Discrimination and refugees

Editor: Edward Santow

REFORMING THE ADJR ACT: IMPACT ON REFUGEE AND DISCRIMINATION LAW

INTRODUCTION

The National Human Rights Consultation, chaired by Father Frank Brennan AO, provided its report to the Attorney-General in September 2009.[1] The Brennan Report recommended major changes to many aspects of Australian human rights law and practice. However, media, academic and legal interest has focused almost exclusively on the recommendation for a national human rights Act (Recommendations 17-31).[2] Such an Act would be based on the statutory "dialogue model", examples of which exist in the UK, NZ, Victoria and the ACT. Since the Brennan Report was released, the momentum for the introduction of a human rights Act seems to have slowed.[3] While the current government has not definitively ruled out the introduction of a human rights Act, it now seems unlikely to occur in the short term.

In light of the uncertainty regarding a human rights Act, it is surprising that relatively scant attention has been given to the Brennan Report's other recommendations for human rights reform. If implemented, those other reforms could herald significant change in Australian human rights law and practice. One of the most interesting and potentially wide-ranging reforms is a recommendation to amend the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) so as to make a list of key human rights a "relevant consideration in government decision making" (Recommendation 11). This note assesses the scope of the proposed amendment, and considers its likely impact on discrimination and refugee law.

PROPOSED AMENDMENT

Currently, the ADJR Act provides a ground of judicial review in respect of any decision or preparatory conduct, to which the ADJR Act applies, where the decision maker has failed to take a "relevant consideration" into account in the exercise of a power (ss 5(1)(e), 5(2)(b), 6(1)(e), 6(2)(b)). A similar ground of judicial review exists at common law.[4] As practitioners in this area are well aware, while the ADJR Act uses the words "relevant consideration", it is perhaps more helpful to think of such considerations as *mandatory*, in the sense that failure to take such matters into account in the decision-making process will render the decision or conduct invalid.

The Brennan Report proposes to expand this ground of review in the ADJR Act by providing a list of Australia's international human rights obligations that are to be taken as "relevant considerations" for ADJR Act purposes. More specifically, the Brennan Report states that this list of human rights should be a "definitive" one, promulgated by the Australian Government, and constituting Australia's most important international human rights obligations, including at least (Recommendations 5 and 11):

> rights from the International Covenant on Civil and Political Rights as well as the following rights from the International Covenant on Economic, Social and Cultural Rights that were most often raised during the Consultation: the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education.

[1] Brennan F et al, *National Human Rights Consultation Report* (2009) (Brennan Report), http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report viewed 12 March 2010.

[2] I have previously written two pieces in these pages on the recommendation for a human rights Act: see (2009) 16 AJ Admin L 183; (2009) 17 AJ Admin L 21.

[3] See eg, Eyers J, "McClelland backpedals on bill of rights", *Australian Financial Review*, 20 January 2010, p 8.

[4] See eg, *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 14.

Where the amended ADJR Act applies, the decision maker would be required to give these human rights "proper, genuine and realistic consideration".[5] However, in my view, the proposed amendment represents relatively modest reform for two main reasons. First, it would add only to individuals' procedural, as distinct from substantive, rights. That is, a requirement to *consider* certain human rights would provide substantially less protection than a more direct requirement on decision makers to *comply with* human rights. Obliging public authorities to comply with human rights is a feature of the dialogue model of human rights Act,[6] but it might equally be imposed through the ADJR Act. Indeed, some submissions to the National Human Rights Consultation proposed this more radical amendment to the ADJR Act,[7] and the proposal was adverted to in the Brennan Report (p 183), but ultimately the Brennan Committee chose not to recommend such an amendment.

Moreover, the extent to which this amendment really constitutes a departure from existing legal requirements should be considered with reference to the legitimate expectations doctrine. In *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, a majority of the High Court held that Australia's ratification of the *Convention on the Rights of the Child* was sufficient, even without legislative incorporation of the Convention into Australian domestic law, to create a legitimate expectation that administrative decision makers would act in accordance with the terms of that Convention. This legitimate expectation exists either where the decision maker's statutory powers or duties are ambiguous, or where there are no clear legislative or executive indications that contradict the foundation of the supposed legitimate expectation (at 291). The majority held that as the decision maker proposed to act otherwise than in accordance with the Convention (that is, the decision maker proposed to defeat the appellant's legitimate expectation) natural justice required the decision maker to grant the appellant a fair hearing (at 291-292).

Since 1995, the High Court has cast some doubt on the foundation of the *Teoh* decision,[8] and Parliament has considered overriding it entirely.[9] Nevertheless, the central proposition from *Teoh* stands. Consequently, one must consider how much the proposed amendment alters the current state of the law. Three issues are most relevant here. First, the ADJR Act amendment would mark a new, more welcoming approach by Parliament to the impact in domestic law of international human rights norms that have not been incorporated in legislation. While partly symbolic, this would be important in solidifying the position regarding unincorporated international human rights treaties and Australian administrative decision making. Secondly, by the ADJR Act's reference to an official, fixed set of human rights (the "definitive list" proposed in the Brennan Report), there would be greater clarity about what rights ought to be taken into account. While this stops short of incorporating those rights into domestic legislation, it would enhance the guidance available to the court.

Thirdly, and most importantly, a requirement to consider a matter (in this case, certain human rights) appears at first blush to differ markedly from a legitimate expectation that a decision maker would act in accordance with that principle. However, as McHugh and Gummow JJ said in *Re Minister for Immigration & Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [101], the effect of *Teoh* is that "unenacted international obligations", while "not mandatory relevant considerations attracting judicial review for jurisdictional error", ought to be treated as "mandatory relevant considerations for that species of judicial review concerned with procedural fairness". Their Honours implied that the distinction between the two positions was a very fine one, and I would respectfully agree. This, in turn, suggests that the practical difference between the *Teoh* principle and the proposed ADJR Act amendment is relatively slight.

[5] *Hindi v Minister for Immigration & Ethnic Affairs* (1988) 20 FCR 1 at 13 per Shephard J.

[6] See eg, *Charter of Human Rights and Responsibilities Act 2006* (Cth), s 38.

[7] See, eg, Eastman K, *Submission to National Human Rights Consultation* (2009) at 6.

[8] See esp, *Re Minister for Immigration & Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

[9] See esp, *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth).

Professor Allars described *Teoh* as a "small step for legal doctrine".[10] Since that step was taken, the judiciary, Executive and legislature have, from time to time, nervously shuffled their feet. With that in mind, the proposed amendment to the ADJR Act might be considered another small step back down the path trod by the High Court in *Teoh*.

APPLICATION TO REFUGEE AND DISCRIMINATION LAW

While the scope of the ADJR Act is broad, it is not comprehensive. Crucially for the purposes of refugee law, it does not apply to decisions made under the *Migration Act 1958* (Cth).[11] As the vast majority of government decision making related to refugees occurs under the *Migration Act* – including decisions in connection with the issue or cancellation of visas – the exclusion of this Act from the scope of the ADJR Act regime means that the proposed ADJR Act amendment will have no direct application to refugee decision making. Moreover, other decisions that have a significant impact on refugees and asylum seekers are also likely not to fall within the ambit of the ADJR Act. For instance, border security decisions, involving asylum seekers attempting to travel to Australia by boat, are often made under the prerogative power, rather than under statute.[12] As the ADJR Act only applies to decisions or conduct made "under an enactment",[13] this expanded ground of review in the ADJR Act would not apply to those decisions either.

In contrast, the proposed amendment to the ADJR Act seems likely to have more impact in relation to discrimination. The grounds of unlawful discrimination under current Commonwealth law – most notably, race, sex, disability and age – are not as comprehensive in their coverage as is prescribed by international human rights treaties to which Australia is a party. For example, while the *International Covenant on Civil and Political Rights* prohibits discrimination on the ground of religion, there remain gaps in the extent to which Australian domestic law prohibits religious discrimination.[14] In particular, while the definition of "race" or "ethnic origin" in the *Racial Discrimination Act 1975* (Cth) has been found to include Jewish people,[15] its extension to other religious groups remains unclear.[16] By closing such gaps, the proposed amendment to the ADJR Act would increase the protection against discrimination carried out in Commonwealth decision making, subject to the ADJR Act's jurisdictional limitations discussed above. Moreover, it would also make the ADJR Act judicial review system consistent with the complaint-handling regime under the *Australian Human Rights Commission Act 1986* (Cth), which permits investigation and conciliation of discrimination claims with reference to the broader grounds of discrimination under the *International Covenant on Civil and Political Rights*.

CONCLUSION

The amendment to the ADJR Act proposed in the Brennan Report should be seen as an incremental, and not a radical, expansion of the existing obligation on Commonwealth decision makers to take account of the human rights of those affected by their decisions. The amendment would enhance the procedural rights of those affected by decisions made under the ADJR Act. It would also require decision makers to consider a broader range of human rights than is currently the case. However, its impact in the areas of refugee law is likely to be less noticeable than in relation to discrimination law. While the proposal would augment the protections in existing anti-discrimination laws, the proposed amendment to the ADJR Act would have little, or no, direct impact on refugee-related decision

[10] Allars M, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law" (1995) 17 Syd LR 204.

[11] *Administrative Decisions Judicial Review Act 1975* (Cth), Sch 2.

[12] This was held to be the case in relation to the *MV Tampa* affair of 2001: *Ruddock v Vadarlis* (2001) 110 FCR 491.

[13] *Administrative Decisions Judicial Review Act 1975* (Cth), s 3(1).

[14] Ronalds C and Pepper R, *Discrimination Law and Practice* (2nd ed, 2004) at 29.

[15] *Jones v Scully* (2002) 120 FCR 243 at 272.

[16] See, eg, Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2004* (2004) at 7-8.

making. This omission is curious given that the Brennan Report identified the treatment of asylum seekers and refugees as an area of particular human rights concern in Australia (pp 38-42).

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