1995

STANDING COMMITTEE ON UNIFORM LEGISLATION AND INTERGOVERNMENTAL AGREEMENTS

SCRUTINY OF NATIONAL SCHEME LEGISLATION

AND THE

DESIRABILITY OF UNIFORM SCRUTINY PRINCIPLES

Tenth Report
In the Thirty-Fourth Parliament

Presented by
Hon. P. G. Pendal, MLA
Laid on the Table of the Legislative Assembly
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COMMITTEE MEMBERS

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COMMITTEE STAFF

Clerk/Research Officer	Ms Tamara Fischer
Legal/Research Officer	Ms Melina Newnan
Secretary/Stenographer	Mrs Patricia Roach

COMMITTEE ADDRESS

Legislative Assembly
Parliament of Western Australia
Harvest Terrace, Perth
(Contact: Ms Tamara Fischer)

Telephone: (09) 222 7390
Facsimile: (09) 321 9366

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

At an historic meeting in Darwin in early July 1995, committees from all Australian Parliaments adopted this Discussion Paper which sets out principles for standard procedures aimed at monitoring uniform legislative schemes. We believe it is the first time that Members of Parliament from all nine Parliaments have reached such an agreement.

It was a singular honour for this Committee to be invited to launch this Discussion Paper at the Conference.

The adoption of this Discussion Paper should be a matter of special pride for the Western Australian Parliament, and is for this Standing Committee, because our Members and staff played a leading role in researching, writing and shaping the final document. I especially acknowledge the valuable work of our Legal/Research Officer, Melina Newnan in this respect.

This report represents a milestone for Australian parliamentary practice. Its contents are expected to be tabled, in all nine Australian Parliaments, federal, State and Territory.

This Discussion Paper seeks to demonstrate why and how Parliaments must be brought into the vital role of scrutinising schemes for uniform legislation at a point earlier than currently occurs. If they are not, the existing inadequate level of scrutiny will continue indefinitely.

At page 4 of this report we spell out just what we mean by the term "uniform legislation" and the variety of forms such legislation can take. In doing so we re-visit our own work in our Second Report which was tabled in 1994.

It is worth restating that the fears of some Members of Parliament - that uniformity is a potential weapon to be used against the State and Territories - **are often without foundation.** Our report on the Mutual Recognition Scheme, a move often seen as overtly centralist, makes it clear, that this method actually preserves the position of the States.

I do urge all Members of Parliament and Ministers to read this report because the role played by this Standing Committee has been one of real leadership in demonstrating to eight other parliaments that there exists a dangerous gap in the process of scrutiny - a gap which can be filled by the Parliaments if they have the will to assert themselves.

HON. PHILLIP PENDAL, MLA
CHAIRMAN

EXECUTIVE SUMMARY

This Report is a development of a Discussion Paper agreed to by Legislative Scrutiny Committees from all jurisdictions in Australia at the Fifth Australasian and Pacific Conference of Delegated Legislation Committees and the Second Australasian and Pacific Conference on Scrutiny of Bills Committees held in Darwin, Northern Territory, in July this year.

This Committee was invited as an observer to a working meeting of Parliamentary Scrutiny Committees in October 1994. At that meeting the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements was asked to address the meeting to provide an overview of national uniform legislative schemes and parliamentary scrutiny.

Legislative Scrutiny Committees throughout Australia had been trying to come to grips with the growing number of national uniform legislative schemes and their ability to scrutinise such legislation under their existing scrutiny procedures.

The Committees had decided to investigate the problem of properly scrutinising such legislation further by Scrutiny Committees of all jurisdictions contributing to and issuing a Discussion Paper on the scrutiny of national scheme legislation and the desirability of uniform scrutiny principles. This Committee was invited to participate in the development of the Discussion Paper.

The Legislative Scrutiny Committees of all jurisdictions relied heavily on the expertise of this Committee in producing a National Discussion Paper covering all issues raised and the problems experienced by Legislative Scrutiny Committees to properly scrutinise national uniform legislation.

A Draft Discussion Paper was debated and endorsed by all Scrutiny Legislative Committees at a meeting in Melbourne in June 1995. That meeting acknowledged the contribution by this Committee to the understanding of national uniform legislation and the process of parliamentary legislative scrutiny and to the development and substance of the Discussion Paper.

The Paper was officially adopted at the Fifth Australasian Pacific Conference of Delegated Legislation, and Second Australasian and Pacific Conference on Scrutiny of Bills Committees in Darwin in July 1995.

It was agreed that each jurisdiction should publish and release the Paper for public comment and discussion. It is with this purpose in mind that the Discussion Paper is tabled as a Report of this Committee. The Committee welcomes response to the options and themes raised in this Report from the community at large.

The Report outlines terminology to describe substantive or principal legislation and subordinate or delegated legislation and provides useful examples from each jurisdiction.

All Parliaments in Australian have appointed Committees to examine subordinate legislation. Some Parliaments have also appointed Committees to scrutinise principal legislation that is Acts or Bills. Parliamentary Committees involved in the scrutiny of legislation at Commonwealth, State and Territory levels are noted and described. The Report describes different structures of achieving national uniform legislation.

The Report gives an informative and useful outline to the historical background to uniform laws in Australia and their development over time as well as parliamentary scrutiny of uniform laws.

The Report examines the particular problems posed by intergovernmental agreements and

Ministerial Councils for the scrutiny of national uniform legislation. It defines intergovernmental agreements and describes the role played by Ministerial Councils in the development and oversight of national uniform legislation.

The difficulties and concerns expressed by individual Parliaments and their Committees for parliamentary scrutiny of national uniform legislation is that they do not have an adequate opportunity to constructively review uniform legislation. Examples of the disregard of the parliamentary process with the introduction of national uniform legislation are outlined in the Report.

The increasing number of proposals for national uniform legislation over recent years and the need to ensure accountability by Ministers to their Parliaments, and concerns expressed by individual Parliaments and their Committees is considered vital.

Scrutiny of Legislation Committees believe that by working together and developing closer cooperation, procedures can be developed to ensure parliamentary scrutiny.

The Report also discusses approaches to developing principles for the scrutiny of national uniform legislation and canvasses the possibility of amending existing Terms of Reference to certain criteria against which to scrutinise subordinate legislation and Bills.

The Report examines how Legislative Scrutiny Committees can become involved in the process of national uniform legislation. The Report adopts proposals previously expressed by this Committee in its previous Reports which in effect establishes procedures which would allow information relating to uniform laws to be brought before Parliaments in a consistent manner and be subjected to scrutiny by Parliamentary Committees. As an example of how such parliamentary scrutiny could be ensured, the Report outlines a Standing Order recommended by the Standing Committee on Uniform Legislation and Intergovernmental Agreements.

The Report sets out options to permit parliamentary scrutiny. Such scrutiny could be ensured if proposed uniform legislation is consistently tabled as an exposure draft in each Parliament.

The Committee welcomes public comment on the proposals outlined in this Report. This will allow further consideration of this important issue, that is of ensuring proper scrutiny of national uniform legislation.

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SUMMARY OF PROPOSALS FOR CONSIDERATION

Listed below is a summary of possible proposals which the majority of the members of the working party believe represent the first steps which need to be taken to ensure the scrutiny of national scheme legislation.

Proposal 1 - Chapter Four

That all Scrutiny Committees adopt the following separate Terms of Reference for the examination of national scheme subordinate legislation -

- **Whether the subordinate legislation is in accordance with the provisions of the Act under which it is made and whether it duplicates, overlaps or conflicts with other regulations or Acts;**
- **Whether the subordinate legislation trespasses unduly on personal rights and liberties;**
- **Whether, having regard to the expected social and economic impact of the subordinate legislation, it has been properly assessed.**

(It is assumed that in respect of this Proposal, all the Scrutiny Committees are to retain their own particular Terms of Reference for the examination of subordinate legislation which relates to their particular jurisdiction. The above Terms of Reference are only to apply to the scrutiny of national scheme subordinate legislation.)

Proposal 2 - Chapter Five

That all Scrutiny of Bills Committees adopt the following separate Terms of Reference for the examination of national scheme primary legislation -

- **Whether the Bill unduly affects personal rights and liberties;**
- **Whether the Bill inappropriately delegates legislative powers.**

(The Scrutiny of Bills Committees are to retain their own particular Terms of Reference for the examination of Bills which relate to their particular jurisdictions.)

Proposal 3 - Chapter Six

Ensure that uniform legislation is tabled as an exposure draft in each Parliament.

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CHAPTER ONE

1. TERMINOLOGY BACKGROUND HISTORY

1.1 Introduction

The purpose of the Discussion Paper is to provide an overview of the problems faced by Australian Scrutiny Committees in respect of monitoring national scheme legislation. All the Scrutiny Committees have contributed to the drafting and preparation of the Paper. The Committees are of the view that it is desirable to promote parliamentary scrutiny of national scheme legislation. It is hoped that this Paper will provide sufficient material to provoke thought and stimulate informed discussion. The Discussion Paper examines some options which may go some distance to achieving those ends in respect of national scheme legislation. The Committees are keen to obtain input from the community at large, Judges, academics, legal practitioners and Government departments as to any matters of relevance or interest. The Committees are aware that there may well be other pertinent matters which require examination. The Committees welcome and invite any submissions or comments.

1.2 Terminology

The Australian Constitution and the Constitutions of each of the States and Territories give power to each jurisdiction to pass legislation or laws. The Parliament in each case is the chief law-making body. There are two types of legislation -

(a) Substantive or principal legislation/Acts of Parliament; and

(b) Subordinate or delegated legislation/regulations.

1.3 Substantive or Principal Legislation/Acts of Parliament

The substantive pieces of legislation passed by Parliament are called "Acts" of Parliament. The Acts of Parliament set out the main laws in respect of the general legislative subject matter. For example, the Victorian *Health Act 1958* consolidates and sets out all the public laws relating to health matters in Victoria. Each jurisdiction has its own respective Health Act to govern health matters.

Prior to being passed by the Parliament, an Act is generally referred to as a “Bill”. Once enacted or passed, it is referred to as an "Act" of Parliament. The contents of the Act have full effect as law.

1.4 Subordinate or Delegated Legislation/Regulations

Such Acts of Parliament generally contain an enabling power which allows further laws to be made to implement details of the matters dealt with in the Act. These further laws are called "subordinate legislation", "delegated legislation" or "regulations" (depending on the jurisdiction)[1]. They are made by the Executive Government to provide the detailed structures

[1] In the Commonwealth, New South Wales and Victoria, the Committee names refer to “Regulations”, while in the Australian Capital Territory, the Northern Territory, Queensland and Tasmania the reference is to “Subordinate Legislation”. The South Australian Committee refers to “Legislation” and the Western Australian Committee refers to “Delegated Legislation”.

to achieve the aims of the Act under which they are made. Despite the differences in terminology, all the Committees deal with substantively the same type of instruments.

An example of a set of regulations is the *Victorian Health (Infectious Diseases) (Donations Statements) Regulations* SR 232/93 which were made pursuant to the Victorian *Health Act 1958*. These particular regulations revised the forms to be completed by blood, tissue or semen donors. They were designed to obtain information to assess the potential risk of a donor having an infectious disease[2]. Regulations are as much law as Acts of Parliament and deal with important subject matters[3].

For convenience, in this Discussion Paper, these further laws will be referred to as "subordinate legislation". The term "legislation" refers to both Acts and subordinate legislation.

1.5 Scrutiny Committees

All Parliaments in Australia have appointed Committees to examine the subordinate legislation applicable in that jurisdiction. Some Parliaments also have appointed Committees to scrutinise their respective Acts or Bills of Parliament. All the Committees are collectively referred to as "Parliamentary Scrutiny of Legislation Committees". Generally, they are composed of a number of members of Parliament and are usually bipartisan in nature. The term “bipartisan” in this

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2 Victoria SR 142/94 Health (Infectious Diseases) (Donations Statements) Regulations. These regulations honour the Minister of Health’s undertaking to remove ambiguities in the questions asked of donors of blood of tissue or semen. The ambiguity had been noted by the Committee in relation to SR 232/92 and pertained to questions concerning exposure to HIV.

3 Tasmania - the Adoption Regulations, SR. No. 48 of 1992. These regulations were made under the *Adoption Act* 1988. The regulations provide for the procedures to be followed by organisations seeking approval as adoption agencies, set out the forms to be used and procedures to be followed for giving consent to the adoption of a child and the procedure to be followed by prospective parents for the adoption of a child. These regulations are designed to provide new and more stringent procedures for controlling the adoption of both Australian children and children from overseas.

Commonwealth - the National Food Authority Regulations SR No. 286 of 1994. These regulations were made pursuant to the *National Food Authority Act* 1991. The regulations prescribe matters to facilitate the operations of the National Food Authority in undertaking its food standards functions. Amongst other things, the regulations expand the list of government agencies which the Authority must notify about food standards matters and prescribe ways in which the standards process can be “fast’ tracked” in appropriate circumstances.

New South Wales - Environmental Planning and Assessment Regulation 1994. The object of this Regulation is to repeal and remake the provisions of the Environmental Planning and Assessment Regulation 1980 under the *Environmental Planning and Assessment Act* 1979. This is one of the major pieces of Planning Legislation in the State.

ACT -Building (Design and Siting) Regulations (Amendment) - No. 9 of 1995
Casino Control Regulations (Amendment) No. 45 of 1994. The Building (Design and Siting) Regulations (Amendment) No. 9 of 1995 was made under the *Building (Design and Siting) Act* 1964. It lists works which are not subject to design and siting approval. The Casino Control Regulations (Amendment) No. 45 of 1994 was made under the *Casino Control Act* 1988. It prescribes $5000 as the minimum amount that can be used as an inducement to people who visit the casino for the purpose of junket gaming as defined in section 3 of the Act.

Queensland - Security Providers Regulation 1995. The Queensland Security Providers Regulation 1995 was made pursuant to the *Security Providers Act* 1993 and provides a procedural guide to licensing and registration requirements under the Act. Specifically, the Regulation details particulars of what security providers (including bouncers, body guards, private investigators) have to do to be licensed under the Act and the implications of being so licensed. Details of registers of security providers and information to be recorded therein are also covered by the Regulation.

Western Australia - Fisheries Regulation 1938
Gas Transmission Regulations 1994. The Fisheries Regulations which are made under the *Fisheries Act 1905*. These regulations among other things, prescribe bag limits for the taking of certain fish and set fees for licences to take fish. The Gas Transmission Regulations 1994 which are made under the *Gas Corporations Act 1994*. The regulations set out law suppliers of gas may transport their gas in gas pipelines in the State.

context refers to Committees which are composed of both Government and Opposition members. Any division which may take place on the Committee may be but is not necessarily, along party lines. The Scrutiny of Legislation Committees play an important role ensuring that the law-making role of Parliament is not undermined.

An example of the way in which a Scrutiny Committee monitors the legislation may be drawn from the experience of the Senate Standing Committee for the Scrutiny of Bills. The Senate Standing Committee for the Scrutiny of Bills considered the *Weapons of Mass Destruction (Prevention of Proliferation) Bill 1994*. The Committee raised concerns in respect of a reversal of the onus of proof in a clause of the Bill. The Committee's concern was that the clause had the effect of forcing an accused person to prove that he/she was innocent and that this unduly trespassed on an important personal right in our society. The responsible Minister agreed with the Committee and the Bill was subsequently amended by the Government during passage through the Senate to assuage the Committee's concerns.

In Western Australia a Standing Committee has been established to specifically scrutinise and report on national legislative schemes. The Committee's Terms of Reference allow the Committee to report generally on any matters and issues which involve agreements for national uniform legislation. The Committee scrutinises proposed national uniform legislation and tables its Reports in the Parliament. This ensures that the Parliament is informed of proposed legislation.

1.6 The Role of the Scrutiny of Subordinate Legislation Committees

With respect to the role of the Scrutiny of Subordinate Legislation Committees, it should be noted that they do not have identical Terms of Reference. They do, however have common functions, for example: to protect rights and liberties and to ensure that subordinate legislation does not exceed the power of the Act under which it is made. This is examined in greater detail in Chapter Three.

1.7 The Parliamentary Scrutiny of Legislation Committees for the Commonwealth, States and Territories

The Parliamentary Scrutiny of Legislation Committees for the Commonwealth and each of the States and Territories are as follows -

Commonwealth

- Senate Standing Committee for the Scrutiny of Bills; and
- Senate Standing Committee on Regulations and Ordinances.

Territories

- Subordinate Legislation and Tabled Papers Committee of the Northern Territory; and
- Standing Committee for Scrutiny of Bills and Subordinate Legislation of the Australian Capital Territory.

States

- Regulation Review Committee of New South Wales;
- Scrutiny of Legislation Committee of Queensland;[4]
- Legislative Review Committee of South Australia;
- Subordinate Legislation Committee of Tasmania;
- Scrutiny of Acts and Regulations Committee of Victoria;
- Joint Standing Committee on Delegated Legislation of Western Australia; and
- Legislative Committee of the Legislative Council of Western Australia.

* In addition, the Legislative Assembly of Western Australia has established a Standing Committee on Uniform Legislation and Intergovernmental Agreements because of considerable concern regarding the development of uniform legislation.

The Scrutiny Committees meet regularly to discuss current issues and matters of common concern.

1.8 What is Uniform Legislation?

Uniform legislation is legislation which is substantially the same in all or a number of jurisdictions. There are a number of ways of achieving national uniform legislation -

- State Parliaments may refer power to the Commonwealth under section 51(xxxvii) of the Australian Constitution which enables the Commonwealth to legislate on the particular matter, eg; *Mutual Recognition Act 1992* (Commonwealth), the mutual recognition scheme for goods and occupations;

- Another method includes the introduction of "mirror" legislation enacted by all jurisdictions in identical terms, eg; the trade practices scheme (Part V consumer protection provisions) of the *Trade Practices Act 1974* (Commonwealth) and the Fair Trading Acts of the States;

- "Co-operative" legislation may be enacted in circumstances where the Commonwealth enacts legislation to the extent of its powers and the States and Territories legislate to cover the remaining matters, eg; the Co-operative Companies and Securities scheme;

- “Template” legislation involves a jurisdiction known as the host jurisdiction, enacting the model legislation and other jurisdictions adopting that legislation, eg; the *Financial Institutions (Queensland) Act 1992*;

- Under "alternative consistent" legislation, a jurisdiction may be permitted to participate in a national legislative scheme by enacting legislation which is consistent with the legislation of the host jurisdiction, eg; the proposed Uniform Consumer Credit Laws in Western Australia; and

- “Mutual recognition” is a method of achieving national co-operation. Under this method jurisdictions agree to recognise each others laws, eg; the mutual recognition scheme for goods and occupations provides mechanisms by which goods and services regulated by laws in one jurisdiction will be automatically recognised in all participating jurisdictions.

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[4] The Queensland *Parliamentary Committees Bill* 1995 was introduced on 24 May 1995 and proposes the establishment of the Scrutiny of Legislation Committee to scrutinise both bills and subordinate legislation. For the purposes of this paper information has been presented as if this proposed Committee was already established.

1.9 Historical Background to Uniform Laws

To understand fully the development of uniformity of laws in Australia, it is important to outline the historical context and the reason there has in recent years been a growing demand for uniform laws. It is perhaps important to remember that even before federation, despite the existence of six different legal systems in Australia, there was a measure of uniformity in the law. This occurred because the British colonists brought with them the English common law and statutes.

In the early days of the Australian colonies much legislation was prepared in the Colonial Office in London and the same provisions were used for several colonies. The Colonial Courts paid deference to the Courts in England and the Privy Council was the common appellate tribunal for all decisions from colonial courts. Even after self-government, statutes were generally copied *verbatim* from English legislation and this continued after federation. The unifying function of the Privy Council was in part transferred to the High Court of Australia.

1.10 Unification of Laws

The Australian States have enacted uniform laws or similar laws over the years in areas such as consumer laws and companies and securities regulation. However as a result of individual State amendments, these laws became less and less uniform over time. This has resulted in demands by industry for a more unified approach to such laws.

1.11 Drafting Differences

Differences in State laws have arisen not only because of political divergence but also from relatively trivial matters such as styles of legislative drafting adopted in each State. There is no agreed uniform style of legislative drafting or terminology between the various jurisdictions.

1.12 Harmonisation of Laws

Globalization and the need for nations to become economically efficient has led to the harmonisation of laws not only nationally but also internationally.

1.13 Parliamentary Scrutiny of Uniform Laws

The increasing move towards national scheme legislation has evolved a method of law-making which involves Ministers at Ministerial Councils agreeing on national uniform legislation. It has effectively excluded Parliaments from the scrutiny process of much national uniform legislation.

CHAPTER TWO

2. PROBLEMS - INTERGOVERNMENTAL AGREEMENTS - MINISTERIAL COUNCILS -

This Chapter examines the particular problems posed by Intergovernmental Agreements and Ministerial Councils in respect of the scrutiny of national uniform legislation.

2.1 What are Intergovernmental Agreements?

Intergovernmental agreements are political compacts which represent agreements reached by executive branches of Government at the Council of Australian Governments ("COAG") and/or Ministerial Councils, to a scheme involving the passage of uniform legislation in different jurisdictions. Many Ministerial Councils are of a bi-lateral nature and may include participants or observers from New Zealand. The agreement usually describes the substantive principles upon which the legislation will be based.

Once COAG or the relevant Ministerial Council has approved a proposal in principle for a scheme, the matter is usually referred to a working party for detailed development of the structure of the scheme and drafting of the legislation. After consultation the working party makes recommendations to COAG or the Ministerial Council. This may be a lengthy process.

2.2 Ministerial Councils - What role do they play?

Bodies comprising officials and Ministers from Federal, State and Territory Governments and in some instances New Zealand meet and agree to adopt proposals for uniform legislation. These bodies are called Ministerial Councils. Examples of these are the Council of the Australian Governments, (COAG) and the Standing Committee of Attorneys-General (SCAG) and other groups of Ministers.

Ministerial Councils play a major role in the development and oversight of national legislative schemes. Sometimes Ministerial Councils take on a more formal role under national legislative schemes including consideration of proposed legislation, regulations and any future amendments as well as approval of appointments to bodies established to administer the legislation.

Ministerial Councils do not regularly report to Parliament after meetings on intergovernmental matters and on proposed national legislation. Examples include the Corporations Law and the Mutual Recognition Scheme.

After attending these meetings, Ministers then present the uniform legislation to their respective Parliaments. A statement of how Ministerial Councils operate was published in a recent report of the Western Australian Standing Committee on Uniform Legislation Intergovernmental Agreements. Goldring made the following comment[5] in 1977 in relation to the Standing Committee on Commonwealth and State Attorneys-General (as it was then called) -

> The Standing Committee has no statutory or constitutional basis, no standing appropriation or funds, no formal rules, and no permanent staff. It meets several times each year, in each capital city in turn. The meetings are preceded by a meeting of departmental staff, which settles the agenda. The

5 Federal Law Review, Volume 9, Issue No. 3, June 1978.

meetings are secret and informal, but action is taken on the basis of unanimity, rather than majority vote. The only public indication of what is done in the Committee are the press statements made by the president ... Any agreement is personal only, and does not bind any government, for decisions of proposed legislation must be taken in the normal way as Cabinet decisions by the Commonwealth and each State. Matters may be referred back to the Committee if there are any significant objections or suggestion in any Cabinet. The drafting of model legislation is entrusted to the parliamentary draftsman of one of the participating legislatures. ...

> Draft uniform legislation prepared by the Standing Committee is not made available for public comment or discussion until it has been introduced into one of the Parliaments, mainly because the ministers do not wish to offend the Parliaments of which they must be members and to which they are responsible; and legislatures traditionally take the view that the members of the legislature should be the first to see any proposed legislation. Legislation introduced into only one legislature is often amended after public comment, but in the case of uniform legislation, this causes difficulties. Not only suggestions from the public, but even suggestions from Cabinet Ministers after the Standing Committee has approved a uniform Act are often met with the argument that amendment at that stage, no matter how desirable politically or on other grounds, would destroy the uniform nature of the Law.
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> The greatest virtue of the Standing Committee is that it is comprised of practising politicians, who are members not only of the various legislatures, but also of the executive governments of the State or the Commonwealth. As such, they are not only concerned in the formulation of uniform laws, and in the political negotiations which are necessary before agreement can be reached on the text of such a law, but they are also in a position to support proposals for uniform law in the Cabinet, where the significant decision as to priority in the legislative program is taken. The political position of the members of the Standing Committee gives it an advantage over any other body concerned with the unification of law, which is ultimately a political issue. One reason advanced for the greater success of the Conference of Commissioners in the United State of America, as compared with Canada, is that while the Canadian Commissioners tend to be either government lawyers or practitioner, those in the United States include a number of legislators.

2.3 A More Recent Perspective on Ministerial Councils

A more recent perspective on the subject of Ministerial Councils was published[6] in 1993 -

> The ACIR (Advisory Council for Inter-government Relations) identified a range of possible roles that ministerial councils may adopt: 'regulatory, advisory, consultative, policy, reviewing, co-ordinating and informing' (ACIR, 1986b, 31). As has been observed by Chapman (1988, 106), most councils in Australia operate mainly in the advisory or co-ordinating roles and are thus comparable to their counterpart bodies in the Canadian federal system. Except for the few councils with statutory powers, the decisions of councils are not binding on the member governments - thus, they do not have the "real power" implied by the term "council" (Soloman, 1986, vii). The ACIR survey indicated that most ministers felt that the major function of councils was to provide a forum for making contact and exchanging information, and also found that the "social" factor was important. (ACIR, 1986b, 32-33) ...
>
> Accountability
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> An important issue relating to the operation of ministerial councils concerns their accountability. Five years ago, the Senate Standing Committee on Finance and Public Administration addressed this issue in relation to all non-statutory bodies including ministerial councils. Its report reiterated an earlier recommendation for the creation of a central register arguing that: "information of this type is integral to the proper management and accountability of the machinery of government." (Parliament of Australia, 1988, 20). The recently released compendium of ministerial councils can be considered as a fulfillment of this recommendation (except that it does not include financial details as specified by the Senate Committee).
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> Another aspect of accountability concerns Parliament. In the formal sense, ministers are ultimately accountable to their respective parliaments for their participation in councils. However, according to Fraser (1989, 120), parliamentary accountability is reduced by the dynamics of councils which may force ministers to go along with decisions they would otherwise oppose. Further, as Soloman points out, some backbenchers see ministerial councils as distancing them from decision-making, and the Senate "is extremely unhappy at being presented with uniform legislation drafted by councils

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6 Policy-making in Volatile Times, "Reforming the Policy Role of Inter-governmental Ministerial Councils", Andrew Hede, Edited by Andrew Hede and Scott Fraser, Hale and Iremonger, 1993, pp 193-205 at 196, 200, 204 and 205.

which it (the Senate) is unable to amend" (1986, viii). Saunders (1991, 50) also comments on the problems for parliamentary practice resulting from ministerial councils becoming involved in the approval of bills.

As for information accessibility, Saunders has noted that : "State parliaments are also less likely than their Commonwealth counterpart to have systematic access to intergovernmental agreements or to the proceedings of ministerial council meetings." (1991, 50). It appears that central agencies are able to obtain copies of the agendas and minutes of ministerial councils. In almost all cases, these documents are considered confidential and not publicly released. A few councils publish resolutions of meetings (e.g., Australian Fisheries Council), and a few publish an annual report (e.g., Australian Education Council). Many councils receive brief coverage in departmental annual reports, and most issue media releases (usually heavily sanitised, and with a public relations slant). Generally, however, ministerial councils in Australia lack the democratic accountability which comes from openness to public and parliamentary scrutiny .....

Conclusion

We have seen that there is some lack of clarity in the official use of the term "ministerial council". The term would be best reserved for ongoing bodies which meet at least annually, which restrict full membership to government ministers/representatives, which comprise members from the Commonwealth and several other governments and which have as a key objective inter-governmental consultation. Ministerial councils can be conveniently classified according to their policy-specificity into four categories: central councils, broad policy councils, specific policy councils and specific issue councils (see Table 1). The role of ministerial councils is not simple or uniform. Very few councils have real power, though many are involved in the co-ordination of policy across governments and almost all perform a consultative role. The over-riding function of ministerial councils is to provide a forum for networking among ministers and senior officials from the various jurisdictions within the Australian federal system.

There are two problems relating to the operation of ministerial councils which take on particular significance in times of economic uncertainty and social change. First, there is a heightened potential for councils to become bottle-necks which prevent the timely development of national policy. Second, because of time pressures, there is an increased risk that policies in one arena will be developed without full appraisal of their impact on policies in other areas. Because of these two problems, the need for improved co-ordination across portfolios and governments becomes paramount in the current decade of ever-escalating change.

It is no coincidence that in this period of volatility, we are witnessing a number of events which will fundamentally alter the policy role of ministerial councils. One such event was the recent establishment of the Council of Australian Governments, the policy equivalent of the only other central ministerial council comprising heads of government, the Australian Loan Council. The other key event is the central review of ministerial councils aimed at improving their cost-effectiveness and halving their number. The overall effect of these changes should be to enhance the policy co-ordination function of ministerial councils and to ensure that they are more accountable to executive government."

2.4 Council of Australian Governments

In April 1995, the Commonwealth-State Committee on Regulatory Reform published[7] an article called "Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies" on behalf of COAG. Some relevant extracts are set out -

Public Consultation

Public Consultation is an important part of any regulatory development process. Consultation should occur when the course of regulatory action is being considered and a draft impact assessment statement is being produced. This will give interested parties a firm proposal to consider.

[7] "Council of Australian Governments - Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies" published in April 1995 by the Commonwealth-State Committee on Regulatory Reform on behalf of the Council of Australian Governments.

Consultation should occur as widely as possible but at the least, should include those most likely to be affected by regulatory action (eg consumer and business organisation) which might provide valuable feedback on the costs and benefits of regulation and on the impact assessment analysis generally. Consultation will also provide feedback on the level of support for the proposed regulation.

Assessment of National Standards proposed to be adopted by a Ministerial Council or other intergovernmental standard-setting body

All national (inter-governmental) standards which require agreement by Ministerial Councils or standard-setting bodies (including standards developed by other bodies) should be subject to a nationally consistent assessment process. The process is set out below:

(a) Minimum Assessment Requirements

Where a Ministerial Council or standard-setting body proposes to agree to regulatory action or adopt a standard, it must first certify that the regulatory impact assessment process has been adequately completed. The assessment process does not necessarily have to be carried out by the Ministerial Council but the Council or body should provide a statement certifying that the assessment process has been adequately undertaken and that the results justify the adoption of the regulatory measure. Most governments have regulatory impact assessment processes in place. The completion of regulatory impact assessments by Ministerial Councils and standard-setting bodies should remove the need to duplicate this analysis.

Adequate completion means that -

(i) an impact statement for the proposed regulatory measures has been prepared which -

- demonstrates the need for regulation;
- details the objectives of measures proposed;
- outlines the alternative approaches considered (including non-regulatory options) and explains why an alternative approach was not adopted;
- documents which groups benefit from regulation and which groups pay the direct and indirect costs of implementation;
- demonstrates that the benefits of introducing regulation outweigh the costs (including administrative costs);
- demonstrates that proposed regulation is consistent with relevant international standards (or justifies the extent of inconsistency); and
- sets a date for review and/or sunsetting of regulatory instruments;

(ii) Advertisements have been placed in all jurisdictions to give notice of the intention to adopt regulatory measures to advise that the impact statement is available on request and to invite submissions;

(iii) A list of persons/groups who made submissions or were consulted and a summary of their views has been prepared; and

(iv) The Council or other intergovernmental standard-setting body has considered the views expressed during the consultation process.

A copy of the completed impact statement should be forwarded to the Commonwealth Office of Regulation Review for information. The Office may be called upon to advise Ministerial Councils on technical issues so that a consistent approach is adopted.

(b) Review

If, at the conclusion of the impact assessment process outlined above, there is some dissatisfaction with the process or adequacy of the analysis by which its conclusions were reached, two or more jurisdictions may request a review of the proposed national standard. The Ministerial Council or other intergovernmental standard-setting body must then defer its consideration of the standard and commission a review.

The process of independent review would be triggered if two Heads of Government write to the Chair of the Ministerial Council or standard-setting body requesting an independent review of the assessment

process. Upon completion, the review body will report back to the relevant Ministerial Council or standard-setting body.

The Ministerial Council is to nominate an independent body to conduct the review. This might include a regulatory review body in any jurisdiction, an appropriate specialist body or consultant. Jurisdictions which request the review will meet its cost and agree to make resources available for the conduct of the review if the Ministerial Council decides to use State or Territory Government regulatory review units to conduct the review.

The review body's task is to reassess the impact statement and report on whether it can be demonstrated that the assessment process has been carried out according to the guidelines for adequate completion noted above. It is not intended that the independent review should necessarily repeat the quantitative analysis. The review body may also comment on any aspect of the proposed regulation and will have access to public submissions made in the course of the assessment process.

The report of the independent review body would become a public document and will be considered by the Ministerial Council or standard-setting body in its discussion of the adoption of the proposed regulatory measures. Once the report has been considered, the Council or standard-setting body's consideration of whether or not the regulation should be adopted by member governments can proceed.

The initial impact assessment and any review of that assessment are designed to provide the best possible information for decision-making by the Ministerial Council or standard-setting body. The impact assessment will not usually bind them or the participating governments since most Ministerial Councils are not formally established and do not have formal and binding voting arrangements. Their purpose is to develop a national consensus in relation to the matters which they consider.

If, upon the advice of the review body, a State or Commonwealth regulatory review body or other advice, the impact assessment is found to have been faulty, the Council retains discretion in its use of the impact assessment to inform its decision making.

If a Ministerial Council or standard-setting body fails to act on the recommendations of the review, the matter may be further examined by Heads of Government.

2.5 Timing

The period from the date that a proposal for uniform legislation is agreed to by a Ministerial Council until it is passed by every Parliament can be quite lengthy. One example is the reform of the domicile legislation. In 1970 the Standing Committee of Commonwealth and State Attorneys-General received a report recommending a number of changes in the law of domicile. In 1974 the Committee of Australian and New Zealand Law Ministers agreed in principle that reforms were desirable, and uniform legislation was drafted for its consideration. In August 1976 the *Domicile Act 1976* (New Zealand) received the Royal Assent and the first Australian jurisdiction to pass similar legislation was Victoria. The *Domicile Act 1978* (Victoria) received Royal Assent on 19 December 1978. By the end of 1980, uniform legislation had also been enacted in New South Wales, the Northern Territory, Tasmania and South Australia. In each case the legislation was to commence on a date to be fixed by Proclamation in order to ensure a uniform commencement date throughout Australia. In the event, the *Domicile Act 1982* (Commonwealth) received Royal Assent on 4 March 1982 and all Acts commenced on 1 July 1982.

2.6 Frequency

It appears that the frequency of this legislation is set to increase (for the reasons outlined in chapter one) based on the number of Bills that have been presented to Parliaments in recent years. The Table below sets out information which is indicative of the range of uniform legislative schemes which have come to the attention of the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements. The list is not comprehensive and does not include existing schemes or co-operative arrangements which may not require uniform

legislation.

Uniform Legislation	Model	Progress
Mutual recognition of goods and services	Reference of powers	Passed in all States except for Western Australia. Western Australia still to introduce legislation.
Credit	Template (States)	Template legislation passed in Queensland in November 1994. WA will pass complementary legislation not template
Evidence	Model legislation enacted in each State	Drafting of legislation commenced
Criminal Code	Model legislation enacted in each State	Under consideration by Committee of Officers
Defamation	Model legislation enacted in each State	Consultation proceeding, led by Qld, Vic and NSW. WA not involved to date.
Portability of restraint orders	Model legislation enacted in each State	Drafting of legislation proceeding
Choice of laws	Model legislation enacted in each State	Drafting of legislation proceeding
Recognition of foreign grants of probate	Model legislation enacted in each State	Will not proceed
Parentage presumptions	Substantially Commonwealth legislation with complementary State legislation	Drafting of legislation proceeding
Trustee companies		Discussion at early stage
Prosecutions with regard to white collar crime		Discussion recently commenced
Road transport	Template (Commonwealth and States)	Drafting of legislation proceeding. WA will consider amending existing legislation where deemed appropriate.
Environment	Commonwealth legislation with complementary State legislation	Intergovernmental Agreement in 1992. Commonwealth has drafted Bill.
Architects	Proposed model Bill for enactment in each State.	Discussions still at officer level.

Trustee companies		Discussion at early stage
Quarantine Arrangements	Developed jointly by the State and the Commonwealth	Little progress to date
Uniform Trade Measurement	Implementation likely to be through State legislation.	Uniform Trade Measurement Legislation Agreement is in place in all States other than WA. WA legislation will be largely consistent with the national model and is proposed for introduction to Parliament in the latter half of 1995.
Dangerous Goods (Road Transport) Bill	Commonwealth legislation with complementary State legislation.	WA Bill is still being drafted.
Legal privilege for quality assurance activities by health professionals	Model legislation enacted in each State	Legislation has been enacted in other States. WA Bill is still being drafted.
Competition Policy Reform	Template	Agreements signed at Commonwealth legislation passed in June 1995. NSW has passed application legislation. States and Territories application laws within 12 months.

Uniform Legislation	Model	Progress
Agricultural & Veterinary Chemicals	Substantially Commonwealth legislation with complimentary State legislation	Commonwealth scheme introduced in March 1995. Legislation in Legislative Council at 2nd Stage.
Health Services	A model Bill is available for enactment in each State.	Health Services (*Quality Improvement Act 1994*) to be proclaimed when regulations are drafted.
Therapeutic Goods	Commonwealth legislation with complimentary State legislation.	Model State Bill being drafted by ACT for consideration by other States.
Medicare Principles and Commitments	Commonwealth legislation with complimentary State legislation.	Contained within *Hospital's Amendment Bill (No.2) 1994*. Tabled in Legislative Council on 13 December 1994 pursuant to Standing Order 230 (C).
Radiation	Proposed uniform regulations standards	Little progress to date
Disability services	Legislation in each State with common principles and objectives	Bill at Second Reading Stage in the Legislative Assembly
Offshore Minerals (submerged lands)	Proposed WA legislation to mirror Commonwealth legislation	WA is currently drafting a model Bill for use as a basis for States/Northern Territory legislation
Occupational health and safety standards in key areas including mines and dangerous goods	Implementation likely to be through State legislation.	Discussions proceeding for uniform regulations, standards and codes of practice.
Building	A model Bill is available for enactment in each State	Under consideration in WA

2.7 The Need for Accountability

Accountability by the Executive to the Parliament is central to the system of responsible government. Procedures which allow access to information are essential if Parliament is to perform its role. It is important to remember that Parliament is supreme and the Government of the day serves at the pleasure of Parliament.

2.8 Accountability of Parliament

The fundamental premise of responsible government is its accountability to the Parliament and hence the people.

> ...the representatives who are members of the Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.[8]

This occurs by providing the forum within which, amongst other things, members publicly debate the issues of the day and exercise constant scrutiny over the Government and its legislative program. However, the procedures for drawing intergovernmental agreements are conducted in a manner that avoids recourse to the Parliament. This failure to bring such matters before the Parliament means that the public exposure and discussion initiated by it does not occur. Accordingly, there are very limited opportunities to improve the legislation.

The increasing number of intergovernmental agreements is a gradual yet significant element in transforming the Westminster system of Government in the Australian Federation. Intergovernmental agreements have been introduced for a variety of reasons. There is however no procedure or opportunity to make Governments more accountable with respect to the creation and implementation of these agreements.

There is a need to ensure accountability in the uniform legislative process by each Minister to their respective Parliaments and to the people of that jurisdiction. The issues so far discussed suggest that there is a need for a better flow of information to Parliaments on intergovernmental matters and tabling of reports in Parliaments.

2.9 Parliamentary Scrutiny

It is a curious feature of the current state of affairs that whilst many parties interested in proposed intergovernmental agreements or proposed uniform legislation are consulted about the proposals, Parliaments are not. Scrutiny of Legislation Committees have expressed their concern that individual Parliaments and their Committees do not have an adequate opportunity to constructively review uniform legislation.

With other (non-uniform) legislation, Committees can point out aspects of Bills that breach the Terms of Reference or point out errors in the legislation. In some cases, the relevant Government takes these comments into account and amends the Bill. However, in relation to uniform legislation no changes are permitted. Committees are often told that the legislation cannot be varied because it has been carefully worked out by the relevant Ministerial Council and has national significance. They have also been told that, if any amendments were to be made to the legislation, it would put that jurisdiction out of kilter with all the others. This is also the case with subordinate legislation.

As a result Scrutiny Committees are restricted from carrying out their roles in relation to uniform legislation. Practically speaking, it is fair to say that there is effectively no parliamentary scrutiny of national scheme legislation.

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8 Australian Capital Television Pty. Ltd V Commonwealth of Australia (No.2) 1992 108 ALR 577 at 594.

2.10 Intergovernmental Co-operation

It is important that scrutiny committees in all jurisdictions share information relating to intergovernmental matters. It is also essential that regular conferences and meetings continue to be held to ensure that all jurisdictions fully exchange views and comment on areas of concern in the scrutiny process of national uniform legislation.

Since the acceptance of uniformity in legislation must result in some practical limitations on the powers of individual Parliaments, new procedures are required to ensure the powers of Parliaments are safeguarded.

2.11 Two Examples of Disregard for Parliamentary Process

(1) Western Australia - A Rubber Stamp

An example where the Parliament was asked to act as a rubber stamp occurred in the Western Australian Parliament in late May 1992 when a Bill to regulate financial institutions was introduced in the Parliament with the parliamentary sitting due to end only a few days later. Ministerial Council had agreed that Queensland would pass "template" legislation which would be adopted by the other jurisdictions.

The Western Australian Parliament was asked to adopt Queensland laws which had not yet been sighted by the Western Australian Parliament. Although during the long process after Ministerial Council agreement over thirty drafts of the proposed law had been circulated to industry for comment, no copies were made available during this long process to the Western Australian Parliament. The final version of the law was not even attached to the Western Australian adoption Bill.

(2) Queensland

A second example of how Parliament's role as law-maker was by-passed by uniform legislation can be drawn from *Queensland's Mutual Recognition (Qld) Act 1992*. The Governor published a notice in the Government Gazette (in accordance with the procedure outlined in the abovementioned Act[9]) requesting an amendment to a schedule to the Act. This amendment effectively constituted an amendment to a principal Act without the Parliament of Queensland being consulted or having a scrutiny role. In addition, the Governor's notice does not qualify as subordinate legislation in Queensland and was therefore not subject to scrutiny by the Parliamentary Committee responsible for the scrutiny of subordinate legislation. The law as it affects Queenslanders was amended without any reference to the Parliament of Queensland.

2.12 Problems Posed by the Introduction of Uniform Legislation

Whilst it is recognised that each piece of uniform legislation, or an amendment thereto, can not feasibly be subjected to scrutiny at each stage by all Scrutiny Committees, an alternative to the current situation must be developed. In a nutshell, the problems with national scheme legislation may be summarised as follows -

! Insufficient scrutiny - There is no mechanism for scrutiny either by Parliaments or Parliamentary Committees; and

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9 Section 6 of the *Mutual Recognition (Qld) Act* 1992 and s.47 of the *Commonwealth Mutual Recognition Bill 1992* which is contained in the Schedule to the Act.

! lack of Governmental accountability at both State and Federal levels.

2.13 Current Challenges for the Committees

The Current Challenges for the Committees are threefold -

! in respect of subordinate legislation, identify common Terms of Reference which all Scrutiny Committees can use;

! in respect of the scrutiny of Bills, identify common Terms of Reference which those Committees which have the function of scrutinising Bills can use; and

! establish a procedure/s to ensure formal and informal intergovernmental agreements and uniform legislative schemes are tabled and/or scrutinised.

The scrutiny of Legislation Committees believe that by working together and developing closer co-operation such an alternative can and must be found. A discussion of the various options is found at Chapters Four and Six.

CHAPTER THREE

3. THE SCRUTINY OF SUBORDINATE/DELEGATED LEGISLATION

3.1 Scrutiny Committees - Subordinate and Delegated Legislation

Scrutiny of Legislation Committees regularly meet to discuss issues of common concern. Scrutiny of Legislation Committees are collectively of the view that the best approach to developing principles for the scrutiny of national uniform legislation is to foster closer links between the Committees themselves. As was discussed in Chapter One all the Committees scrutinise subordinate legislation. Only four Committees scrutinise Bills.

The Committees hold regular conferences to discuss common issues. One of the difficulties Committees face in liaising is that their Terms of Reference which set out the principles on which they review legislation differ significantly. With respect to subordinate legislation, some Committees give emphasis to scrutinising the impact of legislation on business and the community. All Committees are concerned with the rights of the individual.

3.2 The Scrutiny Committees' Current Terms of Reference

The Committees' current Terms of Reference embrace over thirty different grounds of review. However, some common grounds may be readily identified -

- the first ground that is adopted by all Committees is whether the subordinate legislation trespasses unduly on rights and liberties;

- the second most common ground is whether the subordinate legislation is made within the power or pursuant to the objects of the Act under which it is made;

- the third most common ground is whether the subject matter of a subordinate legislation is so important that it should be dealt with more properly in an Act. Aside from New South Wales, all Committees adopt this ground of review of subordinate legislation; and

- the fourth most common ground is whether a regulation unduly makes rights dependent on administrative rather than judicial decisions. Only New South Wales and the ACT omit this ground.

3.3 Table of Terms of Reference

For convenience, the Terms of Reference of all Scrutiny of Legislation Committees are set out in the following table, ie: those which scrutinise subordinate legislation and those which scrutinise Bills:

TERMS OF REFERENCE (b = bills) (s = subordinate legislation)	QLD	NSW	VIC	TAS	SA	WA	NT	ACT	Senate Reg	Senate Bill
Rights, liberties, obligations unduly dependent on insufficiently defined administrative powers	X	X	X (b)					X (b)		X
For any special reason, form or purport instrument requires elucidation	X	X	X (sl)	X			X			
Objective could have been achieved by alternative and more effective means		X								
Costs incurred in administration and compliance with statutory rule outweigh its benefits	X	X	X (sl)							
Adverse impact upon business community		X								
Regulation duplicates, overlaps or conflicts with any other regulation or Act	X	X								
Unjustifiable delay in publication or laying of instrument before Assembly							X			
Explanatory statement fails to meet technical or stylistic standards it ought in Committee opinion conform to	X							X (sl) (b)		
Power of search & seizure without warrant issued by Judge or Judicial Officer	X									
Fails to comply with matters pertaining to Regulatory Impact Statements	X	X	X	X						
Fails to provide appropriate protection against self-incrimination	X									
Insufficient regard to Aboriginal Tradition and Islander Custom	X									
Provides for the compulsory resumption of property without adequate compensation	X									
Confer immunity from proceedings or prosecution without sufficient justification	X									
Not within power or objects of Act	X	X	X (sl)	X	X	X	X	X (sl)	X	

Confer immunity from proceedings or prosecution without sufficient justification	**X**									
Without clear and express authority conferred by Act has - **(i) retrospective effect;** **(ii) imposes tax, fee, fine, imprisonment or other penalty;** **(iii) shifts onus of proof;** **(iv) provides for sub-delegation.**	 **X** **X** **X**		 **X** **X** **X** **X (sl)**							
Instrument appears to make unusual or unexpected use of powers conferred by statute under which it is made			**X (sl)**				**X**			
Not in accord with the spirit of the legislation even though legally made		**X**								
Subordinate legislation amends an Act.	**X**									
Matter more properly dealt with in an Act	**X**		**X (sl)**	**X**	**X**	**X**	**X**	**X (sl)**	**X**	
Insufficiently subjects the exercise of legislative power to parliamentary scrutiny	**X**		**X (b)**					**X (b)**		**X**
Inappropriately delegate legislative powers	**X**		**X (b)**					**X (b)**		**X**
Trespasses on rights, liberties(freedoms)	**X**	**X**	**X (sl)(b)**	**X**	**X**	**X**	**X**	**X (sl) (b)**	**X**	**X**
Is inconsistent with principles of justice and fairness	**X**		**X (sl)**							
Unduly makes rights dependent on administrative and not judicial decisions	**X**		**X (sl)**	**X**	**X**	**X**	**X**		**X**	
Unduly makes rights, liberties or obligations dependent upon non-reviewable decisions	**X**		**X (b)**					**X (sl) (b)**	**X**	**X**

3.4 Cost/benefit Analysis

A significant difference is that some Committees which scrutinise subordinate legislation require a cost benefit analysis of regulations and a degree of public consultation before legislation is made. In NSW, Queensland, Tasmania and Victoria, Regulatory Impact Statements incorporating cost benefit analysis must be completed for regulations which impose a significant burden or cost on

the public[10]. In those States, a Regulatory Impact Statement for National Scheme Legislation is not required if a Regulatory Impact Statement has already been carried out on that National Scheme Legislation in another State.

3.5 Various Options

Chapter Four discusses the various options available in respect of the Terms of Reference for the scrutiny of subordinate legislation.

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10 The *Legislative Instruments Bill* 1994 has been introduced into the Commonwealth Parliament. Under the Bill it is proposed that there be a mandatory consultation process for delegated legislation affecting business. Part of this process will involve the provision of a legislative instrument proposal ("LIP") which analyses the requirement for the instrument, presents a costs and benefits analysis and describes alternative means, if any, of achieving the objective.

CHAPTER FOUR

4. OPTIONS IN RESPECT OF SUBORDINATE LEGISLATION

4.1 Terms of Reference

The challenge for the Committees in respect of subordinate legislation is to identify common Terms of Reference which all Scrutiny Committees can use. This Chapter deals only with Subordinate Legislation Scrutiny Committees.

Given that the Terms of Reference vary widely, a number of options may be considered. The options set out below are the more obvious alternatives.

4.2 Option 1 - Reduce all Terms of Reference to three essential principles for the scrutiny of national uniform subordinate legislation

There are over thirty different grounds of review which have been adopted to a greater or lesser extent by Scrutiny Committees. However, these grounds essentially fall into two categories: - the "legality" of the regulation and the protection of individual rights. A third element of scrutiny in respect of subordinate legislation in some jurisdictions puts the onus on the proponent of regulations to establish objectively that each regulation is in the best interests of the community.

As some Committees are constituted under Acts of Parliament, any action to alter these grounds of review will require amendment of the Act under which the Committees are constituted. Alternate means of achieving uniformity in terms of scrutiny include the introduction of Commonwealth legislation or amendment of the Standing Orders of each Parliament. In all cases, any amendments will normally require the support of the Parliaments in all jurisdictions. In this regard, it is therefore necessary to ascertain the attitude of the particular Government in each jurisdiction before proceeding down that path.

The Terms of Reference of the Scrutiny of Legislation Committees in respect of national uniform subordinate legislation may be amended to reduce the existing Terms of Reference to three criteria against which to scrutinise subordinate legislation. Those three criteria may be described as -

- whether the subordinate legislation is in accordance with the provisions of the Act under which it was made and whether it duplicates, overlaps or conflicts with other regulations or Acts;

- whether the subordinate legislation trespasses unduly on personal rights and liberties; and

- whether, having regard to the expected social and economic impact of the subordinate legislation, it has been properly assessed;

4.3 Option 2 - Adopt the principles referred to in Option 1 as general categories under which existing Terms of Reference can be listed in respect of national uniform subordinate legislation

This option would enable individual committees to retain their current Terms of Reference but would enable each decision made by the committee to be identified by all other committees as relating to a common ground of review. It enables committees to review

legislation on the basis of their individual grounds of review. A Committee's decision may be of use to committees in other Parliaments on the basis of their general classification.

4.4 Option 3 - Retain existing Terms of Reference without amendment

The desirability of existing Terms of Reference is that they have been developed by each Commonwealth, State or Territory Parliament for analysis of legislation based on issues of concern to the particular State. Uniform Legislation should if anything be assessed on the basis of those issues rather than on the basis of general review grounds common to other States.

4.5 Option 4 - That Committees examining National Scheme subordinate legislation in individual Legislatures have the power to either apply their own Legislature's terms of reference or the core Terms of Reference set out in this Discussion paper.

The Committees propose to set up a working group to approach COAG to ensure that each Parliament is adequately consulted prior to the adoption of National Scheme Legislation. If that Working Group is unable to secure adequate prior consultation, then individual Committee's should be permitted to apply appropriate Terms of Reference in the scrutiny of the subordinate legislation.

4.6 Consideration of Options

The following is a summary of the arguments which may be used for and against greater consistency in Committees' terms of reference. It is not an exhaustive list and merely indicates the range of issues which needs to be resolved.

For: Committees can present a united front to Government on regulations common to their legislatures particularly on uniform legislation	
For: Common review grounds will enable portability of decisions on legislation from one Committee to another. Committees will be able to place close reliance on the examination by the Committee which is the first to consider the legislation.	**Against:** Even though decisions of Committees might be based on uniform grounds of review, the Committees will decide matters on facts that are of particular relevant to the state in question. The consideration of a particular piece of legislation will therefore not be of universal application to other Parliaments. It may be of persuasive value.
For: Committees will not run the risk acting ultra vires against their respective terms of reference if they place reliance on decisions on the opinions of Committees in other legislatures. The uniform terms of reference will preclude this.	

For: Common Terms of Reference will further and improve communications between the Committees.	**Against:** The Terms of Reference of individual committees reflect the issue of importance to the particular State legislature. New South Wales, for example, considers impact on business an important ground for review.
For: There will be considerable cost savings in avoiding duplication of effort on uniform regulations or regulations dealing with a similar subject matter.	**Against:** Additional costs will be incurred in increased communications between Committees.
For: The work of the Committees may be more accessible to the public if the review grounds are rationalised.	**Against:** The Committees will be compelled to adopt Terms of Reference which may not accord with the will of the Parliament. For example, not all Committees require cost/benefit analysis of regulations.
For: The Committees work will not be complicated by multiple Terms of Reference. Only the essential Terms of Reference will be required for instance, at the Committee's second conference in Canberra in 1989, Professor Pearce indicated that Committee's Terms of Reference fall into two broad categories - ! the protection of individuals on the one hand; and ! ensuring oversight of legislation on the other. The clear emphasis, he said, was in equity in government decision making.	

4.7 Proposal for Discussion

The preferred option of the majority of the members of the working party is Option 1, set out below as Proposal No.1. However, the Committees invite and welcome any comments on the preferred option or indeed on any other options or matters.

Proposal 1

That all Scrutiny Committees adopt the following separate Terms of Reference for the examination of national scheme subordinate legislation -

! whether the subordinate legislation is in accordance with the provisions of the Act under which it is made and whether it duplicates, overlaps or conflicts with other regulations or Acts;

! whether the subordinate legislation trespasses unduly on personal rights and liberties; and

! whether, having regard to the expected social and economic impact of the subordinate legislation, it has been properly assessed.

(It is assumed that in respect of Proposal No. 1, all the Scrutiny Committees are to retain their own particular Terms of Reference for the examination of subordinate legislation which relates to their particular jurisdiction. The above Terms of Reference are only to apply to the scrutiny of national scheme subordinate legislation.)

CHAPTER FIVE

5. THE SCRUTINY OF BILLS

5.1 Background

All Parliaments in Australia have a role in examining legislation. However, only four Parliaments have committees which examine primary legislation. They are as follows -

- Commonwealth Parliament's Standing Committee for the Scrutiny of Bills;
- Scrutiny of Acts and Regulations Committee of Victoria;
- Australian Capital Territory's Standing Committee on the Scrutiny of Bills and Subordinate Legislation; and
- Scrutiny of Legislation Committee of Queensland.

5.2 Common Terms of Reference

All the abovementioned Committees scrutinise Bills. Their Terms of Reference may be reduced to the two following essential principles -

- whether the Bill unduly affects personal rights and liberties; and
- whether the Bill inappropriately delegates legislative powers.

The Senate Standing Committee for the Scrutiny of Bills and Subordinate Legislation and the Victorian Scrutiny of Acts and Regulations Committee also look at Acts in some instances. The Queensland Scrutiny of Legislation Committee has responsibility for scrutinising all Bills and subordinate legislation. They all have different Terms of Reference and modes of operation yet they all apply the basic principles outlined above to Bills which are introduced into their respective Parliaments.

5.3 Proposal for Discussion

The preferred option of the majority of the members of the working party is set out below as Proposal No. 2. However, the Committees invite and welcome any comments on the preferred option or indeed on any other options or matters.

Proposal 2

That all Scrutiny of Bills Committees adopt the following separate Terms of Reference for the examination of national scheme primary legislation -

- Whether the Bill unduly affects personal rights and liberties; and
- Whether the Bill inappropriately delegates legislative powers.

(The Scrutiny of Bills Committees are to retain their own particular Terms of Reference for the examination of Bills which relate to their particular jurisdictions.)

CHAPTER SIX

6. HOW CAN SCRUTINY COMMITTEES BECOME INVOLVED IN THE PROCESS OF MAKING NATIONAL UNIFORM LEGISLATION?

Many parties interested in a proposed intergovernmental agreement or proposed national uniform legislation are consulted. Parliaments are not. This omission would be rectified if a procedure was established to allow information relating to uniform laws to be brought before Parliaments in a consistent manner and be subjected to scrutiny by parliamentary committees. Some general suggestions as to ways of enabling Scrutiny Committees to become involved are outlined below.

6.1 General Suggestions

- Exposure drafts of proposed uniform legislation, (primary and subordinate legislation) proposed amendments to the primary legislation and subordinate legislation to be tabled in the Parliament of each jurisdiction;

- Heads of Government agree not to enter a formal intergovernmental agreement for a co-operative or uniform legislative until an exposure draft of the material has been tabled in each participating Parliament;

- Amendments to the primary legislation enacted by a host Parliament should be published in the *Government Gazette* of other jurisdictions; and

- Amendments to Standing Orders of Parliaments need to incorporate a procedure to ensure formal or informal intergovernmental agreements and uniform legislative schemes are tabled.[11]

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[11] The following Standing Order was recommended by the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements. It has not yet been adopted by the Western Australian Parliament.

"255A. (1) Subject to paragraph (3), on any Bill which gives effect to a formal or informal intergovernmental agreement or uniform legislative scheme involving the Commonwealth, State and Territories, or any combination of States and Territories without the participation of the Commonwealth, the Order of the Day for the Bill shall stand adjourned after the conclusion of the speech of the mover of the motion "that the Bill be read a second time", until -

(a) 120 days have passed since the second reading was moved;
(b) the responsible Minister has tabled information on the following matters -

the background to the negotiations, the subject matter of the proposed uniform legislation, the model proposed to achieve legislative uniformity, the time schedule for the legislation and its implementation, the text of the draft agreement (if any) and a copy of the legislation and statutory instruments which are intended to implement the agreement or scheme; and

(c) a report on the proposed matter has been tabled by the Standing Committee in Uniform Legislation and Intergovernmental Agreements.

(2) If the report referred to in paragraph (1)(c) is not presented to the House within 6 sitting days of the expiry of the 120 day sitting period, the House may proceed as if the report had been tabled on the sixth such sitting day.

(3) Notwithstanding paragraph (1), a Bill of the kind referred to in that paragraph may proceed past the motion for the second reading if -

(a) the information required under paragraph (1) (b) is tabled at keast two weeks before the Bill is introduced to the House; and
(b) either a report on the proposed matter has been tabled by the Standing Committee on Uniform Legislation and

! Subordinate legislation and amendments should be published in the *Government Gazette* of each jurisdiction and be subject to disallowance.

6.2 Options

Detailed below are two options which, if implemented, would allow Scrutiny Committees to become involved. It would also ensure that national uniform legislation conforms to the same standards that apply to other primary legislation.

6.3 Option 1 - Ensure that Uniform Legislation is tabled as an Exposure Draft in each Parliament

Option 1, if implemented, would enable Scrutiny Committees to examine uniform legislation when it is still an exposure draft and thereby allow comments/alterations to be made. Unlike the present system where no amendments can be made because the legislation is in its final format, exposure draft would still need to be ratified by Ministerial Council.

6.4 Option 2 - Ensure that the Scrutiny Committees are involved in the process of making uniform legislation

Option 2 enables scrutiny Committees to be involved in the actual process of making uniform legislation and thereby ensure that scrutiny principles are applied. The difficulty with this option, however is when to get the committees involved.

Because the time taken between approval by the Ministerial Council and enactment by each Parliament can take so long, it is possible to factor in a role for Scrutiny Committees in relation to uniform legislation. It is considered that the best time for this to occur is after the Ministerial Council has agreed to the legislation and prior to its introduction into each Parliament. This would enable a panel of relevant Scrutiny Chairs from the Commonwealth, Victoria, ACT and to offer preliminary comments on the legislation in relation to their Terms of Reference.

Please note that Option 2 has the effect of excluding some jurisdictions from consultation process. Those jurisdictions without a Scrutiny of Bills Committee should be encouraged to establish a Parliamentary Committee to participate in the process.

Thus, for example, the following could occur in relation to uniform legislation -

(1) Relevant Ministerial Council adopts proposal for uniform legislation and issues press releases informing public of the purpose of the legislation.

(2) A copy of the proposed uniform legislation is provided to the relevant Scrutiny of Bills Committee Chairs for examination and comment within a quick time frame.

(3) The relevant Ministerial Council examines comments made (if any) at the next council meeting and re-examines the proposed legislation in light of comments. The Ministerial Council may make changes to the legislation if it perceives them to be appropriate; and

(4) Bill presented to each Parliament.

Intergovernmental Agreements, or six sitting days have elapsed since the second reading of the Bill was moved.

(4) If the House is not sitting, a Minister may forward in writing any information referred to in paragraph (1)(b) to the Clerk of the Legislative Assembly and on receipt by the Clerk it shall be deemed to be tabled."

6.5 Conclusion

For either of these options to proceed, the terms of reference of Scrutiny Committees may need to be altered to allow them to undertake the respective roles outlined in each option.

The preferred option of the majority of the members of the working party is Option 1, set out below as Proposal No. 3. However, the Committees invite and welcome any comments on the preferred option or indeed on any other options or matters.

6.6 Proposal 3 - Ensure that uniform legislation is tabled as an exposure draft in each Parliament

This option, if implemented, would enable Scrutiny Committees to examine uniform legislation when it is still an exposure draft and thereby allow comments/alterations to be made. Unlike the present system where no amendments can be made because the legislation is in its final format, exposure draft would still need to be ratified by Ministerial Council.