- in general, departments expressed concern at attempting to extend the order to electronically stored data at this stage, and some indicated that it would be impossible for them to comply with such an order.

The Committee endorsed initiatives to develop a whole of government approach to integrated management of paper and electronic records and made no recommendations on this aspect of its terms of reference.

On the fourth term of reference – any legal or practical difficulties encountered by agencies in complying with the order – the Committee noted that no departments or agencies had reported legal difficulties. A number of departments noted practical difficulties, such as the labour intensive nature of the task and the difficulties for staff in one agency meeting the timing of tabling of a list soon after preparation of the Budget. One submission suggested that usage should be monitored to see if it was a cost effective means to achieve the objectives of the Order. Another noted that it was trialing a system for identifying files when they were raised, rather than retrospectively.

The Department of Defence suggested that the titles of files classified Confidential, Secret or Top Secret should be excluded from the Order on the basis that analysis of a collage of individually innocuous files could provide information to foreign intelligence agencies.

The Committee recommended that"the order be amended to exclude the titles of files whose national security classification is Confidential, Secret or Top Secret or their equivalent." (para 1.47)

The Government's response was to agree with this recommendation.

The Committee also decided to provide a further report to the Senate in 12 months.

Senate Committee Consideration of the Administrative Decisions (Effect of International Instruments) Bill 1997

This Bill responds to the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

In that decision, the Court said that, by entering into a treaty, the Government creates a "legitimate expectation" that the Executive Government and its agencies will act in accordance with the terms of the treaty, even where those terms have not been incorporated into Australian law. Further, if a decision-maker intends to act inconsistently with a treaty, procedural fairness requires that the person affected by the decision should be given notice and an opportunity to put arguments on the matter, otherwise the decision could be set aside on the ground of unfairness. However, the Court said that the "expectation" cannot arise if there is a statutory or executive indication to the contrary. The Attorney-General on introducing the Bill (House of Representatives Hansard, 18 June 1997, 5545) stated that it is a clear statutory indication to the contrary.

The Bill passed the House of Representatives on 25 June 1997 and was introduced into the Senate on 27 June. The Bill was subsequently referred to the Senate Legal and Constitutional Legislation Committee and was also considered by the Senate Standing Committee for the Scrutiny of Bills.

The Senate Standing Committee for the Scrutiny of Bills reported on the Bill in its Eleventh Report of 1997 (dated 27 August 1997). This report followed on from comments made by the Committee in its Alert Digest No 9 of 1997, which were outlined in the Committee's Eleventh report as:

> "...the fact that this bill is considered necessary demonstrates that, as things now stand, international instruments may have effect within Australia without being incorporated in legislation. The committee wondered whether this amounts to an exercise of power with insufficient parliamentary scrutiny or no

Parliamentary scrutiny at all. The committee sought the advice of the Attorney-General on this issue and on the process that has been put in place to enable Parliament to examine international instruments.

The committee suggested that doubt had been expressed whether the joint statements of the Attorney-General and the Minister for Foreign Affairs were executive acts within the meaning of the High Court judgment.

The committee went on to say that, if the joint statements of the Attorney-General and the Minister for Foreign Affairs were executive acts amounting to a contrary indication within the meaning of Teoh's case, no legitimate expectation would have arisen since 10 May 1995. Accordingly, legislation to be passed now could not be said to trespass on personal rights and liberties and the issue whether the bill trespasses unduly, therefore, does not arise.

On the other hand, if those statements were not executive acts, then whether the bill trespasses unduly remained a live issue. Accordingly, the committee sought the advice of the Attorney-General on this issue."

The report quotes the Attorney's response (and thanks him for clarifying the processes being put in place):

"In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 the majority of the High Court held 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 where those terms have not been incorporated into Australian law. The High Court held that, where a decision-maker proposes to make a decision which is inconsistent with such a legitimate expectation, procedural fairness requires that the person affected by the decision be given notice and an adequate opportunity to put arguments on the point. The High Court made clear that such an expectation cannot arise where there is either a statutory or executive indication to the contrary.

It is a longstanding principle that the provisions of a treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into domestic law by statute. The High Court in the *Teoh* case affirmed that principle but at the same time gave treaties an effect in Australian law which they did not previously have. The Government is of the view that this development is not consistent with the proper role of Parliament in implementing treaties in Australian law. This view was expressed in the joint statement of 25 February 1997 by the Minister for Foreign and Affairs and myself and reiterated in the Second Reading Speech I delivered in the House of Representatives on 18 June 1997 following introduction of the Bill.

As you would be aware, one of the first major reform initiatives the Minister for Foreign Affairs and I undertook on coming into office was to reform the treaty-making procedures. While in Opposition, the Coalition had long expressed its dissatisfaction with the treaty-making process and the lack of Parliamentary scrutiny of the Executive Government's actions on treaties. One of the principal aims of the treaty-making reforms undertaken by the Minister for Foreign Affairs and myself was to enhance the role of Parliament in scrutinising treaty action by the Executive Government. Those reforms included the tabling of treaties in Parliament at least 15 sitting days prior to the Government taking the action fully to become a party to a treaty, the prepa-

ration and tabling of national interest analyses for each treaty to which it is proposed Australia become a party and the establishment of the Joint Standing Committee on Treaties to examine treaties.

The new treaty-making procedures complement the Bill. However, these procedures do not obviate the need for the Bill. First, the reforms do not affect the position of most of the treaties to which Australia is already a party. Secondly, while greatly enhancing Parliamentary scrutiny of treaty action by the Executive, the process of inquiry and report on a treaty by the Joint Standing Committee would not, of itself, preclude a *Teoh*-type challenge to an administrative decision based upon that treaty. The Committee may identify the legislative and executive action which it believes necessary to implement the treaty. This will assist in ensuring that there is adequate implementation of a treaty. Nevertheless, it will not necessarily preclude a challenge to an administrative decision based upon *Teoh*'s case. Of course, if legislation is to be introduced to implement all or part of a treaty to which Australia is a party, that legislation is subject to the usual Parliamentary procedures for the scrutiny and passage of legislation.

As I stated in my Second Reading Speech, 'the Bill will restore the situation which existed before the *Teoh* case. That is, if there are to be changes to procedural or substantive rights in Australian law resulting from adherence to a treaty, they will result from parliamentary and not executive action'.

Turning to the second issue on which you have sought my advice, both the Joint Statements of 10 May 1995 (made by the then Attorney-General and the then Minister for Foreign Affairs) and the Joint Statement of 25 February 1997 (made by the Minister for Foreign Affairs and myself) are, in the words of Mason CJ and Deane J 'executive indications to the contrary'. Accordingly, as noted in the Alert Digest, I am advised that no legitimate expectation has arisen since 10 May 1995.

I am aware that Hill J of the Federal court in *Department of Immigration and Ethnic Affairs v Ram* (1996) 41 ALD 517 at 522-523 expressed the view that Mason CJ and Deane J in *Teoh's* case may have been referring to 'executive indications to the contrary' made at the time of entering into a treaty, rather than statements made after the treaty entered into force for Australia. Consequently, he cast doubt on the efficacy of the Joint Statement of 10 May 1995 and, necessarily, that of 25 February 1997. However, it must be noted that Justice Hill's comments were *obiter*.

Passage of the Bill will, of course, resolve any uncertainty as to the position of treaties in Australian law arising from *Teoh's* case.

I trust this information is of assistance to your Committee."

The Senate Legal and Constitutional Legislation Committee reported on the Bill in October 1997. In Chapter 5 of that Report, the majority of the Committee recommended that the Senate pass the Bill without amendment. The Committee stated its conclusions as follows:

"5.3 The Committee heard considerable evidence that the bill is unnecessary. The Committee does not accept this evidence as it is of the view that the bill:

- restores the roles of the executive and the Parliament to that which was in place prior to the Teoh decision;

- confirms the fundamental role of the Parliament to change the law to implement treaty obligations and to decide whether entry into a treaty gives rise to domestic rights, be they procedural or substantive;

- ensures administrative certainty without preventing or discouraging an administrative decision maker from taking international obligations into account; and
- complements the recent changes to treaty making procedures.

5.4 The Committee notes, but does not accept, concerns relating to the appropriateness of the bill. In particular, the Committee does not accept that the enactment of the bill is contrary to Australia's international obligations nor will it send the wrong message to domestic decision makers or the international community. The Committee heard no evidence to suggest that the executive statement made on 10 May 1995 had this effect.

5.5 The Committee appreciates amendments suggested by some witnesses to improve the bill. The Committee however considers that these suggested amendments are not of sufficient import to warrant amending the bill."

Senate Committee Inquiry into the Contracting Out of Government Services

On 10 November 1997, the Senate Finance and Public Administration References Committee presented the First Report of its inquiry into contracting out of government services.

The Committee's terms of reference were reported on in *Admin Review* 47. Since that time those terms of reference were added to (see Senate Hansard, 27 May 1997, 3782) and the Committee's report which was tabled on 10 November dealt with those additional terms of reference. The additional terms of reference were as follows:

(g) all aspects of outsourcing the information technology (IT) requirements of Commonwealth departments and agencies, with particular reference to:

(i) the range of IT requirements of Commonwealth agencies,

(ii) the costs and benefits of IT outsourcing,

(iii) the privacy implications of IT outsourcing and the need for privacy protection for sensitive information held by Commonwealth agencies,

(iv) the adequacy of measures proposed to ensure public accountability for taxpayers' funds and public scrutiny of service providers,

(v) the approach being adopted by the Office of Government Information Technology to the outsourcing of IT,

(vi) the means by which opportunities for in house bids and domestic IT industry can be maximised,

(vii) the employment implications of IT outsourcing, and

(viii) the experience of other jurisdictions with IT outsourcing and the international implications for Australia of IT outsourcing.

The Committee's Report on Information Technology expressed the view that agencies should have an option to reject outsourcing if it does not offer genuine benefits to the agency and that contracting out should not diminish public accountability through the Parliament, the Auditor-General and the administrative law. The suggestion that contracting out may improve accountability by requiring services to be defined more precisely and imposing service agreements on providers should be seen as a bonus not an alternative. Coalition members dissented from the majority report on a number of aspects.

The Committee's final report is expected early next year.

Australian Law Reform Commission – Release of Issues Paper : *Rethinking legal education and training*

On 18 August, the Australian Law Reform Commission release its Issues Paper entitled *Rethinking legal education and training*. The