



Legislative Assembly for the ACT

STANDING COMMITTEE ON LEGAL AFFAIRS
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

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

2 MAY 2005

Report 9

TERMS OF REFERENCE

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.

Human Rights Act 2004

Under section 38 of the Human Rights Act, this Committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(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, Canberra on 1 March 2005 and was hosted by the Senate Regulations and Ordinances Committee.

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

The ACT was represented by Mr Bill Stefaniak MLA (Chair), Ms Karin MacDonald MLA (Deputy Chair), Standing Committee on Legal Affairs (performing its duties as a Scrutiny of Bills and Subordinate Legislation Committee) and Mr Max Kiermaier, Secretary.

Resolutions agreed to by the meeting

The Meeting agreed to the following 5 resolutions on 1 March 2005:

- **Co-Chairs of the Chairs and Deputy Chairs Working Group**

That –

- (1) *The Chairs and Deputy Chairs Working Group continue the practice of electing Co-Chairs;*
- (2) *The position of a Co-Chair will be held against an individual jurisdiction rather than in the name of an individual; and*
- (3) *The Co-Chairs will be from the Commonwealth and the jurisdiction hosting the next biennial conference.*

- **Conference fees**

Noting that all jurisdictions, with the exception of New Zealand, have hosted a biennial conference:

That –

Conference fees may be charged for future conferences.

- **Timing of conferences**

That –

Future biennial conferences are held during the winter parliamentary break, taking into account the sitting preferences of the respective Australasian parliaments.

- **Conference Patrons**

That –

- (1) *The Conference, by resolution, extends the appointment of the Patrons appointed at the biennial conference held in Hobart in 2003; and*

(2) *Future Conferences, by resolution, may appoint additional Patrons.*

- **National Scrutiny Principles**

That –

The Chairs and Deputy Chairs Working Party, having discussed a Discussion Paper on The Development of National Scrutiny Principles:

- (1) *Maintain a watching brief on national schemes of legislation;*
- (2) *Continue to examine ways of advancing national scrutiny principles; and*
- (3) *Circulate the Discussion Paper for feedback from legislative scrutiny committees in each jurisdiction, and following that to:*
 - (a) *parliamentary counsel in each jurisdiction; and*
 - (b) *Council of Australian Governments.*

The Meeting's proceedings

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

Opening by Chair

Senator Tsebin Tchen, Co-Chair, opened the meeting and welcomed all participants.

Chairs and Deputy Chairs Working Group

The Chairs and Deputy Chairs Working Group has Co-Chairs, with Senator Tchen holding one Co-Chair position and the other, held by Tasmania, vacant as a result of the Hon Geoff Squibb MLC not being re-elected in the last Tasmanian election. Senator Tchen indicated that his term as a senator would end on 30 June 2005. The Working Group indicated it wished to continue with having Co-Chairs – one from the Commonwealth and the other drawn from the other committees – but being held by the Chairs of particular committees rather than specified individuals. Further, the second Co-Chair position would go to the jurisdiction hosting the next conference. A resolution was accordingly passed to this effect.

The group also expressed a desirability to meet more regularly, at least once between biennial conferences.

Future Conferences

The Group acknowledged that significant costs were incurred in hosting conferences and that the Scrutiny Conference was one of very few, if any, nowadays not to charge delegates a fee. Apart from New Zealand, a relatively recent participant in Scrutiny conferences, it was noted that each jurisdiction had hosted a conference. Therefore it was felt appropriate that, if hosting jurisdictions wished to do so, in future conference fees could be levied.

The time of year for holding conferences was also considered. As most parliaments' sitting patterns do not become known until towards the end of a previous year it is very difficult for the host organizers to plan for a conference in the early months of a year and no matter which dates are chosen inevitably some committees will not be able to attend because their parliaments will be sitting at that time. The Group resolved that the most appropriate time for future conferences would be during the winter break (ie July/August).

As noted earlier, a full cycle of hosting conferences (commencing 1987) has almost been completed and so a fresh round could commence. New Zealand indicated that it would be willing to host the 2007 Conference, but as a change in the Speakership was currently taking place, it could not undertake to do so without formal ratification by the new Speaker. Queensland offered to host the next conference if New Zealand was unable to do so.

National Scrutiny Principles

This issue of national scheme legislation has been one of continuing concern for many years, given that the uniform nature of such "template" legislation prevents individual jurisdictions from subjecting it to effective parliamentary scrutiny.

At the previous conference held in Hobart in 2003 and on the initiative of the ACT Committee it was resolved that a discussion paper (see Attachment 3).be prepared for the consideration of the Chairs and Deputy Chairs Working Group on the feasibility of developing national scrutiny principles for the examination of national scheme legislation. Such principles would embody scrutiny principles which all Australian scrutiny committees expect to see in legislation, and could then be made available to the various intergovernmental bodies who develop national scheme legislation.

The working Group considered the paper and proposed that it be referred to the various scrutiny committees in each jurisdiction for comment, with a view to then providing it to parliamentary counsels and the Council of Australian Governments.

Bill Stefaniak MLA
Chair

May 2005

**Meeting of Chairs and Deputy Chairs of the
Australian Legislative Scrutiny Committees
Canberra, ACT, Tuesday, 1 March 2005**

List of Attendees

Commonwealth

Regulations and Ordinances Committee

Senator Tsebin Tchen

Mr James Warmenhoven, *Secretary*

Ms Janice Paull, *Senior Parliamentary Officer*

Scrutiny of Bills Committee

Mr Richard Pye, *Secretary*

Australian Capital Territory

Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Mr Bill Stefaniak MLA (Chair)

Ms Karin MacDonald MLA (Deputy Chair)

Mr Max Kiermaier (Secretary)

New South Wales

Legislation Review Committee

Mr Russell Keith, *Committee Manager*

Mr Mel Keenan, *Senior Committee Officer*

New Zealand

Regulations Review Select Committee

Mr Michael Wilkinson (Clerk of Committee)

Ms Debbie Angus (Legal Adviser)

Northern Territory

Subordinate Legislation and Publications Committee

Mr Terry Hanley, *Secretary*

Queensland

Scrutiny of Legislation Committee

The Hon Ken Hayward MP, *Chair*
Mr Vaughan Johnson MP
Mr Chris Garvey, *Research Director*

Tasmania

Parliamentary Standing Committee on Subordinate Legislation

Hon Doug Parkinson MLC (Chairman)
Ms Wendy Peddle (Secretary)

Victoria

Scrutiny of Acts and Regulations Committee

Ms Lily D'Ambrosio MP, *Chairperson*
Mr Murray Thompson MP, *Deputy Chairperson*
Mr Andrew Homer, *Senior Legal Advisor*

Western Australia

Joint Standing Committee on Delegated Legislation

The Hon Ray Halligan MLC, *Deputy Chairman*
Ms Denise Wong, *Advisory Officer (Legal)*
Ms Kerry-Jayne Braat, *Committee Clerk*

Standing Committee on Uniform Legislation and General Purposes

Ms Johanna Edwards, *Advisory Officer (Legal)*

**Meeting of Chairs and Deputy Chairs of the
Australian Legislative Scrutiny Committees
Canberra, ACT, Tuesday, 1 March 2005**

**Senate Committee Room 1S4
Parliament House, Canberra
2.00 – 5.00 pm**

Agenda

- Item 1 Confirmation of Minutes (held on 3 February 2003 in Hobart)**
- Item 2 Chairs and Deputy Chairs Working Group**
- Item 3 Future Conferences**
- Item 4 National Scrutiny Principles – Discussion Paper**

The Development of National Scrutiny Principles

Discussion Paper

Prepared for the Working Group of Chairs and Deputy Chairs of
the Australian Legislative Scrutiny Committees

This paper has been prepared by the committee secretariats for and on behalf of the Chairs and Deputy Chairs Working Group. The issues raised in this paper have not been considered by the individual scrutiny committees.

14 February 2005

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Glossary

In this discussion paper the following terminology has been used:

‘Chairs Group’ — to refer to the chairs and deputy chairs of all committees scrutinising both primary and secondary legislation in all jurisdictions.

‘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.

‘primary legislation’ — to refer to statutes or Acts of Parliament.

‘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.

Abbreviations

‘COAG’ — Council of Australian Governments

‘SCAG’ — Standing Committee of Attorneys-General

Chapter 1 – Introduction

Background

What is national scheme legislation?

1.1 National scheme legislation refers to the practice of the Commonwealth, State and Territory governments — or a combination of two or more of those jurisdictions — 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.

What is the problem that the scrutiny committees are trying to address?

1.2 In recent years, successive Commonwealth, State and Territory governments have favoured the move towards uniform laws in Australia. COAG and Ministerial councils agree to adopt uniform legislation, usually in closed session, and then proceed to introduce that legislation in the parliaments of the participating jurisdictions with the message that the bills cannot be amended for fear of destroying their uniform nature.

1.3 In the case of parliamentary review, legislative scrutiny committees 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.

1.4 The problems faced by the Australian legislative scrutiny committees was canvassed in the *Discussion Paper*¹ and the *Position Paper on the Scrutiny of National Scheme Legislation*² published by the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia in 1995 and 1996 respectively.

What steps has the Chairs Group taken?

1.5 The Working Group of Chairs and Deputy Chairs of the Australian legislative scrutiny committees (hereafter referred to as the Chairs Group) has been wrestling with a solution to this problem since national scheme legislation was first discussed at the Perth conference in 1991³. The chronology of initiatives undertaken by the committees since that conference follows.

¹ Working Party of Chairs of Scrutiny of Legislation Committee throughout Australia, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, Discussion Paper No.1, July 1995

² Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation*, Position Paper, October 1996.

³ Third Conference of Australian Delegated Legislation Committees, Perth, 21-23 May 1991.

1993 — The New South Wales and Victorian committees made an initial approach to the Standing Committee of Attorneys-General (SCAG) to seek its support for the development of uniform scrutiny principles for NSL. SCAG was not enthusiastic about the proposal.

1995 — The Chairs Group decided to address the problem of NSL. A discussion paper was released calling for comment on the proposal to adopt uniform scrutiny principles or to require exposure drafts of NSL to be tabled in each parliament.

1996 — The Chairs Group released a Position Paper proposing two options. Option 1 was to establish a national scrutiny committee. Option 2 was to change the standing orders of the individual scrutiny of bills committees to allow more effective reporting to the Parliament on NSL. After the Position Paper was published, various attempts were made to have it placed on the agendas of SCAG and Council of Australian Governments (COAG) but with no success.

1998 — The Commonwealth delegated legislation committee brought a proposal to the Chairs Group that the Senate act as the agent for all jurisdictions with regard to the scrutiny of delegated legislation. The Commonwealth Attorney-General advised that he would only support the disallowance of delegated NSL in one jurisdiction on the terms of reference spelt out in the Position Paper. This proposal was not accepted by the Chairs Group.

2000 — The Victorian committee introduced a draft bill for the scrutiny of NSL primary legislation at the Chairs Group meeting held in Melbourne on 10 November 2000. The bill was discussed and agreed with amendments. The Chairs and Deputy Chairs also agreed that the bill should be extended to include delegated legislation.

2002 — The bill with amendments to include delegated legislation was placed on the table at the Chairs Group meeting held in Canberra on 2 May 2002. Due to time constraints it was not discussed in detail. Consideration of the bill was held over until the next meeting of the Chairs.

2003 — At the meeting of the Chairs Group in Hobart on 3 February 2003, the Chairs and Deputy Chairs voted not to proceed with the bill proposed by the Victorian committee.

A new approach

1.6 The ACT committee raised the issue of the scrutiny of national scheme legislation at the Hobart conference on 3 March 2003.⁴ After discussion of the problem, the ACT committee proposed that consideration be given to developing a set of national scrutiny principles by which all national scheme legislation would be judged. The delegates resolved:

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

That the secretariat to the Australian scrutiny committees prepares a discussion paper on national scrutiny principles and that the next meeting of chairs and deputy chairs considers the discussion paper with a view to whether such principles would further the work of the committees in relation to national scheme legislation.

1.7 Mr Bill Stefaniak, MLA (ACT), who proposed this motion, stated that:

We have national scheme legislation in a wide range of areas in various stages of development. It is very important that we put a national scrutiny process into play. I suggest that a fairly simple way of doing it is to come up with a set of basic principles of which we could make the proponents of national scheme legislation aware as they go through the process of drafting legislation. That is the thought behind this motion.

If we could agree on certain key principles that could be supplied to ministerial council meetings and to anyone relevant in terms of national scheme legislation and its drafting, it would ensure that relevant scrutiny principles, which our individual committees look at in terms of bills and subordinate legislation, could be taken into account on a national level.

1.8 The genesis of the resolution being addressed by this discussion paper arose from a paper (*Towards National Scrutiny Principles of Scrutiny Review*) presented to the Chairs and Deputy Chairs on 3 February 2003 by the legal adviser to the Australian Capital Territory committee, Mr Peter Bayne (see **Appendix A**). The paper proposes that a set of principles be developed that could be sent to intergovernmental bodies that sponsor national scheme legislation.

1.9 In summary, the paper proposes that the scrutiny principles should spell out certain specific scrutiny principles that the Australian scrutiny committees expect to see reflected in national scheme legislation thus exerting some influence over such laws before they are presented in bill form.

Object of paper

1.10 The object of this discussion paper is to:

- (a) identify the principles of scrutiny adopted by all Australian legislative scrutiny committees;
- (b) explore the feasibility of developing a set of national scrutiny principles; and
- (c) examine whether such principles can further the work of the Australian legislative scrutiny committees in their scrutiny of national scheme legislation.

Chapter 2 – Terms of reference of the Australian legislative scrutiny committees

Introduction

2.1 Committees have been established in the Commonwealth and each State and Territory to examine delegated legislation to ensure that it does not infringe personal rights and liberties and parliamentary propriety. Of these nine jurisdictions, six have also established committees to apply the same level of scrutiny to bills passing through their parliaments.

Core terms of reference

2.2 Across the Australian jurisdictions there are a total of 26 terms of reference by which primary or delegated legislation is examined (see **Appendix B**). Of these nine (34%) are common to at least five jurisdictions. For the purpose of this paper these will be referred to as the ‘core terms of reference’. The remaining terms of reference are common to four or less jurisdictions.

2.3 The core terms of reference common to all the bills committees include:

- trespass unduly on rights and liberties
- rights, liberties and obligations unduly dependent on insufficiently defined administrative powers
- rights, liberties and obligations unduly dependent upon non-reviewable decisions
- inappropriate delegation of legislative powers
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny

2.4 The core terms of reference common to all the delegated legislation committees include:

- trespass unduly on rights and liberties
- not within powers or objects of Act
- matter more appropriately dealt with in an Act

2.5 A majority of the delegated legislation committees also considered whether an instrument:

- unduly makes rights, liberties and obligations dependent upon non-reviewable decisions
- unduly makes rights dependent on administrative and not judicial decisions.

2.6 These terms of reference formed the core terms of reference that were previously agreed in the *Position Paper on the Scrutiny of National Schemes of*

Legislation published by the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia in October 1996.

2.7 The Working Party recommended 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;
 - whether the bill makes rights, freedoms or obligations unduly dependent upon administrative decisions which are not subject to appropriate external review; and
 - whether the bill inappropriately delegates legislative powers.
- 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.

2.8 The working party noted that although the terms of reference were not extensive in scope, they reflected fundamental values that were commonly supported by all the Australian jurisdictions. These terms of reference reflected the most common position of the committees at that time and may serve as a starting point for the development of a set of national scrutiny principles.

2.9 The remainder of the terms of reference identified in Appendix B appear to be more jurisdictional-based and influence the application of principles within those jurisdictions. However, some of the jurisdictional-based terms of reference such as fees and charges, retrospective effect, search and seizure, protection from self-incrimination and amendment of Acts by delegated legislation are considered by other jurisdictions under their more general terms of reference. Such issues would therefore appear to warrant inclusion in the proposed national scrutiny principles.

Terms of reference that apply specifically to national scheme legislation

2.10 The only committee that specifically undertakes the examination of national scheme legislation in its terms of reference is the Western Australian Uniform Legislation and General Purposes Committee. It should not be an insurmountable problem that the other committees do not have a specific reference as the fundamental principles that underlie their terms of reference would apply equally to every piece of legislation examined including national scheme legislation.

Chapter 3 – Scrutiny principles of the Australian legislative scrutiny committees

Introduction

3.1 The level of commonality in the terms of reference across the legislative scrutiny committees identified in chapter 2 would suggest that there may be scope for a common approach to the principles by which the committees examine legislation. For example, the majority of the committees have been tasked with determining whether legislation:

- trespasses unduly on personal rights and liberties
- insufficiently defines administrative powers
- provides for non-reviewable decisions
- inappropriately delegates legislative power; and
- insufficiently provides for the parliamentary scrutiny of legislative power.

3.2 The secretariats of the scrutiny committees have identified the following issues under the above terms of reference which have arisen during their examination of legislation.

Trespasses unduly on personal rights and liberties

- retrospective commencement or application of legislation
- self incrimination and right to silence
- onus of proof
- strict liability offences
- search and seizure without warrant
- confidential professional communications
- oppressive official powers
- Parliament's right to obtain information from the Executive
- right to vote
- privacy
- freedom of speech
- vagueness of offence provisions
- oust the jurisdictions of the courts over legal disputes
- deprive a person of their property without just terms compensation
- excessive punishment
- procedural fairness
- property (compulsory acquisition)
- erosion of the right to quiet possession of property
- right to a fair trial
- right of the public to access government information
- rights of children

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers

- ill-defined and wide powers
- wide delegation to ‘a person’
- delegation to a person without criteria
- failure to notify of rights of appeal
- failure to permit guidelines to be made

Makes rights liberties or obligations unduly dependent upon non-reviewable decisions

- exclude merits review
- exclude judicial review
- not require reasons
- closed justice

Inappropriately delegates legislative powers

- Henry VIII clauses (amend Act by regulation)
- matters which should be regulated by Parliament, eg, definition of words in an Act
- provide that a levy or charge should be set by regulation
- provide that a tax be levied, or that its rate be set, by regulation
- provide the Executive with unfettered control over the commencement of an Act
- subdelegation of already delegated legislative powers

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny

- subordinate legislation not tabled in Parliament or not subject to disallowance
- providing regulations may incorporate rules or standards of other bodies in force from time to time
- insufficient disallowance period
- enabling the issuing of guidelines or directions influencing the exercise of powers without any obligation for them to be tabled in Parliament or subject to disallowance
- retrospective operation of regulation making powers
- subsidiary legislation providing for its amendment by an instrument, or through means, that cannot be scrutinized by Parliament

Application of the scrutiny principles

3.3 The information provided by a number of committee secretariats identifies the position that their individual committees have taken with regard to many of the issues identified in paragraph 3.2. For example:

Retrospectivity

Commonwealth – The Scrutiny of Bills Committee endorses the traditional view of retrospective legislation. Its approach is to draw attention to bills which seek to have an impact on a matter which has occurred prior to their enactment. It will comment adversely where such a bill has a detrimental effect on people. It will not comment adversely if the bill is for the benefit of those affected, it makes a technical amendment or corrects drafting errors, or it implements a tax measure in respect of which the relevant minister has published a date from which the measure is to apply and that publication took place prior to that date. In the committee’s view, retrospectivity should be explained in the Explanatory Memorandum and include an assurance that no person would be adversely affected by the proposed legislation.

The Regulations and Ordinances Committee will seek an assurance that no person will be adversely affected by the retrospective application of the legislative instrument. An instrument is void if it commences before notification and it adversely affects any person other than the Commonwealth (*Legislative Instruments Act 2003*, subsection 12(2)).

Australian Capital Territory – On the face of it, the Standing Committee on Legal Affairs (performing its Scrutiny of Bills and subordinate legislation role) (henceforth ‘the Scrutiny Committee’) approaches such provisions on the basis that they may trespass on rights. But it also recognises that many such laws are beneficial; see generally, A Palmer and C Sampford, “Retrospective Legislation ...” (1994) 22 *Federal Law Review* 217.

A case-by-case approach is thus taken. In the ACT, there has been litigation, based on section 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1989*, which precludes a law making an “acquisition of property otherwise than on just terms”, challenging Territory laws that have impinged retrospectively on a person’s ability to pursue some legal remedy. The position is not clear, but the Committee will draw attention to the problem where it perceives that it might arise out of a clause of a bill.

Queensland – The Scrutiny of Legislation Committee has a specific role in relation to retrospective laws. Its chief concern is whether such provisions have, or may have an adverse effect on the rights of any individual (other than the State). The committee recognises and has no concern with retrospective provisions that are beneficial.

Victoria – The Scrutiny of Acts and Regulations Committee has taken the step of developing a set of criteria to assess retrospective provisions. They look at:

- whether the retrospective provision is beneficial to persons other than the State;

- whether the retrospective provision imposes undue obligations or appears to adversely affect the rights and liberties of individuals;
- whether individuals or organisations have relied on the legislation to conduct their affairs or business and have legitimate expectation under the legislation prior to the enactment of the retrospective provision;
- whether adequate public warnings or announcement is made prior to the commencement of the retrospective provision; and
- whether the retrospective provision correct inadvertent errors of a machinery government or nomenclature character.

Western Australia — Western Australia has appointed a committee (Uniform Legislation and General Purposes Committee) with the specific responsibility of examining bills that implement uniform legislative schemes or legislation pursuant to an intergovernmental agreement. The committee is alert to and examines the operation of any clauses with a retrospective operation on a case by case basis.

The Joint Standing Committee on Delegated Legislation — the retrospective operation of subsidiary legislation, without the express or necessarily implied authority of an Act, is of concern to the Committee. The Committee also recognises that retrospectivity can be appropriate and beneficial in certain circumstances. The operation of any clause with retrospective operation is examined on a case by case basis.

Tasmania — There is a presumption when interpreting statutes which the Committee also applies to delegated legislation, that the law is not intended to have retrospective operation. On the rare occasion that a bill with retrospective effect is introduced, there has to be a very good reason for members of the Legislative Council to support the provision.

3.4 There appears to be enough similarity between the positions taken by the scrutiny committees above to propose a general principle on retrospective laws for the consideration of all the scrutiny committees.

Retrospectivity

A set of national scrutiny principles could indicate that the Australian legislative scrutiny committees:

- do not accept retrospective provisions that adversely affect individuals and will comment or seek advice from the relevant minister on reasons for such provisions;
- accept retrospectivity where it is shown to be beneficial to the individual;
- accept retrospectivity where it is making a technical amendment or correcting an error that does not affect the substance of the law;
- accept retrospectivity where adequate prior notice has been given for the introduction of the legislation (such as a tax measure); and

- expect that explanatory material will provide an explanation for the retrospective provision and provide an assurance that no person (other than the state) will be adversely affected by the retrospectivity.

3.5 The secretariat for the New South Wales scrutiny committee considers that the proposed criteria are sufficiently close to the existing NSW position to support the development of a national scrutiny principle. Tasmania also supports the principles listed but would need an assurance that:

- there was no alternative (give the reason why); and
- the retrospective provision does not adversely affect individuals.

Delegation

3.6 Legislation may provide for the delegation of legislative or administrative powers.

Commonwealth — The Scrutiny of Bills Committee does not generally accept delegation to ‘a person’. The committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee’s preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

The Regulations and Ordinances Committee considers that power should only be sub-delegated with the express authority of an Act and that power should only be delegated to a level appropriate to the exercise of the discretion. A person should be suitably qualified and experienced to make the decision.

Northern Territory — The Commonwealth position on this issue is broadly supported.

Australian Capital Territory — The delegation of legislative power of any significant nature is relatively rare in the ACT. The Scrutiny Committee would probably not accept delegation to ‘a person’. Most such delegations are to the Executive of the Territory.

Victoria — The Scrutiny of Acts and Regulations Committee accepts that there may be practical difficulties in specifying individuals in large bureaucracies, but prefers, at least, for a class of persons to be specified. The Committee does not consider provisions which delegate power to ‘any person with the consent of the Minister’ to be generally appropriate.

New South Wales — The committee considers that powers should not be delegated to a person without criteria. The approach of the NSW Committee to the delegation of administrative power has been to seek to limit the scope of the persons to whom a power can be delegated in accordance with the power to be conferred. It has therefore questioned when no relevant attribute or qualification, such as the holding of a particular office, has been required of persons to whom the power to significantly affect rights, liberties and obligations can be conferred.

Tasmania — In most cases the Committee will accept legislation where the minister nominates that power should be delegated to an officer in a department under his or her control. Anything looser would need to be justified.

Western Australia — The Uniform Legislation and General Purposes Committee examines any delegation of legislative power and has inquired into and proposed amendments with respect to such clauses. The Committee has considered the principle in a broader sense and has not restricted itself to the consideration of delegation to ‘a person’.

The Joint Standing Committee on Delegation — a person or body that is delegated a legislative power cannot then subdelegate that power to another person or body (or a differently constituted body). The Committee will raise its concerns if that subdelegation is not authorised by an Act.

3.7 There appear to be variations in the approach to the delegation of powers between jurisdictions. Some look at nominated officers being specified, others to criteria to govern the scope of the delegation. These issues would need to be discussed by the scrutiny committees if a national scrutiny principle were to be developed.

3.8 However, there would appear to be enough of a common thread running through the positions taken by the above committees to indicate that a national scrutiny principle on delegation could be developed. An example of a principle on delegation is shown below.

Delegation

A set of national scrutiny principles could indicate that the Australian national legislative scrutiny committees:

- do not accept that powers should be delegated to ‘a person’ and will comment or seek advice from the relevant minister on reasons for such provisions;
- expect that powers will be delegated to a class of persons or to persons who are suitably qualified to make the decision;
- expect that where powers are delegated to ‘a person’, that scope of the delegation will be governed by criteria;
- accept delegation to ‘a person’ where it can be shown that the nature of the power being delegated cannot be specifically delegated to a class of persons or because flexibility is required in the manner in which the power is exercised.
- expect that explanatory material will provide an explanation for any delegation of power whether it is to ‘a person’, a class of persons or persons considered suitably qualified to make the decision.

3.9 The suggested principles as set out would generally suit Tasmania’s philosophy on this matter.

Strict liability offences

Commonwealth - both the Scrutiny of Bills and Regulations and Ordinances Committees expressed the view that where legislation creates a strict liability offence the explanatory material that accompanies the legislation should set out the reasons for the imposition.

The Scrutiny of Bills Committee accepts that in Commonwealth legislation strict liability might appropriately apply to:

- those elements of offences which are included to attract Commonwealth jurisdiction;
- offences of a regulatory nature – particularly offences designed to discourage careless non-compliance with a statute (as well as intentional or reckless breaches);
- offences dealt with under an infringement notice scheme, with relatively low penalties – the greater the penalty, the less likely that strict liability will be appropriate; and
- offences where evidence of the relevant mental elements such as intention or recklessness is almost impossible to obtain in the absence of admissions or independent evidence (particularly where the conduct involves a failure to do an act by an entity such as a corporation).

The Scrutiny of Bills Committee published a detailed examination of strict and absolute liability offences in Commonwealth legislation together with a set of principles that it recommended should be considered when drafting offences provisions (*Sixth Report of 2002*).

The Regulations and Ordinances Committee adopts a similar approach to the bills committee. The committee also accepts strict liability, if somewhat reluctantly, where it has been provided for in the primary legislation.

Australian Capital Territory — The Scrutiny Committee considers that where a provision of a bill (or of subordinate law) proposes to create an offence of strict or absolute liability, (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

- why a fault element (or guilty mind) is not required, and, if it be the case, explain of which absolute rather than strict liability is stipulated;
- whether, in the case of an offence of strict liability, a defendant should nevertheless be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake or fact allowed under s.36 of the *Criminal Code 2002*.

The Scrutiny Committee has indicated that it has a particular concern with offences of strict or absolute liability in respect of which imprisonment is a possible punishment.

The Scrutiny Committee has not attempted to spell out a framework according to which it assesses whether it is appropriate to provide for an offence of strict or absolute liability. It has, however, referred with approval to an analysis by the Senate Scrutiny of Bills in its *Sixth Report of 2002*.

Western Australia — The Joint Standing Committee on Delegated Legislation advise there is legal argument in Western Australia that there is no such thing in that state. The legal argument stems from the effect of section 36 of *The Criminal Code* of Western Australia, which operates so as to apply the provisions of the Chapter V defences⁵ ‘to all persons charged with any offence against the statute law of Western Australia.’ The committee is not completely convinced by the legal argument and has dealt with the uncertainty by insisting that even though defences may be available, some other, relevant express defence be inserted to mitigate the harshness of what appears to be a strict liability offence.

3.10 In this third example, it is again evident that there is no single approach to the issue of strict liability offences. Careful consideration would need to be given to the development of a national scrutiny principle that would successfully deal with the concerns in each jurisdiction. The common elements identified by the above jurisdictions indicate that these at least could be included in a national scrutiny principle on strict liability offences as shown below.

Strict Liability Offences

A national scrutiny principle on strict liability offences could indicate that the Australian legislative scrutiny committees:

accept that strict liability might appropriately apply to:

- offences of a regulatory nature – particularly offences designed to discourage careless non-compliance with a statute (as well as intentional or reckless breaches);
- offences dealt with under an infringement notice scheme, with relatively low penalties – the greater the penalty, the less likely that strict liability will be appropriate; and
- offences where evidence of the relevant mental elements such as intention or recklessness is almost impossible to obtain in the absence of admissions or independent evidence (particularly where the conduct involves a failure to do an act by an entity such as a corporation).

However, the following matters should be taken into account when deciding whether an offence should be one of strict liability:

⁵ These are currently: Ignorance of law, honest claim of right; Accident etc, intention motive; Mistake of fact; Extraordinary emergencies; Insanity; Intoxication; Immature age; Judicial officer performing judicial functions; and Acting under lawful authority or to avoid death or harm.

- whether a no fault element is required
- if a fault element is required, what that element should be
- if no fault element required, whether a defendant should nevertheless be able to rely on some defence (such as having taken reasonable steps to avoid liability) in addition to the defence of reasonable mistake of fact. (ACT)
- even though defences may be available, some other, relevant express defence be inserted to mitigate the harshness of what appears to be a strict liability offence. (WA)

The committees expect that the reasons for imposing strict liability will be set out in the explanatory material that accompanies the instrument.

3.11 It became apparent during the examination of this issue that the impact of the various *Criminal Codes* will need to be considered if this principle is to be developed further.

3.12 The NSW committee secretariat advise that the criteria set out above seem to be in line with that jurisdiction's current approach to strict liability offences. In NSW the relevant explanatory material is the second reading speech as the explanatory notes of bills and regulations, which are prepared by Parliamentary Counsel, do not address the reasons for legislation. The Tasmanian committee considered the suggested principles would appear to cover most areas were they have a problem. The Northern Territory suggests that the principles should only address issues common to all jurisdictions. To cast the net wider will make it difficult to reach consensus on issues that are purely jurisdictional-specific and could prove cumbersome if not impossible to resolve.

Principles not common to all committees

3.13 As identified in paragraph 3.2 there are a number of common issues that fall within five core terms of reference. However, chapter 2 highlights that there are a number of issues that are specific to one or at most four jurisdictions. For example, whether an instrument is inconsistent with principles of justice and fairness (Queensland, Victoria, Western Australia and the Northern Territory); whether a Regulation duplicates, overlaps or conflicts with any other regulation or act (Queensland, New South Wales and Western Australia) or whether an explanatory statement fails to meet technical or stylistic standards it ought in committee opinion conform to (Queensland and Australian Capital Territory).

3.14 Given the limited number of jurisdictions that consider these matters, it may be argued that they should not be included in the national scrutiny principles. However, if an intergovernmental agreement were to primarily exist between these jurisdictions then there may be scope to include consideration of such issues when national scheme legislation is being examined.

3.15 The extent to which the national scrutiny principles reflect the position of all committees is an important question that needs to be addressed by the committees and the Chairs and Deputy Chairs. If the national scrutiny principles were too descriptive

to pick up every nuance across jurisdictions they may fail to present a clear message to the rule-makers involved in the development of national scheme legislation. In response, rule-makers and drafters may develop legislation that reflects the least common denominator rather than the best practice expected by the committees or they may ignore the principles altogether if they consider the requirements are too difficult to achieve.

3.16 However, even if a set of principles were published to contain only those core principles that were common to all jurisdictions, it would be difficult to ignore the other remaining principles in many jurisdictions, especially where they are determined by statute. Jurisdictions that are responsible for examining national scheme legislation when it is introduced for the first time would not be fulfilling their charter if they did not apply all the scrutiny principles contained in their statute. Any national document should therefore have regard to the criteria of all jurisdictions. The core or common criteria could be separated out and the remaining criteria that apply to individual jurisdictions could be presented as additional matters. Although not core or common criteria, these should not be treated as unimportant.

Principles applicable to national schemes of legislation

3.17 The information received from the secretariats of the Australian legislative scrutiny committees indicate that only Western Australia has a committee that specifically examines national scheme legislation. The nature of the national scheme legislation is such that the issues that arise will be similar to those identified in jurisdictional-based legislation. All scrutiny principles should therefore apply equally to national scheme legislation.

Feasibility of developing national scrutiny principles

3.18 The aim of this proposal is to determine whether a set of national scrutiny principles can be developed for the scrutiny of national scheme legislation. The examples of scrutiny principles above indicate that it may be feasible to develop individual principles against the following core terms of reference:

- trespasses unduly on personal rights and liberties
- insufficiently defines administrative powers
- provides for non-reviewable decisions
- inappropriately delegates legislative power; and
- insufficiently provides for the parliamentary scrutiny of legislative power.

3.19 However, it has become apparent during the development of this paper that there are differences in the manner in which the committees approach the scrutiny of legislation. The extent to which the committees have been able to enunciate a clear position on matters that have arisen during their examination of legislation have made it difficult to determine whether there is sufficient commonality across a wide range of scrutiny principles to enable a comprehensive set of national scrutiny principles to be developed. The committee secretariats will therefore need to provide further information on the position adopted by their committees on all the issues that arise under their terms of reference including those identified in paragraph 3.2.

Chapter 4 – Furthering the work of the legislative scrutiny committees

Introduction

4.1 Since 1994 the Australian legislative scrutiny committees have been wrestling with finding a means by which they could overcome the problems posed by intergovernmental agreements and ministerial councils in respect of the scrutiny of national scheme legislation. This legislation is often presented to the legislature of the Commonwealth, or of a State or Territory, in a way that it is argued that they cannot be amended without breach of the agreement. In this way, the scrutiny committees feel that their hands are tied and they cannot perform their function.

Furthering the work of the committees

4.2 The adoption of a set of national scrutiny principles presents the committees with the opportunity to convey the ‘best practice’ standards expected of provisions that affect personal rights and parliamentary propriety. Such principles would allow the committees to feed back into the drafting process the values that they promote as reflected in their terms of reference.

4.3 The development of a set of national scrutiny principles provides the scrutiny committees with the opportunity to:

- (a) inform and educate ministerial councils and drafters of legislation (both local and national) as to the scrutiny principles and the type of legislative provisions that are acceptable to all scrutiny committees;
- (b) promote ‘best practice’ standards at the drafting stage;
- (c) strengthen the importance of scrutiny principles as they will be seen to be publicly endorsed by all legislative scrutiny committees in Australia;
- (d) provide an avenue for long-term change to drafting practices of national scheme legislation to ensure that it meets scrutiny committee standards;
- (e) provide the scrutiny committees with the opportunity to audit compliance with its principles in relation to particular pieces of legislation and to report on any failings to adopt scrutiny principles both to their own legislature and the other scrutiny committees;
- (f) impose a discipline on committees having to decide on national principles and to some extent to codify the principles they apply;
- (g) provide the scrutiny committees with the ongoing opportunity to share information as national scheme legislation is examined; and
- (h) provide the scrutiny committees with the opportunity to share their experiences in implementing the principles at conferences and the Chairs Group.

4.4 There may also be a flow-on effect into jurisdictional-based legislation as drafters may be influenced by scrutiny principles that have the agreement of all the scrutiny committees in Australia.

Compliance with scrutiny principles

4.5 The development of a set of national scrutiny principles provides no guarantee, however, that they will be reflected in national scheme legislation. The committees would be relying on the goodwill of the ministerial councils to amend draft legislation to address their concerns and the extent of such compliance with the national scrutiny principles will not become evident until the legislation is introduced into a parliament.

4.6 To maintain the effectiveness of the national scrutiny principles, the scrutiny committees will need to be vigilant and proactive to ensure ministerial councils adopt the principles and continue to do so. All committees would need to report to their individual parliaments on their dissatisfaction where principles are not adopted referring to the other committees to strengthen their case. This may be of particular importance to the first jurisdiction considering primary national scheme legislation as they will already know the other committees' positions in relation to specific matters and could use this to argue for amendment where legislation does not meet scrutiny concerns.

4.7 Compliance with the national scrutiny principles could also be made a standing order of business at the biennial conference. This item would allow the committees to discuss the impact of the national scrutiny principles on legislation introduced between the conferences and to revisit the principles to ensure they are still relevant to their terms of reference.

Distribution of the national scrutiny principles

4.8 The Chairs Group propose that, were the development of national scrutiny principles feasible, that they should be sent to all ministerial councils for their consideration and adoption. There are approximately 40 such bodies in Australia. However, the development of national scheme legislation involves many layers of executive government. Principally ministerial councils are responsible for making this legislation but they are supported by individual government agencies at the Commonwealth, State and Territory level who advise on the development of the policy behind the legislation and the legislative drafters who put this policy into legislative form. To be effective the committees will need to identify all those bodies in their jurisdictions to which the scrutiny principles should be distributed, such as ministerial councils, government bodies and legislative drafters. The committees' objective would be further enhanced if these principles were also promoted at the jurisdictional level through the relevant parliaments.

4.9 The committees could undertake to distribute a hard copy to all identified users but this may prove to be a costly exercise. Committee secretariats could be tasked with identifying those bodies that should receive hard copies and promoting an electronic version to all government agencies. The electronic version could be published through the relevant parliamentary websites without the printing and postage costs associated with distributing hard copy principles. The website would

also allow access to those interested organisations and persons in the wider community thus promoting the work of the scrutiny committees and providing a means for such persons to apply greater pressure on governments in the development of legislation that affects personal rights.

Format of the national scrutiny principles

4.10 The principles would receive a wider distribution if they were made available in both the written and electronic form. Two options are proposed for consideration. The first option is to prepare a comprehensive volume or handbook that incorporates all the principles and standards expected of the committees. The second option is to distribute the principles in individual subject related fact sheets as they are developed.

4.11 The following options are proposed for consideration by the Chairs Group.

Option 1 – manual

This option would entail bringing the principles together into one publication that can be clearly identified and distributed. This option has the advantage of physically keeping all the information together for ease of access. However, the manual may need to be republished in its entirety every time it was amended or clear amending instructions would have to be distributed to persons holding this publication. To ensure that the most up-to-date information is being used at any given time, the best practice would be to reprint the entire manual. This would entail additional costs for the committees. There would be no cost implications for the committees if the manual is provided electronically.

Option 2 – series of fact sheets

This option proposes that the principles be published in subject-related fact sheets. This would allow the committees the flexibility of developing and adding to the principles over the years without having to reissue a new publication every time the principles are amended. The series could be developed to present a clearly identifiable corporate image. The publication of fact sheets would be less of a burden to the committees and the users than printing a complete amended manual as proposed in Option 1. Individual principles will be easily amended without the difficulty of updating a complete volume. The release of fact sheets as principles are added or changed would also allow the committee's to highlight their concerns in that particular area of rule-making as they arise.

4.12 Option 2 appears the more attractive of the two options with greater flexibility in the generating and amending of principles with fewer costs.

Coordination of the publication and amendment of the principles

4.13 As indicated in the previous chapter, the exercise of drawing together information for this paper highlights the difficulty in easily compiling information across the jurisdictions. If the Chairs Group were to agree to continue with the development of the national scrutiny principles then a clear list of issues, such as those identified in paragraph 3.2, would need to be agreed upon for inclusion in the

principles. Individual scrutiny committee positions on these issues would then need to be drawn together before a decision can be made on the national principle for a particular issue. This process will be labour intensive and require each committee to dedicate resources to complete the project.

4.14 Were the Chairs Group to pursue this project; a coordinating body would need to be appointed to progress the development and publication of the principles. This will be a matter for individual jurisdictions to decide in line with their own resource constraints. This body of one or more jurisdictions would carry the heaviest workload and require the most resources.

4.15 To be effective the national scrutiny principles will need to be up-to-date and relevant. The principles will need to be revisited at least at each biennial conference to ensure they still reflect the scrutiny committees' position and be amended as necessary. The updating and circulating of new and amended principles could be left to the body responsible for coordinating the initial publication of the principles.

Approving scrutiny principles

4.16 The previous chapter indicates that the scrutiny committees approach issues differently and that any national scrutiny principle may not necessarily reflect the position of every committee. Given these differences, how will the principles be agreed? A principle could initially be developed and sent to all committees for agreement with a final decision being made by the Chairs Group. This is a matter best left to the Chairs Group to decide if it agrees to continue with the proposal to develop the national scrutiny principles.

Conclusion

4.17 The development of national scrutiny principles has the potential to further the work of the committees by:

- (a) encouraging rule-makers to make legislation that does not infringe the scrutiny principles of all Australian committees;
- (b) imposing a discipline on committees having to decide on national principles and to some extent to codify the principles they apply;
- (c) encouraging the sharing of information between jurisdictions; and
- (d) enabling a committee to cite principles agreed by all committees when raising concerns with a particular bill.

4.18 Paragraphs 3.3 to 3.12 highlight the possibility of arriving at a common position on three of the issues that fall within the 'core terms of reference'. These examples indicate that it may be feasible to develop a comprehensive set of national scrutiny principles. However, the extent to which the committees can agree on an accepted position across a range of issues beyond these examples is not clear. Further work will be necessary to draw together principles that reflect the scrutiny concerns of jurisdictions whose terms of reference extend beyond the core identified in Chapter 2.

4.19 Until the committees can decide on the extent to which the scrutiny principles will be developed and applied it will be difficult to determine the resource implications for the secretariats. However, the initial indications are that this proposal will potentially be resource intensive in both secretariat time and costs regardless of whether all terms of reference are covered by the principles. I therefore recommend that the individual committees consider this proposal to determine whether they agree with the issues raised in this paper and are in a position to allocate resources.

Paper for Chairs and Deputy Chairs Working Group Meeting of Monday 3 February 2003

Towards National Principles of Scrutiny Review

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The views expressed are solely those of the author.

The Chairs and Deputy Chairs Working Group has for some years now been concerned that the phenomenon of national scheme legislation impedes the ability of Scrutiny Committees to discharge their task. The Committees do not, of course, control the content of Bills and subordinate laws. In essence, they draw to the attention of the legislative body to which they report clauses of proposed laws that appear to have one or more of a number of effects. Putting it in positive terms, the Committee considers whether a clause

- unduly trespasses on personal rights and liberties;
- make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegates legislative powers; or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The terms of reference usually require the Committee to report on the matter to relevant legislative body.

The concern of the Working Group has been that Bills that have their origin in some agreement, reached as result of some cooperative endeavour between an executive level Commonwealth/State and Territory body, are often presented to the legislature of the Commonwealth, or of a State or Territory, in a way that it is argued that they cannot be amended without breach of the agreement. In this way, the Scrutiny Committees feel that their hands are tied and they cannot perform their function.

What is the point of this paper?

Essentially, it is to suggest that there is another way the Working Group might address this problem, as well as, perhaps more importantly, making the work of a Scrutiny Committee more effective and interesting.

First, it is suggested that the national working group might concern itself with whether it could spell out certain specific principles that it expects would be reflected in legislation that emanates from Commonwealth/State and Territory working groups. In

this way, the legislatures, through their respective Committees, might exercise some influence over national scheme laws before they are presented in Bill form. This influence would, of course, be directed to attaining those ends that are reflected in the terms of reference of the Scrutiny Committees of the State and Territory legislatures (and, where relevant, the Commonwealth legislature).

It is not suggested how this might be achieved. The paper points to one area — in relation to search and seizure powers — where there is already a sound basis of experience and reflection that could be studied towards the end of formulating some national principles. The same might apply to burden of proof provisions.

Secondly, by canvassing a number of specific instances of trespass to rights, the paper points to what might be a framework for a regular exercise in reporting in some detail to national conferences on the work of a Committee over a particular period. This exercise would be valuable in itself, as a means of swapping experience. It might also point to a specific area in relation to which national principles might be thought desirable. One example here might be the issue of when and how the privilege against self-incrimination is displaced.

A third theme of the paper, which will be dealt with now, is the suggestion that the Chairs and Deputy Chairs Working Group might turn its attention as to how it tracks human rights developments. This exercise would inform the particular Committees of movements of ideas in this field, and enable them to take a sharper rights focus.

Scrutiny Committee play a vital role of the protection of rights; see P Bayne, ‘The protection of rights - an intersection of judicial, legislative and executive action’ (1992) 66 *Australian Law Journal* 844-848. It is, however, one that is not well noticed and is undervalued. This is not last so by the courts, for some judges tend to argue that they are the only bulwark protecting the liberty of the citizen against legislative derogation of human rights. This may explain why some Australian courts have been so active in recent years in developing a judge-made body of human rights law. Two points follow from this.

One is that the Committees need to be aware of the content of this judge-made body of human rights law. A Scrutiny Committee is not a court, and is not limited in its assessment of whether there is trespass to rights to considering whether a court would find the law objectionable. (This is one of its advantages.) But a Committee might not assist the legislature very well if it did not anticipate a judicial reaction. Understanding what the judges are doing also requires some understanding of wherefrom the judges are drawing their inspiration for law-making in this area. This takes one to the work of National courts that do operate under a Bill of Rights, and to the case-law developing under the *European Convention on Human Rights*.

The second point is that unless the Committees do not ‘keep up to date’ with human rights law developments, they might be seen to be marginal to the task of protecting rights.

Thus: what do Committees do to “track” rights law developments? Could this be a joint task? How do we keep up with the High Court? Should we track what is going

on under the *European Convention on Human Rights*? Or under the *Human Rights Act* of the UK?

Considering whether a clause is an undue trespass on personal rights

The issue of just what interests are encompassed by the phrase “personal rights and liberties” is canvassed in the paper presented by Mr Stefaniak.

The paper will now canvass a number of specific instances of trespass to rights, to the end of pointing to what might be a framework for a regular exercise in reporting in some detail to national conferences on the work of a Committee over a particular period. This paper will canvass **some only** of the particular rights that appear to be of recurring concern. This is not exhaustive, or even indicative of what rights are important and what not.

- Search and seizure laws

I start with this topic because most Committees have experience of dealing with such laws, and some (the Senate Committee, and the ACT Committee at least) have attempted to spell out a set of principles according to which such laws are assessed.

Is there a basis here for a common position?

- Retrospective laws.

On the face of it, these are objectionable. But, as has been pointed out (A Palmer and C Sampford, “Retrospective Legislation ...” (1994) 22 *Federal Law Review* 217), many such laws are beneficial. There may not be a great deal that could be done to refine just what retrospective laws are and are not objectionable on rights grounds, although it bears thinking about. Perhaps, based on Palmer and Sampford’s article, at least some examples could be given.

- The notion of a ‘right to property’ can bring many kinds of statutory provisions in to focus often in unexpected ways.

There may be a problem identifying a breach of a ‘right to property’. In the ACT, there has been litigation (based on section 23(1)(a) of the *Australian Capital Territory (Self-Government) Act* 1989, which precludes a law making an “acquisition of property otherwise than on just terms”) challenging Territory laws that have impinged on a person’s ability to pursue some legal remedy. It is not very clear just where we stand at present.

A problem of identification of a possible breach arises in relation to planning laws that restrict the uses to which property may be put. Have Committees said much about whether there is a breach here?

Have Committees said much about when a deprivation of property is justifiable? This might have occurred in relation to planning laws.

Many would accept that a deprivation of property must be accompanied by just terms compensation. Have Committees said much about what this means?

- Freedom of speech

As a result of the High Court's political free speech cases, there is now a developing body of judge-created law about whether, in certain contexts, a restriction on free speech is lawful. The Committees are not directly concerned with lawfulness issues, and they are not limited to a concern for only "political free speech".

But given that the High Court's political free speech doctrine affects State and Territory legislatures, the Committees need to follow its development.

Are Committees conscious of the doctrine? Have they identified potential laws that may have a problem with it?

More broadly, what do the Committees regard as "speech"? When do they think a restriction might be (and might not be) an undue trespass?

- Closed justice provisions.

Provisions that close the court to the public crop up regularly. The "axiomatic principle of open justice" is said to be "a principle which is one of the most fundamental aspects of the system of justice in Australia. It informs and vitalises numerous specific rules and practices: see *John Fairfax Pty Ltd v A-G (NSW)* (2000) 181 ALR 694 at 703; see generally Spigelman CJ "Seen to be Done: The Principles of Open Justice" (2000) 74 ALJ 290": *Idoport Pty Ltd ...* [2001] NSWSC 1024 [17] per Einstein J.

When do Committees think closed justice objectionable, and when not?

- Abrogation of the privilege to object to questions, etc that would require a person to self-incriminate.

Provisions that have this effect crop up very regularly.

A standard Committee reaction might be to say (1) the abrogation must be justified, and (2) there must be protection against derivative use of the information obtained after the person self-incriminates.

Do Committees take this, or some other approach? Do they sometimes find that in the circumstances, abrogation cannot be justified? Do they sometimes find that in the circumstances, derivative use protection is not required?

- Abrogation of the privilege to object to questions, etc that would require a person to reveal matter otherwise protected from disclosure by the doctrine of legal professional [or client legal] privilege.

Provisions that have this effect crop up very regularly.

A standard Committee reaction might be to say (1) the abrogation must be justified, and (2) there must be protection against use of the information.

Do Committees take this, or some other approach? Do they sometimes find that in the circumstances, abrogation cannot be justified?

- The right to privacy

In some jurisdictions, (Commonwealth, ACT, and NSW at least), the content of such a right will be influenced by the ‘information’ privacy statutes. But these by no means exhaust the scope of the concept, in particular where it may be said that the law impinges on ‘lifestyle’ choices.

What are the Committees making of the concept?

- Burden of proof provisions

It is very common for a statutory provision to place on the defendant a burden of proof in relation to some issue of fact that might arise on a prosecution. Given that such provisions bring the presumption of innocence into focus, the topic is important. Given the common practice, it is one that calls for set of principles.

The Senate Committee attempted to spell out a general position in respect of such provisions. What is its experience of how that has worked?

The ACT Committee has often commented to the effect that at least the Bill should make it clear whether it is intended to place a burden of proof — and if so, of what kind — on a defendant.

Do the Committees need to revise their thinking here? Consider this comment from Scrutiny Report No 23 (6 December 2002) of the ACT Scrutiny Committee:

Proposed new subsection 7F(4) raises another issue. By casting a persuasive burden of proof on a defendant, it is arguable that it breaches the presumption of innocence. (The Committee understands that provisions of the *Criminal Code 2001* contemplate what proposed new 7F(4) makes provision for, but this merely means that a similar objection can be taken to the *Code*.)

Article 6(2) of the European Convention on Human Rights provides “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

The English courts are reading this provision so that it has the effect that in relation to any statutory offence, the defendant cannot be required to discharge a persuasive burden of proof in relation to any issue of fact in order to establish a defence. All that the defendant can be required to do is to discharge an evidential burden, in the sense of adducing such an amount of evidence that could be a basis for a jury, acting reasonably, to find that the defence had been made out. Once defendant discharged this burden, the prosecution would need to establish beyond reasonable doubt such facts as would prove that the defendant could not take advantage of this defence. See “Burden of Proof (*R v Lambert*)”, [2001] Criminal Law Journal (UK) 806, describing *Lambert* as “an exceptionally important decision, both for constitutional lawyers with an eye to

the impact of the [*Human Rights Act 1988* (UK)], and for evidence lawyers keen to absorb the latest chapter of the “Fall and Rise of *Woolmington*”.

Of course, the presumption of innocence, reflected in the ‘golden thread’ of *Woolmington* that the prosecution bears the onus of proof of criminal guilt, are concepts that may be modified by the Assembly when it enacts statutes. The issue in every instance will be whether a derogation of the presumption of innocence is warranted.

In relation to proposed new subsection 7F(4), it might be argued that if this provision recognises that it would be wrong to punish someone who could not prevent the distribution of the material, it is hard to see why a person who wishes to raise this defence should not be entitled to the benefit of the presumption of innocence, at least to the extent that the person carries only an evidential burden of proof the elements of proposed new subsection 7F(4), (cf “Burden of Proof (*R v Lambert*)”, [2001] *Criminal Law Journal* (UK) 806, at 808.)

This issue of the placing of the burden of proof also arises in relation to proposed new section 7C. In this instance, however, it is not at all clear whether the defendant would carry any burden of proof in relation to the issues of fact involved in the application of this provision.

- Separation of powers concerns

In recent times, the courts have come to see ‘separation of powers’ thinking and what follows from it as a rights limitation on legislative power, or, at least, as source of ideas about what rights deserve common law protection.

In Scrutiny Report No 24, (xx January 2003), the Act Committee commented on a clause as follows:

By subclause 43(3) [of the *Confiscation of Criminal Assets Bill 2002*] “if the DPP has told the court that the restraining order applies to property that has evidentiary value in a criminal proceeding, the court must not revoke the restraining order without the DPP’s agreement ...” (subject to a qualification).

There is a question whether this obligation is inconsistent with the exercise of judicial power. . It gives the appearance of the court acting at the direction of an executive official.

Do other Committees regard ‘separation of powers’ thinking a source of ideas about what rights might be the subject of an undue trespass?

- ‘Rule of law’ concerns

Again, and perhaps more particularly in recent times, the courts have come to see ‘rule of law’ thinking and what follows from it as a rights limitation on legislative power, or, at least, as source of ideas about what rights deserve common law protection.

This is a malleable concept, but it may serve as a vehicle for the Committees to draw attention to a matter that cause problems for the citizens and the courts. In *Report No 20 xxx of 2002*), the ACT Committee said:

In this particular context, but also generally speaking in relation to situation where the content of a criminal offence of stated by reference to vague phrases, it is well to note observations by the High Court (speaking about an analogous statutory provision) in *Taikato v The Queen* (1996) 70 ALJR 960:

One purpose of s 545E is to protect the public from the use of certain dangerous weapons which are analogous to, but not as dangerous as, guns. It strikes at the person who goes into a public place armed with such a weapon. To achieve this purpose it uses language which arguably catches some pharmaceutical and domestic items that are most unlikely to be used to cause harm to members of the public even when they are carried in a public place. Without a defence of reasonable excuse or lawful purpose the reach of the section would be intolerable in a free society. But having regard to the width of the language of s 545E(1) and its evident purpose, determining what constitutes a "reasonable excuse" is not easy.

Plainly, a person has a reasonable excuse for possessing a prohibited weapon in a public place if the person is carrying it to surrender it to police officers or other relevant authorities.²⁰ Similarly, the man or woman carrying a pressurised can of insect spray has a reasonable excuse if the spray was carried for domestic use. So does the trader or carrier who possesses articles, prohibited by s 545E, for ordinary commercial purposes. But given the purpose of the section, it is not easy to conclude that it was a "reasonable excuse" in 1992 for a person to carry an article prohibited by s 545E(1) in a public place for the purpose of using it, if that person happened to be attacked.

The chief difficulty in a court interpreting "reasonable excuse" in s 545E(2) to cover possession for use in case of attack is to find a principled way of distinguishing cases where the legislature could not conceivably have envisaged such a defence arising and those where it may well have envisaged such a defence being available

If the rule of law is to have meaning, a criminal law should operate uniformly in circumstances which are not materially different. Consequently, even if in some circumstances a well-founded fear of attack is a necessary but not decisive criterion of "reasonable excuse", courts will have to formulate various conditions which disqualify some, but not all, individuals or groups from taking advantage of the "reasonable excuse" protection afforded by s 545E(2). That means that, under the label "reasonable excuse", the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear

of attack entitle a person to arm him or herself with a prohibited article or thing

... the reality is that when legislatures enact defences such as “reasonable excuse” they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence. That being so, the courts must give effect to the will of Parliament and give effect to their own ideas of what is a “reasonable excuse” in cases coming within s545E even when it requires the courts to make judgments that are probably better left to the representatives of the people in Parliament to make.

Do other Committees regard ‘rule of law’ thinking a source of ideas about what rights might be the subject of an undue trespass?

Have they, in some other way, drawn attention to the rights issues involved in a vaguely worded criminal offence, or in some other kind of law?

Considering whether a law make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers

This is a matter that perhaps deserves greater attention. The frustration and grievance that a citizen bears against government is often traceable to the way in which some administrative power has been exercised.

In recent years, the ACT Committee has often commented in the following ways.

The particular administrative power is unconfined as to the matter relevant and irrelevant to its exercise. Can some restriction be stated? [In the vast majority of cases, there is some restriction.]

Whether or not some restriction is stated, to the extent that there remains a significant area of discretion, should the decision-maker, or some other person (in particular, the responsible Minister), be empowered to issue guidelines as to the power will be or may be exercised? [There are some choices available here. Such provisions are now common in ACT laws. The ACT Committee has, however, noted that some national scheme laws may omit them.]

If there are guidelines, what is said about the notification, publication, etc? Are they disallowable?

Considering whether a clause makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions

- Should there be provision for review in some particular way?

There is perhaps a tendency on the part of Committees to take the view that the exercise of any administrative power must be subject to a particular regime for review.

Where there is a general administrative appeal tribunal in the jurisdiction, the tendency is to say that this is the appropriate body. In many instances, it may be doubted that it is. A proceeding before a general administrative appeal tribunal is expensive and prolix, and the cost to the person aggrieved, and to government, hardly worth it.

It is suggested that Committees acknowledge the availability of general regimes for review (and in particular by the Ombudsman). If some particular review is thought necessary, thought needs be given to the appropriate body.

Do the Committees have experiences to share?

- What should be said about a provision that excludes judicial review of administrative action?

Considering whether a clause inappropriately delegates legislative power

This is long standing concern of Scrutiny Committees:

- Does a clause permit subordinate legislation to amend statute law (the Henry 8th clause)?

(This part of the paper repeats most of what is in Mr Stefaniak's paper.)

Henry 8th clauses. Scrutiny Committees have long been concerned with provisions of Bills that would, if enacted, empower a person (such as a Minister) or body (such as the Executive) amend a statute by means of a subordinate law. Such powers derogate from the legislative authority of the legislature. (For (probably invalid) historical reasons, they are often referred to as 'Henry 8th clauses'.) The powers are conferred by the legislature itself, but the point may be made that the electorate elects and entrusts the parliamentarians to make laws, and a delegation of legislative power to amend statutes breaches this trust.

It is, however, apparent that many clauses that are technically of this kind do not in substance encroach on the legislative authority of the Legislative Assembly. Such would be a clause that conferred on the Executive a power, exercisable by regulation, to modify the transitional provisions of the Bill. A recent Explanatory Memorandum to a Territory bill pointed out that the clause in question was limited in relation to

- subject matter — in that it cannot be used to make changes of a policy nature; and
- time — in that the section would expire one year after it commences.

The ACT Committee has reached the view that where a clause is of this kind, no purpose is served by its drawing attention to it. Nor does it consider that an Explanatory Memorandum need address the issue of whether this is a necessary power. The Committee continues, however, to draw attention to Henry 8th clauses that have a broader application, and expects that Explanatory Memoranda will provide

an explanation for any such clause. Occasionally, the Committee does find a Henry 8th clause problematic as involving an inappropriate delegation of legislative power.

What do other Committees do or think about this?

- Does a clause confer a dispensing power?

(This part of the paper repeats most of what is in Mr Stefaniak's paper.)

Dispensing powers are a more subtle, yet possibly more objectionable form of inappropriate delegation of legislative power. In essence, they empower the Minister to set aside the statutory scheme as it would normally apply. For example, often the effect of such a clause is to permit the executive to (in effect) re-write the Act by taking out of its purview classes of persons who would otherwise be within its scope, and who, it may be presumed, the Assembly, when it passes the Act, intend should be within its scope. The problem is compounded when the power to dispense is cast in the form of a discretion that is completely unconfined. Again, while such powers are conferred by the legislature itself, the point may be made that the electorate elects and entrusts the parliamentarians to make laws, and conferral of a dispensing power breaches this trust.

From these two illustrations, a more general point may be made. This is that Scrutiny Committees need a flexible attitude to the meaning of their terms of reference. Traditional concerns need to be reworked to suit modern circumstances, and new concerns need to be identified. The terms of reference stay the same, but what they mean will vary over time.

What do other Committees do or think about this?

Considering whether a clause insufficiently subjects the exercise of legislative power to parliamentary scrutiny

Scrutiny Committees have long been concerned with provisions of Bills that have this character. The ACT Committee has very little occasion to make a comment invoking this term of reference. In other jurisdictions, there appears to be a very much greater reliance on subordinate legislation as a means for law-making.

Appendix B

Terms of Reference (or approach adopted by practice) of the Australian Legislative Scrutiny Committees

For convenience, the terms of reference (or approach adopted by practice) of all legislative scrutiny committees are set out in the following table, ie: those which scrutinise subordinate legislation and those which scrutinise bills.

(b = bills committee; sl = subordinate legislation committee)

(* = an approach adopted by practice as an expansion of issues considered under the Committee's terms of reference (a) and (f))

(# = an approach adopted by practice)

Terms of Reference	QLD	NSW	VIC	TAS	SA	WA ¹	NT	ACT	CMWLTH
Trespasses unduly on rights, liberties (freedoms)	X (b) (sl)	X (b) (sl)	X (b) (sl)	X (sl)	X (sl)	X (b) (sl)	X (sl)	X (b) (sl)	X (b) (sl)
Rights, liberties, obligations unduly dependent on insufficiently defined administrative powers	X (b)	X (b)	X (b)			X (b) (sl)#		X (b)	X (b)
Unduly makes rights, liberties or obligations dependent upon non-reviewable decisions	X (b) (sl)	X (b)	X (b)		X (sl)	X (sl)		X (b) (sl)	X (b) (sl)
Inappropriately delegate legislative powers	X (b)	X (b)	X (b)			X (b) (sl)*		X (b)	X (b)
Insufficiently subjects the exercise of legislative power to parliamentary scrutiny	X (b)	X (b)	X (b)			X (b) (sl)*		X (b)	X (b)
Not within powers or objects of Act	X (sl)	X (sl)	X (sl)	X (sl)	X (sl)	X (sl)	X (sl)	X (sl)	X (sl)
Matter more properly dealt with in an Act	X (sl)		X (sl)	X (sl)	X (sl)	X (sl)	X (sl)	X (sl)	X (sl)

¹ In Western Australia, no single committee scrutinizes bills. However, the Uniform Legislation and General Purposes Committee applies certain scrutiny principles as a convenient framework in examining all uniform legislation which is automatically referred to it. In addition, when bills are referred the Legislation Committee also applies these principles as a convenient framework. Bills are only referred to the Legislation Committee when the House determines that it is appropriate.

Terms of Reference	QLD	NSW	VIC	TAS	SA	WA ₁	NT	ACT	CMWLTH
Unduly makes rights dependent on administrative and not judicial decisions	X (b) (sl)		X (sl)	X (sl)	X (sl)	X (sl)#	X (sl)		
For any special reason, form or purport instrument requires elucidation	X (sl)	X (sl)	X (sl)	X (sl)		X (sl)#	X (sl)		
Fails to comply with matters pertaining to Regulatory Impact Statements	X (sl)	X (sl)	X (sl)	X (sl)					
Costs incurred in administration and compliance with statutory rule outweigh its benefits	X (sl)	X (sl)	X (sl)						
Without clear and express authority conferred by Act has (i) retrospective effect (ii) imposes tax, fee, fine, imprisonment or other penalty (iii) shifts onus of proof (iv) provides for sub-delegation	X X X (sl)		X X X (sl)		X X X (sl)	X X X (sl)*			
Regulation duplicates, overlaps or conflicts with any other regulation or act	X (sl)	X (sl)				X (sl)#			
Explanatory statement fails to meet technical or stylistic standards it ought in committee opinion conform to	X (b) (sl)							X (b) (sl)	
Instrument appears to make unusual or unexpected use of powers conferred by statute under which it is made			X (sl)			X (sl)*	X (sl)		
Is inconsistent with principles of justice and fairness	X (sl)		X (sl)			X (b)	X (sl)		

Terms of Reference	QLD	NSW	VIC	TAS	SA	WA ₁	NT	ACT	CMWLTH
Objective could have been achieved by alternative and more effective means		X (sl)							
Adverse impact on business community		X (sl)							
Unjustifiable delay in publication or laying of instrument before Assembly							X (sl)		
Power of search and seizure without warrant issued by judge or judicial officer	X (b) (sl)								
Fails to provide appropriate protection against self-incrimination	X (b) (sl)					X (b)			
Insufficient regard to Aboriginal Tradition and Islander Custom	X (b) (sl)					X (b)			
Provides for the compulsory resumption of property without adequate compensation	X (b) (sl)					X (b)			
Confer immunity from proceedings or prosecution without sufficient justification	X (b)					X (b)			
Not in accord with the spirit of the legislation even though legally made		X (sl)				X (sl)			
Subordinate legislation amends an Act	X (sl)					X (b) (sl)*			