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A TEOH FAQ

*Leslie Katz SC**

Paper presented to AIAL seminar, "Signing International Treaties: What Do the Politicians Think They Are Doing?", Sydney, 16 September 1997.

What do you mean by FAQ?[1]

"FAQ" is a TLA ("three letter acronym"!). When used in computing, the three letters stand, strictly speaking, for "frequently asked question", but are usually used instead to refer to a document setting out the answers to a series of frequently asked questions about a particular topic, whether a computing topic or otherwise.

What is the topic of this FAQ?

The topic of this FAQ is the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh* ((1995) 183 CLR 273) and its aftermath. In *Teoh's case*, the Court dismissed an appeal from a decision of a Full Court of the Federal Court ((1994) 49 FCR 409). That Court had in turn allowed an appeal from a decision of a single judge (unreported) of that Court, the single judge having dismissed an application for judicial review brought by Teoh.

Teoh's case has generated considerable controversy. Will your account of the topic be trustworthy?

I hope so, but I did have some involvement in the case itself to which I should draw attention now, because you may think it has affected my answers to subsequent questions. When the case was before the High Court, I was junior counsel to Richard Kenzie QC. We appeared for the federal Human Rights and Equal Opportunity Commission, which intervened in the matter by leave of the Court. The major part of the Commission's argument (summarised at pages 277-78 of the report) was, generally speaking, accepted by the Court.

Basis of Teoh's application for judicial review

Teoh, who was a Malaysian citizen, had challenged the legality of two administrative decisions made with respect to him by delegates of the Minister for Immigration, one to reject an application which he had made for a permanent entry permit, the other to deport him from Australia.

Facts of the case as found by the High Court

On 16 January 1991, by reason of its ratification one month earlier of the Convention on the Rights of the Child, Australia became bound in international law by that Convention. Article 3, paragraph 1, of that Convention (which was crucial to the outcome of the case) provides as follows:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

About six months after Australia became bound by the Convention, a delegate of the Minister for Immigration decided to reject Teoh's application for a permanent

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entry permit. About six months after the first decision, another delegate of the minister decided to deport Teoh from Australia. At the time of both decisions, Teoh was the father of a number of young children who were Australian citizens. In making his/her decision, neither delegate treated the best interests of those children as a primary consideration. Further, neither delegate had: (1) warned Teoh in advance that he/she proposed not to treat the best interests of those children as a primary consideration in the making of the decision; (2) given his/her reasons for that proposal; and (3) invited Teoh to make submissions on that proposal.

Is Australia still bound in international law by the Convention on the Rights of the Child? If so, in choosing to be bound, is Australia one of a small number of States?

Australia still remains bound by the Convention and, in choosing to be so bound, is decidedly not among a small group of States. The Convention has come the closest to being universally binding of any international human rights agreement ever made. Of the 193 States presently existing in the world, 191 have chosen to bind themselves to give effect to the Convention. As to the two who have not, one is Somalia. Due to an ongoing civil war, Somalia has not had for some years a central government capable of binding it to give effect to the Convention.

The only other State not bound by the Convention is the USA. President Clinton signed the Convention in 1995, over four years after it first came into force, but has not yet transmitted it to the Senate for its advice and consent to his ratification of it. (The Senate's advice and consent to such ratification, by a two thirds majority, is required by Article II, clause 2, of the American Constitution.) The reason for President Clinton's failure to transmit the Convention to the Senate thus far is, no doubt, his belief that the Senate as presently constituted will not advise and consent to its ratification by the required majority, even a ratification with reservations, as is, not surprisingly, permitted by the Convention.

Such belief would be justified alone by the Senate's past attitude to the ratification by the USA of various international agreements. There are currently, for instance, over forty such agreements signed by the President for the time being and sent to the Senate for ratification, but on which the Senate has taken no final action. Among them is another important international human rights agreement, the Convention on the Elimination of All Forms of Discrimination Against Women, which was signed for the United States as long ago as 1980!

However, in the case of the Convention on the Rights of the Child, there are particular reasons for President Clinton's belief, namely, public expressions by senators such as the very powerful Senator Jesse Helms, the (Republican) chairman of the Senate's Foreign Relations Committee, of opposition to the Convention's ratification. Such opposition is said to be based, in part at least, on inconsistency between the Convention and Christian teachings regarding parents' rights with respect to their children, so it is with some amusement that I mention that among the States which have bound themselves to give effect to the Convention is the Holy See! Admittedly, it has done so with certain reservations regarding parents' rights, but at least it has done so, unlike the USA.

Could the obligations imposed by the Convention, especially those imposed by Article 3, paragraph 1, be described as radical in character?

I would not consider that to be an appropriate description of them.

First, many provisions of the Convention simply mirror those expressed in earlier widely accepted international human

rights agreements to be applicable to all persons, but are repeated in the Convention with specific application to children. To give merely one example, parties to the International Covenant on Economic, Social and Cultural Rights (including, since 1975, Australia) recognise, in Article 13, paragraph 1, thereof, the right of "everyone" to education. Article 28, paragraph 1, of the Convention on the Rights of the Child contains an equivalent recognition, limited, however, to the right of "the child". (Perhaps I should add here that, for the purpose of the Convention on the Rights of the Child, a child is someone under eighteen, unless under the law applicable to that person majority is attained earlier.)

Secondly, the almost universal adherence to the Convention itself tells against the Convention being a radical document.

Finally, focussing specifically on the obligations imposed by Article 3, paragraph 1, of the Convention, Gaudron J, a member of the High Court in *Teoh*, stated in her reasons for judgment that Article 3, paragraph 1, "gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected ..." (at 304-05). Her Honour taking that view, she is unlikely to have thought that the obligations imposed by Article 3, paragraph 1, were radical in character.

Apart from Gaudron J, who were the members of the High Court in *Teoh* and how did each of them vote to determine the matter?

The Court consisted on five Justices for the purpose of determining the appeal (no doubt, because it did not sit in Canberra to hear it, but in Perth). McHugh J dissented and, for that reason, I will say nothing else of his reasons for judgment. The four majority Justices were Mason CJ and Deane, Toohey and Gaudron JJ. Although she was one of the four majority Justices, Gaudron J gave reasons for judgment differing from those of the other three majority Justices and, for that reason, I will say nothing further of her reasons. Finally, Mason CJ and Deane J gave joint reasons for judgment, whilst Toohey J gave separate reasons for judgment. There does not appear to me to be any particular difference in approach between the joint reasons, on the one hand, and the reasons of Toohey J, on the other, which it is necessary for me to mention for the purpose of this FAQ.

What were the reasons for judgment of Mason CJ and Deane and Toohey JJ and what orders were made?

In brief, the reasons can be divided into two parts, first, propositions of a general character and, secondly, propositions specific to the facts of the case.

First, it was said that Australia's act of ratification of the Convention, including, as the Convention did, Article 3, paragraph 1, had been a representation by Australia to all persons who might be adversely affected in the future by federal administrative decisions concerning children that, in making such decisions, the decision-makers involved would treat as a primary consideration the best interests of such children. Such persons therefore had a legitimate expectation that federal decision-makers would so act. A federal decision-maker could choose to defeat such expectations, but, before deciding to do so, was obliged to: (1) warn the person(s) whose legitimate expectations he/she was contemplating defeating that he/she proposed not to treat the best interests of the relevant child or children as a primary consideration in making the decision; (2) give his/her reasons for that proposal; and (3) invite the person(s) whose legitimate expectations he/she was contemplating defeating to make submissions on that proposal.

I should add that the reasons I have just set out, although given in the context of the Convention on the Rights of the Child,

were not restricted to that particular international agreement. The reasons extended to any international agreement by which Australia had chosen to bind itself, the nature of any legitimate expectation concerning the future conduct of federal administrative decision-makers generated by Australia's ratification of such agreement depending on the terms of the particular agreement.

Secondly, it was said that both administrative decisions under challenge in the present case, the decision to refuse a father a permanent entry permit and the decision to deport him, were "actions concerning [his] children" within the meaning of Article 3, paragraph 1, of the Convention. Since neither delegate had made the best interests of Teoh's children a primary consideration in making his/her decision and since neither delegate had taken the necessary procedural steps before making a decision in which the best interests of those children were not made a primary consideration, each decision had been unlawful.

In consequence of the reasons set out above, the minister's appeal from the decision of the Full Court of the Federal Court, (which had also held both decisions unlawful, but for different reasons than those of the High Court) was therefore dismissed. That meant that the orders made by the Full Court of the Federal Court, first, setting aside the decision on Teoh's application for a permanent entry permit and requiring that application to be reconsidered according to law and, secondly, staying the deportation decision until such reconsideration had occurred, remained in place.

As a matter of interest, what was the eventual fate of Teoh's application for a permanent entry permit when it was reconsidered as required?

I asked one of Teoh's legal representatives that question for the purpose of preparing this FAQ, and was told that, in July 1996, Teoh's application for a permanent entry permit was finally determined by granting him the permit he had sought.

The controversy generated by the High Court's decision in *Teoh's case* centred on the view of Mason CJ and Deane and Toohey JJ that the act of ratification of an international obligation by Australia was an act capable of giving rise within Australia to "legitimate expectations", as that term is used in administrative law. Do you regard that view as a radical one?

On an earlier occasion, the view had been expressed in the High Court that the issue of a series of news releases by a minister could give rise to a legitimate expectation (*Salemi v MacKellar [No 2]* (1977) 137 CLR 396, 440). Subsequently, the view had been expressed that a statement made by a minister to the House of Representatives could have the same effect (*Haoucher's case* (1990) 169 CLR 648, 655, 682). It is even possible to construe certain remarks in another case (*Simsek v McPhee* (1982) 148 CLR 636, 644) as directly foreshadowing, in the context of international agreements, the view ultimately expressed in *Teoh's case* by Mason CJ and Deane and Toohey JJ. Given that background, I find it difficult to see why the conclusion that a statement by the executive ratifying an international agreement was an act capable of giving rise within Australia to legitimate expectations would be thought to be a radical one.

It was said, however, that, although the ratification of an international agreement by Australia might have a promissory character internationally, it was incapable of having that character domestically. What do you say to that criticism which was made of the reasoning in *Teoh's case*?

I am unable to improve on the answer given to it by Sir Anthony Mason, after he had been freed from the restraints of

judicial office. In "The Influence of International and Transnational Law on Australian Municipal Law", (1996) 7 *Public Law Review* 20, 23, Sir Anthony quoted a statement about *Teoh's case* made by Senator Evans, then Foreign Minister, the statement having been made at a seminar held on "the Mason Court". Senator Evans had said (emphasis in original) that "ratification is a statement to the *international* community to [*sic*] observe the treaty measures in question; it is not a statement to the *national* community—that is the job of the Legislature, not the Executive". Sir Anthony's response to that statement, which statement he described as "breathtaking", was as follows:

> So, when an Australian convention ratification is announced, they may dance with joy in the Halmaneras, while here in Australia, we, the citizens of Australia, must meekly await a signal from the legislature, a signal which may never come. Of course, this concept of ratification involving a statement to the international community, but no statement to the national community, is quite insupportable.

Australia is a party to many international agreements (said to have been about 900 significant ones when *Teoh's case* was argued in October 1994 and, no doubt, more by now). Another criticism of the reasoning in *Teoh's case* was that it was difficult, if not impossible, for federal administrative decision-makers to be aware of the content of the obligations imposed by every international agreement. Accordingly, in many instances they might fail to give effect to an international obligation and not accord procedural fairness before such failure, not even being aware that, in so doing, they had acted unlawfully. What do you say about that criticism?

I consider that the task of alerting federal administrative decision-makers to the international obligations relevant to their particular decision-making functions is not as difficult as is implied by the number of international agreements involved. Many such agreements, by their nature, will not even purport to impose obligations on individual decision-makers. Others will purport to impose obligations on individual decision-makers, but the purported obligations will be expressed in a way which makes them "duties of imperfect obligation", ones which are in any event incapable of giving rise to expectations as to performance which would properly be described as legitimate. (An analogy is to be found in domestic statutes which purport to impose duties, which "duties" are subsequently held to be unenforceable because of their character.) As to those agreements which do impose obligations capable of giving rise to legitimate expectations as to performance, I cannot see any reason why it is more difficult to make decision-makers aware of such obligations than it is to make them aware of their obligations arising under domestic statutes. All that is required is the political will to perform the necessary educative function.

I am comforted in my view that the task of alerting federal administrative decision-makers to the relevant international obligations is not as difficult as some critics sought to make out after *Teoh* by knowing that the federal parliament has obviously not in the past thought the task to be too difficult. One may find a number of federal statutes in recent years in which parliament has both created an instrumentality and then placed that instrumentality under a duty to act so as not to bring Australia into breach of any of its international obligations.

Is *Teoh's case* likely to have important consequences in future for Australian law or was it a "one-off"?

My view is that it falls into the latter category. I hold that view for two reasons. First, there have occurred and are continuing to occur in response to the case a number of developments, both of an executive and of a legislative character, for the purpose of nullifying its

effect. Secondly, even if those developments should not achieve or have achieved their desired outcome, a real question must obviously arise as to the attitude of the High Court in the future to the majority reasoning in the case if a similar case were to come before it.

What are those executive developments?

It is probably best to begin answering that question by referring to *Teoh's case* itself. In their joint reasons for judgment, Mason CJ and Deane J said (at 291; my emphasis):

> [R]atification 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 ...

By their use of the words which I have emphasised, their Honours were expressly acknowledging the ability of (relevantly) the executive to nullify a legitimate expectation which the Convention's ratification would otherwise have engendered by indicating to those in whom that expectation would otherwise have been engendered that they were not entitled to expect that administrative decision-makers would act in conformity with the Convention, in spite of the executive's ratification of it.

Toohey J spoke similarly, saying (at 302; my emphasis):

> [T]here can be no legitimate expectation if *the actions of* the legislature or *the executive are inconsistent* with such an expectation.

Attempting expressly to rely on the judicial statements just referred to on 10 May 1995, about a month after the High Court's decision in *Teoh*, Senator Evans, then Foreign Minister, and Mr Lavarch, then Attorney-General, made a joint statement entitled, *International Treaties and the High Court decision in Teoh.* (Interestingly, the statement was not made to Parliament, or incorporated in Hansard or published in the Commonwealth Gazette. It seems solely to have taken the form of a news release.) The essence of the joint statement was as follows:

> We state, on behalf of the Government, 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 that treaty have not been enacted into domestic Australian law. It is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers. Any expectation that may arise does not provide a ground for review of a decision. This is so both for existing treaties and for future treaties that Australia may join.

The statement from which I have just quoted was not, however, the end of executive action in the matter. Not only was there subsequent Commonwealth executive action, to which I refer below, but, following the joint statement, ministers of at least two states (South Australia and Western Australia) and the Northern Territory also made similar statements during 1995.

When I describe statements by South Australian, Western Australian and Northern Territory ministers as "similar" to the joint statement, I should elaborate. Like the joint statement, each of them was directed to the act of ratification of an international agreement by the federal government. Where each of them differed from the joint statement was that it denied that that act by the federal government could give rise to a legitimate expectation regarding the future conduct of its own state or territory administrative decision-makers.

Returning now to the subsequent Commonwealth executive action just mentioned, on 25 February 1997 a further joint statement by the Foreign Minister (now Mr Downer) and the Attorney-General (now Mr Williams QC) was made. (Unlike the earlier statement, this statement did appear in the Commonwealth Gazette.) This second statement was said to replace the first one in relation to administrative decisions made from 25 February 1997. Its essence was as follows (although I have omitted the numbering of the quoted paragraphs):

> [W]e indicate on behalf of the Government that the act of entering into a treaty does not give rise to legitimate expectations in administrative law which could form the basis for challenging any administrative decision made from today. This is a clear expression by the Executive Government of the Commonwealth of a contrary indication referred to by the majority of the High Court in the *Teoh* Case.
>
> Subject to the next paragraph, the executive indication in this joint statement applies to both Commonwealth and State and Territory administrative decisions and to the entry into any treaty by Australia in the future as well as to treaties to which Australia is already a party. In relation to administrative decisions made in the period between 10 May 1995 and today reliance will continue to be placed on the joint statement made by the then Minister for Foreign Affairs and the then Attorney-General on 10 May 1995.
>
> Where a State or Territory government or parliament takes, or has taken, action to displace legitimate expectations arising out of entry into treaties in relation to State or Territory administrative decisions this statement will have no operation in relation to those decisions.

It appears to me that the only substantial difference between the two Commonwealth joint statements is that the second of them sought to deal with the position of state and territory administrative decision-makers, as well as with the position of Commonwealth administrative decision-makers.

Are the Commonwealth statements, as they purport to apply to federal administrative decision-makers, effective in nullifying *Teoh*?

I must say I doubt their effectiveness. In giving one of my reasons for saying so, I adopt the language of Hill J of the Federal Court in *Department of Immigration v Ram* (1996) 41 ALD 517, 522-23, dealing with the earlier of the two statements:

> When in *Teoh*, Mason CJ and Deane J refer to "executive indications to the contrary", it may well be that their Honours intended to refer to statements made at the time the treaty was entered into, rather than to statements made years after the treaty came into force.
>
> When initially referring to executive comments, their Honours do so in the context of an act of ratification, an act that speaks both to the other parties to the Convention and to the people of Australia as well as to the world. I doubt their Honours contemplated a case where at the time of ratification, Australia had expressed to the world and to its people an intention to be bound by a treaty protecting the rights of children, but subsequently, one or more ministers made statements suggesting that they at least had decided otherwise.

(I should add here that the remarks of Hill J I have just quoted were avowedly *obiter*. I know of no Australian case in which the effectiveness of any of the executive statements I have referred to above has been authoritatively determined.)

It might also be argued that, even if the statements from *Teoh*, quoted above, did contemplate executive indications to the contrary given subsequent to ratification, it also contemplated that such indications would be specific in their character, referring to a particular international agreement or to particular international agreements, rather than being expressed globally.

The reasons I have just given for doubting the effectiveness of the statements are directed to international agreements

already ratified at the time of the making of a statement like either of the joint statements. A further reason for doubting the effectiveness of the statements relates to their intended effect on international agreements ratified *after* the making of the statements. Could a statement like either of the joint statements prevent a later ratification from giving rise to a legitimate expectation or would the later statement by the executive implicit in the act of ratification of a particular international agreement supersede the earlier general statement by two members of the ministry? I suspect that, if the issue were to arise, the courts would take the latter, rather than the former, view.

Before leaving this matter, there are two further points I should make.

First, I have referred above to developments of a legislative character, as well as of an executive character, intended to nullify *Teoh's case*. Among those developments (see below), is a Commonwealth Bill which, if enacted, will, it appears to me, make it unnecessary to worry about the effectiveness of the two ministerial statements, so far as they concern federal administrative decision-makers.

The second point is this: I am unaware of any particular international reaction to the making of the two ministerial statements. However, to the extent to which they are effective, a question arises whether other States might take the view that they amount to a breach by Australia of international agreements already entered into before the statements were made or to a bar to the effectiveness of Australia's purported ratification of any subsequent international agreement. The same question will also arise in connection with the Commonwealth Bill, assuming it is enacted. That other States might take the view I have just mentioned would not surprise me.

What is the effectiveness of the second Commonwealth statement, as it purports to apply to state and territory administrative decision-makers, and of the state and territory statements themselves?

I have even greater doubts than those just expressed about the effectiveness of the two Commonwealth statements, as they purport to apply to federal administrative decision-makers. Even assuming that the two Commonwealth statements, as they purport to apply to federal administrative decision-makers, are fully effective, there seems to me to be a complete misconception underlying both the second Commonwealth statement, as it purports to apply to state and territory decision-makers, and the state and territory statements. That misconception is that the act of ratification of an international agreement by the federal government *could* give rise to a legitimate expectation about the future conduct, not of *federal* administrative decision-makers, but of *state* and *territory* administrative decision-makers.

There appears to be no warrant for such a conclusion in the reasoning of Mason CJ and Deane and Toohey JJ in *Teoh*.

I have already quoted for another purpose what Mason CJ and Deane said jointly at 291 of the report, but it is worth quoting part of it again for present purposes. They said (my emphasis):

> [R]atification 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 [of this country] and its agencies* will act in accordance with the Convention.

Toohey J spoke similarly at 302, saying (my emphasis) that:

> ... Australia's ratification of the Convention ... does have consequences for *agencies of the executive government of the Commonwealth.*

Not only is there no warrant in what was said in *Teoh* for a conclusion that the act of ratification of an international agreement by the federal government could give rise to a legitimate expectation about the future conduct, not of federal administrative decision-makers, but of state and territory administrative decision-makers, but such a conclusion would also be contrary to principle. Where procedural obligations arise as a result of a representation by a person, those obligations should only be imposed on the representor and his/her/its servants and agents, not on others.

Thus, both for reasons of authority and principle, the second Commonwealth statement, so far as it purports to apply to state and territory administrative decision-makers. and the state and territory statements appear to me to have been unnecessary and therefore ineffective.

(I have deliberately refrained from discussing the question of the power of Messrs Downer and Williams QC to make a statement dealing with legitimate expectations as to the future conduct of state administrative decision-makers.)

What are the legislative steps to nullify *Teoh* to which you referred and are you less dismissive of their (potential) effectiveness than you are of the effectiveness of the executive steps taken?

I was referring, first, to a 1995 Act of the South Australian parliament and, secondly, to a 1997 Commonwealth Bill which has passed the House of Representatives, but not yet passed the Senate.

I will discuss first the South Australian Act, the *Administrative Decisions (Effect of International Instruments) Act 1995.*

That Act has two core provisions, subsections 3(1) and (2). They provide as follows:

> (1) An international instrument (even though binding in international law on Australia) affects administrative decisions and procedures under the law of the State only to the extent the instrument has the force of domestic law under an Act of the Parliament of the Commonwealth or the State.
>
> (2) It follows that an international instrument that does not have the force of domestic law under an Act of the Parliament of the Commonwealth or the State cannot give rise to any legitimate expectation that-
>
> (a) administrative decisions will conform with the terms of the instrument; or
>
> (b) an opportunity will be given to present a case against a proposed administrative decision that is contrary to the terms of the instrument.

In so far as these provisions are an attempt to ensure that the act of ratification of an international agreement by the federal government gives rise to no legitimate expectation as to the future conduct of South Australian administrative decision-makers, they are, in my view, unnecessary and therefore ineffective for the reasons I have already given.

However, that does not necessarily mean that the South Australian Act was a complete exercise in futility.

Whilst the act of ratification of an international agreement by the federal government can give rise to no legitimate expectation as to the future conduct of South Australian administrative decision-makers, it is possible to conceive of acts done by the state government *itself* in connection with the federal government's act of ratification, which state acts could arguably give rise to a legitimate expectation that state administrative decision-makers would act in accordance with the ratified international agreement. For instance, the state government might publicly announce its approval of the federal government's act of ratification of an international agreement. It may be that

the provisions I have quoted above would have the effect that such an announcement would be deprived of any "legitimate expectation-generating" characteristics regarding the future conduct of South Australian administrative decision-makers which it would otherwise have had.

In deciding whether the provisions did have that effect, it appears to me that a court considering the matter should approach their construction in a particular way. In *Wentworth v NSW Bar Association* (1992) 176 CLR 239, 252, the High Court said (footnotes omitted):

> There are certain matters in relation to which legislative provisions will be construed as effecting no more than is strictly required by clear words or as a matter of necessary implication. They include important common law rights, procedural and other safeguards of individual rights and freedoms and the jurisdiction of superior courts.

It appears to me that that approach should be held to be applicable to the provisions I am now discussing (and to those of the Commonwealth Bill I am about to discuss, if that Bill is enacted), because in so far as the provisions seek to prevent the arising of a legitimate expectation which would otherwise have arisen, which expectation would have conferred procedural rights on persons, they seek to deprive those persons of those procedural rights.

The Commonwealth Bill is also called the Administrative Decisions (Effect of International Instruments) Bill 1997 It does not, however, have the same core provisions as the South Australian Act, opting instead for a different formulation of its "anti-*Teoh*" provisions.

Its core provision is clause 5, which provides relevantly that:

> The fact that ... Australia is bound by ... a particular international instrument ... does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating ... an administrative decision.

Significantly, "administrative decision" is defined in clause 4 of the Bill as including, not only decisions by or on behalf of the Commonwealth or an authority or office holder of the Commonwealth, but also decisions by or on behalf of a state or territory or an authority or office holder of a state or territory. At the same time, however, clause 6 provides:

> Section 5 does not apply to an administrative decision by or on behalf of:
> (a) a State or Territory; or
> (b) an authority of, or office holder of, a State or Territory;
> if provision having the same effect as, or similar effect to that which, section 5 would otherwise have in relation to the decision is made by an Act passed by the Parliament of the State or Legislative Assembly of the Territory.

As to whether the Bill, if enacted, will effectively overrule *Teoh's case*, I assume that, even applying the approach of the High Court in the *Wentworth case* quoted above, it will be held to do so.

When I say "effectively overrule *Teoh's case*", I am, of course, referring to the Bill's preventing the act of ratification of an international agreement by the federal government giving rise to a legitimate expectation as to the future conduct of *federal* administrative decision-makers. In so far as the Bill goes further and deals with the position of the states and territories, it is not, for reasons I have already given, seeking to overrule *Teoh's case*.

As to the effectiveness of the Bill, assuming it is enacted, so far as state and territory administrative decision-makers are concerned, my comments are similar to those already made regarding the South Australian Act. The Bill may be construed as applying to acts done by state and territory governments themselves in connection with the federal government's act of ratification of international agreements. If so, and

assuming legislative power in that respect (a matter as to which I refrain from making any comment), then the Bill will be effective so far as state and territory administrative decision-makers are concerned; otherwise not.

Do you have any doubts as to whether the Senate will pass the Bill?

None. The issue is one as to which, as I understand it, the Coalition and the ALP take the same view, as appears from the fact that the first of the two Commonwealth joint statements I have referred to above was issued by ALP ministers, whilst the second was issued by Coalition ministers. Further, I should mention that the Bill currently before the Commonwealth parliament is similar to one introduced by the former ALP government in 1995, but not enacted before the last federal election. All in all, I am reminded of a French jibe from the 1930s: "There is more in common between two Deputies, one of whom is a Communist, than there is between two Communists, one of whom is a Deputy".

If the Commonwealth Bill should not be enacted or, if enacted, be held ineffective for some reason, to overrule *Teoh*, the attitude of the High Court in the future to the majority reasoning in *Teoh's case* if a similar case were to come before it, arises. What do you say about that question?

I can't speak on it with any real confidence. By the time such a case came before the Court, there would, at most, be only two Justices on the Bench who had participated in *Teoh's case*, namely Gaudron and McHugh JJ. Further, as I have already mentioned, although Gaudron J formed part of the majority in the case, she did so for different reasons than did Mason CJ and Deane and Toohey JJ. Also, as I have already mentioned, McHugh J dissented.

Whilst it is true that it has been said by the High Court that a change in its composition is not, of itself, a reason for that Court to review the correctness of its own earlier decisions, it is also true that it has also been said by the High Court that it is "not constrained to accept a view which commended itself to three members only of this Court": see *The Queen v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 233; see also the same case at 209 and *Cullen v Trappell* (1980) 146 CLR 1, 10. In those circumstances, it is not clear to me that the reasoning of Mason CJ and Deane and Toohey JJ in *Teoh* would be given any particular deference at all in a case which raised the question of ratification of an international agreement as giving rise to legitimate expectations as to the future conduct of federal administrative decision-makers.

If, as you think, *Teoh's case* was a "one-off" in Australian law, was it a waste of time?

Certainly not, at least not from the point of view of Mr Teoh and his children, as I have already explained. However, even if the case has no lasting significance in Australian law as a precedent, it may still be persuasive in the courts of other countries with legal systems similar to our own. By way of illustration, I will conclude this FAQ by mentioning two cases in other countries in which reference has been made to *Teoh's case*, although I hasten to say that in neither of the cases was the fundamental reasoning in the case applied.

First, I mention *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140, a decision of the New Zealand Court of Appeal.

By Art 2 of the Treaty of Waitangi, the Crown guaranteed to Maori undisturbed possession of (relevantly) their language. However, the Crown's obligations under the Treaty are not directly enforceable at law. Accordingly, when the Crown took and proposed to take certain steps in

connection with the privatisation of certain broadcasting assets, steps which Maori interests considered were and would be in breach of Art 2, it was not possible for them to bring proceedings directly relying upon such alleged breach and threatened breach. Instead, they brought proceedings merely alleging (relevantly) that the Crown's entry into the Treaty had given them a legitimate expectation that they would have undisturbed possession of their language, that the Crown's taking of the steps and proposed steps had defeated and would defeat that legitimate expectation and (relevantly) that they had not been and were not being accorded procedural fairness in connection with the taking of the steps and proposed steps.

In joint reasons, six of the seven members of the Court held, for various reasons, that the lawfulness of the taking of the steps and proposed steps was not reviewable and so summarily dismissed the proceedings. In doing so, however, they found it unnecessary to deal directly with the legitimate expectation argument referred to above.

Thomas J alone dissented and, in doing so, he did deal directly with that argument. He said (at 184-85) that *Teoh's case* provided the "strongest support" for it. Having set out the majority reasoning in that case he then said:

> If an international treaty which has been signed and ratified but not passed into law can found a legitimate expectation, it is almost automatic that this country's recognised fundamental constitutional document, the Treaty of Waitangi, can also found a legitimate expectation ...
>
> ...
>
> I find the High Court of Australia's decision compelling in respect of a legitimate expectation giving rise to a procedural benefit, which Maori claim ...

The second decision is that of the Supreme Court of India in *Vishaka v Rajasthan* (unreported, 13 August 1997).

Article 32, clause (2), of the Constitution of India, contained in Part III, (which deals with "fundamental rights"), confers on the Supreme Court of India the power to issue writs, including writs in the nature of mandamus, for the enforcement of any of the rights conferred by Part III. The clause also confers on the Court a power, to be exercised for the same purpose, to issue "directions".

In *Vishaka's case*, application was made under Article 32 both for a writ of mandamus and or directions for the enforcement of a certain fundamental right alleged to be impliedly conferred on women by Part III of the Constitution, namely a right to be free of sexual harassment in employment. Sexual harassment in employment was not itself specifically dealt with by legislation in India and it was, in part at least, the absence of such legislation which had led to the application under Article 32.

The Articles in Part III primarily relied upon as the source of the alleged implied right included Article 14, which in terms prohibited the State from denying equality before the law or the equal protection of the laws, Article 19(1)(g), which in terms guaranteed the right to practise any profession or carry on any occupation, trade or business, and Article 21, which prohibited in terms deprivation of life or personal liberty except according to procedure established by law.

A crucial question for the Court was obviously whether there was implied by those express provisions a fundamental right of the kind alleged. The Court held that there was, considering itself a liberty to look to "international conventions and norms" applicable to India in order properly to construe the express provisions (at pages 6-7).

It was in that context that Verma CJI, delivering the reasons of the Court, said (at pages 14-15):

> The meaning and content of the fundamental rights guaranteed in the

> Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse ... The international conventions and norms are to be read into them ... when there is no inconsistency between them [*viz*, between the constitutional provisions guaranteeing fundamental rights, on the one hand, and the international conventions and norms, on the other] ... The High Court of Australia in ... *Teoh* ... has recognised the concept of legitimate expectation of its observance [*viz*, the observance of international conventions and norms] ...

Although my reason for referring to *Vishaka's case* is its reference to *Teoh's case*, I should not leave the case before saying something also as to its remedial aspects. Dealing with those aspects, Verma CJI pointed out (at pages 3-4):

> A *writ of mandamus* in such a situation, if it is to be effective, needs to be accompanied by directions for prevention, as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

In substance, what was in contemplation was the use of the Court's "direction issuing" power under Article 32 to make, in effect, temporary sexual harassment legislation and that was exactly what occurred. The Court laid down a set of twelve "guidelines and norms" (at pages 16-23), which it directed should "be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women" (at page 23). It also said that the directed guidelines and norms were "binding and enforceable in law until suitable legislation is enacted to occupy the field" (at page 24), an event which it recognised would take "considerable time" (at page 17).

It will be obvious from all that I have said about *Vishaka's case* that the Court's reference to *Teoh's case* which I have set out above was made in a context far removed from that of the latter case. The Indian Supreme Court was not concerned in the case before it with any question of a denial of procedural fairness, but with another question entirely, namely, the extent to which India's international obligations could be used to construe its Constitution.

(Indeed, it might be thought that, if the Court had wished to rely on decisions from other countries in order to provide support for its use of international agreements to which India was a party as an aid to the construction of the fundamental rights provisions of the Indian Constitution, there were countries other than Australia to which the Court might more appropriately have looked for judicial support. For instance, reference might have been made to *Slaight Communications Inc v Davidson* (1989) 59 DLR (4^{th}) 416, 427, in which the Supreme Court of Canada had held that the content of the rights guaranteed by the Canadian Charter of Rights and Freedoms, part of the Canadian Constitution Act, should be informed by Canada's international human rights obligations. Reference might also have been made to *DPP v Pete* [1991] LRC (Const) 553, 565, in which the Tanzanian Court of Appeal construed the Bill of Rights and Duties enshrined in the Tanzanian Constitution by reference to the provisions of the African Charter of Human and Peoples' Rights, to which Tanzania was a party.)

Nevertheless, I consider it a matter of no little significance that the Indian Supreme Court did in *Vishaka's case* focus on and make approving reference to *Teoh's*

case. Its doing so suggests to me that the fundamental reasoning in *Teoh* may well come to be relied upon on some other occasion in Indian courts.

Endnotes

[1] This question is included only for the benefit of those not familiar with computing jargon.

SIGNING INTERNATIONAL TREATIES: WHAT DO THE POLITICIANS THINK THEY ARE DOING?

*Senator Helen Coonan**

Paper presented to AIAL seminar, "Signing International Treaties: What Do the Politicians Think They Are Doing", Sydney, 16 September 1997.

The question "Signing international treaties: What do the *politicians* think they are doing?", could just as easily be framed "Interpreting international treaties - What do the *judges* think they are doing?" or even "Signing international treaties - What does the *executive* think it is doing?".

The questions are interchangeable.

Treaty making - roles of parliament and executive

What calls for consideration is not what judges, members of the executive government or even politicians believe they are doing in signing Australia up to international treaties. Rather the fundamental question is, what are the proper roles of each branch of government and what are the implications for domestic law of Australia becoming a signatory to international obligations?

Firstly, it is worth repeating that a fundamental tenet of parliamentary democracy and the rule of law is that major policy and law making is not decided without the consent of the governed, that is of parliament. Even where executive power is separate, the legislature retains ultimate power by virtue of its control over the budget and ability to enact legislation. In a democracy the representative body should have the final say if accountability to electors is not just lip-service.

Traditionally, foreign policy and treaty making have been treated as exceptions to this rule. In Australia, prior to the recent changes which I will describe shortly, the decision to enter into treaties was made by the executive and the formal act is given by approval of the Executive Council.

The decision to ratify, though, may not involve cabinet approval. From 1990 to 1994 less than a quarter of international agreements were subjected to cabinet approval before being presented to the Governor-General in Council.[1]

Moreover, sensitive bi-lateral treaties are treated as confidential according to international convention and enter into force on signature.

Prior to recent reforms to parliamentary scrutiny of treaties, they were simply tabled twice yearly in batches. In a 1994 Senate Estimates hearing,[2] the attitude to parliament's role in the processes leading to ratification or the decision to ratify a treaty can be gleaned from the following exchanges between the former Minister for Foreign Affairs and Trade, Senator Gareth Evans and Senator Kemp.

> **Senator Kemp**: The next issue is how long would you propose to lay this on the table so that there can be a proper

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debate on the treaty protocols or on a new treaty?

Senator Gareth Evans: The intention, as we have said, is to continue the practice of tabling the treaties twice yearly in batches. We will ensure, as far as possible, that treaties are tabled before Australia becomes a party to them, thus enabling time for parliament to reflect upon them. In the case of multilateral treaties, this means we will table a treaty either before ratification or before accession, as the case may be ... Bilateral treaties can normally be expected to be tabled after signature, in accordance with the internationally accepted convention that the text of such treaties is confidential between governments until they are signed. There will be occasions when, as has occurred in the past, action has to be taken quickly on adherence, and it might occur during a period in which parliament is out of session, or something of that kind - in which case the notification will be after the event. But we will do our best to get them on the table before adherence in the case of the multilateral ones, where most of the policy interest lies.

Senator Kemp: It is all very well to have them laid on the table for a week, but that does not really provide the time period in which people who have concerns about a particular treaty can raise issues.

Senator Gareth Evans: I am not proposing to make a commitment that the government will wait for any specified period of time following the tabling. The idea is to provide information to parliament about the treaties. We will do that through this tabling process and through the explanatory note that we have also agreed to make part of that process. *But tabling treaties is not intended to be an exercise in ascertaining parliament's views about whether or not Australia should become a party. That decision is the responsibility of the executive under the Constitution, and it will remain so.* (emphasis added)

Senator Kemp: But do you not see it as a chance for the parliament to reflect and debate, and provide the executive government with some sage advice on whether it should proceed or not.

Senator Gareth Evans: Parliament has its constitutional role when it comes to the actual implementation of the treaty as a commitment binding in Australian domestic law. That is a very serious step in the process and it is not one that can occur without *full scale parliamentary adherence*. As you would well know, that is the difference between our system and that in the United States, where the treaty becomes binding as a matter of domestic law once it is adhered to. That is why you have got the advice and consent process involving congressional or at least Senate endorsement. We do not have that status vested in treaties and on their adherence; *that comes only when they are the subject of legislation. That is the failsafe mechanism in our system, and as such you ought not to complain about it.* (emphasis added)

Teoh case

That cast iron assurance proved to be wanting as the decision in *Minister for Immigration and Ethnic Affairs v Teoh* ("*Teoh*") (183 CLR 273) and its aftermath, so graphically illustrates. Gareth Evans was not to know that judicial creativity in the High Court in *Teoh* would see the majority hold that the entry into a treaty by Australia creates a "*legitimate expectation*" in administrative law that the executive government and its agencies will act in accordance with the terms of the treaty even when those terms have not been incorporated into Australian law. The majority held that when a decision-maker proposes to make a decision which is inconsistent with such legitimate expectation, procedural fairness requires that the person so affected by the *decision* be given notice and an adequate opportunity to put arguments on the point.

In distinguishing substantive rights and the doctrine of legitimate expectation, on the basis that the doctrine only gave rise to a procedural right to have the treaty considered, not a legal right to enforce the terms of the treaty, the decision gave treaties an impact in Australian law which they did not previously have.

So what happened to that cast iron guarantee about the constitutional right of parliament to decide whether there should be any commitment binding in Australian

domestic law, be it substantive or procedural? If the question for tonight's discussion is "what do the *politicians* think they are doing?" Gareth Evans clearly though he was correctly describing the law. What did the judges think they were doing? Chief Justice Mason and Deane J explained the reasons for a legitimate expectation so described in the following terms:

> 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.[3]

You cannot help but notice in this statement the absence of any acknowledgment of the role or relevance of parliament in making the law to implement treaty obligations.

So what the majority of the judges thought they were doing was to declare the existence of a hitherto unspecified right arising out of the executive act of entering into a treaty.

Political response

Coalition members of parliament, and I suspect most Labor politicians, think that the High Court's view is inconsistent with the role of parliament and that it should be a matter for parliament to decide whether entry into a treaty gives rise to rights in domestic legislation be they procedural or substantive.

Support for this view is to be found in the dissenting judgment of McHugh J:

> If the result of ratifying an international convention was to give rise to a legitimate expectation that the convention would be applied in Australia the executive government of the Commonwealth would have effectively amended the law of this country[4]

The Coalition Government was elected in March 1996 on a policy platform that included the following principle:

> Australian laws, whether relating to human rights or other areas, should first and foremost be made by Australians, for Australians ... when Australian laws are to be changed, Australians and the Australian political process should be at the beginning of the process, not at the end.[5]

On 25 February 1997, the new Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams QC, issued a joint statement in similar terms to that issued by the former Government. The joint statement confirmed that the executive act of entering into a treaty does not give rise to legitimate expectations in administrative law. The joint statement emphasised that it is the proper role of parliament to implement treaty obligations.[6]

The joint statement foreshadowed the Government's intention to introduce legislation to give effect to the proposition that the executive act of entering into a treaty does not give rise to legitimate expectations in administrative law.[7]

On 18 June 1997, the Administrative Decisions (Effect of International Instruments) Bill 1997 ("the Bill") was introduced into the House of Representatives. On 6 June 1997, the Senate referred the Bill to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 23 September 1997. In referring the Bill, the Selection of Bills Committee suggested that the Committee consider the justification for the Bill in the light of the

Government's changes to the treaty making processes. This brings me to the reforms to the treaty making process as announced in the joint ministerial statement on 2 May 1996 by the Minister for Foreign Affairs and Trade and the Attorney-General.[8]

The reforms closely followed the recommendations of the 1995 report of the Senate Legal and Constitutional References Committee entitled *Trick or Treaty: Commonwealth Power to Make and Implement Treaties.*[9]

The then Attorney-General, Michael Lavarch, had noted that given the increasing influence of treaties over matters of concern to the Australian people, the constraints on the participation of parliament amounted to a gap in the democratic process.[10]

The gap has been referred to by Sir Ninian Stephen as "the democratic deficit".[11]

Recent reforms

The main changes in the treaty process include:

1. The fifteen day rule: Treaties are to be tabled in parliament at least fifteen sitting days before the Government takes binding action unless the treaty deals with an urgent matter.

2. National interest analysis: Treaties are to be tabled in parliament together with the reasons for entry into treaty obligations or withdrawing from them.

3. Joint Standing Committee on Treaties ("Joint Committee"): The committee was established on 30 May 1996 to examine matters arising from treaties and proposed treaty actions presented to parliament.

4. Treaties Council: To operate as an adjunct to the Council of Australian Governments and to provide better consultation with the states as to proposed treaty actions.

5. Database: Establishment of a treaties database to allow individuals and groups with an interest in treaties to obtain the text of treaties and other information, free of charge, via the Internet.

The reforms were designed to ensure that the executive, in carrying out its function of deciding whether or not Australia should become a party to a treaty, is more consultative and accountable to both the public and the parliament.

The changes are designed to increase the opportunity for parliamentary scrutiny of treaties, to enhance the provision of information on treaties to state and territory government, industry and the wider community and to allow greater consultation with interested parties *prior* to Australia committing to become a party to a treaty.

The proposal to establish a Joint Committee was supported by the Australian Law Reform Commission because of its capacity to engage all parties at a federal level in the treaty making process.

> A joint Federal Parliamentary Committee has the advantage of ensuring that responsibility for implementation remains in the federal sphere thereby preventing possible veto action by the States and avoiding inertia of State governments which may place foreign affairs at a relatively lower level of priority than domestic affairs.[12]

Although it is fair to say that most treaty action is uncontroversial and has bi-partisan support, the previously inadequate involvement of parliament and of the general public in the treaty making process led to a growing suspicion and mistrust about treaties in general. It is fair to say that the reforms introduced by the government appear to be engendering a greater understanding of the importance of the role of treaties in our dealings with

other countries, including matters related to trade.

Even the harshest critics seem to agree that the changes to the treaty process and the commitment to openness and accountability are landmark reforms. They fulfil the government's election undertaking to make policy formulation in international relations and trade arrangements more transparent, open and accountable. In particular, real benefits have flowed over the past year from lifting the veil of secrecy over the negotiation and implementation of treaties - free from public suspicion and misconceptions.

The establishment of the Joint Committee has been criticised on the basis that it lacks power to modify or object to proposed treaties and that there is no requirement for government to take the committee decisions and recommendations into account. However, short of requiring ratification of all treaties by parliament, the bi-partisan Joint Committee does act as a useful consultative mechanism and the government would ignore its recommendations at its peril. The alternative would be to expose the government to opposition in the Senate, potentially able to override executive policy by withholding approval to treaty actions, with the potential for the Commonwealth to be seriously impaired and damaged by delay and inability to act in the national interest.

What is the appropriate balance?

Almost a decade ago, the Constitutional Commission reported:

> ... In exercising its undisputed power to bind Australia in this area, it is pointed out that the international relations of the Commonwealth would be considerably hamstrung if its legislative authority to implement treaties were restricted. Instead of taking an active role in the increasing trend towards international co-operation and the widening area of subjects regarded as of international interest and concern, Australia would find itself a backwater on the international scene.[13]

Surely the corollary to the executive having effective power to bind Australia internationally, is that the proper role of parliament should not be subverted by either executive action or the courts.

It must be left to parliament to decide whether international instruments by which Australia is bound or to which Australia is a party should be validly incorporated into Australian law by legislation.

Whilst I have some sympathy with the view expressed by former Chief Justice Mason in *Mabo*, that modern democracy is an evolving concept and responsible government mandates action when the legislature fails to address important internationally recognised benchmarks in areas such as human rights, that of itself should not be a warrant for the courts to override parliament in formulating policy and making the law.

Although the democratic process can be at times inconvenient and frustrating, the principle of parliamentary representative democracy is fundamental to the way we Australians are governed.

Perhaps a more relevant question for present purposes is whether the role of government in signing treaties is reduced to mere politics and diplomacy if treaties are signed in the absence of an intention that the ensuing international obligations will be adhered to?

Ultimately there is a discrepancy between the international and domestic effect of ratification. It leads to the situation where internationally Australia may be bound, but domestically if the so called anti-*Teoh* Bill is passed, there will be no longer any basis for an expectation that provisions in unimplemented treaties will be applied by decision-makers.

There can be no room for doubt that if enabling legislation implementing treaty provisions conforms to the purpose and terms of a treaty, the government is able to rely upon the external affairs power to enact such legislation.[14]

But what if Australia signs a treaty and delays or neglects or even refuses to introduce enabling legislation?

Federal/state perspective

Looked at from an international perspective, when Australia becomes a signatory to a treaty, it will bind the whole of Australia regardless of the federal system and the distribution of legislative powers between the Commonwealth and the states, unless the ratification is subject to a *reservation*.

Australia's ratification of the International Covenant on Civil and Political Rights (ICCPR), was originally subject to a general reservation that was removed in 1904 and replaced by a *federal statement* as follows:

> Australia has a federal constitutional system in which legislative, executive and judicial powers are shared and distributed between the Commonwealth and constituent states. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

Australia had thereby notified other State parties that where the subject matter of a treaty provision falls within the authority of an Australian state, it is up to that state to implement that part of the Covenant.

In 1990 Australia ratified the First Optional Protocol of the ICCPR which enabled the complaint of the so-called "Tasmanian gays" to be bought to the United Nations Human Rights Committee claiming that Tasmanian laws making homosexuality a criminal offence breached the ICCPR.

The complaint set off a chain of events that recently led to Tasmania repealing the offending legislation. In removing the reservation and ratifying the First Optional Protocol, the Commonwealth had clearly acknowledged its international obligations under the ICCPR. In enacting the *Human Rights (Sexual Conduct) Act 1994*, the Commonwealth signified nationally that Tasmanian state rights, (however indefensible the offending provisions of the Tasmanian Criminal Code might appear), were on this subject all but extinct. It led commentators to wonder yet again whether Australia had ceded sovereignty to a United Nations Committee and whether federation has effectively obliterated state rights when push comes to shove!

The right of parties to sign treaties subject to general reservations is however a recognition of the right and indeed in many cases the necessity for State parties to take account of their respective internal constitutional rights or cultural or religious sensitivities.

The right to ratify a treaty subject to a general reservation explicitly recognises there is no guarantee that treaty terms will be enacted without limitation by State parties and implicitly recognises that the act of signing a treaty is not a rubber stamp for the enactment of corresponding national legislation. The *Teoh* situation, for example could not have arisen in the United States where a treaty becomes binding as a matter of domestic law once it is adhered to by the legislature.

The *Toonen* case (which led to the passage of the *Human Rights (Sexual Conduct) Act 1994*) raises the very real problems of applying universal human rights as an undeviating standard across vastly different cultures and legal systems for recognising treaty obligations. The hypocrisy of the Toonen exercise was perhaps highlighted by the fact that at least 5 of the 18 members of the Human Rights Committee which found Australia

was in breach of its international human rights obligations, at that time had been nominated by countries where homosexual acts were still capable of constituting an offence!

Conclusion

This brings me back to the ramifications of the *Teoh* decision and the so-called anti-*Teoh* provision of the Bill. The Senate Legal and Constitutional Legislation Committee heard a deal of evidence from a number of interested parties on a range of issues including whether the Bill is necessary and whether it is appropriate.

There is almost universal agreement that the *Teoh* doctrine has not had a discernible impact on administrative decision-making. There is speculation that this may have been because of the two executive statements indicating a contrary intention or it may be that the requirement to observe procedural fairness where individual rights are affected is already provided for as part of administrative review mechanisms.

Without canvassing the views of the various academics or pre-empting the Senate Committee Report, representatives from the Attorney-General's Department expressed the view that the Bill is necessary to:

- restore the role of the executive and parliament to the conventional position pre-*Teoh*;[15] and
- confirm the hitherto firmly entrenched position that it is the fundamental role of parliament to change the law to implement treaty obligations and to decide what procedural and substantive rights should flow;[16] and
- ensure certainty in administrative decision-making.[17]

Perhaps in the long run the enduring legacy of *Teoh* and the reforms to parliament's ability to scrutinise treaties, will be a greater recognition of the changing roles of each branch of government and the need for a more co-operative approach to Australia undertaking international obligations, confident in the expectation that conflict with the states can be minimised and that the measures will have broad community support.

That is what the politicians are doing!

Endnotes

1 Estimates Committee A, additional information received (PM & Cabinet portfolio Vol I, June 1994) p 85. See also: C Sanders *Articles of Faith or Lucky Breaks*, 1995 17 Sydney Law Review 150, 168 para.
2 Estimates Committees Hansard, Department of Foreign Affairs and Trade, 29 November 1994, p 158.
3 183 CLR 273 at p 291.
4 183 CLR 273 at 316.
5 Liberal and National Parties Law and Justice Policy Statement February 1996, p 25.
6 Joint statement, 27 February 1997, pp 1-2.
7 Ibid p 2.
8 Government announced reform of treaty making. Joint Statement by the Minister for Foreign Affairs and the Attorney-General, 2 May 1996.
9 29 November 1995
10 Treaties and the Parliamentary Process 1996. 7. Public Law Review 199. Keynote address by the Attorney-General to the 23rd International Trade Law Conference 29 May 1997.
11 Editorial, Sydney Morning Herald, 15 July 1996.
12 Andrew Naylor, "Australia's Treaty making process; Democracy in action?", *Reform* (67) Winter 1995 p 42.
13 Final Report of the Constitutional Commission, 1988, Volume 2, p 740 at 10.496.
14 *Commonwealth v Tasmania* (Tasmanian Dams Case) 1983 158 CLR per Mason J at 131.
15 Transcript of evidence, Senate Legal and Constitutional Committee, Tuesday 19 August 1997, 108 and 109.
16 Ibid p 108.
17 Ibid p 108.

NATURAL JUSTICE AND THE CONSTITUTION OF TRIBUNAL MEMBERSHIP

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Paper presented to AIAL seminar, "Bound by the Rules of Natural Justice: Best Practice in Tribunals", Melbourne, 19 June 1997.

Introduction

This paper focuses on natural justice as it applies to the constitution of tribunals, in particular, on the natural justice limb dealing with bias. I propose to cover three main areas:

(a) actual bias;

(b) ostensible or reasonable apprehension of bias; and

(c) a third category, a special creature, which has developed *outside* the field of natural justice in relation to the constitution of tribunals upon a remitter from a court on a successful appeal.

On the assumption that this third category is less well known, I propose to focus on how it operates to require the reconstitution of a tribunal when a matter is remitted to the tribunal after an appeal. I will also consider the various circumstances and factors which may assist a court in determining whether to order that a tribunal be differently constituted.

Philosophical basis

The rule against bias is derived from a long line of cases recognising the need to maintain public confidence in the administration of justice. It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[1]

Another way of putting this is that no person should be a judge in his or her own cause. As with the hearing rule, the content of the rule against bias is flexible and varies with the factual and legal circumstances in any particular case. Some of the administrative law texts dealing with the topic suggest that the rule is most demanding when applied to the judiciary and is least demanding in the context of domestic tribunals.[2] In discussing the application of the rule against bias in the context of administrative tribunals, I have drawn on authorities dealing with the judicial end of the spectrum.

Actual bias

Pecuniary interest

For the purpose of establishing actual bias, a distinction is made between allegations of a pecuniary interest as distinct from all other interests. Where a tribunal member has a *direct* pecuniary interest in the outcome of the decision, that person is clearly and automatically disqualified. One judge has explained the automatic nature of the disqualification as

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arising because as a matter of juristic policy, a court should be reluctant to investigate whether or not the tribunal was in fact biased. A pecuniary interest therefore raises an irrebuttable presumption of bias.[3]

However, the automatic disqualification for pecuniary interest does not arise where the tribunal member has no beneficial interest in the subject matter. Therefore, if the pecuniary interest belongs to someone other than the decision-maker, no matter how close that person is to the decision-maker, there is no irrebuttable presumption of bias. For example, it does not matter that the decision-maker's spouse[4] or father[5] had the pecuniary interest.

Such is the strength of this rule that where that tribunal member is one member constituting the tribunal in a particular case, the whole tribunal as so constituted is disqualified from acting.[6] It makes no difference that the decision-maker was not influenced by his or her interest in the remotest degree. Nor is the size of that person's interest of any relevance.

There is no bias by way of pecuniary interest where that interest is remote, contingent or purely speculative.

Other actual bias

In relation to actual bias arising from other, non-pecuniary involvement, there are very few reported cases. This is because, as one text book writer has warned:

> One risks judicial wrath and encounters evidential hurdles of considerable magnitude if one attempts to lead evidence in Court showing that a [decision-maker] departed from the normal standard of judicial behaviour.[7]

In my view, the paucity of cases considering what would constitute actual authority is largely due to the existence of the second method of disqualifying a decision-maker namely, on the grounds of reasonable apprehension of bias. It is much more dignified for that test to be applied because it is all about appearances of bias as distinct from bias in fact.

However, due to some statutory developments at the Commonwealth level, it is my view that the ground of actual bias will receive further elaboration. This arises in the migration field. Amendments to the migration legislation which came into effect in 1994 have the effect of limiting the basis upon which decisions of the Refugee Review Tribunal (RRT) and Immigration Review Tribunal (IRT) may be judicially reviewed by the Federal Court of Australia. Paragraph 476(1)(f) of the *Migration Act 1958* (Cth) (Migration Act) provides that the decision of the RRT or the IRT may be the subject of an application for review by the Federal Court on the ground that the decision was induced or affected by fraud or by "actual bias". Some recent cases have considered the meaning of "actual bias" in that context. They usually focus on bias in the nature of prejudgment as distinct from other types (such as personal animosity towards a party).

In the case of *Murillo-Nunez v Minister for Immigration and Ethnic Affairs*,[8] Justice Einfeld of the Federal Court considered the meaning of paragraph 476(1)(f) of the Migration Act. He noted that for a considerable time a distinction has been drawn between actual bias and what is known to lawyers as apprehended bias. He also pointed out that in the explanatory memorandum, the legislature explained its intention behind the use of the phrase "actual bias" by stating that it would be necessary to show that the decision-maker was actually biased and not that there was simply a reasonable apprehension of bias.

In describing what was meant by "actual bias" in this context he pointed out that it is possible that bias may be found by evidence that the body or individual

concerned has allowed itself to become affected by prejudgment, preconception or prejudice and that this was difficult to prove. He accepted that if there is a perception of bias to the requisite standard of proof, bias is established and it is unnecessary to go to the point of proving that a judge or tribunal was in fact actually biased.

There must be a clear connection between the proven bias and the decision, in other words, that the bias procured or assisted to procure the decision. There must be a serious case of bias, not one that was remote or required a series of difficult inferences or the construction of a series of disparate facts. The legislature was likely to have meant that the actions of the tribunal under consideration must be so tainted by provable events that a conclusion should be drawn that the decision was affected by bias.

Similarly, in *Wannakuwattewa v Minister for Immigration and Ethnic Affairs*[9], Justice North stated that an allegation of actual bias of a tribunal member involves demonstrating that the tribunal did not, in fact, bring an unbiased mind to the issues before it. It means that the applicant must show that the tribunal had a closed mind to the issues raised and was not open to persuasion by the applicant's case.

In the recent case of *Singh v Minister for Immigration and Ethnic Affairs*,[10] Justice Lockhart considered in some detail what was meant by "actual bias" in paragraph 476(1)(f) of the Migration Act. He confirmed that actual bias has rarely been established. Such cases include those in which the member of the relevant tribunal had an interest in the outcome of the proceedings, but which fell short of a direct pecuniary interest.[11] Justice Lockhart stated:

> It is always difficult to explore the actual state of mind of the person said to biased. Evidence to establish actual bias may consist of actual statements made by the person said to be biased, and of objective facts and circumstances from which an inference of bias may properly be drawn. Bias is not synonymous with absence of good faith; a person may in all good faith believe that he was acting impartially, but his mind may nevertheless be affected unconsciously by bias.[12]

Where it is alleged that the tribunal prejudged the matter before the conclusion of the hearing, the transcript of the proceeding before the tribunal will be important to determine the actual statements made by the tribunal, the nature of the exchanges between the tribunal and the parties or their legal representatives, and the context in which those statements were made.[13] In the *Singh* case, Justice Lockhart consulted a transcript of the evidence as well as the tapes from which the transcript was derived so that he could understand the context, the tone and the manner of the remarks of the tribunal member in question.

It is a question of fact in each case to determine whether or not the tribunal member has been so biased that the decision cannot be allowed to stand. When actual bias is alleged, the matters upon which reliance is placed to establish it must be considered in the context of the whole of the hearing before the decision-maker. A tribunal member may form a preliminary conclusion about a particular issue involved in an inquiry. That is not sufficient to establish actual bias and to disqualify a tribunal member from hearing a matter. Even where a decision-maker is shown to have expressed or otherwise formed views about an issue involved in an inquiry prior to the giving of evidence, actual bias will be established only where the evidence shows that these views were incapable of being altered because the decision-maker had unfairly and irrevocable prejudged the case.[14] The distinguishing line between comments made by a tribunal with a view to identifying the real issues in a particular case and the expression of preconceived views, such as about the reliability of particular witnesses, are what bias cases

are all about. It is the ill-defined nature of that line which creates the difficulty in the determination of bias cases.

Where a tribunal has prejudged a matter before the conclusion of the hearing, that may amount to actual bias.[15] In the case of *Khadem v Barbour, Senior Member of the Administrative Appeals Tribunal and Anor*[16] it was argued that remarks made by the tribunal member gave rise to a reasonable apprehension of bias. Justice Hill of the Federal Court was at pains to point out that the case was run as a reasonable apprehension case and that at no time was it suggested, nor could it be, that Mr Barbour was personally biased against the applicant.

He then grappled with the different expressions of the reasonable apprehension of bias tests and found that it was unnecessary to determine what the correct test was. This was because it was clear in that case that an objective observer would conclude that the tribunal had indicated by its remarks that no matter what further evidence was called, the tribunal had made up its mind at the conclusion of the applicant's evidence and prior to any further evidence being presented. Justice Hill stated:

> I do not think that any different result should follow merely because Mr Barbour was acting as an administrative tribunal rather than exercising judicial power. Although, as indicated earlier, it may be the case that a different test should be applied to an administrative tribunal having a policy function, the Administrative Appeals Tribunal does not have any policy function ... In [performing its function] it must act impartially and be seen to have acted impartially. Although it may be said that judges and members of tribunals are able to put out of their minds preconceived ideas or views formed after they have heard other evidence (and there is no empirical evidence that this is necessarily so), I think that an objective observer would find it difficult in the present case to accept, after the comments which Mr Barbour made, that he would or could change his mind after hearing further evidence from Mr Khadem or his family.[17]

Justice Hill remitted the matter to the tribunal to be heard again by a differently constituted tribunal.

As I have mentioned, it is permissible for judges or decision-makers to make their views known to a party during a hearing so that there may be an opportunity to discuss and ventilate fully the issues in the case. However, as Justice Lockhart pointed out in the *Singh* case:

> It is not sufficient to show that a decision maker has displayed irritation or impatience or even sarcasm during a hearing; regrettable though, these manifestations may be.....[18]

Justice Lockhart continued:

> It is obviously undesirable for decision makers in the course of the hearing before them to be sarcastic or to make fun or mockery of witnesses or to show high personal indignations. In some cases, this may be sufficient to establish actual bias; but generally it would be simply part of the factual matrix that must be taken into account to determine whether a decision maker had such a closed mind to critical issues in a matter that he prejudged the case against the party concerned.

Although on balance he found that the passages alleged to give rise to actual bias did not do so, he did point out some "unfortunate" comments which tended to support the applicant's case. Justice Lockhart did find that "the hearing was somewhat robustly conducted by the Tribunal member". These included comments such as:

- I mean you must think we are stupid or something?;
- So you know, I have just shown that these documents cannot be believed. Either you cannot be believed or they cannot. Or may be both (laughs);
- You have dug your own grave.

As I have suggested, I believe that the law in relation to actual bias in the context of the Migration Act may see some

development given the limited grounds for judicial review from the IRT and RRT.

Reasonable apprehension of bias

In the past there have been some divergent views as to precisely what constitutes the "reasonable apprehension of bias" test. However, for approximately the last twenty years, that test has become more and more certain and the threshold has become less and less severe. It is no longer necessary that there be a "real likelihood of bias".

The test of reasonable apprehension of bias has been recently affirmed by the High Court in the case of *Webb v R*[19]. In that case, the High Court, although dealing with the question of bias of a juror, confirmed that the test is whether, in all the circumstances, a fair minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question in issue.[20] An alternative way of expressing the same test is whether fair-minded people might reasonably apprehend or suspect that the decision-maker has prejudged or might prejudge the case.[21] The test of reasonable apprehension of bias must now be regarded as the prevailing test in this country.[22]

It is clear that this test is equally applicable to judicial officers and to administrative tribunals and enquiries.[23] However, as with any other general rules or principles that are developed, the content of the reasonable apprehension of bias rule fluctuates depending on all the circumstances including the powers of the decision-maker and the form of the bias alleged.

There has been some judicially expressed concern that the acceptance by the High Court of the reasonable apprehension of bias test could have caused an increase in the frequency of applications for disqualification. However, there have been repeatedly endorsed reminders that although it is important that justice must be seen to be done, it is equally important that relevant decision-makers discharge their duty to sit and do not encourage parties to believe that by seeking the disqualification of the decision-maker, they will have their case tried by someone thought to be more likely to decide the case in their favour. Accordingly, they should not accede too readily to the suggestions of appearance of bias raised by the parties.[24]

Although the test is reasonably clear, it is the application of that test to the circumstances of a particular case which proved difficult. As Justice Kirby has pointed out:

> In each case, the judicial officers concerned, whether at first instance or on appeal, must apply the well-worn words. But in the end, the response which each gives may be more instinctive and less deductive than the reasoning of the courts has tended to suggest.[25]

I set out below some recent examples of the application of the reasonable apprehension of bias test. Over the years, a number of categories or classes of case have evolved. However, these are only illustrative and are not an exhaustive list of the types of cases that may arise. Those categories are:

1 prejudgment of the issues or credibility of witnesses arising from:

- prior involvement in the matter to be decided;
- the manner in which proceedings are conducted (for example, stating concluded rather than preliminary views before the finalisation of a hearing);
- holding strong views on the subject matter;

2 improper communications—no communication should take place between a decision-maker and:

- a party; or
- a witness; or
- a representative of a party,

without the knowledge and consent of the other party.

3 improper relationships—these may exist between a decision-maker and:

- a participant in the proceedings;
- the issues in the proceedings.

An example of a case where there was reasonable apprehension of prejudgment is *A v Crimes Compensation Tribunal.*[26] A magistrate, hearing criminal proceedings based on alleged sexual assaults of around 20 years ago, interrupted a prosecution witness on a number of occasions stating "You can't remember things that happened 20 years ago". At the conclusion of the evidence of the accused's wife, the magistrate stated that he had heard enough and that it would not be necessary to call any further witnesses on behalf of the defence. He then dismissed the charges and emphasised that he did not believe that a person could remember things that happened 20 years ago and that such a person could not be precise about things over that time. He then stated that he would hear the accused's application for crimes compensation. An application was made that the magistrate should disqualify himself on the ground of reasonable apprehension of bias. The magistrate did not do so. Justice Beach of the Victorian Supreme Court found that looking objectively at the facts a reasonable apprehension of bias arose. He ordered that the Crimes Compensation Tribunal constituted by a person other than that particular magistrate hear and determine the application for crimes compensation according to law.

An example of disqualification on the basis of holding strong views occurred in the case of *Dental Board of New South Wales v NIB Healthcare Services Pty Ltd.*[27] In that case, the respondent healthcare fund sought to establish a dental health clinic in Sydney. The Dental Board comprised five dentists including a Chairman and four non dentists. At least five years before the proceeding, the Chairman had campaigned against health funds being permitted to open dental clinics because it would affect the livelihood of dentists in private practice. Previous litigation involving an application by the respondent to open a clinic in Newcastle had been resolved on the basis that the Chairman would not sit on the hearing of a new application. The majority of the New South Wales Court of Appeal held that in the circumstances it would be incongruous of the Board now to contend that a reasonable, fair-minded, informed member of the public might not have a reasonable perception that the decision of the Board, chaired by this particular dentist, might be biased. The majority of the court felt that this went beyond having a strong view on a particular subject matter.

Interestingly, Justice Meagher dissented on this point and stated:

> In my opinion, the ordinary reasonable man, once he realised that the Dental Board was constituted by Parliament in such a way that it would usually be dominated by practising dentists, would find it unexceptionable - and indeed, inevitable - that one or more of its members from time to time had strong views on the matters on which it deliberated. He would not perceive bias if this in fact happened. Maybe the average psychopath, to whose imaginary views modern courts seem to pay so much attention, would think otherwise.

Other recent examples of reasonable apprehension of bias include:

- where an "off the record" briefing had been given to a journalist by the person conducting an inquiry;[28]

- where a magistrate met with a legal officer of the respondent (ASC) at his home and requested that he carry out work sorting exhibits during the trial.[29]

Necessity

In some circumstances, the common law principle of necessity may be invoked to allow an otherwise disqualified decision-maker to hear and decide a case where no other qualified person is available. That principle can only be invoked to the extent that it is necessary to prevent a failure of justice or a frustration of statutory provisions.[30] That principle will only be sparingly invoked and applied and then, only to the extent that necessity justifies. Wherever the rule of necessity is invoked, the reviewing court will probably review the matter with particular intensity.[31]

An example of where a decision-maker has disqualified himself on the basis of apprehended bias is the case of *De Alwis v Healy Stewart*[32]. In that case, a part-time judicial registrar had previously received instructions as counsel from a partner of a particular firm. That partner then set up a new partnership with the respondent firm, Healy Stewart. The case in question was about a solicitor from Healy Stewart who had sought compensation for unreasonable notice given in relation to his termination of employment. The judicial registrar determined that it was not appropriate for him to continue in the proceeding given the proximity of the relationship between himself and the partner of the newly formed partnership (which was a party to the proceeding) and the fact that the financial relationship between him and that partner continued, particularly in circumstances where that partner had a contingent liability to the judicial registrar in his capacity as counsel. The proximity of that relationship and the rational link between the registrar's association with the partner and its capacity to potentially influence his decision in the present case was sufficient to cause him to disqualify himself. This case illustrates some of the difficulties which are faced by decision-makers in determining whether or not to disqualify themselves.[33]

It should be noted that there is no room for the principle of necessity where an alternative tribunal with jurisdiction exists or where multi-member Tribunals exist and a quorum can still be found after the disqualified member or members have been excluded.[34] Inconvenience caused by the need to reconstitute a tribunal is not a good enough reason to invoke the principle of necessity.[35]

Waiver

Where a party knows that circumstances exist from which a reasonable apprehension of bias may be inferred, and being aware of the right to object, that person should make an application for disqualification at the earliest opportunity. If that person fails to do so, it is possible that he or she may be taken to have waived to right to subsequently object.[36] This is based on the view that failure to make a timely objection may deprive the decision-maker concerned of the opportunity to correct the wrong impression of bias, to refrain from hearing the case and to save the time, costs and efforts both of the court and of the other party. Without this principle, a person might seen to gain advantage by staying silent and waiting until the litigious waters had first been tested before deciding to raise the suggested ground of disqualification.[37]

It should be noted that the principle of waiver is not limited to cases where the relevant party is legally represented[38], but it will be necessary to inquire whether the party had the knowledge of the right to object to the decision-maker continuing to hear a matter.

Reconstitution on remitter

So far, I have focused on the two traditional limbs of the rule against bias. Namely, actual bias and reasonable apprehension of bias. I will now consider a third broader category of fairness which some authorities have suggested does not spring out of natural justice at all.[39] That third category deals with the constitution of an administrative tribunal when a matter is remitted to it for the reconsideration after a successful appeal to a court.

I will outline the nature of the general principle which has developed and I will attempt to identify some factors considered relevant when a court exercises its discretion in remitting cases to a tribunal.

Where administrative tribunals are established by statute, there is often a provision which enables an appeal to be made to an appropriate court. It is also common for the statute to specify the types of orders which may be made by the court on appeal. One of the types of orders which may be made is an order remitting the matter to the tribunal for reconsideration. Included within this power is a discretion as to whether to order that the tribunal be differently constituted when reconsidering the matter remitted.

A classic example of such a provision is subsection 44(5) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). It relevantly provides that:

> ...the orders that may be made by the Federal Court of Australia on an appeal include.... an order remitting the case to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the Court.

Similar provisions exist in relation to courts or tribunals being able to remit a matter to the original decision-maker.[40] An example of this is paragraph 16(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) which empowers the Federal Court to make an order in relation to a judicial review application:

> ... referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit.

It is in consideration of this latter provision of the ADJR Act from which the general principle springs.

In *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal & Anor*[41] the Australian Broadcasting Tribunal constituted by a particular member had issued a report on an inquiry about the grant of an FM radio licence in the Lismore area. The trial judge set aside the report and referred it to the tribunal for further consideration under paragraph 16(1)(b) of the ADJR Act. In the exercise of the discretion under that section, the judge directed that the tribunal be differently constituted. However, the case was argued, and appeared to have been decided by the single judge on the grounds that the tribunal member should be regarded as disqualified on the ground of reasonable apprehension of bias.

On appeal, the Full Federal Court comprising Justices Davies, Burchett and Foster pointed out that there was no substantive application to prohibit the tribunal member on the grounds of bias. It was solely about the exercise of the discretion under paragraph 16(1)(b) of the ADJR Act.[42] The correct decision had been reached but apparently for the wrong reasons.

The principal judgment of Justices Davies and Foster succinctly stated the general principle about the constitution of the tribunal when exercising the discretion to remit:[43]

> ... when decisions in judicial and administrative proceedings are set aside *in toto* and the matter remitted to be heard and decided again, justice is in

> general better seen to be done if the court or the tribunal is reconstituted for the purposes of the rehearing.

Therefore, the same principle which justifies the rule against bias was used equally to justify this general principle in exercising the discretion to remit to a differently constituted tribunal, namely, that justice is in general better seen to be done.[44]

The judges elaborated on this general principle of ordinary practice as follows:[45]

> If a decision has been set aside for error and remitted for rehearing, it will generally seem fairer to the parties that the matter be heard and decided again by a differently constituted tribunal. This is because the member constituting the tribunal in the original inquiry or hearing will already have expressed a view upon facts which will have to be determined in the rehearing. The aggrieved party may think that a rehearing before the tribunal as originally constituted could be worthless, for the member's views have been stated.... There are, of course, cases where it is convenient for the tribunal as previously constituted to deal with the matter. And occasionally the Court itself expresses such a view,[46] so as to make it clear that it would not be improper for the tribunal as previously constituted to consider the matter again.[47]

The general principle in the *Northern NSW FM* case has been applied many times. In one case an order that the rehearing by the tribunal be by another member was considered not necessary and the *Northern NSW FM* case cited in support.[48] Other cases merely include a reference to the tribunal being differently constituted in the orders made by the court without further discussion of the principle.[49] At least one decision has confirmed that the usual case is that matters remitted to the AAT are heard and decided by a tribunal differently constituted to the one which made the decision the subject of the successful appeal.[50]

The principle has even been applied by an administrative (or quasi-judicial) body where a case has come back to it after a successful appeal. It was not directly remitted. In *Australian Railways Union v Public Transport Corporation of Victoria & Ors*[51] the High Court had held that an industrial award had not validly been made by the Full Bench of the Australian Industrial Relations Commission as the Public Transport Commission had not had an opportunity to make certain submissions. The award was unconstitutional.[52] The Court refused to make a direction that if the matter was to go back before the Commission a different Full Bench should be constituted to hear it. The course to be taken was a matter for the parties and the Commission. It noted that no issue of assessment of the credit of witnesses arose.[53]

Upon the relisting of the matter, the Full Bench of the Commission had submissions made to it about reconstituting itself on the grounds of reasonable apprehension of bias. It noted the High Court's comments and stated:

> However, the Court's refusal [to make a direction] does not obviate the need for the Commission as now constituted to have regard to the principles which it ought itself apply in giving consideration to an application of the kind now made.

The Commission applied the *Northern NSW FM* case and determined that the Full Bench should be differently constituted. The file was referred to the President for further allocation for hearing and determination.

The cases have made it clear that it is a general principle. The *Northern NSW FM* case is not limited to the discretion to remit as set out in the ADJR Act but also extends to subsection 44(5) of the AAT Act.[54] The exercise of the discretion is not affected by subsection 44(6) which states that if the court remits the case to the tribunal, "the Tribunal need not be constituted for the hearing by the person or persons who made the decision to which the appeal relates".[55] Similarly, the

principle applies to an exercise by the Federal Court under its rules of the discretion of whether or not to amend orders it had previously made which had not yet been entered and which remitted a case to the AAT.[56]

I think it is safe to say that the *Northern NSW FM* case has given rise to a "well established principle and general practice applicable to administrative proceedings".[57] But I believe it is one that is not so well known in the legal profession.

The main issue which arises in cases where such a remitter has occurred is whether there are circumstances which exist which would justify an order departing from the general principle and practice. This involves a consideration of the factors which have been identified as supporting a decision to apply or depart from the practice. The practice may also vary among jurisdictions as where certain tribunals are concerned, it may be more convenient to have a previously constituted tribunal deal with a matter rather than reconstituting the tribunal.[58]

The cases have suggested that the following factors are relevant in determining whether the tribunal should be reconstituted:

- whether the member or tribunal has expressed a view or made findings on facts to be determined at the rehearing and which would be relevant to the exercise of any discretion;[59]
- whether views on the merits were fully and firmly expressed, adverse to the appellant;[60]
- whether there is evidence of substantially greater costs or delay incurred by the tribunal than as originally constituted;[61]
- whether there is evidence that rehearing by a differently constituted tribunal would be inconvenient or unsuitable;[62]
- whether there are findings on the credibility of a major witness;[63]
- whether there are statements of strong personal views about the applicant[64] or the applicant's evidence;[65]
- whether there was extensive, lengthy and far-reaching consideration of the matter by the tribunal or any inquiry process which was very detailed and protracted;[66]
- whether a particular member has already dealt with the matter twice;[67]
- if the tribunal took a partisan role in the appeal beyond making submissions about interpretation of the relevant legislation and the powers of the tribunal where no exceptional circumstances existed to justify that role;[68]
- whether a reasonable person in the shoes of the aggrieved party may think a rehearing before the original tribunal was worthless.[69]

Some cases have distinguished the *Northern NSW FM* case or at least tried to do so by focussing on the nature and circumstances of the decision set aside or remitted. In *Ragogo v Minister for Immigration and Ethnic Affairs & Anor*[70] the IRT had wrongly found that it did not have jurisdiction to consider an application to it but, nevertheless, proceeded to determine the matter on the merits for the sake of completeness.

On appeal to the Federal Court, Justice Moore set aside the decision made on jurisdiction. However, after noting that the error of law had no bearing on how the IRT went about determining the matter on the merits, he decided not to remit the matter to the tribunal. He stated[71]:

> The principle in [Northern NSW FM] has been applied where the decision that is set aside is the decision that must be made again..... Such is not the case in these proceedings. In my opinion it would not be unfair if no order was made remitting the matter to the Tribunal to be determined by the Tribunal differently constituted. It should be a matter for the Tribunal to determine by whom and by what means the application for review is determined.

In *Siddha Yoga Foundation Ltd v Strang & Anor*[72] an appeal to the Federal Court was made by a third party against a decision of the AAT on the reverse FOI matter. The appeal considered the application of several exemptions under the FOI Act including section 45, the exemption dealing with documents obtained in confidence. The appeal was ultimately successful on the latter ground and was remitted for that exemption only to be reconsidered.

Justice Jenkinson described the principle as a doctrine or a general precept of what might be thought to be ordinarily a safe and wise course to take; it is not rigidly binding:

> This is a doctrine quite distinct from the doctrines relating to disqualification for bias, actual or apprehended. It is based on an indulgence to the irrational though sometimes quite understandable reactions of persons who are not familiar with the processes of the law or of administration according to law.[73]

Justice Jenkinson found that the AAT had made various conclusions and findings of fact about a particular person's behaviour (relevant to the confidentiality exemption). This included a reference to that person engaging in "tittle tattle".

The respondent, in seeking to distinguish *Northern NSW FM*, had argued that since only one exemption was remitted to the AAT, the whole of the decision had not been set aside and remitted. Justice Jenkinson rejected the argument as the claim for exemption under section 45 of the FOI Act:

> was the remains a whole decision in itself and it is quite separate from the claims for exemption under the other sections which were heard and determined, and involved at the first hearing a determination of questions of fact and required the expression by the Tribunal of views about those facts.[74]

Conclusions

When the constitution of tribunals is in question, it is not enough that one turns his or her mind to the traditional rubrics of actual bias and reasonable apprehension of bias.

One must also consider, in cases of remitter from a court to the relevant tribunal after a successful appeal, whether the tribunal ought be differently constituted. As Justice Jenkinson observed during the hearing of the *Siddha Yoga* case, the tribunal would be differently constituted as a "tenderness for the minds of litigants"[75] in order to provide the "warm feeling that it will be better ....[to] get another tribunal because the parties will feel comfortable".[76]

Endnotes

1 *R v Sussex JJ; Ex Parte McCarthy* [1924] 1 KB 256, 259; *R v Watson; Ex Parte Armstrong* (1976) 136 CLR 248.
2 M Aaronson and N Franklin, *Review of Administrative Action*, (1988), 193.
3 *In Anderton v Auckland City Council* [1978] 1 NZLR 657, 680.
4 *R v Industrial Court* [1966] Qd R 245.
5 *Metropolitan Properties Co (FGC Limited) v Lannon* [1969] 1 QB 577, 598.
6 *R v Hendon Rural District Council; Ex Parte Chorley* [1933] 2 KB 696.
7 Aaranson and Franklin, op cit 192.
8 *Murillo-Nunez v Minister for Immigration and Ethnic Affairs* (1995) 63 FCR 1950.
9 Unreported, 24 June 1996, VG 451 of 1994.
10 Unreported, 18 October 1996, Lockhart J, No. G960 of 1995
11 See *R v Gough* [1993] AC 646, 659.
12 *Singh* at page 6. See also *R v Gough* [1993] AC 646, 659 and *R v Barnsley Licensing Justices; Ex Parte Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, 187 Per Devlin LJ.

13 *Khadem v Barbour, Senior Member of the Administrative Appeals Tribunal and Anor* (1995) 38 ALD 299.
14 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 100.
15 *Re Gooliah and Minister of Citizenship and Immigration* (1967) 63 DLR (2d) 224.
16 (1995) 38 ALD 299.
17 Id 308. Mr Barbour made the following statement.

> *"Mr Khadem, I do not accept your evidence in relation to much of what you have said. I cannot make myself any clearer. I do not accept that you are giving honest evidence. Now, all I am saying to you is this, I want to be sure that you understand what you are doing in proceeding and that you have made that decision in understanding what are the consequences of that."*

18 *Singh* case 9 - 10.
19 (1994) 122 ALR 41.
20 Id 59-60, Per Deane J.
21 Id 44, Per Mason C.J and McHugh J.
22 Id 75, Per Toohey J.
23 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 90 ALR 310.
24 *Re JRL; Ex Parte* CJL (1986) 161 CLR 342, 352 per Mason J; *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1980) 6 NSWLR 272.
25 *Australian National Industries Limited v Spedley Securities (in liquidation)* (1992) 26 NSWLR 411, 417 (Court of Appeal).
26 Unreported, Supreme Court of Victoria, 1 May 1996, Per Beach J.
27 (1996) 39 NSWLR 369.
28 *Gaisford v Hunt & Anor*, unreported, Federal Court, 6 December 1996.
29 *Schreuder v Australian Securities Commission*, unreported, Supreme Court of Tasmania, 14 June 1996.
30 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, Per Deane at 96.
31 *Builder's Registration Board (Qld) v Rauber* (1993) 57 ALJR 376, 386.
32 Unreported, Federal Court, 8 April 1997, Per Ritter JR.
33 Another good example which reviews many of the relevant authorities is *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd & Anor* (1996) 135 ALR 753, Per Merkel J.
34 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70.
35 *R v Auctioneers and Agents Committee; Ex Parte* Amos [1985] 2 Qld R 518, 526.
36 *Vakauta v Kelly* (1989) 167 CLR 568, 572.
37 *Lindon v The Commonwealth of Australia (No 2)*, unreported, High Court, 6 May 1996, Kirby J.
38 *Wentworth v Rogers (No 12)* (1987) 400, 421, 422; *Preston v Carmody & Ors* (1993) 44 FCR 1.
39 See *Siddha Yoga Foundation Ltd v Strang & Anor*, unreported, Federal Court, 9 February 1996, per Jenkinson J, pp 4 - 5 (hereafter **"Siddha Yoga"**).
40 See Appendix A.
41 (1990) 26 FCR 39 (hereafter *Northern NSW FM*) ;contra *Bleicher v Australian Capital Territory Health Authority* (1991) 101 ALR 17, 18.
42 *Northern NSW* FM 40, 44.
43 Id 43.
44 See also *Repatriation Commission v Bushell* (1991) 23 ALD 13, 16-7 per Davies J; *MA v Commissioner of Taxation* (1992) 37 FCR 225, 229.
45 *Northern NSW FM* 42-3.
46 Davies and Foster JJ referred to the unreported Federal Court case, *Versatile Carpets Pty Ltd v Collector of Customs* (unreported, 21 February 1985, Sweeney, Woodward and Davies JJ).
47 Applied in *Australian Postal Corporation v Lucas* (1991) 14 AAR 487, 496.
48 *Repatriation Commission v Malley* (1991) 24 ALD 43.
49 See for example *Rodoriok v Australian & Overseas Telecommunications Corporation Ltd* (1992) 111 ALR 355 (Full Federal Court); *Waldron v Comcare Australia* (1995) 37 ALD 471 (per Burchett J), *Kalwy v Secretary, Department of Social Security (No 2)* (1993) 32 ALD 451, 461-2 (although the decision to order a differently constituted tribunal was couched in language reflecting bias: "perceived to have a preconceived idea about it, such that justice may not be seen to be done").
50 *Blackman v Commissioner of Taxation* (1993) 43 FCR 449, 455 (Full Federal Court); *Northern NSW FM.*
51 Unreported, Australian Industrial Relations Commission, Full Bench, 8 December 1993.
52 *Re Australian Railways Union & Ors; Ex parte Public Transport Corporation* (1993) 117 ALR 17
53 Id 25.
54 *White v Repatriation Commission* (unreported, Federal Court, 3 August 1995, per Moore J); *Siddha Yoga.*
55 Ibid.
56 *Siddha Yoga.*
57 *Australian Railways Union v Public Transport Corporation of Victoria & Ors* (Unreported, Australian Industrial Relations Commission, Full Bench, 8 December 1993); See also *K v Cullen* (1994) 36 ALD 37; *Kunz v Commissioner of Taxation* (unreported, Federal Court, 27 February 1996, per Jenkinson J).
58 *Australian Railways Union.*
59 *Northern NSW FM, Australian Railways Union;*

60 *Northern NSW FM*; PW Young, "Successful appeal-remission to the trial court", (1994) 68 ALJ 79.
61 Ibid.
62 Ibid. This suggests that a concept similar to necessity (described above) is relevant in this context also.
63 PW Young, op cit; *Australian Railways Union* case, 25.
64 Such as calling the applicant an "idiot" in the Shakespearian sense or referring to the oral evidence of the applicant is not "worth the paper it is written on" and to describe him as "an unmitigated liar whose evidence I cannot accept": *Ma v Commissioner for Taxation* (1992) 37 FCR 225, 230. See also *Dolan v Australian and Overseas Telecommunications Corporation* (1992) 42 FCR 206, 218.
65 Such as concluding that the applicant's testimony was "virtually worthless" and repeating it in various places in the tribunal's reasons. *Kunz v Commissioner of Taxation*, unreported, Federal Court, 27 February 1996, per Jenkinson J.
66 *Northern NSW FM* case; *Riverina Broadcasters (Holdings) Pty Ltd v Australian Broadcasting Tribunal*, unreported, Federal Court, 29 September 1992, per Drummond J.
67 *Kalwy* case.
68 *Riverina Broadcasters* case.
69 PW Young, op cit.
70 (1995) 59 FCR 489. This case was about the decision whether or not to remit, rather than the constitution of the Tribunal.
71 Id 500-1.
72 Unreported, Federal Court, 9 February 1996, per Jenkinson J.
73 Id 4.
74 Id 6.
75 Transcript, p 17.
76 Transcript p 28-9.

THINKING CLEARLY ABOUT THE RIGHT TO KNOW: BRITAIN'S WHITE PAPER ON FREEDOM OF INFORMATION

*Spencer Zifcak**

Introduction

It did not start auspiciously - Britain's White Paper on Freedom of Information[1] was leaked to the press prior to its final approval by Cabinet apparently in order to sidestep anticipated opposition from senior ministers in the Blair Government. As soon as its recommendations were canvassed in the broadsheet media, however, it became very much more difficult for the oppositional faction in the Cabinet to argue that the White Paper should not be released. And so the Paper *Your Right to Know*. was duly presented to Parliament by the Chancellor of the Duchy of Lancaster, David Clark, late in December 1997.

It would have been a pity had the Paper not seen the light of day. For it contains some of the clearest thinking about access to official information published by government in recent years. It has its deficits of course. But overall its analysis of the issues and problems surrounding a right to know and the solutions it proposes augur well for British freedom of information (FOI) legislation. It also contains much from which established FOI jurisdictions can learn.

In the remainder of this article I will describe the major proposals contained in the White Paper, analyse its more interesting initiatives, explore its deficits and then make a number of concluding remarks.

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An outline of the White Paper

The FOI White Paper is set against the background of a number of important measures taken by the new Labour Government to promote greater openness and accountability in political and public administration. The Government has supported the establishment of Scottish and Welsh parliaments, it has made the government of London more democratic and it has introduced legislation to incorporate the European Convention of Human Rights into UK domestic law.

The White Paper itself is the first step in delivering on the Government's promise to break down the culture of secrecy in Whitehall and introduce freedom of information laws. Freedom of information campaigners spent many years in the wilderness under the Thatcher and Major administrations but extracted promises from all the major opposition parties to implement more open government upon their election.[2] The new government has moved quickly to commence a process of consultation which will result in a draft bill and then final legislation by the spring session of parliament in 1999.

The proposed Act's coverage is broad. As usual it will apply to government departments and agencies, non-departmental public bodies, local authorities, the national health service, schools, universities and public service broadcasters. It also extends to nationalised industries, public corporations, privatised utilities and

private organisations insofar as they carry out statutory functions. There are exceptions for the parliament, the security service, the intelligence service and the special forces. But beyond this, very few others are envisaged.

The White Paper proposes that the general right of access to official information should take the form of "a right exercisable by any individual, company or other body to records or information of any date held by the public authority concerned in connection with its public functions."[3] Unlike Australian legislation, therefore, there is no retrospective time limit. Like most other FOI legislation, a decision on disclosure will be made with reference to the contents of the relevant documents and information rather than being related to the actual or presumed intentions of the applicant concerned.

Pro-active release of documentation is also encouraged. The Paper proposes, therefore, that facts and analyses underlying key governmental policies and decisions, explanatory materials on dealing with the public, reasons for administrative decisions and operational information about how public services are run should be made available as a matter of course.

A maximum fee of £10.00 will apply to any individual request. Beyond this, charges will be levied but within a clear framework of relevant principles. So, for example, no profit can be made, charges will be structured to ensure that the principal burden falls upon requests which involve significant additional work and cost and applicants will be notified of the cost to provide them with an early choice about whether to proceed. The Paper also canvasses the prospect of introducing a two-tier charging regime. Observing correctly that a uniform charging structure may penalise an individual applicant seeking a limited amount of information in relation to a private company which may stand to gain financially by pursuing information for commercial purposes, it canvasses the possibility of levying steeper charges on commercial and other corporate users of FOI.

Observing that FOI legislation abroad contains multiple exemptions, the Paper seeks to consolidate protected interests under only seven headings:

- National security, defence and international relations
- Law enforcement
- Personal privacy
- Commercial confidentiality
- Public safety
- Information supplied in confidence
- Decision-making and policy advice

Documents will be exempt under these headings only if their disclosure would result in demonstrable harm. The harm test is one of the most interesting features of the Paper and I will return to it presently. The Paper makes it clear that none of the proposed categories of exemption should be regarded as precluding the release of factual and background material. While analytical and opinion related information may be withheld, raw data and explanatory material will be released as a matter of course.

Britain already has Data Protection legislation.[4] The proposed new Freedom of Information Act (FOI Act) will complement its provisions. The FOI Act will provide for access to personal documents but will also contain adequate protection for personal privacy. It will also be drafted in order to be compatible with data protection principles in an amended Data Protection Act. These will include a requirement that data should be used only for the purpose it is collected, that it

should be adequate and relevant for that purpose, and that it should be timely and accurate. Individuals who believe their privacy may be compromised by disclosure under the Act will be able to bring third party proceedings to prevent disclosure they feel would be undesirable.

Finally, a comprehensive system of review and appeal is suggested. An office of Information Commissioner will be established to hear appeals against decisions by departments and agencies not to disclose requested information.

> We see independent review and appeal as essential to our Freedom of Information Act. We favour a mechanism which is readily available, freely accessible, and quick to use, capable of resolving complaints in weeks not months.[5]

Appeal will be a two-stage process. Applicants denied access will be able to seek internal review and then appeal to the new Commissioner's office. The Commissioner will be an independent office-holder rather than an officer accountable to the Parliament. The Commissioner will be empowered to publish annual and special reports, to issue best practice guidance on the interpretation of the Act and to raise public awareness of its provisions. The office will be answerable to the courts for its decisions.

Key initiatives

The first matter that catches one's attention about the British Government's new proposals is the breadth of the FOI Act's coverage. With the advent of the new managerialism and market governance, observers of FOI in Canada, New Zealand, Australia and elsewhere have become familiar with restrictions being placed on the application of FOI to agencies and organisations which engage in commercial and semi-commercial activity. The claim that information is "commercial-in-confidence" has been heard with increasing frequency from privatised utilities, public corporations and agencies engaged by contract to perform functions formerly allocated to governmental instrumentalities.[6]

Conscious of these trends, the White Paper's authors propose nevertheless that agency-based and functional exemptions of this kind ought not to form part of the new FOI regime in Britain. The Act will extend not only to state owned enterprises but also to public corporations, privatised utilities and to information relating to services performed for pubic authorities under contract. The core commitment appears to be that wherever public purposes are being pursued, the agencies responsible, whether public or private, should be drawn to account through freedom of information:

> We are mindful that the Act's proposed coverage will include the nationalised industries, executive public bodies with significant commercial interests and some private bodies in relation to any statutory ... functions which they carry out. But we believe that openness should be the guiding principle where statutory or other public functions are being performed, and in the contractual arrangements of public authorities. ... Commercial confidentiality must not be used as a cloak to deny the public's right to know.[7]

Next, the White Paper seeks to consolidate and constrict the operation of the exemptions to disclosure. Criticising the fact that most FOI legislation abroad is made excessively complex by the inclusion of numerous categories of exemption, it proposes only the seven protected interests outlined above. Both the categorisation and the wording of the exemption provisions, it says, should discourage the use of a class-based approach to exemption. Perhaps the potent example of this discouragement is that no separate category of exemption for cabinet documents is suggested. Whether or not cabinet documents should be disclosed should be determined on the same criterion as that applied to other internal working documents, that is,

whether or not disclosure of any particular document would result in harm to the government's processes of deliberation.

The Paper then proposes a new standard in relation to which all decisions on disclosure should be determined. The common test to be applied is whether the disclosure of information will cause "substantial harm":

> We believe that the test to determine whether disclosure is to be refused should normally be set in specific and demanding terms. We therefore propose to move in most areas from a simple harm test to a substantial harm test, namely, *will the disclosure of this information cause substantial harm?*[8]

The nature of the harm which may arise from the disclosure of each protected interest will be set out indicatively in the terms of the exemptions themselves. Both government agencies and the Information Commissioner will be required to have regard to these indicative harms in making their decisions. So, for example, in relation to cabinet documents, decision-makers will be required to assess whether disclosure will "impair the maintenance of collective ministerial responsibility."

Subject to one reservation that will be made presently, the introduction of the standard of "substantial harm" is to be welcomed. The standard focuses attention clearly on the content rather than the nature or source of the information concerned, it is stringent and it places the onus of demonstrating harm squarely upon the agency seeking to withhold the information. Further, rather than leaving "the public interest" at large the proposed legislation will seek to define its relevant attributes in relation to each category of exemption. It remains to be seen, of course, how successful such an enterprise will be in practice but the intention at least should be applauded.

Ministerial certificates and vetoes will have no place in the legislation proposed. The White Paper's authors believe that their inclusion would undermine the uniform and consistent approach to decisions on disclosure upon which the new Act will be based. Ministerial intervention of this kind, they say, would have the effect of undercutting the authority of the Information Commissioner and eroding public confidence in the integrity of access decisions.

The Information Commissioner is given very substantial authority. The Commissioner will have the power to order the disclosure of any records, the right to obtain access to any records relevant either to a request or an investigation and the power to review and adjust individual charges and charging systems. The Commissioner will be encouraged to engage in mediation wherever possible. In the interests of speed, economy and finality, no right of appeal to the courts is proposed. Rather, the Commissioner's decisions, like those of other tribunals will be subject to judicial review:

> Overseas experience shows that where appeals are allowed to the courts, a public authority which is reluctant to disclose information will often seek leave to appeal simply to delay the implementation of a decision. The cost of making an appeal to the courts would also favour the public authority over the individual applicant.[9]

The introduction of a powerful Commissioner's office, of course, places great weight on the necessity for a sound appointment to the position but again, the Paper's careful consideration of applicants' interests is a very welcome one in this regard.

Some reservations

During the lengthy and extensive debate which took place in the years preceding the White Paper's introduction, the position of governmental internal working documents was a central issue of contention. It was only to be expected that Whitehall, renowned for its secrecy,

would argue that documents reflecting its policy making processes should be exempt from disclosure.[10] Even in drafts produced by the lobby organisation, "The Campaign for Freedom of Information", therefore, deliberative documents were treated very cautiously even to the extent of excluding any consideration of the public interest in their disclosure.

While the White Paper does not propose that internal working documents be accorded a class exemption of this kind, it does tread the area with extra sensitivity. So, while the test for disclosure under every other exemption is that of "substantial harm" in relation to deliberative documents it is altered to "simple harm".

In and of itself, the reduced standard for deliberative documents might be acceptable. But when combined with the White Paper's treatment of "the public interest" it takes on a different complexion. The White Paper defines the public interest quite specifically in terms of protection. That is, a decision to disclose documents will be acceptable only if it is consistent with safeguarding the public interest. The idea that, in a particular circumstance, some broader public interest may demand disclosure of documents which might otherwise have properly been withheld does not feature on the Paper's analysis. Similarly, the public interest in relation to particular exemptions is to be assessed against indicative statutorily defined harms. That there might be countervailing if not statutorily delineated "goods" beyond the obvious and general ones of openness and accountability is not canvassed at all.

Thus, an internal working document will be capable of exemption if it can be determined that its disclosure would result in a simple harm, for example, to the political impartiality of public servants. In the absence of a consideration of any countervailing public interests militating in favour of release, it may readily be appreciated that this particular exemption is cast very widely indeed.

To this should be added the Paper's ambivalent treatment of secrecy provisions in other legislation. On the one hand, it recommends that a thorough review of secrecy provisions in other legislation be undertaken with a view to repealing or amending relevant provisions to make them consistent with the tests of harm it proposes. On the other hand it singles out the infamous *Official Secrets Act 1962* for special mention. This Act, made notable in particular by the *Spycatcher* and *Ponting* trials, has constituted the principal bar to more open government in Whitehall for decades.[11]

The effectiveness of the Official Secrets Act, the White Paper says, should not be reduced by freedom of information. Rather, FOI should be framed in a manner that will ensure that a decision taken under it would not force a disclosure that would result in a breach of the harm tests contained in the more restrictive piece of legislation. It may be, perhaps, that this latter statement was included in an abundance of caution. Even so, since official secrets legislation and FOI co-exist successfully in most other comparable jurisdictions, it is difficult to appreciate why it should be necessary in Britain to make the particular point that FOI will necessarily be subordinate to secrecy legislation, particularly of such a draconian kind.

Conclusion

It is frequently said that it is practical to introduce effective FOI legislation only in the flush first few months of a new government. After that, power and cynicism prevail to overwhelm the principled commitment to more open and accountable government. It may be, therefore, that the liberal approach to the "right to know" contained in this White Paper will, in its course, be overtaken by a more pragmatic, political stance as the

new Labour Government becomes more attracted to the seductions of office.

Yet even if this were the case, the Paper, in drawing attention back to first principles, will have made its contribution. In established FOI jurisdictions it is no longer common to hear from government that:

- fees and charges should be contained in the interests of applicants; and
- all agencies engaged in the pursuit of statutory purposes, whether public or private, should be required to act openly; and
- the accessibility of information should be presumed unless the release of a particular document with a particular content would cause substantial harm to the governmental process; and
- the final arbitration of disputes should be conducted quickly, impartially and without excessive prolongation in the courts.

And yet these are commitments with which almost every piece of FOI legislation has begun.

Nor is it common to acknowledge, as the White Paper does, that openness requires not only legislative reform but a significant alteration in ministerial and public service culture.

It is perhaps here above all that attempts at openness have tended to founder. Reviewing attempts to introduce more open government in Britain and elsewhere, Sir Douglas Wass, the former Permanent Secretary and Head of the Civil Service in Britain observed that :

> The problems then of creating an informed and enlightened public are not easy to resolve. All good democrats can assert their belief in the direction in which we should be travelling. But on this journey, as on so many others where government is concerned, there are few easy shortcuts. More important, in my view, than any institutional changes is the need for a commitment on the part of all who work in the field of government positively to want an informed public. If this is lacking, little in the way of machinery will help.[12]

Certainly, openness in government is a more important component of the political and administrative landscape than it was even two decades ago. And FOI has played its part in reducing the landscape's opacity. But the kind of commitment to which Sir Douglas Wass refers is still, regrettably, rarely to be seen particularly in political circles. It is this fact that makes the British Government's White Paper seem so fresh. We shall have to wait and see, however, whether this particular pudding is proved in the eating.

Endnotes

1 Cm 3818, *Your Right to Know: The Government's proposals for a Freedom of Information Act*, December 1997.

2 The Campaign for Freedom of Information's case is set out in Wilson D. *The Secrets File*, Heinemann Educational Books, 1984. The early history of the reform movement is described in Marsh N.S, "Public Access to Government-Held Information in the United Kingdom: Attempts at Reform in Marsh N.S (Ed) *Public Access to Government-Held Information: A Comparative Symposium*, Stevens, 1987. The culture of secrecy is well-described in Ponting C. *Secrecy in Britain*, Basil Blackwell, 1990.

3 Cm 3818, op cit, p. 6.

4 *Data Protection Act 1984.*

5 Cm 3818, p.26.

6 This matter is discussed in some detail in the Commonwealth Administrative Review Council's recent discussion paper *The Contracting Out of Government Services: Access to Information*, December 1997.

7 Cm 3818, p.18

8 Ibid. p.16

9 Ibid. p.30

10 The case is made articulately in Nairne, Sir Patrick "Policy-Making in Public" in Chapman R.A. and Hunt M. (Eds) *Open Government*, Routledge 1989.

11 The complete reform of the *Official Secrets Act* 1911 was first proposed by Lord Franks as long ago as 1972. See Cmnd 5104, *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Volume 1, Report of

the Committee, London HMSO, September 1972.

12 Wass, Sir Douglas, *Government and the Governed*, BBC Reith Lectures 1983, Routledge and Keegan Paul, 1984 p.100.