

*Standing Committee on Uniform Legislation and Statutes Review — 112th Report —
“Committee’s Treaty Function”*

Resumed from 27 March.

Motion

Hon ADELE FARINA: In the absence of a member of the committee standing to take the call, I am happy to move —

That the report be noted.

I make a contribution as a former chair of this committee who has had a fair bit of experience of the treaty function of the committee. This report is excellent. Who would have thought that Hon Michael Mischin and I would find something to agree on!

The treaty function of this committee has been a longstanding issue. I first chaired the committee when it was established in 2002, and we had a treaty referral function then. Hon Simon O'Brien then took over the chair role, then I came back into it, and now the chair role is with Hon Michael Mischin. Throughout that whole period, it has been a consistent term of reference for the committee to review treaties. The problem is that by the time the committee receives notification of the referral and seeking of the advice of the committee on a particular treaty, the time for providing a response to the commonwealth has already passed. If it has not passed, the time remaining is so limited that there is absolutely no capacity for the committee to obtain the information it needs to provide informed advice to the commonwealth and this Parliament. Sadly, the process does not allow for the committee to perform that function.

This concern has been raised by the committee on a number of occasions. This committee report details how many committee reports that raised this concern have been presented over the years to this Parliament. I think the first report was tabled on 18 November 2004; that was the twenty-third report of the Standing Committee on Uniform Legislation and Statutes Review when I chaired it. The nineteenth report was tabled in June 2007, under the chairmanship of Hon Simon O'Brien. Another committee report was tabled in August 2011, again under my chairmanship. This report has now been tabled under the chairmanship of Hon Michael Mischin. Everyone agrees that close examination of treaties is really, really important because they bind the country and all the states that form part of it, so it is important to get state consideration of those treaty arrangements before the commonwealth signs the country up to a particular treaty. The problem is that the time frame does not allow for parliamentary committee input into that process.

Through the inquiries undertaken while I was chair of that committee, we found that there is extensive consultation between commonwealth and state officers in relation to the treaties, and particularly before Australia becomes a party to any treaty. That is excellent to know, and that consultation is quite thorough. However, it is consultation with just the executive of government; it does not provide a view that may be held differently if it had come from a parliamentary committee made up of members of the opposition and various independent parties in this place. So it is a little frustrating that the process does not allow the opportunity for parliamentary committees to make a contribution to the consideration of that treaty, but the reality is that they do not. Despite some former reports suggesting that that be looked into and that process be extended to provide the committee with an opportunity to make an input, that has never happened; or, if it is has happened, it has not been successful because there has been no change to that time frame.

During one of the committee's investigations into this treaty function when I was chair of the committee, which is covered in the sixty-eighth report tabled in August 2016, the committee had a hearing with various officers from the Department of the Premier and Cabinet to ask the standard questions asked when an inquiry of this nature is undertaken. The officers from the department told us that they could not answer any of our questions. The treaty negotiation and consultation process between the commonwealth and the state is confidential; therefore, they could not answer any of our questions. We all know that the committee has the power to force departmental officers to answer questions, and we surely could have gone down that path. But time did not permit us to go through the process that was required to compel the witnesses to answer the questions. The time frame did not allow us to comply with the time frame even if they willingly gave that information, much less having to go through a process of compelling them to give evidence. The whole process is just unworkable. Given the evidence that various committees have collected over time and the efforts by this committee over many, many years to try to actually implement its treaty function and the numerous reports that it has presented to this Parliament to say, “Despite our best efforts, we simply can't implement this treaty function”, I am not at all surprised that we have yet another report from the committee saying exactly the same thing.

This brings me to one of my frustrations about the committee report process in the Parliament. All we do is note the committee report; we do not adopt any of the recommendations. Once the committee report is noted, it falls

away onto the shelves in Parliament and there is no further action. We understand from the committee's report that we need the chamber to actually change the standing orders to remove the treaty function from the terms of reference of the Standing Committee on Uniform Legislation and Statutes Review. That requires probably this matter to be considered by the Standing Committee on Procedure and Privileges. This chamber had an opportunity when it reviewed the standing orders. The chamber at that time saw fit to limit the committee's terms of reference in relation to uniform bills, to almost make its inquiry ineffectual from my point of view, and no consideration was given to remove this treaty function. In fact, I think from memory Hon Norman Moore savaged the committee for failing to implement that treaty function during that debate, without any real understanding that there had been very real efforts by the committee to implement that treaty function. Having missed that opportunity during the review of the standing orders, we really now need a mechanism by which this recommendation of this committee to amend the standing orders gets before the Standing Committee on Procedure and Privileges.

Hon Michael Mischin: We have already done that by way of a corollary motion that was moved at the time that I tabled the report. It is order of the day 26. This is a useful debate to be able to foreshadow that in due course.

Hon ADELE FARINA: I am grateful for that interjection. The problem with the procedures of this place is that it becomes an order of the day under the orders of business and it relies on the government to bring that order far enough up the notice paper so that it gets debated. My past experience is that sometimes those motions never get debated in this place.

Hon Michael Mischin: I am happy to move them forward.

Hon ADELE FARINA: When we were in opposition, I certainly had a number of motions of that nature pulled out of committee reports and put onto the notice paper, only to have those motions never debated by the house because they were never given sufficient priority by the then government to debate them in the house. All I can say is that I note that it is a motion that is on the notice paper for debate. I will certainly be happy to talk to the Leader of the House to try to lift it up. I am also a member of the Standing Committee on Procedure and Privileges. I am happy to take the matter up with the President directly to see whether we have to wait for the motion to be considered by this place or whether the Standing Committee on Procedure and Privileges can actually consider the recommendation by this committee and provide a report back to the house and we amend the standing orders. This issue has been going on now for decades. It really is time to address it. It is not through laziness that the committee does not perform this function; it is absolutely impossible for the committee to perform this function. Numerous committees have tried and they have all come up with the same position.

Hon SIMON O'BRIEN: I will be characteristically brief! I want not only to provide some support to the view that the report be noted, but also to try to provide some support to the matters that have just been canvassed so very well by Hon Adele Farina in her capacity as a member of this committee over several Parliaments, and in no less than two of those Parliaments as Chair of the Standing Committee on Uniform Legislation and Statutes Review. I also want to offer support to Hon Michael Mischin as the current Chair, who I know wants to further brief the Committee of the Whole about this matter. The support that I want to offer is indeed about the matter that was touched upon most recently by Hon Adele Farina, and that is the question of how do we take this forward, what happens now and, I think, without reading between the lines, an expression of fear that nothing will happen now as nothing has happened in the past on several occasions.

I was in the thirty-sixth Parliament, I think it was, when the Standing Committee on Uniform Legislation and Statutes Review was first established with a treaty review term of reference, under the chairmanship of Hon Adele Farina. I recall we looked at this. That is recounted in the report that is currently before us. In the thirty-seventh Parliament, when I think it is fair to say that the uniform legislation committee had its full flowering and did marvellous things, with members such as Hon Donna Faragher, Hon Sheila Mills, Hon Matt Benson-Lidholm —

Hon Michael Mischin: It was a golden age.

Hon SIMON O'BRIEN: It was a golden age. As for who the fourth pillar of that great committee was —

Hon Darren West: Who was it?

Hon SIMON O'BRIEN: Modesty forbids!

Hon Michael Mischin: Wasn't it you?

Hon SIMON O'BRIEN: All I know is that in reviewing the records of the day and the wonderful legacy that was bequeathed to the chamber by that particular committee, one can see that it certainly was a golden age. Even that committee, with all of its capacity, dignity, standing and expertise, could not get through the question that is before us now, even though we reported it as well. Hon Adele Farina again returned, with all her redoubtable skill and experience in this matter, to chairmanship of the next iteration of that committee. The committee again reported, as we have seen, and no changes were made. Now we have the current iteration, under the chairmanship of

Hon Michael Mischin, that has provided this report. I have just reviewed the report in its entirety. It gives the whole history. I am sure all members have read it, so we do not need to go over that ground anymore. I want to take this forward.

I will pick up on what Hon Adele Farina said. May I say that I think the most recent committee's decision not to compel state government witnesses to give evidence that they were meant to keep secret was a very sensible one to take in the end because of course it would have been counterproductive if such an imperative had been issued. But that is not what we are talking about today; it is about what happens next. Hon Michael Mischin has reminded the chamber that order of the day 26 relates directly to recommendation 1 of this report that we are currently considering, specifically recommending that that be referred to the Standing Committee on Procedure and Privileges.

I want to proceed to answer where we should go now. The appropriate thing to do when we have a recommendation from a standing committee report to vary a standing order is to refer it to the procedure and privileges committee. That is what is proposed quite rightly by the current committee's report. We are all in furious agreement! Historical versions of this standing committee are all in agreement. A legacy has been repeated so often down the years that it is almost tribal law. It is so ingrained in the identical findings of successive iterations of the same committee, so that is what we ought to do.

That brings us to the final point. What we are doing at this point is valid and useful. It also makes it easier for the house in plenary session, when the government is concerned about how time is allocated and so on, because in noting the report, we are canvassing all these matters, and I think we can probably bring that to a conclusion fairly soon, Mr Deputy Chair—possibly even today. The question then is how we get order of the day 26 to the top of the notice paper. I think it is not beyond the capacity of the various parties in the house to agree behind the Chair to deal with its dispatch—heck, we have just considered this report and all the history in some detail. We have had all the advice and all the debate we really need to bring it on and, as in the vernacular, knock it off pretty quickly and then let the PPC get on with it, because all these things take time. Let us hope that happens. Perhaps the government might take an opportunity to respond to that proposition.

I probably said all the things that Hon Michael Mischin wants to say, but that is all right; he will get over it. It is now really in the government's court to say that perhaps it is time to quickly bring on order of the day 26. If in agreement, we will just deal with it very quickly and off it will go to the PPC. That would be a good outcome. It should not be up to the current standing committee chairman to see about finding some non-government business time in a few months to deal with it. No, this is the business of the house and it should be done in plenary session. I look forward to that happening.

The DEPUTY CHAIR (Hon Laurie Graham): Hon Michael Mischin—no, Stephen Dawson has the call.

Hon Alanna Clohesy: There isn't a Michael in his name.

Hon STEPHEN DAWSON: Thank you, Mr Deputy Chair. Actually, my confirmation name was Michael.

On behalf of the government, in the absence of the Leader of the Government in the Legislative Council, who is away from the chamber on urgent parliamentary business, I thank members for their contributions. I thank Hon Adele Farina and Hon Simon O'Brien, who have made contributions on this issue so far. I am very happy to bring this to the attention of the Leader of the Government to see how we might expedite it. I am certainly happy to have conversations behind the Chair if there is agreement from the various parties to bring this on quickly and send it off to a committee quickly as per the recommendation in the report. I am very happy to look at bringing that on as soon as possible. I do not want to say too much because I know Hon Michael Mischin wants to, and should, make a contribution as Chair of the Standing Committee on Uniform Legislation and Statutes Review, but I wanted to indicate that briefly on behalf of the government.

Hon MICHAEL MISCHIN: Thank you, Mr Deputy Chair. I am obliged to the Deputy Leader of the Government in the Legislative Council, Hon Stephen Dawson, for those comments—it is very encouraging—and also for Hon Adele Farina's and Hon Simon O'Brien's contributions on this point.

I have a dream. I have a dream that the committee of which I am part can actually make a difference in this area. I know that if we happen to get a step or two ahead of the work that has been done by previous iterations of this committee, it is because we have managed to clamber up onto the shoulders of giants and jump ahead—by one step anyway. The way that we hoped to do that was by way of not only the self-referral of the matter—it was something that had become apparent to the committee during our work on legislation that was routinely being dealt with under its sovereignty function, if I can call it that—but also that correspondence would nevertheless arrive via either the President of the chamber or from other sources pointing out that treaties were being considered by the commonwealth, and it struck me that that was an area in which we were really not discharging the function we were charged with. I am obliged for the contribution of not only the advisers to the committee, but also my fellow members of the committee for dealing with this matter.

There was not much to say in the report, because we relied essentially on distilling the problems that had been identified in the past, but what had become apparent is that the committee had been burdened with a function that

it could not in practical terms discharge, not only for the time limit reasons identified by Hon Adele Farina, and which were expanded on in the report and the previous reports annexed to this one, but also if one steps back and thinks about what purpose is served by any recommendation or comment by the committee. If we look at it in a vacuum: a treaty that has been negotiated by the commonwealth, examined by its Joint Standing Committee on Treaties and the like, and adopted by the executive as one of its functions as a federal government binding the nation is then examined by a committee of this house of this Parliament and it does so in isolation and out of context. Often these treaties may be, on the face of them, innocuous. Some might threaten parliamentary sovereignty theoretically, but the only way to find out is to have a statute that is based on them that we can look at to see whether it does infringe on this state's sovereignty or on the sovereignty of this Parliament. Frequently that cannot be done with any sense of confidence until there is something in writing prepared by the commonwealth government and passed by the commonwealth Parliament. Even then, any comment that the committee makes is not a comment on the part of the state of Western Australia and it is not an observation or a recommendation on the part of this Parliament; it is one on behalf of a committee of this house of this Parliament. Even if it is noted in some fashion by this house, it has no more weight with the commonwealth than any other submission that the Joint Standing Committee on Treaties might consider. It will be considered amongst them and decided on its merits and whether it suits the commonwealth. In many respects, the exercise is an exercise in futility on a number of levels. First, it cannot be discharged in any sensible fashion. It cannot be done without the input and assistance of the government. It cannot be done in the absence of a context in which that treaty will be effected as part of the law of this country and it is not representative of the views of this Parliament, let alone the state of Western Australia.

Although we recognise that there may be enormous merit in the idea of the state, which already gets the opportunity to consider treaties being negotiated by the commonwealth through various executive and administrative processes, considering it and the possible implications, without something tangible to work with, we cannot offer any sensible recommendation as a committee as to whether there will be an impact on state sovereignty, let alone parliamentary sovereignty. There may be other ways of going about this exercise, but as I mentioned in the statement by which I tabled this report, it is not conducive to the functioning of the committee or to the work of this place or to the dignity of this place that we are charged with a responsibility that goes nowhere, cannot be usefully discharged and has no effect in any event.

We would urge the Standing Committee on Procedure and Privileges to decide, firstly, the threshold question, which seems to have been assumed over the many years since it was called the constitutional affairs committee—that committee was first charged with this responsibility something like 20-odd years ago—of whether there is any useful function for this place to perform in scrutinising commonwealth-entered treaties in a vacuum. But if there is thought to be merit in that, and putting in some submission to the state government on it, on behalf of this chamber or of the Parliament, a better mechanism should be established and put into effect, relieving this committee, which simply cannot do the job, with the best will in the world, of something that is an exercise in futility. We would not have got to this stage if it had not been for the work of previous committees. Hopefully, by placing the corollary motion on the notice paper, some further advance can be made in that area. This has been a useful debate in itself because it allows members to realise that there is from experienced ex-members and chairs of this committee a unanimity in approach, quite apart from their committee reports, which had we not made current in this fashion would probably have gone unnoticed. I am happy to participate in any discussions behind the Chair, as I am sure my fellow committee members may be, with those who want to have a better understanding of the implications of this suggestion. I would think it ironic that this chamber can bring on all sorts of things for debate and resolution when it is important to do so, but something as simple and straightforward as referring a committee function to the Standing Committee on Procedure and Privileges could be bogged down endlessly, and perhaps for years, without having some action taken on it. What I would see as an ideal is if there could be some consensus whereby this standing order could be brought up at an appropriate time, dealt with by consent, or at least some consensus in the chamber, and referred to the Standing Committee on Procedure and Privileges so it can do its stuff and advise the house in due course. Who knows? Maybe within this session of Parliament we will have a reform in this area and I can retire then from my position as chairman with some satisfaction, knowing that I have made a difference.

I commend the report to the chamber. I thank members for their contributions on this report. Hopefully, we have summarised the issues satisfactorily. Our comments are at paragraphs 7.25 through to 7.28, again at paragraphs 7.36 through to 7.42, and at paragraph 8.11, and our conclusion summarises the problems and the futility of the process that we are currently involved in. I am very encouraged by Hon Stephen Dawson's comments and I will discuss the matter further with him behind the Chair in due course.

Question put and passed.