



# LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

## THE ROLE OF THE QUEENSLAND PARLIAMENT IN TREATY MAKING

REPORT NO 22  
(APRIL 2000)

### 1. INTRODUCTION

On 28 October 1999, the Legal, Constitutional and Administrative Review Committee ('the committee' or 'LCARC') resolved to inquire into certain proposals regarding the role of the Queensland Parliament in treaty making.

The committee's inquiry emanated from a letter dated 31 August 1999 from The Hon Andrew Thomson MP, Chair of the Commonwealth Parliament's Joint Standing Committee on Treaties (JSCOT), to the Speaker of the Queensland Parliament, the Hon Ray Hollis MLA.

In his letter, Mr Thomson urged the Queensland Parliament to consider implementing various proposals developed at a June 1999 seminar on the role of parliaments in treaty making (the 'treaties seminar') convened by the JSCOT in association with the Australasian Study of Parliament Group. The proceedings and outcomes of the seminar (which involved participants from most state and territory parliaments) are detailed in a JSCOT report.<sup>1</sup>

One of the purposes of the seminar was to explore the opportunities for Australian parliaments to become more aware of, and involved in, treaty making given: (1) the impact of international law on Australian law and policy; and (2) some community concerns that treaty obligations represent a loss of national sovereignty.

Seminar participants proposed that state and territory parliaments might consider three specific proposals to improve parliamentary awareness of,

and involvement in, treaty making and to make the treaty making process more publicly open, namely:

- arranging for information about proposed treaty actions to be presented to that jurisdiction's parliament as a matter of routine;
- establishing a dedicated parliamentary committee to review proposed treaty actions and liaise with the JSCOT (or adding this responsibility to the charter of an existing committee); and
- contributing to the establishment of an inter-parliamentary working group on treaties to help improve general awareness of treaty actions and to encourage wider parliamentary scrutiny of treaty making.

On 16 September 1999, the committee met with Mrs Linda Lavarch MLA (Chair, Scrutiny of Legislation Committee)<sup>2</sup> and Mr Chris Goodreid (Executive Director, Intergovernmental Relations Directorate, Department of the Premier and Cabinet) who both attended the treaties seminar to discuss these proposals and related issues.

In November 1999, the committee released a position paper outlining its preliminary position on the three seminar proposals<sup>3</sup> and called for public comment on its position. The committee advertised its call for submissions in *The Courier-Mail* on 17 November 1999 and wrote directly to a number of identified stakeholders asking for their comment on the issues

<sup>1</sup> JSCOT, *A seminar on the role of parliaments in treaty making*, report 24, CanPrint Communications, Canberra, August 1999. Available at: <<http://www.aph.gov.au/house/committee/jscot/ppgprep.htm>>.

<sup>2</sup> See Mrs Lavarch's report to Parliament on her attendance: *Queensland Parliamentary Debates*, 20 July 1999 at 2675. Although, the Scrutiny of Legislation Committee does not have jurisdiction to deal with treaties. Currently, the only Queensland parliamentary committee whose jurisdiction would permit some role regarding treaties is the LCARC pursuant to its 'legal reform' responsibility.

<sup>3</sup> LCARC, *The role of the Queensland Parliament in treaty making - Position Paper (No 1)*: available at: <<http://www.parliament.qld.gov.au/comdocs/legalrev/lcarpp01.PDF>>.

under inquiry. Submissions closed on 17 December 1999.

The committee received 21 submissions to its inquiry, all of which have been tabled in the Queensland Parliament. A list of those who made submissions appears at *Appendix A*.

Having considered matters raised in submissions in light of its other research, the committee has prepared this report outlining its recommendations regarding the three seminar proposals.

## 2. THE TREATY MAKING PROCESS

A treaty is a formal written agreement between at least two national governments which is binding in international law.<sup>4</sup> Treaties may cover topics as diverse as human rights, the environment, defence, and reciprocal health and taxation arrangements. Globalisation and the escalating interdependence of countries have seen treaties become increasingly important.

The power to enter into treaties and bind Australia at international law resides solely with the Commonwealth Government.<sup>5</sup> This ensures that in international matters and matters of foreign relations 'the Australian nation speaks with one voice'.<sup>6</sup> However, a treaty ratified by the Commonwealth Government has no *direct* legal force in Australia unless an Australian parliament incorporates its terms into domestic law.<sup>7</sup>

The Commonwealth Government has the legislative power to implement treaties into domestic law pursuant to the 'external affairs' power in s 51(xxix) of the Commonwealth Constitution.

A number of aspects of the treaty making process have sparked legal and political debate, namely:

- The wide legislative power which the High Court says the external affairs power gives the

<sup>4</sup> The general term 'treaty' incorporates documents such as conventions, protocols, covenants etc. Treaties can be: bilateral (between two countries); multilateral (between three or more countries); or plurilateral (between limited parties).

<sup>5</sup> The power to enter into treaties is an executive power under the Commonwealth Constitution, s 61.

<sup>6</sup> Lavarch, n 2 at 2675.

<sup>7</sup> This is because entering into a treaty is an act of government (the executive) and Australian law can only be changed by parliament. However, in some cases citizens might expect the Commonwealth Government to act in accordance with a treaty it has signed: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 as narrowed by *Baldini v Minister for Immigration and Multicultural Affairs* [2000] FCA 173 (25 February 2000).

commonwealth.<sup>8</sup> While state parliaments may be within their legislative competence to legislate to implement Australia's treaty obligations, if state legislation is inconsistent with commonwealth legislation then the latter prevails.<sup>9</sup> In this way, commonwealth laws (sometimes enacted solely pursuant to the external affairs power) can override state laws in areas of traditional state activity.<sup>10</sup> Concern has been expressed about the potential this has to undermine Australia's federal balance.<sup>11</sup>

From this perspective, the states and territories need to increase their role in the treaty process to stem the erosion of their traditional legislative and policy domain.<sup>12</sup>

- The manner in which the executive negotiates and enters into treaties, and the states and territories' role in that process (particularly where a treaty directly concerns them).

There are processes by which state, territory, individual, business and community interests can be represented and/or involved in Australia's treaty negotiations.<sup>13</sup> For example, Queensland has represented the states at international treaty negotiations on a number of occasions, including the *European Union Mutual Recognition Agreement* negotiations.<sup>14</sup> However, at various times, states and territories have expressed concern at the overall lack of consultation, representation and information about treaties (especially those concerning them) and the timing of state/territory involvement when it does occur.<sup>15</sup>

<sup>8</sup> See generally the Senate Legal and Constitutional References Committee's report *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Senate Printing Unit, Canberra, 1996 at 62-85 and the Victorian Federal-State Relations Committee's report *International treaty making and the role of the states: First report on the inquiry into overlap and duplication*, Government Printer, Melbourne, October 1997 at 9-14 and 25-34.

<sup>9</sup> Commonwealth Constitution, s 109.

<sup>10</sup> In this regard, see *Commonwealth v Tasmania* (1983) 158 CLR 1 (the 'Tasmanian Dam case').

<sup>11</sup> Federal-State Relations Committee, n 8 at 14.

<sup>12</sup> That is, where treaties create international obligations in areas of traditional state activity, states should have primary responsibility to implement those obligations.

<sup>13</sup> In some cases, there are commonwealth/state arrangements covering a particular subject area. For example, the 1992 Intergovernmental Agreement on the Environment sets out detailed commonwealth/state mechanisms relating to the negotiation and implementation of environmental treaties.

<sup>14</sup> Federal-State Relations Committee, n 8 at 38.

<sup>15</sup> Although many concerns have been addressed by the 1996 reforms (described below), concerns remain about these matters at least from the perspective of state and territory parliaments: See the comments of the Federal-State Relations Committee n 8 and the treaties seminar n 1.

- The *indirect* influence that treaties can have on Australian law even when not incorporated into domestic law, particularly in the development of the common law<sup>16</sup> and in setting principles which government decision and policy makers should have regard to.<sup>17</sup>

## 2.1 The 1996 reforms

In May 1996, the Commonwealth Government introduced reforms aimed at making the treaty process more open and transparent.<sup>18</sup> These reforms involve five elements.<sup>19</sup>

- The tabling in the Commonwealth Parliament of all proposed treaties at least 15 sitting days before binding treaty action is taken.<sup>20</sup>
- The preparation of a national interest analysis (NIA) for each proposed treaty (also to be tabled for a minimum of 15 sitting days). These analyses, in explaining why a treaty is in Australia's national interest, address: the likely economic, social, cultural, environmental and legal impacts of proposed treaty action; the obligations to be imposed; direct financial costs to Australia; domestic implementation implications; and consultation undertaken.
- The establishment of a joint committee of parliament (JSCOT) which considers and reports to the Commonwealth Parliament on all tabled treaties. In considering treaties, the JSCOT receives public submissions and holds public hearings. As at 30 June 1999, the all-party JSCOT had considered 137 treaty actions and tabled 22 reports.<sup>21</sup>
- The creation of the Treaties Council (comprising the Prime Minister and each of the Premiers and Chief Ministers) to facilitate

commonwealth/state consultation on treaty making. (Although it was envisaged that this council would meet at least once a year, it has only met once, in November 1997).

- The development of an Internet-based library of treaties information. The Australian Treaties library<sup>22</sup> contains a vast amount of information on treaties including: all treaties in force; NIAs for all tabled treaties; a list of multilateral treaties under negotiation and treaties signed by, but not yet in force for, Australia. [The commonwealth Department of Foreign Affairs and Trade (DFAT) also maintains a treaties information telephone service and provides hard copies of treaty texts to people without Internet access.]

Overall, these reforms have provided important mechanisms for disseminating information, enhancing consultation and improving community awareness about treaties.

The 1996 reforms included specific mechanisms to increase state and territory participation in the treaty making process. These mechanisms—set out in the revised *Principles and Procedures for Commonwealth-State Consultation on Treaties*<sup>23</sup> ('the 1996 Principles')—were endorsed by the Council of Australian Governments (COAG) in June 1996. Among other matters, these principles provide for:

- commonwealth consideration of the views of the state and territories where a treaty is one of 'sensitivity and importance to the states and territories';
- the dissemination of treaty information to the states and territories (including the regular provision of a treaties schedule which lists current and forthcoming treaty action);
- the establishment and role of the Treaties Council;
- the establishment of the Standing Committee on Treaties (SCOT)—which comprises senior commonwealth and state and territory officials—to meet bi-annually to identify treaties of particular sensitivity and importance to the states and territories and to take particular action to protect state interests;
- commonwealth/state consultation mechanisms and state and territory participation in international delegations.

<sup>16</sup> See, for example, the comments of Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.

<sup>17</sup> See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>18</sup> These reforms were generated by calls from the Leaders' Forum (put as a position paper to COAG on 11 April 1995) and the Senate Legal and Constitutional References Committee's *Trick or Treaty?* report, n 8 at para 4.1.

<sup>19</sup> These reforms were reviewed in 1999: See the *Review of the treaty-making process*, Canberra, August 1999: <[http://www.austlii.edu.au/au/other/dfat/reports/review\\_treaty\\_making.html](http://www.austlii.edu.au/au/other/dfat/reports/review_treaty_making.html)> at para 2.4 and paras 4.15-4.17>.

<sup>20</sup> In exceptional circumstances—essentially where it is necessary to safeguard Australia's national interest—this tabling period can be reduced. For example, it was not complied with regarding the Bougainville Peace Monitoring Agreement and the 1996 Agreement with Japan concerning tuna long-line fishing. Conversely, the 15 day period can be extended in 'particularly complex matters': *Review of the treaty-making process*, n 19 at para 2.4 and paras 4.15-4.17.

<sup>21</sup> See the *Review of the treaty-making process*, n 19.

<sup>22</sup> At: <<http://www.austlii.edu.au/au/other/dfat/>>.

<sup>23</sup> At: <<http://www.austlii.edu.au/au/other/dfat/reports/infokit.html>>.

## Residual (state) concerns about the treaty-making process

Despite the 1996 reforms, it has been suggested that state and territory parliaments should put additional procedures in place to ensure that treaties of relevance to the states and territories (together with associated treaty information) are brought to the attention of the state and territory *parliaments*.

For example, in October 1997 the Victorian Federal-State Relations Committee<sup>24</sup> recommended that Victoria seek improvements in the consultative framework on treaty matters in the Australian federation via mechanisms such as:<sup>25</sup>

- a requirement that, as soon as practicable, treaties and treaty information be tabled in the Victorian Parliament, (this recommendation was subsequently accepted and implemented by the Victorian Government);
- the establishment of a Victorian parliamentary committee to advise, and be an information source for, the Victorian Parliament on all matters concerning treaty making and their possible impact on Victoria, (this recommendation was not accepted by the Victorian Government);
- the Victorian Government calling upon the commonwealth to, by legislation, extend the length of time that treaties are tabled in the Commonwealth Parliament prior to their ratification from 15 sitting days of the Commonwealth Parliament to 15 sitting days of every Australian parliament, with the proviso that the period be no longer than 6 months, (the Victorian Government responded that it would approach the commonwealth to extend the 15 day period to 45 sitting days).

A number of participants at the treaties seminar endorsed these proposals.<sup>26</sup>

## 2.2 The 1999 review

In August 1999, the Commonwealth Government reported on a review of the 1996 reforms.<sup>27</sup> The review found that, overall, the reforms are working well, although recognised that there is scope to further improve consultation between the states and

<sup>24</sup> This committee was not re-established following the 1999 Victorian state election.

<sup>25</sup> Note 8 recs 1-6. See the Victorian Government response at: <<http://www.parliament.vic.gov.au/fsrc/Report1/Report1.HTM>>.

<sup>26</sup> See, in particular, n 1 at 35-57.

<sup>27</sup> See n 19.

territories on the one hand and commonwealth departments and agencies on the other.<sup>28</sup>

In particular, the Commonwealth Government stated that it would:

- continue to ensure that commonwealth agencies that are leading treaty negotiations consult with the states and territories at a sufficiently early stage, so that the state and territories can make the best possible use of Ministerial Councils and other consultation mechanisms;
- provide the states and territories with a report on the outcome of negotiating sessions of sensitivity and importance to the states, whenever practicable;<sup>29</sup>
- continue to support state and territory funded participation in relevant treaty negotiations.<sup>30</sup>

The review rejected:

- extending the 15 sitting day requirement;<sup>31</sup>
- giving state and territory parliaments a formal role in approving treaties, noting that this would be inappropriate and would unduly delay the treaty making process;<sup>32</sup>
- requiring Australia to insert 'federal clauses' into relevant international conventions. (Federal clauses—which 'limit the application of a treaty to areas of the federal government's constitutional authority'—were also rejected by the 1995 senate report on the basis that they would present 'considerable practical and political difficulties'.<sup>33</sup>)

## 3. THE COMMITTEE'S CONCLUSIONS ON THE ISSUES RAISED AT THE JSCOT SEMINAR

There are important reasons, largely stemming from our federal system of government, why the Commonwealth Constitution gives the commonwealth responsibility in relation to international affairs.

At the same time, given treaties can affect the states and territories, there must be mechanisms by which the

<sup>28</sup> The review also recommended improvements to NIAs and enhancement of the Australian Treaties Library.

<sup>29</sup> Note 19 at para 6.5.

<sup>30</sup> The commonwealth acknowledged that state and territory representation on Australian delegations at treaty negotiations potentially informed the delegation of state and territory views and provided expert technical assistance: n 19 at para 6.9.

<sup>31</sup> The review found that this time limit has 'proved a good balance between the need for adequate parliamentary and public scrutiny and the need for timely treaty action' and that 15 sitting days (30 to 100 calendar days) 'has proved a manageable timeframe for JSCOT to scrutinise treaties': n 19 executive summary and at para 2.3.

<sup>32</sup> Note 19 at para 6.6.

<sup>33</sup> Note 19 at para 6.7 (although the government stated that it would continue to make a federal statement upon signature of a treaty when appropriate).

states and territories are, to some degree, involved in and informed about the treaty making process. The committee believes that the procedures implemented as part of, and subsequent to, the 1996 reforms have assisted in this regard.

To what degree and by what mechanisms the states and territories can further their involvement in the treaty-making process was the subject of discussion at the treaties seminar. The committee outlines below the proposals which emanated from the seminar and the committee's recommendations on these proposals.

### 3.1 The presentation of proposed treaty information to the Queensland Parliament

#### 3.1.1 Background

There was strong support at the treaties seminar for the suggestion that state and territory parliaments negotiate with their respective executives to ensure that information about proposed treaty actions is made available to them as a matter of routine.<sup>34</sup>

In its position paper, the committee expressed its support for the principle underlying this proposal, stating: *'It is important that in a representative democracy information regarding government action (including treaty making) is readily available to all citizens and that it is available at a time when meaningful public consultation can occur, namely, prior to binding action being taken'*.<sup>35</sup>

The committee further stated that while it felt the 1996 reforms had enhanced the dissemination of information about proposed treaty actions, the committee saw scope for having a formal process whereby proposed treaties and treaty information are brought to the attention of the Queensland Parliament.

In this regard, the committee noted that the DFAT already provides a schedule of treaty negotiations to the states twice a year. In Queensland, this schedule is provided to the Intergovernmental Relations Directorate of the Department of the Premier and Cabinet. The committee suggested that this schedule (together with other treaty information) could be tabled in the Queensland Parliament<sup>36</sup> to further inform the Parliament about proposed treaty making, engender public debate on issues of

<sup>34</sup> JSCOT, n 1 at 9.

<sup>35</sup> LCARC, n 3 at 5.

<sup>36</sup> This apparently is the procedure adopted in Victoria, such schedules being tabled on 6 October 1998 and 20 April 1999.

relevance to Queensland, and facilitate the making of submissions to JSCOT where appropriate.

Hence, *Committee proposal 1* was that the Premier be required (by sessional order of the Queensland Parliament) to periodically table in the Queensland Parliament: (a) a schedule of treaties being negotiated by the Commonwealth Government; and (b) other treaty information such as National Interest Analyses.

However, the committee stated that it did not believe that the Premier should be required to table the full text treaties as such as they are readily available through the Australian Treaties Library and in hard copy for those without Internet access from DFAT.

#### 3.1.2 Comments made in public consultation

There was strong support for committee proposal 1 in submissions,<sup>37</sup> although some submitters suggested slight variations, for example that:

- the schedule and other treaty information be tabled as soon as possible after receipt rather than 'periodically';<sup>38</sup>
- when tabling the treaty information, the Premier be also required to report the views of the Queensland Government on treaty proposals that affect Queensland;<sup>39</sup>
- the material required to be tabled also include:
  - a full text of all treaties;<sup>40</sup>
  - (at least) an outline or precis of all treaties tabled;<sup>41</sup>
  - the outcomes of meetings of the Treaties Council;<sup>42</sup>
  - any impact analysis studies conducted or commissioned by the Queensland Government.<sup>43</sup>

The commonwealth Attorney-General's Department, while agreeing with the committee's proposal, stated that the schedule of treaties is provided to the states on the condition that bilateral treaties should not be made public while under negotiation and therefore these particular treaties should not be tabled in the Queensland Parliament.<sup>44</sup>

The Queensland Premier also supported the committee's proposal in-principle noting that the provision of such material will provide Members of the Legislative Assembly with the opportunity to have greater access to information regarding Australia's

<sup>37</sup> See submission nos 3, 4, 5, 6, 7, 8, 10, 12, 14, 16, 17, 18 and 21.

<sup>38</sup> See, submission nos 3, 6, 8 and 15.

<sup>39</sup> Submission no 3.

<sup>40</sup> Submission no 13.

<sup>41</sup> Submissions nos 6 and 11.

<sup>42</sup> Submission no 3.

<sup>43</sup> Submission no 7.

<sup>44</sup> Submissions no 10 (addendum).

current and future treaty negotiations. However, the Premier suggested that clarification was required with regard to the frequency of tabling of information and the level of detail required, and suggested the committee liaise with the Intergovernmental Relations Directorate in relation to these issues.<sup>45</sup>

### **3.1.3 Committee analysis and conclusion**

The committee notes the considerable support in public submissions for its proposal that the Queensland Premier be required to table in the Queensland Parliament a schedule of treaties being negotiated by the Commonwealth Government and other treaty information.

As suggested by the Premier, the committee has liaised with the Intergovernmental Relations Directorate further on the issues associated with the Premier's in-principle support to periodically table treaty information in Parliament.

As a result of this further consultation and after considering the suggested variations to the committee's proposal 1, the committee has refined its position in relation seminar proposal 1.

Rather than requiring the Premier to table the schedule of treaty actions provided by DFAT (which does not itself indicate the negotiation stage of each treaty action), the committee believes that it would be more beneficial if the Premier was required to table advices from the JSCOT concerning proposed treaty actions<sup>46</sup> under negotiation and tabled in both Houses of the Commonwealth Parliament together with the National Interest Analyses which relate to each of the proposed treaty actions under review. (The committee maintains its prior position that the Premier not be required to table the full text of proposed treaties as these are readily available from other sources.)

The JSCOT reviews all proposed treaties actions once tabled in the Commonwealth Parliament and reports to the Commonwealth Parliament on whether Australia should take binding treaty action and on other related issues that have emerged during its review.<sup>47</sup>

<sup>45</sup> Submission no 17.

<sup>46</sup> The phrase 'treaty actions' includes bilateral and multilateral agreements and actions such as entering into new treaties, amending existing treaties and withdrawing from treaties.

<sup>47</sup> For further information on the JSCOT's terms of reference, role and process in reviewing proposed treaty actions see: <<http://www.aph.gov.au/house/committee/jsct/ppgrole.htm>>.

The committee's suggested process would further facilitate members of the Queensland Parliament and the Queensland community to make submissions to the Commonwealth Parliament on treaty issues of their choosing at a time before the JSCOT reports to the Commonwealth Parliament.

Should members of the Queensland Legislative Assembly or the Queensland community require further information on the proposed treaty actions, they will be able to contact the contact person stated in the relevant NIA.

The timing of the receipt of JSCOT advices will, of course, depend on when treaties are tabled in the Commonwealth Parliament. The Premier's Department anticipates receiving advice from JSCOT regarding current treaty negotiations 2-3 times per year. Given the time frames within which the JSCOT reviews proposed treaty actions, it will be important that the Premier tables the JSCOT advices as soon as possible after receipt.

The committee further believes that:

- the requirement that the Premier table JSCOT advices regarding treaty proposed actions initially be adopted by the Legislative Assembly by sessional order, such sessional order to specifically enable the Premier to table the JSCOT advices at a time when the Assembly is not sitting; and
- a review of the effectiveness of this suggested process should be conducted two years after its implementation to ensure that the process is achieving its desired outcomes.

Following a review of this process, the Standing Orders Committee of the Queensland Legislative Assembly might consider the desirability of the proposed procedures contained in committee recommendations 1 and 2 being incorporated into the Legislative Assembly's Standing Rules and Orders.

### **3.1.4 Committee recommendation 1**

The committee recommends that the Premier be required to table in the Queensland Parliament, as and when they are received, advices from the Commonwealth Parliament's Joint Standing Committee on Treaties concerning proposed treaty actions under negotiation and tabled in both Houses of the Commonwealth Parliament together with the National Interest Analyses which relate to each of the proposed treaty actions under review.

The committee does not recommend that the Premier be required to table full text treaties as they are readily available on the Internet (via the Australian Treaties Library) and from the Commonwealth Department of Foreign Affairs and Trade.

The committee further recommends that:

- the above requirement initially be adopted by the Legislative Assembly by sessional order, such sessional order to specifically enable the Premier to table the JSCOT advices at a time when the Assembly is not sitting; and
- the effectiveness of the above requirement be reviewed by the Legal, Constitutional and Administrative Review Committee two years after its implementation. (Following a review of the effectiveness of the requirement, the Standing Orders Committee of the Queensland Legislative Assembly might consider the desirability of the proposed procedures contained in committee recommendations 1 and 2 being incorporated into the Legislative Assembly's Standing Rules and Orders.)

## 3.2 A Queensland treaties committee

### 3.2.1 Background

The second proposal that resulted from the treaties seminar was that state and territory parliaments could enhance their awareness of, and involvement in, treaty making by appointing a committee—or conferring an existing committee—with specific responsibility for reviewing all proposed treaty actions and advising on the local impact of international law making.<sup>48</sup> It was envisaged that such committees would complement the review activities of JSCOT.

Specifically, the Western Australian parliamentary participants proposed:

*Believing that it is essential for views of the various State and Territory Parliaments on the content of treaties to be taken into account by the Commonwealth Government, this seminar recommends that:*

1. *all State and Territory Parliaments have, as a matter of urgency, standing committees responsible for the review of all matters concerning treaties;*

<sup>48</sup> JSCOT, n 1 at 10.

2. *a protocol be established so that such committees of State and Territory Parliaments be informed by the Commonwealth Government of the texts of:*
  - ⇒ *all National Interest Analyses;*
  - ⇒ *all treaties being negotiated;*
  - ⇒ *all treaties that have been signed;*
  - ⇒ *all treaties on which binding treaty actions has been taken;*
  - ⇒ *any domestic legislation that will be required by any state or territory to give effect to treaty obligations; or*
  - ⇒ *any impact that a treaty may have on an existing law of any state or territory; and*
  - ⇒ *any domestic legislation that has been passed by the Commonwealth Parliament, or is proposed, to give effect to treaty obligations; and*
3. *allowing for urgent treaty actions, the Commonwealth Government only take binding action on any treaty after the Joint Standing Committee on Treaties has received representations on the matter from State and Territory Parliaments.*<sup>49</sup>

In its position paper, the committee expressed a number of reservations about establishing a separate treaties committee of the Queensland Parliament (or including specific treaty responsibilities in the areas of responsibility of an existing committee) on the following grounds.

- Not all treaties affect Queensland and the majority of treaties do not contain controversial subject matter. Therefore, it might be queried whether the scrutiny of treaties is an effective use of the Queensland Parliament's time.
- Parliament is not the only means by which (controversial) treaties can be brought to the community's attention. For example, the Internet has been credited as largely responsible for the demise of the Multilateral Agreement on Investment.<sup>50</sup>
- Requiring the Commonwealth Government to delay taking binding action on any treaty until after the JSCOT has received representations on the matter from state and territory parliaments would significantly delay the treaty process.
- The establishment of a new committee or the expansion of the jurisdiction of an existing committee will require additional resources. From its consideration to date, the committee cannot identify any significant benefits additional to those achieved as a result of the reformed treaty-making process which would justify these costs.

<sup>49</sup> Note 1 at 11.

<sup>50</sup> In this regard, see the comments of Professor Gillian Triggs at the treaties seminar: n 1 at 99.

The committee further noted:

- its belief that the 1996 reforms have, among other things, significantly enhanced avenues through which the states and territories can participate in the treaty-making process (and that, in particular, the states and territories can raise treaty matters of concern to them via JSCOT inquiries, SCOT and the Treaties Council);
- one function of Queensland's Intergovernmental Relations Directorate is to promote and maintain Queensland's interest in international treaty submissions and that the Directorate also coordinates Queensland submissions to JSCOT and attendance by Queensland representatives at international negotiations; and
- it is always open to the Queensland Parliament to refer a particular proposed treaty action to a Queensland parliamentary committee for inquiry and report if it considers that such separate state inquiry is desirable.

On this basis, and in light of the committee's first proposal in its position paper, in *Committee Proposal 2* the committee stated that it did not propose that the Queensland Parliament appoint a parliamentary committee—or confer an existing committee—with specific treaty responsibilities.

### 3.2.2 Comments made in public consultation

Submissions were fairly evenly divided regarding committee proposal 2.

The majority of submitters who supported the committee's proposal did so on the basis that the benefits to be gained from a treaties committee (in light of existing mechanisms and the adoption of committee proposal 1) would not outweigh the costs associated with resourcing such a committee.<sup>51</sup> Industry Science Resources<sup>52</sup> also submitted that the additional time to undertake separate reviews in each jurisdiction may delay the treaty making process and may have an adverse effect on trade.

Professor Cheryl Saunders,<sup>53</sup> while agreeing that there is no need for a separate parliamentary committee on treaties, submitted that perhaps the

<sup>51</sup> See, for example, submissions nos 5, 10, 16 and 17.

<sup>52</sup> Industry Science Resources also cited an example of where delay caused by separate state and territory consideration of a particular treaty has had a significant effect on the market share of a number of high value, high technology exporters based in Queensland and other jurisdictions: submission no 5.

<sup>53</sup> Director, Centre for Comparative Constitutional Studies, The University of Melbourne, submission no 3.

Intergovernmental Relations Directorate be invited or required to report annually to LCARC on substantive issues for Queensland arising out of particular treaties and comment on the adequacy of the treaty making and consultation process itself.

Submitters who disagreed with the committee's proposal did so for reasons including:

- the need for increased public disclosure of treaty contents, particularly treaties such as the Multilateral Agreement on Investment, means that the expenditure associated with a treaties committee is justified;<sup>54</sup>
- the committee has overrated the effectiveness of the current system;<sup>55</sup>
- a parliamentary committee would have an important role in ensuring protection of Queensland's rights and sovereignty<sup>56</sup> and bringing together Parliament's view on tabled treaties;<sup>57</sup>
- use of, and access to, the Internet is still limited;<sup>58</sup>
- since not all treaties affect all states and territories and the majority of treaties are non-controversial, additional resources would not be great because the few treaties that do require review could be reviewed by existing committees;<sup>59</sup>
- an all-party body is necessary for integrity in scrutinising treaties.<sup>60</sup>

### 3.2.3 Committee analysis and conclusion

The committee has reconsidered seminar proposal 2 in light of submissions and maintains the view expressed in its position paper. Establishment of a separate treaties committee (or conferring treaty responsibilities on an existing committee) would, in the committee's opinion, involve more costs than benefits and largely duplicate the work of JSCOT.

In response to comments made in opposition to committee proposal 2, the committee makes the following observations.

First, fora already exist to ensure protection of states' rights in the treaty making process. In particular, states and territories can raise matters of concern via SCOT.

<sup>54</sup> Submission no 1.

<sup>55</sup> Submission no 11. The comment was also made in another submission that there is a need for an overhaul of the current system: submission no 4.

<sup>56</sup> Submission no 6.

<sup>57</sup> Submission no 8.

<sup>58</sup> Submissions nos 6 and 7 (which also suggests that Parliament is a more appropriate means of increasing public awareness of treaty actions).

<sup>59</sup> Submission no 13.

<sup>60</sup> Submission no 15.



In this regard, the committee notes that, in its reports on treaties, JSCOT now specifically addresses (under the heading 'consultation') what comments were received from the states and territories following presentation of the text of individual treaties to SCOT.

JSCOT inquiries are another avenue through which state and territory concerns about treaties can be raised. JSCOT has, from its establishment, made clear its readiness to receive state and territory input into its inquiries.

The Treaties Council was also formed with the intent that it would: address concerns raised before JSCOT about inadequate consultation with the states and territories in relation to treaties; and actively consider the potential impact of treaties on state and territory laws and the most appropriate manner of implementing treaties.<sup>61</sup>

While the Treaties Council has not met regularly as intended, it remains a forum in which state and territory premiers/chief ministers can raise concerns about particular treaties with the Prime Minister.

Secondly, and in response to the concern about limited access to treaties via the Internet, the State Library is currently undertaking a project aimed at extending public access Internet services to all Queensland public libraries. The committee understands that the majority of public libraries now have access to Internet facilities. In addition, DFAT maintains a treaty telephone service and provides hard copies of treaty texts to people without Internet access.

Thirdly, in relation to the view that treaties should be scrutinised by an all-party body, the committee points out that all-party scrutiny of treaties already takes place in the forum of JSCOT.

Fourthly, the committee reiterates that it is always open to the Queensland Parliament to refer a particular proposed treaty action to a Queensland parliamentary committee for inquiry and report if it considers that such separate state inquiry is necessary and/or desirable. This would seem a more appropriate course of action if, as one submitter suggested, only few treaties require separate state review.

Having said this, the committee sees merit in (an adaptation of) Professor Saunders' suggestion that the Intergovernmental Relations Directorate be invited or required to report annually to LCARC on substantive issues for Queensland arising out of

<sup>61</sup> Note 8 at paras 0.56 and 0.59.

particular treaties and comment on the adequacy of the treaty making and consultation process itself.

The committee notes that some reporting to Parliament on treaty issues already occurs in the context of the Department of the Premier and Cabinet's annual report.<sup>62</sup> However, the committee believes that the information generally contained in the department's annual report could be expanded upon to specifically address: (a) any substantive issues for Queensland arising out of particular treaties during the reporting period; and (b) the adequacy of the treaty making and consultation process from Queensland's perspective.

Given the role currently performed by the department's Intergovernmental Relations Directorate, the committee envisages that this additional reporting could be undertaken at little further cost to the department.

### **3.2.4 Committee recommendation 2**

The committee does not recommend that the Queensland Parliament establish a parliamentary committee with specific treaty responsibilities or confer such responsibilities on an existing parliamentary committee.

However, the committee recommends that the Sessional Order referred to above in committee recommendation 1 should additionally require the Premier, at any time but at least annually, to report to the Queensland Parliament on:

- (a) any substantive issues for Queensland arising out of particular treaties during the reporting period; and
- (b) the adequacy of the treaty making and consultation process from Queensland's perspective.

## **3.3 The establishment of an inter-parliamentary working group on treaties**

### **3.3.1 Background**

The final proposal put at the treaties seminar was that all Australian parliaments contribute to the establishment of an inter-parliamentary working group on treaties. The precise proposal was that:

*Having regard to:*

1. *the desire to improve the level of parliamentary and public consultation in the development of international treaties; and*

<sup>62</sup> See, for example, Department of the Premier and Cabinet, *Annual report 1998-99*, GoPrint, Brisbane, 1999 at 20-24.

2. *the recommendation from the Victorian Federal-State Relations Committee that the Commonwealth Joint Standing Committee on Treaties liaise with the Victorian Parliament (and other State parliaments) will include territory parliaments in conducting its treaty reviews;*

*this seminar resolves to support the formation of an Inter-Parliamentary Working Group on Treaties.*

*The Inter-Parliamentary Working Group on Treaties should:*

- (a) comprise members from all of the parliamentary committees represented at the seminar here today (and any other committees that may, over time, become interested in treaty matters);*
- (b) act as a forum for promoting public awareness of proposed treaty actions and encouraging wider parliamentary scrutiny of treaty making;*
- (c) meet every six months to review upcoming treaty actions in much the same way as Commonwealth and State officials meet as part of the SCOT (standing committee on treaties) process;*
- (d) be supported by the secretariats of our respective committees on a rotational basis. The secretariats could be responsible for preparing and distributing agenda papers, including lists of upcoming treaty actions and national interest analyses, and for preparing outcome reports for each participating committee.*<sup>63</sup>

In its position paper, the committee recognised that the establishment of an inter-parliamentary working group might have benefits in: (a) increasing the level of parliamentary information/consultation in the development of treaties; and (b) enhancing opportunities for state and territory parliaments to have a greater role regarding the *implementation* of international obligations accepted by the commonwealth.<sup>64</sup>

However, the committee went on to:

- state that it was not convinced that the establishment of an inter-parliamentary working group would significantly add value to the measures introduced in 1996 and that, in the committee's opinion, these measures combined with committee proposal 1 would provide adequate avenues for parliamentary and public information and consultation regarding the development of treaties;
- express reservations about whether biannual meetings of an inter-parliamentary working group would, in practice, facilitate states and territories to take legislative action regarding

<sup>63</sup> Note 1 at 16.

<sup>64</sup> In this regard, see Mrs Lavarch's comments, n 2 at 2677.

matters traditionally within their legislative province (rather than the commonwealth assuming legislative power) given that decisions about who is to take legislative action to implement international obligations take place at the executive level. (In this regard the committee noted that the *1996 Principles* specifically provide for SCOT to monitor and report on the implementation of particular treaties. If Queensland has implementation concerns they can be raised through this avenue or with the Treaties Council or JSCOT); and

- raise questions as to the practical implications of such a proposal, namely, which Queensland parliamentary committee would participate in the group and the need for additional resources for that committee.

Therefore, in *Committee proposal 3*, the committee noted:

- the various mechanisms already available for parliamentarians and the community in general to access information and be consulted about treaty making;
- the added benefits that committee proposal 1 would bring to these existing mechanisms; and
- the resources that would be involved in the Queensland Parliament contributing to an inter-parliamentary working group on treaties;

and concluded that, on balance, the committee did not favour the establishment of an inter-parliamentary working group on treaties.

### ***3.3.2 Comments made in public consultation***

Submissions were fairly equally divided on committee proposal 3.

Those who agreed with committee proposal 3<sup>65</sup> generally felt that such a group would not add value to the existing treaty review mechanisms (coupled with adoption of committee proposal 1) and/or the benefits would be unlikely to outweigh its costs in terms of time and other resources.

Submitters who disagreed with committee proposal 3<sup>66</sup> did so for reasons including:

- existing treaty mechanisms are not effective in ensuring input from state and territory governments;<sup>67</sup>
- the committee has underestimated the value such a group would have in securing a negotiated,

<sup>65</sup> Submission nos 1, 3, 5, 10, 16, 17 and 21.

<sup>66</sup> Submission nos 2, 4, 6, 7, 8, 11 and 13.

<sup>67</sup> Submission nos 6, 7 and 8.

coordinated, national approach to treaties and in increasing public awareness of treaty actions;<sup>68</sup>

- it is desirable for states and territories to be involved in the treaty making process in matters which are traditionally within their jurisdiction and although decisions to take action to implement international obligations take place at the executive level, there is merit in the participation of an inter-parliamentary working group which would work to inform the community about the implication of treaties through the tabling of reports on the subject matter of treaties in the state and territory parliaments;<sup>69</sup> and
- a unified group of states and territories would increase the effectiveness with which the states and territories negotiate with the commonwealth.<sup>70</sup>

### ***3.3.3 Committee analysis and conclusion***

The committee notes the comments of those submitters who disagreed with committee proposal 3. The committee believes that the majority of the benefits of an inter-parliamentary working group put forward in these submissions either currently exist or can be achieved through implementation of committee recommendations 1 and 2.

For example, SCOT provides an avenue for achieving a coordinated, national approach to treaties. This forum also enables the states and territories to negotiate with the commonwealth.

Public awareness of treaty actions is currently facilitated by JSCOT inquiries which are publicly advertised, invite public input and result in the tabling of widely-available reports on treaties. Public awareness would be further facilitated by committee recommendations 1 and 2.

Accordingly, the committee maintains the same position as expressed in its position paper.

### ***3.3.4 Committee recommendation 3***

The committee does not recommend that the Queensland Parliament support the establishment of an inter-parliamentary working group on treaties.

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<sup>68</sup> Submission no 11.

<sup>69</sup> Submission no 13.

<sup>70</sup> Submission no 15.

## **4. CONCLUSION**

The seminar convened by the JSCOT and the Australasian Study of Parliament Group in June 1999 raised important issues for consideration. For this reason, the committee resolved to inquire into the three specific proposals emanating from the seminar designed to increase state and territory parliaments' awareness of, and involvement in, treaty making and to make the treaty making process more open.

As the committee noted in both its position paper and this report, the committee believes that the 1996 reforms (with subsequent refinements) have generally enhanced dissemination of information about treaty actions both within Australian parliaments and Australian communities.

The committee sees some scope for these mechanisms to be enhanced from Queensland's perspective. While the committee does not endorse a Queensland treaties committee or an inter-parliamentary working group, the committee does believe that more information about treaties could be brought to the attention of the Queensland Parliament via the mechanisms proposed in recommendations 1 and 2. These mechanisms, in turn, should facilitate greater public discussion about treaties and, in particular, those treaties which affect this state.

Gary Fenlon MLA  
**Chair**

Copies of this report and all other LCARC publications are available on the Internet at: <<http://www.parliament.qld.gov.au/committees/legalrev.htm>>.

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### LCARC MEMBERSHIP – 49<sup>TH</sup> PARLIAMENT

- Mr Gary Fenlon MLA (Chair), Member for Greenslopes
- Mrs Judy Gamin MLA (Deputy Chair), Member for Burleigh
- Mr Denver Beanland MLA, Member for Indooroopilly
- Ms Desley Boyle MLA, Member for Cairns
- Mr Warren Pitt MLA, Member for Mulgrave<sup>+</sup>
- Dr Peter Prenzler MLA, Member for Lockyer\*

### STAFF

- Ms Kerry Newton (Research Director)
- Ms Veronica Rogers (Principal Research Officer)
- Ms Tania Jackman (Executive Assistant)

The committee also thanks Ms Sarah Lim of the Parliamentary Service for her assistance in the preparation of this report.

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<sup>+</sup> Mr Warren Pitt MLA was appointed to the committee by resolution of the Legislative Assembly of 29 February 2000 replacing Mr Geoff Wilson MLA.

\* Dr Peter Prenzler MLA was appointed to the committee by resolution of the Legislative Assembly of 11 November 1998 replacing Mr Charles Rappolt MLA whose resignation from Parliament was received by the Speaker of the Legislative Assembly on 4 November 1998.

## APPENDIX A – SUBMISSIONS RECEIVED

- 1 Morris, Mr JP
- 2 Standing Committee on Constitutional Affairs (Western Australia)
- 3 Saunders, Professor C – Director, Centre for Comparative Constitutional Studies (University of Melbourne)
- 4 National Civic Council
- 5 Industry Science Resources
- 6 Templeton, Ms T
- 7 Brady, Ms K
- 8 Raymer, Mrs V
- 9 Simpson, Mr A
- 10 Office of International Law, Attorney-General's Department (Cth)
- 11 Edwards, Mr W A
- 12 Queensland Law Society Inc (International Relations Committee)
- 13 Standing Committee on Uniform Legislation and Intergovernmental Agreements (Western Australia)
- 14 STOP MAI Coalition (Qld)
- 15 Hegerty, Mr D C
- 16 Hon R Welford MLA, Minister for Environment and Heritage and Minister for Natural Resources (Queensland)
- 17 Hon P Beattie MLA, Premier of Queensland
- 18 Hon M Foley MLA, Attorney-General and Minister for Justice and Minister for The Arts (Queensland)
- 19 Dr R A Herr, Associate Professor of Political Science, University of Tasmania
- 20 Hon J Elder MLA, Deputy Premier, Minister for State Development and Minister for Trade (Queensland)
- 21 Legislative Review Committee (Parliament of South Australia)