THIRTY-EIGHTH PARLIAMENT

REPORT 71

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

EDUCATION AND CARE SERVICES NATIONAL LAW (WA) BILL 2011

Presented by Hon Adele Farina MLC (Chairman)

May 2012

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

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

"**5. Uniform Legislation and Statutes Review Committee**

5.1 A *Uniform Legislation and Statutes Review Committee* is established.

5.2 The Committee consists of 4 Members.

5.3 The functions of the Committee are:

(a) to consider and report on Bills referred under Standing Order 126;

(b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;

(c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;

(d) to review the form and content of the statute book; and

(e) to consider and report on any matter referred by the Council.

5.4 In relation to function 5.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill, proposal or agreement may impact upon the sovereignty and law-making powers of the Parliament of Western Australia."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)	Hon Michael Mischin MLC
Hon Donna Faragher MLC (Deputy Chairman)	Hon Linda Savage MLC

Staff as at the time of this inquiry:

Alex Hickman (Advisory Officer (Legal))	Irina Lobeto-Ortega (Advisory Officer (Legal))
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CONTENTS

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

EDUCATION AND CARE SERVICES NATIONAL LAW (WA) BILL 2011

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1 REFERRAL

1.1 The Education and Care Services National Law (WA) Bill 2011 (**Bill**) was introduced into the Legislative Council on 6 March 2012 by the Minister for Child Protection, Hon Robin McSweeney MLC. Following the Second Reading Speech, the Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**).

1.2 Pursuant to Standing Order 126(7)(a), the Committee must present its report to the Legislative Council not later than 45 days after the Bill was referred to the Committee. Therefore, the last date for tabling this report was 20 April 2012 or the first sitting date thereafter, being 1 May 2012.

2 INQUIRY PROCEDURE

2.1 The Committee's inquiry was advertised in *The West Australian* on Saturday, 10 March 2012. Details of the inquiry were published on the Committee's webpage. The Committee wrote to stakeholders inviting submissions. The list of stakeholders and those who made submissions is at **Appendix 1**.

2.2 The Committee extends its appreciation to those who made submissions. The Committee notes that some of the submissions fell outside the Committee's Terms of Reference (**TOR**).

3 EXTENSION OF TIME TO REPORT AND AMENDED TERMS OF REFERENCE

Extension of Time to Report

3.1 The Committee Chairman moved a motion in the Legislative Council on 1 May 2012 requesting a short extension of time to table this report on 3 May 2012. The extension was granted by the Legislative Council.

New Terms of Reference

3.2 On 30 November and 1 December 2011, the Legislative Council amended the Committee's TOR to direct its consideration of Uniform Legislation Bills to the question of whether they:

> *may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.*[1]

3.3 The revised Standing Orders incorporating the new TOR came into effect on 6 March 2012.

4 UNIFORM LEGISLATION

4.1 The Bill adopts the "*applied laws*" model of Uniform Legislation. That is, it applies a law of the host jurisdiction, Victoria, being the *Education and Care Services National Law Act 2010 (Victoria)* (**Victorian Act**), which attaches, as a schedule, the Educational and Care Services National Law (**National Law**). The Bill incorporates the National Law as a law of Western Australia. However, rather than identically applying the Victorian Act, the Bill is corresponding in its terms.[2]

4.2 Where a participating jurisdiction is obliged to apply the host jurisdiction's legislation, the use of corresponding legislation provides flexibility to adapt the legislation to suit the particular legislative environment of the participating jurisdiction.

4.3 Variations must not be so inconsistent with the host jurisdiction's original legislation as to jeopardise the participating jurisdiction being part of the national scheme.

4.4 For the information of the Legislative Council, the Committee has set out in **Appendix 2** some of the differences between the Victorian National Law and the Western Australian National Law.

5 SUPPORTING DOCUMENTS

5.1 On 13 December 2011 (shortly after the Bill was introduced in the Legislative Assembly on 30 November 2011), the Committee received a letter from the Minister for Child Protection, Hon Robyn McSweeney MLC, attaching:

5.1.1 the Bill;

5.1.2 the signed National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care (**IGA**);

5.1.3 the Explanatory Memorandum (**EM**);

5.1.4 a Regulatory Impact Statement for Early Childhood Education and Care Quality Reforms;

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1 Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 30 November 2011 and 1 December 2011.

2 Sections 56 and 65 of Schedule A to the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care provides for Western Australia to pass its own corresponding legislation.

5.1.5 an extract from Hansard explaining financial penalties that Western Australia will incur if it does not "*have the national quality agenda ready by 1 January 2012*"; and

5.1.6 the Victorian Act incorporating the National Law.

5.2 The Committee extends its appreciation to the Minister for the early provision of these supporting documents.

5.3 The Committee requested the following further information from the Minister:

5.3.1 The Government's clearly stated policy on the Bill insofar as it impacts on Western Australia's parliamentary sovereignty and law-making powers.

5.3.2 The advantages and disadvantages to the State as a participant in the IGA insofar as it impacts on Western Australia's parliamentary sovereignty and law-making powers.[3]

5.4 In her response to this request, the Minister stated as follows:

> *There is no foreseen impact on the sovereignty and law-making powers of the Western Australian Parliament.*
>
> *The advantage to Western Australia is that the policy of introducing corresponding legislation and retaining the normal Regulations making process does not have a negative impact on the state as a participant in the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care.*[4]

5.5 Nevertheless, the Committee has identified a number of matters which have the potential to affect Parliament's sovereignty and law-making powers.

5.6 The Minister's response also attaches advice received from the Attorney-General as well as the State Solicitor's Office on a number of matters, including whether Western Australia can be considered a "*participating jurisdiction*" for the purposes of the national scheme in light of the Bill's proposed variations to the National Law.

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[3] Letter from Hon Nigel Hallett MLC to Hon Robyn McSweeney MLC, Minister for Child Protection, 7 March 2012.

[4] Letter from Hon Robyn McSweeney MLC, Minister for Child Protection to Hon Nigel Hallett MLC, 15 March 2012, p2.

6 BACKGROUND TO THE BILL

6.1 In December 2009, the Council of Australian Governments (**COAG**) endorsed the IGA, which Western Australia signed on 7 December 2009.[5]

7 THE LEGISLATIVE SCHEME

7.1 The IGA establishes a jointly-governed, unified National Quality Framework (**NQF**) for early education and care and school-aged care.[6]

7.2 The NQF provides for the introduction of legislation based on national quality standards, the establishment of a jointly governed national body, a nationally consistent assessment and rating system and a State-based, nationally consistent approvals system. This will replace the current separate State licensing and national quality assurance processes.[7]

7.3 The NQF comprises the National Law, the National Regulations (**NR**), the National Quality Standard (**NQS**) and the prescribed rating system.

7.4 It is important to note that the NR that have been drafted and are currently available on the New South Wales Government website[8] were drafted by the then Ministerial Council on Education, Early Childhood Development and Youth Affairs (**Ministerial Council**).[9] The NR for the purposes of the Bill are those made by the Governor pursuant to section 301 of the National Law. As far as the Committee is aware, these have yet to be drafted by the Department for Communities (**Department**).

7.5 The reforms within the Bill are stated to focus on improving the quality of education and care services for all children, reducing regulatory burden on services and providing greater access to information about the quality of services.[10]

7.6 The Bill also:

7.6.1 establishes the Australian Children's Education and Care Quality Authority to oversee its consistent implementation (**National Authority**); and

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5 Government of Western Australia, Department for Communities, *Explanatory Memorandum, Education and Care Services National Law (WA) Bill*, p1.

6 Hon Robyn McSweeney MLC, Minister for Child Protection, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 March 2012, pp618-620.

7 Ibid, p618.

8 http://www.legislation.nsw.gov.au/sessionalview/sessional/subordleg/2011-653.pdf (viewed on 17 April 2012).

9 The Ministerial Council on Education, Early Childhood Development and Youth Affairs has subsequently been replaced by the Standing Council on School Education and Early Childhood: see www.mceecdya.edu.au/mceeddya (viewed on 20 April 2012).

10 Government of Western Australia, Department for Communities, *Explanatory Memorandum, Education and Care Services National Law (WA) Bill*, p1.

7.6.2 provides for Regulatory Authorities (**RA**) in each jurisdiction approving providers and services that deliver education and care, monitoring compliance with the National Law and assessing and rating services against the new NQS.

7.7 The Committee understands the Child Care Licensing and Standards Unit of the Department, in its capacity as the regulator for all licensed child care services, including child care centres, family day care centres and outside school hours care, will be the RA in Western Australia.[11]

8 MATTERS WHICH MAY IMPACT UPON THE SOVEREIGNTY AND LAW-MAKING POWERS OF THE PARLIAMENT

8.1 The Committee has identified the following as potentially impacting upon the sovereignty and law-making powers of the Parliament of Western Australia and draws these to the attention of the Legislative Council.

The Intergovernmental Agreement

8.2 The IGA is publically available on the COAG website.[12]

8.3 Sections 69 to 79 of Schedule A of the IGA set out how the NQF or legislation implementing it may be amended. In summary:

8.3.1 any of the members of the Ministerial Council (Commonwealth, State and Territory Ministers responsible for childhood education and child care) may propose amendments;

8.3.2 the Ministerial Council will decide whether to refer member amendments to the National Authority, which will examine them and then discuss the proposed amendments with all jurisdictions. A Regulatory Impact Statement may be required. The National Authority will then provide advice to the Ministerial Council based on discussions with all jurisdictions and the Ministerial Council will agree to such amendments as it sees fit;

8.3.3 if agreed amendments require legislative change and have national application, the host jurisdiction (Victoria) will:

- seek the agreement of all other jurisdictions on the text of the amendments through the board of the National Authority and the Ministerial Council;

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11 http://www.communities.wa.gov.au/childrenandfamilies/NQFEECS/Pages/default.aspx (viewed on 16 April 2012).

12 See http://www.coag.gov.au/coag_meeting_outcomes/2009-1207/docs/nap_national_quality_agenda_early_childhood_education_care_signature.pdf (viewed on 23 April 2012).

- submit to its Parliament a bill, in a form agreed by the Ministerial Council, which effects the amendments; and

- take all reasonable steps to secure passage of the Bill and bring it into force in accordance with a timetable agreed by the Ministerial Council;

8.3.4 once the amendments are passed, the legislation of all other jurisdictions will automatically be amended, with the exception of Western Australia, which will commit to enacting corresponding legislation in consistent terms;

8.3.5 where a jurisdiction wishes to introduce a specific amendment relevant to its jurisdiction, it should inform the Ministerial Council. When this is not more broadly applicable to all jurisdictions, the Ministerial Council can agree that the NQS be amended by the host jurisdiction to address the matter in location-specific terms;

8.3.6 The agreement of the Ministerial Council is by consensus; and

8.3.7 section 74 of the IGA states:

> *Agreement by the Ministerial Council relating to decisions about the NQF or legislation will be by consensus. Where the Ministerial Council has not been able to reach consensus on a recommendation from the board of the national body about an amendment to the legislation within 90 days of the receipt of the proposed amendments, the majority of jurisdictions may agree to the public disclosure of the advice from the board.*

8.4 These provisions are important for the implications they may have, should there be any disagreement within the Ministerial Council about a proposed amendment.

8.5 'Consensus' has been defined as follows.

8.5.1 *"Agreement of opinion; a majority verdict."*[13]

8.5.2 *"Consensus decision-making is a group decision making process that seeks the consent, not necessarily the agreement, of participants and the resolution of objections.*

It is used to describe both the decision and the process of reaching a decision. Consensus decision-making is thus concerned with the process of reaching a consensus decision, and the social and political effects of using this process.

[13] Butterworths Australian Legal Dictionary, p249.

Consensus should not be confused with unanimity or solidarity"[14]

8.6 Accordingly, it is possible that an amendment of national applicability could be agreed by consensus in the Ministerial Council without the consent of Western Australia. The same applies to an amendment only applicable to Western Australia. In these circumstances, if an amendment were to be made contrary to the wishes of Western Australia, it has the potential to impact on the sovereignty of the Parliament of Western Australia.

8.7 There is a requirement in section 76 to Schedule A of the IGA that the Parliament of Western Australia must first pass corresponding legislation in consistent terms with such an amendment, enabling the Parliament to debate it to determine whether it is in the best interests of Western Australia. Accordingly, its law-making power is unrestricted in this sense.

8.8 Refusal to pass such an amendment may, however, jeopardise Western Australia remaining a "*participating jurisdiction*" for the purposes of the National Law. This reinforces the impact the process for making amendments to the NQF under the IGA may have upon the sovereignty of the Parliament of Western Australia.

8.9 The Committee also notes section 67 of the IGA provides that a party may terminate its participation in the IGA at any time by notifying all other parties in writing. Such a provision is a safeguard of parliamentary sovereignty.

8.10 The Committee draws these provisions of the IGA to the attention of the Legislative Council.

The Bill and the National Law

Clause 5(1) of the Bill

8.11 Clause 5(1) of the Bill provides:

> ***5. Exclusion of legislation of this jurisdiction***
>
> *(1) Except as provided in section 17, the following Acts of this jurisdiction do not apply to the Education and Care Services National Law (Western Australia) or to the instruments made under that Law -*
>
> *(a) the Freedom of Information Act 1992;*
>
> *(b) the Interpretation Act 1984.*

[14] http://en.wikipedia.org/wiki/Consensus_decision-making (viewed on 23 April 2012).

8.12 Clause 17 of the Bill provides:

> ***17. National regulations under the WA national law***
>
> *Where regulations may be made under the Education and Care Services National Law (Western Australia) section 301 by the Governor –*
>
> *(a) The Governor means the Governor of Western Australia and includes the officer for the time being administering the Government of Western Australia: and*
>
> *(b) The Interpretation Act 1984 sections 41, 42 and 60 apply to, and in respect of the making of, regulations by the Governor under that section.*

The *Freedom of Information Act 1992* (WA)

8.13 Section 264 of the National Law provides for the application of the *Freedom of Information Act 1982* (Commonwealth) (**Commonwealth FOI Act**) to the National Law.

8.14 Regarding the exclusion of the *Freedom of Information Act 1992* (WA) under clause 5(1), the Western Australian Information Commissioner has expressed a number of serious concerns on the impact of national uniform schemes on State oversight laws.[15] A copy of a paper prepared by the Information Commissioner expressing his concerns is attached in **Appendix 3**.

8.15 Those concerns can be summarised as follows:

- The use of different oversight models for different regulatory schemes will increase the complexity and fragmentation of oversight laws and will result in inefficiencies and unnecessary duplication of effort and expenditure.[16]
- An increase in the number of oversight bodies is likely to create confusion for the public as well as increasing overall bureaucracy.[17]

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15 Letter from Mr Sven Bluemmel, Information Commissioner, to Hon Nigel Hallett MLC, 22 March 2012 enclosing Office of the Information Commissioner, *COAG Regulatory Reform Agenda: Potential Impact on State Oversight Laws and Mechanisms, Issues Paper*, 13 December 2011. See also, Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, *Hearings In Relation To Agency Annual Reports For 2010-2011*, 11 November 2011, pp1-3.

16 Letter from Mr Sven Bluemmel, Information Commissioner, to Hon Nigel Hallett MLC, 22 March 2012 enclosing Office of the Information Commissioner, *COAG Regulatory Reform Agenda: Potential Impact on State Oversight Laws and Mechanisms, Issues Paper*, 13 December 2011, p3.

17 Ibid, p4.

- The approach will also result in multiple bodies applying and interpreting the same law, that is, the Commonwealth FOI Act. This is likely to lead to confusion as well as inconsistency in its application and interpretation.[18]

8.16 Significantly, on 12 December 2011, the appointment of a new position, the "National Education and Care Services Ombudsman, Freedom of Information and Privacy Commissioner", was announced.[19] This underlines the Information Commissioner's concern about the increase in the number of oversight bodies.[20]

8.17 The Committee also highlights the potential impact on the sovereignty of the Parliament of Western Australia of clause 5(1) of the Bill due to the Parliament not having the power to amend the Commonwealth FOI Act. The Committee notes the NR can modify the Commonwealth FOI Act's application to the National Law – see further paragraph 8.45 below.

8.18 The Committee considers that Western Australia's position as a "*participating jurisdiction*" in the national scheme may not be compromised by the *Freedom of Information Act 1992* (WA) applying to the RA and any other bodies in Western Australia which undertake a role in relation to matters covered by the Bill. This may also address some of the concerns of the Information Commissioner and ensure the Parliament of Western Australia retains the ability to amend the law applying to freedom of information requests arising under the Bill.

8.19 It may also be more consistent with a model considered by the Information Commissioner as warranting closer consideration; namely, where one jurisdiction (such as the Commonwealth) provides oversight of the activities of the National Authority, while "*local jurisdiction laws and bodies would continue to provide oversight for activities of jurisdictions*",[21] such as the RA.

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18 Letter from Mr Sven Bluemmel, Information Commissioner, to Hon Nigel Hallett MLC, 22 March 2012 attaching Office of the Information Commissioner, *COAG Regulatory Reform Agenda: Potential Impact on State Oversight Laws and Mechanisms, Issues Paper*, 13 December 2011, p4.

19 See http://www.mceecdya.edu.au/verve/_resources/Media_Release_-_Dr_Sisely_Appointment_-_National_Education_and_Care_Services_Ombudsman_FOI_and_Privacy_Commissioner.pdf (viewed on 20 April 2012). Dr Diane Sisely was appointed to all of these roles.

20 Op. cit. footnote 18, p4, where the Information Commissioner states: "*Although it may be considered that the creation of new stand alone oversight bodies will create nationally consistent oversight within each scheme, OIC is concerned that the potential proliferation of new scheme-specific oversight bodies across the national regulatory scheme raises issues of efficiency and duplication of resources with the existing Commonwealth and state oversight bodies, and will result in a highly fractured oversight framework.*"

21 Letter from Mr Sven Bluemmel, Information Commissioner, to Hon Nigel Hallett MLC, 22 March 2012 enclosing Office of the Information Commissioner, *COAG Regulatory Reform Agenda: Potential Impact on State Oversight Laws and Mechanisms, Issues Paper*, 13 December 2011, p13.

Recommendation 1: The Committee recommends that the Minister for Child Protection provide an explanation to the Legislative Council as to why the *Freedom of Information Act 1992* (WA) should not apply to the Education and Care Services National Law (WA) Bill 2011.

The *Interpretation Act 1984* (WA)

8.20 Schedule 1 to the National Law contains miscellaneous provisions relating to the interpretation of the National Law.

8.21 Regarding the exclusion of the *Interpretation Act 1984* (WA) under clause 5(1), while the Committee has not had an opportunity to undertake a comparison between the provisions of the *Interpretation Act 1984* (WA) and Schedule 1 to the National Law, it is of the view that the Legislative Council should be informed about any potential impact of the exclusion of the *Interpretation Act 1984* (WA) and the application of Schedule 1. This arises as a consequence of the Parliament being asked to adopt uniform legislation of this type.

8.22 More specifically, the exclusion of the *Interpretation Act 1984 (WA)* may have implications for other sections of the National Law, namely section 301(3), which makes a number of references to "*requirements and standards*". Section 43(8)(b) of the *Interpretation Act 1984 (WA)* provides that subsidiary legislation may be made so as to require a matter affected by legislation to be in accordance with a specified standard or specified requirement. There is no provision equivalent to section 43(8)(b) of the *Interpretation Act* in Schedule 1. See also sections 8.50 below.

Recommendation 2: The Committee recommends that the Minister for Child Protection provide an explanation to the Legislative Council:

(a) as to why the *Interpretation Act 1984* (WA), apart from sections 41, 42 and 60, does not apply to the Education and Care Services National Law (WA) Bill 2011; and

(b) of any impact of the exclusion of the *Interpretation Act 1984* (WA) and the application of Schedule 1 to the Schedule to the Education and Care Services National Law (WA) Bill 2011.

Clause 5(2) of the Bill

8.23 Clause 5(2) of the Bill provides:

> ***5. Exclusion of legislation of this jurisdiction***
>
> *(2) The following Acts of this jurisdiction do not apply to the Education and Care Services National Law (Western Australia) or to the instruments made under that Law, except*

to the extent that that Law and those instruments apply to the Regulatory Authority and the employees, decisions, actions and records of the Regulatory Authority —

(a) the Auditor General Act 2006;

(b) the Financial Management Act 2006;

(c) the Parliamentary Commissioner Act 1971;

(d) the Public Sector Management Act 1994;

(e) the State Records Act 2000.

8.24 This means that the only government agency that will be subject to this important accountability legislation is the RA and not any other Western Australian Government agency that may play a role in the implementation and management of the national scheme.

8.25 The exclusion of this legislation is not explained by the EM and, depending on the extent of the role of government agencies other than the RA, denies the Parliament of Western Australia of the ability to scrutinise the activities of these government agencies. This has an impact on parliamentary sovereignty.

8.26 The Committee notes, however, that section 279 of the National Law provides that the Board of the National Authority must, within four months after the end of each financial year, submit an annual report of the National Authority for the financial year to the Ministerial Council. The annual report must include an audited financial statement for the period to which the report relates, which can be audited by the Auditor General of a participating jurisdiction (section 279(6)).

8.27 Clause 16 of the Bill also provides that the Minister must arrange for the annual report of the National Authority as well as the report of the Auditor General to be laid before each House of Parliament.

Clause 19 of the Bill

8.28 Clause 19(1) of the Bill provides that if there is no sufficient provision in the Bill dealing with a transitional matter, the Governor may make regulations prescribing all matters that are required, necessary or convenient to be prescribed in relation to that matter.

8.29 Clause 19(2) of the Bill provides that regulations made under clause 19(1) may provide that specific provisions of the National Law do not apply, or apply with specific modifications to, or in relation to, any matter.

8.30 While this is for the purpose of transitional regulations only, so may not be considered an issue (Part 15 of the National Law contains transitional provisions), the need for this power in clause 19(2) has not been explained. The law-making power question is whether this delegation is appropriate in its application to the whole of the National Law and its unlimited duration. While the regulations must be made within 12 months, there is no limit on the period of their effect.[22]

8.31 The Committee has also identified this clause as a Henry VIII clause (see paragraph 8.43 below).

Clause 25 of the Bill

8.32 Clause 25 provides for the insertion of various sections into the *Child Care Services Act 2007* (WA) giving the power to make regulations to prescribe a code of practice.

8.33 It is unclear to the Committee whether:

8.33.1 any code will have legal effect;

8.33.2 any code will address anything that should more properly be in the Bill or the NR;

8.33.3 there is sufficient guidance in either the Bill or the *Child Care Services Act 2007* (WA) for the making of any code.

8.34 This also raises the question of whether any code should be tabled in Parliament and made disallowable.

Section 265(1) of the National Law

8.35 Section 265(1) provides for the *State Records Act 1998* (NSW) to apply as a law of a participating jurisdiction for the purposes of the NQF except to the extent that the National Law applies to a RA and the records of an RA.

8.36 The rationale given for this was the National Authority will be based in New South Wales,[23] though the EM does not contain such a rationale. However, the National Authority is not specifically mentioned in section 265, so this section could have wider application. For instance, it could apply to any records that were not records of the RA, including those of any other Western Australian Government agencies that may play a role in the implementation and management of the national scheme.

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22 See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, *Trade Measurement Legislation (Amendment and Expiry) Bill 2010*, Report No 55, 11 November 2010, pp38-40 for a discussion of a similar clause.

23 Government of Queensland, Department for Education, *Explanatory Memorandum, Education and Care Services National Law (Queensland) Bill 2011*, p4.

8.37 The fact that the New South Wales Parliament, and not the Western Australian Parliament, has the power to amend the *State Records Act 1998* (NSW), which may govern activities of Western Australian Government agencies, is of concern to the Committee. While the NR may modify this Act for the purposes of the National Law, pursuant to section 265(2), this is a Henry VIII clause which impinges on parliamentary sovereignty (see also paragraph 8.46 below).

8.38 Indeed, the Committee notes regulation 214 of the NR does provide for a modification to the *State Records Act 1998* (NSW). In section 3(1) of that Act, the definition of "*public office*" refers only to the National Authority.

8.39 Attached as **Appendix 4** is a copy of the submission of the State Records Office of Western Australia for the information of the Legislative Council.

Henry VIII Clauses

Generally

8.40 The position of the Committee on Henry VIII clauses is well documented in previous Committee reports.[24] A Henry VIII clause enables an Act to be amended by subordinate legislation.

8.41 The Committee has identified the following provisions in the Bill and the National Law as Henry VIII clauses for the attention of the Legislative Council.

8.42 Provisions that affect important matters such as privacy, freedom of information, state records and the role and powers of the Ombudsman should be dealt with by legislation and subject to the full scrutiny of Parliament, not left to regulations that leave the Parliament to only consider them after they have come into force.

Clause 19(2) of the Bill

8.43 See the discussion in paragraphs 8.28 to 8.31 above.

Sections 263(2)(c) and (3) of the National Law

8.44 Section 263(2)(c) provides that the NR may modify the application of the *Privacy Act 1988* (Commonwealth) to the National Law.

[24] For example, see Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 59, *Personal Properties Securities (Commonwealth Laws) Bill 2007 and Personal Properties Securities (Consequential Repeals and Amendments) Bill 2007*, 22 March 2011, p6; and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry Bill) 2010*, 11 November 2010, pp10-12.

Sections 264(2)(c) and (3) of the National Law

8.45 Section 264(2)(c) provides for the NR to modify the application of the Commonwealth FOI Act to the National Law.

Sections 265(2) and (3) of the National Law

8.46 Section 265(2) provides for the NR to modify the application of the *State Records Act 1998* (NSW) to the National Law.

Section 282(2)(b) of the National Law

8.47 Section 282(2)(b) provides for the NR to modify the application of the *Ombudsman Act 1976* (Commonwealth) to the National Law.

Sections of the National Law which may provide for an Unguided Sub-Delegation of Legislative-Making Power

8.48 The Committee has identified two clauses which may provide for an unguided sub-delegation of legislation-making power. This is where legislation-making power has been delegated without appropriate guidelines or limitations and as a result may constitute an improper delegation and one that impinges on parliamentary sovereignty. In other words, there must be some guidance provided for the exercise of the power. In both instances below, the documents referred to will not necessarily be available to the Legislative Council or subject to scrutiny by the Joint Standing Committee on Delegated Legislation.

Section 301(3) of the National Law

8.49 Section 301(3) states that the NR may provide for a number of matters. There is a frequent reference to "*requirements and standards*" with respect to these matters. These are not specified in the Bill or the National Law.

8.50 While section 43(8)(b) of the *Interpretation Act 1984* (WA) requires a specified standard to be set out in the subsidiary legislation, this section does not apply to the National Law by virtue of clause 17(b) of the Bill, which limits the applicability of the *Interpretation Act 1984* (WA) to sections 41, 42 and 60.

Section 301(4)(f) of the National Law

8.51 Section 301(4)(f) provides (bold added):

> *(4) The national regulations–*
>
> …

> *(f)* *may apply, adopt or incorporate by reference* ***any document*** *either-*
>
> *(i)* *as in force at the date the national regulations come into operation or at any date before then; or*
>
> *(ii)* *wholly or in part or as amended by the national regulations.*

8.52 The Committee is of the view that the wording of this provision is clear enough to authorise the Governor to sub-delegate the regulation-making power to the extent that "*any document*" contains any rules or requirements (such as a standard) which may apply to the subject matter of any regulation. However, "*any document*" is extremely wide.

Sections in the National Law that may provide for an Inappropriate Delegation of Legislative Power

8.53 The National Law provides for significant general and specific regulation-making powers. Legislative power should only be delegated in appropriate cases and to appropriate persons.

8.54 The Committee has identified the following sections of the National Law which provide for matters to be prescribed or determined and which may constitute an inappropriate delegation of legislative power.

Section 19

8.55 Section 19 states that a "*provider approval*" may be granted subject to any conditions that are prescribed or that are determined by the RA. There are similar provisions for a "*service approval*" (section 51(4)) and a "*supervisor certificate*" (section 115). There are no criteria to govern what these conditions may be.

Section 47(1)

8.56 Section 47(1) provides that, in determining an application for a "*service approval*" under section 43, the matters to which the RA must have regard include:

- the NQF (section 47(1)(a));
- any other matter the RA thinks fit (section 47(1)(f)); and
- "*any other prescribed matter*" (section 47(1)(g)).

8.57 There is no guidance as to what such prescribed matters may be or who prescribes them.

Section 49(2)

8.58 Section 49(2) provides that the RA may refuse to grant a "*service approval*" on any other grounds prescribed in the NR. The Committee notes this is very open-ended.

Section 114

8.59 Section 114 provides that the RA may grant a "*supervisor certificate*" to a person within a prescribed class of persons. While the Committee notes regulation 47 in the NR does set out minimum requirements for qualifications, experience and management capability, there are no details in the National Law of the type of class of persons to which a RA may grant a supervisor certificate.

Section 147(3)

8.60 Section 147(3) provides that persons approved as members of the Ratings Review Panel pool must have expertise in one or more of three areas and one of those is stated to be a "*prescribed area*".

8.61 There are no criteria to determine what this area may be. Regulation 70 in the NR provides that the prescribed areas of expertise or expert knowledge are the assessment of quality in education and care services or other relevant services and best practice regulation.

Section 169(7)

8.62 Section 169(7) gives the National Authority significant power to determine qualifications to be equivalent to the qualifications required by the NR. There do not appear to be any criteria to govern the exercise of this power.

Section 262

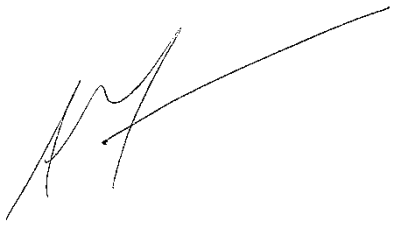
8.63 Section 262 provides that the RA may delegate in writing any of its functions and powers under the National Law to any person employed under a public sector law of "*this jurisdiction*" or "*a prescribed person or a person in a prescribed class of persons*" (section 262(1)(a) and (b)).

8.64 The National Law provides no guidance about the qualifications or experience of the person to whom power may be delegated or whether the delegate is subject to accountability legislation and, if so, of which jurisdiction.

Recommendation 3: The Committee recommends that the Minister for Child Protection provide an explanation to the Legislative Council as to whether any delegate identified by the Regulatory Authority pursuant to section 262 of the Schedule to the Education and Care Services National Law (WA) Bill 2011 will be subject to accountability legislation and, if so, of which jurisdiction.

9 CONCLUSION

9.1 The Committee submits this preliminary analysis of the Bill for the consideration of the Legislative Council.



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Hon Adele Farina MLC
Chairman

Date: 3 May 2012

APPENDIX 1

LIST OF STAKEHOLDERS AND SUBMISSIONS

APPENDIX 1

LIST OF STAKEHOLDERS AND SUBMISSIONS

Mr Sven Bluemmel **(Submission No 1)** Information Commissioner Office of the Information Commissioner
Ms Cathrin Cassarchis **(Submission No 3)** State Archivist & Executive Director State Records State Records Office of Western Australia
Professor John McMillan AO Australian Information Commissioner
Mr Malcolm Peacock Clerk of the Legislative Council Parliament of Western Australia
Dr Sarah Murray WA Chapter Convenor Australian Association of Constitutional Law
Dr Christopher Kendall President Law Society of Western Australia
Ms Catherine Gale President Law Council of Australia
Professor Stuart Kaye Dean of the UWA Law School Faculty of Law University of Western Australia
Associate Professor Jane Power Executive Dean School of Law University of Notre Dame
Dr Pamela Henry Head of School School of Law and Justice Edith Cowan University
Professor Gabriel Moens Dean of Law School of Law Murdoch University

Ms Rachelle Tucker **(Submission No 2)** Executive Officer The Childcare Association of WA
Ms Trish Rear **(Submission No 4)** President Family Day Care WA
Ms Audrey West President Community Kindergartens Association of WA
The Parents and Friends Federation of WA, Inc
Ms Michelle Scott Commissioner for Children and Young People Office of the Commissioner for Children and Young People
President National Out of School Hours Services Association
Independent Education Union of WA

APPENDIX 2

DIFFERENCES BETWEEN THE VICTORIAN AND WESTERN AUSTRALIAN NATIONAL LAW

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DIFFERENCES BETWEEN THE VICTORIAN AND WESTERN AUSTRALIAN NATIONAL LAW

Provision of the Victorian National Law	Difference in Western Australian National Law
Section 3(3)(a) – guiding principles of the NQF	Excludes "*rights and*"
Section 10(3)(a) – application for provider approval	Includes "*requested under section 11(c)*"
Sections 11(c), 22(2)(b), 56(2)(b), 85(2)(b), 88(b), 95(b), 107(b), 119(2)(b), 129(2)(b), 139(2)(b), 141(4)(c)	Replaces "*include the prescribed information*" with "*include any prescribed information that is requested by the Regulatory Authority*"
Section 25 – grounds for suspension of provider approval	Adds section 25(2) – definition of "*monetary order"*
Section 62(4) – transfer of a service approval may be subject to intervention by the RA	Excludes "*include the prescribed information*"
Section 109 – matters to be taken into account in assessing whether fit and proper person (supervisor certificate)	Adds section 109(ab), which states "*any disciplinary action taken against the person*"
	Adds section 165A (Offence relating to children leaving the education and care service premises unauthorised)
	Adds Division 3A (Disciplinary action) – sections 188A-C
Section 197 – powers of entry for assessing and monitoring approved education and care service	Adds section 197(6) – definition of "*specified person*"
Section 204(1)(b) – power to require name and address	Adds "*or a working with children law*"
Section 206 – power of authorised officers to obtain information documents and evidence	Adds (ab), which states "*monitoring compliance with a working with children law by specified persons in relation to the provision of an education and care service*"
Section 208 – offence to fail to assist authorised officer	Deletes "*without reasonable excuse*" after "*A person must not*"
Section 216(2) – power of RA to obtain information, documents and evidence at education and care service	Replaces "*specified person*" with "*person*" and deletes definition of "*specified person*"

Section 219(4) – self-incrimination not an excuse	Deletes 219(4)(c) – "*any information obtained directly or indirectly because of that answer or the provision of that information*"
Section 221 – powers of the Ministerial Council	Deletes (c) "*make regulations in accordance with this Law*"
Section 270 – publication of information	Adds (6) – "*a person against whom disciplinary action has been taken*".
Section 291(4) – infringement offences	Adds "*and for that purpose*" as well as (a) to (d) (infringement offences)
Section 301(1)	Replaces "*The Ministerial Council may make regulations for the purposes of this Law*" with "*The Governor may make regulations for the purposes of this Law*".
Sections 302 (publication of national regulations), 303 (parliamentary scrutiny of national regulations) and 304 (effect of disallowance of national regulation)	Deletes these sections
Section 316(1) – nominated supervisors	Adds (b), which reads "*for a declared out of scope service, the operator of which is taken under section 309 to hold a service approval for the service*"
Schedule 1 – miscellaneous provision relating to interpretation	Adds 11A – penalty at end of provision
Schedule 1, section 33 – repealed law provisions not revived	Replaces "Victorian" with "Western Australian"
Schedule 1, section 35 – continuance of repealed provisions	Replaces "Victorian" with "Western Australian"
Schedule, section 36 – law and amending Acts to be read as one	Replaces "Victorian" with "Western Australian"

APPENDIX 3

COAG REGULATORY REFORM AGENDA: POTENTIAL IMPACT ON STATE OVERSIGHT LAWS AND MECHANISMS

APPENDIX 3

COAG REGULATORY REFORM AGENDA: POTENTIAL IMPACT ON STATE OVERSIGHT LAWS AND MECHANISMS

Office of the Information Commissioner

COAG Regulatory Reform Agenda:
Potential Impact on State Oversight Laws and Mechanisms

Issues Paper

Office of the Information Commissioner
13 December 2011

Purpose of this Paper

The purpose of this paper is to highlight concerns about the potential confusion and proliferation of oversight laws and bodies under national harmonisation schemes being developed under the Council of Australian Governments (COAG) regulatory reform agenda. These concerns are shared by Information Commissioners in other Australian jurisdictions and were raised in the 2010-11 annual report of the Office of the Information Commissioner (OIC).

For the reasons given in this paper, the Information Commissioner does not consider it appropriate for OIC to take a lead role in addressing these concerns. Instead, OIC considers that COAG should look at this issue holistically by commissioning a targeted body of work that examines the different models for applying oversight legislation (including freedom of information) to national harmonisation initiatives under the COAG national reform agenda.

The role of the Information Commissioner

The Western Australian Information Commissioner is appointed by the Governor under s.56 of the *Freedom of Information Act 1992* (the FOI Act) and reports directly to Parliament. The Commissioner's main function is to deal with complaints made under the FOI Act about decisions made by agencies in respect of FOI applications and applications for amendment of personal information. The Commissioner's functions also include ensuring that agencies are aware of their obligations under the FOI Act and ensuring that members of the public are aware of their rights under the Act.

The FOI Act does not expressly confer on the Information Commissioner any policy functions, nor is the Commissioner's office resourced or staffed to discharge such functions. Information Commissioners in some other jurisdictions have a broader policy function. This has allowed Commissioners in those jurisdictions to be more proactive about identifying and responding to the issues in this paper.

For these reasons, the Information Commissioner does not consider it appropriate to take a lead role in resolving the issues identified in the paper. Instead, the Commissioner has brought these issues to the attention of the Department of the Premier and Cabinet for further action.

It is also important to note that this paper reflects the views of OIC as an independent accountability agency. It does not necessarily reflect the views of the Western Australian Government.

The COAG Reform Agenda

OIC understands that COAG has prioritised 36 areas of law for harmonisation to address the regulatory burden and equity issues arising out of inconsistent regulation across Australia.

It appears that, in order to implement these national legislative schemes, an 'applied laws' process is generally being used where a host jurisdiction enacts the national law in that state or territory's Parliament and other states and territories then adopt that law or pass corresponding legislation. The national laws are not Commonwealth laws. OIC's

understanding of the current status of a number of the national regulatory schemes is set out in the Appendix.

Potential Impact on State Oversight Laws and Mechanisms

This paper uses the term 'oversight laws' to include legislation dealing with freedom of information, privacy, public record keeping and the role of Ombudsmen. In some contexts, this may also include laws relating to public audit and public sector management. However, given the role of the Information Commissioner, the main focus of this paper is limited to freedom of information legislation and mechanisms.

The recently introduced national schemes have not adopted a consistent approach to how oversight laws apply to the people and organisations which play a role under the national schemes. Instead, different oversight models have been developed for education and child care services, occupational licensing and health practitioner regulation. It appears likely that a further variety of models will follow in other legislative reforms including national rail safety and heavy vehicle licensing. OIC is concerned that the use of different oversight models in different national regulatory schemes will increase the complexity and fragmentation of oversight laws and will result in inefficiencies and unnecessary duplication of effort and expenditure. The problem appears to have arisen inadvertently as a result of various Ministerial councils each deciding on different oversight models for the areas of national law reform for which they are responsible.

The Australian Information Commissioner, Professor John McMillan, has publicly noted[1] that it appears that *"...the application of FOI and Privacy laws to the national schemes has not been properly thought through...This lack of clarity concerning the application of FOI and Privacy Acts is a great concern, as those laws are regarded nowadays as a fundamental feature of democratic government in Australia. There is likely to be strong public criticism of any scheme of government regulation that does not make adequate or sensible provision for privacy and FOI laws to apply".*

The adoption of the national laws by participating jurisdictions has generally resulted in certain Commonwealth oversight laws, including the *Freedom of Information Act 1982* ('the Commonwealth FOI Act'), being applied as state law for the purpose of the schemes in place of jurisdiction-specific FOI and privacy legislation. OIC understands that this approach has been adopted to ensure *"matters relating to privacy and freedom of information are managed consistently across all State and Territories.*[2]

However, this approach raises a number of issues including which body should be responsible for administering the Commonwealth FOI Act as a state law. OIC understands that the main options in this regard are as follows:

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[1] In his submission to the COAG Business Regulation and Competition Working Group Secretariat on 24 October 2011, publicly available at http://www.oaic.gov.au

[2] Page 12, Explanatory Notes to the *Educational and Care Services National Law (Queensland) Bill 2011* available at http://www.parliament.qld.gov.au

- the Australian Information Commissioner performs the oversight role;
- existing state bodies, such as OIC, perform the oversight role on a territorial basis;
- the oversight role is conferred on a single existing state oversight body which would provide oversight for all participating jurisdictions; or
- a dedicated stand alone oversight body is created.

OIC understands that the Commonwealth opposes the first option on the basis that it would face constitutional difficulties and would in any event be inappropriate.

OIC considers that the option of state oversight agencies, such as OIC, performing the oversight role and applying the Commonwealth FOI Act would be problematic. The application and interpretation of both state and Commonwealth FOI legislation could create conflicting obligations.

Of great concern is that some of the national law schemes - notably the *Health Practitioner Regulation National Law 2009* and the *Education and Care Services National Law Act 2010* - have adopted the fourth option outlined above. Those schemes have established new separate national oversight bodies (not Commonwealth bodies) – the National Health Practitioner Ombudsman and the National Education and Care Services Freedom of Information Commissioner, respectively – who have responsibility for FOI regulation specifically for that scheme.

Although it may be considered that the creation of new stand alone oversight bodies will create nationally consistent oversight within each scheme, OIC is concerned that the potential proliferation of new scheme-specific oversight bodies across the national regulatory scheme raises issues of efficiency and duplication of resources with the existing Commonwealth and state oversight bodies, and will result in a highly fractured oversight framework. An increase in the number of oversight bodies is likely to create confusion for the public, as well as increasing overall bureaucracy.

This approach will also result in multiple bodies applying and interpreting the same law, that is, the Commonwealth FOI Act, currently administered by the Australian Information Commissioner. This is likely to lead to confusion. Also, the national laws generally provide that state review and appeal bodies will fulfil the role of the Administrative Appeals Tribunal and the Federal Court under the Commonwealth FOI Act and the Commonwealth *Privacy Act 1988* ('the Commonwealth Privacy Act'). OIC understands that in Western Australia this role will be performed by the State Administrative Tribunal and the Supreme Court, which means those bodies will be required to interpret and apply the provisions of the Commonwealth Privacy and FOI Acts. This model creates potential for inconsistency in the application and interpretation of the Commonwealth FOI Act by different bodies. As the Queensland Office of the Information Commissioner (Queensland OIC) has noted, *"...the certainty the common law delivers through judicial oversight would be frayed"* [3].

[3] See page 13 of Submission October 2011 re '*Future COAG Regulatory Reform Agenda Stakeholder Consultation Paper*'

The Australian Information Commissioner has publicly noted[4] that the establishment of a new national oversight body for the National Rail Safety Scheme *"...would add to the existing multiple layers, fragmentation and lack of consistency in information law regulation. Multiple regulators can lead to confusion about to whom to complain, differing legislative interpretations and complaints outcomes, and unnecessary duplication of effort and expenditure..."* and that there is a *"...distinct risk of inconsistency, confusion and disharmony" "if, under each scheme, a separate regulator* [is] *appointed with responsibility for interpreting and applying the FOI and Privacy Acts to that scheme"*[5]. OIC agrees with Professor McMillan that it is doubtful that the values of independence, impartiality, accessibility and expertise that underpin the schemes of OIC and of other oversight bodies *"can be truly met by the substitute regulators adopted for some of the schemes"*[6], who may have limited experience administering FOI legislation.

Another issue of concern is that the national regulatory schemes have adopted different approaches regarding the application of Commonwealth and state oversight laws under the national laws. For example, some schemes such as occupational licensing, rail safety and heavy vehicle regulation provide that the Commonwealth FOI Act applies for the purpose of the national law except to the extent that functions are being exercised under the national law by a state entity, whereas under the National Education and Care Services Scheme, the Commonwealth FOI Act applies to state and territory Regulatory Authorities and to the national authority established under that scheme.

State agencies will potentially be required simultaneously to comply with both the State and Commonwealth FOI Acts and in some circumstances it will be unclear and confusing as to which Act applies to any given situation. Accordingly, the application of State and Commonwealth FOI Acts needs to be readily ascertainable and precisely defined in the national laws.

For example, consideration should be given to the potential overlap in application of the Commonwealth and State FOI Acts to documents held by Western Australia's Regulatory Authority under this State's equivalent of the Education and Care Services National Law (for example, to the extent that the Regulatory Authority will exercise functions outside the scope of the national law). This issue of overlapping application of FOI legislation in this scheme has been extensively examined by the Queensland OIC[7] and the subsequent Queensland bill adopting the national law – the *Education and Care Services National Law (Queensland) Bill 2011*, which was passed by the Queensland Parliament on 16 November 2011 – includes a clause[8] which provides that the provisions of the law which exclude the operation of Queensland privacy and FOI legislation[9] do not affect the operation of the those acts in

[4] In his submission to the National Transport Commission 'Draft National Rail Safety Law 2011', August 2011 available at http://www.oaic.gov.au

[5] See above n 1

[6] Ibid

[7] In its submission *'Education and Care Services Regulation 2010'* dated 13 April 2011 publicly available at http://www.oic.qld.gov.au

[8] Clause 30

[9] Sections 5(1)(b) and (c)

relation to the *Child Care Act 2002 (Qld)* or instruments made under that Act. OIC understands that clause was included "*to remove any doubt that applications may continue to be made under the* Information Privacy Act 2009 *and* Right to Information Act 2009 *about matters pertaining to the* Child Care Act 2002" [10].

The application of Commonwealth laws to state entities may raise complex jurisdictional issues and will increase the regulatory burden on State agencies, requiring affected officers to have an adequate understanding of both state and Commonwealth FOI Acts and to apply and comply with two different laws. While there are similarities between the WA FOI Act and the Commonwealth FOI Act, there are substantial differences. In particular, the Commonwealth FOI Act has recently adopted a 'push model' in which agencies proactively make more information available to the public and are required to publish in a 'disclosure log' information that has been released in response to each FOI access request, subject to certain exceptions. In comparison, Western Australia has a more reactive or 'pull' model by which agencies disclose information in response to FOI requests. There are also substantial differences in the exemptions, the imposition of charges and the relevant timeframes under both Acts.

As the Queensland OIC has noted[11], the application of both Commonwealth Privacy and FOI Acts to state agencies will require participating jurisdictions to, among other things, identify similarities and differences between their laws and the Commonwealth Acts and train officers in two additional bodies of law and their precedents, which will come at a financial cost. The regulatory burden in relation to privacy will be high in Western Australia because State agencies, not currently subject to state privacy legislation, will be required to become familiar with and comply with the Commonwealth Privacy Act.

Another issue of concern is that the application of the Commonwealth FOI Act under the national laws can generally be modified by regulations to be made by the relevant ministerial council. This approach could result in the potential dilution of the current provisions in the Commonwealth FOI Act and the fragmentation of oversight arrangements. It can also be argued that this allows regulations to make legislative determinations of a kind that should properly be the preserve of Parliaments.

OIC is also concerned at the limited level of consultation which has taken place with existing oversight bodies, including OIC, about the proposed schemes, a concern which is also shared by other jurisdictions. As the Australian Information Commissioner has publicly noted:

"Though we have a substantial interest in the oversight arrangements for national schemes, our experience is that we are either not consulted or contacted late in the development of the scheme. The same concern has been expressed by our state and territory counterparts. We are left with the feeling that information law issues are treated as a minor technical issue to be resolved in the closing stages of deliberation" [12].

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[10] See above n 2, page 53. The Explanatory Notes includes useful consideration of oversight issues under the national law

[11] See above n 3, page 10

[12] See above n 1

Next Steps

The Australian Information Commissioner has made the following suggestion to address the oversight issue:[13]

"A better framework for consultation is required to ensure that the attention of the governmental representatives developing national regulatory schemes is drawn to [oversight laws and mechanisms] *at an early stage of development. It may assist policy development in this area if COAG commissioned a research paper that sets out the different models for national intergovernmental regulatory schemes and the options for applying privacy, access to information and ombudsman legislation to each model. Such a paper could serve to guide the development of future regulatory proposals and ensure that appropriate information law oversight arrangements are applied".*

OIC considers that it is vitally important that the application of oversight laws to the national regulatory schemes is given adequate and proper consideration. Failing to do so runs the real risk of any benefits of national harmonisation being outweighed by an increase in the complexity, cost and opacity of oversight legislation and mechanisms.

To that end, OIC considers that COAG should look at this issue holistically by commissioning a targeted body of work that examines the different models for applying oversight legislation (including freedom of information) to national harmonisation initiatives under the COAG national reform agenda.

[13] Ibid

APPENDIX

The National Health Practitioner Scheme

This scheme has been operational since 1 July 2010 and provides national regulation of health practitioners from ten professions under the *Health Practitioner Regulation National Law 2009* (enacted in Western Australia as the *Health Practitioner Regulation National Law (WA) Act 2010*).

The national law established the Australian Health Practitioner Regulation Agency (AHPRA), the Agency Management Committee and national boards for ten regulated health professionals.

The scheme applies the Commonwealth FOI and Privacy Acts for the purpose of the national law. However, it did not adopt the significant changes that were made to those Acts in 2010 nor does the Australian Information Commissioner provide FOI or privacy oversight for the scheme. Instead, the scheme has created new national oversight bodies with responsibility for FOI and privacy regulation specifically for the scheme (the National Health Practitioner Privacy Commissioner and the National Health Practitioners Ombudsman). OIC understands that this arrangement was intended to be temporary (until June 2012) and there is concern about the appropriateness of this arrangement continuing.[14]

The National Occupational Licensing Scheme

In 2008 COAG agreed to establish a national licensing system for certain occupations. Victoria is the host jurisdiction for the scheme and passed the *Occupational Licensing National Law Act* (2010) on 17 September 2010 ('the national law').

The scheme creates a new 'National Occupational Licensing Authority' ('NOLA') to administer the national occupational licensing system. NOLA was established on 1 January 2011 and is based in New South Wales.

OIC understands that the national law was drafted along similar lines to the Health Practitioner Scheme. However, unlike that scheme, this is a 'delegated scheme' whereby NOLA may delegate all regulatory functions for licensing to existing jurisdictional regulatory agencies (for example, the issuing of licences).[15]

Under the national law, the Commonwealth Privacy and FOI Acts apply for the purposes of the national licensing system, except to the extent that functions are being exercised under the national law by a state entity.[16] State privacy and FOI laws apply only when functions are being exercised under the national law by a state entity and do not relate to national registers

[14] See draft policy options paper dated 31 October 2011 prepared by the National Heavy Vehicle Regulator Project Office entitled *"Oversight arrangements under the Heavy Vehicle National Law – Policy options paper (issue number 049)"*

[15] Section 102 of the national law

[16] Section 135 and 137 of the national law

kept under the national law.[17] It is not clear from the national law who is proposed to administer the FOI oversight role and OIC understands this issue will be addressed in the national regulations.

The national licensing scheme is scheduled to commence operation from July 2012 for the following occupations: property; electrical; plumbing and gas fitting; and refrigeration and air conditioning. The national law has been adopted by New South Wales, Queensland, South Australia, Tasmania and the Northern Territory but OIC understands but that the Australian Capital Territory is still in discussions about its participation in national licensing.[18]

In Western Australia, the *Occupational Licensing National Law (WA) Bill 2010* ('the Bill') is currently before the Parliament. On 25 November 2010, the Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review. The Committee tabled its report on 14 April 2011, concluding that the Bill was *"too uncertain to be good law"* and recommended that the Bill should not be passed.[19] In relation to the oversight issue, the Committee noted at paragraphs 3.11 and 3.12:

> *"The Bill provides that Commonwealth Acts - the Privacy Act 1988, Freedom of Information Act 1982 and Archives Act 1983 - apply to the Occupational Licensing National Law applied by the Bill. Equivalent State Acts are excluded except to the extent that functions are exercised by State entities. On each occasion of application of a Commonwealth Act, power is conferred for regulations to be made amending the primary legislation as it applies to the national law.*
>
> *This raises two issues: uncertainty in where the lines will be drawn when records are both State and national and Henry VIII clauses".*

The Committee considered that there is uncertainty in clause 6 of the Bill as to whether the WA FOI Act or the Commonwealth FOI Act will apply to documents.[20]

National Education and Care Services Scheme

In December 2009 COAG agreed to establish a National Quality Framework (NQF) for early childhood education and care. The NQF is established by the Education and Care Services National Law and the Education and Care Services National Regulations. Under the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care, the states and territories agreed to enact as applied law the legislation establishing a national system enacted by the host jurisdiction – in this case Victoria – with the exception of Western Australia which will pass its own corresponding legislation.

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[17] Section 5 of the national law and clause 6 of the *Occupational Licensing National Law (WA) Bill 2010*

[18] see http://nola.gov.au/legislation-2/

[19] See page ii and paragraph 1.8 of *"Report 61 Standing Committee on Uniform Legislation and Statutes Review Occupational Licensing National Law (WA) Bill 2010"* available at http://www.parliament.wa.gov.au

[20] Ibid, page 25

In October 2010, Victoria enacted the *Education and Care Services National Law 2010 (Vic).*

According to information on the Department for Communities website[21] "[i]*n Western Australia the law will be introduced through corresponding legislation. This means there may be some local variation due to Western Australia's specific needs, but that it will be consistent with the national law".*

The national law establishes a joint national body - the Australian Children's Education and Care Quality Authority (ACEQA) - to oversee the implementation of the NCF and provides that state and territory Regulatory Authorities will have primary responsibility for the approval, monitoring and quality assessment of services. OIC understands that in Western Australia the Regulatory Authority is proposed to be the Child Care Licensing and Standards Unit of the Department for Communities.[22]

Under the national law, the Commonwealth FOI Acts applies as a law of a participating jurisdiction for the purposes of the NQF. [23] However, this scheme has adopted the Health Practitioner Scheme approach and modified the application of the Commonwealth Act by creating a new national oversight commissioner, the National Education and Care Services Freedom of Information Commissioner.[24] The same approach has been used for privacy oversight.

On 14 October 2011 the Ministerial Council for Education, Early Childhood Development and Youth Affairs approved for publication "Draft Education and Care Services National Regulations". [25]

Under the Regulations, the Commonwealth FOI Act applies to both ACEQA and to each Regulatory Authority in each participating jurisdiction.[26]

According to the Department for Communities website[27], *"*[t]*hese National Regulations will serve as a template for the Western Australian corresponding version which will be developed shortly."*

National Rail Safety Scheme

The National Rail Safety Scheme establishes the National Rail Safety Regulator which will have responsibility for regulatory oversight of rail safety across all of Australia.

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[21] http://www.communities.wa.gov.au/childrenandfamilies/NQFEECS/Pages/default.aspx

[22] Ibid

[23] Sections 264 of the *Education and Care Services National Law 2010 (Vic)*

[24] Ibid

[25] Publicly available at http://www.eduweb.vic.gov.au/edulibrary/public/earlychildhood/childrensservices/draft-edu-care-regs.pdf

[26] Clause 208 of the Regulations

[27] See above n 22

At the inaugural Standing Committee on Infrastructure and Transport (SCOTI) on 4 November 2011, Australia's transport ministers approved the laws which underpin the scheme, the Rail Safety National Law Bill and the Rail Safety National Law Regulations 2011. According to information on the National Rail Safety Regulator Project Office's website[28], *"the legislation will now be progressed through the South Australian parliament during the first half of next year, allowing all other jurisdictions to pass their applying laws in time for the National Rail Safety Regulator to commence operations in January 2013"*.

The Bill establishes the Office of the National Rail Safety Regulator (ONRSR)[29] which consists of a person appointed as the National Rail Safety Regulator (the Regulator) and two non-executive members.[30] Both the ONRSS and the Regulator may delegate its and his or her functions under the law to a person or body.[31] In addition, the ONRSR may enter into a service agreement with a State or Territory that makes provision for the State or Territory to provide services to ONRSR that assist ONRSR in exercising its functions[32] and the Regulator may appoint authorised persons (such as rail safety officers) which appointment may be limited to a part of a particular jurisdiction.

Clause 263 of the Bill provides that the Commonwealth Privacy and FOI Acts apply as laws of a participating jurisdiction for the purposes of the law, except to the extent that functions are being exercised under the national law by a state entity.

It is not clear from the Bill which body will have responsibility for FOI oversight. Part 8 of the draft Regulations headed *"Application of certain Commonwealth Acts to the Law"* currently says *"Drafting note – Details as to how the oversight arrangements will work are still being developed"*. Further, regulation 36 in Part 8 headed *"Application of FOI Act"* says *"For the purposes of section 263(3)* (Application of certain Commonwealth Acts to this Law) *of the Law, this Division sets out modifications of the Freedom of Information Act 1982 of the Commonwealth as it applies as a law of a participating jurisdiction for the purposes of the national rail safety scheme"*.

National Heavy Vehicle Regulator Scheme

The scheme establishes the National Heavy Vehicle Regulator which will be responsible for regulating all vehicles in Australia over 4.5 tonnes and is proposed to become operational by 1 January 2013.

The National Transport Commission's website[33] notes as follows.

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[28] See http://www.nrsrproject.sa.gov.au/news

[29] Section 12

[30] Section 16

[31] Section 45

[32] Section 15

[33] http://www.ntc.gov.au

> *"In November 2011, Australia's transport ministers approved the laws to underpin the new National Heavy Vehicle Regulator at the inaugural Standing Committee on Infrastructure and Transport (SCOTI) meeting.*
>
> *The NTC is working with the National Heavy Vehicle Regulator Project Office and stakeholders to prepare a second Bill to resolve minor issues raised by industry and government during consultation. This second Bill will amend the Heavy Vehicle National Law that was submitted to SCOTI".*

The law establishes the National Heavy Vehicle Regulator as a body corporate.[34] The Regulator may delegate any of its functions to, among others, the chief executive of an entity or a department of government of a participating jurisdiction or the Commonwealth.[35] OIC understands that certain functions of the Regulator are proposed to be contracted to State road and traffic authorities[36]and that the Regulator may appoint employees of the State or local government authorities as 'authorised officers' who are given compliance and enforcement powers.[37]

Clause 619 of the Bill provides that the Commonwealth Privacy and FOI Acts apply for the purposes of the national licensing system, except to the extent that functions are being exercised under the national law by a state entity. However, OIC understands that the Queensland OIC has viewed a discussion paper commissioned by the National Transport Commission (after release of the Bill for comment) wherein it is proposed that the Commonwealth Privacy and FOI Acts should apply to all functions under the national law, including those exercised by state entities. It is the Queensland OIC's understanding that the National Transport Commission is currently considering this proposal, and that a second Bill will provide further detail regarding oversight arrangements.

The National Heavy Vehicle Regulator (NHVR) Project Office recently sought comments from jurisdictional transport offices, oversight bodies and industry in response to a draft policy options paper entitled *"Oversight arrangements under the Heavy Vehicle National Law – Policy options paper (issue number 049)"* which outlined four different oversight models under consideration. These can be summarised as follows:

1. New, dedicated oversight bodies such as a HVNL Information Commissioner and a HVNL Ombudsman are created.

2. Existing jurisdictional bodies perform the oversight role on a territorial basis, which would involve each jurisdiction's oversight body retaining their oversight role for the matters that relate to the administration of the HVNL in their jurisdiction.

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[34] Sections 597 and 598

[35] Section 602

[36] See section 599

[37] See Part 9.1 of the Bill

3. One state oversight body administers the oversight role on a national basis, which would involve a single existing jurisdictional oversight body administering the oversight function for all parties under the HVNL scheme.

4. A model suggested by the Queensland OIC, which would involve one jurisdiction providing oversight for the new Regulator's activities, using that jurisdiction's existing oversight laws and mechanisms, while local jurisdictional laws and bodies would continue to provide oversight for activities of jurisdictions, including where the Regulator's functions are performed by an authorised officer or delegate/subdelegate employed by the jurisdiction.

While OIC considers that each of these models has drawbacks, the model suggested by the Queensland OIC in option 4 has considerable merit which warrants closer consideration.

APPENDIX 4

SUBMISSION OF THE STATE RECORDS OFFICE OF WESTERN AUSTRALIA

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Standing Committee on Uniform Legislation and Statutes Review

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Education and Care Services National Law (WA) Bill 2011

While I do not wish to discuss the purpose and structure of the national scheme for the regulation of education and care services for children proposed under the *Education and Care Services National Law (WA) Bill 2011* (the Bill), I would like to raise an issue with respect to the records created, received or otherwise managed in the performance of the functions by the various bodies under the Bill.

Background
The *State Records Act 2000* (WA) provides for the keeping of State records and for related purposes. Under the *State Records Act 2000* every government organization in Western Australia is required to have a Recordkeeping Plan (including a Records Retention and Disposal Schedule) approved by the State Records Commission of WA.

The Bill provides for a nationally consistent, integrated approach to regulation and quality improvement for education and care services. To the extent that the education and care services for children are currently regulated under existing Western Australian legislation, the Western Australian government organization/s performing the regulatory functions are already covered by approved Recordkeeping Plans and Records Retention and Disposal Schedules, in accordance with the *State Records Act 2000*.

It is against this background, and on my interpretation of the Bill as drafted, that I provide the following comment on the possible extent and application of some its provisions.

Comment

The Bill establishes the Australian Children's Education and Care Quality Authority (the National Authority) and provides it certain functions.

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Clause 5 provides that the *State Records Act 2000* (among other Acts of the Western Australian jurisdiction) does not apply to the Bill except to the extent that the Bill is applicable to the Regulatory Authority and the employees, decisions, actions and records of the Regulatory Authority.

Clause 8 provides that the chief executive officer of the Department principally assisting in the administration of the *Child Care Services Act 2007* is declared to be the regulatory authority for this jurisdiction for the purposes of the Bill.

Clause 265 provides for the *State Records Act 1998* of New South Wales to apply as a law of a participating jurisdiction for the purposes of the National Quality Framework except to the extent that the Bill applies to a Regulatory Authority and the records of a Regulatory Authority.

Therefore, it would be my understanding that the *State Records Act 2000* (WA) applies to the Regulatory Authority performing its functions as provided by the Bill in the Western Australian jurisdiction and the *State Records Act 1998* (NSW) applies to all else, such as, to the National Authority.

This recordkeeping oversight arrangement is similar to that provided in the *Occupational Licensing National Law (WA) Bill 2010*, except that Bill provided for the *Archives Act 1983* of the Commonwealth to apply as a law in Western Australia for the purposes of the national licensing system, with the proviso that the *Archives Act 1983* does not apply to WA state entities performing the regulatory functions as delegated, in which case the *State Records Act 2000* applies to those WA state entities performing the delegated regulatory functions.

The Committee will be aware of the Western Australian Information Commissioner's concerns about the disparate oversight mechanisms adopted, or at least proposed, in national schemes legislation, as outlined in his Issues Paper *COAG Regulatory Reform Agenda: Potential Impact on State Oversight Laws and Mechanisms*, submitted to the Committee's inquiry into the *Criminal Investigation (Cover Powers) Bill 2011*.

In the Issues Paper, the Information Commissioner provided an outline of four different options or models under consideration for oversight arrangements for heavy vehicle regulation and suggested that although each of the models has drawbacks, that model 4 has merit which warrants closer consideration. I would suggest that the recordkeeping oversight arrangements proposed in the Bill appear to be consistent with that proposed in model 4 and to that extent I am satisfied with the Bill's recordkeeping oversight arrangements as drafted.

In regard to the Committee's invitation that as part of my submission I comment on the impacts of the Bill on Western Australia's parliamentary sovereignty and law-making powers, I respectfully decline.

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