



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON
UNIFORM LEGISLATION
AND GENERAL PURPOSES:**

**THE WORK OF THE COMMITTEE
DURING THE SECOND SESSION OF THE
THIRTY-SIXTH PARLIAMENT -
AUGUST 13 2002 TO NOVEMBER 16 2004**

Presented by Hon Adele Farina MLC (Chairman)

Report 23
November 2004

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed:

April 11 2002

Terms of Reference:

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

“7. Uniform Legislation and General Purposes Committee

- 7.1 A Uniform Legislation and General Purposes Committee is established.
- 7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.
- 7.3 The functions of the Committee are –
- (a) to consider and report on bills referred under SO 230A;
 - (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to consider and report on any matter referred by the House.
- 7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)

Hon Simon O’Brien MLC

Hon Paddy Embry MLC

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ISBN 1 9208 8631 1

Government Response

This Report is subject to Standing Order 337:

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

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

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

THE WORK OF THE COMMITTEE DURING THE SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT - AUGUST 13 2002 TO NOVEMBER 16 2004

EXECUTIVE SUMMARY

- 1 This is the second sessional report of the Uniform Legislation and General Purposes Committee for the Thirty-Sixth Parliament. The report summarises the Committee's activities during the second session of the Parliament, provides a convenient analysis of the matters into which the Committee has inquired and discusses challenges that have faced the Committee.

- 2 In particular, the sessional report provides the opportunity for the Committee to report to the House on a number of systemic and overarching matters that are not related to a particular item of legislation including:
 - a discussion on parliamentary scrutiny, and parliamentary committee oversight;
 - a discussion on legislative scrutiny principles as applied by parliamentary committees in other jurisdictions and as applied by this Committee;
 - a synopsis of some of the main issues of concern to the Committee with examples distilled from some of its reports;
 - a discussion of issues facing the Committee and Committee initiatives;
 - the identification of proposed uniform legislation; and
 - the Committee's participation in interjurisdictional meetings, conferences and initiatives.

- 3 The Committee has also taken the opportunity to share its experiences and make some Recommendations to assist the House in its consideration of parliamentary committee scrutiny in the next Parliament.

RECOMMENDATIONS

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

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Recommendation 1: The Committee recommends that the role of the Uniform Legislation and General Purposes Committee, as established by its terms of reference, continue into the next Parliament. Should the Legislative Council review its committee system then the Committee recommends that the House ensure that the Committee’s mandate is reflected in a Legislative Council parliamentary committee.

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Recommendation 2: The Committee recommends that, if the notice of motion given by Hon Adele Farina MLC on April 7 2004 is not resolved in this Parliament, then the default period in standing order 230A(4) should be considered by the House in the next Parliament with a view to amending the standing order to refer to “30 sitting days” as opposed to “30 days”.

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Recommendation 3: The Committee recommends that the Minister for State and Federal Relations do liaise with relevant Ministers of other Australian jurisdictions, in particular the Commonwealth Minister for Foreign Affairs and Trade, with a view to ascertaining whether the period provided to state parliamentary committees for consultation on proposed treaties can be extended to enable sufficient and proper state parliamentary scrutiny to occur.

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Recommendation 4: The Committee recommends that in the next Parliament, subject to an extension of time for consultation in relation to treaties being achieved, an express treaty reviewing function be given to a relevant parliamentary committee with sufficient resources to undertake the work.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES**

**THE WORK OF THE COMMITTEE DURING THE SECOND SESSION OF THE THIRTY-SIXTH
PARLIAMENT - AUGUST 13 2002 TO NOVEMBER 16 2004**

1 INTRODUCTION

Establishment of the Committee

- 1.1 The Legislative Council (**Council**) established the Standing Committee on Uniform Legislation and General Purposes (**Committee**) on April 11 2002.
- 1.2 The Committee continues the work of the Standing Committee on Legislation (**Legislation Committee**) of the Thirty-Sixth Parliament in relation to uniform legislation. Uniform legislation refers to a bill that ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party or a bill that, by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.
- 1.3 National schemes of legislation emerge from such bodies as the Council of Australian Governments (**COAG**) and the various ministerial councils such as the Standing Committee of Attorneys General (**SCAG**). At its simplest level, such Councils agree to uniform legislation, usually in closed session, and then proceed through the participating Ministers to sponsor bills through individual Parliaments. The message from the Executive (Cabinet) is that such bills cannot be amended for fear of destroying their uniform nature and breaching the intergovernmental agreement upon which the uniform bill was based.
- 1.4 The Committee is essentially an amalgamation of two previous committees from the Thirty-Fifth Parliament, the Legislative Council Standing Committee on Constitutional Affairs and the Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements. Neither committee was reappointed in the Thirty-Sixth Parliament; however, their terms of reference have, in part, been incorporated into the Committee's terms of reference. In its *Second Report*, the Committee provided a Chronology of Events in relation to the development of scrutiny of uniform legislation.¹ This is reproduced in the Committee's *Nineteenth Report*.²

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

² Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 19: Uniform Legislation and Supporting Documentation*, August 2004, Appendix 3.

Terms of reference

- 1.5 The Legislative Council established the Committee's terms of reference on its appointment on April 11 2002. They are published at the front of this report.
- 1.6 Under the terms of reference the functions of the Committee are:
- a) to consider and report on uniform legislation;
 - b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of uniform legislation;
 - c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia; and
 - d) to consider and report on any matter referred by the House.
- 1.7 The Committee's terms of reference also provide that, 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 territory, and New Zealand and similarly, may participate in any conference or other meeting.
- 1.8 The Committee's terms of reference need to be read in conjunction with Legislative Council Standing Order 230A which is attached as Appendix 1.
- 1.9 The policy of a bill is not open for inquiry by the Committee (refer to standing order 230A(5)).

Membership and Chairman

- 1.10 The Committee consists of three members of the Legislative Council with power in the Committee to co-opt two additional members for a specific purpose or inquiry.
- 1.11 On April 11 2002 the Legislative Council appointed Hon Paddy Embry MLC, Hon Adele Farina MLC, and Hon Simon O'Brien MLC as members of the Committee.
- 1.12 By resolution of the Committee on May 5 2002, Hon Adele Farina MLC was appointed Chairman.
- 1.13 There has been no change in committee membership during this reporting period. The ability to co-opt two additional members has not been exercised.

2 PARLIAMENTARY SCRUTINY

Parliamentary committee oversight

Legislative Council Committees and Joint Standing Committee

- 2.1 Any comparative analysis between Australian parliamentary committees with legislative scrutiny roles should take into account the nature of scrutiny afforded by the Western Australian parliamentary committee system. Unlike other Australian jurisdictions, no parliamentary committee of the Council performs the function of a ‘scrutiny of bills committee’;³ that is, there is no committee that considers *all* bills.⁴
- 2.2 In Western Australia, the role of legislative scrutiny is not vested in any one committee. Legislative scrutiny is primarily divided between three committees:
- a) the Joint Standing Committee on Delegated Legislation (scrutiny of *all* subsidiary legislation and local laws);
 - b) the Legislative Council Standing Committee on Legislation (scrutiny of primary legislation, except for primary uniform legislation, *as and when referred*); and
 - c) the Legislative Council Standing Committee on Uniform Legislation and General Purposes (scrutiny of *all* primary uniform legislation).
- 2.3 In addition most Legislative Council committees have terms of reference that can receive bills referred by the House. Any parliamentary committee, if ordered by the House, can receive uniform bills in lieu of the Committee. Indeed this has happened in recent times with uniform bills being referred to the Environment and Public Affairs Committee.⁵
- 2.4 Since its appointment on April 11 2002 the Committee has considered and reported on 22 uniform bills and one item of draft uniform subsidiary legislation.⁶ Prior to the Committee’s appointment, the scrutiny of uniform bills was vested in the Legislative

³ For example: Queensland Standing Committee for the Scrutiny of Legislation; Victorian Scrutiny of Acts and Regulations Committee (Joint Committee); Senate Standing Committee for the Scrutiny of Bills; New South Wales Legislation Review Committee (Joint Committee); and the ACT Standing Committee on Legal Affairs.

⁴ In Western Australia the Standing Committee on Legislation does not function as a scrutiny of bills committee – it considers bills if and when referred by the House.

⁵ Gene Technology Bill 2001 and Gene Technology Amendment Bill 2001.

⁶ Refer to the List of Reports in Appendix 3.

Council Standing Committee on Legislation.⁷ Amendments have been recommended to many of these bills, mainly to facilitate effective parliamentary scrutiny.

Consideration of legislative scrutiny principles

Approach by parliamentary committees in other jurisdictions

2.5 Many parliamentary legislative scrutiny committees are required to have regard to a list of principles against which legislation referred for scrutiny is measured. These principles can differ from jurisdiction to jurisdiction.

2.6 In Queensland these principles are known as ‘fundamental legislative principles’ and are legislatively enshrined in the *Legislative Standards Act 1992* (Qld). They are applied by the Queensland Scrutiny of Legislation Committee *to every bill tabled in Parliament*. The Act recognises two main principles and requires that legislation has sufficient regard to:⁸

- a) the rights and liberties of individuals; and
- b) the institution of Parliament.

2.7 In Victoria, the Commonwealth and New South Wales, similar principles formally comprise part of the terms of reference for:

- i) the Scrutiny of Acts and Regulations Committee (**SARC**), which is a Joint Committee of the Victoria Parliament. In deciding whether to comment on legislation, SARC is guided by the terms of reference (or scrutiny principles) set out in legislation.⁹ These scrutiny principles allow SARC to look for such things as trespasses to rights and freedoms and inappropriate delegation of legislative powers. In Victoria the principles are referred to as ‘legislative standards’ and have been applied by SARC (and its predecessor committees) since 1992;
- ii) the Senate Standing Committee for the Scrutiny of Bills (Cth). The principles are stipulated in standing orders.¹⁰ The Committee has been applying these principles since its establishment in 1981; and

⁷ Between June 2001 and April 2002 the Legislation Committee considered in detail, and tabled reports on, 15 uniform bills.

⁸ *Legislative Standards Act 1992* (Qld), s4.

⁹ *Parliamentary Committees Act 2003* (Vic), s17; and *Subordinate Legislation Act 1994* (Vic), s21.

¹⁰ The work of the Committee is governed by Senate Standing Order 24 and, in particular, by the five principles set out in subparagraph 1(a) of that Standing Order. Standing order 24(1)(a) provides:

24(1)(a) At the commencement of each parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

- iii) the New South Wales Legislation Review Committee.¹¹ In New South Wales, legislative scrutiny principles formally comprise part of the statutory terms of reference for the committee.¹²

The principles are applied by these committees *to every bill tabled* in Parliament.

Approach by committees involved in the scrutiny of uniform legislation

2.8 National legislative schemes of uniform legislation and scrutiny principles were addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation (**1996 Position Paper**) by the Working Party of Representatives of Scrutiny Committees throughout Australia (**Working Party**).

2.9 One of the recommendations contained in the 1996 Position Paper was the adoption of the following uniform scrutiny principles:

- does the bill trespass unduly on personal rights and liberties;¹³ and
- does the bill inappropriately delegate legislative powers?¹⁴

2.10 The 1996 Position Paper was based on extensive work undertaken by the former Legislative Assembly Standing Committee on Uniform Legislation and

-
- (i) *trespass unduly on personal rights and liberties;*
 - (ii) *make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;*
 - (iii) *make rights, liberties or obligations unduly dependent upon non-reviewable decisions;*
 - (iv) *inappropriately delegate legislative powers; or*
 - (v) *insufficiently subject the exercise of legislative power to parliamentary scrutiny.*

¹¹ On September 2002, the New South Wales Parliament passed the *Legislation Review Amendment Act 2002* to reconstitute the Regulation Review Committee as the Legislation Review Committee and to extend its role to the scrutiny of bills. The committee is a joint committee and is established by statute.

¹² *Legislation Review Act 1987* (New South Wales) (as amended by the *Legislation Review Amendment Act 2002*), ss8A and 9.

¹³ For example: strict liability offences; reversal of the onus of proof; abrogation of the privilege against self-incrimination; inappropriate search and seizure powers; decision-making safeguards (that is: written decisions and reasons for decisions); consistency with the principles of natural justice; personal privacy; decisions unduly dependent on administrative decisions; delegation of administrative power only in appropriate cases and to appropriate persons; retrospectively affecting rights and liberties, or imposing obligations; the conferral of immunity from proceeding or prosecution without adequate justification; provision for compulsory acquisition of property only with fair compensation; sufficient regard to Aboriginal tradition and Island custom; and clear, precise and unambiguous drafting.

¹⁴ Such question also raises the issue of whether or not a bill has sufficient regard to the institution of Parliament. For example: provisions allowing or authorising the amendment of an Act only by another Act (known as 'Henry VIII clauses'), insufficient parliamentary scrutiny of the exercise of legislative power, the delegation of legislative power only in appropriate cases and to appropriate persons and sufficiently subjecting the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council.

Intergovernmental Agreements (**SCULIA**). SCULIA endorsed the principles of the 1996 Position Paper in its *Thirteenth Report*.¹⁵

Approach in Western Australia

- 2.11 In Western Australia there is no *statutory requirement* that a committee consider certain legislative scrutiny principles when considering legislation. As more than one committee may receive referrals of legislation for scrutiny there is no one view on what legislative scrutiny principles might be applied or where the boundaries may lie in relation to each principle; rather each committee may have a view dependent on its own experiences and composition.
- 2.12 With the exception of the Joint Standing Committee on Delegated Legislation Committee, legislative scrutiny principles also *do not form part of the terms of reference* for any other Council committee.

The Committee's approach

- 2.13 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.
- 2.14 To date, the Committee considers issues as they arise on a case by case basis. The Committee observes that similar approaches have been adopted by other committees of the Council when scrutinising bills referred by the House.¹⁶
- 2.15 An outline of legislative scrutiny principles as may be considered by the Committee is attached at Appendix 2. This list is indicative only and is based, in part, on those applied by the Queensland Parliament's Scrutiny of Legislation Committee and expanded by this Committee as a result of its own experiences.
- 2.16 The legislative scrutiny principles that may be considered by the Committee may be conveniently approached under two main headings:

¹⁵ Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Report No 13: Position Paper: Scrutiny of National Schemes of Legislation*, October 1996.

¹⁶ For example: Parliament of Western Australia, Legislative Council, Standing Committee on Legislation: *Report No 1: Corporations (Ancillary Provisions) Bill 2001, Corporations (Administrative Actions) Bill 2001, Corporations (Commonwealth Powers) Bill 2001, and Corporation (Consequential Amendments) Bill 2000*, June 2001; *Report No 2: Agricultural and Veterinary Chemicals (WA) Amendment Bill 2001 and Co-operative Scheme (Administrative Actions) Bill 2001*, June 2001; *Report No 3: Road Traffic Amendment Bill 2001*, September 2001; *Report No 12, Corporations (Consequential Amendments) Bill (No 2) 2001*, March 2002; and *Report No 13, Corporations (Consequential Amendments) Bill (No 3) 2001*, March 2002.

Parliament of Western Australia, Legislative Council, Standing Committee on Public Administration and Finance Legislation, *Report No 1: Planning Appeals Amendment Bill 2001*, March 27 2002; and *Report No 3: Economic Regulation Authority Bill 2003*, May 2003.

- *Does the legislation have sufficient regard to the rights and liberties of individuals?*
 - *Does the legislation have sufficient regard to the institution of Parliament?*¹⁷
- 2.17 Whilst the referral of a bill or bills to a parliamentary committee is usually the result of divisive debate on a contentious issue in the House, uniform bills stand referred to the Committee regardless of whether or not they are publicly contentious.¹⁸ 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.
- 2.18 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.
- 2.19 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.
- 2.20 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.
- 2.21 The Committee draws this scrutiny process to the attention of departmental officers and hopes that it will provide guidance on the types of issue that may attract the Committee's attention and comment. With this in mind, the Committee has outlined the scrutiny principles to which it may have regard (Appendix 2) and has identified the issues that have been raised in its previous reports (Appendix 3).
- 2.22 The Committee also draws the legislative scrutiny principles, as applied by the Committee, to the attention of the House for consideration and possible application by other committees when considering legislation.

¹⁷ This principal heading includes a subsidiary principle relating to *whether the bill inappropriately delegates legislative powers*, which issue is part of those principles adopted by the 1996 Position Paper: refer to paragraph 2.9

¹⁸ The scrutiny of delegated legislation (including any uniform delegated legislation) is within the purview of the Joint Standing Committee on Delegated Legislation.

Overarching issue: uniform legislation and respect for the institution of Parliament

- 2.23 Parliamentary committees charged with the scrutiny of legislation do not oppose the concept of legislation with uniform application in all jurisdictions across Australia. However, they do question the mechanisms by which those uniform legislative schemes are made into law and advocate the recognition of the importance of the institution of Parliament.¹⁹
- 2.24 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive that consistency with the legislative form agreed among the various executive Governments is a 'given'.²⁰
- 2.25 In view of the manner in which uniform legislation is developed, agreed and implemented, a fundamental issue arising in relation to all uniform legislation is *whether it has sufficient regard to the institution of Parliament*. This is an overarching issue and, although it is not one that falls within the particular subcategories outlined in Appendix 2 and is not noted against the list in Appendix 3, the Committee's reports often address this issue.
- 2.26 The view may be taken that uniform legislation diminishes the role of Parliament in law making for this State. For example, in the Committee's *Ninth Report*, when considering uniform legislation applied by way of a template mechanism, the Minister for Consumer and Employment Protection noted:²¹

The most common concern with template legislation is that it impacts the sovereignty of participating jurisdictions and a perceived reduction in Parliament's role as the ultimate law-maker.

- 2.27 The development of proposals or agreements that relate to uniform legislation was discussed in detail in the Committee's *Nineteenth Report*.²²

¹⁹ For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp.7-12 attached as Appendix 1 to Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Report No 13: Position Paper: Scrutiny of National Schemes of Legislation*, October 1996.

²⁰ Ibid.

²¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 9: Consumer Credit (Western Australia) Amendment Bill 2002*, May 2003, p.18, referring to a letter from the Minister for Consumer and Employment Protection to the Committee dated April 1 2003.

²² Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 19: Uniform Legislation and Supporting Documentation*, August 2004.

- 2.28 The Committee may consider this overarching issue when inquiring into, for example:²³
- a) the type of legislative structure employed to achieve uniformity;
 - 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.
- 2.29 The Committee is of the view that there is a very important role for a parliamentary committee to fulfil in relation to the scrutiny of uniform legislation, including its development and implementation.
- 2.30 The Committee considers that it has performed an effective role in providing such scrutiny and urges the House to ensure that the scrutiny of uniform legislation remains part of the mandate of a parliamentary committee.

Recommendation 1: The Committee recommends that the role of the Uniform Legislation and General Purposes Committee, as established by its terms of reference, continue into the next Parliament. Should the Legislative Council review its committee system then the Committee recommends that the House ensure that the Committee's mandate is reflected in a Legislative Council parliamentary committee.

Identification of legislative structures

- 2.31 The Committee emphasises that the term 'uniform legislation' does not mean that the legislation is identical in nature. As noted in the Committee's *Nineteenth Report*,

²³ Examples of the Committee's reports where these issues are examined include: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 6: Terrorism (Commonwealth Powers) Bill 2002*, December 2004; *Report No 8: Gas Pipelines Access (Western Australia) (Reviews) Amendment Bill 2002*, April 2003; *Report No 9: Consumer Credit (Western Australia) Amendment Bill 2002*, May 2003; *Report No 13: Human Reproductive Technology Amendment Bill 2003 and Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003*, December 2003; and *Report No 21: Consumer Credit (Western Australia) Code Regulations Amendment Order 2004*, November 2003.

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.²⁴

- 2.32 National legislative schemes, to the extent that they may give effect to an intergovernmental agreement or introduce a uniform scheme or uniform laws throughout the Commonwealth, can take a number of forms. Nine different categories of legislative structures, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability have been identified. Some categories accommodate quite a separate legislative approach between participating jurisdictions. The legislative structures are described in Appendix 4.²⁵
- 2.33 The Committee endeavours to include in its reports an identification of the legislative structure utilised when it considers bills standing referred.

3 REPORTS TABLED

- 3.1 Since its appointment on April 11 2002 the Committee has tabled 22 reports in the Legislative Council, and considered 22 bills and one item of draft uniform subsidiary legislation. Nineteen of the reports were tabled in the Second Session of this Parliament. A list of the Committee’s reports is attached at Appendix 3.

4 IMPACT OF THE COMMITTEE’S REPORTS

- 4.1 The Committee’s principal role is to inform Parliament of any issues arising with respect to the uniform bills introduced into the House. The Committee’s reports seek to enhance debate in the House on issues arising in relation to uniform legislation and regarding the rights and liberties of individuals and the institution of Parliament.
- 4.2 The Committee considers that during the Thirty-Sixth Parliament it has had an appreciable influence on the scrutiny of bills on which the Committee has reported, and amendments made to those bills. For example the Committee considers that its reports:
- a) have raised numerous issues for the consideration of Parliament, and in so doing has facilitated debate on the bills concerned;
 - b) have clarified issues with, and obtained information from, Ministers in respect of matters of potential concern; and

²⁴ Ibid, pp.26-27. Also refer to Hon P Pendal MLA, ‘Uniform Law in Australia: An Alternative Approach’, *The Federalism Project: Issues Paper No 6*, The Institute of Public Affairs, May 1996, pp.25-26.

²⁵ Also see reports of the Parliament of Western Australia, Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

- c) were influential in achieving the amendment of various bills to address the issues and concerns raised by the Committee.
- 4.3 In addition, the Committee observes that bills drafted subsequent to it having raised an issue have sometimes incorporated drafting modifications at least partially addressing an issue of concern. In this respect, the Committee believes that through its activities, it has had an ongoing influence on the drafting of bills introduced into Parliament.
- 4.4 The Committee also trusts that the matters raised in its reports, in particular its *Nineteenth Report*, will lead to future co-operation during which practical procedures can be put in place by the Executive, to ensure that Parliament is provided with the necessary information to perform its rightful role as law-maker in the legislative process.²⁶

5 MAIN ISSUES OF CONCERN TO THE COMMITTEE

- 5.1 The following comments are provided to illustrate some of the issues, which are considered by the Committee when scrutinising uniform bills.

Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?

Principle

- 5.2 This principle is worthy of some discussion, as the Committee observes that there is an increasing tendency for bills to contain provisions that may strike an inappropriate balance between the Executive and the Legislature. Indeed many of the bills scrutinised by the Legislation Committee during the Thirty-Sixth Parliament contained clauses that required a consideration of this issue. The Legislation Committee often recommended amendments to such clauses.²⁷
- 5.3 Generally where Parliament seeks to delegate the power to legislate to others, it should address the question of how much oversight it should maintain over the exercise of the delegated power.
- 5.4 One approach to this question is that of the Senate Standing Committee for the Scrutiny of Bills, which has suggested that a bill may insufficiently subject the exercise of delegated legislation to parliamentary scrutiny in a number of circumstances. For example a bill may:

²⁶ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 19: Uniform Legislation and Supporting Documentation*, August 2004.

²⁷ For example, refer to the discussion of provision for the retrospective operation of regulations: Western Australia, Legislative Council, Standing Committee on Legislation, *Report No 13: Corporations (Consequential Amendments) Bill (No 3) 2001*, March 2002.

- a) give a power to make subordinate legislation which is not to be tabled in Parliament;
- b) provide that regulations to be made under primary legislation may incorporate rules or standards of other bodies as in force from time to time;
- c) require subordinate legislation to be tabled and be subject to disallowance, but with a disallowance period so short that Parliament may not be able to scrutinise it properly; or
- d) give a Minister or other person the ability to issue guidelines, directions or similar instruments influencing how powers granted under a law are to be exercised without any obligation for instruments to be tabled in Parliament or without them being subject to disallowance.

Examples

Incorporation by reference: Higher Education Bill 2003

- 5.5 The Committee observes that the incorporation of material authored externally to Parliament is not uncommon in uniform legislative schemes. Legislation may be enacted to provide that regulations to be made under that legislation would be able to incorporate rules or standards of other bodies for example: *Building Code of Australia*.²⁸ The main objections to this mechanism are:
- a) that the incorporation of material authored externally to the Parliament lessens the ability of Parliament to maintain scrutiny and control over the content of and changes to the material; and
 - b) the practice of incorporating external documents may effectively delegate the making of Western Australian law to outside bodies.
- 5.6 There may be concerns that adopting standards that are set by an independent interjurisdictional body will result in a reduction of the Parliament's ability to scrutinise, as the Parliament would often have had very little or no participation in the development of such standards or their alteration. However, the Committee notes that matters such as *Australian Standards* are often appropriately adopted in legislation, for example, in regulations dealing with very technical or specialised subject matters.
- 5.7 In the Committee's view any incorporated material described in legislation needs to be in existence, clear, genuinely subsidiary and readily available to the public at large (ideally from the same source from which the regulations can be obtained).

²⁸ Section 43(8)(b)(i) of the *Interpretation Act 1984* states that subsidiary legislation may be made so as to require a matter affected by the legislation to be in accordance with "a specified standard or specified requirement".

- 5.8 The Committee's *Eleventh Report* (regarding the Higher Education Bill 2003) considered the issue of incorporation by reference.²⁹ The definition of "National Protocols" in that bill was defined to mean "... *the National Protocols for Higher Education Approval Processes approved by the [Ministerial Council on Education, Employment, Training and Youth Affairs] on 31 March 2000, as amended from time to time*".
- 5.9 The Committee's report noted that the National Protocols are an integral part of the operation of the accreditation and approval processes established by the bill. The Committee also noted that the bill is drafted so that the National Protocols are incorporated "... *as amended from time to time*" and that amendment does not require the involvement of Parliament. When the National Protocols change, the requirements that are imposed by means of certain clauses are also changed. By contrast the Committee noted that the relevant Queensland legislation only adopted the National Protocols as at a particular date and does not include any subsequent amendments.³⁰
- 5.10 What, if any, continuing involvement the State has in the development of the National Protocols was of interest to the Committee, particularly as the balance of state/federal relations frequently falls for consideration when scrutinising uniform legislation. The Committee inquired into the amendment process of the National Protocols, the involvement of the State in that process and the ability of the State to resist any amendments to the National Protocols.
- 5.11 After consideration of the response of the Minister for Education and Training the Committee was satisfied that the State's interests are represented and respected in relation to the future amendment of the National Protocols.
- 5.12 The bill and the Committee's report are yet to be debated by the House.

Termination, by proclamation, of a legislative reference of power to the Commonwealth: Commonwealth Powers (De Facto Relationships) Bill 2003

- 5.13 The Committee's *Fourteenth Report* regarding the Commonwealth Powers (De Facto Relationships) Bill 2003, canvassed the termination, by proclamation, of a legislative reference of power to the Commonwealth.³¹
- 5.14 The purpose of the bill is to refer certain matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth. Clause 4 details the

²⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 11: Higher Education Bill 2003*, September 2003, pp.13-16; and *Report No 1: Offshore Minerals Bills*, June 2002, pp.60-66. See also *Report No 4: Trans-Tasman Mutual Recognition (Western Australia) Bill 2002*, October 2002.

³⁰ *Higher Education (General Provisions) Act 2003* (Qld), Dictionary.

³¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 14: Commonwealth Powers (De Facto Relationships) Bill 2003*, April 2004.

- legislative powers (to the extent to which they are not otherwise included in the legislative powers of the Parliament of the Commonwealth) that are to be referred to the Parliament of the Commonwealth.
- 5.15 Clause 5(1) provides that the Governor may at any time fix a day as the day on which the references of power to the Commonwealth are to terminate. This termination is to be by way of proclamation.
- 5.16 The Committee noted that the conferral of the referred power is made by Parliament, whereas the termination of one or both of the referred powers is by executive action of the Governor by proclamation.
- 5.17 By way of a comparison, the Committee noted that Queensland's equivalent legislation³² with regard to termination of references is virtually identical save for an additional provision.³³ The inclusion of section 5(6) provides that the Queensland Parliament may disallow the Governor's proclamation prior to its taking effect, thereby enabling the reference to continue. Accordingly, the role of Parliament in scrutinising delegated legislation is preserved.
- 5.18 In Western Australia, section 42(8)(b) of the *Interpretation Act 1984* states that regulations include rules, local laws and by-laws. On the other hand proclamations, as a form of subsidiary legislation, are not specifically included and therefore would not be disallowable under the provision of section 42 of the *Interpretation Act 1984*. The Committee wrote to the Attorney General in relation to this matter.
- 5.19 Despite advice from the Attorney General that the legislation follows the model bill, and that it has been the general practice in this State to permit termination of a reference by proclamation,³⁴ the Committee's report recalled that the termination of references pursuant to section 51(xxxvii) of the Commonwealth Constitution were considered in its *Sixth Report* in relation to the *Terrorism (Commonwealth Powers) Bill 2002* and that the bill had an additional clause in the following terms:³⁵

5(6) *A proclamation is to be made under this section if and only if the making of that proclamation has been recommended by resolution passed by both Houses of Parliament of this State.*³⁶

³² *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld).

³³ Section 5(6) of the *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) provides that "A proclamation made under this section is subordinate legislation."

³⁴ Letter to the Committee from the Attorney General, March 11 2004, p.2.

³⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 6: Terrorism (Commonwealth Powers) Bill 2002*, December 2002, pp.6-7.

³⁶ Now s. 5(6) *Terrorism (Commonwealth Powers) Act 2002*.

- 5.20 The bill was enacted in that form as the *Terrorism (Commonwealth Powers) Act 2002*. Although that Act provides for a termination of a reference of power by proclamation, a proclamation can only be made after its making has been recommended by an affirmative resolution of both the Council and the Legislative Assembly. The Committee observed that this affords parliamentary scrutiny to the termination of a reference by executive act.
- 5.21 The Committee's report on the Commonwealth Powers (De Facto Relationships) Bill 2003 noted that the bill would be greatly enhanced if it were to provide for parliamentary scrutiny of the proposed termination of the reference. The Committee discussed means of affording greater parliamentary scrutiny in the context of subsidiary legislation and executive action in earlier reports,³⁷ and canvassed possible options in which the bill might be amended to facilitate parliamentary scrutiny in this instance, by reference to affirmative resolution procedures and negative resolution procedures.
- 5.22 The Committee was supportive of the procedure utilised in the *Terrorism (Commonwealth Powers) Act 2002* as it is a variant on the philosophy behind the affirmative resolution procedure and accordingly made a recommendation for such an amendment to the bill.
- 5.23 The bill and the Committee's report are yet to be debated by the House.

Provision for the retrospective operation of regulations: Australian Crime Commission (Western Australia) Bill 2003

- 5.24 The Committee's *Fifteenth Report* regarding the Australian Crime Commission (Western Australia) Bill 2003, discussed and recommended amendment to a provision that provided for the retrospective operation of regulations.³⁸
- 5.25 Clause 64(3) of that bill provided that:

If regulations made under subsection (1) [which permits the making of regulations dealing with a transitional matter] provide that a state of affairs specified or described in the regulations is to be taken to have existed, or not existed, at and from a day that is earlier than the day on which the regulations are published in the Gazette, but not

³⁷ For example in Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, Western Australia, June 2002, Chapter 4 especially pp.62–64. See also Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 13: Human Reproductive Technology Amendment Bill 2003 and the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003*, Western Australia, December 2003, pp.12-14.

³⁸ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 15: Australian Crime Commission (Western Australia) Bill 2003*, June 2004.

earlier than 1 January 2003, the regulations have effect according to their terms.

- 5.26 The Committee noted that, effectively, this clause permitted transitional regulations, once published in the *Gazette*, to have retrospective effect from a date not earlier than January 1 2003 (the date the Australian Crime Commission commenced pursuant to the *Commonwealth Act*). For example, transitional regulations may be made in January 2005 that alter a state of affairs in January 2003.
- 5.27 When considering similar clauses in previous reports, the Committee observed that the common law position is that subsidiary legislation³⁹ (for example, a regulation) does not come into operation until it is published.⁴⁰ Although regulations made pursuant to clause 64 do not come into operation until they are published, *once published*, the regulations can operate from an earlier point in time. The Committee's *Fifteenth Report* notes that the undesirability of the retrospective operation of subsidiary legislation has been the subject of comment in recent reports of Legislative Council standing committees.⁴¹
- 5.28 The Committee noted that clause 64 contained two mechanisms to ameliorate the harsh consequences of regulations that operate retrospectively to alter or extinguish existing rights or impose liabilities.⁴² However the Committee also noted that the Australian Crime Commission had (at the time of its report in June 2004) been in

³⁹ Also known as 'subordinate legislation', which is defined as legislation the creation of which, by individuals or bodies other than Parliament, is authorized by an Act of Parliament. The forms of subordinate legislation include regulations, rules, by-laws, ordinances, statutory instruments and proclamations. Dr P. Nygh and P. Butt, General Editors, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p1126.

⁴⁰ The Committee highlighted that the statutory controls in the *Interpretation Act 1984* reflect this common law position by requiring subsidiary legislation to be published in the *Gazette* and to take effect only at the time of publication or some later time. Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, June 2002, p61.

⁴¹ Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, *Report No 1: Planning Appeals Amendment Bill 2001*, March 2002; Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, June 2002, pp.60-64; Western Australia, Legislative Council, Standing Committee on Legislation, *Report No 21: Corruption and Crime Commission Act 2003 and Corruption and Crime Commission Amendment Bill 2003*, December 2003, p182.

⁴² Firstly, clause 64(4) provided that the power to make retrospective transitional regulations expires 12 months after the day on which clause 65 comes into operation thereby creating a 'sunset' on the ability to make retrospective regulations.

Secondly, clause 64(5) provided that retrospective regulations made under clause 64(3) do not operate so as to (a) affect in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the day of publication of those regulations; or (b) impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the day of publication of those regulations.

operation for approximately 18 months during which time transitional matters should have already been addressed.

5.29 The Committee was of the view that provisions such as clause 64(3), which enable retrospective transitional regulations to be made, are undesirable and accordingly recommended that the provision be deleted.

5.30 The bill and the Committee's report are yet to be debated by the House.

Does the legislation authorise the amendment of an act only by another act, or by subsidiary legislation or executive action? - 'Henry VIII clauses'

Principle

5.31 In its scrutiny of uniform bills, the Committee has noticed an increase in the use of legislative mechanisms to afford the executive greater flexibility and discretion, in particular, the use of 'Henry VIII clauses'.⁴³ These clauses most commonly occur to facilitate transitional arrangements and to facilitate the application of national schemes of legislation and are claimed as being necessary for a smooth transition from a scheme or arrangement that is being discontinued to its replacement. Such clauses have also been noted by other Council committees when scrutinising primary legislation.⁴⁴

5.32 Although there are variations on what regulations may do for transitional purposes, the Committee observes that in some instances provision is made for the regulation to operate either before publication in the *Gazette* or, when published, retrospectively.⁴⁵ Either way, there may be no capacity for a House to disallow the regulation. By the time of *Gazette* publication (if any) the regulation may have already had effect and disallowance cannot undo it.

⁴³ A 'Henry VIII clause' is a provision in an Act that authorises the amendment of the enabling legislation or another Act by means of subsidiary legislation or executive act. 'Henry VIII clauses' appear to be so named because that King is regarded popularly as the personification of executive autocracy and because of its actual use by that monarch: *Report by the Committee on Ministers' Powers* (the Donoughmore Committee), HMSO, London, 1932, p.36 cited in Parliament of Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The Use of "Henry VIII Clauses" in Queensland Legislation*, January 1997, p2.

⁴⁴ For example: Parliament of Western Australia, Legislative Council, Standing Committee on Legislation: *Report No 1: Corporations (Ancillary Provisions) Bill 2001, Corporations (Administrative Actions) Bill 2001, Corporations (Commonwealth Powers) Bill 2001, and Corporation (Consequential Amendments) Bill 2000*, June 2001; *Report No 2: Agricultural and Veterinary Chemicals (WA) Amendment Bill 2001 and Co-operative Scheme (Administrative Actions) Bill 2001*, June 2001; *Report No 3: Road Traffic Amendment Bill 2001*, September 2001; *Report No 12, Corporations (Consequential Amendments) Bill (No 2) 2001*, March 2002; and *Report No 13, Corporations (Consequential Amendments) Bill (No 3) 2001*, March 2002.

Parliament of Western Australia, Legislative Council, Standing Committee on Public Administration and Finance Legislation, *Report No 1: Planning Appeals Amendment Bill 2001*, March 2002.

Parliament of Western Australia, Legislative Council Standing Committee on Public Administration and Finance, *Report No 3: Economic Regulation Authority Bill 2003*, May 2003.

⁴⁵ The retrospective operation of regulations is also discussed in paragraphs 5.24 to 5.29.

- 5.33 Where a ‘Henry VIII clause’ appears in a bill that has been referred to the Committee, the Committee may consider:
- i) the type of executive action permitted and the type and adequacy of parliamentary scrutiny afforded (for example, whether it is a regulation that is subject to tabling and disallowance procedures and parliamentary committee scrutiny; whether disallowance, not being retrospective, is sufficient or a form of positive affirmation is preferred; or an order which is not subject to parliamentary scrutiny);
 - ii) the subject matter (usually transitional);
 - iii) the scope (whether prospective and/or retrospective); and
 - iv) the time during which the clause is operative (that is, whether the empowering provisions, and any executive action made pursuant to such provisions, such as regulations, are accompanied by a sunset clause so that they expire one year after they commence).
- 5.34 Whilst recognising that ‘Henry VIII clauses’ are a useful tool to ensure that amendments adopted in the principal legislation of one jurisdiction flow through to all other jurisdictions, the Committee considers whether the use of such clauses is justified and whether their use in a particular case has sufficient regard to the institution of Parliament. The Committee does not have a general position on such clauses, although it has noted the Queensland Scrutiny of Legislation Committee report on this issue.⁴⁶
- 5.35 From the Committee’s perspective the scrutiny of empowering provisions in primary legislation is important as it can influence the nature and extent of the exercise of delegated legislative power by the Executive. The Committee notes that once a bill containing a ‘Henry VIII clause’ is enacted, the Joint Standing Committee on Delegated Legislation is only able to deal with the manifestation of unfettered or unscrutinised ‘Henry VIII clauses’ after they have been used and only to the extent that the exercise of executive power falls within that committee’s scrutiny.
- 5.36 In most cases the balance to be achieved with such clauses is between the State executive and the State legislature. However, in some uniform bills the use of such clauses can require a consideration of the appropriate balance to be achieved between the legislature of the Western Australian Parliament and the Executive of *another* state (for example, the Consumer Credit (Western Australia) Amendment Bill 2002 which

⁴⁶ Parliament of Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The Use of “Henry VIII Clauses” in Queensland Legislation*, January 1997, p.26.

proposed to adopt the *Consumer Credit (Queensland) Amendment Act 2002* and regulations).⁴⁷

Examples

Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001

- 5.37 The Committee's *First Report* (regarding the *Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*) considered this issue.⁴⁸ Although that report involved bills falling within the period canvassed by the Committee's last sessional report, the matters raised by one of those bills, the Offshore Minerals Bill 2001, are of continuing interest.
- 5.38 In that report the Committee considered and expressed dissatisfaction with the provisions of the Offshore Minerals Bill 2001 in which an 'order' could be made to address transitional matters, with such orders being able to operate with retrospective effect and with a 'Henry VIII' aspect.⁴⁹
- 5.39 Clause 12 of Schedule 2 of the Offshore Minerals Bill 2001 permits orders to be made that may provide that specific provisions of the bill do not apply, or apply with or without modifications. In short, in certain circumstances, clause 12 of Schedule 2 enables executive action (an order) to amend the application of primary legislation (the provisions of Schedule 2).
- 5.40 The Committee's report notes that an 'order' is not subsidiary legislation that is subject to the tabling and disallowance provisions in section 42 of the *Interpretation Act 1984* which would otherwise afford some parliamentary scrutiny.
- 5.41 The Committee also noted that corresponding uniform legislation in Queensland, South Australia and the Commonwealth do not have equivalent provisions. The corresponding New South Wales legislation requires such matters to be addressed by regulation (which would be subject to parliamentary disallowance procedures).
- 5.42 The Committee's report does not endorse the use of clauses such as clause 12 contained in Schedule 2 of the Offshore Minerals Bill 2001. The Committee, however, did consider that, in the bill's circumstances, it is acceptable to use executive powers to address transitional provisions and anomalies in the transition from the

⁴⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report 9: Consumer Credit (Western Australia) Amendment Bill 2002*, May 2003.

⁴⁸ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, June 2002, pp.52-66.

⁴⁹ Ibid.

regime under the *Mining Act 1978* to the regime proposed by the package of three bills so long as the appropriate balance is achieved between the need for the Executive to act with flexibility and the rightful place of Parliament as the legislature.

- 5.43 The Committee's report canvassed the various mechanisms which might be employed to facilitate parliamentary scrutiny of executive instruments, for example: applying the disallowance provisions of section 42 of the *Interpretation Act 1984*; inserting a 'sunset clause'; or subjecting the instrument to a parliamentary affirmative or negative resolution procedure before it may take effect.
- 5.44 In the circumstances, the Committee considered that clause 12 of Schedule 2 of the Offshore Minerals Bill 2001 should be amended to require that an order made pursuant to those provisions:
- a) does not come into operation until a period of time has passed within which Parliament, if it is so inclined, may disallow the order; or
 - b) in some circumstances, may come into operation immediately. Such circumstances would include situations where, for example, a House is not sitting or Parliament is prorogued and by reason of necessity an order made under clause 12(1) or (2) of Schedule 2 is to have effect before the expiration of the parliamentary scrutiny period referred to above.
- 5.45 The Committee made a recommendation to this effect. The bills and the Committee's report were debated by the House and amendments were effected to provide greater parliamentary scrutiny to orders created under Schedule 2. The form of amendment ultimately adopted by the House required the Minister to table the order before each House of Parliament within six sitting days after the order's publication in the *Gazette*.⁵⁰

Architects Bill 2003

- 5.46 The Committee's *Seventeenth Report*, in relation to the Architects Bill 2003, also considered this issue.⁵¹
- 5.47 Item 11, clause (2) of that bill provides the Governor with wide powers to make regulations stipulating that specific provisions of the Act either do not apply, apply with modifications or do not apply at all in relation to any transitional matter. The Committee expressed reservations about the width of Item 11, clause (2) and how it derogates from parliamentary sovereignty, whilst providing the Executive with an express power to alter the Act.

⁵⁰ Legislative Council, *Parliamentary Debates (Hansard)*, April 2 2003, p5927.

⁵¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 7: Architects Bill 2003*, June 2004.

- 5.48 The Committee acknowledged, however, that: this power is only for transitional purposes; that the regulations must be made within 12 months of commencement; and the regulations cannot operate so as to prejudice or impose liabilities on any person. However, the regulations can have retrospective operation under clause (4).⁵²
- 5.49 The Committee recommended amendments to the bill to address this issue. The bill and the Committee's report are yet to be debated by the House.

Erosion of state parliamentary privilege

Principle

- 5.50 It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a 'necessary implication' to that effect.⁵³
- 5.51 'Necessary implication' would require the relevant statutory scheme to be rendered meaningless if an interpretation affecting parliamentary privilege was *not* applied.⁵⁴ As was stated in a recent case there is "*implausibility*" in the "*proposition that Parliament should have intended by ... indirect means to surrender by implication part of the privilege attaching to its proceedings.*"⁵⁵
- 5.52 It is notable that in the United States the courts have consistently held that a statutory secrecy provision does not prevent the Houses of Congress or their committees requiring the production of the protected information.⁵⁶

⁵² The retrospective nature of transitional regulations was canvassed in detail in the *Committee's Fifteenth Report* concerning clause 64 of the Australian Crime Commission (Western Australia) Bill 2003: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 15: Australian Crime Commission (Western Australia) Bill 2003*, June 2004. See also paragraphs 5.24 to 5.29.

⁵³ *Daniels Corporations International Pty Ltd and Anor v ACCC* [2002] HCA 49, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [11]. See also: *Baker v Campbell* (1983) 153 CLR 52; *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

⁵⁴ *Daniels Corporations International Pty Ltd and Anor v ACCC* [2002] HCA 49, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [43] (dealing with the question of abrogation of legal professional privilege). It is noted that the Clerk of the Senate does not appear to subscribe to the view that parliamentary privilege may be affected by 'necessary implication': "*Once the principle that parliamentary privilege is not affected by a statute except by express words is abandoned, there is no end to the provisions which may be interpreted as inhibiting the powers of the Houses and their committees*": H Evans (ed), *Odggers Senate Practice*, Department of the House of the Senate, Canberra, 2001, (10th edition) pp.50-51.

⁵⁵ *Criminal Justice Commission v Dick* [2000] QSC 272 upheld on appeal (2002) 2 Qd R 8. The discussion on statutory construction in this case was in the context of whether or not by providing for a limited immunity for acts and omissions of the parliamentary commissioner in *Criminal Justice Act 1989* (Qld), Parliament intended substantially to derogate from its own privilege.

⁵⁶ For example: *FCT v Owens-Corning Fibreglass Corp.*, 1980 626 F 2d 966, cited in H Evans (ed), *Odggers Senate Practice*, Department of the House of the Senate, Canberra, 2001, (10th edition) Supplement to p51.

- 5.53 The paramount position should be that secrecy provisions do not have any effect on the powers of the Houses of Parliament and their committees to conduct inquiries. It is also to be noted that the law of parliamentary privilege provides absolute immunity to the giving of evidence to a House of Parliament or a committee and to disclosures made in a 'parliamentary proceeding'.⁵⁷
- 5.54 The basic issue is one of statutory interpretation, that is, whether Parliament when it enacts a secrecy provision can be taken to have overridden the parliamentary powers, privileges and immunities under the *Parliamentary Privileges Act 1891*. Parliament should not be taken as intending to override its powers, privileges and immunities unless there are express words or a necessary implication to indicate a contrary intention. As it has been noted by one commentator:

*Disagreement tends to turn on the nature of the provisions which are needed to evince the contrary intention. The nature of statutory presumptions of this kind makes it almost inevitable that there will be disagreement about the kind of provisions needed to show the existence of the contrary intention.*⁵⁸

- 5.55 Ultimately statutory interpretation is a matter for the courts. The intention of Parliament, however, is relevant to such interpretation.

Examples

National Crime Authority (State Provisions) Amendment Bill 2002

- 5.56 The Committee's *Fifth Report*, in relation to the National Crime Authority (State Provisions) Amendment Bill 2002, noted an interesting consequence of the adoption of the Commonwealth Criminal Code.⁵⁹
- 5.57 The Committee's report expressed concern about the effect on state parliamentary privilege of the abolition of reasonable excuse as, amongst other things, an excuse for failing to answer a question. In particular, the Committee was concerned as to whether a Commonwealth law may expressly negate what would otherwise be an immunity derived from state parliamentary privilege. Although there were no express provisions in the Commonwealth Act (the *National Crime Authority Act 1984* (Cth)) that used language or express words to erode parliamentary privilege, the intent of the section was to confine any defence to one of those specified in the Commonwealth's

⁵⁷ Article 9, *Bill of Rights 1689*; section 36, *Constitution Act 1890*; and *Parliamentary Privileges Act 1891*.

⁵⁸ Lindell, Geoffrey 'Parliamentary Inquiries and Government Witnesses', *Melbourne University Law Review*, Vol 20 (1995) 383 at pp.408-409.

⁵⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002.

Criminal Code (which does not include State parliamentary privilege). Case law is unsettled with respect to this issue and the Committee's report requested clarification from the Minister.

5.58 The bill and the Committee's report are yet to be debated by the House.⁶⁰

Australian Crime Commission (Western Australia) Bill 2003

5.59 The Committee's *Fifteenth Report* regarding the Australian Crime Commission (Western Australia) Bill 2003, discussed and recommended amendment to address provisions that arguably affected the operation and effect of parliamentary privilege.⁶¹

5.60 The Committee's report noted that:

- Prior to the enactment of the amendments contained in the *National Crime Authority Legislation Amendment Act 2001* (Cth) there was a defence of 'reasonable excuse' available in relation to attendance at a National Crime Authority hearing and the answering of questions or the production of documents.
- The *National Crime Authority Legislation Amendment Act 2001* (Cth) abolished the defence of reasonable excuse for non-attendance at National Crime Authority hearings under the *National Crime Authority Act 1984* (Cth). The bill replicates the current Commonwealth position under the *National Crime Authority Act 1984* (Cth), that is there is no defence of reasonable excuse available for Australian Crime Authority hearings.

5.61 The Committee's *Fifth Report* (on the National Crime Authority (State Provisions) Amendment Bill 2002), indicated that the effect of the Commonwealth and proposed State amendments created uncertainty as to whether it was intended to extinguish a defence of 'reasonable excuse' founded on a claim of parliamentary privilege.⁶²

5.62 The Committee was of the view that the issue should be clarified. This issue also arises in relation to the relevant Commonwealth legislation and the bill.

⁶⁰ See also the Committee's report on the Higher Education Bill 2003: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 11: Higher Education Bill 2004*, September 2003, pp.24-34. The bill and the Committee's report are yet to be considered by the Legislative Council.

⁶¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 15: Australian Crime Commission (Western Australia) Bill 2003*, June 2004, pp.51-55.

⁶² Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, pp.7-12.

- 5.63 After inquiry by the Committee, the Minister for Police and Emergency Services indicated that it is ‘arguable’ that the issue of a summons or notice under the provisions of the bill to a Member of Parliament whilst Parliament is sitting could constitute a contempt of Parliament. However, the Committee noted advice from the Clerk of the Council that it was not ‘arguable’ and would constitute a contempt of Parliament. The Committee also noted these views were at variance with the Minister’s advice that parliamentary privilege under the *Parliamentary Privileges Act 1891* was to be abrogated by the bill.
- 5.64 In light of these conflicting views, the Committee’s report concluded that the issue was most appropriately resolved by an amendment to the bill to expressly preserve the operation of the *Parliamentary Privileges Act 1891*.
- 5.65 Clause 44(3) of the bill also intended to preserve the secrecy of information relating to the Australian Crime Commission’s functions where a ‘court’ would otherwise have power to require the production of documents or the answering of questions by certain Australian Crime Commission officers that would disclose that information.
- 5.66 Clause 44(4) of the bill provides that ‘court’ is defined for the purposes of the clause as including “...any tribunal, authority or person having power to require the production of documents or the answering of questions”.
- 5.67 The Committee noted that parliamentary privilege, in particular, the *Parliamentary Privileges Act 1891*, enables parliamentary committees to compel: the attendance of witnesses; the giving of evidence; and the production of documents. Therefore, the Committee observed that parliamentary committees fall within the definition of ‘court’. Consequently, it might be argued that the statutory secrecy provisions in clause 44 of the bill (and section 51 of the *Commonwealth Act*) would prevent the Chief Executive Officer, a member of the proposed Board of the Australian Crime Commission, a member of the staff of the Australian Crime Commission and an examiner from producing information to a parliamentary committee of the Western Australian Parliament.
- 5.68 Although the Committee noted the view that the bill does not abrogate the *Parliamentary Privileges Act 1891* through necessary intendment, this view contrasted with advice received from the Minister (see paragraph 5.63). The Committee’s report recommended an amendment to the Australian Crime Commission (Western Australia) Bill 2003 to address this matter.
- 5.69 The bill, and the Committee’s report, are yet to be debated in the House.

Review*Principle*

5.70 In some uniform bills which adopt Commonwealth legislation, whilst provision is made for a review at Commonwealth level no provision is made for:

- a) a review of the effects of the legislation at a state level; or
- b) for the tabling of the Commonwealth review in State Parliament.

5.71 In some of its reports the Committee considered it desirable that the state legislative component of the uniform scheme provide for the conduct and tabling of a review.

Examples

Human Reproductive Technology Amendment Bill 2003 and Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003

5.72 The Committee's *Thirteenth Report* in relation to the Human Reproductive Technology Amendment Bill 2003 and Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003 (**State Bills**), discussed the requirements for a provision for state review of the state legislative component.⁶³

5.73 Both the *Research Involving Human Embryos Act 2002* (Cth)⁶⁴ and the *Prohibition of Human Cloning Act 2002* (Cth)⁶⁵ (**Commonwealth Acts**) set out requirements for the review of each respective Act. The Commonwealth Acts provide that the review reports must be given to the Council of Australian Governments and both Federal Houses of Parliament before the third anniversary of the day on which the *Prohibition of Human Cloning Act 2002* (Cth) received royal assent.⁶⁶

5.74 The State Bills require that the responsible Minister must cause a review to be undertaken as soon as possible after December 19 2004.⁶⁷ The State review may be undertaken as part of the Commonwealth review. However, the State Bills did not

⁶³ Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 13: Human Reproductive Technology Amendment Bill 2003 and the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003*, Western Australia, December 2003.

⁶⁴ Section 47 states that the National Health and Medical Research Council must cause an independent review as soon as possible after the second anniversary of the day on which the Act received Royal Assent.

⁶⁵ Section 25 states that the Minister must cause an independent review as soon as possible after the second anniversary of the day on which the Act received Royal Assent.

⁶⁶ Which according to s.2 of the *Prohibition of Human Cloning Act 2002* (Cth) would be December 19 2005.

⁶⁷ Clause 36 of the Human Reproductive Technology Amendment Bill 2003 and clause 8 of the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003.

specify a requirement that the State review (or the Commonwealth review if the two are combined) be tabled in State Parliament, only that the Minister must cause a review to be undertaken.

- 5.75 The Committee noted that the State Bills reflect the Commonwealth Acts and that any review of the Commonwealth provisions would assist in any discussion of the operation and effectiveness of the provisions proposed to be inserted into the State's *Human Reproductive Technology Act 1991* by the State Bills. In light of the contentious issues raised by the State Bills, the Committee recommended that the State Bills be amended to ensure the tabling of any reviews in State Parliament so as to ensure accountability and scrutiny.
- 5.76 The Committee's report and the State Bills were considered by the House and amendments to the bills effected in accordance with the Committee's recommendations.⁶⁸

Australian Crime Commission (Western Australia) Bill 2003

- 5.77 The issue of provision for review was also noted by the Committee in its *Fifteenth Report* in relation to the Australian Crime Commission (Western Australia) Bill 2003.⁶⁹
- 5.78 Section 61A of the relevant Commonwealth Act (the *Australian Crime Commission Act 2002* (Cth)) provided for a review of the operation of the Commonwealth Act. The section raised the following matters which were canvassed in the Committee's report:
- a) tabling of the Commonwealth review in State Parliament;
 - b) the scope of the Commonwealth review; and
 - c) the conduct of a State review and its tabling in State Parliament.
- 5.79 In relation to (a) the Committee noted that, unlike other uniform legislation that it had considered,⁷⁰ there was:
- no provision in the Commonwealth Act for the Commonwealth review to be provided to the State Minister on the intergovernmental committee; and

⁶⁸ Legislative Council, *Parliamentary Debates (Hansard)*, June 30 2004, pp.4557-4558.

⁶⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 15: Australian Crime Commission (Western Australia) Bill 2003*, June 2004.

⁷⁰ For example: section 25, *Prohibition of Human Cloning Act 2002* (Cth) and s.47, *Research Involving Human Embryos Act 2002* (Cth) which relate to the Human Reproductive Technology Amendment Bill 2003 and the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003.

- no requirement that the State Minister table the Commonwealth review in State Parliament.
- 5.80 Despite that fact that the Commonwealth review, once tabled in Commonwealth Parliament, is made public, the Committee saw merit in the review also being formally tabled in State Parliament. In the Committee's view this would ensure that the issues raised by the Commonwealth review are directly brought to the attention of the State Parliament thereby providing greater scrutiny of the operations of the Australian Crime Commission under the complementary legislation. Accordingly, the Committee considered it appropriate that a clause be inserted into the bill to provide that after the tabling of the Commonwealth review in the Commonwealth Parliament, the State Minister also table the Commonwealth review in the State Parliament.
- 5.81 In relation to (b), the Committee noted that, unlike other uniform legislation that it had considered,⁷¹ the Commonwealth Act did not expressly require the Commonwealth to undertake a review involving consultation with the states.
- 5.82 The Committee observed that because the State Parliament cannot make amendments to the Commonwealth Act, the State Minister could make representations to the intergovernmental committee for an amendment to the Commonwealth Act. However, the Committee noted that a more direct approach would be for the bill to include a clause requiring a review of the operation of the bill to occur.
- 5.83 In relation to (c), that is, the conduct of a State review and its tabling in State Parliament, the Committee noted that that there was no provision in the bill requiring a review to be undertaken of the operation of the bill: that is, a review of the State component of the legislative scheme. The Committee observed that this was in contrast to other uniform legislation that the Committee had considered.
- 5.84 The Committee considered that a review of the operation of the bill should occur to ensure that the operation of the uniform legislative regime at the State level is considered and the review should be tabled in State Parliament. The Committee made recommendations to this effect.
- 5.85 The Committee's report and the bill are yet to be debated in the House.

Amendments

- 5.86 The Committee has noted that a common difficulty with most forms of national scheme legislation is that any proposed amendments at the State level may be met by

⁷¹ Ibid.

an objection from the Executive that consistency with the legislative form agreed among the various Executive Governments is a 'given'.⁷²

5.87 When addressing any issues in the context of a piece of uniform legislation the Committee may consider:

- i) The model of uniform legislative scheme employed;⁷³ and
- ii) What the relevant intergovernmental agreement (**IGA**) for the particular scheme says in relation to amendments. The IGA (or memorandum of understanding) may limit the ability for the State to depart from the legislative scheme.

5.88 However the Committee does not assume that just because a bill is a piece of uniform legislation that the State cannot amend it. Indeed, in recent reports the Committee (and the Legislation Committee when it had the mandate to scrutinise uniform bills) has recommended amendments to uniform bills that were substantive or dealt with 'Henry VIII clauses'. Those recommended amendments (or a variant) have been passed by the House.⁷⁴

5.89 The manner and extent to which the underlying IGA/memorandum of understanding may govern future amendments to bills forming part of a national scheme was discussed in the Committee's *Nineteenth Report*.⁷⁵

6 ISSUES FACING THE COMMITTEE AND COMMITTEE INITIATIVES

Introduction

6.1 In this Parliament, difficulties have been experienced with:

- a) the identification of bills to which standing order 230A applies and the timetable for the passage of some legislation;

⁷² For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp.7-12.

⁷³ Refer to any of the reports of the Legislative Council Uniform Legislation and General Purposes Committee which discuss the types of models used to enact uniform legislation - some models are more flexible than others. Also see Appendix 4.

⁷⁴ For example, refer to the amendments made by the Legislative Council to the Criminal Code Amendment Bill 2003, Human Reproductive Technology Amendment Bill 2003, Human Reproductive Technology Amendment (Prohibition of Cloning) Bill 2003 and Offshore Mineral Bill 2003.

⁷⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 19: Uniform Legislation and Supporting Documentation*, August 2004, p.19. See also: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 9: Consumer Credit (Western Australia) Amendment Bill 2002*, May 2003, pp.4-5; and *Report No 13: Human Reproductive Technology Amendment Bill 2003* and the *Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003*, Western Australia, December 2003, pp.8-9.

- b) provision of supporting documentation to the Committee;
- c) reporting bills within the ‘default period’ of 30 days provided for in standing order 230A;
- d) State legislation incorporating definitions from the legislation of other jurisdictions; and
- e) the consideration of treaties.

Identifying bills to which SO 230A might apply and the provision of supporting documentation to the Committee

6.2 The matters referred to at paragraphs (a) and (b) above were examined in detail in the Committee’s *Nineteenth Report*. In that report the Committee made a number of recommendations to address the challenges being faced by the Committee. Early responses to the House from some Ministers have been supportive. The Premier is yet to respond in relation to the recommended Premier’s Directive.⁷⁶ Pursuant to Legislative Council standing order 337 the due date for government responses to the Committee’s *Nineteenth Report* is December 27 2004.

Thirty days to report

6.3 It is apparent to the Committee that the 30 (calendar) days referred to in standing order 230A(4) is too short a time for many uniform bills to be given anything more than a cursory examination. This is particularly so when information is not promptly provided by the Executive. Although standing order 230A(4) makes provision for a different period to be ordered, the ‘default period’ of 30 (calendar) days needs to be revisited. This issue was canvassed in detail in the Committee’s *Nineteenth Report*.⁷⁷

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

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

⁷⁶ See Recommendation No 1 of the Committee’s *Nineteenth Report*: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 19: Uniform Legislation and Supporting Documentation*, August 2004, p.29.

⁷⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 19: Uniform Legislation and Supporting Documentation*, August 2004, pp.3-7.

- 6.5 The Committee observes that if the notice of motion given by Hon Adele Farina MLC is not dealt with in this Parliament, then it is of the view that the default period in standing order 230A(4) be considered by the House in the next Parliament with a view to amending the standing order to refer to “30 sitting days” as opposed to “30 days”.

Recommendation 2: The Committee recommends that, if the notice of motion given by Hon Adele Farina MLC on April 7 2004 is not resolved in this Parliament, then the default period in standing order 230A(4) should be considered by the House in the next Parliament with a view to amending the standing order to refer to “30 sitting days” as opposed to “30 days”.

State legislation incorporating definitions from the legislation of other jurisdictions.

- 6.6 In its *Seventh Report* the Committee considered the Unclaimed Money (Superannuation and RSA Providers) Bill 2002.⁷⁸ This legislation is complementary to legislation passed by the Commonwealth and is similar to that introduced by other States and Territories. A substantial number of terms in the bill are defined by reference to various sections and Parts of numerous Commonwealth Acts, and in many cases simply by reference to an entire Commonwealth Act. The Committee noted that this makes it very difficult for people reading the bill, and in particular members considering and debating the bill in the House, to access all the legislation referred to in the bill in a short period of time.⁷⁹
- 6.7 The Committee observed that, for ease of reference when considering the bill, it would have greatly assisted members if the meanings of all terms defined by reference to a Commonwealth Act had been included in the Explanatory Memorandum (or included the Minister’s Second Reading Speech to the Bill if no Explanatory Memorandum had been provided to the House).
- 6.8 The Committee recommended that:⁸⁰

... in future, and as a matter of general practice, where a Bill contains terms that are defined by reference to Commonwealth legislation, those Commonwealth definitions be set out in the Explanatory Memorandum or Second Reading Speech to the Bill if no Explanatory Memorandum is provided in the Legislative Council

- 6.9 By way of government response dated May 21 2003, the Premier advised that:⁸¹

⁷⁸ Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes: *Report No 7: Unclaimed Money (Superannuation and RSA Providers) Bill 2002*, April 2003.

⁷⁹ Ibid, pp.7-8.

⁸⁰ Ibid, p.8.

⁸¹ Tabled in the Legislative Council on June 10 2003: Legislative Council Tabled Paper No. 1080.

As a general matter, the Government is happy to agree to this recommendation and will, where possible, endeavour to include this information in the material presented to the Legislative Council. There may, of course, be occasions when for example, due to the length of bulk of the material, this will not be feasible. In such cases the Commonwealth legislation will be available for members to consider and examine.

- 6.10 The Committee is pleased to note that the Government has agreed to its recommendation and looks forward to seeing it implemented in practice.

Consideration of treaties by a parliamentary committee

The impact of treaties on Western Australia

- 6.11 The provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australian municipal law by statute. However, an international treaty has certain legal force in that the courts can take a treaty into account where there are uncertainties or ambiguities with a particular piece of legislation purports to give effect to a treaty.⁸²
- 6.12 Further, as noted in a report of the former Legislative Council Standing Committee on Constitutional Affairs:⁸³

High Court cases demonstrate the extent of the Commonwealth's power to use treaties as a way of overriding State legislation and its underlying policy. ... The only limitations the High Court has placed on treaty implementation is that the legislation must not violate other provisions of the Constitution and that treaties must be entered into in good faith, without the intention to simply extend the powers of the Commonwealth. Provided that this is not its sole purpose in entering into a treaty, the Commonwealth has the potential to legislate in any area formerly the province of a State, and such Commonwealth legislation must supersede existing State legislation.

- 6.13 That report also noted that treaties may also have an administrative impact on State law.⁸⁴ The High Court decision in *Minister for Immigration v Teoh* (1995) 183 CLR 273 requires that administrative decisions taken by Commonwealth officials reflect Australia's participation in treaties and conventions. Such international instruments

⁸² P. Hanks, P Keyzer and D Creamean, 'Constitutional Law' *Halsbury's Laws of Australia*, para. 90-1660, see website at www.butterworthsonline.com.au, (accessed October 29 2004).

⁸³ Parliament of Western Australia, Legislative Council, Standing Committee on Constitutional Affairs: *Report No 38: A Seminar on the Role of Parliaments in Treaty Making Canberra 24 and 25 June 1999*, July 1999, pp.4-5.

⁸⁴ *Ibid*, p.7.

do not of themselves alter domestic law, but raise a legally recognisable expectation that decisions will reflect their existence. It is an open question as to whether State officials must also take note of treaties in their decisions.⁸⁵

Constitutional Affairs Committee of the Thirty-Fifth Parliament

6.14 Before September 1999, no Western Australian parliamentary committee had ever examined treaties. In August 1999 it was noted in Parliament by Hon Murray Nixon MLC, chairman of the former Legislative Council Standing Committee on Constitutional Affairs (**Constitutional Affairs Committee**), that although the Commonwealth Government sent copies of proposed treaties to the State Governments, they did not go directly to the State Parliaments for tabling.⁸⁶

6.15 In August 1999, the Constitutional Affairs Committee tabled its *Thirty-Eighth Report* on the Commonwealth's Joint Standing Committee on Treaties (**JSCOT**) seminar that was held in Canberra where:⁸⁷

[it was] agreed by the majority of delegates at the seminar that there is a need for scrutiny of proposed treaties at the State level. Treaties and related information should be tabled in State Parliaments and State Parliamentary Committees should be given the role of investigating treaty matters and reporting to the State Parliaments on the impact of treaties on the State.

6.16 The Constitutional Affairs Committee report made three recommendations. Relevantly, recommendation 2 stated:⁸⁸

That treaties be scrutinised at the state level at the earliest opportunity. More particularly, treaties and related information should be tabled in State Parliaments and State Parliamentary Committees should be given the role of investigating treaty matters.

6.17 It was noted in parliamentary debate that the Constitutional Affairs Committee was the "*best committee to undertake this task*".⁸⁹ As a result the President of the

⁸⁵ Ibid.

⁸⁶ Hon Murray Nixon, former MLC and Chairman, Constitutional Affairs Committee, Legislative Council, *Parliamentary Debates (Hansard)*, August 19 1999, p.469.

⁸⁷ Parliament of Western Australia, Legislative Council, Standing Committee on Constitutional Affairs: *Report No 38: A Seminar on the Role of Parliaments in Treaty Making Canberra 24 and 25 June 1999*, July 1999, paragraph 7.2.

⁸⁸ Ibid, p.8.

⁸⁹ Hon Ray Halligan MLC member of the former Constitutional Affairs Committee, Legislative Council, *Parliamentary Debates (Hansard)*, August 19 1999, p.470. The former committee's terms of reference included: "(b) the constitutional or legal relationships between Western Australia and the Commonwealth, the States and Territories, and any related matter or issue;"

Legislative Council formally advised the Chairman of JSCOT that the Constitutional Affairs Committee was the appropriate forum to review treaty information.⁹⁰

- 6.18 However, after September 1999, the Constitutional Affairs Committee's reports do not reveal any formal review of treaties during the remainder of the Thirty-Fifth Parliament.⁹¹

Uniform Legislation and General Purposes of the Thirty-Sixth Parliament

- 6.19 On March 21 2002, the Legislative Council Procedure and Privileges Committee tabled a report recommending the establishment of a new committee of three members to address: uniform legislation (standing order 230A); proposals for uniform legislation; treaties and other international agreements that require the Commonwealth to enact domestic law; and any bill/matter referred by the House or on request from a State or Commonwealth authority.⁹²

- 6.20 The Committee notes that the recommendation in relation to treaties appears at reference 7.3(c) which provides that one of the functions of the Committee is 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.

Commonwealth Joint Standing Committee on Treaties

- 6.21 JSCOT was appointed by the Commonwealth Parliament to review and report on all treaty actions proposed by the Commonwealth Government before action is taken that binds Australia to the terms of the treaty. JSCOT was first established in 1996 as part of a package of reforms to improve the openness and transparency of the treaty making process in Australia.⁹³
- 6.22 The treaty making process requires that all 'treaty actions' proposed by the Commonwealth Government are tabled in the Commonwealth Parliament for a period of at least 15 sitting days before action is taken that will bind Australia at international

⁹⁰ Letter to Hon Andrew Thomson, MP, Chairman, JSCOT, September 8 1999.

⁹¹ One submission was made by the former Constitutional Affairs Committee to the Chairman of Queensland's Constitutional and Administrative Review Committee regarding an inquiry it was conducting into the role of the Queensland Parliament in treaty making: Submission to the Chairman of Queensland's Constitutional and Administrative Review Committee, dated December 1 1999.

⁹² Parliament of Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, *Report No 3: Report in relation to proposals - 1. to alter the membership and functions of the Legislation Committee and establish a new standing committee as a consequence; 2. to repeal SO 72 and substitute a new SO 72*, March 2002, p.3.

⁹³ Commonwealth Parliament website: <http://www.aph.gov.au/house/committee/jsct/ppgrole.htm> (accessed on November 3 2004).

- law to the terms of the treaty.⁹⁴ Depending on the type of treaty the period may be extended to 20 sitting days.⁹⁵
- 6.23 The one exception to the rule that treaties be tabled before binding treaty action is taken is where the Commonwealth Minister for Foreign Affairs certifies that a treaty is particularly urgent or sensitive, involving significant commercial, strategic or foreign policy interests.⁹⁶
- 6.24 When tabled in the Commonwealth Parliament, the text of proposed treaty actions are accompanied by a National Interest Analysis (NIA), which explains why the Commonwealth Government considers it appropriate to enter into the treaty. An NIA includes information about:⁹⁷
- a) the economic, environmental, social and cultural effects of the proposed treaty;
 - b) the obligations imposed by the treaty;
 - c) how the treaty will be implemented domestically;
 - d) the financial costs associated with implementing and complying with the terms of the treaty; and
 - e) the consultation that has occurred with State and Territory Governments, industry and community groups and other interested parties.
- 6.25 The text and NIA for each proposed treaty are automatically referred to the JSCOT for review. JSCOT advertises its reviews in the national press and on its website, inviting comments from anyone with an interest in the subject matter of the proposed treaty. JSCOT also routinely takes evidence at public hearings from government agencies and people who have made written submissions. As part of this review, copies of treaties are sent to relevant state parliamentary committees for comment.⁹⁸

⁹⁴ The phrase 'treaty actions' has a broad meaning. It covers bilateral and multilateral agreements and encompasses a range of actions including entering into new treaties, amendments to existing treaties and withdrawal from treaties: Commonwealth Parliament website at <http://www.aph.gov.au/house/committee/jsct/ppgrole.htm> (accessed on November 3 2004).

⁹⁵ Letter to the Committee from Ms Gillian Gould, Committee Secretary, JSCOT, September 2 2003.

⁹⁶ Commonwealth Parliament website at <http://www.aph.gov.au/house/committee/jsct/ppgrole.htm> (accessed on November 3 2004).

⁹⁷ Ibid.

⁹⁸ Ibid.

6.26 At the completion of its inquiries JSCOT presents a report to the Commonwealth Parliament containing advice on whether Australia should take binding treaty action and on other related issues that have emerged during its review.⁹⁹

Consideration of treaties by the Committee

6.27 JSCOT continues to send correspondence relating to treaties to the Committee, but to date the Committee has not been in a position to consider the treaties in detail or report on any of them. In the Committee's view this is due, in part, to the extremely short period of time within which the Committee must provide comment to JSCOT.

6.28 Prior to August 2002, JSCOT itself had only 15 sitting days within which it could review treaties and report to the Commonwealth Parliament. This period was amended, in respect of treaties falling within Category B, on August 20 2002 to 20 sitting days.¹⁰⁰

6.29 Despite the five additional sitting days, the reporting timeframes remain problematic for the Committee. In the Committee's view this is primarily due to:

- a) the short reporting timeframes for reporting uniform bills to the House which requires priority to be afforded to term of reference 7.3(a); and
- b) the fact that sitting weeks of the Commonwealth Parliament do not necessarily coincide with sitting weeks of the Legislative Council. Although the Commonwealth Parliament may be in session the Legislative Council may be in recess and the Committee may not be meeting; and
- c) the short period of time provided by JSCOT enables only the most cursory examination by the Committee and little opportunity to consult with any stakeholders. Of necessity, the period is always less than the 15 or 20 days within which JSCOT itself must report back to the Commonwealth Parliament. One view might be that the consultation by JSCOT with state parliamentary committees is illusory.

⁹⁹ Ibid.

¹⁰⁰ Letter to the Committee from Ms Gillian Gould, Committee Secretary, JSCOT, September 2 2003.

Category A treaties, comprising about two thirds of Australia's current treaty action, are for the most part uncontroversial in nature and relatively routine in form. They are considered by the Joint Standing Committee on Treaties within 15 parliamentary sitting days. Other treaties are less routine and sometimes may be controversial. They can be of major political, economic or social significance and they often attract considerable public interest and debate. Because the Government believes it important that the scrutiny of such Category B treaties should be as thorough and reasonable as possible, the tabling period is 20 sitting days: website of the Department of Foreign Affairs and Trade: <http://www.dfat.gov.au/treaties/making/category.html> (accessed November 3 2004).

6.30 To date, the Committee has not responded to any of JSCOT's requests for comment on treaties although it has expressed its concerns in relation to the short timeframe for consultation.¹⁰¹

Considerations for the next Parliament

6.31 The debate on the former Constitutional Affairs Committee's *Thirty-Eighth Report* emphasised the importance of a parliamentary committee reviewing the treaty making process and tabling of treaties in State Parliament.¹⁰²

6.32 The Committee believes that there is a need for scrutiny of proposed treaties at the State level and that it is essential for the views of the various State and Territory Parliaments to be taken into account by the Commonwealth Government through its committee system. To enable State to play an effective role in the treaty process, the Commonwealth must allow sufficient time for consultation with the States prior to treaty ratification.

6.33 The Committee considers that:

- a) the Minister for State and Federal Relations do liaise with relevant Ministers of other Australian jurisdictions, in particular the Commonwealth Minister for Foreign Affairs and Trade, with a view to ascertaining whether the period provided to state parliamentary committees for consultation on proposed treaties can be extended to enable sufficient and proper state parliamentary scrutiny to occur; and
- b) subject to an extension of time for consultation being achieved, then in the next Parliament, an express treaty reviewing function be given to a relevant committee with sufficient resources to undertake the work. The Committee emphasises that to enable the State to play an effective role in the treaty process, the Commonwealth must allow sufficient time for consultation with the States prior to treaty ratification.

Recommendation 3: The Committee recommends that the Minister for State and Federal Relations do liaise with relevant Ministers of other Australian jurisdictions, in particular the Commonwealth Minister for Foreign Affairs and Trade, with a view to ascertaining whether the period provided to state parliamentary committees for consultation on proposed treaties can be extended to enable sufficient and proper state parliamentary scrutiny to occur.

¹⁰¹ Letter from the Committee to JSCOT, August 14 2002.

¹⁰² Legislative Council, *Parliamentary Debates (Hansard)*, August 19 1999, pp.469-470.

Recommendation 4: The Committee recommends that in the next Parliament, subject to an extension of time for consultation in relation to treaties being achieved, an express treaty reviewing function be given to a relevant parliamentary committee with sufficient resources to undertake the work.

Activation of the Committee's scrutiny function by reference from a Minister

6.34 Term of reference 7.3(b) provides that the Committee may:

... 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;

6.35 Since the Committee's inception, no Minister has sought to refer any matter to the Committee for inquiry and report pursuant to term of reference 7.3(b).

7 PROPOSED UNIFORM LEGISLATION

'Six-monthly audit'

7.1 The Committee continued its initiative outlined in its first *Sessional Report* in an endeavour to identify bills that may become subject to standing order 230A if tabled in the Legislative Council.

7.2 The Committee has identified certain areas in which the issue of proposed uniform legislation has been raised and which might be tabled in Parliament over each forthcoming six-month period. This is through a process that the Committee colloquially calls a 'six-monthly audit'.

7.3 Every six months the Committee writes to Ministers requesting information on what bills implementing national legislative schemes might be tabled in the forthcoming six-month period. The most recent audit for this reporting period was when the Committee wrote to Ministers on August 26 2004. As at November 4 2004, 13 Ministers have responded.

7.4 This process assists the Committee to plan its workload and, if desired, conduct pre-emptive research on a bill or activate term of reference 7.3(b).¹⁰³ A spreadsheet is compiled from the responses and copied to the Legislative Council Table Officers to facilitate easier identification of bills to which standing order 230A applies.

¹⁰³ Term of reference 7.3(b) provides for one of the functions of the Committee is, "*of its motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to standing order 230A*".

7.5 As at the date of this report the Committee has been advised by Ministers that the following legislation may be introduced and may fall to be considered under standing order 230A.¹⁰⁴

- Amendments to the *Gas Pipelines Access Act (WA) 1998* to address institutional arrangements being advanced in relation to an Australian Energy Market Commission to replace the National Gas Pipelines Advisory Committee and the Code Registrar.
- A Land Information Bill.
- Petroleum Legislation Amendment and Repeal Bill 2004.
- Another Petroleum Legislation Amendment and Repeal Bill.
- A Road Traffic Amendment Bill to address Driver Licensing Policy - Primary Principles.
- Amendments to the *Road Traffic Act 1974* to implement policy objectives of the national road transport Reform (Compliance and Enforcement) Bill.
- A Trade Measurement Bill and Trade Measurement Administration Bill.
- A Transport Co-ordination Amendment Bill.
- Vocational Education & Training Act addressing model clauses for National Registration & Accreditation (of training providers).
- Legislation to address 'double jeopardy'.

8 OTHER ACTIVITIES

Conferences and seminars

8.1 Committee members and staff attended and participated in two conferences during this reporting period.

Meeting of Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees: Hobart, February 3 2003

8.2 A meeting of the Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees was convened in Hobart on

¹⁰⁴ Standing Order 230A would also have applied to the Community Protection (Offender Reporting) Bill 2004 however on November 12 2004 the Legislative Council agreed to a motion preventing the referral of that bill to the Committee: Legislative Council, *Parliamentary Debates (Hansard)*, November 12 2004.

February 3 2003. The Committee was represented by the Chairman, Hon Adele MLC and also attended by the Committee's (then) Advisory Officer, Ms Felicity Mackie.

- 8.3 At that meeting the Chairman presented a report from the Committee: *The Victorian Proposal for National Scrutiny of National Schemes of Legislation: A Perspective of a New Member of the Working Group*.¹⁰⁵ A copy of the Chairman's Report is attached as Appendix 5.

Eighth Australasian and Pacific Conference on Delegated Legislation and Fifth Australasian and Pacific Conference on the Scrutiny of Bills: Hobart, February 4-6 2003

- 8.4 The Eighth Australasian and Pacific Conference on Delegated Legislation and Fifth Australasian and Pacific Conference on the Scrutiny of Bills was held in Hobart between February 4 and 6 2003. The Committee was represented by the Chairman, Hon Adele Farina MLC and also attended by the Committee's (then) Advisory Officer, Ms Felicity Mackie.

- 8.5 At this conference the Chairman presented a report from the Committee: *Recent Developments in the Scrutiny of Uniform Legislation by the Parliament of Western Australia*. A copy of the Chairman's report is attached as Appendix 6.

Contribution to Proposed Discussion Paper on National Scrutiny Principles

- 8.6 On February 3 2003 delegates at the Meeting of the Working Group in Hobart resolved that the Australian legislative scrutiny committee secretariats be responsible for developing a discussion paper on national scrutiny principles.

- 8.7 The objective of the resolution is to develop a discussion paper that spells out a set of scrutiny principles that will provide information to both ministerial councils and drafters on the issue that the committees would like to see addressed in national scheme legislation. The Committee understands that the intent is to move forward the national scrutiny of national scheme legislation in view of the lack of progress with the Victorian proposal (that is, a formal coordinated structure underpinned by legislation and intergovernmental agreements).

- 8.8 The development of the paper is being coordinated by the Commonwealth and Tasmanian secretariats. Each jurisdiction was asked to provide certain preliminary information by July 4 2003. In June 2003 the Committee provide detailed comment to the Senate Regulations and Ordinances Committee contributing to the proposed

¹⁰⁵ The Victorian Proposal includes a draft intergovernmental agreement and a model bill. The draft intergovernmental agreement establishes a Scrutiny of National Schemes of Legislation Committee (SNSLC) consisting members from each jurisdiction. The SNSLC is to consider any uniform bill and uniform subsidiary legislation introduced into a House of Parliament and report to the respective Parliaments of Australia. For a discussion of the Victorian Proposal refer to the Committee's *Nineteenth Report: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No 19: Uniform Legislation and Supporting Documentation*, August 2004, pp.19-21.

discussion paper on National Scrutiny Principles. The development of the discussion paper is still progressing.



Hon Adele Farina MLC
Chairman

November 18 2004

APPENDIX 1

STANDING ORDER 230A

Extract from the Standing Orders of the Legislative Council:

“Uniform legislation

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

APPENDIX 2
FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES
FOR CONSIDERATION WHEN SCRUTINISING BILLS REFERRED
PURSUANT TO SO230A

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 3
COMMITTEE REPORTS OF THE THIRTY-SIXTH
PARLIAMENT AND CONSIDERATION OF LEGISLATIVE
SCRUTINY PRINCIPLES

Appendix 3

Committee Reports of the Thirty Sixth Parliament and Consideration of Legislative Scrutiny Principles

KEY: ✓ means that the issue is discussed in the Committee's report. Numbered columns refer to the number of the issue identified in Appendix 2.

Report No	Report Title	Date tabled	Does the legislation have sufficient regard to the rights and liberties of individuals? (Number refers to issue in Appendix 2)											Does the Bill have sufficient regard to the institution of Parliament? (Number refers to issue in Appendix 2) (Also Note paragraphs 2.23 to 2.28)				
			1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
1	Offshore Minerals Bill 2001; Offshore Minerals (Registration Fees) Bill 2001; Offshore Minerals (Consequential Amendments) Bill 2001	26/06/2002				✓	✓	✓		✓	✓				✓	✓		
2	The Work of the Committee During the First Session of the Thirty-Sixth Parliament - May 1 2001 to August 9 2002	21/08/2002	Not applicable											Not applicable				
3	Censorship Amendment Bill 2002	17/10/2002				✓				✓								
4	Trans-Tasman Mutual Recognition (Western Australia) Bill 2002	17/10/2002												✓				

Report No	Report Title	Date tabled	Does the legislation have sufficient regard to the rights and liberties of individuals? (Number refers to issue in Appendix 2)											Does the Bill have sufficient regard to the institution of Parliament? (Number refers to issue in Appendix 2) (Also Note paragraphs 2.23 to 2.28)				
			1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
5	National Crime Authority (State Provisions) Amendment Bill 2002	28/11/2002						✓									✓	✓
6	Terrorism (Commonwealth Powers) Bill 2002	12/12/2002													✓			✓
7	Unclaimed Money (Superannuation and RSA Providers) Bill 2002	02/04/2003					✓						✓					
8	Gas Pipelines Access (Western Australia) (Reviews) Amendment Bill 2003	10/04/2003																
9	Consumer Credit (Western Australia) Amendment Bill 2002	06/05/2003																
10	Acts Amendment and Repeal (Competition Policy) Bill 2002	10/06/2003																
11	Higher Education Bill 2003	16/06/2003 (addendum tabled 17/06/2003)		✓				✓					✓		✓		✓	

APPENDIX 4

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.* 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 regulations of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

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 5
PAPER PRESENTED BY THE CHAIRMAN TO THE MEETING OF
THE WORKING GROUP OF CHAIRS, HOBART, FEBRUARY 3
2004

**MEETING OF WORKING GROUP OF CHAIRS AND DEPUTY CHAIRS OF AUSTRALIAN
SCRUTINY OF PRIMARY AND DELEGATED LEGISLATION COMMITTEES
HOBART - MONDAY FEBRUARY 3 2003**

**REPORT FROM THE LEGISLATIVE COUNCIL COMMITTEE OFFICE, LEGISLATIVE
COUNCIL OF WESTERN AUSTRALIA: THE VICTORIAN PROPOSAL FOR NATIONAL
SCRUTINY OF NATIONAL SCHEMES OF LEGISLATION: A PERSPECTIVE OF A NEW
MEMBER OF THE WORKING GROUP**

**1. BACKGROUND TO THE UNIFORM LEGISLATION AND GENERAL
PURPOSES COMMITTEE**

- 1.1 Since 1991 both the Western Australian Legislative Assembly and the Legislative Council have established procedures to assist Parliament in the scrutiny of uniform legislation. These have included:
- amending Legislative Council standing orders to provide for a delay before the second reading debate on a bill implementing a uniform legislative scheme could resume in the House; and
 - appointing the Legislative Council Standing Committee on Constitutional Affairs (**CONAFF**) and the Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements (**SCULIA**) with terms of reference including the scrutiny of uniform legislation.
- 1.2 **CONAFF** and **SCULIA** were reappointed in successive Parliaments until the Thirty-Sixth Parliament. They were not reappointed following reviews of the Western Australian Parliamentary Committee systems in early 2001.
- 1.3 On May 24 2001 the Legislative Council of the Thirty-Sixth Parliament appointed the Legislation Committee, with new terms of reference including the scrutiny of uniform legislation. The terms of reference for the former **CONAFF** and **SCULIA** were, in part, incorporated into the Legislation Committee's terms of reference.
- 1.4 Between June 2001 and April 2002 the Legislation Committee considered in detail, and tabled reports on, 15 bills implementing uniform legislative schemes.

Amendments were recommended to many of these bills, mainly to facilitate effective parliamentary scrutiny.

- 1.5 The volume of uniform legislation being referred to the Legislation Committee during 2001 led to the appointment of a new Legislative Council standing committee, the Uniform Legislation and General Purposes Committee. This Committee was appointed on April 11 2002 and consists of three members. The Committee's terms of reference are attached as Appendix 1 and a list of members and staff is attached as Appendix 2.

2. THE COMMITTEE'S CONSIDERATION OF THE VICTORIAN PROPOSAL

- 2.1 As a new member of the Working Group, the Committee has commenced a review of material specifically relating to the proposal put forward by the Victorian Scrutiny of Acts and Regulations Committee to the Working Group in February 2000 (**Victorian proposal**).
- 2.2 As part of its review the Committee has compiled a list of matters gleaned from papers and commentary available to it.

Issues facing any proposal

Differences between Commonwealth, State and Territory legislative scrutiny systems

- 2.3 Some jurisdictions, New South Wales being an example, do not have a scrutiny of legislation committee and the ambit of review for each committee differs. *What criteria should a national committee apply?*
- 2.4 Some jurisdictions have regulatory impact assessment and consultation procedures for bills and delegated legislation while others do not. National schemes of legislation are normally exempt from such assessment. *On what basis could a national committee purport to restore such scrutiny?* (Note: WA does not have regulatory impact assessment procedures).
- 2.5 Some state committees cannot scrutinise for national effects. The Senate Committee on Regulation and Ordinances cannot scrutinise for state effects. *How then should a national scrutiny committee's functions be conceived?*
- 2.6 The national scrutiny committee cannot report to the ministerial council, which developed the intergovernmental agreement, as this is not a legislative body. There is no national legislative body for regulatory analysis. *To what political body should the national committee report?*
- 2.7 Strict timetables accompany the implementation of NSLs (national schemes of legislation) sometimes imposed by the Commonwealth to meet an international

commitment or tied to financial grants. *To what degree will, should or could the national scrutiny committee slow the legislative process?*

- 2.8 *To what degree should any report from a national scrutiny committee replace the report of a committee in each jurisdiction or prevent an additional report from being tabled by a state committee?*

Issues facing the Victorian proposal

- 2.9 Does the Victorian proposal address the matters identified at 2.3 to 2.8 above?
- 2.10 Jurisdictions without scrutiny of legislation committees. Those jurisdictions without scrutiny of legislation committees would need to introduce legislation and/or amendments to standing orders before they could participate in a national committee scrutinising NSL primary legislation.
- 2.11 The jurisdiction of existing state parliamentary committees. The Victorian proposal appears to depend upon the various Parliaments ceding their powers of scrutiny of NSL to a national committee of which they are but one of nine representatives. Would this ceding of power require legislative amendment to exclude scrutiny of national schemes by individual Parliaments and their scrutiny committees?
- 2.12 The intergovernmental agreement itself is silent on what roles, if any, existing state parliamentary committees are to have in scrutinising uniform legislation. Would it be an erosion of state sovereignty if review by any national committee would prevent review by a state committee?
- 2.13 Would such a proposal gain the support of Parliaments traditionally wary of giving away their sovereign powers?
- 2.14 The Model Bill contains provisions that are special to Victoria and which may not be appropriately included in other states and territories. One of these provisions is the amendment of the Victorian Parliamentary Committees Act to remove jurisdiction from the Victorian Scrutiny of Acts and Regulations Committee to scrutinise uniform bills.
- 2.15 How are members to be appointed by each jurisdiction? This was raised as an issue for action by each jurisdiction at the Working Group's meeting in Melbourne in November 2000. Has this issue been addressed further?
- 2.16 How are the powers, immunities of members and justiciability of the committee's proceedings and work to be addressed? This was raised as an issue to be addressed in an amended version of the bill at the Working Group's meeting in Melbourne in November 2000. Has this issue been addressed further?
- 2.17 Meetings by audio/video link up and privilege? Has this issue been considered?

- 2.18 Voting and minority reports. If voting on the national committee is not on the basis of unanimity or the national committee does not take up the concerns of one of its members, a particular state or territory interest may be subverted by a decision of the national committee. Would this not undermine the very thing the proposal is intended to prevent – the erosion of each Parliament’s right to scrutinise NSLs and of parliamentary sovereignty in the face of executive sponsored national legislation?
- 2.19 Secretariat support. It is proposed that a Canberra based secretariat be established and then funded jointly by the participating jurisdictions. Will there be difficulty in convincing all Parliaments to contribute to funding a national committee and its supporting secretariat given existing funding limitations and how this funding is to be apportioned between the various jurisdictions?
- 2.20 An informal system of national scrutiny? At the February 2000 Working Group of Chairs meeting, Hon Angus Redford MLC, then Chairman of the South Australian Legislative Review Committee, raised concerns in relation to the Victorian proposal. Given the perceived difficulties with the formal model for the national committee, the Chairman of the South Australian Committee mooted an informal system of national scrutiny be explored before deciding whether to proceed with a formal structure. This was reiterated at the May 2002 meeting. What merit is there in this proposal? Has this been addressed further?

Appendix 1

Standing Committee on Uniform Legislation and General Purposes Appointed April 11 2002 Terms of Reference

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

“7. Uniform Legislation and General Purposes Committee

- 7.1 *A Uniform Legislation and General Purposes Committee is established.*
- 7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.
- 7.3 The functions of the Committee are –
- (a) to consider and report on bills referred under SO 230A;
 - (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to consider and report on any matter referred by the House.
- 7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Appendix 2

Members and staff of the Legislative Council Uniform Legislation and General Purposes Committee

Members

Hon Adele Farina MLC (ALP) (Chairman)

Hon Paddy Embry MLC (One Nation)(at that time)

Hon Simon O'Brien MLC (Liberal)

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APPENDIX 6

**REPORT PRESENTED BY THE CHAIRMAN TO THE
EIGHTH AUSTRALASIAN AND PACIFIC CONFERENCE ON
DELEGATED LEGISLATION AND FIFTH AUSTRALASIAN
AND PACIFIC CONFERENCE ON THE SCRUTINY OF
BILLS, HOBART, FEBRUARY 4 TO 6 2003**

**LEGISLATIVE COUNCIL OF WESTERN AUSTRALIA
STANDING COMMITTEE ON
UNIFORM LEGISLATION AND GENERAL PURPOSES**

**REPORT TO THE EIGHTH AUSTRALASIAN AND PACIFIC
CONFERENCE ON DELEGATED LEGISLATION AND THE FIFTH
AUSTRALASIAN AND PACIFIC CONFERENCE ON THE SCRUTINY OF
BILLS
HOBART, 4 - 6 FEBRUARY 2003**

**RECENT DEVELOPMENTS IN THE SCRUTINY OF UNIFORM
LEGISLATION BY THE PARLIAMENT OF WESTERN AUSTRALIA**

- 1. Scrutiny of uniform legislation by Western Australian Parliamentary Committees**
- 1.1 Legislation scrutiny committees have been appointed in WA since 1989.
- 1.2 Following reviews of the WA Parliament committee systems in early 2001 the Legislative Council of the 36th Parliament appointed the Legislation Committee with new terms of reference including the scrutiny of uniform legislation.
- 1.3 Between June 2001 and April 2002 (10 month period) the Legislation Committee considered in detail and tabled reports on 15 bills implementing uniform legislative schemes.
- 1.4 The volume of uniform legislation being referred to the Legislation Committee during this period led to the tabling, in November 2001, of a Special Report by the Legislation Committee in relation to Intergovernmental Agreements, Uniform Schemes and Uniform Laws.

Legislative Council Standing Committee on Uniform and General Purposes

- 1.5 In response to the Special Report, the Legislative Council appointed a new committee, the Uniform Legislation and General Purposes Committee, in April 2002.
- 1.6 The Committee comprises 3 members only – one Government member (the chair) and two opposition members. The Committee has the power to co-opt 2 additional members for a specific purpose or inquiry. To date this power has not been used.
- 1.7 The terms of reference of the Committee are:
- (a) to consider and report on bills referred under SO230A

This order applies to a bill that:

- ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of WA is a party; or
 - by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.
- (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 SO230A;
- (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
- (d) to consider and report on any matter referred by the House.

- 1.8 Since its first meeting in May 2002, the Committee has considered and reported on 7 uniform bills, all 7 bills have being referred under SO230A. The Committee has recommended amendments to 6 of the 7 uniform bills reported on.
- 1.9 The Committee has not by its own motion considered and reviewed the development and formulation of any proposal or agreement pursuant to its powers under term of reference (b) at paragraph 1.7. Identifying a mechanism by which the Committee can be informed of such proposals or agreements being considered by Government has proved a difficult task.
- 1.10 The Committee has been frustrated in its efforts to consider Treaties and other such instruments under terms of reference (c) at paragraph 1.7. Although the Joint Standing Committee on Treaties (JSCOT) writes to the Committee seeking its comment on Treaties before JSCOT, the 14 day time constraint for comment means that it is impossible for the Committee to review and provide considered comment. Frequently, due to the Committee's meeting schedule the comment period has expired before JSCOT's letter requesting comment can be brought to the Committee's attention.

2. Legislative Council Standing Orders

Standing Order 230A

- 2.1 SO230A provides that:
- Unless otherwise ordered, a uniform bill stands referred to the Uniform Legislation and General Purposes Committee without the question being put.
 - By order of the House, a uniform bill may be referred to a committee other than the Uniform Legislation and General Purposes Committee, or not referred to a committee at all.

- Unless otherwise ordered, the Committee must report to the House within 30 days, although the Legislative Council, on request of the Committee, may grant an extension of time to report.
- The Legislative Council has the flexibility to alter the period within which the Committee must report to the House. With the Terrorism (Commonwealth Powers) Bill 2002 the Committee was ordered to report within 7 days.
- For the suspension of the second reading debate on a uniform bill until the expiry of 30 days of the date of the first reading or until the Committee has reported, whichever is the later.
- The policy of a uniform bill is not a matter for inquiry by the Committee.

Administrative measures

- 2.2 Difficulties have been experienced with the identification of bills to which SO230A applies and the timetable for passage of some legislation.
- 2.3 In an endeavour to address these concerns the Committee, on referral of a uniform bill, writes to the responsible Minister requesting the following materials be immediately provided to the Committee:
- (i) copy of the relevant intergovernmental agreement, memorandum of understanding or other instrument that relates what the several governments has agreed to, and if not available a copy of the most recent draft with a statement as to the status of the draft;
 - (ii) statement as to any agreed timetable for the implementation of the legislation;
 - (iii) copy of the explanatory memorandum or clause notes to the bill;

- (iv) statement of the Government's policy on the bill;
- (v) statement as to the advantages and disadvantages to the State as a participant in the particular scheme;
- (vi) statement as to the constitutional issues affecting jurisdiction affected by the bill;
- (vii) explanation as to whether and by what mechanism the State can opt out of the scheme; and
- (viii) statement as to the mechanism by which the bill, once enacted, can be amended. That is, whether the Commonwealth has the power to amend the then Act of its own volition without consultation with the States and Territories or whether the agreement of all States and Territories or a majority of States and Territories is required.

2.4 In addition, every 6 months the Committee writes to all Ministers requesting information on what bills implementing legislative schemes might be tabled in the forthcoming 6 months period. This enables the Committee to plan its workload and if desired, conduct pre-emptive research on the bill.

2.5 The Committee has sought to have the following arrangements made to assist the scrutiny of uniform bills:

- Enhancing the Committee's approach at paragraph 2.3 by implementing as a Premier's Directive.
- Implementing a Premier's directive that responsible Ministers ensure that any uniform legislation of which the Minister has charge contain a prominent statement that it is legislation subject to SO230A. There are cases where the bill and its explanatory memorandum give no hint that it is giving effect to an

intergovernmental agreement or uniform scheme and the explanatory memorandum is silent on the matter.

- Executive consideration of scrutiny requirements in relation to uniform bills and ensuring that any timetable for the passage of uniform bills takes full account of the Council's procedure under its standing orders.

It is not uncommon for the Council (and the Committee) to receive uniform legislation at the last possible moment. Council Ministers are frequently placed in a position of pursuing unrealistic turnaround because the Commonwealth is demanding that the legislation pass by a particular date. The political distribution in the Council gives no comfort to a Minister trying to push through such legislation without reference to a committee.

The proposed arrangements are currently before the Premier for his consideration.

Consideration of Uniform Bills

2.6 The Committee considers whether a clause of a uniform bill:

- (a) unduly trespasses on personal rights and liberties;
- (b) makes rights, liberties and/or obligations unduly dependent upon sufficiently defined administrative powers;
- (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
- (d) inappropriately delegates legislative powers; or

(e) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

2.7 The Committee refers to the materials listed at paragraph 2.3 to assist it in its considerations.

2.8 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 the Commonwealth, States and Territories.