

CHAPTER 6

Uniform legislation

Overview

6.1 Uniform legislation refers to those bills that seek to harmonise legislation across a number of jurisdictions. This structure requires cooperation between different bodies where it is considered appropriate to take a nationally consistent legislative approach to an issue or matter.¹ In Australia, such legislation arises from the federal structure of government, which provides a constitutional division of power between the State and Commonwealth governments. For this reason it is also often described in Australia as 'national scheme legislation'.

6.2 The Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review (the WA Uniform Legislation Committee) has identified the following purposes of uniform legislation:

- achieving consistency in a common functional area (for example, criminal law);
- avoiding duplication of services between the Commonwealth and the States/Territories;
- pooling resources (for example, the administration of the First Home Owner's Grant Scheme);
- applying uniform laws to mobile resources (for example, rivers which cross State borders);
- achieving nationally consistent legislation in those areas where the Commonwealth Government has limited or no constitutional power;
- or some other harmonising purpose.²

6.3 The WA Uniform Legislation Committee has also noted that since the 1990s there has been an increased incidence of uniform legislation, primarily arising from globalisation of the economy.

6.4 The scrutiny committee's consideration of uniform laws in this inquiry has proceeded without reference to the policy details of any proposed or actual uniform laws. However, even without exploring policy specifics it is apparent that the approach has advantages and disadvantages. The use of uniform laws can be seen to

1 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, p. 4.

2 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, p. 4.

deliver benefits such as the removal of duplication of administration and compliance costs, increased efficiency, and economies of scale. However, uniform legislation can also have disadvantages, particularly in respect of parliamentary (and State) sovereignty.³

Process of formulating uniform legislation

6.5 Uniform legislation emerges primarily from the work of ministerial councils, comprising State and Commonwealth ministers responsible for particular portfolios. In some cases, ministerial councils also involve ministers from the New Zealand Government. There are currently over 40 State-Commonwealth ministerial councils and fora. The most well known are the Council of Australian Governments (COAG) and the Standing Committee of the Attorneys General.⁴

6.6 Once a ministerial council has approved a proposal for a scheme, the matter is generally referred to COAG for approval. In the event an intergovernmental agreement or uniform scheme requires legislation to give it effect, the various Ministers are responsible for sponsoring bills through individual Parliaments.⁵

Concerns about uniform legislation

Lack of information

6.7 The WA Uniform Legislation Committee has noted the difficulty in accessing information concerning the decisions of ministerial councils. Where information that a decision has been made is available, there may not be any publicly available written record of the content of the agreement beyond a statement of intention to jointly address an agreed problem. While there has been a trend in recent years for more formality, some intergovernmental agreements to implement uniform legislation are not supported by a formal document executed by the participating jurisdictions. Ministerial councils usually meet only once or twice a year and so they may settle issues by correspondence. This correspondence may constitute the only documentation supporting a proposal for uniform legislation. Even where there is a written intergovernmental agreement it is often primarily concerned with principle and provides no detail on implementation.⁶

3 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, pp 4–5.

4 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, p. 5.

5 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, p. 5.

6 Western Australian Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Information report: scrutiny of uniform legislation*, June 2011, pp 6 and 9–10.

Curtailment of parliamentary scrutiny

6.8 Further difficulty arises where intergovernmental agreements require that legislation in each jurisdiction is identical, or where identical provisions may be necessary to give practical effect to a national scheme. In these cases the ability of the Senate and its committees to effectively scrutinise and amend bills is curtailed.

6.9 An illustration of the difficulties can be found in the passage of the National Vocational Education and Training Regulator Bill 2010 (and related bills) through the Commonwealth Parliament in March 2011. The bills were the result of a referral of powers from New South Wales under section 51(xxxvii) of the Constitution. The government argued that the bills could not be amended because the referral of powers was based on the specific text of the bill as it was introduced, and any alteration of the text would result in the failure of the agreement to establish the Vocational Education and Training Regulator altogether.

6.10 This committee made several comments on the bills in its *Alert Digest No. 1 of 2011*.⁷ In addition, the Education, Employment and Workplace Relations Legislation Committee (EEWR Committee) recommended changes to the explanatory memoranda and that certain provisions of the legislation be amended once they had been enacted (and the text-based referral of powers had been effected).⁸ The EEWR Committee also specifically supported the provision of exposure drafts of such legislation in the future to enable examination of proposals by parliamentary committees *before* they were locked into the terms of intergovernmental agreements.

6.11 During debate on the bills several senators expressed concern about the curtailment of parliamentary scrutiny when bills such as these are presented to the Parliament as a *fait accompli*.⁹

6.12 The Chair of the Senate Economics Legislation Committee, Senator Mark Bishop,¹⁰ also made a submission to this inquiry about uniform legislation.¹¹ Senator Bishop described his committee's similar recent experience with uniform legislation when it was inquiring into the Business Names Registration Bill 2011 and related bills. In his submission, Senator Bishop referred to concern expressed by other Senate committees relating to national scheme legislation, including the National Vocational Education and Training Regulator Bill 2010. Senator Bishop expressed his committee's support for the EEWR committee recommendation and stated:

7 The Rule of Law Institute of Australia issued a media release dated 8 March 2011 commending the committee for its 'assiduous reporting' of rule of law concerns about provisions of the bill.

8 In response, a remedial bill was introduced in the Senate on 24 August 2011.

9 Department of the Senate, *Procedural Information Bulletin*, No. 249, 28 March 2011, p. 1.

10 Senator Bishop is also a member of the Scrutiny of Bills Committee.

11 Senate Economics Legislation Committee, *Submission 22* [2011].

...the committee suggests that for future national scheme legislation bills requiring the coordination of their passage through the various federal, state and territory legislatures, the exposure draft of the bill(s) should not be introduced into state or territory legislatures before federal parliamentary committees have had the opportunity to examine its provisions and make recommendations.¹²

6.13 A submission from the Chair of the Community Affairs Legislation Committee, Senator Claire Moore, also provides insight into that committee's experience with the National Health Reform Amendment (National Health Performance Authority) Bill 2011.¹³ The legislation was the product of a COAG decision which generally attracted broad support, although a few concerns were apparent. Senator Moore states:

Late in the committee's inquiry, the government prepared proposed amendments to the Bill and a draft supplementary Explanatory Memorandum, and provided them to the committee, following discussions between the government and a number of stakeholders, but particularly some State governments.

The committee believes that such cases demonstrate the importance of ensuring that exposure drafts are subject to consultation, including through the scrutiny committees and legislative and general purpose standing committees. The committee suggests that significant improvements in policy implementation and technical design of framework legislation and national schemes could be achieved through such a process.¹⁴

Comment

6.14 This committee shares the concerns outlined above and notes that they are not new: a Working Party of the Chairs of Scrutiny of Legislation Committees throughout Australia identified similar issues in a discussion paper issued in July 1995. The discussion paper, titled *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, stated the issues from a scrutiny perspective clearly:

...in relation to uniform legislation no changes are permitted. Committees are often told that the legislation cannot be varied because it has been carefully worked out by the relevant Ministerial Council and has national significance....This is also the case with subordinate legislation.

As a result, Scrutiny Committees are restricted from carrying out their roles in relation to uniform legislation. Practically speaking, it is fair to say that

12 *Submission 22* [2011], pp. 4 and 5.

13 *Submission 23* [2011].

14 *Submission 23* [2011], p. 2.

there is effectively no parliamentary scrutiny of national scheme legislation.¹⁵

6.15 The discussion paper goes on to state:

In a nutshell, the problems with national scheme legislation may be summarised as follows: -

- Insufficient scrutiny – there is no mechanism for scrutiny either by Parliaments or Parliamentary Committees;
- Lack of Governmental accountability at both State and Federal levels.¹⁶

6.16 Although this was written many years ago, the views expressed are still apposite today. In fact, it is arguable that the issues have a sharper resonance due to the noted increase in the use of uniform legislation.

6.17 In addition to agreeing with the concerns of the three legislation committees outlined above, the Scrutiny of Bills committee suggests that to encourage the practice of providing exposure drafts the Senate could consider deferring the passage of any uniform or national scheme legislation unless adequate opportunity to scrutinise it and negotiate amendments, if they are considered necessary, is provided.

Recommendation 11

6.18 The committee recommends that where there is a proposal for uniform legislation, amendments to uniform legislation or delegated legislation and the nature of the proposal means that the ability of the Senate and its committees to effectively scrutinise and amend the relevant proposal is limited, exposure drafts should be provided as soon as practicable to this committee, the relevant legislative and general purpose standing committee, and the Senate Regulations and Ordinances Committee if the proposal includes delegated legislation. All relevant information about the proposal, including any formal agreements or correspondence should also be provided to the committees to assist in their consideration of the exposure drafts.

Recommendation 12

6.19 That standing order 24 be examined to confirm whether the Scrutiny of Bills Committee is empowered to consider, advise and report on exposure drafts and associated information and, if it is not, that standing order 24 be amended to allow the committee to do so.

15 Under the auspices of the Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee for the Scrutiny of Bills, the Working Party of the Chairs of Scrutiny of Legislation Committees published the *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles* July 1995, paragraph 2.18, p. 22.

16 *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles* July 1995, paragraph 2.25, p. 24.

