CHAPTER 4

CONSTITUTIONAL CONSIDERATIONS

Introduction

4.1 The Committee is required by term of reference (d) to inquire into the constitutional power of the Commonwealth Parliament to legislate with respect to existing laws affecting mandatory sentencing.

4.2 As discussed in detail below, the Commonwealth does not have a constitutional power to legislate directly in relation to either the criminal law or children and, therefore, in particular it has no direct power with respect to juvenile justice. It does, however, have a constitutional power in respect of territories (section 122) and a power with respect to external affairs (section 51(xxix)), both of which may provide a valid basis for relevant Commonwealth legislation.

The Commonwealth and the States/Territories

4.3 For the benefit of those persons who are unfamiliar with the structure of government in Australia, there are two levels of government concerned in issues of justice and international obligations, the Commonwealth and the States. There are six States, of which Western Australia is one, and three internal Territories (the Australian Capital Territory, the Northern Territory, and Jervis Bay). State governments operate independently in the areas for which they are responsible such as health, education, and police. The internal Territories, although independent to a degree, are subordinate to the Commonwealth government, and their laws may not be inconsistent with those of the Commonwealth. [1]

4.4 The Commonwealth has responsibility for matters such as foreign affairs and defence, and it is the Commonwealth Government executive which enters into treaties or conventions following consultation with the States, and the Commonwealth which is responsible for the maintenance of obligations incurred through conventions. For this reason, the Commonwealth may develop legislation which can prevail over State law to the extent that the State law is inconsistent (S109 of the Constitution).[2] The legislation that is developed may be based on the external affairs power (as noted above) whereby the Commonwealth establishes its overarching responsibility for aspects of a subject or power not otherwise under its control.

4.5 However, the Commonwealth must ensure that the law thus developed must be reasonably capable of being appropriate and adapted to implementation of a treaty or convention. Previous examples of this were the *Human Rights (Sexual Conduct) Act*

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1 See in particular *Submission No. 67*, National Children's and Youth Law Centre, vol. 4, pp.730-735

2 See *Submission No. 28*, National Youth Advocacy Network, vol. 2, pp. 466-467

1994 by which Tasmania's Criminal Code was nullified insofar as it related to same sex practices,[3] and the so-called Tasmanian Dam case.

States' rights issue

4.6 States guard their independence as do the Territories, and emphasise States' rights to operate according to State law. This independence is recognised and generally supported, including by legal organisations. However, in instances where the law is seen to be repugnant to other principles, the importance of maintaining basic principles of law and of meeting international obligations have dominated. The Vienna Convention on the Law of Treaties (1969) does not allow states parties to argue that it is municipal law which breaches obligations; they must themselves take steps to overcome the relevant provisions of such law.

The Commonwealth's Territories power

References to the territories in the Bill

4.7 The *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* provides in clause 5 that:

> A law of the Commonwealth, or of a State or of a Territory, must not require a court to sentence a person to imprisonment or detention for an offence committed as a child.

Clause 3 extends the operation of the legislation to 'every external Territory.'

The Territories Power in the Constitution

4.8 The Territories power is found in Section 122 of the Commonwealth Constitution. Section 122 reads:

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit.

4.9 There are a number of Commonwealth Territories - internal[4] and external.[5] Among other matters, section 122 refers to the way in which Territories may be brought into being.[6]

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3 *Submission No. 28*, National Youth Advocacy Network, vol. 2, p. 466

4 The internal Territories are the Northern Territory, the Australian Capital Territory and the Jervis Bay Territory.

5 The external Territories are Norfolk Island, the Coral Sea Islands, the Australian Antarctic Territory, Ashmore and Cartier Islands, Cocos (Keeling) Islands, Christmas Island and the Heard and McDonald Islands. Only some of these external territories - Norfolk Island, Christmas Island, and Cocos (Keeling)

Overriding territory laws—the Euthanasia Laws Act 1997 (Cth)[7]

4.10 In 1997, the Commonwealth Parliament passed the *Euthanasia Laws Act 1997*. This piece of Commonwealth legislation invalidated the Northern Territory's *Rights of the Terminally Ill Act 1995* which sought to establish a statutory regime under which a competent adult with a fatal illness could request assistance to terminate their life.

4.11 The *Euthanasia Laws Act* removed the power of the legislative assemblies of the Northern Territory, the ACT and Norfolk Island to enact legislation permitting euthanasia or mercy killing. It allowed those Territories to enact laws allowing for the withdrawal of life-prolonging medical treatment and for palliative care - so long as those laws did not permit the intentional killing of the patient. And, most significantly, it provided that the *Rights of the Terminally Ill Act 1995* was to have 'no force or effect.'

4.12 In its report on the Euthanasia Laws Bill 1996 the Senate Legal and Constitutional Legislation Committee said:

> The Commonwealth has the power under s. 122 of the Constitution to enact the Bill. Even opponents of the Bill conceded this.
>
> The question for the Committee was whether the Parliament should exercise this power.[8]

4.13 In respect of the current bill, the Northern Territory Government did not dispute the power of the Commonwealth to override legislation, but was more concerned that any change should come from within the Territory.[9]

Islands have permanent populations - see Alvin Hopper, 'Territories and Commonwealth places: the Constitutional position,' *Australian Law Journal*, 73(3), March 1999, pp. 181-218.

6 Both the Northern Territory and the Australian Capital Territory were constituted by land previously belonging to the States and surrendered by them to the Commonwealth, from South Australia and NSW as contemplated by section 125 of the Constitution and by section 6 of the Commonwealth of Australia Constitution Act 1900 (Imp) respectively. Norfolk Island, an external Territory, was placed under the Commonwealth's authority by the Queen. There is some debate about whether the territories power should be construed differently in relation to different territories. It has been suggested that, for the purposes of section 122, distinctions may exist between internal and external territories, between territories established by surrender from the States and those acquired by other means, and between the ACT as the Seat of Government and the other self-governing territories. However, these matters are not canvassed here.

7 For a discussion see Hopper, op.cit. See also *Capital Duplicators Pty Ltd v. Australian Capital Territory* (1992) 177 CLR 248.

8 Senate Legal and Constitutional Legislation Committee, *Report on the Euthanasia Laws Bill 1996*, March 1997, p.13.

9 *Transcript of evidence*, Northern Territory government, p. 41.

The High Court and the territories power[10]

4.14 In considering the territories power the High Court has traversed a number of issues. These include the relationship between section 122 and other constitutional provisions,[11] whether constitutional guarantees limit the use of the territories power,[12] the extraterritorial operation of section 122 laws,[13] the representation of the Territories in the Commonwealth Parliament,[14] and the nature of judicial power in relation to the Territories.[15]

4.15 Of more relevance to the bill being considered are questions about the nature and scope of section 122, how general Commonwealth laws which apply to the Territories should be characterised, and whether there are limits to the Commonwealth's power to override Territory laws.

Nature and scope of the power

4.16 The nature of the power in section 122 has been described by the High Court on many occasions as 'plenary'.[16] A plenary power is one that is full, complete or unqualified. Legislation enacted in reliance on section 122 does not need to fall within any other head of constitutional power.

4.17 In relation to the scope of the territories power, two slightly different approaches have been taken by the High Court. The first is that enunciated by Dixon CJ in *Lamshed v Lake* where His Honour said that the power was a power related to a particular subject matter - 'the government of any territory.'[17] The second view is that of Barwick CJ who said in *Spratt v Hermes* that the power was 'unlimited by reference to subject matter'.[18] His Honour concluded:

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10 A comprehensive summary of the High Court's interpretation of s. 122, on which these notes rely, is Christopher Horan, 'Section 122 of the Constitution: A "disparate and non-federal power"?', *Federal Law Review*, Vol 25(1), pp. 97-126. See also Hopper, op.cit.

11 See, for example, *Buchanan v Commonwealth* (1913) 16 CLR 315, *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248.

12 See, for example, *Kruger v Commonwealth* (1997) 190 CLR 1; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

13 See, for example, *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

14 See *Western Australia v Commonwealth* (1975) 134 CLR 201; *Queensland v Commonwealth* (1977) 139 CLR 585.

15 See, for example, *Spratt v Hermes* (1965) 114 CLR 226; *Re the Governor, Goulburn Correctional Centre; Ex parte Eastman* [1999] HCA 44 (2 September 1999).

16 *Lamshed v Lake* (1958) 99 CLR 132 at 153 per Kitto J; *Spratt v Hermes* (1965) 114 CLR 226 at 242 per Barwick CJ; *Teori Tau v Commonwealth* (1969) 119 CLR 564 at 570 - unanimous High Court; *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607 per Mason J; *Northern Land Council v Commonwealth* (1986) 161 CLR 1 at 6 - unanimous High Court.

17 (1958) 99 CLR 132 at 141.

18 *Spratt v Hermes* (1965) 114 CLR 226 at 242 per Barwick CJ.

> Section 122 gives to the Parliament legislative power of a different order to those given by s51. The power is not only plenary but unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory – an expression condensed in s122 to "for the government of the Territory." This is as large and universal a power of legislation as can be granted.[19]

Characterising general Commonwealth laws which apply to the territories

4.18 Another matter which deserves brief mention is how to construe a law that might arguably rely on section 122 and other heads of legislative power. A number of questions may arise here. The first is whether a law intended to apply throughout the Commonwealth applies in the Territories by force of section 122 or by operation of other heads of legislative power (for example, those found in section 51 of the Constitution). It appears that section 51 heads of power apply to the Territories and that 'consequently a general law under s51 may extend to the Territories without any assistance from s122.'[20] A second and consequential question is what will happen if a general Commonwealth law is beyond power in its application to the States. Will such a law fail completely—that is, will it also fail with respect to the Territories? In *Spratt v Hermes*, Windeyer J said:

> If [a law intended to be of general application throughout the whole of the Commonwealth and its territories is] invalid as beyond s51 then, in the absence of a clear intention that it should nevertheless apply in the territories, it will I consider fail altogether …[21]

4.19 His Honour considered that 'clear intention' would be evidenced by express words or by intention.[22]

Commonwealth laws and self-governing territories

4.20 The Commonwealth Parliament has exercised its section 122 power to enact self-government laws for the Northern Territory, the Australian Capital Territory and Norfolk Island.[23] Can the Commonwealth override a Territory law when the Territory

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19 *Spratt v Hermes* (1965) 114 CLR 226 at 241-242. However, as one commentator has remarked: It may not make any practical difference whether the territories power is regarded as a power with respect to a subject-matter, or as a plenary grant of power unlimited by reference to subject-matter. Under either approach, the power under s122 will extend to virtually any law concerning a territory or territories. And, whichever approach is adopted, it will be necessary to demonstrate that the relevant law purportedly enacted under s122 possesses a connection with a territory or territories'. Horan, op.cit, pp.107-108.

20 Horan, op.cit, p.98.

21 (1965) 114 CLR 226 at 278.

22 *Ibid.*

23 See *Northern Territory (Self-Government) Act 1978* (Cth), *Australian Capital Territory (Self-Government) Act 1988* (Cth), *Norfolk Island Act 1979* (Cth).

in question has been granted self-government and has its own legislature empowered to make laws for 'peace, order and good government'?[24]

4.21 This point was raised by the Northern Territory Government which believed that the Bill was a direct challenge to the Territory's powers. The Bill, it was believed:

> Seeks to interfere in the process whereby the citizens of the Northern Territory govern their own affairs within the sphere of jurisdiction of their Legislative Assembly. The bill, if passed, would gravely damage the position of the Northern Territory as a self-governing partner in the Australian federation. It would damage the credibility of the Northern Territory (Self-Government) Act. It would send a clear message to the citizens of the Northern Territory that self-government is not really self-government at all and that those citizens do not have control of their own affairs. [25]

4.22 The independence of the Territory and the importance of not 'singling it out' was also emphasised by the Law Society of the Northern Territory. The Society, however, saw that a proper role would be for 'the Commonwealth legislating Australia wide to prevent the abuse of basic human rights of Australian citizens.'[26]

Summary

4.23 The answer to the question concerning the power to override appears to be 'yes' - possibly subject to a limitation as to the manner in which the Territory law can be overridden. A majority of the High Court addressed this issue in *Capital Duplicators Pty Ltd v Australian Capital Territory*. In considering the *Business Franchise ("X" Videos) Act 1990* which had been passed by the Australian Capital Territory Legislative Assembly, the majority remarked:

> The [Commonwealth] Parliament has no power under the Self-Government Act to disallow any duty imposed by the Legislative Assembly; the Parliament must, if it wishes to override the enactment [the Business Franchise ("X" Videos) Act], pass a new law to achieve that result. It cannot repeal or amend the enactment.[27]

4.24 Territory laws which conflict with Commonwealth laws will be overridden because Territory legislatures are subordinate to the Commonwealth Parliament. As Lockhart J remarked in *Attorney-General (Northern Territory) v Hand*:

> It is not a question of inconsistency between the two sets [of laws] which may otherwise be valid, rather it is a question going to the competency of

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24 Section 6 *Northern Territory (Self Government) Act 1978* (Cth); section 22 *Australian Capital Territory (Self-Government) Act 1988* (Cth); section 19 *Norfolk Island Act 1979* (Cth).

25 *Transcript of evidence*, Northern Territory Government, p. 35.

26 *Submission No. 22*, Law Society of the Northern Territory, vol. 1, p. 158i.

27 (1992) 177 CLR 248 at 283 per Brennan, Deane & Toohey JJ. And at 284 per Gaudron J.

> the subordinate legislature to enact laws or cause laws to operate in a manner inconsistent with or repugnant to laws of the paramount legislature.[28]

4.25 It is sometimes suggested that:

> … recognition must be given to the development of any convention which may affect the Commonwealth's power to legislate for a self-governing Territory.[29]

4.26 It should be emphasised, however, that any such convention is a matter of politics and not of law. First, it has been said that the Commonwealth Parliament cannot abdicate its legislative power.[30] Second, the Commonwealth Parliament's power to legislate under section 122 of the Constitution can only be changed by a constitutional amendment effected under section 128.

The external affairs power

4.27 In the following paragraphs, the Committee outlines the constitutional power of the Commonwealth Parliament to legislate under the external affairs power, particularly in relation to its treaty making aspect. While the discussion is broadly based, the principles apply to such matters as the existing laws affecting mandatory sentencing.

4.28 The Committee previously discussed the external affairs power at length in its report *Trick or Treaty: Commonwealth Power to Make and Implement Treaties* (1995). Since that report was tabled, the High Court has brought down another important decision on section 51(xxix): *Victoria v Commonwealth* (1996) 187 CLR 416 (the *Industrial Relations Act* case).[31] Many of the amendments to the Industrial Relations Act drew on international instruments including the *Termination of Employment Convention 1982* adopted by the General Conference of the International Labour Organisation (ILO)[32] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) adopted by the United Nations General Assembly. Victoria, South Australia and Western Australia challenged these amending provisions on a number of bases, including that they exceeded the Commonwealth's external affairs power in section 51(xxix) of the Constitution.

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28 (1989) FCR 345 at 367.

29 R D Lumb & G A Moens, *The Constitution of the Commonwealth of Australia. Annotated*, 5th ed, Butterworths, Sydney, 1995, p. 553.

30 *Victorian Stevedoring & General Contracting Co Pty Ltd v. Dignan* (1931) 46 CLR 73 at 121 per Evatt J; *Giris Pty Ltd v. Federal Commissioner of Taxation* (1969) 119 CLR 365 at 373 per Barwick CJ.

31 In 1993 and 1994 amendments were made to the *Industrial Relations Act 1988* (Cth) to provide for the imposition of obligations on employers relating among other things to termination of employment and discrimination in employment.

32 The majority also considered the related Termination of Employment Recommendation 1982 (Recommendation No. 166).

4.29 The High Court in *Victoria v The Commonwealth*[33] upheld the validity of most of the provisions on the basis that, in most instances, they were clearly supported by the external affairs power. However, a majority judgement of Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ (Dawson J agreeing) considered that certain provisions dealing with unfair dismissal *expanded* upon the regime established in the ILO instruments dealing with termination of employment. These aspects were not upheld by the High Court except where they could be supported by other constitutional provisions.

4.30 It has been asserted that:

> The outcome of *Victoria v Commonwealth* is unquestionably to cement into place for the foreseeable future the broadest of views as to the scope of the external affairs power.[34]

The External Affairs Power

4.31 As a general proposition the external affairs power will support a law, the purpose of which is to implement an international treaty or convention. When a law purports to give domestic effect to an international instrument, the primary question to be asked is this: has the law selected means which are 'reasonably capable of being considered appropriate and adapted to implementing the treaty'?[35]

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33 (1996) 187 CLR 416.

34 John W Perry, Supreme Court of South Australia, *At the Intersection – Australian and International Law*, Australian Law Journal, volume 71, November 1997, p.846.

35 The first threshold question is whether there is a reasonably clear 'obligation, aspiration or objective' contained in the treaty (Richardson v Forestry Commission (1987) 164 CLR 261, per Deane J at p. 313). It has been said that, to be relied upon, a treaty must be more than a mere 'statement of general political accord' which leaves each party to determine its own course of action. (Richardson v Forestry Commission (1987) 164 CLR 261, per Mason CJ and Brennan J at p. 289). However, it has also been said that, once an obligation, etc. is identified, it may be implemented, however loosely it is defined. *The Commonwealth v Tasmania* (1983) 158 CLR 1, per Deane J, at p. 262. See also Murphy J, at p. 178, Brennan J, at p. 226. The difficulty is in determining if and when ideals merge into concrete obligations, etc. (See comments by Brennan J in *The Commonwealth v Tasmania* (1983) 158 CLR 1 at p. 226 and Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ in *Victoria v The Commonwealth* (1996) 187 CLR 416 at p. 486). The language of treaties may be imprecise and it may often be difficult to determine whether it imposes an obligation, etc. (In *The Commonwealth v Tasmania* both Deane J (at p. 261-262) and Murphy J (at pp. 177-178) referred to the issue of 'precision' in the drafting of treaties in international law and the inevitable problem of compromise in reaching consensus among contracting parties.) A key indicator is whether the treaty objective suggests a common course of action or whether it could sustain opposite or contradictory implementation measures *(Victoria v The Commonwealth* (1996) 187 CLR 416, per Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ, at p. 486). This may raise questions of degree, but 'a broad objective with little precise content and permitting widely divergent policies by parties does not meet the description' (Leslie Zines, *The High Court and the Constitution (3rd ed)*, Butterworths, Sydney, 1992, p. 250. This passage was quoted by the majority in *Victoria v The Commonwealth* (1996) 187 CLR 416 at p 486.) This difficulty should not be overstated, however. It seems that no law has been invalidated by the High Court on the basis that the terms of a treaty were insufficiently precise to provide a basis for domestic legislation. The second threshold question relates to the scope and meaning ascribed to the obligation, aspiration or objective of the Treaty. The Parliament cannot 'undertake the general regulation of the subject matter to which [the treaty] relates' (*R v Burgess; Ex parte Henry* (1936) 55 CLR, per Dixon J, at pp. 674-

The external affairs power is a broad one

Deference

4.32 The High Court will, within reason, defer to the judgement of the Parliament as to the means by which a treaty may be implemented.[36] Thus the test is not whether the High Court thinks the law is 'appropriate and adapted' to the purpose of implementation, but whether it is 'reasonably capable of being considered' so. The level of constitutional scrutiny is not as strict as it would be if those latter words were not included.

Partial Implementation

4.33 The power is not confined to the implementation of a treaty in full. A law is valid even if it only partially implements a treaty,[37] provided the deficiency is not so substantial as to deny the law the character of a measure implementing the treaty.[38] This provides considerable latitude for the Parliament to select which aspects of a treaty it aspires for domestic implementation.

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675). The power to legislate about that subject matter is confined by the way in which that instrument deals with it. Thus, defining the scope of the treaty and its terms is critical to defining the scope of Commonwealth legislative power. The majority joint judgement of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ in the *Queensland Rainforest* case addressed this issue in relation to the World Heritage Convention and made it clear that the task of interpretation is primarily for the international community and only secondarily for a domestic Australian court. Regard may therefore be had to the terms of the Convention in deciding whether an international duty of protection and conservation exists, but the existence or otherwise of the duty is not necessarily concluded by the municipal court's construction of its terms or by its opinion as to the Convention's operation. The existence of an international duty depends upon the construction which the international community would attribute to the Convention and on the operation which the international community would accord to it in particular circumstances. The municipal court must ascertain that construction and operation as best it can in order to determine the validity of a law of the Commonwealth, conscious of the difference between the inquiry and the more familiar curial function of construing and applying a municipal law *(Queensland v The Commonwealth* (1989) 167 CLR 232 at pp. 239-240). It appears then that the High Court will be guided by international legal materials to the extent that they illuminate the agreed international understanding of the meaning of a provision in an international instrument. If the answer yielded is inconclusive in some way, it appears that it then falls to the domestic Australian court to essentially 'do the best it can' in giving a meaning to the provision. *Victoria v Commonwealth* (1996) 187 CLR 416 at 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. See also at 488.

36 *Victoria v Commonwealth* (1996) 187 CLR 416 at 487. See also the references in footnote 243 at that page including the joint judgement of Mason CJ and Brennan J in *Richardson v Forestry Commission* (1988) 164 CLR 261 at p. 289.

37 *Victoria v The Commonwealth* (1996) 187 CLR 416, per Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ, at pp. 488-489; *The Commonwealth v Tasmania* (1983) 158 CLR 1, per Deane J, at pp. 233-234, 268; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 75 (cf *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, per Evatt and McTiernan JJ, p 688).

38 *Victoria v The Commonwealth* (1996) 187 CLR 416, per Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ, at p. 489.

Not Confined to Obligations

4.34 The test of validity[39] indicates that the power is not confined to the implementation of obligations per se.[40] The focus is on 'implementing the treaty'. Again, depending on the specificity or otherwise of the international instrument, this potentially allows the Parliament more latitude when it legislates in purported reliance on a treaty than if the formula was expressed in terms of 'obligation'. The five-way joint judgement in the *Industrial Relations Act* case confirmed[41] that section 51(xxix) 'may be attracted by a treaty notwithstanding the absence of a treaty obligation', to use Gaudron J's language from an earlier case to which their Honours referred.[42] In the *Lemonthyme Forest* case, Deane J expressed the idea in terms of whether the Act manifests 'the international purpose or object', which he described as the 'discharge and pursuit of obligations, aspirations and objectives imposed or recognized and accepted by an international treaty to which Australia is a party'.[43]

Other International Instruments

4.35 The external affairs power not only supports the implementation of treaty provisions which do not amount to 'obligations', it also seems it may extend to provisions found in other kinds of international instruments. As far back as 1936 Evatt and McTiernan JJ suggested that:

> [I]t is not to be assumed that the legislative power over 'external affairs' is limited to the execution of treaties or conventions; and … the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organization or of other international

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39 See text at note 35 above.

40 *R v Burgess, Ex Parte Henry* (1936) 55 CLR 608 per Starke J, at pp. 659-660, Evatt and McTiernan JJ, at p. 688; *Airlines of NSW Pty Ltd v New South Wales [No. 2]* (1965) 113 CLR 54, per Menzies J, at p 141; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, per Mason J, at p. 233 and Murphy J, at p. 241-242; *Commonwealth v Tasmania* (1983) 158 CLR 1, per Mason J at p 130, Murphy J, at p 177 and Deane J, at p. 258-259.

41 *Victoria v Commonwealth* (1996) 187 CLR 416 at 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

42 *Richardson v Forestry Commission* (1988) 164 CLR 261 at p. 342. See also, for example, Mason CJ and Brennan J at 289.

43 *Richardson v Forestry Commission* (1988) 164 CLR 261 at p. 313. I am of the view that it is not necessary for a treaty to which Australia is a party to impose an obligation upon Australia as a condition precedent to engaging the external affairs power. The fact that Australia is a party to a treaty (leaving to one side a treaty which is not entered into bona fide) will itself suffice to engage the power to legislate with respect to external affairs, and will authorize the passing of a law so long as that law is reasonably capable of being viewed as conducive to the purpose of the treaty if it is also reasonably capable of being viewed as appropriate, or adapted to, the circumstance which engages the power. Ibid, Gaudron J's judgement at p. 342.

> recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.[44]

4.36 In the *Tasmanian Dams* case, Deane J said:

> It is, however, relevant for present purposes to note that the responsible conduct of external affairs in today's world will, on occasion, require observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuit of international objectives which cannot be measured in terms of binding obligation.[45]

4.37 In a similar vein, Murphy J said that amongst other things it was sufficient if the law:

> ... (b) implements any treaty or convention whether general (multilateral) or particular, or (c) implements any recommendation or request of the United Nations organization or subsidiary organizations such as the World Health Organization, the United Nations Education, Scientific and Cultural Organization, the Food and Agriculture Organization or the International Labour Organization.[46]

4.38 The majority joint judgement in the *Industrial Relations* case recognised that recommendations etc. of international bodies such as the International Labour Organisation may reinforce a conclusion based on the text of a Convention that a law is appropriate and adapted to implementation of that Convention, but found it unnecessary to decide the question whether recommendations could themselves provide independent support for legislation under section 51(xxix).[47]

'Federal Balance'

4.39 The Executive having signed the treaty, Parliament may enact laws to implement it even if the result would involve 'a likelihood of a substantial disturbance of the balance of powers as distributed by the Constitution'.[48] This reflects more general propositions that the High Court should lean towards a broader interpretation of constitutional expressions[49] and should not be constrained by assumptions

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44 *R v Burgess, Ex Parte Henry* (1936) 55 CLR 608 at p. 687.

45 *Commonwealth v Tasmania* (1983) 158 CLR 1 at pp. 258-259.

46 Ibid pp 171-172.

47 *Victoria v Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, at pp. 509 and 524.

48 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, per Mason J at p 229. See also *Commonwealth v Tasmania* (1983) 158 CLR 1, per Murphy J at p. 169.

49 *Jumbunna Coal Mine N.L. v Victorian Coal Miners' Association* (1908) 6 CLR 309 per O'Connor J at p. 368; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1, per Dixon J at p. 332.

regarding the distribution of legislative powers between the Commonwealth and the States.[50]

4.40 Similarly, Parliament may enact laws which restrict or impinge upon State functions. For example, Murphy J said in the *Tasmanian Dams* case about the *National Parks and Wildlife Conservation Act 1975* and the *World Heritage Properties Conservation Act 1983*: 'the mere fact that these Acts impair, undermine, make ineffective or supersede various State functions or laws is an ordinary consequence of the operation of federal Acts and does not affect their validity'.[51]

4.41 However, a different result might be achieved if the laws single out a given State (or States) for special burdens or disabilities or if they effectively prevent the continued existence of a State (or States) or its capacity to function.[52] This reflects a more general proposition that the powers in section 51 are subject to certain express or implied prohibitions in the Constitution:

> The exercise of the power is of course subject to the express and to the implied prohibitions to be found in the Constitution … [including] the implied general limitation affecting all the legislative powers conferred by s 51 that the Commonwealth cannot legislate so as to discriminate against the States or inhibit or impair their continued operation or existence.[53]

Limits on the Power

4.42 The High Court to date has not provided a great deal of guidance about the outer limits of the broad power to implement the terms of an international instrument under section 51(xxix). To a large extent the comments of individual judges tend to be restatements of the basic 'appropriate and adapted' requirement. However, a number of subsidiary points can be made about the 'appropriate and adapted' requirement. [54]

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50 *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129.

51 *Commonwealth v Tasmania* (1983) 158 CLR 1, per Murphy J at p. 169.

52 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Victoria v Commonwealth* (1971) 122 CLR 353; *Queensland Elecricity Commission v Commonwealth* (1985) 159 CLR 192.

53 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, per Mason J at p. 225.

54 **Characterisation** As already noted, the majority joint judgement in the *Industrial Relations Act* case suggested that where Parliament engages in *partial implementation* of an international instrument, invalidity only occurs when the deficiency in partial implementation is so glaring that it denies 'the law the character of a measure implementing the Convention'.(*Victoria v Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at p. 489. It is doubtful whether this or similar characterisation approaches (See for example, Deane J in *Commonwealth v Tasmania* (1983) 158 CLR 1 at p. 259 where he said that 'a law would not properly be characterized as a law with respect to external affairs if it failed to carry into effect or to comply with the particular provisions of a treaty which it was said to execute') add anything to our understanding of the basic 'appropriate and adapted' test. For example, in the *Lemonthyme Forest* case Gaudron J (in dissent on this point) rejected provisions of the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987*, (Subsections 16(1)(b)-(d) and 16(1)(a) (in relation to the prohibition on killing, cutting down or damaging trees) [pp. 348-349 - on the basis of the evidence available]) because they did not relate directly to the subject matter of the *Convention for the Protection of the World Cultural and Natural Heritage*, but in doing so she relied on

Summary

4.43 The above discussion highlights the complexity of the Commonwealth's right to legislate to override State and Territory laws in relation to the mandatory sentencing of juveniles.

Conclusion

4.44 The Committee concludes that the territories power provides the basis for the Commonwealth to override the Northern Territory legislation.[55]

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the 'appropriate and adapted' requirement: "Because [the section] must be viewed as affording general environmental protection rather than protection of the qualities and features which may be of outstanding universal value, it is not on the material before the court reasonably capable of being viewed as appropriate or adapted to the circumstance that the areas may be or contain areas constituting part of the world heritage."(*Richardson v Forestry Commission* (1987) 164 CLR 261, per Gaudron J, at pp. 347-348). **Conformity** As indicated above, the power to legislate about the subject matter in a treaty is confined by the way in which that instrument deals with it. The corollary is a well-established requirement that there must be conformity between the terms of an international instrument and the law which purports to effect its domestic implementation. Thus, Mason J in the *Tasmanian Dams* case said that merely because a subject-matter was an external affair by virtue of the existence of a treaty did not mean that Parliament could '*depart from the provisions of the treaty* after it has been entered into by Australia and enact legislation *which goes beyond the treaty or is inconsistent with it* (*Commonwealth v Tasmania* (1983) 158 CLR 1, at pp. 131-132 [emphasis added]). Similarly, in the *Industrial Relations Act* case the majority said that, in the case of partial implementation, a law will be invalid if the deficiency or shortfall in implementation, 'when coupled with other provisions of the law, make it *substantially inconsistent* with the Convention': *Victoria v Commonwealth* (1996) 187 CLR 416, per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, at p. 489). In the *Industrial Relations Act* case the court found that provisions in sections 170DE and 170EDA of the Act which purported to implement the Termination of Employment Convention were not supported by the external affairs power. The reason was that, in contrast to other provisions of the law, which bore 'an evident relationship' (*Victoria v Commonwealth* (1996) 187 CLR 416 at p. 515) to the text of the Convention, the inclusion of the terms 'harsh, unjust or unreasonable' went beyond the meaning of the term 'valid' in the Convention: '[it] goes beyond its requirements and adds an alternative ground for making terminations unlawful' (*Victoria v Commonwealth* (1996) 187 CLR 416, at p. 518). It should be noted that in this case, the international convention provided, not general aspirational statements, but detailed and specific obligations including procedural remedies. In the area of general human rights conventions, this degree of specificity is frequently absent which presumably means that domestic legislatures have more latitude in exercising their judgement about the means of implementation. **Mere device** In the *Tasmanian Dams* case Deane J said invalidity would flow if 'the treaty which the law was said to carry into effect was demonstrated to be no more than a device to attract domestic legislative power' (*Commonwealth v Tasmania* (1983) 158 CLR 1 at p. 259). This statement reflects a long line of authority suggesting that the Commonwealth is not permitted to enter into non bona fide agreements or to use agreements merely to centralise legislative power (*Queensland v The Commonwealth* (1989) 167 CLR 232, per Mason CJ and Brennan, Deane, Toohey, Gaudron, McHugh JJ at p. 242; *Commonwealth v Tasmania* (1983) 158 CLR 1, per Brennan J at p. 217; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, per Stephen J at p. 217, per Mason J at p. 231, per Brennan J at p. 260; *Ffrost v Stevenson* (1937) 58 CLR 528, per Evatt J at p. 599; *R v Burgess, Ex Parte Henry* (1936) 55 CLR 608, per Latham CJ at p. 642 and Evatt and McTiernan JJ at p. 687. Such a test is likely to be very difficult to satisfy in practice. One commentator has observed: '[t]he limitation has not been invoked in any case and the political circumstances in which international agreements are made make it unlikely that it will ever be invoked' (Keven Booker, Arthur Glass and Robert Watt, *Federal Constitutional Law: An Introduction*, Butterworths, Sydney, 1998, p 96).

55 The Committee notes that in 1996, the then Minister for Sport, Territories and Local Government, the Hon Warwick Smith, brought into effect an Ordinance to overcome the application of Western Australian mandatory sentencing laws to Christmas Island, being Ordinance No. 11 of 1996.

4.45 In relation to the Western Australian legislation, the Committee concludes that the Commonwealth power may be more open to judicial interpretation.[56]

56 Several witnesses told the Committee that in their view, the Commonwealth has the constitutional capacity to enact legislation to override the mandatory sentencing laws in the Northern Territory and Western Australia based on the external affairs power: See for example, *Transcript of evidence*, Law Council of Australia, p. 173; and *Transcript of evidence*, Mr Martin Flynn, Faculty of Law, University of Western Australia, p. 121, referring to the "international lawyer's answer".