

Opinion

The Constitutional Powers of the Commonwealth with respect to Child Rights

Introduction

1. We have been asked for our Opinion on the constitutional powers of the Australian (Commonwealth) Parliament with respect to child rights.
2. In the letter brief of 5 May 2023, the Australian Child Rights Taskforce has noted that the Australian Government has made the following statement as a description of its relative responsibilities:

“As matters such as education, child protection, healthcare and youth justice fall predominantly within the constitutional responsibility of the States and Territories”.

3. To the contrary: *the Australian Government has as much legislative power to regulate child rights as it wants to have*. It could pass valid legislation implementing every single one of its international human rights obligations, including the entirety of the *Convention on the Rights of the Child*, into justiciable and enforceable domestic law.
4. Australia simply chooses not to do so. The Australian Government’s statement quoted in paragraph 2 above is, frankly, intellectually dishonest.
5. The Opinion addresses the topics of federal reservations, constitutional power, and finally the realpolitik of Australia’s frankly indefensible approach to international human rights.
6. This Opinion rejects the notion that the constitutional responsibility of the States and Territories is in any way relevant to Australia’s failure to comply with international human rights obligations.

Federal reservations

7. The Commonwealth, as a nation and as a State Party, is the bearer of international human rights obligations. Under article 27 of the *Vienna Convention on the Law of Treaties* a State Party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. (“Office of the United Nations High Commissioner for Human Rights”)

8. The UN Human Rights Committee has made it clear that although States are allowed to give effect to human rights in accordance with domestic constitutional processes, ‘the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.’¹
9. As a State Party to the International Covenant on Civil and Political Rights, Australia is obliged under Article 50 to ensure that the rights in that Covenant ‘shall extend to all parts of federal states without any limitations or exceptions’.
10. In the next section of the Opinion, we will explain why there are substantial Australian constitutional principles that indicate that the Commonwealth has ample power to regulate “education, child protection, healthcare and youth justice”, and so invocation of a *de facto* federal reservation (as in the quotation in paragraph 2 above) is misleading.

Constitutional powers

11. The Commonwealth Parliament has an express legislative power under the Constitution to enact legislation that is reasonably capable of being considered appropriate and adapted to implement international obligations into Australian law.² That express legislative power is the ‘external affairs’ power, s 51(xxix) of the Constitution. The Commonwealth could use the external affairs power to implement the *Convention on the Rights of Child* into domestic law. It chooses not to.
12. Valid legislation enacted under s 51(xxix) would override any State law to the extent of its inconsistency, by dint of section 109 of the Constitution.³
13. There are **no** constitutional provisions in the Commonwealth Constitution or any of the State Constitutions or the Territory self-government acts that reserve “education, child protection, healthcare and youth justice” to the States or Territories. The Commonwealth can regulate any of these areas.
14. Beyond any express restrictions in the Commonwealth Constitution on Commonwealth power to regulate the States (none of which are presently relevant or apply in this context), **since 1920** it has been orthodox constitutional principle in Australia **not** to assume that any topics of legislative action are reserved to the States.⁴ It is frankly astonishing that the Commonwealth would assert what it has asserted in paragraph 2.

¹ United Nations Human Rights Committee, ‘General Comment 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ CCPR/C/21/Rev.1/Add. 13 (26 May 2004) [4].

² See, *Victoria v The Commonwealth (The Industrial Relations Act Case)* (1996) 187 CLR 416.

³ Patrick Keyzer, Christopher Goff and Asaf Fisher, *Principles of Constitutional Law*, LexisNexis, Fifth Edition, 2017, Chapter 21.

⁴ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

15. Even if the Commonwealth had no power to regulate “education, child protection, healthcare and youth justice” it could grant money to the States under section 96 of the Constitution to do so on conditions it could set; such as compliance with the Convention on the Rights of the Child.
16. The Commonwealth also has plenary power to regulate the Territories. The Commonwealth could directly regulate “education, child protection, healthcare and youth justice” in the Territories, either directly or by telling the self-governing territories (the Australian Capital Territory and the Northern Territory) what they have to do. Those self-governing territories would not even exist, but for Commonwealth legislation authorising their self-government.⁵

Conclusions

17. Ratification of an international treaty by the executive can create a ‘legitimate expectation’ in domestic administrative law that the executive and its agencies will act in accordance with the terms of the ratified treaty, even where those terms have not been incorporated by legislation into Australian law.⁶
18. Australia has made a reservation to Article 37 of the *Convention on the Rights of the Child* (the Convention) regarding the obligation under subsection (c) to separate children from adults in prison.⁷ This reservation is inconsistent with the object and purpose of the Convention and unnecessary.
19. This inconsistency is played out in the intractable situation created with children in adult detention. This can be seen most egregiously, in Banksia Hill Detention Centre and Barwon Prison Case which manifest the practical inconsistency of Australia’s reservation with the Convention.
20. It is plain under international law that any reservation that is incompatible with the treaty’s object and purpose will be invalid.⁸ Under Article 51(2) of the Convention, a ‘reservation incompatible with the object and purpose of the present Convention shall not be permitted.’
21. There is extensive constitutional scope for the Commonwealth to expand its support for children and its legislative protection of their rights.⁹ What has been lacking is the

⁵ Patrick Keyzer, Christopher Goff and Asaf Fisher, *Principles of Constitutional Law*, LexisNexis, Fifth Edition, 2017, Chapter 5.

⁶ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

⁷ It accepted this article ‘only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia’.

⁸ *Vienna Convention on the Law of Treaties*, art 19.

⁹ This is similar to the finding by Matthew Stubbs, Adam Webster and John Williams on the Constitutional protection of people with disability in Australia in *Research Report - Persons with Disability and the Australian*

appetite of Australian governments to evolve and expand their activities regarding children through use of existing Commonwealth powers in new contexts, or through enhanced Commonwealth-state cooperation.

22. Absent recognition of the rights of children in the Constitution, their best interests and equal dignity as human beings is undermined in legislative, administrative and policy contexts. This is most evident, where in all Australian jurisdictions children over the age of 10 can be found guilty of a criminal offence.¹⁰ In 2019, a bill before Federal Parliament to amend the *Crimes Act* and the *Criminal Code Act 1995* (Cth) to increase the minimum age of criminal responsibility for Commonwealth offences from 10 years of age to 14 years of age, failed passage.
23. Recognition of the fundamental rights of children, such as in the criminal process, is limited by the need to generate political will and potential inconsistencies across the States and Territories. Children's human rights need to be uniformly protected across all Australian jurisdictions.

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(Research assistance, Nathan X McNally).

Constitution (October 2020), p 46. However, unlike the former political will is yet to be seen with respect to protecting the rights of children at the Commonwealth level.

¹⁰ Only recently, in 2023, Victoria committed to raising the age of criminal responsibility from 10 to 12, and to 14 within four years.