DEVELOPMENTS IN ADMINISTRATIVE LAW

*Ron Fraser**

Government initiatives, inquiries, legislative and parliamentary developments

Proposal for an ACT Human Rights Act

Following wide community consultation and research, the ACT Bill of Rights Consultative Committee, chaired by ANU Professor Hilary Charlesworth, presented its report to the Chief Minister on 22 May 2003. It found that human rights for people in the ACT were covered 'only in a partial and haphazard manner', and in the absence of a bill of rights this fragmented approach 'would remain a serious barrier to the development of a human-rights conscious culture'. A bill of rights would have real significance for those marginal groups most vulnerable to rights abuse and with a limited capacity to advocate on their own behalf.

The report recommends a bill of rights in the form of a Human Rights Act (HRA) of the Legislative Assembly, rather than an entrenched bill of rights or a declaration of the Assembly. The proposal has broad similarities to the UK Human Rights Act, as well as drawing on ideas from New Zealand and South Africa. The rights to be protected are those set out in the two major human rights treaties to which Australia is a party (the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights), other than those not within the power of the ACT legislature to protect. The report proposes alternative provisions for 'reasonable limits' to some but not all rights to the extent justified in an open and democratic society.

The proposed model is designed to provide for 'a dialogue' between the legislature, executive and judiciary on human rights issues, while permitting the legislature to override the courts in the last resort, rather than providing for invalidation of incompatible primary legislation by the courts. The Supreme Court would have power, however, to give a non-binding determination that a law is incompatible with the HRA, and to invalidate incompatible subordinate legislation (unless specifically covered by primary legislation), and, together with other courts and tribunals, would be subject to a clause requiring interpretation of all ACT laws (including the common law) wherever possible in a way compatible with the HRA. Remedies would be designed to change behaviour and prevent future breaches of human rights, but could include damages where the court considers it necessary to provide an effective remedy. All bodies performing public functions (other than the legislature) would be required to act in accordance with the HRA, unless specifically required to do otherwise by legislation, and to report annually on their implementation of human rights.

The report recommends scrutiny of proposed legislation by the Assembly for compatibility with the HRA, monitoring by an ACT Human Rights Commissioner with additional educational and promotional functions, and regular review, initially after five years operation.

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It includes a draft Bill for government consideration and public discussion, and useful general comments by UN Committees on individual rights in the Covenants. The Chief Minister, while not ruling out other models, has undertaken to respond to the report within 3 months. (***Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee***, May 2003, available from the Executive Director, Policy and Regulatory Division, Department of Justice and Community Safety, phone (02) 6207 0520 or from website: www.jcs.act.gov.au/prd/rights/index.html)

Report on Australian Human Rights Commission legislation

The government's controversial Australian Human Rights Commission Legislation Bill 2003 was introduced into Parliament on 27 March 2003. The Bill is similar but not identical to an unsuccessful 1998 Bill. Under it the existing Human Rights and Equal Opportunities Commission (HREOC) is to be renamed the Australian Human Rights Commission (AHRC). Among the major changes in the Bill are proposals to reduce the number of commissioners from five to three and abolish the concept of designated commissioners, such as the Sex Discrimination Commissioner, and to require the AHRC to obtain the approval of the Attorney–General before intervening in litigation involving human rights (it has intervened in 35 actions in 15 years, including recently a number of high profile immigration matters). However, where the President is or was a judge, it is sufficient to notify the Attorney.

After extensive consultation, all but one of the members of the Senate Legal and Constitutional Legislation Committee – Senator Scullion (Country–Liberal Party, Northern Territory) – rejected the requirement for approval by or notification to the Attorney–General before AHRC intervention in litigation, while suggesting informal arrangements be developed to improve communications on this issue between the AHRC and the Attorney and requiring the AHRC to report annually on interventions. While a majority accepted the restructuring proposals (and other major proposals), acceptance was subject to each Commissioner being required to have a core designated area of responsibility, and to a requirement that one Commissioner have significant experience in Aboriginal or Torres Strait Islander community life. Labor, Democrat and Green Senators submitted a dissenting report rejecting the restructuring proposals and the other major changes, and proposing changes of their own. The retiring President of HREOC, Professor Alice Tay, welcomed the report. (**Senate Legal and Constitutional Legislation Committee, *Provisions of the Australian Human Rights Legislation Bill 2003*,** May 2003)

Commonwealth Bills and proposed government legislative program

On 20 March 2003 the government reintroduced into the House of Representatives what is now entitled the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No. 2]. At the time of writing, the Government was proposing, and the Opposition considering, the following amendments in a stated attempt to meet Opposition objections to the Bill: increasing the minimum age of detainees from 14 to 16; providing for up to 24 hours of questioning over 7 days in up to 8 hour blocks under a single warrant, replacing warrants for up to 48 hours continuous questioning that could be extended; provision for access to a lawyer of choice at any stage of proceedings, although questioning may commence in the absence of a lawyer, with safeguards to protect disclosure of sensitive information including higher penalties for breach of a secrecy provision, and provision for a right for ASIO to apply to a prescribed authority to prevent access to the lawyer of choice. **Note**: The Bill has now been passed by both Houses of the Parliament. It will be discussed further in the next Developments section. (See also under heading 'Scrutiny of Bills Committee' below for this Bill and the Criminal Code Amendment (Terrorism) Bill 2002. **And see Parliamentary Library Information and Research Services, *Bills Digests* No 133 of 2002–3 and No 128 of 2001–2; Commonwealth Attorney–General, News Release**, 11 June 2003)

In response to an Opposition Bill to provide for specific listing of the Hizballah External Security Organisation as a terrorist organisation, in place of the Government's Criminal Code Amendment (Terrorist Organisations) Bill 2003 – which confers general powers in relation to listing terrorist organisations – the Government itself introduced a second Bill, the Criminal Code Amendment (Hizballah) Bill 2003 allowing the specific listing of elements of Hizballah as terrorist organisations if they meet certain criteria. Both the specific and general Government Bills have passed through the House of Representatives. The Attorney–General has announced that once the law is passed he will make regulations listing the Hizballah External Security Organisation as a terrorist organisation; the regulation will be disallowable by either House of the Parliament and open to judicial review. (For the Government view, see: **Commonwealth Attorney–General, News Releases,** 2 and 5 June 2003.)

The list of government legislation proposed for introduction in the winter sittings of Parliament, commencing on 13 May 2003, includes the following items of administrative law interest (the quoted comments come from the government release):

- Administrative Appeals Tribunal Amendment Bill – 'reform the AAT to enable it to flexibly manage its workload and to ensure that reviews are conducted as efficiently as possible'.

- Classified Information Procedures Bill – 'implement measures to safeguard classified information that is tendered as evidence in the course of a criminal proceeding'. (Note: In addition, the Attorney–General has referred the question of 'Measures to protect classified and security sensitive information in the course of investigations and proceedings' for inquiry and report by the Australian Law Reform Commission by 29 February 2004 – see Attorney–General's News Release, and ALRC Media Release, both issued on 3 April 2003.)

- Legislative Instruments Bill – 'provide a comprehensive regime governing the making, registration, publication, tabling and sunsetting of delegated legislation'.

(The list of proposed government legislation is available from: http://www.pmc.gov.au/new.cfm)

Senate Scrutiny of Bills Committee

The following aspects of proposed bills are among the matters the Senate Scrutiny of Bills Committee has drawn to the attention of Senators or Ministers in its *Alert Digests* and *Reports* between 26 March and 14 May 2003:

- Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2]: The Committee had previously been concerned with several aspects of the Bill, including provision for obtaining warrants to question a person not suspected of committing an offence, the possibility of detention for questioning for continuous periods without right to seek legal advice or communicate with anyone else, and problems concerning self-incrimination. Despite increased safeguards in relation to the issue of warrants, increased protections for people in detention and restrictions on the later admissibility of evidence obtained (but not on its derivative use), the Committee maintained its view that the provisions in question may appear to trespass unduly on personal rights and liberties and that it was for the Senate to weigh those considerations against the intended policy outcome of the Bill. (***Alert Digest No 4 of 2003***, 26 March 2003)

- Migration Legislation Amendment (Further Border Protection) Bill 2002 [No 2]: The Bill provides for the excision of certain islands from the Migration Zone under the *Migration Act 1958*. The Committee maintained its comment on a previous version of the Bill concerning its retrospective operation from 19 June 2002, likening this to 'legislation by press release' in assuming that both Houses of Parliament will accept and approve the bill without amendment. In its view, the provision may be considered to trespass unduly on personal rights and liberties. (***Alert Digest No 5 of 2003***, 14 May 2003)

- Private Health Insurance (Collapsed Organization) Bill 2003 and Private Health Insurance (Reinsurance Trust Fund Levy) Bill 2003: The Committee was concerned that the first Bill provided for the Minister to fix a levy by delegated legislation without reference to a cap or rate or formula for calculating it. It would normally expect one of these measures relating to delegated legislation. However, in view of the need for the Minister to take certain advice which had to be tabled in both Houses, and the provision for determination of the rate to be a disallowable instrument, the Committee made no further comment. In the case of the second Bill, the Committee sought the Minister's advice on the absence of Parliamentary scrutiny of principles involved in the determination of a levy, and the fact that the determination was not a disallowable instrument. (***Alert Digest No 5 of 2003***, 14 May 2003)

The Committee's *Alert Digests* and *Reports* are available from the Committee's website: http://www.aph.gov.au/senate/committee/scrutiny/index.htm

Creation of office of Inspector–General of Taxation

The Commonwealth has established a position of Inspector–General of Taxation to review systems established by the Australian Taxation Office to administer tax laws and systems established by tax laws to deal with administrative matters. The Inspector–General must consult at least once a year with the Ombudsman and the Auditor–General to assist in setting his or her work program. After completing a review, the Inspector–General must report to the Minister and a copy must be tabled in each House of the Parliament or otherwise made publicly available. There is detailed provision concerning the obtaining of information and its protection. (***Inspector–General of Taxation Act 2003*, Act No 28, 2003**, assented to on 15 April 2003)

Report on fee for review by Refugee Review Tribunal (RRT)

A report of the Australian Parliament's Joint Standing Committee on Migration has recommended that the provisions of Migration Regulation 4.31B relating to the fee payable by unsuccessful applicants to the RRT should remain in operation subject to a two-year sunset clause and a further review by the Committee. It also recommended that the fee be raised from $1,000 to $1,400 in line with the Migration Review Tribunal fee. Earlier reviews of the fee occurred in 1999 and 2001. The majority of the Committee considered there was no evidence that the fee discouraged bona fide applicants from pursuing an RRT review, and that there was evidence that without the fee the number of applications by those with no grounds for protection would be higher. The Committee recommended the provision of additional resources to enable the RRT to provide more expeditious hearings and finalisation of cases. Senator Bartlett, Leader of the Australian Democrats, submitted a dissenting report recommending that the regulation cease to apply after 30 June 2003. (**Joint Standing Committee on Migration, *2003 Review of Migration Regulation 4.31B***, 29 April 2003, available at the Committee's website: http://www.aph.gov.au/house/committee/mig/index.htm)

ALRC reports on civil and administrative penalties, and protection of human genetic information

The Australian Law Reform Commission (ALRC) has released its report on federal civil (court-imposed) and administrative penalties (eg for late payment of tax, social security breaches). The ALRC found that the current penalty schemes lack any real common structure, foundation or operational theory. Major recommendations include the enactment of a Regulatory Contraventions Statute to provide a set of principles, standards and processes applying to imposition of penalties, and improving the transparency of decision-making processes. (**ALRC Media release,** 19 March 2003; ***Prinicipled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95**, December 2002)

The ALRC's substantial report on the protection of human genetic information was released on 29 May 2003. It addresses many complex issues, including the need for amendment of discrimination laws, and of privacy laws in relation to human genetic material, and the protection of confidential genetic information and its limited disclosure to genetic relatives in some circumstances. The report recommends the establishment of a Human Genetics Commission of Australia. (**ALRC Media release**, 29 May 2003; ***Essentially Yours: The Protection of Human Genetic Information in Australia***, **ALRC Report 96**, May 2003)

Changes in methods of access to Commonwealth government publications

As part of new arrangements for distribution of Commonwealth publications announced by the government in the Budget, existing arrangements for distribution of publications will be supplemented by establishment through the National Office for the Information Economy (NOIE) of a panel of contractors for printing and distribution of agency publications and the development of a searchable central electronic register of government publications. Reflecting a marked reduction in sales, the Government Bookshop Network will be closed in October. NOIE will assist agencies to make publications available through a range of mechanisms including online and mail order, telephone sales and availability in other retail/specialist bookshops. (**Media release by Minister for Communications, Information Technology and the Arts**, 13 May 2003)

ACT review of complaints mechanisms

The ACT Chief Minister has announced a review of complaints mechanisms to be conducted by a team from the Foundation for Effective Markets and Governance (FEMAG) based at the ANU. The formal title of the review is Review of Statutory Oversight and Community Advocacy Agencies. The team will be led by Mr John Wood, a former Deputy Commonwealth Ombudsman and President of ACTCOSS. The Chief Minister will shortly release details of a comprehensive consultative process to be undertaken by the FEMAG team. Greens MLA Kerrie Tucker and ACTCOSS director Daniel Stubbs have commented on the need for wider community involvement. (**ACT Chief Minister, Media Release 182/03**, 18 May 2003; ***Canberra Times***, 22 May 2003, page 11)

Judicial review

All decisions mentioned may be accessed on the Australian Legal Information Institute (Austlii) website:
http://www.austlii.edu.au

Failure to correctly identify the 'particular social group' on which a claim for refugee status depended

By a majority of 4:1 (Gleeson CJ dissenting on the central question of fact), the High Court held that the Refugee Review Tribunal (RRT) had misunderstood and misstated the 'particular social group', membership of which formed the basis of the applicant's claim for refugee status under the *Convention on the Status of Refugees* (Refugees Convention). This was a mixed question of law and fact. The RRT had concluded that the applicant would not be persecuted by reason of being a businessman in Russia. In the majority's view the applicant's claim had clearly been based on membership of a group of 'entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals' (Gummow and Callinan JJ). Only after the relevant social group is correctly identified can a decision-maker properly decide the causal question of whether the applicant had a well-founded fear of persecution on the basis of membership of that group. The RRT's failure to address the case put to it was critical to the outcome of its review and constituted a breach of natural justice and a constructive failure to exercise jurisdiction.

The court granted discretionary relief to Mr Dranichnikov under section 75(v) of the Constitution, requiring the RRT to review the merits of the case according to law, rather than dealing first with his appeal from the Federal Court, as it normally would do. There was uncertainty whether he would be entitled to any remedy under the relevant but now repealed provisions of the *Migration Act 1958*, and there would have been a need to obtain special leave from the Full Federal Court for him to put his arguments. (***Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs***[1] **[2003] HCA 26**, **(2003) 197 ALR 389**, 8 May 2003)

High Court considering refugee claims of persecution on the basis of sexual orientation

On 8 April 2003 the High Court reserved its decision on two related appeals from the Federal Court in which the appellants are gay men from Bangladesh who were in a same-sex relationship in that country. Significant issues raised in the appeals include the appropriate definition in such a case of the 'particular social group' for the purposes of the Refugees Convention, and whether the RRT should have considered whether or not the need for a homosexual couple to live discreetly amounts to persecution. The alleged employment by the RRT of a 'doctrine of discretion' in such cases was canvassed in argument.. (***Appellant S395/2002*** **and** ***Appellant S396/2002 v MIMIA***; **see Catherine Dauvergne and Jenni Millbank, 'Before the High Court:** ***Applicants S396/2002 and S395/2002*****, a gay refugee couple from Bangladesh', (2003) 25** ***Sydney Law Review*** **97 [2003]** ***SydLRev*** **6,** available in electronic form from Austlii; and **High Court Bulletin – No. 4**, as at 16 May 2003; and see transcript of special leave hearing available through www.austlii.edu.au)

Impact in Federal Court of High Court decision about privative clauses in **Plaintiff S157/2002**

Following the High Court's decision in *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24 on privative clauses in the Migration Act (see discussion in (2003) 36 *AIAL Forum* 1 at 6–7), both successful and unsuccessful appeals continue in the Federal Court against decisions made on the basis of the decision of the Full Court in *NAAV of 2002 v MIMIA* (2002) 193 ALR 449 (discussed in (2002) 35 *AIAL Forum* 1 at 4–5). (Special leave to appeal to the High Court in a number of the *NAAV* decisions is being sought: see (2003) 37 *AIAL Forum* 20 at 32.)

At first the Federal Court developed two differing lines of authority in response to *S157/2002*. A narrow view of the use of 'jurisdictional error' in *S157/2002* was taken by Gyles J in *Lobo v*

MIMIA [2003] FCA 169, 6 March 2003. His Honour considered he was bound to follow *NAAV* (above) which he considered had only been overruled by the High Court in relation to procedural fairness, and could not grant relief because of s 474 of the Migration Act, despite the fact that failure of the Migration Review Tribunal to address the relevant statutory criteria would ordinarily amount to a constructive failure to exercise jurisdiction.

Despite *Lobo*, the trend in the Federal Court to adopt a broad view of the High Court's reference to 'jurisdictional error' is now orthodox. In *WADK v MIMIA* [2003] FCAFC 48, 18 February 2003, Hill J (with whom French and Marshall JJ agreed) clearly endorsed the broader view that the High Court in *S157/2002* had not needed to define the boundaries of jurisdictional error given its previous decisions in *Craig v South Australia* (1995) 184 CLR 163 and *MIMIA v Yusuf* (2001) 206 CLR 323. In *SBBG v MIMIA* [2003] FCAFC 121, 6 June 2003, the Full Court (Gray, von Doussa and Selway JJ – see also below), endorsed previous decisions of the Full Court and of single judges that the reasoning of the majority in *NAAV* was incorrect and no longer binding authority, and disapproved obiter views expressed by two judges in *Koulaxazov v MIMIA* [2003] FCAFC 75, 2 May 2003. (See also S*cargill v MIMIA* [2003] FCAFC 116, 3 June 2003.)

One significant issue yet to be definitively examined by the courts is the effect in the context of *S157/2002* of new provisions purporting to remove natural justice as a ground for review inserted by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth)(see (2003) 35 *AIAL Forum* at 2–3).[2]

Failure to address persecution claims of Mandaen asylum seekers

The applicants in *SBAS*, a family of Sabaean Mandaeans who had left Iran in 2001, claimed refugee status on many grounds alleging general persecution of Mandaeans in Iran as well as individual acts of persecution they, including the children of the family, had experienced there because of their religion. Justice Cooper found that the RRT had failed to address the claims of each of the applicants 'in all their aspects' as it was required to, and failed to apply the test of a well founded fear of persecution under the Refugees Convention. His Honour examined Australian and other authorities on the meaning of "persecution", including the statement of Gaudron J in *MIMA v Haji Ibrahim* (2000) 204 CLR 1 (at 6–7) that '… the notion of "persecution" includes sustained discriminatory conduct or a pattern of discriminatory conduct against individuals or a group of individuals who, as a matter of fact, are unable to protect themselves by resort to the law or by other means', when the persecution is for a Convention reason. The RRT had not approached the matter by assessing the actual harm feared by the family on the basis of their being Mandaeans and then determining whether it would constitute persecution under the Convention. The court directed the RRT, differently constituted, to hear and determine the application for review according to law and the court's reasons. The decision may have implications for a number of other similar RRT decisions. A case raising similar issues has been remitted by the Full Court to a single judge for hearing. (***SBAS v MIMIA* [2003] FCA 528**, 30 May 2003; ***SBBG v MIMIA* [2003] FCAFC 121**, 6 June 2003)

Full Federal Court upholds* Al Masri *decision to release detainee awaiting removal

A unanimous decision of the Full Court (Black CJ, Sundberg and Weinberg JJ) has resolved differences within the court on whether or not the *Migration Act 1958* (Cth), in particular sections 196 (detention) and 198 (removal), prevents release from detention of detained unlawful non–citizens (including unlawful asylum seekers) who request the Minister to remove them from Australia in circumstances where there is no real likelihood or prospect of their removal in the reasonably foreseeable future. Although it said such a conclusion would not be lightly reached, the court upheld the decision of Merckel J in those circumstances to grant an order in the nature of *habeas corpus* for Mr Al Masri's release. It was not possible to

conclude that Parliament had intended to abrogate the fundamental right to liberty – which extended to those unlawfully in Australia – for a period of potentially unlimited and possibly permanent duration. The Court was fortified in its conclusions by its view that its decision was consistent with persuasive overseas authorities, with international obligations prohibiting arbitrary detention, and with constitutional considerations relating to the scope of the aliens power. Without needing to decide the question, the Court had difficulty in accepting that detention without limit of a person who had sought removal could be regarded as reasonably appropriate and adapted to an end sufficiently linked to the aliens power.

Despite the successful removal of Mr Al Masri from Australia after the original decision, the Full Court had jurisdiction to hear the Minister's appeal because there was a disputed costs order relating to an issue of continuing importance. The Minister has indicated he will appeal to the High Court, and has introduced legislation that appears to reverse the effect of the Full Court's decision as well as the decision in *MIMIA v VFAD* (see (2002) 36 *AIAL Forum* at 9). Following the decision, Emmett J granted interlocutory orders for release on certain conditions of six applicants whom he had previously concluded were not entitled to such relief, pending the Minister seeking leave to reopen proceedings to present new evidence. (***MIMIA v Al Masri* [2003] FCAFC 70**, 15 April 2003; for background see (2003) 35 *AIAL Forum* at 6 and 36 *AIAL Forum* at 9; ***NAGA & ors v MIMIA* [2003] FCA 460**, 17 April 2003; in another decision, a detainee was released on the same basis although she had not exhausted her review rights: ***VKAC v MIMIA* [2003] FCA 483**, 19 May 2003, RD Nicholson J; **Migration Amendment (Duration of Detention) Bill 2003**, passed by the House of Representatives on 26 June 2003).

Whether removal to country of origin would constitute* refoulement *(return) under the Refugees Convention

The failure to incorporate the Refugees Convention into Australia's domestic law meant that, even assuming that the applicant's allegations of fact as to his being a refugee would be established, s 198(6) of the Migration Act, providing for removal as soon as is reasonably practicable of an 'unlawful non-citizen' whose application for a visa has been refused and finally determined, was not subject to the *non-refoulement* (non-return) provisions of Article 33 of the Refugees Convention. ((***Applicant M38/2002 v MIMIA* [2003] FCA 458**, 15 May 2003)

Requirement of procedural fairness before exercise of discretion to disclose sensitive information to an applicant

In *NAFQ* the court accepted the Minister's claim of public interest immunity for documents that had been provided to the RRT under s 438 of the Migration Act. However, Moore J also held that there had been a denial of procedural fairness where the RRT, before exercising its discretion under s 438(3)(b) to disclose documents or information to the applicant or withhold them, had not given the applicant the opportunity to comment on Departmental advice about the significance of the documents (see ss 438(2)(a) and (b)). The RRT, in reviewing the refusal of refugee status, had a clear statutory mandate to have regard to the documents obtained from the Chinese authorities without disclosing them to the applicant, but that made it more significant for the applicant to have an opportunity to be heard first. An absence of procedural fairness constitutes an excess of jurisdiction which founds a writ of prohibition (cf Ryan J in *VBAC v Minister for Immigration and Indigenous Affairs* [2003] FCA 205, 17 March 2003), but in appropriate cases there might still be discretionary considerations for refusing relief. (***NAFQ v MIMIA* [2003] FCA 473,** 16 May 2002)

Discretion to refuse judicial review in view of availability of AAT review

The applicant, Ms McGowan, sought review of a decision by the Migration Agents Registration Board (the Board) to suspend her until she met certain conditions, and had also lodged an application with the Administrative Appeals Tribunal (AAT) shortly beforehand. Branson J exercised the court's discretion, both in relation to its jurisdiction to give relief under s 39B of the *Judiciary Act 1903* (Cth) and under s 10(2)(b)(ii) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), to decline to consider the application on the basis that there was an adequate alternative right of full merits review by the AAT. The respondent had indicated early in the proceedings that it would seek such an order and the proceedings were not well advanced. For the court to consider the application for judicial review could potentially result in further appeals to both the AAT and the court. (***McGowan v Migration Agents Registration Authority*** **[2003] FCA 482**, 20 May 2003)

Ministerial directions to ATSIC upheld

The Federal Court (Hely J) has upheld the legality of directions, concerning making grants to bodies where there may be a conflict of interest, given by the Minister to the Aboriginal and Torres Strait Islander Commission under s 12 of the *Aboriginal and Torres Strait Islander Commission Act 1989*. (***National Aboriginal and Torres Strait Islander Legal Services Secretariat v MIMIA*** **[2003] FCA 287**, 3 April 2003)

Administrative review and tribunals

Tasmanian review of administrative appeal processes

In December 2002, the Tasmanian State Service Commissioner released an Issues Paper on review of administrative appeal processes, for comment by 14 February 2003. The review is to make recommendations on the processes for effective review of administrative decision-making in Tasmania and the linkages that should exist between relevant agencies. Among the issues raised are opportunities for reduction of duplication, standardising arrangements for public access, common approaches to vexatious complaints and/or a 'public good' test for acceptance of cases, common mediation approaches, and administrative support and resourcing arrangements. (**State Service Commissioner,** ***Review of Administrative Appeal Processes: Issues Paper***, December 2002, available on the following website or from the office of the State Service Commissioner: http://www.ossc.tas.gov.au/issues/issues%20paper.pdf)

Ombudsman

European Ombudsman retires

The first European Ombudsman, Mr Jacob Soderman, appointed in 1995, retired on 31 March 2003. In January 2003 the European Parliament elected his successor, Dr Nikiforos Diamandouros, previously the first National Ombudsman of Greece (1998–2003). Mr Soderman's annual report for 2002 throws light on the development of the office of European Ombudsman. Since 1995 the Ombudsman has dealt with close to 12,000 complaints and opened over 1,500 investigations. Complaints exceeded 2,000 for the first time in 2002, an increase of 8% over the previous year; 92% were from individual citizens. Over 25% of complaints resulted in some benefit for the complainant. The major areas of complaint include lack or refusal of information, avoidable delay, unfairness, procedural errors and negligence; problems with calls for tenders for EU institutions were frequent. In 2002 Mr Soderman placed pressure on EU institutions to implement the Charter of Fundamental Rights, with some success, and sought in a variety of ways to increase public awareness of the right to complain to the Ombudsman. An opinion poll in 2002 showed that 87% of

European citizens were aware of their right to do so. The Ombudsman's website contains a comprehensive collection of material concerning the work of the office, including copies of decisions. (Source: **The European Ombudsman, Press Release No. 6/2003**, 24 March 2003; the website is at:
http://www.euro-ombudsman.eu.int/)

Freedom of information & privacy

Amendments to FOI Act to protect information relating to pornography sites and taxation matters

The Communications Legislation Amendment Bill (No. 1) 2002 will amend Part II of Schedule 2 to the *Freedom of Information Act 1982* (FOI Act) to exempt the Australian Broadcasting Authority (ABA), the Classification Board, the Classification Review Board and the Office of Film and Literature Classification in relation to documents containing offensive content copied from the Internet by the ABA pursuant to the scheme in Schedule 5 to the *Broadcasting Services Act 1992*, or containing information about how to access such material, eg the name of an Internet site, an IP address, a URL, a password or the name of a newsgroup. (Note also the AAT's decision that IP addresses and URLs in the possession of the ABA were exempt under section 40(1)(d) of the FOI Act: *Re Electronic Frontiers Australia Inc and Australian Broadcasting Authority* [2002] AATA 449, 12 June 2002.)

Information and documents protected by the secrecy provision in section 37 of the *Inspector–General of Taxation Act 2003* (see above under 'Government initiatives etc') have been made exempt under section 38 of the FOI Act by amendment to Schedule 3 of that Act.

Federal Privacy Commissioner's guidance on publicly available personal information

The Privacy Commissioner has published a new information sheet concerning privacy and publicly available personal information. This is a new and complex area for private sector firms, and the Privacy Commissioner's guidance should be of considerable assistance to them as well as being relevant to Commonwealth Government agencies. (**Information Sheet 17 – 2003*, Privacy and personal information that is publicly available***, February 2003; see website:
http://www.privacy.gov.au/publications/index.html)

Western Australian proposals for new privacy laws

The Western Australian Attorney–General, Mr Jim McGinty, has released draft proposals for introduction of privacy legislation that would apply to State and local government agencies and private contractors doing government work, and would extend to the private sector in relation to health information. The legislation would be contained in a distinct 'Privacy and Personal Information Act', and not be combined with any other legislation such as the WA FOI or State Records Acts. It would incorporate a set of Information Privacy Principles similar to those in other jurisdictions but adapted where necessary. Some kinds of personal information, known as 'sensitive information', would be subject to special restrictions. The proposals include expanding the present office of Information Commissioner, currently with FOI responsibilities only, into a State Privacy and Information Commissioner, with power to investigate and deal with complaints about interferences with the privacy of individuals. The proposed State Administrative Tribunal (see (2002) 35 *AIAL Forum* at 1–2) would be able to review compensation determinations and award damages up to $40,000. Submissions are due by 30 June 2003, and may be made to the Privacy Working Group in the Office of the Attorney–General or emailed to: jim–mcginty@dpc.wa.gov.au with subject heading: ATT: PRIVACY WORKING GROUP. (**Office of the Attorney–General for Western Australia,**

Privacy Legislation for Western Australia: Discussion Paper **and** ***Policy Research Paper***, May 2003, available from the link at:
http://www.ministers.wa.gov.au)

Queensland Parliamentary report on the use of 'commercial-in-confidence' in relation to contracts

The Public Accounts Committee of the Queensland Parliament has produced a useful report on 'commercial-in-confidence' arrangements in relation to contracts. This is the latest in a long line of reports and statements in many Australian jurisdictions dealing with similar issues. The report recognises that commercial-in-confidence clauses are frequently applied to material that is neither confidential nor likely to damage commercial interests if disclosed. It recommends that the Premier and Minister for Trade direct all public bodies to develop and adopt guidelines consistent with a set of principles set out by the Committee, including the broad principles that 'information should be made public unless there is a justifiable legal or commercial reason why it should not be' and that the 'information needs for public accountability and public interest should take precedence', and the need to specifically identify commercial-in-confidence information. It should not be necessary for taxpayers to rely on FOI provisions to scrutinise government financial management, the report says. In the Queensland context it is also necessary to find a way of removing a final contract approved by Cabinet from the Cabinet exemption in the FOI Act and instead applying a commercial-in-confidence regime consistent with the stated principles. (**Queensland Legislative Assembly, Public Accounts Committee,** ***Commercial-in-confidence arrangements*****, Report No 61**, November 2002)

Other developments

Recent Parliamentary Library papers on East Timorese asylum seekers and on the power to deport

Two recent Current Issues Briefs issued by the Commonwealth Parliamentary Library shed considerable light on two complex interconnected issues relating to deportation or acceptance of people or groups of people who do not currently have a right to remain in Australia despite strong community ties. (***The East Timorese Asylum Seekers: Legal Issues and Policy Implications Ten Years On*****, Current Issues Brief No 17 2002–03 (18 March 2003), and** ***The High Court and Deportation Under the Australian Constitution*****, Current Issues Brief No 26 2002–03 (15 April 2003), Information and Research Services, Commonwealth Parliamentary Library.** Current Issues Briefs are available from:
http://www.aph.gov.au/library/pubs/CIB/index.htm)

Updated chronology of changes in the Australian Public Service

The Commonwealth Parliamentary Library has updated its chronology of changes in the Australian Public Service (APS) since 1975, including tables of parliamentary publications related to the APS. (***Changes in the Australian Public Service 1975–2003*****, Chronology No 1 2002–3 (2 June 2003), published by the Information and Research Services, Commonwealth Parliamentary Library;** the chronology is available at the following website:
http://www.aph.gov.au/library/pubs/chron/2002-03/03chr01.pdf)

UK Parliament considers curbs on ministerial advisers – similar issues raised in Australia

The Public Administration Committee of the UK Parliament has drawn up a draft Civil Service Act which among other things would curb the numbers and powers of special ministerial advisers. They would be subject to rules designed to prevent abuse and provide for a duty to act with integrity and honesty. A separate order regulating their conduct would prevent them bullying civil servants and trying to make them break their duty to be impartial. They would no longer have the power to give orders to Whitehall civil servants. The proposal, still to be considered by the government, arose out of the 'Jo Moore affair' in which Ms Moore, a special adviser in the Department of Transport, told civil servants to take advantage of 11 September 2001 to 'bury bad news'. (***The Independent***, 27 May 2003)

Similar issues of accountability of ministerial staff were raised by Professor Patrick Weller in a recent Occasional Senate Lecture, and are part of the inquiry by the Senate Finance and Public Administration References Committee into the *Members of Parliament (Staff) Act 1984*, submissions for which closed on 23 May 2003. (***Canberra Times***, 31 May 2003; **Professor Patrick Weller, 'The Australian Public Service: Still Anonymous, Neutral and a Career Service?'**, delivered on 30 May 2003, which is expected to become available from website:
http://www.aph.gov.au/Senate/pubs/occa_lect/index.htm)

See also Professor Meredith Edwards 'Ministerial Advisers and the Search for Accountability' (2002) 34 *AIAL Forum* 1 and David Williams 'Commentary on Meredith Edwards' Paper' (2002) 34 *AIAL Forum* 7.

Endnotes

1 Hereafter the Minister's current title is referred to in case names by the initials 'MIMIA'.
2 See generally Dr Caron Beaton–Wells, 'Restoring the Rule of Law – Plaintiff S157/2002 v Commonwealth of Australia', (2003) *10 AJ Admin L* 125, and the papers by Duncan Kerr and David Bennett in (2003) 37 *AIAL Forum* at 1 and 20.