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The Secretary
Joint Standing Committee on Treaties
House of Representatives
PO Box 6021
Parliament House
Canberra, ACT, 2600

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Dear Sir or Madam,

Treaties Ratification Bill 2012

Please accept the following as a submission to the Committee's inquiry into the *Treaties Ratification Bill* 2012. Clause 4 of the Bill provides that: 'The Governor-General must not ratify a treaty unless both Houses of the Parliament have, by resolution, approved the ratification'. The proposal that there be prior parliamentary approval before treaties are ratified was addressed by the Senate Legal and Constitutional References Committee in its report *'Trick or Treaty? Commonwealth Power to Make and Implement Treaties'* in November 1995. Much of this submission is drawn from matters raised in that report.

The proposal gives rise to constitutional, political and practical issues.

Constitutional issues

The power to enter into treaties is an executive power that is associated with sovereignty. It was a power that was not exercisable by the Commonwealth Government at the time of federation. Instead, the United Kingdom continued to exercise that power for Australia, at least with respect to political treaties. The treaty-making power was gradually transferred to Australia in the 1920s as a consequence of a number of Imperial Conferences.

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When the proposal for parliamentary approval of treaties was raised in 1995, the former Solicitor-General, Sir Maurice Byers, argued that while the Commonwealth Parliament can legislate to regulate the manner in which the executive exercises its power to enter into treaties, it cannot take away the executive's power to enter into (or ratify) treaties, or make the exercise of that power conditional upon parliamentary consent. The argument appeared to be that such a power had become subsumed under s 61 of the Constitution and the Commonwealth Parliament had no legislative power to alter the content of s 61 of the Constitution.

Others, however, have disagreed with this assessment. Professor Winterton observed that the power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation.

Professor Enid Campbell agreed that s 61 does not entrench prerogative powers. However, she also thought it arguable that the Commonwealth Parliament, while being able to abrogate a prerogative power, could not confer upon itself the power to exercise an executive power. The Commonwealth Parliament only has 'legislative power' conferred upon it – not 'executive power'. Hence, if the Commonwealth Parliament were itself to purport to ratify treaties on behalf of Australia, it is arguable that this would be constitutionally invalid. It would also give rise to questions as to whether its capacity to do so would be recognized at international law. If, however, the Parliament did not purport to exercise the power to ratify treaties, but instead made the approval of its two Houses a condition precedent to the exercise by the Government of its executive power to do so (as proposed under this Bill) then Professor Campbell thought that this would probably not give rise to any separation of powers problems.

Professor Zines and Professor Lindell have both also expressed the view that legislation requiring parliamentary approval prior to the Executive ratifying a treaty would most likely be constitutionally valid. I agree with their assessment. I would have serious concerns if the Parliament sought to exercise the power to ratify treaties on its own behalf, but unless the High Court were to establish a more rigid separation of powers between legislative and executive power, it would

seem unlikely that the measure proposed by the *Treaties Ratification Bill* 2012 would be held to be constitutionally invalid.

Political issues

The Government generally does not control majority support in the Senate. If the approval of *both* Houses were required before a treaty could be ratified by the Executive, this would potentially take control of a significant part of Australia's foreign policy out of the hands of the Government and place it in the hands of whoever holds the balance of power in the Senate. (Compare the different approach taken in the United Kingdom and Ireland, discussed below.) This could make it extremely difficult for the Government to develop and implement Australia's foreign policy in a consistent and considered manner and would potentially result in conflicting messages being sent about Australia to foreign nations. It might also be economically detrimental to Australia if it is shut out of international trade blocs and organizations and impeded from fully implementing Australia's economic policy.

The Constitutional Commission, when considering a proposal for the parliamentary approval of treaties, rejected it on the ground that:

> A requirement that Parliament or its Houses consent to the ratification of all treaties would therefore give non-government supporters in the Senate the power to override executive policy supported by the Government and the House of Representatives.

Questions also arise as to what would be achieved by such a change. The reality is that treaties are negotiated between governments. Realistically, a Parliament is not capable of negotiating a treaty as this is inconsistent with its status, role and method of operation. The Parliament is not in a position to renegotiate aspects of a treaty that it does not like. The most the Parliament could do, under this Bill, would be to refuse its consent to ratification of the whole treaty. This is a blunt instrument which will not in any meaningful way increase Parliament's involvement in the negotiation of treaties.

Practical issues

The main practical issue concerns the amount of parliamentary time involved in passing positive resolutions to approve each treaty. The number of treaties ratified each year is significant and many of them are technical, pro-forma or routine in nature. They already receive sufficient attention through their examination by the Joint Standing Committee on Treaties. It would appear unnecessary for there to be a positive resolution with respect to each treaty in each House. It would be more efficient to have a system, similar to the current disallowance procedures for subordinate legislation, under which a treaty, having been tabled and scrutinized by the Joint Standing Committee on Treaties, is deemed to be approved by each House within a requisite period of sitting days unless a notice of motion is given calling for debate on the ratification of the treaty. Such a system was proposed in Senator Bourne's *Parliamentary Approval of Treaties Bill* 1995 and proposed by all the State and Territory Governments to the *Trick or Treaty?* inquiry in 1995. A similar system has been adopted in the United Kingdom, as discussed below, but with a distinction being made between the powers of the upper and lower Houses and with greater capacity for a Ministerial override.

Another approach is to require parliamentary approval only for certain categories of treaties. This is the approach most commonly taken in those countries where a form of parliamentary approval is required (eg France, Italy and Germany). However, this gives rise to the risk that a treaty might be characterized wrongly and the validity of its ratification challenged on the basis that the prerequisite of parliamentary approval was not met. On this basis, it may be preferable to deal with all treaties in the same manner.

Provision might also be needed for the making of treaties urgently, in cases of emergency, without parliamentary approval. Treaties concerning the urgent provision of peacekeeping forces, for example, may need to be negotiated and ratified in a very short period if their deployment is to be effective in dealing with a crisis. The British system deals with urgency by permitting the relevant Minister to override the parliamentary approval process in such circumstances.

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Comparative material

Parliamentary approval of the ratification of treaties tends to occur in countries where treaties are self-executing (i.e. the treaty becomes part of the law of the land simply by virtue of its ratification). Given that ratification of a treaty immediately affects the law of the land in those countries, it is not surprising that parliamentary approval is also required. In contrast, countries that have inherited the Westminster model of government have tended to retain the 'dualist' approach to treaties, under which ratification of a treaty gives rise to obligations at international law but no obligations arise as part of domestic law unless they are implemented by domestic legislation. In these countries, which include the United Kingdom, Canada, New Zealand and Australia, ratification of treaties is a matter for the executive and Parliament's primary role has been the implementation of treaty obligations through domestic legislation. However, in more recent times there have been reforms that permit greater parliamentary scrutiny of treaties through parliamentary committees and national interest analyses prior to the ratification of treaties. These reforms were first initiated in Australia as a result of the *Trick or Treaty?* Report and have been picked up in New Zealand and Canada.

United Kingdom

In 2010, the United Kingdom also significantly reformed its system of parliamentary scrutiny of treaties. The process is set out in s 20 of the *Constitutional Reform and Governance Act* 2010 (UK). It provides that the Government must table certain types of treaties in the Westminster Parliament and (subject to the following) may not ratify them if, within 21 sitting days, either House resolves that the treaty not be ratified. If the House of Commons resolves that a treaty not be ratified, then the Minister may lay a statement before the House stating that the treaty should in his or her opinion still be ratified and explaining why. The Minister may ratify the treaty if, after an additional 21 sitting days, no further resolution is passed by the House of Commons rejecting ratification. If, on the other hand, the House does again resolve against ratification, then the process may continue indefinitely, with the Minister making

statements as to why the treaty should be ratified and the House of Commons resolving that it not be ratified.

In contrast, if the House of Lords resolves that a treaty not be ratified, but the House of Commons makes no such resolution, then the Minister may make a statement that in his or her opinion the treaty should still be ratified, explaining why this is so. After making this statement, the Minister is entitled to go ahead with ratification, regardless of whatever the House of Lords might resolve. Hence, a Minister will prevail over the House of Lords and the House of Lords cannot effectively block the ratification of a treaty.

Section 22 also provides that the above process does not apply to a treaty 'if a Minister of the Crown is of the opinion that, exceptionally, the treaty should be ratified without the requirements of [s 20] having been met'. This decision has to be taken before either House has resolved that a treaty not be ratified. Moreover, the Minister must, as soon as practicable after the treaty is ratified, lay a copy before Parliament with a statement indicating why the Minister was of the opinion that the parliamentary process in s 20 should not be met. This means that in urgent or particularly sensitive cases, the Government may choose to avoid parliamentary scrutiny and ratify a treaty without it.

Ireland

The Irish Constitution also provides for a degree of parliamentary involvement in treaty approval. Article 29.5 provides as follows:

> 1° Every international agreement to which the State becomes a party shall be laid before Dáil Éireann [the lower House of the Irish Parliament].
> 2° The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.
> 3° This section shall not apply to agreements or conventions of a technical and administrative character.

Article 29.6 also provides that: 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [Irish Parliament]'. So treaties are not self-executing in Ireland, but those treaties that are not of a technical or administrative character and which involve a charge upon public funds, must be approved by the lower House of Parliament. Interestingly, the Executive must ratify the treaty *first,* before it is tabled and the approval of the lower House sought. If the agreement of the lower House is not given, the treaty is not domestically binding, even though it may still be binding at international law (see J M Kelly, *The Irish Constitution,* 4th ed, 2003, p 546). Hence, the Irish lower House does not have a veto upon the ratification of treaties.

Failure of the Irish lower House to approve a treaty can still, however, have domestic and international consequences. For example, a 1984 extradition treaty with the United States required each country to bear certain expenses involved in the extradition of prisoners. It therefore created a charge on public funds. As it had not been approved by the lower House, 'the statutory instrument which purported to bring it into force was invalid' (J M Kelly, *The Irish Constitution,* 4th ed, 2003, p 556).

South Africa

South Africa, which originally followed the traditional Westminster system, has now moved to a hybrid system which goes part of the way towards self-executing treaties. Although the Executive maintains the responsibility for negotiating and signing treaties, the approval of both Houses of Parliament is needed before the treaty binds South Africa, unless it is a technical, administrative or executive treaty. Note that this distinction was not originally drawn in the 1993 Interim Constitution, but was implemented in practice by bureaucrats who found that it was too difficult to present all treaties to Parliament in a timely manner and that some types of treaties are intended to come into effect immediately and did not require ratification (see: J Dugard, *International Law – A South African Perspective,* 3rd ed, 2005, pp 59-60).

The 1993 Interim Constitution was also intended to treat all treaties as self-executing. However, a step back from this position was taken in the permanent

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Constitution, which takes a two-track approach. Normally, the obligations in a treaty will not become law until they are implemented by national legislation, but if a treaty includes a self-executing provision, and the treaty has been approved by both Houses of the Parliament, then its self-executing provisions take effect as part of the law of South Africa, unless they are inconsistent with the Constitution or an Act of Parliament. This places a burden upon Parliament, and in particular, its committees, to identify whether or not provisions are intended to be self-executing and will take effect once parliamentary approval of ratification is given.

I trust that the above information is of assistance to you. If you need any further information, please do not hesitate to contact me.

Yours sincerely,

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