



THIRTY-EIGHTH PARLIAMENT

REPORT 64

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**INFORMATION REPORT ON UNIFORM SCHEME
STRUCTURES**

Presented by Hon Adele Farina MLC (Chairman)

August 2011

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:

“8. Uniform Legislation and Statutes Review Committee

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

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

- (a) to consider and report on Bills referred under SO 230A;
- (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
- (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
- (d) to review the form and content of the statute book;
- (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
- (f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

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EXECUTIVE SUMMARY FOR THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW
IN RELATION TO AN
INFORMATION REPORT ON UNIFORM SCHEME STRUCTURES

EXECUTIVE SUMMARY

- 1 Since 2002, the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) and its former incarnations included and described the features of nine uniform scheme structures in an Appendix to every report on a uniform bill. From this list, the Committee has routinely matched a particular bill to a particular structure for the benefit of the Parliament.
- 2 The list was first formulated from the Senate's Working Party of Representatives of Scrutiny Committees throughout Australia when, in 1996, it developed a *Position Paper on the Scrutiny of National Schemes of Legislation*. Since that time, academic scholarship in the identification of uniform scheme structures has progressed.
- 3 The Committee has now updated its list by including five structures adapted from the 2008 *Protocol on Drafting National Uniform Legislation* by the national Parliamentary Counsel's Committee. The Committee advises the Legislative Council that it will include this list in every report on a uniform bill from this point in time.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO AN

INFORMATION REPORT ON UNIFORM SCHEME STRUCTURES

1 REFERENCE AND PROCEDURE

- 1.1 On 18 May 2011, the Standing Committee on Uniform Legislation and Statutes Review (**Committee**), of its own motion, resolved to inform the Parliament of developments over the past 16 years in identifying and describing various structures or mechanisms of uniform legislation. These structures are known more colloquially as cooperative schemes.

2 BACKGROUND

- 2.1 In August 1995, the Legislative Assembly's Standing Committee on Uniform Legislation and Intergovernmental Agreements tabled a report identifying six methods for achieving national uniformity in legislation.¹

1. State Parliaments could refer power to the Commonwealth under section 51(xxvii) of the Australian Constitution which enables the Commonwealth to legislate on the particular matter.

2. The introduction of Mirror legislation enacted by all jurisdictions in identical terms.

3. Co-operative legislation which 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.

4. Template legislation which involves a jurisdiction known as the host jurisdiction, enacting the model legislation and other jurisdictions adopting that legislation.

5. Under Alternative Consistent legislation, where a jurisdiction may be permitted to participate in a national legislative scheme by

¹ Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report 10, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, 31 August 1995.

enacting legislation which is consistent with the legislation of the host jurisdiction.

6. Mutual Recognition which is a method of achieving national co-operation. Under this method jurisdictions agree to recognise each other's laws.

3 THE SENATE'S POSITION PAPER

3.1 In 1996, the six structures listed above were considered by the Senate's Working Party of Representatives of Scrutiny Committees throughout Australia when, as part of the development of a *Position Paper on the Scrutiny of National Schemes of Legislation*, eight structures were identified and finalised. The eight structures and their features are described as follows from that *Position Paper*.

1 - Complementary Commonwealth-State or Co-operative legislation

3.2 Here, the Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

3.3 Amendments to the Commonwealth legislation are totally under the control of the Commonwealth Parliament and amendments to the State legislation are totally under the control of the State Parliament. This structure emphasises flexibility outside the matters covered by the Commonwealth legislation, as each jurisdiction is able to draft its own legislation to suit local considerations.

2 - Complementary or mirror legislation

3.4 For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction. The identifying feature of this structure is the enactment of separate identical legislation in all participating jurisdictions. Totally consistent (but not necessarily identical) Acts are passed in each jurisdiction to prevent any questions about the validity of the legislation.

3.5 The intergovernmental agreement may require the Minister to introduce the Bill in identical terms. However, the Bill is considered and debated in each Parliament. There is a tendency for each participating jurisdiction to vary the draft agreed to by the executive branch of Government, to accommodate local concerns and the different drafting styles of local parliamentary draftsman. This structure may also be used where there is no uncertainty about the extent of the constitutional powers of the Commonwealth, but jurisdictions wish to establish a national regulatory body.

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- 3.6 The intergovernmental agreement may state that amendments agreed at the Ministerial Council level should be enacted promptly by all participating jurisdictions. However in practice each Parliament may delay passage of the agreed amendment, refuse to enact the agreed amendment, or vary the terms of the agreed amendment.
- 3.7 If the scheme has been devised to cure questions of constitutional validity, delay or variations to amendments agreed by the executive branch of Government will endanger the cure. Further, the passage of inconsistent amendments will inevitably contribute to the breakdown of a national scheme reliant on consistent legislation or regulations. Assuming the Bills pass through each Parliament as originally drafted, this structure emphasises consistency.

3 - Template, Co-operative, Applied or Adopted Complementary legislation

- 3.8 Known variously, this type of legislation is enacted by one main jurisdiction and other jurisdictions then pass Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own. This is an elastic structure as variations can be made to accommodate requirements determined during the negotiation process.
- 3.9 Each jurisdiction retains some flexibility in its consideration of proposed amendments. A high degree of consistency is emphasised in the original legislation.

4 - Referral of powers

- 3.10 The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51(xxxvii) of the *Commonwealth Constitution*. Such Commonwealth legislation will only operate in the States which referred the matter, or which after referral of the matter by another State, adopted the resultant legislation. The section enables the States to extend the legislative power of the Commonwealth at their instigation. The Commonwealth would then have legislative coverage of a matter over which previously the States had comprehensive power to legislate.
- 3.11 The referral may include a mechanism for amending the legislation. For example, the agreement of the Ministerial Council or national regulatory body. Amendments must be made by the Commonwealth, although limited referrals of power may restrict the Commonwealth's ability to amend the original legislation. Amendments may be difficult if all States involved have to amend their referring legislation to confer broader power on the Commonwealth, to enable the Commonwealth to comply with the directions of the relevant Ministerial Council or national regulatory body.
- 3.12 Section 109 of the *Commonwealth Constitution* dictates that this structure has an emphasis on total consistency.

5 - Alternative consistent legislation

- 3.13 Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.
- 3.14 The intergovernmental agreement may permit a jurisdiction to participate in a national scheme by enacting legislation which states that ‘an act or thing’ will be lawful, if such an act or thing would be lawful under legislation of the host jurisdiction. The State or Territory would undertake not to introduce any legislation which would otherwise conflict with the legislation, and would undertake to repeal, amend or vary existing legislation which conflicted with the ‘alternative consistent’ legislation.
- 3.15 The intergovernmental agreement may permit a jurisdiction to later repeal its legislation and adopt the legislation of the host jurisdiction. The host legislation may prevent States and Territories joining national schemes in this manner.
- 3.16 Each participating jurisdiction would be responsible for monitoring amendments to the legislation in the host jurisdiction and introducing consistent amendments, where necessary, into the Parliament. The Parliament is reliant on the executive branch of Government to monitor amendments proposed in relevant Ministerial Councils or the Council of Australian Governments (**COAG**).
- 3.17 The emphasis in this structure is on flexibility.

6 - Mutual recognition legislation

- 3.18 It recognises the rules and regulations of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.
- 3.19 States may agree on a scheme of mutual recognition of laws. In general terms under mutual recognition all States and Territories retain their local laws. However, goods and services produced or imported into a State or Territory need only comply with that State or Territory laws but may be sold in another State or Territory without the necessity of complying with further requirements of the latter State or Territory.

7 - Unilateralism

- 3.20 Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity. Each State may retain its own particular law. Unilateralism, sometimes referred to as ‘diversity’, reinforces State sovereignty. State legislation can be specially tailored to

local needs. The ability to enact diverse legislation can be important in advancing social reform. Governments with vision can legislate for change. The disadvantages of unilateralism is that it may be seen as impeding national activities. For example, producers trading interstate will be confronted with laws that differ from jurisdiction to jurisdiction. Local rules may be used to protect regional producers from competition to the detriment of general community and economy.

8 - *Non-binding national standards model legislation.*

- 3.21 Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.
- 3.22 National standards are agreed to by all jurisdictions. Under this mechanism, a State or Territory passes its own legislation. A national authority is appointed to make decisions for the State or Territory under the State or Territory legislation. The State or Territory Minister has the authority to vary any decision of the appointed authority.
- 3.23 Clearly Structures 1, 7 and 8 do not require identical legislation in participating jurisdictions.

4 IDENTIFICATION OF STRUCTURES IN COMMITTEE REPORTS

- 4.1 Nine structures of uniform legislation were first identified by the former 2001-2005 Legislation Committee when it reported on the Child Welfare Amendment Bill 2001 on 12 March 2002.² The list of structures was developed from a combination of:
- reports of the former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements; and
 - the Senate's *Position Paper* on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia. (Discussed at paragraphs 3.1 to 3.22).
- 4.2 The former committee had added another structure called Adoptive Recognition to the Senate's eight structures identified in the *Position Paper*. Adoptive Recognition involves a jurisdiction choosing to recognise the decision making process of another

² That committee had terms of reference which included the scrutiny of uniform legislation. Its terms of reference evolved out of the Legislative Council's former *Constitutional Affairs Committee* and the Legislative Assembly's *Standing Committee on Uniform Legislation and Intergovernmental Agreements* terms of reference. The former 2001-2005 *Legislation Committee* scrutinised 15 uniform bills and recommended amendments to many bills, mainly to facilitate effective parliamentary scrutiny. The Legislative Council then appointed a specialist uniform legislation committee on 11 April 2002 to deal with such bills and the first was called the *Uniform Legislation and General Purposes Committee*. The nine structures were re-identified by that first specialist committee when it reported on the Offshore Minerals Bill 2001; Offshore Minerals (Registration Fees) Bill 2001; and Offshore Minerals (Consequential Amendments) Bill 2001 on 26 June 2002.

jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual. This list of nine structures then became the standard Appendix that has been included in every report on a uniform bill since March 2002. From the list, the Committee and its former incarnations has routinely matched a bill with a particular structure for the benefit of the Parliament.

5 ACADEMIC SCHOLARSHIP IN IDENTIFYING STRUCTURES

- 5.1 Between 2002 and 2007, there was little scholarship on the identification of uniform scheme structures. However, in 2007 a report prepared for the Council for the Australian Federation³ recommended that improvements be made in the arrangements and mechanisms for intergovernmental cooperation.⁴
- 5.2 In May 2009, a further report commissioned by the Council for the Australian Federation identified the following four structures which specifically addressed the recommendation of that 2007 report.⁵

³ Formed in 2006, this group supports and enhances Australia's federal system by providing an intergovernmental forum for State and Territory leaders in Australia. Each State and Territory Premier or Chief Minister is a member.

⁴ <http://www.caf.gov.au> (viewed on 24 May 2011). Council for the Australian Federation (viewed on 24 May 2011) by Anne Twomey and Glenn Withers, *Federalist Paper 1 Australia's Federalist Future*, A Report for the Council for the Australian Federation, 2007, p5.

⁵ <http://www.caf.gov.au> (viewed on 24 May 2011). Council for the Australian Federation by Professor John Wanna, Professor John Phillipmore, Professor Alan Fenna and Dr Jeffrey Harwood, *Common Cause: Strengthening Australia's Cooperative Federalism*, Final report to the Council for the Australian Federation May 2009.

TABLE 1: SUMMARY OF LEGAL MECHANISMS

MECHANISM	DESCRIPTION	RATIONALE	EXAMPLES	STRENGTHS	WEAKNESSES
Referral of Powers	Entails States referring 'matters' to the Commonwealth under s.51 (xxxvii), which may then legislate in regard to the matter	There is a need for uniform legislation and administration in areas that do not fall within the jurisdiction of the Commonwealth ²¹	<i>Commonwealth Powers (Family Law) Act 1986 (SA)</i> ; <i>Terrorism (Commonwealth Powers) Act 2003 (Vic)</i> ; <i>Trans-Tasman Mutual Recognition (South Australia) Act 1999 (SA)</i> ; <i>Commonwealth Powers (Industrial Relations) Act 1996 (Vic)</i> ; <i>Corporations (Commonwealth Power) Act 2001 (Tas)</i>	Avoids the need for a referendum; States can set or influence the terms of the referral; a State can impose criteria that limits or terminates the referral at a given time	Unclear whether the powers can be made conditional, amended or revoked
Complementary Applied Laws	Established by one jurisdiction enacting a law and that law then being adopted by other parliaments	There is a need for uniformity in statutes and subordinate legislation, and usually a single administrative portal implementing uniform administrative rules/decisions	<i>Consumer Credit (Queensland) Act 1994 (Qld)</i> ; <i>Food Standards Australia New Zealand Act 1991 (Cth)</i>	Complete consistency across the nation, but based upon a spirit of cooperation	States may find themselves excluded from an area of legislative responsibility
Mirror Legislation	Involves a model law being developed, with each State parliament then enacting it, but being able to make variations to meet local circumstances	A variant on complementary applied laws but allows some discretion for variability	Crimes at Sea Acts, Crown Proceedings Acts, Defamation Acts, Uniform Evidence Legislation.	Allows for greater harmonisation, yet still allows for the States to implement their own versions and to amend their component of the legislation	States may undermine the effectiveness of a federal legislative solution; uniformity may be undermined if parliaments amend the legislation too much
Framework Laws	Commonwealth establishes its own set of procedures but winds back their application if State procedures are deemed to be adequate replacements	Applies a national standard but reduces administrative burdens and compliance costs by enabling parties to only deal with one level of government	<i>Native Title Act 1993 (Cth)</i> ; <i>Environmental Protection and Biodiversity Conservation Act 1999 (Cth)</i> ; <i>Water Act 2007 (Cth)</i> ; <i>Part IIIA of the Trade Practices Act 1974 (Cth)</i> .	Utilises State approval processes and regulatory regimes, and is integrated with existing State laws and practices. Eliminates duplication and red-tape	No explicit constitutional mandate Commonwealth retains policy supremacy

²¹ Cheryl Saunders (2002) 'Collaborative Federalism', *Australian Journal of Public Administration* 61:2, p. 71

5.3 Between 2008 and 2010 the Committee noted further developments in identifying uniform scheme structures by:

- the national Parliamentary Counsel's Committee which identified five structures;
- the COAG Reform Council which identified five structures;
- the Australian Law Reform Commission which identified four main types of structures⁶;
- the Law Council of Australia when it identified four structures⁷; and

⁶ See: <http://www.alrc.gov.au/> (viewed on 26 May 2011).

⁷ For example, when it made a submission to the Senate's Inquiry into Reform of the Australian Federation, Submission Number 34, 3 September 2010 and other submissions noted there at page 6.

- the President of the Western Australian Legislative Council, Hon Barry House MLC who identified four types of structures.⁸

5.4 The Committee observed that many of the structures identified by the above sources have similar characteristics to those identified in the 1996 Senate's *Position Paper* or are the same but have been renamed.

5.5 Of this scholarship, the Committee is of the view that the five structures identified by the national *Parliamentary Counsel's Committee* are useful for the Committee's continuing purpose of both identifying and describing the features of a particular structure in every report on a uniform bill.

6 STRUCTURES IDENTIFIED BY THE NATIONAL PARLIAMENTARY COUNSEL'S COMMITTEE

6.1 The national, Parliamentary Counsel's Committee (**PCC**) is a committee representing the drafting offices in Australia and New Zealand. It comprises the heads of each of those drafting offices, with other drafters from those offices co-opted by their respective heads as required.

6.2 In 2008, the PCC published a *Protocol on Drafting National Uniform Legislation*⁹ from which the following five structures and their features are extracted.

1 - Applied laws

6.3 This structure is also known variously as:

- template legislation;
- cooperative legislation;
- complementary applied law;¹⁰ and
- complementary non-applied law.¹¹

⁸ "When a Nod and a Wink Amounts to an Intergovernmental Agreement Issues faced by the Legislative Council of Western Australia in the identification and scrutiny of uniform legislation", A paper presented by Hon Barry House MLC, President of the Legislative Council, Parliament of Western Australia, in Darwin, July 2010. The President identified four types: model legislation, co-operative or template legislation, constitutional referral of power and mirror legislation.

⁹ Protocol on Drafting National Uniform Legislation, Third Edition, p.2, available at: <http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf>

¹⁰ M Farnan, in *Commonwealth-State Cooperative Schemes—Issues for Drafters*, Paper presented at 4th Australasian Drafting Conference, Sydney, 3–5 August 2005 states an example is the Australian Consumer Law contained in the *Competition and Consumer Act 2010 (Cth)*. State and territory legislation has been enacted to apply the Australian Consumer Law as a law of each other jurisdiction. Another is the agricultural and veterinary chemicals legislation. The Commonwealth enacted the Agvet Code with provisions to enable the States to apply the text of the Code as a law of the State.

- 6.4 Here, legislation is enacted in one jurisdiction and applied (as in force from time to time) by other participating jurisdictions as a law of those other jurisdictions. An early example is the national corporations law scheme adopted in the 1990s by the Commonwealth, States and Territories. Another example is the counter-terrorism legislation.
- 6.5 Applied laws legislation falls into two broad categories:
- Legislation on matters that are generally within the States' legislative powers. Here, national template legislation is enacted in one State or Territory and applied in other States or Territories.¹²
 - Legislation on matters that are generally within the Commonwealth's remit. Here, national template legislation is enacted in the Commonwealth (for Commonwealth legislative matters such as corporations) and applied in the States (for residual matters for example, individuals).¹³
- 6.6 In the case of Commonwealth template legislation, a policy decision is required as to whether the law is to be administered only by the Commonwealth or by both the Commonwealth and the States.
- 6.7 If the law is to be administered only by the Commonwealth, the States' application legislation will 'federalise' the local law so that the Commonwealth and local laws can be administered as a single body of law by Commonwealth officials (or State officials appointed under Commonwealth legislation) using Commonwealth adjectival law (i.e. laws relating to the investigation and prosecution of criminal offences, laws relating to administrative appeals, laws relating to Ombudsman complaints/investigations).¹⁴
- 6.8 The PCC describe a typical example of a 'federalised' uniform law as Western Australia's *Water Efficiency Labelling and Standards Act 2006* (and the corresponding Acts of the other jurisdictions).¹⁵ If the law is to be administered by

¹¹ M Farnan, in *Commonwealth–State Cooperative Schemes—Issues for Drafters*, Paper presented at 4th Australasian Drafting Conference, Sydney, 3–5 August 2005 states an example is the National Classification Scheme for films, publications and computer games. They are classified under *Commonwealth legislation (the Classification (Publications, Films and Computer Games) Act 1995*. Controls and penalties are imposed under State and Territory legislation such as Western Australia's *Classification (Publications, Films and Computer Games) Enforcement Act 1996*.

¹² It is no longer the practice for the Commonwealth to legislate for the Territories and the law applied in other States.

¹³ In the case of a Territory, there is the option for the Territory to vacate the field and for the Commonwealth template law to apply expressly to the Territory.

¹⁴ Adjectival law is that portion of the law that deals with the rules of according to which the substantive law is administered. Such rules prescribe the practice method, procedure or legal machinery by which substantive law is enforced or made effective.

¹⁵ Section 8 of the Act states: It is the intention of the Parliament that this Act form a part of a cooperative scheme between the Commonwealth and the States and Territories to provide for national water efficiency labelling and standards.

both the Commonwealth and the States, the practicalities of administration by State officials may require the enactment or application in each jurisdiction of local standard adjectival laws (particularly if the State officials use those local laws in the exercise of their other regulatory functions).

6.9 COAG said of this structure:

*Each jurisdiction's application mechanism to give effect to the legislation may vary, particularly in relation to the effect of amendments of the legislation. Accordingly, the scheme would include effective limits (these may be non-legislative) on the modification of the law, and it is advantageous to include a means of central administration and enforcement of the law to promote a substantial degree of uniformity.*¹⁶

6.10 From COAG's perspective, the major advantage of an applied law scheme is that it provides the greatest prospect of achieving lasting uniformity across jurisdictions, provided the scheme is underpinned by an intergovernmental agreement and allows for the central administration and application of that law. In this model, the intergovernmental agreement requires any proposed amendments to the legislation in the lead jurisdiction be implemented only if all of the parties to the agreement, through the Standing Committee of Attorney Generals (**SCAG**), support the proposals. The SCAG would essentially need to agree to give effect to the amendments by continuing to apply the law in the lead jurisdiction. The uniformity of an applied law scheme may be compromised if there is any capacity for a non-lead jurisdiction to amend the application of the law in its jurisdiction. To overcome this issue, an intergovernmental agreement would be used to implement a transparent and uniform process for amendments to the legislation in the lead jurisdiction.

6.11 The PCC states that this approach would require a concession of parliamentary scrutiny by non-host jurisdictions, but would make the regime more likely to achieve the goal of uniformity. The Ministerial Council scrutiny process would minimise the concession of parliamentary processes made by non-lead jurisdictions. This process would enable each Minister to advocate the view of his or her jurisdiction about the proposals and in turn to be accountable to his or her parliament.

6.12 A recent example of an applied law scheme is the Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions. Queensland was the promulgating State of the 'lead legislation', which was adopted and applied (as amended from time to time) by other participating jurisdictions.¹⁷

¹⁶ http://www.coag.gov.au/coag_meeting_outcomes/2010-04-19/docs/ris_national_legal_profession_reform.pdf (viewed on 14 May 2010), page 27.

¹⁷ National Legal Profession Reform Project – Consultation Regulation Impact Statement, p28.

6.13 The PCC said:

Given the challenges in achieving uniformity under a mirror law scheme, and to avoid a repeat of the return to variations between jurisdictions, COAG asserts that the proposals would be best implemented under an applied law scheme. The applied law would operate differently from the Model Bill in that it would institute uniformity initially, and then include a process for any future amendments to the law to be reflected in the intergovernmental agreement between executive governments. This process for amendments would involve all jurisdictions working together to enact the same legislative changes. This system would also eradicate much of the duplication of laws and resources that would be necessary to give effect to a mirror law system.

2 - Model legislation

6.14 Also known as mirror legislation, the objective of this structure is that it will be enacted in participating jurisdictions with any local variations that are necessary to achieve the agreed uniform national policy when the legislation forms part of the local law. An example is the Uniform Evidence Acts.

6.15 Model legislation can be drafted either:

- in non-jurisdictional specific terms; or
- as the law of a particular jurisdiction, in which case the model legislation will note that local variations will be necessary when other jurisdictions enact the legislation.

6.16 The PCC said:

Model legislation can be drafted with a view to a high degree of uniformity when implemented where the relevant Ministerial Council (or policy officers) have indicated that a high degree of uniformity is desired when the legislation is implemented in each jurisdiction.

Whether jurisdictions follow the model legislation when implementing the legislation is a matter for those jurisdictions.

6.17 Of this structure, the Hon Barry House MLC, President of the Legislative Council, said at a Darwin conference in 2010:

Here an agreed model bill is enacted in each jurisdiction, sometimes with minor regional variations, and amendments are made by each

jurisdiction as required. In theory, the Model legislation structure is the least potentially disadvantageous structure for a State from a legislative sovereignty viewpoint.

Indeed, it is the only structure where the legislation and any amendments are always within the control of each jurisdiction's own Parliament, as they each implement their own version of an agreed model law. However, the main issue for the Western Australian Parliament has proven to be the identification of the relevant intergovernmental agreement and/or model law on which such uniform legislation is based - and it is only legislation following the Model legislation structure that may often deceptively appear not to be uniform legislation on its face.¹⁸

3 - Legislation of the States referring legislative power to the Commonwealth

6.18 Here, the legislation can either confer general authority to legislate with respect to a general matter described in the referral legislation (for example meat inspection legislation) or confer specific authority to legislate in the terms set out in the referral legislation (for example mutual recognition legislation). Particular features include:

- provision for the referral to be terminated by (or to terminate on a specified day unless extended by) an instrument issued by the Governor of the State (or by subsequent State legislation);
- where authority is conferred to legislate in the terms set out in the referral legislation, provision on how that legislation may be amended by the Commonwealth in the future (for example by requiring a request from each of the referring States under the Australia Act. Alternatively, future amendments although not legally constrained can be the subject of agreements between the Commonwealth and the States for Ministerial Council approval of changes; and
- where authority is conferred to legislate in particular terms it is usual for those terms to be set out in each State referring legislation. However, if it is extensive, the reference can be made by adopting the text tabled in one of the State jurisdictions (for example, the new Corporations legislation).

6.19 Of referring power to the Commonwealth, the Attorney General recently said in a submission to the Senate's current *Inquiry into Reform of the Australian Federation*:

¹⁸ When a Nod and a Wink Amounts to an Intergovernmental Agreement Issues faced by the Legislative Council of Western Australia in the identification and scrutiny of uniform legislation. A paper presented by Hon Barry House MLC, President of the Legislative Council, Parliament of Western Australia, Darwin, July 2010.

The referral of State legislative powers to the Commonwealth Parliament has significantly contributed to the continuing growth and centralization of Commonwealth power. There has been in recent years a profusion of referrals in areas such as crime, family law, corporations law and personal property securities, traditionally and constitutionally well regulated by State laws. Indeed, successive Commonwealth governments have pressed States to refer powers in other areas, including education.

Western Australia has, on a number of occasions, not referred powers. This has not prevented uniformity and national legislative schemes from being achieved. For example, this State has adopted (under section 51(37) of the Constitution) Commonwealth laws in areas such as mutual recognition and child support rather than like other States, referring power to the Commonwealth.¹⁹

Of course the achievement of such uniform legislation (by whatever legislation mechanism) must always be balanced against the benefits that flow from diversity, experimentation and localisation that are the hallmark of a robust federal system.²⁰

4 - Legislation of the States adopting a Commonwealth law

- 6.20 The *Commonwealth Constitution* at paragraph 51 (xxxvii) enables a State, as an alternative to referral, to “adopt” a Commonwealth law enacted in reliance on a referral by other States (for example the *Child Support (Adoption of Laws) Act 1990*).
- 6.21 This option is not usually favoured because the Commonwealth has taken the view that the States can only adopt a law as it exists at a particular time, not from time to time. A referral of power gives the Commonwealth greater flexibility to make future changes and to ensure that those changes commence at the same time in all jurisdictions. The Committee observed this problem first hand when it discovered that amendments to Western Australia’s *Child Support (Adoption of Laws) Act 1990* over the past decade had lagged from between three and 15 months.²¹

5 - A combination of structures

- 6.22 The PCC states it may be possible for a legislative project to deal with some provisions by way of an applied law scheme and other provisions by way of a national

¹⁹ And defamation legislation.

²⁰ Submission No 44 from Hon Christian Porter MLA, Attorney General, to the *Senate Inquiry into Reform of the Australian Federation*, 10 March 2011, pp3-4.

²¹ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report 58, *Child Support (Adoption of Laws) Amendment Bill 2009*, 15 February 2011, p11.

model scheme.²² Those jurisdictions that are currently prepared to use an applied law model to achieve future consistency by delegation of legislative changes to the Parliament of another jurisdiction (the template jurisdiction) may also be prepared to enact national model legislation and delegate legislative changes that are agreed by governments nationally to the executive of their own jurisdiction, subject to a power of the local Parliament to disallow the changes in the same way as they may disallow subordinate legislation made by the executive.

6.23 The Health Practitioner Regulation National Law (WA) Bill 2010, reported on by the Committee in June 2010, contained a uniform legislation structure which combined both template and model uniform structures. Whilst all other States and Territories passed legislation applying a Queensland template Act on the subject, Western Australia instead agreed to pass its own ‘substantially similar’ corresponding Act.

6.24 Another example is the regulation of gene technology. The *Gene Technology Act 2000* (Cth) extends to matters within the Commonwealth’s constitutional power, leaving the states and territories with the option of either applying the Commonwealth Act or enacting their own legislation. Both options have been adopted by different states.²³ Subject matters such as therapeutic goods and research involving embryos have involved combined structures.²⁴

7 STRUCTURES FOR INCLUSION IN COMMITTEE REPORTS ON UNIFORM BILLS

7.1 The Committee has now adapted the five structures identified by the national PCC in the Third Edition of the *Protocol on Drafting National Uniform Legislation* as a new Appendix for future reports on uniform bills.

7.2 The Committee chose to adapt the national PCC’s five structures on the basis that it is both a representative forum for all jurisdictions’ drafters and the predominant forum for:

- the preparation of uniform or complementary legislation;
- the promotion of consistent styles of legislation in Australia and New Zealand; and
- the exchange of ideas.

²² Protocol on Drafting National Uniform Legislation, Third Edition, p4, available at: <http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf>.

²³ For example, NSW opted for the applied law model while Victoria has adopted mirror legislation: *Gene Technology (New South Wales) Act 2003* (NSW); *Gene Technology Act 2001* (Vic).

²⁴ M Farnan, in *Commonwealth–State Cooperative Schemes—Issues for Drafters* Paper presented at 4th Australasian Drafting Conference, Sydney, 3–5 August 2005 states a recent example is the National Classification Scheme, p9.

- 7.3 The work of the national PCC consists of projects specifically referred to it from time to time by the SCAG and matters brought to the committee by one or more of its members. This happens when Parliamentary Counsel, individually or collectively, are assigned a project which warrants or would benefit from collective consideration and discussion. The PCC described its own value in the following manner:

Experience has shown that the collective discussion of draft legislation in this forum has been most useful. Members of the Committee are well-known to each other, and legislative matters are discussed in a friendly and frank way, with the application of the highest drafting principles.

There can be no doubt that the work of the Committee has made a major contribution to Australian legislation.²⁵

- 7.4 The Committee will characterise a uniform bill from the brief description of each structure outlined in **Appendix 1** for the benefit of the Parliament.



Hon Adele Farina MLC
Chairman

Date: 31 August 2011

²⁵ Protocol on Drafting National Uniform Legislation, Third Edition, p.16, available at: <http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf>

APPENDIX 1

A NEW APPENDIX FOR ATTACHMENT TO FUTURE REPORTS OF THE UNIFORM LEGISLATION AND STATUTES REVIEW COMMITTEE

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The Committee has adapted the following five structures from the *Protocol on Drafting National Uniform Legislation* by the national Parliamentary Counsel's Committee, 2008 Third Edition. Further detail of these structures may be found at: <http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf> or in the Committee's sixty fourth report titled *Information Report on Uniform Scheme Structures* tabled in August 2011.

Structure 1 - Applied laws. Also known as also known as template, cooperative and complementary legislation, here legislation is enacted in one jurisdiction and applied (as in force from time to time) by other participating jurisdictions as a law of those other jurisdictions.

Structure 2 - Model legislation. Also known as mirror legislation, this legislation is enacted in participating jurisdictions with any local variations that are necessary to achieve the agreed uniform national policy when the legislation forms part of the local law. It is drafted in either non-jurisdictional specific terms, or as the law of a particular jurisdiction.

Structure 3 - Legislation of the States referring legislative power to the Commonwealth. Legislation can either confer general authority to legislate with respect to a general matter described in the referral legislation or confer specific authority to legislate in the terms set out in the referral legislation.

Structure 4 - Legislation of the States adopting a Commonwealth law. The *Commonwealth Constitution* at paragraph 51 (xxxvii) enables a State, as an alternative to referral, to "adopt" a Commonwealth law enacted in reliance on a referral by other States. A referral of power gives the Commonwealth greater flexibility to make future changes and to ensure that those changes commence at the same time in all jurisdictions.

Structure 5 - A combination of structures. Here some provisions of a legislative project may be dealt with by way of an applied law scheme and other provisions by way of national model scheme. Those jurisdictions that are currently prepared to use an applied law model to achieve future consistency by delegation of legislative changes to the Parliament of another jurisdiction (the template jurisdiction) may also be prepared to enact national model legislation and delegate legislative changes that are agreed by governments nationally to the executive of their own jurisdiction, subject to a power of the local Parliament to disallow the changes in the same way as they may disallow subordinate legislation made by the executive.