



THIRTY-EIGHTH PARLIAMENT

REPORT 68

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**INFORMATION REPORT IN RELATION TO THE
SCRUTINY OF TREATIES**

Presented by Hon Adele Farina MLC (Chairman)

November 2011

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“8. Uniform Legislation and Statutes Review Committee

8.1 *A Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

- (a) to consider and report on Bills referred under SO 230A;
- (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
- (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
- (d) to review the form and content of the statute book;
- (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
- (f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)

Hon Liz Behjat MLC

Hon Nigel Hallett MLC (Deputy Chairman)

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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

INFORMATION REPORT IN RELATION TO THE

SCRUTINY OF TREATIES

1 REFERENCE AND PROCEDURE

- 1.1 Under clause 8.3(c) of its current terms of reference, one of the functions of the Uniform Legislation and Statutes Review Committee (**Committee**) is:

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

- 1.2 Schedule 1 of the new Standing Orders of the Legislative Council, as proposed by the subcommittee of the Standing Committee on Procedure and Privileges (**PPC**), contains amended terms of reference for the Committee. Clause 5.3(c) states:

(c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;

2 BACKGROUND

- 2.1 Before September 1999, no Western Australian parliamentary committee had ever examined treaties.¹

- 2.2 In August 1999, the Constitutional Affairs Committee (**CAC**) tabled its Thirty-Eighth Report on a seminar hosted by the Commonwealth's Joint Standing Committee on Treaties (**JSCOT**) in Canberra. The recommendations in this report reflected what was agreed at this seminar, namely:

2.2.1 there was a need for scrutiny of proposed treaties at the state level;

2.2.2 treaties and related information should be tabled in State Parliaments; and

¹ Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, Report 23, *The Work of the Committee during the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004*, 18 November 2004, p32.

- 2.2.3 State parliamentary committees should be given the role of investigating treaty matters and reporting to the State Parliaments on the impact of treaties on the State.²
- 2.3 JSCOT was subsequently advised by the President of the Legislative Council that the CAC was the appropriate committee to review treaties.³
- 2.4 However, after September 1999, the CAC's reports do not reveal any formal review of treaties during the remainder of the Thirty-Fifth Parliament.⁴
- 2.5 In its Report 23, the Standing Committee on Uniform Legislation and General Purposes (**SCULGP**), in considering the scrutiny of treaties function, highlighted the very short period given by JSCOT within which comments must be received on proposed treaties and remarked that:

One view might be that the consultation by JSCOT with state parliamentary committees is illusory.⁵

- 2.6 SCULGP also stated:

To enable State to play an effective role in the treaty process, the Commonwealth must allow sufficient time for consultation with the States prior to treaty ratification.⁶

- 2.7 In its Report 19, the Committee inquired into the administrative practices and procedures and parliamentary processes involving treaties entered into, or proposed to be entered into, by the Commonwealth and made the following findings.

Finding 1

The negotiation and execution of treaties is a function of the Executive Government at either State or Commonwealth level.

² Parliament of Western Australia, Legislative Council, Standing Committee on Constitutional Affairs: *Report No 38: A Seminar on the Role of Parliaments in Treaty Making Canberra 24 and 25 June 1999*, July 1999, paragraph 7.2.

³ Letter from Hon George Cash, MLC, President of the Legislative Council to Hon Andrew Thomson, MP, Chairman, JSCOT, 8 September 1999.

⁴ See Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, Report 23, *The Work of the Committee during the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004*, 18 November 2004, p33.

⁵ Ibid, p35.

⁶ Ibid, p36.

Finding 2

Municipal legislation giving effect to treaties that have been duly executed by the Commonwealth Government is subject to the scrutiny of the Commonwealth Parliament.

Finding 3

Any statute of the Commonwealth Parliament that purports to be pursuant to a treaty executed by the Commonwealth Government is reviewable by originating summons in the High Court of Australia. The power to bring a High Court action on behalf of the Crown in right of the State of Western Australia is an executive power that resides with the Attorney General for Western Australia.

Finding 4

Any valid exercise of the treaty-making power of the Commonwealth Government and a subsequent valid amendment to the municipal law of Australia by the Commonwealth Parliament, are binding on the Crown in right of the State of Western Australia, and are not justiciable.

Finding 5

There is a wide range of publicly available information relating to treaties to which the Commonwealth Government has acceded, or proposes to accede.

Finding 6

The Western Australian Government is consulted extensively by the Commonwealth Government in the treaty-making process and the process of implementing treaty obligations.

Finding 7

Noting that the majority of treaties to which the Commonwealth Government proposes to accede are only tabled in the Commonwealth Parliament 15-20 sitting days prior to execution, any period of notice subsequently given to the Legislative Council by the Commonwealth Parliament Joint Standing Committee on Treaties of that committee's inquiries into treaties so tabled is not sufficient for any committee of the Legislative Council to participate meaningfully in such inquiries.

Finding 8

Western Australia is currently the only State in which a parliamentary committee is charged with the scrutiny of treaties to which the Commonwealth Government has acceded or proposes to accede.

Finding 9

In relation to other State and Territory parliaments, notice of treaties and any subsequent reports published by the Commonwealth Parliamentary Joint Standing Committee on Treaties are tabled only in the parliaments of Queensland and Victoria. Such tabling of notice and reports does not occur in any other State or Territory parliament.⁷

- 2.8 On the basis of these findings, the Committee **recommended** the deletion of term of reference 8.3(c).⁸
- 2.9 Until August this year, neither the Committee nor its former incarnations had ever conducted an inquiry into any treaty due to:
- 2.9.1 a lack of capacity as a result of the significant number of uniform bills referred for scrutiny;
 - 2.9.2 the very short timeframes still in place to provide comments to JSCOT; and
 - 2.9.3 the volume of treaties that are often sent by JSCOT inviting comment.

3 HEARING WITH THE DEPARTMENTS OF STATE DEVELOPMENT AND PREMIER AND CABINET

- 3.1 On 31 August 2011 the Committee determined, pursuant to its Treaty Review term of reference, to inquire into the *Agreement for the Establishment of the International Anti-Corruption Academy as an International Organization (Treaty)*.
- 3.2 The Committee invited the Department of State Development (**DSD**) and the Department of Premier and Cabinet (**DPC**), the lead agencies for the Treaty, to a hearing before the Committee on 7 September 2011.
- 3.3 In order to understand the Treaty and its implications for parliamentary sovereignty and any obligation on the State to enact legislation to give effect to the Treaty, the Committee posed a range of scrutiny and legal questions.

⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 19, *Administrative Practices and Procedures and Parliamentary Processes involving Treaties entered into, or proposed to be entered into, by the Commonwealth*, 20 June 2007, pp i-ii.

⁸ Ibid, p14.

3.4 The DPC and DSD informed the Committee they were unable to answer the Committee's questions, even though they answer similar questions in relation to bills, because the advice provided by the State to the Commonwealth and the negotiations between the State and the Commonwealth on treaties is confidential.⁹

3.5 The source of the requirement to maintain confidentiality is the official handbook on treaties produced by the Department of Foreign Affairs and Trade entitled '*Signed, sealed and delivered: treaties and treaty making: an officials' handbook*'.¹⁰

3.6 The DPC further advised as follows.

- The DPC does not undertake its own independent analysis and research on treaties, it merely refers the treaties to the relevant government agencies for comment and collates their replies and provides them to the Standing Committee on Treaties (SCOT).¹¹
- There has been no fundamental changes that have taken place in the processes and procedures followed by DPC since tabling of Report 19 in 2007.¹²
- The Committee seek legal advice on treaties from the Attorney-General as well as the Commonwealth's Office of International Law.¹³

3.7 The DSD further advised:

*Again, we, I think, have a much humbler role than our cousins in the Department of the Premier and Cabinet, and, effectively, in terms of treaties our key role is to provide information to DPC and to the federal government in relation to how a free trade agreement, for example, may affect businesses. That is the relevance in relation to treaties that my department has had in recent years.*¹⁴

⁹ Lyn Genoni, Executive Director, Strategic Policy, Department of Premier and Cabinet, *Transcript of Evidence*, 7 September 2011, p12.

¹⁰ Letter from Lyn Genoni, Executive Director and Holly van der Gaag, Policy Officer, Strategic Policy, Department of Premier and Cabinet, 21 September 2011, pp1-2.

¹¹ Op. cit. footnote 9, p11. The Standing Committee on Treaties consists of Commonwealth, State and Territory government representatives and provides a mechanism for consultation between governments on treaties.

¹² Ibid, p2.

¹³ Ibid, pp10-11.

¹⁴ Nathan Backhouse, Director, International Trade and Investment, Department of State Development, *Transcript of Evidence*, 7 September 2011, pp2-3.

3.8 On advice of the DPC, the Committee wrote to the Attorney-General requesting a representative from the Department attend a hearing to provide answers to the questions on the Treaty.¹⁵

3.9 The Attorney-General responded by stating:

*It should be noted that the Solicitor General and solicitors engaged in the State Solicitor's Office are tasked with providing legal advice to the State Government, not Parliament or its committees. And further, such advice, should it be received by the Executive Government, is covered by legal professional privilege.*¹⁶

3.10 The Committee notes that the Attorney-General did, however, arrange for the Acting Solicitor General to attend a hearing on the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 to provide legal advice to the Committee.¹⁷

3.11 The Committee wrote to the Office of International Law seeking its assistance in the undertaking of its treaty function, in particular, whether it can provide the Committee with advice about particular Articles in treaties.¹⁸

3.12 In its response the Office of International Law gave similar feedback to the DPC and the Attorney-General. It stated:

*One of the key functions of this Office is to provide legal advice to the Commonwealth Government on international law, including the domestic implementation of treaties to which Australia is a party, or contemplating becoming a party. To provide advice to your Committee would potentially conflict with our role in providing advice to the Executive Government of the Commonwealth, and consequently, we are not in a position to provide your Committee with the assistance that you seek.*¹⁹

3.13 It also stated:

I note that the Commonwealth provides information on proposed treaty actions to the Standing Committee on Treaties, which is

¹⁵ Letter from Hon Adele Farina MLC to Hon Christian Porter MLA, Attorney-General, 7 September 2011, p1.

¹⁶ Letter from Hon Christian Porter MLA, Attorney-General, to Hon Adele Farina MLC, 16 September 2011, p1.

¹⁷ Robert Mitchell SC, Acting Solicitor General, *Transcript of Evidence*, 28 September 2011. See also letter from Robert Mitchell SC, Acting Solicitor General, 4 October 2011.

¹⁸ Letter from Hon Adele Farina MLC, to the Office of International Law, 22 September 2011.

¹⁹ Letter from Greg Manning, First Assistant Secretary, Office of International Law to Hon Adele Farina MLC, 16 November 2011, p2.

*comprised of officers from State and Territory First Ministers Departments, the Department of the Prime Minister and Cabinet, the Department of Foreign Affairs and Trade and this Department. The Department of the Premier and Cabinet of Western Australia is represented on this Committee.*²⁰

- 3.14 The Committee recognises the important role that is played by the exchange of confidential information at Executive level as part of the state-commonwealth consultation and negotiation process on treaties. However, obtaining the type of advice it has requested, which includes advice on the meaning of certain Articles in the Treaty and the implications on State sovereignty and law-making, is essential to the Committee being able to effectively scrutinise treaties, just as would be the case when the Committee inquires into a bill.

Treaties given effect to in the municipal law of Australia

- 3.15 During the hearing the Committee queried the frequency of treaties the Commonwealth has entered into which have required a legislative response from Western Australia. DPC said:

*I did check with the Attorney General's Office to see whether, over a 15-year period, they had examples of cooperative legislative schemes that they could directly ascribe to treaties, and they could come up with only three over that 15-year period. Two of them are currently before the Western Australian Parliament—one is the Electronic Transactions Bill 2011, and one is the Commercial Arbitration Bill 2011—and one is some international wills uniform law work, which is in the pipeline; it has not come through as legislation yet. So it is quite rare.*²¹

4 CORRESPONDENCE WITH THE STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

- 4.1 On 17 December 2010 the PPC wrote to the Committee inviting suggestions regarding amendments to the Standing Orders of the Legislative Council.²²

²⁰ Letter from Greg Manning, First Assistant Secretary, Office of International Law to Hon Adele Farina MLC, 16 November 2011, p2.

²¹ Ms Lyn Genoni, Executive Director, Strategic Policy, Department of Premier and Cabinet, *Transcript of Evidence*, 7 September 2011, p10.

²² Letter from Hon Barry House MLC, President of the Legislative Council to Hon Adele Farina MLC, 17 December 2010.

4.2 In its response, the Committee drew attention to Report 19 and in particular the recommendation that term of reference 8.3(c) be deleted. The Committee also endorsed that recommendation.²³

4.3 Once the Committee had considered the proposed terms of reference, the Committee again wrote to the PPC and expressed its concern that confining the Committee's examination of a treaty once it has entered into force raised a question about the purpose of proposed term of reference 5.3(c).

4.4 The letter stated:

*There is little value in examining how a treaty impacts on sovereignty, after the event. As Members we have an obligation to protect the sovereignty of the Western Australian State Parliament. This can only be achieved by examining treaties before the Commonwealth signs the treaty and binds the State.*²⁴

5 CONCLUSION

5.1 During the consideration by the House of the Committee's Report 63,²⁵ Hon Simon O'Brien MLC, a former Chairman of the Committee, in referring to the redrafting of the Committee's terms of reference as part of the review of the Standing Orders of the Legislative Council, stated:

There have been references for some years, and I believe there is proposed to be reference in the terms of reference under the new standing orders, to this committee having some overview of treaties. I remember that in a previous Parliament this committee actually did look at how it could deliver on this particular term of reference. It conducted some inquiries, communicated with other jurisdictions and so on, and came to certain conclusions.

It could maybe review them after the fact, but that would be a forlorn and pointless exercise. I would rather that the house perhaps noted the committee's previous work on treaty scrutiny and the conclusions it formed after having spoken to a whole lot of sources, and perhaps come to the view that this committee's most valuable contribution is actually to be made in the scrutinising of intergovernmental agreements from the context of how much of Western Australia's

²³ Letter from Hon Adele Farina MLC to Hon Barry House MLC, President of the Legislative Council, 14 April 2011, p1.

²⁴ Letter from Hon Adele Farina MLC to Hon Barry House MLC, President of the Legislative Council, 30 August 2011, p2-3.

²⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statues Review, Report 63, *Information Report: Scrutiny of Uniform Legislation*, 30 June 2011.

future prerogatives are proposed to be done away with. [Committee Emphasis]²⁶

- 5.2 The Committee agrees with this view and is also of the view that:
- 5.2.1 it is unable to meaningfully carry out its function under term of reference 8.3(c) and would be unable to do so under proposed term of reference 5.3(c) due to:
- an inability to obtain advice and feedback from the Executive on the Articles in treaties it inquires into due to confidentiality constraints;
 - the insufficient consultation period during which JSCOT accepts submissions on treaties, during which it would not be feasible for the Committee to advertise the inquiry, obtain submissions and undertake anything but superficial scrutiny; and
 - a lack of capacity owing to the significant number of uniform bills taking priority.
- 5.3 The Committee also re-iterates the findings set out in paragraph 2.7 regarding Report 19 and concludes that it is highly questionable what value the Committee can add to the process as a result of the following factors.
- 5.3.1 Significant consultations and negotiations take place between the State of Western Australia and the Commonwealth through the SCOT.
- 5.3.2 There are other bases upon which treaties can be scrutinised and challenged.
- 5.4 There is little value in the Committee considering the impact on State and Parliamentary sovereignty of the Commonwealth entering into treaties as this is an exclusive power of the Commonwealth. Effective consideration could only take place before the Commonwealth signs the treaty, thereby binding the states.
- 5.5 The Committee therefore makes the following recommendations.

Recommendation 1: The Committee recommends the Legislative Council delete clause 8.3(c) in Schedule 1 of the Standing Orders and re-number the remaining sub-clauses accordingly.

²⁶ Hon Simon O'Brien MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 3 November 2011, p8890.

Recommendation 2: The Committee recommends that the Legislative Council, in its consideration of the new Standing Orders as proposed by the subcommittee of the Standing Committee on Procedure and Privileges, amend the Committee's proposed terms of reference at clause 5.3 by deleting sub-clause (c) of Schedule 1, which reads:

(c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;

and re-number the remaining sub-clauses accordingly.



Hon Adele Farina MLC
Chairman

22 November 2011