DEVELOPMENTS IN ADMINISTRATIVE LAW

Ron Fraser*

Government initiatives, inquiries, legislative and parliamentary developments

Election called

On Sunday 29 August 2004 the Prime Minister, Mr Howard, called an election for the House of Representatives and half the Senate to be held on 9 October 2004. In an unusual twist, Parliament was prorogued and the House of Representatives dissolved by the Governor–General, from 4:59 pm and 5 pm respectively on Tuesday 31 August 2004, and the sittings of the House scheduled for 30 and 31 August were cancelled. The Senate met only on Monday 30 August, and among other things established a select committee to inquire into matters arising from public statements by Mr Mike Scrafton about conversations he had with the Prime Minister about the 'children overboard' affair on 7 November 2001. The committee immediately took evidence from Mr Scrafton and some other witnesses and is to report by 24 November 2004. Cabinet met in the two days before Parliament was prorogued, and made a number of spending decisions announced later during the election campaign. The Government moved into caretaker mode immediately after the proroguing of Parliament: a document *Guidance on Caretaker Conventions* is available from:
http://www.pmc.gov.au/docs/caretaker.cfm

HREOC report on children in immigration detention

In April 2004, the Human Rights and Equal Opportunity Commission (HREOC) reported on the national inquiry it conducted into children in immigration detention. The report, entitled *A last resort?*, was tabled in Parliament on 13 May 2004. The inquiry was commenced in November 2001, and covered the period 1999–2002, although more up to date information is included in the report where possible. HREOC consulted with all relevant parties, received 410 submissions and held 68 public hearings and 17 confidential sessions which heard a total of 155 witnesses. It obtained access to primary documents relating to management of detention centres and concerning particular children and families.

HREOC made three major findings and a large number of detailed findings concerning the treatment of children in detention centres. Its principal finding is that Australia's immigration detention laws and their administration in relation to 'unauthorised arrival children' 'create a detention system that is fundamentally inconsistent with the *Convention on the Rights of the Child*' (CRC). In particular, it found among other things that the system failed to ensure that: detention of children was a measure of last resort, for the shortest appropriate period of time and subject to effective independent review; the best interests of the child are the primary consideration in all actions concerning children in the system; and children are treated with humanity and respect for their inherent dignity. Another major finding was that children in immigration detention for long periods of time are at high risk of serious mental harm. The

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

report made specific recommendations to rectify these abuses of human rights, including releasing all children currently in detention centres and residential housing projects, together with their parents, as soon as possible, but no later than four weeks after tabling. It also recommended the urgent amendment of Australia's immigration detention laws to comply with the CRC, including a presumption against the detention of children for immigration purposes. The Government rejected the major findings and recommendations contained in the report, together with the view that the immigration system was inconsistent with the UN CRC. It claimed that the conduct of the inquiry did not accord procedural fairness to the Department of Immigration and Multicultural and Indigenous Affairs or the detention services, and that the report was unbalanced and backward looking. The Treasurer, Mr Costello, has indicated that in his view the aim of policy should be to achieve a situation where there are no children in detention. (***A last resort? National Inquiry into Children in Immigration Detention***, HREOC, April 2004, available from HREOC's website, www.hreoc.gov.au/ ; **'HREOC Inquiry into Children in Immigration [Detention] Report Tabled', Joint media release of Minister for Immigration and Multicultural and Indigenous Affairs and the Attorney–General (VPS 68/2004)**, 13 May 2004, available from: http://www.minister.immi.gov.au/media_releases/media04/index04.htm)

Commonwealth legislative developments

Government legislative program Spring 2004

Among the new bills proposed by the Government for the Spring Sittings 2004 before the announcement of the calling of the federal election for 9 October 2004, were the following. Bills actually introduced before the dissolution of Parliament have lapsed. (The comments on Bills are drawn from the Government release, or from Parliamentary Bills lists where already introduced; the former list is available from:
www.pmc.gov.au/docs/parlinfo.cfm#legislation)

- *Jurisdiction of Courts (Judicial Review and Other Amendments) Bill 2004*, to implement the outcomes of the review of migration litigation [see (2004) 40 *AIAL Forum* at 5; its report has not been made public], in particular to: direct migration cases to the Federal Magistrates Court for quicker handling; reform court processes to reduce delays; and deter the bringing of unmeritorious migration cases. (See also below, 'Other legislative developments', for an earlier bill arising out of the Migration Litigation Review.) Additional resources will be injected into the Federal Magistrates Court, and the appointment of eight new Federal Magistrates was announced by the Attorney–General on 24 June 2004. The High Court will be able to remit migration cases directly to the Federal Magistrates Court 'on the papers'. The Government also intends to amend the High Court's fee waiver provision so that those people whose fees are waived on the ground of financial hardship will be required to pay one-third of the fees to discourage unmeritorious litigation. Courts may be given discretion to make personal costs orders against lawyers filing 'unmeritorious' migration cases. See Joint Media Release by the Immigration Minister and the Attorney–General, 11 May 2004, and Attorney–General's Media Releases, 6 May and 24 June 2004; also media release by Shadow Attorney–General, 6 May 2004.

- *Migration Amendment (Migration Zone) Bill*, to simplify the definition of 'migration zone' and clarify detention powers to remove persons to a place outside Australia, and *Migration Amendment (Border Protection and Visa Compliance) Bill*, to 'implement measures which will provide for further border protection and assist in combating people smuggling'.

- *Archives Amendment Bill*, to update the *Archives Act 1983* in accordance with current practice and assist the National Archives of Australia to promote good record-keeping across the Commonwealth.

- *Australian Communications and Media Authority Bill* and a companion transitional and consequential amendments Bill, to establish a new broadcasting and communications regulator as a result of the merger of the Australian Communications Authority and the Australian Broadcasting Authority, and provide for transitional arrangements arising from the merger. The new body will regulate telecommunications, broadcasting, radio-communications and online content, and is intended to be established by 1 July 2005.

- *Postal Industry Ombudsman Bill 2004*: see below under heading 'Ombudsman'.

- *Defence Legislation Amendment Bill*, to create the statutory appointments of Director of Military Prosecutions and Registrar of Military Justice; amend Defence legislation in relation to Defence Force discipline arrangements, including the convening and administration of courts martial and Defence Force magistrates trials; and other matters.

Other legislative developments

- The *Administrative Appeals Tribunal Amendment Bill 2004* was introduced into the Parliament on 12 August 2004, and the second reading was adjourned to a later date. See below under heading 'Administrative review' for a brief summary of the Bill.

- The Government introduced the *National Security Information (Criminal Proceedings) Bill 2004*, together with a consequential amendments Bill, on 27 May 2004, and debate was adjourned to a later date. The Bill's intention is to provide a procedure for federal criminal proceedings which will 'facilitate the prosecution of an offence without prejudicing national security and the rights of the defendant to a fair trial'. The principal mechanisms in the Bill for achieving these ends are: a requirement to notify the Attorney–General concerning the expected introduction of any information related to or affecting national security; a discretion for the Attorney to issue a certificate preventing the disclosure of such information or allowing it only in a summarised or edited form; providing for a certificate preventing the calling of a specified witness; empowering a court either to accept the certificate in relation to admissible evidence or to order disclosure of the information, subject to appeal in either case; provision for closed proceedings, from which the defendant and his legal representatives may be excluded; a prohibition on the legal representative of an accused receiving security related information without a security clearance by the Attorney–General's Department. Several new offences are created by the Bill. The Bill covers not only criminal proceedings but also certain applications under the *Extradition Act 1988* or for judicial review under s 39B of the *Judiciary Act 1903*. The Attorney–General, Mr Ruddock, has commented that the principal Bill was 'consistent with a number of the [Australian Law Reform Commission's] recommendations' in the report referred to below (see 'Freedom of Information, etc.'). The Senate Legal and Constitutional Legislation Committee, reporting on 19 August 2004, has recommended a number of significant amendments to the Bill, many of which are designed to give the courts greater discretion in relation to the exclusion or otherwise of evidence, the holding of closed hearings and ensuring that the defendant receives a fair trial. See:
  http://www.aph.gov.au/senate/committee/legcon_ctte/index.htm

  See also *Bills Digests*, Nos 25 and 26 2004–05, Information and Research Services, Parliamentary Library, 9 August 2004, available from:
  http://www.aph.gov.au/library/pubs/bd/index.htm

- The *Age Discrimination Act 2004* and a consequential amendments Act (see (2004) 41 *AIAL Forum* at 2 for the Bill) were passed by the Senate on 29 March 2004 and assented to on 22 June 2004. Such legislation had been recommended by HREOC and the House of Representatives Standing Committee on Employment, Education and Work Place Relations. In another development, a *Disability Discrimination (Education Standards) Bill 2004* was introduced into the House of Representatives on 12 August 2004 to support draft Disability Standards which will be formulated and tabled following passage of the Bill. The draft standards are available online from: http://www.ag.gov.au/DSFE

- A Bill to amend the *Sex Discrimination Act 1984* to permit the provision of teaching scholarships to males 'in order to address the imbalance in the number of male and female teachers in schools', was defeated in the Senate on 25 June 2004, and was reintroduced into the House of Representatives on 11 August 2004 (*Sex Discrimination Amendment (Teaching Profession) Bill 2004*). The legislation has been the subject of criticism by the Sex Discrimination Commissioner, Pru Goward: HREOC Media Release, 12 May 2004, available from: www.hreoc.gov.au/media_releases. See report of Senate Legal and Constitutional Legislation Committee, May 2004, available from the Committee's website: http://www.aph.gov.au/senate/committee/legcon_ctee .

- The *Aboriginal and Torres Strait Islander Commission Amendment Bill 2004* which is designed to abolish the Aboriginal and Torres Strait Islander Commission (ATSIC)was referred by the Senate to the Select Committee on the Administration of Indigenous Affairs for report on 31 October 2004. In the meantime, the Government has transferred responsibility for ATSIC–ATSIS programs and services to mainstream agencies from 1 July 2004: the programs are continuing. (See also Angela Pratt and Scott Bennett, 'The End of ATSIC and the future administration of Indigenous affairs', Current Issues Brief, No. 4 2004-05, Parliamentary Library, 9 August 2004.)

- The *Military Rehabilitation and Compensation Act 2004* (MRC Act) and its companion consequential amendments Act, after considerable amendment, finally passed through Parliament on 1 April 2004 and were assented to on 27 April 2004 (see (2004) 41 *AIAL Forum* at 9 concerning the review provisions). The Government accepted a recommendation concerning the review structure from the Senate Foreign Affairs, Defence and Trade Legislation Committee with the effect that all Australian Defence Force (ADF) members, regardless of the nature of their service, will 'have the option of applying to the Veterans' Review Board for review of decisions affecting them'. (Report of Senate Foreign Affairs, Defence and Trade Legislation Committee on the above Bills, March 2004, available via the Senate Committee's website: www.aph.gov.au/senate/committee/fadt_ctte/index.htm

  See also *Parliamentary Debates*, House of Representatives, 31 March 2004, p 27, 668; Dr Neil Johnston, 'Legislation for the Military Rehabilitation and Compensation Scheme', below p 19)

- See below under heading 'FOI, privacy etc' for the *Privacy Amendment Act 2004*, and recent amendments to the *Freedom of Information Act 1982*.

- *Migration Legislation*: The following are among the legislative developments in this area, in addition to those mentioned above:

  - The *Migration Amendment (Duration of Detention) Bill 2004* (see (2004) 41 *AIAL Forum* at 3) was defeated in the Senate on 8 March 2004.

- The first stage of the Government's response to the report of the migration litigation review is contained in the *Migration Amendment (Judicial Review) Bill 2004* (and see above for the proposed second stage). The Bill seeks to respond to the High Court's decision in *S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 by redefining the term 'privative clause decision' in section 5(1) of the *Migration Act 1958* (but not in section 474, the privative clause provision) to include a 'purported decision'. As stated in the Explanatory Memorandum to the Bill: 'It is intended that by redefining 'privative clause decision' in this way, those provisions in Part 8 that relate to time limits on judicial review applications, and the courts' jurisdiction in migration matters, will apply to all migration decisions, even those that are arguably affected by jurisdictional error'. The time limits are 28 days and an additional 56 days where it is in the interests of the administration of justice; in the case of the High Court, time runs from a deemed date of notice of a decision. On the question of the jurisdiction of courts, the result is that the Federal Court and the Federal Magistrates Court only have jurisdiction in relation to 'privative clause decisions' in the expanded sense that have been the subject of a merits review decision by the Migration Review Tribunal or the Refugee Review Tribunal. The Bill includes a consequential amendment to the *Administrative Decisions (Judicial Review) Act 1977*. (*Senate Legal and Constitutional Legislation Standing Committee*, report, June 2004; *Bills Digest*, No. 118 2003–04, 6 April 2004, Parliamentary Library, Information and Research Services.)

- The *Migration Legislation Amendment (Migration Agents Integrity Measures) Act 2004*, after acceptance by the House of Representatives on 24 March 2004 of a substantial number of Senate amendments, was assented to on 21 April 2004. (See reference in (2004) 41 *AIAL Forum* at 3.)

Report of select committee on ministerial discretion in migration matters

The report of the Senate Select Committee into the above matter was unable to reach any conclusion on allegations about impropriety in the exercise of the statutory discretions under sections 351 and 417 of the Commonwealth *Migration Act 1958* by the former Immigration Minister, Mr Ruddock, because, it claimed, it had been met with resistance from the Department and the present Minister, Senator Vanstone, in its attempt to collect detailed case file information. Nonetheless, the report contains interesting discussion of the history and practice of these wide ministerial discretions, and makes a number of recommendations which it believes would improve the transparency and accountability of the exercise of the discretion, and ultimately make the discretion a genuine last resort to deal with cases that are 'truly exceptional or unforeseeable'. It also recommends that the Government consider 'a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations' under international conventions to which Australia is a signatory. (***Report of the Senate Select Committee on Ministerial Discretion in Migration Matters***, March 2004; see also: ***Ministerial Discretion in Migration Matters: Contemporary Policy Issues*****, Australian Parliamentary Library, Current Issues Brief No. 3, 2003–04**, 15 September 2003)

Report of consultative group on resolving Parliamentary deadlocks

The report of the Prime Minister's Consultative Group on Constitutional Change on the question of resolving deadlocks between the two houses of the Parliament under section 57 of the Constitution was presented to the Prime Minister in March 2004 and tabled in the House of Representatives on 1 June 2004. The group sought the views of the public by way of public meetings, written submissions (of which it received 293) and private discussions. It reported that in its view the issues raised in a discussion paper (see (2004) 40 *AIAL Forum* at 6 for further details) were of public importance, but that the proposals in that paper, while

meriting serious debate in future considerations of these issues, would not be carried in the event of a referendum. In view of the group's report, the Government did not propose to hold a referendum on this issue at the next election, and the Prime Minister announced that he had commenced discussions with the Leader of the Opposition about implementation of a program of education and consultation in relation to section 57 and constitutional issues more generally. (***Parliamentary Debates*, House of Representatives**, 1 June 2004, at pp 29,656–29,661; ***Resolving Deadlocks: The Public Response*, Report of the Consultative Group on Constitutional Change**, March 2004, available from website: www.pmc.gov.au/docs/constitutionalchange.cfm)

NSW legislation review committee's report on its operations & future directions

The New South Wales Parliament's Legislation Review Committee has reported on its operations since its establishment in September 2003 to undertake the scrutiny of bills coming before the Parliament as well as regulations subject to disallowance. It makes some detailed suggestions as to how it may perform its tasks better in the future, including the appointment of a sub-committee to consider regulations. (**Parliament of New South Wales, Legislation Committee, Report No. 1, *Operations, Issues and Future Directions, September 2003 – June 2004***, 24 June 2004)

The courts

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

Non-state actors and persecution under the Refugees Convention – differing theories

Respondents S152/2003 raised issues relating to determination of refugee status where an asylum seeker claims to have a well-founded fear of persecution for reasons referred to in the Refugees Convention (the Convention) on the basis, not of the actions or complicity of a state or its agents (see *Kharwar* (2002)), but of the conduct of non-state actors. An asylum seeker (the applicant) was a Jehovah's Witness from the Ukraine who had been seriously attacked on three occasions when engaged in distributing publications and other forms of proselytising. On review of a refusal to grant him a protection visa, the Refugee Review Tribunal (RRT) rejected the claim that the Ukraine government had encouraged persecution of Jehovah's Witnesses or had been unable or unwilling to protect its citizens, and found that the attacks on the applicant because of his religious beliefs must be seen as 'individual and random incidents of harm' not amounting to persecution under the Refugees Convention.

The High Court (Gleeson CJ, Hayne and Heydon JJ in a joint judgment, McHugh and Kirby JJ) decided unanimously to allow an appeal against a decision of the Full Court of the Federal Court that the RRT had been in error in failing to consider 'the State's ability, in a practical sense, to provide protection' against the actions of non–state actors. However, there were significant differences between the judges' reasons for decision which, it is thought, could produce significantly different results in some circumstances. The authors of the joint judgment, and Kirby J in a separate judgment, essentially allowed the appeal on the basis that the RRT had in fact dealt with the matter and that its findings were open to it on the evidence. The joint judgment accepted that the question of the willingness or ability of the state to discharge its protection obligations to its citizens is relevant to determining whether conduct giving rise to a fear is persecution, whether such a fear is well-founded and whether an asylum seeker has justified being unable or unwilling to seek the home state's

protection. In the words of the joint judgment, a state is obliged to 'take reasonable measures to protect the lives and safety of its citizens' including an appropriate criminal law.

Justice McHugh, however, rejected the 'protection' theory that in the case of non-state actors it was necessary for an asylum seeker to show both persecutory acts by such persons and that the state has breached its duty to protect the applicant, as was held in a 2001 decision of the House of Lords. On the appropriate test of whether there was a real chance of persecution, the issue did not arise in this case on the evidence. Justice Kirby acknowledged the power of McHugh J's arguments against the 'protection' theory, while referring to contrary indications in its favour; as the outcome did not depend on the approach taken he applied the protection theory he had previously accepted as applicable in such cases. (***MIMIA v Respondents S152/2003*** **(2004) 205 ALR 487**, 21 April 2004; see also the application of *S152/2003* in, eg, ***Applicant A99 of 2003 v MIMIA*** **[2004] FCA 773**, 9 July 2004 and ***SVFB v MIMIA*** **[2004] FCA 822**, 25 June 2004)

Identification of 'a particular social group' under Article 1A(2) of the Refugees Convention

The appeal to the High Court in *Applicant S v MIMIA* raised the question whether it would have been open to the RRT to find that young, able-bodied male Afghans (or some variation on that description) were members of 'a particular social group' for the purposes of the definition of a refugee in the Refugees Convention. The appellant claimed refugee status on the ground of a well-founded fear of persecution in the form of random forcible recruitment to their armed forces by the Taliban of young able-bodied male Afghans. A majority of a Full Court of the Federal Court, on the basis of an earlier decision of that court, dismissed his appeal against a decision of the RRT upholding the refusal of a protection visa. In a five-member judgment, the High Court disapproved the decision of the Full Court that, in order for there to be persecution for reasons of 'membership of a particular social group', it is necessary that there be a *recognition* or *perception* within the relevant society that a collection of individuals is set apart from the rest of the community. All judges considered that to be a misreading of remarks of McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997). Whether or not individuals were members of a particular social group is rather an objective question whether a group is distinguished or set apart from society at large, on the basis of a common characteristic or attribute other than fear of persecution; perceptions held by the community may amount to evidence that a social group is a cognisable group within the community, but is not necessary to reaching that conclusion (joint judgment of Gleeson CJ, Gummow and Kirby JJ). The RRT had not considered the correct issue. Justice McHugh took a similar approach.

Justice Callinan agreed that the RRT and Full Court had been in error on the question of 'a particular social group', but would have dismissed the appeal on the ground that liability to conscription by the Taliban did not constitute persecution. The authors of the joint judgment, McHugh J taking a similar view, did not consider that the actions of the Taliban in relation to conscription amounted to a law of general application, being ad hoc and random, and for the same reason its conduct could not be considered appropriate and proportionate to a legitimate national objective. The joint judgment noted that on remittal of the matter to the RRT, it would be necessary for the tribunal to take into account the changes to the situation in Afghanistan since it last considered the matter. (***Applicant S v MIMIA*** **(2004) 206 ALR 242**, 27 May 2004)

In *Applicant S v MIMIA* (above), the High Court recognised that, while the persecution feared could not be the sole characteristic common to 'a particular social group', circumstances could arise where discriminatory behaviour might be absorbed into the social consciousness of the community with the result that those discriminated against became 'a particular social group' for the purposes of the Convention. Justice Merkel applied this conclusion in a case

concerning claims for refugee status by the Chinese parents of a child born in contravention of the Chinese 'one-child' policy and on behalf of the third child of such a couple, remitting the matter to the RRT for decision in accordance with the law as stated by the court. (***VTAO, VTAP, VTAQ v MIMIA*** **[2004] FCA 927**, 19 July 2004)

Procedural fairness claim rejected – further report to RRT on mental state of asylum seeker not required

In a 4:1 decision (Kirby J dissenting), the High Court rejected a claim that the RRT had not acted with procedural fairness in refusing to seek a 'more independent and expert' assessment of the mental state of an asylum seeker (the respondent), over and above a report obtained by the RRT from a psychologist in the detention centre where he was held. There had been evidence of the respondent's distress and self-harm in the detention centre, as well as his distress during the RRT proceedings. The majority, in allowing the Immigration Minister's appeal from the Federal Court (Selway J, exercising the appellate jurisdiction of the court), considered that the RRT went to great lengths to accommodate the respondent and his concerns, dealing with inconsistencies in his evidence in a way highly favourable to him on the assumption that he may have been suffering from post-traumatic stress disorder which had affected his evidence. In the words of Gleeson CJ, the RRT 'was not then obliged to embark on an open-ended investigation of the respondent's psychological condition to see whether, in any way, it might have affected his ability to put his case to best advantage'. In addition, the majority held that the grounds actually given by the Federal Court did not constitute jurisdictional error. Justice Kirby considered that there had been a denial of procedural fairness by the RRT. Despite the RRT's attempts to be fair, the history of the respondent's self-harm and attempts to commit suicide, together with other considerations, 'suggested that the proper course for the Tribunal to take was to postpone the hearing and to obtain an independent, expert and medical report on his psychiatric condition'. Referring to *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, four judges (Gleeson CJ, Gummow and Hayne JJ, and Kirby J) rejected the Minister's alternative argument that, if the Federal Court's findings had been upheld they would have been caught by the privative clause in section 474 of the Migration Act,. (***MIMIA v SGLB*** **(2004) 207 ALR 12**, 17 June 2004; and see (2003) 36 *AIAL Forum* at 6–7 on *S157/2002*)

In the event the court in *SGLB* did not find it necessary to examine legal issues relating to Selway J's finding that the RRT had 'no evidence' for its finding concerning post-traumatic stress disorder or in relation to the respondent's fitness to take part in the proceedings. See *NAYQ v MIMIA* for a decision of Wilcox J on an invalid lack of probative evidence to sustain an RRT decision. (***NAYQ v MIMIA*** **[2004] FCA 365**, 31 March 2004; relying on the Full Court decision in ***SFGB v MIMIA*** **(2003) 77 ALD 402**, 24 October 2003)

Family Court lacks jurisdiction to order release of children from immigration detention

The High Court unanimously allowed an appeal from a decision of a Full Court of the Family Court which would have had the effect of requiring the Immigration Minister (the Minister) to release the respondent children in this matter from immigration detention. By a majority, the Full Court had held that the welfare jurisdiction of the Family Court in respect of children was not limited to disputes between parents concerning custody and access to children, and could enable it in appropriate cases to make orders against third parties, including ordering the Minister to release children from immigration detention. In broad terms the proceedings in the High Court raised the issue whether the Family Court had power to make orders with that legal effect.

All judges except Kirby J proceeded by examining the provisions of the Commonwealth *Family Law Act 1975* (FLA) to determine the extent of the jurisdiction of the Family Court in relation to the welfare of children (in particular under section 67ZC of the FLA, the so-called 'welfare jurisdiction' provision). All concluded on the basis of detailed analysis of the statutory provisions of the FLA that the 'welfare jurisdiction' in relation to children under that provision was not at large, being limited by the other provisions of Part VII of that Act to the relationships between parents and children. Justice Callinan added that amendments to the Family Law Act did not incorporate in that Act the provisions of the UN Convention on the Rights of the Child.

Justice Kirby disposed of the matter entirely on the ground that, however wide the general powers of the Family Court might be assumed to be, they could not override specific and valid provisions of the Migration Act which required that the children, as 'unlawful non-citizens', be kept in immigration detention until they obtained a visa enabling them to stay in Australia or were removed or deported from Australia. In view of the failure of Parliament to change the legislation despite many official reports concerning the impact of detention on children and possible breaches of Australia's international obligations, there was no scope for reading the provisions of the Migration Act to make them consistent with international law. Justice Kirby rejected any relevance of the *Al Masri* decision (see below) in this matter. The Full Court's conclusion that detention of the children was unlawful could not be sustained. (***MIMIA v B* (2004) 206 ALR 130**, 29 April 2004)

For later proceedings seeking interlocutory orders for the release of the children involved in *B*, see *B v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2004] FCA 699, 3 June 2004, in which Lander J, relying in part on Kirby J in the earlier decision, decided there was no serious issue to be tried. There was evidence that, if the mother of the children requested her removal from Australia with them, there was nothing to prevent that happening. Note that further challenges to detention of children are involved in the matter of *Re Woolley & anor; Ex parte Applicants M276/2003*, on which the High Court reserved judgment on 3 February 2004.)

High Court upholds constitutional validity of indeterminate power of detention in Migration Act where removal of detainee unlikely to be achieved – Al Masri decision overruled

In two cases removed from the Full Federal Court for decision by the High Court, a 4:3 majority of the High Court (McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow and Kirby JJ dissenting) has determined that there is no scope in sections 196 and 198 of the *Migration Act 1958* (the Migration Act) for release of a detainee who has sought removal from Australia but for whom there is no real likelihood of such removal occurring in the reasonably foreseeable future, as had been decided in *Al Masri v MIMIA* (2002) 192 ALR 609, upheld on this issue by the Full Court in *MIMIA v Al Masri* (2003) 126 FCR 54. One of the appellants (Mr Al-Kateb) was a stateless person of Palestinian origin who had lived most of his life in Kuwait; the other (Mr Al–Khafaji), an Iraqi national who had fled to Syria with his family as a child and had grown up there. The latter had been found to satisfy the Convention definition of refugee, but ironically had been excluded from protection under section 36(3) of the Act on the ground that he had effective protection in Syria including a right to re-enter and reside there. The Federal Court had found that there was little prospect of the removal of either appellant.

For the majority, Justice Hayne, with whom McHugh and Heydon JJ agreed, considered that the statutory scheme of mandatory detention essentially provides for indeterminate detention which only ceases when the detainee is removed or deported from Australia or is granted a visa (section 196). The language of the provisions did not permit the construction adopted in

the *Al Masri* cases (above): 'the time for the performance of the duty [of removal in section 198] does not pass until it is reasonably practicable to remove the non-citizen in question'. Continued detention remains for the purpose of subsequent removal even if it is impossible at a particular time.

On the constitutional issues, Justice McHugh characterised the detention provisions as being at the centre of the aliens power, with the purpose of making an alien available for deportation or preventing him or her from entering Australia or the Australian community; as such the provisions were not punitive and did not infringe Chapter III. Justice Hayne defined the aliens power more widely than the joint judgment in *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1, extending it not only to prevention of entry and removal from Australia, but also to 'segregation from the community by detention in the meantime'. Similar points were made by Callinan J, while Heydon J substantially agreed with Hayne J without giving separate reasons.

In dissent, Gleeson CJ was not prepared, in the absence of unambiguous language to that effect, to impute to the Parliament an intention to achieve indefinite and perhaps permanent administrative detention, unrelated to personal circumstances or danger to the community. Justice Gummow, with whom Kirby J agreed, held that, on the proper construction of the detention provisions against the background of the constitutional principles discussed in *Lim*, where a detainee's prospects of removal to another country are so remote that continued detention could not be for the purpose of removal, the detainee's further detention is not authorised. A construction of legislation that recognises a power to keep a person in custody for an unlimited time should be avoided where reasonably open. In the of view Kirby J, the conclusion reached by Gummow J was further supported by considerations of international law and common law presumptions in favour of personal liberty. The reasons for decision are remarkable for the overt clash of views on such issues between McHugh and Kirby JJ, revealing profound differences concerning constitutional interpretation. (***Al Kateb v Godwin* (2004) 208 ALR 124** (the leading decision) and ***MIMIA v Al-Khafaji* (2004) 208 ALR 201**, 6 August 2004; for the *Al Masri* line of cases see also: (2002) 35 *AIAL Forum* at 6, (2003) 36 *AIAL Forum* at 8–9, and (2003) 38 *AIAL Forum* at 7–8)

Conditions of detention not a defence to a charge of escaping from immigration detention

By a majority of 6:1 (Gleeson CJ, McHugh, Gummow and Heydon JJ (joint judgment), Hayne and Callinan JJ; Kirby J dissenting), the High Court has held that it would not be an answer to a charge under section 197A of the Migration Act of escaping from immigration detention for a defendant to demonstrate that the conditions of his or her detention had been inhumane and harsh. Accordingly, the court upheld the decision of the Full Court of the Supreme Court of South Australia to set aside as irrelevant to the issues to be tried witness summonses issued on the appellant's behalf seeking to obtain material relating to conditions in the Woomera detention centre. While other legal remedies are available in relation to the conditions of detention, immigration detention is not for a punitive purpose, and whatever the conditions of detention it cannot be denied that a person is in 'immigration detention' if the detention satisfies the statutory definition of that term; there is no ground for a different statutory construction. Justice Hayne considered that to apply a test of whether the conditions of detention were reasonably necessary to migration control purposes would logically lead to a conclusion that 's 189 of the [Migration] Act was invalid insofar as it provided for mandatory detention of *all* unlawful non-citizens'. (Note that the appellant had not argued for such invalidity.) For the reasons his Honour gave in *Al Kateb* (above), the mandatory detention provisions are valid laws of the Commonwealth. In addition, Justice Callinan considered the summonses to be oppressive in their width and imprecision.

Justice Kirby dissented strongly on the grounds, among others, that the matter ought not to be concluded without having the desirable evidentiary foundation in a primary court. Only a court could determine whether the actual forms of the administrative restraint provided for by Parliament exceeded its constitutional powers. To subject an alien to inhuman and intolerable conditions of detention was quite different to establishing administrative detention for the limited purposes envisaged by the Migration Act. Principles of international law are relevant to interpreting a statute where the language permits a construction consistent with international law. The availability of alternative remedies was unlikely to provide a detainee with a forum to determine the lawfulness of his detention in relation to his actual legal position. (***Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs & ors*** **(2004) 208 ALR 271**, 6 August 2004)

High Court decision on extent of the aliens power in relation to certain children

The High Court has delivered its decision in a case involving the question whether the aliens power in section 51(xix) if the Australian Constitution extends to a child born in Australia of parents who are not Australian citizens or permanent residents. The court decided by a majority of 5:2 (McHugh and Callinan JJ dissenting) that the power did extend to such a child, who was therefore subject to the detention and removal provisions of the Migration Act. The decision will be summarised in more detail in the next developments section. (***Singh v Commonwealth of Australia & anor*** **[2004] HCA 43**, 9 September 2004; see also (2004) 41 *AIAL Forum* at 6)

Suspension of ATSIC Chairperson invalid

Justice Gray in the Federal Court has quashed the suspension by the present Minister for Immigration and Multicultural and Indigenous Affairs, Senator Vanstone (the Minister) of Mr Geoff Clark, Chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC). The Minister gave notice to Mr Clark on 23 December 2003 to show cause why he should not be suspended from office on the ground of 'misbehaviour' as provided for under section 40 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (the ATSIC Act). Suspension under the ATSIC Act is a condition precedent to terminating a Commissioner's appointment. Mr Clark had been convicted in a Victorian magistrates court on 28 March 2003 of two offences, obstructing police and behaving in a riotous manner; the Victorian County Court allowed an appeal against the latter conviction. Mr Clark was fined $750 on the former conviction. The Minister considered that the conviction amounted to misbehaviour within the terms of a Determination made by the former Minister under s 4A of the ATSIC Act. The Determination specifies that conviction of an offence for which there is a penalty of imprisonment is misbehaviour, even if a conviction is not recorded. The Minister also relied on the 'general concept of misbehaviour'.

The court noted that indigenous people were over-represented in the criminal justice system particularly in relation to public order offences, many of which under State and Territory laws provided for sentences of imprisonment. It found as a fact that 'the standard of behaviour required by [the Determination] was higher than that set for any other comparable office' and exceeded the power in the ATSIC Act to specify misbehaviour. That power must be construed so as not to require a higher standard of behaviour, since otherwise the Act would be in breach of the International Convention on the Elimination of all Forms of Racial Discrimination, and by section 10(1) of the Commonwealth *Racial Discrimination Act 1975* would have to be read down to avoid discrimination on the ground of race. The Determination must be read down to apply only to conduct within the meaning of 'misbehaviour' in the ATSIC Act. The clause was not saved by the fact that the Determination is a disallowable instrument.

The court held that the Minister, in considering the application of the Determination and the general concept of misbehaviour, was required to consider the impact of Mr Clark's conduct and conviction on his capacity to hold the office of Commissioner before making a finding of misbehaviour. In the court's view, her reasons for decision showed she acted on the assumption that the conviction itself was enough to constitute misbehaviour. On the other hand, in order to issue a valid notice to show cause, it was only necessary for the Minister to form the view that suspension was a possible outcome. (***Clark v Honourable Amanda Vanstone*** **[2004] FCA 1105**, 27 August 2004)

Administrative review and tribunals

Amendments to AAT Act

Following an internal government review of the operation of the Administrative Appeals Tribunal (AAT), the Attorney–General provided an exposure draft bill in May, and on 12 August introduced the Administrative Appeals Tribunal Amendment Bill 2004 (the Bill) into the Parliament. The Attorney–General stated that the Bill is intended to enable the AAT to provide 'a more efficient review mechanism by better managing its workload'. It makes changes in the areas of AAT procedures, removes some restrictions on the constitution or reconstitution of the AAT, provides for a greater role for ordinary members, gives the Federal Court and the Federal Magistrates Court greater powers to make findings of fact on appeal from the AAT (as earlier recommended by the Administrative Review Council), and enables the appointment as President not only of a Judge of the Federal Court but also of a former Judge of that court or of a State or Territory Supreme Court or of a legal practitioner of five years standing. Future appointments of members will be for periods up to seven years, with no provision for tenurable appointments. The Bill sets out criteria for consideration by the President in determining the constitution of the AAT for a particular hearing, and permits multi-member panels of the AAT to be comprised entirely of ordinary members, in place of the present requirement for a Senior Member to preside.

In performing its functions the AAT is made subject to the objective of providing a mechanism of review that is 'fair, just, economical, informal and quick', reflecting the formula found in the legislation establishing other Commonwealth tribunals. The President is given a new power to give directions as to the 'conduct of reviews', which is not thought to extend to the manner in which a particular review is conducted. Members will be able to carry out many procedural functions that are currently limited to presidential and senior members, giving the increased numbers of member level appointees a greater role in the management and determination of applications. Greater emphasis is to be given to the use of alternative dispute resolution procedures in the determination of applications. The AAT will have greater power to limit the questions of fact, the evidence and the issues that it considers, to avoid the consideration of irrelevant issues. Applicants may be required to give further details of their claim that a decision is not the 'correct or preferable' one, while decision-makers must use their best endeavours to assist the AAT to make its decision. A reference to the Federal Court will now require the consent of the President. **(For a fuller statement concerning these matters, see Dennis Pearce in (2004) 226 Australian *Administrative Law Bulletin* at[6729])**

Breach of Hardiman principle by ABA

The Australian Broadcasting Authority (ABA) was found by the Federal Court (Sackville J) to have breached the principle laid down by the High Court in *The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, namely that a tribunal or other similar body that becomes a protagonist in litigation challenging its decisions risks endangering its impartiality in subsequent proceedings that may follow. The court did not

believe the principle should be confined in the way suggested by the ABA, ie to quasi-judicial proceedings involving contraventions of legislation which are substantially adversarial in character. The court followed a Victorian decision that held that the High Court's reasoning applied equally to 'decision-makers before whom hearings which were in substance inter partes were conducted'. There is the same need for impartiality and its appearance, particularly in relation to potential subsequent proceedings if the matter is remitted for reconsideration. In the matter before the court another party had been present to act as a contradictor, and the ABA had gone beyond assisting the court in relation to the proper extent of its powers. It was justified, however, in defending allegations that it had taken the possibility of criticism of its allocation decision into account in making that decision. In the event the court awarded the ABA only 25% of its costs against the unsuccessful party. (***Community Television Sydney Limited v Australian Broadcasting Authority*** **[2004] FCA 614**, 14 May 2004)

Ombudsman

Postal Industry Ombudsman

The *Postal Industry Ombudsman Bill 2004* was introduced into the House of Representatives on 12 August 2004, to amend the Commonwealth *Ombudsman Act 1976* to establish the Postal Industry Ombudsman (PIO) as a separate office within the office of the Commonwealth Ombudsman. The Bill also provides for the scheme to be self-funding through recovery on a proportionate basis of the costs of the PIO from Australia Post and other postal industry operators who opt into the scheme. The PIO will take over the existing role of the Commonwealth Ombudsman of investigating postal complaints against Australia Post, of which the Ombudsman receives about 1,000 each year. In addition, the PIO will have jurisdiction to investigate complaints against private sector postal operators that register to participate in the scheme. The holder of the new office will have the normal powers of an ombudsman. The scheme is distinctive in conferring jurisdiction on a single ombudsman to investigate complaints in the public and private sectors. The Commonwealth Ombudsman, Professor John McMillan, has referred to the benefits for organisations of participating in professional complaint handling schemes. Once the scheme was established, he would work with the postal industry to establish in-house customer complaint handling procedures to provide prompt and helpful service to complainants and to allow the PIO to concentrate on more serious or intractable complaints. The scheme is expected to commence within six months of the enactment of the legislation. (**'New postal industry role for Commonwealth Ombudsman', Media Release**, 23 August 2004**)**

Brief issues relating to the Commonwealth Ombudsman

- The Commonwealth Ombudsman has introduced a secure online complaint form which may be accessed at the Ombudsman's website. Its use is optional: http://www.comb.gov.au/

- Among the Ombudsman's public reports for 2004 is a report on an own motion investigation into a review of the operational and corporate implications for the Australian Crime Commission arising from alleged criminal activity by two former secondees (June 2004). The Ombudsman was limited to reviewing the review conducted by independent consultants, which he concluded had been undertaken in a proper manner and had made appropriate recommendations. In addition, the Ombudsman recommended a performance review of managers to address a concern that prescribed policies and procedure had not been appropriately followed, and implementation of a system of professional reporting to protect staff so that they can make a confidential disclosure about colleagues. Other reports relate to the Tax Agents'

Board of New South Wales, relating principally to the desirability of the Board giving adequate explanations of its decisions, and a major report on changes of assessment by the Commonwealth Child Support Agency to a person's child support payment. The reports, and media releases, are available from the above website.

Freedom of information, privacy and other information issues

Australian Law Reform Commission (ALRC) report on protection of classified and security sensitive information

In May 2004 the ALRC presented its report on the protection of classified and security sensitive information (security information), especially, but not only, in the context of court or tribunal proceedings. The principal recommendation is for the enactment of a National Security Information Procedures Act that would apply only in relation to the protection of security information in proceedings in any Australian court of tribunal. The principal feature of the Act would be to require notification at the earliest possible stage to the relevant court or tribunal of the likelihood of the use of security information in such proceedings, and require the court or tribunal to hold a directions hearing and make further orders for the further conduct of the proceedings and the use of security information. The report includes detailed recommendations on principles and processes concerning the court's powers to determine how relevant information will be dealt with, and includes safeguards for defendants or other litigants where the court imposes limitations on disclosure of information. It makes provision for certificates to be given by the Attorney–General stipulating that security information is not to be disclosed to all or specified persons, and for a court to determine in the light of the certificate whether proceedings should be stayed, discontinued, dismissed or struck out in part or whole. Ministers would be required to table in Parliament a report on the issuing of such certificates (and other similar certificates under other legislation such as the FOI Act).

As in its Discussion Paper, the ALRC recommends comprehensive 'whistleblower' legislation, amendment of certain offences to enable injunctions to be obtained to prevent disclosure of information, together with comprehensive reviews of provisions giving rise to a duty not to disclose official information, including section 79 of the Commonwealth *Crimes Act 1914* and other secrecy provisions. The report provides advice on a broader range of issues than those dealt with in the National Security Information (Criminal Procedures) Bill 2004 (see above under 'Other legislative developments'), and proposes somewhat different processes. (See also comments by the ALRC President that the Bill's mechanisms are consistent with the framework of the report.) **(*Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC, Report 98**, May 2004; **ALRC Media Release,** 24 June 2004; **Commonwealth Attorney–General, Media Release No. 102/2004**, 23 June 2004; see also (2004) 41 *AIAL Forum* at 11)

ANAO report on administration of FOI requests

The Australian National Audit Office (ANAO) completed its audit of six agencies, including the Attorney–General's Department, to assess the appropriateness of their policies and processes for dealing with FOI requests, and their compliance with the provisions of the FOI Act in relation to selected FOI requests. The report was generally favourable concerning the agencies' policies and processes for dealing with FOI requests, and found that the Attorney–General's Department and the Australian Government Solicitor 'had effective mechanisms in place to provide practical information to FOI practitioners about significant issues that may impact on the FOI process'. (***Administration of Freedom of Information Requests*, ANAO Audit Report No. 57 2003–04, Business Support Process Audit**, 24 June 2004)

Amendments to FOI Act

The *Law and Justice Amendment Act 2004* assented to on 26 May 2004 made some minor changes to the *Freedom of Information Act 1982* (Cth) (FOI Act), the most important of which was to amend section 45(1) so that the exemption does not apply where an action for breach of confidence could only be taken by a Commonwealth agency or the Commonwealth, bringing it into line with the wording of section 45(2). The other amendments remove some redundant provisions and make a minor technical change to the definition of 'request' in section 4(1) of the FOI Act.

In addition, the AAT Amendment Bill (see above under 'Administrative review' heading) makes significant amendments to provide: (1) that an exempt document that is voluntarily produced to the AAT is subject to a confidentiality provision, contrary to the decision in *Day v Collector of Customs* (1995) 57 FCR 176; and (2) that the AAT may require the production of such a document under the provisions of section 64 after 28 days have elapsed from notice to the decision-maker of the application to the AAT, even if the AAT has not yet begun to hear argument or otherwise deal with the matter. Both these amendments will assist the production of exempt documents to the AAT and its proper consideration of exemption claims in relation to them.

Amendments to Privacy Act

The *Privacy Amendment Act 2004* (Cth) was assented to on 21 April 2004. Its primary aims include amending the *Privacy Act 1988* (Cth) to: ensure that protections under the Act are available to all persons irrespective of nationality; provide the private sector with greater flexibility in relation to privacy codes; allow the disclosure of government payroll numbers for superannuation purposes; and enable the Privacy Commissioner to audit acts and practices of Commonwealth agencies in relation to certain personal information where those acts and practices are prescribed by regulation.

Privacy action brought directly to Federal Court

In a recent decision, the Federal Court (Gyles J) heard an application by the Seven Network against the Media Entertainment and Arts Alliance (the union) and a polling firm for injunctive relief in relation to alleged breaches of the National Privacy Principles (NPPs) contained in the Commonwealth *Privacy Act 1988*. The case was the first in which a person or organisation has gone straight to the Federal Court rather than complaining first to the Privacy Commissioner. The union had obtained personal information from employees of Network Seven via a polling organisation which used an annotated copy of an internal phone book supplied by the union. As it was not clear how the union had obtained the copy of the phone book, the court did not uphold any breaches by it of the NPPs on that basis. However, the court found that there had been a breach of NPP 1.1 concerning collection of personal information by the union, but not by the polling company, as collection of the information over the phone was not necessary to the functions of the union, although it was necessary to the functions of the polling company. Neither the union nor the polling company had complied with NPPs 1.3 and 1.5 by providing information about such matters as the fact that the person was able to gain access to the information, the purposes for which it was collected, and so on. The court made injunctive orders under section 98 of the Privacy Act as well as awarding damages under copyright legislation. (***Seven Network (Operations) Limited v Media Entertainment and Arts Alliance*** **[2004] FCA 637**, 21 May 2004)

Brief privacy issues

- The Commonwealth Attorney–General announced on 16 August 2004 that the Privacy Commissioner, Ms Karen Curtis, has been asked to conduct a review of the private sector provisions inserted into the *Privacy Act 1988* in 2000. Such a review was promised by the former Attorney–General when the legislation was introduced. The Privacy Commissioner has announced that she will prepare and issue a discussion paper in October 2004. There will be a consultation period of two months with key stakeholders, including consumer and privacy advocacy groups, business representatives and members of the private health sector, and submissions will be received up until 31 March 2005. (See Privacy Commissioner, Media Release, 20 August 2004; Attorney–General's Media Release, 13 August 2004.)

- The federal Privacy Commissioner has introduced a new interactive site called ComplaintChecker that asks step by step questions about users' privacy problem, and will tell you at the end if you are entitled to make an official privacy complaint: www.privacy.gov.au/privacy_rights/ComplaintChecker/index.html

  The Commissioner's website also now includes multilingual web pages available in 11 languages.

- The federal Privacy Commissioner has published 28 de-identified Case Notes on complaints investigated by the Commissioner's office in the period 2002–04, together with five 2004 determinations under section 52 of the Privacy Act; see Privacy Commissioner Media Release, 19 April 2004; the determinations are available from: http://www.privacy.gov.au/publications/index.html

- The New South Wales *Health Records and Information Privacy Act 2002* commenced on 1 September 2004. It applies to all health service providers, and to any other public or private sector organisation that deals with any health information. At its August meeting, the Australian Health Ministers Advisory Council was to consider a draft National Health Privacy Code which has been the subject of public consultation.

Public administration

Legal training for primary decision makers

The Administrative Review Council (ARC) has recently published a 'curriculum guideline' aimed to assist those providing legal training to public sector primary decision makers. Preparation of the guideline was assisted by Professors Robin Creyke and John McMillan, both members of the ARC. It is not itself a training document, but is 'designed as a resource for people who are developing training programs, either at agency level or more widely across the Australian Public Service', allowing for agencies to develop training programs reflecting their specific decision-making environment. It is expected that the guidelines will be reviewed and revised from time to time, and comments and suggestions for change are welcome. (***Legal training for primary decision makers: A curriculum guideline*, ARC**, June 2004; the document may be obtained in hard copy from the ARC or from its website at: www.law.gov.au/arc)

Public Service Commissioner's thoughts on managing the interface of the APS with ministers and Parliament

In April 2004 the Commonwealth's Public Service Commissioner, Mr Andrew Podger, delivered an address to Senior Executive Service personnel on the above theme. It covers a

wide range of topics, including the role of the Australian Public Service (APS) Values in relation to contact with Ministers and their advisers, the need for responsiveness to government without losing sight of other APS values including being apolitical, the results of an agency and employee survey on relationships with government and Parliament in practice, and the Commissioner's views on such currently significant issues as record-keeping, leaking and whistleblowing, the system of ministerial advisers, relations with the media, 'frank and fearless' advice, and appointments and performance management of Secretaries and Agency Heads. In a much-quoted passage, the Commissioner remarked that he did not believe that 'the Children Overboard case was the Service's finest hour' and that he remained uncomfortable with 'the [subsequent] reluctance by officials to face up to the facts'. (**Andrew Podger, 'Managing the interface with ministers and the Parliament'**, 23 April 2004, available from the Commissioner's website: www.apsc.gov.au/about/pscommissioner.htm)

Brief public administration items

- On 5 August 2004 the Secretary of the Department of Prime Minister and Cabinet, Dr Peter Shergold, launched a Manual on *Public Service Governance* published by CCH and written by Stephen Bartos with the assistance of a reference group. (**Dr Peter Shergold, 'Public Service Governance in Australia: Launch of CCH Manual'**, 5 August 2004, available from his website at: www.pmc.gov.au/doc/Shergold)

- The latest publication of the Management Advisory Committee (MAC), a forum of Secretaries and Agency Heads established by statute to advise government on the management of the APS, deals with the question of whole of government responses to priority challenges. (***Connecting Government: Whole of Government Responses to Australia's Priority Challenges*, MAC Report 4**, 2004, available from the MAC website at: www.apsc.gov.au/mac/index.html)

Other developments

United States Supreme Court decisions on detention of 'enemy combatants' in Guantanamo Bay and the US

In two decisions of the US Supreme Court delivered on 28 June 2004, the court held that Congress had, in its 2001 Authorization for Use of Military Force, authorised the Executive Branch to detain persons as enemy combatants, but that (1) such a detainee who was an American citizen had a constitutional due process right to a meaningful opportunity to offer evidence that he was not an enemy combatant (*Hamdi v Rumsfeld*), and (2) US courts had jurisdiction under the federal habeas corpus statute to consider challenges to the legality of the detention of foreign nationals captured abroad and incarcerated in Guantanamo Bay (*Rasul et al v Bush*, brought on behalf of two Australian detainees, Mamdouh Habib and David Hicks, and 12 Kuwaiti detainees). Four judges in *Rasul* (Stevens J delivering judgment for the court, O'Connor, Ginsburg and Dreyer JJ joining the opinion) distinguished a 1950 decision of the court, concerning German prisoners held by US forces in a fort in Germany, on the facts and the legal context. They also held that the presumption against extra-territorial application of statutes did not apply to the Guantanamo Bay Base held under an indefinite lease from Cuba under which the United States exercises complete jurisdiction and control. Justice Kennedy agreed with the decision of the majority, but on the grounds that the decision could be justified within the framework of the earlier decision because Guantanamo Bay was in every practical respect a US territory far removed from hostilities, and that the detainees were subject to indefinite detention. The minority (Scalia J delivering the opinion,

Rehnquist CJ and Thomas J joining it), considered that the majority's decision was a 'wrenching departure from precedent'.

Following those decisions, it was reported that Mr Habib and Mr Hicks would take action in the US federal courts. Preliminary proceedings against David Hicks before a military commission were heard in August, attended by Australian Government observers and an observer on behalf of the Law Council of Australia (Melbourne barrister Lex Lasry, QC). After those proceedings, the Australian Government stated it had some concerns about the military commission process, in particular relating to procedural fairness, which it said it would take up with the United States Government. (***Hamdi et al v Rumsfeld*, No. 03/6696,** and ***Rasul et al v Bush*, No. 03/334, US Supreme Court,** 28 June 2004; see also ***Rumsfeld v Padilla*, 03/1027**, 28 June 2004; ***Canberra Times***, 6 September 2004, p 3)

House of Lords rejects bill concerning the office of Lord Chancellor and structure and appointment of the judiciary

On 13 July 2004, after receiving an inconclusive report from a select committee, the House of Lords (by 240:208) rejected legislation to abolish the office of Lord Chancellor, replace the Law Lords by a new Supreme Court and create a judicial appointments commission (see (2004) 41 *AIAL Forum* at 14). The majority consisted of Conservative and cross-bench peers, while the Liberal Democrats supported the Government's measures. The Bill had not gone back to the House of Commons at the date of writing. (**'Peers throw out plans to abolish Lord Chancellor',** ***The Independent***, 14 July 2004; for the role of the new Department for Constitutional Affairs see its website at:
www.dcaaagov.uk/dept/manifesto.htm

For a copy of the Bill as amended by the Select Committee, see the link at:
www.publications.parliament.uk/pa/pabills.htm)