

IT'S A SMALL WORLD (AFTER ALL): THE ROLE OF INTERNATIONAL BODIES IN LEGISLATIVE SCRUTINY

Mrs Lorraine Finlay*

ABSTRACT

There is an increasing potential for legislation proposed or passed by State or Federal governments in Australia to be subjected to scrutiny by international quasi-judicial bodies. This paper will consider this trend, particularly in relation to the role played by the various United Nations treaty bodies that monitor Australia's compliance with its international human rights obligations. It will highlight some recent examples of international scrutiny being applied, and consider the possible impact on the development and implementation of legislation in Australia. In particular, the paper will consider the broader implications of this international scrutiny of domestic legislation in relation to national sovereignty, parliamentary sovereignty and Australian federalism.

I INTRODUCTION

The 'growing internationalisation of law'¹ means there is increased potential for international quasi-judicial bodies to scrutinise proposed, or passed, State and Federal legislation in Australia, particularly in relation to Australia's compliance with its international human rights obligations. This paper will examine this trend, considering the various quasi-judicial international bodies and mechanisms that potentially play a role in monitoring Australia's compliance with its international human rights

* BA (Hons) (UWA), LLB (Hons) (UWA), LLM (NYU), LLM (NUS). Law Lecturer, Murdoch University. This paper was originally presented at the Australia-New Zealand Scrutiny of Legislation Conference (Perth, 11-14 July 2016).

¹ As described by Henry Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards' (1995) 17(2) *Sydney Law Review* 127, 130.

obligations. It will then consider the broader implications of this international scrutiny in relation to national sovereignty, parliamentary sovereignty and, lastly, Australian federalism.

The first question, in terms of national sovereignty, is whether there is any credence to the 'fear that international law undermines Australian sovereignty or the capacity to govern ourselves as we choose'.² In relation to parliamentary sovereignty the question concerns the extent to which an international body should be able to scrutinise democratically-elected legislation (promulgated in either a State or Federal Parliament), and whether this additional international layer of scrutiny will enhance the quality of legislation or undermine parliamentary sovereignty. Finally, international scrutiny gives rise to additional sovereignty issues in federated states (such as Australia) due to sub-national governments being subject to international scrutiny on the basis of international agreements, which national governments enter. The implications of this increased international scrutiny on the Australian federal balance will also be considered.

This paper concludes that the implications for the Australian legislative process of enhanced international scrutiny ultimately depends on the weight given to that scrutiny. If Australian governments deem the conclusions of international scrutiny as definitive, there may be potentially significant effects for parliamentary sovereignty and Australian federalism, and these effects may also undermine our national sovereignty. If, however, international scrutiny is seen as but one factor to be considered by Australian governments and is placed in the

² Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *The Sydney Law Review* 423, 424.

appropriate context, then such scrutiny can play a positive role in the Australian legislative process.

II AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

At the time of federation, when drafting the Australian Constitution, the founding fathers gave relatively little thought to the legal mechanisms that would govern Australia's engagement in foreign affairs and international diplomacy. According to Brian R. Opeskin and Donald R. Rothwell, this relative silence should not be surprising given Australia's colonial history:

Prior to federation in 1901, the U.K. had the power to conduct foreign relations and conclude treaties on behalf of the various Australian colonies, as part of the British Empire. After federation it was thought that the Imperial government should continue to conduct the foreign policy of the Empire. Only gradually did Australia develop an independent international personality.³

Today, however, Australia's level of international engagement is entirely different. Australia is a party to a significant – and ever growing – number of international agreements, of which treaties are just one key example.⁴ In terms of treaties, a search of the Australian Treaties

³ Brian R. Opeskin and Donald R. Rothwell, 'The Impact of Treaties on Australian Federalism' (1995) 27(1) *Case Western Reserve Journal of International Law* 1, 4.

⁴ A useful discussion of Australia's engagement with international instruments other than treaties can be found in Andrew Byrnes, 'Time to put on the 3-D glasses: is there a need to expand JSCOT's mandate to cover "instruments of less than treaty status"?', paper presented at Joint Standing Committee on Treaties, *Twentieth Anniversary Seminar* (Parliament House, Canberra, 18 March 2016). Accessed at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/20th_Anniversary>.

Database ('ATD') reveals 2,041 currently in force and binding treaties.⁵ In the first half of 2016 alone, the ATD lists 23 new treaties that Australia has signed.

A further feature of the growing number of treaties binding Australia is the expanding range of covered subject areas. Whereas treaties once dealt primarily with matters concerning peace and security between nations, they now cover a whole range of policy areas that were previously seen as the exclusive domain of a domestic government. A simple example is the 'subject matter' options provided under the search function of the ATD, which includes subjects previously not seen as subjects of international character such as 'Criminal Matters' and 'Health and Social Services'. However, in modern times, '[t]he range of topics that might, on one view, be described as being of international concern, is wide and constantly increasing'.⁶ It is now difficult to envisage *any* topic that could not potentially be the subject of a future international agreement.

In terms of international human rights, the ATD lists 27 treaties that are currently in force and binding on Australia that can be characterised as primarily concerned with human rights. Of the nine core international human rights instruments listed by the United Nations Office of the High Commission for Human Rights, Australia is signatory to seven of these, namely:

- *International Covenant on Civil and Political Rights* ("ICCPR");⁷
- *International Covenant on Economic, Social and Cultural Rights*;⁸

⁵ Which can be accessed at: <<http://dfat.gov.au/international-relations/treaties/pages/treaties.aspx>>.

⁶ *XYZ v Commonwealth* [2006] HCA 25, [18] (Gleeson CJ).

⁷ [1980] ATS 23.

- *International Convention on the Elimination of all forms of Racial Discrimination*;⁹
- *Convention on the Elimination of all forms of Discrimination against Women*;¹⁰
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;¹¹
- *Convention on the Rights of the Child*;¹² and
- *Convention on the Rights of Persons with Disabilities*.¹³

Importantly, Australia is also a signatory to a number of Optional Protocols relating to these particular human rights treaties. This paper will focus on these core human rights treaties, although it is obviously acknowledged that there are a range of other international treaties and instruments that are also significant with respect to human rights, which have potential implications in terms of legislative scrutiny.

These core international human rights treaties have also given rise to a growing range of international mechanisms under which a country's compliance with international human rights standards is monitored and measured. Each of the treaties outlined above has a treaty body attached to it,¹⁴ which is a committee of independent experts designed to oversee

⁸ [1976] ATS 14.

⁹ [1975] ATS 40

¹⁰ [1983] ATS 9.

¹¹ [1989] ATS 21.

¹² [1991] ATS 4.

¹³ [2008] ATS 12.

¹⁴ The treaty bodies that relate to the seven human rights treaties listed above are (in order) the Human Rights Committee; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Racial Discrimination; Committee on the Elimination of Discrimination Against Women; Committee Against Torture; Committee on the Rights of the Child; and Committee on the Rights of Persons with Disabilities.

the implementation of the particular treaty.¹⁵ Treaty bodies have a range of different functions, including monitoring State implementation (primarily through reporting mechanisms, but also including inquiry procedures in some cases), promoting compliance, developing human rights standards (through issuing General Comments regarding treaty interpretation) and, in most cases, considering individual communications alleging breaches of treaty obligations. In the case of Australia, the end result is that the country is obliged to submit regular reports to seven separate United Nations human rights treaty bodies, and has additionally specifically accepted both individual complaints procedures and inquiry procedures in relation to a number of these human rights treaties.¹⁶

There are also other significant United Nations mechanisms in addition to the above treaty bodies. Most importantly, the United Nations General Assembly has established the United Nations Human Rights Council, which is an inter-governmental body within the United Nations system that is made up of 47 elected Member States. The Human Rights Council has a broad mandate to strengthen the promotion and protection of universal human rights and to address situations of human rights violations. It does this in a variety of ways, including the Universal Periodic Review mechanism and the Complaint Procedure. The

¹⁵ The Committee Against Torture is the smallest of the above treaty bodies, with 10 members. The Committee on the Elimination of Discrimination Against Women is the largest with 23 members. Each of the other five treaty bodies have 18 members.

¹⁶ Australia has accepted five individual complaints procedures, specifically those that relate to the *Convention against Torture*, *International Covenant on Civil and Political Rights*, *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Elimination of All Forms of Racial Discrimination*, and *Convention on the Rights of Persons with Disabilities*. Australia has also accepted inquiry procedures in relation to three treaties, namely the *Convention against Torture*, *Convention on the Elimination of All Forms of Discrimination against Women* and *Convention on the Rights of Persons with Disabilities*.

Universal Periodic Review mechanism requires all 193 United Nation Member States to engage in what is effectively a ‘peer review’ of their human rights situation and performance over what was initially a four-year reporting cycle.¹⁷ Australia completed its first cycle of review in 2011 and a second cycle of review in 2015, with this second cycle culminating in the *Report of the Working Group on the Universal Periodic Review: Australia* being released in January 2016.

The complaint procedure adopted by the UN Human Rights Council allows complaints to be submitted by individuals, groups of persons or non-governmental organisations who claim to be the victims of human rights violations, or who have direct and reliable knowledge of the alleged violations. The complaint procedure was established ‘to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances’.¹⁸ There are a range of criteria that must be met before a complaint will be considered, including that domestic remedies have been exhausted ‘unless it appears that such remedies would be ineffective or unreasonably prolonged’.¹⁹ The complaint procedure is not a judicial one, for a binding determination cannot be imposed on Member States, and the body considering the complaints is not technically a court. Rather, the process is designed to focus on creating dialogue and co-operation with the State concerned in order to

¹⁷ The first Universal Periodic Review cycle was completed between 2008 and 2011, with 48 States being reviewed each year. The second and current cycle (which officially commenced in May 2012) has been extended to four and a half years, with 42 States now being reviewed each year.

¹⁸ United Nations Human Rights Council, *Resolution 5/1: Institution-building of the United Nations Human Rights Council* (18 June 2007), [85].

¹⁹ United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Complaint Procedure*. Accessed at: <<http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>>.

address and remedy the alleged violations and, as a result, the procedure is a confidential one.

A final aspect of the Human Rights Council that has particular significance in terms of legislative scrutiny is the system of Special Procedures. This is a system of special rapporteurs, independent experts and working groups who are appointed with particular mandates to report and advise on human rights from either a thematic or country perspective. Their specific tasks are outlined in the individual resolutions creating their mandates; however, they can include activities such as undertaking country visits, communicating with States with regards to individual situations, and producing reports on human rights compliance. There are currently 41 thematic mandates and 14 country mandates.²⁰ The broad reach of the special procedures mechanisms is apparent from the figures highlighted in the annual report covering activities in 2015. This report indicates that in 2015 alone, 76 country visits were undertaken, 134 reports were submitted to the Human Rights Council, 38 reports were submitted to the General Assembly and 532 communications were sent to 123 State and 13 non-State actors (covering 846 individual cases).²¹ Interestingly, it was pointed out in relation to this final statistic that 64% of United Nations Member States received one or more communications from special procedures.²²

²⁰ See United Nations Human Rights Council, *Report of the twenty-second annual meeting of special rapporteurs/representatives, independent experts and working groups of the special procedures of the Human Rights Council (Geneva, 8 to 12 June 2015), including updated information on the special procedures (A/HRC/31/39)* (17 February 2016). Accessed at: <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>>.

²¹ Ibid 17.

²² Ibid.

While Australia is not the subject of a specific country mandate, it has been subject to scrutiny in relation to various thematic mandates in recent years. Indeed, Australia is one of 115 United Nations Member States that have extended a standing invitation to always accept requests to visit from all special procedures. The Australian standing invitation was issued on 7 August 2008, with the then-Minister for Foreign Affairs and Trade and Attorney-General issuing a joint media release stating that this standing invitation was designed to demonstrate Australia's 'willingness to engage positively with the international community to implement human rights obligations'.²³ Since the standing invitation was issued Australia has received four special procedures country visits from different special rapporteurs or independent experts, with two other visits currently pending or under active consideration.²⁴

The above outline focuses only on human rights scrutiny mechanisms relevant to Australia within the context of the United Nations. It is important to note that there are a whole range of international and regional scrutiny mechanisms beyond this that also impact Australia and create international and regional obligations. Even a limited examination of the United Nations human rights mechanisms outlined above highlights the extensive scrutiny that can potentially be applied to Australian legislation and government policy from the international community.

²³ The Hon Stephen Smith MP (Minister for Foreign Affairs and Trade) and The Hon Robert McClelland MP (Attorney-General), *Invitation to United Nations Human Rights Experts*, 8 August 2008. Accessed at: <<http://foreignminister.gov.au/releases/2008/fa-s080808.html>>.

²⁴ See <<http://www.ohchr.org/EN/HRBodies/SP/Pages/countryvisitsa-e.aspx>>.

For example, if we consider the past twelve months (that is, from the July 2015 until June 2016) it is clear that there are considerable activities and obligations undertaken by and in relation to Australia through the above mechanisms. During this most recent twelve month period Australia has submitted periodic State Party reports to both the United Nations Human Rights Committee ('UNHRC') and the Committee on Economic, Social and Cultural Rights, and Australia is overdue in submitting reports to the Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of Racial Discrimination.²⁵ Under the second cycle of the Universal Periodic Review process Australia submitted its National Report in August 2015, engaged in the interactive dialogue process on 9 November 2015, received the Working Group Report in January 2016 and lodged its response to the 290 recommendations that emerged from this process on 26 February 2016. In terms of Special Procedures, one invited visit by a Special Rapporteur was scheduled to take place in late 2015 but was postponed,²⁶ a country

²⁵ This is not unexpected or unusual. The United Nations High Commissioner for Human Rights noted that,

[i]f a State ratifies all nine core treaties and two optional protocols with a reporting procedure, it is bound to submit in the time frame of 10 years approximately 20 reports to treaty bodies, i.e. two annually. The reporting includes a national process followed by a meeting between the State party with the respective treaty body in Geneva (or New York) during a constructive dialogue. A State which is party to all the treaties and submits all of its reports on time will participate in an average of two dialogues annually.

See Navanethem Pillay (United Nations High Commissioner for Human Rights), *Strengthening the United Nations human rights treaty body system* (June 2012), 21.

²⁶ Namely the Special Rapporteur on the human rights of migrant's agreed country visit, dated from 27 September 2015 to 10 October 2015. The Special Rapporteur released a statement on 25 September 2015 indicating that the visit had been postponed 'due to the lack of full cooperation from the Government regarding protection concerns and access to detention centres'. Specifically, this appeared to relate to the failure of the Australian Government to provide requested assurances that the *Border Force Act 2015* would not be applied to

visit request by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment was accepted (although has not yet occurred) and a country visit request was made by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. In relation to individual complaints mechanisms, the Committee on the Rights of Persons with Disabilities has made two adverse findings against Australia,²⁷ and the UNHRC has made one adverse finding.²⁸

III THE EROSION OF NATIONAL SOVEREIGNTY

A common criticism of this increased international scrutiny through the United Nations and related bodies is that it represents a loss of national sovereignty or independence and an attack on Australian democracy.²⁹

sanction detention centre service-providers who disclosed protected information to the Special Rapporteur. There were also concerns about being unable to gain access to off-shore processing centres. See <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>>.

²⁷ *Beasley v Australia* (Views adopted by the Committee on the Rights of Persons with Disabilities, CRPD/C/15/11/2013, 1 April 2016); *Lockrey v Australia* (Views adopted by the Committee on the Rights of Persons with Disabilities, CRPD/C/15/D/13/2013, 1 April 2016). Both of these communications related to the right of people with disabilities to serve as jurors, with the individual complainants in each case being summonsed for jury service in New South Wales and denied the ability to serve on a jury due to their hearing disabilities. Australia has six months to provide a written response outlining to the Committee the measures that it has taken to implement the recommendations contained in the communication.

²⁸ *Z v Australia* (Views adopted by the Human Rights Committee, CCPR/C/115/D/2279/2013, 5 November 2015). This communication concerned the removal to Australia of a dual national child by his mother from his father in Poland, with the Committee finding that this removal constituted an arbitrary interference with family life, together with other related violations of the ICCPR.

²⁹ See, for example, Sir Harry Gibbs, 'The Erosion of National Sovereignty' (2001) 49 *National Observer*; Senator Rod Kemp, 'International Tribunals and the Attack on Australian Democracy', (1994) 4 *Upholding the Australian Constitution (Proceedings of the Twenty-Second Conference of the Samuel*

The crux of the sovereignty argument is that, in subscribing to international treaties that prescribe international standards, Australia has lost its political independence due to the imposition of international obligations that bind Australia to decisions of international tribunals. This part of the paper will consider whether international bodies scrutinising national legislation does in fact result in the erosion of Australia's national sovereignty, and whether this should be a matter of concern.

An interesting analogy has previously been drawn here between increased international scrutiny and the past debate in Australia concerning appeals to the Privy Council. In 1973 then-Prime Minister Gough Whitlam made a statement to the Australian Parliament in which he indicated his intention to introduce legislation that would abolish residual appeals from Australian courts to the Privy Council,

[t]he purpose of the Australian Government is to make the High Court of Australia the final court of appeal for Australia in all matters. That is an entirely proper objective. It is anomalous and archaic for Australian citizens to litigate their differences in another country before Judges appointed by the Government of that other country.³⁰

The same argument can be raised in terms of national sovereignty and the implications of allowing individual complaints to be made to United Nations bodies. Of course, there are limits to this analogy, with the decisions of United Nations bodies being quasi-judicial and not being

Griffith Society), Chapter 5; Alun A Preece, 'The Rise and Fall of National Sovereignty' (2003) 8 *International Trade and Business Law Review* 229.

³⁰ Gough Whitlam, *Parliamentary Statement by Whitlam: The Queen and the Privy Council* (Canberra, 1 May 1973). Contained within Department of Foreign Affairs and Trade, *Documents on Australian Foreign Policy: Australia and the United Kingdom, 1960-1975* (vol. 27, doc. 461). Accessed at: <<http://dfat.gov.au/about-us/publications/historical-documents/volume-27/Pages/461-parliamentary-statement-by-whitlam.aspx>>.

binding in the way that Privy Council decisions once were. In this sense, international scrutiny of Australian legislation and government decisions is less problematic in terms of retaining national sovereignty, as it is the Australian government that still retains ultimate authority over the legislative process. Accordingly, international human rights committees do not directly affect Australian sovereignty when they exercise their monitoring and oversight roles since, ultimately, '[t]he choice whether to accept the standards or the views of international committees remains essentially one for Australia alone'.³¹

But these international treaties and mechanisms must clearly be intended to have *some* impact on Australian decision-making, otherwise what would be the point of signing up to them in the first place? If they are merely symbolic, and the Australian government doesn't actually intend for them to be binding in practice, then surely Australia is in breach of the core *pacta sunt servanda* obligation under international law.³² Alternatively, assuming that they *are* entered into in good faith, then they are inevitably intended to have some effect within Australia. The question then becomes whether an appropriate balance between international engagement and national sovereignty has been struck and maintained.

To consider this question, attention must turn to the quality of the international scrutiny applied to Australia. To this end, there are appropriate criticisms that can be made regarding the process of human rights scrutiny at the international level. This is not to say that the

³¹ Henry Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review* 127, 130.

³² Article 26 of the *Vienna Convention on the Law of Treaties* sets out the obligation of *Pacta Sunt Servanda*, namely: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

strengths of the system should not also be acknowledged. But, if we accept that international scrutiny is now a reality of the Australian policy process, then those international mechanisms themselves should not be above criticism. In many respects the existing mechanisms fall well short of the standards that should be expected, given the automatic weight that many expect Australia to automatically accord to any process that has a United Nations label attached to it.

For example, both the membership of those treaty bodies and the realities of the periodic reporting review process necessarily impact the quality of the reviews that those treaty bodies conduct. In terms of membership, each treaty body consists of a group of independent experts who are generally elected by the relevant State Parties. The reality of the election process means that 'sometimes it is questionable whether in the end you get people of the highest calibre, as there is a fair amount of politicking in ensuring that particular candidates are elected'.³³ Torkel Opsahl, writing specifically about the UNHRC, made a similar observation:³⁴

Inevitably, however, independence is relative and varies with the backgrounds of the members and the practices of their governments. It is not unique to this body that some experts seem to have been in closer contact with the authorities of their own countries than other members, if they have not acted directly under instructions; others have at the same time as their Committee membership been serving their governments in an official capacity. Some have even combined posts by being cabinet ministers, UN ambassadors, advisers to the Foreign Ministry, and so on in a way which could easily prejudice the independence of their contribution to the work of the Committee.

³³ See Hilary Charlesworth, 'The UN treaty-based human rights system: an overview' contained in Sarah Pritchard (ed.), *Indigenous peoples, the United Nations and human rights* (Federation Press, 1998).

³⁴ Torkel Opsahl, 'The Human Rights Committee', contained in Philip Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, 1992), 376.

While these independent experts are elected in their independent capacities, must themselves be of high moral character, and are not formally representatives of their national government, public confidence in the treaty body system is undermined when members so often come from countries whose human rights records are themselves far from exemplary. This is of particular concern in light of the varying realities of independence outlined by Opsahl above, and is especially troublesome when the rights record is poor in the very area that the treaty body exercises responsibility over. For example, of the 22 current members of the Committee for the Elimination of Discrimination Against Women, six come from countries that were ranked amongst the 25 least ‘gender equal’ countries in the world according to the 2015 Global Gender Gap Index produced by the World Economic Forum.³⁵ Similarly, the current membership of the UNHRC includes members from three countries who are ranked as ‘Not Free’ by the 2015 Freedom in the World Report produced by Freedom House.³⁶ While an argument can certainly be made that this type of positive engagement may ultimately help to improve human rights outcomes in countries with otherwise poor track records, there is also the risk that it delegitimizes the weight given to scrutiny by these human rights bodies, making it easier for national governments to dismiss or deflect that criticism.

In relation to the periodic reporting process, each treaty body meets for only a short period each year (often just several sessions of a number of weeks duration each time). It is difficult to see how in that short space of time they would be able to even begin to adequately consider the periodic

³⁵ World Economic Forum, *Global Gender Gap Index* (2015). Accessed at: <<http://reports.weforum.org/global-gender-gap-report-2015/>>.

³⁶ Freedom House, *Freedom in the World Report* (2015). Accessed at: <<https://freedomhouse.org/report/freedom-world-2015/table-country-ratings>>.

reports that are received – even noting that most State Parties are consistently late in submitting their reports with, for example, only 16% of reports due in 2010 and 2011 being submitted in accordance with their original due dates.³⁷ This problem was highlighted in the 2012 United Nations High Commissioner for Human Rights report, which noted that in 2012 there were 281 State Parties reports that were pending examination under the UN human rights treaty body system.³⁸ The average waiting time for the examination of State Parties reports was between two to four years.³⁹ One consequence of this is that it potentially leads to differential treatment among States, with the United Nations High Commissioner for Human Rights acknowledging that ‘a State the complies with its reporting obligations faithfully will be reviewed more frequently by the concerned treaty body compared to a State that adheres to its obligations less faithfully’.⁴⁰ Given these problems, some have suggested abandoning the periodic reporting process altogether,⁴¹ while others have concluded that the system is ‘riddled with major deficiencies’.⁴²

The individual complaints process is also experiencing problems related to this growing backlog. The same report by the United Nations High Commissioner for Human Rights noted that as at 21 March 2012 there were 333 pending cases before the UNHRC, with an average time of

³⁷ Navanethem Pillay (United Nations High Commissioner for Human Rights), *Strengthening the United Nations human rights treaty body system* (June 2012), 21.

³⁸ Ibid 18.

³⁹ Ibid 19.

⁴⁰ Ibid 22.

⁴¹ See Hilary Charlesworth, ‘The UN treaty-based human rights system: an overview’ contained in Sarah Pritchard (ed.), *Indigenous peoples, the United Nations and human rights* (Federation Press, 1998), 72.

⁴² Anne Bayefsky, ‘The UN Human Rights Treaties: Facing the Implementation Crisis’ (1996) 15 *Windsor Yearbook of Access to Justice* 189, 197.

three and a half years between the registration of a communication and the final decision.⁴³ This is obviously problematic in terms of an individual complainant who is required to wait for an extended period before their complaint is resolved and – while the analogy is somewhat tangential and clearly not without flaws – it is interesting to note that the UNHRC has previously found that Australia violated the right of an individual complainant to be tried without undue delay and thereby breached Article 14(3) of the ICCPR when there was a delay of two years in handing down an appellate decision.⁴⁴ From the perspective of a State Party these lengthy delays also have undesirable consequences, as States are often faced with implementing requested interim measures over extended periods and, more importantly, with uncertainty regarding the consistency of their public policy choices with their international obligations.

These are not isolated or small problems, but are instead systemic and reflect a system that urgently needs significant reform. In the report *Universality at the Crossroads* Professor Anne Bayefsky concludes that

the gap between universal right and remedy has become inescapable and inexcusable, threatening the integrity of the international human rights legal regime. There are overwhelming numbers of overdue reports, untenable backlogs, minimal individual complaints from vast numbers of potential victims, and widespread refusal of states to provide remedies when violations of individual rights are found.⁴⁵

⁴³ Ibid 23.

⁴⁴ See *Rogerson v Australia*, Communication No. 802/1998 (U.N. Doc. CCPR/C/74/D/802/1998) (3 April 2002). To further highlight this point, in that particular case the Human Rights Committee took just under six years from the date of the initial communication to the date of the adoption of the Views of the Committee.

⁴⁵ Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Kluwer Law International, 2001).

These systemic problems undermine the credibility of these bodies when it comes to monitoring or scrutinizing the actions of Member States and makes arguing that states such as Australia should be willing to cede any degree of national sovereignty considerably more difficult.

A key criticism regularly raised about this enhanced international scrutiny concerns the democratic deficit, since these international bodies are unaccountable to the Australian people for the views and decisions that they adopt in relation to Australia. The fact that treaty bodies approach problems from the single-minded perspective – which comes from their mandate to protect and promote human rights, focusing particularly in many cases on certain specific human rights – amplifies this lack of accountability. The complexities that face governments who are required to balance competing human rights, conflicting public policy priorities, implementation difficulties and financial realities do not need to concern treaty bodies, whose mandate is more narrowly targeted. Treaty bodies do not need to engage in the types of balancing exercises that governments regularly engage in where competing (and sometimes conflicting) interests must be weighed and considered, and need not answer for their decisions at the ballot box in the same way as Australia political leaders. To the Australian public, these treaty bodies can often be seen as out-of-touch, scrutinizing Australian laws without needing to consider fully the practical consequences.

One illustration of this is the recent communication of the UNHRC in *Blessington and Elliot v Australia*.⁴⁶ The two complainants were convicted of the rape and murder of Janine Balding in New South Wales

⁴⁶ *Blessington and Elliot v Australia* (UN Human Rights Committee, Communication No. 1968/2010) (CCPR/C/112/D/1968/2010), 17 November 2014.

in 1988 when they were 14 and 16 years old respectively. They were sentenced to life imprisonment, with the sentencing judge recommending that they should never be released. The NSW Court of Criminal Appeal rejected appeals against both conviction and sentence in 1992, and a further appeal to the High Court of Australia was dismissed in 2007.⁴⁷ The UNHRC received an individual communication from the two prisoners in 2010.

In 2014 the UNHRC found that the imposition of a life sentence without possibility of parole on a juvenile offender was inherently incompatible with Australia's obligations under the ICCPR, specifically Articles 7, 10(3) and 24. It was held that a life sentence would only be compatible with these rights 'if there is a possibility of review and a prospect of release, notwithstanding the gravity of the crime they committed and circumstances around it'.⁴⁸ The UNHRC emphasised that this did not mean that release should necessarily be granted in any individual case, but rather that there needed to be a thorough review procedure in place that assessed release as more than a theoretical possibility.

It is highly unlikely that this decision would have surprised any international human rights lawyer. It appears to be consistent with previous interpretations given to those particular human rights obligations and, when considered in isolation, it does not seem unreasonable from a human rights perspective to conclude that a juvenile offender should not be sentenced to life imprisonment with no prospect of release. However, these types of issues can never be considered in isolation. The context is important, and this particular decision aroused considerable controversy

⁴⁷ *Elliot v The Queen; Blessington v The Queen* (2007) 234 CLR 58; [2007] HCA

51.

⁴⁸ *Ibid* [7.7].

in Australia. In particular, the family of Janine Balding and victim support groups were vocal in criticising the UNHRC for failing to give appropriate weight to the horrific nature of the crime committed and for failing to acknowledge the human rights of the individual who was killed in a manner that the Sentencing Judge described as ‘barbaric’.⁴⁹ Indeed, the NSW Attorney-General was quoted as saying that he had no plans to release the two men despite the communication stating that the UNHRC ‘has failed to acknowledge the human rights of Janine Balding and those of the community who are entitled to protection’ and that ‘I don’t see any sign that the Human Rights Committee weight up the barbaric end to her life at the hands of these individuals’.⁵⁰ The formal response of the Australian Government to the UNHRC was much more diplomatic and circumspect, but ultimately committed only to giving the UNHRC the assurances of its highest consideration’.⁵¹

Again, while it is important not to overlay the impact of this international scrutiny on Australian national sovereignty, it is also important to recognise that it is not without consequence. It is true – as highlighted in the *Blessington* example – that the views of a treaty body are not binding, but are only recommendations. Indeed, there are a significant number of examples in which the Australian Government has simply rejected the findings of United Nations treaty bodies, asserting

⁴⁹ See, for example, Stephen Gibbs, ‘Could two of Australia’s most notorious murderers go free? Victims’ groups horror after UN claimed life sentences for Janine Balding’s killers were “cruel, inhuman and degrading”’, *The Daily Mail* (22 November 2014).

⁵⁰ Janet Fife-Yeomans, ‘NSW will defy United Nations on killers of Janine Balding’, *The Daily Telegraph*, 25 November 2014.

⁵¹ See *Response of Australia to the Views of the Human Rights Committee in Communication No. 1968/2010 (Blessington and Elliot v Australia)*. Accessed at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/BlessingtonAndElliotVAustralia-AustralianGovernmentResponse.pdf>.

that the views of these bodies are not binding and ‘it is up to the countries to decide whether they agree with those views and how to respond to them’.⁵² In this way, national sovereignty is technically maintained, as it is ultimately up to the Australian Government to determine if and how it will respond to any adverse finding.

However, these findings do carry weight by virtue of the fact that they come from the United Nations, and there are significant political factors that make it difficult for governments to simply ignore such findings. Sir Harry Gibbs noted this point, observing that while the findings of United Nations Committees were non-binding and that the Committees had no power to actually enforce their decisions within Australia:

it is equally true that individuals living in Australia have a right to apply to these international tribunals to seek redress against Australian laws and governmental actions. The decisions of these tribunals are seen to have so strong a moral force that governments face obloquy at home and abroad if they fail to give effect to them. Realistically these Conventions have diminished Australian sovereignty.⁵³

It is important not to overstate this point. Clearly, Australia is still a sovereign state and retains the ultimate authority to decide whether to act on decisions or recommendations made at the international level by United Nations bodies. However, it is equally clear that those international decisions or recommendations are designed to have some impact, and there will be some form of consequence (even if only symbolic or reputational) if they are dismissed or ignored. The growing

⁵² J MacDonald, ‘Australia Rejects Ruling on Asylum Seekers’, *The Age* (Melbourne) 18 December 1997 at A10, quoted in Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *The Sydney Law Review* 423, 431.

⁵³ Sir Harry Gibbs, “The Erosion of National Sovereignty” (2001) 49 *National Observer*.

role of international bodies in legislative scrutiny necessarily must place *some* level of constraint on Australian decision-makers.

A clear example of this can be seen in the *Toonen* case. In this example, Nicholas Toonen lodged a complaint with the UNHRC claiming that sections 122(a) and (c) and 123 of the *Tasmanian Criminal Code* breached his human rights under the ICCPR, in particular the right to privacy under Article 17 and the right to freedom from discrimination on the ground of sex under Article 26. The relevant laws made sexual contact between consenting adult men in private a criminal offence in Tasmania. The UNHRC ultimately found that there had been a violation of Toonen's human rights, with the appropriate remedy being the repeal of the offending laws. The Tasmanian Parliament refused to repeal the relevant provisions. As a result, the Federal Government intervened and passed the *Human Rights (Sexual Conduct) Act 1994* (Cth), which provided that

[s]exual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.⁵⁴

This Commonwealth law had the obvious effect of overriding the Tasmanian criminal law that had been the subject of Toonen's original complaint to the Human Rights Committee. The *Toonen* case will be referred to again below when the impact of international scrutiny on the Australian federal balance is considered. For the moment, however, it stands as a good example of the impact that the non-binding decisions of the UNHRC can have. Nicholas Poynder observed that, while the views of the UNHRC are not enforceable, 'they are widely published and carry

⁵⁴ *Human Rights (Sexual Conduct) Act 1994* (Cth), s 4(1).

significant moral and persuasive authority’, and there is ‘no doubt’ that the UNHRC finding in the *Toonen* case ‘led directly to the enactment by the Australian Parliament of legislation rendering those laws ineffective’.⁵⁵

Indeed, Christian Porter, the former Western Australian Attorney-General, has observed that ‘particularly in relation to international human rights bodies, to assume that, because their decisions are non-binding, that they are therefore of no consequence, is a superficial and incomplete analysis’.⁵⁶ Instead, he considered that these decisions – although non-binding – ‘are likely to have a significant and practical effect on the capacity of domestic Australian legislatures and executives to effect outcomes that they consider represent those desired by the citizens they represent’.⁵⁷ Where Australia ultimately retains the power to adopt or reject the views of these international bodies it cannot be said that national sovereignty has been entirely abrogated. However, for reasons discussed above, it can certainly be seen that this enhanced international scrutiny does constrain Australian decision-making to some degree. Given this, the shortcomings of such scrutiny and particularly its inherent democratic deficit are factors that should not be overlooked or beyond comment.

IV AN INTERNATIONAL DIMINUTION OF PARLIAMENTARY SOVEREIGNTY?

⁵⁵ Nicholas Poynder, *When All Else Fails: The Practicalities of Seeking Protection of Human Rights under International Treaties* (Speech given at the Castan Centre for Human Rights Law, Melbourne, 28 April 2003).

⁵⁶ Christian Porter, ‘Parliamentary Democracy, Criminal Law and Human Rights Bodies’ (2010) 22 *Upholding the Australian Constitution (Proceedings of the Twenty-Second Conference of the Samuel Griffith Society)* 321, 352-353.

⁵⁷ *Ibid* 353.

While the overarching question of national sovereignty is an important one, it is also important to consider the internal processes by which Australia engages in treaty-making. As discussed above, the international treaty system is based primarily on the concept of consent. That is, nation states consent to treaty obligations and, as such, it can be argued that they retain sovereignty despite subjecting themselves to enhanced international scrutiny as they ultimately retain the ability to withdraw that consent if they so desire. The international scrutiny also carries additional weight, for it is a scrutiny that the nation state itself invited and agreed. If, however, there is a disconnect between our own internal decision-making processes (or constitutional framework) and our external treaty-making processes, this may run the risk of de-legitimizing that international scrutiny as those being scrutinized can claim they had no role in consenting to such scrutiny in the first place. It is in this context that a discussion about international scrutiny and its impact on both Australian parliamentary sovereignty and the federal balance is significant, and it is to these two issues that the paper now turns.

The process of treaty signing and ratification in Australia is one which is entirely dominated by the Commonwealth Government, and specifically the Executive. The power to enter into treaties falls exclusively to the Executive under s 61 of the *Australian Constitution*, with Justice Stephen acknowledging that ‘the federal executive, through the Crown’s representative, possesses exclusive and unfettered treaty-making power’.⁵⁸ The treaty-making power of the Executive ‘has political ramifications, but it is subject to no legislative or constitutional limits’.⁵⁹

⁵⁸ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 215 (Stephen J).

⁵⁹ Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *The Sydney Law Review* 423, 431.

Parliamentary approval is neither a constitutional or legal pre-requisite to the creation of an international obligation however, given Australia's dualist approach to international law,⁶⁰ parliamentary approval is required for the passage of domestic legislation to implement the provisions of an international treaty within Australia.

The fundamental doctrine of parliamentary sovereignty is, put simply, the concept that Parliament is the supreme lawmaker, with the power to create, amend or repeal any law. This is a principle that has been endorsed without reservation by the greatest authorities on our constitutional, legal and cultural history.⁶¹ Dicey described the doctrine as follows:

[The] Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.⁶²

In the Australian context, it has been suggested that the concept should be strictly described as one of parliamentary supremacy, given that the powers of Australian Parliaments are constitutionally limited.⁶³ Justice Dawson recognised parliamentary supremacy as 'a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should

⁶⁰ See, for example, Joanna Harrington, 'Redressing the democratic deficit in treaty law making: (re-) establishing a role for Parliament' (2005) *McGill Law Journal* 465.

⁶¹ Lord Bingham, 'The Rule of Law and the Sovereignty of Parliament?' (2008) *King's Law Journal* 223, 228.

⁶² AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959), 39-401.

⁶³ Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32(1) *Federal Law Review* 57.

give unquestioned effect to it accordingly'.⁶⁴ For the purposes of this article, the term parliamentary sovereignty will be used to describe the general concept of parliamentary legislative supremacy relative to the executive and judicial branches of government.

The importance of the concept of parliamentary sovereignty is rooted in democratic theory and fundamental to the principle of representative government, on which Australia's political system is based. The concept ensures that Australia's elected representatives are ultimately accountable to the Australian people. Professor Jeffrey Goldsworthy eloquently explained the consequences of repudiating or diminishing parliamentary sovereignty:

What is at stake is the location of ultimate decision-making authority – the right to the 'final word' – in a legal system. If the judges were to repudiate the doctrine of parliamentary sovereignty, by refusing to allow Parliament to infringe unwritten rights, they would be claiming that ultimate authority for themselves. In settling disagreements about what fundamental rights people have, and whether legislation is consistent with them, the judges' word rather than Parliament's would be final. Since virtually all significant moral and political controversies in contemporary Western societies involve disagreements about rights, this would amount to a massive transfer of political power from parliaments to judges. Moreover, it would be a transfer of power initiated by the judges, to protect rights chosen by them, rather than one brought about democratically by parliamentary enactment or popular referendum. It is no wonder that the elected branches of government regard that prospect with apprehension.⁶⁵

⁶⁴ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, [1996] HCA 24, [17] (Dawson J).

⁶⁵ Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Oxford University Press, 1999), 3.

The words ‘international human rights bodies’ could easily be substituted for ‘judges’ in the above quotation to demonstrate the potential problem that this paper is examining. There is a real risk here of ‘a diminution of the sovereignty of Australia’s domestic democratic institutions through the procedures enlivened by the continuing signature of international documents’.⁶⁶ This diminution of parliamentary sovereignty, resulting from the Executive’s dominance in the treaty process and the growing scrutiny exercised by international bodies, should be of significant concern if it leads to reduced democratic accountability and responsiveness by Australian governments and a transfer of responsibility away from local parliaments. For this diminution, ultimately, has potentially detrimental consequences for the practical operation of representative government in Australia.

There have been various attempts in Australia over the years to provide for greater parliamentary involvement in the treaty process. For example, in 1961 the Menzies Government instituted a practice of tabling all treaties for a period of time in both Houses of the Commonwealth Parliament prior to ratification. This reflected the *Ponsonby Rule* in Britain, which required the tabling of a treaty in both Houses of Parliament at least 21 days prior to ratification.⁶⁷ The advantage of this practice was that it helped to avoid the potential international embarrassment that would arise if Australia consented to international treaty obligations, signing and ratifying a particular treaty, only for the Australian Parliament then to refuse to pass enacting legislation to

⁶⁶ Christian Porter, ‘Parliamentary Democracy, Criminal Law and Human Rights Bodies’ (2010) 22 *Upholding the Australian Constitution (Proceedings of the Twenty-Second Conference of the Samuel Griffith Society)* 321, 373.

⁶⁷ Rt. Hon. Sir Ninian Stephen, *The Expansion of International Law – Sovereignty and External Affairs* (Sir Earle Page Memorial Trust Lecture, 15 September 1994).

implement those treaty obligations at the domestic level. Allowing a period of parliamentary scrutiny prior to ratification was designed to ensure that there was an opportunity for any concerns surrounding Australia's entry into the treaty to be raised. In fact, the dualist approach to international law was initially developed partly as a way to limit prerogative power and 'mitigate the absence of parliamentary consultation'.⁶⁸ However, as Sir Ninian Stephen observed:

its mitigating effect is reduced by the fact that, once the executive ratifies a treaty, so that the state becomes a party to it, the legislature will have little option but to enact any necessary enabling legislation; not to do so would be tantamount to repudiation, to a failure to honour the country's obligations.⁶⁹

By the time of the Hawke/Keating Government this practice had fallen into disuse, and it had instead become commonplace for groups of treaties to be tabled in Parliament every six months, which left little room for parliamentary scrutiny as the treaties were generally tabled after they had been signed.⁷⁰

The Howard Government revived this practice as part of a series of reforms in 1996, following the landmark Senate Legal and Constitutional References Committee review of the treaty-making power,⁷¹ and which were designed to enhance meaningful parliamentary scrutiny of treaties (as well as the involvement of State Governments in the treaty process, which will be discussed further below). The following were included in the adopted reforms: the re-institution of the practice that all proposed

⁶⁸ For a discussion on the origins of the doctrine of dualism see *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Joanna Harrington, "Redressing the democratic deficit in treaty law making: (re-) establishing a role for Parliament (2005) *McGill Law Journal* 465.

⁷¹ Commonwealth of Australia, Senate Legal and constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (November 1995).

treaty actions be tabled in Parliament at least 15 joint sitting days before any binding action is taken; the creation of the Joint Standing Committee on Treaties ('**JSCOT**') (appointed to review and report on all proposed treaty actions before any binding obligations are entered into); the development of a National Interest Analysis to accompany each proposed treaty that is tabled; and the creation of an Australian Treaties Database ('**ATD**') to make the treaty process more publicly accessible.⁷² It has been noted, however, that while the Senate inquiry recommended that these reform measures be implemented legislatively they weren't entrenched in this way but implemented through policy and administrative means.⁷³

These reforms have certainly enhanced to some degree the role of the Commonwealth Parliament by providing it with a greater ability to scrutinize international treaties prior to ratification. However, the involvement of Parliament is ultimately consultative only, and the reforms do not impose any legal constraints on the executive in its exercise of its treaty-making powers. Further, the Commonwealth Parliament is only involved after the treaty has been signed, with the failure to provide for any parliamentary involvement or input during the negotiation phase limiting the ability of Parliament to contribute to the treaty making process in a meaningful and substantive way. For example, while JSCOT has been described as 'the most influential of all

⁷² For an outline of these reforms see, for example, Tasmanian Government, Department of Premier and Cabinet, *Treaties: Policy & Procedures Manual* (June 2014), 9; Joanna Harrington, 'Redressing the democratic deficit in treaty law making: (re-) establishing a role for Parliament' (2005) *McGill Law Journal* 465.

⁷³ Tasmanian Government, Department of Premier and Cabinet, *Treaties: Policy & Procedures Manual* (June 2014), 9.

of the 1996 reforms’⁷⁴ it is doubtful that it has had a substantial independent impact on Australia’s engagement in the treaty-making process. Indeed, Ann Capling and Kim Richard Nossal described the main role of JSCOT as being ‘a tool of political management, a means by which the executive can channel protest, deflect opposition, and in essence legitimize its own policy preferences’.⁷⁵

This ‘side-lining’ of Parliament can also be seen not only in the treaty-making process, but also in the way that Australia responds to legislative scrutiny under existing treaty mechanisms. The recent Universal Periodic Review process provides a good example of this, with the timeline of Australia’s second cycle review noted above. The Working Group Report that Australia received in January 2016 contained 290 individual recommendations that emerged from the interactive dialogue that took place in Geneva in November 2015. There were a number of parliamentarians amongst the Australian delegation that participated in the interactive dialogue session in 2015, which is a welcome development in terms of strengthening the role of the parliamentary arm of government in this sphere. However, there were conservatively over 50 recommendations that expressly called for legislative action, which is ultimately the domain of the Parliament. Yet, aside from noting that ‘there was limited time for full consideration across all levels of government’,⁷⁶ there is no indication in the Australian response that there

⁷⁴ Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *The Sydney Law Review* 423, 441.

⁷⁵ Ann Capling & Kim Richard Nossal, ‘Square Pegs and Round Holes: Australia’s Multilateral Economic Diplomacy and the Joint Standing Committee on Treaties’, paper presented at the annual meeting of the International Studies Association (Chicago, 20-24 February 2001).

⁷⁶ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia, Addendum: Views on conclusions and/or*

had been any formal engagement with either state or federal parliaments as part of the process of preparing the Australian response. Indeed, the only reference to the Universal Periodic Review in the Commonwealth Parliament during the period when the Australian Government would have been finalising its formal response was on two occasions in early February when two parliamentary committees asked some basic questions about the review process during Estimates Hearings. Both State and Federal Parliaments lack a meaningful role in this process, despite their cooperation and assistance being essential if Australia is to act on many of the recommendations.

In many respects this is unsurprising. It reflects the reality of both Australia's international relations being traditionally considered the domain of the Executive, and an Executive that increasingly dominates Parliament. However, given that the international scrutiny of Australian legislation continues to expand, the failure of the Executive to engage in a meaningful way with Parliament is a problem that is likely to become acutely apparent in the future.

The lack of a legal or constitutional role for Parliament in the treaty-making process, and the corresponding lack of any legal or constitutional restraints on the Executive role, undermines parliamentary sovereignty and gives rise to a possible democratic deficit.⁷⁷ This possible democratic deficit is particularly concerning when the ratification of a treaty has the result of transferring power from the national government to an

recommendations, voluntary commitments and replied present by the State under review, [2].

⁷⁷ See here Rt. Hon. Sir Ninian Stephen, *The Expansion of International Law – Sovereignty and External Affairs* (Sir Earle Page Memorial Trust Lecture, 15 September 1994).

international body.⁷⁸ This is problematic not only from the perspective of undermining parliamentary sovereignty, but also in terms of its longer-term impact on Australia's international engagement. If the Australian people feel that the treaty-making process lacks democratic legitimacy, then they are also less likely to accept the international scrutiny that results from those treaties as legitimate.

V INTERNATIONAL SCRUTINY AND THE FEDERAL BALANCE

A specific issue that arises in a federal system of government, such as Australia, is international bodies scrutinising the legislation of regional parliaments, who themselves did not consent to the international treaty under which the relevant international obligations were created. In the Australian context, the Commonwealth Executive enters into international treaties, yet legislation from State Parliaments is often subject to human rights scrutiny at an international level. Accordingly, this section of the paper will consider the impact of international scrutiny on the Australian federal balance.

At the international level, the national Australian government enters into treaties and is responsible under international law for meeting those treaty obligations. However, the effect of international human rights treaties 'extend to all parts of federal States without any limitations or exceptions'.⁷⁹ Indeed, Article 27 of the *Vienna Convention on the law of treaties* expressly provides that a State 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. That is, a national government cannot avoid international responsibility by

⁷⁸ Ibid.

⁷⁹ See, for example, Article 50 of the *International Covenant on Civil and Political Rights* and Article 28 of the *International Covenant on Economic, Social and Cultural Rights*.

claiming that a treaty breach is actually due to the actions of a sub-national government. To this end, the previous policy of the Australian Government of seeking the inclusion of federal clauses in international treaties was of doubtful use.⁸⁰

This creates an interesting dynamic wherein the Australian Government is responsible at the international level for treaty obligations that may, in practice, deal with areas of activity that are the exclusive responsibility of State Governments. Indeed, as Katharine Gelber observed, in Australia ‘the onus of responsibility for implementing treaty obligations on many issues including human rights rests with the States’.⁸¹ This is a common difficulty in a federated State, as Justice Stephen noted: ‘[d]ivided legislative competence is a feature of federal government that has, from the inception of modern federal [S]tates, been a well recognized difficulty affecting the conduct of their external affairs’.⁸²

Notably, for State Governments, this opens up the possibility of the Commonwealth Government creating binding obligations at the international level without necessarily requiring any State Government’s input or consent. This has important constitutional consequences in Australia, for under the external affairs power,⁸³ when the Commonwealth Government ratifies an international treaty, the Commonwealth Government is granted the constitutional power to

⁸⁰ For a discussion of federal clauses see Henry Burmester, ‘Federal Clauses: An Australian Perspective’ (1985) 34 *International and Comparative Law Quarterly* 522;

⁸¹ Katharine Gelber, ‘Treaties and Intergovernmental Relations in Australia: Political Implications of the Toonen Case’ (1999) 45(3) *Australian Journal of Politics and History* 330, 336.

⁸² *New South Wales v Commonwealth* (‘*Seas and Submerged Lands Case*’) (1975) 135 CLR 337, 445 (Stephen J).

⁸³ Section 51(xxix) of the *Australian Constitution* provides that ‘[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... external affairs’.

introduce domestic legislation to implement the treaty, which may encroach on the State's legislative purview. Further, under s 109 the Commonwealth legislation will prevail over any inconsistent State law, which will be invalid to the extent of the inconsistency. In this way, the external affairs power under the Australian Constitution and the modern proliferation of international treaties combine to expand greatly the legislative power and purview of the Commonwealth Government.

But the founding fathers never intended the external affairs power to be such an expansive power. Sir Ninian Stephen surmised the intended scope of the power as being 'no wider than to permit the implementation within Australia of imperial treaties affecting it'.⁸⁴ As early as 1936 Justices Evatt and McTiernan noted that this could potentially lead to a considerable expansion of Commonwealth jurisdiction when they observed that

[t]he Commonwealth has power both to enter into international agreements and to pass legislation to secure the carrying out of such agreements according to their tenor, even though the subject matter of the agreement is not otherwise within Commonwealth legislative jurisdiction.⁸⁵

Indeed, the Victorian Federal-State Relations Committee concluded exactly the same, acknowledging that under Australia's constitutional arrangements '[s]imply by entering into a treaty, the Commonwealth Government can give the Commonwealth Parliament what is in effect a new head of legislative power'.⁸⁶ The effect of this expansive interpretation of the external affairs power has been described as

⁸⁴ Rt. Hon. Sir Ninian Stephen, *The Expansion of International Law – Sovereignty and External Affairs* (Sir Earle Page Memorial Trust Lecture, 15 September 1994).

⁸⁵ *R v Burgess* (1936) 55 CLR 608; [1936] HCA 52, per Evatt and McTiernan JJ.

⁸⁶ Victorian Parliament, Federal-State Relations Committee, *Report on International Treaty Making and the Role of States* (1997), 13.

‘revolutionary’.⁸⁷ The concern is that this will be at the expense of the State Government’s current legislative powers, which will further tilt the Australian federal balance in favour of the Commonwealth Government.

This potentially also opens the door for Commonwealth intervention whenever there is adverse scrutiny by any of the United Nations human rights mechanisms in relation to State Government legislation. A finding that State Government legislation is contrary to an existing Australian treaty obligation would seemingly provide the Commonwealth with the constitutional power to introduce legislation to address that breach to ensure that Australia complies with its international obligations in the future. While there may well be political limits to the extent that the Commonwealth Government would wish to intervene in this way, the constitutional power must now be surely beyond doubt.

A current example from Western Australia highlights the potential reach of this mechanism. At the time of writing, the WA Parliament is considering the *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015*. This Bill is primarily intended to deal with the common tactic of protestors locking themselves onto objects, creating new criminal offences of ‘Physical prevention of lawful activity’ and ‘Preparation for physical prevention or trespass’.⁸⁸ These are criminal offences, with a maximum penalty of imprisonment for one year and a \$12,000 fine.⁸⁹ While the proposed legislation has been controversial, the most interesting intervention, perhaps, has been the statement issued by three United Nations Special Rapporteurs who urged the WA Parliament

⁸⁷ Rt. Hon. Sir Ninian Stephen, *The Expansion of International Law – Sovereignty and External Affairs* (Sir Earle Page Memorial Trust Lecture, 15 September 1994).

⁸⁸ Which will be enacted as s 68AA and 68AB of the *Criminal Code (WA)*.

⁸⁹ Imprisonment and the fine increases to two years and \$24,000 if the offence is committed in circumstances of aggravation.

not to adopt the proposed laws.⁹⁰ This statement, publicly released the day before the legislation was due to be debated in the WA Legislative Council, followed a similar statement that had been released the year before that addressed anti-protest legislation being considered in the Tasmanian Parliament.⁹¹

The statement was jointly issued from Geneva on 15 February 2016 by the Special Rapporteur on freedom of opinion and expression, Special Rapporteur on the rights to freedom of peaceful assembly and of association, and Special Rapporteur on the situation of human rights defenders. While the Special Rapporteurs ultimately urged the WA Parliament not to adopt the legislation and highlighted a number of perceived problems with the proposed laws, the key statement that was made was that '[i]f the Bill passes, it would go against Australia's international obligations under international human rights law'. Whether these views ultimately influenced the parliamentary debate in Western Australia regarding this Bill is yet to be determined. However, if indeed the Special Rapporteurs are correct in their assessment that the laws go against Australia's international obligations, this would seemingly open up the potential for the Commonwealth Government to legislate to override the laws in an effort to ensure compliance with our treaty obligations. One of the significantly detrimental consequences of enhanced international scrutiny based on treaty obligations is its impact

⁹⁰ United Nations Office of the High Commissioner for Human Rights, *UN human rights experts urge Western Australia's Parliament not to pass proposed anti-protest law*, 15 February 2016. Accessed at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17047&LangID=E>>

⁹¹ United Nations Office of the High Commissioner for Human Rights, *UN experts urge Tasmania to drop its anti-protest bill*, 9 September 2014. Accessed at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>>.

on federalism; in that, it greatly expands the potential constitutional reach of the Commonwealth Government, undermining the sovereignty of State Governments.

The *Toonen* case (outlined above) illustrates this point, both in terms of the ultimate outcome of that case and the process by which that outcome was reached. Brian R. Opeskin and Donald R. Rothwell observed that the Commonwealth Government had not, at that point in time, developed adequate procedures to deal with communications lodged with the UNHRC, particularly given the necessary interplay between the federal and state levels of government.⁹² In this case it was the Commonwealth Government that was the State Party to the complaint, despite it being the Tasmanian legislation that was being complained about. There was significant disagreement between the two levels of government in terms of how the complaint should be addressed. While the Tasmanian Government requested that the admissibility of the claim be contested, the Commonwealth Government formally conceded this point. Similarly, the Commonwealth Government conceded that Toonen ‘ha[d] been a victim of arbitrary interference with his privacy, and that the legislative provisions challenged by him cannot be justified on public health or moral grounds’.⁹³ It did however ‘incorporate into its submissions the observations of the government of Tasmania, which denies that the author has been the victim of a violation of the Covenant’.⁹⁴

This highlights the potential tension in a federal system between a national government that is ultimately responsible at the international

⁹² See Brian R. Opeskin and Donald R. Rothwell, ‘The Impact of Treaties on Australian Federalism’ (1995) 27(1) *Case Western Reserve Journal of International Law* 1, 51.

⁹³ *Toonen v Australia*, Communication No. 488/1991 (Human Rights Committee, U.N. Doc CCPR/C/50/D/488/1992) (1994), [6.1].

⁹⁴ *Ibid* [6.1].

level for compliance with international human rights obligations, and a sub-national government whose laws are the subject of a complaint but who does not have any recognised international personality before the United Nations treaty bodies.⁹⁵ It is simply an international reality that State Governments from Australia are not entitled to speak directly to United Nations treaty bodies in response to complaints alleging human rights violations as a result of State legislation. Instead, they must rely on the Commonwealth Government to speak on their behalf, inevitably ‘providing scope for Commonwealth flavouring of the tone of Australian government response’.⁹⁶

Further, the ultimate legislative outcome in the *Toonen* example highlights a further movement of the federal balance towards the Commonwealth Government and away from the States. When Tasmania refused to repeal the relevant provisions of the *Tasmanian Criminal Code* the Commonwealth Government intervened and passed Commonwealth laws to override the Tasmanian provisions. Putting to one side any views regarding the substantive merits of the particular laws, this is a clear example of the hypothetical situation described above in relation to the proposed WA anti-protest laws. That is, the fact that the UNHRC found that the Tasmanian laws breached Australia’s international obligations

⁹⁵ Justice Murphy reinforced this point in the *Seas and Submerged Lands Case* when he stated that

[t]he States have not international personality, no capacity to negotiate or enter into treaties, no power to exchange or send representatives to other international persons and no right to deal with other countries, through agents or otherwise. Their claims to international personality or to sovereignty are groundless.

See *New South Wales v Commonwealth* (*‘Seas and Submerged Lands Case’*) (1975) 135 CLR 337, 506 (Murphy J).

⁹⁶ Katharine Gelber, ‘Treaties and Intergovernmental Relations in Australia: Political Implications of the *Toonen* Case’ (1999) 45(3) *Australian Journal of Politics and History* 330, 337.

under the *ICCPR* gave the Commonwealth Government the constitutional power to legislate to override the laws to ensure compliance with our treaty obligations. This is despite criminal law traditionally being an area of State Government responsibility. In this way, enhanced international scrutiny can be seen as a potentially powerful tool in enhancing the legislative powers of the Commonwealth Government and weakening the Australian federal balance.

There have been attempts to reform the treaty process to provide for greater State input and involvement before treaties are entered. For example, the Treaties Council, established under the Council of Australian Governments in 1996, comprises the Prime Minister, State Premiers and Territory Chief Ministers. The Council was intended to meet at least once a year, empowered with an advisory role in relation to treaties and other international instruments of particular sensitivity or importance to the States and Territories. The Commonwealth-State-Territories Standing Committee on Treaties provides another advisory mechanism for intergovernmental consultation, being initially established in 1991 and consisting of senior Commonwealth, State and Territory officers who meet twice a year. The adoption of a strengthened *Principles and Procedures for Commonwealth-State Consultation on Treaties* in 1996 was another positive attempt to increase cooperation and to provide the States with a greater role in the treaty process. However, while these efforts to enhance cooperation and consultation are positive, they do not go nearly far enough in terms of entrenching meaningful consultation. For example, the Treaty Council can only be convened with the consent of the Commonwealth and has only been convened once

since its creation.⁹⁷ Similarly, the *Principles and Procedures for Commonwealth-State Consultation on Treaties* has been criticised as establishing a consultative mechanism that is merely discretionary and symbolic.⁹⁸

Ultimately, speaking with one voice at the international level is desirable, and it is necessary for the Commonwealth Government to retain the ultimate responsibility for entering into treaties on behalf of Australia. However, it is also desirable for the States to be given a more substantive role in this process, both to strengthen the federal balance but also, at a practical level, to ensure compliance with the international obligations that Australia does ultimately sign up to given that much of this responsibility does rest with the States. There have been various suggestions for reform, including the establishment of an Inter-Parliamentary Working Group on Treaties consisting of parliamentary representatives from all jurisdictions, which would have the benefit of enhancing both parliamentary and State Government involvement in the treaty process,⁹⁹ introducing a practice of tabling treaties and relevant information in State Parliaments,¹⁰⁰ and establishing State Parliamentary Committees to advise State Parliaments on matters concerning treaties.¹⁰¹

⁹⁷ Brian Galligan, 'The Centralizing and Decentralizing Effects of Globalization in Australian Federalism: Toward a New Balance', in Harvey Lazard, Hamish Telford and Ronald L Watts (eds), *The Impact of Global and Regional Integration on Federal Systems: A Comparative Analysis* (McGill-Queen's University Press, 2003), 113.

⁹⁸ See Augusto Zimmermann and Lorraine Finlay, 'Reforming Federalism: A Proposal for Strengthening the Australian Federation' (2011) 37 *Monash University Law Review* 190, 219.

⁹⁹ See Joint Standing Committee on Treaties, *A Seminar on the Role of Parliaments in Treaty Making* (JSCOT Report 24) (August 1999), [3.31] – [3.32]; Victorian Parliament, Federal-State Relations Committee, *International Treaty Making and the Role of the States* (October 1997), [0.35].

¹⁰⁰ Victorian Parliament, Federal-State Relations Committee, *International Treaty Making and the Role of the States* (October 1997), [Recommendations 2 & 4].

¹⁰¹ *Ibid.*, [Recommendation 3].

It is well overdue for serious thought to be given to reform in this area as presently it remains the case ‘that a continuing difficulty in the conduct of Australia’s foreign affairs is the need to balance the national interest in pursuing a robust foreign policy with the political exigencies of a federal system of government’.¹⁰²

VI CONCLUSION

This paper is not trying to suggest that there is no role for international bodies or international scrutiny. Indeed, as Henry Burmester recognised some twenty years ago, ‘an acknowledgment that Australia is increasingly subject to international constraints in terms of its internal governance seems necessary’.¹⁰³ It is, however, arguing that ultimately Australia’s engagement with the international community must be premised on a strong recognition of the paramountcy of the national interest and national sovereignty. To ensure that this remains the case, it is important to understand what international scrutiny is being applied, and what its consequences are. As this paper has sought to highlight, there is an increasing potential for Australian legislation to be subjected to international scrutiny, particularly in relation to compliance with international human rights obligations. This heightened scrutiny has potentially important implications in terms of national sovereignty, parliamentary sovereignty and Australian federalism.

The ultimate question here is one of balance. While international engagement is simply a reality for the modern-day Australian nation, it is important to balance this with maintaining a strong sense of national

¹⁰² Brian R. Opeskin and Donald R. Rothwell, ‘The Impact of Treaties on Australian Federalism’ (1995) 27(1) *Case Western Reserve Journal of International Law* 1, 59.

¹⁰³ Henry Burmester, ‘National Sovereignty, Independence and the Impact of Treaties and International Standards’ (1995) 17 *Sydney Law Review* 127, 149.

sovereignty. If enhanced international scrutiny simply results in an additional international voice playing some role in the broader public debate over policy issues in Australia, and this international voice is placed in its appropriate context, then this ultimately has limited foundational impact on the Australian system of governance. If, however, the international scrutiny is viewed as being itself beyond scrutiny and as placing a significant restraint on the legislative capacity of Australian governments, then this represents a considerable shift away from the democratic foundations that have served this country so well throughout its history.