *Access to Information Act 1983* (ATI Act). It is only the second review of the ATI Act, the previous one occurring in 1987. The last ten years or so have produced considerable controversy about the effectiveness of the administration of the ATI Act, including allegations of a continuing culture of secrecy, major differences between the Information Commissioner and the Privacy Commissioner and a growing number of

Federal Court proceedings relating to the scope of the Information Commissioner's powers and questions of procedural fairness.

The Task Force was chaired by a senior member of the Treasury Board Secretariat, which has a major coordinating role in the implementation of the ATI Act. Its other members were drawn from leading federal government agencies, together with one member of a provincial government agency. It worked with an Advisory Committee of Assistant Deputy Ministers, and had an External Advisory Committee drawn from academia, the media and the law. The Task Force undertook wide-ranging consultations within and outside government. In addition, twenty-nine research papers were prepared by consultants for the Task Force's consideration on a wide range of relevant issues, ranging through the governance context, scope of the Act, access processes, redress and investigations, and performance reporting.

The Task Force concluded that the ATI Act was basically sound but needed modernisation in some areas. It stressed the need for changes to broaden administrative practices and attitudes within government, including record creation and management, making information available outside the Act, and embedding a culture of access within government. The Task Force considered that the original goals and principles of the Act remained as relevant and attainable today as when they were formulated 20 years before, but thought that all those involved in access to information needed to recommit themselves to those goals and principles. Some of the most interesting of the 139 recommendations include practical measures for achieving cultural change in the attitudes to access of government agencies and officers.

The Task Force did not recommend major changes to the structure of exemptions and exclusions, but its recommendations included the following: the need for guidelines on the exercise of the discretion not to claim certain exemptions; including Cabinet confidences within the scope of the Act but making them subject to a mandatory class exemption (lasting 15 rather than the existing 20 years), subject to easy severance of background information and analysis and its disclosure when the relevant decision is released or after five years; and listing certain categories of information not subject to the internal working processes exemption, as well as reducing the period of protection for such information to 10 years.

Other significant recommendations include a division between commercial and non-commercial access requests for purposes of calculating fees, and the expansion of the role of the Information Commissioner to include public education, an advisory role to government institutions on administering the Act, and power (together with the Treasury Board Secretariat) to conduct assessments of practices of agencies having an impact on compliance.

At the time of writing, the government of Canada had not responded to the Report. (***Access to Information: Making it Work for Canadians, Report of the Access to Information Task Force***, Government of Canada, June 2002, available from: www.atirtf-geai.gc.ca)