

**40TH PARLIAMENT**



## **Report 115**

# **STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW**

*Education and Care Services National Law (WA) Amendment  
Bill 2018*

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Presented by  
Hon Michael Mischin MLC (Chairman)  
August 2018

## **Standing Committee on Uniform Legislation and Statutes Review**

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**ISBN 978-1-925578-36-2**



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## EXECUTIVE SUMMARY

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- 1 The Education and Care Services National Law (WA) Amendment Bill 2018 (Bill) amends the *Education and Care Services National Law (WA) Act 2012* which applied the Education and Care Services National Law (National Law) in Western Australia.
- 2 The National Law established a nationally consistent framework for the regulation of early childhood education and care services in Australia.
- 3 The key features of the Bill include:
  - improving oversight of, and support for, educators engaged by family day care services
  - making approved providers responsible for ensuring that only fit and proper persons with suitable skills to perform the role are appointed nominated supervisors
  - simplifying administrative and enforcement provisions
  - making minor and technical improvements to the operation of the National Law
  - making consequential amendments to two other Western Australian Acts, namely the *Spent Convictions Act 1988* and the *Working with Children (Criminal Record Checking) Act 2004*.
- 4 There is no intergovernmental agreement for the Bill.
- 5 The Bill was referred in unusual circumstances. The initial referral under Standing Order 126 did not trigger the Committee's jurisdiction to consider and report on the Bill. The referral of the Bill two days later under Standing Order 128 cured the irregularity and clarified the referral.
- 6 With the exception of the proclamation clause, the Committee has not identified any clause in the Bill that impacts upon the sovereignty and law-making powers of the Parliament of Western Australia.

### Findings and recommendations

**Findings and recommendations are grouped as they appear in the text at the page number indicated:**

#### RECOMMENDATION 1

Page 9

The Committee recommends that a second reading speech that identifies a bill as a Uniform Legislation Bill should clearly set out detailed reasons why the bill is a Uniform Legislation Bill.

#### RECOMMENDATION 2

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The Committee recommends that a second reading speech that asserts that a bill is not a Uniform Legislation Bill should give detailed reasons why the bill is not a Uniform Legislation Bill.

#### RECOMMENDATION 3

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The Committee recommends that a bill that is not a Uniform Legislation Bill should not be referred to the Standing Committee on Uniform Legislation and Statutes Review under Standing Order 126.

**RECOMMENDATION 4**

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The Committee recommends that if the Government wishes to refer a bill to a committee when Standing Order 126 does not apply, it should do so under Standing Order 128.

**RECOMMENDATION 5**

Page 9

The Committee recommends that if the Government wishes to refer a bill to the Committee under Standing Order 128, the second reading speech should include detailed reasons why the Government believes the bill ought to be referred to the Committee, having regard to its terms of reference.

**FINDING 1**

Page 11

The Committee finds there is no intergovernmental agreement for the Education and Care Services National Law (WA) Amendment Bill 2018.

**FINDING 2**

Page 14

The Committee finds that clause 2(b)(ii) of the Education and Care Services National Law (WA) Amendment Bill 2018, in providing that the Executive determines commencement dates, erodes the Western Australian Parliament's sovereignty and law-making powers.

**FINDING 3**

Page 14

The Committee finds that there are acceptable reasons for leaving the proclamation of Parts 2, 3 and 4 of the Education and Care Services National Law (WA) Amendment Bill 2018 to be determined by the Executive.

**RECOMMENDATION 6**

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The Committee recommends that the Legislative Council note the Committee's findings and recommendations during consideration of the Education and Care Services National Law (WA) Amendment Bill 2018.

## 1 Introduction

- 1.1 On 28 June 2018, the Legislative Council referred the Education and Care Services National Law (WA) Amendment Bill 2018 (Bill) to the Standing Committee on Uniform Legislation and Statutes Review (Committee) for consideration and report. The reporting date is 14 August 2018, being the next sitting day after the 45 day period mandated in the referral.
- 1.2 The Bill amends the *Education and Care Services National Law (WA) Act 2012* (Act) which applied the Education and Care Services National Law (National Law) in Western Australia. The National Law established a nationally consistent framework for the regulation of early childhood education and care services in Australia. That scheme replaced the separate State licensing and national quality assurance systems for centre based care, outside school hours care and family day care that existed prior to the commencement of the Act.
- 1.3 The amendments have arisen from a review of the national scheme conducted in 2014.
- 1.4 This report includes discussion and analysis of the:
  - manner in which the Bill was referred to the Committee
  - intergovernmental agreement that established the national scheme
  - Education and Care Services National Law (WA) Bill 2011 (2011 Bill)
  - Committee’s report on the 2011 Bill
  - lack of any intergovernmental agreement that underpins this Bill
  - Bill.

## 2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its website at the [Uniform Legislation Committee homepage](#). The general public was immediately notified of the referral via social media.<sup>1</sup> Given the Committee’s terms of reference, the Committee considered that any broader advertising or invitation for submissions from the public was neither necessary nor warranted.

## 3 Supporting documents

- 3.1 The Committee received copies of the Bill, the second reading speech and the Explanatory Memorandum when the Bill was introduced into the Legislative Council.
- 3.2 Hon Simone McGurk MLA, Minister for Community Services, provided the Committee with the information required pursuant to Ministerial Memorandum MM 2007/01.<sup>2</sup>

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<sup>1</sup> Legislative Council, 26 June 2018, retrieved from <https://twitter.com/WALegCouncil/status/1011616081763422208>.

<sup>2</sup> Ministerial Office Memorandum MM 2007/01 requires the provision of information to the Committee such as: a copy of the relevant intergovernmental agreement/memorandum of understanding or a copy of the communiqué from the Ministerial Council meeting at which it was agreed to introduce the legislation, a statement as to any timetable for the implementation of the legislation, the advantages and disadvantages to the State of Western Australia as a participant in the relevant scheme or agreement, any relevant constitutional issues, an explanation as to whether and by what mechanism the State can opt out of the scheme, the mechanisms by which the bill, once enacted, can be amended and, if the legislation has been developed by reference to a model bill, a copy of that model bill.

3.3 Standing Order 126(5) states:

The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral ...

3.4 The Minister forwarded the information required under Ministerial Memorandum MM 2007/01 to the Committee on 29 June 2018, three working days after referral. The Committee extends its appreciation to the Minister for the timely provision of the supporting documentation and information.

## 4 Referral process

4.1 The Bill was referred to the Committee in unusual circumstances. The Committee has provided analysis of the referral and recommended how the process can be improved for future referrals.

4.2 This section of the Report discusses:

- Legislative Council Standing Order 126 and its predecessor
- the referral of the Health Practitioner Regulation National Law (WA) Amendment Bill 2017 to the Committee
- the referral of the Bill to the Committee
- the referral of the Fair Trading Amendment Bill 2018 to the Committee.

### Legislative Council Standing Order 126

4.3 Standing Order 126 (SO 126) superseded Standing Order 230A (SO 230A) on 6 March 2012. The relevant parts of previous SO 230A and current SO 126 (that is, the definition of a Uniform Legislation Bill<sup>3</sup>) are identical. Any differences in approach to determining whether a bill should be referred to the Committee do not arise from the wording of the Standing Orders.

4.4 The following analysis is relevant to both SO 230A and SO 126.

4.5 A Uniform Legislation Bill is a bill that:

- (a) ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party; or
- (b) by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.<sup>4</sup>

4.6 In summary, a referral of a bill to the Committee under SO 126 is triggered if the bill implements either:

- a new uniform scheme or intergovernmental agreement or
- substantial changes to an existing uniform scheme.

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<sup>3</sup> Uniform Legislation Bill is defined in Legislative Council Standing Order 126(2).

<sup>4</sup> The Standing Orders of the Legislative Council, Standing Order 126(2).

- 4.7 There are two ways that a Uniform Legislation Bill may be referred to the Committee:
- Referral by the Member in charge of the bill identifying the bill as a Uniform Legislation Bill or
  - Referral by order of the Council, following a motion with or without notice, by any Member.

#### **Referral by Member in charge of the bill**

- 4.8 A Member in charge of a bill must advise the Legislative Council whether or not a bill is a Uniform Legislation Bill and give reasons why. This occurs during the Member's second reading speech.<sup>5</sup> A bill identified as a Uniform Legislation Bill by the Member in charge of the bill stands referred to the Committee at the conclusion of the Member's second reading speech.<sup>6</sup>

#### **Referral by order of the Council on motion of any Member**

- 4.9 The Legislative Council may order that a bill is a Uniform Legislation Bill notwithstanding contrary advice from the Member in charge of the bill.<sup>7</sup> Standing Order 125 (SO 125) and Standing Order 128 (SO 128) are relevant to this process.
- 4.10 SO 125 provides that the debate on a bill is adjourned following the second reading speech and not resumed for a period of two calendar weeks for a Legislative Council bill and one calendar week for a Legislative Assembly bill. The adjournment provides an opportunity for each Member to review the bill and explanatory memorandum, take advice and make their own inquiries.
- 4.11 A Member may move that a bill be referred to the Committee under SO 128 upon resumption of the second reading debate on the bill.
- 4.12 SO 128(1) provides:
- At any time after the second reading has been moved and before the third reading has been moved, a motion without notice may be moved to refer the Bill to a Standing or Select Committee.
- 4.13 If the Member's motion is carried it becomes an order of the Legislative Council in accordance with SO 126(3) and stands referred to the Committee immediately following the order.<sup>8</sup>
- 4.14 Alternatively, by virtue of Standing Order 19, a Minister or Parliamentary Secretary may move without notice that a bill be referred to the Committee under SO 128 prior to the resumption of the second reading debate.<sup>9</sup>
- 4.15 Another option for Members is to give notice of a motion to refer a bill to the Committee. This is the least preferable option as the motion is unlikely to come on for debate for some

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<sup>5</sup> *ibid.*, Standing Order 126(1).

<sup>6</sup> *ibid.*, Standing Order 126(4).

<sup>7</sup> *ibid.*, Standing Order 126(3).

<sup>8</sup> *ibid.*, Standing Order 126(4).

<sup>9</sup> Standing Order 19 states: 'Any motion connected with the conduct of the business of the Council may be moved by a Minister or Parliamentary Secretary at any time without notice'.

time unless either the Leader of the House lists the motion on the Business Program or the fast-tracking procedure in Standing Order 17(5) is employed.<sup>10</sup>

- 4.16 The 45 day period for the Committee to report on bills to the Legislative Council does not commence until a bill is referred or such other date as ordered by the Legislative Council.<sup>11</sup>

#### **Difficulties in identifying intergovernmental agreements**

- 4.17 It is often difficult to identify what is a bilateral or multilateral intergovernmental agreement.
- 4.18 National uniform schemes of legislation generally emerge from such bodies as the Council of Australian Governments (COAG) and various ministerial councils. At its simplest level, such councils agree to uniform legislation, usually in closed session and with little publicly available documentation. The participating Minister then sponsors the bill through individual State or Territory Parliaments.
- 4.19 Some ministerial councils do not have formal meeting or reporting procedures. There may only be a short, edited, extract of the minutes of a relevant ministerial council meeting, or a communiqué or summary of the decisions made at a meeting.
- 4.20 It is therefore sometimes difficult to identify which discussions at the national and ministerial council level may be categorised as intergovernmental agreements influencing State legislative programs. This is a matter for the Member in charge of a bill to determine on a case by case basis.

#### **Legislative Council Procedure and Privileges Committee guidelines on the application of Standing Order 230A**

- 4.21 In November 2005, the Legislative Council Procedure and Privileges Committee (PPC) endorsed internal guidelines in relation to the application of SO 230A. It did so in order to promote continuity and consistency.<sup>12</sup>
- 4.22 The object of the guidelines was to reflect previous practice of the Legislative Council to ensure, in the absence of any indication by the responsible Minister, SO 230A was applied in a consistent manner.<sup>13</sup>
- 4.23 The PPC emphasised that the application of SO 230A in any given case was ultimately a matter for the Legislative Council.<sup>14</sup>
- 4.24 The PPC guideline for National Competition Policy (NCP) was:

Bills that involve elements of NCP *have not stood referred* under SO 230A to a committee for inquiry where the changes have come about pursuant to a review required by NCP (for example, reviews of professional occupations and trade practices) rather than a separate or subsidiary agreement.

...

Bills *have stood referred* if, although reflecting NCP, the changes being implemented are also required by a further separate agreement whether or not

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<sup>10</sup> Standing Order 17(5) states: 'A Member may move without notice that an order of the day or a notice of motion listed on the Notice Paper in the Member's name be made order of the day No. 1 or motion No. 1 on the Business Program for the next sitting of the Council. Any such motion shall be put without amendment or debate'.

<sup>11</sup> The Standing Orders of the Legislative Council, Standing Order 126(7).

<sup>12</sup> Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Report 8, *Report 8 Standing Committee on Procedure and Privileges*, November 2005, p 20 and Appendix 3.

<sup>13</sup> *ibid.*, p 20.

<sup>14</sup> *ibid.*

that agreement flows from NCP (for example, the impetus for road transport reforms stems from NCP but legislative changes are agreed in separate principles endorsed by ministerial councils).<sup>15</sup>

4.25 The PPC guideline for amendment bills was:

If uniform legislation has been implemented by a previous Act then bills that propose further amendments to that uniform legislation have not stood referred unless the particular bill implements additional uniform legislation.<sup>16</sup>

### **Legislative Council Procedure and Privileges Subcommittee Report – Review of the Standing Orders**

4.26 On 15 September 2009, the Legislative Council resolved to undertake a comprehensive review of the Legislative Council Standing Orders with a view to modernising the procedures of the Legislative Council.<sup>17</sup> The review by the PPC Subcommittee led to the replacement of SO 230A with SO 126, effective from 6 March 2012.

4.27 The report noted that SO 126 was to replace the practice, under SO 230A, of the Clerk advising the President on whether a bill should be referred to the Committee and the President ruling accordingly. The PPC Subcommittee noted that the Committee was established by the Legislative Council to undertake its work on behalf of the Legislative Council and considered it was:

appropriate that the decision-making process regarding which Bills are referred to the [Committee] should be a matter exclusively for the House.<sup>18</sup>

### **Committee comment**

4.28 Referrals under SO 230A were problematic as the President had to decide whether a bill was a Uniform Legislation Bill based only on the bill itself and the second reading speech. Under SO 126, the President no longer has any role in determining whether a bill is a Uniform Legislation Bill. The Member in charge of the bill advises the Legislative Council whether the bill is a Uniform Legislation Bill and provides reasons why. The Government is best placed to advise on the uniform nature of a bill given its access to a greater breadth of information about the bill, including the existence of any intergovernmental agreement. It is now for the Government to disclose all that evidence in the Member's second reading speech and it is for the Member to say if the bill is one to which SO 126 applies.

4.29 If the Member in charge of the bill is of the view that SO 126 does not apply, they should not refer the bill under SO 126. If another Member disagrees with that view, that Member should seek a referral of the bill during the resumption of the second reading debate.

### **Presidents' Rulings on the operation of Standing Order 126**

4.30 Although ultimately it is a decision for the Legislative Council, it is instructive to consider Presidents' rulings on the operation of SO 126 and its predecessor as to what constitutes a Uniform Legislation Bill:

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<sup>15</sup> *ibid.*, Appendix 3 at p 33.

<sup>16</sup> *ibid.*, Appendix 3 at p 34.

<sup>17</sup> Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Subcommittee, Report 22, *Review of the Standing Orders*, October 2011, p 1.

<sup>18</sup> *ibid.*, p 12.

- A bill that provides for the continuation of an existing uniform scheme that has already had effect in Western Australia and been given legislative effect does not fall under SO 230(c).<sup>19</sup>
- If a bill modifies legislation that would be categorised as a Uniform Legislation Bill, that nexus is insufficient to capture the bill itself as a Uniform Legislation Bill.<sup>20</sup>
- A bill that makes no significant changes to an existing scheme or Western Australian Act does not fall under SO 126.<sup>21</sup>
- A bill that is basic in nature, simply provides an overarching framework and leaves the specific regulation of interjurisdictional matters to separate legislation arising from various intergovernmental agreements does not fall under SO 126.<sup>22</sup>

4.31 On 27 June 2013, the President ruled that the Duties Legislation Amendment Bill 2013 was not one to which SO 126 applied.<sup>23</sup>

### **Bills returned to the Legislative Council as not Uniform Legislation Bills**

4.32 The Committee has tabled a number of reports on bills referred to it under SO 126 which have effectively returned the bills to the Legislative Council with the explanation that they are not Uniform Legislation Bills for the purposes of the Standing Orders.<sup>24</sup>

4.33 By way of example, the Committee noted in its report on the *Child Support (Adoption of Laws) Amendment Bill 2012*:

the Bill does not change the uniform scheme adopted by the Principal Act, implement an additional uniform scheme or implement a further separate

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<sup>19</sup> Hon John Cowdell MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2001, p 901. The President ruled that the Mutual Recognition (Western Australia) Bill 2001 was not a Uniform Legislation Bill on the basis that 'it is a continuation of a uniform scheme that has already had effect in Western Australia and been given legislative effect. It lapsed in February this year and this provides for the revival of that scheme, and presumably the initial Bill had been subject to the referral'.

<sup>20</sup> Hon Barry House MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 October 2010, p 7317 in relation to the Railway (Roy Hill Infrastructure Pty Ltd) Agreement Bill 2010. In order to be considered a Uniform Legislation Bill, the bill itself would need to ratify or give effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party.

<sup>21</sup> Hon Barry House MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 10 November 2010, p 8467. The President ruled that in addition to enabling the continuation of a uniform scheme that has already had longstanding legislative effect in Western Australia, the Mutual Recognition (Western Australia) Bill 2010 'is a relatively short bill and there are no significant changes proposed in the bill from the existing [State Act]. Similarly, the commonwealth act that is proposed to be continued to be adopted in Western Australia by the bill ... has not been the subject of any significant amendment since its last adoption in 2001'.

<sup>22</sup> Hon Barry House MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 10 November 2010, p 8467 in relation to the Mutual Recognition (Western Australia) Bill 2010. Note that in that case the specific regulation of inter-jurisdictional trade and the recognition of professional qualifications were dealt with in separate legislation arising from various intergovernmental agreements. The President ruled that those specific intergovernmental agreements and their implementing legislation are each subject to [current Standing Order 126] as the relevant bills come before the House.

<sup>23</sup> Hon Barry House MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2013, pp 2265-66. The President stated: 'This Duties Legislation Amendment Bill 2013 does not implement additional uniform legislation. A review by the Standing Committee on Uniform Legislation and Statutes Review is very narrow and would not be able to consider the issues the member has raised' at p 2266.

<sup>24</sup> For example see Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 74, *Child Support (Adoption of Laws) Amendment Bill 2012*, September 2012 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 102, *Aquatic Resources Management Bill 2015*, August 2016.

intergovernmental agreement. As such the uniform scheme remains the same as was reviewed by the House at the time it considered the Principal Act.

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Further, under its current *Terms of Reference* the Committee is restricted to considering matters of parliamentary sovereignty and law making powers – which would have been considered by the House at the time it considered the Principal Act and remain unchanged by this Bill.<sup>25</sup>

## **Referral of the Health Practitioner Regulation National Law (WA) Amendment Bill 2018**

- 4.34 On 6 September 2017, Hon Alanna Clohesy MLC second read the Health Practitioner Regulation National Law (WA) Amendment Bill 2017 (Health Bill). The speech contained indications that the Health Bill was a Uniform Legislation Bill but concluded by saying it was not. Accordingly, no referral was made under SO 126.<sup>26</sup>
- 4.35 Hon Nick Goiran MLC sought a ruling from the President on whether the Health Bill was a Uniform Legislation Bill.<sup>27</sup>
- 4.36 The President made no ruling about whether the Health Bill should be referred under SO 126 as she said it was a matter for the Legislative Council itself to determine.<sup>28</sup> She did, however, provide some guidance to Members. The President noted that:
- The Health Bill amended a national scheme established in accordance with COAG's Health Council intergovernmental agreement.
  - The Committee previously scrutinised the original national scheme.
  - Legislative Council practice has been not to refer bills to the Committee that make only minor amendments to existing schemes that have been previously scrutinised. What amounts to a minor amendment is initially a matter of judgement for the Member in charge of the bill. It may subsequently become a matter for determination by the Legislative Council upon a motion without notice by any Member seeking to refer the bill under SO 126(3).
  - The appropriate time for moving a motion without notice under SO 126(3) is when the order of the day is called for the resumption of the second reading debate on the bill.<sup>29</sup>
- 4.37 Hon Nick Goiran MLC subsequently moved that the Health Bill be referred to the Committee pursuant to SO 126. Hon Alanna Clohesy MLC supported the referral on behalf of the Government. The Health Bill was referred to the Committee under SO 126.<sup>30</sup>

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<sup>25</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 74, *Child Support (Adoption of Laws) Amendment Bill 2012*, September 2012, p 2.

<sup>26</sup> Hon Alanna Clohesy MLC, Parliamentary Secretary to the Minister for Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 September 2017, pp 3408-09.

<sup>27</sup> Hon Nick Goiran MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 September 2017, p 3409.

<sup>28</sup> Hon Kate Doust MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 7 September 2017, p 3494.

<sup>29</sup> *ibid.*

<sup>30</sup> Hon Nick Goiran MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2017, pp 4053-54.

## Referral of the Education and Care Services National Law (WA) Amendment Bill 2018

4.38 On 26 June 2018, Hon Sue Ellery MLC second read the Education and Care Services National Law (WA) Amendment Bill 2018 (Bill). The speech concluded by asserting that the Bill was not a Uniform Legislation Bill for the following reasons:

- The original Western Australian national law was referred to the Committee in 2012.
- The Bill does not ratify or give effect to an intergovernmental or multilateral agreement to which the Government of the State is party.
- The Bill does not, due to its subject matter, introduce a uniform scheme or uniform laws throughout the Commonwealth; rather, it amends an existing scheme.
- The amendments to the existing scheme clarify and simplify some aspects of the regulatory regime and strengthen other aspects of the regulatory regime.
- No new or additional intergovernmental agreement underpins the regulatory improvements; rather, they fortify the existing national scheme.<sup>31</sup>

4.39 Despite concluding that the Bill was not a Uniform Legislation Bill, Hon Sue Ellery MLC purported to refer the Bill under SO 126 to the Committee 'in order to provide certainty for members of the Council'.<sup>32</sup>

4.40 On 28 June 2018, Hon Sue Ellery MLC moved without notice that the Bill be referred to the Committee under SO 128.<sup>33</sup> The Member provided the following explanation for the motion:

If I may give a brief explanation: this is to provide absolute certainty. Members will recall that the second reading speech of this bill, which I read in on Tuesday night, indicated the government had received advice that the bill did not necessarily require a standing order 126 referral but we thought, for the purpose of certainty, it would be a good idea to do it. To make it absolutely clear that the government is seeking to refer the Education and Care Services National Law (WA) Amendment Bill 2018, I am taking the precautionary step of moving this motion.<sup>34</sup>

### Committee comment

4.41 Referral of a bill to the Committee under SO 126 may occur by either the Member in charge of the bill advising the Legislative Council that the bill is a Uniform Legislation Bill or by order of the Legislative Council that the bill is a Uniform Legislation Bill (see paragraph 4.7). Neither of these occurred in the initial purported referral of the Bill. In this instance the referral was made under SO 128 without reference to SO 126.

4.42 The Committee's view is that its jurisdiction to consider and report on the Bill was not triggered on 26 June 2018.

4.43 The referral of the Bill two days later under SO 128 cured the irregularity and clarified the referral.

4.44 It is for the Member in charge of a bill to say if the bill is one to which SO 126 applies. Second reading speeches which nominate a bill as a Uniform Legislation Bill should clearly

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<sup>31</sup> Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 June 2018, pp 3782-83.

<sup>32</sup> *ibid.*, p 3783.

<sup>33</sup> See Legislative Council Standing Order 19 and paragraph 4.14 of this report.

<sup>34</sup> Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 28 June 2018, p 4065.

set out detailed reasons why the bill is a Uniform Legislation Bill. Reference should be made, as necessary and among other things, to Presidents' rulings on the operation of SO 126 and the PPC guidelines on the application of SO 230A. Consideration of the existence of any intergovernmental agreement, in all its possible forms, is also important.

- 4.45 Conversely, second reading speeches which nominate that a bill is not a Uniform Legislation Bill should give detailed reasons why the bill is not a Uniform Legislation Bill. Such bills should not be referred to the Committee under SO 126. If a Member disagrees with that view, that Member should seek a referral of the bill under SO 128 during the resumption of the second reading debate.
- 4.46 If the Government wishes to refer a bill to a committee when SO 126 does not apply, it is preferable to do so under SO 128. The referral may be to the Committee or any other Legislative Council Standing or Select Committee. In such cases, the second reading speech should include detailed reasons why the Government believes the bill ought to be considered by the committee to which it intends to make the referral. If the referral is to the Committee, it should be noted that the Committee has a limited remit under its terms of reference. The reasons for referral should have regard to the Committee's terms of reference, given that they are limited to considering how a bill may have an impact upon the sovereignty and law-making powers of the Western Australian Parliament.
- 4.47 The Committee notes that the second reading speech for the Bill contained reasons why SO 126 did not apply. It assists the Legislative Council to be provided with detailed reasons and the Committee encourages the Government to continue this practice for bills that it considers are not Uniform Legislation Bills.

#### **RECOMMENDATION 1**

The Committee recommends that a second reading speech that identifies a bill as a Uniform Legislation Bill should clearly set out detailed reasons why the bill is a Uniform Legislation Bill.

#### **RECOMMENDATION 2**

The Committee recommends that a second reading speech that asserts that a bill is not a Uniform Legislation Bill should give detailed reasons why the bill is not a Uniform Legislation Bill.

#### **RECOMMENDATION 3**

The Committee recommends that a bill that is not a Uniform Legislation Bill should not be referred to the Standing Committee on Uniform Legislation and Statutes Review under Standing Order 126.

#### **RECOMMENDATION 4**

The Committee recommends that if the Government wishes to refer a bill to a committee when Standing Order 126 does not apply, it should do so under Standing Order 128.

#### **RECOMMENDATION 5**

The Committee recommends that if the Government wishes to refer a bill to the Standing Committee on Uniform Legislation and Statutes Review under Standing Order 128, the second reading speech should include detailed reasons why the Government believes the bill ought to be referred to the Committee, having regard to its terms of reference.

## Referral of the Fair Trading Amendment Bill 2018

- 4.48 On 27 June 2018, the Minister for Regional Development introduced the Fair Trading Amendment Bill 2018 (Fair Trading Bill) into the Legislative Council. During her second reading speech, the Minister advised that the Fair Trading Bill was considered by the Government not to be a Uniform Legislation Bill as it 'does not in itself give effect to a national agreement or introduce a uniform laws scheme'.<sup>35</sup>
- 4.49 The Minister noted that the Fair Trading Bill 'proposes amendments to a uniform legislation scheme that may have implications for parliamentary sovereignty and it is appropriate for the committee to consider that issue'.<sup>36</sup> As such, the Minister moved a motion without notice to refer the Fair Trading Bill to the Committee under SO 128 for consideration and report.<sup>37</sup>
- 4.50 The Legislative Council agreed to that motion.<sup>38</sup>

### Committee comment

- 4.51 The Committee notes that the second reading speech for the Fair Trading Bill included some reasons why SO 126 did not apply. The Committee encourages the Government to give detailed reasons why a bill it is introducing is not a Uniform Legislation Bill.

## 5 The Intergovernmental Agreement

- 5.1 The Act was made pursuant to the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care (IGA) which was endorsed by COAG in December 2009. Western Australia signed the IGA on 7 December 2009. The IGA established a National Quality Framework for Early Childhood Education and Care (NQF).
- 5.2 The NQF provided for the introduction of legislation based on national quality standards, the establishment of a jointly governed national body, a nationally consistent assessment and rating system and a State-based, nationally consistent approvals system.<sup>39</sup>
- 5.3 The NQF comprised the National Law, the *Education and Care Services National Regulations 2012*, the National Quality Standard (NQS) and the prescribed rating system.<sup>40</sup>
- 5.4 The NQF commenced on 1 January 2012 in all States and Territories, apart from Western Australia where it commenced on 1 August 2012.
- 5.5 The IGA required that it be reviewed by COAG in 2014 to assess the progress made in respect of achieving its agreed objectives and outcomes.<sup>41</sup>
- 5.6 The amendments proposed by the Bill purport to arise from the 2014 review of the IGA.<sup>42</sup>

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<sup>35</sup> Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2018, p 3903.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*, p 3904.

<sup>38</sup> *ibid.*

<sup>39</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 71, *Education and Care Services National Law (WA) Bill 2011*, May 2012, p 4.

<sup>40</sup> *ibid.*

<sup>41</sup> Council of Australian Governments, *National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care*, an Agreement between the Commonwealth of Australia and all Australian States and Territories, December 2009, Clause 64.

<sup>42</sup> Woolcott Research and Engagement, *Review of the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care*, 2014.

5.7 There is no intergovernmental agreement for the Bill.

#### **FINDING 1**

The Committee finds there is no intergovernmental agreement for the Education and Care Services National Law (WA) Amendment Bill 2018.

## **6 The Education and Care Services National Law (WA) Bill 2011**

- 6.1 The 2011 Bill was introduced into the Legislative Council on 6 March 2012.
- 6.2 The purpose of the 2011 Bill was to apply the National Law in Western Australia.
- 6.3 The 2011 Bill adopted the applied laws model of uniform legislation. That is, it applied a law of the host jurisdiction, Victoria, the *Education and Care Services National Law Act 2010* (Victorian Act) which attached the National Law as a Schedule. The National Law was incorporated as a law of Western Australia as it was attached as a schedule to the 2011 Bill. However, rather than identically applying the Victorian Act, Western Australia enacted a law which mirrored, or substantially corresponded, to the National Law. This reflected what was agreed in the IGA.<sup>43</sup>
- 6.4 The 2011 Bill was referred to the Committee pursuant to SO 126.

### **Uniform Legislation and Statutes Review Committee Report on the Education and Care Services National Law (WA) Bill 2011 – Report 71**

- 6.5 The Committee provided a comprehensive and detailed analysis of the 2011 Bill and the National Law in its Report 71.<sup>44</sup> Information in that report may help to inform Members' consideration of the Bill. Click [here](#) to view Report 71.
- 6.6 The Committee identified a number of concerns with the IGA, the 2011 Bill and the National Law.
- 6.7 In summary, the Committee noted:
- an amendment to the National Law which would apply nationally could be agreed by consensus in the Ministerial Council, albeit without the consent of Western Australia<sup>45</sup>
  - some Western Australian legislation did not apply to the National Law and the instruments made under the National Law<sup>46</sup>
  - a broad regulation-making power for transitional matters<sup>47</sup>

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<sup>43</sup> Council of Australian Governments, *National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care*, an Agreement between the Commonwealth of Australia and all Australian States and Territories, December 2009, Item 65 of Schedule A – National Governance which provides that: 'The State of Western Australia will, as soon as practicable, enact corresponding legislation in corresponding terms to the template legislation, so as to permit the national system to be established on 1 January 2012'.

<sup>44</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 71, *Education and Care Services National Law (WA) Bill 2011*, May 2012.

<sup>45</sup> *ibid.*, paras 8.2-8.10.

<sup>46</sup> *ibid.*, paras 8.11-8.27.

<sup>47</sup> *ibid.*, paras 8.28-8.30.

- a power to make regulations to prescribe a code of practice. The Committee queried whether such a code should be tabled in Parliament and made disallowable<sup>48</sup>
- the application of the *State Records Act 1998* (NSW) as a law of Western Australia in some circumstances<sup>49</sup>
- some Henry VIII clauses<sup>50</sup>
- sections of the National Law which may provide for an unguided sub-delegation of legislative-making power<sup>51</sup>
- sections in the National Law which may provide for an inappropriate delegation of legislative power.<sup>52</sup>

6.8 The Committee recommended that the Minister explain some provisions in the 2011 Bill but did not recommend any amendments to the 2011 Bill.<sup>53</sup>

#### **Committee's concerns addressed and 2011 Bill passed**

6.9 The Minister responded to the issues raised by the Committee in her second reading reply.<sup>54</sup>

6.10 The Legislative Council passed the 2011 Bill without amendment on 13 June 2012 and it received Royal Assent on 20 June 2012. It is the *Education and Care Services National Law (WA) Act 2012* (Act).

## **7 Review of the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care – 2014**

7.1 The IGA required a review to be conducted in 2014 to assess the progress made in respect of achieving its agreed objectives and outcomes.<sup>55</sup>

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<sup>48</sup> *ibid.*, paras 8.32-8.34.

<sup>49</sup> *ibid.*, paras 8.35-8.39.

<sup>50</sup> *ibid.*, paras 8.40-8.47.

<sup>51</sup> *ibid.*, paras 8.48-8.52.

<sup>52</sup> *ibid.*, paras 8.53-8.64.

<sup>53</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 71, *Education and Care Services National Law (WA) Bill 2011*, May 2012. The Committee recommended that the Minister explain why the *Freedom of Information Act 1992* should not apply to the 2011 Bill (Recommendation 1), why the *Interpretation Act 1984*, apart from sections 41, 42 and 60, did not apply to the 2011 Bill and any impact of the exclusion of the *Interpretation Act 1984* and the application of Schedule 1 to the Schedule to the 2011 Bill (Recommendation 2) and whether any delegate identified by the Regulatory Authority pursuant to section 262 of the Schedule to the 2011 Bill would be subject to accountability legislation and, if so, of which jurisdiction (Recommendation 3).

<sup>54</sup> Hon Robyn McSweeney MLC, Minister for Community Services, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 June 2012, pp 3540-3548. The explanations for the issues raised in Recommendations 1 and 2 were 'national consistency' and the explanation for the issue raised in Recommendation 3 was that any delegate would be subject to Western Australian accountability legislation.

<sup>55</sup> Council of Australian Governments, *National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care*, an Agreement between the Commonwealth of Australia and all Australian States and Territories, December 2009, Clause 64.

- 7.2 The 2014 Review of the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care (Review) recommended amendments to the National Law. These were approved by the Education Council on 31 January 2017.<sup>56</sup>
- 7.3 The amendments proposed by the Bill arise from the Review.

## **8 The Education and Care Services National Law (WA) Amendment Bill 2018**

- 8.1 The Bill proposes to amend the Act (including the National Law which is contained in the Schedule to the Act).
- 8.2 The key features of the Bill include:
- strengthening the eligibility criteria for an application for the 'excellent' rating as part of implementing the revised NQS
  - improving oversight of, and support for, educators engaged by family day care services
  - removing the supervisor certificate requirements and making approved providers responsible for ensuring that only fit and proper persons with suitable skills to perform the role are appointed nominated supervisors
  - simplifying administrative and enforcement provisions
  - making other minor and technical improvements to the operation of the National Law.<sup>57</sup>
- 8.3 The Bill also makes consequential amendments to two other Western Australian Acts, namely the *Spent Convictions Act 1988* and the *Working With Children (Criminal Record Checking) Act 2004*.<sup>58</sup>

### **Structure of the Bill**

- 8.4 The Bill contains 94 clauses in four Parts as follows:
- Part 1 contains preliminary provisions.
  - Part 2 Division 1 amends the Act and Part 2 Division 2 amends the National Law.
  - Part 3 amends the *Spent Convictions Act 1988*.
  - Part 4 amends the *Working with Children (Criminal Record Checking) Act 2004*.

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<sup>56</sup> Changes to the National Law were agreed on 16 December 2016. There is no communiqué from the Education Council for these changes as they did not have a consensus agreement due to the Australian Capital Territory still awaiting Cabinet endorsement. As a result, official agreement was achieved out of session and that agreement communicated through the National Regulator, Australian Children's Early Education Quality Authority. A public statement advising of agreement to changes to the National Quality Framework was released by the Australian Children's Early Education Quality Authority on 13 February 2017: Dr Susan Gallacher, Senior Policy Advisor, Office of Minister McGurk, Email, 29 June 2018, p 1.

<sup>57</sup> Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 June 2018, p 3782.

<sup>58</sup> The *Spent Convictions Act 1988* (clause 92 of the Bill amends Schedule 3 clause 1(5) item 6A of the *Spent Convictions Act 1988* by deleting reference to a supervisor certificate) and the *Working with Children (Criminal Record Checking) Act 2004* (clause 94 amends section 38(3)(b)(ii) of the *Working with Children (Criminal Record Checking) Act 2004* by deleting 'certified supervisor').

## Clauses that may impact upon Parliamentary sovereignty and law-making powers

### Clause 2

- 8.5 Clause 2(a) of the Bill provides that Part 1 of the Act will come into operation on the date of Royal Assent.
- 8.6 Clause 2(b) of the Bill provides that the rest of the Act (Parts 2, 3 and 4) will come into operation on:
- if Royal Assent is given before 1 October 2018 – that date<sup>59</sup>
  - if Royal Assent is given on or after 1 October 2018 – a day fixed by proclamation.<sup>60</sup>
- 8.7 Proclamation is an executive action and affects the Parliament's sovereignty as the commencement dates will be controlled by the Executive. There is nothing in the Bill that requires proclamation of Parts 2, 3 and 4 of the Bill within a specified time. It is conceivable that a proclamation may never be made and the will of the Parliament, in passing the Bill, would be frustrated.
- 8.8 The Explanatory Memorandum for the Bill does not explain why Parts 2, 3 and 4 of the Act will commence on a day fixed by proclamation if Royal Assent is given on or after 1 October 2018.
- 8.9 An Education Council Communiqué states that changes to the National Law will commence in Western Australia no later than 1 October 2018.<sup>61</sup>
- 8.10 The Committee wrote to Hon Simone McGurk MLC, Minister for Community Services, seeking her advice as to:
- Why commencement dates were not stipulated for all of Parts 2, 3 and 4 of the Bill.
  - How soon after the passage of the Bill through both Houses of Parliament she expects all provisions in the Bill will be proclaimed.
- 8.11 The Minister's response is attached as Appendix 1.
- 8.12 The Committee notes the Minister's explanation and considers that there are acceptable reasons for the proclamation clause as drafted.

### FINDING 2

The Committee finds that clause 2(b)(ii) of the Education and Care Services National Law (WA) Amendment Bill 2018, in providing that the Executive determines commencement dates, erodes the Western Australian Parliament's sovereignty and law-making powers.

### FINDING 3

The Committee finds that there are acceptable reasons for leaving the proclamation of Parts 2, 3 and 4 of the Education and Care Services National Law (WA) Amendment Bill 2018 to be determined by the Executive.

<sup>59</sup> Education and Care Services National Law (WA) Amendment Bill 2018 cl 2(b)(i).

<sup>60</sup> *ibid.*, cl 2(b)(ii).

<sup>61</sup> Education Council, *Communiqué*, 15 September 2017, p 2. It was agreed that changes to the National Law in all States and Territories except Western Australia were to commence from 1 October 2017. Changes were to be rolled out later in Western Australia to allow for the corresponding legislation to be passed through the Western Australian Parliament.

## Conclusions

- 8.13 There is no intergovernmental agreement for the Bill.
- 8.14 Under its terms of reference, the Committee is confined to investigating whether the Bill has an impact upon the sovereignty and law-making powers of the Parliament of Western Australia.
- 8.15 With the exception of the proclamation clause, the Committee has not identified any clause in the Bill that impacts upon the sovereignty and law-making powers of the Parliament of Western Australia.

### RECOMMENDATION 6

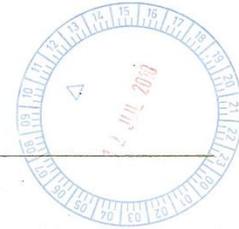
The Committee recommends that the Legislative Council note the Committee's findings and recommendations during consideration of the Education and Care Services National Law (WA) Amendment Bill 2018.

A handwritten signature in blue ink, appearing to read 'Michael Mischin'.

Hon Michael Mischin MLC  
**Chairman**

# APPENDIX 1

## LETTER FROM THE MINISTER



**Hon Simone McGurk MLA**  
Minister for Child Protection; Women's Interests;  
Prevention of Family and Domestic Violence; Community Services

Our ref: 74-04271/1

Hon Michael Mischin MLC  
Chairman  
Standing Committee on Uniform Legislation and Statutes Review  
Legislative Council Committee Office  
[unileg@parliament.wa.gov.au](mailto:unileg@parliament.wa.gov.au)

Dear Mr Mischin *Michael,*

Thank you for your correspondence dated 2 July 2018, regarding the Education and Care Services National Law (WA) Amendment Bill 2018 (the Amendment Bill) which was recently referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) by the Legislative Council pursuant to Standing Order 128, on 28 June 2018.

You have requested further advice regarding *Clause 2 – Commencement provision*, specifically:

- why the commencement date or dates were not stipulated for all of Parts 2,3 and 4 of the Amendment Bill; and
- how soon after the Amendment Bill is passed by the Parliament, will all provisions in the Amendment Bill be proclaimed.

The Amendment Bill relates to a national regulatory system for education and care services that has been in place since 2012. One of the major benefits of a national system, particularly in safeguarding the safety, health and wellbeing of children, is the ability to pool relevant licensing, operational and compliance information from all states and territories.

The information system is known as the National Quality Agenda Information Technology System (the National IT System) which is hosted and maintained by the national regulator, the Australian Children's Education and Care Quality Authority (ACECQA).

The amendments to the National Law that are the subject of the current bill, including changes to information sharing arrangements, commenced in all jurisdictions, except Western Australia, on 1 October 2017. Consequently, ACECQA has been operating two versions of the National IT System and intends to merge the two systems subject to the passage of the Amendment Bill through the State Parliament.

ACECQA has been working on an indicative timeline of 1 October 2018 to merge the two versions together. If the Bill receives Royal Assent prior to 1 October 2018, the first commencement provision will apply.

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If this timeline is not met, the merge of the two databases will occur on the first day of the next available month, following Royal Assent and system readiness, for shutdown of the system to occur and the merge to take place. The second option was inserted as a backup, in the event the Amendment Bill does not pass in time for commencement on 1 October 2018.

Due to the requirements of the National IT System, the specified parts of the Amendment Act must commence on the 1<sup>st</sup> of the month and with sufficient time for ACECQA to put into place the system changes required to merge the two versions of the National IT System, to ensure it is operating on a single platform. Therefore, if the Amendment Bill is not passed by 1 October 2018, the Proclamation date for all provisions may be 1 November 2018 or 1 December 2018, depending on the readiness of the National IT System.

If you have any further queries, please contact Ms Vicki Kelly, Manager Education and Care Legislation at the Department of Communities by telephone on 6552 1544 or by email at [vicki.kelly@communities.wa.gov.au](mailto:vicki.kelly@communities.wa.gov.au).

I trust this information has addressed your concerns.

Yours sincerely



HON SIMONE MCGURK MLA  
**MINISTER FOR CHILD PROTECTION; WOMEN'S INTERESTS;  
PREVENTION OF FAMILY AND DOMESTIC VIOLENCE; COMMUNITY SERVICES**

12 JUL 2018

## GLOSSARY

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Term	Definition
<b>Act</b>	<i>Education and Care Services National Law (WA) Act 2012</i>
<b>Bill</b>	Education and Care Services National Law (WA) Amendment Bill 2018
<b>COAG</b>	Council of Australian Governments
<b>Committee</b>	Standing Committee on Uniform Legislation and Statutes Review
<b>Fair Trading Bill</b>	Fair Trading Amendment Bill 2018
<b>Health Bill</b>	Health Practitioner Regulation National Law (WA) Amendment Bill 2017
<b>IGA</b>	National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care
<b>National Law</b>	Education and Care Services National Law
<b>NCP</b>	National Competition Policy
<b>NQF</b>	National Quality Framework for Early Childhood Education and Care
<b>NQS</b>	National Quality Standard
<b>PPC</b>	Legislative Council Procedure and Privileges Committee
<b>SO 125</b>	Legislative Council Standing Order 125
<b>SO 126</b>	Legislative Council Standing Order 126
<b>SO 128</b>	Legislative Council Standing Order 128
<b>SO 230A</b>	Previous Legislative Council Standing Order 230A
<b>Review</b>	Review of the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care
<b>Victorian Act</b>	<i>Education and Care Services National Law Act 2010 (Victoria)</i>
<b>2011 Bill</b>	Education and Care Services National Law (WA) Bill 2011





## Standing Committee on Uniform Legislation and Statutes Review

### Date first appointed:

17 August 2005

### Terms of Reference:

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

#### '6. Uniform Legislation and Statutes Review Committee

- 6.1 *A Uniform Legislation and Statutes Review Committee is established.*
- 6.2 The Committee consists of 4 Members.
- 6.3 The functions of the Committee are –
  - (a) to consider and report on Bills referred under Standing Order 126;
  - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
  - (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
  - (d) to review the form and content of the statute book; and
  - (e) to consider and report on any matter referred by the Council.
- 6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.'



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