

*Standing Committee on Uniform Legislation and Statutes Review — Sixty-third Report —
“Information Report: Scrutiny of Uniform Legislation”*

Resumed from 30 June.

Motion

Hon LIZ BEHJAT: I move —

That the report be noted.

I am very pleased to be able to speak on any of the work that the Standing Committee on Uniform Legislation and Statutes Review does because, as members know, I am a passionate member of that committee and thoroughly enjoy the work.

This information report, which was tabled in June, came about for a number of reasons. It does not actually deal with any bills, unlike most of our reports, and therefore no recommendations are attached to the report; it is merely to be noted. I think all members should take the time to read it. However, I preface my remarks by saying that in future we will be looking at changes to standing orders, and there will, no doubt, be a great impact on uniform legislation if the changes mooted in that report are adopted. I will probably make some reference to that today.

One of the issues that we have is how bills are determined to be uniform, and what constitutes a uniform bill. In relation to the Council of Australian Governments meetings, I think at the last count there were something like 44 ministerial councils that convene across Australia between the various jurisdictions that can trigger some sort of uniform scheme, so it is very hard to keep up with not only the number of meetings but also the communiqués that result from those meetings that define what a uniform scheme is. As members know, I personally think that a lot more work should be done by way of mutual recognition rather than with national schemes; however, that is the way it is at the moment, and until we can move forward on making some changes to the federation to strengthen it back to what it originally was, we have to live with what we have. At the moment, ministers go off to ministerial meetings and things happen behind closed doors; sometimes communiqués are issued from those meetings, sometimes they are not. Sometimes it is merely, as the President wrote in a paper he delivered to a conference in Darwin, that a nod and a wink amount to an intergovernmental agreement. I think those are issues ministers are faced with in determining whether bills are uniform and need to be referred to the uniform legislation committee. I will not talk so much about the referral process because there are changes in the wind on that, and that will be a lengthy—I hope—discussion for another day.

Paragraph 2.7 of the report states —

The provision of a government response to recommendations in Committee reports is a useful tool for the House during debate on the bill.

That relates to one of the mooted changes to standing orders in that it is proposed not only that the government's time to respond be decreased from four to two months, but also that if the report tabled by a committee deals with a bill, the government will no longer be required to table a response; the government will provide its response at the time of further debate on the bill. That is all well and good, and I think it is a good way of handling it, but sometimes with bills of a complex nature it helps if not only the committee members who have been involved in the construct of the report, but also members on both sides of the chamber have the opportunity to see the government response. For instance, we recently talked about the occupational licensing national laws. A very good committee report was tabled on that legislation, one of the recommendations of which was that the legislation was too skeletal in nature and that the Parliament should not be dealing with it yet because it left way too much for the bureaucrats to deal with, rather than us as the legislators, which is what we should always be mindful of. The government response was that it would take that on board because it understood what the committee was saying. The government said it thought the committee was right, and the legislation was withdrawn from Parliament until such time as it is in a better form for this chamber's consideration. I again put on the record my thanks and the committee's thanks to the responsible minister, Hon Simon O'Brien, for taking that lead. Unless that provision is retained in the standing orders, I think the process of having those responses provided might go by the wayside. I ask members to think about that again when we are considering the changes to standing orders.

Paragraph 2.10 states that —

Practical benefits, such as the removal of duplication of administration and compliance costs, increased efficiency and economies of scale also result from uniform laws.

But they can also have the reverse effect in that sometimes we find that the adoption of these uniform schemes adds an extra layer of bureaucracy, a classic example of which is the national health practitioners' regulation

legislation. The first annual report of that national scheme was tabled only yesterday. In a very quick summary of that, I note that members of the medical profession have told me anecdotally that the national scheme has not only doubled doctors' registration fees, but also tripled the registration time, when we compare the scheme in place with the state board process. We need to think about these uniform legislation schemes and talk more about mutual recognition between the states and not so much about national schemes and uniformity of the whole.

The report goes through the actions taken to identify various structures. It is quite difficult with some of the quite nefarious COAG communiqués and agreements made to identify exactly what is a uniform scheme, what is meant by it and what has to be put in place. There are various structures.

Quite often they try to do things by way of adopting the unicameral Queensland model of legislation and ramming it through the state houses. Obviously, we as fiercely proud Western Australians will never adopt that way of doing things. We never adopt the template legislation, but create the mirror legislation because, as always, there should be recognition for territorial differences in any uniform scheme. The report goes into the various structures used when we consider what we will do.

The committee, chaired by Hon Adele Farina, has four members, including Hon Linda Savage, Hon Nigel Hallett, Deputy Chair, and me. It is a bipartisan committee and reaches decisions by way of consensus. The committee does not look at the policy of the bill because it is not allowed to do so. Although we rarely go down that route, we would love to. In recent discussions in other forums, people are amazed that committees in Western Australia are sometimes not allowed to look at policy. But that might be a discussion for another day. If we were able to look at policy, we may see quite different reports. However, I think all members agree that the uniform legislation committee reports are very good and very useful tools that enhance the debate in this place.

I recommend the sixty-third report of the Standing Committee on Uniform Legislation and Statutes Review to all members, who should have a copy at their bedside. Not that it will send them to sleep, Hon Norman Moore! I can see the look on the member's face from here!

Hon Norman Moore: I have committed it to memory.

Hon LIZ BEHJAT: It should be definite reading for all members of this house—both those who have been here for a very long time and those of us who are the newer members. With those words, I commend the report to the house.

Hon NORMAN MOORE: I understood that other members were going to speak on this, and I just want to make sure that they do not miss out on the opportunity because they were not paying attention at the time. I want to say a few words about the comments made by the previous speaker who, when she referred to people who had been here a long time, was looking at me, so I presume she was referring to me.

In the past couple of years, I have spent a fair bit of time looking at standing orders, at how our committee system works and, at the same time, seeking to assist the Standing Committee on Uniform Legislation and Statutes Review with the additional workload it receives. There is no doubt that with the Council of Australian Governments' process, far more legislation about uniform schemes comes through. At the present time in Australia, COAG meets to discuss a range of issues from the point of view of harmonisation or uniformity across the nation. Deep down, I do not have much enthusiasm for this process. I believe in competitive federalism—the process in which the states do their own thing and compete with each other to see who can do it best. Uniformity and harmonisation sometimes result in the lowest common denominator. However, that is not something that I can influence; it is a process that is happening within government in Australia at present. As a result of that process, more bills than ever before about uniform schemes are coming to this Parliament. As a result of that, I acceded to a request of the uniform legislation committee to find additional resources for the committee; albeit I had to beat up a couple of Treasurers along the way! Also, the house agreed to extend the time the committee has to deal with legislation. I know that one of those achievements, if I can describe them that way, was acceptable to the committee, and the other one only half acceptable—but that is the nature of the business.

Because of the circumstances in which we now find ourselves, lots of bills that come to this chamber, be they bills that originate in this house or come from the other place, automatically go to the uniform legislation committee, which means they are not dealt with for at least 45 days. Because of the increasing number of these bills, that impacts on the way the house is managed. I have therefore exercised my mind on two fronts; one being the bills automatically referred to the uniform legislation committee. The relevant standing order provides some fairly broad parameters, such that some bills that I would never have thought of are captured by that standing order. There have been occasions when I have had a different point of view from the presiding officers about what is and what is not a uniform legislation bill.

As part of the process of looking at the standing orders, we have sought to look at that issue to clarify which bills ought to go to the Standing Committee on Uniform Legislation and Statutes Review and which bills ought not. When we come to debate those new standing orders, we will see that there has been some slight change to the

current process. At the moment, as I understand the process, when a bill is introduced, a determination is made by the chair that this is or is not a standing order 230A bill. If it is determined that it is, the bill automatically goes to the committee without the house being involved in that decision. The problem for government—it will happen to both sides of politics—is that there may be an occasion when the government does not agree with that proposal or, for reasons best known to itself, does not want it to go to a uniform legislation committee for a particular reason. However, because it is an automatic process the opportunity to prevent that happening is limited, other than perhaps to move a subsequent motion that the time to report is reduced, or something of that nature. I think that is slightly unsatisfactory; albeit I have no problems with the uniform legislation committee dealing with bills that relate to uniform legislation.

The committee's terms of reference and what it does when a bill is referred to it are the other issues that are important to me. I was here when this issue first arose. My vague recollection is that one year, between Christmas and new year, the, I think, Burke government brought in legislation about a uniform scheme that had to be passed. The Parliament was recalled. We did not even have a copy of the bill, and yet it was passed. That provoked a number of members to question whether that was a satisfactory process. Out of that came a standing order for this chamber that required any bill putting into place a uniform scheme to sit on the table for at least 180 days before it could be dealt with, giving that time for members to discover what the bill meant in reality. Over time, that has changed. We set up the Standing Committee on Uniform Legislation and Statutes Review and we now send the bills to that committee on the basis of the house wanting to know the consequences of the legislation for Western Australia. I have always understood that the consequence has to relate to the sovereignty of the state of Western Australia or the Parliament of Western Australia. It is not a process, as Hon Liz Behjat suggested, whereby the committee looks at the policy of the legislation, because if we want a committee to look at the policy of legislation, we have a legislation committee for that purpose. I understand that the uniform legislation committee was set up to make sure that if a uniform scheme being legislated for adversely affects the sovereignty of the state of Western Australia, we need to know how.

Sitting suspended from 1.00 pm to 2.00 pm

Hon NORMAN MOORE: Prior to the lunchbreak I made some comments about the Standing Committee on Uniform Legislation and Statutes Review and I indicated that the Standing Committee on Procedure and Privileges has looked at the standing orders on the way in which this committee operates. I explained a little of the history, and my understanding—whether it is a universally accepted understanding is another thing—is that the committee was basically set up to preserve the sovereignty of the state of Western Australia and the sovereignty of the Parliament of Western Australia. When bills were sent off to the uniform legislation committee, it would look at the legislation to see what effect it would have on the ability of the state to look after its own interests and it would determine whether we would give away some of our sovereign rights as a state to the commonwealth or some other body by virtue of that uniform legislation being enacted. It is not to say that the committee would come back and say, “We do not give away some of our sovereignty.” It is a matter of the Parliament being made aware of the consequences of the legislation on the capacity of the state Parliament to legislate for the people of Western Australia. That was my view of the committee's purpose. Bear in mind that we began to do this when a uniform bill about giving away some sovereignty went through Parliament a long time ago and we were required to pass the legislation because, if we did not—I think we lost some money, if my memory serves me right.

This is not meant to be in any way critical, but when I read the Standing Committee on Uniform Legislation and Statutes Review's reports, many of which go into a lot more detail than simply the question of sovereignty, I begin to wonder whether the committee has been exceeding its brief. However, the standing orders do not in any way refer to the sovereignty of the state or the sovereignty of Parliament. I think that there have been lots of discussions on that committee about what it ought to do and not do. That is fair enough because, perhaps, the house has not provided the sort of guidance it may well have done if it wanted that committee to be a little more constrained in the sorts of issues it deals with. I started looking more carefully at this and discovered that attached to a number of uniform legislation committee reports is an appendix titled “Fundamental Legislative Scrutiny Principles”. The first question is —

Does the legislation have sufficient regard to the rights and liberties of individuals?

That is a legitimate question to be asked of legislation, but is it a legitimate question to be asked by the uniform legislation committee? Is that its job? The committee looks at a number of things within that fundamental question. The second main question is —

Does the Bill have sufficient regard to the institution of Parliament?

That is getting towards the notion of sovereignty but it does not say that Parliament is a sovereign institution on behalf of the state of Western Australia. When we look at some of those scrutiny principles, we can see why the

committee has come up with a number of its reports; it has been taking into account these legislative scrutiny principles. The principles include —

10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?
- ...
15. Does the Bill affect parliamentary privilege in any manner?

Those are a few of the questions that are considered by this committee when it deals with legislation. I do not have a problem with those principles, but I am not so sure that they should necessarily apply to the uniform legislation committee. Those questions seem to be the sort of questions that the Standing Committee on Legislation or a committee of that type might ask when it looks at a bill in far more detail and is concerned with the policy of the bill.

Perhaps I should indicate that the sixty-third report was delivered in time for the Standing Committee on Procedure and Privileges to be made very much aware of what the Standing Committee on Uniform Legislation and Statutes Review thought its role was. Indeed, the Standing Committee on Procedure and Privileges looked at that particular report carefully in its deliberations. Members will now be aware that we have tabled our report with some revised standing orders, not to constrain the committee, but to ensure that it is directed in a particular way and that its responsibility is made clearer.

In summary, the concern that I have had over time has been standing order 230A(1)(b), which reads —

- (b) by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.

The phrase “by reason of its subject matter” has led to some disputes about whether it is a uniform legislation bill. Although the Standing Committee on Procedure and Privileges has left that in the standing orders, I am not absolutely sure that is the best way to go in the future, because I am trying to remove any ambiguity on whether a bill is subject to standing order 230A or whatever its successor will be numbered in the new standing orders. The functions of the Standing Committee on Uniform Legislation and Statutes Review are outlined in section 8 of schedule 1 of the standing orders. I will not go through the content of the proposed orders, but they try to identify that the sovereignty of the state and the sovereignty of the Parliament are the main reasons for the committee to look at these bills.

While I am on my feet, I want to raise one other matter. The committee is called the Standing Committee on Uniform Legislation and Statutes Review. Over the lunchbreak I was thinking that most people would probably think that it is a negative that we do not have a lot of legislation to debate and that the house is not doing its work. It has crossed my mind that we pass too much legislation and we might be better off spending our time on getting rid of some. One of the reasons that this committee has statutes review as part of its terms of reference is that it should spend some time looking at legislation that it considers to be obsolete and that should be removed from the statute books.

At the moment, governments do that through omnibus bills, but they are dealing only with issues that are of no great consequence and are uncontroversial. I do not think it would do us any harm if the Standing Committee on Uniform Legislation and Statutes Review were to spend more time on statutes review, and for Parliament to give some serious thought to which legislation it considers to be obsolete or past its use-by date, so we might start to reduce the amount of legislation that burdens the community, rather than doing as we always do, which is to see whether we can create even more legislation. It is a bit of a pity, in a sense, that parliamentary performance is measured on the basis of how many bills are passed. If we could change our thinking on performance measurement, a key performance indicator could be how many acts we got rid of; that might be an interesting scenario. I just put that on the table and suggest that this committee—although it is very busy at the present time—might like to give a bit of thought to that particular part of its role.

I have had a quick look through the sixty-third report; it is a report that clearly seeks to make the house understand what the committee does, how it occupies its time and the important role it plays. Although I have had some disagreements with the committee, I have to say that I think it does an excellent job, albeit in some areas that it does not need to be involved in. As a federalist, I am vitally interested in a report of this chamber being able to tell us what impact uniform legislation will have on our sovereignty. That has to be the fundamental reason for that committee’s activities and its role, because it is vital to the chamber clearly understanding the consequences of the legislation we pass and, as I said at the beginning of my speech, there is more and more legislation. Personally—this is not the government’s view, but my own—I think it is a pity there is so much legislation. We have effectively given away a lot of the authority this Parliament had by enacting

uniform legislation or going down the path of harmonisation, which takes away our capacity to make our own laws.

The fundamental problem that the state faces is that the commonwealth government has all the money, and most of its reform agenda in respect of the Council of Australian Governments processes relates to how much money the state is going to get. State governments are put in a position in which they are told that they will get X amount of dollars if they go down the path of uniformity or harmonisation, but if they do not, they will lose the money. As we all know, state governments do not have enough money, so they are often almost bribed, if I can use that term, into agreeing to legislation that they might not otherwise agree to.

We need to know when sovereignty is affected, but at the same time it also would be helpful to know whether uniform legislation is the lowest common denominator and better than what we might have already had in place on a particular subject, as a sovereign Parliament dealing with our own issues.

Anyway, we will probably have a further conversation about this when we deal with the proposed new standing orders. Hon Liz Behjat has already mentioned that if that were to be adopted, it would make some difference to the way this committee operates, so I will be interested to hear the committee members' points of view, at that particular point in time, in some more detail than now. I am happy to note this particular report.

Hon SIMON O'BRIEN: I also think the report needs to be noted. I think it is a good move by the Standing Committee on Uniform Legislation and Statutes Review to provide this report; it is a proactive effort not only to share perspective with other members of the house in general, but also to provide information to members about the evolution of the committee. I think the committee does a useful job and, as the Leader of the House indicated in his remarks just now, it is an increasingly important job.

The point I want to make is that it is an evolving job, and that also leads us to focus some attention on it, not only now, but also when we review the standing orders in the time ahead. As members come and go from the membership of this committee and its successors, it is important that they note that the whole process of what they are examining is evolving. I think we have reached a critical stage in the development of the federation; I would like briefly to give some perspectives on how I see that evolution taking place, obviously with reference to consideration of this report.

The report notes the development of scrutiny of uniform legislation over a number of years, and spends some time talking about the approach that is taken these days. As I say, this has been developing over several Parliaments and it is still a work in progress. This committee does a good job; whether it is up to the standards that were achieved during the thirty-seventh Parliament, of course, is another question! Well, it gives it something to shoot for, and I encourage it to get there! However, the Leader of the House has just invited us to consider the real benefits and purpose of having this committee. It is about the sovereignty that is reserved by this Parliament for the state's own free exercise in future, or what bit of that sovereignty is to be given up, and in what form, in the interests of some uniform scheme that has been dreamed up elsewhere in the federation and to which Western Australia is a participant, regardless of the degree of enthusiasm the state might have for such participation. There are a heck of a lot of them around at this time, and it seems to be a feature of the age. As I say, this is an important time in the evolution of the federation.

We have a device whereby successive federal governments seek to contribute in matters that do not necessarily fall within the federal government's jurisdiction by sponsoring harmonised systems—all with the best of intentions, of course. Inevitably, a federal government can claim that ordinary Australians will be saved squillions of dollars if certain matters are harmonised across the country. In fact, there seems to be no limit to the number of schemes that are in the sights of the federal government—sometimes, I am sure, with the best of intentions; but sometimes also from a perspective of wanting to take control and increase its own relevance.

Successive state governments, here and elsewhere, have had to wrestle, and are still wrestling with, the same questions. For example, when contemplating ongoing involvement in the development of a national scheme, any jurisdiction is going to consider what it already has, and whether it will end up with something better. If the jurisdiction is going to end up with something better as part of a nationally harmonised scheme, it will probably decide to pursue it vigorously; whereas if it already has a scheme that is likely to be better than anything the collective could come up with, it will perhaps consider whether it will go down that path at all. Again, it might be persuaded to contribute so that it can bring other jurisdictions up to the standards that it exhibits, thereby making it of benefit to people who do business in this state to also create the benefits of higher standards across the border in other states or territories where they also do business.

These are not matters that are as simple to work through as I have just described them. As successive governments have come and gone—and I have seen a few now—I have seen the same questions being considered. Where does this leave the Parliament? The Parliament—this is reflected in the report—sometimes feels that it waits on the sidelines while executive government goes off and enters into arrangements. It signs up

the state to participate in a program to harmonise a particular area of regulation or other government activity, such as trade activity. It does so, as the Leader of the House told us, sometimes under the additional encouragement that federal funding will be made freely available to those who choose to be actively involved in the process. Therefore, because agreements have already been entered into, documents have been signed and federal government money is riding on the outcome, Parliaments can feel pressured to accede to enabling legislation. A committee set up to scrutinise that sort of legislation or the agreement around it also has pressure brought to bear on it that, for example, this matter has to be finalised by a certain date or else federal government money may not be as freely available and so on. That dilemma is discussed at some length in this report. It is a very real consideration.

I am a member of an executive government. Executive governments and their ministers come and go all the time. I have seen quite a few of these intergovernmental agreements and had the management of introducing schemes on quite a number of occasions for the portfolios for which I have had charge. Indeed, we received a report from this committee just on Tuesday this week about a bill of which I have carriage and which involves some uniform arrangements. I spent two Parliaments as a member of this committee and one Parliament as its chair. What I would say to the committee and the Parliament is that I think there is an absolutely vital role for this committee to play in examining and scrutinising the questions of sovereignty that attach themselves to these intergovernmental agreements.

I am seriously concerned, as both a minister and a legislator, about some of the schemes that I see, whether they are in my portfolio area or in another area that I have had some opportunity to observe. I have also noticed just how, in the time of this government, and certainly over a few years in the Parliament, there has been an evolution in how members view this ongoing process of national harmonisation. I think there is growing disquiet. Every time there is a debate in this place I hear more and more concern vocalised about this trend of sovereignty, no matter how small an individual parcel, being taken away from this Parliament and aggregating in Canberra. A lot of little chips start to add up to a larger hole. The hole, of course, is drilled in the Western Australian Parliament's capacity to be master of its own destiny. I think the role of the committee is one that does need to continue to evolve. It needs to be targeted at working out and reporting to this house on just what are the implications, from the point of view of Western Australia's sovereignty, of the particular agreement or bill that finds its way to that committee for its consideration.

Given that we have touched on the future of this committee and we have already had reference to the redrafting of terms of reference in the context of the review of standing orders, which has been going on for some time, I just want to stray a little outside this immediate report to refer to another related matter. It relates to something else the commonwealth does and which states basically just wear as they flow on in the commonwealth's wake. I am talking about the agreements that successive federal governments enter into on behalf of the whole country that in turn impact on state governments. There have been references for some years, and I believe there is proposed to be reference in the terms of reference under the new standing orders, to this committee having some overview of treaties. I remember that in a previous Parliament this committee actually did look at how it could deliver on this particular term of reference. It conducted some inquiries, communicated with other jurisdictions and so on, and came to certain conclusions. Basically, in my view, and looking at the timetables involved, it is quite impossible for a standing committee of this type to be taking up its time in meaningful pursuit of references about treaties, particularly in view of treaties that are proposed to be entered into, because it just does not have the capacity to do that. It could maybe review them after the fact, but that would be a forlorn and pointless exercise. I would rather that the house perhaps noted the committee's previous work on treaty scrutiny and the conclusions it formed after having spoken to a whole lot of sources, and perhaps come to the view that this committee's most valuable contribution is actually to be made in the scrutinising of intergovernmental agreements from the context of how much of Western Australia's future prerogatives are proposed to be done away with. I thank the committee for its report, which I think is a very useful addition.

HON ADELE FARINA: The purpose of the committee providing the information report to the Parliament was to actually set the record straight about the evolution of the committee and what the standing orders currently provide and require the committee to do. It would seem that, sadly, at least in the instance of one member of this place, the committee has failed to achieve that. From the comments made by Hon Norman Moore, the Leader of the House, it is clear that he has not read the report, because he continues to assert the views that he holds and which are not entirely accurate on what the standing orders actually require this committee to do. However, in the same breath he is amending the standing orders to ensure that the standing orders actually do what he wants the committee to do.

Hon Norman Moore: I am not amending standing orders personally; the house does.

Hon ADELE FARINA: Hon Norman Moore did say that he just skimmed the report. Perhaps he should take the time to read the report and understand and actually consider the report before he stands in this place and makes

Extract from *Hansard*

[COUNCIL — Thursday, 3 November 2011]

p8885c-8891a

Hon Liz Behjat; Hon Norman Moore; Hon Simon O'Brien; Hon Adele Farina

comment on the report. He might then seek to address the issues contained in the report—rather than his view of life—that are the subject of the matter the committee is currently discussing.

Committee interrupted, pursuant to temporary and standing orders.

[Continued on page 8899.]