

# ACCOUNTABILITY FOR DETAINING AND REMOVING UNLAWFUL NON-CITIZENS

The cases of Vivian Solon and Cornelia Rau

ANGUS FRANCIS

On 6 July 2005 Mick Palmer delivered his findings as to how Cornelia Rau, an Australian permanent resident of German origin, came to be detained for six months at the Brisbane Women's Correctional Centre and for four months at the Baxter Immigration Detention Facility. The report of the Palmer Inquiry was followed on 26 September 2005 by the Commonwealth Ombudsman's report of Neil Comrie's investigation into the detention and removal from Australia of Vivian Solon, an Australian citizen born in the Philippines. The Commonwealth Ombudsman summed up the management of her case by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) in one word: 'catastrophic'.<sup>1</sup> On 18 November 2005 Vivian Solon arrived back in Australia. Her dispute with the Commonwealth government over the compensation for her wrongful removal from Australia will be the subject of a binding arbitration award to be made by the former Chief Justice of the High Court, Sir Anthony Mason.

The government has since responded to the Palmer and Ombudsman reports by introducing the Migration and Ombudsman Legislation Amendment Bill 2005, which builds on earlier amendments to the detention regime — the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) — passed in response to pressure from the government's backbench. The most recent legislative amendments follow on from a process of reflection and reform begun within DIMIA in response to the recommendations of the Palmer and Ombudsman reports. More recommendations may also be forthcoming from the ongoing Ombudsman investigation into over 200 other potential cases of the wrongful detention of permanent residents and citizens in detention centres in Australia, which are under the control of a private company, GSL (Australia) Pty Ltd (a wholly owned subsidiary of its UK parent, Global Solutions Limited).

The Rau and Solon cases have sparked widespread criticism and concern over the nature and exercise of the detention and removal powers found in the *Migration Act 1958* (Cth). For example, the Senate Legal and Constitutional References and Legislation Committee's Inquiry into the administration and operation of the *Migration Act* (Senate Migration Act Inquiry), referred to the Committee by the Senate on 21 June 2005, has received over 200 submissions.

This article considers the tension between the notion of accountability that is present in the terms

of reference, findings and recommendations of the Palmer and Ombudsman inquiries, the internal reform process begun within DIMIA and the legislative reform package put so far to Parliament, and the notion of accountability that underpins the principal criticisms of these developments. Before exploring this theme, however, it is worthwhile recapping the regulatory and factual context of the Rau and Solon cases.

## The detention and removal of Vivian Solon and Cornelia Rau

The regulatory context for the Palmer and Ombudsman reports was the detention and removal powers found in the *Migration Act*. Section 189 of the Act imposes an obligation on authorised officers, including DIMIA compliance officers and police officers, to detain any person they know or reasonably suspect to be an unlawful non-citizen. An unlawful non-citizen is defined in the Act to mean a non-citizen who does not hold a valid visa. The legal opinion of the Australian Government Solicitor's Office prepared for DIMIA and provided to the Palmer Inquiry, states that an officer is under an obligation 'to keep the person's circumstances under review and to seek to resolve their immigration status as soon as possible by further inquiry'.<sup>2</sup> According to the Australian Government Solicitor this means that an officer 'must be able to demonstrate at any particular time that the suspicion persists and that it is reasonably held'.<sup>3</sup> Closely related to s 189 of the Act, which requires that an unlawful non-citizen be kept in detention until removed or deported from Australia or granted a visa.

The findings of both inquiries suggest that DIMIA breached s 189 in its management of the Vivian Solon and Cornelia Rau cases.<sup>4</sup> As noted above, the government has agreed to an arbitration of the compensation to be paid to Vivian Solon for her wrongful removal from Australia. The facts of Vivian Solon's case were that she was found on 30 March 2001 in a deep drain in a park in Lismore, New South Wales. She was taken to Lismore Base Hospital, where, under the name Vivian Alvarez, she was admitted to the Richmond Clinic Psychiatric Unit. DIMIA officers interviewed Vivian Solon on 3 May 2001 after a social worker at the Clinic advised DIMIA that Vivian may be an 'illegal immigrant'. The officers wrongly assumed that she was an unlawful non-citizen. The conclusion reached at this first interview was found to be the catalyst for the subsequent treatment of Vivian Solon by DIMIA officers. She was formally

## REFERENCES

1. Commonwealth Ombudsman, *Report on the Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report under the *Ombudsman Act 1976* by the Commonwealth Ombudsman, Professor John McMillan, of an inquiry undertaken by Mr Neil Comrie AO APM, Report No. 03 2005, xv (Commonwealth Ombudsman Report).
2. Commonwealth of Australia, *Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, July 2005, 23 (Palmer Inquiry Report).
3. *Ibid.*
4. *Ibid.* 21–28; Commonwealth Ombudsman Report, xi.

interviewed again on 13 July 2001. Despite stating that she was an Australian citizen and that she wanted to stay in Australia, she was wrongfully removed from Australia under s 198 of the Act on 20 July 2001. The Commonwealth Ombudsman expressed the view that the decision to detain Vivian Solon under s 189 was not based on a reasonable suspicion: 'the relevant inquiries were neither timely nor thorough and there was a lack of rigorous analysis of the available information'.<sup>5</sup>

In the case of Cornelia Rau, the Palmer Report concluded that her initial detention may have been lawful, given that it was based on a reasonable suspicion that she was an unlawful non-citizen — she spoke German, had a fake passport, and gave conflicting accounts of her identity to suggest she was an unlawful non-citizen.<sup>6</sup> However, the Palmer Report went on to find that the various accounts that she gave of her identity, her origins, and the circumstances of her arrival in Australia (at one point she claimed she had walked overland from Europe to China before paying a Russian people-smuggler to get her to Australia), imposed an ongoing responsibility on officers to persist in making inquiries to identify her. A major finding of the Palmer Report was that there were insufficient internal processes to ensure this ongoing responsibility was met.<sup>7</sup>

### The notion of accountability underlying the Palmer and Comrie investigations

The terms of reference, findings and recommendations of the Palmer and Comrie investigations generally reflect an understanding of accountability in government that is typical of recent trends in public administration and management. Since the 1980s a transformation in the management of the public sectors of advanced countries has occurred by which '[t]he rigid, hierarchical, bureaucratic form of public administration, which has predominated for most of the twentieth century, is changing to a flexible, market-based form of public management'.<sup>8</sup> This has included not only the transfer of the exercise of public functions to the private sector, for example, the transfer of corrective and administrative detention functions to privately owned corporations like Group 4 Falck Global Solutions, Wackenhut, and Australian Correctional Management, but perhaps more dramatically the techniques and mechanisms of public administration have been 'refashioned' in the mould of the private corporate sector.<sup>9</sup> Contractual and auditing principles now seek to replace 'command and control' as the 'paradigm of regulation'.<sup>10</sup>

In Australia, this trend has manifested a willingness to experiment with governance techniques, including a larger role for non-government agencies in formulating and implementing policy.<sup>11</sup> In terms of administrative and public law, there has been a willingness to experiment with different tools or mechanisms for ensuring accountability and administrative justice. Mark Aronson and his colleagues comment on what they refer to as the radical departure in government commentaries in the field of administrative law marked

by the Administrative Review Council's report on *The Contracting Out of Government Services*, which displayed according to Aronson et al that the:

ARC no longer adheres to the view that administrative law is an indivisible package, whose components must be taken or rejected in full ... It now sees its prescriptions as being pragmatic adaptations to changing times, in which the key principles of accountability and transparency remain, although the mechanisms for giving them effect might be a mix of public and private law remedies.<sup>12</sup>

What this means in terms of concrete proposals for ensuring accountability and transparency may be seen in the administrative arrangements made for the provision of detention services to unlawful non-citizens in Australia. Detention centres are established and maintained by the Minister, on behalf of the Commonwealth, under s 273 of the *Migration Act*. That section also states that the *Migration Regulations* may make provision for the operation and management of detention centres. However, the preference has been to execute the Commonwealth's duty of care to detainees through policy documents, principally the Immigration Detention Standards, which are scheduled to a contract with the detention service provider. The Detention Services Contract entered into between DIMIA and Group 4 Falck Global Solutions Pty Ltd on 27 August 2003 states (cl 2.4.1) that the detention service provider must 'in performing its obligations under this Contract comply at all times with the Immigration Detention Standards'. The provider is then obliged (cl 2.4.2) to prepare Operational Procedures for the implementation of the Immigration Detention Standards that are subject to DIMIA approval.

In addition to these and other internal contractual controls, the Detention Services Contract states in Schedule 3 (Immigration Detention Standards) that '[d]etention services and their delivery are subject to an external scrutiny and accountability framework which includes the Parliament and a number of statutory authorities such as the Commonwealth Ombudsman, Privacy Commissioner and the Human Rights and Equal Opportunity Commission'. Notably missing from this line up of external scrutiny bodies is the courts. Since the early 1990s the legislature has attempted to restrict judicial review of decisions made under the *Migration Act*, including decisions concerning detainees, for example, the *Migration Reform Act 1992* (Cth), the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), the *Migration Amendment (Duration of Detention) Act 2003* (Cth), and the *Migration Litigation Reform Act 2005* (Cth). The same rationale underlies the *Migration Amendment (Detention Arrangements) Act 2005* (Cth), which ensures that the Minister's decisions not to consider whether to exercise the powers to grant a visa to a detainee or to make a residence determination are not susceptible to judicial review. On current authority this is so because the powers are carefully framed so that the Minister is under no duty to consider whether to exercise the powers.<sup>13</sup>

From this small picture of detention services in Australia it is clear that internal private contractual

5. Commonwealth Ombudsman Report, xi.

6. Palmer Inquiry Report, viii.

7. Ibid 26–27.

8. O E Hughes, *Public Management and Administration* (3rd ed, 2003) 1.

9. Murray Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in Michael Taggart (ed), *The Province of Administrative Law* (1997) 21.

10. Ibid.

11. Geoff Airo-Farulla and Steven White, 'Separation of Powers, 'Traditional' Administration and Responsive Regulation' (2004) 4 *Macquarie Law Journal* 57–80, 57.

12. M Aronson et al, *Judicial Review of Administrative Action* (3rd ed, 2004) 177.

13. *Minister for Immigration & Multicultural & Indigenous Affairs, Re; Ex parte Applicants S134/2002* (2003) 211 CLR 441 [48] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ). See also: Ibid [100] (Gaudron and Kirby JJ); *Bedlington v Chong* (1998) 87 FCR 75; *Morato v Minister for Immigration, Local Government & Ethnic Affairs* (No 2) (1992) 39 FCR 401.

*In terms of training, the Ombudsman drew attention to the fact that the ad hoc attempts to identify Vivian Solon showed inadequate training of the compliance officers, reflecting similar findings of the Palmer Inquiry.*

obligations and remedies, buttressed by supervisory executive bodies, are the preferable tools of governance rather than legislative prescription of an officer's duty to detainees and judicial supervision and control of an officer's exercise of that power. The mechanisms utilised by the government for the provision of detention services in Australia therefore generally follow the international trend in public administration toward private sector practices. An issue for further inquiry is the extent to which the implementation of new public management techniques in the immigration portfolio are informed by the historical role of the executive in immigration control that has been observed by leading commentators in the area.<sup>14</sup>

The terms of reference, findings and recommendations of the Palmer and Ombudsman reports into the Rau and Solon cases also reflect to a large degree the new management values now widespread in public administration. Most significantly, they display a tendency to encourage reliance on internal regulatory controls within DIMIA and between DIMIA and its inter-governmental and private sector partners, buttressed by external supervision by executive bodies or executive appointed boards, as a means of ensuring the quality of decision-making in the detention and removal context.

The tone of the Palmer and Comrie investigations, in this respect, was set with the terms of reference of the Palmer Inquiry. In addition to examining the events and circumstances leading to Cornelia Rau's detention, the Palmer Inquiry's terms of reference were confined by the Minister for Immigration and Multicultural and Indigenous Affairs, Senator Amanda Vanstone, to investigation into the systems and processes of, and cooperation between, relevant State and Commonwealth agencies, and the recommendation of any 'necessary systems/process improvements'.<sup>15</sup> Likewise, the Ombudsman's report on Neil Comrie's investigation into Vivian Solon's detention and removal, although begun on an own-motion investigation under s 5 of the *Ombudsman Act 1976* (Cth), and thereby not limited in its terms of reference, reflected its genesis in the Palmer Inquiry, more or less following the Palmer Inquiry's concentration on 'DIMIA's culture, policies, systems, processes and staff shortcomings'.<sup>16</sup>

The major findings of the Palmer and Ombudsman reports reflected this focus. These may be grouped into five categories: databases and operating systems; training and selection of staff; case management;

processes (including outsourcing); and departmental culture. At the core of the Palmer and Ombudsman findings was what the Palmer Report called an 'assumption culture' within DIMIA.<sup>17</sup> The most disturbing example was one DIMIA officer's erroneous assumption that Vivian Solon might have been a 'sex slave'.<sup>18</sup> The Palmer Report also found that DIMIA's database infrastructure is 'siloed' and lacking integration.<sup>19</sup> In terms of training, the Ombudsman drew attention to the fact that the ad hoc attempts to identify Vivian Solon showed inadequate training of the compliance officers, reflecting similar findings of the Palmer Inquiry.<sup>20</sup> Adverse findings were also reached about the quality of the case management of the Rau and Solon matters. For example, the Commonwealth Ombudsman found that the management of Vivian Solon's case was 'very poor, lacking rigour and accountability'.<sup>21</sup> Inadequate training and poor case management was not assisted, in Palmer's view, by poor internal processes, especially the lack of any automatic internal review of decisions made under s 189.

The Palmer Inquiry also made adverse findings about the contractual arrangement between DIMIA and the detention services provider, the renamed GLS (Australia) Pty Ltd (GSL). However, the Palmer Inquiry did not question the appropriateness of outsourcing administrative detention of unlawful non-citizens to a private security provider. Instead, the investigation focused on the lack of adequate controls in the outsourcing agreement with GSL.<sup>22</sup> The same concerns had been raised by the Australian National Audit Office (ANAO), which found that the detention service contracts between the Commonwealth and Australasian Correctional Management and the current service provider, GSL, had not been adequately monitored.<sup>23</sup> A particular concern of the ANAO was that there was a lack of sufficient qualitative and quantitative measurements for assessing compliance with the Immigration Detention Standards. In evidence before the Senate Migration Act Inquiry, ANAO stated that there was a 'lack of definition, a lack of measurement and poor record keeping to do with what constitutes lawful, appropriate, humane or efficient detention'.<sup>24</sup>

The major recommendations of the Palmer and Ombudsman reports also reflected the focus on systemic and process improvements within DIMIA. Both reports made a range of recommendations for improvements in internal management processes within

14. Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51, 53.

15. Palmer Inquiry Report, Appendix A, 196

16. Commonwealth Ombudsman Report, 5. Also see the evidence of Mr Neil Comrie to the Senate Legal and Constitutional References and Legislation Committee Inquiry into the administration and operation of the Migration Act, Commonwealth of Australia, Hansard, Senate, Tuesday 8 November 2005, 30.

17. Palmer Inquiry Report, ix (main finding 8), xi (main finding 17)

18. Commonwealth Ombudsman Report, x (main finding 5) 31–42.

19. Palmer Inquiry Report, xi (main finding 16); xiii (main findings 32–3).

20. Commonwealth Ombudsman Report, x (main finding 8); Palmer Inquiry Report, x (main findings 14 and 15).

21. Commonwealth Ombudsman Report, x (main finding 9).

22. Palmer Inquiry Report (main findings 6, 13, 29).

23. See, eg Australian National Audit Office, *Management of the Detention Centre Contracts — Part B: Department of Immigration and Multicultural and Indigenous Affairs*. Audit Report No. 1, ANAO, Canberra, 2005–06.

24. Senate Legal and Constitutional References and Legislation Committee Inquiry into the administration and operation of the Migration Act, Commonwealth of Australia, Hansard, Senate, Tuesday 8 November 2005, 30.

DIMIA, including improvements in training and selection of staff, better database and records management, the revision of the contract with GSL in line with ANAO recommendations, and personnel change to ensure 'top-down' reform of DIMIA's culture. In a letter to the Commonwealth Ombudsman, the newly appointed Secretary for DIMIA, Andrew Metcalfe, confirmed that DIMIA had commenced reform of its internal processes and culture in line with the Palmer Inquiry recommendations, including ensuring that DIMIA 'be a more open and accountable organization'.<sup>25</sup>

The recommendations of the Palmer and Ombudsman reports further express a firm belief in the capacity of external audit and executive supervisory overview processes — by ANAO, an 'Immigration Detention Health Review Commission' set up under the Commonwealth Ombudsman legislation, and a Detention Contract Management Group made up of external experts — to provide adequate means of oversight and direction to DIMIA in the exercise and administration of the detention and removal powers by DIMIA. The recommendations of the Palmer and Ombudsman reports concerning external review follow the same trajectory as the government's legislative initiatives in the detention regime in 2005, which have given the Commonwealth Ombudsman a greater role in supervising the duration and conditions of detention for long-term detainees. The *Migration Amendment (Detention Arrangements) Act 2005* (Cth) introduced s 486O which gives the Ombudsman power to review and make recommendations to the Minister concerning whether a person who has been detained for two years should be released into the community on a visa, or detained in accordance with the new alternative residence determination powers of the Minister. The Migration and Ombudsman Legislation Amendment Bill 2005, introduced into the Senate on 15 September 2005, seeks to further amend the *Migration Act and the Ombudsman Act 1976* (Cth) to allow the Ombudsman to use the title 'Immigration Ombudsman' when performing functions in relation to the immigration portfolio.

In summary, the general thrust of the Palmer and Ombudsman reports and the surrounding departmental and legislative activity is to enhance existing public management techniques, rather than to consider their replacement with any other model of governance. Accountability, therefore, is roughly formulated as an exercise in ensuring the quality of primary decision-making through a system of integrated, and largely executive-focused, internal and external checks and balances. This has meant hybridisation, in many respects, of the key elements of the administrative law model of the 1970s and 1980s, most importantly the adaptation of the Ombudsman to the new role as Immigration Ombudsman.

### Tension with public law values underlying accountability

In comparison to this general formulation of accountability that accompanies the current trend in the

administration of the detention and removal powers, is a contrasting notion of accountability that underpins much of the criticism of those developments. It is an understanding of accountability that derives from traditional public law values, particularly the separation of powers doctrine, and that is evident in criticisms of the current regulatory framework for the detention and removal of unlawful non-citizens. The current regulatory framework is criticised for not providing for an independent judicial mechanism for overseeing the detention and removal of people alleged to be unlawful non-citizens, and not setting out clearly in legislative form the obligations of the Commonwealth to detainees. Whether the Palmer and Comrie investigations should have given greater consideration to these factors is still being debated.

The Senate Migration Act Inquiry received a number of submissions calling for judicial oversight of the detention and removal powers. The submission of the South Brisbane Immigration and Community Legal Service to the Senate Migration Act Inquiry represents a common concern of many in the immigration sector:

The power to detain must have checks similar to that when a person is detained in criminal matters. Given the cases of Cornelia Rau and others, and the other adverse findings about detention contractors, the Department should be extremely cautious about detaining people and should welcome further scrutiny. We understand that prior to the 1994 changes that regular judicial scrutiny was available in some cases of detention. Whilst recent softening of the approach and review by the Commonwealth Ombudsman is welcome we submit that further change is required.<sup>26</sup>

These views reflect a belief that the judiciary is ultimately best placed to examine the lawfulness of detention. Referring to the Palmer Report's finding that DIMIA officers had misconstrued s 189 when exercising the power to detain, the Law Council of Australia argues that the government 'has not adopted a best practice approach which balances considerations of efficacy, fairness and proper safeguards to individual liberty'.<sup>27</sup> The Law Council further claims that this must be provided by a judicial officer.<sup>28</sup>

Such criticisms could be read as no more than evidence of the 'lag time' in which public lawyers catch up with the reality of changes in public administration. Certainly, there has been much introspection by public lawyers across jurisdictions seeking to come to terms with changing practices in public management. Michael Taggart, for example, would argue that it was no coincidence that the 'self-conscious identification of "public law values"' in the early 1980s in Britain emerged at the same time as privatisation of government functions.<sup>29</sup> Taking this perspective, the insistence on judicial involvement in the detention and removal processes could be seen as a failure to adapt legal mechanisms to the changes in the forms and mechanisms of government generally.<sup>30</sup>

However, this raises the question in Australia of how far changes in public administration and adaptations in administrative law can go in the face of the *Australian Constitution*. In *Plaintiff S157/2002 v Commonwealth of*

25. Commonwealth Ombudsman Report, Appendix C, 89–93.

26. South Brisbane Immigration and Community Legal Service, Submission 200, Senate Legal and Constitutional References and Legislation Committee Inquiry into the administration and operation of the Migration Act 1958, <[http://www.aph.gov.au/senate/committee/legcon\\_ctte/migration/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/migration/submissions/sublist.htm)> at 20 November 2005, 5–6.

27. Law Council of Australia, Submission 233, Senate Legal and Constitutional References and Legislation Committee Inquiry into the administration and operation of the Migration Act 1958, <[http://www.aph.gov.au/senate/committee/legcon\\_ctte/migration/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/migration/submissions/sublist.htm)> at 20 November 2005, 6.

28. *Ibid.*

29. Michael Taggart, 'The Province of Administrative Law Determined?' in Michael Taggart (ed), *The Province of Administrative Law* (1997) 3.

30. Mark Aronson, 'A Public Lawyer's Response to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (1997) 40–70 (arguing that as the forms and sites of government become mixed, legal mechanisms for dealing with government must also change form).

... this raises the question in Australia of how far changes in public administration and adaptations in administrative law can go in the face of the Australian Constitution.

Australia the High Court confirmed its constitutional jurisdiction to supervise the lawfulness of executive action.<sup>31</sup> In *s v Secretary, Department of Immigration & Multicultural & Indigenous Affairs*, Finn J in the Federal Court also recently agreed with the Commonwealth's concession in that case that it owed a non-delegable duty of care to detainees.<sup>32</sup> New public management techniques designed to ensure accountability, it could be argued, must take account of the presence of a minimum standard of judicial review under the *Australian Constitution*.

A related concern to the need for judicial review of the detention and removal powers is that the government has failed to clearly spell out in regulatory form under s 273 of the *Migration Act* the Commonwealth's obligations to detainees. The Federal Court described this approach as necessarily resulting in uncertainty as to what powers and obligations apply to those responsible for the operation of detention centres.<sup>33</sup> It is possible to view this criticism as a reflection of the traditional legal paradigm where 'the only valid forms of regulation are relatively inflexible instruments having the status of legislation or delegated legislation'.<sup>34</sup> It could therefore be argued that calls for the Immigration Detention Standards and related detention policies to be set out in legislative form fly in the face of Mark Aronson's observation, made in the general context of outsourcing of government services, that '[t]he need for regulatory reform has recognized for some time the advantages of using less formal regulatory devices in many contexts'.<sup>35</sup>

Indeed, it would be a challenge for legislators to devise a comprehensive catalogue of duties that could cater for the current outsourcing model of administrative detention of unlawful non-citizens in Australia. However, presumably the Commonwealth could mould its contractual relationship with GSL to cater for the legislative provisions (much as it does with the Immigration Detention Standards) so that if the Commonwealth is found to be in breach of a legislative duty of care, it could seek indemnity from the detention service provider. The principal challenge, however, would be in setting out clear and transparent statutory standards that were at the same time responsive to changes in the immigration detention environment, including the specific needs of new detainees that may not fit the profile of previous detention populations.

Nevertheless, the fact that the government leans away from this suggestion while the courts and many stakeholders in the immigration sector call for clearer

statutory standards (and judicial oversight of them) is indicative of the deeper tension between notions of accountability in this area. It is almost as if two different languages are being spoken: the language of performance measures, audit, contractual obligation, and flexible regulation, and the language of rule of law, judicial review, and restrictions on the exercise of public power.

### Conclusion

While there appears to be a continuing divergence between these positions, studies have also been undertaken which seek to explore, for example, whether flexibility in institutional design, including the outsourcing of government functions, can be made compatible with the separation of powers doctrine.<sup>36</sup> In this regard, it may be observed that judicial review represents, in many respects, another avenue for attaining the same objects as the new techniques of public management, most importantly, the review of the appropriateness of a primary decision or decision of a merits review tribunal thereby encouraging consistent and quality decision-making. It could also be argued that placing the Immigration Detention Standards in legislative form would only enhance the understanding of DIMIA and GSL of their respective obligations under the detention services contract. These standards could be realised as positive aspects of the 'command and control' model of administrative law in the new public management environment. As much as the role of the Ombudsman has been adapted to the overview of detention arrangements of individual detainees under the recent amendments, there is potential for new hybrid forms of governance and accountability in the administration of the detention and removal powers.

ANGUS FRANCIS teaches law at Griffith University.\*

© 2005 Angus Francis

email: A.Francis@griffith.edu.au

31. (2003) 211 CLR 476.

32. [2005] FCA 549 (5 May 2005) [199].

33. *Secretary, DIMIA v Mastipour* [2004] FCA FC 93 [17] (Selway J).

34. Aronson, above n 30, 68.

35. *Ibid.*

36. Geoff Airo-Farulla and Steven White, 'Separation of Powers, 'Traditional' Administration and Responsive Regulation' (2004) 4 *Macquarie Law Journal* 57–80.

\* I am very grateful to Savitri Taylor and Jane McAdam for their helpful suggestions and comments on earlier drafts of this article. Thanks also to Mary Crock for permitting me to read her work in progress. The opinions expressed and any errors that remain are my own.