



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON UNIFORM
LEGISLATION AND GENERAL PURPOSES
IN RELATION TO
UNIFORM LEGISLATION
AND SUPPORTING DOCUMENTATION**

Presented by Hon Adele Farina MLC (Chairman)

Report 19
August 2004

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed: April 11 2002

Terms of Reference:

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

“7. Uniform Legislation and General Purposes Committee

- 7.1 *A Uniform Legislation and General Purposes Committee* is established.
- 7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.
- 7.3 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 consider and report on any matter referred by the House.
- 7.4 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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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.

The four-month period commences on the date of tabling.

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 Standing order 230A of the Legislative Council provides that, unless otherwise ordered, a bill implementing uniform legislation, when read a first time, stands referred to the Uniform Legislation and General Purposes Committee for inquiry and report within 30 days of the bill's first reading.
- 2 The effectiveness and efficiency of the Committee's scrutiny of uniform legislation is affected by many factors including:
 - the identification of a bill as one to which standing order 230A will apply when it is introduced into the Council; and
 - the adequate and timely provision by the Government of relevant supporting documentation.
- 3 Early identification of bills that will fall within the remit of standing order 230A when introduced into the Legislative Council enables the Committee to commence preliminary research. In this manner the Committee endeavours to perform its mandate, assist in the Council's scrutiny of the bill and report within the 30-day reporting period.
- 4 Noting an increase in uniform legislation being introduced into Parliament the Committee resolved to conduct an inquiry into the matters more particularly listed as follows:
 - a) the development, formulation and recording of proposals or agreements whose implementation would require the enactment of uniform legislation;
 - b) the means by which uniform legislation (which may stand referred to the Committee for inquiry) might be identified; and
 - c) the existence and availability of supporting documentation relevant to the Committee's inquiries into uniform legislation.
- 5 The Committee considers that the matters recommended in this report are immediately achievable and are reflective of the spirit of other circulars issued by the Premier and the Department of Local Government.

- 6 The Committee tables this report with the expectation that the report will:
- facilitate the early identification of bills to which standing order 230A applies; and
 - improve the type and quality of information provided to the Committee,
- resulting in greater transparency of uniform legislation introduced into Parliament.
- 7 The Committee is interested in pursuing other aspects of its terms of reference for this inquiry in the near future.

RECOMMENDATIONS

- 8 Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Government ensure that a Premier's Circular is issued in the form attached as Appendix 7 to this report as soon as possible.

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Recommendation 2: The Committee recommends that all government departments and agencies amend their procedural documentation to alert staff to the requirements of the Premier's Circular referred to in Recommendation 1.

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Recommendation 3: The Committee recommends that until such time as a Premier's Circular is issued all government departments and agencies amend their procedural documentation to include reference to the matters raised in the draft circular attached as Appendix 7 to this report.

CHAPTER 1

UNIFORM LEGISLATION

INTRODUCTION

- 1.1 The Legislative Council established the Uniform Legislation and General Purposes Committee (**Committee**) on April 11 2002. The Committee's terms of reference are published at the front of this report.
- 1.2 Under the terms of reference the functions of the Committee include:
- a) considering and reporting on uniform legislation;
 - b) of its own motion or on a reference from a Minister, considering or reviewing the development and formulation of any proposal or agreement whose implementation would require the enactment of uniform legislation;
 - c) examining 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; and
 - d) considering and reporting on any matter referred by the Legislative Council (**Council** or **House**).
- 1.3 Under Council standing order 230A 'uniform legislation' is the term applied to bills that ratify or give effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party, or which by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.
- 1.4 The Committee emphasises that the term 'uniform legislation' does not mean that the legislation is identical in nature. National legislative schemes, to the extent that they may give effect to an intergovernmental agreement or introduce a uniform scheme or uniform laws throughout the Commonwealth, can take a number of forms. Nine different categories of legislative structures, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability have been identified. Some categories accommodate quite a separate legislative approach between participating jurisdictions. The legislative structures are described in Appendix 1.
- 1.5 Standing order 230A provides that, unless otherwise ordered, a bill implementing uniform legislation, when read a first time, stands referred to the Committee for inquiry and report within 30 days. A copy of the standing order is attached as Appendix 2.

REFERENCE

1.6 On May 3 2004 the Committee:

- noting an increase in uniform legislation being introduced into Parliament; and
- emphasising the importance of the existence and timely availability of documents supporting the implementation, justification, understanding and interpretation of uniform legislation,

resolved to conduct an inquiry into the matters more particularly listed as follows:

- a) the development, formulation and recording of proposals or agreements whose implementation would require the enactment of uniform legislation;
- b) the means by which uniform legislation (which may stand referred to the Committee for inquiry) might be identified; and
- c) the existence and availability of supporting documentation relevant to the Committee's inquiries into uniform legislation.

1.7 The inquiry was motivated in part by the Committee's terms of reference 7.3(b) and (c) and the Committee's experiences when inquiring into uniform legislation that stood referred pursuant to standing order 230A. Since the Committee's appointment on April 11 2002 it has considered and reported on 20 pieces of uniform legislation. The Committee recommended amendments to many of these bills, some to facilitate effective parliamentary scrutiny.

PARLIAMENTARY COMMITTEE SCRUTINY

1.8 The effectiveness and efficiency of the Committee's scrutiny of uniform legislation is affected by many factors including:

- a) the identification of a bill as one to which standing order 230A will apply when it is introduced into the Council; and
- b) the adequate and timely provision by the Government of relevant supporting documentation.

1.9 Early identification of bills that will fall within the remit of standing order 230A when introduced into the Council enables the Committee to commence preliminary research. In this manner the Committee endeavours to perform its mandate, assist in the Council's scrutiny of the bill and keep to the 30-day reporting period.

1.10 The Committee emphasises that it is reliant on the Government to respond to the Committee's inquiries in an accurate and timely fashion.

- 1.11 The Committee also emphasises that its remit is not limited to concluded agreements and proposals. Term of reference 7.3(b) provides that, of its own motion or on a reference from a Minister, the Committee is 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 230A.
- 1.12 This report examines the difficulties the Committee has experienced in its scrutiny of proposed uniform legislation when supporting information is not provided. In addition, where supporting information is provided, the Committee considers that it has not always been of a quality to sufficiently explain the purpose and operation of the bill in the national scheme or in context of the intergovernmental agreement.
- 1.13 The Committee considers that such accountability should occur without the need for the Committee to consider exercising powers under the *Parliamentary Privileges Act 1891* to summons persons, papers and records. The Committee tables this report with the expectation that the report will:
- a) facilitate the identification of bills to which standing order 230A applies; and
 - b) improve the type and quality of information provided to the Committee,
- resulting in greater transparency of uniform legislation introduced into Parliament.

UNLESS OTHERWISE ORDERED - 30 DAYS TO REPORT

- 1.14 Standing order 230A provides that:
- a) Bills falling within the definition in the standing order stand referred to the Committee without the question being put.
 - b) The Council has flexibility to order that a uniform bill be referred to a committee other than the Committee, or not referred to a committee at all.
 - c) A committee referred a uniform bill must report to the House within 30 days of the first reading of a bill, although an extension of time can be sought.
 - d) The Council has flexibility to order that the period within which a committee must report to the House on a uniform bill be altered.
 - e) The standing order suspends the second reading debate on a uniform bill until:
 1. the expiry of 30 days of the date of the first reading; or
 2. until it has been reported from a committee,whichever is the later.

- f) The policy of a bill is not a matter for inquiry by the committee receiving it.

Extensions of time to report due to lack of information provided by Government

1.15 The Committee has often been in the position where it has had to seek extensions of time to report because the Government has not provided information requested by the Committee in a timely fashion, or the wrong information has been provided. This has occurred even when the Committee has asked for information prior to formal referral of a uniform bill in an attempt to facilitate reporting back within the 30-day period. For example:

- a) In one instance a bill stood referred to the Committee on December 4 2003. However, because the Committee was aware that the bill had been introduced into the Legislative Assembly (**Assembly**) and would stand referred when it reached the Council, the Committee anticipated its referral and on November 11 2003 had written to the responsible Minister for information.¹ Despite further contact by the Committee no response was received from the responsible Minister until February 16 2004. The Committee notes that this was over 2½ months since the Committee first wrote to the responsible Minister.
- b) In another instance a bill was referred to the Committee on March 30 2004. Once again because the Committee was aware that the bill had been introduced into the Assembly and would stand referred when it reached the Council, the Committee anticipated its referral and on November 28 2003 wrote to the responsible Minister for further information. Despite numerous further contacts by the Committee no response was received prior to the bill's referral. After referral the Committee again sought the information and a response was finally received on April 8 2004. The Committee notes that this was over four months since the Committee first wrote to the responsible Minister.

1.16 Such delay is inappropriate, does not assist efficient scrutiny by the Committee and ultimately does not assist with passage of legislation through Parliament. As previously noted, the Committee considers that prompt co-operation should occur without the need for the Committee to consider exercising powers under the *Parliamentary Privileges Act 1891* to summons persons, papers and records.

¹ In anticipation of referral the Committee, of its own motion, may commence preliminary research into the background to a bill. The Committee's Term of Reference 7.3(b) states "*The functions of the Committee are...(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;*".

Notice of motion to amend standing order 230A(4)

- 1.17 The Committee notes that on April 7 2004 Hon Adele Farina MLC gave notice of her intention to move that standing order 230A(4) be amended by inserting “sitting” after “30”. If moved and adopted by the House standing order 230A(4) would then read:

The Uniform Legislation and General Purposes Committee, or other committee, receiving a Bill under subclause (3) is to present its final report not later than 30 sitting days of the day of the reference or such other period as may be ordered by the House.

Chronology of scrutiny and previous reporting periods

- 1.18 The Committee notes that parliamentary committees have previously commented on the period within which uniform legislation is to be reported by a committee to the House. In its Second Report (August 2002) the Committee provided a Chronology of Events.² This is reproduced in Appendix 3.
- 1.19 Originally the terms of reference for the Council Standing Committee on Legislation (**Legislation Committee**) included the scrutiny of uniform legislation. The volume of uniform legislation standing referred to the Legislation Committee during 2001 led to the tabling, in November 2001, of a *Special Report of the Standing Committee on Legislation in relation to Intergovernmental Agreements, Uniform Schemes and Uniform Laws: Amendment to Standing Orders 230(c) and (d) (Special Report)*.³
- 1.20 The Special Report noted the history of the development of the standing order. In particular:⁴
- a) It is evident from prior debate in the House on standing orders 230(c) and (d) (the precursors to standing order 230A) and national schemes of uniform legislation, that the imposition of a delay between the second reading speech and the second reading debate in relation to bills implementing uniform legislation was directed at proper scrutiny of such bills by Parliament and proper accountability of executive actions to Parliament.
 - b) An overview of the genesis of the standing order is instructive to understand the reporting back period. Standing order 230(c) was inserted into the standing orders by resolution of the House passed on October 21 1992. In its

² Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, August 2002, Appendix 1.

³ Western Australia, Legislative Council, Standing Committee on Legislation, *Special Report of the Standing Committee on Legislation in relation to Intergovernmental Agreements, Uniform Schemes and Uniform Laws: Amendment to Standing Orders 230(c) and (d)*, (tabled November 6 2001).

⁴ *Ibid*, pp2-3.

original form, 120 days were to elapse between first reading and commencement or resumption of the second reading. The 120 days was to enable members to scrutinise the bill and raise any concerns. At this time, the standing orders did not provide for referral to a committee.

- c) In 1995, the 120 day period was reduced to the current 30 days “... *on the basis that 30 days should provide sufficient time within which members can identify perceived defects in, or unresolved issues arising from, the bill.*”⁵
- d) It was not until March 1998 that the standing orders provided for referral to a committee. This was on the recommendation of a select committee that had been appointed to review the operations of the Council committee system. The select committee, when discussing the intended ambit of operations for the then Constitutional Affairs Committee, noted:

*It is regrettable that the House has not used the “30 day” rule for its original purpose viz, to give adequate time for the House to consider the full implications for the State of legislation giving effect to intergovernmental agreements. A standing referral of this type of legislation to the Constitutional Affairs Committee after the Minister’s second reading speech would give the committee a 30 day period within which to consider the bill’s implications.*⁶

1.21 The Committee notes that the original intent was to allow for a ‘cooling off’ period, initially 120 and later 30 days, during which time it was up to individual members to read the legislation and raise matters of interest or concern when debate was resumed on second reading. Standing referral to a committee came at a later stage and in the expectation that formal consideration by a committee within the 30 days would produce a more informed appreciation of the mechanics, but not the policy, of the legislation.

1.22 Where the uniform bills are not accompanied by sufficient information to alert the Parliament to serious constitutional implications, the scrutiny role of the Committee may be the only mechanism to do so. However uniform bills, in general, represent a restriction on the operation of the Committee due to the pressure to report bills without amendment or within a particularly short time frame, such as the 30 days stipulated in standing order 230A(4).

⁵ Western Australia, Legislative Council, Standing Orders Committee, *Report on Motions for Disallowance of Regulations, Documents Quoted from by Member, Uniform Legislation “120 Day” Rule*, September 1995, p5.

⁶ Western Australia, Legislative Council, Select Committee to Review the Committee System, *Report*, August 1997, pp17-18.

- 1.23 The quantity of bills that stand referred to the Committee under standing order 230A is considerable and as also noted by the Legislation Committee in its Special Report, there is a growing practice of introducing two or more companion bills in order to give intergovernmental agreements legislative effect.⁷
- 1.24 Much uniform legislation is complex in character and, leaving aside the legislative purpose, the Committee must concern itself with matters such as the jurisdictional interlocking mechanisms and the extent to which (if any) the State is subordinating its instrumentalities or governmental capacities to an external authority.
- 1.25 It is apparent to the Committee that the 30 (calendar) days referred to in standing order 230A(4) is too short a time for many uniform bills to be given anything more than a cursory examination. This is particularly so when information is not promptly provided by the Executive. Although standing order 230A(4) makes provision for a different period to be ordered the 'default period' of 30 (calendar) days needs to be revisited.

⁷ Western Australia, Legislative Council. Standing Committee on Legislation, *Special Report of the Standing Committee on Legislation in relation to Intergovernmental Agreements, Uniform Schemes and Uniform Laws: Amendment to Standing Orders 230(c) and (d)*, (tabled November 6 2001).

CHAPTER 2

THE DEVELOPMENT OF PROPOSALS OR AGREEMENTS THAT RELATE TO UNIFORM LEGISLATION

INTRODUCTION

- 2.1 Challenges arise in relation to effective parliamentary scrutiny because of the rise of national schemes of legislation which emerge from such bodies as the Council of Australian Governments (COAG) and various Ministerial Councils. Much exploratory work has been conducted in this area by the former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements (SCULIA).
- 2.2 The Committee is interested in exploring this area in later reports; however, to provide context for the remainder of this report, a brief overview of the process follows.

THE DEVELOPMENT AND FORMULATION OF PROPOSALS AND AGREEMENTS

- 2.3 The federal structure of government in Australia, with a constitutional division of power between the central Commonwealth government and regional State and Territory governments, can require co-operation between these bodies to achieve national uniform laws in areas where the central Commonwealth government has limited or no constitutional power.⁸
- 2.4 Intergovernmental agreements can be utilised to effect uniform laws where the Commonwealth does not have the power to legislate in the particular area. Uniform schemes are implemented in a variety of ways, depending on the degree of flexibility and permanence required (refer to paragraph 1.4).

Advantages and disadvantages

- 2.5 The Committee notes that there may be significant benefits in uniform laws, particularly in industry and commerce. It may be appropriate that there be uniform laws to regulate the single Australian market rather than having eight separate markets with different conditions, as is possible if each State and Territory were to legislate in the field. Uniform laws can also make it easier for consumers and businesses to operate, because there may be greater certainty as to their rights and obligations.

⁸ Unless otherwise stated most of the background material in this part has been drawn from the reports of Western Australia, Legislative Assembly, SCULIA: *Report No 2: Structures*, March 1994; *Report No 19: Ministerial Councils*, June 1997; and *Report No 21: Uniform Legislation*, April 1998.

- 2.6 Practical benefits such as the removal of duplication of administration and compliance costs, increased efficiency and economies of scale may also result from uniform laws.
- 2.7 The disadvantages associated with uniform laws relate to the possible erosion of the States' powers. The Committee emphasises that it is important to take into account the role of the Western Australian Parliament in determining the appropriate balance between the advantages to the State in enacting uniform laws, and the degree to which Parliament, as legislature, loses its autonomy through the mechanisms used to achieve uniform laws.
- 2.8 The Committee, while prevented by the standing orders from examining the policy behind a uniform law, is in a position to alert the Council to the constitutional issues associated with particular forms of uniform laws as they are introduced.

Intergovernmental agreements and ministerial councils

- 2.9 Intergovernmental agreements are political compacts that represent agreements reached by executive branches of government. Intergovernmental agreements result primarily from the activity of Ministerial Councils.⁹ The most well known Ministerial Councils are COAG and the Standing Committee of Attorneys General (SCAG).
- 2.10 Ministerial Councils play a major role in the development and oversight of national cooperative agreements and uniform legislative schemes. Once a Ministerial Council has approved a proposal (in principle) for a scheme, the matter is referred to a working party for detailed development of the scheme and drafting of the legislation. After consultation the working party makes recommendations to COAG or the Ministerial Council.¹⁰
- 2.11 Ministerial Councils do not regularly report to Parliament after meetings on intergovernmental matters or proposed national legislation. Although COAG maintains a website, which provides extracts of more recent COAG meetings, copies of COAG communiqués and intergovernmental agreements, the minutes of its Ministerial Councils are not as easily accessible.¹¹

⁹ Meetings between State, Territory and Commonwealth Ministers responsible for particular portfolios or areas to discuss matters of interest.

¹⁰ Western Australia, Legislative Assembly, SCULIA: *Report No 19: Ministerial Councils*, June 1997, p5; and *Report No 21: Uniform Legislation*, April 1998, p4.

¹¹ COAG website at <http://www.coag.gov.au>.

The effect of intergovernmental agreements

- 2.12 In legal terms, a State Parliament might not be bound by an intergovernmental agreement to enact legislation to implement a uniform scheme.¹² The Executive of a State does not have the power in law to commit or compel a State Parliament to follow a particular course of action.
- 2.13 However in practical terms, particularly where Commonwealth grants are concerned, there may be a fiscal imperative to pass a uniform bill. These intergovernmental agreements result in considerable pressure being placed on State Parliaments to enact uniform legislation by making funding contingent on compliance with the agreement.
- 2.14 Restrictive time limits can be imposed on Parliaments by the agreements, further limiting the possibility of the effective scrutiny of uniform legislation. In addition, there may be pressure not to amend or reject uniform bills for the sake of achieving national unity.
- 2.15 It is observed that the Executive is, in effect, exercising supremacy over a State Parliament when it enters agreements that, in practical terms, bind a State Parliament to enact legislation to give effect to national uniform schemes or an intergovernmental agreement.
- 2.16 Where a State Parliament is not informed of the negotiations prior to entering the agreement and is pressured to pass uniform bills by the actions of the Executive, its superiority to the Executive can be undermined.
- 2.17 It may also be questionable whether members of Parliament have adequate notice or detailed information about the operation of Ministerial Councils so as to formulate questions about a Minister's activity. There is no formal requirement under legislation or standing orders for Ministers to inform the Parliament of their activities in Ministerial Councils. The first notice given to a State Parliament of a uniform scheme can be the media coverage of the signing of the agreement by the Ministerial Council or the introduction of the bill for the first reading. To a degree, if the Committee is aware of a proposal, greater scrutiny may be afforded by the Committee's term of reference 7.3(b).

¹² Although there is a view that intergovernmental agreements are policy instruments and not intended to have legal effect or be enforceable by a court, some courts have had occasion to determine questions relating to intergovernmental agreements and have found some of the disputes to be justiciable: Western Australia, Legislative Assembly, SCULIA: *Report No 2: Structures*, March 1994, pp3-6; and *Report No 15: Review of the National Environment Protection Council (Western Australia) Bill 1996*, October 1996, pp5-7.

- 2.18 More information on Ministerial Councils and intergovernmental agreements is provided by COAG's website.¹³ The Committee has extracted some material in Appendix 4.

THE FORM OF AGREEMENTS AND PROPOSALS

- 2.19 The Committee has previously reported its concerns to the House where there is little or no written material that records the original agreement between the Commonwealth, State and Territories when uniform legislation is proposed.¹⁴
- 2.20 As was noted in the Committee's Fifth Report:¹⁵

When dealing with originating or amending legislation promoted by the governments of the participating jurisdictions, the Committee, not unreasonably in its opinion, expects the State Minister to provide the Committee with a copy of the memorandum of understanding or other instrument that recites what the several governments have agreed to and a description of the legislation that each jurisdiction will need to have enacted if the agreement is to have lawful effect.

and further:

The Committee's examination of the relevant inter-governmental agreement and supporting documents is not a perfunctory exercise. First, the governments' policy should be stated in obvious terms. Second, the legislation should reflect that policy accurately. Third, the advantages and disadvantages to the State as a participant should be listed and examined. Fourth, the constitutional issues affecting each jurisdiction should be identified. The same considerations apply to subsequent amending legislation such as this Bill.

- 2.21 As previously noted in the Committee's Fifth Report, the importance the Committee attaches to the source documentation as an aid to interpretation is supported by the

¹³ COAG website at <http://www.coag.gov.au>.

¹⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p1. In the case of that bill there were no documents available to the Committee on the National Crime Authority (State Provisions) Amendment Bill 2002. In addition there was no state held record of why that bill had been introduced, whether its provisions accorded with the agreement of the Inter-Governmental Committee and whether other options had been considered. See also: *Report No 14: Commonwealth Powers (De Facto Relationships) Bill 2003*, April 2004, pp6-7.

¹⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, pp1-2.

High Court when, speaking in context of the *Corporations Law*, the joint judgment in *R v Hughes* stated:¹⁶

The national scheme was implemented by legislation of the legislatures of all the polities that were parties to the Alice Springs Agreement. In construing that legislation, regard may be had to the Alice Springs Agreement as part of the relevant context.

2.22 The Committee observes that intergovernmental agreements can take many forms ranging from formal contracts between governments through to the most informal mechanisms. In its Eleventh Report the Committee noted that uniform legislation is often underpinned by a detailed intergovernmental agreement particularly where the legislative scheme requires a high degree of uniformity and consistency.¹⁷ Recent examples include:

- a) The Gene Technology Bill 2001. This bill is underpinned by a very detailed intergovernmental agreement which strictly regulates amendments to legislation forming part of the scheme, even requiring amendments approved by a Ministerial Council to be effected in all participating jurisdictions, even if voted against by a participating jurisdiction.¹⁸
- b) The Gas Pipelines Access (Western Australia) (Reviews) Amendment Bill 2003. The relevant intergovernmental agreement provides that a party must not amend its legislation either directly or by making other legislation that would alter its effect, scope or operation, unless the amendment has been approved in writing by all the relevant Commonwealth, State and Territory Ministers responsible for the obligations under the agreement.¹⁹

2.23 However the Committee observes that in several cases where uniform legislation has stood referred, the Committee has not been provided with a copy of an

¹⁶ *R v Hughes* [2000] HCA 22. Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p2.

¹⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 11: Higher Education Bill 2003*, September 2003, pp8-9.

¹⁸ Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, *Report No 8: Gene Technology Bill 2001 and Gene Technology Amendment Bill 2001*, Western Australia, July 2003, p29.

¹⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 8: Gas Pipelines Access (Western Australia) (Reviews) Amendment Bill 2003*, Western Australia, April 2003, p4.

- intergovernmental agreement/memorandum of understanding as it was informed that one did not exist.²⁰
- 2.24 For example in respect of its inquiry into the Commonwealth Powers (De Facto Relationships) Bill 2003 the Committee was advised by the Attorney General that there was no intergovernmental agreement/memorandum of understanding ‘as such’ relating to the bill although extracts from the minutes of the relevant SCAG meeting were provided.²¹
- 2.25 In its report on that bill the Committee noted that whilst the extracts of the SCAG minutes provided by the Attorney General were indicative of the type of legislation, it was a matter of concern to the Committee that it has had to rely on the extracts of minutes rather than an intergovernmental agreement/memorandum of understanding.²²
- 2.26 As a preliminary observation the Committee finds this surprising given the stated objectives of the Council of Australian Governments to written agreements:²³

Where COAG has directed ministerial councils to carry forward issues on its behalf, there is an expectation that any substantive decisions requiring legislation will be enshrined in intergovernmental agreements. This provides members of COAG with an opportunity to review and scrutinise these ministerial decisions before signing and entering into an agreement at head of government level.

There have been occasions when because of the nature of the issues and the urgency to have legislation in place (recent examples being the legislation to restrict the use of human embryos for medical research purposes and handgun bans) the political compact forged at the relevant COAG meeting has not been consolidated through an intergovernmental agreement. However, it must be emphasised that this is the exception rather than the rule. COAG level agreements

²⁰ The fact that there was no formal intergovernmental agreement/memorandum of understanding in respect of certain bills standing referred to the Committee was noted in: Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 11: Higher Education Bill 2003*, September 2003, pp7-10; *Report No 12: Criminal Code Amendment Bill 2003*, December 2003, pp1-2; *Report No 15: Australian Crime Commission (Western Australia) Bill 2003*, June 2004, pp4-5; and *Report No 18: Workers’ Compensation and Rehabilitation Amendment (Cross Border) Bill 2004*, August 2004, pp4-9.

In the case of two bills the agreement was in a draft form when legislation was introduced into the Parliament: Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 13: Human Reproductive Technology Amendment Bill 2004 and Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2004*, December 2003, pp6-7.

²¹ Letters to the Committee from the Attorney General, dated January 20 2004 and March 11 2004.

²² Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 14: Commonwealth Powers (De Facto Relationships) Bill 2003*, April 2004, pp6-7.

²³ COAG website at http://www.coag.gov.au/ministerial_councils.htm, (current at July 23 2004).

make clear that the outcomes have head of government support and have greater currency and force than ministerial reports and communiqué text which may not always contain detailed policy and/or operational matters. [Committee emphasis]

- 2.27 Based on the Committee's experiences to date it appears that intergovernmental agreements/memoranda of understanding are the exceptions not the rule.
- 2.28 An analysis (which took seven years) of about 250 intergovernmental agreements revealed that they may be formed as:²⁴
- a) Contracts signed by legal entities such as statutory corporations, including commercial contracts.
 - b) Formal written agreements for joint action signed by either:
 - (i) the Governor-General and/or Governor;
 - (ii) the Prime Minister and/or Premier;
 - (iii) the relevant national and/or state Minister; or
 - (iv) permanent heads of relevant national and/or state administrative organisations.
 - c) Memoranda of understanding signed by any of the above combinations of signatories.
 - d) Constitution of joint ministerial or administrative bodies, which clearly specify matter such as the composition of the body and its terms of reference, etc. (However, the author noted that there appeared to be more of these bodies that do not possess a constitution than there are that do).
 - e) Charters for joint bodies that have their origin in other intergovernmental arrangements. For example, many bodies have been established on the basis of formal minutes and proceedings of Premiers' Conferences or similar institutions, such as the Australian Agricultural Council or the Australian Transport Advisory Committee.
 - f) The wording and occasionally the accompanying schedules of national or state bills, and the expansion of aims contained in second reading speeches in one or more parliaments.

²⁴ K Wiltshire, *Working with Intergovernmental Agreements – The Canadian and Australian Experience*, Centre for Research on Federal Financial Relations, Australian National University, Canberra, 1980, pp360–361 citing K Wiltshire, ed. *Administrative Federalism, Select Documents in Australian Intergovernmental Relations*, Brisbane, University of Queensland Press, 1977.

- g) Simple exchanges of correspondence (the study noted that this is a frequently used device).
- h) Informal discussions with no documented evidence of arrangements. Occasionally no more than a telephone call.
- i) Official annual and other reports of joint action taken at the discretion of the administrators involved.

2.29 It has been suggested by one writer that:²⁵

It can be seen that there is no semblance of any logical pattern, nor are there clearly defined models which are followed in identical situations. Indeed the actual origins of many of the agreements have been lost in antiquity. Moreover, it is difficult to speculate on which areas have witnessed most intergovernmental cooperation at the administrative level. Although in some cases the existence of a formal agreement can be construed as evidence of a desire to cooperate, in other instances real cooperation takes place more smoothly because of the absence of any written agreement.

2.30 As noted in 1985 by another author:²⁶

Intergovernmental arrangements take a variety of forms. Some of the forms are traditional ones. Many arrangements require legislative support. Others need parliamentary appropriation. Parliamentary involvement usually is avoided as far as possible, however, Parliaments cannot always be guaranteed to produce the results on which governments have agreed. Many intergovernmental arrangements are manifested only in resolutions of ministerial conferences, letters between Ministers or Heads of Governments, or agreements. The practices followed in relation to agreements varies between schemes and between jurisdictions: some are scheduled to legislation, some are approved by legislation, some are ratified or authorised by legislation and given the force of law. Some are required to be tabled, in some or all parliaments. Some are never brought before the Parliaments at all.

²⁵ Ibid, p361.

²⁶ C Saunders, *Papers on Federalism: Accountability and Access in Intergovernmental Affairs: A Legal Perspective*, Intergovernmental Relations in Victoria Program Law School, University of Melbourne, Victoria, 1985, pp6-7.

- 2.31 The Committee is interested in exploring this area in later reports however the present relevance is that it is the Executive who has knowledge of the type of supporting information that indicates whether or not a bill is uniform legislation.
- 2.32 The Committee emphasises the importance of the existence and availability of constating documents to the implementation, justification, understanding and interpretation of uniform legislative schemes.
- 2.33 The Committee observes that:
- a) when state governments implement an agreement reached with another jurisdiction which affects the people of Western Australia, such agreements might be reduced to a readily identifiable form accessible to the State's public; and
 - b) it is highly desirable that Ministers and their departments are in possession of confirmed information evidencing an intergovernmental agreement at a time when the state legislative component is being developed and certainly by the time legislation is introduced into Parliament.

AUSTRALIA-WIDE CONCERN

Background

- 2.34 There is Australia-wide concern about the increase in uniform legislation. Scrutiny committees from Australia and New Zealand have been meeting on a bi-annual basis since 1986. The issue of scrutiny of national scheme legislation (as it has been uniformly called) was first raised in a workshop presented by the delegation of New South Wales Regulation Review Committee at the Third Australasian and Pacific Conference on Delegated Legislation held at Perth in 1991.
- 2.35 The common concern is that the role of Parliament as the legislature is threatened by the rise of national scheme legislation that employ a method of law making which in some cases effectively excludes Parliaments from the scrutiny process. The challenge for Parliaments and their scrutiny committees is to seek out acceptable mechanisms for scrutiny of national schemes of legislation so as to ensure:
- proper scrutiny of both primary and delegated national schemes of legislation by elected representatives of the people; and
 - proper accountability of the Executive to Parliament.
- 2.36 The matter has been the subject of continuing study by the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees (**Working Group of Chairs**) since 1994. Past meetings have involved

discussion and consideration on proposed structures by which scrutiny of both primary and subordinate national scheme legislation can be achieved.

- 2.37 The Working Group of Chairs has published two papers dealing with scrutiny of national scheme legislation. A Discussion Paper was released in 1995 and the Position Paper followed in 1996. Both the Discussion Paper and Position Paper have been tabled in the Western Australian Parliament.²⁷ The Position Paper has become known as the “1996 Position Paper”. The Working Group of Chairs is also considering various proposals to establish a coordinated national approach to the scrutiny of national schemes of legislation, with particular reference to a proposal being promoted by the delegation from the Victorian Scrutiny of Acts and Regulations Committee (**Victorian Proposal**).

The 1996 Position Paper

- 2.38 The 1996 Position Paper emphasised that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. However, it does question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.
- 2.39 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive that consistency with the legislative form agreed among the various executive Governments is a ‘given’.²⁸ As the 1996 Position Paper noted:²⁹

Effective parliamentary scrutiny has been threatened because of the rise of national schemes of legislation which emerge from such bodies as COAG... Expressed at its simplest level, such councils agree to uniform legislation, usually in closed session, and then proceed through the participating Ministers to sponsor bills through individual Parliaments, often with the message that the bills cannot be amended for fear of destroying their uniform nature.

²⁷ Western Australia, Legislative Assembly, SCULIA, *Report No 10: Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, August 1995; and *Report No 13: Report on Position Paper: Scrutiny of National Schemes of Legislation*, October 1996.

²⁸ For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp7-12 attached as Appendix 1 to Western Australia, Legislative Assembly, SCULIA, *Report No 13: Position Paper: Scrutiny of National Schemes of Legislation*, October 1996.

²⁹ *Ibid* at pv.

2.40 This concern has been reflected in the Senate where it has been noted that.³⁰

National schemes of legislation also known as uniform legislation have always presented difficulties for Senate scrutiny because they are framed by an agreement between the Commonwealth and state and territory executive governments and then presented to the respective parliaments as unchangeable because the parliaments cannot change the intergovernmental agreements.

2.41 The 1996 Position Paper suggested two possible solutions:

- a) a national committee for the scrutiny of uniform legislation; and
- b) the adoption of parliamentary procedures so that legislation commented on by a scrutiny committee would not proceed until the government had reported on the matters raised.

2.42 These matters have been progressed to varying degrees by the Working Group of Chairs. Other jurisdictions have enacted or introduced legislation to ensure the provision of information and identification of uniform legislation – refer to paragraphs 3.20 to 3.25.

The Victorian Proposal

2.43 The Victorian Proposal includes a draft intergovernmental agreement and a model bill.³¹

2.44 The draft intergovernmental agreement establishes a Scrutiny of National Schemes of Legislation Committee (SNSLC) consisting members from each jurisdiction. The SNSLC is to consider any uniform bill and uniform subsidiary legislation introduced into a House of Parliament and report to the respective Parliaments of Australia.

2.45 The substantive provisions of the Model Bill establish a procedure for identifying uniform legislation:

- a) The member of Parliament introducing the bill must certify whether it is or is not a uniform bill.
- b) The Clerk of the Parliament transmits the uniform bill to the SNLSC.

³⁰ H Evans, ed, *Odgers' Australian Senate Practice Tenth Edition*, Parliament of Australia, Canberra, Tenth Edition June 2002, paragraph 15.17.

³¹ For a text of the proposal including the draft intergovernmental agreement and the draft model bill refer to: Australian Capital Territory, Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report No 11: Meeting of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees*, May 2002, Attachment 5.

- c) The tabling member has a duty to include an explanation of the purposes and intended operation of each clause of the bill. (This duty may overlap with duties to table explanatory memoranda).
- d) After a uniform bill has been read a second time it must not be considered by Parliament for 28 calendar days.
- e) The SNLSC is to apply five criteria. These are whether the uniform bill:³²
 - 1. trespasses unduly upon rights or freedoms/liberties;
 - 2. makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - 3. makes rights, freedoms or obligations unduly dependent upon non-reviewable administrative decisions;
 - 4. inappropriately delegates legislative powers; or
 - 5. insufficiently subjects to exercise of legislative power to parliamentary scrutiny.
- f) If any issue of concern arises from the report, the SNSLC prepares correspondence to the Minister introducing the bill, seeking clarification on the issues of concern.
- g) The correspondence to the Minister and the Minister's response is published in a follow up report.
- h) As the uniform legislation is introduced around Australia, the SNSLC report is then tabled in the respective Parliaments and would represent that Parliament's report on the bill.
- i) State and territories without scrutiny committees will need to consider the manner in which they could table or formally deal with the report of the SNSLC.

³² These criteria are generally consistent with the core criteria applied by most Australian parliamentary committees that operate as a 'scrutiny of legislation committee', and the principles recommended by the 1996 Position Paper which the Committee also applies.

CHAPTER 3

IDENTIFICATION OF UNIFORM BILLS

BILLS STAND REFERRED

- 3.1 Standing order 230A applies to a bill that:
- (a) *ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party; or*
 - (b) *by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.*
- 3.2 Unless otherwise ordered a bill when read a first time stands referred to the Committee: standing order 230A(3). After the question for first reading has been put it is not unusual for the responsible Minister to stand and deliver the second reading speech after which the debate stands adjourned. However it is important to remember that it is after the first reading of a uniform bill that it stands referred to the Committee.
- 3.3 The Committee observes that the distinction is important. A bill to which standing order 230A applies “*stands referred*”, that is, there is no question put to the House for determination. Accordingly a bill needs to be immediately identified as uniform legislation so that it can be notified to the Committee and the progress of the bill would thereafter be governed by standing order 230A as to the commencement or resumption of the second reading debate: standing order 230A(2). The Committee also notes that on conclusion of the first reading (or the second reading speech if it immediately follows) the Presiding Officer also usually notes to the House that the bill stands referred to the Committee.
- 3.4 In each case, in the absence of background information from the relevant Minister, identification is limited to any matter that may alert the reader that appears in the bill, second reading speech or the explanatory memoranda (if tabled). The Committee observes that the title of a bill may not clearly indicate that it is uniform legislation. The bill must then be perused to determine whether standing order 230A applies. The Committee understands that bills are usually read by a Table Officer however the text of a bill does not always clearly indicate that it is uniform legislation. In addition the perusal of a bill must occur in a limited period of time as a bill stands referred after first reading.

- 3.5 If the second reading speech immediately follows the first reading then identification may prove easier: for example, the speech might include some indication that a bill is uniform legislation if it makes reference to a Ministerial Council, an intergovernmental agreement or uniform scheme. However in many cases the Committee observes that it is not clear from either the bill or the second reading speech whether a bill is or is not uniform legislation.
- 3.6 The Committee notes that on occasion it has been necessary to clarify the application of standing order 230A to the House. For example:
- a) In August 2003, Hon Nick Griffiths MLC made a ministerial statement that standing order 230A did not apply to the Civil Liability Amendment Bill 2003.³³
 - b) Further in September 2003, during the second reading of the Criminal Code Amendment Bill (No. 2) 2003, Hon Bruce Donaldson MLC, on a point of order, queried whether standing order 230A applied to the bill given that the responsible Minister's second reading speech mentioned that some amendments 'complemented' Commonwealth legislation. The Deputy President later confirmed that in part, the bill arose as a result of an agreement entered into with other States and the Commonwealth and therefore standing order 230A applied.³⁴
- 3.7 The above examples demonstrate the difficulties faced by the House in identifying bills to which standing order 230A applies. The Committee is of the view that there is a need for the relevance of standing order 230A to be addressed at the time a bill is introduced into the House. The Committee has addressed this matter in paragraphs 3.26 and Recommendations 1 to 3.

THE COMMITTEE'S APPROACH

- 3.8 The Committee has previously commented on the difficulty of identifying bills subject to standing order 230A and it has expressed the desire that the Executive adopt practices to be mindful of the process of referral under that standing order.³⁵
- 3.9 Early identification of bills that may fall within the remit of standing order 230A when introduced into the Council enables the Committee to commence preliminary research into the bill. In this manner the Committee endeavours to perform its mandate, assist in the Council's scrutiny of the bill and report within the 30-day reporting period.

³³ Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, August 15 2003, p10055.

³⁴ Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, September 19 2003, p11598.

³⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, August 2002.

Committee initiatives

- 3.10 During the Thirty-Sixth Parliament the Committee has taken a number of pro-active steps to identify bills that may become subject to standing order 230A when tabled in the Council:
- a) Committee staff regularly review the Assembly Notice Paper and endeavour to identify bills that are likely to be subject to standing order 230A when they are tabled in the Council.
 - b) Every six months the Committee writes to all Ministers requesting that they advise the Committee of what uniform legislation they, and the department/s for which they are responsible, may introduce into Parliament in the next six months (**six-monthly audit**). A copy of the Committee's current pro forma letter is attached as Appendix 5.
- 3.11 This process assists the Committee to plan its workload and, if desired, conduct pre-emptive research on the bill or activate term of reference 7.3(b).³⁶ A spreadsheet is compiled from the responses and copied to Table Officers to facilitate easier identification of bills to which standing order 230A applies.

Initiatives not comprehensive

- 3.12 The initiatives adopted by the Committee assist with the identification of proposed uniform legislation however they are not comprehensive:
- a) Perusal of the Assembly Notice Paper can only assist in identifying bills if they are first introduced in the Legislative Assembly – uniform bills may be (and have been) first introduced into the Council. In addition perusal of the tabled information may not indicate that the bill is uniform legislation (refer to paragraphs 3.3 to 3.5).
 - b) Whilst most Ministers respond to the six-monthly audit, the process still relies on a timely response and even then, reflects the Executive's interpretation of standing order 230A.

RESPONSIBILITY OF THE EXECUTIVE

- 3.13 The Committee is of the view that the Executive should be in a position to justify and explain all legislation introduced into Parliament. As discussed in Chapter 2 intergovernmental agreements and proposals are usually designed away from public

³⁶ Term of reference 7.3(b) provides for one of the functions of the Committee is, "*of its 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 standing order 230A*".

scrutiny and can escape searching analysis or debate by Parliament. As servants of the Executive, public servants are usually intimately involved in this process.

- 3.14 Accordingly the Committee considers that the Government should be overtly clear when it is introducing legislation to which standing order 230A might apply. The Committee has addressed this matter in paragraphs 3.26 and Recommendations 1 to 3.

Acknowledgment of the scrutiny process

- 3.15 The Committee is pleased to note that its work in endeavouring to increase awareness amongst government departments and agencies of standing order 230A and referral of bills to the Committee is paying dividends, albeit isolated ones.
- 3.16 In this respect the Committee was pleased to note that in the case of the Higher Education Bill 2003, the Explanatory Memorandum to the bill and the second reading speeches in both the Assembly and the Council expressly stated that:

*The Bill gives effect to a multilateral intergovernmental agreement to which the Government of the State is a party. At the stage where the proposed legislation enters the Legislative Council it is required to be forwarded to the Uniform Legislation and General Purposes Committee of the Legislative Council for consideration.*³⁷

- 3.17 In the Committee's view such measures assist in increasing awareness, amongst the Executive and Parliament, of the operation of standing order 230A, the role of the Committee and the importance of the scrutiny of uniform legislation. Correspondingly, it also influences considerations for the Executive's timetable for the passage of legislation. In its Eleventh Report the Committee commended the responsible Minister and the Department of Education Services for such measures.³⁸ The Committee is pleased to see such initiatives.

OTHER JURISDICTIONS

- 3.18 Unlike other Australian jurisdictions no parliamentary committee of the Council performs the function of a 'scrutiny of bills committee';³⁹ that is, there is no committee that considers *all* bills.⁴⁰ Jurisdictions with scrutiny of bills committees

³⁷ Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, May 6 2003, p7045 and Legislative Council, June 24 2003, p9046.

³⁸ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 11: Higher Education Bill 2003*, September 2003, p4.

³⁹ For example: Queensland Standing Committee for the Scrutiny of Legislation; Victorian Scrutiny of Acts and Regulations Committee (Joint Committee); Senate Standing Committee for the Scrutiny of Bills; NSW Legislation Review Committee (Joint Committee); and the ACT Standing Committee on Legal Affairs.

⁴⁰ In Western Australia the Standing Committee on Legislation does not function as a scrutiny of bills committee – it considers bills if and when referred by the House.

therefore do not need to distinguish between the ‘types’ of legislation being introduced into the House (that is, whether or not it is uniform legislation) before a bill is open to parliamentary committee scrutiny. Identification of a bill as uniform legislation and one to which standing order 230A applies is a prerequisite to parliamentary scrutiny by the Committee.

- 3.19 However the Committee observes that other jurisdictions have responded to the challenges presented by the scrutiny of intergovernmental agreements and uniform legislation in a manner that would assist with the identification of bills as uniform legislation.

Australian Capital Territory

- 3.20 The Australian Capital Territory (ACT) has enacted the *Administration (Interstate Agreements) Act 1997*. The object of that Act is to impose an obligation on Ministers to inform and consult with the ACT Legislative Assembly regarding interstate agreements “... so as to protect the freedom of the Assembly to carry out its legislative deliberations without being subjected to necessity or compulsion due to the actions of the Executive...”.

- 3.21 The *Administration (Interstate Agreements) Act 1997* (ACT):⁴¹

- a) imposes a duty on a Minister to inform members of the ACT Legislative Assembly and consult with the relevant standing committees of the ACT Legislative Assembly about negotiations for intergovernmental agreements which could be expected to require legislation to be passed by the ACT Legislative Assembly;
- b) requires that the Minister have regard to any recommendations made by the parliamentary committee;
- c) prevents the Minister from entering into any interstate agreement until the parliamentary committee has provided a recommendation or six days have elapsed since the Minister’s consultation with that committee; and
- d) requires that, once an agreement has been reached, the Minister shall within seven days, inform in writing each member of the ACT Legislative Assembly of the terms of the interstate agreement and any commitment made on behalf of the ACT.

- 3.22 The *Administration (Interstate Agreements) Act 1997* (ACT) also provides that if the Minister is satisfied, on reasonable grounds, that compliance with a requirement of the Act would not be possible or reasonable because of the urgency of the negotiation; or

⁴¹ Sections 6–9.

would adversely affect the public interest or interests of the ACT then the Minister is not required to comply with that requirement. However the Minister remains accountable for that decision and the Act provides that the Minister must inform in writing all members of the ACT Legislative Assembly of his or her opinion and the grounds for that opinion within seven days of commencing the negotiations for the interstate agreement.⁴²

- 3.23 The ACT parliamentary committee charged with the responsibility to examine interstate agreements is the ACT Standing Committee on Legal Affairs. That committee includes ministerial notifications in its scrutiny reports.

South Australia

- 3.24 Similar legislation was introduced into the South Australian Parliament in 2003. The South Australian Parliament partly considered the Interstate Agreements Bill 2003; however, the bill lapsed due to prorogation of the Second Session of the Fiftieth South Australian Parliament and was not again introduced. The purpose of the bill was to impose upon Ministers a duty to consult with the Parliament in relation to interstate agreements. The bill was similar to the *Administration (Interstate Agreements) Act 1997* (ACT) in that it sought to impose four requirements on the relevant Minister:

1. to write to all members;
2. to consult with the appropriate committee of the South Australian Parliament;
3. take into account any committee recommendations; and
4. to report back in writing to all Members following any Ministerial Council meeting. Any recommendation made by a parliamentary committee must be taken into account by the Minister in the process of negotiation which precedes entering into an interstate agreement.

- 3.25 Exemptions were provided for urgency and public interest issues as well as specific exemptions for the (then) National Crime Authority and the Australian Loans Council of the Premiers' Conference.

HOW CAN THE EXECUTIVE ASSIST THE PROCESS?

- 3.26 The Committee considers that the Executive should note that it can assist the passage of uniform legislation through the Council by:
- a) early identification of a bill as one subject to standing order 230A. In this respect:

⁴² Section 10.

1. the Committee's six-monthly audit letter should be answered as soon as possible; and
 2. confirmation of the type of bill should be included in the Minister's second reading speech to make it clear to Parliament that it is a bill to which standing order 230A might apply; and
- b) being aware that in programming the introduction of a uniform bill a 30-day (minimum) period is to be taken into account when the bill will be with the Committee for inquiry.
- 3.27 The Committee emphasises that the term 'uniform legislation' does not mean that the legislation is identical in nature. National legislative schemes, to the extent that they may give effect to an intergovernmental agreement or introduce a uniform scheme or uniform laws throughout the Commonwealth, can take a number of forms. Nine different categories of legislative structures, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability have been identified. Some categories accommodate quite a separate legislative approach between participating jurisdictions.
- 3.28 Some collaborative arrangements may not necessarily involve identical or even common legislative elements at all. Indeed it had been suggested that the phrase "harmonisation in law" is also an appropriate descriptor for uniform legislation.⁴³ It has been noted that some of the most high profile collaboration takes place to ensure harmonisation of law:⁴⁴

At one end of the spectrum harmonisation may involve no more than consistency of underlying principle. In this case variation in detail will be unimportant. At the other end, however absolute uniformity may be required, not only of principal and subsidiary legislation but also of administration, enforcement, adjudication and ancillary procedures.

- 3.29 The legislative structures are described in Appendix 1 to this report. The Committee draws the attention of the Executive to these structures.

PREMIER'S CIRCULAR

- 3.30 The Committee is of the view that although this report will provide guidance on a number of issues, it is preferable that the Government also reinforces such guidance through the establishment of new procedures and practices. The Committee believes

⁴³ P Pental, 'Uniform Law in Australia: An Alternative Approach', *The Federalism Project: Issues Paper No 6*, The Institute of Public Affairs, May 1996, pp25-26.

⁴⁴ C Saunders, 'Collaborative Federalism', *Australian Journal of Public Administration*, Vol 61 No 2, June 2002, pp69-77 at p72.

that a government department's or agency's understanding of the process that affects the passage of uniform legislation and the Committee's position on information requirements would be enhanced if the Premier issued a Premier's Circular on the matter.

3.31 The Committee envisages that this process would:

- a) assist the Executive in ensuring that they have the relevant supporting information to hand;
- b) enable the Committee to conduct preliminary research on the bill;
- c) highlight to the House the fact that a bill is one to which standing order 230A may apply so that any motion to change the automatic operation of the standing order could be moved (for example, referral to a different committee or no referral at all); and
- d) increase awareness within the Executive (particularly sponsoring departments) of the scrutiny and reporting requirements of the House to take into account for their legislative timelines.

3.32 The Committee is of the view that the issuing of a Premier's Circular would be consistent with the spirit in which:

- a) the Premier has issued a Premier's Circular in relation to the Joint Standing Committee on Delegated Legislation. *Premiers Circular (No 2002/04)* requires that immediately following the publication of subsidiary legislation or other instrument that is subject to disallowance, Ministers must ensure that an explanatory memorandum is signed and provided to the Joint Standing Committee on Delegated Legislation.⁴⁵ The Circular then sets out what the explanatory memorandum must contain; and
- b) the Department of Local Government and Regional Development has recognised and reflected the particular information requirements of the Joint Standing Committee on Delegated Legislation in respect of Local Law Explanatory Memoranda Directions - refer to *Departmental Circular No 12-2002 – Explanatory Memorandum Directions 2002*. The Circular sets out the information to be sent to the committee when a local government has adopted a local law.⁴⁶

⁴⁵ The Premier's Circular can be accessed from the website of Ministry of Premier and Cabinet at: http://www.dpc.wa.gov.au/psmd/pubs/legis/premcirculars/2002_04UP.pdf. Issued March 1 2003.

⁴⁶ The Circular can be accessed from the website of the Department of Local Government and Regional Development at: <http://www.dlgrd.wa.gov.au/database/mincirc/mincirc.asp>.

- 3.33 The Committee observes that Council standing committees established by standing orders survive dissolution (of Parliament) and continue from one Parliament to the next. Accordingly the Committee observes that the prospect of an election would not be an impediment to the issue of a Premier's Circular.
- 3.34 The Committee has prepared a draft Premier's Circular addressing these issues. It also includes matters the subject of later chapters of this report. It is attached as Appendix 7.

Recommendation 1: The Committee recommends that the Government ensure that a Premier's Circular is issued in the form attached as Appendix 7 to this report as soon as possible.

Recommendation 2: The Committee recommends that all government departments and agencies amend their procedural documentation to alert staff to the requirements of the Premier's Circular referred to in Recommendation 1.

Recommendation 3: The Committee recommends that until such time as a Premier's Circular is issued all government departments and agencies amend their procedural documentation to include reference to the matters raised in the draft circular attached as Appendix 7 to this report.

CHAPTER 4

AVAILABILITY OF SUPPORTING DOCUMENTATION

INTRODUCTION

- 4.1 It is a fact worth repeating that Parliament cannot scrutinise what it has not seen. The availability of information about the actions and decisions of Government are fundamental to effective scrutiny and review. The Committee observes the comments of SCULIA:

*Accountability of the Executive to the Parliament is central to the system of responsible government. Procedures which allow access to information are essential if Parliament is to perform its role.*⁴⁷

...

*This occurs by providing the forum within which amongst other things, members publicly debate the issues of the day and exercise constant scrutiny over the government and its legislative program. However the procedures for drafting intergovernmental agreements are conducted in a manner that avoids recourse to the Parliament. This failure to bring such matters before the Parliament means that public exposure and discussion initiated by it does not occur.*⁴⁸

...

*An important issue in the debate over scrutiny of uniform legislation is the dual role performed by the Executive. Ministers remain accountable as they are required to explain and publicly justify their legislation as it passes through Parliament. However the advent of ministerial councils established to deal with aspects of government activity that is intergovernmental, blur the lines of responsibility of individual ministers and that participating government to their Parliament. Ministerial councils are not required to report to Parliaments.*⁴⁹

⁴⁷ Western Australia, Legislative Assembly, SCULIA, *First Annual Report – A Year’s Experience*, May 1995, pp19-20.

⁴⁸ Western Australia, Legislative Assembly, SCULIA, *Report No 21: Uniform Legislation*, April 1998 pp11-12.

⁴⁹ Western Australia, Legislative Assembly, SCULIA, *First Annual Report – A Year’s Experience*, May 1995, pp19-20.

- 4.2 The need to enhance parliamentary scrutiny of intergovernmental agreements and uniform legislation was a matter of much consideration in the previous reports of SCULIA. The Committee observes that SCULIA recommended in several reports that the Legislative Assembly standing orders (under which SCULIA was established) be amended to expressly provide that the question for the second reading of a bill shall not be finally put and determined until (amongst other matters):⁵⁰

... the responsible Minister has tabled certain information –

the background to the negotiations, the subject matter of the proposed uniform legislation, the model proposed to achieve legislative uniformity, the time schedule for the legislation and the text of the draft agreement (if any)...

- 4.3 The concerns of SCULIA were recognised by the Legislative Assembly Select Committee on Procedure in 1995 which recommended in an Interim Report that a sessional order be moved to accommodate the committee's concerns. The sessional order also required the responsible Minister to table certain supporting and background information.⁵¹
- 4.4 The concern has been noted elsewhere. One author has noted that:⁵²

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

⁵⁰ For example refer to: Western Australia, Legislative Assembly, SCULIA, *First Annual Report – A Year's Experience*, May 1995, p20.; and *Committee Report January 1 1995 to May 31 1996*, June 1996, pp15–16.

⁵¹ Western Australia, Legislative Assembly, SCULIA, *Committee Report: 1 June 1996 to 31 October 1996* pp11–12. The proposal was not proceeded with.

⁵² A Hede, 'Reforming the Policy Role of Inter-Governmental Ministerial Councils' in A Hede and S Prasser (eds), *Policy Making in Volatile Times*, Hale and Iremonger, Sydney, 1993, p200.

- 4.5 As regards scrutiny and debate of uniform legislation it would seem to the Committee that neither a parliamentary committee nor a member should be expected to spend most of their time:
- a) ascertaining that there was an agreement; and
 - b) obtaining a copy of the agreement and other supporting information,
- before a measure could be scrutinised.

THE COMMITTEE'S APPROACH

Committee initiatives

- 4.6 During the Thirty-Sixth Parliament the Committee has taken a number of steps to obtain supporting documentation:
- a) On its establishment the Committee wrote to all Ministers requesting that at the time that a bill to which standing order 230A applies is tabled in the Council, certain information be immediately supplied to the Committee to assist with its scrutiny of the bill.⁵³ The letter also requested that the Minister ensure that relevant Chief Executive Officers and Heads of Department were notified of the Committee's request.
 - b) Every time a uniform bill is referred to the Committee a letter is reissued to the responsible Minister again requesting supporting information. A pro forma copy of the most recent form of the letter is attached as Appendix 6. If, prior to introduction into the Legislative Council, a bill has been identified as one to which standing order 230A might apply, then the Committee is able to request this information at an earlier stage.
- 4.7 Prompt provision of supporting information also enables the Committee to commence preliminary research into a bill. In this manner the Committee endeavours to perform its mandate, assist in the Council's scrutiny of the bill and reports in the 30-day reporting period.

Challenges

- 4.8 The effectiveness and efficiency of the Committee's scrutiny of uniform legislation is affected by the adequate flow of relevant, and timely provision of, supporting documentation by the Government.

⁵³ The letter requested a copy of the relevant intergovernmental agreement; if the agreement is not available, a copy of the most recent draft with a statement as to the status of that draft; a statement as to any timetable for the implementation of the legislation; and a copy of the Explanatory Memoranda if not tabled with the bill.

- 4.9 The Committee emphasises that it is reliant on the Government to respond to the Committee's inquiries in an accurate and timely fashion.
- 4.10 The Committee has experienced difficulty in its scrutiny of proposed uniform legislation when supporting information is not provided. In addition where supporting information is provided, the Committee considers that it has not always been of a quality to sufficiently explain the purpose and operation of the bill in the national scheme or context of the intergovernmental agreement (refer to the examples at paragraph 1.15).⁵⁴
- 4.11 The Committee anticipated that its early advice of the information required by the Committee would enable the Executive to prepare the requested documentation for contemporaneous presentation to the Committee when the bill is tabled in the Council. The Committee observes that this early advice has had little impact on the information supplied to the Committee.

HOW CAN THE EXECUTIVE ASSIST THE PROCESS?

- 4.12 The Committee considers that the Executive should note that it can assist the passage of uniform legislation through the Council by:
- a) locating a copy of the relevant intergovernmental agreement which the Committee will want to see and model bill and other matters referred to in the letter annexed as Appendix 6; and
 - b) assisting the Committee to keep to its 30-day time limit (and avoiding the need for applications to the House for extensions of time) by responding promptly to the Committee's requests for information.
- 4.13 The Committee notes that other issues may have an impact on whether material is available for provision to the Committee and the quality of material provided; for example, the provision of adequate information to officers who are responsible for preparing a Minister's second reading speech and explanatory memoranda.
- 4.14 Governments should be active participants in and sponsors of legislative proposals whether or not pursuant to an intergovernmental agreement or a uniform legislative scheme. Ministers and their departments should already be in possession of the information sought by the Committee (refer to Appendix 6) at a time when the legislation is being developed and certainly by the time legislation is introduced into Parliament.

⁵⁴ See also paragraphs 2.27 to 2.33 above and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 18: Workers' Compensation and Rehabilitation Amendment (Cross Border) Bill 2004*, August 2004, pp4-9.

PREMIER'S CIRCULAR

- 4.15 As discussed at paragraphs 3.30 to 3.34, the Committee is of the view that although this report will provide guidance on a number of issues, it is preferable that the Government also reinforces such guidance. The Committee believes that a Government department's or agency's understanding of the process that affects the passage of uniform legislation and the Committee's position on information requirements would be enhanced if the Premier issued a Premier's Circular.
- 4.16 In addition to the matters raised at paragraph 3.31, the Committee envisages that this process would:
- a) assist the Executive in ensuring that they have the relevant supporting information to hand;
 - b) enable the Committee to conduct preliminary research on the proposed uniform legislation;
 - c) assist the Committee in efficient and effective scrutiny of uniform legislation; and
 - d) assist the Committee to keep to its 30-day time limit and avoid the need to apply to the House for extensions of time.
- 4.17 The Committee has made recommendations to this effect (refer to Recommendations 1 to 3 in Chapter 3).

CHAPTER 5

OTHER OPTIONS

OTHER PROPOSALS

- 5.1 In addition to the Victorian Proposal discussed in Chapter 2, the Committee observes that many options to facilitate scrutiny of intergovernmental agreements, uniform legislation and proposals for such legislation have been mooted by the Western Australian parliamentary committees since 1992 including:⁵⁵
- a) requirements for Ministers to report to Parliament on proposals for intergovernmental agreements and their tabling in Parliament;⁵⁶
 - b) processes for parliamentary committees to report on proposals with Ministers being required to take the committee's comments into consideration in Ministerial Council negotiations;⁵⁷
 - c) requirements that the Government do not give support or assent at Ministerial Council meetings to any uniform legislation until the appropriate scrutiny procedures have been completed by a parliamentary committee;⁵⁸
 - d) the tabling of exposure drafts of legislation (including regulations) and proposed amendments;⁵⁹
 - e) the establishment of a central register of current and proposed, formal and informal intergovernmental agreements;⁶⁰

⁵⁵ Some of these matters were also canvassed in the 1996 Position Paper, see Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, Commonwealth of Australia, Canberra, October 1996, p13.

⁵⁶ Western Australia, Legislative Assembly, SCULIA, *Report No 1: Establishment and Analysis*, (March 1994), Annexure 1; *Report No 6: Mutual Recognition*, September 1994, p7; and *Report No 21: Uniform Legislation*, April 1998.

⁵⁷ Western Australia, Legislative Assembly, SCULIA, *Report No 1: Establishment and Analysis*, (March 1994), Annexure 1; and *Report No 6: Mutual Recognition*, September 1994, p7.

⁵⁸ Western Australia, Legislative Assembly, SCULIA, *Report No 4: Parliament and the Executive* (June 1994), p29.

⁵⁹ Western Australia, Legislative Assembly, SCULIA, *Report No 1: Establishment and Analysis*, (March 1994), Annexure 1; and *Report No 6: Mutual Recognition*, September 1994, p7.

⁶⁰ Western Australia, Legislative Assembly, SCULIA, *Report No 1: Establishment and Analysis*, (March 1994), Annexure 1; and *Report No 3: Register*, 1994.

- f) requirements for annual reports of governmental departments and agencies to contain evaluations of the operation of relevant intergovernmental agreements and uniform legislative schemes implemented by uniform legislation;⁶¹ and
- g) the annexing of agreements to relevant uniform legislation and comment on the terms of agreements.

WHAT THE COMMITTEE CONSIDERED

5.2 The Committee has considered a range of other options such as:

- a) Whether to recommend a proposed amendment to standing order 230A to require a Minister to cause specified material to be tabled when uniform legislation is introduced into the Council. This would both assist in identifying bills to which standing order 230A applies and provide a form of accountability.
- b) A requirement that the responsible Minister be required to state to the House (for example by providing a certificate) whether or not a bill is subject to standing order 230A.

Amendment to the standing order

5.3 The Committee observes that this approach was recommended to the Assembly by SCULIA in 1994. This was further refined in 1995 where, in its Ninth Report, SCULIA recommended that Legislative Assembly standing orders be amended to provide that the question for a second reading of a uniform bill could not be put until 120 days had passed since the second reading was moved, three days had passed since a parliamentary committee had reported back on the uniform legislation and the responsible Minister had tabled certain information. Such information included: the background to the negotiations, the subject matter of the proposed legislation, the model proposed to achieve legislative uniformity, the time schedule for the legislation and its implementation and the text of any agreement.⁶²

⁶¹ Western Australia, Legislative Assembly, SCULIA, *Report No 1: Establishment and Analysis*, (March 1994), Annexure 1.

⁶² Western Australia, Legislative Assembly, SCULIA, *Report No 9: A report Concerning the various methods of implementing the Australian Uniform Credit Laws Agreement 1993 of Western Australia*, April 1995. See also Western Australia, Legislative Assembly, SCULIA, *Report No 1: Establishment and Analysis*, March 1994, p11; and *Report No 20: Bank Mergers Bill 1997*, June 1997, p11.

5.4 The concerns of SCULIA were recognised by the Legislative Assembly Select Committee on Procedure in 1995 which recommended in an Interim Report that a sessional order be moved to accommodate the committee's concerns.⁶³ The sessional order also required the responsible Minister to table certain supporting and background information.⁶⁴ The proposal was not proceeded with.

Certification by the Minister

5.5 This approach would be reflective of one proposed by the 1996 Position Paper and is also reflected in the Victorian Proposal.⁶⁵ The approach might be that before a bill is introduced into the Council, the Minister in charge of the bill must state to the House whether or not the bill is a uniform bill for the purpose of standing order 230A. A certificate must accompany the bill upon introduction by the Minister and it must state the reason why the bill is or is not a uniform bill, include an explanation of the purpose and intended operation of each clause of the bill, and be tabled.

Present preference for Premier's Circular

5.6 The Committee has reserved its position on whether to canvass further and recommend amendments to the standing orders or require certification by a Minister as the Committee:

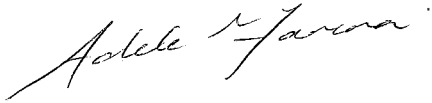
- recognises that both procedures might involve further detailed consideration by the House;
- hopes and trusts that most of the Committee's concerns can be immediately met in an administrative manner by the issue of the recommended Premier's Circular; and
- desires to ascertain the effect of the recommendations contained in this report in relation to the proposed Premier's Circular.

⁶³ As cited in Western Australia, Legislative Assembly, SCULIA, *Committee Report: 1 June 1996 to 31 October 1996*, pp11 – 12.

⁶⁴ Ibid, and see Western Australia, Legislative Assembly, SCULIA, *Report No 20: Bank Mergers Bill 1997*, June 1997, p11.

⁶⁵ Refer to the discussion in Chapter 2.

- 5.7 In noting the above, the Committee emphasises that it is always open for the Committee to report further on more stringent requirements for the identification of uniform legislation and the provision of supporting information should the recommendations contained in this report not be implemented and have the desired effect.



Hon Adele Farina MLC
Chairman

August 27 2004

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

- Structure 1:** *Complementary Commonwealth-State or Co-operative Legislation.* 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.
- Structure 2:** *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.
- Structure 3:** *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.
- Structure 4:** *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.
- Structure 5:** *Alternative Consistent Legislation.* 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.
- Structure 6:** *Mutual Recognition.* Recognises the rules and regulation 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.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* 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.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 2

STANDING ORDER 230A

Extract from the Standing Orders of the Legislative Council:

“Uniform legislation

- 230A. (1) This order applies to a Bill that —
- (a) ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party; or
 - (b) by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.
- (2) The second reading stage of a Bill is not to be resumed where SO 230(a) applies, or commence where SO 230(b) applies, within 30 days of the date of the Bill’s first reading or before it has been reported from a committee, whichever is the later.
- (3) Unless otherwise ordered, a Bill when read a first time stands referred to the *Uniform Legislation and General Purposes Committee*.
- (4) The *Uniform Legislation and General Purposes Committee*, or other committee, receiving a Bill under subclause (3) is to present its final report not later than 30 days of the day of the reference or such other period as may be ordered by the House.
- (5) The policy of a Bill is not a matter for inquiry by a committee receiving it. ”

APPENDIX 3

**CHRONOLOGY OF EVENTS: SCRUTINY OF UNIFORM
LEGISLATION – PARLIAMENTARY COMMITTEES AND
LEGISLATIVE COUNCIL**

Date	Event
1989	Council committee system established. Standing Committee on Legislation appointed to scrutinise bills referred by the Council.
1992	Assembly Select Committee on Parliamentary Procedures for Uniform Legislation Agreements reports on uniform legislation.
September 24 1992	<p>Standing order 230(c) inserted into the standing orders by resolution of the House with a time period of <i>120 days</i> as a delay before the second reading debate on the bill may resume in the House. At this stage standing order 230(d) (referral to a committee) did not exist. The 120 days (say 17 weeks) was to enable Members to scrutinise the bill and raise any concerns. Parliamentary debate highlights -</p> <ul style="list-style-type: none"> - Members' concerns about the '120 day rule'. Comments made that not all uniform legislation would require this period of delay and to circumvent the '120 day rule' would require a suspension of standing orders. Comments made that suspension of standing orders would be the norm and not the exception. - Members' desire that draft uniform legislation should be tabled in WA Parliament 6 months before executive governments agree the legislation.
August 1993	<p>Assembly establishes Standing Committee on Uniform Legislation and Intergovernmental Agreements (SCULIA).</p> <p>SCULIA recommends that Assembly standing orders be amended to require that the second reading debate on a bill giving effect to uniform legislation be adjourned until 120 days have passed, the responsible Minister has tabled information on certain matters (including the background to the negotiations and the text of any draft intergovernmental agreements) and a report has been tabled by SCULIA. Standing order never inserted.</p>
June 15 1995	Council refers standing order 230 to the Standing Orders Committee for report on the motion of Hon Peter Foss MLC. Mr Foss proposes that the

Date	Event
	‘120 day rule’ be maintained but that legislation be referred to the Standing Committee on Legislation for review during that period. Comments raised during debate reflect those of members on September 24 1992.
June 1995	The concerns of SCULIA are recognised by the Assembly Select Committee on Procedure which recommends in an Interim Report that a sessional order be moved to accommodate SCULIA’s concerns. The proposed sessional order also requires the responsible Minister to table certain supporting and background information. The proposal is not proceeded with.
September 1995	Council Standing Orders Committee tables report in Council recommending that standing order 230(c) be amended by deleting “120” and substituting “30” on the basis that 30 days should provide sufficient time within which Members can identify perceived defects in or unresolved issues arising from, the Bill. The committee did not comment on Foss’ proposal to refer matters to a committee. Note: Standing order 230(d) (referral to a committee) not yet inserted.
October 18 1995	Council debates Standing Orders Committee report and resolves to amend standing order 230(c) to read “30 days”.
December 1995	Commission on Government Report. COG recommends that SCULIA be abolished and its functions incorporated into a new Council committee. That committee should be called the Standing Committee on Constitutional and Federal/State Affairs.
October 1996	SCULIA responds to the Final Report of the Legislative Assembly Select Committee on Procedure. SCULIA recommends that the role of SCULIA be expanded to look at Federal/State affairs and legal and constitutional issues.
August 1997	Council Select Committee to Review Council Standing Committee System tables report. Recommendations include “ <i>That a bill to which the “30 day” rule applies stands referred to the Constitutional Affairs Committee after the Minister’s second reading speech and the committee is to report within 30 days of that referral.</i> ” (that is, standing order 230(d)).

Date	Event
August 28, September 11 and October 23 1997	Council debates Select Committee report and inserts standing order 230(d) requiring referral of such bills to the Constitutional Affairs Committee.
October 23 1997	Terms of reference of the Council's Constitutional Affairs Committee are amended to include uniform legislation in accordance with 1997 Select Committee report.
June 1998	Legislative Assembly Standing Orders and Procedure Committee tables report. Committee rejects 1995 Commission on Government recommendations and finds instead that SCULIA and Joint Standing Committee on Delegated Legislation should be amalgamated. Neither of the two committees are in favour of the merger.
May 24 2001	Council appoints Legislation Committee with terms of reference encompassing uniform legislation, a role previously performed by SCULIA and Council Constitutional Affairs Committee.
November 6 2001	Legislation Committee tables <i>Special Report of the Standing Committee on Legislation in relation to Intergovernmental Agreements, Uniform schemes and Uniform Laws: Amendment to Standing Orders 230(c) and (d)</i> .
November 13 2001	Council repeals standing orders 230(c) and (d) and inserts standing order 230A.
March 21 2002	Council Procedure and Privileges Committee tables report recommending establishment of a new committee of three members that will address uniform legislation (standing order 230A); proposals for uniform legislation; treaties; and any bill/matter referred by the House or on request from a State or Commonwealth authority.
April 11 2002	Council appoints the Standing Committee on Uniform Legislation and General Purposes Committee.

APPENDIX 4

EXTRACT FROM COAG WEBSITE

Material accessed from the COAG website at http://www.coag.gov.au/ministerial_councils.htm, (current at July 23 2004). (See also: Department of the Prime Minister and Cabinet, *Commonwealth-State Ministerial Councils – A Compendium*, Department of the Prime Minister and Cabinet, Canberra, June 2002 – note that this compendium is being updated by COAG)

“About COAG

The Council of Australian Governments (COAG) is the peak intergovernmental forum in Australia. COAG comprises the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association (ALGA). The then Prime Minister, Premiers and Chief Ministers agreed to establish COAG in May 1992. It first met in December 1992. The Prime Minister chairs COAG. The COAG Secretariat is located within the Department of the Prime Minister and Cabinet.

The role of COAG is to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments (for example, National Competition Policy, water reform, reform of Commonwealth and State/Territory roles in environmental regulation, the use of human embryos in medical research, counter-terrorism arrangements and restrictions on the availability of handguns). Issues may arise from, among other things: Ministerial Council deliberations; international treaties which affect the States and Territories; or major initiatives of one government (particularly the Australian Government) which impact on other governments or require the co-operation of other governments.

COAG meets on an as needed basis. However, the Prime Minister stated after the April 1999 Premiers' Conference that, since there would be no further Premiers' Conferences following the landmark Intergovernmental Agreement on the Reform of Commonwealth-State financial relations, COAG would meet at least once a year from 2000. Alternatively, COAG may settle particular issues out-of-session by correspondence. In recent years, a number of issues have been settled in this manner.

The outcomes of COAG meetings are contained in communiqués released at the end of each meeting. Where formal agreements are reached, these may be embodied in Intergovernmental Agreements.

Ministerial Councils

Over 40 Commonwealth-State Ministerial Councils and fora currently facilitate consultation and co-operation between governments in specific policy areas, initiate, develop and monitor policy reform jointly in these areas, and take joint action in the resolution of issues that arise

between governments. In particular, Ministerial Councils may develop policy reforms for consideration by COAG, and oversee the implementation of policy reforms agreed by COAG. Responsible ministers from each government (there may be more than one) participate in the councils (although each government, where voting arrangements apply, generally has only one vote). New Zealand Ministers have full membership of councils when matters affecting New Zealand are being considered, for example Trans Tasman mutual recognition. Normally, Ministerial Councils would meet only once or twice a year, although they may regularly settle issues by correspondence.

In June 2001, COAG agreed to combine a number of Councils in related functional fields, to strengthen their strategic direction and improve opportunities for cooperative policy development. COAG also updated the 'Guidelines for the Creation of New Ministerial Councils', which introduced a series of issues to be addressed before a Council can be established, and agreed to a revised version of the "Broad Protocols and General Principles for the Operation of Ministerial Councils" to improve the overall coordination, efficiency and effectiveness of Ministerial Councils. As a general rule, Councils determine their own rules and procedures consistent with these documents.

Guide to Intergovernmental Agreements

Since its establishment in 1992 the Council of Australian Governments (COAG) has settled and signed a number of intergovernmental agreements. The agreements have signified the commitment of jurisdictions to implement decisions that have been either reached or confirmed by COAG. In many instances agreements have been the precursor to the passage of legislation. Sometimes this has been Commonwealth legislation, while on other occasions joint Commonwealth and State and Territory legislation has been enacted.

Where COAG has directed ministerial councils to carry forward issues on its behalf, there is an expectation that any substantive decisions requiring legislation will be enshrined in intergovernmental agreements. This provides members of COAG with an opportunity to review and scrutinise these ministerial decisions before signing and entering into an agreement at head of government level.

There have been occasions when because of the nature of the issues and the urgency to have legislation in place (recent examples being the legislation to restrict the use of human embryos for medical research purposes and handgun bans) the political compact forged at the relevant COAG meeting has not been consolidated through an intergovernmental agreement. However, it must be emphasised that this is the exception rather than the rule. COAG level agreements make clear that the outcomes have head of government support and have greater currency and force than ministerial reports and communiqué text which may not always contain detailed policy and/or operational matters.

There is no single template governing the form of an intergovernmental agreement, but typically agreements are composed of the following elements:

- recitals;
- definitions;
- objectives;
- institutional arrangements, if any;
- ministerial council(s) involvement and any voting arrangements;
- future legislative commitments, if any;
- financial arrangements, if appropriate;
- dispute resolution procedures;
- amendment or variation to the agreement provisions; and
- review provisions and/or a sunset clause, where appropriate.

”

APPENDIX 5
PRO FORMA LETTER – SIX MONTHLY AUDIT

**STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES**

«Title» «FirstName» «LastName»
«JobTitle»
«Company»
«Address1»
«Address2»
«City» «State» «PostalCode»

Dear Minister

**Uniform Legislation:
Proposals for the Enactment of Uniform Legislation**

On April 11 2002, the Legislative Council appointed the Uniform Legislation and General Purposes Committee (Committee) with the attached terms of reference.

As part of the Committee's mandate it is required to report, usually within 30 days, on uniform legislation, being bills that:

- ratify or give effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party; or
- by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the Commonwealth.

In order to assist the Committee with its consideration of current and proposed uniform legislation, the Committee requests that you advise what uniform legislation you, and the department/s for which you are responsible Minister, may introduce into Parliament in the next six months.

The Committee would appreciate your response by *[date]* addressed to:

Sheena Hutchison, Committee Clerk
Uniform Legislation and General Purposes Committee
Legislative Council Committee Office
Parliament House
Perth WA 6000

Legislative Council standing committees may authorise the publication of material received by the committee at some stage during its inquiry. This material is then available to the public on request.

It is important that any request for the Committee to prohibit publication of all or part of the information provided be made in your reply. State why you want it confidential. If you want part of it kept confidential please put that part on a separate page(s). The Committee will consider requests for confidentiality, but retains the power to publish any material. The Legislative Council may also authorise publication.

A similar letter is being sent to other Ministers. For further information please contact Sheena Hutchison on 9222 7300. If you wish to discuss substantive issues please contact Felicity Mackie, Advisory Officer on 9222 7409. Thank you in anticipation of your assistance.

Yours sincerely

Hon Adele Farina MLC
Chairman

[date]

APPENDIX 6
PRO FORMA LETTER REQUESTING
SUPPORTING INFORMATION

STANDING COMMITTEE ON UNIFORM LEGISLATION
AND GENERAL PURPOSES

Hon *[name of Minister]*
Minister for *[insert Ministry]*
[Insert Address]

Dear Minister

Uniform Legislation: *[Insert name of bill/s]*

On *[Insert date bill stood referred]* the above Bill/*s]* stood referred to the Uniform Legislation and General Purposes Committee (Committee) by operation of the Standing Orders of the Legislative Council. The Standing Orders require that the Committee report to the Legislative Council by *[insert report date in bold]*.

In order to assist with the conduct of its inquiry, the Committee requests that the following information is immediately provided to the Committee:

- a) a copy of the relevant intergovernmental agreement/memorandum of understanding or, if one is not available, a copy of the most recent draft with a statement as to the status of that draft;
- b) if (a) is not available, a copy of the minutes of the Ministerial Council meeting at which it was agreed to introduce the legislation;
- c) a statement as to any timetable for the implementation of the legislation;
- d) [*Select: a copy of the Explanatory Memoranda; or the Committee has already received copies of the Explanatory Memoranda tabled in the Legislative Council;*]
- e) the Government's clearly stated policy on the Bill;
- f) the advantages and disadvantages to the State as a participant in the [... ..] scheme;
- g) the constitutional issues affecting each jurisdiction;

- h) an explanation as to whether and by what mechanism the State can opt out of the scheme;
- i) the mechanisms by which the bill, once enacted, can be amended. That is, whether the intergovernmental agreement/memorandum of understanding places parameters on the type of and manner in which it is envisaged that amendments are to be made to the legislation, for example whether the agreement of the State, or a majority of States and Territories, is required;
- j) if the legislation has been developed by reference to a model bill, a copy of that model bill; and
- k) the name and contact numbers for the:
 - 1. Policy Officer who has carriage of the bill; and
 - 2. Instructing Officer in the relevant department.

Material should be lodged with:

Ms Sheena Hutchison, Committee Clerk
Uniform Legislation and General Purposes Committee
Legislative Council Committee Office
Parliament House
Perth WA 6000

Legislative Council standing committees may authorise the publication of material received by the committee at some stage during its inquiry. This material is then available to the public on request.

It is important that any request for the Committee to prohibit publication of all or part of the information provided be made in your reply. State why you want it confidential. If you want part of it kept confidential please put that part on a separate page(s). The Committee will consider requests for confidentiality, but retains the power to publish any material. The Legislative Council may also authorise publication.

If you have any questions, require further information or have difficulties with promptly supplying the requested material, please contact Ms Hutchison on 9222 7300. If you wish to discuss substantive issues please contact [*name*], Advisory Officer (Legal) on 9222 7[*ext*].

Yours sincerely

Hon Adele Farina MLC
Chairman

[*Insert date*]

APPENDIX 7

DRAFT PREMIER'S CIRCULAR

Premier's Circular [draft]

Number:	
Issue Date:	
Review Date:	

TITLE

UNIFORM LEGISLATION – INFORMATION TO BE PROVIDED TO PARLIAMENT

OBJECT

The object of these Directions is to assist the Uniform Legislation and General Purposes Committee which examines uniform legislation introduced into the Legislative Council. The Committee performs this scrutiny function to assist the Legislative Council of Western Australia.

BACKGROUND

The Uniform Legislation and General Purposes Committee scrutinises all uniform legislation on behalf of the Legislative Council of Western Australia.

Uniform legislation is legislation that ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party; or which by reason of subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth (**uniform legislation**).

The functions of the Uniform Legislation and General Purposes Committee are:

- a) to consider and report on uniform legislation
- 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 uniform legislation;
- 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; and

- d) to consider and report on any matter referred by the House.

Pursuant to the standing orders of the Legislative Council, uniform legislation automatically stands referred to the committee for inquiry and report within 30 days of referral.

On occasion, the Legislative Council may refer the legislation to another committee for inquiry and report. In such a case the Policy of this Directive applies in respect of that other committee.

POLICY

Identification of bills as uniform legislation

When introducing into the Parliament of Western Australia a bill that implements uniform legislation, Ministers must ensure that the second reading speech for the bill:

- a) makes reference to the fact that the bill is pursuant (whether in whole or in part) to uniform legislation; and
- b) outlines the relevant intergovernmental agreement/memorandum of understanding pursuant to which the bill has been introduced.

Provision of Information

Immediately following the introduction to Parliament of a bill implementing (whether in whole or in part) uniform legislation, Ministers must ensure that the Uniform Legislation and General Purposes Committee is provided with the following information:

- a) a copy of the relevant intergovernmental agreement/memorandum of understanding or, if a copy is not available, a copy of the most recent draft with a statement as to the status of that draft;
- b) if (a) is not available, a copy of the minutes of the Ministerial Council meeting at which it was agreed to introduce the legislation;
- c) a statement as to any timetable for the implementation of the legislation;
- d) a copy of the Explanatory Memoranda;
- e) the Government's clearly stated policy on the bill;
- f) the advantages and disadvantages to the State as a participant in the relevant scheme or agreement;
- g) the constitutional issues affecting each jurisdiction;

- h) an explanation as to whether and by what mechanism the State can opt out of the scheme;
- i) the mechanisms by which the bill, once enacted, can be amended. That is, whether the intergovernmental agreement/memorandum of understanding places parameters on the type of and manner in which it is envisaged that amendments are to be made to the legislation, for example whether the agreement of the State, or a majority of States and Territories, is required; and
- j) if the legislation has been developed by reference to a model bill, a copy of that model bill; and
- k) the name and contact numbers for the:
 - 1. Policy Officer who has carriage of the bill; and.
 - 2. Instructing Officer in the relevant department.

On occasion, the Uniform Legislation and General Purposes Committee also conducts pre-legislative inquiries and in such case the Committee may seek the above information prior to introduction of the bill(s) into Parliament. In such case, Ministers should ensure that the information is supplied to the Committee as soon as possible.

The documentation and other information to be supplied to the Uniform Legislation and General Purposes Committee is to be sent to:

Advisory Officer
Uniform Legislation and General Purposes Committee
Legislative Council of Western Australia
Parliament House
PERTH WA 6000.

Electronic versions of the materials may be sent on floppy disc, cd rom or by e-mail. The e-mail address of the Uniform Legislation and General Purposes Committee is: unileg@parliament.wa.gov.au.

Request for confidentiality of material provided

Legislative Council standing committees may authorise the publication of material received by the Committee at some stage during its inquiry. This material is then available to the public on request.

It is important that any request for the Committee to prohibit publication of all or part of the information provided be made when the information is provided and the reason why it is to be confidential is clearly stated. If part of the material is to be kept confidential then that part should be provided on a separate page(s). The Committee will consider requests for

confidentiality, but retains the power to publish any material. The Legislative Council may also authorise publication.

DR GEOFF GALLOP MLA
PREMIER

For inquiries contact:	Committee Clerk Uniform Legislation and General Purposes Committee 9222 7300
Other relevant Circulars:	
Circular/s replaced by this Circular:	