

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS (PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)

SCRUTINY REPORT NO. 11

on the

*Meeting of Working Group of
Chairs and Deputy Chairs
of Australian Scrutiny of Primary
and Delegated Legislation Committees*

2 May 2002

Parliament House
Canberra

14 MAY 2002

TERMS OF REFERENCE

- (1) The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:
 - (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
 - (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee
 - (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
 - (d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

MEMBERS OF THE COMMITTEE

MR BILL STEFANIAK, MLA (CHAIR)
MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)
Ms KERRIE TUCKER, MLA

LEGAL ADVISER: MR PETER BAYNE
SECRETARY: MR TOM DUNCAN
**(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**
ASSISTANT SECRETARY: Ms CELESTE ITALIANO
**(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

Introduction

This is a report of the Committee's attendance at the meeting of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees. The meeting was held at Parliament House in Canberra on 2 May 2002 and was hosted by the Senate Scrutiny of Bills Committee.

The meeting was attended by representatives of all scrutiny committees from Australian States and Territories. A list of attendees is at Attachment 1.

The ACT was represented by Mr Bill Stefaniak, MLA (Chair), Mr John Hargreaves MLA (Deputy Chair), Standing Committee on Legal Affairs (performing its duties as a Scrutiny of Bills and Subordinate Legislation Committee), Mr Peter Bayne, Legal Adviser, and Mr Tom Duncan, Secretary.

Resolutions agreed to by the meeting

The Conference agreed to the following resolutions on 2 May:

1. That a paper will be presented at the biennial conference in Hobart in 2003 by the Tasmanian committee comparing the problems and difficulties experienced by each Australian legislative scrutiny committee in the scrutiny of legislative instruments other than regulations.
2. That the committee secretariats from each of the Australian jurisdictions will prepare a list of the different types of legislative instruments subject to scrutiny in their jurisdiction and forward this list to the Tasmanian secretariat for inclusion in the discussion paper.

The Conference proceedings

Detailed below is a short description of the conference proceedings. The full conference agenda is attached at Attachment 2.

Opening by Chairs of the Senate Committees

Senator Tchen, Chair of the Regulations and Ordinances Committee and Senator Cooney, Chair of the Scrutiny of Bills Committee opened the meeting and welcomed all participants.

Reviewable Legislative Instruments – How do we prevent parliamentary scrutiny bypass

Mr Geoff Squibb MLC, Chair of the Tasmanian Scrutiny of Legislation Committee discussed this issue (see attachment 3). Other delegates offered their perspectives and the meeting made 2 resolutions in relation to the matter (see above).

Committee procedures – Dealing with correspondence between Ministers and committees

Mr Warren Pitt MP, Chair of the Queensland Scrutiny of Legislation Committee discussed the issue of the publication of correspondence between committees and ministers, and whether such information should be tabled (see attachment 4).

The other issue raised was scrutiny of amendments to Bills, with the Queensland highlighting that they had recently adopted the procedure of examining all amendments to Bills. It was noted that the Committee reported on Bills even if the Bill had passed the Assembly. The ACT Committee will examine this issue with a view to seeing whether this might be viable in the ACT Legislative Assembly.

Scrutiny of National Schemes of Legislation

Ms Janice Paull, Assistant Secretary of the Senate Standing Committee on Regulations and Ordinances presented a brief summary of the history and progress of scrutiny of national scheme legislation. (see attachment 5)

Following this, Ms Mary Gillett MP, Chair of the Victorian Scrutiny of Acts and Regulations Committee led a discussion on the draft bill and resolution (see attachment 6) for the establishment of a National Scrutiny Committee. This matter has been the subject of previous meetings of Chairs and Deputy Chairs.

The meeting did not make any resolution on what is a difficult issue to resolve. It is expected that the matter will be further considered at the next conference of Scrutiny committees to be held in February 2003.

Working Group of Chairs and Deputy Chairs

The meeting elected members to be on the working group of Chairs and Deputy Chairs for the next 2 years to pursue the Scrutiny of National Schemes Legislation issue and other related matters. The members elected were as follows:

Co Chairs:

Mary Gillete, MP (Vic) [State], Senator Tchen [Commonwealth]

Executive positions:

Mr Geoff Squibb, MLC (Tas)

Representative from either WA, SA or NT.

Mr John Hargreaves, MLA (ACT)

Mr Warren Pitt, MLA (QLD)

Mr Gerald Martin, MP (NSW)

Reports from Chairs/Deputy

Each of the Chairs or representatives from each jurisdiction gave a report on their activities since the last meeting in November 2000. The details of these reports are contained in the draft transcript which is available from the Committee's secretary.

Contribution of the work of Senator Barney Cooney

The meeting noted the work of Senator Cooney over the last 12 years and all delegates expressed their appreciation.

Bill Stefaniak, MLA
Chair

May 2002

Meeting of Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Scrutiny Committees

Canberra, Thursday 2 May 2002

List Of Attendees

Commonwealth

Senate Standing Committee for the Scrutiny of Bills

Senator Barney Cooney (Chair)
Mr James Warmenhoven (Secretary)
Mr David Creed (Secretary)
Professor Jim Davis (Legal Adviser)

Senate Standing Committee on Regulations and Ordinances

Senator Tsebin Tchen (Chairman)
Ms Janice Paull (Senior Research Officer)
Professor Stephen Bottomley (Legal Adviser)

Australian Capital Territory

Justice and Community Safety Committee

(incorporating Scrutiny of Bills and Subordinate Legislation)
Mr Bill Stefaniak MLA (Chair)
Mr John Hargreaves MLA (Deputy Chair)
Mr Tom Duncan (Secretary)
Mr Peter Bayne (Legal Adviser)

New South Wales

Regulation Review Committee

Mr Gerard Martin MP (Chairman)
Hon Janelle Saffin MLC (Vice-Chairman)
Hon Don Harwin MLC
Ms Marianne Saliba MP
Hon Malcolm Jones MLC
Mr Gregory Hogg (Project Officer)
Mr Russell Keith (Committee Manager)

Queensland

Scrutiny of Legislation Committee

Mr Warren Pitt MP (Chairman)
Mr Peter Wellington MP (Deputy Chairman)
Mr Chris Garvey (Research Director)

South Australia

(The new committee will not be established until the week beginning 6 May 2002.)
Mr George Kosmas (secretariat staff officer)

Tasmania

Parliamentary Standing Committee on Subordinate Legislation
Hon Geoff Squibb MLC (Chairman)
Hon Doug Parkinson MLC (Deputy Chairman)
Ms Wendy Peddle (Secretary)

Victoria

Scrutiny of Acts and Regulations Committee
Ms Mary Gillett MLA (Chair)
Hon Andrew Alexander MLC (Deputy Chair)
Mr Andrew Homer (Senior Legal Adviser)

Western Australia

(new committees to be advised)
Ms Mia Betjeman (Principal Adviser Procedure)
Ms Felicity Beattie (secretariat staff)

**Meeting of Working Group of Chairs and Deputy
Chairs**

of

**Australian Scrutiny of Primary and Delegated
Legislation Committees**

Canberra - Thursday 2 May 2002

Program

**Senate Committee Room 2S3
Parliament House, Canberra**



Meeting of Working Group of Chairs and Deputy Chairs of Australian Scrutiny of Primary and Delegated Legislation Committees

Program

**Thursday, 2 May 2002
Senate Committee Room 2S3**

9.00 am - 9.30 am	Tea/Coffee Senate Committee Room 2S3
9.30 am	Welcome
9.40 am	Election of Chair of Working Group Apologies Minutes of previous meeting
	Reviewable Legislative Instruments - How do we prevent parliamentary scrutiny bypass? Tasmania to lead agenda item - Hon Geoff Squibb MLC (Chair)
10.45 am	Morning Tea
11.15 am	Committee Procedures Queensland to lead agenda item - Mr Warren Pitt MP (Chair) <ul style="list-style-type: none">• Tabling of correspondence between committees and Ministers concerning particular delegated legislation• Scrutiny of amendments to bills
12.15 - 1.45 pm	Lunch Dining Room, 2 nd Floor Parliament House
1.45 pm	Scrutiny of National Schemes of Legislation <ul style="list-style-type: none">• Brief summary of the history and progress of scrutiny of national scheme legislation
	The establishment of a Scrutiny of National Schemes of Legislation Committee <ul style="list-style-type: none">• Victoria to lead agenda item - Mary Gillett MLA (Chair) Further discussion on a draft bill for the establishment of a National Committee (<i>continuation of business from the previous meeting held in Melbourne in November 2000</i>)• Open discussion and consideration of proposal including the addition of provisions concerning the scrutiny of delegated legislation

3.00 pm	Afternoon Tea
3.30 pm	<ul style="list-style-type: none">• Reports from Chairs/Deputy Chairs (5 minutes each) <i>(Update on the position of each Committee since the last meeting in November 2000 including: NSW - progress report on the establishment of Scrutiny of Bills committee WA - recent developments)</i>• Resolutions• Venue and date of next meeting
4.30 pm	Meeting concludes

Reviewable Legislative Instruments - How do we prevent parliamentary scrutiny bypass?

Tasmania

Parliamentary Standing Committee on Subordinate Legislation

Reviewable Legislative Instruments - How do we prevent parliamentary scrutiny bypass?

The Tasmanian Committee has the following concerns with disallowable legislative instruments:

- The Committee is concerned that successive Governments are using terminology other than Regulations for instruments to bypass scrutiny by the Committee and the Parliament.
- Names such as ‘Guidelines’, ‘Codes’, ‘Management Plans’, ‘Standards’, ‘Orders’ and ‘Notices’ are being used to avoid automatic referral to the Committee.
- The Committee would like to amend its charter to encompass all subordinate legislation whatever its name or content.
- The main purpose of discussing this subject at the Chairs and Deputy Chairs meeting is to see whether it would be a worthwhile exercise to include a similar paper on the Agenda for the Conference in Hobart next February.

**Tabling of correspondence between committees
and Ministers concerning particular
delegated legislation**

Senate Standing Committee on Regulations and Ordinances

Publication of Ministerial correspondence

Following the re-establishment of the Regulations and Ordinances Committee in 1998, the members of the Committee have been systematically reviewing its practices and procedures in order to make its work more streamlined, more accessible and better understood.

One of the areas to which the Committee gave careful consideration was the accessibility of correspondence with Ministers. During 1999-2000, the Committee sought advice/clarification/additional information from Ministers on approximately 250 instruments. The majority of this correspondence was not published and therefore accessible to the community and interested parties. The only time correspondence was published was when the Committee gave notice of intention to withdraw a notice of disallowance on an instrument. At this stage, relevant correspondence between the Minister and the Committee was incorporated in *Hansard*.

The Committee considers that most ministerial responses to its concerns are instructive, providing detailed advice on its concerns. The Committee therefore agreed at the end of 2000 to place these responses on the public record unless a request was made and it agreed that the response should be treated confidentially. Publication of this correspondence will ensure that the work of the Committee is open and transparent and that interested parties have the benefit of the advice provided by the Minister.

Since February 2001 the Committee has tabled in the Senate two volumes of correspondence with Ministers relating to its scrutiny of delegated legislation. The Committee expects to table at least two volumes each year.

The Committee also continues its practice of incorporating in *Hansard* correspondence relating to instruments on which it has given a notice of motion to disallow.

National Schemes of Legislation

Background Paper

National Schemes of Legislation

Background Paper

Introduction

National scheme legislation (NSL) refers to the practice of the Commonwealth, State and Territory governments agreeing that a particular issue will be addressed by each individual jurisdiction passing legislation of a certain, agreed nature. These inter-governmental agreements are made in forums such as the Council of Australian Governments (COAG) or Ministerial Councils.

Types of National Scheme Legislation

There are a number of ways of achieving national scheme legislation. The types discussed below are the most usual and relevant to the Committee's considerations.

Type 1—‘Complementary Commonwealth-State’ Legislation

This type developed out of the confines of the Constitution. 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. An example is the Commonwealth *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 that are not covered by the Commonwealth legislation. The relevant relationship in this type 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 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.

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

Type 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 participating jurisdictions. Totally consistent

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

This type 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.

The inter-governmental 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. The passage of inconsistent amendments will inevitably contribute to the breakdown of a national scheme reliant on consistent legislation or regulations.

Assuming the Bills pass through each Parliament as originally drafted, this type of legislation emphasises consistency.

Type 3 — ‘Template’ Legislation

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

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

Amendments adopted automatically — in this type, 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 that 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. The relevant inter-governmental 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. The *Financial Institutions* legislation and the *Corporations Law* are examples of this structure.

The inter-governmental agreement may provide for the method of agreeing amendments. Unless the approval of all Ministers is required to proposed amendments, a vote against the proposal will not of itself prevent that amendment applying to that Minister’s jurisdiction. It is therefore possible that the Minister of the host jurisdiction will be obliged to introduce amendments into the host Parliament, if the amendments are approved by the Ministerial Council, even if that Minister voted against the proposal in Ministerial Council.

The Parliaments of the participating jurisdictions are not involved in the amending process, unless the attention of a State Parliament is drawn to the need to pass legislation that specifically varies an amendment made in the host Parliament. This type of legislation emphasises a high degree of consistency for the legislation as amended.

Amendments enacted separately — this type 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 that applies the legislation of the host jurisdiction, but retain control over the amendment process.

The inter-governmental 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 inter-governmental agreement may require Ministers to propose amending legislation in their jurisdictions, despite voting against the proposed amendments at Ministerial Council. Each jurisdiction retains some flexibility in its consideration of proposed amendments. A high degree of consistency is emphasised in the original legislation.

Category 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.

Type 5 — ‘Alternative Consistent’ Legislation

This is a relatively new type known as ‘Alternative Consistent’ legislation. This was a category used for the Uniform Consumer Credit Laws.

The inter-governmental 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.

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. The emphasis in this type of legislation is on flexibility.

The Problem

Participants at Scrutiny Conferences have described the problem in the following terms:

Various governments agree to put NSL legislation through their respective parliaments and the success of the whole approach is dependent on the legislatures of all the jurisdictions passing legislation in the form agreed. As a result, legislatures are told that they cannot amend the legislation because the

legislation is in a form that has been agreed between governments and amendment will undo that agreement. In the case of parliamentary review committees they are told that, for the same reasons, they cannot press their concerns about legislation. The end result is that practically speaking, there is effectively no parliamentary scrutiny of national scheme legislation.

Possible size of the problem

In 1997, Mr Victor Perton MP commented on the size of the problem in Victoria:

... I draw your attention yet again to the continuing numbers of NSL proposals that reach our respective parliaments year by year. In 1998, there were 5 NSL proposals introduced into the Victorian Parliament. All were passed into law by the Victorian Parliament. So far in 1999 [as at July 1999], there have been four new NSL proposals introduced.

Chronology of initiatives by scrutiny committees

1993

The Victorian and New South Wales Committees approached their Attorneys-General seeking their endorsement of a general proposal for parliamentary scrutiny of NSL. The Victorian Attorney responded accordingly:

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.

1995

In 1995, a Working Party of Chairs of Scrutiny of Legislation Committees throughout Australia released a **Discussion Paper** seeking comment on the following proposals:

Proposal 1

That all Scrutiny Committees adopt the same terms of reference for the examination of national scheme subordinate legislation.

Proposal 2

That all Scrutiny of Bills Committees adopt the same terms of reference for the examination of national scheme primary legislation.

Proposal 3

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

1996

In October 1996 the Working Party published its **Position Paper** on *Scrutiny of National Schemes of Legislation*. The Paper proposed two options by which the Committees could consider national schemes of legislation.

Option 1

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.

Modus Operandi — For working purposes, within that National Committee there will be two ‘lists’; one for Subordinate Legislation and one for Bills. Those committees that deal with Bills will be on the ‘Bills List’. Those committees that 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 that will have responsibility for the carriage of the Report. The coordinating of the Report (conducting of teleconferences etc) should be worked out between the advisers of the Chair and the Deputy Chair.

Material — All the material should be sent to all committees. 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. 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. There were 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. A fourteen-day timetable for scrutiny was proposed.

Option 2

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 inter-governmental 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.

1997

Following the publication of the Position Paper, Senator O'Chee approached the Commonwealth Attorney-General concerning the scrutiny of national scheme delegated legislation in the proposed Legislative Instruments Bill 1996. Senator O'Chee reported on these discussions in the following terms:

...[the Attorney-General] indicated a reluctance to allow Parliamentary scrutiny of delegated legislation in all jurisdictions and therefore preferred to exclude these instruments from any possible scrutiny until after a review [of the Legislative Instruments Bill if passed] in three years. After discussion, the Attorney-General was willing to accept the possibility of scrutiny in one jurisdiction, ideally the Senate, if a mutually satisfactory scheme could be established. Accordingly an indication of our intentions would assist with the passage of the Bill while maintaining the legitimate concern of the different Commonwealth, State and Territory Committees.

When these discussions were reported to the other Committees, a majority of the State and Territory Committees agreed in principle to the proposal but Victoria and Western Australian expressed misgivings about relinquishing their responsibilities to the Senate. The Chairs did not agree to this proposal when it was discussed further at a meeting held in Sydney in March 1997.

Timing of Scrutiny

There have been concerns about scrutinising bills/regulations in draft form. For example, Senator Cooney, on 7 August 1996, expressed the following view:

For Scrutiny Committees to examine and approve of legislation proposed at a joint sitting of Australian Governments before it becomes available to the relevant Parliaments:

1. could give a reasonable person the impression that they were the creatures of the Executives rather than of the Legislatures;
2. could be reasonably seen as attempting to pre-empt the Parliaments' management of the legislation;
3. could be reasonably taken as prejudicing the constitutional proprieties that should exist between the Parliaments and the Executive.

1998

In 1998, the Victorian Committee refined Option 2 noted above. The proposal is summarised as follows:

Legislation applicable to the initiative is developed and becomes the NSL. The NSL is auspiced through a jurisdiction of the Federal, State or Territory Governments. Upon the NSL being introduced to its originating jurisdiction (OJ) it is marked on its face as being NSL. When the NSL is Second Read in the OJ it is immediately referred to a Committee for Scrutiny of National Scheme Legislation (CSNSL).

The CSNSL shall comprise a representative from each of the six States, the two Territories and the Commonwealth Government being nine members in all. The Committee would be established through Commonwealth legislation. It would have a capacity to scrutinise both primary and subordinate legislation.

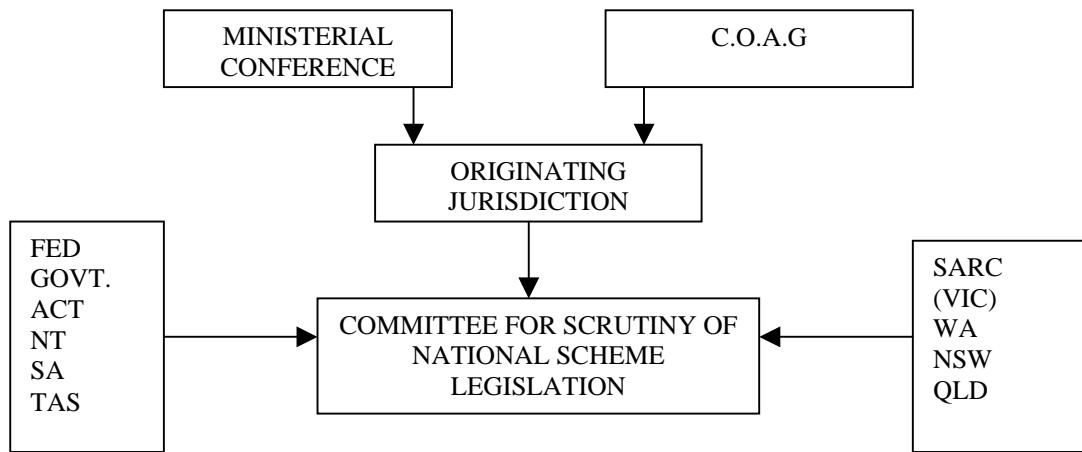
Its membership would comprise representation from the Scrutiny Committees in each of the national jurisdictions with the representative in each instance being the Chair or nominee of the respective Committees. The CSNSL would scrutinise the legislation and prepare a report.

The Report would then be tabled within the Parliaments of each of the nine jurisdictions and would represent the report to the respective Parliaments upon the NSL.

To enable this to happen State and Territory procedures may need to provide for the tabling of an Alert Digest pertaining to NSL in the form of the Report from the CSNSL. In the event of any future amendment to the NSL, the process would still apply in that the proposal would be scrutinised by the CSNSL in the same manner as the principal instrument.

The proposal enables the nine jurisdictions to have a capacity to influence the shape of the NSL in accord with scrutiny principles. On the other hand it also enables that scrutiny to occur contemporaneously - rather than going through the protracted process of being considered by each jurisdiction at different points in time with the inevitable proposals for change coming from different points of view. Any proposed change is appropriately co-ordinated through the operation of the Committee.

The proposal enables the principles of scrutiny to be observed within each of the national jurisdictions by ensuring that there has been consideration of the NSL on behalf of the respective jurisdictions and that a report is duly tabled in all Parliaments.



2000

The Victorian Committee drafted a bill to give statutory effect to the above proposal. The relevant papers are attached. The bill was the subject to lengthy discussion at a meeting of Chairs and Deputy Chairs in Melbourne on 10 November 2000. The Chairs agreed to the bill with amendments (see amended bill that accompanies this paper). The Chairs further agreed that the bill should be extended to include the scrutiny of delegated legislation and that proposed amendments be drafted for the next meeting of Chairs (see proposed amendments in the bill that accompanies this paper). Because this proposal involves the introduction of legislation, the Chairs agreed to seek comments from the Attorney-General in each jurisdiction.

DISCUSSION PAPER ONLY

A BILL

to better enable the Parliaments of Australia to scrutinise national schemes of legislation.

Scrutiny of National Schemes of Legislation Act 2000

Preamble

The Parliaments of the Commonwealth of Australia, the States and Territories of Australia (the Parliaments) wishing to ensure that national schemes of legislation introduced into a Parliament are amenable to effective Parliamentary scrutiny hereby agree to establish a national committee for the scrutiny of national schemes of legislation.

Recognizing that under this agreement the role of the Committee will be to scrutinise legislation introduced into any Australian Parliament which has arisen from an international or intergovernmental agreement, arrangement undertaking or understanding.

Also mindful that the Committee's role will not be to make any comment on the policy aspects of such legislation but rather to report to the Parliaments within agreed common terms of reference.

The Commonwealth of Australia, the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania, the Australian Capital Territory, the Northern Territory have agreed to the enactment of legislation in the several jurisdictions for the establishment of a National Scrutiny Committee.

The Parliament of Victoria therefore enacts as follows -

1. Purpose

The purpose of the Act is to give legal force (so far as it depends on the legislative power of the State) to establish a Committee for the scrutiny of national schemes of legislation and thereby, better enable the Parliament to scrutinize legislation arising out of any international or intergovernmental agreement, arrangement or understanding introduced into an Australian House of Parliament, and to report to the Parliament whether the Bill by its express terms or otherwise meets certain agreed legislative standards.

2. Commencement

The Act comes into operation on proclamation. If the Act is not proclaimed by 31 December 2001 it is repealed on that day.

3. Citation

This Act may be cited as the *Scrutiny of National Schemes of Legislation Act 2001*.

4. Definitions In this Act -

Committee means the Scrutiny of National Schemes of Legislation Committee "SNSLC":
Parliaments means the Parliaments of the Commonwealth of Australia, and of the respective States and Territories of Australia.

Presiding Officers means the President of the Legislative Council and the Speaker of the Legislative Assembly.

National Schemes of Legislation (NSL) means any legislation arising out of or having its origin from any international or national inter-governmental agreement, arrangement or understanding, and includes, bi-lateral or multi-lateral treaties, mirror, model and template legislation.

Scrutiny of Acts and Regulations Committee means the Committee of that name established pursuant to section 4D of the **Parliamentary Committees Act 1968**.

Secretariat means the office providing administrative support to the "SNSLC". Terms of reference means the terms of reference of the SNSLC.

5. Ratification of cooperative scheme

To the extent that it lies within the legislative competence of the State to give the establishment and functions of the Committee the force of law, it has the force of law.

6. Savings

(1) Notwithstanding the provisions of section 4D(a) of the **Parliamentary Committees Act 1968** the Scrutiny of Acts and Regulations Committee must not report to the Parliament on an NSL Bill dealt with by a report under this Act.

(2) Despite anything to the contrary in this Act the Scrutiny of Acts and Regulations Committee must make a report to the Parliament under section 4D(b) of the **Parliamentary Committees Act 1968** where an issue is raised in any Bill concerning the jurisdiction of the Supreme Court of Victoria.

7. Tabling of report

(1) A report prepared under this Act must be tabled in each House of the Parliament as soon as practicable after the adoption of the report by the Committee.

(2) If a House of the Parliament is not sitting at the time a report referred to in sub-section (1) is to be tabled, the report may be tabled by delivery of the report to the Presiding Officers of the Parliament.

8. Appointment of Members

(1) At the commencement of this Act and from time to time thereafter there shall be appointed 2 members of the Committee as follows -

- (a) One member and an alternate member shall be appointed by the, Premier; and;
- (b) One member and an alternate member shall be appointed by the Leader of the Opposition.

(c) Members and alternate members nominated under sub-sections (1) and (2) must be members of the Scrutiny of Acts and Regulations Committee.

(2)

(a) A members or alternate members appointment to the Committee may be revoked by the Premier or the Leader of the Opposition as the case may be.

(b) An appointment to the Committee shall expire on the dissolution of the Legislative Assembly.

(3) An alternate member may only serve on the Committee in the absence of the relevant member.

9. Resignation

(1) A member or alternate member may resign his or her position on the SNSLC by letter addressed to the respective Presiding Officer.

(2) A member or alternate member's position is deemed to be vacated if the member ceases, for any reason to be a member of the Parliament of Victoria.

10. Vacancy

A vacancy on the Committee shall be filled in accordance with section 8(1)(a) or 8(1)(b) as the case requires.

SCHEDULE

SCRUTINY OF NATIONAL SCHEMES OF LEGISLATION COMMITTEE

Be it enacted by the President of Australia the Senate and the House of Representatives as follows -

1. Establishment of Committee

There is established a Committee for the scrutiny of national schemes of legislation to be known as the *Scrutiny of National Schemes of Legislation Committee (SNSLC)*.

2. Definitions

In this schedule -

Committee means the Scrutiny of National Schemes of Legislation Committee "SNSLC".

Parliament means the Parliaments of the Commonwealth of Australia, and of the respective States and Territories of Australia.

national schemes of legislation (NSL) means any legislation arising out of or having its origin from any international or inter-governmental agreement, arrangement or understanding, and includes, mirror, model and template legislation.

responsible Minister means the Minister introducing an NSL Bill into a House of Parliament.

Secretariat means the office or staff providing administrative support to the "SNSLC".

terms of reference means the terms of reference of the SNSLC in section 11.

3. Composition of SNSLC

The SNSLC shall consist of -

- (a) Two members and two alternate members shall be appointed according to the practices and procedures of each of the Parliaments;
- (b) Notwithstanding the generality of sub-section (a) the Prime Minister, Premier or Chief Minister as the case requires shall appoint one member and one alternate member and the Leader of the Opposition shall appoint one member and one alternate member to serve on the Committee.
- (c) An alternate Member may only act in the place of a member in the absence of the relevant member for any reason;
- (d) The Members of the Committee shall elect a Chair and a Deputy Chair;
- (e) The Deputy Chair shall serve as the Chair of the Committee in the absence of the Chair;
- (f) In the absence of the Chair and Deputy Chair the Members of the Committee the Members may elect a Chair pro temp;
- (g) The Chair of the Committee or the Chair pro temp shall have a deliberative vote only;
- (h) The Chair and Deputy Chair of the Committee shall be chosen on a rotational basis for a 12 month period with the objective that a member from each of the Australian Parliaments shall serve as Chair and Deputy Chair before an Australian Parliament's representative serves a second or subsequent time.

4. Quorum

- (1) A quorum of the Committee shall be 10 Members but no quorum shall

comprise of less than a representative from at least 6 of the 9 Parliaments. (2) This section also applies to meetings held pursuant to section 10.

5. Ministers duty

- (1) It is the duty of the responsible Minister to identify legislation introduced into a House of Parliament which may be reasonably characterised as an NSL Bill.
- (2) A Minister introducing NSL into a Parliament must ensure that the Bill, has marked beneath its short title 'National Scheme Legislation'
- (3) A Bill introduced under sub-section (1) must have attached to it an Explanatory Memorandum in accordance with section 6.
- (4) The Minister introducing a Bill under sub-section (1) shall request that the House in which the Bill is introduced, defer further consideration of the Bill for two (2) sitting weeks after the second reading speech.

6. Content of explanatory memorandum

An explanatory memorandum for an NSL Bill introduced under section 5 must include the following information about the Bill in plain language -

- (a) the Bills short title;
- (b) a statement of the origins of the international or intergovernmental agreement, arrangement, undertaking or understanding giving rise to the Bill;
- (c) a statement of the policy objectives of the Bill;
- (d) an explanation of the purpose and intended operation of each clause of the Bill.

7. Clerk to advise the Secretariat

The Clerk of the House of Parliament in which an NSL Bill is introduced in accordance with section 5(1) shall, at the conclusion of the second reading speech, take all reasonable steps to immediately advise the Secretariat of its introduction and to make available to the Secretariat a copy of the Bill, the explanatory memorandum and the second reading speech concerning that Bill.

8. Secretariat to prepare report

- (1) On receipt of advice under clause 7 concerning an NSL Bill the Secretariat shall prepare a draft report in accordance with the terms of reference of the Committee.
- (2) The Secretariat shall as soon as practicable convene a meeting of the Committee to consider the draft report.
- (3) The Secretariat may convene a meeting pursuant to section 10.

9. Committee to consider report

- (1) The Committee may consider the Secretariats draft report and may authorize the Secretariat to publish a report concerning the Committee's scrutiny of the Bill in accordance with the terms of reference.
- (2) A member or members of the Committee may require the Committee to publish with the report a separate dissenting opinion.
- (3) On a request made under sub-section (2) the Secretariat shall publish such dissenting opinion with the report.

10. Proceedings of Committee

- (1) The Committee may make rules for the conduct of its meetings that are not inconsistent with this Act and may regulate its own proceedings.
- (2) The Committee may permit members to participate in a particular meeting, or all meetings, by telephone, closed circuit television or other means of communication.

11. Terms of reference

The functions of the SNSLC are to consider any Bill introduced into a House of Parliament and to report to the respective Parliaments of Australia as to whether the Bill by express words or otherwise -

- (a) trespasses unduly upon rights or freedoms;
- (b) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
- (c) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
- (d) inappropriately delegates legislative power; or
- (e) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

12. Administrative arrangements

The Committee may make such administrative and staffing agreements with the consent of a Parliamentary committee or government department or agency as appear proper or necessary to establish and maintain a Secretariat.

Scrutiny of National Schemes of Legislation Bill

EXPLANATORY MEMORANDUM

PART 1

[MODEL PART]

Part 1 sets out the Victorian model legislation. Part 1 will have some mandatory aspects to it, such as the commencement provision and clause 8. Other States and Territories may not need a savings provision or may require a modified one, where, for example, there is no scrutiny committee as such in existence.

Clause 1	Sets out the purpose of establishing a national committee for the scrutiny of bills.
Clause 2 an accede or more	The Commonwealth, the States and Territories will need to determine appropriate commencement date. If some jurisdictions do not wish to accede to the agreement a forced repeal provision may be necessary. The conference may wish to consider whether the scheme is workable/ feasible absent one of the jurisdictions?
Clause 3	The Act could be called the ' <i>Scrutiny of National Schemes of Legislation Act'</i> or the ' <i>Scrutiny of National Legislation Act</i> '.
Clause 4	Provides for the definitions used throughout the Act.
Clause 5	Ratifies the agreement so far as it is possible for the State to do so.
Clause 6 4D of the National Victorian Committee. requirement Unless the its	(1) The clause will ensure that the scrutiny obligations under section 4D of the <i>Parliamentary Committees Act 1968</i> are discharged in the case of a Scheme Bill by a report of the National Committee on that Bill. The Committee will thus not duplicate the work of the National Committee will thus not duplicate the work of the National Committee.
Clause 7	(2) This is a provision unique to Victoria in respect to the states to report on issues affecting the jurisdiction of the Supreme Court.
Clause 8 the	requirement is repealed the Victorian Committee will need to continue reportage of such provisions under section 4D(b) of the <i>Parliamentary Committees Act 1968</i> .
Clause 9	The report of the National Committee may be tabled in the Victorian Parliament and stand as the Scrutiny Committees report on that Bill.
Clause 10	Sets out the provision for the appointment of the Victorian members of the National Committee.
	Deals with resignation as a member of the National Committee.
	Deals with the filling of casual vacancies.

PART 2
[MIRROR OR TEMPLATE PART]
THE SCHEDULE

SCRUTINY OF NATIONAL SCHEMES OF LEGISLATION COMMITTEE

Part 2 is the template legislation which each participating jurisdiction agrees to adopt to give effect to the establishment of the National Committee.

- Clause 1 establishes the National Committee to be known as the *Scrutiny of National Schemes of Legislation Committee (SNSLC)*.
- Clause 2 Provides for definitions used in the Act.
- Clause 3 Provides that each participating jurisdiction shall appoint 2 members one from the government and one from the opposition. The Members of the Committee shall elect a Chair and a Deputy Chair. The Chair of the Committee or the Chair pro temp shall have a deliberative vote only. It is envisaged that the Chair and Deputy Chair of the Committee shall be chosen on a rotational basis for a 12 month period with the objective that a member from each of the Australian Parliaments shall serve as Chair and Deputy Chair before an Australian Parliament's representative serves a second or subsequent time.
- Clause 4 A quorum of the Committee shall be 10 Members but no quorum shall comprise of less than a representative from at least 6 of the 9 Parliaments. The provision also applies to meetings held pursuant to clause 10.
- Clause 5 Provides that it is the duty of the responsible Minister to identify legislation introduced into a House of Parliament which may be reasonably characterised as an NSL Bill. It is the Minister that bears the burden of advocacy when introducing any other Bill into the Parliament so this requirement does no more than ask members of the executive to identify the genesis of the Bill. In any event it would be no more than the drafting instructions and departmental briefing already given to Parliamentary Counsel in preparing a Bill suitable for introduction and approved by Cabinet. In short the information required to comply with this section is already known by the executive.
Once introduced and Second Read the Bill should be adjourned for a reasonable period to enable the national Committee to consider its content. The Bill should be accompanied by sufficient and suitable explanatory notes and comments in the Second Reading Speech.
- Clause 6 Provides the minimum standards for the content of an explanatory memorandum.
- Clause 7 The Clerk of the House in which the Bill is introduced or his or her delegate must transmit the material to the National Committee.
- Clause 8 The Secretariat of the National Committee prepares a report and calls a meeting of the members (including a meeting under clause 10).
- Clause 9 The Committee considers its position and authorises a report to be published. A dissenting member(s) may request a separate minority report.
- Clause 10 The Committee may regulate its own procedures and may make rules for holding a meeting by electronic means.
- Clause 11 Set out the terms of reference of the National Committee. The terms broadly reflect the existing terms of reference used by the Commonwealth (Senate), Victoria, Queensland and ACT scrutiny committees.
- Clause 12 Will permit the Committee to make administrative arrangements for the establishment of a secretariat.

- State and Territory Parliaments may refer power to the Commonwealth under section 51(xxxvii) of the Australian Constitution, which enables the Commonwealth to legislate on the particular matter, eg. *Mutual Recognition Act 1992* (Commonwealth), the mutual recognition scheme for goods and occupations.
- Another method includes the introduction of ‘mirror’ legislation enacted by all jurisdictions in identical terms, eg. the trade practice scheme (Part V consumer protection provisions) of the *Trade Practices Act 1974* (Commonwealth) and the Fair Trading Acts of the States.
- ‘Co-operative legislation may be enacted in circumstances where the Commonwealth enacts legislation to the extent of its powers and the States and Territories legislate to cover the remaining matters, eg. the Co-operative Companies and Securities scheme.
- ‘Template’ legislation involves a jurisdiction known as the host jurisdiction, enacting the model legislation and other jurisdictions adopting that legislation, eg the *Financial Institutions (Western Australia) Act 1992*.
- Under ‘alternative consistent’ legislation, a jurisdiction may be permitted to participate in a national legislative scheme by enacting legislation which is consistent with the legislation of the host jurisdiction, eg. the proposed Uniform Consumer Credit Laws in Western Australia.
- ‘Mutual recognition’ is a method of achieving national co-operation. Under this method jurisdictions agree to recognise each others laws, eg the mutual recognition scheme for goods and occupations provides mechanisms by which goods and services regulated by laws in one jurisdiction will be automatically recognised in all participating jurisdictions.

Establishment of a Scrutiny of National Schemes of Legislation Committee

Proposed Bill

NOTE

Amendments approved at the Melbourne Meeting of 10 November 2000 are single-underlined.

Proposed additional amendments dealing with subordinate legislation are double-underlined.

A BILL

to provide for the scrutiny of national schemes of legislation and for other purposes.

Scrutiny of National Schemes of Legislation Act 2000

The Parliament of Victoria therefore enacts as follows –

PART 1—PRELIMINARY

1. Purposes

The purposes of the Act are—

- (a) to record the State's intention to give effect to the Agreement on the Scrutiny of National Schemes of Legislation;
- (b) to provide for the appointment of the Victorian members of the Scrutiny of National Schemes of Legislation Committee;
- (c) to enable reports of the Scrutiny of National Schemes of Legislation Committee to be tabled in Parliament.

2. Commencement

- (1) Sections 1, 2 and 3 come into operation on the day after the day on which this Act receives the Royal Assent.
- (2) Subject to sub-section (3), the remaining provisions come into operation on a day or days to be proclaimed.¹
- (3) If a provision referred to in sub-section (3) does not come into operation before [date], it comes into operation on that day.

3. Definitions

In this Act –

Legislation includes both primary legislation (that is, Acts) and subordinate legislation.

National Scheme Legislation means all forms of legislation developed pursuant to or arising out of an any intergovernmental agreement which is –

- (a) uniform or substantially uniform in application, and
- (b) enacted or made, or proposed to be enacted or made, in each of the jurisdictions of the States Territories and/ or the Commonwealth.

National Scrutiny Committee means the Scrutiny of National Schemes of Legislation Committee established under the Agreement.

Presiding Officers means the President of the Legislative Council and the Speaker of the Legislative Assembly.

Uniform bill means a bill that gives legislative effect to national scheme legislation.

Uniform instrument means a uniform bill or uniform subordinate legislation

Uniform subordinate legislation means subordinate legislation that gives legislative effect to national scheme legislation.

Scrutiny Committee means the Scrutiny of Acts and Regulations Committee established under section 4 of the **Parliamentary Committees Act 1968**.

PART 2—INTERGOVERNMENTAL AGREEMENT

4. *Intergovernmental Agreement*

- (1) A copy of the Scrutiny of National Schemes of Legislation Intergovernmental Agreement is set out in the Schedule.
- (2) It is the intention of the State to comply with, and give effect to, the Intergovernmental Agreement.

PART 3—VICTORIAN MEMBERSHIP OF THE NATIONAL SCRUTINY COMMITTEE

5. *Appointment of Victorian members*

- (1) In accordance with the clause 3 of the Intergovernmental Agreement 2 members of the National Scrutiny Committee must be appointed as follows—
 - (a) the Premier must appoint one member of the Victorian Scrutiny Committee; and

- (b) the Leader of the Opposition must appoint one member of the Victorian Scrutiny Committee; and
 - (c) the Premier must appoint one member of the Victorian Scrutiny Committee as an alternate member; and
 - (d) the Leader of the Opposition must appoint one member of the Victorian Scrutiny Committee as an alternate member.
- (2) An alternate member appointed by the Premier may only serve on the National Scrutiny Committee in the absence of the other member appointed by the Premier.
- (3) An alternate member appointed by the Leader of the Opposition may only serve on the National Scrutiny Committee in the absence of the other member appointed by the Leader of the Opposition.

6. *Termination or revocation of appointment*

- (1) A person ceases to be a member or alternate member of the National Scrutiny Committee if—
 - (a) the person's seat as a member of the Council or the Assembly becomes vacant under the **Constitution Act 1975**; or
 - (b) the person resigns from the Committee by notice in writing to the Premier or the Leader of the Opposition, as the case may be.
- (2) If a person appointed under section 5 ceases to be a member or alternate member of the National Scrutiny Committee, the vacancy on the Committee must be filled in accordance with section 5(1).

PART 4—INTRODUCTION OF UNIFORM BILLS

7. *Certification of uniform bills*

- (1) Before a bill is introduced into either the Council or the Assembly, the member of the Council or the Assembly who brings in the bill must state whether the Bill is or is not a uniform Bill for the purposes of the Act.
- (2) A certificate under sub-section (1) must—
 - (a) state the reason why the bill is or is not a uniform bill; and
 - (b) include an explanation of the purpose and intended operation of each clause of the bill; and
 - (c) be tabled/lodged with/given to the Clerk of Parliaments when the Bill is first introduced.

8. *Consideration of uniform bill*

A uniform bill may not be considered by the Parliament for 28 calendar days after a Bill is read for a second time (introduced into Parliament) etc.²

9. Clerk to advise the National Scrutiny Committee

On the day after a uniform Bill is introduced the Clerk of the Parliament must transmit to the National Scrutiny Committee —

- (a) the bill; and
- (b) the certificate stating that the bill is a uniform bill; and
- (c) a copy of the second reading speech relating to the uniform bill; and
- (d) any other relevant material.

PART 4A – INTRODUCTION OF UNIFORM SUBORDINATE LEGISLATION

9A. Certification of uniform subordinate legislation

- (1) When subordinate legislation is tabled in either the Council or the Assembly, the Minister whose Department has responsibility for that subordinate legislation must also table a certificate stating whether the subordinate legislation is or is not uniform subordinate legislation for the purposes of the Act.
- (2) A certificate under sub-section (1) must —
 - (a) state the reason why the subordinate legislation is or is not uniform subordinate legislation; and
 - (b) include an explanation of the purpose and intended operation of each section of the subordinate legislation; and
 - (c) be tabled/lodged with/given to the Clerk of Parliaments when the subordinate legislation is tabled.

9B. Clerk to advise the National Scrutiny Committee

On the day after uniform subordinate legislation is tabled the Clerk of the Parliament must transmit to the National Scrutiny Committee —

- (a) the subordinate legislation; and
- (b) the certificate stating that the subordinate legislation is uniform subordinate legislation; and
- (c) a copy of any explanatory memorandum relating to the uniform subordinate legislation; and
- (d) any other relevant material.

PART 4B – GENERAL

10. Tabling of report

- (1) A report published by the National Scrutiny Committee in accordance with the Intergovernmental Agreement must be tabled in the Council and the Assembly as soon as practicable after the adoption of the report by the Committee.

- (2) If a House of the Parliament is not sitting at the time a report referred to in sub-section (1) is to be tabled, the report may be tabled by delivery of the report to the Presiding Officers of the Parliament.

11. *Immunity from judicial review*³

The proceedings of the National Scrutiny Committee or any recommendation, report made or any document published by the National Scrutiny Committee shall not give rise to any cause of action in law or be made the subject of, or in any way be called into question in, any proceedings before a court.

12. *Privileges and powers of members*⁴

Any member or alternate member serving on the National Scrutiny Committee shall hold, enjoy and exercise such privileges, immunities and powers as if that member was a member of a Committee established under the *Parliamentary Committees Act 1968*.

13. *Supreme Court – limitation of jurisdiction*

It is the intention of section 11 to alter or vary section 85 of the *Constitution Act 1975*

PART 5—CONSEQUENTIAL AMENDMENT

14. *Consequential amendment to the Parliamentary Committees Act 1968*

In section 4D of the **Parliamentary Committees Act 1968** after paragraph (d) insert—

- (2) Despite sub-section (1)(a), the Scrutiny of Acts and Regulations Committee may not consider a uniform bill or uniform subordinate legislation and report to the Parliament on that bill or subordinate legislation, if the National Scrutiny Committee in accordance with the Intergovernmental Agreement within in the meaning of the *****Act 200*** authorises the publication of a report on the bill or subordinate legislation.
- (3) Despite sub-section (2), the Scrutiny of Acts and Regulations Committee must make a report to the Parliament under sub-section (1)(b) if the uniform bill or uniform subordinate legislation raises an issue as to the jurisdiction of the Supreme Court of Victoria.
- (4) Despite sub-section (2), the Scrutiny of Acts and Regulations Committee must make a report to the Parliament under sub-section (1)(iiia) if the uniform bill or uniform subordinate legislation raises an issue whether it unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000.*⁵

SCHEDULE ONE

Agreement

AN AGREEMENT (to be called the "Scrutiny of National Schemes of Legislation Agreement") made this first day of April two thousand and one BETWEEN THE COMMONWEALTH OF AUSTRALIA of the first part, THE STATE OF NEW SOUTH WALES of the second part and THE STATE OF VICTORIA of the third part, THE STATE OF QUEENSLAND of the fourth part, THE STATE OF WESTERN AUSTRALIA of the fifth part, THE STATE OF SOUTH AUSTRALIA, of the sixth part, THE STATE OF TASMANIA, of the seventh part, THE AUSTRALIAN CAPITAL TERRITORY, of the eighth seventh part, and THE NORTHERN TERRITORY, of the ninth part (the participating Parliaments).

WHEREAS the participating Parliaments have agreed that a Scrutiny of National Schemes of Legislation Committee should be established for the better scrutiny of legislation introduced into a Parliament;

AND WHEREAS the participating Parliaments recognise -

that under this agreement the role of the Committee will be to scrutinise legislation introduced into any Australian Parliament which has arisen from an intergovernmental agreement.

AND ALSO MINDFUL that the Committee's role will not be to make any comment on the policy aspects of such legislation but rather to report to the Parliaments within the agreed terms of reference established by the agreement.

NOW IT IS HEREBY AGREED by and between the parties to this agreement as follows:

1. Establishment of Committee

There is established a committee for the scrutiny of national schemes of legislation to be known as the ***Scrutiny of National Schemes of Legislation Committee (SNSLC)***.

2. Definitions

In this schedule -

Committee means the Scrutiny of National Schemes of Legislation Committee "SNSLC".

Parliament means the Parliaments of the Commonwealth of Australia, and of the respective States and Territories of Australia.

"National Scheme Legislation" means all forms of legislation developed pursuant to or arising out of any intergovernmental agreement which is –

- (a) uniform or substantially uniform in application, and
- (b) enacted or proposed to be enacted in each of the jurisdictions of the States Territories and/ or the Commonwealth.

responsible Minister means the Minister introducing a uniform Bill into a House of Parliament, or whose Department has responsibility for particular subordinate legislation.

Secretariat means the office or staff providing administrative support to the “SNSLC”.

terms of reference means the terms of reference of the SNSLC in section 11.

uniform bill means a bill that gives legislative effect to national scheme legislation.

uniform subordinate legislation means subordinate legislation that gives legislative effect to national scheme legislation.

3. Composition of SNSLC

The SNSLC shall consist of –

- (1) Two members and two alternate members appointed according to the practices and procedures of each of the Parliaments to this agreement.
- (2) Notwithstanding sub-section (1) only one member and one alternative member may be appointed from the government parties represented in a Parliament.
- (3) An alternate Member may only act in the place of a member in the absence of the relevant member for any reason;
- (5) The Members of the Committee shall elect a Chair and a Deputy Chair who shall hold office for 2 years;
- (6) The Deputy Chair shall serve as the Chair of the Committee in the absence of the Chair;
- (7) In the absence of the Chair and Deputy Chair the Members of the Committee the Members may elect a Chair pro temp;
- (8) The Chair of the Committee, the Deputy Chair or the Chair pro temp shall have a deliberative vote only.

4. Quorum

- (1) A quorum of the Committee shall be 10 Members but no quorum shall comprise of less than at least one representative from at least 6 of the 9 Parliaments.
- (2) This section also applies to meetings held pursuant to section 7(2).

5. Secretariat to prepare report

- (1) On receipt of advice from a participating Parliament introducing a uniform bill or uniform subordinate legislation, the Chair shall prepare a draft report in accordance with the terms of reference of the Committee.
- (2) The Chair shall as soon as practicable convene a meeting of the Committee to consider the draft report.
- (3) The Chair shall cause to be convened a meeting pursuant to section 7.

6. Committee to consider report

- (1) The Committee may consider the Chair’s draft report and may authorise the Chair to publish a report concerning the Committee’s scrutiny of the Bill or subordinate legislation in accordance with the terms of reference.

- (2) A member or members of the Committee may require the Committee to publish with the report a separate dissenting opinion.
- (3) On a request made under sub-section (2) the Chair shall cause to be published such dissenting opinion with the report.

7. Proceedings of Committee

- (1) The Committee may make rules for the conduct of its meetings that are not inconsistent with this Act and may regulate its own proceedings.
- (2) The Committee may permit members to participate in a particular meeting, or all meetings, by telephone, closed circuit television or other means of communication.

8. Terms of reference

The functions of the SNSLC are to consider any legislation introduced into, or tabled in, a House of Parliament and to report to the respective Parliaments of Australia as to whether the legislation by express words or otherwise –

- (a) trespasses unduly upon rights or freedoms/liberties;
- (b) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
- (c) makes rights, freedoms or obligations unduly dependent upon non-reviewable administrative decisions;

And, in the case of bills:

- (d) inappropriately delegates legislative power; or
- (e) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;

And, in the case of subordinate legislation:

- (f) is in accordance with the statute; or
- (g) does not contain matter more appropriate for parliamentary enactment.

9. Administrative arrangements

The Committee may make such administrative and staffing agreements with the consent of a Parliamentary committee or government department or agency of a participating Parliament as appear proper or necessary to establish and maintain a Secretariat.

10. Parliamentary privileges

In the exercise of any function under this Agreement it is intended that each member of the National Committee shall enjoy all rights, privileges, powers and immunities as they would enjoy as members of the Parliament appointing the Member.

11. Immunity from judicial review

The parties to this agreement intend that the proceedings of the National Scrutiny Committee or any recommendation, report made or any document published by the National Scrutiny Committee shall not give rise to any cause of action in law or be made the subject of, or in any way be called into question in any proceedings before a court.

¹ Commencement by proclamation may be necessary as all jurisdictions will need to bring the legislation into force simultaneously.

² Each jurisdiction will need to modify according to suit practice and procedure.

³ Mirrors immunity provision in Victorian *Parliamentary Committees Act 1968*.

⁴ Mirrors privilege provision in *Victorian Constitution Act 1975*.

⁵ Other jurisdictions may have special reporting requirements in addition to those established under the common terms in the agreement. This provision will allow all jurisdictions to report on the non-common terms and thereby discharge any statutory requirements.