CONFIDENTIAL.

Submission of the Federation of Community Legal Centres (Victoria) Inc

Senate Legal and Constitutional Legislation Committee
Inquiry into the Administrative Decisions (Effect of International Instruments) Bill 1997

August 1997

Contents

NOTE: **This submission is subject to ratification at the next General Meeting of the Federation.**

WHAT IS THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC.

The Federation of Community Legal Centres (Vic) Inc ("the Federation") is the peak organisation for 41 legal centres around the State of Victoria. Accordingly the Federation reflects a wide community perspective.

Community legal centres include both specialist and generalist centres. Specialist centres exist for areas including women, disability, mental health, employment issues, immigration, refugees, the environment and welfare rights. Centres are assisted by many dedicated volunteers from both legal and non-legal backgrounds. Centre staff can range from lawyers to financial counsellors, youth workers, social workers and other professionals. Centres are also linked to many other community organisations who both refer and are referred clients.

The philosophy behind community legal centres is not merely to provide straight-forward legal advice, but to empower people so that they can also find ways of resolving their own problems in the future. Overwhelmingly, the people who use community legal centres are on low incomes. Most receive some form of pension or benefit. A considerable, albeit declining, percentage are employed. These people in particular are, for the most part, ineligible for legal aid, but are not in a position to pay a private legal practitioner. Community Legal Centres are particularly successful in meeting the needs of persons from non-English speaking backgrounds. In summary, community legal centres work with people who, but for the assistance of the centres, would have extremely limited access to justice.

Centres are dedicated to a preventative approach in solving client's problems and are actively involved in community education and law reform. Community Legal Centres believe that issues which present continual problems and/or reflect anomalies in the law and legal practice are most effectively addressed through reform of the relevant systems.

In the light of the above the Federation is in a position to raise valid concerns about the operation of legislation in practice and in particular the effect of such legislation on disadvantaged people.

THE TEOH CASE

The Administrative Decisions (Effect of International Instruments) Bill 1997 ("the Bill") is referred to by the Government as a response to the decision in *Minister for Immigration and Ethnic Affairs v. Teoh* ("the Teoh Case")[1]. It is therefore important to bear in mind the factual circumstances that gave rise to the *Teoh* decision.

Mr Teoh was a Malaysian citizen who had entered Australia on a temporary entry permit. He married an Australian citizen, Ms Lim. Ms Lim had four children. Thereafter, Mr Teoh and Ms Lim had three more children. Mr Teoh applied for a permanent entry permit, however, whilst

---

[1] Second reading speech - Mr Williams QC Attorney-General and Minister for Justice P5435 Wednesday 18 June 1997.

his application was being considered he was convicted of importing heroin and his application was denied by a Minister's delegate on the grounds that he failed to meet the character requirement.

After a failed review by the Immigration Review Panel Mr Teoh applied to the Federal Court for a review of the decision. Mr Teoh was unsuccessful at first instance but successful in his appeal to the Full Court of the Federal Court. During the hearing in the Full Court of the Federal Court the issue the effect of the decision on the children. Mr Teoh's wife had a heroin addiction (the reason for the importation by Mr Teoh for which he had been convicted) . The decision of the Commonwealth would have resulted in the break up of the family, leaving the children without a possible breadwinner/father and placing them in a precarious position. Justices Lee and Carr noted that Australia was a party to the Convention on the Rights of the Child and that this Convention required that in any action concerning children the interests of the child shall be the primary consideration. It was held that the Government's ratification of the Convention created a "legitimate expectation" that in terms of a decision by a Commonwealth decision-maker the best interest of the children a primary consideration.

The Minister appealed to the High Court and lost. The majority decision of the High Court held that where a convention is ratified it gives rise to a "legitimate expectation" by individuals that the Executive will, in exercising their discretion, *take into account* the provisions of the relevant convention/s it had itself ratified. If the decision-maker proposes to make a decision inconsistent with the legitimate expectation, procedural fairness requires that the person so affected should be notified and given an opportunity to be heard on that point.[2]

WHAT WAS THE EFFECT OF THE TEOH DECISION?

Legitimate Expectation

The purpose of the doctrine of 'Legitimate Expectation' in administrative law is to provide procedural fairness.

Prior to *Teoh* the doctrine of legitimate expectation meant that when the Government published a policy, or made a representation about how it would proceed in making certain types of administrative decisions, an affected person had to be given the opportunity of a hearing if the decision-maker decided to act in a manner which is contrary to the policy or other representation.[3]

---

2 Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353, per Mason CJ and Deane J at 365; Toohey J at 371-2; and Gaudron J at 375-6

3 Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648; Attorney-General of Hong Kong v Ng Yuen Shiu (1983) 2 AC 629 as reported in "Minister for Immigration and Ethnic Affairs v Teoh", Ms A Twomey, Vol 23 No 2 Federal Law Review.

The *Teoh* decision

The question in *Teoh* was whether a ratified treaty operated in the same manner as a published policy or representation. The High Court answered this question in the affirmative. Mason CJ and Deane J noted the special status of ratified treaties:

> **"Ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention..."**[4]

It is interesting to note that the High Court is not alone in this view of the special status of ratified treaties. The New Zealand Court of Appeal stated that an argument that the New Zealand Government was entitled to ignore ratified treaties was "an unattractive argument" which implied that New Zealand's ratification of such treaties had been "partly window-dressing".[5]

The Federation views that the *Teoh* decision was a minimal and natural extension of existing administrative law. The decision sought to enhance the procedural rights of those affected enabling them, in certain circumstances, to have a say about decisions that impacts on their lives.

WHAT *TEOH* DID NOT DO

The decision in *Teoh* did not change the position that treaties are not directly incorporated into domestic law until the have been implemented by legislation. The decision provided:

> **"It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute...So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law."**[6]

---

4 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 365.

5 *Tavita v Minister for Immigration* (1994) 2 NZLR 257 at 266

6 (1995) 128 ALR 353 per Mason CJ and Deane J at 361-2; per Toohey J at 370 and per Gaudron J at 375.

Accordingly the statement in the General Outline to the Bill's Explanatory Memorandum is misplaced in that it states ***"The Government is of the view that this development is not consistent with the proper role of Parliament in implementing treaties in Australian law. Under the Australian Constitution, the Executive Government has the power to make Australia a party to a treaty. It is for Australian parliaments, however, to change Australian law to implement treaty obligations."*** It is clear that *Teoh* does not interfere with the proper role of Parliament in implementing treaties in Australian domestic law.

The *Teoh* decision does not interfere with the discretion of the decision- maker. The decision maker is not bound by the terms of the relevant convention. The decision maker is only required consider the terms of the convention. If the decision maker is going to make a decision that is inconsistent with the convention, the decision maker must notify the persons affected and give them an opportunity to be heard on that point.

IS IT THE EXECUTIVE OR THE PARLIAMENT THAT MAKES THE LAWS OF AUSTRALIA?

The preamble to the Bill provides:

> **"However, international instruments by which Australia is bound or to which Australia is a party do not form part of Australian law, unless those instruments have been validly incorporated into Australian law by legislation."**

This statement leaves the impression that it is only Acts of Parliament or regulations passed pursuant to Acts of Parliament influence decision makers in the exercise of their power to make decisions. There are, however, a multitude of departmental guidelines, policy positions and procedural protocols that have not been tabled in Parliament but which nevertheless must be considered by decision makers and may provide an opportunity to be heard.

One advantage of international instruments are that access to them is often easier than to bureaucratic guidelines, policies and protocols. Accessibility to information about rights is crucial in a world of increasing complexity. This is particularly true for persons seeking to rely on international treaties when they are not under the umbrella of domestic legislative protection.

WHAT ARE THE BENEFITS OF THE *TEOH* DECISION?

Decision making "Best Practice"

The Federation regards that *Teoh* has provided an opportunity to significantly improve the quality of administrative decision making in Australia. Such an improvement can be achieved:

- By enhancing the concept of procedural fairness in decision making processes and thus increasing accountability.

- By increasing the body of information available to the decision maker. In any decision

making process it is well established that the quality of the decision will depend upon the information on which it was based. In this regard, turning to the facts of *Teoh*, questions that consider:

- what would have been the quality of the decision if the interests of the 7 children not been, at least, considered?

- what would have been the implications for the lives of those children and the flow on effects for the community?

The Federation view that it is in the public interest for decision makers to have all important facts before them to assist in the decision making process.

- By ensuring that decision-makers *consider* international best practice through referring Australia's international obligations when making decisions. In this regard it is important to note that these are obligations that Australia has entered into voluntarily and obligations that Australia expects other signatories to observe. The Federation views that it is in the public interest that there be compliance with the minimal requirement provided for by *Teoh*. Such consideration should not pose a difficulty given that Governments stated commitment to our international convention obligations. In this regard the Federation notes that the Preamble of the Bill states ***"Australia is fully committed to observing its obligations under international instruments"***

Putting fairness into Government decision-making

The effect of *Teoh* is to provide, in certain circumstances, an opportunity for persons to be heard with respect to decisions of bureaucracy that impact upon their lives. The Federation views that the concept of 'procedural fairness' is an integral part of a civilised and democratic society. It exists to ensure that persons and bodies that are vested with the power to make decisions affecting the lives of others do not do so without fully considering the implications of their decisions. In certain circumstances, it provides citizens with a right to put their views and play a role in the decision making process.

The Federation is of the view that the concept of procedural fairness should not be discarded or limited for the sake of convenience or to 'streamline' bureaucratic administrative processes.

Certainty

The preamble to the Bill provides:

> **"...There is a need for certainty in making administrative decisions. Uncertainty is created by allowing decisions to be challenged on the ground that decision makers did not properly give effect to such legitimate expectations."**

The Federation views that any uncertainty created by the existence of a right to review is minimal when compared with the uncertainty of administrative decision making generally.

It is clear that Australia is quickly losing credibility with respect to human rights matters. Not only does this have consequences for the rights of our citizens and our standing internationally, it also curtails Australia's capacity to influence other developing countries with respect to such issues.

PERCEIVED DIFFICULTIES WITH THE IMPLEMENTATION OF *TEOH*

Apart from the issue of uncertainty (dealt with above) the other difficulty that is touted is the alleged burden that *Teoh* will impose on decision makers. This argument is not capable of substantiation. Whilst Australia is a signatory to some 920 treaties these treaties are distinct in their terms and accordingly, each decision maker would only have to be aware of the handful of treaties that effect the area with which the decision maker is dealing. Furthermore, it is clear that a wide range of executive policies and guidelines has to be taken into account by decision makers even before the *Teoh* decision. The *Teoh* decision provides a minimal extension.

Instead of limiting procedural fairness rights as conferred by the *Teoh* decision to avoid mere inconvenience, the Federation views that it would be a more appropriate and responsible response to utilise *Teoh* as an opportunity to improve decision making processes by:

- The development of management information systems to support decision makers in the decision making process. Such systems could include information in relation to the handful of relevant treaties relevant to the decision concerned, together with details of the relevant government policies, procedures and protocols.

- Training of decision makers with respect to such international obligations.

The Federation views that such an approach would not only assist the handling of issues surrounding the *Teoh* decisions but assist in, and raise the quality of, the decision making process generally.

CONCLUSION

The Federation supports statements by Mason CJ and Deane J. in *Teoh* that **"Judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian Law"**. However, the importance of Australia adhering to its commitments even though they have not been implemented into domestic law should not be undermined. In this regard the Federation also supports the comments by Mason CJ and Deane J. in *Teoh* that the entry into an international obligation is not **"a mere platitudinous or ineffectual act"** but is a **"positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention or treaty."**

Our international obligations often deal with issues that assist the disadvantaged and vulnerable in our society. These are also groups that are marginalised and therefore the least likely to be heard. The Federation views that it is in the public interest that decision makers take care not to trample the rights of such people. Whilst *Teoh* does not operate to protect such substantive rights, it at least provides persons who may be adversely affected by a decision with an opportunity if their rights are to be breached.

The Federation views that the purported negative effects of *Teoh* are overstated and the Bill is therefore an over reaction that places administrative convenience before the rights of people.

The Federation views that the effects of the *Teoh* decision are positive. Such positive effects include the opportunity to improve the quality of administrative decision making, the provision of a greater degree of fairness to those affected and the upholding Australia's commitment to the international instruments to which we are a party.

The Federation strongly recommends that the Bill not proceed.