MEDICINES AND POISONS (VALIDATION) BILL 2022

Second Reading

Resumed from 29 November.

Declaration as Urgent

On motion by **Hon Sue Ellery (Leader of the House)**, resolved —

That the bill be declared an urgent bill.

Remaining Stages — Time Limits — Motion

On motion without notice by **Hon Sue Ellery (Leader of the House)**, resolved —

That pursuant to standing order 125A, the following maximum time limits apply to the following stages of the bill: second reading, 85 minutes; Committee of the Whole House, 150 minutes: and third reading, 60 minutes.

Second Reading Resumed

HON WILSON TUCKER (Mining and Pastoral) [2.21 pm]: I am not concerned with the content of the Medicines and Poisons (Validation) Bill 2022. The bill is very short; it has only four clauses. I also understand the government's need to deal with this bill urgently before the summer break. It is unfortunate that we do not have more time to debate the bill. However, the fact that we are debating this bill at all raises some concerns for me around the legislative processes in this place. My biggest concern is that this bill will be retrospective. The Leader of the House touched on this earlier. I am also concerned that this bill will encroach on natural justice. I am not referring to the natural justice for the people who have been convicted of offences relating to drugs that are listed on the federal government schedule. I am concerned about the larger question of using Parliament as a government instrument or tool to pass laws that will, in a sense, exonerate the government from prosecution for actions that it has taken previously. To use a sporting analogy, if the government has the sense that it is losing the game on a particular matter, it will change the rules halfway through the game. We saw that occur with the Clive Palmer case. I do not need to remind members of the details of that case. I am not siding with Clive Palmer, or, indeed, with some of the people who have been convicted of these offences. We could probably have a larger debate around the convictions for some of the drugs that are on the schedule, but I understand that the laws are the laws, so I will leave that for another day. In both those cases, I believe the government's actions are justified. However, a precedent has been set. That is a concerning trend. I believe this process should be used only in extreme circumstances, and with an adequate amount of debate.

An easier case can be made for changing the laws and moving forward. That is also easier to understand from a public perception point of view. The government is basically drawing a line in the sand and saying that from this day forward, this is how the laws will operate. As I have said, that is easier to understand. When we start to change the laws of the past, we enter a murky reality in which the government can theoretically never be proven wrong on anything. To use a sporting analogy again, the government is not just changing the rules while it is playing the game; it is basically changing the rules after the game has finished so that it can alter the score. If we tread in this direction, we should do it with a level of caution. I urge the government to think long and hard when it goes down the route of making retrospective laws in the future.

The other question I have is why it has taken so long to bring this bill into this house. The Leader of the House has already answered that, so I will leave that point for now. This problem was originally uncovered in August. I understand that a number of offences and convictions are pending as a result. The other question I have is around how this has happened. The state government is blaming the federal government and saying that it was not notified. However, this schedule update has not affected the federal government. The federal government has made sure that its processes are in order. It has affected the state government. Therefore, the onus is on the state government. It is our responsibility to ensure that our laws operate as intended. We need to be more proactive about ensuring that any changes that are made and that we rely upon will not break us. It is not the other way around. As far as I can see, it is the state government's responsibility. I will use a software analogy to paint a picture. I know how much members enjoy my software analogies.

Several members interjected.

Hon WILSON TUCKER: I am getting a mixed response!

Hon Darren West interjected.

Hon WILSON TUCKER: Thank you, Hon Darren West.

To use a software analogy, the Western Australian jurisdiction can be painted as one application, and the federal jurisdiction as another application. For the most part, the federal application runs by itself. We do not know what

the federal government is doing behind the scenes. A lot of its internal processes are hidden to us. We rely upon the federal government's laws occasionally. In this case, we have a dependency upon the federal government drug schedule. In that sense, the state government is operating downstream from the federal government. For the most part, we are operating in our own little bubble, as is the federal government. In the software realm, the onus is on whoever owns the Western Australian application to ensure that we are aware of any changes that are made upstream of our application. A good software principle if that if we are making a change in our application and someone else has a dependency upon that application—for example, the federal jurisdiction—we notify the other teams. We tap on the shoulder and say, "I'm making a change; please test it", and we give them a time frame, and hopefully no-one will break away as a result. The onus and responsibility is on the owner of the software to ensure that if they make any changes, they put in place adequate processes and testing to notify the other users of that software of those changes. It is not the other way around.

To labour that point a bit more, monitoring and checking needs to be put in place. We have not seen that in the case of this legislation. Obviously, a lot more automation takes place in the software realm. Within the legislative processes, there is obviously a lot more human intervention. To take a broad look, we can certainly draw a lot of parallels from those two processes. The reliance on federal laws and on using tables or excerpts or parts of federal laws is part of a wider pattern that is used in not just the Misuse of Drugs Act but also other acts at the state level.

The other question I have is: if we encountered this issue with the federal act as part of this legislation, how do we know it is not happening in other legislation as well? Typically, with software systems, if a bug is found in one application or part of a code, if they dig more widely, they will find other bugs as well. What assurance can the government give that federal laws that have been updated have not broken other parts of our state laws and that this is not more widespread and systemic in other acts? Also, what assurances can the government give that this is not going to happen again? Obviously, there has been a break in the process between when this was put in place and now. We are having to deal retrospectively with a period of time. What assurance can the government give that the process will be robust enough moving forward to ensure that we are proactively monitoring the situation and making sure that state laws behave as intended?

I will leave it there. They are the two larger questions that I have. The bill is very short. It is troubling that we are dealing with this retrospectively. Again, I urge the government to tread cautiously because we are, in a dramatic sense, rewriting history on the fly as we debate this bill.

HON MARTIN ALDRIDGE (Agricultural) [2.31 pm]: I rise to make a contribution as the lead speaker for the opposition on the Medicines and Poisons (Validation) Bill 2022. As the Leader of the House pointed out today in an earlier debate, this is a bill that, at least by brief reference, the opposition became aware of on Thursday last week. We certainly became aware at that time that it was something to do with medicines and that it was a validation bill. A validation bill usually means it is an attempt to make something lawful that was potentially unlawful, as is the case with this matter. On Monday, the opposition received a briefing, at which, for the first time, we learnt of the substance of this legislation. It was clear from that briefing that the genesis of this issue occurred some time before Monday this week. The period in question, referred to as the "validation period", was between 1 February 2019 and 19 November 2019, during which the Medicines and Poisons Regulations 2016 had an incorrect reference to the SUSMP, which is the Standard for the Uniform Scheduling of Medicines and Poisons. This appears to have had numerous implications across the statute book, impacting numerous offence provisions. I pause here, because it was an offence, a conviction, an appeal and then an appeal against a conviction that has brought this matter to the fore today. There are also other concerns regarding other statutory provisions for licensing and regulation.

The second reading speech makes reference to "more than 40 items of legislation". The opposition was provided, subsequent to the briefing, with some supplementary information that lists numerous provisions in both primary acts and subsidiary legislation that were potentially affected by this issue between 1 February 2019 and 19 November 2019. When we go into Committee of the Whole, it would be good to understand the implications for some of those statutory provisions and whether a finer number can be put on the primary acts and subsidiary regulations, and perhaps other instruments, that have been impacted by this issue. The minister in the other place yesterday described this matter as "unfortunately, necessary" and I agree with that assessment. It is not a good position for the state to be in. Effectively, for 292 days, more than 40 pieces of legislation were ineffective or to some extent ineffective as a result of this regulatory oversight. I understand that new regulations were gazetted by the Governor on 20 November 2019 to address this issue. It is not clear, from the time line that I have been provided, at what point the government became aware of this issue in the course of 2019, which then led to new regulations being gazetted by the Governor on 20 November 2019. If I can draw members' attention to the regulations that existed up until 19 November 2019, the definition of "Standard for the Uniform Scheduling of Medicines and Poisons"—the SUSMP—was —

> … the document set out in Schedule 1 of the current Poisons Standard.

The issue is that schedule 1 of the updated Poisons Standard did not contain the definition of the SUSMP. From 20 November 2019, the SUSMP was defined as —

> … the Standard for the Uniform Scheduling of Medicines and Poisons set out in the current Poisons Standard;

That is obviously a more generic and less specific reference to where one might find the definition of the SUSMP. I understand that it was intentionally designed this way to futureproof and guard against future commonwealth changes. If I understand it correctly from my briefing, the problem arose because the definition of the standard was moved from schedule 1, but then it reverted to schedule 1. It is rather odd that there seem to be regular changes at a commonwealth level. In fact, one of the questions taken on notice at our briefing, which we hope we may be able to get some greater understanding of today, was about the commonwealth's intention for changing its regulations in the way that it did, which resulted in the impact on many pieces of legislation and legislative instruments in Western Australia.

Noting the limited period I have had to turn my mind to this—we were briefed around noon on Monday, the Legislative Assembly dealt with this bill yesterday and we are now dealing with it this afternoon, being Wednesday—the other thing I want to raise is the extent to which we will futureproof this issue from arising again. I am looking at the Medicines and Poisons Regulations 2016—this version was published and current as at 20 November 2019. I understand that further regulations were published, but they do not deviate from this version in the matters I am going to raise now. The definition of SUSMP found in regulation 3 provides that it is —

> … the Standard for the Uniform Scheduling of Medicines and Poisons set out in the current Poisons Standard;

We then need to turn to the earlier definition in regulation 3 of "current Poisons Standard", which is defined as having —

> … the meaning given in the *Therapeutic Goods Act 1989* (Commonwealth) section 3(1);

If we then turn to the commonwealth Therapeutic Goods Act 1989, section 3(1) reads —

> In this Act, unless the contrary intention appears:
>
> …
>
> ***current Poisons Standard*** has the meaning given by section 52A.

Section 52A of the Therapeutic Goods Act says —

> (1) In this Part, unless the contrary intention appears:
>
> ***current Poisons Standard*** means:
>
> (a) if no document has been prepared under paragraph 52D(2)(b)—the first Poisons Standard; or
>
> (b) otherwise—the document last prepared under that paragraph (including as amended).
>
> ***first Poisons Standard*** means the latest edition at the commencement of this Part of the document known as the *Standard for the Uniform Scheduling of Drugs and Poisons* published by the Australian Health Ministers' Advisory Council.

Section 52D(2)(b) says —

> Subject to this Act and the regulations, the Secretary may:
>
> …
>
> (b) prepare a document (including schedules containing the names or descriptions of substances or classes of substances), in substitution for the current Poisons Standard.

I make the point that there is a deep web of definitional references that one has to go through to navigate to where the Standard for the Uniform Scheduling of Medicines and Poisons might be. Although we may have addressed where our regulations and other instruments point to in the commonwealth act, there is probably still a risk to the state from legislative amendment to the Therapeutic Goods Act 1989. I put on notice—it may not be something that the minister will reply to in her second reading response—that something I would like to contemplate when we get to the committee stage is whether the state remains vulnerable to legislative change by the commonwealth, with the impact being that numerous pieces of state legislation become inoperative or inoperative in part.

We also note from the time line that was provided to the opposition that the Attorney General became aware of this issue on an undisclosed date in August 2022. In the information that we have been provided with, we were advised that the Office of the Director of Public Prosecutions notified the Attorney General that an appeal against conviction had been lodged on the basis of the anomaly that existed between 1 February 2019 and 20 November 2019. That is

about the limit of what we know, but, as we understand it, that was the point at which the government became aware of this issue.

The opposition also sought information about the appeal. Obviously, somebody had been charged with an offence—I understand that it was an offence under the Misuse of Drugs Act—they were convicted and they then appealed that conviction. I understand that that appeal is currently before the Supreme Court and is the reason that the ODPP raised this issue with the Attorney General sometime in August this year. The question that was specifically raised by the opposition at the briefing about the appeal currently before the Supreme Court was to ask the DPP whether this was raised as a defence at trial in the first instance. We were comforted by the response provided by the minister's office that this matter can be addressed during Committee of the Whole. We look forward to a better understanding of the circumstances that led to the ODPP informing the Attorney General that we, as a state, had an issue.

There has obviously been limited consultation. We asked about this at our briefing. A number of stakeholders were referenced. From memory, they were all internal stakeholders of government. The Western Australia Police Force, the office of the Attorney General, the State Solicitor's Office and the Department of Justice were consulted on the bill. I understand the sensitivity of this issue and that consulting more broadly would have alerted more people to the fact that they may have a defence or a right of appeal based on the circumstances that are being dealt with by this bill.

That takes me to the briefing. Although I made some remarks earlier, I want to make some comments at this point about how we find ourselves, on the second-last sitting day of the Legislative Council, in this position of dealing with a bill that we first learnt of last Thursday. We had a briefing scheduled for 11.30 am on Monday this week. I naturally, but wrongly, assumed that this was the earliest opportunity that the government could brief the opposition because cabinet would be considering the matter on the same day. It then followed that a briefing had been arranged for the opposition to deal with this matter of urgency following cabinet having first made a decision. But what is now obvious from the information that has been provided to the opposition, and also confirmed by the Leader of the House in debate earlier today, is that cabinet took a decision one week earlier. Some time had certainly passed—in fact, one week had passed—between cabinet taking a decision on the printing of the bill and the opposition being briefed on this matter.

As I said, the briefing commenced at about 11.30 am on Monday. When these things take place virtually, there are quite a lot of people at the briefing, including advisers, but also members of the opposition. It is interesting, but also quite alarming, when members commence a briefing on a matter, particularly one that they know nothing about, with no documents. The first question that I asked the briefers as my colleagues were joining the briefing was whether we could have access to the bill and explanatory memorandum. Although it still would have been challenging to receive them at 11.30 am, when the briefing was commencing at the same time, it is most unusual for a briefing on a bill to occur without a bill. In fact, I struggle to recall many instances when I have experienced that. I was advised that the documents that I sought—the bill and explanatory memorandum—would be provided immediately following the briefing. The second question that I asked as my colleagues were joining the briefing was, if it was not too much trouble, whether I could be afforded the respect of knowing the name of the bill. That was forthcoming, and I was fortunate to receive for the first time the name of the bill that we would be contemplating, at least in the Legislative Assembly the following day.

At 11.53 am—at this point, we were roughly halfway, if not more than halfway, through the briefing—the bill and explanatory memorandum were circulated, and that was after a number of members of the opposition had pointed out quite strongly to those briefing us that it was extraordinary that a briefing was being conducted on these important legislative provisions without the relevant documents. Clearly, the position changed quite quickly. I believe that email was sent at 11.49 am and I personally received the documents at 11.53 am.

The opposition has certainly faced over the past few years numerous circumstances like these in which a strong case is put, and I think there is a strong case that we act quickly on this matter. We expect some understanding and respect from the government and government advisers about these matters, and I do not think we fully got that on Monday. In fact, there was at least one instance when an officer of the department, who was providing an answer to a question, was spoken over by a staff member of the minister's office to stop that person from speaking. That certainly did not give me confidence or assure me that the government, or indeed the minister, was interested in advancing this important issue in a bipartisan way.

As I said, that is not the only time such conduct has occurred; there have been others. Nevertheless, in the limited time that we have had, we have been able to contemplate the bill to an extent. We gratefully received some supplementary information that was provided on the same day as the briefing—being Monday—noting that the bill was considered in the Legislative Assembly the following day.

We are still waiting for clarity on some things. The first is the legislative provisions impacted by this "anomaly", as the government describes it. We have been provided with a table, as I am sure other parties have. It would be

interesting to know whether that is an exhaustive assessment of impacted legislative instruments in Western Australia or whether it is simply what the government has been able to identify in the time available. We sought to understand whether there is a rational explanation for the commonwealth changing the structure of the Poisons Standard, and specifically the definition of "Standard for the Uniform Scheduling of Medicines and Poisons". I might pause here to make some comments about this.

Hon Sue Ellery: To clarify, are you asking why the commonwealth made the change?

Hon MARTIN ALDRIDGE: Yes, that is right.

The government's message last week, when we did not know what we were dealing with, was that it was all the fault of the commonwealth. Looking at it a little more closely, I learnt on Monday that WA is the only jurisdiction impacted by these regulatory changes by the commonwealth. It was not an issue that affected every state and territory; it affected only Western Australia, as I understand. To that extent, it would be interesting to contemplate the issue raised by Hon Wilson Tucker, which is: how did this happen? If more than 40 pieces of legislation rely on a reference to a schedule contained within a standard published by the commonwealth, whose job is it to maintain those linkages accurately, particularly given we were the only state deficient in this respect? I think that ought to be explored further in the committee stage, unless a reasonable explanation can be provided. I am not convinced that this is entirely the fault of the commonwealth, as it has been described by the government and the minister. The response we got was that this information has now been requested, and when a response is received, it will be communicated through appropriate channels. Up to the point that I stood in this chamber on this debate, I had not received any communication on whether there is an update on that, but the Leader of the House may have some further information.

The third issue I spoke to was the action in the Supreme Court that caused this issue to come to the fore. I pause to make comment on this. The department became aware of the issue on a date we do not know. There was a period between 1 February and 19 November 2019 in which somebody became aware of this issue; it would be good to understand who became aware and how they became aware, as it resulted in the change on 20 November 2019. According to the uncorrected *Hansard* of 29 November 2022, the Minister for Health said —

> The definition was amended in 2019, when it was brought to the attention of the department. At that time, it did not occur to anyone that retrospectivity was required, but it became apparent through the Director of Public Prosecutions that that is now required, hence the short time frame.

I find that a little difficult to accept. I assume that an officer of the department realised in 2019 that our regulations were pointing incorrectly to a commonwealth law. Obviously, somebody made an informed decision that our regulations ought to be updated, but, according to the minister, they did not contemplate the impact of the 292 days during which the regulations inaccurately referenced a standard until the appeal was made to the Supreme Court.

The other issue that was raised was with respect to uniform legislation. Some information was provided. In reading the bill in last evening, the Leader of the House confirmed that this is not a uniform legislation bill. We asked for some information about the 5 000 alleged offences that were at risk, and that was provided, but, as I said in my earlier remarks, it would be good to have a greater understanding of some of the other impacts. I know the focus has been on drug offences, if you like, but what are some of the other impacts that may exist in Western Australia from the 292 days of a deficient level of regulation of medicines and poisons? That could go to the conduct of doctors, pharmacists, vets and a whole range of people, organisations and functions that are regulated by state law.

We have a time line. Some further information is needed, and information was sought about the bill commencing on the day of royal assent rather than the day following. I understand that the opposition in the other place yesterday sought clarification from the Minister for Health about other examples of acts that commenced on the day of assent. We were advised by the minister in the other place that that information would be available when the Legislative Council considered this matter further today.

I want to comment on something Hon Wilson Tucker just mentioned in his second reading contribution. I do not want to verbal the member, and it is something we can probably discuss further in the committee stage. I think his concern was that somehow the state government was trying to limit its liability on this matter. That is not something that I drew from the briefing or from the bill that is before us. In effect, I think we are trying to address this so-called anomaly so that the regulations were in force during this period as though they were correctly referencing the commonwealth statute. I admit that this has been a very short time frame to fully consider these issues, particularly while Parliament has been in session, but from the clauses before us I did not get an understanding that the state was trying to limit liability. In fact, it was trying to validate the many legislative instruments in Western Australia's statute book that could be in jeopardy if a court found in favour of an applicant in the Supreme Court, as I understand is being considered on the basis that the SUSMP, as referred to in our regulations, directed people to a standard that did not exist. The legislation tries to address that issue, but clause 4 of the bill, the main clause before us, contains a number of subclauses. We will more fully consider each of those subclauses and whether the concern the member

raised is one we should explore to ascertain whether it is a case of the state trying to limit its liability in this respect. I reiterate that the opposition supports the bill.

HON DR BRIAN WALKER (East Metropolitan) [3.00 pm]: I must say in advance that I see no reason not to support the Medicines and Poisons (Validation) Bill 2022. I will be supporting it. I do not particularly want to say anything in Committee of the Whole. However, I want to use this time to highlight some of the issues that arise from this. The government is doing a sensible thing by closing a loophole that could have the consequence of letting people off the hook who should not be left free from the consequences of their crimes. However, I will speak to the bill as a doctor. One of the things we do as doctors is make a diagnosis, first by looking at the symptoms. It is a little like standing on the beach and, when the water suddenly goes out way past the groyne, thinking, "Isn't that lovely. Now we can see the rock formations where we can play, and, look, there are fish there. We can have a gentle walk along an area that we could not normally reach." A sensible person would realise that a tsunami was coming and would run as fast as they could to the highest hill! The diagnosis depends on looking at the symptoms, the signs, and saying, "Right, now I have come to the conclusion that this is not a good place to be. I am out of here—now."

I relate this to the case of a dearly loved one of mine on the other side of the world. I was told that this elderly person had fallen and was a little confused, and the sodium levels that the GP measured were a bit down. I made the diagnosis then that it was syndrome of inappropriate antidiuretic secretion, possibly a non–small cell lung cancer, and I was going to visit that person as soon as possible. I assessed the signs and symptoms and came to a presumptive diagnosis. The tests that were done reinforced the diagnosis and I was indeed correct, simply by looking at the symptoms and signs. What we have here is a symptom that needs to be closely assessed. It is not just putting a patch on the symptom. If the doctor had simply said that person was confused and gave them some medication to make them less confused, that would not have dealt with the underlying problem.

We could say that another symptom is that we had to have a briefing a day later without documents, suggesting that perhaps we were treated less kindly than the opposition. Members can draw their own conclusions from that. The symptoms point to an underlying diagnosis; it is a symptom of needing illicit drugs. One might think that a bad thing. It is also a symptom of intergovernmental communication issues, which need to be addressed. Looking at the symptom of needing illicit drugs, we are looking at unmet treatment. People are driven to treat themselves because no treatment has been available to them. Are we accepting this? Are we comfortable with this or are we going to allow them to be driven to criminals who will ply them with the drugs they seek? That will, indeed, manage their symptoms, but they will be in the hands of criminals who care not a whit for their wellness at all because they are just making profit. As we see with the vast number of people who attempt to bypass the laws, the criminals are encouraged to make an example of this loophole and to get off their crimes. By the same token, we are also encouraging criminals to flourish. By banning drugs, by criminalising them, we are encouraging criminals to do business. Criminalising the issue prevents us from medicalising the issue. Preventing the medicalising of the issue means that we condemn people to poorer health. We condemn them to less wellness. We condemn them to a lower quality of life. We condemn them to fewer chances of reintegration into society. Are we, as a Parliament, comfortable with that?

It is also causing problems and increasing costs to the judiciary, because what we are looking at is: how do we put these cases through the courts and the police system? What is the cost to us as a society of criminalising it? It is costing us money. It is also losing us life because people are falling foul of this and are having a very hard time and are killing themselves as a result or, indeed, being killed. They are losing quality of life. Are we, as a Parliament, comfortable with propagating such legislation? Passing this bill will address the symptom that has been created, but it will not address the cause. If we are at all interested in helping people live better lives, as we have sworn to do as members of Parliament, we ought to consider this fact very closely. We can respond by crafting ever more bills, as we are doing now to close a loophole in complex legislation. We can then predict that the costs will rise in the judiciary. We can predict that costs will rise in the policing of this. This is predictable.

I point out that the war on drugs is being lost; it has always been a losing war. I do not think anyone here could argue that it has been a winning war in any shape or form. Therefore, throwing more resources at the losing drug war is simply illogical. We can see this scurrying to catch up with the legislation that has now found a problem. We have created the problem by criminalising the drugs in the first place. I am not saying that drugs are good; I am saying that minimising harm is better. Let me reinforce that. As Hon Martin Pritchard showed in his example, taking drugs is a foul thing to do. No-one in their right mind would recommend that—no-one—but are we also recommending that we not deal with that in a medical fashion but instead criminalise it and make the problem worse? I have personally experienced that people have gone through this system and come out no better; in fact, they are worse, and we have created that. Are we, as a Parliament, happy that we have worsened a problem?

Throwing more resources at a losing drug war, as we are doing right now, is simply illogical. It results in increased costs to the public exchequer. Are we happy with that? It results in the loss of quality of life in general society, and thus swathes of people feel disenfranchised. I point out that although this bill must pass—it must pass in its current form; I fully support that—there is a problem that I wish to highlight. That problem is drugs themselves. We need

to change the way we think about this. There has to be a change because if we carry on doing more of the same, we will get more of the same result. Are we happy with that? Seriously—are we happy getting more of the same failing result? If we say we are, I will be very unhappy to hear that because it is completely wrong. It is a losing proposition. It is also a measure of insanity—the famous Einsteinian quote. It needs a change in thinking. We cannot continue to think the same way. We need to think about decriminalising drugs.

Let us consider the approach of the Australian Capital Territory, for example. Why would the ACT have passed a bill to decriminalise drugs? It is not saying that drugs are a good thing—I agree with it that they are not a good thing—but has it gone down the right path in harm minimisation? I could take the example of Portugal, where that has been done since the early 2000s. Portugal found that health and wellness improved, alcoholism and drug deaths went down, gross domestic product went up and good things happened. The ACT is following a tried and tested path that has succeeded, whereas we are staying with the old mindset, criminalising rather than medicalising, with the result of loss of life and loss of money. We need an innovative mindset based on clear evidence and proof of success. The question is: why are we not already heeding the lessons already learnt? Why do we continue down the pathway of fighting a losing battle?

I hope these thoughts, which will not affect the bill in any way, and nor should they, percolate gently through the minds of those here—that we need to be thinking differently and responding differently because the path we have taken so far has not worked. Although this bill will be eminently good at fixing the symptom, it will not address the underlying issue. By failing to address the underlying issue, we will have failed in our duty.

HON DR STEVE THOMAS (South West — Leader of the Opposition) [3.09 pm]: I will make a very short contribution to the Medicines and Poisons (Validation) Bill 2022, which retrospectively endorses a set of schedules under the Standard for the Uniform Scheduling of Medicines and Poisons regulations.

I say this as someone who, like Hon Dr Brian Walker, has been registered to handle most of those poisons up to schedule 8, at least, for many years. It is a fairly complicated system. It is very well regulated. I have to say that it is more regulated than it ever has been and will continue to be so.

This is fairly simple legislation to correct the issue of the commonwealth government changing the regulations. In changing the order of the appendices and schedules, the commonwealth change affected the regulations that sit in the state of Western Australia.

My first point is simply that, these days, we have a plethora of actions that are governed by regulation rather than by legislation because regulations are very simple to change and move around. If these things were covered in legislation, there would be an obvious debate, and we would see them much more easily. The regulations are done effectively on the stroke of a pen; somebody tables a set of regulations for the new set of poison schedules and, unless we are actively looking to check, there is no debate on it and so we do not see it occurring.

That is exactly what happened in this circumstance: the state of Western Australia was unaware that the commonwealth had changed the regulations. The minister might be able to confirm this. It was changed simply by the tabling of a set of regulations, and Western Australia was not notified. I can see how it happens, even though it potentially should not happen. This is one of the things we need to consider with the plethora or expansion of the use of regulations, because regulations should make it easier for government, rather than making it more complex.

As I understand it, this bill will deal with a number of the definitions of the higher medicine and poison schedules, particularly schedule 8 and schedule 9, which need to be very carefully managed. Schedule 8 includes controlled drugs. Most of the drugs in human or veterinary medicine are in schedule 4 and are by prescription. That system works for most of the common things people might be exposed to, such as antibiotics. In the veterinary field, schedule 8 is the drugs related to pain relief, such as morphine and pethidine, which might be addictive if misused. Vets used to have to keep a register of their use in each case and record each dose. Beyond that, schedule 9 is prohibited substances, and schedule 10 has complete prohibition because they are far too dangerous. This deals with addictive drugs that are the centre of court cases.

The simple change of a regulation has messed up the system. I suspect that, unbeknownst to the state of Western Australia, the change in regulations somehow opened a door for a very strict legal interpretation to be applied in court cases, particularly for those charged during the brief period throughout 2019 when the regulations were changed and the schedule was shifted. From February 2019 to November 2019, the shift of the schedules and appendices basically put this out of whack. It has been corrected since, and I understand that the government needs to retrospectively apply this to prevent an easy out for people who have been misusing and selling drugs.

It is a fairly simple argument. Obviously, the opposition supports the bill before the house. It is not a debate about the use of medicines. It is not a debate about the use of drugs. It is simply a debate about a set of regulations and the order in which this instrument is scheduled. It is a shame that the state of Western Australia was not informed

at the appropriate time that the schedule was shifted. As Hon Martin Aldridge, the opposition's lead speaker, said, the opposition is happy to support the government to make sure we do not leave open a potential loophole.

As we expand the amount of regulation by which we govern ourselves and our society—particularly competitive or uniform regulations between the state and commonwealth governments—there will be a constant risk that regulations will not get picked up as they change and affect other jurisdictions. I do not have a simple solution for that. I think it will become more common. Ideally, more things would be done by legislation, and Parliament would have a stronger control, but this will be more frequent as we expand the amount of subsidiary legislation and regulations.

Having said that, we probably need to proceed. The opposition is happy to support the bill before the house to make sure that we do not allow people to escape justice and get away with something on a legal technicality.

HON SUE ELLERY (South Metropolitan — Leader of the House) [3.15 pm] — in reply: I thank members for their contributions and support in the second reading.

I will begin with the comments made by Hon Wilson Tucker, who went to the question of retrospectivity and used the term "natural justice", although I do not think he fleshed out that argument. I took notes during his contribution, and he made the point that the government was using this as a tool to exonerate the government. That is not what the government is trying to do at all. He put a proposition that used the analogy that it was like someone who is losing the game and so changes the rules of the game part way through. I do not resile from that at all. If he wants to describe it as changing the rules of the game against drug offenders because of a technical problem about where a definition sat, he can go ahead and describe it as that. I do not resile from what we are trying to fix here.

In one sense, the honourable member is right about retrospectivity. We do not do it very often. We do not do validation bills very often either because, as a matter of general practice, we work on the rule that we should not change the rules for the sake of change after we have put something in place. However, I am told that recent precedents for validation bills include the Waste Avoidance and Resource Recovery Amendment (Validation) Bill 2014 and the Environmental Protection Amendment (Validation) Bill 2014.

Hon Wilson Tucker raised a couple of themes about how this occurred. I am advised that the Western Australian Department of Health was not notified of the change made by the commonwealth. The structural change was identified some months later by the department, and it was not mentioned in any consultation material released by the Therapeutic Goods Administration in the lead-up to the release of the amended Poisons Standard, nor was it in the explanatory notes published in conjunction with the amended Poisons Standard.

The question was asked about why we did not seek to retrospectively apply the correction in November 2019. It does not appear that the amending regulation that corrected the anomaly in 2019 contemplated the anomaly's implications for drug offences in the Misuse of Drugs Act 1981 or any other affected legislation. Members may raise a question about whether it should have, and that is a legitimate question to raise. Why did the commonwealth not notify the state, and how can the lack of communication be rectified going forward? These changes were made in 2019 and 2020. Since that time, we have seen a significant improvement in communications between the commonwealth and the states in respect of amending the Poisons Standard. For example, the commonwealth has recently published an amended Poisons Standard, which will commence in February 2023. It consulted and communicated extensively with the Department of Health in respect of the amended Poisons Standard, including in relation to changes to the structure of the Poisons Standard, which will commence at that time. Another question was: how do we know this will not happen in respect of other laws in this state? All I can say to the honourable member is that generally the state and federal governments, and departments, have a very good working relationship in most areas.

Hon Martin Aldridge asked exactly how many acts, regulations or other instruments would be affected. I ask the honourable member to explore that question in Committee of the Whole. The member will have to forgive me; I have a lot of notes here. In respect of the court case, I am advised that I am not in a position to share any details about the matter that is before the court. I can only apologise if the honourable member was given the impression that we could provide him with that information, so I am sorry, but I am advised that I am not able to.

A further question was: when did Western Australia become aware of this anomaly? I am advised that the Department of Health became aware of it around June 2019 and immediately initiated the process for amendment regulations. With regard to the member's question about the late provision of the bill, I tried to address the matter of the timing of the matter before government more generally in my contribution to an earlier debate. The member referred to going to the briefing and the people providing the briefing assuming it was reasonable to provide it without giving the member a copy of the bill. I do not think that is reasonable, and I apologise to him for that. I note that he was provided with the bill during the course of the briefing, and that is as it should be, but I do not think it is at all reasonable for people to be expected to understand the detail of a bill without having been provided with a copy of it. People were working really fast behind the scenes to get things ready for Parliament, but it is nevertheless not

reasonable for members of Parliament to not have a copy of the bill in front of them when they receive a briefing. I apologise to the member for that.

Hon Martin Aldridge also raised the matter of the table of effective legislation. It appears that it was a preliminary assessment. I have a table, but I think the member has already been provided with it. The member asked whether what he had been provided with is exhaustive, and the answer is no, it is not. I am not sure whether during Committee of the Whole I can get the member something that is exhaustive, but that is the best effort at this point.

Another question was: why did the commonwealth make the change in the first place? We have not been provided with an explanation of why it changed the structure; it appears to have been an administrative amendment to improve the drafting of the instrument. In February 2019 the commonwealth made a number of changes to the Poisons Standard following consultation with stakeholders. The changes included amendments to existing entries and the inclusion of a number of specified substances in the Poisons Standard for the first time. It appears that consultation on those specific amendments occurred in February 2017, May 2017, April 2018 and September 2018. In addition, the February 2019 Poisons Standard was the first in which the commonwealth repealed the preceding Poisons Standard; the previous Poisons Standard had only three clauses: a citation clause; a clause providing that the Poisons Standard consisted of the SUSMP, as set out in schedule 1; and a commencement clause. We can perhaps explore that if the honourable member wants to in Committee of the Whole, but it appears from the information available to me that, despite there having been consultation on other elements of the Poisons Standard going back as far as 2017, there was no consultation on the matter that we are dealing with today.

There was also the question as to why the department did not consider retrospective legislation. That is a very good question, and the response is that there should have been consideration of a retrospective impact, but at that point the focus of the department was to ensure that an immediate change to the regulations was put in place to protect us going forward. It appears that no-one put their mind to that until it was drawn to their attention by law enforcement. I think that covers the main issues raised by Hon Martin Aldridge, and I will be happy to go into more detail on those when we go into Committee of the Whole.

I thank Hon Dr Brian Walker for his support of the legislation, and note his general philosophical contribution about why people turn to the kinds of drugs that are on the schedules subject to this legislation. That is noted, but it is nothing to do with the bill. I also thank Hon Dr Steve Thomas, who made the point that there is a risk when we rely upon regulations in this manner. We need to take that into account when we are thinking about these things. I have to say that the circumstances of the legislation in front of us are unusual. Members know that I have been in this place for a long time and I do not remember anything having been fixed halfway going forward, but not fixed looking backwards. It is an unusual set of circumstances; it is unusual for the commonwealth jurisdiction to not consult when it is making a change that it is obviously aware will have consequences for at least our state, if for no others. I thank members for their contributions and for taking the time to prepare themselves for this debate so quickly under the circumstances, and I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Jackie Jarvis) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Hon MARTIN ALDRIDGE: I might start with the case that has brought this to the government's attention and work from there. As I understand it, this bill has a long history. It starts from a point sometime in August, when the Office of the Director of Public Prosecutions had a conversation, or some communication, with the Attorney General or the Office of the Attorney General, who said, "I think we have got a problem. There is an appeal in the Supreme Court claiming that this anomaly exists, and they are using it as a defence to a conviction." We will get to the issue of the court case, which may have some problems, in a moment. However, can anything more specific be provided in terms of whether it was the Director of Public Prosecutions that spoke directly with the Attorney General or their officers? Additionally, I guess if there is the date in August when that happened, that would be useful.

Hon SUE ELLERY: I am advised that the Acting DPP spoke to the Attorney General's office. The Attorney General wrote to the Minister for Police and copied the Minister for Health into that letter. In the event that the member was going to ask for that letter—it contains details of the appeal. We are not in a position to table it, because we do not want to do anything to prejudice a matter that is on foot. I am not in the position that I can table the letter, but I can tell the member that that is the sequence of events.

Hon MARTIN ALDRIDGE: I am not exactly sure how we would prejudice the matter. I assume that an appeal in the Supreme Court is before a judge, not a jury. I am not sure how disclosing to Parliament under the protection of parliamentary privilege would prejudice a matter in the Supreme Court. In fact, it would protect that information from being provided to the Supreme Court in those circumstances. I might just make that as a comment.

Did the minister mention the date in August when that occurred?

Hon SUE ELLERY: I am told the letter was sent from the Attorney General on 15 August.

Hon MARTIN ALDRIDGE: With respect to this case, as we understand it at the moment, there is one appeal that is live. That is what has brought this to a head. Is there some information that the minister can provide on the appeal that would not necessarily disclose—I mean, is the entire case, the initial case where the conviction occurred and now the appeal to whatever stage it is at, some sort of secret, behind-closed-doors court proceeding that none of us are allowed to know about or is there some information that can be provided, even if it as simple as knowing who the defendant is?

Hon SUE ELLERY: It is not normal practice for the house to talk about the details of a matter on foot. That is not our normal practice. What I can tell the member is that the basis of the appeal is that methylamphetamine was not a prohibited drug at the time. The appeal is not expected to be finalised before next year. It is not possible then for us to kind of predict in advance a time frame for the decision to be handed down. I think that we can take from that that what is being relied upon is that methylamphetamine was not a prohibited drug at the time, because of the issue that we pointed out about it being in one schedule or the other.

Hon MARTIN ALDRIDGE: I take the minister's point that it is not normal for us to probe into individual cases, but this is not a normal bill. We are dealing with a bill arising from a case. I am not sure that there is any issue of sub judice here, unless I am incorrect in the belief that a matter of appeal before the Supreme Court would be before a judge. The likelihood of the Council considering this matter and influencing the decision of a judge would not hold against our standing orders. It is challenging for us, in terms of this being the motivation for the need for urgent reform. Clearly, the government and the court have information, but in terms of understanding the circumstances of the case that we are legislating to effectively prevent a successful appeal of, we do not. That is the motivation for this bill progressing in the way that it has. I know that the Leader of the House provided an apology in her second reading reply. It certainly was the opposition's belief from the written information that we were provided post-briefing that this matter could be addressed during consideration in detail. Obviously, under the circumstances that the Leader of the House has outlined, it cannot.

In terms of the need to legislate quickly on this matter, is the appeal something that is likely to be resolved in the short term? Is it something that needs to be legislated today because there is a hearing tomorrow? I know that when we were dealing with a similar matter, not necessarily a directly comparable one—the Mineralogy bill—the government was nothing but open about the circumstances of that legal action that it was seeking to intervene with through legislation. Certainly, there was an importance of the timing of that as well. Is there anything that the minister can provide, noting what she has said already, with respect to the stage of appeal?

Hon SUE ELLERY: Other than what I have said already, not really. The appeal itself is not expected to be finalised before next year. It is then not possible for us to anticipate the time frame for the decision to be handed down. I am at a slight disadvantage. I did not know that the government's position had changed on what information we could provide the member until I was handed a note in response to his question in his second reading debate contribution. I found out when he found out.

The other thing is that I do not have someone from the Office of the Attorney General here at the table. It might be something I follow up on in question time to see if I can test the reasons. I do not really know what the reasons are. It is not easy for me to do that here, with the greatest respect to him, with the member sitting two feet away from me. I might use question time to see if I can find out more information about that. Maybe we can move on in the meantime.

Hon MARTIN ALDRIDGE: I thank the minister for the approach she is taking to this, because it certainly would help if we can understand it more. Perhaps we cannot. Obviously, we may have a different view around the ability for the Legislative Council to prejudice a decision against an appeal court. I guess if there is something that could be answered, which is around this case, the original conviction, and now the appeal, it would be: is any public information accessible?

I find it difficult to accept that in every respect the action that has occurred in terms of the charge, the conviction and now the appeal is private. I understand the appeal is still on foot, but the conviction has occurred. If, during question time, I went down and knocked on the Supreme Court doors and said, "I'm interested in a case. I can't even name it at this point, but I am interested in a case; what can you give me?", will the answer be nothing, because it is effectively sealed, secret, private—not accessible to the public? If that is the case, that will help my understanding of the issue.

Hon NICK GOIRAN: Further to this line of questioning, I am glad that the Leader of the House will take this away, consider this matter or seek some further advice on it, because, as I understand the bill before the house, its very purpose is to prejudice this appeal. We are passing this bill, in part, to extinguish at the very least that element of the appeal that is arguing that methamphetamine was not a prohibited drug at the time. We, in the chamber, are saying on a bipartisan basis that, in actual fact, everybody knew full well in 2019 that methamphetamine was a prohibited drug and it was contained in the relevant standard. People might have a view on whether the definition said that it was set out in the current Poisons Standard. Perhaps let us start with that. Is methamphetamine currently set out in the Poisons Standard?

Hon SUE ELLERY: Yes, it is; we are going to find out where that sits for you.

It is listed in schedule 9 of the Poisons Standard.

Hon NICK GOIRAN: That is current, as at today. Was it also in schedule 9 of the Poisons Standard in 2019 or, more particularly, in what is referred to in the bill as the validation period?

Hon SUE ELLERY: Yes, it was.

Hon NICK GOIRAN: To what extent does it matter what the definition of a standard for the uniform scheduling of medicines and poisons, what is being referred to as the SUSMP, matter with regard to knowing that methamphetamine was a prohibited drug at the moment and also during the validation period?

Hon SUE ELLERY: I will step the member through this. The Misuse of Drugs Act uses a definition for prohibited drug that includes the term "drug of addiction". "Drug of addiction" is defined broadly as a schedule 8 or 9 poison as defined in the Medicines and Poisons Act 2014. The Medicines and Poisons Act 2014 broadly provides that a schedule 8 or 9 poison means a substance classified as such by the Medicines and Poisons Regulations 2016. Those regulations in turn provide that a schedule 8 poison is a substance listed in the SUSMP schedule 8, and it is similar for schedule 9. The Medicines and Poisons Regulations define the SUSMP. The member can see that we are going to a series of different definitions. The document set out in schedule 1 of the current Poisons Standard was correct prior to 1 February 2019 but incorrect from 1 February 2019, when the SUSMP was moved to schedule 2. That is when we got ourselves in a pickle. From 20 November 2019, the Medicines and Poisons Regulations defined the SUSMP to be —

> means the Standard for the Uniform Scheduling of Medicines and Poisons set out in the current Poisons Standard;

Did the member follow that?

Hon NICK GOIRAN: I understand the sequence of events and thank the Leader of the House for it. It would be useful to have that set out.

Hon Sue Ellery: If someone wants to copy this, we could give you this.

Hon NICK GOIRAN: That would be particularly handy.

Hon SUE ELLERY: If it is helpful, I might identify the two documents. One of them is titled "How is the MDA affected?" The other is a table which is headed, "Misdirected definition of the SUSMP". I am checking whether I can table that; yes.

[See paper 1914.]

Hon NICK GOIRAN: Thank you, Leader of the House. We will look at those documents momentarily and I think that will be helpful to set out those matters. In the meantime, going back to the original point, the very purpose of this bill before the house is, in my view, to prejudice that Supreme Court appeal. I do not see any difficulty in actually being clear about what we are doing. We want to affect this Supreme Court appeal. Why do we want to do that? I understand from the second reading speech that the matter was drawn to the attention of the government, particularly the Attorney General, or if not from the second reading speech at least with respect to the Leader of the House's reply and her interactions with Hon Martin Aldridge. That led to a letter from the Attorney General to the Minister for Police and the Minister for Health on 15 August 2022. According to the second reading speech, there has been some consultation with the WA Police Force, the office of the Attorney General, the Office of the Director of Public Prosecutions and the Department of Justice. It says in the second reading speech, "all of which are in support of this validating legislation." Did any of those four agencies raise any concerns?

Hon SUE ELLERY: I am advised that no concerns were raised on the draft of the bill.

Hon NICK GOIRAN: Is that a way of saying that concerns were raised with respect to the policy of the bill?

Hon SUE ELLERY: No, it is not. It is the honourable member's deeply suspicious and worryingly perverse mind! No.

Hon NICK GOIRAN: Very good. Apart from those four agencies, were others also consulted with respect to this validation bill?

Hon SUE ELLERY: There were seven in total: the Attorney General, the Office of the Director of Public Prosecutions, the Department of Justice, the WA Police Force, the Department of Health, the State Solicitor's Office and the Solicitor-General.

Hon NICK GOIRAN: Seven agencies were consulted on this matter and four of them are specifically mentioned in the bill. Someone decided to mention those four but not the other three. The minister said in her second reading speech that all four of them were in support of the validating legislation and the minister has confirmed that none of those four expressed any concerns in any way. What about the other three?

Hon SUE ELLERY: I am not sure why they were not referenced in what I have said already, but no concerns were raised by any of them.

Hon NICK GOIRAN: Good. I note in particular that the Solicitor-General has been consulted and that the minister is on record reflecting that the Solicitor-General has not expressed concerns with this validating legislation. I was away on urgent parliamentary business at the time, but I understand that in the minister's second reading reply, she set out a couple of recent examples of validation bills. The minister indicated that they were just a couple of examples and that there were others.

Hon Sue Ellery: The two that the honourable member raised in his contribution, as I recall, were the Clive Palmer matter and —

Hon NICK GOIRAN: Was it not the environmental —

Hon Sue Ellery: That was the bill that I named. As I recall, Hon Wilson Tucker referenced two different bills. One was the Clive Palmer bill and the second was—it is in my second reading notes. No, it is one bill, sorry. In my notes I saw it as two, but the correct title is the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill. It is one.

Hon NICK GOIRAN: That was an example of a validation bill raised by the honourable member. As I said, I apologise, but I was away on urgent parliamentary business and the minister, in reply, indicated —

Hon SUE ELLERY: I named two. They were the Waste Avoidance and Resource Recovery Act 2007 and the Environmental Protection (Amendment) Validation Act 2014. I then said there were two others because I was looking with my pathetic 60-year-old eyes and I have not had time to get my glasses adjusted, honourable member, so I saw what was really one bill, which was the Mineralogy bill, and referred to it as two bills.

Hon NICK GOIRAN: I appreciate the clarification. Is it correct to say that on our statute book we have three validation acts and that this will be the fourth?

Hon SUE ELLERY: We do not have a full list. No-one has researched whether there is a full list. I am advised that the Railway (METRONET) Amendment Bill 2022 is the most recent bill to have a commencement date on the day on which it receives royal assent. That was the question that the notes were addressing when going to the issue of the validation matters.

Hon Nick Goiran: About the day of royal assent?

Hon SUE ELLERY: Yes.

Hon NICK GOIRAN: Putting that to one side, do we know how many validation bills have passed?

Hon Sue Ellery: No, we do not. At this point, I will not ask them to do a search, but I have given examples.

Hon NICK GOIRAN: That is fine. We do not have a precise number. I assume that we could be in agreement that they are not particularly common.

Hon Sue Ellery: That's correct.

Hon NICK GOIRAN: It is interesting that the minister mentioned, I think, the Mineralogy bill.

Hon Sue Ellery: The Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill.

Hon NICK GOIRAN: I thank the minister. Again, I think it would be fair to say that the Parliament, and certainly the government, was being very clear about what type of court action it was expressly trying to prejudice. There was no doubt about it. It was very clear. It led to some other consequences that we will not spend time talking about today, but that was done in a transparent fashion. Again, it goes to my earlier point—I acknowledge that the minister will try to get some further information in the next half an hour or so—that I do not see why we cannot be clear about this, because whoever the appellant is, they should be under no illusion. They believe they have found a loophole

and I believe that everyone in Parliament—there has not been any dissent that I am aware of—is saying that regardless of whether there is a loophole, we are shutting the door on it.

Hon SUE ELLERY: I came in here with a note telling me that we could provide further information —

Hon Nick Goiran: That you could?

Hon SUE ELLERY: Yes. But when I was giving the second reading reply, I got a Sticky Note saying that we could not. I have not had the opportunity to be briefed on that or to test the reasons why, but I will take the time to do that.

Hon WILSON TUCKER: For the record, I support the bill. I understand that it will fix a technicality that should not exist. The points I raised were around the breakdown of the process that we have seen. I asked some questions about what assurances we can be given to ensure that this will not happen again. I will get to that.

The other points I raised were about the danger of retrospectivity. The example that I gave of a sport game was not about exonerating criminals for drug offences; it was a more theoretical or high-level example. Once we use these retrospective powers in other situations, there could be examples when the government changes the rules of play in less morally acceptable circumstances. That was my point. I acknowledge the minister's comments that this is to be used only in exceptional circumstances.

The minister is right that I did not flesh out the comments around natural justice. My point was that it goes to the issue of retrospectivity in general whereby the government is changing the laws and information available to people in a court case, which will move the goalposts for the process of a fair trial.

I have a question about ensuring that this will not happen again. What actions will be taken to ensure that we have correctly diagnosed the problem? The minister mentioned that there was a good working relationship between the state and federal agencies. Can the minister talk a little bit about what happened? Let us start with that. Why did this breakdown in the process occur?

Hon SUE ELLERY: I tried to address that in my second reading reply. The commonwealth made a change but did not notify the Western Australian jurisdiction of that change. It would appear from the circumstances that at this end there was not a mechanism in place to check in every three months and see what was happening. Maybe lessons have been learnt and people will be more proactive in the future. I am not sure about that. I am the representative minister, not the minister in charge. I am not trying to hide anything. The advice that I have been given is that the commonwealth made a change but did not advise the Department of Health and that when the Department of Health became aware of the change, it fixed it going forward but did not look back and consider whether any other legislation would have been impacted by the change during that time.

Hon WILSON TUCKER: Minister, thank you for the explanation. I am a firm believer that we need to understand the problem before we can fix it. It seems like the minister does understand the problem. She mentioned that there could be a provision that allows us to be proactive and to review acts that are dependent or rely upon federal acts. Is the minister able to take that to the appropriate minister? Can we take any other action to ensure that this does not happen again in the future?

Hon SUE ELLERY: As a representative minister, all I can do is raise that issue with the minister. I have no advice available to me at the table to tell me that any systematic change has been put in place.

Hon WILSON TUCKER: That is it for my line of questioning. I appreciate that the minister will take that away. That was the main point I wanted to raise.

Hon MARTIN ALDRIDGE: We have talked about this table of potentially impacted provisions that was provided to the opposition after the briefing. It goes over 12 pages, and apart from having a cursory —

Hon Nick Goiran interjected.

Hon MARTIN ALDRIDGE: The honourable member has a larger edition than I have.

Hon Nick Goiran: This was the version that was given to the opposition after the briefing.

Hon MARTIN ALDRIDGE: Mine is 12 pages long, so perhaps I have lost something along the way.

Hon Sue Ellery: Mine is 13 pages long.

Hon MARTIN ALDRIDGE: Perhaps the first step will be to get the 13-page document tabled. I think that during the minister's second reading reply, she confirmed that this is not an exhaustive list, but an assessment of potentially impacted legislative provisions. I have not interrogated the document any more than to scan it ever so briefly, but it seems to list a range of legislative provisions, both in primary legislation and in regulation, that are impacted or potentially impacted. In the Medicines and Poisons Act 2014, a number of offences relate to manufacture, supply, prescribing and the like of schedule poisons. I am not talking about specific provisions, but is the Medicines and

Poisons Act effectively the act that limits when and how a medical practitioner, for instance, can prescribe a medicine to a person?

Hon SUE ELLERY: Broadly speaking, yes; that is what it does.

Hon MARTIN ALDRIDGE: Thank you for that confirmation.

If these provisions were potentially disrupted or ineffective during the 292-day period in 2019, what is the concern? I know that we do not want to leave this to the courts to decide, but what is the concern? Is it that a medical practitioner had no right to prescribe a drug or could they have prescribed whatever they liked without restriction or regulation?

Hon SUE ELLERY: There is a broad range of implications, honourable member. In addition to those matters related to convictions and drug traffickers, there are possible implications for licensing decisions, employee disciplinary offences and associated disciplinary actions, activities undertaken pursuant to statutory authorisation—that goes to the issue that the member raised earlier when he asked about who was authorised to do what—and statutory obligations, insofar as the legislative provisions that established those rights and obligations and powers and liabilities were dependent on the correct definition of the Standard for the Uniform Scheduling of Medicines and Poisons in the Medicines and Poisons Regulations 2016 during that affected period.

Hon MARTIN ALDRIDGE: If the minister answered my question, it is not necessarily clear to me. I think that something was said at my briefing to the effect that nothing was scheduled. If the effect of this anomaly was that no medicine or poison was scheduled, I assume it follows that there was no prohibition on a medical practitioner prescribing any substance.

Hon SUE ELLERY: That is correct, honourable member.

Hon MARTIN ALDRIDGE: Which agency has carriage of the Medicines and Poisons Act 2014?

Hon SUE ELLERY: It is the Department of Health.

Hon MARTIN ALDRIDGE: This is probably the most important question that I want to ask today: if the Department of Health has responsibility for the act and the regulations, and I assume an officer of the Department of Health in June 2019 became aware of this anomaly that in effect resulted in no prohibition or restriction on a medical practitioner from prescribing whatever they liked—this is just one example from the 13 pages that we have been given—how on earth did that person or that department not contemplate that some sort of action would be required other than a correction of the regulation?

Hon SUE ELLERY: Quite right, honourable member; that is the question, and I am unable to provide an answer. At some level, a decision was made to fix the problem. It would appear to me, on the basis of how I have been briefed, that nobody contemplated the need to look back. That might seem extraordinary to diligent legislators like the member and me, but it would appear, on the basis of the information provided to me, that that is what happened.

Hon MARTIN ALDRIDGE: I accept the complexity of this issue. As I demonstrated in my contribution to the second reading debate, it is almost like one has to read five references across state and commonwealth legislation to get to the answer one seeks.

Hon Sue Ellery: It is not "almost like"; it is.

Hon MARTIN ALDRIDGE: I also appreciate that it is probably unreasonable to expect an agency such as the department, as big as it is, to have a 24/7 watching brief on all these things. Things like this will occur from time to time, as unfortunate as that is. Some other things were obviously happening in 2019. What I cannot accept is that, once aware of the situation and fixing it, the officer or officers did not contemplate the impact of the situation at that time. I do not know whether those employees are still employees of the state, but one would question whether they should be. How did the issue that arose in June 2019 become known? Was it a departmental officer who stumbled across this during a late-night reading of commonwealth regulations? What led to that point in June when somebody turned their mind to this?

The DEPUTY CHAIR (Hon Dr Sally Talbot): Members, can I just remind you that your microphones are still on when you finish speaking.

Hon Martin Aldridge: I will repeat it in a moment.

The DEPUTY CHAIR: I have no doubt!

Hon SUE ELLERY: I am advised that the State Solicitor's Office drew it to the attention of the legal and legislative services branch of the Department of Health in June 2019, and the legal and legislative services branch actioned it on 2 July 2019.

Hon Martin Aldridge: Sorry, actioned what?

Hon SUE ELLERY: I am advised that the State Solicitor's Office told Health in June, and that Health actioned it on 2 July 2019.

Hon MARTIN ALDRIDGE: This makes it even worse. The State Solicitor's Office, which should know better, has said, "We've got a problem. You'd better fix your regulation, but don't worry about the implications of the 292 days", during which, by my example, medical practitioners could prescribe whatever drug they liked without any hindrance or regulation. In June, this issue was drawn to the attention of the State Solicitor's Office, and the State Solicitor's Office drew it to the attention of the legal and legislative services branch of the Department of Health. Is there any understanding of how the State Solicitor's Office became aware of this issue?

Hon SUE ELLERY: I am advised that the State Solicitor's Office was working on another piece of legislation and somehow discovered this anomaly. I do not know that I can take it much further. I am advised that the State Solicitor's Office probably thought that Health would look at retrospectivity as well, but that is not a matter of fact, so I am not sure I can take that much further.

Hon MARTIN ALDRIDGE: I understand the constraints; obviously, this was a couple of years ago as well. In 2019, the State Solicitor's Office was probably quite preoccupied with reading a number of privileged documents of the Legislative Council, so maybe its resources were limited at the time.

The minister said that the matter was actioned on 2 July 2019. Given that the change did not happen until 20 November, as I understand it, what was actioned on 2 July?

Hon SUE ELLERY: It was the commencement of the preparation of drafting instructions for how to change the Western Australian component of this exercise.

Hon MARTIN ALDRIDGE: It was the preparation of drafting instructions. The body of work that was completed on 20 November commenced on 2 July. When was the then Minister for Health briefed on this matter?

Hon SUE ELLERY: I am not in a position to tell the member that. I do not have anyone at the table who was working in his office, so I cannot tell the member that.

Hon MARTIN ALDRIDGE: In the time line that I have been able to establish, my concern is probably not so much about the time taken to get this bill, because, in a legislative sense, August until now is pretty tight. My greater concern is that the Department of Health became aware of this issue in June, yet the issue continued until 20 November. I read in my second reading reply—sorry, not my second reading reply; I am not a minister yet! The effective change was a matter of just a few words. We are changing the definition of "Standard for the Uniform Scheduling of Medicines and Poisons", or SUSMP, from "the standard … set out in schedule 1 of the current Poisons Standard" to "the standard for the uniform scheduling of medicines and poisons set out in the current Poisons Standard".

I understand that the Department of Health was probably not as cognisant as it should have been of the impact of this anomaly until now, or at least until August, but why did it take from June to November to draft and gazette such a simple amendment?

Hon SUE ELLERY: The normal process is that the department requests approval to draft, the minister provides approval for that, instructions go to parliamentary counsel, drafting commences, and then there is often a to and fro about the drafting. I am advised that it was not just this matter that was being considered in that amendment. Although this might have been the simplest and easiest part of it in terms of the actual number of words, another matter was to have been included in the amendment as well. That is the normal sort of timetable to deal with something like that, because it goes to the Parliamentary Counsel's Office, there is the instruction, there is some to and fro—"We don't understand this", "Here's the explanation", "We don't understand this bit", "Here's the explanation"—and then it goes back up the ministerial chain to get approval to print. There are all those elements.

Hon MARTIN ALDRIDGE: This might seem like a silly question, but do regulations require cabinet approval before they are gazetted or is there ministerial discretion to instruct the Governor to gazette?

Hon SUE ELLERY: They do not require cabinet approval, but they do require ministerial sign-off.

Hon MARTIN ALDRIDGE: I looked at the regulations and saw that other issues were clearly contemplated in what was gazetted. What probably did not make this move more swiftly was the lack of a red light flashing in the Department of Health that said, "We have a problem, and the problem is not just fixing it but also contemplating the effect on the laws of Western Australia more generally across this 292-day period." I would have thought that if that had been more fully known at the time, things probably would have or could have moved a bit more quickly between June and November, which is actually a longer period than the February to June period, when this issue was identified.

There are probably going to be limitations on some of the other provisions in here. This table is across government. I was contemplating asking the minister a question about the Emergency Management Act; I think that would be futile.

Hon Sue Ellery: You could give it your best shot, honourable member. I give you a tip what the answer would be!

Hon MARTIN ALDRIDGE: The Minister for Emergency Services is here; the minister could always swap out and we could examine the Minister for Emergency Services on the provisions of his portfolio that are affected. We know that this bill was subject to a cabinet process that resulted in a decision to print on the 21st of this month. Driving this is the offence, but probably my bigger concern is what is in this table. I have only really used the one case, which is medical practitioners prescribing medicines. As the Leader of the House says, there is a range of things. There are a lot of regulations that deal with conduct—conduct of police, conduct of prison officers and conduct of firefighters—and probably a range of other scenarios could be examined at great length. However, obviously, we are not going to do that in one hour and 39 minutes. It is an across-government issue, really. Apart from the offence, we know that no other offences are affected at this point in terms of a live matter before the court or an appeal that is resting on whether we have a schedule of poisons and medicines. My broader concern is with licensing and other regulatory mechanisms. Are there any examples of live issues that are known to the officials at the table, other than this misuse of drug appeal?

Hon SUE ELLERY: No; none is known to the people at the table.

Hon NICK GOIRAN: What is happening here is to clarify what the definition was from 1 February 2019. We are saying that the definition contained in this bill is to be taken at all material times to be the definition, including during the validation period. What is the definition of the SUSMP prior to the validation period—so, prior to 1 February 2019?

Hon Sue Ellery: Can I just be really clear on the period for which the member is asking for the definition?

Hon NICK GOIRAN: Prior to 1 February 2019, so prior to the validation period.

Hon SUE ELLERY: Thank you. I am reading from "Definitions" in the Medicines and Poisons Regulations 2016 as at 1 December 2018 —

> ***Standard for the Uniform Scheduling of Medicines and Poisons (SUSMP)*** means the document set out in Schedule 1 of the current Poisons Standard;

The member will recall the single sheet of paper that I tabled that had the text in it, and I went through those steps.

Hon NICK GOIRAN: Yes. Will this bill change that definition?

Hon SUE ELLERY: For the affected period —

Hon NICK GOIRAN: Is the affected period different from the validation period?

Hon SUE ELLERY: It is the same thing. For the validation period, SUSMP means the Standard for the Uniform Scheduling of Medicines and Poisons set out in the current Poisons Standard.

Hon NICK GOIRAN: I am very clear on that. The minister indicated what the definition was prior to 1 February 2019—that is, prior to the validation period—but will this bill affect that definition prior to 1 February 2019?

Hon SUE ELLERY: No.

Hon NICK GOIRAN: From 1 February 2019, once this bill passes, we will have what I am going to describe as the new definition. When I say "new", it needs to be recognised that it is the current definition as at today. Why do we not make that new or current definition the definition for all time?

Hon SUE ELLERY: I am advised there is no need to because prior to February 2019, the definition was correct.

Hon NICK GOIRAN: That is because the document was set out in schedule 1 of the Poisons Standard.

Hon Sue Ellery: Correct, honourable member.

Hon NICK GOIRAN: The genesis, of course, of this matter is the decision by the commonwealth to shift it to schedule 2. I asked during the briefing if we could find out from the federal government why it keeps changing it because, as I understand it, it did not just change it once, which caused this problem, but it then went backwards and forwards. The good thing is that the definition here puts that beyond doubt. We do not care which schedule it puts it in, as long as it is in the Poisons Standard, but have we had any clarity about why it keeps changing it?

Hon SUE ELLERY: The short answer to that is no. The commonwealth has not provided any explanation of why it changed then and why it has made other changes.

Hon NICK GOIRAN: At any other time after 1 February 2019, was the document set out in schedule 1?

Hon SUE ELLERY: Yes. The Poisons Standard July 2020 was moved to schedule 1.

Hon NICK GOIRAN: Where is it now?

Hon SUE ELLERY: It is there in schedule 1. What a strange world we live in.

Hon NICK GOIRAN: Indeed. With the indulgence of Hon Martin Aldridge, if I might take the last couple of minutes before Committee of the Whole is interrupted for the taking of questions without notice, when did the Medicines and Poisons Amendment Regulations (No. 2) 2019, which were obviously approved by the then Minister for Health, Hon Roger Cook, commence?

Hon SUE ELLERY: They commenced on 20 November 2019.

Hon NICK GOIRAN: I do not normally ask the same question a second time. I have been known to ask it in different ways and so forth but can I, in this instance, ask whether we are absolutely sure that they started on 20 November? We can imagine what a circus it would be if they started on the nineteenth or the twenty-first. Are we very, very clear it has been checked and triple-checked that it was the twentieth and, therefore, the validation period we are putting in this bill does not need to be extended by even one day?

Hon SUE ELLERY: I am advised yes. I am saying yes twice. People at the table are breaking out in a sweat.

Committee interrupted, pursuant to standing orders.

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