



1995

**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND
INTERGOVERNMENTAL AGREEMENTS**

CENSORSHIP BILL

**Consideration of the Western Australian
Censorship Bill**

Eleventh Report
In the Thirty-Fourth Parliament

Presented by
Hon. P. G. Pandal, MLA
Laid on the Table of the Legislative Assembly
on Tuesday, 28 November 1995.

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TERMS OF REFERENCE

On Wednesday 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following terms of reference:

1. to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth;
 2. when considering draft agreements and legislation, the Committee shall use its best endeavours to meet any time limits notified to the Committee by the responsible Minister;
 3. the Committee shall consider and, if the Committee considers a report is required, report on any matter within three months; but if it is unable to report in three months, it shall report its reasons to the Assembly;
 4. each member, while otherwise qualified, shall continue in office until discharged, notwithstanding any prorogation of the Parliament;
 5. no member may be appointed or continue as a member of the Committee if that member is a Presiding Officer or a Minister of the Crown;
 6. when a vacancy occurs on the Committee during a recess or a period of adjournment in excess of 2 weeks the Speaker may appoint a member to fill the vacancy until an appointment can be made by the Assembly;
 7. the Committee has power to send for persons and papers, to sit on days over which the House stands adjourned, to move from place to place, to report from time to time, and to confer with any committee of the Legislative Council which is considering similar matters;
 8. if the Assembly is not sitting, a report may be presented to the Clerk of the Legislative Assembly who shall thereupon take such steps as are necessary and appropriate to publish the report; and
 9. in respect of any matter not provided for in this resolution, the Standing Orders and practices of the Legislative Assembly relating to Select Committees shall apply.
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CHAIRMAN'S FOREWORD

In the Eleventh Report of this Standing Committee, the legislative structure in the *Censorship Bill 1995* used to introduce uniform classification standards for films and computer games was examined.

The Terms of Reference of this Standing Committee allow the Committee to inquire into and report to the Legislative Assembly on uniform legislation and intergovernmental agreements. This report examines the *Censorship Bill 1995* introduced into the Western Australian Parliament on 26 October 1995.

The legislative structure used to introduce uniform classification standards under the Bill was examined in light of structures which have previously been identified by this Committee in its earlier reports.

In its Second Report the Committee identified five different categories of legislative models dealing with uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws. In its Sixth Report the Committee identified two additional legislative mechanisms.

In comparing the legislative model used to introduce the *Censorship Bill 1995* with previously identified structures, this Standing Committee found that it is unlike other models previously used.

Under this model Western Australia will pass and amend its own legislation, yet will be able to participate in a national scheme providing uniform censorship standards. In essence, the model chosen by the Government achieves the desirable objectives of national standards and at the same time preserves the Parliaments right to scrutinise, vary or amend the legislation.

PHILLIP PENDAL, MLA
CHAIRMAN

1995.

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1. INTRODUCTION

Against the background of the Terms of Reference of this Standing Committee to examine and report to the Legislative Assembly on uniform legislation and intergovernmental agreements, this report examines the *Censorship Bill 1995* introduced into the Western Australian Parliament on 26 October 1995. The Bill is a result of a revised censorship scheme to be introduced throughout Australia.

The national censorship scheme was the subject of a report by the Australian Law Reform Commission in 1991. That report resulted in a general revision of censorship laws and administration throughout Australia.

The Bill has been introduced after extensive consultation with the Commonwealth, State and Territory Censorship Ministers as well as industry and community representatives. The legislation results from two agreements reached by the Standing Committee of Attorneys General. The two agreements are as follows -

- (1) This agreement involves all jurisdictions and is based on a revision of the Co-operative Legislative Scheme for Censorship in Australia which sets up the censorship scheme for the classification of films and computer games. The Agreement also provides that the Classification Guidelines can only be amended with the consent of all the Ministers. The Agreement recognises that Western Australia will have its own legislation and will classify publications on its own account. This Agreement is in the process of being signed by Ministers.
- (2) The second Agreement between the Commonwealth and Western Australia enables the appointment of the Commonwealth censor as censor and appeal censor for this State. This Agreement sets out the mechanisms by which the Commonwealth will carry out the censorship process. The Agreement may be terminated by the Minister at any time. This Agreement is currently being drafted.

In evidence before the Standing Committee, Mr Gary Newcombe, Legal Officer with the Ministry of Justice advised that -

At the end of the day the Bill also contains a fall back provision so that if there is no agreement put in place with the Commonwealth to classify films or computer games, or for some reason the system does not work, then there is provision in the Bill for the Western Australian Government to establish its own system by appointing its own censor and having its own guidelines. So, there is that safety net that if the system does not work Western Australia could, if necessary, continue under this current legislation without having to amend it.¹

2. THE CENSORSHIP BILL 1995 (WESTERN AUSTRALIA)

The Bill was introduced into the Legislative Assembly of Western Australia and is intended to commence operation on 1 January 1996.

¹ Mr Newcombe in Transcript of Evidence before the Standing Committee on Uniform Legislation and Intergovernmental Agreements, taken at Perth, Wednesday, 15 November 1995, p 5.

It consolidates into one Act provisions in the following statutes -

- the *Indecent Publications and Articles Act 1902*;
- the *Censorship of Films Act 1947*;
- the *Video Tapes Classification and Control Act 1987*; and
- the *Criminal Code* (which deals with classification and control of publications, film video tapes and indecent and obscene articles and objects).

The Bill also incorporates new provisions dealing with -

- **classifications and control of computer games; and**
- **control of computer services such as Internet.**

The Bill is part of a new censorship scheme to be introduced throughout Australia. The scheme is based on changes to the Commonwealth procedures for the classification of publications, films and computer games. The scheme is contained in the -

- ***Classification (Publications, Films and Computer Games) Act 1995 (Cwth)*; and**
- **complementary State and Territory legislation.**

Previously, the Commonwealth Censorship Board classified films and videos for all Australian jurisdictions except Western Australia and Tasmania.

The 1995 Commonwealth Act -

- establishes a new Classification Board;
- establishes a Classification Review Board;
- sets out new administrative procedures for classification of material; and
- provides for the classification of computer games.

Under the new scheme the Commonwealth Censorship Board will decide on classifications for films and computer games to apply throughout Australia.

- All other States and Territories will pass legislation adopting classifications under the Commonwealth Act.
- Western Australia will not be adopting decisions made under the Commonwealth Act, but under an agreement (referred to on page 1), the Commonwealth Censorship Board will be appointed censor for Western Australia and will make decisions under the Western Australian legislation.
- The Western Australian Minister may vary Commonwealth classification decision and act as the censor in Western Australia.
- The National Classification Code (which is a Schedule to the Commonwealth Act) and Guidelines were agreed to by all State, Territory and Commonwealth Ministers. Any changes to the Code and Guidelines requires the consent of all Ministers.

3. ENFORCEMENT

The following points outline the principles relating to enforcement -

- model enforcement provisions have been developed co-operatively as a guide for all jurisdictions;
- actual enforcement is left to the States and Territories;
- each State and Territory is preparing its own legislation; and
- the new scheme is to commence operation on 1 January 1996.

4. PUBLICATIONS

In Western Australia publications will continue to be classified by the State Minister acting on advice of a Censorship Advisory Committee. However, the National Classification Code and Guidelines will be taken into account.

5. CONSIDERATION OF LEGISLATIVE STRUCTURES

The Standing Committee has examined the legislative structure used to introduce uniform classification standards under the *Censorship Bill 1995* in light of legislative structures which have previously been used and identified by this Standing Committee in its earlier reports.

In its Second Report tabled in March 1994, the Committee identified five different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability. In its Sixth Report the Committee identified two additional legislative mechanisms. These legislative structures are fully outlined in Annexure 1 to this report.

In comparing the present legislative structure to introduce the *Censorship Bill 1995* with previously identified legislative structures, this Standing Committee found that it is unlike other legislative model previously used.

The following is a summary of the eight structures.

Structure 1, known as Complementary Commonwealth - State or Co-operative legislation and may sometimes be used when a legislative field is broader than the defined powers of the Commonwealth. In such circumstances the Commonwealth may legislate to the extent of its powers and the States and Territories may legislate to cover the remaining matters.

Structure 2, Complementary or Mirror legislation may be used when there is uncertainty as to the extent on the constitutional power of the Commonwealth. Under this structure identical legislation is passed by each jurisdiction. However there is a tendency for the draft Bills and inconsistent amendments to result in legislation becoming less uniform.

Structure 3, known as Template, Cooperative, Applied or Adopted Complementary legislation. Under this structure one jurisdiction acts as host and enacts the legislation in the form agreed. The other jurisdictions enact legislation which applies the legislation of the host jurisdiction and any further amendments to the legislation.

Structure 4, known as Referral of Power. Under this structure the States agree to refer power to the Commonwealth under section 51(xxxvii) of the Australian Constitution. This enables the Commonwealth to legislate with respect to the matter referred. The Commonwealth legislation will only operate in the States which have referred the matter, or which after referral of the matter by another State, have adopted the legislation.

Structure 5, known as Alternative Consistent legislation. The intergovernmental agreement may permit a jurisdiction to participate in a national scheme by enacting legislation which states that “an act or thing” will be lawful, if such an act or thing would be lawful under legislation of the host jurisdiction. The State or Territory would undertake not to introduce any legislation which would conflict with the legislation and would undertake to repeal, amend or vary existing legislation which conflicts with the alternative consistent legislation.

Structure 6, known as Mutual Recognition. Under mutual recognition all States and Territories retain their local laws, however, goods and services produced or imported into one State or Territory need only comply with the originating State or Territory laws without complying with further requirements in the latter State or Territory.

Structure 7, known as Unilateralism means each State or Territory retains its own laws. This structure promotes diversity and reinforces State sovereignty.

Structure 8, known as Non-Binding National Standards Model. The present *Censorship Bill 1995* adopts this mechanism to promote national standards. Under this mechanism the Parliament in Western Australia will pass its own legislation. A national authority appointed under the Western Australian legislation will make decisions for Western Australia. The Western Australian Minister will have the authority to vary any decision.

6. CONCLUSION

The Standing Committee notes that the model used for the introduction of the *Censorship Bill 1995* is unlike any of the previous structures identified by this Standing Committee in its previous reports. For this reason the Standing Committee has termed this new structure the ***Non-Binding National Standards Model***. The Standing Committee commends the Attorney General for adopting a method for achieving national censorship standards in Western Australia which still ensures scrutiny by the Parliament of Western Australia.

In essence, the model chosen by the Government of Western Australia achieves the desirable objectives of national standards and at the same time preserves the Parliament of Western Australia’s right to properly scrutinise, vary or amend the agreed legislation.

ANNEXURE 1

ALTERNATIVE LEGISLATIVE STRUCTURES

In its Second Report tabled in March 1994, the Standing Committee had identified five different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on the competing claims of consistency or flexibility. In its Sixth Report the Committee drew attention to two additional legislative mechanisms. In this report the Committee recognises another method of achieving uniform standards throughout Australia. Under this method the Western Australian Parliament maintains its legislative independence, to pass amend its own legislation while at the same time enforcing national standards.

Some of the different structures bear similar names, which can be confusing. For example, a reference to "Complementary" legislation may equally be referring to:

- ! "Complementary Commonwealth-State" legislation (identified by the Standing Committee below as Structure 1); or
- ! "Complementary" legislation (identified by the Standing Committee below as Structure 2); or
- ! "Adopted Complementary" legislation (identified by the Standing Committee below as Structure 3).

Further, the same structure may bear many different names, for example, the structure identified by the Standing Committee as Structure 3 is known variously as "Template" legislation, "Co-operative" legislation, "Applied" legislation and "Adopted Complementary" legislation. The structure identified by the Standing Committee as Structure 1 is known variously as "Complementary Commonwealth-State Legislation" and "Co-operative" legislation.

The Standing Committee believes commonly accepted names should be determined prior to 1 July 1995. Until the different structures acquire commonly accepted names the Standing Committee suggests that legislators remain alert to the possibility of confusion when considering the structure of a proposed piece of uniform legislation. To this end the Standing Committee is considering whether a symposium to explore these structures and their practical effectiveness may be of value. This symposium could also consider structures developed in other countries, and other matters falling within the terms of reference of the Standing Committee.

The different structures have been considered from the perspective of the State of Western Australia and the sovereignty of its Parliament.

Structure 1

This structure developed out of the confines of the Constitution and is known as "Complementary Commonwealth - State" or "Co-operative" legislation.

Sometimes a legislative field is broader than the defined powers of the Commonwealth. In these circumstances the Commonwealth may enact legislation to the extent it is empowered to do so and the States and Territories may legislate to cover the remaining matters, for example, the Commonwealth's *Trade Practices Act 1974* (consumer protection provisions), complemented by various Fair Trading Acts in the different States and Territories.

The legislation of the State complements the legislation of the Commonwealth in that it recognises the existence of the Commonwealth legislation and the over-riding nature of the provisions of that legislation and does not attempt to contradict these provisions by enacting legislation on the same matters. Instead the legislation of the State is restricted to matters which are not covered by the Commonwealth legislation.

The relevant relationship in this structure is between the legislation of one State and the Commonwealth. The legislation of the various States and Territories is not necessarily uniform in nature.

Amendments

Amendments to the legislation are totally under the control of the State Parliament.

Emphasis

This version of the structure emphasises flexibility outside the matters covered by the Commonwealth legislation, as each jurisdiction is able to draft its own legislation to suit local considerations.

Structure 2

"Complementary" or "Mirror" legislation may be used when there is uncertainty as to the extent of the constitutional power of the Commonwealth.

The identifying feature of this structure is the enactment of separate identical legislation in all participating jurisdictions.

Totally consistent Acts are passed in each jurisdiction to prevent any questions about the validity of the legislation. The regime established by the *Petroleum (Submerged Lands) Act 1967* is an example.²

The intergovernmental agreement may require the Minister to introduce the bill in identical terms. However, the Bill is considered and debated in each Parliament. There is a tendency for each participating jurisdiction to vary the draft agreed to by the executive branch of Government, to

² The companion legislation to that Act, the Offshore Minerals Act, is currently with the parliamentary draftsman in Western Australia.

accommodate local concerns and the different drafting styles of local parliamentary draftsman.³

This structure may also be used where there is no uncertainty about the extent of the constitutional powers of the Commonwealth, but jurisdictions wish to establish a national regulatory body.⁴

Amendments

The intergovernmental agreement may state that amendments agreed at the Ministerial Council level should be enacted promptly by all participating jurisdictions. However in practice each Parliament may delay passage of the agreed amendment, refuse to enact the agreed amendment, or vary the terms of the agreed amendment.

If the scheme has been devised to cure questions of constitutional validity, delay or variations to amendments agreed by the executive branch of Government will endanger the cure. Further, the passage of inconsistent amendments will inevitably contribute to the breakdown of a national scheme reliant on identical legislation or regulations.

Emphasis

Assuming the Bills pass through each Parliament as originally drafted, this structure emphasises consistency.

Structure 3

This is an elastic structure as variations can be made to accommodate requirements determined during the negotiation process. It is variously known as "Template" or "Co-operative" or "Applied" or "Adopted Complementary" legislation.

The two common versions differ in their treatment of amendments. In the first version participating jurisdictions automatically adopt future amendments to the legislation by the host jurisdiction. In the second version participating jurisdictions retain the ability to consider amendments.

Amendments adopted automatically

One jurisdiction acts as host and enacts the legislation in the form agreed by the executive branches of governments. The other participating jurisdictions enact legislation which applies the legislation of the host jurisdiction, and any future amendments to that legislation.

The States may choose to apply a Commonwealth Act in a Territory, or the Commonwealth may choose to apply a State Act.⁵

³ There is no convention of drafting styles and terminology in Australia equating with the position in Canada, see "Canadian Legislative Drafting Conventions" in *Proceedings of the 58th Meeting of the Canadian Uniform Law Conference* (1976) 59.

⁴ See below for comments on National Regulatory Bodies.

⁵ For example, the *Commonwealth Places, (Application of Laws) Act 1970*.

The relevant intergovernmental agreement usually provides that participating jurisdictions must refrain from introducing separate legislation on any matter within the scope of the agreed legislation, and must undertake the repeal, amendment or modification of existing inconsistent legislation. Each State or Territory is usually permitted to make minor or technical variations to the applied legislation to ensure consistency with other State or Territory legislation.

The *Financial Institutions (Western Australia) Act 1992* and the *Corporations (Western Australia) Act 1990* are examples of this structure.⁶

Amendments

The intergovernmental agreement should provide for the method of agreeing amendments. For example, the relevant Ministerial Council may have to:

- ! unanimously agree to any proposed amendment; or
- ! two-thirds of the Ministerial Council may have to agree; or
- ! a majority of the Ministerial Council may have to agree; or
- ! the Ministerial Council may only have to be consulted, rather than agree.

Sometimes failure to reject regulations within a specified time period may result in deemed approval by the Ministerial Council.⁷ Sometimes the national regulatory body will also have to be consulted, or agree to the proposed amendments.

Unless the approval of all Ministers is required to proposed amendments, a vote against the proposal will not of itself prevent that amendment applying to that Minister's jurisdiction.

It is therefore possible that the Minister of the host jurisdiction will be obliged to introduce amendments into the host Parliament, if the amendments are approved by the Ministerial Council, even if that Minister voted against the proposal in Ministerial Council.

The Parliaments of the participating jurisdictions are not involved in the amending process, unless the attention of a State Parliament is drawn to the need to pass legislation which specifically varies an amendment made in the host Parliament.

Emphasis

This version of the structure emphasises a high degree of consistency.

Amendments enacted separately

This version of the structure requires one jurisdiction to act as host and enact legislation in a form agreed to by the Council of Australian Governments or relevant Ministerial Council. The other participating jurisdictions enact legislation which applies the legislation of the host jurisdiction, but retain control over the amendment process.

⁶ Discussed in the Western Australian Legislative Assembly Select Committee on Parliamentary Procedures for Uniform Legislation Agreements Report 1992.

⁷ For example, the intergovernmental agreement relating to National Road Transport legislation.

The intergovernmental agreement may specify whether the Ministerial Council or national regulatory body is required to agree to any departures from the national scheme by individual States or Territories. Further, the intergovernmental agreement may require Ministers to propose amending legislation in their jurisdictions, despite voting against the proposed amendments at Ministerial Council.

Amendments

Each jurisdiction retains some flexibility in its consideration of proposed amendments.

Emphasis

A high degree of consistency is emphasised in the original legislation.

Structure 4

If the Commonwealth is unsure of the extent of its Constitutional power in an area, or completely lacks power, the States may agree to refer power to the Commonwealth under section 51(xxxvii) of the Constitution.

Section 51(xxxvii) of the Australian Constitution enables the Commonwealth Parliament to legislate with respect to matters referred to it by the Parliament of any State. Such Commonwealth legislation will only operate in the States which referred the matter, or which after referral of the matter by another State, adopted the resultant legislation.

The section enables the States to extend the legislative power of the Commonwealth at their instigation. The Commonwealth would then have legislative coverage of a matter over which previously the States had comprehensive power to legislate.

Legislation adopted pursuant to section 51(xxxvii) operates in the adopting State as a Commonwealth law, bringing with it the operation of section 109 of the Australian Constitution. The *Child Support Adoption Act 1990* is the only current Western Australian Act which has adopted a Commonwealth Act pursuant to section 51(xxxvii) ⁸

Section 109 of the Australian Constitution prevents the operation of inconsistent State laws. Any inconsistent State or Territory laws would be inoperative whilst the Commonwealth had legislation operating in the area, preventing inconsistencies occurring between jurisdictions due to deliberate or inadvertent amendment of State legislation.

The reference of power may refer to a legislative area - for example, matters relating to ex-nuptial children⁹, or may be limited to the passage of a Commonwealth Bill attached as a Schedule to the State legislation referring the power. For example, the reference of power by Queensland and New South Wales in their respective *Mutual Recognition Acts* annexed the Commonwealth Bill.

⁸ Per transcript of evidence taken by the Committee at Perth on 1 December 1993 from Mr Gregory Calcutt, Parliamentary Counsel.

⁹ It is difficult to accurately define the boundaries of the referral so as to ensure that unintended powers are not also conferred.

Referral of powers ensures that Commonwealth legislation is valid if there are doubts about the extent of the Commonwealth's constitutional power to legislate in the area. Or if all participating jurisdictions want to ensure a national scheme will operate without the necessity of repealing, amending or modifying all inconsistent State or Territory legislation; for example - the mutual recognition legislation.

Amendments

The referral may include a mechanism for amending the legislation - for example, the agreement of the Ministerial Council or national regulatory body. Amendments must be made by the Commonwealth, although limited referrals of power may restrict the Commonwealth's ability to amend the original legislation. Amendments may be difficult if all States involved have to amend their referring legislation to confer broader power on the Commonwealth, to enable the Commonwealth to comply with the directions of the relevant Ministerial Council or national regulatory body.

Emphasis

Section 109 of the Constitution dictates that this structure has an emphasis on total consistency.

Structure 5

This is a relatively new structure known as "Alternative Consistent" legislation, identified by the Standing Committee in its consideration of the proposed Uniform Consumer Credit Laws.

The intergovernmental agreement may permit a jurisdiction to participate in a national scheme by enacting legislation which states that "an act or thing" will be lawful, if such an act or thing would be lawful under legislation of the host jurisdiction. The State or Territory would undertake not to introduce any legislation which would otherwise conflict with the legislation, and would undertake to repeal, amend or vary existing legislation which conflicted with the "alternative consistent" legislation.

The intergovernmental agreement may permit a jurisdiction to later repeal its legislation and adopt the legislation of the host jurisdiction .

The host legislation may prevent States and Territories joining national schemes in this manner, or introducing their own legislation in accordance with Structure 2. For example, the definition of "participating jurisdiction" in the Commonwealth Mutual Recognition Act 1992 excludes jurisdictions from participating in the national mutual recognition scheme if they have not referred power to the Commonwealth or adopted the Commonwealth legislation under section 51(xxxvii) of the Constitution.

Amendments

Each participating jurisdiction would be responsible for monitoring amendments to the legislation in the host jurisdiction and introducing consistent amendments, where necessary, into the Parliament. The Parliament is reliant on the executive branch of Government to monitor amendments proposed in relevant Ministerial Councils or the Council of Australian Governments.

Emphasis

The emphasis in this structure is on flexibility.

Structure 6**Mutual Recognition**

States may agree on a scheme of mutual recognition of laws. In general terms under mutual recognition all States and Territories retain their local laws. However, goods and services produced or imported into a State or Territory need only comply with that State or Territory laws but may be sold in another State or Territory without the necessity of complying with further requirements of the latter State or Territory.

Structure 7**Unilateralism**

Each State may retain its own particular law. Unilateralism, sometimes referred to as "diversity", reinforces State sovereignty. State legislation can be specially tailored to local needs. The ability to enact diverse legislation can be important in advancing social reform. Governments with vision can legislate for change. The disadvantages of Unilateralism is that it may be seen by some to impede national activities. For example producers trading interstate will be confronted with laws that differ from jurisdiction to jurisdiction. Local rules may be used to protect regional producers from competition to the detriment of general community and economy.

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

National standards are agreed to by all jurisdictions. Under this mechanism the Western Australian Parliament passes its own legislation. A national authority is appointed to make decisions for Western Australia under the State legislation. The Western Australian Minister has the authority to vary any decision of the appointed authority.

WITNESSES

Date	Witness	Title
15 November 1995	Mr Francis Lloyd Morisey	Public Servant, Ministry of Justice
15 November 1995	Mr Gary David Newcombe	Legal Officer, Ministry of Justice