



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON UNIFORM
LEGISLATION AND GENERAL PURPOSES
IN RELATION TO THE
HIGHER EDUCATION BILL 2003**

Presented by Hon Adele Farina MLC (Chairman)

Report 11
September 2003

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed: April 11 2002

Terms of reference:

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

“7. Uniform Legislation and General Purposes Committee

- 7.1 A Uniform Legislation and General Purposes Committee is established.
- 7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.
- 7.3 The functions of the Committee are –
- (a) to consider and report on bills referred under SO 230A;
 - (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to consider and report on any matter referred by the House.
- 7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES
IN RELATION TO THE
HIGHER EDUCATION BILL 2003

EXECUTIVE SUMMARY

- 1 The purpose of the Higher Education Bill 2003 (**Bill**) is to implement the National Protocols for Higher Education Approval Processes in Western Australia. The Long Title of the Bill states that it is an Act “... *to provide for recognition of Australian and overseas universities, authorisation of other higher education institutions and accreditation of higher education courses, and for related purposes.*”
- 2 The Uniform Legislation and General Purposes Committee (**Committee**) has recommended that the Bill be passed subject to certain amendments, and has raised matters for the consideration of the Legislative Council. In examining this Bill the Committee has also made important comments on:
 - a) matters relating to uniform legislation including the identification of bills subject to standing order 230A, and the nature of intergovernmental agreements; and
 - b) the intended and actual operation of clauses 26(2)(d) and (e), not only for the purpose of the Committee’s scrutiny of the Bill but to the extent that such provisions may appear in other legislation introduced into Parliament. The Committee has taken this opportunity to make some general observations on matters of statutory interpretation and parliamentary privilege to explain its concerns and to assist informed debate in the Legislative Council should similar provisions appear in future legislation.

RECOMMENDATIONS

Page 13

Recommendation 1: The Committee recommends that Clause 3 of the Higher Education Bill 2003 be amended in the following manner –

Page 3, line 2 – To insert after “Commonwealth,” –

“ for a State, ”

Page 20

Recommendation 2: The Committee recommends that clause 11 of the Higher Education Bill 2003 be amended in the following manner –

Page 8, after line 28 - To insert the following –

“

- (3) A suspension or revocation under subsection (1) is to be given to the education institution in writing signed by the Minister and is to state the grounds relied on in making the decision.**

”

Page 20

Recommendation 3: The Committee recommends that clause 15 of the Higher Education Bill 2003 be amended in the following manner –

Page 10, after line 15 – To insert the following –

“

- (3) A suspension or revocation under subsection (1) is to be given to the non-university institution in writing signed by the Minister and is to state the grounds relied on in making the decision.**

”

Page 20

Recommendation 4: The Committee recommends that clause 19 of the Higher Education Bill 2003 be amended in the following manner –

Page 12, after line 22 - To insert the following –

“

- (4) A suspension or revocation under subsection (2) is to be given to the course provider in writing signed by the Minister and is to state the grounds relied on in making the decision.**

”

Page 22

Recommendation 5: The Committee recommends that clause 18 of the Higher Education Bill 2003 be amended in the following manner –

Page 11, after line 31 - To insert the following –

“

- (5) A right of access under subsection (4) may be exercised –**
- (a) without notice during ordinary and actual business hours on any day; or**
 - (b) after giving written notice of not less than 24 hours if access is to occur at any other time.**
- (6) A requirement under subsection (4) –**
- (a) is to be in writing identifying the form and content of the information or described by reference to a class or type of information that corresponds to that in the requirement; and**
 - (b) is to state the purpose of the requirement and require the information to an extent that is proportionate in scope and purpose to that purpose.**

”

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Recommendation 6: The Committee recommends that in the absence of the responsible Minister providing a satisfactory justification to the Council for the absence of consultation with the Minister for Public Sector Management in clause 21 of the Higher Education Bill 2003, the Committee recommends that clause 21 be amended to include a requirement to consult as may be found in other legislation. This could be effected in the following manner:

Page 13, after line 17 - To insert -

“

- (3) A determination is only to be made after having regard to the recommendation of the Minister for Public Sector Management.**

”

Recommendation 7: The Committee recommends that during debate in the Council on the Higher Education Bill 2003 the responsible Minister clarify the operation of clause 26(2)(e) in light of the Committee's observations at paragraph 7.50 to 7.68 of this report.

Depending on the responsible Minister's explanation the Committee recommends that the Council consider either:

- a) deleting clause 26(2)(e) in its entirety. This could be effected in the following manner:**

Page 15, lines 25 to 28 - To delete the lines

OR

- b) amending clause 26(2)(e) to refer comprehensively to the *Parliamentary Privileges Act 1891*. This could be effected in the following manner:**

Page 15, lines 25 to 28 - To delete the lines and insert instead -

“

(3) Nothing in this section affects the operation of the *Parliamentary Privileges Act 1891*.

”

Recommendation 8: The Committee recommends that during debate in the Council on the Higher Education Bill 2003 the responsible Minister clarify the operation of clause 26(2)(d) in light of the Committee's observations at paragraphs 7.50 to 7.70 of this report.

In the event that the Council is not satisfied with the Minister's explanation as to the existence of clause 26(2)(d) then the Committee recommends that the Council consider either:

- a) deleting clause 26(2)(d) in its entirety. This could be effected in the following manner:**

Page 15, lines 23 to 24 - To delete the lines

OR

- b) amending clause 26(2) to refer comprehensively to the *Parliamentary Privileges Act 1891*. This could be effected in the following manner:**

Page 15, lines 23 to 24 - To delete the lines and insert instead -

“

- (3) Nothing in this section affects the operation of the *Parliamentary Privileges Act 1891*.**

”

This is the same amendment referred to in recommendation 7b).

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Recommendation 9: The Committee recommends that during debate in the Council on the Higher Education Bill 2003 the responsible Minister provide an explanation as to why the State is protected from tortious liability under clause 27.

In this respect the Committee draws the scope of clause 27 to the attention of the Council and in so doing observes that the relevant Queensland legislation, the Higher Education (General Provisions) Bill 2003 (Qld):

- a) does not relieve the Minister of liability for negligence; and
- b) provides that where the statutory protection does operate to protect others then civil liability attaches to the State instead.

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Recommendation 10: The Committee recommends that subject to recommendations 1 to 9 the Higher Education Bill 2003 be passed.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

HIGHER EDUCATION BILL 2003

1 REFERRAL OF THE BILL

- 1.1 On June 24 2003 the Higher Education Bill 2003 (**Bill**) stood referred to the Uniform Legislation and General Purposes Committee (**Committee**) pursuant to standing order 230A. Standing order 230A(4) requires that the Committee report to the Legislative Council (**Council** or **House**) within 30 days of the first reading of the Bill. Pursuant to standing order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee. On August 12 2003 the Council ordered that the time within which the Committee had to report the Bill to the Council be extended to September 16 2003.
- 1.2 The purpose of the Bill is to implement the National Protocols for Higher Education Approval Processes (**National Protocols**) in Western Australia. The Long Title of the Bill states that it is an Act “... *to provide for recognition of Australian and overseas universities, authorisation of other higher education institutions and accreditation of higher education courses, and for related purposes.*”

2 INQUIRY PROCEDURE

- 2.1 The Committee was aware that the Bill would be subject to standing order 230A when it was introduced into the Council and would probably stand referred to the Committee. In anticipation of such referral the Committee, of its own motion, commenced preliminary research into the background of the Bill.¹
- 2.2 On May 7 2003 the Committee wrote to Hon Alan Carpenter MLA, Minister for Education and Training (**Minister**) seeking specific information about a number of aspects of the Bill. A copy of the Minister’s reply dated May 22 2003 is attached as Appendix 2.
- 2.3 The Committee sought further information from the Minister and the Office of Higher Education, Department of Education Services (**Department**). A copy of the Committee’s letter dated July 10 2003 and the Minister’s reply dated July 23 2003 are attached as Appendix 3. A copy of the Committee’s letter dated August 8 2003 and

¹ The Committee’s Term of Reference 7.3(b) states “*The functions of the Committee are...(b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;*”.

the Department's reply dated August 18 2003 are attached as Appendix 4. The Committee thanks the Minister and the Department for their assistance.

- 2.4 Details of the inquiry were also placed on the parliamentary website at: www.parliament.wa.gov.au.

3 UNIFORM LEGISLATION

- 3.1 The Bill is an example of 'uniform legislation'. Uniform legislation arises out of national uniform schemes of legislation or may ratify or give effect to an intergovernmental agreement to which Western Australia is a party.

Scrutiny of uniform legislation in the Western Australian Parliament

- 3.2 The scrutiny of uniform legislation is not new to the Western Australian Parliament. Since 1991 both the Council and Legislative Assembly have established procedures to assist Parliament in the scrutiny of uniform legislation.²
- 3.3 More recently during the Thirty-Sixth Parliament until the appointment of the Committee, the scrutiny of uniform legislation fell within the terms of reference for the Council Standing Committee on Legislation. In November 2001 the relevant Council standing order (standing order 230A) was amended to consolidate matters relevant to uniform legislation and to facilitate automatic referral of such bills to the Committee for inquiry and report within 30 days.

Legislative structures

- 3.4 National legislative schemes of uniform legislation have been addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (**1996 Position Paper**). The 1996 Position Paper emphasises that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. It does, however, question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.
- 3.5 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive that

² For discussion of the history behind the scrutiny of uniform legislation and standing order 230A refer to: Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, Western Australia, August 2002, pp5 - 6.

consistency with the legislative form agreed among the various Executive Governments is a 'given'.³

- 3.6 National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth (refer to standing order 230A(1)(b)), can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The legislative structures are summarised in Appendix 1.⁴
- 3.7 Although the Bill does not reflect any particular one of the identified structures, it is 'uniform legislation' within the meaning of standing order 230A by virtue of it being pursuant to an intergovernmental agreement to which the Government of the State is a party: standing order 230A(1)(a).

Scrutiny principles

- 3.8 One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:
- Does the Bill trespass unduly on personal rights and liberties?⁵
 - and
 - Does the Bill inappropriately delegate legislative powers?⁶
- 3.9 In addition, in recent times, the Committee has considered the impact of any proposed legislation on the application of parliamentary privilege.⁷ Although not adopted formally by the Council as part of the Committee's terms of reference, the principles can be applied as a convenient framework for the scrutiny of legislation.

³ For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp7 – 12.

⁴ Ibid. Also see reports of the Parliament of Western Australia, Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

⁵ For example: strict liability offences, reversal of the onus of proof, abrogation of the privilege against self-incrimination, inappropriate search and seizure powers, decision-making safeguards (that is: written decisions and reasons for decisions), personal privacy, decisions unduly dependent on administrative decisions.

⁶ For example: 'Henry VIII clauses', insufficient parliamentary scrutiny of the exercise of legislative power.

⁷ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, pp7 – 10.

Identification of bills subject to SO230A and acknowledgment of the scrutiny process

3.10 The Committee has previously commented on the difficulty with the identification of bills subject to standing order 230A and it has expressed the desire that the Executive adopt practices to be mindful of the process of referral under that standing order.⁸

3.11 The Committee is pleased to note that the Explanatory Memorandum to the Bill and the Second Reading Speeches in both the Legislative Assembly and the Council expressly state that:

“The Bill gives effect to a multilateral intergovernmental agreement to which the Government of the State is a party. At the stage where the proposed legislation enters the Legislative Council it is required to be forwarded to the Uniform Legislation and General Purposes Committee of the Legislative Council for consideration.”⁹

3.12 In the Committee’s view such measures assist in increasing awareness, amongst the Executive and Parliament, of the operation of standing order 230A, the role of the Committee and the importance of the scrutiny of uniform legislation. Correspondingly, it also influences considerations for the Executive’s timetable for the passage of legislation. **The Committee commends the responsible Minister and the Department of Education Services for such measures.**

4 OVERVIEW OF THE BILL

4.1 The Bill contains 31 clauses in three Parts:

- a) Part 1 – Preliminary (clauses 1 – 5).
- b) Part 2 – Establishing and maintaining standards for higher education (clauses 6 – 22).
- c) Part 3 – Other matters (clauses 23 – 31).

4.2 The Second Reading Speech of Hon Graham Giffard MLC, Parliamentary Secretary representing the Minister in the Council (**Parliamentary Secretary**) stated that the purpose of the Bill is to implement the National Protocols in Western Australia. The Parliamentary Secretary further stated that:

“The State is signatory to a multilateral intergovernmental agreement to implement the National Protocols, which were approved by the

⁸ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, Western Australia, August 2002.

⁹ Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, May 6 2003, p7045 and Legislative Council, June 24 2003, p9046.

Ministerial Council on Education, Employment, Training and Youth Affairs on March 31 2003. Under the agreement all States and Territories are required to develop legislation to give full effect to the National Protocols."¹⁰

- 4.3 The Parliamentary Secretary further stated that the National Protocols have been developed to promote consistent criteria and standards across Australia in such matters as the recognition of new universities, the operation of overseas higher education institutions in Australia, and the accreditation of higher education awards to be offered by non-university providers and overseas universities.¹¹ A copy of the National Protocols is attached as Appendix 5.
- 4.4 By national agreement, all universities and State and Territory higher education accreditation authorities will be subject to audit by the Australian Universities Quality Agency (AUQA) in relation to their quality assurance procedures and operations. It is also agreed that AQUA is to monitor State, Territory and Commonwealth legislation and procedures to ensure that the National Protocols have been effectively implemented.¹²
- 4.5 The main emphasis in the Bill is on accreditation, authorisation and quality assurance matters in the private non-university sector of higher education. The Parliamentary Secretary stated that the Bill does not apply directly to recognised Australian universities, which are self-accrediting institutions established under State, Territory or Commonwealth Acts.¹³
- 4.6 The Second Reading Speech of the Parliamentary Secretary states that the Bill provides for five key elements of the Protocols:¹⁴
- i) *Protection of the title 'university' and higher education awards:* Under the National Protocols, legislation is required to protect the standing of Australian universities nationally and internationally. The Bill is designed to protect the title 'university' and the use of higher education awards in accordance with the National Protocols.
 - ii) *Establishment and recognition of universities in Western Australia:* The Bill incorporates nationally agreed criteria for establishing an Australian university and a procedure for an application for university status to be investigated. Any determination made by the Minister about an application

¹⁰ Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, June 24 2003, p9046.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

for university status must be laid before each House of Parliament: clause 10(5). The establishment of a university in Western Australia will require an Act of the State Parliament.

- iii) *Overseas universities seeking to operate in Western Australia:* The legislation makes provisions for overseas universities to gain approval to operate in Western Australia as a university and to have nominated awards accredited. To gain approval to operate in Western Australia, an overseas university will need to meet agreed national criteria. Any determination made by the Minister about an application for university status must be laid before each House of Parliament: clause 10(5).
- iv) *Accreditation and authorisation of non-university higher education institutions:* The National Protocols require that non-university providers wishing to offer courses of study leading to higher education awards be subject to regulation by each State and Territory. The Western Australian legislation establishes the basis by which the State will seek to maintain standards in the private sector by authorising institutions to provide accredited higher education awards.
- v) *Endorsement of higher education awards for full fee overseas students:* The National Protocols also deal with the protection of overseas students and the international reputation of Australian higher education awards. In Western Australia the provisions of the National Protocols are effectively met by the existing *State Education Service Providers (Full Fee Overseas Students) Registration Act 1991*. The Bill complements this Act and establishes the State higher education accreditation authority required under the Act to ensure that the “... *educational standards of the applicant have been assessed through proper accreditation procedures by the appropriate accreditation body.*”¹⁵

4.7 The Committee notes that in relation to ministerial decision-making the Bill stipulates those matters which the Minister *must* take into account, that is, the report of the higher education advisory committee appointed to consider the matter (clauses 10(2), 14(2) and 18(2)) and those matters which the Minister *may* take into account (for example, clauses 10(3), 14(3) and 18(3)). The Committee also notes that the Bill binds the Crown: clause 25.

¹⁵ Ibid.

5 BACKGROUND TO THE BILL

Need for consistent criteria and standards

5.1 In June 2003 the Parliamentary Secretary informed the Council that:

*“The Australian export of education services earns in excess of \$3.7 billion, with Western Australia contributing in excess of \$400 million. The growth of the industry is reliant on the maintenance of Australia’s reputation for delivering quality education services. The National Protocols and the associated Commonwealth, State and Territory quality assurance legislation are essential elements in maintaining quality in Australian higher education.”*¹⁶

5.2 More recently the Department advised the Committee that:

*“The export of Australian education services has recently been estimated at \$5 billion with huge potential for growth. ... The legislation is aimed inter alia to strengthen Western Australia’s capacity to address the problem of higher education ‘degree mills’ and the fraudulent activities of some organisations operating in and out of Western Australia and claiming to be Australian Universities or accredited Australian higher education institutions. These fraudulent organisations bring Australian higher education into disrepute and provide worthless qualifications to students, at considerable cost. Promoting national standards is essential. If Western Australia did not implement appropriate legislation, doubtful and fraudulent operators would be able to move to Western Australia from other States and operate with relative impunity to the detriment of Western Australia’s and Australia’s reputation as a deliverer of quality higher education.”*¹⁷

The intergovernmental agreement

Terms of the agreement

5.3 When dealing with originating or amending legislation promoted by the governments of the participating jurisdictions, the Committee expects the responsible State Minister to provide the Committee with certain information. The information includes a copy of the memorandum of understanding or other instrument that recites what the several

¹⁶ Ibid.

¹⁷ Letter dated August 18 2003 from Alan Marshall, Principal Policy Officer, Office of Higher Education, Department of Education Services to the Committee.

governments have agreed to and a description of the legislation that each jurisdiction will need to have enacted if the agreement is to have lawful effect.

5.4 As noted in the Committee's Fifth Report, the Committee's examination of the relevant intergovernmental agreement and supporting documents is not a perfunctory exercise:¹⁸

- First, the government's policy should be stated in obvious terms.
- Second, the legislation should reflect that policy accurately.
- Third, the advantages and disadvantages to the State as a participant should be listed and examined.
- Fourth, the constitutional issues affecting each jurisdiction should be identified.

5.5 Intergovernmental agreements/memoranda of understanding also usually address the implementation of, and amendments to, legislation. Accordingly the Committee was interested to view a copy of the intergovernmental agreement pursuant to which the Council was informed that the Bill was introduced (refer to paragraph 4.2 of this report). The Committee noted that various parts of the National Protocols refer to 'agreements' in 1995 and 1997. The Committee made inquiry of the Minister in relation to these matters. The Minister's responses are at Appendices 2 and 3.

5.6 Uniform legislation is often underpinned by a detailed intergovernmental agreement particularly where the legislative scheme requires a high degree of uniformity and consistency. Recent examples include:

- a) The Gene Technology Bill 2001. This bill is underpinned by a very detailed intergovernmental agreement which strictly regulates amendments to legislation forming part of the scheme, even requiring amendments approved by a Ministerial Council to be effected in all participating jurisdictions, even if voted against by a participating jurisdiction.¹⁹
- b) The Gas Pipelines Access (Western Australia) (Reviews) Amendment Bill 2003. The relevant agreement provides that a party must not amend its legislation either directly or by making other legislation that would alter its effect, scope or operation, unless the amendment has been approved in writing

¹⁸ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, p1.

¹⁹ Legislative Council, Standing Committee on Environment and Public Affairs, *Report No 8: Gene Technology Bill 2001 and Gene Technology Amendment Bill 2001*, Western Australia, July 2003, p29.

by all the relevant Commonwealth, State and Territory Ministers responsible for the obligations under the agreement.²⁰

- 5.7 The Minister subsequently advised the Committee that the National Protocols were endorsed at a meeting of the Ministerial Council on Education, Employment, Training and Youth Affairs (**MCEETYA**) and that there is no separate agreement or memorandum of understanding.²¹ The Minister further advised the Committee that:

*“The reference to a MCEETYA agreement in 1995 refers to a previous undertaking to develop one element of the future national agreement, which related to procedures where organisations wished to obtain accreditation of higher education courses in two or more States or territories. This agreement was a forerunner of the present National Protocols. The reference to 1997 is to the agreement by the then Higher Education taskforce to commission the project, which resulted in the [National Protocols] which were endorsed by MCEETYA in March 2000. ... The endorsed National Protocols outline the intent and detail of the MCEETYA agreement in relation to the National Protocols.”*²²

- 5.8 Accordingly it appears to the Committee that there is no legal restriction on the manner and degree to which the State can amend the Bill of its own volition. In this respect the Minister has stated to the Committee that:

“Western Australia can decide not to abide by the National Protocols envisaged by MCEETYA and Parliament can introduce legislation in this area on whatever basis it chooses or not introduce the required legislation.

*... Amendments to the National Protocols might be proposed by MCEETYA at some future time which could have implications for the Western Australian legislation. However, whether the proposed legislative changes are made or not is a matter for the Western Australian Parliament.”*²³

And further

²⁰ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 8: Gas Pipelines Access (Western Australia) (Reviews) Amendment Bill 2003*, Western Australia, April 2003, p4.

²¹ Letter dated July 23 2003 from the Minister to the Committee.

²² Ibid.

²³ Ibid.

*“Proposed amendments would come before Parliament where necessary to improve the operations of the Act in Western Australia or in relation to agreed amendments to the National Protocols. Amendments to the National Protocols would require agreement by all States, Territories and the Commonwealth.”*²⁴

- 5.9 The Committee observes that, in this case, the relevant ‘intergovernmental agreement’ which attracts the operation of standing order 230A is evidenced by various minutes of MCEETYA meetings and the National Protocols.

Funding considerations

- 5.10 The Committee notes the Minister’s advice that there is no agreement that restricts or addresses the ability of the State to amend the Bill however the Committee was interested in whether there were any *fiscal* implications and whether participation in the scheme was tied to any federal government funding.

- 5.11 In this respect the Committee notes that Commonwealth funding for higher education, with some minor exceptions, is provided as a triennial funding agreement under the *Higher Education Funding Act 1988* (Cth):

*“Integral to higher education funding in Australia is an accountability framework which requires publicly funded institutions to submit annually an ‘educational profile’ to the Commonwealth that outlines their strategies to achieve outcomes in a variety of key areas, information regarding previous and projected student load, as well as a detailed financial report. ... As part of the profile process each institution is required to submit plans in the areas of quality assurance, research, indigenous education and equity.”*²⁵

- 5.12 The Department advised the Committee that:

“There are no fiscal restrictions associated with implementing the [National Protocols] in Western Australia. The National Protocols represent an agreement to work towards national quality standards and there is no funding implication or agreement associated with their implementation.

The development of the National Protocols was an initiative of the States and Territories as an essential move, in part, to protect and promote quality in Australian higher education in relation to a fast

²⁴ Letter dated May 22 2003 from the Minister to the Committee.

²⁵ Commonwealth of Australia, Department of Education, Training and Youth Affairs, *The Australian Higher Education Quality Assurance Framework*, Occasional Paper Series 2000–H, 2000, p10.

developing national and international export industry in education services. The National Protocols were not imposed on the States and Territories by the Commonwealth with associated State funding implications."²⁶

Advantages and disadvantages of involvement in the scheme

- 5.13 The advantages of the State's involvement in the National Protocols have been previously mentioned (refer to paragraphs 4.3 and 5.1 to 5.2 of this report). The Minister informed the Committee that "... *there are no apparent disadvantages to the State in promoting consistent criteria and standards across Australia in relation to higher education quality assurance.*"²⁷

6 THE LEGISLATIVE RESPONSE OF OTHER PARTICIPATING JURISDICTIONS

- 6.1 The Minister advised the Committee that the intent of the National Protocols was for implementation by no later than June 30 2001, however "... *this date has proved to be optimistic.*"²⁸ As at August 19 2003 the legislative response in other participating jurisdictions was:²⁹
- a) ACT: The Tertiary Accreditation and Registration Bill 2003 was introduced into Parliament on April 3 2003.
 - b) NSW: The *Higher Education Act 2001* commenced on July 1 2003.
 - c) Queensland: The Higher Education (General Provisions) Bill 2003 was introduced into the Queensland Parliament on May 29 2003. On August 19 2003 the Queensland Scrutiny of Legislation Committee tabled its Alert Digest raising matters for consideration by the Queensland Parliament.
 - d) SA: The *Training and Skills Development Act 2003* has been passed and was expected to commence in July 2003.
 - e) Tasmania: The *Universities Registration Act 1995* was amended in June 2001 by the *Universities Registration Amendment Act 2001*.
 - f) Victoria: The Post-Compulsory Education Acts (Amendment) Bill 2001 made amendments to the *Tertiary Education Act 1993*, which amendments were proclaimed in June 2002.

²⁶ Letter dated August 18 2003 from Alan Marshall, Principal Policy Officer, Office of Higher Education, Department of Education Services to the Committee.

²⁷ Letter dated July 23 2003 from the Minister to the Committee.

²⁸ Ibid.

²⁹ Ibid.

- g) Northern Territory: Consultation on amendments to section 73A of the *Education Act 1979* has commenced.
- h) Commonwealth: *The Higher Education Legislation Amendment Act (No. 3) 2002* was enacted on December 2 2002.

7 SELECTED CLAUSES OF THE BILL

Clause 3 - definition of “education Minister”

- 7.1 The definition of “education Minister” in clause 3 provides:

“Minister of State of the Commonwealth, the Australian Capital Territory or the Northern Territory who is principally responsible for the administration of the law relating to higher education in the respective jurisdiction;”

- 7.2 The phrase “education Minister” is only used in clause 10(3)(a). Clause 10 provides a process and criteria for an education institution wishing to make application as to whether the institution meets the criteria for recognition as a university. An ‘education institution’ means “... *a company or other body that provides, offers to provide or proposes to provide a course of study*”: clause 3.

- 7.3 Clause 10(3)(a) provides:

“When making a determination, the Minister may also have regard to any or all of the following –

- (a) any national policies and agreements about the governance and other characteristics of Australian universities made by the Minister with other education Ministers; ... ”*

- 7.4 Clause 10(3)(a), when read with clause 3, therefore provides that the WA Minister may have regard to any national policies and agreements about the governance and other characteristics of Australian universities made by the WA Minister with the Commonwealth Minister, the ACT Minister or the NT Minister. The Committee notes that there is no reference to a minister of another state - that is – ‘*a Minister of State for a State*’.

- 7.5 The Department advised the Committee that it is intended to enable the WA Minister to have regard to any agreement that may be made by the WA Minister with the Minister of other States and agreed with the Committee that the Bill should be

amended.³⁰ The Committee has made a recommendation to this effect (Recommendation 1) that, if agreed to, means clause 3 will read:

“ *“education Minister” means the Minister of State of the Commonwealth, for a State, the Australian Capital Territory or the Northern Territory who is principally responsible for the administration of the law relating to higher education in the respective jurisdiction;*” (amendment underlined)

Recommendation 1: The Committee recommends that Clause 3 of the Higher Education Bill 2003 be amended in the following manner –

Page 3, line 2 – To insert after “Commonwealth,” –

“ for a State, ”

Clause 3 - definition of “higher education award”

- 7.6 The definition of “higher education award” includes reference to, amongst other matters, a diploma or any other award, “... *if the course of study relating to it is classified as higher education in the course descriptions published by the Australian Qualifications Framework Advisory Board*”.
- 7.7 The Bill therefore incorporates by reference the course descriptions of the Australian Qualifications Framework Advisory Board (AQFAB).

Incorporation of material by reference and involvement of the State

- 7.8 Incorporation of material authored externally to Parliament is not uncommon in uniform legislative schemes. For example, legislation may be enacted to provide that regulations to be made under that legislation would be able to incorporate rules or standards of other bodies. The main objections to this mechanism are:
- a) that the incorporation of a material authored externally to the Parliament lessens the ability of Parliament to maintain scrutiny and control over the content of and changes to the material; and
 - b) the practice of incorporating external documents may effectively delegate the making of Western Australian law to outside bodies.

³⁰ Letter dated August 18 2003 from Alan Marshall, Principal Policy Officer, Office of Higher Education, Department of Education Services to the Committee.

- 7.9 There may be concerns that adopting course description standards that are set by an independent body will result in a reduction of the Parliament's ability to scrutinise, as the Parliament would often have had very little or no participation in the development of such standards or their alteration. However matters such as *Australian Standards* are often appropriately adopted in legislation, for example, in regulations dealing with very technical or specialised subject matters.
- 7.10 In the Committee's view any incorporated material described in legislation needs to be in existence, clear, genuinely subsidiary and readily available to the public at large ideally from the same source from which the regulations can be obtained. The Department advised the Committee that:³¹
- a) the course descriptions published by the AQFAB are readily available in printed form or on the AQFAB website. The AQFAB website includes the register of all organisations and associated courses of study accredited in each State and Territory. The AQFAB website is a key location for organisations and individuals seeking advice on whether an organisation claiming government accreditation is appropriately accredited to offer a specific course of study; and
 - b) the State has input directly to AQFAB by way of contribution to the development of course descriptions and policy matters generally. Membership of AQFAB and associated working groups vary, but WA is currently represented on the AQFAB working group dealing with providing advice to AQFAB and MCEETYA on the introduction of an Associate Degree on the Australian Qualifications Framework.
- 7.11 The Committee notes the involvement of the State in the development of course descriptions and considers that the incorporation by reference of the course descriptions published by AQFAB is appropriate.

Clause 3 – definition of “National Protocols”

Incorporation of material by reference and involvement of the State

- 7.12 The definition of “National Protocols” means “... *the National Protocols for Higher Education Approval Processes approved by the [MCEETYA] on 31 March 2000, as amended from time to time*”. They are incorporated by reference - refer to paragraphs 7.8 to 7.9 of this report.
- 7.13 The National Protocols are referred to in clauses 10(g), 14(1)(b) and 18(1)(b). These clauses set out matters of which the Minister is to be satisfied when determining:

³¹ Ibid.

- a) that an education institution meets the criteria for recognition as a university;
- b) whether to authorise a non-university institution to provide a higher education course; and
- c) whether to accredit a higher education course leading to a higher education award.

For example: “*The Minister may authorise a non-university institution to provide a higher education course if satisfied that - ... the institution otherwise meets the criteria set out in the National Protocols in relation to non-university institutions*”: clause 14(1)(b).

- 7.14 Accordingly the National Protocols are an integral part of the operation of the accreditation and approval processes established by the Bill.
- 7.15 The National Protocols as at March 31 2003 are attached as Appendix 5. However the Bill is drafted so that the National Protocols are incorporated “... *as amended from time to time*”. Amendment does not require the involvement of Parliament. When the National Protocols change, the requirements that are imposed by means of clauses 10(g), 14(1)(b) and 18(1)(b) are also changed. By contrast the Queensland legislation only adopts the National Protocols as at a particular date and does not include any subsequent amendments.³²
- 7.16 What, if any, continuing involvement the State has in the development of the National Protocols was of interest to the Committee, particularly as the balance of state/federal relations frequently falls for consideration when scrutinising uniform legislation. The Committee inquired into the amendment process of the National Protocols, the involvement of the State in that process and the ability of the State to resile from any amendments to the National Protocols.
- 7.17 The Department advised the Committee that:³³
- a) The National Protocols are a fairly broad and general statement of intent in terms of the key elements of a national quality assurance framework. Policy practice and interpretation associated with the National Protocols is ongoing and overseen by the Joint Committee of Higher Education (JCHE) which reports to MCEETYA and on which all States, Territories and the Commonwealth are represented.

³² Higher Education (General Provisions) Bill 2003 (Qld), Dictionary.

³³ Letter dated August 18 2003 from Alan Marshall, Principal Policy Officer, Office of Higher Education, Department of Education Services to the Committee.

- b) Formal amendment of the National Protocols is likely to be infrequent but would involve advice from the JCHE and acceptance by all States, Territories and the Commonwealth at MCEETYA.
- c) The State has a key role in all matters associated with the National Protocols. A decision on amending the National Protocols must be agreed unanimously.
- d) If the State did not agree then an amendment would not be made.
- e) If the State resiles from part or all of the National Protocols there are no funding implications, however the effect on the national quality assurance framework and on the reputation of Western Australian and Australian higher education would be significant.

7.18 The Committee is satisfied that the State's interests are represented and respected in relation to the future amendment of the National Protocols.

Clause 6 - Protection of titles and awards

Exemption by regulation

7.19 Clause 6(1) protects the title "university" and imposes a penalty of \$20,000 for breaches of the provision. It provides—

"An education institution or an agent of an education institution must not, by use of the title "university" or in any other way, represent that the education institution is a university or part of a university unless it is —

(a) a recognised Australian University; or

(b) a recognised overseas university."

7.20 Clause 6(2) provides for an exemption for the University of the Third Age or "*a prescribed person or organisation*" from the general prohibition on the use of the title "university". Exemptions will be included in regulations and subject to the tabling and disallowance procedures of the *Interpretation Act 1984* and scrutiny by the Joint Standing Committee on Delegated Legislation.

- 7.21 The Committee notes that, by regulation, an organisation may be exempted from the offence provisions of clause 6(1). This will have the effect that a regulation affects the operation of the principal Act.³⁴

Scope of exemption

- 7.22 The Committee notes that the National Protocols state:

“Protection of the use of the title should not extend to those bodies where the context makes it clear that there is no connection with an existing university (eg: University Avenue Newsagent Pty Ltd)”: Protocol 1.11.

and

“Protection of title legislation should provide for the responsible Minister to exempt a body from the requirements of the legislation when it is clear that the purpose of the body could not be construed as providing higher education – as in the case of the University of the Third Age”: Protocol 1.12.

- 7.23 As a person or organisation can be exempted, by regulation, from the operation of the primary legislation the Committee was interested in why the power of exemption in clause 6(2) was not expressly restricted to the circumstances illustrated in the National Protocols.

- 7.24 The Department advised the Committee that clause 6 gives effect to the spirit of the National Protocols, but is not drafted in exactly the same way as the National Protocols for various reasons. The position was clarified by the Department in the following manner:³⁵

- a) For the purposes of the Bill, there are three groups of persons or bodies who might use the word “university” in the title of the person or body:

1. recognised universities;
2. persons and bodies who are not education institutions; and
3. education institutions that are not recognised universities.

³⁴ A ‘Henry VIII clause’ is a provision in an Act that authorises the amendment of the enabling legislation or another Act by means of subsidiary legislation or executive act.³⁴ Clauses that allow for the amendment of relevant Acts by subsidiary legislation are generally objectionable. Such clauses are discussed at length in a Queensland parliamentary publication: Legislative Assembly, Scrutiny of Legislation Committee, *The Use of “Henry VIII Clauses” in Queensland Legislation*, Queensland, January 1997.

³⁵ Letter dated August 18 2003 from Alan Marshall, Principal Policy Officer, Office of Higher Education, Department of Education Services to the Committee.

- b) In the Department's view clause 6(1) of the Bill makes clear and final provision for the first two groups and to that extent gives full effect to the intent of Protocols 1.11 and 1.12. The use of the title "university" by an education institution is reserved for the use of recognised universities within the meaning of the Bill. The purpose of a person or body that is not an education institution could never be "*construed as providing higher education*" as mentioned by Protocol 1.12, and such a person or body is completely exempt from the prohibition under clause 6(1). In the Department's view, there is no need to exempt them by regulation.
- c) The remaining group of persons and bodies consists of those education institutions that are not recognised universities. Only a member of this group needs exemption by regulation to be able to use the title "university". In Protocol 1.12, The University of the Third Age is given as an example of a body whose purpose could not be construed as providing higher education. However, the Department advised the Committee that despite Protocol 1.12, it is arguable that University of the Third Age could indeed be construed, by overseas students and anyone else who is not already familiar with its operation and purpose, as providing some form of higher education: many of the subjects offered by the organisation are taught and discussed at a tertiary and even post-first-degree level, and the teaching and discussion groups are often led by academics or retired academics.
- d) In the Department's view the discretion in the Bill to exempt by regulation needs to be unfettered, to permit an administrative decision to be made in a particular case as to whether a person or body that is an education institution should or should not be permitted to use the title "university". The Department submitted that because the Protocols clearly intend that University of the Third Age should be exempt, the organisation is for convenience exempted by the Bill (instead of by regulation), as no other organisations are intended to be prescribed at present. The unfettered discretion permits the appropriate resolution of any unforeseen anomaly arising from the prohibition on the use of the title "university". The Department submitted that it can be assumed that the discretion will be exercised, in the context of the entire Bill, in a way that will not defeat the evident purpose of the Bill or breach the national agreements to which the Bill gives effect.

7.25 The Committee notes the desire of the Executive to enable exemption by regulation to be unfettered, that is, to permit an administrative decision to be made in a particular case as to whether a person or body that is an education institution should or should not be permitted to use the title "university". The Committee notes that the effect of such executive action would be that, by regulation, an entity could be exempted from the operation of the primary legislation. However the Committee observes that

regulations will be caught by the tabling and disallowance provisions in section 42 of the *Interpretation Act 1984* and subject to the scrutiny of the Joint Standing Committee on Delegated Legislation. In the circumstances the Committee makes no further comment on this clause.

Clauses 11, 15 and 19 - Suspension or revocation of a determination, authorisation or accreditation

- 7.26 Clauses 11, 15 and 19 provide for the suspension or revocation of a determination, authorisation or accreditation in certain circumstances.
- 7.27 The principles of procedural fairness require that something should not be done to a person that will deprive the person of some right, interest, or legitimate expectation of a benefit, without the person being given an adequate opportunity to present their case to the decision-maker. In this respect the Committee notes that clauses 11(2), 15(2) and 19(3) require the Minister to give the institution an opportunity to make representations on the matter and to consider those representations.
- 7.28 Depending on the seriousness of a decision made in the exercise of an administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in a bill without providing for access to reasons for the decision and review and/or appeal rights.
- 7.29 The Committee notes that the Bill does not require the Minister to provide reasons for the Minister's decision to suspend or revoke a determination, authorisation or accreditation. The Committee notes that clause 31(2)(d) enables regulations to be made that provide for "... *procedures relating to the suspension or revocation, or proposed suspension or revocation, of a section 10 determination, a provider's authorisation or ministerial accreditation.*"
- 7.30 It may be that it is intended that the regulations might address such matters however it is the Committee's view that the Act should provide for the provision of the Minister's reasons for decisions made under clauses 11, 15 and 19 to suspend or revoke a determination, authorisation or accreditation. The Committee has recommended amendments to this effect (Recommendations 2, 3 and 4).

Recommendation 2: The Committee recommends that clause 11 of the Higher Education Bill 2003 be amended in the following manner –

Page 8, after line 28 - To insert the following –

“

- (3) A suspension or revocation under subsection (1) is to be given to the education institution in writing signed by the Minister and is to state the grounds relied on in making the decision.

”

Recommendation 3: The Committee recommends that clause 15 of the Higher Education Bill 2003 be amended in the following manner –

Page 10, after line 15 – To insert the following –

“

- (3) A suspension or revocation under subsection (1) is to be given to the non-university institution in writing signed by the Minister and is to state the grounds relied on in making the decision.

”

Recommendation 4: The Committee recommends that clause 19 of the Higher Education Bill 2003 be amended in the following manner –

Page 12, after line 22 - To insert the following –

“

- (4) A suspension or revocation under subsection (2) is to be given to the course provider in writing signed by the Minister and is to state the grounds relied on in making the decision.

”

Clause 18(4) - Ministerial accreditations - access conditions

- 7.31 Clause 18(4) imposes a condition on ministerial accreditation of courses. The condition is to the effect that the course provider gives to the Minister as much access to the course provider's premises and as much information, as the Minister may from time to time determine. The purpose of this condition is to enable the Minister to determine whether conditions of accreditation are being complied with; whether the provision or standard of the course meet the criteria referred to in, amongst other things, the National Protocols; and to carry out a review (under clause 22(c)) of the provision and standard of the course.
- 7.32 Although couched as conditions of accreditation, these are significant entry powers that are exercisable without warrant or consent and that have no element of 'reasonableness' attached, for example, 'access at any reasonable time'. The Committee notes that the relevant Queensland legislation incorporates an element of reasonableness into the exercise of such powers.³⁶ The Committee has previously examined entry powers in its earlier reports.³⁷
- 7.33 The Committee notes that the powers provided by clause 18(4) are not general and relate only to matters relevant to what may be termed 'quality assurance' of accreditations which is at the heart of the legislation - they provide a form of accountability by permitting access by the Minister to a course provider's premises and its records to ensure appropriate delivery of higher education courses. However the Committee considers that the powers should be circumscribed by an element of reasonableness in their exercise. The Committee has made a recommendation to this effect (Recommendation 5).

³⁶ The Higher Education (General Provisions) Bill 2003 (Qld), clause 50 provides:

"It is a condition of the accreditation of an accredited course that the governing body of the non-university provider offering the course –

- (a) allows the Minister to enter, at any reasonable time, a place to examine the providers operation for the course at the place; and*
- (b) complies with all reasonable requests by the Minister to give the Minister information or records ...".*

³⁷ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, Western Australia, June 25 2002, pp46 - 49.

Recommendation 5: The Committee recommends that clause 18 of the Higher Education Bill 2003 be amended in the following manner –

Page 11, after line 31 - To insert the following –

“

(5) A right of access under subsection (4) may be exercised –

- (a) without notice during ordinary and actual business hours on any day; or**
- (b) after giving written notice of not less than 24 hours if access is to occur at any other time.**

(6) A requirement under subsection (4) –

- (a) is to be in writing identifying the form and content of the information or described by reference to a class or type of information that corresponds to that in the requirement; and**
- (b) is to state the purpose of the requirement and require the information to an extent that is proportionate in scope and purpose to that purpose.**

”

Clause 21 - Remuneration of higher education advisory committee members

Appointment of higher education advisory committee

7.34 Clause 20 provides for the appointment of a suitably qualified and experienced person or persons as a higher education advisory committee (**advisory committee**) to consider and report to the Minister on applications made under clauses 9, 13 or 17.³⁸ The Minister may also appoint an advisory committee to consider and report to the Minister on any other matter related to the Minister’s functions under the Bill.

7.35 An advisory committee may be appointed ad hoc or as a standing committee: clause 20(3). There is no cap on the number of members or number of advisory committees that may be appointed under the Bill. The Committee was advised that there would be a number of advisory committees “... *mostly meeting for one or more sessions*

³⁸ These clauses address applications for: a section 10 determination (recognition of university standards); a provider’s authorisation; and a ministerial accreditation.

*ultimately to advise the Minister on the accreditation of courses and the registration of organisations. In the main these will be academic staff employed at universities”.*³⁹

Remuneration of advisory committee members

- 7.36 Clause 21 addresses the remuneration of advisory committee members. The remuneration and allowances of an appointee is determined by the Minister subject to the *Salaries and Allowances Act 1975 (SAT)* if that Act applies. Determinations can be made in respect of the holder of a statutory office under the SAT if the office is prescribed under that Act as an office to which the Act applies. If prescribed, determinations are made under the SAT. However if the office is not prescribed, the Minister is free to make a determination. This was confirmed by the Department which advised the Committee that:⁴⁰

“A standard set of allowances and procedures for sitting fees per session, such as under the [SAT], is appropriate in most cases. It was considered however that the Minister may need some flexibility in setting allowances such as for Chairs of prestigious panels such as an ex Vice-Chancellor to Chair a State panel to investigate an application to establish or be recognised as a university in Western Australia.”

- 7.37 The Committee notes that clause 21 operates to provide flexibility to the Minister to make appointments at a level of remuneration that is commensurate and attractive with an appointee’s experience subject to any applicable determination made under the SAT. The provision for individual determinations of remuneration will allow recognition of a person’s qualifications and experience.

Consultation

- 7.38 The Committee notes that there is no requirement for the Minister to consult with the Minister for Public Sector Management in relation to the appointment of advisory committee members. This consultation is evident in other legislation relating to the appointment of members of a board or tribunal: for example, the *Town Planning and Development Act 1928*, Schedule 3, Item 6.
- 7.39 In this respect the Department advised the Committee that an ‘alternative approach’ to the wording of clause 21 “... *could have been to provide that the ‘remuneration of members of higher education advisory committees be determined by the Minister on the recommendation of the Minister for Public Sector Management’* ”. However the Department submitted that as there will be many members of advisory committees

³⁹ Letter dated August 18 2003 from Alan Marshall, Principal Policy Officer, Office of Higher Education, Department of Education Services to the Committee.

⁴⁰ Ibid.

sitting for one or two sessions only, a provision for such specific consultation seemed in the main to be unnecessary.⁴¹

- 7.40 The Committee observes that committees may be ad hoc or standing. The Committee further observes that consultation with the Minister for Public Sector Management is not necessarily an “alternative approach” as stated by the Department but it may also be incorporated as an additional subsection, as appears in other legislation.⁴² The Committee has made a recommendation in relation to this matter (Recommendation 6).

Recommendation 6: The Committee recommends that in the absence of the responsible Minister providing a satisfactory justification to the Council for the absence of consultation with the Minister for Public Sector Management in clause 21 of the Higher Education Bill 2003, the Committee recommends that clause 21 be amended to include a requirement to consult as may be found in other legislation. This could be effected in the following manner:

Page 13, after line 17 - To insert -

“

- (3) A determination is only to be made after having regard to the recommendation of the Minister for Public Sector Management.**

”

Clause 26 - Disclosure of information

Prohibition on disclosure

- 7.41 Clause 26(1) is a statutory secrecy/confidentiality provision (**secrecy provision**) that prohibits a person who has acquired information about the affairs of another person as a result of the carrying out of a function under the Act, from directly or indirectly recording, divulging or communicating the information to a third party.
- 7.42 Clause 26(2) specifies exceptions to the prohibition on disclosure. Clauses 26(2)(d) and (e) are of interest to the Committee insofar as they raise matters relevant to the *Parliamentary Privileges Act 1891*, in particular the powers and privileges of the Houses of Parliament and their committees. Those clauses provide that the prohibition on disclosure in subsection (1):

⁴¹ Ibid.

⁴² For example, the *Town Planning and Development Act 1928*, Schedule 3 Item 6.

“... does not prohibit recording, divulging or communicating information -

...

(d) for the purpose of answering a question asked in a House of Parliament; or

(e) for the purpose of complying with a written law, or an order or resolution of a House of Parliament, that requires information to be given to a House of the Parliament.”

- 7.43 The Department advised the Committee about the type of information that clause 26 seeks to protect:⁴³

“Applications for a section 10 determination, a provider’s authorisation or the accreditation of a course will require the applicant to provide particulars in relation to the applicant of all the matters listed in clauses 10(1), 14(1) and (3), and matters prescribed under 17(2)(b) respectively. Much of the information supplied will consist of details about the applicant’s financial and other resources and other matters of a commercial-in-confidence nature, as well as personal details of the applicant’s staff and students. As a matter of policy, information that is not required to be registered should not be available to anyone except the relevant decision makers or their interstate counterparts, except to the extent provided by clause 26(2). The clause is consistent with section 40 of the Education Service Providers (Full Fee Overseas Students) Registration Act 1991.”
[Committee emphasis]

- 7.44 The Committee was interested in clause 26, not only for the purpose of its scrutiny of the Bill but to the extent that such provisions may appear in other legislation introduced into Parliament. The Committee has made some general comments to explain its concerns with the clause and in the event that they may assist informed debate in the Council should similar provisions appear in future legislation.

Provisions in other legislation

- 7.45 A number of provisions in state legislation prevent the disclosure of information thought to require special protection from disclosure.⁴⁴ Legislation may also create

⁴³ Letter dated August 18 2003 from Alan Marshall, Principal Policy Officer, Office of Higher Education, Department of Education Services to the Committee.

⁴⁴ Examples include: *First Home Owner Grant Act 2000*, section 65; *Taxation Administration Act 2003*, section 114.

criminal offences for disclosure in contravention of the provisions, although the Bill does not have this effect.

7.46 The question as to whether statutory provisions of this type prevent the disclosure of the information to a House of Parliament or a parliamentary committee was an issue for the Australian Senate in 1990, 1991 and 1995⁴⁵ and has been the subject of debate in Western Australia in the context of the Joint Standing Committee on the Anti-Corruption Commission and the *Anti-Corruption Commission Act 1988*.⁴⁶

7.47 The Committee notes one other example of drafting similar to clauses 26(2)(d) and (e) in section 40 of the *Education Service Providers (Full Fee Overseas Students) Registration Act 1991*. It appears to the Committee that it is more usual for legislation to not refer to matters the subject of clauses 26(2)(d) and (e) in any list of permitted disclosures to a secrecy provision.⁴⁷ In making this observation the Committee notes that whilst phrases similar to those found in clauses 26(2)(d) and (e) do appear in other legislation, this is in a more refined context - that of when a Minister may have access to information for parliamentary purposes.⁴⁸

Previous comment by the Committee and the Council

7.48 The Committee in its Fifth Report recently canvassed whether legislation may operate to oust aspects of parliamentary privilege.⁴⁹ In that report the focus of the Committee's discussion was on whether a Commonwealth law may expressly negate what would otherwise be an immunity derived from State parliamentary privilege. The Committee noted the general rule of statutory construction:

⁴⁵ I Harris (ed), *House of Representatives Practice*, Department of the House of Representatives, Canberra, 2001, (4th edition) pp631 - 632; H Evans (ed), *Odgers Senate Practice*, Department of the House of the Senate, Canberra, 2001, (10th edition) pp48 - 51.

⁴⁶ P McHugh, 'Statutory Secrecy Provisions', Paper presented at the 34th Presiding Officers and Clerks Conference, Tonga, June 28 - July 5 2003.

⁴⁷ For example the following provisions impose duties of confidentiality and list permitted disclosures but those lists do not repeat matters the subject of clause 26(2)(d) or (e): *First Home Owner Grant Act 2000*, section 65; *Taxation Administration Act 2003*, section 114.

⁴⁸ For example the following provisions state that "*For parliamentary purposes ... the Minister is entitled ... to have information...*". "*Parliamentary purposes*" is then defined in terms equivalent to clauses 26(2)(d) and (e): *State Superannuation Act 2000*, section 36; *Disability Services Act 1993*, section 21, *Agricultural Produce Commission Act 1988*, section 6B; *Builders Registration Act 1939*, section 23D.

⁴⁹ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, pp7 - 10.

“The presumption that the legislature does not intend any alteration in the rules or principles of the common law beyond what it expressly declares.”⁵⁰

And further, quoting Murphy J in *Hammond v Cth*:

“The privileges of Parliament are jealously preserved and rightly so. Parliament will not be held to have diminished any of its privileges unless it has done so by unmistakable language.”⁵¹

7.49 The Council has also had occasion to conduct detailed debate on the nuances of statutory interpretation in circumstances where questions were raised as to whether legislative requirements to provide information to authorised persons extended to Parliament, its members and officers. Despite the statements of the Governments at the time that it was not intended that the provisions of the relevant bills affect the *Parliamentary Privileges Act 1891*, the response of the House was different in each case:

- a) The Official Corruption Commission Amendment Bill 1996. In that case the then Attorney General persuaded the Council that it was unnecessary to expressly declare in the bill that the powers given to the re-named Anti-Corruption Commission did not override parliamentary privilege.
- b) The Royal Commission (Police) Bill 2002. In that case the Council did make an amendment to the bill to expressly declare that *“Nothing in this section affects the operation of the Parliamentary Privileges Act 1891”*.⁵² The difference in approach of the House to the Royal Commission (Police) Bill 2002 as opposed to the Official Corruption Commission Amendment Bill 1996 was the all-embracing language of the former used to confer coercive powers on that royal commission and the attendant doubt as to its effect on parliamentary privilege.⁵³

⁵⁰ Ilbert, *Legislative Methods and Forms*, 1901 ed, p 250, cited in Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, p8.

⁵¹ (1982) 152 CLR 188 per Murphy J at p200, cited in Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, p8.

⁵² Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, June 20 2002, pp11590 & 11592 - 11594.

⁵³ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, p8.

Statutory presumptions and constructions

- 7.50 It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.⁵⁴
- 7.51 ‘Necessary implication’ would require the relevant statutory scheme to be rendered meaningless if an interpretation affecting parliamentary privilege was not applied.⁵⁵ As was stated in a recent case there is “*implausibility*” in the “*proposition that Parliament should have intended by ... indirect means to surrender by implication part of the privilege attaching to its proceedings.*”⁵⁶
- 7.52 It is notable that in the United States the courts have consistently held that a statutory secrecy provision does not prevent the Houses of Congress or their committees requiring the production of the protected information.⁵⁷
- 7.53 The paramount position should be that secrecy provisions do not have any effect on the powers of the Houses of Parliament and their committees to conduct inquiries. It is also to be noted that the law of parliamentary privilege provides absolute immunity to the giving of evidence to a House of Parliament or a committee and disclosures made in a ‘parliamentary proceeding’.⁵⁸
- 7.54 The basic issue is one of statutory interpretation, that is, whether Parliament when it enacts a secrecy provision can be taken to have overridden the parliamentary powers, privileges and immunities under the *Parliamentary Privileges Act 1891*. Parliament should not be taken as intending to override its powers, privileges and immunities unless there are express words or a necessary implication to indicate a contrary intention. As it has been noted by one commentator:

⁵⁴ *Daniels Corporations International Pty Ltd and Anor v ACCC* [2002] HCA 49, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [11]. See also: *Baker v Campbell* (1983) 153 CLR 52; *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

⁵⁵ *Daniels Corporations International Pty Ltd and Anor v ACCC* [2002] HCA 49, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [43] (dealing with the question of abrogation of legal professional privilege).

It is noted that the Clerk of the Senate does not appear to subscribe to the view that parliamentary privilege may be affected by ‘necessary implication’: “*Once the principle that parliamentary privilege is not affected by a statute except by express words is abandoned, there is no end to the provisions which may be interpreted as inhibiting the powers of the Houses and their committees*”: H Evans (ed), *Odgers Senate Practice*, Department of the House of the Senate, Canberra, 2001, (10th edition) pp50 - 51.

⁵⁶ *Criminal Justice Commission v Dick* [2000] QSC 272 upheld on appeal (2002) 2 Qd R 8. The discussion on statutory construction in this case was in the context of whether or not by providing for a limited immunity for acts and omissions of the parliamentary commissioner in *Criminal Justice Act 1989* (Qld), Parliament intended substantially to derogate from its own privilege.

⁵⁷ For example: *FCT v Owens-Corning Fibreglass Corp.*, 1980 626 F 2d 966, cited in H Evans (ed), *Odgers Senate Practice*, Department of the House of the Senate, Canberra, 2001, (10th edition) Supplement to p51.

⁵⁸ Article 9, *Bill of Rights 1689*; *Constitution Act 1890*, section 36; and *Parliamentary Privileges Act 1891*.

“Disagreement tends to turn on the nature of the provisions which are needed to evince the contrary intention. The nature of statutory presumptions of this kind makes it almost inevitable that there will be disagreement about the kind of provisions needed to show the existence of the contrary intention.”⁵⁹

- 7.55 Ultimately the matter of statutory interpretation is a matter for the courts, however the intention of Parliament is relevant.

Clause 26(2)(e)

Why restate the privileges of Parliament?

- 7.56 In view of the above statutory presumptions and constructions the Committee was interested in why it was necessary to include clauses 26(2)(d) and (e) which restate aspects of the privileges of Parliament. For example, (ignoring clause 26(2)(e) for the present) the Committee notes that there are no express words that prevent parliamentary committees from seeking the information covered by clause 26, or prevent persons who have that information providing it to a parliamentary committee. It does not appear to the Committee that by ‘necessary implication’ disclosure to a parliamentary committee is precluded - it could not be said that the statutory scheme evidenced by the Bill would be rendered fatally defective unless its application to the Houses of Parliament and its committees were implied. However there is an attempt in clause 26(2)(e) to provide an express exception to the application of the general secrecy provision in relation to some privileges of Parliament.

- 7.57 The Department’s view on the matter was advised to the Committee as follows:⁶⁰

“As a general principle, an Act of the Parliament that has a provision that is inconsistent with a provision in an earlier Act may be construed as overriding the earlier Act. As a matter of policy, the operation of the Consumer Affairs Act 1971 is explicitly preserved to protect students at risk of exploitation by improperly run education institutions. However, it is also a principle of statutory construction that the express mention of a particular thing implies the exclusion of anything not expressly mentioned (the expressio unius est exclusio alterius rule). Any restatement of a law in clause 26(2) was included to avoid the application of this principle to exclude the law.”

⁵⁹ Lindell, Geoffrey ‘Parliamentary Inquiries and Government Witnesses’, *Melbourne University Law Review*, Vol 20 (1995) 383 at pp408 - 409.

⁶⁰ Letter dated August 18 2003 from Alan Marshall, Principal Policy Officer, Office of Higher Education, Department of Education Services to the Committee.

7.58 The Committee notes that the explanation proffered by the Department does not address the matters discussed at paragraphs 7.50 to 7.54.

Including clauses excepting parliamentary privilege as a matter of course

7.59 The construction of the particular legislative scheme may require that an express provision preserving parliamentary privilege should be included, for example, the Royal Commission (Police) Bill 2002. However including provisions protecting or preserving parliamentary privilege in legislation as a matter of course raises the following issues:

- a) Does the Department's explanation suggest that the express mention of, for example, the *Consumer Affairs Act 1971* but not the *Parliamentary Privileges Act 1891* means that by 'necessary implication' the privileges of Parliament are affected by the Bill and that is why clause 26(2)(e) was included? In view of the matters discussed at paragraphs 7.50 to 7.54, the Committee would be surprised if this were the case.
- b) Issues wider than the context of this Bill are also raised by the Department's response, that is, the effect of statements similar to clauses 26(2)(d) and (e) appearing in legislation as a matter of course when they are not necessary. For example:
 1. If a statement regarding parliamentary privilege is put into one piece of legislation then the question might be raised as to why it is not put into another.
 2. Is it suggested that other legislation which contains a general secrecy provision followed by specified exceptions (that do not include reference to the privileges of Parliament) runs the risk of being interpreted as excluding those privileges?

In this respect the Committee has already noted other legislation which contains secrecy provisions with a list of permitted disclosures, which do not mention matters the subject of clauses 26(2)(d) or (e) (refer to paragraph 7.47 of this report).

The manner in which it is restated

7.60 In the event that it might be considered that an express restatement of the powers and privileges of Parliament is necessary, the Committee was also interested in the manner in which matters involving the privileges of Parliament were restated. When it is necessary to expressly preserve the privileges of Parliament the most common and complete way of doing so would be to provide that "*Nothing in this Act affects the operation of the Parliamentary Privileges Act 1891*".

- 7.61 The *Parliamentary Privileges Act 1891* provides that the Council, Legislative Assembly, their committees and members shall hold enjoy and exercise the privileges, immunities and powers as are for the time being held, enjoyed and exercised by the House of Commons. For present purposes any committee of either House of Parliament duly authorised by the relevant House to send for persons and papers may order any person to attend and produce documents: sections 4, 5 *Parliamentary Privileges Act 1891*.
- 7.62 Parliament has established parliamentary committees by resolution (for example, Schedule 1 of the Council standing orders) and by orders (for example the establishment of the recent Select Committee into the Reserves (Reserves 43131) Bill 2003). Council committees are empowered by the standing orders or an order of reference to “*send for persons, papers and records*”. The orders are reflective of the *Parliamentary Privileges Act 1891*.
- 7.63 The only expressly stated ground for an objection to the production of a document under the *Parliamentary Privileges Act 1891* is that the question or document is of a private nature and does not affect the subject of inquiry. If such an objection is made the relevant House of Parliament is acquainted of the matter and the House may determine the validity of the objection and either excuse or order production/attendance. It is also not uncommon for a person to refuse to produce documents or provide information on the grounds of legal professional privilege, commercial-in-confidence or executive immunity (also known as ‘Crown immunity’ or ‘public interest immunity’). The extent to which the House may, or may not debate and deal with any refusal to comply with a summons on such bases is inextricably linked to the political climate in the House at the particular time that the issue may arise.
- 7.64 The manner and extent to which parliamentary privilege is referred may lead to an argument that a legislative provision impinges on the privileges of Parliament in so far as they are not mentioned.
- 7.65 In the context of this Bill the Committee was interested in whether it could be said that the express mention in clause 26(2)(e) of “... *order or resolution of House of Parliament that requires information to be given to a House of Parliament*” was intended to exclude parliamentary committees. For example, does this mean that a person is not required to comply with a summons issued under authority of the *Parliamentary Privileges Act 1891* at the request of a Council committee unless the Council, upon a report of non-compliance with a summons, makes an order that the person comply? Does this mean that information may be disclosed to a House of Parliament but not to a committee?

7.66 In the Committee's view any possible fetter on the investigatory powers of parliamentary committees is not acceptable. Put another way - the Committee was interested in:

"Whether it was intended that clause 26(1) apply to a witness before a parliamentary committee to prevent questions being asked, or answers being compelled, by a parliamentary committee of a person who has information called for by such questions where that information is obtained in the exercise of their functions under that Act?"

7.67 The Department's view on the matter was advised to the Committee as follows:⁶¹

"Clause 26(2)(e) provides, amongst other things, that information acquired under or for the purposes of the Act may be disclosed for the purpose of complying with "an order or resolution of a House of the Parliament, that requires information to be given to a House of the Parliament". Parliamentary committees, whether standing or ad hoc, are established, and their terms of reference are given, by orders or resolutions of a House of the Parliament. Depending on the particular terms of reference of a committee, compliance with the order or resolution of the House of the Parliament that established the committee may require the communication to the committee of information acquired under or for the purposes of the Act. To that extent the clause does not apply to a witness before the parliamentary committee. The clause is only intended to exclude any disclosure that is not specifically authorised by an order or resolution of the Parliament."

7.68 In the Committee's view there is still room for debate. As discussed at paragraphs 7.61 and 7.62, the *Parliamentary Privileges Act 1891* clearly outlines the powers of committees to require and be provided with information. The Department's response does not address the *Parliamentary Privileges Act 1891* nor does clause 26, unless it is intended to do so by the reference in clause 26(2)(e): "... for the purpose of complying with a written law, ... that requires information to be given to a House of Parliament" (again - what of committees?).

⁶¹ Ibid.

Recommendation 7: The Committee recommends that during debate in the Council on the Higher Education Bill 2003 the responsible Minister clarify the operation of clause 26(2)(e) in light of the Committee's observations at paragraph 7.50 to 7.68 of this report.

Depending on the responsible Minister's explanation the Committee recommends that the Council consider either:

- a) deleting clause 26(2)(e) in its entirety. This could be effected in the following manner:**

Page 15, lines 25 to 28 - To delete the lines

OR

- b) amending clause 26(2)(e) to refer comprehensively to the *Parliamentary Privileges Act 1891*. This could be effected in the following manner:**

Page 15, lines 25 to 28 - To delete the lines and insert instead -

“

(3) Nothing in this section affects the operation of the *Parliamentary Privileges Act 1891*.

”

Clause 26(2)(d)

- 7.69 Clause 26(2)(d) provides that the prohibition on disclosure does not prohibit recording, divulging or communicating information -

“(d) for the purpose of answering a question asked in a House of Parliament;”

- 7.70 As noted, the law of parliamentary privilege provides absolute immunity to disclosures made in a “parliamentary proceeding”.⁶² This would encapsulate the answering of questions asked, in a House of Parliament. The Committee is interested in the intent of this clause and why it was considered necessary to the extent that it

⁶² Article 9, *Bill of Rights 1689*; *Constitution Act 1890*, section 36; and *Parliamentary Privileges Act 1891*.

overlaps the *Parliamentary Privileges Act 1891* (refer to previous discussion). The Committee has drawn the matter to the attention of the Council (Recommendation 8).

Recommendation 8: The Committee recommends that during debate in the Council on the Higher Education Bill 2003 the responsible Minister clarify the operation of clause 26(2)(d) in light of the Committee's observations at paragraphs 7.50 to 7.70 of this report.

In the event that the Council is not satisfied with the Minister's explanation as to the existence of clause 26(2)(d) then the Committee recommends that the Council consider either:

- a) deleting clause 26(2)(d) in its entirety. This could be effected in the following manner:

Page 15, lines 23 to 24 - To delete the lines

OR

- b) amending clause 26(2) to refer comprehensively to the *Parliamentary Privileges Act 1891*. This could be effected in the following manner:

Page 15, lines 23 to 24 - To delete the lines and insert instead -

“

- (3) Nothing in this section affects the operation of the *Parliamentary Privileges Act 1891*.

”

This is the same amendment referred to in recommendation 7b).

Clause 27 - Immunity from tortious liability

7.71 Clause 27 provides that:

- “(1) *An action in tort does not lie against the State, the Minister, the chief executive officer or any other person acting under this Act or purporting to act under this Act in relation to a determination or decision of the Minister, chief executive officer or other person made in good faith under or for the*

purposes of this Act, or any other action taken or omitted to be taken under this Act. [Committee emphasis]

- (2) *The protection given by subsection (1) applies in relation to an act even though the act could have been done whether or not this Act was in force at the material time.”*

7.72 One of the fundamental principles of law is that all persons are equal before the law, and should therefore be fully liable for their acts or omissions. A law should not confer immunity on a specified person or class of persons from legal proceedings or prosecution without adequate justification. It has been suggested by some Australian parliamentary committees that:

- a) the immunity should not extend to negligence; and
- b) the responsible authority should remain liable for damage caused by its negligence, or the negligence of its officers or employees (that is, whilst civil liability may not attach to an official, liability attaches instead to the State).⁶³

7.73 The current wording of clause 27 provides that those entities and persons listed will be protected from being sued in tort (for example, negligence which is a creature of tort) as long as they have acted or purported to act under the Act in relation to certain decisions and determinations made in good faith under or for the purpose of the Act. The current wording also protects the State from an action in tort.

7.74 The Explanatory Memorandum states that clause 27(1) provides “... *a standard clause providing for honest mistakes and intended to limit frivolous complaints and is consistent with provisions in the State Education Service Providers (Full Fee Overseas Students) Registration Act 1991.*”

7.75 In this respect the Committee noted that the provisions in the *State Education Service Providers (Full Fee Overseas Students) Registration Act 1991* are drafted differently. The Department advised the Committee of the difference in scope between section 45 of that Act and clause 27(1) of the Bill:⁶⁴

“Clause 27(1) of the Bill gives protection against an action that can be classed as an action in tort, whereas under section 45 of the Education Service Providers (Full Fee Overseas Students) Registration Act 1991, the immunity extends to any action.

⁶³ See discussion in the Committee’s earlier report: Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, Western Australia, June 25 2002, pp43 - 45.

⁶⁴ Letter dated August 18 2003 from Alan Marshall, Principal Policy Officer, Office of Higher Education, Department of Education Services to the Committee.

Actions that result in personal loss or injury are almost always tortious or a breach of contract. Contracts are not relevant here. Since it is entirely likely, for example, that an education provider would suffer financial loss if its provider's authorisation were revoked because of failure to meet the requisite standards, it is appropriate to ensure that the intention of the legislation is not undermined by allowing the provider to recover the loss by an action in tort when the revocation was made in accordance with the provisions of the Bill and in good faith. (Failure to comply becomes "self-punishing".)

The principal effect of clause 27(1) (as compared with section 45) is to deny immunity from the issue of a prerogative writ. [That is - a prerogative writ may still be issued despite clause 27(1)]. (The prerogative writ of mandamus, for example, can be issued by a court on the application of an aggrieved person to compel an official to do something required to be done under an Act, such as make a decision for the purposes of the Act.) The occasion to issue a prerogative writ rarely arises, but it was considered, as a matter of policy, that it should be open to the court to issue a prerogative writ in an appropriate case."

7.76 The Committee notes that the Queensland bill (Higher Education (General Provisions) Bill 2003 (Qld)):

- a) protects from "*civil liability for an act done, or omission made, honestly and without negligence under*" the Queensland bill. Such a phrase would not protect the Minister from negligent acts or omissions: clause 83(1) Higher Education (General Provisions) Bill 2003 (Qld); and
- b) in the event that the Queensland legislation operated to protect any of the listed persons from civil liability then liability attaches to the State instead: clause 83(2) Higher Education (General Provisions) Bill 2003 (Qld).

7.77 The Explanatory Memorandum further states that clause 27(2) "*... extends the protection given in subclause (1).*" The Department advised the Committee that clause 27(2) does not so much extend the protection as explain its limits:⁶⁵

"There is an argument to the effect that if a public official who takes a particular action for the purposes of a written law could have taken the same action as part of his or her administrative functions even if the written law had not been made, then immunity given by the written law does not apply in relation to the action even if it was done solely

⁶⁵ Ibid.

for the purposes of the written law. In other words, immunity is alleged to extend only to actions that could not have been taken in the absence of the written law. It is often hard to distinguish clearly between the powers and duties of a departmental employee to take actions administratively in accordance with the terms of employment and the powers and duties to take actions under or for the purposes of an Act administered by the department. Often the two overlap to some extent. Clause 27(2) was included to ensure that the immunity continues to apply in relation to any areas of overlap.”

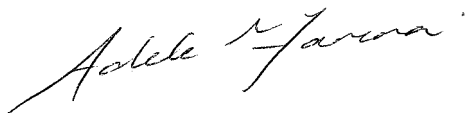
- 7.78 The Committee notes that whilst it may be essential for the operation of the legislation that persons acting under the Bill are to be assured of the protection of clause 27, the State is also protected from such liability.
- 7.79 The Committee observes that whether liability should be imposed on the State (for acts or omissions from which the State is protected by virtue of the current drafting of clause 27) may involve matters of policy and as such the Committee may be prevented from inquiring into this matter by standing order 230A(5). The Committee has drawn this matter to the attention of the Council (Recommendation 9).

Recommendation 9: The Committee recommends that during debate in the Council on the Higher Education Bill 2003 the responsible Minister provide an explanation as to why the State is protected from tortious liability under clause 27.

In this respect the Committee draws the scope of clause 27 to the attention of the Council and in so doing observes that the relevant Queensland legislation, the Higher Education (General Provisions) Bill 2003 (Qld):

- a) **does not relieve the Minister of liability for negligence; and**
- b) **provides that where the statutory protection does operate to protect others then civil liability attaches to the State instead.**

Recommendation 10: The Committee recommends that subject to recommendations 1 to 9 the Higher Education Bill 2003 be passed.



APPENDIX 1
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

- Structure 1:** *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.
- Structure 2:** *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.
- Structure 3:** *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.
- Structure 4:** *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.
- Structure 5:** *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.
- Structure 6:** *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 2
MINISTER'S LETTER DATED MAY 22 2003



Minister For Education and Training;
Sport and Recreation; Indigenous Affairs



Our Ref: 58912/39:004



Hon Adele Farina MLC
Chairman
Standing Committee on Uniform Legislation and General Purposes
Parliament House
PERTH WA 6000

Dear Chairman

Higher Education Bill 2003

The following information is provided in response to your letter of 7 May 2003.

- (a) The *National Protocols for Higher Education Approval Processes* were endorsed by the Ministerial Council for Education, Employment, Training and Youth Affairs (MCEETYA) at the 11th MCEETYA meeting, Sydney, March 2000. Attached is a package outlining the Australian Quality Assurance Framework and including the *National Protocols for Higher Education Approval Processes*.
- (b) See above.
- (c) The agreement envisaged the implementation of the *National Protocols* would occur as soon as possible and no later than June 2001. The legislation is intended to be implemented as soon as possible.
- (d) The Government regards the Western Australian legislation as an essential component of the Australian higher education quality assurance framework.
- (e) The legislation is required to effectively implement the *National Protocols for Higher Education Approval Processes* in Western Australia. The *National Protocols* have been developed to promote consistent criteria and standards across Australia in such matters as the recognition of new universities, the operation of overseas higher education institutions in Australia, and the accreditation of higher education awards to be offered by non-university providers and overseas universities. The main emphasis in the Bill is on

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accreditation, authorisation and quality assurance matters in the private non-university sector of higher education. The legislation does not apply directly to recognised Australian universities which are self-accrediting institutions established under State, Territory or Commonwealth Acts.

- (f) The Higher Education Bill 2003 effectively implements the *National Protocols for Higher Education Approval Processes* in Western Australia as required by national agreement. All other States and Territories and the Commonwealth have either approved or are in the process of developing similar legislation.
- (g) The State is a signatory to a multilateral intergovernmental agreement to implement the *National Protocols* in Western Australia as an essential component of the Australian higher education quality assurance framework.
- (h) The Western Australia Higher Education Bill 2003 once enacted can only be amended by the Western Australian Parliament. Proposed amendments would come before Parliament where necessary to improve the operations of the Act in Western Australia or in relation to agreed amendments to the *National Protocols*. Amendments to the *National Protocols* would require agreement by all States, Territories and the Commonwealth.

I hope that the above information adequately addresses the request from the Committee for information to facilitate preliminary research to the background of the Bill.

There is no restriction applied to the publication of any of the information supplied to the Committee.

If you have any questions or require further information please contact Ms Linley Hine on 9324 6819. If you wish to discuss substantive issues in relation to the Bill please contact Mr Alan Marshall, who is the Instructing Officer on the Bill, on 9324 6823.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alan Carpenter', with a stylized, wavy line extending from the end.

Alan Carpenter MLA
MINISTER FOR EDUCATION AND TRAINING

Att 22 MAY 2003

APPENDIX 3
COMMITTEE'S LETTER DATED JULY 10 2003 AND
MINISTER'S REPLY DATED JULY 23 2003



STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Hon Alan Carpenter MLA
Minister for Education and Training
12 Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

Dear Minister

Higher Education Bill 2003

The Committee has now been referred the above Bill for inquiry and report. Thank you for your letter to the Committee dated May 22 2003, however it did not answer some of the Committee's questions in its letter of May 7 2003.

Would you please provide the following information by July 23 2003:

- a) *a copy of the relevant intergovernmental agreement/memorandum of understanding:* You have provided the Committee with a copy of the National Protocols for Higher Education Approval Processes (Protocols). Please immediately provide a copy of the relevant agreement that lead to the Protocols – that is - the intergovernmental agreement/memorandum of understanding pursuant to which the Protocols were developed and endorsed. Intergovernmental agreements/memoranda of understanding usually address the implementation of, and amendments to, legislation. In this respect it is noted that page 1 of the Protocols refers to agreements in 1995 and 1997 and page 2 of the Protocols refers to “*Each State and Territory agreed to review its legislative and regulatory mechanism ...*”. In addition your letter refers to a “national agreement” and “multilateral intergovernmental agreement”.
- b) If the intergovernmental agreement/memorandum of understanding is not available, provide a copy of the most recent draft with a statement as to the status of that draft.
- ...
- e) *the advantages and disadvantages to the State as a participant in the scheme:* Your letter touches on advantages but what are the disadvantages?

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- g) *an explanation as to whether and by what mechanism the State can opt out of the scheme.* This question has not been answered. Please do so. It may require an examination of the intergovernmental agreement/memorandum of understanding.
- h) *the mechanisms by which the bill, once enacted, can be amended. That is, whether the Commonwealth has power to amend the bill of its own volition, or whether the agreement of the State, or a majority of States and Territories, is required.* This question has not been answered. Please do so. It may require an examination of the intergovernmental agreement/memorandum of understanding.

If you have any questions, require further information or have difficulties with promptly supplying the requested material, please contact me on 9222 7474.

Yours sincerely



Mia Betjeman
Clerk Assistant, Legislative Council

July 10 2003

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Minister For Education and Training;
Sport and Recreation; Indigenous Affairs



Our Ref: 60497/ACM:acm:39:004

Ms M Betjeman
Clerk Assistant
Standing Committee on Uniform Legislation
and General Purposes
Parliament House
PERTH WA 6000

Dear Ms Betjeman

HIGHER EDUCATION BILL 2003

The following information is provided in response to your letter of 10 July 2003 and in addition to the responses to the Committee contained in my letter of 22 May 2003.

- (a) The *National Protocols for Higher Education Approval Processes* were endorsed by the Ministerial Council for Education, Employment, Training and Youth Affairs (MCEETYA) at the 11th MCEETYA meeting, Sydney, March 2000. Attached is an extract from the Minutes - item 1.5.1 (c), which refers to the endorsement of the *National Protocols*. There is no separate agreement or memorandum of understanding. Copies of the endorsed *National Protocols for Higher Education Approval Processes* have been forwarded to the Committee, which outline the intent of the nationally agreed *Protocols* including the approach taken to implementing the *National Protocols*.

The reference to a MCEETYA agreement in 1995 refers to a previous undertaking to develop one element of the future national agreement, which related to procedures where organisations wished to obtain accreditation of higher education courses in two or more States or Territories. This agreement was a forerunner of the present *National Protocols*. The reference to 1997 is to the agreement by the then Higher Education Taskforce to commission the project, which resulted in the *National Protocols for Higher Education Approval Processes*, which were endorsed by MCEETYA in March 2000. The *National Protocols* were endorsed by all States and Territories and the Commonwealth. The endorsed *National Protocols* envisaged that each State and Territory would review its legislative and regulatory mechanisms to ensure they could effectively implement the *National Protocols* in their State or Territory. The intent was that

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the implementation of the *Protocols* was to occur by no later than 30 June 2001, however this date proved to be optimistic. While initially the legislative changes were only seen to involve the States and Territories, subsequently the Commonwealth has moved to implement the National Protocols in external territories. Outlined below is the State/Territory and Commonwealth progress in implementing the *National Protocols*.

ACT The *Tertiary Accreditation and Registration Bill 2003* was introduced on 3 April 2003.

NSW The *Higher Education Act 2001* commenced on 1 July 2003.

QLD The *Higher Education (General Provisions) Bill 2003* was introduced into the Queensland Parliament on 28 May 2003.

SA The *Training and Skills Development Act 2003* has been passed and is expected to commence in July 2003.

TAS The *Universities Registration Act 1995* was amended in June 2001 and is consistent with the *National Protocols*.

VIC Amendments to the *Tertiary Education Act 1993* were proclaimed in June 2002.

NT Consultation on amendments to Section 73A of the *Education Act* have commenced.

CW The *Higher Education Legislation Amendment Act (no.3)* was enacted on 2 December 2002.

- (b) See above. There is no separate national agreement or memorandum of understanding. The endorsed *National Protocols for Higher Education Approval Processes* outline the detail and intent of the MCEETYA agreement in relation to the *National Protocols*.

.....

- (e) In point (e) of my response on 22 May 2003 I outlined the advantages to the State of the participation in the *National Protocols*. There are no apparent disadvantages to the State in promoting consistent criteria and standards across Australia in relation to higher education quality assurance.

.....

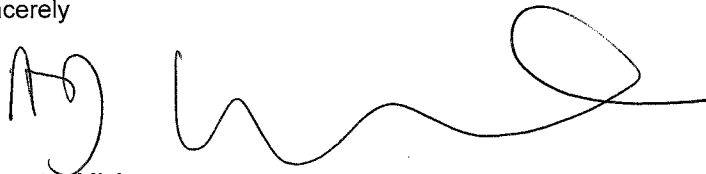
- (g) Western Australia can decide not to abide by the *National Protocols* as envisaged by MCEETYA and Parliament can introduce legislation in this area on whatever basis it chooses or not introduce the required legislation.

- (h) As indicated in my letter of 22 May 2003, the Western Australia Higher Education Bill 2003 once enacted can only be amended by the Western Australian Parliament. Proposed amendments could come before Parliament where necessary to improve the operations of the Act in Western Australia. Neither the Commonwealth nor MCEETYA has the power to amend the proposed Western Australian legislation of its own volition. Amendments to the *National Protocols* might be proposed by MCEETYA at some future time which could have implications for the Western Australian legislation. However, whether the proposed legislative changes are made or not is a matter for the Western Australian Parliament.

I hope that the above adequately addresses the request for additional information to facilitate preliminary research on the Bill.

If you have any questions or require further information please contact Mr Alan Marshall who is the Instructing Officer on the Bill on 9324 6823.

Yours sincerely

A handwritten signature in black ink, appearing to be 'AG' followed by a long, wavy line that ends in a large loop.

Alan Carpenter MLA
MINISTER FOR EDUCATION AND TRAINING

23 JUL 2003

APPENDIX 4
COMMITTEE'S LETTER DATED AUGUST 8 2003 AND
THE DEPARTMENT'S REPLY DATED AUGUST 18 2003



STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

By Facsimile: 9321 6826

Mr Alan Marshall
Principal Policy Officer
Office of Higher Education
Department of Education Services
PO Box 7533 Cloisters Square
PERTH WA 6850

Dear Mr Marshall

Higher Education Bill 2003

I refer to the Minister's letter to the Committee dated July 25 2003 in which he referred the Committee to you in respect of any further queries.

The Committee seeks your assistance with a number of questions in relation to the Bill. The Committee anticipates that you may need to liaise with Parliamentary Counsel in respect of some of these matters and they have been copied them with this letter.

As the Committee is under tight reporting constraints it would be appreciated if you could provide a written reply to the Committee's questions as soon as possible. Thank you for your assistance.

1. **Funding.** The Committee notes the Minister's advice that there is no intergovernmental agreement that restricts or addresses the manner in which and degree to which the State can amend the Bill. However are there any *fiscal* restrictions? For example, is participation in this scheme tied to or will it affect federal government funding? Are state powers being diluted by making state education subject to the standards set by a federal body?
2. **Clause 3 - definition of "education Minister".** Clause 10(3)(a), when read with clause 3, provides that the WA Minister may have regard to any national policies and agreements about the governance and other characteristics of Australian universities made by the WA Minister with the Commonwealth Minister, the ACT Minister or the NT Minister. The Committee notes that there is no reference to a minister of another state - that is - "*a Minister of State for a State*".

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- a) Is it intended to enable the WA Minister to have regard to an agreement that may be made by the WA Minister with the Minister of another State?

- b) If so, then should the definition of 'education Minister' in clause 3 be amended to read:

" "education Minister" means the Minister of State for a State, the Commonwealth, the Australian Capital Territory or the Northern Territory who is principally responsible for the administration of the law relating to higher education in the respective jurisdiction;" (amendments underlined)

OR

"education Minister means the Minister in each Australian jurisdiction that is recognised as principally responsible for the administration of the law relating to higher education in the respective jurisdiction;" (amendments underlined)

Please comment.

3. **Clause 3 - definition of "higher education award"**. The definition incorporates by reference the course descriptions of the Australian Qualifications Framework Advisory Board (AQFAB).
 - a) How readily available to the public are course descriptions published by AQFAB?
 - b) What involvement does the State have in the development of course descriptions?
4. **Clause 3 – definition of "National Protocols"**. Reference is made to the National Protocols for Higher Education Approval Processes approved by the MCEETYA on 31 March 2000, "*as amended from time to time*". When, the National Protocols change, the requirements that are imposed by means of clauses 10(g), 14(1)(b) and 18(1)(b) are also changed.
 - a) Please advise of the amendment process for the National Protocols.
 - b) What involvement does the State have in amendment of the National Protocols? Are decisions made by unanimous/majority resolution?
 - c) If the National Protocols are altered and WA does not agree with the change is it under any obligation to continue to reflect the change in its legislation? (WA could amend its legislation to fix the date of the version of the National Protocols in clause 3).
 - d) If WA elects to resile from part (or all) of the Protocols are there any ramifications? For example, is there any effect on federal funding? Is there an effect on the perception of standards and the quality of WA education compared to other participating states?
5. **Clause 6(2)**. This clause provides for an exemption for "*a prescribed person or organisation*" from the use of the title "university". The Committee notes that the National Protocols state:

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“Protection of the use of the title should not extend to those bodies where the context makes it clear that there is no connection with an existing university (eg: University Avenue Newsagent Pty Ltd)”: Protocol 1.11.

and

“Protection of title legislation should provide for the responsible Minister to exempt a body from the requirements of the legislation when it is clear that the purpose of the body could not be construed as providing higher education”: Protocol 1.12.

- a) Why is the power of exemption in clause 6(2) not restricted to such circumstances?

6. *Clause 21 - Remuneration of higher education advisory committee members.*

- a) Clause 21 could be interpreted to mean that if the person is subject to the *Salaries and Allowances Act 1975* a ceiling may apply (clause 21(2)), however if the person is not subject to *Salaries and Allowances Act 1975* then no ceiling applies? Please comment.
- b) Why is there no requirement for the Minister to consult or obtain the recommendation of with the Minister for Public Sector Management in relation to the appointment?

7. *Clause 26 - Disclosure of information.*

- a) To what type of information is the secrecy provision addressed? Why is the information sought to be protected?

The expressly stated exceptions to disclosure in clause 26(2) involve consideration of the powers and privileges of a House of Parliament and its committees. The Committee notes that clause 26(2)(e) does not refer to a committee of a House of Parliament. Restating the law (arguably in part - clause 26(2)(e)) may raise the issue of the exclusion of other parliamentary powers and privileges.

- b) Why is the law restated at clause 26(2)(e)?
- c) Why does clause 26(2)(e) not refer to a parliamentary committee?
- d) Is it intended that clause 26(1) apply to a witness before a parliamentary committee to prevent questions being asked, or answers being compelled, by a parliamentary committee of a person who has information called for by such questions where that information is obtained in the exercise of their functions under that Act?

- 8. ***Clause 27 - Immunity from tortious liability.*** The Explanatory Memorandum states that clause 27(1) provides “*a standard clause providing for honest mistakes and intended to limit frivolous complaints and is consistent with provisions in the State Education Service Providers (Full Fee Overseas Students) Registration Act 1991*”

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- a) The provisions in the *State Education Service Providers (Full Fee Overseas Students) Registration Act 1991* are drafted differently. Is there any difference in scope between section 45 of that Act and clause 27(1) of the Bill?
 - b) The Explanatory Memorandum further states that clause 27(2) “*extends the protection given in subclause (1).*” Why is the protection extended?
9. **Clause 31 – Regulations.** Clause 31 empowers the Governor to make regulations under the Bill. Clause 31(2)(e) states that “*the regulations may provide for .. the fees payable for services provided under this Act*” (emphasis added). Where an Act confers power to make subsidiary legislation to *make provision for*, or *provide for* certain matters, those matters have been sub-delegated to another person or body.

The current wording of clause 31(2)(e) may enable the determination of regulatory fees imposed under the Bill to be sub-delegated in the relevant regulations to another body. If this was to occur parliamentary scrutiny of the fees would be avoided as the decisions of the other body are not defined as ‘regulations’. This situation has already arisen in a number of Acts, for example: sections 99(1) and 207(2) of the *School Education Act 1999* and regulations 63(2), 102(1) and 149(1) of the *School Education Regulations 2000*.

- a) Why does clause 31(2) refer to “provide for” insert of “prescribe”?
- b) Is it intended to enable the determination of regulatory fees imposed under the Bill to be sub-delegated in the relevant regulations to another body?
- c) Clause 31(2) of the Bill could be amended to delete “provide for” and insert instead “prescribe”. Please comment.

Thank you for your assistance. If you have any questions, require further information or have difficulties with promptly supplying the requested material, please contact Mia Betjeman, Clerk Assistant on 9222 7474.

Yours sincerely



Hon Adele Farina MLC
Chairman

August 8 2003

Copies to: Minister for Education and Training; and Parliamentary Counsel’s Office.

Please note that this document (including any attachments) is privileged. You should only use, disclose or copy the material if you are authorised by the Committee to do so. Please contact Committee staff if you have any queries.

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DEPARTMENT OF EDUCATION SERVICES
(ABN 86 936 328 729)

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Office of Education Policy and Coordination
Office of Higher Education
Office of Non-Government and International Education

18 August 2003

Hon Adele Farina MLC
Chairman
Standing Committee on Uniform Legislation and General Purposes
Parliament House
PERTH WA 6000

Dear Chairman

Higher Education Bill 2003

The following information is provided in response to your letter of 8 August 2003.

1. **Funding**

There are no fiscal restrictions associated with implementing the *National Protocols for Higher Education Approval Processes* in Western Australia. The *National Protocols* represent an agreement to work towards national quality standards and there is no funding implication or agreement associated with their implementation.

The development of the *National Protocols* was an initiative of the States and Territories as an essential move, in part, to protect and promote quality in Australian higher education in relation to a fast developing national and international export industry in education services. The *National Protocols* were not imposed on the States and Territories by the Commonwealth with associated State funding implications.

The export of Australian education services has recently been estimated at \$5 billion with huge potential for growth. This industry rests predominantly on the reputation and quality of Australian higher education and Western Australia along with all other States/Territories and the Commonwealth have a major interest in promoting standards in higher education. The legislation is aimed *inter alia* to strengthen Western Australia's capacity to address the problem of higher education 'degree mills' and the fraudulent activities of some organisations operating in and out of Western Australia and claiming to be Australian Universities or accredited Australian higher education institutions. These fraudulent organisations bring Australian higher education into disrepute and

provide worthless qualifications to students, at considerable cost. Promoting national standards is essential. If Western Australia did not implement appropriate legislation, doubtful and fraudulent operators would be able to move to Western Australia from other States and operate with relative impunity to the detriment of Western Australia's and Australia's reputation as a deliverer of quality higher education.

2. *Clause 3 - definition of "education Minister"*

The phrase "a Minister of State for a State" was included in an earlier draft of the Bill and appears to have been inadvertently omitted. As you have rightly noted, it is intended to enable the WA Minister to have regard to an agreement that may be made by the WA Minister with the Minister of another State. In essence the first definition would be appropriate.

3. *Clause 3 – definition of "higher education award"*

- (a) The course descriptions published by the Australian Qualifications Framework Advisory Board (AQFAB) are readily available in printed form or on the AQFAB website. The AQFAB website includes the register of all organisations and associated courses of study accredited in each State and Territory. The AQFAB website is a key location for organisations and individuals seeking advice on whether an organisation claiming government accreditation is appropriately accredited to offer a specific course of study.
- (b) The State has input directly to AQFAB by way of contribution to the development of course descriptions and policy matters generally. While membership of the AQFAB and associated working groups vary, WA is currently represented on the AQFAB working group dealing with providing advice to AQFAB and MCEETYA on the introduction of an Associate Degree on the Australian Qualifications Framework.

4. *Clause 3 – definition of "National Protocols"*

- (a) The *National Protocols* are a fairly broad and general statement of intent in terms of the key elements of a national quality assurance framework. Policy practice and interpretation associated with the *National Protocols* is ongoing and overseen by the Joint Committee of Higher Education (JCHE) which reports to MCEETYA and on which all States/Territories and the Commonwealth are represented. Formal amendment of the *National Protocols* is likely to be infrequent but it would involve advice from the JCHE and acceptance by all States/Territories and the Commonwealth at MCEETYA.
- (b) As above, WA has a key role in all matters associated with the *National Protocols*. A decision on amending the *National Protocols* must be agreed unanimously.
- (c) If WA does not agree then an amendment would not be made. Any decision on an amendment to WA legislation and the nature of the amendment is a matter for WA.

- (d) As indicated previously, if WA resiles from part or all of the *National Protocols* there are no funding implications, however the effect on the national quality assurance framework and on the reputation of Western Australian and Australian higher education would be significant. WA would have no controls over the developing private higher education sector and dubious and fraudulent education providers could operate in and out of WA with relative impunity. On the other hand, legitimate private providers could not be recognised nationally as appropriately accredited organisations and students would not have the benefits which accrue to an appropriately recognised qualification.

5. *Clause 6(2)*

Clause 6 of the Bill gives effect to the spirit of the Protocols, but is not drafted in exactly the same way as the Protocols suggest for the reasons mentioned below.

For the purposes of the Bill, there are 3 groups of persons or bodies who might use the word "university" in the title of the person or body: recognised universities, persons and bodies who are not education institutions, and education institutions that are not recognised universities.

Clause 6(1) of the Bill makes clear and final provision for the first 2 groups and to that extent gives full effect to the intent of Protocols 1.11 and 1.12. The use of the title "university" by an education institution is reserved for the use of recognised universities within the meaning of the Bill. The purpose of a person or body that is not an education institution could never be "construed as providing higher education" as mentioned by Protocol 1.12, and such a person or body is completely exempt from the prohibition under clause 6(1). There is no need to exempt them by regulation.

The remaining group of persons and bodies consists of those education institutions that are not recognised universities. Only a member of this group needs exemption by regulation to be able to use the title "university". In Protocol 1.12, The University of the Third Age (U3A) is given as an example of a body whose purpose could not be construed as providing higher education. However, despite Protocol 1.12, it is arguable that U3A could indeed be construed, by overseas students and anyone else who is not already familiar with its operation and purpose, as providing some form of higher education: many of the subjects offered by the organisation are taught and discussed at a tertiary and even post-first-degree level, and the teaching and discussion groups are often led by academics or retired academics.

On that basis, the discretion in the Bill to exempt by regulation needs to be unfettered, to permit an administrative decision to be made in a particular case as to whether a person or body that is an education institution should or should not be permitted to use the title "university". Because the Protocols clearly intend that U3A should be exempt, the organisation is for convenience exempted by the Bill (instead of by regulation), as no other organisations are intended to be prescribed at present. The unfettered discretion permits the appropriate resolution of any unforeseen anomaly arising from the prohibition on the use of the title "university". It can be assumed that the discretion will be exercised, in the context of the entire Bill, in a way that will not

defeat the evident purpose of the Bill or breach the national agreements to which the Bill gives effect.

6. *Clause 21 – Remuneration of higher education advisory committee members*

- (a) There will be a number of higher education advisory committees mostly meeting for one or more sessions ultimately to advise the Minister on the accreditation of courses and the registration of organisations. In the main these will be comprised of academic staff employed at universities. A standard set of allowances and procedures for sitting fees per session, such as under the *Salaries and Allowances Act 1975*, is appropriate in most cases. It was considered however that the Minister may need some flexibility in setting allowances such as for Chairs of prestigious panels such as an ex Vice-Chancellor to Chair a State panel to investigate an application to establish or be recognised as a university in Western Australia.
- (b) An alternate approach to that above could have been to provide that the 'remuneration of members of higher education advisory committees be determined by the Minister on the recommendation of the Minister for Public Sector Management'. As indicated, there will be many members of committees sitting for one or two sessions only and a provision for such specific consultation seemed in the main to be unnecessary.

7. *Clause 26 – Disclosure of information*

- (a) Applications for a section 10 determination, a provider's authorisation or the accreditation of a course will require the applicant to provide particulars in relation to the applicant of all the matters listed in clause 10(1), 14(1) and (3), and matters prescribed under 17(2)(b) respectively. Much of the information supplied will consist of details about the applicant's financial and other resources and other matters of a commercial-in-confidence nature, as well as personal details of the applicant's staff and students. As a matter of policy, information that is not required to be registered should not be available to anyone except the relevant decision makers or their interstate counterparts, except to the extent provided by clause 26(2). The clause is consistent with section 40 of the *Education Service Providers (Full Fee Overseas Students) Registration Act 1991*.
- (b) As a general principle, an Act of the Parliament that has a provision that is inconsistent with a provision in an earlier Act may be construed as overriding the earlier Act. As a matter of policy, the operation of the *Consumer Affairs Act 1971* is explicitly preserved to protect students at risk of exploitation by improperly run education institutions. However, it is also a principle of statutory construction that the express mention of a particular thing implies the exclusion of anything not expressly mentioned (the *expressio unius est exclusio alterius* rule). Any restatement of a law in clause 26(2) was included to avoid the application of this principle to exclude the law.

(c) and (d)

Clause 26(2)(e) provides, amongst other things, that information acquired under or for the purposes of the Act may be disclosed for the purpose of complying with “an order or resolution of a House of the Parliament, that requires information to be given to a House of the Parliament”. Parliamentary committees, whether standing or ad hoc, are established, and their terms of reference are given, by orders or resolutions of a House of the Parliament. Depending on the particular terms of reference of a committee, compliance with the order or resolution of the House of the Parliament that established the committee may require the communication to the committee of information acquired under or for the purposes of the Act. To that extent the clause does not apply to a witness before the parliamentary committee. The clause is only intended to exclude any disclosure that is not specifically authorised by an order or resolution of the Parliament.

8. *Clause 27 – Immunity from tortious liability*

- (a) Clause 27(1) of the Bill gives protection against an action that can be classed as an action in tort, whereas under section 45 of the *Education Service Providers (Full Fee Overseas Students) Registration Act 1991*, the immunity extends to any action.

Actions that result in personal loss or injury are almost always tortious or a breach of contract. Contracts are not relevant here. Since it is entirely likely, for example, that an education provider would suffer financial loss if its provider's authorisation were revoked because of failure to meet the requisite standards, it is appropriate to ensure that the intention of the legislation is not undermined by allowing the provider to recover the loss by an action in tort when the revocation was made in accordance with the provisions of the Bill and in good faith. (Failure to comply becomes “self-punishing”.)

The principal effect of clause 27(1) (as compared with section 45) is to deny immunity from the issue of a prerogative writ. (The prerogative writ of *mandamus*, for example, can be issued by a court on the application of an aggrieved person to compel an official to do something required to be done under an Act, such as make a decision for the purposes of the Act.) The occasion to issue a prerogative writ rarely arises, but it was considered, as a matter of policy, that it should be open to the court to issue a prerogative writ in an appropriate case.

- (b) Clause 27(2) does not so much extend the protection as explain its limits. There is an argument to the effect that if a public official who takes a particular action for the purposes of a written law could have taken the same action as part of his or her administrative functions even if the written law had not been made, then immunity given by the written law does not apply in relation to the action even if it was done solely for the purposes of the written law. In other words, immunity is alleged to extend only to actions that could not have been taken in the absence of the written law. It is often hard to distinguish clearly between the powers and duties of a departmental employee to take actions administratively in accordance

with the terms of employment and the powers and duties to take actions under or for the purposes of an Act administered by the department. Often the two overlap to some extent. Clause 27(2) was included to ensure that the immunity continues to apply in relation to any areas of overlap.

9. *Clause 31 – Regulations*

- (a) In this case “provide for” was used because it was syntactically appropriate for expressing the various regulation-making powers without limiting the powers in unintended ways. The choice of words is made by the parliamentary drafter and depends to a large extent on what the drafter considers is the best way of expressing the various regulation-making powers to be conferred. For example, in section 94(2) of the *Animal Welfare Act 2002*, the 5 specific regulation-making powers listed begin with the words [may] “provide that”, “exempt”, “provide for”, “adopt” and “prescribe” respectively.

In clause 31(2)(e) of the Bill, the use of “provide for” is particularly appropriate to ensure the application of section 45 of the *Interpretation Act 1984* to the provision. Section 45(1) says “Where provision is made by subsidiary legislation in respect of fees or charges, the subsidiary legislation may provide for (my emphasis) all or any of” a number of other relevant matters listed in section 45(1). Section 45 is intended to apply to paragraph 31(2)(e), and the paragraph is not intended to be limited to prescribing the fees themselves.

- (b) A sub-delegation is not intended, and is beyond the power conferred by the Bill. It is an established rule of law that a delegate of the Parliament cannot delegate a legislative power to a third party without the express authority of the Parliament. (The rule is often expressed as “*delegatus non potest delegare*”. For further information see *Delegated Legislation in Australia* by Pearce and Argument, 2nd edition, Perth 1999, at page 257 and ff.)

As a result of the rule, providing in regulations under an Act for a third party, such as the Minister, to fix the amount of a fee or to do anything else that is legislative in character is beyond the power given to the Governor except where the Act explicitly permits the Governor to make the sub-delegation. Since the Bill does not expressly permit the Governor to delegate any regulation-making powers to a third party, the amount of the fee must be and will be prescribed in the regulations.

- (c) If the clause were amended as suggested, some of the regulation-making powers would need to be extensively redrafted to have the intended effect. The powers given by paragraphs (a), (b) and (e) would be considerably limited in scope if introduced with “prescribe” instead of “provide for”. Paragraph (e) has already been discussed. As another example, the power given by paragraph (a) as it is, when read with the “necessary or convenient power” in clause 31(1), includes a power, amongst other things, to prescribe the form in which records must be kept and the length of time for which they must be retained. If “prescribe” were used instead of “provide for”, construction of the paragraph could be limited to prescribing only the nature of the records to be kept. The syntax of paragraph (f)

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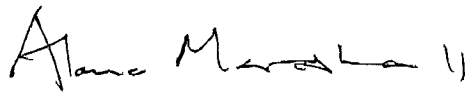
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does not lend itself to the insertion of “prescribe” instead of “provide for”, and the paragraph would have to be reworked. Paragraphs (c), (d) and (g) would have the intended effect in either case. I recommend leaving clause 31(2) in its current form, which gives effect to government policy without need for revision.

I hope that the above information and advice adequately addresses the issues you have raised.

Yours sincerely



ALAN MARSHALL
PRINCIPAL POLICY OFFICER
OFFICE OF HIGHER EDUCATION

cc Minister for Education and Training
Lindsay King, Assistant Parliamentary Counsel, Parliamentary Counsel's Office

APPENDIX 5
EXTRACT OF NATIONAL PROTOCOLS

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Preface

The following National Protocols for Higher Education Approval Processes were recommended by the Joint Committee on Higher Education and approved by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) on 31 March 2000.

These Protocols are a key element of a new national quality assurance framework for Australian higher education.

They have been designed to ensure consistent criteria and standards across Australia in such matters as the recognition of new universities, the operation of overseas higher education institutions in Australia, and the accreditation of higher education courses to be offered by non self-accrediting providers.

The Australian States and mainland Territories, which have responsibility for managing higher education accreditation and approval processes, have agreed to their adoption.

Protocol 1
Criteria and processes for recognition of universities

Protocol 2
Overseas higher education institutions seeking to operate in Australia

Protocol 3
The accreditation of higher education courses to be offered by non-self-accrediting provider

Protocol 4
Delivery arrangements involving other organisations

Protocol 5
Endorsement of courses for overseas students

Introduction

Under arrangements for sharing responsibility for higher education between the Commonwealth and the States, responsibility for exercising control over the use of the term 'university' and for protecting the capacity to confer higher education awards such as 'bachelor degree' rests with the States and Territories.

Most States and Territories have legislative provision governing the recognition of non self-accrediting institutions that wish to offer courses leading to higher education awards, the approval of courses offered by non self-accrediting institutions, and mechanisms to approve the establishment and operation of institutions wishing to operate as universities within their jurisdiction. All States and Territories, excluding the external Territories, protect the use of the term 'university' in legislation regulating the use of business names.

While there are many similarities in how States and Territories manage the recognition of universities and the accreditation of courses offered by non self-accrediting institutions, there has been no nationally agreed protocol of common principles underpinning the management of these functions.

In 1995, MCEETYA agreed to implement a common protocol for the concurrent accreditation of higher education courses to be offered simultaneously in two or more States or Territories. This protocol was elaborated in operational guidelines for the use of State and Territory officials in 1999, and has been used successfully since its adoption to process a number of applications.

In 1997, the then Higher Education Taskforce agreed to commission a project to develop common principles and a cooperative approach to the quality assurance of all higher education accreditation processes among relevant jurisdictions. The project examined accreditation and recognition processes for universities and for higher education courses offered by non self-accrediting institutions.

The national Protocols recommended in this statement are primarily drawn from an analysis of the results of that project, and meet one of its recommendations: 'to develop national Protocols, where appropriate'. The introduction of nationally agreed Protocols for the recognition of universities is seen as particularly desirable to protect the standing of Australian universities nationally and internationally.

Endorsement of Protocols

In March 2000 the Joint Committee on Higher Education, comprising State, Territory and Commonwealth officials responsible for higher education, recommended to MCEETYA that it endorse the common principles, criteria and processes for quality assurance of higher education accreditation arrangements which are outlined below. The Protocols endorsed by MCEETYA deal with the following matters:

- ☒ criteria and processes for recognition of Australian universities;
- ☒ operation of overseas higher education institutions in Australia;
- ☒ the accreditation of higher education courses to be offered by non self-accrediting institutions;
- ☒ delivery arrangements for higher education institutions involving other organisations; and
- ☒ endorsement of courses for overseas students.

Mechanisms to ensure adherence to national quality assurance arrangements

Each State and Territory agreed to review its legislative and regulatory mechanisms to ensure they had adequate authority to monitor, require improvements, or withdraw accreditation or approval where minimum quality standards are not met and necessary remedial action is not taken by an institution following critical audit reports. It was agreed that this authority should be available to the host State or Territory in the case of institutions with interstate campuses, and that the processes may differ significantly for self-accrediting and non self-accrediting institutions.

Timeframe for implementation

Implementation of the Protocols was to occur as soon as possible, but by no later than 30 June 2001.

Definitions

Jurisdictions:

All Australian States and Territories which are signatories to the Protocol.

Accreditation:

A process of assessment and review which enables a higher education course or institution to be recognised or certified as meeting appropriate standards.

Part One: Recognition of Australian universities

Background

- 1.1 Until recently, it was taken for granted that a university in Australia was an institution established by specific legislation. All States and mainland Territories of Australia have legislative or procedural arrangements which effectively require an institution wishing to operate as a university in the State/Territory to be established by the mechanism of a legislative instrument.
- 1.2 Recently some organisations have sought to use the title 'university' in a business name without seeking such formal authorisation.
- 1.3 To protect the standing of Australian universities nationally and internationally, MCEETYA agreed to protect the title 'university' in two ways:
 - ☒ by protection of the title 'university' in business names and associations legislation, and in Commonwealth Corporations Law; and
 - ☒ by establishment in all Australian jurisdictions of a legislative framework specifying consistent criteria and procedures by which an institution/organisation may use the title 'university'.
- 1.4 To establish a common standard and processes for the recognition of universities across Australia, MCEETYA agreed to:
 - ☒ adopt the common definition of an Australian university shown in 1.13 below;
 - ☒ adopt the common criteria for the assessment of an organisation's application for university status listed in 1.14 and 1.15; and
 - ☒ core elements of the process for evaluating such claims, listed in 1.16-1.22.

Protocol 1 – Criteria and processes for recognition of universities

Business names and related legislation

- 1.5 All Australian jurisdictions should provide for the protection of the title ‘university’ under the procedures established for the protection of names in business names and associations legislation; the Commonwealth should adopt appropriate measures to protect the title in Commonwealth Corporations Law.
- 1.6 Jurisdictions should provide for consultation between the authority responsible for approving business names and the relevant higher education authority (Minister or Director-General) before a decision is made to allow the use of the term ‘university’ in a business or corporation name.
- 1.7 The relevant higher education authority should undertake an investigation of the education credentials of an applicant before providing advice on the use of the term ‘university’ in a business or corporation name.

University recognition legislation

- 1.8 Establishment or recognition as a university in Australia should only occur by the mechanism of a legislative instrument, either by a separate Act, or by a Regulation or order made under an Act. The enactment should be subject to scrutiny by the relevant Australian Parliament.
- 1.9 There should be a legislative framework, in the form of either specific legislation or Ministerial Guidelines, to protect the title ‘university’ and establish a process and criteria by which it becomes possible to use the title ‘university’ in the relevant jurisdiction.

- 1.10 The scope of the protection of title should extend to prohibition on:
- ☒ use of the title without authorisation in Australia;
 - ☒ operating or purporting to operate as a university; and
 - ☒ advertising as a university, offering a course as a university, or issuing an award as a university.
- 1.11 Prohibition of the use of the title should not extend to those bodies where the context makes it clear that there is no connection with an existing university (e.g. University Avenue Newsagent Pty Ltd).
- 1.12 Protection of title legislation should provide for the responsible Minister to exempt a body from the requirements of the legislation when it is clear that the purpose of the body could not be construed as providing higher education – as in the case of the University of the Third Age.

Definition

- 1.13 An Australian university is an institution which meets nationally agreed criteria and is established or recognised as a university under State, Territory or Commonwealth legislation.

Criteria

- 1.14 An Australian university will demonstrate the following features:
- ☒ authorisation by law to award higher education qualifications across a range of fields and to set standards for those qualifications which are equivalent to Australian and international standards;
 - ☒ teaching and learning that engage with advanced knowledge and inquiry;
 - ☒ a culture of sustained scholarship extending from that which informs inquiry and basic teaching and learning, to the creation of new knowledge through research, and original creative endeavour;

- ☑ commitment of teachers, researchers, course designers and assessors to free inquiry and the systematic advancement of knowledge;
- ☑ governance, procedural rules, organisation, admission policies, financial arrangements and quality assurance processes, which are underpinned by the values and goals outlined above, and which are sufficient to ensure the integrity of the institution's academic programmes; and
- ☑ sufficient financial and other resources to enable the institution's programme to be delivered and sustained into the future.

1.15 These broad criteria should be supported by more elaborated criteria.

Process for assessing applications

1.16 The process by which an institution is established or recognised as a university should have the following features:

- ☑ the process should be transparent and equitable. Applications to establish 'public' and 'private' universities should be treated equally;
- ☑ a fee for assessment of an application, based on partial cost recovery, should be charged. National consistency in fee levels is desirable;
- ☑ the application should be subject to review by an independent, expert panel. The panel's composition should include a majority of senior academic administrators with experience in the Australian university sector, including significant representation from outside the jurisdiction in which the application is made;
- ☑ the review process should involve evaluation against agreed national criteria, on the basis of written material and discussion with proponents of the institution, including academic staff and students, and must include an inspection of facilities where they exist. An evaluation of the financial capacity of the institution to deliver its proposed programmes, and to sustain them appropriately, is required; and

- ☒ the review process should be sufficiently open to provide opportunity for public comment on the proposal before the review report is final.
- 1.17 The panel should report on whether an application should be approved together with any conditions it believes should be established, to a legally authorised decision-maker (Minister, Director-General, relevant Higher Education Board).
- 1.18 In establishing or recognising an institution, jurisdictions should specify:
- ☒ that the responsible Minister or the authorised delegate of the Minister will have the power to require information of the institution; and
 - ☒ that the responsible Minister may set conditions on the institution, such as willingness to participate in periodic review processes, including national quality assurance processes.

Proposed new universities

- 1.19 For proposed new universities where the assessment is based on a plan, rather than an existing institution, approval may be given to operate on a provisional basis for a period of up to five years from commencement of operation, where the review panel and the responsible accrediting authority believe that there is a high probability of the criteria being fully satisfied.
- 1.20 The responsible accrediting authority may establish conditions for the operation of the university during this period. These conditions may include a period of sponsorship or mentoring by an established institution.
- 1.21 Continued operation after the initial five-year period should be conditional on the university meeting the criteria in full. Provision for the welfare of students if the institution is not approved to continue as a university at the completion of this period should be guaranteed.

- 1.22 Each State and Territory should establish significant financial penalties for breaching the legislation or guidelines which protect the title 'university'. These penalties might be administered via university recognition legislation and/or fair trading legislation. National consistency in the level of penalties is desirable.

The Register

- 1.23 An institution which meets agreed national criteria, and is authorised under legislation, will be listed on the Australian Qualifications Framework (AQF) *Register of Bodies with Authority to Issue Qualifications*.

Part Two: Operation of overseas higher education institutions in Australia

Background

- 2.1 At the time of endorsement of the Protocols only three States had specific arrangements relating to the operation of overseas higher education institutions in Australia, and the approach was different in each case. However, in all cases the accreditation status of an overseas provider in the country of origin had to be established, and the accrediting authority concerned had to be a recognised authority. The level of oversight of local delivery arrangements, and of actual courses, varied.
- 2.2 In the case of overseas providers, the community has an interest in being assured of:
- ☒ the standing of the provider in its own system;
 - ☒ the comparability of qualifications and learning outcomes with those offered in Australia;
 - ☒ the adequacy of delivery arrangements, including arrangements for oversight of course delivery by the overseas institution;
 - ☒ the legitimacy of any local agent or provider delivering on behalf of the overseas institution; and
 - ☒ the adequacy of safeguards for students if the provider ceased to operate in Australia.

Protocol 2 – Overseas higher education institutions seeking to operate in Australia

Definition

- 2.3 An overseas higher education institution refers to a university or other recognised higher education provider whose legal origin is in a country other than Australia.

Process for assessing applications

- 2.4 The process for assessing applications should be transparent and equitable, and should be documented for the information of applicants.
- 2.5 The process should involve the independent verification of the credentials of the provider in the country of origin, and the independent verification of the relationship between the provider and any nominated local agents.
- 2.6 The application from a provider must be made to a legally authorised decision-maker, who should be bound to take advice from the relevant higher education authority in arriving at a decision about whether to give the provider permission to operate in the jurisdiction.
- 2.7 No applicant should be allowed to operate without the permission of the relevant accrediting authority. The permission to operate should be for specific courses, and should be subject to review after a maximum period of five years. The permission to operate is limited to the nominated local agents.
- 2.8 Jurisdictions should maintain a public register of courses permitted to operate in the jurisdiction and the registered providers and local agents delivering such courses.

Criteria

- 2.9 To gain approval to operate in an Australian jurisdiction, an overseas institution will need to demonstrate that:
- ☒ it is a bona fide institution, legally established in its country of origin;
 - ☒ that the courses to be offered have been properly accredited in the provider's country of origin by an authority that, in the opinion of the Australian jurisdiction's decision-maker, is the appropriate authority;
 - ☒ where the standing of the institution's accreditation status is not acceptable to the decision-maker, the decision-maker may require the proposed courses to be subject to a full accreditation process;
 - ☒ the course or courses are comparable in requirements and learning outcomes to a course at the same level in a similar field in Australia;
 - ☒ that the delivery arrangements, including the arrangements for academic oversight and quality assurance proposed by the overseas institution are comparable to those offered by accredited Australian providers; and
 - ☒ that appropriate financial and other arrangements exist to permit the successful delivery of the course in the Australian jurisdiction.
- 2.10 More elaborated operational guidelines should be developed.

Part Three: Accreditation of higher education courses offered by non self-accrediting institutions

Background

- 3.1 At the time of endorsement of the Protocols, six States and Territories currently had legislation governing the recognition of awards (protecting the award titles) offered by non self-accrediting institutions. Western Australia was developing such legislation, and the ACT had policy guidelines which had this effect.
- 3.2 All jurisdictions examined both the quality of the proposed course, and the capacity of the provider to deliver it. In some States (NSW, Qld, and NT) the provider's capacity was considered in the context of the accreditation of the course. In the remaining States, the accreditation of the course and the registration of providers were separate requirements but both essential to recognition of the award.
- 3.3 MCEETYA approved protocols had been in place for some time to enable accreditation across jurisdictions for courses to be offered simultaneously in two or more States or Territories.
- 3.4 The awards protected under the relevant legislation differed from jurisdiction to jurisdiction, and there was no common position on what awards should be protected. In practice, in spite of these legislative differences, all States protected bachelor, masters and doctoral degrees, and awards of graduate certificate and graduate diploma were accredited under higher education legislation or procedures. Some award levels including diploma, graduate certificate and graduate diploma were able to be accredited under both higher education and vocational education legislation. This lack of uniformity caused some difficulties in cross-jurisdictional accreditation processes.

- 3.5 In practice, there is strong common ground with respect to the criteria and processes used for accreditation of non-university courses.

Protocol 3 – The accreditation of higher education courses to be offered by non self-accrediting providers

Legislative basis for accreditation and provider registration

- 3.6 There should be a legislative framework (specific legislation or Ministerial policy or Guidelines) to protect the titles of specific higher education awards, which establishes a process and criteria for the accreditation process.
- 3.7 Operation as a non self-accrediting provider of protected awards should only be authorised under such a framework.
- 3.8 Where legislative provisions relating to higher education are located in legislation which also deals with vocational or school education, it is desirable that provisions relating to higher education should be located together, in a separate part of the relevant Act.

Definitions

- 3.9 The awards covered by higher education legislation and processes should be those defined as higher education awards on the AQF.
- 3.10 The term ‘course accreditation’ includes the assessment, approval, accreditation or authorisation of courses of study that lead to higher education awards, and must include consideration of a provider’s capacity to deliver the course, where provider registration or approval to operate is not a separate requirement.
- 3.11 The term ‘provider registration’ includes the registration, authorisation or approval of a provider to deliver one or more courses of study leading to a higher education award.

Process for assessing applications

- 3.12 The process for assessing applications should be transparent and equitable, and should be documented for the information of applicants.
- 3.13 The process should involve the appointment of an expert panel, with extensive knowledge of higher education courses in the same or similar fields, which is independent of the provider. The provider should have the right to comment on the panel's composition.
- 3.14 The panel must report to a legally authorised decision-maker, who should be bound to take advice from the panel in arriving at a decision.
- 3.15 The review process must involve consideration of the applicants' capacity to deliver the course, including financial capacity, and must include verification of claims made by the institution through interaction with the institution and its representatives.
- 3.16 Jurisdictions should use appropriate investigatory mechanisms to ensure financial probity and ensure that an applicant is a fit and proper person to establish and operate an institution offering higher education programmes.
- 3.17 Courses should be subject to re-accreditation after a maximum of five years.
- 3.18 Applicants should be required to disclose their prior history of applications for accreditation in all jurisdictions, including the outcomes of such processes, as a condition of making an application.
- 3.19 Jurisdictions should maintain a public register of accredited courses and the registered providers of such courses.
- 3.20 Applicants must be willing to report confidentially to jurisdictions, as a condition of accreditation, statistical information on their higher education offerings covering student load and enrolments, fields of study and some staff statistics. Jurisdictions are to report this information annually on a 'whole of jurisdiction' basis, in a format compatible with Commonwealth statistics collection.

- 3.21 A fee for processing an application based on partial cost recovery should be charged. National consistency in the fee levels is desirable.

Criteria

- 3.22 The following broad criteria should be common to all jurisdictions:

- ☒ the course design and content should satisfy the requirements set in the AQF for the award level;
- ☒ the course should be comparable in requirements and learning outcomes to a course at the same level in a similar field at Australian universities;
- ☒ the delivery arrangements, including matters of institutional governance, facilities, staffing, and student services are appropriate to higher education and enable successful delivery of the course at the level proposed; and
- ☒ the provider should have appropriate financial and other arrangements to permit the successful delivery of the course, and is a fit and proper person to accept responsibility for the course.

- 3.23 Detailed review criteria should be developed to assist assessment panels and providers in their work.

- 3.24 Authorities responsible for recommending accreditation and approval of courses offered by non-university private providers should publish annually reports on their procedures and criteria used, summaries of approvals given and processes to be followed to ensure consistency.

- 3.25 The processes for quality assurance followed by State and Territory jurisdictions should be subject to audit by the Australian Universities Quality Agency (AUQA).

Part Four: Delivery arrangements for higher education institutions involving other organisations

Background

- 4.1 In March 2000 a number of higher education institutions had established campuses in distant locations where conventional relationships based on physical proximity were not feasible. In some cases they had established companies, entered joint ventures or contracted with other organisations to assist in the delivery of programs in locations a substantial distance from their major campuses. These delivery points were variously in other countries or other States, and the organisation delivering programmes may have been operating under the name of the delivery agency, or the institution offering the award.

Protocol 4 – Delivery arrangements involving other organisations

University operating its own name

- 4.2 Where an Australian university or other self-accrediting institution operates in a distant location and issues an award under its own name, the Council or governing body of the university or other institution is responsible for quality assurance and will be subject to audit by the AUQA. For overseas campuses the institution will be expected to maintain standards at least equivalent to those provided in Australia regardless of any specific requirements of overseas governments.

University operating through another organisation

- 4.3 Where a university or other self-accrediting institution enters into an arrangement with another organisation, and the university or other self-accrediting institution is to grant the

academic award, the relationship will be construed as one of principal and agent. The principal in this relationship must carry full responsibility for all aspects of delivery, including:

- ☒ quality and standards comparable to those on other campus(es) of the institution;
- ☒ teaching by staff qualified at a level comparable to those on other campuses of the institution;
- ☒ resources and facilities adequate for the delivery of the course; and
- ☒ adequate measures to protect the welfare of students.

4.4 Measures taken by the institution to ensure standards comparable to those of other campuses will be subject to audit by the AUQA.

4.5 The Council or governing body of a university or other self-accrediting institution has primary responsibility for quality assurance under these arrangements, and the direct line of accountability for that council or governing body is to the Minister and Government of the State or Territory in which it is established. However, there must be some capacity for action in the case of seriously deficient quality standards and failure to take remedial action in relation to a campus in another jurisdiction. Consequently where the Minister in a State or Territory in which a campus is operating has serious concerns about quality of delivery whether resulting from reports of the AUQA or otherwise, the Minister may, following consultation with the Minister in the State or Territory where the institution is largely based and an independent review:

- ☒ establish conditions for the continuation of activities within the State or Territory;
- ☒ require that the operations of the institution within the State or Territory occur under the academic supervision of another institution; or
- ☒ close the campus and cease providing programmes in that State or Territory.

- 4.6 Universities and other self-accrediting institutions do not have the power to accredit the courses of other institutions. Where an institution makes curriculum and materials available to another institution, and the award issued following completion of the programme will be issued in the name of another institution, the other institution will be subject to the accreditation requirements of the State or Territory in which it proposes to operate as if it was operating as an independent organisation. The institution in whose name the award will be issued will have full responsibility for the academic welfare of students who are enrolled in programmes leading to the award.

Part Five: Endorsement of courses for overseas students – for the purposes of listing on the CRICOS register

Background

- 5.1 It is the responsibility of State and Territory Governments under the Commonwealth Education Services for Overseas Students Act, to endorse courses of study as suitable for overseas students. This endorsement is accepted by the Commonwealth for the purpose of issuing visas to students.
- 5.2 For the protection of students and the international reputation of Australian awards, MCEETYA decided that this endorsement should only be given where the endorsing authority has confidence that the courses concerned are offered at a standard equivalent to other programmes of similar kind, that facilities and services are of adequate standard, and that the organisation providing the programme has the financial and other resources to ensure full and effective delivery of the programme.

Protocol 5 – Endorsement of courses for overseas students

- 5.3 Endorsement of courses for overseas students should be given by the State or Territory where the course is to be delivered.
- 5.4 Endorsement of higher education courses for overseas students should only be given by or following advice from State or Territory officers responsible for accreditation and approval of higher education awards.

- 5.5 Where a course is to be offered by a university or other self-accrediting institution, accreditation of the course may be assumed. However, if the course is to be offered in special circumstances, such as at a distant location or through an agent, the endorsing authority must be satisfied that:
- ☒ the special circumstances will be made clear to students before enrolment;
 - ☒ the facilities and services are of adequate standard for the courses offered;
 - ☒ in the case of delivery through an agent, the teaching staff are adequately qualified, effective quality assurance measures are in place, and appropriate guarantees by the principal institution are given for the protection of students; and
 - ☒ the endorsement of the course is not transferable to another provider.
- 5.6 Where a course is to be offered by an institution other than a university or other self-accrediting institution:
- ☒ the course should be accredited according to the criteria specified in 3.22 and 3.23 and the institution has approval to offer the course in that jurisdiction; and
 - ☒ the endorsement of the course is not transferable to another provider.