DownUnderAllOver

A regular column of developments around the country

Federal Developments

STATEMENT ON TEOH

The Commonwealth Government has issued a statement designed to counter the effect of the *Teoh* case *(Minister for Immigration & Ethnic Affairs v Teoh* (1995) 128 ALR 353). In that case, the High Court endorsed the long-standing principle that international treaties ratified by Australia do not become part of Australian law unless implemented by domestic legislation. However, the Court held that the act of ratification gives individuals a legitimate expectation, for administrative law purposes, that government decision makers will act in accordance with the treaty. The Court also said that such a legitimate expectation would not arise if there was statutory or executive indication to the contrary.

The previous Government issued a statement to the effect that entry into an international treaty, in the absence of implementing legislation, gave no grounds for any expectation that decision makers would apply the treaty (Joint Statement by the Minister for Foreign Affairs and Trade, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, 10 May 1995). The Government also introduced *the Administrative Decisions (Effect of International Instruments) Bill 1995* to override the *Teoh* decision, but the legislation lapsed when Parliament was prorogued for the 1996 election. There has been some speculation that, as a result, the previous Government's Statement will not be taken into account by the courts in future cases (see Bill Taylor MP, Chairman Parliamentary Joint Standing Committee on Treaties, 'Trick or Treaty — An Australian Perspective', Conference Paper, Internationalising Communities Conference, 28 November 1996).

Now the current Government has made its position clear on the subject, in effect repeating the actions of the previous Government. The Attorney-General and the Minister for Foreign Affairs have jointly stated that the executive act of entering into a treaty does not give rise to legitimate expectations in administrative law (Joint Statement by the Minister for Foreign Affairs and Trade, Alexander Downer, and the Attorney-General, Daryl Williams, 25 February 1997). The Government also foreshadowed that it will introduce legislation to reinforce that position.

WILL AUSTRALIA DENOUNCE THE OPTIONAL PROTOCOL TO THE ICCPR ?

The United Nations Human Rights Committee is soon to hand down a decision on a complaint that Australia has breached Article 9 of the International Covenant on Civil and Political Rights (the ICCPR) by arbitrarily detaining an asylum seeker in Port Headland for over four years.

George Lombard reported in the *Canberra Times* on Wednesday, 26 February 1997 that the Federal Government is getting nervous about the impending decision. Entitled 'We mustn't spit the dummy', Lombard speculates that if the Human Rights Committee finds Australia in breach of Article 9 of the ICCPR, the backlash will be worse than that experienced in the wake of the Tasmanian gay rights case.

Lombard suggests that many human rights lawyers and academics are concerned that the Federal Government will denounce the Optional Protocol to the ICCPR. He speculates that moves are already afoot to do just that. If the Optional protocol is denounced, individuals who have exhausted all available domestic renmedies would no longer be able to lodge complaints with the United Nations Human Rights Committee relating to violation of rights under the ICCPR. There is concern that Australia's reputation in the international community will be seriously damaged, especially given that no other state has pulled out of the Protocol procedure. ● SM

ACT

DISCRIMINATION LAW AND MACHINERY CHANGES

In December 1996 there were substantial changes to both the *Discrimination Act 1991* (ACT) and the machinery for handling discrimination complaints in the ACT.

The agreement whereby the Commonwealth and the ACT had jointly delivered anti-discrimination services came to an end, and the Commonwealth closed its HREOC Office in Canberra. This means that complaints under Commonwealth laws, or against Commonwealth Departments and Agencies, must now be handled through the HREOC Sydney office.

The ACT Government established a stand-alone Human Rights Office, headed by a new Commissioner, Rosemary Follet. At the same time, the *Discrimination Act 1991* was amended in the Legislative Assembly, the major changes being:

- The Commissioner no longer has a determinative role. Her main tasks are to investigate and to attempt to conciliate complaints, to refer matters to the Discrimination Tribunal, and to conduct community education on discrimination matters.

- The complaint handling process is now separated into four stages:
Lodgment — a complaint must be in writing on the prescribed form.
Investigation — the Commissioner has 60 days in which to investigate a complaint and to decide whether to decline to take further action, or to proceed to conciliation.
Conciliation — this is still a confidential process, but the parties are to produce a written agreement on the outcome, with the assistance of the Commissioner.
Hearing — a new body, the Discrimination Tribunal, has been established and is presided over by a magistrate. Hearings of the Tribunal are to be relatively informal and there is currently no fee for lodging a matter. The Commissioner refers matters to the Tribunal largely at the request of the complainant — where, for instance the complainant disagrees with the decision of the Commissioner, or where a complaint cannot be conciliated, or where a conciliated agreement has been breached.

- The Commissioner can now initiate investigations into matters which have not been the subject of a complaint.

The contact details for the ACT Human Rights Office are: 06 207 0585

(telephone), 06 207 0587 (fax), email: Rosemary_Follet@dpa.act.gov.au
● **BC and SM**

Northern Territory

ATSIC VICTIMS

ATSIC has made a decision to cease funding the largest homeless youths accommodation centre, Aranda House, in Alice Springs, by ceasing its Community and Youth Support funding program late last year.

Aranda House provides accommodation for up to 15 homeless young people a night and acts as bail house for youths who are from bush communities and get stuck in town. Aranda House also conducts youth patrols on Alice Springs streets at night, encouraging bored young people to go home, or go to the House and relax with TV and games.

Recently Aranda House ceased its youth patrol for three weeks to demonstrate the chaotic effect of their absence. Shop keepers, who did not hesitate to contribute to a media beat up of street violence, were then asked to contribute to the House. No replies were received. Healthy community attitude? No.

The Department of Correctional Services has proposed providing half the funding Aranda House needs and turning it into a remand home. The future of the rest of Aranda House, which is youth accommodation, remains uncertain.

Also directly and drastically affected by ATSIC's decision is the Nganyatjarra, Pitjantjatjara and Yankunytjatjarra Women's Council. NPY runs a variety of social services including disabled and aged peoples care and advocacy, and domestic violence victims support and advocacy. They have lost 75% of their operational budget. Nice one ATSIC.

THOU SHALT NOT REFRAIN FROM DRINKING

The Northern Territory's *Liquor Act* empowers the Liquor Commission, at the request of a community, to declare areas onto which it is prohibited to bring or consume alcohol. In recent years numerous Aboriginal communities have obtained such declarations. Now, however, Chief Minister Shane Stone has announced that he has '... come to the view that perhaps communities should not be permitted to by dry'.

This apparently stems from a perception that urban alcohol problems are caused by an invasion of bush drinkers bingeing in Territory towns. This is despite that fact that police statistics indicate only a small minority of people arrested in Alice Springs for alcohol-related matters are from out of town. Community groups have condemned Stones's proposals as an attack on self-determination. ● **RM**

Queensland

Yes, Queensland has it all; Pauline Hanson describing High Court judges as 'trendy lefties', Police Commissioner Jim O'Sullivan not wanting to speculate on whether 'God' exists and corrupt police officers telling us that Daffy Duck is really made of LSD.

COMPENSATION TO MINER FOR SEXUAL HARASSMENT

In 1992, Narelle Hopper was one of the first women to be employed as an apprentice diesel fitter with Mount Isa Mines (MIM). From October 1992, Hopper encountered problems with fellow workers and ultimately complained to the Anti-Discrimination Tribunal that she had been subjected to persistent sexual harassment and discrimination. The Tribunal has now awarded Narelle Hopper $48,724 in damages as well as finding that MIM had failed to take reasonable steps before April 1994 to prevent workers contravening anti-discrimination legislation. Hopper stated: 'The company's policy against sexual harassment was really good, but it never went below middle management'.

EXTENSION OF DOMESTIC VIOLENCE PROTECTION

State Cabinet is shortly to consider draft legislation which would extend existing domestic violence laws to include non-spouse relationships. Children aged 12 and older would be able to seek protection orders against abusive parents. Same sex relationships, parents living with their children and unmarried heterosexual couples would all be covered by the draft legislation.

LESBIAN ACCESS TO ARTIFICIAL INSEMINATION

The Anti-Discrimination Tribunal awarded a woman $7500 compensation for humiliation after she was refused access to an artificial insemination program. Specialists from the clinic had told the Tribunal that the State Government had for the past 15 years taken a very conservative approach to access to the program. The Government denied that it had dictated terms in relation to program access through threatening to revoke licences. The decision generated substantial publicity, much of it negative, with the State Government now considering the establishment of a special lesbians-only sperm bank.

CJC DRUGS INQUIRY

The Criminal Justice Commission's Inquiry into police involvement in the Queensland drug trade continues. The 'God' referred to above is the nickname of a corrupt senior police officer said to control much of the drug trade in the Whitsunday area. The Inquiry is expected to run until the middle of the year. Ironically, the Queensland Government has backflipped in relation to providing extra funding for the Inquiry. An additional $1.5 million will be provided to the CJC for the inquiry which was a central cause of the CJC-State Government dispute which resulted in the establishment of the Connolly-Ryan Commission.

MAL COLSTON

Premier Rob Borbidge has suggested that if Senator Mal Colston is forced to resign from the Senate, the Queensland Parliament could well replace him with another 'independent' rather than with a nominee of the Labor Party as would appear to be clearly required under the Commonwealth Constitution. Are these the same people who swear by our Constitution and system of government? Borbidge's comments appear driven by National Party concerns in relation to the need for the Senate to approve any legislation designed to extinguish native title on pastoral leases. ● **JG**

South Australia

FORTRESS ADELAIDE

A candidate for Lord Mayor of Adelaide has proposed that the city pay for extra police patrols to protect the 13,000 residents who live within the city's

boundaries between the hours of 10 p.m. and 6 a.m. Alternatively, the city might pay for private security patrols.

Such a proposal raises a number of issues. First, how appropriate is it that a local government, even one which is centred on the central business district, should attempt to influence how police resources are allocated? If such a proposal were allowed to be implemented it might mean that rich councils could buy policing while poor councils went without. The second issue this proposal raises is more difficult. If the Council did hire private security patrols, then what guidelines would it draw up? Does the fact that such patrols operate at the behest of local government suggest that they would carry some ostensible authority to intervene in situations which would normally be left to police? The notion that they might should cause concern.

This proposal cannot be divorced from other developments in Adelaide. Over the past few years there has been significant residential development within the city. But most (if not all) of this development has been aimed at affluent people. In the latest issue of City Living, a Council publication which lists recent apartment construction, most properties were priced at $170,000 or above with some as high as $985,000. Only a few developments were listed in the low $100,000s for small apartments. Such development is hardly going to create a mix of people in the city precincts. But what it will create is a desire to flush out those who do not fit into the new image being created for the city. In effect, private patrols will be about patrolling the streets for 'undesirable' elements — code for policing which is racist and targets youth.

The other matter this proposal raises is accountability. The State Government has flagged that it desires to 'reform' the governance of Adelaide City Council. One proposal is that the Council should be elected on the basis of 'constituencies' representing business, universities and residents. In such a structure there is little doubt that residents would be a minority. A private policing service controlled by such a Council raises all manner of issues. Not least is the question in whose interests it would operate. Of course, some residents might welcome such policing from within their apartment fortresses. But for those who reside on the streets and who do not fall within a 'constituency', what is being proposed carries all the characteristics of a policing agency which is not accountable to those whom it polices.

If local councils wish to enter into policing the streets then there should be greater democracy and accountability at this level of government. A council constructed around the needs of business development will no doubt generate a private police force with a particular bias. It may be that the move towards greater involvement of councils in policing is irresistible. Making local government more accountable to all residents might be the only way to ensure that this trend occurs in a sensible manner. ● **BS**

Tasmania

ANTI-QUEER LAWS UNDER ATTACK

Gay activists Rodney Croome and Nick Toonen brought a case before the High Court, asking it to find the Tasmanian anti-queer laws inconsistent with *the Human Rights (Sexual Conduct) Act 1994* (Cth), and hence invalid under s.9 of the Constitution. On 26 February 1997, the High Court cleared the way for the Croome challenge to the sodomy provisions of the Tasmanian Criminal Code to proceed.

At a hearing in September 1996, the Tasmanian Government argued that, as the plaintiffs had not actually been prosecuted under the Code (despite their best efforts — they and others had presented themselves for arrest some time previously, to no avail) there was no real justiciable 'matter' at stake within the meaning of s.76 of the Constitution. This argument was supported by the Victorian Government. Tasmania also challenged the standing of Croome and Toonen, but this argument was abandoned. The plaintiffs argued that there was the possibility they may be prosecuted under the sodomy laws in the future, and they suffered discrimination in other areas of their lives because the laws were still valid. The Commonwealth Government and the Human Rights Commission both supported these arguments.

The High Court found unanimously in favour of the plaintiffs. Rejecting Tasmania's argument that the plaintiffs were seeking an abstract declaration of the law because of the lack of any evidence of a current threat of prosecution, the Court accepted that the plaintiffs had a 'right, duty or liability' affected in the proceedings and that the Court, in hearing the case, would be involved in administering a law so that there was a justiciable matter. Brennan CJ, Dawson and Toohey JJ found that the law being administered was the federal Sexual Conduct law which determined the validity or invalidity of the Tasmanian Code provisions. Gaudron, McHugh and Gummow JJ found that the administration of law involved was the Court's process in dispensing justice. The Court also rejected Tasmania's argument that the remedy of a declaration would not be available in the proceedings.

The Tasmanian Government has filed a Defence in the case which asserted that the sodomy laws were not an arbitrary interference with privacy (hence did not breach the Commonwealth law) and that the Commonwealth law was unconstitutional. The Government has now stated that it will not pursue the case, although the Defence still stands on the record.

The Tasmanian Liberal Government has now done an about-face in favour of tolerance and the Tasmanian Assembly has passed amendments to repeal the relevant provisions of the criminal code. In a historic move the upper house (the Legislative Council) voted on the second reading of the Bill to decriminalise gay sex. However, it may seek to introduce amendments which could render 'promoting homosexuality' a criminal offence punishable by up to 21 years gaol. It is still not certain whether the Council will pass the Bill on the third reading, or whether the lower house would accept such amendments. ● **MD and AD**

Western Australia

SENTENCING

WA's three-strikes-and-you're-in legislation amends the sentencing provisions relating to burglary in the *Criminal Code*. The amendment came into effect on 14 November 1996 requiring a judge sentencing a repeat offender convicted of home burglary committed after that date to a minimum of 12 months detention (juveniles) or imprisonment (adults).

A repeat offender is a person who, having been convicted of a home burglary, commits and is convicted of another home burglary. A home burglary occurs when a person enters a place ordinarily used for human habitation

without permission and commits an offence while there. Since the age of criminal responsibility under the *Criminal Code* is 10 years, the provision could apply to any person aged 10 or over.

Welfare groups have expressed grave concerns about the amendments. In particular, the effect is that juveniles will receive harsher treatment than adults in the same circumstances. This is because the *Young Offenders Act 1994* (s.122) requires that a young person must serve at least 50% of a sentence of 12 months or less before being eligible for supervised release. In contrast, the *Sentencing Act 1995* (s.93) requires an adult to serve only one-third of his/her sentence before being eligible for parole.

Welfare groups have also expressed concern that the provision is contrary to international standards for the administration of juvenile justice in that imprisonment is not used here as a measure of last resort; the law does not promote the young person's rehabilitation and reintegration into society; and the law breaches the principle of proportionality of sentencing. ● **DP**

Victoria

THE LEGAL SYSTEM AND RAPE

In a grim reflection on Victorian legal culture, a Department of Justice report released at the end of March has revealed an extremely low level of confidence in the way the legal system deals with rape. The report involved a three-year evaluation of Victoria's laws relating to rape and included interviews with survivors of rape, barristers and solicitors, magistrates and judges. Interviewees were asked what advice they would give to a friend who had been raped and, alarmingly, the responses included five magistrates indicating that they would advise against reporting the rape unless it involved the more dramatic and clear-cut circumstances of the stereotypical 'stranger rape'. Of 13 magistrates questioned, only two said that they would advise a friend to go ahead with a prosecution whatever the circumstances. One female magistrate said that she would not advise prosecution even if her daughter had been raped because she would not want her daughter to go through the trauma that victims experience in the current legal climate. Similarly negative responses came from practitioners, who were generally cautious about the value of reporting rape and who stressed that they would explain to the victim that the system would treat them harshly. Interestingly, only two out of eighteen victims of rape interviewed indicated that they would advise against reporting a rape. The report has made 36 recommendations for the improvement of the operation of rape trials and reporting methods, including suggesting that the Bar Council takes some responsibility for the conduct of barristers.

PRIVATISING PRISONS

Advertisements calling for tenders for Victoria's community correctional services have been appearing in state newspapers The State Government proposes to privatise around 40% of the State's correctional services by the year 2000 and is seeking to contract out the handling of services alternative to prison sentences. The Public Corrections Enterprise negotiated with the Department of Justice earlier this year to privatise part of the system, the CEO of Public Corrections Enterprise even suggesting that law firms could perform prosecutions for breaches of community orders. Hopefully the move to, further privatisation has not been inspired by correctional facilities already privatised, such as Deer Park women's prison. A report in The Age in late March has suggested that serious assaults and drug problems are being downgraded or excluded from the prison's reports to the Government. 'Incidents' such as attempted suicide self-self-mutilation, assaults on prisoners and staff and a fire involving inmates were recorded by government officials as 'actions contrary to the security and good order' of the prison. It is understood that Corrections Corporation of Australia (CCA), the operator of Deer Park, is financially penalised according to the number of serious incidents which occur at the prison. Passing strange, then, that the alleged incidents have been 'misclassified'. The State Government has consistently refused to release details of its contract with CCA, and has also refused an FoI request by the *Age* to gain access to the reports, stating that the material would 'expose CCA to disadvantage'. It is difficult to think of a more clear vindication of the concerns of those opposed to the privatisafion of Victoria's prisons. However, one has emerged in South Carolina, where CCA's parent company, Corrections Corporation of America has been relieved of control of a 400-bed prison by the State's Governor after reports of excessive violence and security breaches. The Minister for Corrections, Mr Bill McGrath, has since called for a report on the accuracy of the prison's records of serious incidents.

'THREE STRIKES AND YOU'RE OUT'

Continuing its revamp of Victorian justice, the State Government is currently examining a proposal to impose mandatory minimum jail terms on repeat offenders, similar to the American 'three strikes and you're out' rule. Under the new proposals, offenders who have had sentences suspended or converted after two convictions for specific crimes would automatically incur a mandatory sentence at a third conviction. The Attorney-General, Jan Wade, has indicated that longer mandatory gaol terms would be imposed for child sex offences and fraud offences. Taken in the context of Jeff Kennett's remarks during the fires in Victoria over summer that arsonists should receive a mandatory minimum gaol term of 25 years, it is anyone's guess how many offences will come under the new system, and how long these minimum terms will be. However, it is clear that the Government is unconcerned about the appropriateness of executive intervention into the administration of justice. Mrs Wade indicated last year that the Government may legislate to impose long minimum terms for serious crimes if judges did not reflect community attitudes, something for judges to consider on their march down to the rubber stamp room. ● **EC**

DownUnderAllOver was compiled by Elena Campbell, Belinda Carman, Annemaree Devereux, Myke Dobber, Jeff Giddings, Sonja Marsic, Ruth Morley, Darren Pratt, Brian Simpson.