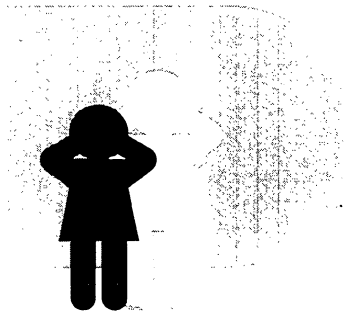
Australian Children's Rights News



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the international movement for children's rights

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O Woe to Australia's children for TEOH is undone! [1]

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The Commonwealth Government has been shamefully slow and ambivalent about implementing the human rights of children in Australia. Having done little to introduce CROC principles into Australian domestic law, it is now hastily pushing legislation through Parliament to nullify the small step offered by the High Court, to fill the void made by the Government's inaction.

THE TEOH CASE

In April of this year, the High Court of Australia brought down its judgement of *Minister for Immigration and Ethnic Affairs v. Teoh (Teoh's Case). Teoh's Case* says that whenever a decision which affects children is made by a government official, the decision-maker *must at l east consider* Australia's obligations as a State Party to the United Nations Convention on the Rights of the Child.

The Convention was ratified by Australia on 17 December 1990, but has not been incorporated into Australian law. Until this High Court decision, it was widely held that the Convention had no direct effect on Australian decision-making.

The High Court said that ratification of the Convention was a positive statement by the Executive Government to the Australian people and to the world, that it will act in accordance with the Convention. It described the Convention as "relevant", "a canon of construction" and "legitimate guide" for the exercise of discretionary decisions affecting children. There exists therefore "a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention". In other words, if a government employee fails to act in accordance with the Convention, the decision can be challenged as being unlawful.

(continued on page 6)

[1] This paper is based on an article on Teoh's Case by Emilia della Torre, published in Australian Children's Rights News (June 1995) and campaign material circulated by DCI- Australia about the anti-Teoh legislation in July - August1995

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THE UNDOING OF TEOH

Teoh's Case sets out the common law (or judge-made law), which can be overridden by legislation. Indeed the High Court said that the 'legitimate expectation' only exists in the absence of an executive statement to the contrary. The Teoh decision was promptly undone by a joint statement of the Commonwealth Attorney-General, Michael Lavarch and Minister for Foreign Affairs and Trade, Gareth Evans on 10 May.[2] Legislation to reinforce the undoing, the *Administrative Decisions (Effect of International Instruments) Bill 1995.* is now being considered in Parliament. The Opposition has not yet declared its position on this Bill. The Australian Democrats and Senators Chamarette and Margetts have indicated they will oppose it. So why have the two responsible ministers acted immediately and with one voice to reverse the TEOH decision? They have offered two arguments, neither of which hold any water, in DCI's opinion.

"UNDEMOCRATIC"

The first argument is that it is fundamentally undemocratic for international treaties which have not been scrutinised by Parliament to have a direct effect in domestic law. DCI accepts this and has no argument with the view that Parliament is the proper forum for implementing human rights.[3] Indeed, DCI argues that legislation to comprehensively implement CROC in Australia should be introduced to Parliament as a matter of urgency. This would be an equivalent response to TEOH as that given to the MABO decision, which was also only judge-made law until it was promptly and constructively implemented by legislation.

CROC has not been scrutinised by Parliament. This happened when HREOC was empowered to receive and conciliate complaints However it is not true that relating to CROC. Although there was some opposition to this step, the Parliament authorised HREOC to defend children's rights, as set out in CROC. We consider that this in itself has created a 'legitimate expectation' in the community that governments will not breach those rights of the child that are set forth in the Convention. Mr Teoh could, for instance, have complained to HREOC instead of pursuing his case through the Federal and High Courts.[4]

"A GREAT DEAL OF UNCERTAINTY"

The second argument asserted by the Attorney-General and Minister for Foreign Affairs and Trade is that the Teoh decision has created a "great deal of uncertainty (in relation to) a wide range and large number of decisions." They seem to envisage a level of complexity which is beyond the ordinary decision-maker in the public service and which will create an avalanche of appeals. Justice Toohey in his judgement anticipated this argument, saying that 'no great practical difficulties will arise in giving effect to priciples that(conventions) acknowledge."[5] Alarmist arguments have been used before, of course, to hold back progress in human rights. Early in the movement for women's rights, fears of hugely complex and demanding cases were raised against proposals for sex discrimination legislation. (It is intriguing how much the children's rights movement mirrors the early women's movement!) Firstly we make a point of principle. Ratified international treaties should not be ignored simply on the basis of a perceived lack of infrastructure to implement them. Secondly we ask a more pragmatic question. Is it likely that public administrators would find the the principles in international treaties impossibly difficult to apply? We doubt it. Each decision-maker simply needs to be trained in the basic principles enshrined in the handful of treaties which are directly relevant to their work. The

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[2] Joint Statement issued 10 May 1995

[3] The question of when and how this should take place is a separate matter and is not considered here.

[4] HREOC's powers relating to CROC complaints are however limited to conciliation. It has no powers to enforce a remedy as it has for complaints of sex, race or disability discrimination. In Mr Teoh's case, the Minister for Immigration could have simply refused to conciliate.

[5] Toohey J, Teoh v MIEA, p. 28

Commonwealth Government has already undertaken to do this as part of Australia's National Action Plan on Human Rights.[6] Is an avalanche of appeals really likely? Again we doubt it. there would undoubtedly be a series of test cases which would be litigated in the normal way and would give rise to precedents and guidelines. This is happening already as the courts turn to CROC to enlighten them on the principles to be applied to issues affecting children, when Australian law does not adequately do so.

TREATIES CANNOT BE IGNORED

The arguments raised give the lie to Australia's declarations of committment to human rights at home. If public decision-makers are not readily able to apply international treaties in their work, it is because they have not been trained to do so. If the application of principles such as the best interests of the child is expected to create a great deal of uncertainty, it is because the general community has not been educated about human rights. If a large number of appeals could be expected, it is because our legislation and administrative procedures often do not consider the rights of children at all.

IMPOSSIBLE THINKING, DOUBLE STANDARDS

The Government's position on CROC is impossible to fathom. On the one hand, it has asserted that Australia's domestic legislation conforms, by and large, to CROC and therefore not much needs to be changed. (Is this the explanation for the inconscionable delay and apparent indifference to establishing effective monitoring mechanisms at the national level?) When Foreign Minister Evans announced ratification, he stated "State and Territory laws already enable Australia to meet all the obligations the Convention will impose except one that requires child and adult criminal offenders to be imprisoned separately.... 0Ratification indicates Australia's total commitment to the objectives and purposes of the Convention."[7]

On the other hand, these Ministers now assert that there will be a great deal of uncertainty about the effect of CROC, leading to an impossible flood of work, if it is to be applied.BOTH POSITIONS CANNOT BE TRUE. What is true is that *CROC has not been implemented in Australia.* What is needed, as was said in the June issue of ACRN, is legislation to reinforce the Teoh decision, not to nullify it. The government's double standard on CROC is a betrayal of children. It is a disgrace in the eyes of the international community, among which Australia has so proudly and so repeatedly vaunted its committment to CROC and urged nations to submit their human rights record to international scrutiny. We will not be able to do so again! The Bill specifically ousts legitimate expectations based on international treaties, "unless Australian legislation provides otherwise" notwithstanding its preamble which states that "Australia is fully committed to observing its obligations under international instruments."

WHAT IS UNDONE MUST BE DONE!

Defence For Children Calls For The Administrative Decisions (Effect Of International Instruments) Bill To Be Withdrawn Immediately.

We demand that Australia's promise to children is not left limp and broken any longer. We call on all Governments of Australia make a serious committment to legislate for the implementation of CROC, to establish proper monitoring and reporting procedures and to undertake a national program of community education, reaching all regions, to reduce misunderstanding and common misapprehensions of CROC.

Teoh, like Mabo, should be protected by special legislation which defines the rights of children in Australia and develops clear and workable co-operative arrangements between the Commonwealth and States to turn those rights into realities.

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[6]National Action Plan for Australia, AGPS 1994

[7]News Release M219, 18 Dec1990