



THIRTY-EIGHTH PARLIAMENT

REPORT 63

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

**INFORMATION REPORT: SCRUTINY OF UNIFORM
LEGISLATION**

Presented by Hon Adele Farina MLC (Chairman)

June 2011

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

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

“8. Uniform Legislation and Statutes Review Committee

- 8.1 A *Uniform Legislation and Statutes Review Committee* is established.
- 8.2 The Committee consists of 4 Members.
- 8.3 The functions of the Committee are -
- (a) to consider and report on Bills referred under SO 230A;
 - (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to review the form and content of the statute book;
 - (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
 - (f) to consider and report on any matter referred by the House or under SO 125A.
- 8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)	Hon Linda Savage MLC
Hon Nigel Hallett MLC (Deputy Chairman)	Hon Liz Behjat MLC

Staff as at the time of this report:

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

IN RELATION TO THE

INFORMATION REPORT: SCRUTINY OF UNIFORM LEGISLATION

1 INTRODUCTION

1.1 In the latter part of 2009 and early part of 2010, a number of bills to which Standing Order 230A (**SO230A**) applied were introduced to the Parliament by the Government but were not identified as such in the Second Reading Speech.¹ In some instances, the application of SO230A continued to be disputed to the Committee after referral of the bill.²

1.2 It is apparent from correspondence to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) that, on occasion, failure to identify a bill as one to which SO230A applies is based on a narrow interpretation of the colloquial phrase ‘uniform legislation’, rather than the terms of SO230A.³

1.3 It has also emerged from:

- the limited information at times provided to the Committee;
- lack of preparedness of departmental witnesses at some Committee hearings; and
- assertions and challenges as to the issues the Committee is empowered to inquire into,

that some Ministerial officers and government departments and agencies are not cognisant of the Committee’s function to inquire into the entire bill referred (term of reference 8.3(a)) or the ambit of its inquiry.⁴ This occurs notwithstanding the fact that

¹ The Arson Legislation Amendment Bill 2009, the Criminal Code (Identity Crime) Bill 2009, the Approvals and Related Reforms (No.1) (Environment) Bill 2009 and the Aboriginal Housing Legislation Amendment Bill 2009.

² Letter from Hon Donna Faragher JP, MLC, Minister for Environment, Youth to Hon Adele Farina MLC, 8 December 2009.

³ On this, the Committee notes that the Legislative Council Standing Committee on Procedure and Privilege stated in its Report 8 - *Matters Referred to the Committee and Other Miscellaneous Matters*: the Committee is of the view that it is desirable that any consideration of the application of SO230A be in accordance with the practice of the House, p20.

⁴ Ibid, pp20 and 34.

the Committee regularly states the parameters of its inquiries in its reports on individual bills.

- 1.4 The Committee, therefore, tables this information report to provide members of the House with a brief historical overview of the role and purpose of the Committee, as revealed in Parliamentary debates and reports of earlier incarnations of the Committee. A historical perspective of the scrutiny of uniform legislation by the Western Australian Parliament is set out at **Appendix 1**.
- 1.5 The Committee also tables this report (which in large part collates information provided in previous reports of this and former Committees tasked with reviewing ‘uniform legislation’) for the particular reference of Ministers, the staff of Ministerial Offices and government departments and agencies in correctly identifying bills to which SO230A applies and the issues which may be examined by the Committee during its inquiry into those bills.
- 1.6 The Report clarifies that when a Bill is referred under SO 230A, the Committee is tasked with scrutinising the entire bill, not just the parts that are uniform.

No recommendations

- 1.7 Given its purposes, this report does not comprise a critical examination of the Committee’s current terms of reference for the purpose of suggesting changes in those terms of reference or to the Committee’s approach to the bills referred to it.

2 TERM OF REFERENCE 8.3(a), STANDING ORDER 230A AND “UNIFORM LEGISLATION”

Term of Reference 8.3(a)

- 2.1 The full terms of reference of the Committee are set out on the inside cover of this report. This report is focussed on term of reference 8.3(a), which requires the Committee “to consider and report on bills referred under SO 230A”.

Standing Order 230A

- 2.2 It states:

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, within 30 days of the date of the adjournment (exclusive of that day) or before it has been reported from a committee, whichever is the later.*

(3) *Unless otherwise ordered, a Bill stands referred to the Uniform Legislation and Statutes Review Committee at the conclusion of the second reading speech of the Minister or Member in charge.*

(4) *The Uniform Legislation and Statutes Review 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 (exclusive of the referral day) or such other period as may be ordered by the House.*

How and when a Bill is referred to the Committee

2.3 Term of reference 8.3(a) requires the Committee “*to consider and report on bills referred under SO 230A*”. SO 230A states that the 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.*

2.4 Unless otherwise ordered, a Bill stands referred to the Committee at the conclusion of the Second Reading Speech of the Minister or Member in charge. It is at this point in time that the supporting documentation is required so that the Committee may discharge its duty to the Parliament. Ministerial Office Memorandum, MM 2007/01 (MM 2007/01) states that a Minister “should consider” providing the information at the time a Bill is first tabled in Parliament even if this is in the Legislative Assembly.

2.5 The Committee until recently had 30 days within which to table a Report but on 24 March 2011, Temporary Standing Orders of the Legislative Council increased this to 45 days.

- 2.6 When a report on a bill is tabled, the Committee routinely includes a request for a government response under Standing Order 337. It states:

Clerk shall send copy of a report to Government; Government to respond within 4 months

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.

- 2.7 The provision of a government response to recommendations in Committee reports is a useful tool for the House during debate on the bill.

Uniform legislation

Structures

- 2.8 Uniform legislation arises from the federal structure of government in Australia, which provides a constitutional division of power between the Commonwealth Government and State and Territory Governments. This structure requires co-operation between these bodies where it is considered appropriate to take a nationally consistent legislative approach to an issue or matter.

- 2.9 The purposes of uniform legislation include:

- achieving consistency in a common functional area (for example, criminal law);
- avoiding duplication of services between the Commonwealth and the States/Territories;
- pooling resources (for example, the administration of the First Home Owner's Grant Scheme);
- applying uniform laws to mobile resources (for example, rivers which cross State borders);
- achieving nationally consistent legislation in those areas where the Commonwealth Government has limited or no constitutional power,

or some other harmonising purpose. **Appendix 2** sets out a list and brief description of the most common structures for uniform legislation. This list is not comprehensive and many of the bills referred to the Committee pursuant SO230A contain only isolated features of different “structures” or are part of a uniform structure that

resembles, rather than represents, the stated structures.⁵ The Committee is in the process of reviewing Appendix 2, which was compiled in 1995, to better reflect current uniform legislation structures.

- 2.10 Since the 1990s there has been an increased incidence of uniform legislation, primarily arising from globalisation of the economy. There are significant benefits in uniform laws regulating the single Australian market rather than having eight separate markets with different conditions. Practical benefits, such as the removal of duplication of administration and compliance costs, increased efficiency and economies of scale also result from uniform laws.
- 2.11 However, uniform legislation can also have detriments, particularly in respect of State sovereignty, which the Parliament is required to consider in deciding whether to enact such legislation.

Process

- 2.12 Uniform legislation emerges primarily from the work of Ministerial Councils, comprising State and Commonwealth Ministers responsible for particular portfolios. Some Ministerial Councils also involve responsible Ministers from the Government of New Zealand.
- 2.13 The most well known Ministerial Councils are the Council of Australian Governments (COAG) and the Standing Committee of the Attorneys General (SCAG). However, there are currently:

*Over 40 Commonwealth-State Ministerial Councils and fora facilitat[ing] consultation and cooperation between the Australian Government and state and territory governments in specific policy areas.*⁶

- 2.14 Once a Ministerial Council has approved a proposal for a scheme, the matter is generally referred to COAG for approval, after which it is returned to the Ministerial Council for referral to a working party for detailed development of the scheme and proposals for legislation. If a proposal is initiated by COAG, the matter may be referred for development and implementation to another Ministerial Council, such as SCAG, or to a COAG working party.
- 2.15 In the event an intergovernmental agreement (written or otherwise) or uniform scheme requires legislation to give it effect, the various Ministers are responsible for sponsoring bills through individual Parliaments.

⁵ For discussion of the variety of forms uniform legislation may take see Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 44, *Criminal Code Amendment (Identity Crime) Bill 2009*, March 2010, pp28-30.

⁶ http://www.coag.gov.au/ministerial_councils/index.cfm, (viewed on 17 June 2011).

3 IDENTIFICATION OF BILLS TO BE REFERRED UNDER STANDING ORDER 230A

Introduction

Interest in correct and early identification

3.1 SO230A operates to refer all bills to which it applies to the Committee. No question is put to the House for determination unless the sponsor (or some other Member) moves that the bill not stand referred despite the application of SO230A. As has been pointed out by the Standing Committee on Uniform Legislation and General Purposes (SCULGP) and the Standing Committee on Procedure and Privileges (SCPP), in these circumstances correct identification of the bills to which SO230A applies is necessary to ensure that non-referral of the relevant bills occurs only when the House considers appropriate.⁷

3.2 The SCULGP reported in 2004 that:

*Identification of bills as uniform legislation has proved to be a significant challenge.*⁸

This observation was echoed by the SCPP in its Report 8⁹ and continues to be the experience of the Committee.

3.3 Reports of earlier incarnations of the Committee have drawn attention to difficulty in accessing information concerning the decisions of Ministerial Councils.¹⁰ Where information that a decision has been made is available, there may not be any publicly available written record of the content of the agreement beyond a statement of intention to jointly address an agreed problem. Where there is a written intergovernmental agreement it is often primarily concerned with principle and provides no detail on implementation.

3.4 Difficulty in determining the content of an intergovernmental agreement or uniform scheme and, therefore, whether legislation is implementing it or giving it effect, is not limited to the House or Committee. The COAG Reform Council¹¹ reported in its review of compliance with the COAG National Reform Agenda:

⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, August 2004, p21.

⁸ Ibid, p19. See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Special Report - *Standing Order 230A - Referral of Uniform Legislation and Reporting Time Frames*, August 2005 for continued discussion of the issues arising.

⁹ Op. cit. n 3, p19.

¹⁰ Op. cit. n 7, p10.

¹¹ COAG Reform Council 2009, *National Partnership Agreement to Deliver a Seamless National Economy: Report on Performance 2008-2009*, COAG Reform Council, Sydney, 23 December 2009.

*The National Partnership agreement and the implementation plan do not provide a detailed explanation of the intended reform under each stream. To understand the intended reform it is necessary to refer to COAG communiqués, ministerial council communiqués, Business Regulation and Competition Working Group papers, Productivity Commission reports, and other primary sources.*¹²

- 3.5 The Committee has a particular interest in **early**, as well as correct, identification of the bills to which SO230A applies.
- 3.6 As has been observed in numerous reports of this Committee and its predecessors, the Committee's efficiency and effectiveness - in the context of its 30 day reporting period - (currently 45 days pursuant to Temporary Standing Orders) is enhanced by its ability to undertake preliminary research, which research is assisted by timely provision by the Government of relevant supporting documentation.¹³ This preliminary research may commence before referral or even introduction of a bill.¹⁴
- 3.7 While research is conducted by Council and committee staff to determine whether or not uniform legislation is involved in a bill, access to the information which may be necessary to identify the bill as one to which SO230A applies is limited.¹⁵ Further, when a bill is introduced to the House, rather than the other place, there is generally little opportunity for preliminary research to occur.

Steps taken by the Committee to improve early identification

- 3.8 In the 36th Parliament, SCULGP took steps to improve early identification of bills to which SO230A applies. Committee staff began to review the Legislative Assembly Notice Paper to identify bills to which SO230A would apply when tabled in the House and the Committee instituted its practice of biannual letters to Ministers requesting advice of the uniform legislation within their portfolios that might be introduced to the Parliament in the following six months. The current pro forma audit letter is attached as **Appendix 3**.
- 3.9 In 2005, in response to recommendations made in the Committee's Report 19, a Ministerial Office Memorandum was issued requiring Ministers to:

¹² Ibid, clause 1.4.

¹³ Op. cit. n 7, p10.

¹⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 20, *Reserves (National Parks, Conservation Parks and Nature Reserves) Bill 2004*, September 2004, p1.

¹⁵ As evidenced by the difficulties the Committee has experienced in obtaining information from the Executive - see for example Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 48, *Approvals and Related Reforms (No.1) (Environment) Bill 2009*, April 2010, p15, paragraph 3.4.

- ensure the Second Reading Speech to a bill identifies it as one to which SO230A applies and identifies the intergovernmental agreement to which the bill relates; and
- provide stipulated supporting information to the Committee on the introduction, to either House of the Parliament, of a bill to which Standing Order 230A applies (to address lack of access to relevant information).

The current MM 2007/01 attached as **Appendix 4**.

3.10 It was anticipated these measures would also assist the House in determining whether the bill was one to which SO230A applied.¹⁶

3.11 It is, however, the Committee's experience that incorrect or different understanding of the application of SO230A results in a failure to identify 230A bills. This impedes the effectiveness of these measures.

3.12 In April 2011, the Committee introduced a new practice to improve the flow of information. On receipt of an audit letter response from a Minister advising that a uniform bill is likely to be introduced in the next six months, the Committee sends a further letter outlining the Committee's information requirements requesting the information be provided as soon as the bill is introduced into the Parliament, irrespective of which House it may be introduced.

What constitutes 'uniform legislation'?

Recurrent misunderstandings

3.13 In 2010, the President of the Legislative Council observed that there continues to be a gulf between parties' understanding as to what constitutes uniform legislation when a bill arises from an undertaking made at a Ministerial Council meeting.¹⁷

3.14 There appear to be recurrent misunderstandings that SO230A applies only:

- to a bill implementing a requirement for specific legislation set out in a formal, written intergovernmental agreement; and/or
- in the event a model bill or legislation identical in all jurisdictions is presented to the Parliament.

¹⁶ Op. cit. n 7, p28.

¹⁷ *When a Nod and a Wink Amounts to an Intergovernmental Agreement: Issues faced by the Legislative Council of Western Australia in the identification and scrutiny of uniform legislation*, a paper presented by Hon Barry House MLC, President of the Legislative Council, Parliament of Western Australia, Darwin, July 2010, p12.

- 3.15 Less frequently, the view is expressed that as only part of the bill effects an intergovernmental agreement or uniform scheme, SO230A has no application.

No requirement for written agreement

- 3.16 SO230A(1)(a) does not impose a requirement that an intergovernmental agreement be a written agreement.
- 3.17 SO230A(1)(b) confirms that a formal, written intergovernmental agreement is not required for SO230A to apply to a bill. Under SO230A(1)(b), the critical factor is whether the “*subject matter*” of the bill is such that the bill introduces a uniform scheme or laws.
- 3.18 Many intergovernmental agreements to implement ‘uniform legislation’ are not supported by a formal document executed by the participating jurisdictions. A survey of approximately 250 intergovernmental agreements conducted in 1977 found that they may be formed as:

Contracts signed by legal entities such as statutory corporations, including commercial contracts.

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.*

Memoranda of understanding signed by any of the above combinations of signatories.

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).

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.

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.

Simple exchanges of correspondence (the study noted that this is a frequently used device).

Informal discussions with no documented evidence of arrangements. Occasionally no more than a telephone call.

*Official annual and other reports of joint action taken at the discretion of the administrators involved.*¹⁸

- 3.19 While the trend over the years has been for more formality, this is by no means universal. Ministerial Councils, for example, meet only once or twice a year. In this circumstance, the COAG website notes: “*they may regularly settle issues by correspondence*”.¹⁹ That correspondence may constitute the only documentation supporting a legislative proposal for uniformity.
- 3.20 Committee reports providing examples of bills referred under SO230A that have not arisen from formal, written documentation are:
- Report 2 - *Standard Time Bill 2005*, dealing with a bill implementing an agreement made during a meeting of the SCAG, recorded only in the minutes of the relevant meeting;²⁰
 - Report 4 - *Defamation Bill 2005*, dealing with a bill reflecting a model bill of the SCAG in respect of which it was unclear whether the written intergovernmental agreement provided to the Committee had come into force due to it being unclear whether the Attorneys General of other States and Territories had signed it, as was required by clause 7 of the agreement;²¹

¹⁸ Op. cit. n 7, pp15-16. The reference in that report was to 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.

¹⁹ Op. cit. n 6.

²⁰ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 2, *Standard Time Bill 2005*, September 2005, p3.

²¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 4, *Defamation Bill 2005*, October 2005, p5.

- Report 24 - *Cross-border Justice Bill 2007*. The Bill was automatically referred to the Committee despite the fact that the intergovernmental agreement in relation to the scheme established by the Bill was not signed by the Attorneys General of Western Australia and the Northern Territory until five days after the Bill had been referred to the Committee²²;
- Report 40 - *Cross-border Justice Amendment Bill 2009*, dealing with a bill implementing an agreement to amend model legislation which was “assumed” by the proposing agency on the basis of the amendments arising in the course of administrative mechanisms to transfer information;²³ and
- Report 47 - *Petroleum and Energy Legislation Bill 2009*, dealing with a bill giving effect to the Offshore Settlement Intergovernmental Agreement, 1979, which is not set out in any single document but found in the legislation which implements it.²⁴

3.21 Referral of such bills under SO230A is not a recent practice. The SCULGP also reported there was no formal, written intergovernmental agreement or memorandum of understanding in respect of the following bills referred to it under SO230A:

- Report 11 - *Higher Education Bill 2003*;²⁵
- Report 12 - *Criminal Code Amendment Bill 2003*;²⁶
- Report 15 - *Australian Crime Commission (Western Australia) Bill 2003*;²⁷ and
- Report 18 - *Workers’ Compensation and Rehabilitation Amendment (Cross Border) Bill 2004*.²⁸

²² Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 24, *Cross-border Justice Bill 2007*, February 2008, p1.

²³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 40, *Cross-border Justice Amendment Bill 2009*, October 2009 pp5-8, in particular p7.

²⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 47, *Petroleum and Energy Legislation Bill 2009*, April 2010, p16, referring to the letter from Hon Norman Moore MLC, Minister for Mines and Petroleum, 11 December 2009, Appendix p1.

²⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 11, *Higher Education Bill 2003*, September 2003.

²⁶ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 12, *Criminal Code Amendment Bill 2003*, December 2003.

²⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 15, *Australian Crime Commission (Western Australia) Bill 2003*, June 2004, pp4-5.

²⁸ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 18, *Workers’ Compensation and Rehabilitation Amendment (Cross Border) Bill 2004*, August 2004, pp4-9.

3.22 Whether legislation implements, ratifies or gives effect to an intergovernmental agreement or introduces a uniform scheme or laws is not necessarily expressed in any particular written agreement. The need for, or desirability of, uniform legislation:

- is often implied in the agreement or decision to introduce the uniform scheme or laws;
- may arise from the manner in which the State decides to implement an intergovernmental agreement or uniform scheme; or
- may become apparent as a result of more detailed consideration of reform proposals involving several forums and documents.

This is illustrated in the quote in paragraph 3.18 above.

3.23 It is, therefore, often necessary to go beyond the express terms of a written intergovernmental agreement to determine whether SO230A applies to a bill.

Uniform legislation is not required to be identical or model

3.24 The key to identifying ‘uniform legislation’ is whether it has a harmonisation purpose.²⁹

3.25 While some intergovernmental agreements require that legislation be identical (and identical provisions may be necessary to give practical effect to some uniform schemes), SO230A is not limited in its application to bills that are identical to a model bill or to legislation proposed by other participating jurisdictions.

3.26 Appendix 2, which has been used by the Western Australian Parliament as a reference for identifying uniform legislation structures since 1995,³⁰ includes the following structures that clearly do not require identical legislation in participating jurisdictions:

***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*

²⁹ As noted by the former Standing Committee on Uniform Legislation and General Purposes: “*some collaborative arrangements may not necessarily involve identical or even common legislative elements at all. Indeed it has been suggested that the phrase “harmonisation in law” is also an appropriate description for uniform legislation.* (Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 23, *The Work of the Committee during the Second Session of the Thirty-Sixth Parliament – August 13 2002 to November 16 2004*, 18 November 2004, pp9-10.)

³⁰ The structures were first identified by the Standing Committee on Uniform Legislation and Intergovernmental Agreements, a standing committee of the Legislative Assembly and adopted by the Legislative Council when the Standing Committee on Uniform Legislation and General Purposes took over the function.

which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

...

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.*

SO230A applies to a bill that is part-uniform

3.27 On 19 September 2003, the Deputy President ruled that a bill that arose “*at least in part*” out of an intergovernmental agreement stands referred to the Committee under SO230A.³¹

3.28 In 2005, SCPP endorsed guidelines for the Department of the Legislative Council to assist the House in identifying bills to which SO230A applied, confirming they were consistent with the custom and practice of the House.³² The endorsed guidelines include the following passage:

Bills partially relating to uniform legislation.

*If a bill only partially relates to uniform legislation, the entire bill stands referred under SO 230A. When referred, the entire bill is open for inquiry and report - not just those parts relating to uniform legislation.*³³

3.29 This was confirmed publicly in 2010 when the President of the Legislative Council, the Hon Barry House MLC, said:

*An important aspect of such automatic referrals is that the **entire** bill is referred to the committee for inquiry - even if only a single clause of the bill falls within the category of uniform legislation. The only limit to the committee's inquiry is that it may not inquire into the*

³¹ Hon Simon O'Brien MLC, Deputy President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 September 2003, p11598.

³² Op. cit. n 3, p20.

³³ Ibid, p34.

*policy of a referred bill, unless the House has expressly resolved that it may do so.*³⁴

- 3.30 Term of Reference 8.3(a) is clearly not limited to the particular clauses of a referred bill that attract the application of SO230A.³⁵
- 3.31 From a practical perspective, the Committee notes that the uniform or non-uniform nature of particular clauses of a bill may only become apparent during the course of an inquiry and that there may be differing views on whether a particular clause falls within the ambit of SO230A. Further, it is a principle of legislative interpretation that the meaning of the provisions of an Act be determined in their context.³⁶ It is generally necessary to have regard to a bill as a whole to correctly interpret and understand individual parts and clauses.
- 3.32 On those rare occasions, when the Committee has not reported on an entire bill, it has been due to:
- the volume of bills referred to the Committee at the same time;
 - staff resourcing issues;
 - the 30 calendar day time constraints; and
 - poor provision of supporting documentation,
- not as a result of any deficiencies in Standing Order 230A.

Custom and Practice of the House in respect of non-referral of SO230A bills

Introduction

- 3.33 On occasions, failure to identify a bill to which SO230A applies in accordance with MM 2007/01 is explained by the Executive on the basis of an understanding that it is the practice of the House not to refer such bills.
- 3.34 The Committee notes that identification of a bill as one to which SO230A applies is a separate question from that of whether a bill so identified will be referred. It also observes that it is the President, not the Executive, who is responsible for making decisions as to the application of the custom and practice of the House. In 2010, the President of the Legislative Council said:

³⁴ Op. cit. n 17, p4.

³⁵ Op. cit. n 3, p34.

³⁶ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at pp161-2.

*The Standing Orders do not state who is to make the decision as to what bills are uniform legislation, and therefore automatically referred. This role has fallen upon the Clerk of the Legislative Council by default and, where there is dispute over the issue, I as the presiding officer have been required to make a ruling.*³⁷

- 3.35 In annual reports, the Committee notes the bills to which SO230A applies that have not been referred to the Committee during the period canvassed by the report. Where available, the Committee reports the reasons for non-referral.
- 3.36 However, an occasion of non-referral does not necessarily establish a practice and custom of the House. There may be a specific statement in the House that non-referral in the particular instance is not intended to establish custom and practice. But even absent that statement, a decision not to refer a bill is considered in light of the circumstances pertaining to that bill. For example, a reason for non-referral under SO230A may be that an essentially identical bill was previously considered by the Committee. On other occasions, a bill may be referred notwithstanding that fact (for example, the Child Exploitation reports in 2009).³⁸

Issues arising from Executive failure to identify SO230A on basis of “practice” of non-referral

- 3.37 If a bill is not identified as a SO230A bill in response to the Committee’s audit letter or in the Second Reading Speech, the House is not alerted to the application of SO230A with the consequence that the President may be deprived of the opportunity to:
- correct any misunderstanding on the part of the Executive in respect of the custom and practice of the House; or
 - correct a misunderstanding on the part of the Executive as to the application of that custom and practice to the particular bill.
- 3.38 The House is also deprived of the opportunity to consider whether it wishes to depart from custom and practice in the particular instance.

Advice of facts and circumstances that suggest the bill should not be referred helpful

- 3.39 As reported above, the purpose of early identification of SO230A bills is twofold: to assist the President in making a ruling on referral and the Committee in conducting preliminary research in respect of bills that will be referred. The second purpose also

³⁷ Op. cit. n 17, p6.

³⁸ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 41, *Child Exploitation Material and Classification Legislation Amendment Bill 2009 (Report 2)*, October 2009.

supports the first. It is, therefore, helpful to the decision of the President and managing the Committee's workload to receive early advice from the Executive of facts and circumstances suggesting that, notwithstanding the application of SO230A, the bill should not be referred to the Committee.

3.40 In his response to an audit letter from the Committee, the Premier advised:

I will be introducing the Mutual Recognition (Western Australia) Bill 2010 ... However, I note that when the Mutual Recognition (Western Australia) Bill 2010 was introduced in Parliament, the then President of the Legislative Council ruled that the Standing Order 230(c) did not apply on the basis that the legislation was a continuation of a uniform scheme that already had effect in Western Australia [citation provided] ... Therefore, whether the Bill is referred will be a matter for the Legislative Council.³⁹

3.41 The question of whether a bill represents a continuation of a scheme already in effect or introduces an amendment to a scheme such that it falls within the spirit of SO230A is problematic.

3.42 The SCPP endorsed the following passage in the guidelines of the Department of the Legislative Council, which recognises that the President is called upon to make a judgement on referral that is not answered by whether the bill amends an existing Act or uniform scheme:

Amendment bills

If uniform legislation has been implemented by a previous Act then bills that propose further amendments to that uniform legislation have not stood referred unless the particular bill implements additional uniform legislation. For example, the Home Owner Grant Bill 2000 which implemented uniform legislation stood referred pursuant to SO 230A but some subsequent amendment bills have not stood referred, even if identified by the Minister in the six-monthly audit.

It is worth noting that an intergovernmental agreement may lead to a number of distinct uniform schemes. If these schemes are addressed by separate legislation then the relevant 'amendment' bill may still fall within SO 230A.⁴⁰

3.43 The Premier's response to the Committee's audit letter enables the Department of the Legislative Council to provide the President with the background research that will

³⁹ Letter from Hon Colin Barnett MLA, Premier, to Mr Mark Warner, 23 July 2010, p1.

⁴⁰ Op. cit. n 3, p34.

assist in determining the application of SO230A and the Committee in best directing its resources.

Custom and Practice in respect of National Competition Policy Bills

3.44 In Report 8, the SCPP reported:

The broad application of SO 230A to bills reflecting NCP [National Competition Policy] objectives would result in a significant volume of legislation standing referred. Therefore not all bills that reflect NCP have stood referred under SO 230A.⁴¹

3.45 The Department of the Legislative Council guidelines state:

Bills that involve elements of NCP have not stood referred under SO 230A to a committee for inquiry where the changes have come about pursuant to a review required by NCP (for example, reviews of professional occupations and trade practices) rather than a separate or subsidiary agreement. One plank of the NCP reforms - the Competition Policy Reform (WA) Act 1996 - gives effect to the general principles of national competition policy in the State.

Bills have stood referred if, although reflecting NCP, the changes being implemented are also required by a further separate agreement whether or not that agreement flows from NCP (for example, the impetus for road transport reforms stems from NCP but legislative changes are agreed in separate principles endorsed by ministerial councils).

Early provision of supporting documents

3.46 MM 2007/01 states a Minister “*should consider*” providing stipulated supporting information in respect of a SO230A bill when it is first tabled in Parliament “*even if this is in the Legislative Assembly*”.

3.47 In practice, the Committee is rarely provided with supporting documents prior to its standard request, which is made after referral of a bill. An exception to this was the Inquiry into the *Rail Safety Bill 2009*.

3.48 Delay in provision of supporting documents and incomplete provision of those documents (with the Committee identifying additional supporting documents), were noted in the following recent reports:

⁴¹ Op. cit. n 3, p20.

- Report 40 - *Cross-border Justice Amendment Bill 2009*;⁴²
- Report 44 - *Criminal Code Amendment (Identity Crime) Bill 2009*;⁴³
- Report 47 - *Petroleum and Energy Legislation Amendment Bill 2009*;⁴⁴
- Report 48 - *Approvals and Related Reforms (No. 1) (Environment) Bill 2009*;⁴⁵
- Report 52 - *Health Practitioner Regulation National Law (WA) Bill 2010*;⁴⁶
- Report 59 - *Personal Property Securities (Commonwealth Laws) Bill 2011 and Personal Property Securities (Consequential Repeals and Amendments) Bill 2011*;⁴⁷ and
- Report 60 - *Electronic Transactions Bill 2011*.⁴⁸

3.49 As the SCULGP said in 2004:

*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.*⁴⁹

However, given the problems the Committee and predecessor committees have encountered, agencies can expect summonses to be issued in the future.

⁴² Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 40, *Cross-border Justice Amendment Bill 2009*, October 2009, p4.

⁴³ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 44, *Criminal Code Amendment (Identity Crime) Bill 2009*, March 2010, p2.

⁴⁴ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 47, *Petroleum and Energy Legislation Amendment Bill 2009*, April 2010, p2.

⁴⁵ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 48, *Approvals and Related Reforms (No. 1) (Environment) Bill 2009*, April 2010, pp7-8.

⁴⁶ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 52, *Health Practitioner Regulation National Law (WA) Bill 2010*, June 2010, p4.

⁴⁷ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 59, *Personal Property Securities (Commonwealth Laws) Bill 2011 and Personal Property Securities (Consequential Repeals and Amendments) Bill 2011*, March 2011, p1. Supporting documents were not received until 1 March 2011, 12 days into the 30 days within which the Committee is required to report. The late provision of supporting documentation to the Committee made it impossible for the Committee to undertake a full and proper inquiry.

⁴⁸ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 60, *Electronic Transactions Bill 2011*, March 2011, p1. The Committee's ability to scrutinise and report on bills within 30 days relies upon the timely provision of supporting documentation. This did not occur. Two weeks elapsed before the supporting documentation (in particular, the document recording the inter-governmental agreement giving rise to the Bill) was supplied.

⁴⁹ Op. cit. n 7, p3.

3.50 Delay in provision of supporting documents and incomplete provision of those documents hinders the Committee's ability to inquire into a bill, in that its resources are diverted to establishing the terms or parameters of the intergovernmental agreement or uniform scheme, rather than the practical effect of the proposed bill - such as its impact on State sovereignty and the rights and privileges of the Parliament - and 'technical' issues such as retrospectivity or incorrect references to other legislation.

3.51 Delay in provision of information required in the course of an inquiry is canvassed in Part 4.

4 MATTERS INTO WHICH THE COMMITTEE IS REQUIRED TO INQUIRE ON REFERRAL OF A BILL UNDER STANDING ORDER 230A

Introduction

Recurrent misunderstandings

4.1 The Committee's enquiries during the course of an inquiry have from time to time been met by officers of government departments, or Ministerial Offices, advising that it is their understanding that the terms of reference of the Committee limit its enquiries into whether the bill referred to is consistent with a written intergovernmental agreement or, alternatively, whether the bill has consequences for the sovereignty of the State.

4.2 On other occasions, the Committee experiences government witnesses who have inadequate information in respect of the 'non-uniform' clauses of a bill referred.

4.3 Misunderstandings as to the matters into which the Committee is required to inquire hampers the Committee's ability to effectively and efficiently fulfil its function within its reporting deadlines as it results in witnesses taking questions on notice and the Committee having to engage in follow-up correspondence or additional hearings. This is particularly a problem where the Committee wishes to explore the Government's position with non-government stakeholders.

4.4 The Committee has endeavoured to address these difficulties by (insofar as it is possible in light of the timeframes under which the Committee operates and delays in providing supporting documents) providing written questions on particular matters in advance of a hearing together with an advice that these questions are an indication only of the matters to be explored.

4.5 However, even questions provided beforehand are often taken on notice at the subsequent hearing and the tendency for government officers to read prepared written responses at hearings can have the consequence that valuable hearing time is taken up with repetition of information already available to the Committee and for officers to

be reluctant to provide additional, spontaneous responses to the Committee's questions.

Committee's inquiry

General

4.6 As stated at paragraph 2.1, under term of reference 8.3(a), the Committee's remit is to "consider and report on" bills referred. There is no express limitation in term of reference 8.3(a) as to the matters into which the Committee may inquire. However, the Committee's inquiry is made in the context of:

- the intergovernmental agreement or the bill's subject matter giving rise to a uniform scheme or uniform laws;
- the prohibition imposed by SO230B on a standing committee reviewing the policy of a bill (unless specifically directed by the House to do so); and
- the issues which led the House to establish a standing committee to review 'uniform legislation' and a standing order providing for automatic referral of such bills.

4.7 The Committee has, therefore, in **Appendix 1** set out a history of the review of uniform legislation and the various Committees that have been tasked with that review.

Entire bill

4.8 As noted above, it is the entire bill that is referred to the Committee pursuant to SO230A, not that part of the bill that is identified as uniform legislation. Term of Reference 8.3(a) is not limited to the particular clauses of a referred bill that attract the application of SO230A.⁵⁰

4.9 See also the commentary above at paragraph 3.31.

Consistency

4.10 The Committee's inquiry into the 'consistency' of a bill with its supporting documents and uniform scheme is contextual. As seen below, one of Parliament's main concerns with uniform legislation is that it is presented with a bill that the Executive asserts cannot be amended due to a requirement for consistency with other jurisdictions in that this has potential to derogate from Parliament's primacy as the law-making body. Many of the Committee's (and its predecessor committees) reports contain a statement to the following effect:

⁵⁰ Op. cit. n 3, pp20 and 34.

6.1 *An issue the Committee examines in considering uniform legislation is whether, in practical terms, an intergovernmental agreement or uniform scheme to which a bill relates, or provision of a uniform bill itself, derogates from the sovereignty of the State.*

6.2 *In a sense, all uniform legislation has this effect. As the Standing Committee on Uniform Legislation and General Purposes pointed out in its Report No. 19:*

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.⁵¹

- 4.11 For the Committee to inquire solely on consistency would, in fact, be the antithesis of the Committee's function. Unless, of course, the circumstances of the particular bill render that appropriate.
- 4.12 Consistency (complete or partial) may be required for a uniform legislative scheme to be effective or for Commonwealth funding to be made available. In these circumstances, the Committee may draw attention to any inconsistent provisions and suggest amendment for the sake of consistency.
- 4.13 Where the intergovernmental agreement (whether written or not) stipulates a certain level of consistency, reporting on consistency - and the explanations for any deviation from the stipulated standards - is also important for transparency and accountability of the Executive.
- 4.14 On the other hand, the Committee draws the attention of the House to provisions that infringe the Fundamental Legislative Scrutiny Principles (these are discussed in the paragraphs below) or the State's sovereignty. It may in these circumstances recommend such provisions be amended or not enacted, notwithstanding their consistency with the intergovernmental agreement or uniform legislative scheme.
- 4.15 A recent example of this is the Committee's inquiry into the Health Practitioner Regulation National Law (WA) Bill 2010. In its Report 52, the Committee recommended that the national model in respect of scrutiny of certain regulation making powers not be enacted and that instead the *Interpretation Act 1984* be applied.⁵² The Committee's recommendation was endorsed by the House.⁵³

⁵¹ Op. cit. n 7, p26.

⁵² Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report No. 52, *Health Practitioner Regulation National Law (WA) Bill 2010*, June 2010, p35.

⁵³ Letter from Dr Kim Hames MLA, Minister for Health, to Mr Donald Allsion, Clerk Assistant (Committees), Legislative Council, 4 August 2010.

Parliamentary rights and privileges

- 4.16 In a sense, it is correct to identify the Committee's function in scrutinising the uniform legislation referred to it as an inquiry into the impact of the legislation on State sovereignty.
- 4.17 However, inherent in the discussion of State sovereignty is the matter of Parliamentary rights and privileges and the relationship between the Parliament and the Executive in the exercise of State sovereignty. Central to this relationship is Parliament's primacy as legislator.
- 4.18 In its 1996 Position Paper, *Scrutiny of National Schemes of Legislation*, the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia observed that the following statement reflected general concerns that the process by which uniform legislation was made conferred legislative primacy on the Executive:

*... the urgent challenge in Australian political life and the practices of governance is to restore the role of Parliament as Legislature (over against the Executive) and with that to restore public confidence in Parliament.*⁵⁴

- 4.19 As Hon Norman Moore MLC, in his capacity as Leader of the Opposition in the Council in August 2005, said during debate on the Petroleum Legislation Amendment and Repeal Bill 2005:

*We have a uniform legislation committee so that there is a degree of parliamentary scrutiny by this house of legislation that is of a uniform nature that comes out of agreements made and committed to by the executives of the various governments of Australia, even though they do not have legislation in place to give them the authority to do that.*⁵⁵

- 4.20 Historically the concerns of the Parliament have been that 'uniform legislation' is made by a process that frequently results in inadequate notice of, or detailed information about, the proposal for the legislation and negotiations leading to the intergovernmental agreement or uniform scheme. This denigrates from Parliament's role as *the* forum for public debate of issues and scrutiny of the Government and its legislative programme.

⁵⁴ Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation*, October 1996, pvi.

⁵⁵ Hon Norman Moore MLC, Leader of the Opposition, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 August 2005, p4318.

- 4.21 It also hampers the ability of Members of Parliament to raise questions with the responsible Minister prior to introduction of a bill and to suggest improvements to legislation in the course of its development.
- 4.22 When this is combined with the circumstances that ‘uniform legislation’ is often introduced with deadlines that curtail Parliamentary scrutiny and assertions that changes cannot be made due to requirements for uniformity or consistency with the legislation of other jurisdictions, the opportunity to improve bills to which SO230A applies is more limited than for other bills.
- 4.23 The SCULGP pointed out:

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.⁵⁶

- 4.24 The Standing Committee on Legislation, after referring to concerns as to uniform legislation representing an erosion of State power, pointed out that in scrutinising uniform legislation 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.⁵⁷

- 4.25 The Legislative Assembly’s Select Committee on Parliamentary Procedures for Uniform Legislation Agreements, established in 1992, expressed Parliamentary concerns in:

⁵⁶ The Standing Committee on Uniform Legislation and General Purposes identified derogation in State Parliament sovereignty in: fiscal imperatives to pass uniform legislation; limited time frames for consideration of uniform legislation and lack of notice and detailed information as to negotiation’s inhibiting Members formulating questions and performing their legislative scrutiny role. This is not an exhaustive list of the ways in which State sovereignty might be impinged by uniform agreements or schemes. Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, August 2004, p11.

⁵⁷ 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)*, 6 November 2001, p2. That Committee made the following comments on the advantages of uniform legislation: “*There are significant benefits in uniform laws, particularly in industry and commerce. It is appropriate that there be uniform laws to regulate a national 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 make it easier for consumers and businesses to operate, because there is greater certainty as to their rights and obligations. Practical benefits such as the removal of duplication of administration and compliance costs, increased efficiency and economies of scale also result from uniform laws*” (p2).

- lack of opportunity to participate in the intergovernmental agreement process compromising Members of Parliament's ability to consider whether a uniform scheme was necessary or desirable;⁵⁸ and

- accountability - Parliament being questioned in the event it:

*enacted legislation with inadequate knowledge of the contents of the uniform provisions*⁵⁹

4.26 From the above, it can be seen that the 'State sovereignty' issues considered by the Committee involve more than ability to amend legislation after it is enacted, preservation of review of the exercise of delegated legislation making power or the questions of transfer of functions to an authority of another jurisdiction.

4.27 The Committee's inquiry involves consideration of how the legislation impacts on the institution of Parliament and ensuring the Parliament has sufficient information to decide whether the uniform legislation is necessary or desirable. The Committee's inquiry, therefore, involves seeking, collating and presenting to the House information in respect of an intergovernmental agreement or uniform scheme and its practical effect.

4.28 In response to 'State sovereignty' concerns, since, at least, 1996, committees scrutinising 'uniform legislation' have inquired and reported on whether the bill:

- trespasses unduly on personal rights and liberties; or
- inappropriately delegates legislative powers.

4.29 Since November 2004, the Committee and its predecessors have reported use of the Fundamental Legislative Scrutiny Principles (FLPs) as a guide to answering the broader questions giving rise to the establishment and maintenance of committees with the function of reviewing uniform legislation.⁶⁰ The FLPs are grouped under two headings:

- Does the legislation have sufficient regard to the rights and liberties of individuals?
- Does the legislation have sufficient regard to the institution of Parliament?

⁵⁸ Western Australia, Legislative Assembly, Select Committee on Parliamentary Procedures for Uniform Legislation Agreements, *Report of the Select Committee on Parliamentary Procedures for Uniform Legislation Agreements*, 27 August 1992, p46.

⁵⁹ Ibid, p37.

⁶⁰ This was first noted in Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004*, November 2004, pp6-9.

4.30 The FLPs, which are almost invariably annexed to the Committee's reports, are attached as **Appendix 5**.

4.31 The Committee's use of the FLPs is explained in the following statement of SCULGP:

In the Committee's view, consideration of scrutiny principles can identify and alert the Committee (and the House) to matters that may not have been raised in the House or may not be readily apparent on the face of a bill.

The Committee emphasises that it does not suggest that strict compliance with legislative scrutiny principles is required; rather what is required is a consideration as to whether the legislation has 'sufficient regard' to the principles. Nor does the Committee suggest that legislation that infringes on these principles is 'wrong' - it may be necessary and justifiable in the particular circumstances.

Therefore, there is no one view on what legislative scrutiny principles are to be applied or where the boundaries may lie in relation to each; rather each committee may have a view dependent on its own experiences and composition.

In the Committee's view legislative scrutiny principles provide a convenient threshold question. The Committee considers that there is a realistic role for such scrutiny to supervise the substance and merits of proposed legislative action and to ensure that sufficient regard is had to the rights and liberties of individuals and the institution of Parliament.⁶¹

4.32 The FLPs are consistent with the terms of reference of the legislation scrutiny committees of Queensland, the Commonwealth, Victoria and New South Wales, whom apply them to every bill tabled in the Parliament.⁶²

4.33 That the Committee's inquiry extends beyond 'consistency' and a narrow understanding of 'State sovereignty' is illustrated by the re-referral of the Child Exploitation Material and Classification Legislation Amendment Bill 2009 to the Committee.

4.34 The Bill had been previously referred to the Committee automatically under SO230A but had to be reported to the House prior to the Committee completing its inquiries. The House re-referred the Bill to the Committee to enable it to complete its inquiries

⁶¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004*, November 2004, pp6-7.

⁶² Ibid, pp4-5.

on the Bill.⁶³ This was commended by both the Greens and the Opposition during debate on the Bill:

*Hon Kate Doust: ... It was very beneficial to members that the Uniform Legislation and Statutes Review Committee had a second opportunity, which is not always one that is afforded to it, to deal with this legislation not only over a far greater period of time, but also in much more detail and to have the opportunity to seek input from a range of stakeholders. Given the nature of the subject matter that is being dealt with in this legislation, that was very helpful.*⁶⁴

...

*I commend the work of the Standing Committee on Uniform Legislation and Statutes Review has done on both the first and the second report that was tabled in October. Although it is not always easy to deal with uniform legislation, as we are quite confined by the commentary that we can make, from time to time, like some of the other bills that we have had before us, we should not always just accept what has come out of other states. We should say that we can do it better. If there are proposed amendments to this legislation that will make it better and tighter legislation, that will be a positive thing. The committee has come up with a raft of very solid amendments that would indeed do that job.*⁶⁵

Hon Alison Xamon: ...As a result of the decision to refer this to the committee for further consideration, we were able to consider this bill armed with more detailed information, as provided by the committee in its report.

5 COMMITTEE COMMENT

5.1 The Committee concurs with the President's view that:

Whilst in practice very few instances of proposed uniform legislation may give rise to serious concerns such as a constitutional failure by a State Parliament to make laws for the peace, order and good government of the State, or even as to a possibly unwise delegation of legislative power, it is still arguable that all uniform legislative

⁶³ Hon Simon O'Brien MLC, Minister for Transport, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 August 2009, p6003.

⁶⁴ Hon Kate Doust MLC, South Metropolitan, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 3 March 2010, p391a.

⁶⁵ *Ibid*, p394a.

schemes diminish the role of Parliament to some extent by ministerial council decision-making potentially blurring the line of responsibility of individual Ministers to their parliaments.

Casting as much light as possible upon such decision-making and its supporting documentation can only benefit the parliamentary process.⁶⁶

- 5.2 An extract from the President's paper setting out a useful background to the establishment of the Committee is attached as **Appendix 6**.



Hon Adele Farina MLC
Chairman

30 June 2011

⁶⁶ Op. cit. n 17, p15.

APPENDIX 1
SCRUTINY OF UNIFORM LEGISLATION - HISTORICAL
PERSPECTIVE

APPENDIX 1

SCRUTINY OF UNIFORM LEGISLATION - HISTORICAL PERSPECTIVE

- 1.1 The first comment on “consistency” of a bill with a uniform scheme in a Committee report was in 2004. In an Appendix to its Report No. 23 (being its 2003 report to the biennial legislation scrutiny committee conference), the SCULGP, after listing a shorter version of the FLPs:

The Committee also examines complementary bills enacted by the Commonwealth and other States and Territories under the scheme for inconsistencies or lack of uniformity with the WA bill and considers any reports by scrutiny committees [of those jurisdictions].

- 1.2 In fact, the concern that led to the establishment of uniform legislation committees was that Parliament’s privileges were being eroded in it being asked to accept legislation without amendment on the basis that it was uniform and could not be amended.

- 1.3 The issues were set out in Report No. 19 of the SCULGP - *Uniform Legislation and Supporting Documents*. The issues arising were explained as follows:

2.12 In legal terms, a State Parliament might not be bound by an intergovernmental agreement to enact legislation to implement a uniform scheme. 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).⁶⁷

- 1.4 The earlier Committees' focus was not degree of consistency but whether model legislation should be enacted in its proposed form. To that end, it applied the usual scrutiny approach it applied to any bill and gathered information for the purpose of alerting the House to areas that it might like to question (i.e. reporting on the practical effect of the bill and hearings/research).
- 1.5 Consistency was, however, a factor to consider - not from the perspective of what was required by the intergovernmental agreement - but from the perspective of whether practical problems would result from inconsistency.

Uniform legislation scrutiny standing committees

- 1.6 The first Western Australian Parliamentary standing committee established to specifically scrutinise uniform legislation was the Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements (**SCULIA**), established on 4 August 1993.
- 1.7 In the Legislative Council, Standing Order 230 was amended in March 1998 to provide for standing referral of uniform bills to the Constitutional Affairs Committee, as a result of recommendations made by the Select Committee to Review the Committee System in that year. On reconstitution of the Committee system,

⁶⁷ Op. cit. n 7, p 11.

responsibility for scrutinising uniform legislation was passed to the Standing Committee on Legislation (SCL).⁶⁸

- 1.8 As a result of the increasing volume of uniform legislation, the SCULGP was established in April 2002 (following the tabling of a report of the SCPP and a Special Report of the Legislation Committee).⁶⁹ The Standing Committee on Uniform Legislation and Statutes Review, established 2005, continues specific scrutiny of uniform bills.

Does a bill have sufficient regard to the institution of State Parliament?

- 1.9 Provision for specific scrutiny of proposed uniform legislation arose from concerns that the process for formulation of uniform legislation often showed a “*disregard of the Parliamentary process*” and resulted in a “*lack of opportunity to constructively review uniform legislation*”⁷⁰ and that the sovereignty of the State Parliament may be impinged.⁷¹

- 1.10 This concern underlies the observation of SCULIA that:

Since its creation in 1993, this Standing Committee has continued to unearth more and more instances in which the States and Territories can take the initiative in harmonising their laws in ways which enhance rather than weaken the Australian Federation.

*This adds an exciting new dimension to the evolution of federalism. For too long the States have simply bemoaned the growth of central power, seemingly doing little to enhance creatively their own roles. Similarly, on the other side of the coin, it has been all too easy for Australia to resort to uniform legislation without a strong case necessarily having been made out for such uniformity.*⁷²

- 1.11 The Committee is mindful of Standing Order 230B (which provides that, unless otherwise ordered, a standing committee is not to enquire into the policy of a bill).

⁶⁸ For the history of the Legislative Council’s provision for consideration of uniform bills to October 2001, see: Western Australia, Legislative Council, Standing Committee on Legislation, *Special Report in relation to Intergovernmental Agreements, Uniform Laws and Uniform Schemes: Amendments to Standing Orders 230(c) and (d)*, October 2001, p3.

⁶⁹ Ibid. See also Parliament of Western Australia, Legislative Council, Procedure and Privileges Committee, *Report on the Legislation Committee and Standing Order 72*, March 2002.

⁷⁰ Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report 10, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, August 1995, pvi.

⁷¹ Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Committee Report of Activities November 1996 to October 1999*, October 1999, p9.

⁷² Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report 14, *Guardianship Laws*, October 1996, piv.

- 1.12 However, the question of whether a bill impinges on the privileges of Parliament is a different question. The SCL, after referring to concerns as to uniform legislation representing an erosion of State power, said that in its scrutiny of uniform legislation 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.*⁷³

- 1.13 The purpose and role of uniform legislation scrutiny committees was captured by the SCULGP when it said:

The 1996 Position Paper of the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia (Working Party) emphasised the critical need for effective parliamentary scrutiny of National Schemes because they evolve out of bodies like the Council of Australian Governments as well as various Ministerial Councils, and involve a method of lawmaking which the Working Party referred to as “executive dominance vis a vis parliamentary scrutiny and assertiveness.”

*National Schemes appear to challenge the sovereignty of the Western Australian Parliament itself and so the work of the Committee under Standing Order 230 is an attempt, in part, to preserve the role of Parliament as the legislature, and in doing so, maintain public confidence in the Western Australian Parliament.*⁷⁴

- 1.14 In its Report No 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament August 13 2002 to November 16 2004*, the SCULGP identified “*whether [a bill] has sufficient regard to the institution of Parliament*” as the “*overarching*” question in its inquiries. It saw that question as informing, in particular, its inquiries into:

a) the type of legislative structure employed to achieve uniformity;

⁷³ Op. cit. n 68, p2. That Committee made the following comments on the advantages of uniform legislation: “*There are significant benefits in uniform laws, particularly in industry and commerce. It is appropriate that there be uniform laws to regulate a national 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 make it easier for consumers and businesses to operate, because there is greater certainty as to their rights and obligations. Practical benefits such as the removal of duplication of administration and compliance costs, increased efficiency and economies of scale also result from uniform laws*” (p2).

⁷⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 2, *Co-operative Schemes (Administrative Actions) Bill 2001 and the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001*, June 2001, p5.

b) the type and availability of the relevant intergovernmental agreement/memoranda of understanding;

c) the advantages and disadvantages to the State as a participant in the legislative scheme;

d) the constitutional issues affecting each jurisdiction;

e) whether and by what mechanism the State can opt out of the scheme; and

f) the mechanisms by which the legislation, 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.⁷⁵

1.15 To a large extent, these questions provide the basis for the Committee's standard letter requiring the provisions of supporting documents and information, with which the Committee generally commences its inquiry.

1.16 The Committee also has regard to questions that have become known as 'fundamental legislative scrutiny principles'.

FLPs

1.17 As a significant issue with uniform legislation is - absent the committee process - lack of opportunity for Parliament to constructively review legislation for improvement, uniform legislation scrutiny committees have from their inception been concerned to review uniform bills from the 'technical' perspective.

1.18 A discussion paper agreed to by legislative scrutiny committees from all jurisdictions in Australia at the Fifth Australasian and Pacific Conference of Delegated Legislation Committees and the Second Australasian and Pacific Conference on Scrutiny of Bills Committees in 1995 (**Discussion Paper**) recommended that all committees scrutinising national scheme primary legislation adopt the following terms of reference:

- whether the bill unduly affects personal rights and liberties; and

⁷⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament August 13 2002 to November 16 2004*, November 2004, pp8-9.

- whether the bill inappropriately delegates legislative powers.⁷⁶
- 1.19 These questions reflected the FLPs applying to the scrutiny of all bills set out in the *Legislative Standards Act 1992* (Qld) and the terms of reference of the Senate Standing Committee for the Scrutiny of Bills. These principles were subsequently reflected in the *Parliamentary Committees Act 2003* (Vic) (Section 17) and legislation governing the New South Wales Legislation Review Committee.
- 1.20 SCULIA reported on the Discussion Paper and the desirability of uniform scrutiny principles, in 1995.⁷⁷
- 1.21 As the SCULGP reported in its Report No. 23 - *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament August 13 2002 to November 16 2004*:
- Although not adopted formally by the House as part of the Committee's terms of reference, legislative scrutiny principles are applied by the Committee as a convenient framework for the scrutiny of uniform legislation.*⁷⁸
- 1.22 Annexed to that report was the list of FLPs the SCULGP had compiled (in part from the legislative scrutiny principles applied by the Queensland Parliament's Scrutiny of Legislation Committee and in part from its own experiences). That list has regularly formed part of successive committee reports.

Consistency with intergovernmental agreement/uniform scheme

- 1.23 The nature of uniform legislation dictates additional considerations. As the SCL explained, when it scrutinised bills implementing uniform schemes:
- the Committee must concern itself with matters such as the jurisdictional interlocking mechanisms and the extent (if any) to which the State is subordinating its instrumentalities or governmental capacities to an external authority.*⁷⁹
- 1.24 From time to time, as appropriate to the particular bill under scrutiny, the Committee reports on the practical effect of a bill having regard to the degree of consistency between a bill and the uniform regime to which it relates. In doing so, the Committee has regard to the purpose in presenting a bill regulating the subject matter as part of a

⁷⁶ Op. cit. n 70, pviii.

⁷⁷ Ibid.

⁷⁸ Op. cit. n 75, p6.

⁷⁹ Op. cit. n 68, p5.

uniform regime and whether that purpose is undermined by the degree of consistency exhibited by a bill.

Information on committee's website

- 1.25 The Committee notes that MM 2007/01, available on the Committee's Parliamentary website, sets out the information required by the Committee in its standard letter. There is also on that website a document entitled "*Information required by the Standing Committee on Uniform Legislation and Statutes Review*", which directs the attention of Ministerial staff and departmental officers to the FLPs and Report No. 23 of the SCULGP.
- 1.26 The Committee urges and expects Ministerial staff and departmental officers to have regard to this information.
- 1.27 There is a statement in a report from 2004/5 that the Committee had "*recently*" commenced asking the question of whether a bill impinged on Parliamentary privileges. This does not appear to be correct. The only Committee that did not make an express statement about this was the Constitutional Affairs Committee. However, that Committee did not table review or annual reports and made no comment in any of its uniform bill reports as to its approach to scrutiny of uniform legislation. The reasons for the change in SO230 to refer uniform bills to it suggest that Parliamentary privileges were in its mind.
- 1.28 The report of the Select Committee to Review the Legislative Council Standing Committee System made the following comments in respect of its recommendation that uniform bills be automatically referred to that committee:

What ought to concern members of this Parliament is the non-existence of adequate parliamentary mechanisms intended to inform them about the formal and informal arrangements made among the States and between the Commonwealth and the States. Many of these arrangements do not require mutual legislation for their implementation and where sanctioning legislation is required, the Parliament's acquiescence is assumed if not demanded.

...

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.⁸⁰

⁸⁰ Western Australia, Legislative Council, Select Committee to Review the Legislative Council Standing Committee System, *Report*, August 1997, pp17-18.

APPENDIX 2
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

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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 3
AUDIT LETTER

APPENDIX 3

AUDIT LETTER

Dear Minister

Proposals for enactment of Uniform Legislation

On 17 August 2005, the Legislative Council appointed the Uniform Legislation and Statutes Review Committee (the Committee). As part of the Committee's mandate, it is required to report on bills referred pursuant to Standing Order 230A, that is bills that:

- ratify or give effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party (SO230A(1)(a)); **or**
- by reason of their subject matter, introduce a uniform scheme **or** uniform laws throughout the Commonwealth (SO230A(1)(b)).

These bills are generally referred to as 'uniform legislation'.

In order to assist the Committee with its consideration of current and proposed uniform legislation, the Committee requests that you advise:

- any legislation to which Standing Order 230A applies that you may introduce to the Parliament in the next six months; and
- the specific department/s to which your Ministerial reply relates.

In addition, the Committee requests that you identify any specific intergovernmental agreement(s) or national scheme associated with the proposed legislation.

It is the Committee's observation that there currently appears to be some confusion on the part of a few government agencies and Ministerial Offices as to the bills to which Standing Order 230A applies. I have, therefore, included in my letter to each Minister the following additional information to assist in correct identification of bills which will be referred to the Committee:

- 'uniform legislation' does not equate to legislation that is required by a written intergovernmental agreement to be identical in its terms;
- Standing Order 230A(1)(a) and (b) are disjunctive, as are the legs of sub-order 230A(1)(b);
- as with other Legislative Council Standing Orders, Standing Order 230A(1) is interpreted in accordance with the custom and practice of the Legislative Council and

its intent. The Committee has at times been provided with arguments that interpret Standing Order 230A(1) more narrowly than its plain terms, or the custom and practice of the Legislative Council, permit; and

- a review of the reports of the current and previous Committees will give a good indication of the bills to which Standing Order 230A applies. In particular, Reports 19 and 23 of the former Standing Committee on Uniform Legislation and General Purposes contain a useful summary of the various materials that may constitute, or evidence, an intergovernmental agreement and the range of structures that 'uniform legislation' may take.

I point out that correct identification of the bills to which Standing Order 230A applies assists not only the Committee in its preparation for referral, but also the government in taking into account the reference to the Committee in its legislative timetable and ensuring information is provided to the Committee in sufficient time to enable the Committee to report without need to extend its 45⁸¹ day deadline.

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

Renaë Jewell
Committee Clerk
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council Committee Office
GPO Box A11
PERTH WA 6837
tel: (08) 9222 7364 fax: (08) 9222 7805

Yours sincerely

Hon Adele Farina MLC
Chairman

⁸¹ Temporary Orders of the Legislative Council, 22 March 2011.

APPENDIX 4
MINISTERIAL OFFICE MEMORANDUM MM 2007/01

APPENDIX 4

MINISTERIAL OFFICE MEMORANDUM MM 2007/01

MINISTERIAL OFFICE MEMORANDUM

MM 2007/01

UNIFORM LEGISLATION AND STATUTES REVIEW COMMITTEE

The Uniform Legislation and Statutes Review Committee ("the Committee") scrutinises all uniform legislation on behalf of the Legislative Council of Western Australia.

Uniform legislation

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 of Australia ("uniform legislation").

The Legislative Council standing order

The Legislative Council standing orders provide for Bills implementing uniform legislation to automatically stand referred to the Committee for inquiry and report. The relevant standing order provides:

- 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, within 30 days of the date of the adjournment (exclusive of that day) or before it has been reported from a committee, whichever is the later.
- (3) Unless otherwise ordered, a Bill stands referred to the *Uniform Legislation and Statutes Review Committee* at the conclusion of the second reading speech of the Minister or Member in charge.
- (4) The *Uniform Legislation and Statutes Review 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 (exclusive of the referral day) or such other period as may be ordered by the House.

There is an additional standing order of relevance to this matter, namely:

230B. Unless otherwise ordered, a standing committee is not to inquire into the policy of a Bill.

The standing orders require that the Committee report back on the Bill within 30 days. The Legislative Council can resolve to extend or reduce this period although it is more usual that the time for the Committee's inquiry and report is extended.

Ministers can assist the passage of uniform legislation through the Legislative Council by:

- (1) identifying the Bill/s early as one that may be subject to standing order 230A;
- (2) being aware that in programming the introduction and parliamentary passage of the Bill/s, account must be taken of the 30-day (minimum) period that the Bill/s will stand referred to the Committee for inquiry; and
- (3) responding to a request from the Committee for information in a timely manner.

Identification of Bills as uniform legislation

When introducing into the Parliament of Western Australia a Bill that implements uniform legislation, Ministers should 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

To assist the conduct of the Committee's inquiries, a Minister should consider providing the following information to the Committee, at the time a Bill to which standing order 230A applies is first tabled in Parliament (even if this is in the Legislative Assembly):

- (a) a copy of the relevant intergovernmental agreement/memorandum of understanding, if one is available;
- (b) if (a) is not available, a copy of the communiqué from 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) a public statement of the Government's policy on the Bill;
- (f) the advantages and disadvantages to the State as a participant in the relevant scheme or agreement;
- (g) relevant constitutional issues;
- (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:
 - Policy Officer who has carriage of the Bill;
 - Instructing Officer in the relevant department; and
 - where relevant, any government expert(s) who can answer technical questions posed by the legislation.

This information should be sent via the Minister's Office to:

Advisory Officer
Uniform Legislation and Statutes Review Committee
Legislative Council
Parliament House
PERTH WA 6000.

In order to assist the timely passage of uniform legislation through the Legislative Council, Ministers should ensure that Ministerial staff and agencies within their portfolios are familiar with the above requirements of the Committee.

It is important that any request for the Committee to prohibit publication of all or part of the information provided is made when the information is provided and the reason why it is to be confidential is clearly stated. It should be noted that ongoing negotiations between levels of government are considered to be confidential and wherever possible, should not be divulged until the State's position is finalised. It should be further noted that the Committee will consider requests for confidentiality, but retains the power to publish any material. The Legislative Council may also authorise publication.

Further information regarding the functions or procedures of the Committee may be sought from the Committee Clerk, Uniform Legislation and Statutes Review Committee, telephone 9222 7300.



Alan Carpenter MLA
PREMIER

Enquiries:	Committee Clerk, ph: 9222 7300 Uniform Legislation and Statutes Review Committee
Circulars replaced by this MM	2005/01
Issue Date	14/11/2007
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APPENDIX 5
FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

APPENDIX 5

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 6
EXTRACT OF PAPER PRESENTED BY
HON BARRY HOUSE MLC, PRESIDENT OF THE
LEGISLATIVE COUNCIL, PARLIAMENT OF WESTERN
AUSTRALIA, DARWIN, JULY 2010

APPENDIX 6

EXTRACT OF PAPER PRESENTED BY HON BARRY HOUSE MLC, PRESIDENT OF THE LEGISLATIVE COUNCIL, PARLIAMENT OF WESTERN AUSTRALIA, DARWIN, JULY 2010

Background to the establishment of the Western Australian Uniform Legislation and Statutes Review Committee

In considering the current divergent views of the Committee and the State Government as to what constitutes uniform legislation, it is worthwhile examining the history of that Committee and the general experience of the Parliament of Western Australia with uniform legislation.

The role of the current Uniform Legislation and Statutes Review Committee in scrutinising uniform legislation has its origins in developments that occurred in both Houses of the Western Australian Parliament in 1992 following significant concerns raised by the extraordinary circumstances in which a bill implementing a national scheme had been introduced and passed.

The Bill in question (the Financial Institutions (Western Australia) Bill 1992) had proposed changes to the supervision of non-bank financial institutions in Western Australia, in order to create uniformity in laws across Australia. The Bill had the following characteristics:

- i) The Bill proposed to apply two Acts of the Queensland Parliament as laws of Western Australia. Queensland had been chosen as the home State for the scheme legislation apparently because it had only a single House of Parliament - and was thus the most likely Parliament to pass the legislation quickly and without amendment.
- ii) It was the first time that such a model for applying one Parliament's legislation in other jurisdictions had been used in Australia without the participation of the Commonwealth Parliament. The *Corporations Law*, for instance, had been an example of such an approach being used previously between the Commonwealth and the States.
- iii) Only the Queensland Parliament had the ability to amend the two applied Queensland Acts. This effectively meant that the Western Australian Parliament was delegating its legislative power over the supervision of non-bank financial institutions in Western Australia to the Queensland Parliament.
- iv) Regulations made under the applied Queensland Acts would be made by the Queensland Government and would apply in Western Australia, but not be subject to disallowance by the Western Australian Parliament.

- v) 5. Appeals on a matter of law in relation to the two applied Queensland Acts could only be made to the Supreme Court of Queensland. In addition to the above substantive issues raised by the Bill, the following practical difficulties were faced by the Western Australian Parliament:
- a) This was in the days before online legislation databases were available, and accordingly copies of the two Queensland Acts that were to be applied in Western Australia by the Bill were not available to Members of the Western Australian Parliament during their consideration of the Bill. The two Queensland Acts to be applied in Western Australia were neither incorporated within nor appended to the Bill.
 - b) The Bill was declared by the State Government to be extremely urgent and had to be passed by the Western Australian Parliament within a month. The Bill was also stated to be very beneficial to the State, and in particular for the State's non-bank financial institutions and its customers. The State would allegedly be significantly disadvantaged if it did not participate in the scheme.

The Bill was subsequently passed by the Western Australian Parliament. However, as a result of the controversy generated by the extraordinary circumstances surrounding the Bill, the Legislative Assembly established a select committee to investigate the various issues raised by uniform legislation.

As a result of the recommendations of the select committee inquiry, in 1993 a new standing committee was established in the Legislative Assembly specifically concerned with the scrutiny of uniform legislation – the Standing Committee on Uniform Legislation and Intergovernmental Agreements (SCULIA). SCULIA was the first committee of its type in Australia. The terms of reference of the Committee were to:

“[I]nquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth”.

Another recommendation of the select committee was that Ministers be required to provide the Parliament of Western Australia with reports about proposed intergovernmental agreements at the earliest opportunity - that is, well before actually entering into the agreement.

The select committee noted that intergovernmental agreements were simply political compacts which represented agreement in principle reached by the executive branches of two or more governments. Such agreements do not have any legal consequences in the event of any failure to implement them. Recommendation 1 of the select committee was:

“That the primary consideration in decisions on participation in intergovernmental agreements and uniform legislative schemes

should be whether Western Australia will be better served by the enactment of uniform law than by Western Australian legislation specifically drafted to address Western Australian needs and requirements.”

In its first report SCULIA noted the lack of a central register of proposed intergovernmental agreements. SCULIA noted that although some steps were being taken at the Western Australian Ministry of Premier and Cabinet to establish an up-to-date register, the Ministry had urged SCULIA to maintain regular communication with individual Ministers to keep informed about proposed intergovernmental agreements and planned legislation to implement them.

Reforms also proceeded in relation to uniform legislation in the Legislative Council. In September 1992 the Legislative Council standing orders were amended to provide for a 120-day delay after introduction before the second reading debate on a bill implementing a uniform legislative scheme could commence in the Council. At that time, however, the standing orders did not provide for the referral of uniform bills to a committee.

In October 1995 the Legislative Council again amended the standing orders to provide for a reduced, 30-day, delay before the second reading debate on a bill may commence in the House. Again, at this time the standing orders still did not provide for referral of the bill to a committee.

In 1997 the Legislative Council standing orders were amended to provide for the automatic referral of uniform bills to the then Legislative Council Standing Committee on Constitutional Affairs after the Minister's (introducing Member's) Second Reading Speech. The 30-day interruption to the second reading debate therefore became the de facto period in which the Committee had to inquire into the bill and report back to the House.

Interestingly, following reviews of the respective Legislative Assembly and Legislative Council committee systems in 2001, neither the Constitutional Affairs Committee nor the SCULIA were re-established for the 36th Parliament. In their place, the Legislative Council's Standing Committee on Legislation took on the role, amongst its other duties, of inquiring into all uniform bills - which continued to be referred automatically for a 30-day inquiry.

Between June 2001 and April 2002 the Legislation Committee considered in detail, and tabled reports on, 15 bills implementing uniform legislative schemes. The sheer volume of uniform legislation standing referred to the Legislation Committee led to the re-establishment in 2002 of a specialist standing committee on uniform legislation - the Legislative Council Standing Committee on Uniform Legislation and General Purposes.

In 2005 that Committee was re-established as the current Uniform Legislation and Statutes Review Committee.