DEVELOPMENTS IN ADMINISTRATIVE LAW

*Ron Fraser**

Government initiatives, inquiries, legislative and parliamentary developments

Strategy paper concerning federal civil justice system

The Commonwealth Attorney–General has released a major strategy paper prepared by the Attorney–General's Department concerning the federal civil justice system. It builds on previous work in this area, including the Australian Law Reform Commission's report, *Managing Justice ... .* The paper is organised around four key goals: promoting an understanding of the system to enhance public confidence in it; supporting access to justice for cases with merit; facilitating the resolution of disputes at the lowest appropriate level; and maximising the performance of the components of the system. Among the recommendations aimed to improve access to the legal system for cases with merit, including actions brought by self-represented litigants, are proposals to increase the availability of legal advice through such means as additional Community Legal Centres, and finding ways to expand court services in rural, regional and remote Australia. Other recommendations are designed to increase knowledge and use of Alternative Dispute Resolution options in the court system in appropriate cases. Some recommendations are aimed at preventing lawyers from encouraging unmeritorious litigation, and at increasing court control of the course of litigation, including cases where there are no real prospects of success, and some propose specific powers for the High Court to be able to deal expeditiously with unmeritorious actions. The paper contemplates a future in which the federal court system is more integrated, and in which the Federal Magistrates Court conducts the vast majority of less complex federal civil litigation. (**Commonwealth Attorney–General, Media Release**, 9 March 2004; ***Federal Civil Justice System Strategy Paper***, December 2003, available from website: www.ag.gov.au/civiljusticestrategy)

Human Rights Act passed by ACT Legislative Assembly

After consideration of the report of the ACT Bill of Rights Consultation Committee (see (2003) 38 *AIAL Forum* 1–2), the ACT Government introduced the Human Rights Bill 2003 which was passed on 2 March 2004. The legislation relates to the rights contained in the International Covenant on Civil and Political Rights, but not at this stage those in the International Covenant on Economic and Social Rights as the committee had recommended. The Act is based on the 'dialogue' model whereby legislation must be interpreted where possible to be compatible with the rights contained in the Human Rights Act, and new and existing legislation will need to be scrutinised for its consistency with the Human Rights Act. Where proposed new legislation does not meet those standards, the Legislative Assembly may still enact it but must explain the necessity for doing so. A Human Rights Commissioner will review existing legislation and conduct human rights education programs. Where an issue arises in an existing proceeding, the Supreme Court may make a declaration that legislation is incompatible with the Act. While such a declaration does not affect the validity of the law or the rights of anyone, the Attorney–General must table a response in the Assembly. The *Human Rights Act 2004* (ACT) is the first Bill of Rights in Australia; it will come into force on 1 July 2004 and will be reviewed in 2009. (**Chief Minister's Media Release**, 22 October 2003, including the **Government Response to the Report of the ACT**

Bill of Rights Consultative Committee; and **Chief Minister's Media Release**, 2 March 2004.) See further below Max Spry, The ACT Human Rights Bill 2003: A Brief Survey, page 34; Elizabeth Kelly, Human Rights Act 2004: A New Dawn for Rights protection, page 30.

Commonwealth legislative developments

Government legislative program Autumn 2004

Among the new bills proposed for the Autumn Sittings 2004 are the following, some of which were scheduled for earlier sittings (the list is available from: www.pmc.gov.au/new.cfm; the comments on Bills come from the government release):

- *Customs Amendment Bill*, to amend the principal 1901 Act to reflect elements of the World Trade Organisation Anti-Dumping Agreement and other matters.

- *National Security Information (Criminal Proceedings) Bill*, to put in place measures to safeguard classified information that is tendered as evidence in the course of a criminal proceeding (and see below under heading 'Freedom of information etc' for ALRC discussion paper).

- *Postal Industry Ombudsman Bill* and *Postal Industry Ombudsman Cost Recovery Bill*, to establish a Postal Industry Ombudsman (PIO) within the office of the Commonwealth Ombudsman, and to enact a taxation measure to recover the additional costs of the PIO from Australia Post and other postal industry operators who opt into the scheme.

- *Migration Legislation Amendment Bill*, including provisions implementing the government's response to the recommendations of the Joint Standing Committee on Migration's report on the Deportation of Non-Citizen Criminals (June 1998), and provisions allowing authorised officers to disclose International Movement Records to an individual to whom the record relates or to his or her agent.
  (*Note*: The previously listed *Administrative Appeals Tribunal Bill* does not appear on the Autumn Sittings list.)

Other legislative developments

- The Labor Opposition reversed its opposition to the *Criminal Code Amendment (Terrorist Organisations) Bill 2003* that allows the listing of terrorist organisations (other than those listed by the UN) by regulation rather than by a decision of the Attorney–General (and see (2004) 40 *AIAL Forum* 3 on previous legislative measures). The Bill, as amended in the Senate and accepted by the House on 4 March 2004, includes mandatory consultation with State and Territory leaders, as well as the Federal Opposition Leader, provision for appeals to the Federal Court by banned organisations, and expiry of listings after two years.

- The *Age Discrimination Bill 2003* and its consequential provisions bill were passed by the House at the end of November and introduced into the Senate on 1 December 2003. See also Report of the Senate Legal and Constitutional Legislation Committee on Provisions of the Age Discrimination Bill 2003, tabled on 19 September 2003.

- The *Disability Discrimination Amendment Bill 2003*, introduced into the House of Representatives on 3 December 2003, would ensure a person's drug addiction cannot be the sole basis of a claim of unlawful discrimination, reversing the effect of a Federal Court decision that addiction to a prohibited drug could be regarded as a disability.

- The *Military Rehabilitation and Compensation Bill 2003*, which has a companion consequential amendments and transitional Bill, is discussed briefly below under the heading 'Administrative review'. The Bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for report by 22 March 2004.

Migration legislation

The following are among the legislative developments in this area in late 2003, early 2004:

- *Disallowance of Migration Amendment Regulations 2003 (No. 6)*: These regulations were disallowed by the Senate on a motion by Labor and all non-Government parties other than One Nation. They provided for three matters: to broaden the Temporary Protection Visa (TPV) regime to apply to all asylum seekers arriving in Australia, not just those arriving unlawfully; enabling the grant of TPVs and offshore humanitarian visas for shorter periods than at present; and allowing those TPV holders who had arrived before (but not after) 27 September 2001, and who had stayed in another country on the way to Australia for more than 7 days without seeking protection there, to apply for permanent protection in Australia. The supporters of disallowance noted that it was not technically possible to disallow only the first two sets of provisions as they would have preferred.

- *Migration Amendment (Duration of Detention) Bill 2004*: This Bill replaces a 2003 Bill. As now drafted, it amends section 196 of the *Migration Act 1958* to put it beyond doubt that an unlawful non-citizen must be kept in immigration detention unless a court makes a final determination that (a) the detention is unlawful or (b) he or she is not an unlawful non-citizen. The legislation will prevent the interlocutory release of detainees prior to the resolution of their substantive court proceedings (see, eg *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249, discussed (2003) 36 *AIAL Forum* 9 and (2003) 35 *AIAL Forum* 6–7).

- The *Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003* and the *Migration Agents Registration Application Charge Amendment Bill 2003* were referred to the Senate Legal and Constitutional Legislation Committee which reported on 25 November 2003 that major changes should be made to the legislation.

Review of legal competition in legal services for Commonwealth agencies

A report prepared for the Attorney–General's Department by an independent review, conducted by Ms Sue Tongue, has concluded that the opening up of Australian government legal services to competition from the private sector has been a success in its first four years. It found that a wide range of private firms as well as the Australian Government Solicitor have a strong presence in the government legal services market, and government departments and agencies were generally satisfied with the quality, timeliness and cost effectiveness of legal services they received. There had been a steady increase in legal spending by government departments and agencies, rising from $198 million in 1997 to $242.97 million in 2001–02. The review made a number of recommendations largely concerning the ways in which the Office of Legal Services Coordination could improve the coordination of Commonwealth legal services, many of which have been accepted. (**Attorney–General's News Release**, 24 September 2003; ***Report of a Review of the Impact of the Judiciary Amendment Act 1999 on ... Legal Services and on the Office of Legal Services Coordination***, June 2003, and **Government Response**, September 2003, available at: www.ag.gov.au/JAAReport and www.ag.gov.au/JAAResponse)

Inquiry into the effectiveness of Australia's military justice system

On 30 October 2003 (amended 12 February 2004), the Senate Foreign Affairs, Defence and Trade References Committee was given a reference to conduct an inquiry into the effectiveness of Australia's military justice system. The inquiry will include the general issues of the provision of 'impartial, rigorous and fair outcomes' and mechanisms to include transparency and accountability of procedures, as well as particular issues concerning inquiries into peacetime deaths, mistreatment of personnel, inquiries into administrative or disciplinary action, drug abuse, the deaths of named service people and alleged misconduct in East Timor. Submissions were due by 16 February 2004, and a public hearing was held in Canberra on 1 March 2004. See the Committee's website:
www.aph.gov.au/Senate/committee/FADT_CTTE/miljustice/htm

ATSIC to challenge legality of ATSIS

The Board of the Aboriginal and Torres Strait Islander Commission (ATSIC) has resolved to launch a High Court legal challenge against the Federal Government's decision to establish the executive agency the Aboriginal and Torres Strait Islander Services (ATSIS). (**ATSIC, Media Release**, 11 March 2004)

The courts

Study of outcomes of judicial review

Professors Robin Creyke and John McMillan of the Australian National University have published the results of an empirical study into the outcomes of judicial review. The authors looked at the subsequent administrative history of 300 cases. They found that 'in a surprisingly high number of cases the ultimate decision of the agency was favourable to the applicant', and also examined subsequent changes to legislation or agency practice. (**Robin Creyke and John McMillan, 'Judicial review outcomes – An empirical study' (2004) 11 *AJ Admin L* 82–100)**

All decisions discussed below may be accessed on the Australian Legal Information Institute website: http://www.austlii.edu.au

High Court allows appeal by two Bangladeshi gay men seeking refugee status

By a 4–3 majority the High Court remitted to the RRT for reconsideration two matters in which the RRT had rejected claims for refugee status of two Bangladeshi gay men on the ground that, although homosexual men constituted 'a particular social group' in Bangladesh for purposes of refugee determination, they were unlikely to be persecuted on the basis of their sexuality because they were likely to continue to act 'discreetly'. The majority (McHugh and Kirby JJ, and Gummow and Hayne JJ, in separate joint judgments) accepted the finding on membership of a particular social group, but rejected any formulation that asylum seekers could be required or expected to take steps, or to modify behaviour, to avoid persecutory harm, whether on political, religious or other grounds. The RRT had not considered whether the appellants' 'discreet' lifestyle was a result of a well-founded fear of persecution, and had in effect divided the relevant social group into two groups, 'discreet and non-discreet homosexual males in Bangladesh'. Broadly speaking, the minority (Gleeson CJ, and Callinan and Heydon JJ in a joint judgment) did not consider the RRT had erred: it had not been satisfied as to claims of past persecution or that the appellants' expected expression of their sexuality would be likely to provoke future persecution. Justices Callinan and Heydon also expressed some doubt that sexual inclination or practice necessarily defines a social class for purposes of the definition of a refugee. (***Appellant S395/2002 v Minister for***

***Immigration and Multicultural Affairs; Appellant S396/2002 v MIMA* (2003) 203 ALR 112**; see also (2003) 38 *AIAL Forum* 6)

Failure to give reasons for visa cancellation not jurisdictional error

Mr Palme, a German national who had lived in Australia for 32 years since the age of 10, challenged the Minister's personal decision to cancel his visa on character grounds because of his conviction in 1992 for murder. He had served a minimum sentence of 10 years. The Minister's notification of his decision was accompanied only by a copy of the departmental brief to the Minister which included the Minister's approval of one of a range of options. All judges agreed that the Minister had failed in his duty to provide reasons for his decision: a neutral departmental brief that did not weigh the competing factors and indicate the views of the decision-maker could not be considered to be a statement of reasons. However, four judges (Gleeson CJ, Gummow, Heydon and McHugh JJ) considered that Mr Palme was prevented from challenging the cancellation decision on that ground because of a statutory provision to the effect that failure to comply with the reasons and other requirements of the Act did not affect the validity of a decision. Mr Palme could have brought an action for mandamus to compel the giving of reasons, but could not use the absence of reasons to establish jurisdictional error.

Justice Kirby dissented, holding that the statutory saving provision established the validity of a decision for practical purposes where there had been real but defective compliance with the statutory requirements, but could not serve to protect an 'unreasoned decision-making process' about the applicant's status which was the antithesis of the legislated process and amounted to a constructive failure to exercise jurisdiction: 'Some decisions cry out for a clear explanation.' (***Re MIMIA; Ex parte Palme* (2003) 201 ALR 327**)

In a subsequent decision, the Full Federal Court doubted that an order that the Minister provide a statement of reasons after a court hearing amounted to performance of his statutory duty to provide reasons at the time of notification, given the unreliability of later explanations of decisions. In the event, the Full Court found serious breaches of procedural fairness and set aside the Minister's decision to cancel the appellant's visa on character grounds. (***Dagli v MIMIA* [2003] FCAFC 298**, 19 December 2003; see also ***Preston v MIMIA (No 2)* [2004] FCA 107** where later reasons of the Minister were held inadmissible without consent, or an affidavit by the Minister)

High Court reverses position on application of aliens power to non-citizen Britons resident in Australia

Mr Shaw was born in Britain in 1972, migrated with his parents to Australia in 1974, and did not ever take out Australian citizenship or travel overseas. He was convicted of serious crimes beginning when he was 14. Following the retirement of Gaudron J and her replacement by Heydon J, the latter joined with the three minority judges from an earlier decision (*Re Patterson; Ex parte Taylor* (2001) 207 CLR 391) to hold that the aliens power supported the cancellation of his visa and his deportation. All judges except Heydon J considered that, while in 1901 a 'subject of the Queen' born in Britain who came to Australia would not have come within the aliens power, the situation had changed as a result of constitutional evolution, but they differed as to when this process was completed. Gleeson CJ, Gummow and Hayne JJ in a joint judgment considered the operative date was 1948 (when British nationality laws changed and Australian citizenship was introduced), while McHugh, Kirby and Callinan JJ accepted 3 March 1986 (the date of the coming into force of the various Australia Acts). Justice Heydon left open the question whether in 1901 British subjects were or were not aliens. Justice Kirby criticised the reopening of *Taylor*, which the

joint judgment considered did not rest on clear principle. (***Shaw v MIMIA* (2003) 203 ALR 143**)

Whether aliens power extends to children born in Australia of parents who are not Australian citizens or permanent residents

In a case described by McHugh J as 'probably one of the most important cases th[e] Court has ever had to decide', the High Court has reserved its decision on an application for a declaration that a child born in Australia is an Australian national as a 'subject of the Queen', and therefore not subject to deportation, even though the overseas-born parents of the child were not Australian citizens or permanent residents as required for citizenship by birth since 1986 by section 10(2) of the *Australian Citizenship Act 1948*. (***Singh v Commonwealth of Australia & anor* [2004] HCA Trans 5 & 6**, 10 & 11 February 2004; see also **Research Paper No 3 of 2003–04 (24 November 2003), *We are Australian – The Constitution and Deportation of Australian-born Children*, Commonwealth Parliamentary Library, Information and Research Services,** available from website: www.aph.gov.au/library/pubs/rp/index.htm)

Detention for deportation purposes

In a recent decision, a Full Court of the Federal Court followed a Full Court decision in *Vo v MIMA* (2000) 98 FCR 371 in rejecting an argument that a person can only be held pending deportation under section 200 of the Migration Act for the period reasonably necessary to effect deportation. There was no evidence that the intention to deport the applicant had changed, and delay in effecting his deportation was due in part to legal proceedings he had instituted, although a period of 6 months appeared to be due to bureaucratic inaction. (***Te v MIMIA* [2004] FCAFC 15**, 5 February 2004)

Effects on protection visa application of 'effective protection' of a refugee in another country – Article 33 of the Refugees Convention ('non-refoulement')

Two decisions of different benches of the Full Court of the Federal Court (*NAGV v MIMIA* and *NAEN v MIMIA*) deal with similar fact situations where Jews of Russian origin had a well-founded fear of persecution in Russia for a relevant reason, and were therefore refugees under the Refugees Convention and Protocol, but were legally able to gain 'effective protection' in Israel under its *Law of Return*. In neither case did the applicants wish to take advantage of that law. Both benches dismissed the appeals by the refugees, but for differing reasons. In *NAGV*, all judges considered that an earlier decision of a differently constituted Full Court (*Thiyagarajah v MIMA* (1997) 80 FCR 543) had been wrongly decided, but a majority of the court in *NAGV* (Finn and Conti JJ, Emmett J dissenting) felt compelled to follow the 'developed jurisprudence' of the court flowing from the earlier decision. In *NAEN*, all judges (Whitlam, Moore and Kiefel JJ) accepted that *Thiyagarajah* had been correct in holding that Australia did not have 'protection obligations' to a refugee where Article 33 of the Refugees Convention did not prevent the removal of the refugee to a third country which would provide 'effective protection' under the Convention. In contrast, the judges in *NAGV* were of the opinion that on a correct interpretation 'protection obligations' should be held to arise under the Convention where a person is a found to be a refugee, which would entitle the person to a protection visa. The court in *NAEN* was advised that an application for special leave to appeal had been filed in the High Court in *NAGV*. (***NAGV v MIMIA* [2003] FCAFC 144**, 27 June 2003; ***NAEN v MIMIA* [2004] FCAFC 6**, 13 February 2004)

Misfeasance in public office not established

In a matter that had been remitted by the High Court to the Supreme Court of Norfolk Island, a Full Court of the Federal Court allowed an appeal against the finding of the Chief Justice of Norfolk Island that Mr Sanders had committed the tort of misfeasance in public office when he, as Tourism Minister of Norfolk Island, directed the Tourist Bureau to terminate the contract of its Executive Officer, Mr Snell. It was held in the earlier proceedings that in giving that direction Mr Sanders had denied Mr Snell procedural fairness. The Chief Justice awarded compensatory and exemplary damages of $83,000 (including interest) for misfeasance in public office.

The Full Court dismissed a challenge to the decision on the ground of bias, but held that the evidence before the Chief Justice did not justify a finding that Mr Sanders had committed misfeasance in public office. On the basis of the law stated by the High Court in *Northern Territory v Mengel* (1995) 185 CLR 307 and subsequent cases, the court held that there was no evidence of an intention to terminate the plaintiff's employment as a means of harming him. That was not the actuating motive: he merely wanted Mr Snell out of the job because of the views he held about his performance in it. Moreover, Mr Sanders had not known, or been recklessly indifferent to the possibility, that denial of procedural fairness would render his action invalid as well as causing harm to Mr Snell. (***Sanders v Snell* (2003) 198 ALR 560**)

Effect of a decision held invalid under the ADJR Act

A Full Federal Court has considered the legal and factual effect of a decision revoking the approval of an aged care facility once that decision was set aside by an order of the Full Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act, Cth). All judges agreed that the High Court's decision in *MIMA v Bhardwaj* (2002) 209 CLR 597 did not mean that jurisdictional error on the part of a decision-maker will always lead to a decision having no legal or factual consequences whatever: it depends on the provisions of the particular statute. Gray and Downes JJ held that there was nothing in the legislative scheme to require the decision to be a nullity for all purposes, and the absence of jurisdictional error prevented this in any case. Justice Kenny considered that the court's earlier decision under the ADJR Act should not be construed by reference to the common law concept of jurisdictional error: the intention behind the ADJR Act was to simplify the common law of judicial review including the date of effect of an order quashing a decision. All judges held that the appellant was estopped from arguing for an earlier date of operation of the court's order. (***Jadwan v Department of Health and Aged Care* (2003) 204 ALR 55**)

Need to satisfy Statement of Principles concerning war-caused death or injury

A bench of the Full Federal Court has rejected as both *obiter dicta* and incorrect the statements of two judges in a previous Full Court decision (*Keeley v Repatriation Commission* (2000) 98 FCR 108, per Lee and Cooper JJ) to the effect that the link between the death or injury or disease of a veteran and war-caused service need be no more than temporal, and may not require satisfaction of the relevant Statement of Principles under the *Veterans' Entitlement Act 1986* (Cth). The legislation requires both a temporal relationship and a causal relationship, and the latter involves consideration of any existing Statement of Principles in determining the reasonableness of a hypothesis concerning the connection between war service and the injury, disease or death of a service person. A Statement of Principles in relation to a condition covers the field in relation to that condition. (***Woodward v Repatriation Commission, Gundry v Repatriation Commission* (2003) 200 ALR 332**)

Whether Minister had power to direct South Australian Director of Public Prosecutions to appeal a particular case

A recent decision of the South Australian Full Supreme Court throws interesting light on the scope of a power 'to give directions and furnish guidelines' that is not specifically limited in extent. Federal Court decisions concerning powers to give 'general directions' were held not to be relevant to the present power. The applicant sought judicial review of a decision of the South Australian Attorney–General (the Attorney) to direct the State's Director of Public Prosecutions (DPP) to institute an appeal against a suspended sentence of imprisonment for three years and three months for knowingly endangering a person's life. There had been considerable public controversy concerning the sentence.

Justices Prior and Vanstone agreed with Doyle CJ that section 9 of the *Director of Public Prosecutions Act 1991* (SA) (the Act) gave the Attorney the power to give directions to the DPP in general terms and that this had the capacity to dictate the DPP's decision in a particular case referred to in the direction. However, they disagreed with the Chief Justice that the specific direction to appeal in a particular case amounted to an exercise of the DPP's appeal powers conferred by the Act, powers which had specifically been withdrawn by the Act from the Attorney. The Act merely replaced the Attorney's previous powers in relation to prosecutions and appeals with a conditional power to give directions. There was no provision as in other jurisdictions prohibiting directions or guidelines 'in respect of a particular case', and Parliament had specifically rejected limiting the power in this way. The same majority allowed the appeal against sentence. Leave to appeal to the High Court has been refused in both matters. (***Nemer v Holloway & ors* [2003] SASC 372, *R v Nemer* [2003] SASC 375**, 7 November 2003; ***Nemer v Holloway, Nemer v The Queen* [2004] HCATrans 24**, 13 February 2004 and earlier transcripts)

Volume of migration litigation in federal courts system

The significant impact of migration litigation at all three levels of the federal courts system is apparent from their annual reports for 2002–2003. In the High Court, 82 per cent of all matters filed in the court were in the migration area, while all matters filed before the court increased by 217 per cent, most of them in the form of constitutional writs in the migration area. However, a large number of migration matters was remitted by the High Court to the Federal Court or the Federal Magistrates Court, many of them following the court's decision limiting the migration privative clause in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 (see (2003) 36 *AIAL Forum* 6–7) or resulting from the representative proceedings in *Muin v MIMIA* (2002) 190 ALR 601(see (2002) 35 *AIAL Forum* 3–4). Numbers in the Federal Court's migration jurisdiction had been expected to decline because of the concurrent jurisdiction of the Federal Magistrates Court, but the remittal of matters from the High Court resulted in about a 30 per cent increase in migration matters filed. Appeals in migration matters also constituted 66.5 per cent of the Federal Court's appellate jurisdiction. Meanwhile the Federal Magistrates Court dealt with over half of migration matters filed in that court and the Federal Court, the numbers rising from 182 in the previous year to 1397 in 2002–2003. The Attorney–General stated that he was considering the recommendations of the Migration Litigation Review established last year (see (2004) 40 *AIAL Forum* 5), and would shortly release a comprehensive paper on the federal civil justice system containing proposals to assist self-represented litigants and reduce the number of unmeritorious claims (see above under heading 'Government initiatives, etc'). (***Annual Reports for 2002–2003*, High Court, Federal Court and Federal Magistrates Court**, available from the websites of the courts; **Attorney–General's Media Release**, 22 January 2004)

Administrative review and tribunals

Senate Committee report on the administrative review of veteran and military compensation decisions

A recent Senate Committee inquiry arose out of concern about the review provisions in the Military Rehabilitation and Compensation Bill 2003, a bill which brings together into one piece of legislation provisions for compensation/income support where injury, disease or death is due to Australian Defence Force service on or after the commencement date (expected to be 1 July 2004). However, the Bill retains two separate avenues of administrative review drawn from the *Veterans' Entitlements Act 1986* (Cth) and the *Safety, Rehabilitation and Compensation Act 1988* (Cth); their availability depends on whether injury, etc, occurs during wartime or peacetime. The first avenue is to the Veterans Review Board (VRB) and then to the Administrative Appeals Tribunal (AAT); the second is directly to a different Division of the AAT. The committee recommended that future administrative review processes 'should be the same for all ADF and ex-ADF personnel', and that all appeals to the AAT should be heard by a single Division, perhaps entitled the Military Division. Because of the opposition of ex-service organisations, the committee envisaged a process of incremental reform rather than the abolition of the VRB tier of review, amalgamating the two tiers of review, or placing a limitation on appeal to the second tier, although it considered the last option should be kept under review. The report makes a number of recommendations aimed at resolving claims at an earlier appeal stage, including introduction at VRB level of pre-hearing mediation and conciliation processes, and measures to encourage the provision of full medical evidence at the earliest possible stage. (**Report of Senate Finance and Public Administration References Committee, *Administrative review of veteran and military compensation and income support*,** December 2003)

Tribunals Efficiency Working Group

The presiding officers of the AAT, the Migration Review Tribunal, the Refugee Review Tribunal, the Social Security Appeals Tribunal, and the Veterans Review Board, together with officers from their portfolio departments, have formed the above working group to investigate and evaluate measures to achieve administrative efficiencies between the key Commonwealth merits review tribunals, while maintaining their separate identities.

Ombudsman

Role and function of the Ombudsman in the modern context

The following contain interesting contributions on the present-day role and functions of the Commonwealth Ombudsman:
Assoc Prof Anita Stuhmcke, 'Privatisation and corporatisation: What now for the Commonwealth Ombudsman?' (2004) 11 *AJ Admin L* 101–114
Prof John McMillan, Commonwealth Ombudsman, 'The Ombudsman's Role – Looking Backwards, Looking Forwards', 25 June 2003, and **'Future Directions for Australian Administrative Law – The Ombudsman'**, July 2003 (available from: www.comb.gov.au)

Professor McMillan's Foreword to the Commonwealth Ombudsman's *Annual Report for 2002–2003* deals with similar issues. He mentions that the Prime Minister has agreed to a project initiated by the Ombudsman to prepare for the Government's consideration a proposal for a revised Ombudsman Act. The report notes that there was an increase of 3 per cent in complaints over the previous year (to 19,850), but a decrease in the proportion of complaints investigated (from 31 per cent to 29 per cent, 6,133 as against 6,496). There were substantial increases in complaints concerning the Child Support Agency (CSA) (21

per cent) and Centrelink (10 per cent), and a significant fall in tax-related complaints. The proportion of complaints investigated in which agency error or deficiency was identified remained the same, 29 per cent. The report notes that the previous Ombudsman, Mr Ron McLeod AM, had achieved acceptance by the Government of the Ombudsman's role in relation to the outsourcing of government functions. The Ombudsman has been active in relation to agency complaint-handling mechanisms, and has begun an own motion investigation into CSA change of assessment decisions. As usual, the report contains interesting case studies. (**Commonwealth Ombudsman, *Annual Report 2002–2003***, available at above website or from the Ombudsman's national office)

ACT review of statutory oversight and community advocacy agencies

Following earlier inquiries into disability services and ACT Health, the ACT Government established a review of the relationships between statutory oversight and community advocacy agencies, conducted by The Foundation for Effective Markets and Governance based at the Australian National University. Its report was released on 2 December 2003. Appendix H of the report sets out a number of options for the structural reform of the government's external complaints handling mechanisms, including the Ombudsman, and the Discrimination, Health Complaints and Disability Services Commissioners; the options range from a full amalgamation of the various agencies to a simple co-location model. The report is available from: www.dhcs.act.gov.au

Freedom of information, privacy and other information issues

Public service secrecy provision held invalid

In a landmark judgment, Finn J of the Federal Court has held that regulation 7(13) of the previous Commonwealth Public Service Regulations (see now regulation 2.1 of the Public Service Regulations 1999) was invalid as it burdened the constitutional freedom of communication about political and governmental matters and was not reasonably appropriate or adapted to serving the efficient operation of government under the system of representative and responsible government (see the test formulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567). His Honour considered the regulation to be 'a relic' of a different era of government that took no account of the developing public interest in open government in Australia. It was a 'catch-all' provision that did not differentiate between the types and quality of information protected, the protection of some but not all of which could clearly be justified constitutionally, and the provision could not be read down. The court remitted the matter to HREOC to consider whether the actions of Customs concerning Mr Bennett's public comments as President of the Customs Officers Association had been justified in terms of an APS employee's common law duty of loyalty and fidelity. There has been no appeal against the decision. The APS Commission has taken legal advice and will shortly approach the Office of Legal Drafting and consult with agencies. ALRC Discussion Paper 67 (below) proposes the amendment of the regulation so that a duty of secrecy is imposed only in relation to information that genuinely requires protection and where unauthorised disclosure is likely to harm the public interest. (***Bennett v President, HREOC and CEO of Australian Customs Service* (2003) 204 ALR 119**; **Research Note No. 31, 2003–04, *Public Servants Speaking Publicly: The* Bennett *Case*, Commonwealth Parliamentary Library, Information and Research Services,** available from website: www.aph.gov.au/library/pubs/rn/2003–04. See also **'Disclosure of information by APS employees – implications of the Bennett case'**, available from website of the APS Commission: www.apsc.gov.au)

ALRC Discussion Paper on protecting classified and security sensitive information

The ALRC has issued a Discussion Paper containing draft proposals on protecting classified and security sensitive information (DP 67). The paper seeks to 'develop mechanisms capable of reconciling, so far as possible, the tension between disclosure in the interests of fair and effective legal proceedings, and non-disclosure in the interests of national security'. It proposes a new Act to be used in exceptional cases to deal with the protection of documentary or oral classified and security sensitive information, setting out a range of strategies open to courts and tribunals in such cases. The paper also proposes that there should be comprehensive public interest disclosure ('whistleblower') legislation, and that those standards in the Protective Security Manual intended to be mandatory and enforceable should be identified, and modified if necessary. It is also proposes that Ministerial certificates should not be conclusive on a question of public interest immunity, and that Ministers should be required to table a notice in Parliament concerning any certificate to withhold information, whether it relates to court proceedings, an FOI request, an investigation by the Federal Privacy Commissioner, or otherwise. The paper further proposes that certain criminal offences concerned with disclosure of information should be amended to enable injunctions to be granted to prevent disclosure or further disclosure. (See also above on *Bennett* case.) (**ALRC, *Protecting Classified and Security Information: Discussion Paper*, DP 67**, January 2004; **ALRC Media Release**, 5 February 2004)

Record number of Commonwealth FOI requests

Commonwealth FOI requests have increased by 11.6 per cent to 41, 481 in 2002–2003, the largest number since the FOI Act came into force in December 1982. Close to 92 per cent of requests were for personal information about the applicant. Agencies granted 71 per cent of requests in full, and 23 per cent were granted in part. The cost to the Commonwealth of FOI administration is calculated to be more than $18 million at an average cost of $444 per request; 1.4 per cent of the cost was collected in fees and charges. The annual report on FOI contains a list of agencies which have lodged with the National Archives of Australia (NAA) statements about documents required by section 9 of the Act to be made available for purchase. In May 2004, the Australian National Audit Office (ANAO) is due to release an audit of selected agencies' compliance with the FOI Act and their policies and processes for dealing with FOI requests. (***Freedom of Information Act 1982: Annual Report 2002–2003***, October 2003; **Attorney–General's Media Release**, 14 January 2004)

Federal ALP to review Freedom of Information Act

The Shadow Attorney–General, Labor's Nicola Roxon, has announced that Federal Labor will review the operation of the Commonwealth FOI Act. She stated that the review would cover all areas of the current FOI regime including, but not limited to: the breadth of the public interest test; the growing use of the commercial-in-confidence exemption; implications of new technology; and the use of conclusive certificates. (**Media release by Shadow Attorney–General, Nicola Roxon MP**, 10 February 2004)

Senate restricts commercial-in-confidence claims

The Senate voted on 30 October 2003 that it would not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from disclosure of the information. Labor Senator Kim Carr, who moved the motion, later referred to reports by the ANAO showing that only a small proportion of confidentiality

claims made by agencies were appropriate. (***Senate Hansard***, 30 October 2003; **Aban Contractor, 'Senate sick of commercial confidence'**, ***Sydney Morning Herald***, 31 October 2003)

Commonwealth review of government ownership of copyright material

The Commonwealth government's Copyright Law Review Committee (CLRC) has published an Issues Paper on the subject of crown copyright, both Commonwealth and State, a matter dealt with in Part VII of the *Copyright Act 1968* (Cth). The paper seeks public submissions on a range of issues, including the appropriateness of the legislative scheme establishing government ownership of copyright, the public policy issues in relation to ownership of material produced by the executive, judicial and legislative arms of government, and options for reform. The CLRC is to report to the government by November 2004. (**CLRC, *Crown Copyright: Issues Paper***, February 2004, available from website: www.law.gov.au/clrc)

Victorian online FOI requests

The Victorian Government has launched an online service for lodging FOI requests as part of a government policy to improve public access to information. It allows members of the public to both submit and pay for FOI requests online through a credit card online transaction facility, available on: www.foi.vic.gov.au (**Media Release by Attorney–General Rob Hulls**, 1 December 2003)

NSW Auditor–General's report on operation of FOI in three agencies

In August 2003 the NSW Auditor–General issued a performance report on the operation of the NSW FOI Act in three agencies, the Ministry of Transport, the Premier's Department and the Department of Education. The report was critical of a number of aspects of their practice, including tardiness, inconsistent charging of fees, inadequate reasons for refusing access, and the involvement of chief executives and ministerial staff in FOI decision-making. The Director–General of the Premier's Department responded to the criticisms in robust terms in a letter included in the report. (***Auditor–General's Report: Performance Audit, Freedom of Information, Ministry of Transport, Premier's Department and Department of Education***, August 2003, available from: http://www.audit.nsw.gov.au/repperf.htm)

Brief privacy issues

- On 4 March the ALRC issued Discussion Paper 68 on *Gene Patenting and Human Health* (see: www.alrc.gov.au).

- The Commonwealth Attorney–General's Department and the Department of Employment and Workplace Relations have prepared a discussion paper on privacy of employee records entitled *Employee Records Privacy: A discussion paper on information privacy and employee records.* A link to the document is available on the Privacy Commissioner's website at: www.privacy.gov.au/news/media/04_02.html

- The Government is developing legislation to give parents access on request to all information held by the Health Insurance Commission concerning their children who are aged under 16 (the present administrative practice cuts off at age 14).

- An issues paper on the operation of Residential Tenancy Databases in Australian has been developed by a working party chaired by the Commonwealth Treasury Department, of which the Commonwealth Privacy Commissioner is a member.

Replacement of National Office for the Information Economy (NOIE) by an Australian Government Information Management Office (AGIMO)

The Minister for Communications, Information Technology and the Arts, Daryl Williams QC, has announced that NOIE will be disbanded, and its role in promoting and coordinating the use of new information and communications technology in the delivery of Australian Government programs and services will be assumed by AGIMO, headed by a new position of Australian Government Information Officer. NOIE's functions in facilitating and promoting IT use in the rest of the economy will be handled by an OIE within the Department. Details of the reorganisation are contained in a News Release by the Minister. (**Minister for Communications, Information Technology and the Arts, News Release**, 10 March 2004; see also comment in ***Canberra Times*, 'Forum'**, 13 March 2004 at B10)

National Archives survey on record-keeping in the APS

In response to the ANAO's report on recordkeeping and the 2001–02 *State of the Service Report* by the APS Commission, the website of the NAA includes new practical advice on recordkeeping, and the NAA has released a training package for agency trainers and records staff for teaching staff about their recordkeeping responsibilities. (**NAA, *Using e-permanence: Advice on addressing ANAO and APS Commission findings on recordkeeping*, Archives Advice 60**, October 2003; **NAA training package, *Keep the knowledge – Make a record!***, June 2003, both available from: www.naa.gov.au)

Public administration

Debate on 'leaking' by public servants

Perhaps as a result of the *Bennett* decision (above under heading 'Freedom of Information etc'), there have been several significant items in the *Canberra Times* concerning the question of 'leaking' of official information by public servants. These include contributions by Dr Shergold, Secretary of the Department of the Prime Minister and Cabinet, Mr Podger, Public Service Commissioner, Professor Nethercote of Griffith University, and a *Canberra Times* editorial.
(***Canberra Times*, 'Opinion'**, 20 & 24 February and 4 March 2004, and editorial 'A question of public interest', 8 March 2004)

Report on the state of the Australian Public Service

The latest report of Public Service Commissioner, Andrew Podger, on the state of the APS provides valuable insights into the current makeup, mode of operation and governance of the public service at national level. The report is based on a survey sent to all APS agencies employing more than 20 people. Among other issues, the report deals with: the trend towards an older and more skilled workforce; APS values and the code of conduct (also the subject of a separate publication, see below), including breaches of the code; recordkeeping (see also below); relationships between public servants and Ministers and their offices; relationships between APS and the public; whistleblowing; public consultation; selection, performance, promotion, conditions of service, work-life balance and general job satisfaction of APS employees; conflicts of interest; workplace diversity; outsourcing; and many other matters. (**Public Service Commissioner, *State of the Service Report 2002–03***; and ***APS Values and Code of Conduct: Guide to official conduct for APS employees and agency heads***, August 2003, both available from: www.apsc.gov.au)

Other developments

Proposed changes to the UK legal system

In mid–2003 the Blair Labor Government announced it intended to abolish the office of Lord Chancellor, replace the Lord Chancellor's Department with a Department of Constitutional Affairs, establish an independent judicial appointments committee, and substitute a new Supreme Court, not within the Parliamentary framework, to carry out the judicial functions of the House of Lords. In December the House of Lords called on the Government to withdraw its proposals and undertake meaningful consultation. The government introduced a Constitutional Reform Bill into the Lords to achieve the above aims, but encountered strong opposition from members who fear the new court system would reduce the authority and independence of the courts. The Lord Chief Justice, Lord Woolf, claimed in a speech to Cambridge University's Faculty of Law that the new Supreme Court would be a 'second-class' institution which would be a 'poor relation' of other Supreme Courts around the world, which could lead to strong pressures for a written constitution. After a nine hour debate, the House of Lords voted to refer the Bill to a select committee, which would prevent it reaching the Commons at all during the present session, prompting the Leader of the Commons to repeat threats to introduce the reforms in the Commons and use the Parliament Act to override the House of Lords. (***The Independent*, 'Minister and judges on collision course over asylum, says Woolf'**, 4 March 2003, **'Curb on Lords if they shun supreme court'**, 7 March 2004, and **'Government crisis as Lords scupper supreme court Bill'**, 9 March 2004)

Brief items

The Australian Institute of Judicial Administration (AIJA) and the National Alternative Dispute Resolution Committee (NADRAC) have released a new research paper to assist courts and tribunals to make decisions to refer a dispute to ADR. The paper acknowledges that 'one-model-fits-all' cannot be applied to the complex area of ADR and suggests that each court or tribunal develop its own program which considers factors including potential ADR users, the case mix, and the support required to effectively deliver ADR services. (**Attorney–General's Media Release**, 5 March 2004; **Prof Kathy Mack, *Court referral to ADR: criteria and research*, AIJA & NADRAC**, available from: www.nadrac.gov.au)

The Productivity Commission has published a draft report on the operation of the *Disability Discrimination Act 1992* (Cth), on which it will report to the government by 30 April 2004. (**Productivity Commission draft report, *Review of the Disability Discrimination Act 1992***, 31 October 2003, available from: www.pc.gov.au)

The new Western Australian Corruption and Crime Commission began operation in early January 2004.

The Australian Institute of Health and Welfare has published a new edition of its comprehensive work on welfare services in Australia. (**AIHW, *Australia's Welfare 2003*, Australia's Welfare No. 6**, December 2003, available from CanPrint on 1300 656 863)

Two major reports on poverty and disadvantage in Australia were published at the beginning of March. The Senate Community Affairs Committee has completed its inquiry into poverty and financial hardship, presenting a majority report by the ALP and Australian Progressive Alliance Senators, and a minority report by the Liberal Party Senators. The inquiry undertook public hearings in capital cities and some major regional towns. The second report, on community adversity and resilience, is published by the policy and research arm of Jesuit Social Services, The Ignatius Centre, and was undertaken by Prof Tony Vinson; it is a

follow-up to an earlier report by Professor Vinson in 1999. (**Senate Community Affairs References Committee, *A hand up not a hand out: Renewing the fight against poverty*, Report on poverty and financial hardship**, 11 March 2004, available from website: www.aph.gov.au/senate/clac_ctte/poverty/index.htm; **Prof Tony Vinson, *Community adversity and resilience: the distribution of social disadvantage in Victoria and New South Wales and the mediating role of social cohesion*, The Ignatius Centre**, March 2004, which can be purchased through website: www.jss.org.au)