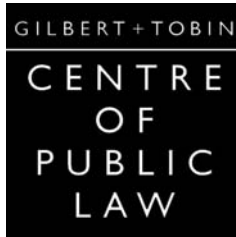


SUBMISSION NO. 2
Treaties Ratification Bill 2012



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Committee Secretary
Joint Standing Committee on Treaties
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into Treaties Ratification Bill 2012

Thank you for the invitation to make a submission to the Committee's inquiry into the Treaties Ratification Bill 2012 ('the Bill'). We make this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

Issues raised by this inquiry were examined as part of a three-year research project funded by the Australian Research Council and led by Professors Hilary Charlesworth and George Williams. This submission draws upon the findings of that project, as published in Chapter 5 of Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, *No Country is an Island: Australia and International Law* (UNSW Press, 2006).

1. Introduction

The Bill states in section 4 that:

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

The power to sign treaties is part of the executive power of the Commonwealth, and is currently not subject to any significant limitations. The Bill attempts to rectify the perceived 'democratic deficit' in Australia's treaty-making process by requiring parliamentary support for any ratification.

2. The Current Process of Treaty Ratification

There have been significant changes over the last century to Australia's treaty-making process. However, while the 1996 reforms by the Howard Government in particular marked a symbolic shift towards a more inclusive and open process of treaty-making, these changes have not been as significant as might have been expected.

The 1996 reforms had four key aspects:

1. The relevant Commonwealth department is required to prepare a National Interest Analysis ('NIA') for each treaty, outlining information including the obligations contained in the treaty and the benefits for Australia of entering into the treaty.
2. The Joint Standing Committee on Treaties ('JSCOT') was established to inquire into and report upon: matters arising from treaties, related NIAs and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament; and questions relating to a treaty or other international instrument referred to it by a Minister or the House of Parliament.
3. The executive is required to table in Parliament all proposed treaty actions for at least 15 sitting days prior to binding action being taken, with an exemption for treaties considered by the Minister for Foreign Affairs to be urgent or sensitive.
4. A Treaties Council was established, comprising the Prime Minister, premiers and chief ministers.

2.1 NIAs

NIAs often do little more than outline basic information about a treaty and the consultation processes the government has used in considering becoming party to the treaty. NIAs typically lack depth of analysis and often do not provide an effective platform for the parliamentary or public debate that many treaties might provoke.

2.2 JSCOT

The difficulty that Parliament faces in engaging in debate about the value of treaties is exacerbated by the limited time for scrutiny. While JSCOT is empowered to inquire into and report upon matters arising from treaties and their related NIAs, it generally only has 15 or 20 parliamentary sitting days to do this. This time frame is usually adequate for simple treaties, but it can be too short for treaties dealing with complex issues or where there are a large number of treaties to be considered at one time. Perhaps because of this, the media has generally failed to scrutinise and comment on Australia's treaty-making decisions in a detailed way. The media typically reports treaty issues only where they give rise to a political contest, whether between the major parties or within one of them. Where a treaty could be important due to the impact it might have upon Australia, but is the subject of bipartisan support or simply does not prompt a sharp difference of opinion, it will usually not be the object of media scrutiny.

A further problem is that JSCOT has not proven to be the vehicle for analysis, or even robust critique of government action about treaties, that some might have hoped. Indeed, JSCOT has almost always made recommendations in line with government policy. As a joint committee of the federal parliament, on which the government has a majority and which a government member chairs, this is to be expected.

It is fair to say that, in this, JSCOT suffers from the same limitations that afflict other like parliamentary committees. Where JSCOT has been willing to criticise, it has done so mostly in relation to the procedural issues that have arisen in treaty-making, rather than in regard to questions of substance such as whether Australia should ratify the treaty at all. Such decisions still fall within the sole prerogative of the executive. While some would argue that this is where the decisions should be made, it does mean that the importance and role of JSCOT in the treaty-making process should not be exaggerated.

The most important outcome of the 1996 reforms is that parliament, through JSCOT, is now *seen* to be actively involved in the process of Australia accepting further treaty obligations. Yet, it is far from clear that this enhanced role for parliament has addressed the 'democratic deficit' that was argued to exist in Australia's treaty-making practices. When the most important political and policy decisions are made, JSCOT is often excluded, preventing it from providing effective scrutiny. For example, in respect of the Australia–United States Free Trade Agreement ('AUSFTA'), JSCOT's role did not even commence until after the terms of the agreement had been settled and, when it did hold an inquiry, the time had passed to make changes to the agreement. In such circumstances, faced with a *fait accompli*, the task left to JSCOT was to provide the rubber stamp of parliament to give the appearance that the process of agreeing to the AUSFTA was more democratic and accountable than it actually was.

2.3 *Other Limitations upon the Executive's Power*

It might be thought that the power of parliament to control the implementation of treaty obligations through legislation is a sufficient check on executive power. This is not always the case because, once an obligation is assumed, there may be considerable momentum built up for domestic implementation and little leeway as to how this is achieved.

The AUSFTA is an example of where the decision of the executive left little room for parliament to act. Parliamentary committees examined the agreement but had minimal effect upon its drafting or implementation. Indeed, even the attempt to bring about change in just one area of its implementation, relating to prescription drugs, led to accusations by the executive that such changes could damage Australia's economic future as well as its relations with the United States. In this case, implementation provided little control to parliament over the process and did not remedy the democratic deficit in decision-making. In such cases, where agreement has been reached or an obligation assumed, parliament can be left with no real option but to accept the deal. In some cases, parliament may also have little time in which to make the choice. The House of Representatives was, for example, given three hours to debate 353 pages of implementing legislation for the Rome Statute of the International Criminal Court.

Another problem with relying upon the subsequent implementation process to provide parliament with a meaningful role is that some obligations assumed by the government do not require implementation by legislation. This may be because the executive believes that the necessary laws are already in place or because the obligation does not require legislation for its operation. A good example of the latter is the executive decision of the Hawke government in 1991 to commit Australia to the Optional Protocol to the International Covenant on Civil and Political Rights ('ICCPR'). Without the need for further legislation, this accession provided an opportunity for people within Australia's jurisdiction to take a complaint to the UN Human Rights Committee alleging a violation of the ICCPR. The decision to open up this path to the Human Rights Committee was not the subject of scrutiny

by parliament and passed without much notice. This is at odds with the importance of the step: given that Australia has still not legislated to implement the ICCPR domestically, the Optional Protocol is often the only avenue available to Australians to argue that their Covenant rights have been breached. The lack of parliamentary and popular involvement in the decision to adhere to the Optional Protocol may also partly explain why almost all of the decisions of the committee that have exposed Australia's violations of the ICCPR have been ignored by both the Australian Government and the media.

3. The Desirability of Parliamentary Scrutiny of the Ratification of Treaties

Decisions whether or not to enter into treaties involve issues of importance to Australia which ought to be the subject of greater public debate, both within and outside parliament. In the past, Australians have found themselves surprised by news of Australia's acceptance of a major new international treaty. Today, even where international agreements are the subject of significant public debate, as in the case of the AUSFTA, the concerns of individuals and interest groups can be sidelined.

Many of the decisions made behind closed doors are not made by ministers, but by employees in their departments, working within government-endorsed negotiating mandates. While this is inevitable in any complex process of agreement-making, it does mean that such decisions are rarely the subject of external analysis before they are made and, after the event, may in practice be impossible to change. This point can be made in relation to much of the detail in the AUSFTA. Where there was debate, this was limited to only a few issues and came too late. The example of the AUSFTA illustrates an ongoing 'democratic deficit' in Australia's treaty-making process.

The powers of the committee also require rethinking. JSCOT should have a clearly mandated role early in the process of inquiring into treaty actions, before such instruments are signed by the executive. Indeed, we believe that the committee could be charged with providing an advisory opinion on whether each instrument should be signed, with the matter then being determined, as with other matters of importance, by a majority vote of each house of the parliament. Each house could have the power, as it currently has for a set number of days with regard to regulations made by the executive, to disallow a government decision to assume new international obligations on behalf of Australia. Where this process is impractical, such as where a bilateral agreement is being drafted, any negotiations should be conducted according to an instrument subject to disallowance by parliament setting out the terms of the negotiation. The executive would have a mandate only to negotiate within its terms.

The cost of doing this could be to slow down the process of international agreement-making by Australia. It could also limit the power of the executive to lead by acting decisively in the national interest. However, we envisage that parliamentary agreement to treaties such as these would not be a time-consuming process, as they would not require detailed scrutiny on each separate occasion. It would primarily be treaties of major social, political or economic importance that would occupy parliamentary time, and, as we argue above, it is precisely these kinds of commitments that should be considered by parliament.

In any event, these are costs that arise equally in other areas, in fact in most other forms of parliamentary law-making, where it is accepted that the power of the executive to make important national decisions should be the subject of parliamentary oversight.

4. Recommendation that the Bill Extend to All Treaty Actions

While the Bill provides that parliamentary approval is required for the ratification of treaties, it does not mandate such approval for the amendment of or withdrawal from treaties that Australia has already ratified. In contrast, the current process of parliamentary review does not make this distinction. All proposed treaty actions are required to be tabled in parliament for 15 or 20 days. All these actions can affect Australia's obligations under international law, and should be subject to parliamentary oversight for the reasons discussed above.

We recommend that the Bill be amended to permit either house of Parliament to disallow any treaty action undertaken by the executive, including ratifying, amending or withdrawing from a treaty.

5. Conclusion

The key dilemma in treaty-making practice is how to balance the power of the executive to act unilaterally and decisively on behalf of the nation, with the need for genuine and open democratic deliberation about some of the most important policy choices facing Australia. Our view is that it is no longer appropriate for the government of the day to have unfettered power to commit Australia to new international obligations. Parliament should be given an enhanced role.

Yours sincerely

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Anthony Mason Professor
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Ms Emily Burke
Social Justice Intern