Scrutiny of National Schemes of Legislation

Position Paper

By the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia

October 1996

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FOREWORD

With the twentieth century soon to make way for the new millennium, few issues in Westminster-style legislatures are as central to democracy as that of *executive dominance vis-a-vis parliamentary scrutiny and assertiveness.*

This Position Paper, and the 30 months work it represents by Members of Parliament and parliamentary advisers around Australia, is about repositioning our Commonwealth, State and Territory Parliaments in Australia, and introducing mechanisms by which national schemes of legislation sponsored by executive government (Cabinets) can properly be scrutinised by the Parliaments.

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

This Position Paper which deals with mechanisms to ensure scrutiny of national schemes of legislation, will be tabled in all nine Australian Parliaments, Commonwealth, State and Territory, and is the result of the adoption of this paper by Chairs of scrutiny committees of Australian Parliaments during 1996.

This Paper followed the release by all scrutiny committees of a Discussion Paper for comment in Darwin last year. The submissions received in response to the Discussion Paper provided the Committees with great encouragement and assisted in the completion of this Paper. The Committees wish to thank all parties and organisations which provided submissions.

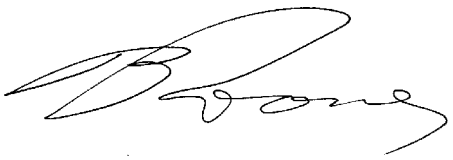
Against this background, this Paper deals with two important and interrelated issues concerning national schemes of legislation. Firstly, the technical scrutiny of primary and subordinate legislation and the role of Parliamentary scrutiny committees and secondly, the position of legislators in the various Parliaments throughout Australia.

This Paper looks at the role of scrutiny committees and how to deal with the problems encountered in scrutinising national schemes of legislation. It deals with the challenges posed to the institution of Parliament by national schemes of legislation. National schemes of legislation have involved a method of lawmaking which has effectively excluded Parliaments from the scrutiny process.

This Paper concludes with broad support for adopting uniform scrutiny principles. It proposes several options for the implementation of uniform scrutiny principles, including the setting up of a National Committee for the Scrutiny of National Schemes of Legislation with members from all the ten legislative scrutiny committees.

Members are of the view that scrutiny committees need to establish an effective role in scrutinising national schemes of legislation. We consider that all legislation can be greatly improved by exposing it to the scrutiny and experience of a variety of people. Such input will improve the administrative effect of the final legislation. Allowing uniform legislation to be subjected to scrutiny by Parliamentary scrutiny committees will assist its passage through legislatures.

We urge all Members of Parliament and Ministers to read this Paper because it deals with the urgent challenge in Australian political life, that is, to restore the role of Parliament as the legislature and restore public confidence in the Parliament.



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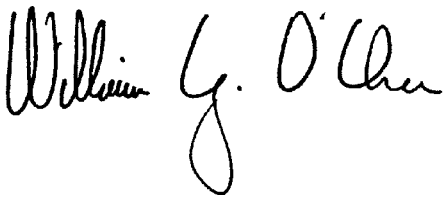

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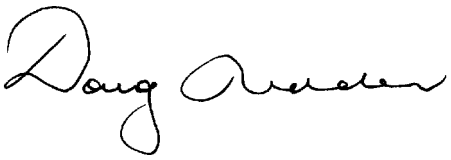

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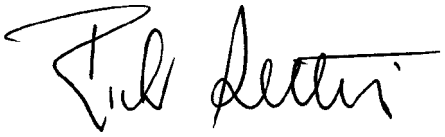

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Victorian Scrutiny of Acts and Regulations Committee

Phillip Pendal MLA
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Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements

Bruce Donaldson MLC
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Western Australian Joint Committee on Delegated Legislation

GLOSSARY:

In this Position Paper the following terminology has been used:

"**legislation**" - to include reference to both primary and subordinate legislation.

"**national schemes of legislation**" - to describe broadly:

- any and all methods of developing legislation, which is
  - uniform or substantially uniform in application
  - in more than one jurisdiction, several jurisdictions, or nationally.

(The different models of national schemes of legislation are shown at Annexe 1)

"**Committee of Chairs**" - to refer to the chairs and deputy chairs of all committees scrutinising both primary and secondary legislation in all jurisdictions.

"**subordinate legislation**" - to refer to rules made by a body authorised to do so under an Act of Parliament. It is also referred to as delegated or subsidiary legislation.

"**primary legislation**" - to refer to statutes or Acts of Parliament.

"**National Scrutiny Committee**" - to refer to the body proposed as one of the means of reviewing national schemes of legislation.

"**Scrutiny committees**" - to refer to those parliamentary committees which scrutinise primary and/or subordinate legislation in accordance with terms of reference which involve the protection of rights and respect for the institution of Parliament.

"**working party**" - to refer to the Committee of Chairs.

ABBREVIATIONS

"**COAG**" - Council of Australian Governments
"**SCAG**" - Standing Committee of Attorneys-General
"**RIS**" **-** Regulatory Impact Statement

1. PARLIAMENTARY COMMITTEES SCRUTINISING DELEGATED AND PRIMARY LEGISLATION

THE ESTABLISHMENT OF SCRUTINY COMMITTEES IN AUSTRALIA

1.1 As this century has progressed the legislative output of all Parliaments in Australia, both Federal and State/Territory, has escalated considerably. With this trend came the realisation that Parliament had to develop a more effective means of maintaining control over the legislative process.

1.2 With respect to subordinate legislation, Professor Pearce summed up the position:

> *In all parliaments, it has also been recognised that the respective houses of the Parliament, sitting as houses, cannot effectively exercise control over delegated legislation. The response to this has been to establish a parliamentary committee charged with the duty of scrutinizing the delegated legislation that the Parliament can disallow. It is noteworthy, however, that the terms of reference of these committees all contemplate a distinction between review of the policy on which the legislation is based and review of the way in which that policy has been implemented. The committees are not empowered to question the reasons for implementing the legislation: their power of scrutiny is limited to the form of the legislation only.*[1]

1.3 The first Committee of this type, the Senate Standing Committee on Regulations and Ordinances, was established in 1932. The other jurisdictions followed suit, some as early as 1938,[2] but most of the State and Territory scrutiny committees were established during the 1960s and 1970s, with the last in 1989.

1.4 In the late 1970s, the Senate identified a need to establish a similar committee to scrutinise primary legislation, to inform Parliament generally on bills and specifically to identify problems. The Senate Standing Committee for the Scrutiny of Bills was therefore set up in 1982 in an effort to restore Parliament to its role as legislator. Once again the Senate's lead is being followed in several other jurisdictions with the ACT, Victoria and Queensland now also having Committees to scrutinise Bills.

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1 Pearce, D. C., (1977) *Delegated Legislation in Australia and New Zealand,* Butterworths, p.30.

2 South Australian Joint Committee on Subordinate Legislation.

SCRUTINY COMMITTEES AND NATIONAL SCHEMES OF LEGISLATION

1.5 In 1986 the scrutiny committees then in existence throughout Australia met at the first biennial Conference of Australian Delegated Legislation Committees where matters of mutual interest and concern were discussed. By 1993, at the fourth conference (which by then also incorporated scrutiny of bills committees), the problem posed in respect of the legislative role of Parliaments by national schemes of legislation was placed on the national agenda by the following resolution:

> *That the representatives of Parliamentary Delegated Legislation and Scrutiny of Bills Committees resolve to propose to their respective Committees that their Committee Report to its respective House or Houses on the issues relating to:*
>
> *(i) the possibility and/or desirability of establishing uniform principles on*
>
> *scrutiny of regulations and ...*
>
> *scrutiny of bills;*
>
> *(ii) the method and means of ensuring proper public consultation and parliamentary scrutiny of statutes and/or instruments of delegated legislation developed as part of the process of mutual recognition and harmonization of statutes and regulations.*
>
> *And that their Committee consult with other relevant Committees in the preparation of such a Report.*

1.6 The conference also called on the Standing Committee of Attorneys-General to establish and fund a working party to report on the desirability of establishing uniform scrutiny principles and on the methods and means of ensuring proper public consultation.

1.7 The Victorian and New South Wales Committees subsequently approached their Attorneys-General. Their responses are set out below.

1.8 The Victorian Attorney-General wrote to the Scrutiny of Acts and Regulations Committee on 3 February 1994 as follows:

> *I refer to your letter of 30 July 1993 which I referred to the SCAG meeting in Sydney on 4 November 1993.*
>
> *It is fair to say that there was no enthusiasm among the Attorneys-General for developing uniform scrutiny principles, or grounds which might give rise to comment by scrutiny committees.*

> *Committees such as yours provide a mechanism to review executive government action. To involve ministers of the executive government in a general uniformity exercise would, in the view of the SCAG ministers, intrude upon the proper independence of Parliament and its committees from the executive government.*
>
> *The SCAG Ministers suggest, therefore, that this matter should be taken up by your Committee with the Council of Heads of Australian Governments.*
>
> *In doing so, your Committee might well give some consideration to my view that there could well be a strong case for developing uniform scrutiny principles to deal with legislation which forms part of a uniform national scheme.*
>
> *I hope these comments will be of assistance to you and your Committee.*

1.9 The New South Wales Attorney-General responded on 11 February 1994 in the following terms:

> *I refer to your request that the Standing Committee of Attorneys-General (SCAG) consider a resolution made by the Australasian and Pacific Conferences on Delegated Legislation and on the Scrutiny of Bills.*
>
> *The resolution, which proposed the establishment and funding of a Committee to report on the possibility of establishing uniform principles on the scrutiny of regulations and bills was considered at the November 1993 SCAG meeting, where Ministers considered the proposal to be a parliamentary matter and not one appropriate for oversight by SCAG.*

1.10 As the Attorneys-General left the issues to the Parliament to resolve, the inaugural Chairs Conference in 1994 agreed that a discussion paper be prepared and circulated seeking comments on identified issues and options. In 1993, the Western Australian Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements to specifically examine and report on national schemes of legislation. In recognition of its expertise in this area, that Committee was invited to participate in the development of the Discussion Paper. The Discussion Paper, titled *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, was made publicly available in July 1995 and called for submissions from a wide range of interested persons in each jurisdiction.

1.11 The purpose of this Paper is to reassess the preferred options outlined by the working party in the Discussion Paper, in the light of comments made in the submissions received. The ensuing chapters will deal critically with the original three proposals, refining them and adding or subtracting content where necessary.

1.12 This Paper will also make it clear that the working party does not oppose national schemes of legislation. It merely seeks to ensure that the legislation is subject to effective parliamentary scrutiny.

1.13 The outcome (in the final chapter) is the proposal of two options to provide a flexible, feasible solution to the problem which will be brought to the attention of all Parliaments. In particular, it is proposed to seek the assistance of the Council of Australian Governments (COAG) and the Standing Committee of Attorneys-General (SCAG) with the implementation of this proposal**.**

1.14 Ultimately, the working party trusts that this Position Paper will lead to a period of co-operation during which practical procedures can be put in place to reinstate Parliament to its rightful role as law-maker, in the uniform legislation process.

Role of scrutiny committees

1.15 As alluded to by Professor Pearce in the extract quoted at the outset, Parliamentary scrutiny committees do not review the political acceptability of the legislation. The objective of the committees is to scrutinise the mechanisms by which policies are to be implemented. This point must be emphasised strongly to clarify some enduring misconceptions about the purpose and role of scrutiny committees.

1.16 Senator Cooney summarised the role of a scrutiny committee as:

> *... one of technical scrutiny in which it examines the justice, the fairness or the propriety of the way in which regulatory measures are determined and imposed. Properly limited by its narrow remit, it does not look for the political acceptability of the policy being pursued. That is the province of the Parliament itself. Rather the Committee looks for wisdom, fairness, justice and restraint in the regulatory procedures to be followed in achieving that policy.*[3]

1.17 It has been reported that at the time of the establishment of the Senate Scrutiny of Bills Committee:

> *Concerns were expressed that this Committee was about to take over the role of the Senate, or about to take over the role of the Government. People said it was going to become the place from which all legislation would emerge in terms of its actual content.* [4]

1.18 That Committee, through its work and over time, has displaced these misguided views.

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[3] The Chair of the Senate Standing Committee for the Scrutiny of Bills, Senate Hansard, 4 June 1987, p.3528.

[4] Pearce, D. C., (1991) *Ten Years of Scrutiny* - A Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills, Canberra, p.6.

1.19 While similar views have been expressed in relation to the work being undertaken by scrutiny committees in respect of national schemes of legislation, all committees involved in this initiative believe that their primary role is to examine the processes by which uniform laws are made and not the policies being incorporated therein.

1.20 Occasions arise on which the very policy of legislation is in direct conflict with, and may unduly trespass on, personal rights and liberties. The Senate Scrutiny of Bills Committee has taken the view, on such occasions, that the conflict of the proposed legislation with personal rights and liberties should be brought to the attention of Senators, and that it is for the latter to determine whether that conflict creates an undue trespass.

1.21 There is little doubt that, in relation to national schemes of legislation, any scrutiny committee charged with a review of that legislation which found that the very policy of the measure was in conflict with personal rights and liberties would report that view.

2. THE INSTITUTION OF PARLIAMENT AND NATIONAL SCHEMES OF LEGISLATION

BACKGROUND

2.1 It is not intended to cover background material (like information on the terminology, the meaning of uniform legislation, intergovernmental agreements, etc) in this Paper as this was covered in the Discussion Paper.[5] For convenience at this point, however, the three proposals supported by the working party in the Discussion Paper are set out in Annexe 2.

2.2 This chapter includes a cross-section of views stated in submissions received late in 1995 responding to the Discussion Paper.

THE ROLE OF PARLIAMENT AS LAWMAKER

2.3 Parliament has the constitutional obligation to:

make laws for the peace, order, and good Government of the State.[6]

2.4 It is the constitutional intention that all proposed legislation affecting the people of Australia, a State or Territory should proceed through the Parliament. The responsibility of each Parliament is to express the views of the people and represent the best interests of the people.

2.5 It is central to the idea of responsible government that the executive is accountable to the Parliament. For Parliament to perform its role it is essential that it has access to information on proposed legislation for it to fulfil its constitutional role.

2.6 It is accepted that there may be a need for national schemes of legislation because of, for example, the internationalisation of the world economy and need for the finance and commercial sectors of the economy to meet international standards and regulations, but this trend in law making should not exclude Parliaments from executing their constitutional responsibility.

2.7 National schemes of legislation affecting the people of a State should be made available to the Parliament. Parliament has a broad responsibility to the electors and the people whom it represents. The current system of dealing with national

[5] A copy of the Discussion Paper may be obtained by contacting the scrutiny committee in their jurisdiction (a list of Committees with contact numbers is included at Annexe 5).

[6] Constitution Act 1889, Western Australia. Similar intent is found in all other Australian Constitutional Acts.

schemes of legislation removes the Parliament's ability to carry out its responsibility to scrutinise and hold the Executive responsible.

2.8 The sentiment expressed by many delegates at a recent conference of scrutiny committees[7] is reflected in the following statement of Dr Noel Preston:

> *... the urgent challenge in Australian political life and the practices of governance is to restore the role of Parliament as Legislature (over against the Executive) and with that to restore public confidence in Parliament.*[8]

2.9 The then Premier of Tasmania, the Honourable Ray Groom MHA, endorsed this constitutional principle when he referred to the problem posed by national schemes of legislation:

> *The general principle of accountability of government to the Parliament and ultimately to the people should be affirmed. In accordance with that principle it may be that further work should be undertaken to determine whether modifications could be made to the present system which could increase the role of Parliament in considering uniform legislation without unduly fettering the effectiveness of government to govern*.

It should be noted that the submission of the Commonwealth Attorney-General's Department also envisages possible modification of the process.

2.10 The Chairman of the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements, the Honourable Phillip Pendal MLA, further focused the issue on the role of parliamentary scrutiny:

> *The Premier has rightly outlined this morning, as have many speakers here, that it is not a question of us being against uniform national legislation per se; it is the processes ... It is about the procedures and it is about retaining for parliament the right to properly scrutinise.*[9]
>
> *It is not something that is just merely about Parliamentary pride; it is certainly not something that is just about Parliamentary mechanisms but it is everything to do with whether or not we actually believe the Parliament is going to survive and see the light of day.*[10]

2.11 Mr Stephen Wilson MLC (Tasmania), examined the problem by reference to the new lawmaking role adopted by Ministerial Councils:

> *It* (national scheme legislation) *has given Ministerial Council meetings a new status in the making of laws which can and do have the effect of*

[7] Conference of Scrutiny Committees, Hobart, 8 December 1995.
[8] Submission re the Scrutiny of National Scheme Legislation by Dr Noel Preston, Senior Lecturer, School of Humanities, Queensland University of Technology, p.1.
[9] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p. 15.
[10] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p. 16.

> *compromising the primary and legitimate role of parliaments to legislate within their own jurisdictions.*[11]

THE ROLE OF PARLIAMENT AND THE EXECUTIVE

2.12 National schemes of legislation have evolved as a method of lawmaking which risks hampering Parliaments in effective scrutiny of much of this type of legislation. This has not dampened the support for the institution of Parliament held by some Members of the Executive:[12]

2.13 Late in 1995, the then Queensland Treasurer stated his position as follows:

> *... I agree with the primacy of Parliament as law maker and the need to ensure accountability of Ministers to the Parliament, which in turn is accountable to the people.*[13]

2.14 Support for allowing Parliament to scrutinise properly national schemes of legislation was expressed by the then Queensland Minister for Minerals and Energy:

> *I very strongly support the position that all uniform legislation be brought before the Legislative Assembly for scrutiny and open discussion prior to its enactment.*
>
> *I also strongly support review of such legislation through a rigorous regulatory impact assessment process.*[14]

2.15 A response received from officers of the Premier's Department in Queensland[15] reflects a lack of understanding of the role of Parliament and of its scrutiny committees:

> *Perhaps the greatest obstacle facing committees is likely to be the role government perceives the committees having in the scrutiny process. If government has a firm view that committees should be excluded from the process then it is difficult to foresee any future deviation from the present situation.*[16]

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[11] Submission dated 5 December 1995, p.1.

[12] The references in this section are predominantly to Members of the Executive in Queensland, many of whom provided submissions to the Discussion Paper. The working party is indebted to them for their co-operation in this project.

[13] Submission from the Honourable Keith De Lacy MLA, then Treasurer of Queensland dated 21 September 1995, p.1.

[14] Submission from the Honourable Tony McGrady MLA, then Minister for Minerals and Energy, Queensland dated 6 September 1995, p.1.

[15] Note: the comments in the submission were stipulated not to reflect the views of the Premier or the Government but to represent a summary of views provided by Departmental officers.

[16] Submission from the Queensland Premier's Department, dated 27 September 1995, p.2.

> *... the issue which should be paramount to the committees is that of obtaining a legitimate role in the national scheme legislation process. If this is not accomplished, the establishment of common Terms of Reference as suggested in Proposals 1 and 2 could prove ineffective.*[17]

PARLIAMENT AS A SYMBOL OF DEMOCRACY

2.16 Concerns about the role of Parliament in our system of democracy are expressed in this extract from the submission of Mr Anthony Morris QC:

> *Our democratic system proceeds on the assumption that the people, through their elected representatives, exercise a measure of control - indeed, ultimate control - over the legislation which is enacted in each State Parliament and the Federal Parliament. But, so far as concerns the great bulk of legislative provisions, the democratic ideal of elected Parliamentarians taking responsibility for the form and content of legislative provisions has become a palpable fiction.*[18]

2.17 The then Premier of Tasmania, the Honourable Ray Groom MHA, highlighted the difficulties posed by national schemes of legislation to our democratic process:

> *It really concerns me that the whole matter is getting out of hand and laws are being created which are not really genuine products of the democratic process; they are not genuinely products of the Parliaments - that might seem a strange thing to say but I really believe that is the case. I do know that in certain cases we have had uniform legislation created without Members of Parliament really examining and understanding what that legislation is all about. Obviously on the face of it we see what it is about but no one has scrutinised it in any detail.*[19]

2.18 This point was endorsed by the Chairman of the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements, the Honourable Phillip Pendal MLA:

Our concern then ... is the process by which parliaments are being excluded from the job that history and their constituents give them".[20]

On this subject, the Queensland Chamber of Commerce and Industry made the following comment:

> *...The Chamber demands that in the interests of democracy all legislation within a particular jurisdiction be debated in that Parliament by the elected representatives before being passed into law.* [21]

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[17] ibid.
[18] Submission from Anthony J. H. Morris QC, dated 2 August 1995, pp.6-7.
[19] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p.1.
[20] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p.39.
[21] Submission from Queensland Chamber of Commerce and Industry, 28 September 1996, p.1.

THE ROLE OF THE PARLIAMENT IN THE NATIONAL SCHEME LAWMAKING PROCESS

2.19 Some submissions maintained that Parliament can in fact take an active role in the legislative process where national schemes of legislation are concerned. A ministerial adviser submitted:

> *Clearly, recourse to national uniform scheme legislation does not derogate from the sovereignty of State Parliaments. The fact of what is essentially an agreement entered into in an executive-related forum does not necessarily bind the legislature whose scrutiny mechanisms should, of course, still be applied.*[22]

2.20 A contrary view was put by the then Tasmanian Premier, the Honourable Ray Groom MHA:

> *It can be politically incorrect to question uniform legislation of national agreements. You say. "Look. I don't want to sign that agreement" and they say "of course you should sign it. This is the thing to do" or "Should we agree with this legislation?". "Of course you should. It's the thing to do". It is politically correct to adopt it when in some cases in fact it might be wrong to do so when we look at it thoroughly. So I do believe this is a very real problem for parliaments in this country.*[23]
>
> *Secondly, the push for uniformity can result in proper Parliamentary scrutiny being bypassed. ... In some cases if the minister questions the necessity for particular legislation or its impact on his or her jurisdiction, he or she is told that it is either too late - you cannot turn back, you cannot pull out of the process - or that it is essential that regional differences should be overlooked or ignored in the national interest, whatever that might be.*[24]

2.21 Approaching the issue of national schemes of legislation from a different perspective the Commonwealth Attorney General's Department was of the opinion that the problem had been overstated in the Discussion Paper. That Department submitted that the Discussion Paper had been harsh in its description of existing processes dealing with uniform law:

> *... the Department is concerned that the paper may overstate the criticisms regarding scrutiny of "uniform laws", does not address the issue of policy concerns and does not discriminate between the various methods that may be used to achieve uniformity.*[25]

2.22 The Department of the Attorney-General, however, noted the existence of some national schemes of legislation which, because they are developed as an

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[22] Submission from Ministerial Policy Adviser, Office of the Minister for Justice and Attorney-General and Minister for the Arts, Queensland, received 8 November 1995, p.2.

[23] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p. 1.

[24] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p. 2.

[25] Submission from the Commonwealth Attorney-General's Department, dated 5 October 1995, p.2. These criticisms will be addressed in Chapter 6 of this report on the implementation of an option to ensure scrutiny of national schemes of legislation.

integrated package, will fail if one of the key components is changed. The Department acknowledged that:

> *such schemes, it is true, give almost no room to manoeuvre for individual Parliaments.*[26]

BALANCING THE BENEFITS OF NATIONAL SCHEMES OF LEGISLATION WITH THE IMPORTANCE OF THE INSTITUTION OF PARLIAMENT

2.23 The working party notes the views such as those expressed above and the views of others like the then Tasmanian Premier, the Honourable Ray Groom MHA, who perceives the problem of national schemes of legislation to be even more severe:

> *I seriously believe that the process by which we arrive at uniform national legislation carries with it threats to our Federal system and to the fundamental role of State Parliaments.*[27]

2.24 At this point, however, the working party again emphasises that it does not oppose the concept of legislation with uniform (or substantially uniform) application in all jurisdictions across Australia. It does, however, question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament. The working party does not suggest that national schemes of legislation be discouraged, nor that there should be any interference in the role of government, but that the role of the Executive be:

> *... balanced against the need of the Parliament not to be excluded from the (lawmaking) processes ... which it is currently excluded from.*[28]

Mr Stephen Wilson MLC (Tasmania) also commented:

> *Notwithstanding the possible value of uniform legislation, it should not be achieved by circumventing the accepted lawmaking process.*[29]

ISSUES - SOLUTIONS

2.25 This Chapter establishes that, despite some views to the contrary, there are significant issues to be resolved. The succeeding chapters of this Paper explore viable alternatives to the current processes adopted in making national schemes of legislation.

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[26] ibid, p.4.
[27] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p. 2.
[28] Honourable Phillip Pendal, MLA, at the Conference of Scrutiny Committees, Hobart, 8 December 1995, transcript p.7.
[29] Submission from Stephen Wilson MLA, member for Monmouth, Hobart, dated 5 December 1995, p.1.

3. UNIFORM LEGISLATION - TABLING OF EXPOSURE DRAFTS (PROPOSAL 3 OF THE DISCUSSION PAPER)

BACKGROUND

3.1 In the Discussion Paper, the working party examined the terms of reference of all committees scrutinising subordinate legislation on the one hand and those scrutinising bills on the other. Several options were then proposed which would facilitate the scrutiny of national schemes of legislation according to a common terms of reference for subordinate legislation and for bills. The working party specified its preferred option for the scrutiny of both primary and subordinate legislation and proposed them to readers as Proposals 1 and 2 respectively (see Annexe 2).

3.2 The third proposal proffered to readers of the Discussion Paper was developed as a means of ensuring that information about proposed intergovernmental agreements or proposed national schemes of legislation was brought to the attention of Parliament at a time when it was being considered by other interest groups. The role of scrutiny committees in reviewing legislation (either subordinate and/or primary) could therefore also be restored by such a process.

3.3 This proposal was intended to counterbalance a perceived shortcoming in the existing system which merely saw the introduction into Parliament of the completed legislation to which the Executive had committed Parliament, without its input or prior consent.

3.4 Submissions were sought in relation to all issues covered by the Discussion Paper and the three proposals in particular. This chapter and the following two chapters provide an overview of the views expressed in all the submissions received nationally. In each of these three chapters, these views are analysed before a conclusion is reached which reflects the collective view of the working party.

THE DISCUSSION PAPER - PROPOSAL 3

3.5 Chapter six of the Discussion Paper explores methods by which scrutiny committees can become involved in the process of making national scheme legislation. Two options were outlined in the Discussion Paper. The working party supported the first option and put it as Proposal 3 of the Paper:

> *PROPOSAL 3* -
>
> ***Ensure that uniform legislation is tabled as an exposure draft in each Parliament.***

SUBMISSIONS

General support for bringing national schemes of legislation before the Parliament

3.6 The general concept of Parliament becoming more involved in the process of scrutinising national schemes of legislation received strong support from the majority of submissions. The overall perception was also that Parliament itself should be involved to a greater extent than it currently is.

3.7 There was, however, considerable discussion about the way in which these two ideals should be put into practice.

3.8 Several of the submissions including, for example, the then Queensland Minister for Minerals and Energy and the ACT Law Society, expressed support for Proposal 3:

> *Having uniform legislation tabled as an exposure draft in each Parliament before COAG or a ministerial council enters into an inter governmental agreement makes good sense and deserves support.*[30]

3.9 There were also, however, a number of submissions that detailed the reasons that Proposal 3 was flawed and these are discussed below.

Policy considerations

3.10 The major objection was that the views expressed by the working party in the Discussion Paper gave insufficient consideration to the role of the Executive in the development of policy:

> *As you are aware, exposure drafts are intended to aid in the further development of the policy of a proposal. Early access to such drafts would be of little use to a scrutiny committee of the parliament concerned with ensuring that Bills and subordinate legislation conform to certain fundamental legislative principles.*[31]

3.11 Commenting on the views that may be held by members of the Executive on an obligation to table an exposure draft, Mr Andrew Whitecross MLA (ACT) opined:

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[30] Submission from the Law Society, ACT, dated 4 December 1995, p.2.

[31] Submission from Peter Clarke, then Ministerial Policy Adviser, Office of the Minister of Justice and Attorney-General and Minister for the Arts, Queensland, received 8 November 1995, p.2.

> *... What they will be worried about will be the fact that this process of consultation will open up their legislation to a raft of opposition on a range of policy matters.*[32]

3.12 The Commonwealth Attorney-General's Department also pointed to the fact that the working party was perhaps preoccupied with its scrutiny role without sufficiently appreciating the position of the Executive in policy development:

> *Another concern is the paper's underlying assumption that the main problem for Parliaments with 'uniform' schemes is breach of scrutiny principles (which are limited in scope and to which Scrutiny Committees are confined). It is unlikely that most of the 'uniform' legislative schemes would fail on these grounds, but more probable that they may raise policy concerns in one or more Parliaments. Examination of legislation on general policy grounds is not the province of Scrutiny Committees but of other special Committees.*[33]

Tabling of exposure drafts appropriate?

3.13 The same Department further observed that while the tabling of exposure drafts is appropriate in some circumstances, it may not be so in others:

> *(Proposal 3) ... may be appropriate when there is agreement to have a national scheme. It is clearly inappropriate in the model law situation where there is no prior commitment to enact the model. There is obviously no point in a Bill being tabled in a Parliament of a jurisdiction where the Government has not decided to adopt the model, or has even decided not to adopt it. Further, it would hinder those jurisdictions which are enacting the model Bill if they cannot proceed until, or unless, the Bill has been tabled in the Parliaments of other jurisdictions.*
>
> *Another problem with the first option (Proposal 3) is that much so-called "uniform" legislation (at least that involving SCAG) would not, because of its nature, warrant tabling as an exposure draft.*[34]

3.14 Insufficient consideration of policy issues was not the only objection to Proposal 3. The Queensland Premier's Department pointed out that the tabling of exposure drafts was not a requirement with respect to other Bills submitted to Parliament. In addition, the ACT Attorney-General, Mr Gary Humphries MLA, expressed the view :

> ... [that tabling exposure drafts] *is not feasible because the legislation is not drafted until very late in the process and there would not be enough time to allow each Parliament to table exposure drafts.*[35]

[32] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p.31.
[33] Submission from Colin Neave, Commonwealth Attorney-General's Department, dated 5 October 1995, p.3.
[34] Submission from Colin Neave, Commonwealth Attorney-General's Department, dated 5 October 1995, p.9.

3.15 The point was also made that an exposure draft may be a document not suitable for the needs of scrutiny committees:

> *Unlike in the past, the trend today is for Ministerial Councils to circulate draft legislative proposals to interested persons or groups for comment prior to agreeing to it. In some cases an exposure draft is tabled in one or more Parliaments to assist in the consultation process. There is no reason why these drafts cannot be sent to (or used by, if tabled) Parliamentary Committees for comment. However, Committees may not be particularly interested in draft legislation unless it is, in effect, the final version.*[36]

Option 2 preferred

3.16 A number of commentators in the submissions expressed a preference for Option 2 outlined in chapter six of the Discussion Paper, rather than Option 1 which was preferred by the working party. This view was taken in the Australian Finance Conference submission and was also reported to be the view of the ACT Attorney-General:

> *Mr Humphries is very supportive of this option (2). He suggests that once the responsible Parliamentary Counsel has drafted the legislation a copy be sent to a representative committee of Scrutiny of Bills Committees for comment before it is discussed at the relevant Ministerial Council.*[37]

A flexible approach recommended

3.17 In conjunction with their dissatisfaction with the preferred option, several commentators recommended the adoption of a flexible approach which would allow either option to be adopted in the appropriate circumstances:

> *While the Department recognises the paper's attempt to deal with some of the difficult issues raised in relation to scrutiny of uniform legislation, it considers that any scheme to enhance scrutiny must take into account the significant differences between different types of uniform legislation. This in turn influences the particular issues which may require consideration in relation to each type.*[38]

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[35] Proposal by ACT Attorney-General, Mr Gary Humphries MLA, concerning Discussion Paper No. 1, p.1.
[36] Submission from Colin Neave, Commonwealth Attorney-General's Department, dated 5 October 1995, pp.9-10.
[37] Proposal by ACT Attorney-General, Mr Gary Humphries MLA, concerning Discussion Paper No. 1, p.1.
[38] Submission from Colin Neave, Commonwealth Attorney-General's Department, dated 5 October 1995, at para 57.

> *I can see no reason for adopting a fixed, inflexible rule for all "uniform" schemes, given, as discussed above, their great diversity and the different considerations that apply to them.*[39]
>
> *... perhaps the best course would be to suggest that Ministerial Councils, before finalising a "uniform" legislative scheme, give consideration to following one or other of the approaches reflected in the two options. This would introduce an appropriate degree of flexibility into the process by allowing the approach adopted (if any) to reflect the nature of the "uniform" legislative scheme under consideration.*[40]

3.18 The consequence of an impractical, inflexible approach was illustrated by the following example provided by the WorkCover Authority in NSW:

> *With regard to Proposal Three the development of nationally uniform occupational health and safety regulations is being achieved by individual jurisdictions developing regulations and codes of practice based on national standards which are expressed as common essential requirements. Consequently, there is no exposure draft of a nationally uniform regulation which could be tabled in Parliament as this proposal recommends.*
>
> *The appropriate document to table would be the public comment draft of the national standard. This would enable scrutiny committees to consider draft documents before there is a national agreement. By the time WorkCover develops a national uniformity draft regulation there has already been national agreement on the essential requirements of that regulation. Therefore, tabling the draft regulation would cause delays and it would be too late for any scrutiny committee to make effective intervention at a national level.*[41]

3.19 The then Tasmanian Premier, the Honourable Ray Groom MHA, who had been particularly supportive of the scrutiny committees' other initiatives, had some reservations about Proposal 3:

> *... is it our job to ensure that uniform legislation is tabled as an exposure draft in each parliament?' It worries me a little bit and so do some of the proposals in chapter 4* [of the Discussion Paper].[42]

ANALYSIS OF SUBMISSIONS

3.20 The scrutiny committees accept the validity of points made about policy considerations, occasional time constraints, differences in types of national

[39] ibid at para 49.
[40] ibid at para 50.
[41] Submission from Ian Ramsay, General Manager, WorkCover Authority, Sydney, dated 20 December 1995.
[42] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p.33.

legislation and the possible insufficiency of exposure drafts for scrutiny. Given these factors, it is clear that a flexible approach is required.

3.21 The committees remain of the view that the tabling of exposure drafts in various Parliaments, where appropriate and possible, is sound Parliamentary practice. It may well be appropriate to allow scrutiny committees to examine national scheme legislation at that early stage. The problem with this approach is that the legislation may undergo significant changes between its exposure in the Parliament and its final introduction. Any comments made by the committees may be of little value, if in its final form, the legislation differs significantly from the exposure drafts. Given the submissions and the gestation periods of national schemes of legislation, such a scenario is probable. Scrutiny committees are part of the parliamentary process and to facilitate this the most appropriate time for the committees to examine national scheme legislation is at a time early enough to allow constructive comment.

CONCLUSION AND POSITION ADOPTED

3.22 In conclusion on Proposal 3, the working party adopts the following views:

- that the current practice of providing exposure drafts for uniform legislation to various interest groups presently excludes the participation of the Parliaments of Australia;

- that where exposure drafts for uniform legislation are available, they should be made available to the Parliaments;

- If a National Scrutiny Committee is the preferred option:

- although there is merit in examining exposure drafts, the working party believes that a National Scrutiny Committee should be able to examine uniform legislation at a time early enough to be constructive;

- that the National Scrutiny Committee should be flexible in its approach in its scrutiny of uniform legislation to prevent delays in its process; and

- that this is not an invariable model of operation. It is proposed that after a period of two years of operation, the structure of the model of operation should be reviewed and any suitable amendments then be made.

4. UNIFORM TERMS OF REFERENCE FOR THE SCRUTINY OF PRIMARY NATIONAL SCHEME LEGISLATION (PROPOSAL 2 OF DISCUSSION PAPER)

THE DISCUSSION PAPER - PROPOSAL 2

4.1 Chapter Five of the Discussion Paper deals with the proposal for achieving uniform scrutiny of national scheme primary legislation. Only one option was outlined in this chapter and was supported by the majority of the members of the working party:

PROPOSAL 2

That all Scrutiny of Bills Committees adopt the following separate Terms of Reference for the examination of national scheme primary legislation.

- ***Whether the Bill unduly affects personal rights and liberties;***
- ***Whether the Bill inappropriately delegates legislative powers.***

(The Scrutiny of Bills Committees are to retain their own particular Terms of Reference for the examination of Bills which relate to their particular jurisdictions.)

SUBMISSIONS

4.2 This proposal was generally supported and drew considerably less comment than either of the other two proposals.

Emphasise scrutiny role

4.3 Some misconceptions were held by the Australian Finance Conference about the possible involvement of scrutiny committees in reconsidering the policy objectives of legislation.

> *... the risk is there that the scrutiny committees may be tempted to re-hear or re-debate already agreed policy and administrative positions. Given the passing parade among the Ministerial, Scrutiny and adviser/public servant participants across the jurisdiction this temptation in the past has proved very real.*
>
> *There is a need therefore for the Scrutiny Committees' terms of reference to be explicit in relation to its scrutiny rather than policy role. The*

proposals at 4.9 and 5.5 (of the Discussion Paper) will need to ensure this.[43]

Additional terms of reference suggested

Non-reviewable decisions

4.4 The Administrative Review Council made the following suggestions about incorporating a requirement into the terms of reference to consider the question of whether decisions are reviewable:

> *At present the terms of reference of the Federal, Queensland, Northern Territory and ACT Parliamentary Scrutiny Committees require consideration of whether the legislation "unduly makes rights, liberties, or obligations dependent on non-reviewable decisions". The Council sees this as an important term of reference because it promotes specific consideration of the question whether the persons who would be affected by the relevant administrative decisions would have appropriate avenues of review open to them.*
>
> *The common terms proposed in the Discussion Paper do not retain this language but direct consideration instead to the question whether the legislation unduly affects or trespasses on personal rights and liberties. While it is arguable that these terms encompass the question whether rights, liberties, or obligations would be dependent on non-reviewable decisions, the Council considers that it would be preferable to retain consideration of the matter as a separate and distinct term of reference. This would ensure the question was given specific attention and appropriate emphasis by Scrutiny Committees.*
>
> *... In relation to a national scheme proposal it is open to State and Territory governments to confer jurisdiction on the appropriate Federal tribunal (usually the Administrative Appeals Tribunal) to hear applications for review of decisions made under the scheme.*[44]

Identification of problems

4.5 Mr Trevor Nyman, a Sydney solicitor, suggested the following additional term of reference:

[43] Submission from the Australian Finance Conference, Sydney, dated 20 December 1995.
[44] Submission from the Administrative Review Council, Canberra, dated 29 September 1995, p.2.

> *... whether because of any special feature of this Bill the Committee should alert the Parliament to particular and unusual problems that the legislation might create.*[45]

Cost-benefit analysis for primary legislation

4.6 The Australian Bankers' Association expressed the view that impact statements should also be prepared with respect to primary legislation:

> *The Association is unsure as to why the Terms of Reference for national scheme subordinate legislation should differ from national scheme primary legislation. It does not appear that social and economic impacts are to play any part in the examination of national scheme primary legislation, a feature of particular concern to the Association.*
>
> *Accordingly, the Association believes that any uniform standard Terms of Reference should specifically include a requirement that committees seek references covering such things as*
>
> - *whether the objective could have been achieved by alternative and more effective means*
> - *whether the cost incurred in administration and compliance with a statute or rule outweighs the benefits*
> - *the adverse impact on the business community*
> - *the regulatory duplication, overlaps or inconsistencies with any other regulation or Act.*[46]

Henry VIII clauses

4.7 A 'Henry VIII clause' has been defined by Professor Pearce as:

> *... the inclusion in an Act of a power to amend either that Act or other Acts by regulation.*[47]

4.8 The persistent problem posed to Parliaments by Henry VIII clauses was alluded to by Mr Stephen Wilson MLC (Tasmania):

> *An additional dilemma faced within the parliaments, (often included in uniform legislation), is the power to make substantial change in the*

[45] Submission from Trevor Nyman and Company, Sydney, dated 25 July 1995.
[46] Submission from the Australian Bankers Association, Melbourne, dated 12 December 1995.
[47] Pearce, D. C., (1977), *Delegated Legislation in Australia and New Zealand*, Butterworths, p.7

future by subordinate legislation, to be tabled only in one parliament to become law in all participating States.[48]

4.9 Mr Wilson provided the following additional comments:

Any subsequent changes either to the primary legislation or of a subordinate nature should follow the same process as the original legislation.

Scrutiny of a bill should place emphasis on whether it inappropriately delegates legislative powers, and whether provisions to provide for subsequent changes are appropriate (eg. Henry VIII clauses).

ANALYSIS OF SUBMISSIONS

Emphasise scrutiny role

4.10 As already outlined in the opening chapter of this Paper, the working party is anxious to clarify any misconceptions on this point.

4.11 Mr Jon Sullivan MLA expressed the following views:

We should be very clear, in my view, that we are about the kind of technical scrutiny being applied to national scheme legislation - ... primary and subordinate ... being applied to legislation in our own jurisdiction.[49]

... our focus is not necessarily on the policy of the scheme but on the way that it achieves the objectives ...[50]

4.12 In an effort to clarify the limits of this approach, the Honourable John Ryan MLC, outlined a similar view but emphasised that the definition should be not too restrictively focused on technical issues only:

If we define our role so narrowly that all we are going to do is whack a technical ruler up against legislation to make sure it does not have things like 'no compensation clauses' in it and it does not have any Henry VIII clause in it, then they are pretty easy questions to determine.

... We do not really want to be quite that narrow. There are some wider considerations that we want considered, such as the rights, liberties and obligations and whether they are unduly dependent on insufficiently

[48] Submission from Stephen Wilson MLA, Member for Monmouth, Tasmania, dated 5 December 1995, p.1.
[49] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p.23, per Mr Jon Sullivan MLA (Chairman) Scrutiny of Bills Committee, Queensland.
[50] Jon Sullivan MLA, (Chairman) Scrutiny of Legislation Committee, Queensland, ibid p.5.

> *defined powers. They are not the sorts of things which can be done by a group of public servants. That is not a technical running the ruler up against the legislation to see whether it is fair in those sorts of considerations.*[51]

4.13 Ultimately the working party agrees that the determination of policy and its expression as proposed legislation is a matter exclusively for the executive. The mechanisms by which the policies are given effect by legislation however, are matters with which scrutiny committees can validly concern themselves.

4.14 Occasions arise in which the very policy of legislation is in direct conflict with, and may unduly trespass on, personal rights and liberties. The working party takes the view that, on such occasions, the conflict of the proposed legislation with personal rights and liberties is a matter that relates to scrutiny principles. In relation to a national scheme of legislation, any scrutiny committee charged with reviewing that legislation, which found that the very policy of the measure was in conflict with personal rights and liberties, would report that view.

Additional terms of reference suggested

Non-reviewable decisions

4.15 The working party is of the view that the suggested expansion of the uniform terms of reference to incorporate the consideration of non-reviewable decisions has merit. Administrative decisions affecting the rights and liberties of citizens have grown enormously in scope and importance since the 1970s. The Commonwealth Parliament has relied increasingly upon administrative tribunals as a means of review of the more important administrative decisions. In 1979 the Senate Regulations and Ordinances Committee amended its terms of reference to ensure that 'decisions having an important effect on individual rights were reviewable on their merits'[52] - the only amendment to its terms of reference since its establishment in 1932.

Identification of problems

4.16 The current terms of reference of scrutiny committees generally do not involve them in searching out actively potential problems with legislation. This would be an almost impossible task as many difficulties with legislation arise when it is practically implemented or under unusual circumstances. These are the province of standing and/or select committees. Scrutiny committees do not have knowledge necessarily about the practical workings of legislation; neither can

[51] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p.36, per the Honourable John Ryan.

[52] Senate Standing Committee on Regulations and Ordinances, Sixty-fourth Report, *Principles of the Committee*, Canberra, March 1979.

they foresee the development of unusual circumstances. These are matters for the drafters of legislation to grapple with and need not be specifically incorporated into the terms of reference.

4.17 If, however, unusual problems are foreseen by scrutiny committees that would, for example, unduly affect personal rights and liberties, these would be brought to the attention of Parliament.

Cost-benefit analysis for primary legislation

4.18 The topic of impact statements for primary legislation has been discussed by scrutiny committees at a previous conference.[53] In that forum it was agreed that although the concept has merit it has not yet been sufficiently discussed by Parliaments in Australia and is unlikely to come to fruition in the near future. Consensus was therefore that the working party's efforts were best concentrated on the project at hand - the development of uniform scrutiny principles.

Henry VIII clauses

4.19 The Member for Monmouth, Tasmania, Mr Stephen Wilson MLC, drew attention to the need to ensure the appropriate delegation of legislative power giving Henry VIII clauses as an example. A Henry VIII clause is the classic example of a clause which requires scrutiny to determine whether or not the clause inappropriately delegates legislative power. The second of the proposed terms of reference - whether the Bill inappropriately delegates legislative powers - appears to cover the problems associated with Henry VIII clauses. The working party believes that, where Henry VIII clauses are necessary to a national scheme of legislation, scrutiny committees may find that legislative power has not been inappropriately delegated. Nevertheless the working party has serious reservations over the use of Henry VIII clauses in national schemes of legislation.

CONCLUSION AND POSITION ADOPTED

4.20 In conclusion on Proposal 2, the working party adopts the following views on the terms of reference relating to scrutiny of national scheme primary legislation:

- that all scrutiny of bills committees adopt the following terms of reference for the examination of national scheme primary legislation:

  - whether the bill trespasses unduly on personal rights and liberties;

[53] Conference of Scrutiny Committees, Hobart, 8 December 1995.

- whether the bill makes rights, freedoms or obligations undulydependent upon administrative decisions which are not subject to appropriate external review; and

- whether the bill inappropriately delegates legislative powers.

- that the terms of reference do not give scrutiny committees examining national schemes of legislation an additional role with respect to reviewing policy;

- that although they are not extensive in scope or particularly complex, the terms of reference reflect commonly supported and fundamental values to be protected;

- that the terms of reference will provide a basic and uniform level of scrutiny to which all national scheme primary legislation will be subjected;

- that scrutiny committees should not have a formal role of identifying unusual problems in legislation;

- that, although appealing, the concept of formal impact statements for Bills has not yet been sufficiently discussed by Parliamentarians and members of the Executive to be proposed at this stage; and

- that an additional term of reference to curtail the use of Henry VIII clauses need not be added to the terms of reference.

5. UNIFORM TERMS OF REFERENCE FOR THE SCRUTINY OF NATIONAL SCHEME SUBORDINATE LEGISLATION (PROPOSAL 1 OF DISCUSSION PAPER)

THE DISCUSSION PAPER - PROPOSAL 1

5.1 Chapter four of the Discussion Paper deals with four options for achieving uniform scrutiny for national scheme subordinate legislation. The majority of the members of the working party specified Proposal 1 as the preferred option:

PROPOSAL 1

That all Scrutiny Committees adopt the following separate Terms of Reference for the examination of national scheme subordinate legislation.

- *Whether the subordinate legislation is in accordance with the provisions of the Act under which it is made and whether it duplicates, overlaps or conflicts with other regulations or Acts;*
- *Whether the subordinate legislation trespasses unduly on personal rights and liberties;*
- *Whether, having regard to the expected social and economic impact of the subordinate legislation, it has been properly assessed.*

(It is assumed that in respect of this Proposal, all the Scrutiny Committees are to retain their own particular Terms of Reference for the examination of subordinate legislation which relates to their particular jurisdiction. The above Terms of Reference are only to apply to the scrutiny of national scheme subordinate legislation.)

SUBMISSIONS

5.2 This proposal was generally supported, however, there were some suggestions on how the uniform terms of reference should be expanded and how they were deficient. The third element of Proposal 1 relating to regulatory impact statements attracted considerable comment. Some of the comments already reported on for Proposal 2 were repeated for Proposal 1 and will only briefly be referred to here.[54]

[54] For full details on those points please refer to the previous chapter and to the relevant submissions.

Non-reviewable decisions

5.3 The Administrative Review Council's point on incorporating a requirement into the terms of reference to consider the question of whether decisions are reviewable was also applicable to this proposal.

Accommodation of separate terms of reference

5.4 Several submissions, particularly from Queensland, expressed a preference for Option 2 (see pp. 29-30 of the Discussion Paper) which would enable individual committees to retain their current terms of reference but would provide for them to be grouped under three broad categories, recognised and applied by all jurisdictions.[55]

5.5 Mr Neil Roberts MLA, who subsequently became a Member of the Queensland Scrutiny of Legislation Committee, provided the following rationale:

> *I believe Option 2 provides the most workable outcome. Reasons:*
>
> *it provides for the consistency desired between Committees from other Parliaments, and*
>
> *it enables consistency in a Committee's approach to the scrutiny of both State and National Subordinate legislation.*
>
> *The option could be strengthened by requiring all Committees to categorise their Terms of Reference under the three criteria listed in Proposal 1.*[56]

5.6 The Queensland Police Service submission outlined the same concern as follows:

> *It appears that in the search for common principles and agreements on uniform legislation that there is often a shift to the lowest common denominator, rather than maybe moving up to the best practice model. As a result strong regional legislation can at times be sacrificed to the need to reach national agreement.*[57]

[55] Option 2 also supported by Queensland Department of Minerals and Energy.
[56] Submission from the Member for Nudgee, Queensland, dated 15 August 1995, p.1.
[57] Submission from the Queensland Police Service, dated 22 September 1995, p.1.

Terms of reference not to be limited to 'subordinate legislation' only

5.7 Mr Anthony Morris QC,[58] proposed that the scrutiny carried out by Parliamentary committees should incorporate a broader range of instruments:

> *It is very important, to my mind, that the form of scrutiny suggested in Proposal 1 should not be confined to "subordinate legislation" in the traditional sense, but should also extend to all manner of instruments (whether described as "rules", "regulations", "codes", "by-laws", "declarations", or what have you) to which legal force is given under uniform legislation. A good example is that mentioned in my letter to the editor of the Australian Law Journal, namely the Building Act Amendment Act 1991 (Queensland), which gives statutory force to the "Building Code of Australia" - an expression which is defined as meaning "the edition, current at the relevant time, of the Building Code of Australia ... published by the body known as the Australian Uniform Building Regulation Co-Ordinating Council and including that edition as amended from time to time by amendments published by that body". If the "Building Code of Australia" has legal force under a Queensland Act, and is capable of being amended or repealed by an unelected body which is not responsible through the Parliament to the people of Queensland, at the very least the Queensland Parliament (through an appropriate Scrutiny Committee) should review all amendments made to the Code.*[59]

Regulatory impact statements

Review of policy?

5.8 The third term of reference in Proposal 1, which relates to regulatory impact statements, drew a raft of varied comments. The fact that the wording of the section could be interpreted as giving the committees a role with respect to reviewing policy was emphasised by both the Australian Law Reform Commission and the ACT Law Society:

> *... implementation of Proposal 1 would lead to a fundamental change in the terms of reference of many Scrutiny Committees. ... Committees will be embarking on an inquiry into the underlying policy rationale for legislation, a matter which has not generally been part of terms of reference to date. Such a realignment of purpose might put at risk the proud records of bi-partisanship enjoyed by scrutiny committees in every Australian jurisdiction.*[60]

[58] Barrister, Queensland.
[59] Submission from Anthony J. H. Morris QC, Brisbane, dated 2 August 1995, pp.8-9.
[60] Submission from the Australian Law Reform Commission, Sydney, dated 4 December 1995, p.2.

> *... the third term of reference, as worded may indicate a review of the policy of the subordinate legislation. This would contradict the ACT Standing Committee's stated role as that "does not make* any *comments on the policy aspects of the legislation". Substituting "sufficiently" for "properly" may clarify that the policy itself is beyond the reach of the scrutiny committee*.[61]

RISs to extend to environmental impact?

5.9 The yardstick against which the effect of national scheme subordinate legislation is measured was also the subject of comment. The Australian Bankers Association observed:

> *The Association believes that any legislation, whether it be primary legislation or subordinate legislation, should be subjected to a number of preliminary tests including the likely business or economic impact of the legislation as compared with the social benefits to be gained.*[62]

5.10 The Sydney Water Corporation added:

> *... this objective should be altered so as to take into account the potential negative environmental impacts of national scheme subordinate legislation.*[63]

RISs for a specified category of subordinate legislation only?

5.11 Addressing the scope of application of this term of reference, the then Queensland Treasurer, whilst expressing strong support for the adoption of uniform, simplified terms of reference, expressed the view that:

> *While Regulatory Impact Statements (RIS) provide a useful discipline for assessing subordinate legislation, they should be required only for significant proposals. Indiscriminate use of such a tool can be an inefficient and time consuming exercise.*[64]

5.12 The then Queensland Treasurer also made the point that:

[61] Submission from The Law Society, Canberra, dated 4 December 1995, p.2
[62] Submission from the Australian Bankers' Association, Melbourne, dated 12 December 1995.
[63] Submission from the Sydney Water Corporation, Sydney, dated 28 November 1995.
[64] Submission from the Honourable Keith De Lacy MLA, then Queensland Treasurer, dated 21 September 1995, p.2.

> *Section 46 of the Statutory Instruments Act 1992 (Queensland) also appears to exempt matters arising under uniform or complementary legislation.*

5.13 In addition, the Discussion Paper[65] pointed out that New South Wales, Tasmania and Victoria also have legislation stipulating that an RIS is not required if one has already been carried out on that national scheme legislation in another State.

Acceptance of COAG guidelines?

5.14 On the same subject, the General Manager of the WorkCover Authority suggested that:

> *In relation to the third proposed Term of Reference in Proposal One it is considered that it would be appropriate for scrutiny committees to automatically accept national Economic Impact Assessments which are consistent with COAG principles for national standards.*[66]

5.15 Finally, and on a positive note, the third term of reference received a resounding endorsement from the then Queensland Minister for Minerals and Energy:

> *I also strongly support review of such (uniform) legislation through a rigorous regulatory impact assessment process.*[67]

ANALYSIS OF SUBMISSIONS

Non-reviewable decisions

5.16 The working party is of the view that the point made with respect to the expansion of the uniform terms of reference to incorporate the consideration of non-reviewable decisions has merit.

5.17 The working party believes, as with primary legislation, that the proposed terms of reference should be amended to require consideration of whether subordinate legislation makes rights, liberties, or obligations unduly dependent on non-reviewable decisions.

Accommodation of separate terms of reference

[65] Para 3.5, p.28.
[66] Submission from the WorkCover Authority, Sydney, dated 20 December 1995.
[67] Submission from the Honourable Tony McGrady MLA, then Minister for Minerals and Energy, dated 6 September 1995, p.1.

5.18 Whilst members of the working party value their individual jurisdiction's terms of reference and the fact that they reflect the needs of each jurisdiction, there is recognition that each jurisdiction is currently unable to effectively scrutinise national schemes of legislation in accordance with its own terms of reference.

5.19 The working party believes that compromise is required with respect to terms of reference in order to achieve effective scrutiny on fundamental issues.

Terms of reference not to be limited to 'subordinate legislation' only

5.20 The working party accepts the validity of the concerns expressed by Mr Morris QC. Scrutiny committees are aware of problems that can arise by reason of statutory restrictions on nominal descriptions of subordinate legislation that may be scrutinised by committees. For example, a rule which has legislative effect may be described as an 'order' which does not fall within the terms of reference of a particular scrutiny committee. The Western Australian Joint Standing Committee on Delegated Legislation recently reported on this problem.[68] Each of the Australian jurisdictions applies different restrictions on kinds of subordinate legislation that may be scrutinised by parliamentary committees. There is not, as yet, any agreement on extending the capacity of scrutiny committees to scrutinise all subordinate legislation. This may be a growing problem and it is one which scrutiny committees will continue to monitor.

5.21 Furthermore, subordinate legislation may incorporate by reference other documents which do not themselves fall within the scrutiny committee's terms of reference. Amendments to those other documents may be implemented, thereby affecting the application of the relevant subordinate legislation, without any parliamentary scrutiny. Again, this may be a growing problem which scrutiny committees will continue to monitor.

Regulatory impact statements

Review of policy?

5.22 The working party notes the submission of the Australian Law Reform Commission and the ACT Law Society which draws attention to the fact that the wording of this term of reference could be interpreted as granting the national scrutiny committee a role with respect to the policies underlying legislation. As the ACT Law Society suggests, 'sufficiently' may overcome the perceived problem. The working party has reframed this term of reference to refer specifically to the guidelines adopted by COAG for the assessment of national schemes of legislation. This will enable the relevant committee to determine whether due process for assessment of the legislation has been followed.

[68] Western Australia, Joint Standing Committee on Delegated Legislation, *The Subordinate Legislation Framework in Western Australia*, 16th Report, November 1995, para 5.4.

RISs to extend to environmental impact?

5.23 The Sydney Water Corporation's suggestion that the RISs also have regard to environmental impact is a reminder of the increasing emphasis being placed on environmental considerations in legislation and government generally in the 1990s.

5.24 The working party notes that there is an express requirement to assess environmental impact under the regulatory impact statement procedures adopted in Queensland and Victoria. The COAG Principles and Guidelines also require the environmental assessment of national scheme legislative proposals.

RISs for a specified category of subordinate legislation only?

5.25 The then Queensland Treasurer also highlighted the fact that it would be counterproductive for the terms of reference to intimate that the sufficiency of the RIS process would be evaluated in respect of each subordinate instrument. The category of instruments in respect of which an RIS process is expected to be undertaken must be limited for it to be of value.

5.26 The working party takes cognisance of the then Treasurer's comments.

Acceptance of COAG guidelines?

5.27 The benefits of the scrutiny committees utilising the COAG guidelines in assessing the impact of subordinate legislation are clear. It would considerably simplify the lawmaking process for bureaucrats and interested parties alike.

5.28 This point has been considered along with another point made by the then Queensland Treasurer that national schemes of legislation are exempt from RIS requirements in that jurisdiction. Similar exemptions apply in other jurisdictions with RIS requirements. While regulatory impact assessment statements are now required to be prepared for national schemes of legislation in accordance with the COAG Principles and Guidelines, these exemptions preclude scrutiny committees from determining whether those requirements have been complied with and thus create a vacuum in the scrutiny of such legislation. The working party considers that appropriate enabling provisions will need to be made in scrutiny committees' terms of reference to permit them to monitor compliance with the COAG Principles and Guidelines.

CONCLUSION AND POSITION ADOPTED

5.29 In conclusion, on Proposal 1, the working party adopts the following views on the terms of reference relating to scrutiny of national scheme subordinate legislation:

- that all scrutiny of subordinate legislation committees adopt the following terms of reference for the examination of national scheme subordinate legislation:

- whether the subordinate legislation is in accordance with the provisions of the Act under which it is made and whether it duplicates, overlaps or conflicts with other regulations or Acts;

- whether the subordinate legislation trespasses unduly on personal rights and liberties;

- whether, having regard to the expected social and economic impact of the subordinate legislation, it has been assessed according to the *Principles and Guidelines for National Standards Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies* or other equivalent guidelines; and

- whether the subordinate legislation makes rights, freedoms or obligations unduly dependent upon administrative decisions which are not subject to appropriate external review.

- that although they are not extensive in scope, the four terms of reference reflect fundamental values which are commonly supported;

- that the terms of reference will provide a basic and uniform level of scrutiny to which all uniform subordinate legislation will be subjected; and

- that the category of instruments to which the terms of reference will be applied should not, at this stage, be extended to all subordinate legislation or to incorporated documents referred to in (or associated with) subordinate legislation.

6. IMPLEMENTATION OF UNIFORM SCRUTINY PRINCIPLES

BACKGROUND

6.1 At the conference of scrutiny committees in Hobart in December 1995 which considered the submissions on the Discussion Paper, there was broad based support for the concept of uniform scrutiny principles to be applied to national schemes of legislation. The discussion centred around how this objective was to be achieved.

6.2 This chapter will deal with the aims of the working party in the application of uniform scrutiny principles, the concerns expressed in the submissions on the initiative and how the proposed mechanisms will overcome or avoid these concerns.

6.3 Options for implementation will be outlined which take into consideration the constructive comments in the submissions. These provide efficient and viable means of exposing national schemes of legislation to the scrutiny of Parliaments at a time when it will be both effective and constructive.

6.4 Means of providing to Parliament information on national schemes of legislation at an early stage will also be canvassed.

OBJECTIVES EMBRACED BY INITIATIVE

6.5 In addition to the support for the initiative of developing uniform scrutiny principles from Members of Parliament involved with scrutiny committees in all jurisdictions, there was support from other quarters.

6.6 Submissions from Ministers and departments expressed firm support for the three proposals in the Discussion Paper. Encouragement was also expressed by academics and industry groups.

6.7 Submissions indicated views on the qualities that any proposed initiative would have to embody. This constructive advice has been accepted as a challenge which this working party has sought to meet. One submission which communicated scepticism about the initiative's likelihood of success had the following advice to offer:

> *... the onus rests with the committees to convince government that they can make a positive contribution to national scheme legislation processes. It would appear that perhaps the most effective means for committees to become institutionalised in the process (which it appears*

> *they desire) is for their role to be recognised and accepted by the Council of Australian Governments.*[69]

6.8 Other submissions focused on features which a proposed model would have to have to succeed:

> *A process must be put in place, known to all parties, that facilitates change but does not stifle it.*[70]
>
> *... the representative committee would need to devise a process that was streamlined and cost effective.*[71]
>
> *A unified approach to legislative standards, a proactive model, and a cooperative approach towards public officers and the Executive Government would go a long way to meeting that challenge.*[72]

6.9 The working party believes that these criteria are addressed in the options proposed.

CONCERNS EXPRESSED IN SUBMISSIONS

6.10 The concerns expressed in all submissions have also been closely examined and the options for implementation have been specifically developed to address these difficulties. Some of the most significant difficulties which the working party had to confront are dealt with below.

Delays to the existing process should be minimised

6.11 Several submissions expressed the same misgivings about introducing another step in an already time consuming process:

> *... if I have a concern with the Paper, it is that the proposals may potentially slow the legislative process down even further.*[73]
>
> *... I should point out, however, that there are often fairly strict timetables applying to national scheme legislation which are imposed by, for instance, Commonwealth or international commitments and any system which can minimise delays in the process would be of great benefit.*

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[69] Submission from the Queensland Department of the Premier, dated 27 September 1995, p.2.
[70] Submission from Clive Bubb, General Manager, Queensland Chamber of Commerce and Industry, Brisbane, dated 28 September 1995, p.1.
[71] Proposal by ACT Attorney-General Mr Gary Humphries MLA concerning Discussion Paper No. 1, p.1.
[72] Submission from Queensland Department of Primary Industries, dated 8 December 1995, p.2.
[73] Submission from the Honourable Keith De Lacy MLA, thenQueensland Treasurer, dated 21 September 1995, p.2.

> *I agree that opportunities for parliamentary scrutiny and input have at times been limited when such schemes are proposed, principally because the process of gaining government acceptance is so involved and time-consuming that a second-tier review would introduce a whole new area of uncertainty. You will appreciate the difficulties involved in settling the terms of legislation with all States and the Commonwealth and that changes made by or in individual parliaments could add years to the process of adoption of national scheme legislation, particularly given the delays caused by elections and the parliamentary timetables generally. Nevertheless, it has to be accepted that parliaments have an over-riding responsibility to review legislation and should not be seen as, in your terms, a rubber stamp.*[74]

6.12 The view expressed in the above submission that, despite the perceived potential for delays, the role of Parliament has to be restored, was taken a step further in the extract below which anticipated that the scrutiny process would in fact improve legislation:

> *It is considered that the introduction of a structured approach whereby the Parliamentary Scrutiny Committees are involved in the process of making uniform legislation should in the long run speed up the process and result in more appropriate outcomes ...*[75]

6.13 One means of containing and limiting the anticipated delay in the process was suggested by the Commonwealth Attorney-General's Department:

> *The Department would advocate time-limits on the period a Committee has to make its findings, as excessive delays could defeat uniform schemes in themselves.*[76]

6.14 However, the working party feels that when considering national schemes of legislation, the relevant committee should use its best endeavours to meet whatever time constraints that circumstances dictate, especially given development of national legislation may have already taken several years.

Duplication would be wasteful and should be avoided

6.15 The opinion that scrutiny of national schemes of legislation by uniform scrutiny principles would be likely to result in costly and wasteful duplication was particularly expressed by the Commonwealth Attorney-General's Department:

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[74] Submission from K P Sheridan, Director-General, NSW Agriculture, dated 4 December 1995.

[75] Submission from Clive Bubb, General Manager, Queensland Chamber of Commerce and Industry, dated 28 September 1995, p.2.

[76] Submission from Colin Neave, Commonwealth Attorney-General's Department, dated 5 October 1995, at para 51.

> *It is unclear how the suggestions in paragraphs 6.2 - 6.5 (Discussion Paper) would enhance the scrutiny process if the legislation is to be scrutinised again after it is settled by the Ministerial Council. Without a guarantee that there will be no double-handling, this suggestion may involve the expenditure of additional resources and further delays.*[77]

6.16 The working party believes that duplication may be unavoidable but is prepared to try to minimise costs recognising, however, that the essential function of scrutiny must be carried out in scrutinising national schemes of legislation.

Should the proposed legislation or agreements by Ministerial Councils be tabled in Parliament to expose them to general examination within that forum, and at what stage should this take place?

6.17 There was widespread support in the submissions for the idea that Parliaments should be informed about national schemes of legislation before they are introduced as a *fait accompli*.

6.18 The Australian Law Reform Commission came to the following conclusion:

> *In the Commission's view the best way in which to promote greater involvement of the legislatures in the development of uniform legislation is initially through improved information flow between Ministerial Councils and legislatures .*[78]

6.19 The Australian Council for Civil Liberties made its suggestions after describing the difficulties caused by the current situation:

> *We have had a concern for some time at the growing trend for important policy decisions, especially in the criminal justice area, to be made at the national level rather than, as has traditionally been the case, at State level.*
>
> *Much legislation is formulated through these two bodies (Standing Committee of Attorney-General's (SCAG) and Australian Police Ministers' Council (APMC)) but it is difficult if not impossible to find out what each of these two bodies are to consider as agenda items in advance of any particular meeting and it is equally difficult to find out what resolutions were made by each of these particular bodies after any given meeting.*
>
> *... we consider that it is highly desirable that criminal justice and other decisions made at a national level which can end up in mirroring State*

[77] Submission from Colin Neave, Commonwealth Attorney-General's Department, dated 5 October 1995, at para 51.

[78] Submission from Mr Alan Rose, President of the Australian Law Reform Commission, dated 4 December 1995, p.4.

> *legislation should be advised to interested parties at least at the time that they are agenda items either at SCAG or the APMC or, desirably, even earlier.*[79]

6.20 Several Parliamentarians expressed the firm view that information flow on national schemes of legislation to Parliaments should be improved:

> *It is critical that each Parliament has tabled, prior to any uniform legislation being introduced, a detailed report including a copy of any Heads of Government or Ministerial Council Agreement and an exposure draft of both the bill and regulations. Forewarning by, or accompanying the report to parliament, by a Ministerial Statement to each House of Parliament.*[80]

6.21 In his address to the conference of scrutiny committees in Hobart, the then Tasmanian Premier, the Honourable Ray Groom, MHA also supported the view that:

> *As you say, it is not simply policy-type matters, it is the detail of the scheme and the legislation which people need time to consider. The problem that arises is partly out of the nature of the beast - everyone sometimes wonders where this thing is coming from and suddenly you are landed with it and ministers often have to suddenly consider detail in which they have not been directly involved themselves. But it is a question of Parliament having proper notice, ... actually having the bill well in advance so that you can consider the precise mechanisms and the detail. I think the tabling of agreements which have a degree of information in them that is not perhaps as detailed as the bill itself would be a valuable step forward, so that parliaments are informed of what is developing; not just policy but also some of the mechanisms that are actually contained in proposed agreements.*[81]

6.22 Mr Groom did, however, express misgivings about the suggestion in Proposal 3 that there be a requirement to table exposure drafts.

6.23 It is clear, therefore that there is a need for Parliaments to be informed about intergovernmental agreements.

Recognition of different methods of achieving national schemes of legislation

[79] Submission from T P O'Gorman, President, Australian Council for Civil Liberties, dated 11 October 1995.
[80] Submission from Stephen Wilson MLA, Member for Monmouth, Tasmania, dated 5 December 1995, p.2.
[81] Transcript of Conference of Scrutiny Committees, Hobart, 8 December 1995, p. 6.

6.24 This point was particularly made by the Commonwealth Attorney-General's Department and has been canvassed in preceding chapters. Ultimately the Department called for a flexible approach. This point was recognised by the working party and is reflected in the changes made to Proposal 3.

OPTIONS PROPOSED FOR THE IMPLEMENTATION OF THE UNIFORM SCRUTINY PRINCIPLES

6.25 The concept of a National Scrutiny Committee was foreshadowed in the Discussion Paper and further suggested by Mr Anthony Morris QC who proposed:

> *I would only suggest, in connection with Proposal 3, that some consideration should be given to the establishment of inter-Parliamentary scrutiny committees, comprising both Government and Opposition members from each State or Territory which is likely to be affected by proposed legislation. It seems to me that a substantial saving in time and resources could be achieved by the establishment of an inter-Parliamentary Committee for the scrutiny of proposed uniform legislation, which comprises (say) one Government and one Opposition member from the Scrutiny Committee in the Lower House of each State or Territory Parliament affected by the proposed uniform legislation.*[82]

6.26 The working party has considered the following two options (see pp 41-44) for implementation of the effective scrutiny of national schemes of legislation in the light of uniform scrutiny principles.

6.27 Option 1 proposes the establishment and operational process of a National Scrutiny Committee. This National Scrutiny Committee could scrutinise legislation at one of two points of time although the working party differs as to which is appropriate. These two points are, first, when the draft legislation is in its final (or near to final) form but before it is introduced into any Parliament, secondly, when the bill is introduced into the first Parliament.

6.28 Option 2 operates with respect to national scheme primary legislation. It proposes that each Parliament adopt formal procedures for the purposes of achieving effective scrutiny of national schemes of legislation.

6.29 The working party invites suggestions for alternative means of implementing effective scrutiny of national schemes of legislation.

[82] Submission from Anthony J. H. Morris, QC, Brisbane, dated 2 August 1995.

OPTION NO. 1

NATIONAL COMMITTEE FOR THE SCRUTINY OF NATIONAL SCHEMES OF LEGISLATION

The model national Committee outlined below represents one way in which it is envisaged scrutiny committees from every jurisdiction can operate as one voice in respect of the scrutiny of National Schemes of Legislation

CHAIR
(Chair - Senate Scrutiny of Bills Committee - for three year initial period)

|

TWO DEPUTY CHAIRS

(Deputy Chairs appointed from other Committees on a rotating basis)

|

SECRETARIAT

(Senate)

|

MEMBERS
(All Committees are to be members. See below for operation)

Chair - Initially, it is anticipated that the Chair of the Senate Scrutiny of Bills Committee will be the Chair of the National Committee for either a two or three year period.

Two Deputy Chairs - The Deputy Chairs are to be appointed from the other committees on a rotating basis for the same two or three year period. There should be one Deputy Chair drawn from those committees which deal with Subordinate Legislation. There should be another Deputy Chair drawn from those committees which deal with Bills.

Members - It is anticipated that all committees will be members of the National Committee. For working purposes, within that National Committee there will be two 'lists'; one for Subordinate Legislation and one for Bills. Obviously, those committees which currently deal with Bills will be on the 'Bills List'. Those committees which deal exclusively with Subordinate Legislation will be on the 'Subordinate Legislation List'. Those committees with dual functions will be on both Lists.

Reports - Within each List it is envisaged that there will be one rostered/nominated committee which will have responsibility for the carriage of the Report. Perhaps the sensible way to select the rostered committee is for it to be the same Committee whose Chair is appointed Deputy of the National Committee. That way, the practical work of drafting the Report remains with the committee whose Chair (ie: Deputy Chair of the National Committee) is responsible for presentation of the Report, along with the Chair (ie; Chair of the National Committee). The coordinating of the Report (conducting of teleconferences etc) should be worked out between the advisers of the Chair and the Deputy Chair.

All the material should be sent to all committees. However, only those committees who have appropriate jurisdiction in respect of a particular area are obliged to respond. Practically, this means that all committees must respond in respect of Subordinate Legislation. Only those committees, including scrutiny of Bills (only) committees, who have existing responsibility for Bills are obliged to respond where Bills are introduced. This does not mean that those committees who do not currently examine Bills should refrain from comment. They are of course most welcome to comment, if they believe it is appropriate. The onus is on the committees to respond to the legislation and work within the timetable. At the end of the day, the success of the National Scrutiny Committee involves the cooperation and commitment of individual committees to the process. Each committee must respond when called upon to do so, ie; when legislation is circulated.

The scrutiny by this national committee can be carried out at one of two points in time:

EITHER

at a time when the draft legislation is in its final (or nearly final) form but before it is introduced into any Parliament;

OR

upon its introduction into the first Parliament.

Each jurisdiction would have to consider appropriate amendments to its procedures in Parliament to enable either of these alternatives to operate.

As previously noted in paragraph 6.27 there are differing views within the working party as to the appropriate time for this scrutiny. The working party invites suggestions for alternative means of implementing effective scrutiny of national schemes of legislation.

OPTION 1
TIMETABLE

The model timetable outlined below represents one way in which it is believed it is possible for scrutiny committees to examine national schemes of legislation without hindering the legislative process. It should be stressed that it is a model only and of course subject to alteration should circumstances so dictate. The model outlined allows for the time required in a practical sense for actually examining the legislation, convening committees, contacting Chairs, allowing feedback and drafting the final Report.

A fourteen-day timetable (Note the days represented are working days - 14 days for approximately three weeks).

DAY 1	All material to be sent to all the committees. Note that the rostered/nominated committee is to have the carriage of the Report.
DAYS 2-3	Advisers to examine material
DAY 4	Advisers liaise with Chairs of individual committees
DAY 5	Teleconference - all Advisers (Subordinate Legislation Advisers when appropriate and Bills Advisers when appropriate. However, all Advisers should be advised of the impending teleconference.)
DAY 8	First draft Report is sent to all committees
DAY 11	Feedback from all committees
DAY 12	Final draft to all committees
DAY 14	Final Report Complete

OPTION No. 2

CHANGE OF STANDING ORDERS

An alternative to establishing a National Scrutiny Committee to scrutinise national schemes of legislation (as outlined in Option 1) would be for all jurisdictions with the responsibility for scrutinising Bills to agree to endeavour to achieve a change in their jurisdiction to allow more effective reporting to that Parliament on national schemes of legislation.

The change would require each relevant jurisdiction to endeavour to have its standing orders amended, or a resolution agreed to by the respective House of Parliament to provide (words to the effect of) the following:

- Upon the introduction of a Bill implementing an intergovernmental agreement, and a comment being made by the relevant Scrutiny Committee, no further debate or progress is to be made upon the Bill until the Minister responsible for the Bill has reported back to the Parliament on the issues raised.

These procedures are only applicable to those jurisdictions with a scrutiny of Bills function (the Senate, Victoria, the Australian Capital Territory and Queensland). Other jurisdictions wishing to implement scrutiny principles of this kind would need to consider alternative procedures.

This option would ensure that, where a scrutiny committee has concerns with respect to a Bill which is being introduced in one or more of the other jurisdictions, in substantially the same form, the Bill can not be passed without the responsible Minister reporting back to Parliament on concerns raised.

ANNEXE 1

LEGISLATIVE STRUCTURES

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

- 'Complementary Commonwealth-State' legislation (identified below as Structure 1); or
- 'Complementary' legislation (identified below as Structure 2); or
- 'Adopted Complementary' legislation (identified below as Structure 3).

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

Until the different structures acquire commonly accepted names legislators should remain alert to the possibility of confusion when considering the structure of a proposed piece of uniform legislation.

STRUCTURE 1 - 'COMPLEMENTARY COMMONWEALTH-STATE' OR 'CO-OPERATIVE LEGISLATION'

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

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

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

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

Amendments

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

Emphasis

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

STRUCTURE 2 - 'COMPLEMENTARY' OR 'MIRROR' LEGISLATION

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

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

Totally consistent (but not necessarily identical) Acts are passed in each jurisdiction to prevent any questions about the validity of the legislation.

The intergovernmental agreement may require the Minister to introduce the Bill in identical terms. However, the Bill is considered and debated in each Parliament. There is a tendency for each participating jurisdiction to vary the draft agreed to by the executive branch of Government, to accommodate local concerns and the different drafting styles of local parliamentary draftsman.[83]

This structure may also be used where there is no uncertainty about the extent of the constitutional powers of the Commonwealth, but jurisdictions wish to establish a national regulatory body.[84]

Amendments

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

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

Emphasis

[83] There is no convention of drafting styles and terminology in Australia equating with the position in Canada see 'Canadian Legislative Drafting conventions' in *Proceedings of the 58th Meeting of the Canadian Uniform Law Conference (1976)*

[84] See below for comments on National Regulatory Bodies

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

STRUCTURE 3 - 'TEMPLATE' OR 'CO-OPERATIVE' OR 'APPLIED' OR 'ADOPTED COMPLEMENTARY' LEGISLATION

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

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

Amendments adopted automatically

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

The States may choose to apply a Commonwealth Act in a Territory, or may choose to apply a State Act.[85]

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

The *Financial Institutions* legislation and the *Corporations Law* are examples of this structure.

Amendments

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

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

Sometimes failure to reject regulations within a specified time period may result in deemed approval by the Ministerial Council.[86] Sometimes the national regulatory body will also have to be consulted, or agree to the proposed amendments.

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

[85] For example, the *Commonwealth Places, (Application of Laws) Act 1970*

[86] For example, the intergovernmental agreement relating to National Road Transport legislation

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

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

Emphasis

This version of this structure emphasises a high degree of consistency for the legislation as amended.

Amendments enacted separately

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

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

Amendments

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

Emphasis

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

STRUCTURE 4 - 'REFERRAL OF POWERS'

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

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

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

Legislation adopted pursuant to section 51(xxxvii) operates in the adopting State as a Commonwealth law, bringing with it the operation of section 109 of the Australian Constitution.

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

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

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

Amendments

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

Emphasis

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

STRUCTURE 5 - 'ALTERNATIVE CONSISTENT' LEGISLATION

This is a relatively new structure known as 'Alternative Consistent' legislation. This was a structure used for the Uniform Consumer Credit Laws.

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

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

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

Amendments

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

Emphasis

The emphasis in this structure is on flexibility.

STRUCTURE 6 - 'MUTUAL RECOGNITION' LEGISLATION

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

STRUCTURE 7 - 'UNILATERALISM'

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

STRUCTURE 8 - 'NON-BINDING NATIONAL STANDARDS MODEL' LEGISLATION

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

ANNEXE 2

THE DISCUSSION PAPER'S PROPOSALS

PROPOSAL 1

That all Scrutiny Committees adopt the following separate Terms of Reference for the examination of national scheme subordinate legislation.

- ***Whether the subordinate legislation is in accordance with the provisions of the Act under which it is made and whether it duplicates, overlaps or conflicts with other regulations or Acts;***

- ***Whether the subordinate legislation trespasses unduly on personal rights and liberties;***

- ***Whether, having regard to the expected social and economic impact of the subordinate legislation, it has been properly assessed.***

(It is assumed that in respect of this Proposal, all the Scrutiny Committees are to retain their own particular Terms of Reference for the examination of subordinate legislation which relates to their particular jurisdiction. The above Terms of Reference are only to apply to the scrutiny of national scheme subordinate legislation.)

PROPOSAL 2

That all Scrutiny of Bills Committees adopt the following separate Terms of Reference for the examination of national scheme primary legislation.

- ***Whether the Bill unduly affects personal rights and liberties;***

- ***Whether the Bill inappropriately delegates legislative powers.***

(The Scrutiny of Bills Committees are to retain their own particular Terms of Reference for the examination of Bills which relate to their particular jurisdictions.)

PROPOSAL 3 -

Ensure that uniform legislation is tabled as an exposure draft in each Parliament

ANNEXE 3

EXTRACTS FROM COAG GUIDELINES

Ministerial Council agreements are commonly translated into laws and regulations. Rather than create an artificial boundary between the different forms of regulatory control there is a need for a set of consistent principles that can govern the approach of Ministerial Councils and intergovernmental standard-setting bodies in developing all proposals which have a regulatory impact.

These guidelines consider the best processes to follow in determining whether a set of standards and their associated laws and regulations are the appropriate course of action for a Ministerial Council or other standard-setting body to take. They describe the features of good regulation and conclude by recommending a set of principles for standard setting and regulatory action.

ASSESSMENT OF NATIONAL STANDARDS PROPOSED TO BE ADOPTED BY A MINISTERIAL COUNCIL OR OTHER INTERGOVERNMENTAL STANDARD-SETTING BODY

All national (inter-governmental) standards which require agreement by Ministerial Councils or standard-setting bodies (including standards developed by other bodies) should be subject to a nationally consistent assessment process. The process is set out below.

Minimum Assessment Requirements

Where a Ministerial Council or standard-setting body proposes to agree to regulatory action or adopt a standard, it must first certify that the regulatory impact assessment process has been adequately completed. The assessment process does not necessarily have to be carried out by the Ministerial Council but the Council or body should provide a statement certifying that the assessment process has been adequately undertaken and that the results justify the adoption of the regulatory measure. Most governments have regulatory impact assessment processes in place. The completion of regulatory impact assessments by Ministerial Councils and standard-setting bodies should remove the need to duplicate this analysis.

Adequate completion means that:

1. an impact statement for the proposed regulatory measures has been prepared which:

    - demonstrates the need for regulation,
    - details the objectives of measures proposed,
    - outlines the alternative approaches considered (including non-regulatory options) and explains why an alternative approach was not adopted,

- documents which groups benefit from regulation and which groups pay the direct and indirect costs of implementation,
- demonstrates that the benefits of introducing regulation outweigh the costs (including administrative costs),
- demonstrates that proposed regulation is consistent with relevant international standards (or justifies the extent of inconsistency), and
- sets a date for review and/or sunsetting of regulatory instruments;

2. advertisements have been placed in all jurisdictions to give notice of the intention to adopt regulatory measures, to advise that the impact statement is available on request and to invite submissions;

3. a list of persons/groups who made submissions or were consulted and a summary of their views has been prepared; and

4. the Council or other intergovernmental standard-setting body has considered the views expressed during the consultation process.

A copy of the completed impact statement should be forwarded to the Commonwealth Office of Regulation Review for information. The Office may be called upon to advise Ministerial Councils on technical issues so that a consistent approach is adopted.

ANNEXE 4

LIST OF SUBMISSIONS RECEIVED IN RELATION TO NATIONAL SCHEMES OF LEGISLATION

RECEIVED BY SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES, CANBERRA

President, Australian Law Reform Commission, 133 Castlereagh Street, Sydney, NSW.
President, Australian Council for Civil Liberties, C/- GPO Box 2281, Brisbane, QLD.
Deputy Secretary, Attorney-General's Department, National Circuit, Barton, ACT.
President, Administrative Review Council, 40 Marcus Clarke Street, Canberra, ACT.
Anthony J Morris, QC, 239 George Street, Brisbane, QLD.
Trevor Nyman, Trevor Nyman and Company, 170 Riley Street, East Sydney, NSW.

RECEIVED BY STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION, ACT

Mr Gary Humphries MLA, Attorney General, ACT Legislative Assembly, London Circuit, Canberra, ACT.
Executive Director, The Law Society of the Australian Capital Territory, 1 Farrell Place, Canberra, ACT.

RECEIVED BY REGULATION REVIEW COMMITTEE, NEW SOUTH WALES

Commissioner, New South Wales Fire Brigades, 227 Elizabeth Street, Sydney.
Director General, State Emergency Service, 6-8 Regent Street, Wollongong.
Acting Director-General, Department of Public Works and Services, 2-24 Rawson Place, Sydney.
Managing Director, Sydney Water, 115-123 Bathurst Street, Sydney.
Director-General, NSW Agriculture, 161 Kite Street, Orange.
Attorney General, Goodsell Building, Chifley Square, Sydney.
Joint Acting Executive Director and Director Legal, Australian Bankers' Association, 55 Collins Street, Melbourne.
General Manager, WorkCover Authority, 400 Kent Street, Sydney.
Executive Director, Australian Finance Conference, 68 Pitt Street, Sydney.

RECEIVED BY SCRUTINY OF LEGISLATION COMMITTEE, QUEENSLAND

Government and Executive Services Branch, Department of the Premier, Economic and Trade Development, 100 George Street, Brisbane, QLD.
Director-General, Department of Tourism, Sport and Youth, 85 George Street, Brisbane, QLD.
Treasurer of Queensland, 100 George Street, Brisbane, QLD.
Acting Executive Director (Business Services), Queensland Transport, 85 George Street, Brisbane, QLD.
Ministerial Policy Advisor, Department of Justice and Attorney General and the Arts, 50 Ann Street, Brisbane, QLD.
Director, Executive Support Unit, Administrative Services Department, 80 George Street, Brisbane, QLD.
Minister for Minerals and Energy, 61 Mary Street, Brisbane, QLD.
Acting Director-General, Department of Minerals and Energy, 61 Mary Street, Brisbane, QLD.
Mr Neil Roberts MLA, Member for Nudgee, 5 Royal Parade, Banyo, QLD.
Dr Noel Preston, Queensland University of Technology, Brisbane, QLD.
Mr Tom Round, Griffith University, Messines Ridge Road, Mt Gravatt, Brisbane, QLD.
Chairman, Litigation Reform Commission, Supreme Court, George Street, Brisbane, QLD.
Anthony J Morris, QC, 239 George Street, Brisbane, QLD.
General Manager, Queensland Chamber of Commerce and Industry, 375 Wickham Terrace, Brisbane, QLD.
The Honourable the Chief Justice of the Supreme Court, Brisbane, QLD.
Acting Assistant Commissioner, Operations Support Command, Queensland Police Service, Police Headquarters, Brisbane, QLD.
Acting Director-General, Department of Primary Industries, 80 Ann Street, Brisbane, QLD.

RECEIVED BY PARLIAMENTARY STANDING COMMITTEE ON SUBORDINATE LEGISLATION, TASMANIA

Mr Stephen Wilson, M.L.C., Member for Monmouth, Parliament House, Hobart, TAS.

RECEIVED BY STANDING COMMITTEE ON UNIFORM LEGISLATION AND INTERGOVERNMENTAL AGREEMENTS, WESTERN AUSTRALIA

Executive Officer, Association of Mining and Exploration Companies (Inc), 33 Ord Street, West Perth, WA.
Parliamentary Counsel, 141 St George's Terrace, Perth, WA.

ANNEXE 5

SCRUTINY COMMITTEES IN AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY	
Standing Committee on the Scrutiny of Bills and Subordinate Legislation	(06) 205 0171
NEW SOUTH WALES	
Regulation Review Committee	(02) 9230 3060
NORTHERN TERRITORY	
Subordinate Legislation and Tabled Papers Committee	(08) 8946 1423
COMMONWEALTH	
Senate Standing Committee on Regulations and Ordinances	(06) 277 3066
Senate Standing Committee for the Scrutiny of Bills	(06) 277 3055
SOUTH AUSTRALIA	
Legislative Review Committee	(08) 8237 9415
TASMANIA	
Parliamentary Standing Committee on Subordinate Legislation	(03) 6233 2311
VICTORIA	
Scrutiny of Acts and Regulations Committee	(03) 9651 3500
WESTERN AUSTRALIA	
Joint Standing Committee on Delegated Legislation	(09) 222 7300
Standing Committee on Uniform Legislation and Intergovernmental Agreements	(09) 222 7483
QUEENSLAND	
Scrutiny of Legislation Committee	(07) 3406 7445