YOUTH AFFAIRS

Children get a look in

The Australian High Court in its decision in *Teoh*[1] gave much needed support for the United Nations Convention on the Rights of the Child (CROC) which was in danger of becoming a hollow mission statement.

The issue was whether the Convention rights of the six children for whom Mr Teoh, a Malaysian overstayer, had responsibility were a factor that the Department of Immigration had to take into account in deciding whether to grant his application for permanent residency in Australia. He had been convicted of heroin offences and had been sentenced to six years imprisonment. His application for residency had been refused because he was not of good character. After various reviews and appeals, the case came before the High Court of Australia.

The majority accepted that the principles of CROC were not part of Australian domestic law but they refused to accept that CROC had no legally binding affect. The Chief Justice rejected the argument by the Minister that the provisions of an international treaty did not have to be considered if they were not incorporated in Australian law and insisted that:

> ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act . . . 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.

The majority applied the doctrine of 'legitimate expectation' which had developed as part of the common law doctrine of natural justice. In their judgment anyone affected by an administrative decision has a legitimate expectation that the decision will not bring Australia into breach of its obligations under CROC. There is a corresponding obligation on government decision makers to consider the principles of CROC in reaching their decision.

Interestingly, Gaudron J expressed the view that legal effect for CROC could be drawn from common law rights enjoyed by the six children as Australian citizens. Citizenship, in her view:

> . . . carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare . . .

Rick Snell has argued ((1995) 20(3) *Alt.LJ* 136) that the dissenting opinion of McHugh J in *Teoh* is to be preferred. Snell sees the doctrine of legitimate expectation as being an outdated concept in Australian adminstrative law since *Kioa v West* (1985) 159 CLR 550 but seems to overlook *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 in which the High Court (including McHugh J) accepted that a domestic policy statement creates legitimate expectations. Snell sees *Teoh* as putting decision makers in the difficult position of facing an 'amber light' and having to 'look left, right then take a punt that there is no applicable Convention hanging around'. Snell's argument is as confused as the mixture of metaphors in which it is couched. Decision makers already are required to take into account official departmental policies. While there may be more than 900 international conventions to which Australia is a party, the reality is that only a very few of these will impinge upon any particular area of decision making. Government departments are quite capable of acquainting decision makers with relevant international human rights instruments through departmental manuals or policy documents. While it is well settled that a decision maker cannot be required to apply the principles of an international convention unless they are incorporated into domestic law, the fact of ratification is an undertaking that the Executive Government intends to comply with these principles. In the case of CROC the Government by Article 4 agreed to 'to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the . . . Convention'.

The *Teoh* decision was greeted with enthusiasm by the youth sector which was becoming increasingly sceptical of the Commonwealth Government's commitment to CROC.

. . . then the door is slammed in their faces

Any squeals of delight were quickly silenced when the the Attorney-General and the Minister of Foreign Affairs released a joint statement on 10 May 1995 making the assertion that:

> Entering into an international treaty is not reason for raising any expectation that government decision makers will act in accordance with the treaty if the relevant provisions of the treaty have not been enacted into domestic Australian law.

This statement was followed by the introduction into the House of Representatives of the *Administrative Decisions (Effect of International Instruments) Bill 1995*. Clause 5 of the Bill states:

> The fact that Australia is bound by, or a party to, a particular international instrument, or that an enactment reproduces or refers to a particular international instrument does not give rise to a legitimate expectation on the part of any person that . . . an administrative decision will be made in conformity with the requirements of that instrument . . .

The Bill is not restricted to decisions made by Commonwealth decision makers. The definition of administrative decision in clause 4 makes it clear that State and Territory governments are also relieved from considering the principles of CROC when making decisions affecting children.

By reversing the effect of *Teoh*, the Government seems to be admitting that ratifying CROC was 'a platitudinous and ineffectual act' and making a clear statement that it only intends to honour Convention obligations when it suits. Even more disturbing, the Commonwealth is pressing forward with legislation which frees State and Territory governments from any obligation to children they may have under CROC. At the Sydney hearing of the Senate Legal and Constitutional Legislation Committee every agency that made submissions was opposed to the Bill.

The Bill has the support of both major Parties and was supported by the Senate Committee with dissent from the Democrat and Green members. It is likely to be passed into law. Australian children are likely to see this as gross hypocrisy and betrayal.

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Reference

1. *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* High Court of Australia (Mason CJ, Deane, Toohey, Gaudron JJ, McHugh JJ dissenting) 7 April 1995.