Effect of treaties in Australia

Consistent with many other countries, Australian law itself does not recognise treaty obligations as a source of law unless the treaty is specifically incorporated into Australian law through legislation: see Implementing treaties in Australian law.

Each country has its own procedures for implementing international obligations through its domestic law. In some, the constitution specifies that treaties form part of the law of the land (‘monist’ states). In others, including Australia, an ‘act of transformation’ such as passing a law for Australia which reflects the terms of the treaty is necessary before treaty obligations have effect in domestic law (‘dualist’ states). In Australia, specific ‘enabling’ legislation is necessary in order to implement treaty obligations. If there is no relevant legislation, a treaty cannot create rights in domestic law. However in some circumstances, even without specific enabling legislation, international law and the terms of treaties can be a legitimate influence on the way courts will interpret and apply Australian laws: see Human rights in Australian courts.

Relationship between state and federal governments

Australia is organised as a federation – that means that we have a central or federal government, the Commonwealth Government, together with State and Territory governments. We also have a layer of local government in Australia. The Commonwealth or Federal Government bears responsibility for protecting, respecting, promoting and fulfilling human rights in Australia. That responsibility includes ensuring that human rights obligations are met by other levels of government, by non-state actors such as corporations, and by individuals.

In federated legal systems, such as Australia’s, the requirement of transformation from international to domestic law can create particular difficulties. The Commonwealth Constitution gives the Commonwealth Parliament power to make laws about particular subjects. The remainder is left for the States. That seems simple enough, but the dividing line of Commonwealth/State responsibility is not always clear. For example, section 51(xxix) of the Australian Constitution gives the Federal Government an ‘external affairs’ power. This has been interpreted by the High Court to include the power to enter into treaties on behalf of Australia, and to pass domestic legislation to implement these obligations. But to fully implement the provisions of an international treaty it is sometimes necessary to enact or amend laws in areas that are traditionally under State or Territory jurisdiction.

Domestic conflicts arising from Federal/State relations cannot be used as an excuse for failure to implement obligations under international treaties. According to Article 27 of the Vienna Convention on the Law of Treaties of 1969, a state cannot use the provisions of its own law or deficiencies in that law to answer a claim against it for breaching its obligations under international law. All levels of government in Australia have to play a role in protecting human rights, but it will always be the Federal Government that is ultimately accountable for any violations to the international community: see Human rights in State/Territory law.

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