

Submission

on the

Treaties Ratification Bill 2012

to the

Joint Standing Committee on Treaties

Department of House of Representatives

PO Box 6021

Parliament House

CANBERRA ACT 2600

Phone: (02) 6277 4002

Fax: (02) 6277 2219

Email: jsct@aph.gov.au

Website: www.aph.gov.au

by

FamilyVoice Australia

4th Floor 68 Grenfell St

Adelaide SA 5000

Phone: 1300 365 965

Fax: 08 8223 5850

Email: office@fava.org.au

Website: www.fava.org.au

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1. Introduction

On 13 February 2012 the Treaties Ratification Bill 2012 was presented and recommended to the House of Representatives by Mr Bob Katter the Member for Kennedy.

On 16 February 2012 the House of Representatives Selection Committee asked the Joint Standing Committee on Treaties to inquire into and report on the Bill.

The Committee has invited public submissions on the Bill which are due by 11 May 2012.

2. Treaties Ratification Bill 2012

This Bill has a single simple provision contained in Clause 4:

The Governor-General must not ratify a treaty unless both Houses of the Parliament have, by resolution, approved the ratification.

The effect of this provision would be to require the executive government before ratifying treaty to move a resolution supporting ratification in each House of Parliament. Only if the resolution succeeded could ratification proceed.

3. Effects of ratification of a treaty

Since the Franklin dams case the ratification of an international treaty by the Commonwealth has been held, by virtue of Section 51 (xxix) of the Constitution, the “external affairs” provision, to give the Commonwealth power to legislate on a matter, the subject of the treaty, for which it would otherwise have no head of power under which to legislate.¹

The High Court has made it clear that the provisions of international treaties which Australia has ratified are not in themselves part of Australian law:

It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power, whereas the making and alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.²

However, the High Court has also held (since 1917) that the ratification of a treaty can affect the interpretation of an ambiguous provision in a statute on the presumption that the legislature would have intended to legislate in accordance with Australia’s international obligations.³

Also, the High Court found in Teoh's case that the entry into a treaty by Australia creates a “*legitimate expectation*” that the Government and its agencies will act in accordance with the terms of the treaty, even where those terms had not been incorporated into Australian law.⁴

Given these effects on Australian domestic law of ratifying treaties there is a good case that the legislative branch of government – the Parliament – should have a role in the ratification of a treaty.

4. United States Constitution

Article II, Section 2 of the Constitution of the United States provides that the President:

shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

The constitutional requirement that the Senate approve a treaty with a two-thirds vote means that successful treaties must gain support that overcomes partisan division.

This provision has led to the United States being one of the few countries in the world not to ratify certain international treaties including the Convention on the Rights of the Child and the Convention on Elimination of All Forms of Discrimination Against Women.

Given the absurd interpretation of some of these treaties by the United Nations treaty body committees who are notorious for adopting strong ideological positions, often completely unsupported by the text of the convention they are charged with upholding, the United States has been very wise not to do so.

For example UN treaty bodies have expressed the view governments must implement the following actions to fulfil their obligations under the UN human rights treaties:

- prohibit parents from withdrawing their children from a sex education class;
- ensure that at least 30 percent of children under age three are in full time day care;
- deny doctors or hospitals the right to conscientiously object to participation in abortion;
- deny economic support to mothers who choose to stay at home;
- allow children to access medical or legal counselling without parental consent;
- allow teenagers to access to abortion without parental knowledge; and
- deny religious bodies any exemptions from anti-discrimination laws.⁵

5. United Kingdom

It had been established constitutional practice in the United Kingdom to lay a proposed treaty before both Houses of Parliament for 21 days before ratification.

On 11 November 2010 the provisions of Part 2 of the *Constitutional Reform and Governance Act 2010* came into effect. These provide that a treaty that is subject to ratification or its equivalent, is to be published and laid before Parliament for a period of 21 sitting days, during which both Houses have the opportunity to resolve that the treaty should not be ratified.

This development gives statutory force to the long established constitutional practice.

The *Treaties Ratification Bill 2012* is in line with this development in the United Kingdom.

Requiring a resolution of both Houses of Parliament before Australia could ratify a treaty would create an opportunity for a full public debate on the merits of each treaty and the potential effect on Australian domestic law and public policy.

6. Conclusion and recommendation

Treaties are increasingly impacting on Australian domestic law and public policy.

It is entirely appropriate for the legislative arm of government – the Parliament – to have an active role in the process leading to the ratification of a treaty by the executive arm of government.

The *Treaties Ratification Bill 2012* provides a simple mechanism for creating such a role. It should be supported.

Recommendation:

The Treaties Ratification Bill 2012 should be supported.

7. Endnotes

1. Commonwealth v Tasmania (1983) 158 CLR 1, available at: www.austlii.edu.au/au/cases/cth/HCA/1983/21.html
2. Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 286-287.
3. Zachariassen v Commonwealth (1917-18) 24 CLR 166, at 181 per Barton, Isaacs and Rich JJ.
4. Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 286-287
5. Fagan, Patrick F, “How U.N. Conventions On Women’s And Children’s Rights Undermine Family, Religion, And Sovereignty”, *Heritage Foundation Backgrounder* no. 1407, 5 February 2001 at: http://www.heritage.org/Research/InternationalOrganizations/upload/95496_1.pdf