



1996

**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND
INTERGOVERNMENTAL AGREEMENTS**

**THE COMMITTEE'S RESPONSE TO THE FINAL
REPORT OF THE SELECT COMMITTEE ON
PROCEDURE**

Seventeenth Report
In the Thirty-Fourth Parliament

Presented by
Hon. P. G. Pental, MLA
Laid on the Table of the Legislative Assembly
on 31 October, 1996.

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TERMS OF REFERENCE

On Wednesday, 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following Terms of Reference:

- (1) to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth;
- (2) when considering draft agreements and legislation, the Committee shall use its best endeavours to meet any time limits notified to the Committee by the responsible Minister;
- (3) the Committee shall consider and, if the Committee considers a report is required, report on any matter within three months, but if it is unable to report in three months, it shall report its reasons to the Assembly;
- (4) each member, while otherwise qualified, shall continue in office until discharged, notwithstanding any prorogation of the Parliament;
- (5) no member may be appointed or continue as a member of the Committee if that member is a Presiding Officer or a Minister of the Crown;
- (6) when a vacancy occurs on the Committee during a recess or a period in excess of two weeks the Speaker may appoint a member to fill the vacancy until an appointment can be made by the Assembly;
- (7) the Committee has the power to send for persons and papers, to sit on days over which the House stands adjourned, to move from place to place, to report from time to time, and to confer with any committee of the Legislative Council which is considering similar matters;
- (8) if the Assembly is not sitting, a report may be presented to the Clerk of the Legislative Assembly who shall thereupon take such steps as are necessary and appropriate to publish the report; and
- (9) in respect of any matter not provided for in this resolution, the Standing Orders and practices of the Legislative Assembly relating to Select Committees shall apply.

CHAIRMAN'S FOREWORD

This Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreement (SCULIA) is its response to the Final Report of the Legislative Assembly Select Committee on Procedure.

The future of this Standing Committee was considered as part of the general review of the Committee system in the Legislative Assembly by the Select Committee on Procedure. The Select Committee on Procedure recommended that the functions of SCULIA should be amalgamated with the functions of the Joint Standing Committee on Delegated Legislation (JSCDL).

This Committee is of the view that the Select Committee failed to understand fully the substantially different roles and functions of SCULIA and JSCDL.

While some national uniform legislation may result in the need for subordinate legislation which would be, or should be, subject to review by the JSCDL this is only a minor part of the legislative picture. The role of SCULIA is not only that of legislative review but involves looking at constitutional issues and matters involving legal and Commonwealth/State affairs.

The Commission on Government Report recognised that the functions of this Committee are more aligned to a Constitutional and Federal State/Affairs Committee.

This Committee has been very active in initiating inquiries and has presented sixteen reports to the House, as well as two Annual Reports since it came into existence in August 1993. This is an indication of the heavy workload of the Committee and the ever increasing number of national legislative schemes and intergovernmental agreements that have originated from Ministerial Councils in recent years. The work of this Committee has been widely recognized around Australia for its achievements. Indeed, this Committee played a key role in developing the *Position Paper on the Scrutiny of Uniform National Legislation* which is now on the verge of being raised in the Council of Australian Governments (COAG).

The ever-increasing volume of legislation embodying uniform schemes of legislation is itself an argument to maintain this Standing Committee as a specialist body. As an alternative the Committee recommends that the role of this Committee should be expanded in the Legislative Assembly to look at Federal/State affairs and legal and constitutional issues.

I am especially grateful for the work of our Legal/Research Officer, Ms Melina Newnan and, our Clerk, Mr Keith Kendrick, for a superb contribution and who continue to serve the Committee in a most professional and highly enthusiastic manner.

HON. PHILLIP PENDAL, MLA
CHAIRMAN

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CHAPTER ONE

1. INTRODUCTION

The Standing Committee on Uniform Legislation and Intergovernmental Agreements (SCULIA), established on 4 August 1993, has as its specific purpose -

to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth.¹

The SCULIA has been very active in initiating inquiries and has presented sixteen (16) reports to the House in the course of its existence, two (2) Annual Reports of the Committee's activities, as well as other reports yet to be tabled.

By way of background SCULIA was established because of concerns raised in the Western Australian Parliament about the process of dealing with uniform legislation and the inability of Members to adequately scrutinise such legislation.² As a result of these concerns the Select Committee on Parliamentary Procedures for Uniform Legislation Agreements was established in 1992 to look at the processes behind the *Financial Institutions (Queensland) Act 1992* and the more general question of ensuring full Parliamentary scrutiny of uniform legislative schemes and Intergovernmental Agreements. That Select Committee reported to the Legislative Assembly on 27 August 1992. One of its major recommendations was to establish SCULIA.

Intergovernmental Agreements are usually developed under the direction of a Ministerial Council or the Council of Australian Governments (COAG).

Uniform legislative schemes will always diminish the role of Parliament. Ministerial Council decision-making inevitability blurs the lines of responsibility of individual Ministers to their Parliaments.³

Ministerial Councils have grown out of a need for greater intergovernmental co-operation.

The ever-increasing volume of legislation embodying uniform schemes of legislation emanating from Ministerial Councils is in itself an argument to maintain this Standing Committee as a specialist body. The Committee has reported on a number of intergovernmental issues such as Mutual Recognition, Consumer Credit, Competition Policy, Censorship, Guardianship, Evidence and the Environment. The work of this Committee has been widely recognised around Australia for its achievements. In this regard the Committee brings to Members' attention the key role played by this Committee in working with, and providing advice, to eleven Parliamentary Scrutiny Committees from around Australia in producing two major works on national scrutiny principles.

¹ Terms of Reference of Standing Committee on Uniform Legislation and Intergovernmental Agreements.

² Concerns were raised in Parliamentary debates about the inability of Parliament to properly scrutinise the *Financial Institutions (Queensland) Act 1992*.

³ Cheryl Saunders. *Accountability and Access in Intergovernmental Affairs: A Legal Perspective*, Papers on Federalism 2, p 28.

The first, was the Tenth Report of this Committee namely, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, tabled on 31 August 1995. The second, the Thirteenth Report, of this Committee, *Position Paper on Scrutiny of National Schemes of Legislation*, tabled on 17 October 1996.

The work of this Committee has had influence in other jurisdictions with the establishment in Queensland of the Constitutional Affairs Committee and the establishment in the Victorian Parliament of the Intergovernmental Relations Committee.

The future of this Standing Committee has been considered as part of the general review of the Committee system in the Legislative Assembly by the Select Committee on Procedure⁴ and this Report is a response to that Committee's recommendations.

The Report also considers the response by the Joint Standing Committee on Delegated Legislation (JSCDL)⁵ to the recommendations of the Select Committee on Procedure. This Committee concurs with the JSCDL's conclusion that the amalgamation into JSCDL of this Committee's work is inappropriate because of the diverse roles of each Committee.

This Report, in response to comments about this Committee's future, also notes the recommendations of the Commission on Government (COG).⁶

⁴ Western Australia, Legislative Assembly, Select Committee on Procedure, *Final Report*, 27 June 1996.

⁵ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *The Committee's Response to the Final Report of the Legislative Assembly Select Committee on Procedure*, 19th Report, September 1996.

⁶ Western Australia, Commission on Government, Report No. 2 Part 2, December 1995.

CHAPTER TWO

2. CONSIDERATION OF SELECT COMMITTEE ON PROCEDURE REPORT ⁷

The Committee gave consideration to the Select Committee on Procedure's recommendations concerning the future of SCULIA.

The Select Committee on Procedure rejected the Committee's representations that SCULIA stand as a separate committee in the Legislative Assembly. The Select Committee on Procedure considered that the functions of the SCULIA should be amalgamated with the functions of the Joint Committee on Delegated Legislation (JSCDL). It stated -

... The functions of the committees do not necessitate in-depth investigation of all the issues in any proposed legislative power for regulations.⁸

It also stated -

... As the Delegated Legislation Committee is concerned with the use of legislative power for regulations, and SCULIA deals with the issue of legislative power between the Australian jurisdictions, the two should be amalgamated.⁹

The Select Committee on Procedure in its Final Report recommended -

That the concurrence of the Legislative Council be sought to alter the name of the Standing Committee on Delegated Legislation to Standing Committee on Uniform and Delegated Legislation and amend its functions by substituting for rule 5 of the rules for the Committee, the following -

“5. It is the function of the Committee -

- (1) to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth.
- (2) to consider and report on any regulation that -
 - (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;
 - (b) unduly trespasses on established rights, freedoms or liberties;
 - (c) contains matter which ought properly to be dealt with by an Act of Parliament;
 - (d) unduly makes rights dependent upon administrative, and not judicial, decisions.¹⁰

⁷ Western Australia, Legislative Assembly, Select Committee on Procedure, *Final Report*, 27 June 1996.

⁸ *Ibid* p 44.

⁹ *Op Cit*.

¹⁰ *Ibid* p xvii.

The Select Committee on Procedure noted that -

The Select Committee on Procedure acknowledges the work of the Commission on Government (COG). In the course of its broad ranging inquiry, COG has given consideration to the committee system and legislative process of the Western Australian Parliament. COG's brief has been "to make recommendations aimed at improving Western Australia's political and governmental institutions and increasing their openness, transparency and accountability".¹¹ With this in mind, COG has recommended changes to the legislative process and committee system.¹²

The Select Committee then stated -

Your Committee concurs with COG on the importance of establishing a portfolio-based standing committee system for the Legislative Assembly and many of the principles in relation to such a restructuring.¹³

SCULIA is of the view that the Select Committee on Procedure's Report lacks conceptual basis. The Committee considers that there was a lack of understanding by the Select Committee on Procedure, and insufficient and superficial consideration was given to the quite clearly different functions of the SCULIA and JSCDL.

SCULIA's primary role is to consider **proposed uniform legislative schemes** including Intergovernmental Agreements. Intergovernmental Agreements to enact uniform legislation are usually reflected in the enactment of primary legislation.

The legislative power of uniform legislation derives from an assumed position of Ministerial Councils thus from Executive Government.

It is worth reminding the Western Australian Parliament of the original reason for the existence of this Committee. **The Select Committee on Parliamentary Procedures for Uniform Legislation Agreements recommended the establishment of SCULIA because of concerns emanating from the Parliament about their role to effectively scrutinise and review legislation and the need to ensure accountability by Ministers to the Parliament.**

Thus the role of SCULIA is conceptually different to the role of JSCDL. JSCDL looks at subordinate legislation after primary legislation has been passed. It is only at this point that JSCDL would consider subordinate legislation which may have originated from a national uniform legislative scheme. It must be pointed out that not all subordinate legislation comes before the Western Australian Parliament.

While some national uniform legislation may result in the need for subordinate legislation which would be, or should be subject to review by the JSCDL this is only part of the legislative picture.

¹¹ Statement by Mr Jack Gregor, Chairman, Commission on Government, delivered to the Australian Society of CPAs' State Congress 1996 on Friday 12 April 1996, Perth, Western Australia, p 3.

¹² Western Australia, Legislative Assembly, Select Committee on Procedure, *Final Report*, 27 June 1996, p 1.

¹³ *Ibid*, p 2.

The role of SCULIA is not only that of legislative review but involves looking at constitutional issues and matters involving legal and Commonwealth /State affairs.

The recommendations of COG concerning the future of SCULIA were not addressed by the Select Committee on Procedure. The Select Committee on Procedure failed to provide reasoned argument why they recommended that the functions of SCULIA should be amalgamated in an expanded JSCDL or why the recommendations of COG that SCULIA be amalgamated with a Constitutional and Federal State Affairs Committee were not considered.

This Committee concludes that the Select Committee on Procedure's recommendation lacks conceptual basis.

CHAPTER THREE

3. CONSIDERATION OF JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION REPORT¹⁴

This Report also considers the response by the Joint Standing Committee on Delegated Legislation (JSCDL) to the Select Committee on Procedure's recommendations. As outlined below this Committee generally agrees with comments raised by the JSCDL.

The Joint Standing Committee on Delegated Legislation (JSCDL) has responded to the Final Report of the Select Committee on Procedure and its Recommendation 18 that provides that the Standing Committee on Uniform Legislation and Intergovernmental Agreements (SCULIA) should be amalgamated with the JSCDL.

The JSCDL indicated that the only apparent substantive reason for the amalgamation given by the Select Committee on Procedure is -

As the Delegated Legislation Committee is concerned with the use of legislative power for regulations, and SCULIA deals with the issue of legislative power between the Australian jurisdictions, the two should be amalgamated.¹⁵

The JSCDL observes that the reasons stated by the Select Committee on Procedure for the amalgamation of the functions of the JSCDL and SCULIA -

... reflects a fundamental misconception of the respective roles of the two committees and, if implemented in its current form, has great potential to undermine the apolitical impartiality fought long and hard for by JSCDL.¹⁶

This Committee agrees with the JSCDL that there are fundamental differences between the two Committees and the amalgamation of the two is conceptually inappropriate and impractical.

SCULIA is required by its Terms of Reference:

... to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes.¹⁷

The JSCDL interprets this as empowering SCULIA to inquire into matters of policy.

¹⁴ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *The Committee's Response to the Final Report of the Legislative Assembly Select Committee on Procedure*, 19th Report, September 1996.

¹⁵ Western Australia, Legislative Assembly, Select Committee on Procedure, *Final Report*, 27 June 1996, p 44.

¹⁶ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *The Committee's Response to the Final Report of the Legislative Assembly Select Committee on Procedure*, 19th Report, September 1996, p 3.

¹⁷ Terms of Reference of Standing Committee on Uniform Legislation and Intergovernmental Agreements.

This Committee has found that it is not possible to examine national uniform scheme structures in a vacuum. That is, policy and matters of substance relating to the subject of national uniform legislation must be considered in relation to the legislative structure.

The Terms of Reference of the JSCDL are -

It is the function of the Committee to consider and report on any regulation that:

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;
- (b) unduly trespasses on established rights, freedoms or liberties;
- (c) contains matter which ought properly to be dealt with by an Act of Parliament;
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.¹⁸

The JSCDL's Terms of Reference are similar to those applied in other jurisdictions and are concerned mainly with the review of processes. Adoption of the Select Committee on Procedure's recommendations would require a major change to the JSCDL's Terms of Reference and would make the Western Australian JSCDL decidedly different from other similar Committee's throughout Australia.

As the JSCDL stated in their response to the Select Committee on Procedure's Report -

... the JSCDL only looks at the way in which things are done, not what is actually done.¹⁹

SCULIA is empowered to inquire into proposed or current intergovernmental agreements and uniform legislative schemes. SCULIA's main purpose is to ensure that there is Parliamentary scrutiny of any proposed legislative scheme and this is achieved by bringing any of these proposed legislative schemes before the Parliament by way of reports. It is important to remember that under some legislative structures, some uniform legislative schemes may not come before the Western Australian Parliament for scrutiny, although the legislation affects the people of Western Australia. For example, this was the case under the *Financial Institutions Act (Queensland) 1992*, where only the adopting legislation came before the Western Australian Parliament. As indicated earlier in this Report the role of SCULIA has grown with the increasing volume for uniform and consistent regulation.

It is important to reiterate that SCULIA and the JSCDL have quite different roles. While SCULIA reviews **proposed primary legislation** and operative legislative schemes. JSCDL

¹⁸ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *The Committee's Response to the Final Report of the Legislative Assembly Select Committee on Procedure*, 19th Report, September 1996, p 4.

¹⁹ *Ibid* p 5.

reviews operative subordinate legislation after it comes into operation. As the JSCDL points out in its response to the Select Committee on Procedure's Report -

This is a significant difference which appears to have been overlooked by the Select Committee. The JSCDL has limited terms of reference to inquire into subordinate legislation made under Acts of the State Parliament. SCULIA is more concerned with proposed primary legislation made at a national level. It would seem to be quite incongruous for the JSCDL to be able to review operative subordinate legislation and proposed primary national uniform legislation: what is the functional connection? In this context, the terms of reference of the SCULIA are much more compatible with the terms of reference of the Legislative Council Legislation Committee and it would therefore make more sense to amalgamate SCULIA with the Legislation Committee.²⁰

This Committee agrees with the JSCDL in that it would be inappropriate to amalgamate the functions of SCULIA with JSCDL as the functions of both Committees are incompatible.

²⁰ *Ibid* p 5.

CHAPTER FOUR

4. CONSIDERATION OF COMMISSION ON GOVERNMENT REPORT ²¹

This Committee also examined the Commission on Government Report which was acknowledged by the Select Committee on Procedure and which also made some comments on the future of SCULIA.

The Commission on Government Report No 2 discusses at some length the Committee system and concludes that:

There is no systematic arrangement to scrutinise and review legislation in the Western Australian Parliament. Parliaments in other jurisdictions have a system of legislation committees to do so.²²

The Commission on Government (COG) made the following recommendation -

Recommendation 119

1. The portfolio-related standing committees, recommended for the Legislative Assembly, should examine legislation relevant to their portfolios.
2. The Legislative Council's Standing Committee on Legislation should be retained.
3. Any Member of Parliament, including ministers, should be allowed to make representation to a committee examining a particular Bill.
4. *The current Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements should be abolished. In its place, the proposed Standing Committee on Constitutional and Federal/State Affairs in the Legislative Council should be responsible for scrutinising uniform legislation and intergovernmental agreements. Its brief should also include considering legislation with constitutional implications.* (emphasis added)²³

The Commission on Government stated -

... [SCULIA] is concerned with Bills which form part of interstate or national legislative schemes involving the Commonwealth and other state and territory parliaments. The general aim of the Committee is to provide Parliament with a mechanism to scrutinise the appropriateness of such legislation and agreements from Western Australia's standpoint.²⁴

²¹ Western Australia, *Commission on Government*, Report No. 2 Part 2, December 1995.

²² Western Australian, *Commission on Government* Report No. 2 - Part 2, December 1995, p 19.

²³ *Ibid* p 19.

²⁴ Western Australia, *Commission on Government*. Report No. 2 - Part 2, December 1995, p 248.

The COG also recognised that SCULIA -

... has gained considerable status and recognition for its work.²⁵

The COG was at pains to recognise that the Standing Committee on Uniform Legislation and Intergovernmental Agreements, was established by the Legislative Assembly in August 1993 out of the growing concern that laws being applied in Western Australia had by-passed the scrutiny of the Western Australian Parliament. Such laws which resulted from Intergovernmental Agreements were introduced in one Parliament in Australia and then adopted without further scrutiny by all other Australian Parliaments. Of concern was that the adopting legislation sometimes did not even contain the substantive laws which would apply in Western Australia. COG quite properly recognised the genesis and the work of SCULIA. It clearly recognized that its work should continue in an expanded Committee all be it in the Legislative Council. The Committee is disappointed that COG did not consider retaining this Committee in the Legislative Assembly and extending the role of SCULIA to look at Federal/State affairs and legal and constitutional issues.

The COG recommended that SCULIA be replaced by a new Legislative Council Standing Committee on Constitutional and Federal State Affairs which would be responsible for scrutinising uniform legislation and Intergovernmental Agreements. Thus COG clearly recognised the special and vital role of the work of SCULIA. While the functions of SCULIA are more aligned to a general Constitutional and Federal State Affairs Committee, this Committee considers that its role should be expanded in the Legislative Assembly as legislation, which requires review by the Committee, generally originates in the Legislative Assembly. Somewhat similar Committees exist in the Senate, the House of Representatives, as well as in Queensland and in Victoria.

²⁵ Western Australia, *Commission Government*, Report No. 2 - Part 2, December 1995, p 252.

CHAPTER FIVE

5. SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

This Report provides overwhelming support for the retention of SCULIA. It outlines the background to the establishment by the Western Australian Parliament of SCULIA and the vital role it plays in ensuring that proposed uniform legislation is brought to the attention of the Parliament. It also outlines the increasing volume of legislation emanating from Ministerial Councils embodying uniform legislative schemes.

The Report presents evidence of the influence this Committee has had in all other jurisdictions culminating the development of uniform scrutiny principles for national schemes of legislation by Scrutiny Committees from all Australian jurisdictions. SCULIA's performance has also influenced the establishment of similar Committee's in both Queensland and Victoria and is highly regarded by Scrutiny Committees in all Australian States and Territories.

The Report demonstrates that the Select Committee on Procedure's recommendations lack conceptual basis and that it failed to understand the substantially different roles of the two Committees. SCULIA primarily examines proposed primary national uniform legislation while the JSCDL is concerned with operative subordinate legislation.

The Committee agrees with the JSCDL that there are fundamental differences between SCULIA and JSCDL and that recommendation for their amalgamation is conceptually inappropriate and impracticable.

The Report also considers the COG Report which recognises the vital role and influence of this SCULIA's work.

The Committee concludes that the work of this Committee has been invaluable not only to the Western Australian Parliament but also has had enormous influence in all Australian Parliaments who have established Committees with a similar role to SCULIA.

The Committee also concludes that the ever-increasing volume of national scheme legislation emanating from Ministerial Councils necessitates the retention of this Committee to ensure Parliamentary scrutiny of legislation affecting Western Australia.

The Committee makes the following recommendations -

Recommendation One

The Committee recommends that the Select Committee on Procedure's *Recommendation 18* is not proceeded with.

Recommendation Two

That the role of SCULIA be maintained in its present form as a specialist Committee.

Recommendation Three

That the role of SCULIA be expanded to include Federal/State affairs and legal and constitutional issues.