DEVELOPMENTS IN ADMINISTRATIVE LAW

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Government initiatives, inquiries, legislative and parliamentary developments

Anti–terrorism legislation agreed to by Council of Australian Governments

Following the actual and attempted terrorist bombings in London on 7 and 21 July 2005, and the UK Government's steps to strengthen anti–terrorism legislation, the State Premiers called on the Prime Minister to convene a national summit on the question of anti-terrorism laws, and a number announced measures they proposed to take. On 8 Sept 2005 the Australian Prime Minister, Mr John Howard, announced twelve new 'regimes' to counter attempted terrorist attacks. The most controversial of these were control orders for up to 12 months in relation to people who 'pose a terrorist threat' and preventative detention for up to 14 days, with the assistance of State and Territory laws to overcome constitutional constraints on the Commonwealth. In addition it was proposed to replace the existing offence of sedition with an offence of inciting violence against the community, consistent with the recommendations of the Gibbs committee in 1991 for updating and simplifying that offence, and increasing its penalty.

These measures have parallels in existing or proposed UK legislation. Major changes were also signalled to airport security following the Wheeler report. At a special meeting of the Council of Australian Governments (COAG), most State Premiers expressed support for the Commonwealth's proposals, subject to certain safeguards. The ACT Chief Minister, Mr Jon Stanhope sought an opinion from the ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs, concerning the potential human rights implications of the proposals: the advice stated that ACT legislation to implement the proposals would probably require extensive amendments to make it human rights compliant. Earlier, on 23 Aug 2005 the Prime Minister held consultations with leading figures from the Australian Islamic community which developed a statement of principles.

The COAG meeting unanimously agreed to a large number of measures designed to combat terrorist attack, and the Prime Minister announced additional funding of $40 million for a range of security-related measures. Legislative amendments to the Commonwealth Criminal Code and options for 'harmonising State and Commonwealth legislation' will also be produced. Consultations will also take place between the Commonwealth and the States and Territories concerning legislative amendments 'to enhance and clarify' arrangements for calling out the Australian Defence Force to assist civil authorities[1].

The details concerning control orders and preventative detention orders include the following:

- *Control orders*: The AFP (acting with the Attorney–General's approval) must have reasonable grounds for claiming that issue of an order would substantially assist in preventing a terrorist act, or that a person has trained with a listed terrorist organisation. A control order will be issued by a court which must be satisfied on the balance of probabilities that each of the controls is reasonably necessary, appropriate and adapted

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to the purpose of protecting the public from a terrorist act. A control order may last up to 12 months; it is not stated whether it can then be renewed. The person concerned will not be given notice of an application to the court to issue an order, but after receiving official notice of an order may immediately apply for its revocation by the same court.

- *Preventative detention orders*: The AFP must have reasonable grounds for claiming that making an order would substantially assist in preventing a terrorist attack or preserve evidence of one that has occurred. Orders can be issued by an AFP officer for an initial 24 hours, which can be extended by a further 24 hours by a Magistrate or Judge acting as an issuing authority in a personal capacity. Persons detained can only be questioned in order to confirm their identity. Because of the Commonwealth's constitutional constraints, the States and Territories have agreed to enact measures designed to supplement Commonwealth legislation by providing for preventative detention for a total of up to 14 days, and stop, question and search powers in areas 'such as transport hubs and places of mass gatherings'.

Limitations and safeguard measures:

- Judicial review of the issue of both kinds of orders, and of the treatment of detainees.

- Access to a lawyer, with potential limitations on security grounds for a lawyer acting in relation to preventative detention.

- Power for the Commonwealth Ombudsman to investigate in relation to preventative detention orders (presumably the Ombudsman's normal investigatory powers would be applicable also to some aspects of control orders, though subject to limitations in relation to Commonwealth judges).

- Application in Queensland only of its existing mechanism of a Public Interest Monitor to be involved in monitoring orders on a continuing basis.

- Orders not applicable to people under 16, and modified for those between 16 and 18.

- Annual reporting to Parliament by Commonwealth Attorney–General.

- Observance of human rights obligations in relation to detainees with a penalty of up to two years' imprisonment for breach by an officer of such obligations.

- Review after five years, sunset clause after 10 years.

Debate continues concerning whether or not the control and preventative detention orders regimes in particular is necessary and proportional to Australia's situation. The Law Council of Australia states that it wants to see the details of the proposals, many of which it describes as 'foreign to our legal traditions'[2].

Note: Unfortunately it has not been possible to update this item in the light of developments following its preparation, but readers are referred to the Anti–Terrorism Bill 2005 and the Anti–Terrorism Bill (No 2) 2005. The latter purports to reflect the COAG agreement together with subsequently agreed changes which is available together with other materials from: http://parlinfoweb.aph.gov.au/; for the initial draft of the Bill sent to Premiers and Chief Ministers, and for a range of advice on the human rights and constitutional law issues relating to the Bill, see: www.chiefminister.act.gov.au/ 'what's new?'. The Senate Legal and Constitutional Affairs Legislation Committee is to report on the main Bill (No 2) by 28

November after receiving submissions by 11 Nov 2005. *See also* www.aph.gov.au/senate/committee/legcon_ctte/inquiries.htm .

Military justice report and government response

Senate Committee report

A unanimous Senate Foreign Affairs, Defence and Trade References Committee has produced an extremely thorough and comprehensive report[3] on all aspects of the military justice system, which is made up of the two separate processes of (i) disciplinary proceedings, where military offences have been committed, and (ii) administrative proceedings relating to complaints, redress of grievance for administrative action taken and inquiries concerning untoward incidents.

The almost two-year inquiry took into account a number of previous reports on the system, as well as major changes made recently to the military justice systems in Canada and the United Kingdom, and received a substantial number of open and confidential submissions and oral evidence, much of it from members or ex-members of the Australian Defence Force (ADF) or their relatives, some of whom had died while serving in the ADF. In the words of committee chair, Labor Senator Steve Hutchins: 'The Committee has been compelled by the evidence of bereaved families. … [These incidents reflect] a systematic breakdown of both the administrative and disciplinary arms of the military justice system.'

The Committee found serious defects of competence in the investigation process in both disciplinary and administrative matters, found that Service police were not up to date with forensic methods and that a number of disciplinary investigations had gone badly wrong. It was also critical of the way the ADF handled decisions to initiate disciplinary prosecutions and the provision of legal services to members of the ADF. The Committee was highly critical of the effect on the administrative processes of the ADF of 'the culture of silence' within it, including fear of reprisals of various kinds, together with the failure to respond to complaints made by ADF members or their families. The lack of perceived independence and the apparent conflicts of interest built into the processes, the tendency for lengthy delays, and other defects in the redress of grievance process, required significant reforms.

Among the Committee's major recommendations to address the identified defects were the following:

- All ADF suspected criminal activity in Australia to be referred to State or Territory civilian police for investigation and prosecution in civilian courts, except where no equivalent civilian offence exists or where a matter is referred back to the ADF. In today's circumstances it made sense to 'outsource' rather than duplicate the existing civilian system.

- Investigation of criminal activity committed on operations outside Australia to be conducted by the Australian Federal Police (AFP).

- Prosecutions to be referred to civilian prosecuting authorities.

- Replacement of Courts Martial and Defence Force Magistrate trials by an Independent Permanent Court, composed of independently appointed judges possessing extensive civilian experience.

- Introduction of a new ADF Administrative Review Board (ADFARB), similar to the Canadian Forces Grievance Board, to:

- Monitor progress of military grievances at unit level.
- Deal with those grievances not resolved at that level within 60 days of lodgement.
- Oversee and continue the work of the Inspector General ADF (introduced in Sept 2003), which could not itself rectify a deeply flawed system.
- Through its chair, decide on the manner and system of means of inquiring into serious incidents such as suicide, accidental death or serious injury, subject to the Minister's power to appoint a Court of Inquiry where necessary.

- Replace ad hoc Boards of Inquiry by a military division of the Administrative Appeals Tribunal (AAT), which could include service members appointed for particular matters by the Chief of the Defence Force, to inquire into major incidents referred to ADFARB.

Government response to report

The Government responded to the report on 5 Oct 2005. While promising to implement significant changes to all aspects of the military justice system, and accepting in whole or in part 30 of the committee's 40 recommendations, the Government rejected or modified most of the more sweeping recommended changes summarised above on the principal basis that 'a military justice system, as a core function of command, cannot be administered solely by civilian authorities'. Among the most important features of the Government's response are the following:

- Disciplinary and criminal matters:

  - A tri–Service ADF Investigation Unit, independent of chains of command and headed by a new ADF Provost Marshal.

  - As recommended by the committee, a statutorily based independent Director of Military Prosecutions to be responsible for military prosecution decisions, including referral to other authorities, and investigation or prosecution of offences only where a service connection is clearly present.

  - An Australian military court with a statutorily appointed Chief Judge Advocate (an existing position), two permanent judge advocates and a part-time reserve panel, selected from available full or part-time legal officers with five year fixed terms and possible renewal for a further five years, to function outside the chain of command in relation to their judicial duties.

  - A summary authority scheme for more minor offences with simplified procedures and rules of evidence, and a right of appeal to a judge advocate on conviction and sentence, and a modified right of appeal to the Defence Force Discipline Tribunal. (The relationship between these appeals is not clear in the response.)

- Administrative proceedings**:**

  - The Government rejected the centrepieces of the Committee's recommendations on administrative proceedings (see above), i.e. the proposed ADFARB, and a military division of the AAT to replace Boards of Inquiry. Instead, the existing Complaints Resolution Agency within Defence will become the lead agency in the coordination of complaints and redress of grievances, with similar oversight and monitoring functions in this regard to those recommended for ADFARB. It will take over the management of all cases unresolved by commanders after 90 days. The recommendations of a Joint Review of the ADF Redress of Grievances Process, conducted by the Defence department and the Defence Force Ombudsman, will continue to be implemented. The functions of the Inspector General of the ADF will be put on a statutory basis,

the Defence Force Ombudsman, will remain, and Boards of Inquiry will continue to be appointed. Mandatory Commissions of Inquiry headed by an independent civilian president will be appointed to consider all suicides of ADF members and deaths in service.

- Implementation, report and review:

  - A high level team will oversee the two year implementation period and the Defence department will report on progress to the Senate Committee at six monthly intervals. Independent reviews of the military justice system will be carried out periodically by a qualified eminent Australian, the first to be held in two years to assess the effectiveness of the new reforms. The approximate cost of the change process will be $3.5 million per annum.

Major developments in immigration portfolio

Major changes to the detention regime for asylum seekers have been implemented and substantial changes are being introduced into the administration of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), as a result of representations by Government backbenchers and the revelations and recommendations of the Palmer Report.. These changes are dealt with in roughly the chronological order of their announcement.

Removal pending bridging visas

The Minister for Immigration and Multicultural and Indigenous Affairs, Senator Amanda Vanstone[4], announced removal of some of the previously announced limitations on eligibility for this class of visa, designed for unsuccessful asylum seekers whose removal from Australia is not possible at least for the moment (see (2005) *AIAL Forum* 2), especially those limitations relating to litigation by detainees and their cooperation with removal from Australia. The existence of the new form of visa was an important consideration in the package of measures resulting from discussions by the Prime Minister with a group of government backbenchers (see below).

Government backbenchers' private members bills

As a result of dissatisfaction with existing legislation concerning detention of asylum seekers, Liberal MP Petro Georgiou, with the approval of a small number of other Liberal MPs, gave notice to the House of Representatives of two private members bills, the Migration Amendment (Mandatory Detention) Bill 2005 and the Migration Amendment (Act of Compassion) Bill 2005, which were subsequently withdrawn by him in view of concessions made by the Government . However, the bills were introduced into the Senate by Greens Senator Kerry Nettle on 16 June 2005; after Senator Nettle's second reading speech, debate was adjourned to a later date. The bills go much further in principle and practice than most of the government concessions, replacing mandatory detention by detention for specific purposes only and making it subject to time limits and court and other supervision, as well as providing for limitations on long term detention and the detention of children. Temporary protection visas for recognised refugees would be replaced by permanent protection visas.

Government changes to operation of the immigration detention regime

Following discussions between the Prime Minister and government backbenchers who supported the private members' bills , the Prime Minister announced a package of reforms to the operation of the immigration detention system which would result in the policy of mandatory detention being 'administered more fairly and flexibly', while the framework of the

Government's existing policies remained completely intact. Many of the changes are included in the *Migration Amendment (Detention Arrangements) Act 2005* (Cth), which amongst other things confers a number of non-compellable and non-reviewable discretions on the Minister, and in the Migration and Ombudsman Legislation Amendment Bill 2005.

The principal changes[5] include:

- Stating the principle in the *Migration Act 1958* (Cth) (Migration Act) that minors shall only be detained in a detention centre as a measure of last resort, that detention of families with children should take place in the community under residence determinations that will be subject to individual conditions. On 29 July 2005 it was announced that all families with children in detention centres had moved into the community under residence determination arrangements. However, detention of families in Residential Housing Projects will continue during primary assessment of refugee claims, where removal is imminent or where conditions have been breached.

- Widening the Minister's discretion to grant visas to those in detention, including the Removal Pending Bridging visas.

- Providing for non-enforceable time limits of 90 days for processing applications for protection visas and for their review by the Refugee Review Tribunal (dealt with in the Migration and Ombudsman Legislation Amendment Bill 2005).

- Giving the Ombudsman a specific function to review the cases of those detained for more than 2 years, and thereafter every 6 months (see under *Ombudsman* heading).

- The government undertook to complete the consideration of the remaining caseload of applications for permanent visas from temporary protection visa holders, understood to be about one-third of an initial figure of 9,000 TPV holders. It made no statement as to whether those already refused would be reconsidered.

- The government agreed to the appointment of an Interdepartmental Committee (IDC) (including Attorney– General's, DIMIA, Foreign Affairs and Trade, ASIO and Family and Community Services) chaired by the Secretary of the Department of the Prime Minister and Cabinet to oversee the implementation of all the changes agreed on. The Minister and the chair of the IDC will meet regularly with interested members of the government to discuss implementation progress.

The *Detention Arrangements Act 2005* was passed by the Senate on 23 June 2005 and assented to on 29 June 2005.

Reports of inquiries into Cornelia Rau and Vivian Alvarez/Solon affairs and administrative changes

The report of the inquiry by former AFP Commissioner Mick Palmer into the mistaken immigration detention of Australian permanent resident Ms Cornelia Rau (and permanent resident Ms Vivian Alvarez/Solon) was released by the government on 14 July 2005. In broad terms the findings by Mr Palmer included the following:

- There was no automatic process of review sufficient to provide confidence to the government that the power to detain a person on reasonable suspicion of being an unlawful non-citizen under s 189 of the Migration Act was being exercised 'lawfully, justifiably and with integrity'. Mr Palmer recommended review and assessment within 24 hours or as soon as possible afterward.

- There were serious problems with the handling of immigration detention cases stemming from 'deep-seated cultural and attitudinal problems within DIMIA and a failure of executive leadership in the immigration compliance and detention areas'. The culture was overly self-protective and defensive and unwilling to engage in self-criticism or analysis, and urgent reform coming from the top was necessary, assisted by external professional assistance.

- The mental health care Ms Rau received in Baxter Detention Centre was inadequate, and the detainee population generally required 'a much higher level of mental health care than the Australian community'. There was a need for accountability and review mechanisms.

- The services contract with Global Solutions Limited for provision of immigration detention was fundamentally flawed, and the inquiry recommended consultation with the Auditor–General and the establishment of a panel of external experts to advise on management of the detention services contract and report to the Minister quarterly. (Note also ANAO Audit Report No 1, 2005-2006, *Management of the Detention Centre Contracts: Part B*, 2005.)

- A nationwide missing persons database should be established as a national priority. The federal Minister for Justice and Customs, Senator Ellison is pursuing this issue with Commonwealth and State law enforcement agencies. Those detained are to be fingerprinted, without their consent if necessary.

Mr Palmer recommended a range of new groups and bodies to supervise, monitor and implement changes and made a number of specific recommendations for improving detention administration including better training for DIMIA officers and detention provider employees.

The Ombudsman's report on the removal of Ms Vivian Alvarez, reflecting the work of Mr Neil Comrie and his team initially appointed by the Government but later continued under the Ombudsman Act, was presented to the Government on 26 Sept 2005. Mr Comrie's team was able to make use of the Ombudsman's statutory powers to obtain evidence that had not been available to it in its previous role. The report found that the handling of Ms Alvarez/Solon's removal from Australia had been 'catastrophic' and, after considering legal authority including *Ruddock v Taylor*[6] in its opinion the removal had been unlawful. The report found that DIMIA officers at all levels had 'little understanding of their responsibilities under [s 189 of] the [Migration] Act – other than a mistaken belief that they *must* detain a person and that when the person is detained the detention is absolute' (original emphasis).

Like the Palmer Report, the Ombudsman's Report found there were numerous major systemic problems in the Department, but in this case dating back at least to 2001. The Ombudsman's recommendations complemented and endorsed those of the Palmer Report. One recommendation drew the attention of the Secretary of DIMIA to the opinion of the Ombudsman that the conduct of three officers might constitute a breach of one or more requirements of the Australian Public Service Code of Conduct. After a preliminary departmental investigation, an investigation into the conduct of the officers by the former Australian Government Solicitor, Mr Dale Boucher, was announced by the Secretary.

The government accepted the thrust of the findings and recommendations of Mr Palmer and the Ombudsman[7]. The Prime Minister has apologised to both Ms Rau and Ms Alvarez/Solon for the treatment they received; the current DIMIA Secretary, Mr Andrew Metcalfe, has also apologised to Ms Alvarez/Solon. Questions of compensation and other assistance are still under discussion between the government and the two women's legal representatives.

Major administrative and other systemic changes arising out of the two inquiries were announced before and during their conduct (on 7 February and 25 May 2005), as well as on the release of the Palmer report in July 2005 and in the implementation report provided in September 2005. These measures include a complete change of the leadership team in DIMIA, including the replacement of Secretary Bill Farmer (posted as Ambassador to Indonesia) by then Prime Minister and Cabinet Deputy Secretary, Andrew Metcalfe, and numerous other changes at executive level. The proposed changes are complex and extensive with an estimated cost of $231.1 million over five years. A specific Palmer Programme Office is part of a Change Management Task Force and will report directly to the Secretary on progress.

The three broad goals are for DIMIA to become a more open and accountable organization; that it deal more reasonably and fairly with 'clients', and that staff be well trained and supported. Other goals include:

- A high level Values and Standards Committee which will have external representation, including from the Ombudsman's office and the Australian Public Service Commission.

- Training will be delivered through the establishment by mid–2006 of a College of Immigration Border Security and Compliance at a cost of $50.3 million over five years.

- An independent review of the compliance and detention divisions, and a group of external experts is to advise the Minister on the management of the detention contract.

- The role of IT systems in supporting active case management and identification of clients is to be independently assessed.

- Major initiatives are proposed to address the mental and general health particularly of long term detainees. Quarterly implementation reports will be made to the Government and an implementation report will be tabled in Parliament in September 2006[8].

Senate Committees inquire into operation of the Migration Act and into Mental Health Care

The Senate Legal and Constitutional References Committee is conducting an inquiry into the administration and operation of the *Migration Act 1958*, with particular attention to the processing and assessment of visa applications, migration detention and the deportation of people from Australia, and the inquiry extends to the adequacy of healthcare, including mental healthcare, and other services and assistance to people in immigration detention, the outsourcing of management and service provision at immigration detention centres, and related matters. The committee is required to report by 8 November 2005. A Senate Select Committee on Mental Health is due to report by 6 October 2005, and has received a large number of submissions[9].

Legislative developments in the Autumn 2005 sittings

The following are among the legislative items dealt with in the Autumn sittings of the Commonwealth Parliament:

- *Australian Communications and Media Authority Act 2005* and companion legislation were passed by the Senate on 16 March 2005 and assented to on 1 April 2005 (see (2004) 43 *AIAL Forum* 3).

- *Migration Litigation Reform Bill 2005* was passed by the House of Representatives on 10 May and introduced into the Senate on 11 May 2005 and debate adjourned. The Senate

Legal and Constitutional Legislation Committee reported on the provisions of the bill on 11 May 2005. Coalition and Labor members of the committee recommended that the Senate pass the bill, subject to: repeal after 18 months of provisions conferring broadened powers of summary dismissal of proceedings; and presentation to Parliament after 12 months of a comprehensive report by the Attorney–General on the operation of the bill's provisions. The Australian Democrats opposed the bill as unnecessary, but if it were to be enacted supported the committee's recommendations together with a three year sunset clause[10].

- See *National Security Information Amendment Act 2005* was passed by the Senate on 16 June 2005 and assented to on 6 July 2005. In essence it extends the operation of the *National Security Information (Criminal Proceedings) Act 2004* (see (2005) 45 *AIAL Forum* 3 and (2004) 43 *AIAL* 3 and 14) to include federal civil proceedings, and makes specific provision for the conduct of such proceedings in relation to national security information, including the giving of conclusive certificates by the Attorney–General and the joining of the Attorney–General as a party to proceedings. A submission by the Australian Law Reform Commission to the relevant Senate Committee urged that the process should be extended to administrative proceedings in tribunals. The Human Rights and Equal Opportunity Commission submitted that the bill raised concerns in relation to the human rights to a fair and public hearing and to an effective remedy for violations of a person's human rights. Notices given and certificate decisions made by the Attorney–General or another Minister in relation to civil proceedings are excepted from review under the *Administrative Decisions (Judicial Review) Act 1977*, and the Federal Court is precluded from judicial review of a proceeding or appeal before another federal or state or territory court. The Act renames the original Act the *National Security Information (Criminal and Civil Proceedings) Act 2004*[11].

Legislative developments Spring sittings 2005

The Spring sittings are notable for the fact that the Howard Coalition Government controls the Senate for the first time with 39 seats out of 76. Following the Palmer report on Cornelia Rau, new provisions permit disclosure of identifying information to individuals or the public to assist with identifying or locating a person who is otherwise unable to be identified or located.

Controversial legislation that has been or will be introduced includes: a bill for the full sale of Telstra (passed), industrial relations legislation, legislation on counter-terrorism and legislation concerning voluntary student unionism.

The following bills of administrative law interest are among those proposed by the government for consideration in the Spring Sittings 2005: those marked with an asterisk are intended for passage in those sittings. Comments on bills not yet introduced are drawn from the Government release at www.pmc.gov.au/parliamentary/index.cfm, and, where the bill has already been introduced, from Parliamentary Bills lists; details of some bills dealt with in earlier issues are not repeated:

- *Law Enforcement Reform Bill**: To provide for the establishment, functions and powers of an independent Australian Commission for Law Enforcement Integrity, headed by a statutory Integrity Commissioner, with investigative powers to look into possible corruption in Australian government law enforcement agencies, with power to recommend prosecutions, and other remedial measures.

- *Migration Amendment (Migration Zone) Bill*: To amend the *Migration Act 1958* to provide greater certainty in the definition of 'migration zone', expand the definition of 'excised

offshore place' to include certain islands and territories in Northern Australia, and other purposes. *Note* that the Government has already made regulations to similar effect. A disallowance motion supported by the ALP, Greens and Democrats was rejected by the Senate on 18 August 2005[12].

- *Migration and Ombudsman Legislation Amendment Bill 2005*: To implement elements of the changes to detention discussed above and other matters (see *Immigration* above and below under *Ombudsman* heading). The bill was introduced into the Senate on 15 September 2005.

In addition the following relevant legislation has been enacted so far in the Spring sittings:

- *Human Services Legislation Amendment Act 2005* was passed by the Senate on 5 September and assented to on 6 September 2005. The bill abolishes the governance boards of Centrelink and the Health Insurance Commission (HIC) and establishes Medicare Australia, which will replace the HIC; the *Health Insurance Commission Act 1973* is renamed the *Medicare Australia Act 1973*. The bill creates the offices of CEO of Medicare Australia and Centrelink and makes them directly accountable to the Minister. (See under *Public Administration* for the background to these changes.)

ACT and Victorian human rights developments

The ACT Human Rights and Discrimination Commissioner, Dr Watchirs, delivered a report[13] to the ACT Chief Minister on 30 June 2005 concerning the effect of the *Children and Young Persons Act 1999* (ACT) in relation to human rights in Quamby Detention Centre. The report contained detailed recommendations on a wide range of practices within Quamby that the Commissioner found were inconsistent with the human rights of detainees, and included a recommendation for the urgent making of disallowable rules for the operation of Quamby compatible with the *Human Rights Act 2004* (ACT). While supporting the Government's intention to commit $40 million to build a new detention centre for young offenders by 2008, the Commissioner believed a review of policies now could improve the treatment of detainees before the new facility commences operation. The Minister for Children, Youth and Family Support, Ms Gallagher, indicated that her department's review of Quamby would be guided by the report.

The Victorian Government is currently carrying out a community consultation on Human Rights. The government has produced a statement of intent and set up an independent committee chaired by Professor George Williams of the University of NSW to consult with Victorians about the need for change. The committee has produced a community discussion paper available from the website of the Victorian Department of Justice: www.justice.vic.gov.au .

The courts

Appointment of Justice Susan Crennan to High Court

On 20 Sept 2005, the Commonwealth Attorney–General, Mr Ruddock, announced he would recommend to the Governor–General that Justice Susan Crennan of the Federal Court be appointed to the High Court from 1 November following the retirement of McHugh J on 31 Oct 2005. The appointment was widely welcomed by legal professional organisations and others. The appointment revived debate about whether a more open method of selection and appointment would be desirable[14].

Statutory procedural fairness provision for RRT review not confined to pre-hearing processes

By a majority of 3:2 (McHugh, Kirby and Hayne JJ; Gleeson CJ and Gummow J dissenting) the High Court held in *SAAP*[15] that the procedural fairness provisions in s 424A if the Migration Act are not restricted to matters preceding any hearing held by the Refugee Review Tribunal (RRT) but apply to all stages of the RRT review process. The appellants were an Iranian mother and daughter, whose applications for a refugee protection visa, based on fear of persecution as members of the Sabian–Mandean sect, were rejected by the Minister's delegate.

The RRT upheld the visa refusal, in part at least on the basis of evidence given by the first appellant's eldest daughter in the appellant's absence. The RRT member summarised some of that evidence and put three aspects of it to the first appellant, indicating that he was prepared to receive written submissions; however, he did not at any time issue a written invitation to the first appellant to comment on the eldest daughter's evidence. Section 424A requires the RRT to give an applicant particulars in writing of any information it considers would be the reason, or part of the reason, for affirming the decision under review, making clear their relevance to the review, and inviting the applicant's comments.

Chief Justice Gleeson and Gummow J held that the structure of the division of the Act in which s 424A is found was 'sequential' and that s 424A did not apply to information that emerged once a hearing by the RRT was under way. In the view of Gummow J, the purpose of the sections among which s 424A appears is 'to improve the efficiency of the RRT's procedures by compelling the RRT to obtain the maximum amount of documentary information that may be available before resorting to the [hearing] procedure in s 425'. The Chief Justice could see no purpose in applying s 424A when the RRT could invite oral comment at the hearing.

The majority rejected the sequential construction of the provisions. In the view of McHugh J, it was inconsistent with the inquisitorial nature of the RRT's review to require it to 'obtain all information relevant to the decision under review before invoking the s 425 [hearing] procedure', since further adverse information could emerge at the hearing. Similarly, Hayne J considered that the review process is primarily a documentary process in which the applicant's appearance at a hearing is not the culmination of the review, and further information may emerge at any time. The language of the Act did not dictate a sequential construction. Justice Kirby agreed with Hayne J's analysis, noting that a written communication, even to an illiterate person (as in this case), of a 'potentially important, even decisive, circumstance' permitted the review applicant to receive advice and give instructions. All majority judges held that the section was imperative, and that its breach therefore constituted a jurisdictional error rendering the RRT's decision invalid. The court found no grounds for exercising its discretion not to grant relief.

Assessment of future persecution on the ground of proselytising religion

In *NABD*[16], a similar issue arose to that determined in *Appellant S395/2002 v MIMA*[17] RRT and decided after the Federal Court decisions in this matter. By a majority of 3:2 (Gleeson CJ, and Hayne and Heydon JJ in joint reasons; McHugh and Kirby JJ dissenting) the High Court dismissed the appeal by an appellant who had claimed that he was entitled to protection as a refugee on the basis of a well-founded fear of persecution by reason of religion because of his conversion to Christianity (Uniting Church) in Indonesia after fleeing from Iran.

The RRT rejected claims of past persecution, ultimately finding on the basis of relevant 'country information' that his fear of future persecution was not well-founded because there was no real chance of his being persecuted in Iran if he practised his religion as he had in Indonesia and in a detention centre in Australia. The appellant claimed that the RRT had made a similar jurisdictional error to that identified in *S395/2002*, in that it had decided the question of whether his fear was well-founded by erroneously classifying converted Christians in Iran into 'proselytising Christians' and 'quietly evangelising Christians' (McHugh J), where only the former ran a real chance of persecution by reason of their religion.

Chief Justice Gleeson decided the appeal in the same way as he had in dissent in *S395/2002*, finding that the RRT's process of reasoning was legitimate. The joint judgment of Hayne and Heydon JJ distinguished *S395/2002* on the ground that here the RRT did not ask, as it had in the earlier case, 'whether it was possible for the appellant to live in Iran in such a way as to avoid adverse consequences', thereby failing to assess the appellant's individual case. The RRT was entitled to conclude on the information available to it that the appellant's actual practice of his religion would not raise a real chance of persecution in Iran on the basis of his religion.

Justice McHugh dissented on the principal grounds that the RRT's adoption of the classification of Iranian Christians into two categories was not justified by the evidence and that by doing so the RRT failed to answer the real question as to whether the appellant's fear was well-founded. In this case there was no evidence of recognition in Iran itself of the supposed two sub-groups, or that the Iranian authorities tolerated any form of faith sharing. In Kirby J's view, consistency with the approach adopted in *S395/2002* required the same outcome in this matter. It was time to erase the supposed dichotomy of those who might be able to avoid or diminish the risks of persecution by conducting themselves 'discreetly' in denial of their fundamental human rights, and those who were expected to assert those rights openly.

The objects of the Refugee Convention properly understood embodied principles for the protection of basic human rights, and fundamental human rights relating to religion included rights to manifest and practice the religion. The RRT had failed to consider whether, in Iran, the obligation to avoid proselytising would be the result of a denial of fundamental freedoms by its harsh laws and social practices, which would itself provide grounds for a well-founded fear of persecution.

Whether Army Sergeant's injury was attributable to defence service –AAT asked wrong question

The appellant in *Roncevich*[18], when serving as a Sergeant in the Australian Army, had attended a function in the Sergeants' Mess at Holsworthy Military Barracks to welcome the Regimental Sergeant Major of the Army; the function was scheduled at short notice. The appellant was present at the function for four and a half hours, becoming inebriated. He returned to his room in the barracks intending to change into civilian clothes, ironed his uniform for the next day and then returned to the Mess. He fell from a window when standing on a trunk to spit, with the result that his left knee was badly injured.

The appellant sought compensation under s 70(1) and (5) of the *Veterans' Entitlement Act 1986* (Cth) (the VE Act). He appealed to the High Court against the upholding by the trial judge and the Full Court of the Federal Court of a decision of the Administrative Appeals Tribunal (AAT) to affirm the respondent's decision to refuse compensation. In a unanimous decision, the High Court (in joint reasons, and separate reason of Kirby J) held that the AAT had asked the wrong question, namely whether the appellant's intoxication arose out of a task he had to do as a soldier, rather than the question posed by the VE Act as to whether

the injury arose out of, or was attributable to, any 'defence service' of the applicant. The court remitted the matter to the AAT for determination according to law; the court could not substitute a finding of facts in favour of the appellant as the AAT had made no findings on the real issue.

The evidence was capable of providing an affirmative answer to the correct question: the authors of the joint reasons had little doubt that there was a requirement short of military orders, or an expectation, of attendance at the Sergeants' Mess accompanied by the consumption of alcohol. The remaining question was whether the Sergeant's subsequent actions, including his fall, also arose out of or was attributable to his defence service. Justice Kirby's judgment raises interesting questions relating to appeals from the AAT (or other tribunals) to the Federal Court on a question of law, including issues relating to 'perverse' findings of fact. None of the judges accepted that the AAT's reasons were insufficient: in Kirby J's words, the AAT 'made its reasons plain enough'.

Application of Nauruan immigration laws to asylum seekers detained at Australia's request

A 4:1 majority of the High Court (Gleeson CJ, Gummow, Hayne and Heydon JJ in a joint judgment; Kirby J dissenting), sitting to review a decision of the Supreme Court of Nauru under the *Nauru (High Court Appeals) Act 1976*, upheld the application of the Nauruan Immigration Act and Regulations to the detention in Nauru of asylum seekers taken to Nauru by the Australian Government for detention pursuant to Memoranda of Understanding (MOUs) between Nauru and Australia. The appellant[19], an Afghan national of Hazara ethnicity, was brought to Nauru at the end of 2001 by Australian sea transport. His presence there was purportedly governed by successive special purpose visas issued on certain conditions. His application for habeas corpus had been dismissed by the Nauruan Supreme Court. Some time before the High Court's decision, the appellant had been granted an Australian visa and was reported to have come to Australia.

All judges dismissed the respondent's argument that the matter was therefore moot and should be dismissed: there were important issues to be determined including the question of costs. In the opinion of the majority the conditions attached to the special purpose visas were valid, and the visas themselves had been lawfully issued under the Nauruan legislation. They rejected the argument that the visas had been invalidly issued because the Australian Consulate–General in Nauru had applied for them without the request or consent of the appellant: the legislation did not provide that no valid visa could be issued except upon application. The majority identified a 'conundrum' to the effect that if the appellant's current visa were found to be invalid, under the Nauruan legislation he would be subject to arrest, punishment and removal from Nauru.

Justice Kirby interpreted the Nauruan laws in the context of a significant deprivation of the appellant's liberty (and that of others in a similar position). The High Court in exercising its jurisdiction in relation to decisions of the Nauruan Supreme Court should apply the principle applied by those courts of construing legislation as far as possible to conform with Nauru's international relations, even if that principle is not accepted in Australia (referring to *Al-Kateb v Godwin*[20]). The Nauruan Immigration Act and Regulations, which had a general application, were simply not applicable to justify prolonged indefinite detention of a person deliberately brought to Nauru by its Government pursuant to the MOU with Australia. The appellant would also not be subject to penalties under legislation that was inapplicable to him; in any case, he could not be said to have unlawfully entered Nauru or be unlawfully in it.

Whether procedural fairness or dismissal at pleasure applied to statutory power of removal of senior police officer

Six members of the High Court (Kirby J being absent) allowed an appeal by a former NSW Deputy Commissioner of Police[21] (the appellant) on the ground that his removal from that office was invalid for lack of procedural fairness. The court rejected the appellant's submission that legislation gave the Commissioner the power of 'dismissal at pleasure', as had historically been the case at common law in relation to constables. The existence of another power in the legislation providing all members of the Police Service with a right of hearing did not exclude procedural fairness under s 51 of the *Police Act 1990* (NSW), which provided for removal from office 'at any time' of certain senior police officers by the Governor on a recommendation of the Commissioner that had been approved by the Minister for Police.

The appellant had been reappointed to the position of Deputy Commissioner on a 5-year contract. The recommendation for the appellant's removal from office after 19 months' service was stated to be on the ground of 'performance'. The appellant did not receive prior notice of the recommendation or any particulars on which it was based, and had no opportunity to respond to the recommendation before it was made to the Governor. No performance appraisal process, as provided for in the employment contract, had occurred.

In overruling the decision of the NSW Court of Appeal, all members of the High Court accepted the principle stated in *Annetts v McCann*[22] (that unless excluded by plain words of necessary intendment, the conferral of a power to prejudice a person's rights and interests was subject to the rules of procedural fairness. The Police Act did not contain any provision that resulted in the exclusion of the rule of procedural fairness requiring an opportunity to be heard. In the Chief Justice's opinion, the breadth of the power to remove, and its manner of exercise, tended to the conclusion that it was intended to be exercised fairly. The views of the remaining judges were broadly similar, but Callinan and Heydon JJ differed on the effect of the decision's invalidity. The result of the orders made by the majority was to reinstate the orders of the trial judge in favour of the appellant, including substantial compensation. Following the decision of the primary judge in 2002, the Police Act was amended to provide that an 'executive officer may be removed from office at any time for any or no reason and without notice'.

Wrongful imprisonment and immigration detention

A majority of the High Court (Gleeson CJ; Gummow, Hayne and Heydon JJ in joint reasons, and Callinan J; McHugh and Kirby JJ dissenting) allowed an appeal against a decision of the NSW Court of Appeal upholding a decision to award damages to the respondent, Mr Taylor[23], on the basis of a finding that two periods of immigration detention totalling 316 days amounted to wrongful imprisonment. The respondent was born in England and emigrated to Australia with his family as a child in 1966; he did not ever take out citizenship and later was granted a permanent transitional visa.

In 1996 he pleaded guilty to eight sexual offences against children, and on his release from prison, the then Minister for Immigration and Multicultural Affairs cancelled his visa on character grounds in September 1999. That decision was quashed by consent by a single justice of the High Court in April 2000 on the basis of a jurisdictional error.

In June 2000 the then Parliamentary Secretary again cancelled the respondent's visa on the same grounds. That decision was also quashed by the Full Court of the High Court on constitutional grounds and on a separate ground of jurisdictional error[24], overturning a

previous authority on the constitutional ground. In turn, the constitutional ground for the decision in *Patterson* was overruled by a differently constituted court in *Shaw v MIMA*[25] .

The joint reasons distinguished between the issue of the lawfulness of a decision to detain a person under s 189 of the Migration Act and the lawfulness of a decision under s 501 of that Act to cancel a person's visa. Section 189(1) provided that if 'an officer knows or reasonably expects that a person in the migration zone is an unlawful non-citizen' he or she *must* detain that person. In their Honours' view, a belief or suspicion that a person is an unlawful non-citizen may be reasonable even if the basis for the detention turns out to have been legally inaccurate. What constitute reasonable grounds for suspecting a person to be an unlawful non-citizen is to be judged against what was known or reasonably capable of being known at the relevant time. There was no justification in the provision for making a distinction between mistakes of fact and law. Justice Callinan's reasons for decision are in similar terms.

Justices McHugh and Kirby dissented, the former on the technical meaning of the words in s 189, the latter agreeing that if the facts are legally incapable of making the person an unlawful non-citizen, the officer cannot be said to reasonably suspect the person has that status. Justice Kirby held that the Ministers' action could not be justified under s 189, which did not apply to them, or under the provisions for cancelling a visa in s 501. The law of tort governed the appeal unless displaced by statute: wrongful imprisonment is a tort of strict liability in which lack of fault is irrelevant to the existence of the wrong, because its focus is on the vindication of liberty and reparation to the victim. Both judges held that the decisions made by the Ministers were directly responsible for the detentions of the respondent.

Apprehended bias – ACT bushfire and Queensland Bundaberg hospital inquiries

Litigation in relation to two major public inquiries illustrates the significant role the procedural fairness rule of apprehended bias may play in adjudicative processes. In the ACT Coroner's inquiry into the 2003 bushfires, an application to the Supreme Court resulted in the proceedings of the inquiry being delayed from October 2004 to October 2005. Nine ACT government officials at the time of the destructive January 2003 bushfires, including the former bushfire chief and the head of the Emergency Services Bureau, joined by the ACT Government, made an application for prohibition against the coroner, Ms Doogan, based on claims of apprehended bias.

A full bench of the ACT Supreme Court (Higgins CJ, Crispin and Bennett JJ) rejected the application in a joint judgment[26] based on the test of whether 'a fairminded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide'. The result was in part connected with the fact that the court took a narrower approach to the legislative scope of a coroner's inquiry in the ACT than had previously been widely understood by coroners and government. The coroner's powers extended only to inquiring into the 'cause and origin' of the fire, and not into all the circumstances surrounding it.

A large number of matters were claimed as the cumulative basis for apprehended bias, focusing principally on the relationship of the coroner and counsel assisting the inquiry with two investigators/expert witnesses appointed by the ACT Government to assist the inquiry, whom the coroner mistakenly thought had been appointed by her as independent experts. Other grounds of complaint included comments and interventions by the coroner during the hearings, actions and comments by counsel assisting the inquiry, and actions such as meetings and site inspections with the investigators. Despite some concerns, the Court held that no grounds for reasonable apprehension of bias had been established at the stage of

proceedings reached by the inquiry. The Court would in any case have exercised its discretion to refuse relief in relation to mere possibilities. No appeal has been lodged.

In the case of proceedings relating to a challenge to Mr Tony Morris, QC, the commissioner appointed by the Queensland Government to conduct an inquiry into events at Bundaberg Base Hospital involving Dr Jayant Patel, the discriminatory behaviour of the commissioner towards witnesses from the hospital administration compared to other witnesses from the hospital, and an unjustified and intemperate interjection by the commissioner during cross-examination of a witness by one applicant's counsel, led to the opposite result to that in the bushfire inquiry[27]. The inquiry will now continue with wider terms of reference under new commissioner, former judge Geoff Davies, who will discard tainted evidence from consideration entirely

Invalidity of suspension of ATSIC Chairperson on grounds of 'misbehaviour' under delegated legislation and general statutory power

The Full Court of the Federal Court (Black CJ and Weinberg J, Selway J having died after the court's decision was reserved) upheld the decision of Gray J that the decision of the Minister for Immigration and Multicultural and Indigenous Affairs to suspend Mr Clark from his position as a Commissioner of the Aboriginal and Torres Strait Islander Commission (ATSIC), which he chaired, was invalid.[28] If not disallowed in the Parliament, the suspension would have provided the basis for possible dismissal by the Minister.

In suspending Mr Clark because of his conviction and fine of $750 for obstructing police, the Minister purported to act under (i) a paragraph of a Determination made by the previous Minister in 2002. It provided that the behaviour of a person in circumstances where they were convicted of an offence for which there is a penalty of imprisonment was taken to be statutory misbehaviour, even where the person was discharged without a conviction being recorded, and (ii) the general meaning of 'misbehaviour' in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (the Act). Although ATSIC had been effectively abolished by the time of the court's decision, the court considered that important questions of law, as well as the matter of costs, needed to be resolved.

Their Honours agreed that the relevant provision in the Determination was invalid, but differed in their reasons, Weinberg J holding that the provision was so wide that it was invalid on the ground of not being reasonably proportional to the purpose of the empowering Act, while Black CJ based the invalidity of the provision in the Determination on the ground that it failed to specify the misbehaviour with sufficient clarity, a ground rejected by the Weinberg J.

Although their Honours also differed on whether the provision should be read down or not, the Minister's decision based upon it was invalid on either reading. Moreover, the Minister's reliance on the general meaning of 'misbehaviour' in the Act had miscarried, because her reasons for decision gave no indication that she had considered the central question whether Mr Clark's conduct bore on his capacity to continue to hold office as an ATSIC Commissioner. However, the court rejected the trial judge's finding that the Minister's Determination of what constituted misbehaviour had to be read down to avoid discrimination on the grounds of race.

Brief items

- *Industrial relations*: The High Court's rejection of the challenge by the ALP and the ACTU, to proposed Government advertising promoting changes to industrial relations

laws, was handed down on 29 Sept 2005. At the time of writing, no reasons had been published for the court's decision that there were no grounds for relief[29].

- *Lawyers advertising*: By a majority of 5:2 (McHugh and Kirby JJ dissenting) the High Court has held that NSW legislation prohibiting lawyers from advertising personal injury services do not infringe the implied freedom of political communication in the Constitution[30].

- *Refugee protection*: The Minister for Immigration and Multicultural and Indigenous Affairs has sought special leave to appeal to the High Court in relation to a majority decision[31] of the Full Court of the Federal Court (Wilcox and Madgwick JJ; Lander J dissenting) holding that the correct test for granting a permanent protection visa to a person, who has already been recognised as a refugee by the grant of a temporary protection visa, is whether or not the cessation clause in Article 1C(5) of the Refugees Convention applies to the person, rather than treating the matter afresh under Article 1A(2) of the Convention, as Lander J held.

In the majority's view, the former provision required changes in the country of origin to be of a fundamental nature addressing the causes of displacement which led to the recognition of refugee status; UNHCR guidelines referred to the need for conditions to have changed 'in a profound and enduring manner before cessation can be applied'. Justice Lander agreed with Emmett J and other judges at first instance that the Migration Act was unambiguous in requiring a fresh application for a permanent protection visa 'even if that did not necessarily sit comfortably with the framework of the Refugees Convention'.

Administrative review and tribunals

United Kingdom tribunals reform developments

The UK Department for Constitutional Affairs (DCA) has announced that two major tribunals are to join the new Tribunals Service in April 2006, one to two years ahead of schedule. They are the Criminal Injuries Compensation Appeals Panel and the Appeals Service which resolves disputes on matters such as social security, child support cases and disability living allowance. Between them the two tribunals deal with 230,000 cases a year[32].

COAT report on tribunal remuneration

The Council of Australasian Tribunals (see (2002) 35 *AIAL Forum* 1) has published a comprehensive table concerning the remuneration of members of Australian tribunals: see 'Results of Remuneration Survey' at: www.coat.gov.au.

Ombudsman

Commonwealth Ombudsman's immigration jurisdiction, including actions of contractors

The following changes have recently occurred in relation to the Commonwealth Ombudsman jurisdiction in relation to immigration matters[33]:

- The Ombudsman has acquired a new function, under new Part 8C of the Migration Act of reviewing and reporting on the detention of immigration detainees who have been held for more than 2 years, and thereafter every 6 months. The Ombudsman has power to recommend the release of a person, the granting of a visa, the ongoing detention, or any other recommendation the Ombudsman considers appropriate. While his

recommendations are not binding on the Minister, the Ombudsman's de-identified statements on each such detainee will be tabled in Parliament. The Ombudsman may exercise all existing powers of investigation in carrying out this new function.

- There is to be a separate team within the Ombudsman's office to investigate the circumstances of long-term detainees. It will deal with cases in order of priority, beginning with those who have been in detention the longest, among whom precedence will be given to assessing cases involving the long-term detention of people with significant health problems, including those with current mental health issues such as those in Glenside Hospital in Adelaide. Visits have been made to Glenside and visits are planned to Baxter and Villawood detention centres. The Ombudsman's staff have met with a range of community organisations and advocacy groups.

- Following the publication of the report into the Vivian Alvarez matter (see *Immigration* heading), the Ombudsman's office continues to investigate the other more than 200 related matters originally referred to the Palmer inquiry and a number of further matters.

- The Migration and Ombudsman Legislation Amendment Bill 2005 provides that the Ombudsman, in performing his or her functions in relation to immigration, including immigration detention, may be called the Immigration Ombudsman if he or she chooses. The bill also makes explicit that the Ombudsman can perform functions and exercise powers under other Commonwealth and ACT legislation. There is also provision to enable an agency or person to provide information to the Ombudsman notwithstanding any law that would otherwise prevent them from doing so. Of wide significance is the general provision giving the Ombudsman jurisdiction in relation to the actions of contractors and subcontractors when they are exercising powers or performing functions for or on behalf of Australian Government agencies in providing goods or services to the public: these actions are deemed to be actions of the relevant agency, and can therefore be investigated by the Ombudsman. This change may have been prompted by the need for the Ombudsman to be able to investigate contractors providing immigration detention services, but it is not limited to those circumstances. Successive Ombudsmen have long sought clarification of this matter and it will be interesting to see if similar amendments are made to the FOI Act.

- The Ombudsman has sought and been assured by the Government of additional funding of $12.8 million over four years to fulfil his enhanced role of Immigration Ombudsman, in particular a broader detention review role including health complaints, a greater role in examining compliance activities and an expanded role in investigating immigration complaints and issues.

Freedom of information, privacy and other information issues

Limitation on AAT's powers where conclusive certificate issued in relation to deliberative process documents

In *McKinnon v Secretary, Department of Treasury*[34], a majority of the Full Court of the Federal Court (Jacobson and Tamberlin JJ; Conti J dissenting) rejected an appeal against a decision of the AAT to uphold a conclusive certificate supporting exemptions under s 36 of the *Freedom of Information Act 1982* (Cth) (FOI Act) for deliberative process documents relating to (a) taxation 'bracket creep' and (b) the First Home Owners Scheme[35] .

The appellant, Mr McKinnon, is the FOI Editor of The *Australian* newspaper. The central issue concerned the proper interpretation of the provisions in the Commonwealth FOI Act to the effect that, while the AAT does not have power to review a decision to issue a conclusive

certificate, it must in the case of deliberative process documents covered by a conclusive certificate 'determine the question whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest' (s 58(5)).

Justice Jacobson followed previous authority in holding that in carrying out such a determination the AAT was not required to balance different aspects of the public interest. Justice Tamberlin agreed with Jacobson J's reasons and orders, adding that answering the question posed in s 58(5) is different from the AAT's normal role in determining the balance of public interest factors, and in performing that task it is unnecessary 'to evaluate anything beyond the question whether the ground raised to support the particular facet of the public interest is irrational, absurd or patently untenable'.

Justice Conti dissented, holding that, when making a s 58(5) determination, the AAT is required to determine all the grounds that exist (at the time of its determination) in relation to a public interest claim, and to weigh and balance those grounds in order to determine whether reasonable grounds exist in favour of non-disclosure: the provision did not direct determination of whether there are 'any' reasonable grounds. Similarly, the AAT was obliged in principle to weigh and balance the testimonies of the appellant's witnesses as well as those for the respondent. Where there are conflicting views the AAT has to 'determine [a] question', not just one side. His Honour was alone in finding that the appellant's claims that the AAT had erred in its approach to the concept of public interest had force, and that it had misinterpreted the meaning of an exception allowing the release of reports of 'scientific and technical experts'. Mr McKinnon has sought special leave to appeal to the High Court.

Reports concerning privacy and the private sector

A report by the Commonwealth Privacy Commissioner[36] on the operation of the private sector provisions of the Privacy Act found that on balance the provisions worked well, noting, however, that at present her office did not have the power to conduct audits of the compliance of private sector business with the Privacy Act's requirements. The Commissioner noted that the provisions seemed to be working well for business, but that there was less satisfaction on behalf of those representing consumer and privacy advocacy groups. The Commissioner also recommended a wider review of privacy for the 21st century, which the Commissioner saw as relevant to a number of complex areas. Her recommendations included the following:

- Examination of the differing privacy principles applicable to the government and private sectors with a view to developing a single set of principles applicable to both..

- Examining exemptions from the Act.
- Retaining the small business exemption, but with a modified cut off point of 20 or fewer employees.

- A National Health Privacy Code as a schedule to the Privacy Act, and specific legislation for any national electronic health records system.

- Greater resources to carry out her responsibilities especially in the private sector.

- A right of review of the merits of the Commissioner's complaints decisions.

A later Senate Committee privacy report endorsed the Privacy Commissioner's recommendations as having high priority, recommending a review by the Australian Law Reform Commission of privacy regulation, including the Privacy Act, with a view to establishing 'a nationally consistent privacy regime'.

Brief FOI and privacy issues

- The Queensland *Freedom of Information and Other Legislation Amendment Act 2005*, assented to on 31 May 2005, implements some of the recommendations of the report on the FOI Act of a Legislative Assembly committee, and formally establishes the position of Information Commissioner as separate from the position of Ombudsman, who previously held it.

- In May 2005 the new Victorian Ombudsman, Mr GE Brouwer, issued a discussion paper[37] in conjunction with a review of the Victorian FOI Act. The paper deals with a range of matters relating broadly to administration of the Act, review of decisions, relationship with privacy legislation, and the general ethos of open government, but not generally with exemptions. The Ombudsman's report to Parliament is awaited.

- Note the publication of a new text on access to and amendment of government-held information under FOI and privacy legislation in Australia, especially NSW, Victoria and the Commonwealth[38].

Public administration

Statutory authorities and corporate governance – review and changes

In August 2004 the Commonwealth Government responded to the Uhrig report on corporate governance of statutory authorities and office holders, accepting all but one of the review's recommendations. In summary, the report recommended two basic templates for the governance of such bodies, the first being an 'executive management' model, the second a 'board template'. The latter is appropriate where government takes the decision to delegate full powers to act to a board, or where the Commonwealth itself does not fully own the assets or equity of a statutory authority. A system of Ministerial Statements of Expectations of authorities and their responding Statements of Intent will be introduced.

Where it is appropriate that statutory authorities be legally and financially part of the Commonwealth and do not need to own assets (typically budget-funded authorities), the *Financial Management and Accountability Act 1997* (Cth) (FMAA) will be applied. Those that are appropriately legally and financially separate from the Commonwealth and best governed by a board will come under the *Commonwealth Authorities and Companies Act 1997* (Cth). Ministers are considering the authorities in their portfolios, and changes are to be completed by 31 March 2007. The boards of Centrelink and the Health Insurance Commission have been abolished as part of this process (see *Legislative developments*, Spring sittings 2005).

The Public Service Commissioner, Ms Lynelle Briggs[39], has further argued that the overall structure and governance arrangements of a particular body should also influence whether it should be covered by the *Public Service Act 1999* (Cth), noting the flexibility the Act allows in relation to such matters as employment. In her view, the Act is based on values that should apply to authorities under the FMAA, leading to greater cultural coherence in the public sector and contributing to whole-of-government working in such matters as movement of staff between agencies.

Brief items

- Note ANAO, *Performance Audit: Legal Services Arrangements in the Australian Public Service*, Audit Report No 52, 2004–2005, 20 June 2005; available from: www.anao.gov.au. There are also recent ANAO reports into Centrelink's complaints

procedures and other customer relations measures and the Departmental oversight of the Job Network.

- Amendment and disallowance of Public Service Regulation 2.1 following the *Bennett* case: this matter is fully dealt with in Christopher Erskine's article in (2005) 46 *AIAL Forum* 15 at 25–26.

Other developments

US Military Commission developments

On 20 Sept 2005, the Appointing Authority for the US Military Commissions, John Altenburg, lifted the stay on the trial of Australian Guantanamo Bay detainee David Hicks[40], imposed on 10 Dec 2004 pending the decision of an appeal in the case of *Hamdan v Rumsfeld*[41], decided on 15 July 2005. He directed the presiding officer to hold a hearing within 30 days in order to resolve preliminary issues, including objections to the remaining three members of the military commission panel. A first hearing date of 18 Nov 2005 has since been reported.

A Pentagon source stated that the Australian authorities wanted to see the Hicks case moved forward expeditiously. Minor changes to the procedures of the commissions were announced early in September 2005, including restricting decisions on questions of law to the commission's presiding member, while the two members who are not lawyers are to decide only on verdicts and sentences. Classified evidence may now only be presented in closed session if the presiding officer concludes that it would not deny the defendant a full and fair trial. In a strange twist, it has been reported that Mr Hicks, through his US Army-appointed lawyer, Major Mori, has applied for British citizenship on the basis of his mother's citizenship, in the hope that the UK Government might then intervene to secure his release.

The Federal court litigation and other aspects of the military commission process are dealt with in a further report by the Law Council of Australia's independent legal observer, Mr Lex Lasry, QC, who concludes that it is virtually impossible for Mr Hicks and other detainees to obtain a fair trial[42].

The Appeals Court upheld the US Government's submissions on significant issues, finding that the Geneva Convention could not be enforced in US courts and did not in any case apply to Mr Hamdan. It upheld the validity of the establishment of military commissions by the President and refused to consider challenges to their procedures at this stage. The court struck down the District Court's finding that military commissions must have the same procedures as courts-martial. The decision in *Hamdan* runs counter to much of the decision of DC District Court Judge Joyce Hens Green in *In re Guantanamo Bay Cases*[43]. At the time of writing, a decision by the US Supreme Court on whether it would hear an appeal by Mr Hamdan was awaited.

Endnotes

1 For the decisions of COAG and other material see Media Releases on www.pm.gov.au; for examples of opinions see: Gerard Henderson, Sydney Morning Herald, 27 Sept 2005; George Williams, Australian Financial Review, 26 Sept 2005 and Fulbright Public Lecture, 23 June 2005, Gilbert & Tobin Centre for Public Law, www.gtcentre.unsw.edu.au/publications/terrorism.asp . HREOC Media Releases, 'New Terrorism Laws – Tough on terror, Tough on Human Rights', 27 (see also 13) Sept 2005, available from www.hreoc.gov.au; correspondence from ACT Human Rights and Discrimination Commissioner to ACT Chief Minister, 19 Sept 2005 and 30 Aug 2004, available from:www.hro.act.gov.au/index.html

2 Note that the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCDAAD) is conducting an inquiry into the operations of the detention and questioning regime in Div 3, Pt III of the *Australian Security*

Intelligence Act 1979 and other amendments introduced by the *Australian Security Intelligence (Terrorism) Act 2003* (see (2004) 40 *AIAL Forum* 1-2). The Committee will report by Jan 2006 and has received 113 submissions and held four public hearings. For submissions and other material see www.aph.gov.au/house/committee/pjcaad/index.htm .

3 Report of the Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, available from website::www.aph.gov.au/Senate/committee/FADT_CTTE/index.htm; Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, Oct 2005, Statement by Minister for Defence, Senator Hill, 'Enhancements to the Australian Defence Force Military Justice System', 5 Oct 2005, and Media Release, 5 Oct 2005, all available from: www.defence.gov.au/mjs/index.cfm; and see Ombudsman's Media Releases on military justice and on the Joint Review of redress of grievances available on: www.comb.gov.au.

4 Senator Vanstone, Media Releases, 16 & 20 June 2005, on www.minister.immi.gov.au, and Joint Press Conference of the Prime Minister and Senator Vanstone on the Palmer Report, 14 July 2005, on www.pm.gov.au.

5 Transcript of interview with Prime Minister John Howard, 17 June 2005; Senator Vanstone, Media Releases, 28 & 29 July 2005: see above website.

6 Note also ANAO Audit Report No 1, 2005-06, *Management of the Detention Centre Contracts*: Part B, 2005.

7 Mick Palmer, *Report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, 6 July 2005, available from; Senator Vanstone, Media Releases, 14 July, 25 May and 26 February 2005, available from above website; Transcript of Prime Minister John Howard's Joint Press Conference with Senator Amanda Vanstone, 14 July 2005, www.pm.gov.au; Statement by Dr Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet, 'Managing Administrative Reform in DIMIA', 14 July 2005, on www.pmc.gov.au/new.

8 Commonwealth Ombudsman, *Report of Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report No 03/2005, 26 Sept 2005, and Media Release, 6 Oct 05, Senator Vanstone, Media Release, 6 Oct 2005; reports from the Secretary of DIMIA, 'Implementation of the recommendations of the Palmer inquiry into the circumstances of the immigration detention of Cornelia Rau' (27 Sept 2005) and 'Response to the recommendations of the report of the Commonwealth Ombudsman of the inquiry into the circumstances of the Vivian Alvarez matter' (4 Oct 2005), available from: www.immi.gov.au/current-issues/issues.htm; interim report of the Senate Foreign Affairs, Defence and Trade References Committee, The removal, search for and discovery of Ms Vivian Solon, 15 Sept 2005, available from the Committee's website.

9 Website: www.aph.gov.au/senate/committee.

10 *Report on Provisions of the Migration Litigation Reform Bill 2005*, available from the Senate Committees' website (above). Examination by Caron Beaton–Wells, 'Judicial Review of Migration Decisions: Life After S157" (2005) 33 Federal Law Review 141, especially at 160–171; and also brief discussion of the bill in (2005) 45 AIAL Forum 1–2, and Parliamentary Library, Bills Digest, 9, 2005–06, 4 Aug 2005.

11 See also the Report on the bill of the Senate Legal and Constitutional Legislation Committee on 11 May 2005: see above website.

12 See Migration Amendment Regulations 2005 (No 6), SLI 2005, No 171, which inserts new reg 5.15C into the Migration Regulations 1994; and Parliamentary Library, 'Excising Australia: Are we really shrinking?' Research Note, No 5, 2005–06, 31 Aug 2005.

13 Human Rights and Discrimination Commissioner, ACT Human Rights Office, Human Rights Audit of Quamby Youth Detention Centre, 30 June 2005: www.hro.act.gov.au.

14 Attorney–General Philip Ruddock, Media Release, 20 Sept 2005; 'ALP urges transparency in court appointments', ABC News Online, 21 Sept 2005; 'Court choices too secretive: judges', Australian, 22 Sept 2005; Helen Irving, 'Judging the judges', *Sydney Morning Herald*, 24–25 Sept 2005.

15 *SAAP v MIMIA* (2005) 215 ALR 162, 18 May 2005

16 *Applicant NABD of 2002 v MIMIA* (2005) 216 ALR 1, 26 May 2005

17 (2003) 216 CLR 473 (see (2004) 41 AIAL Forum 5–6)

18 *Roncevich v Repatriation Commission* (2005) 218 ALR 733, 10 Aug 2005

19 *Ruhani v Director of Police (No 2)* [2005] HCA 43, 31 Aug 2005; for the constitutional issue concerning the competence and nature of the appeal, see: *Ruhani v Director of Police* [2005] HCA 42, 31 Aug 2005)

20 (2004) 208 ALR 124

21 *Jarratt v Commissioner of Police for NSW* [2005] HCA 50, 8 Sept 2005; see also Giuseppe Carebetta, 'Dismissal at Pleasure, Procedural Fairness and 'Off-with-their-heads' Clauses in Public Sector Employment' (2004) 17(2) *Australian Journal of Labour Law 204.*

22 (1990) 170 CLR 596

23 *Ruddock v Taylor* [2005] HCA 48, 8 Sept 2005

24 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391

25 (2003) 78 ALJR 203 (see (2004) *41 AIAL Forum* 5–6).

26 *The Queen v Coroner Maria Doogan; ex parte Peter Lucas-Smith & ors* [2005] ACTSC 74, 5 Aug 2005; Canberra Times, 18 Aug 2005

27 *Keating v Morris & ors; Leck v Morris & ors* [2005] QSC 243, 1 Sept 2005; ABC Online News, items on Queensland, 6 & 7 September 2005; see also *Parramatta Design & Developments Pty Ltd v Concrete Pty Ltd* [2005] FCAFC 138, 29 July 2005 for a case where a judge's adverse observations on a party's case during trial, reflected in his reasons for decision, led to a finding of apprehended bias.

28 (see (2004*) 43 AIAL Forum* 11–12 which contains a fuller account of the facts. *Vanstone v Clark* [2005] FCAFC 189, 6 September 2005

29 *Combet & anor v Commonwealth of Australia*, 29 September 2005; editorial, 'Court shrinks from its duty', Canberra Times, 30 September 2005; there is also an inquiry in progress into these issues by the Senate Finance and Public Administration References Committee, which is due to report on 10 November 2005, see: www.aph.gov.au/senate/committee/fapa_ctte.

30 *APLA Limited & ors v Legal Services Cmr (*NSW) [2005] HCA 44, 1 Sept 2005

31 *QAAH v MIMIA* [2005] FCAFC 136, 27 July 2005; for detailed examination of the cessation clauses see: *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed Feller, Turk and Nicholson, Cambridge UP, 2003, Part 8

32 See DCA news release, 26 Aug 2005, on website www.dca.gov.uk/; for previous items on this issue see: (2005) *45 AIAL Forum* 11–12; (2002) *35 AIAL Forum* 7–8).

33 See Commonwealth Ombudsman, Media Releases, 14 July, 28 July 2005, Immigration Bulletins 2 & 3, 1 & 6 Sept 2005, available on: www.comb.gov.au.

34 *McKinnon v Secretary, Dept of Treasury* [2005] FCAFC 135, 2 Aug 2005; see also 'FOI Act may as well be scrapped', editorial, *Canberra Times*, 4 Aug 2005.

35 (2005) *45 AIAL Forum* 14-15.

36 *Office of the Privacy Commissioner,* Getting in on the Act: Review of the Private Sector Provisions of the Privacy Act 1988*, March 2005, available from: www.privacy.gov.au ;* Senate Legal and Constitutional References Committee*,* The Real Big Brother: Inquiry into the Privacy Act 1988*, June 2005, available from: www.aph.gov.au/senate/committee/legcon_ctte/index.htm.*

37 *Review of the Freedom of Information Act: Discussion Paper*, Ombudsman Victoria, May 2005, available from: www.ombudsman.vic.gov.au.

38 Moira Paterson, *Freedom of Information and Privacy in Australia*, LexisNexis Butterworths, Chatswood (Australia), 2005 (pp i–xlix, 1–611).

39 www.finance.gov.au/governancestructures. See also the recently published *Foundations of Governance in the Australian Public Service*, Australian Public Service Commission, 1 June 2005, and note speech by the Secretary of the Department of the Prime Minister and Cabinet, Dr Peter Shergold, 1 June 2005, available from: www.pmc.gov.au

40 'US lifts stay on Hicks trial', 'Guantanamo trial changes "desperate"', ABC News Online, 1 & 21 Sept 2005; 'Hicks to face hearing within 30 days', Australian, 22 Sept 2005; Attorney–General, Media Releases, 22 Sept 2005.

41 On 15 July 2005 the United States Court of Appeals for the District of Columbia (DC) handed down its appellate decision in the case of *Hamdan v Rumsfeld* (No 04–5393) (see (2005) 45 *AIAL Forum* 18–19 for a note on Hamdan and other cases decided by judges of the DC District Court.

42 'United States v David Hicks: Report of the Independent Legal Observer for the Law Council of Australia', Lex Lasry, QC, July 2005; see also correspondence between the Law Council of Australia and the Prime Minister/Attorney–General available on www.lawcouncil.asn.au).

43 31 January 2005 *(see* 45 *AIAL Forum* 18–19).