



**THIRTY-EIGHTH PARLIAMENT**

**REPORT 75**

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

**NATIONAL HEALTH FUNDING POOL BILL 2012**

Presented by Hon Adele Farina MLC (Chairman)

October 2012



# 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:

### **“5. Uniform Legislation and Statutes Review Committee**

- 5.1 A *Uniform Legislation and Statutes Review Committee* is established.
- 5.2 The Committee consists of 4 Members.
- 5.3 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.
- 5.4 In relation to function 5.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill, proposal or agreement may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”

## **Members as at the time of this inquiry:**

Hon Adele Farina MLC (Chairman)

Hon Donna Faragher MLC (Deputy Chairman)

Hon Michael Mischin MLC (until 16 August 2012)

Hon Linda Savage MLC (until 18 September 2012)

Hon Nick Goiran MLC (from 16 August 2012)

Hon Robin Chapple MLC (from 20 September 2012)

## **Staff as at the time of this inquiry:**

Kimberley Ould (Advisory Officer (Legal))

Pamela Pohe (Committee Clerk)

Irina Lobeto-Ortega (Advisory Officer (Legal))

## **Address:**

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

lcco@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

ISBN 978-1-922047-16-8



# CONTENTS

EXECUTIVE SUMMARY.....	i
FINDINGS AND RECOMMENDATIONS.....	i
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES	
REVIEW.....	1
1. REFERRAL.....	1
2. CONDUCT OF THE INQUIRY.....	1
3. BACKGROUND TO THE BILL.....	1
National Health Reform Agreement 2011 .....	1
The Legislative Scheme .....	2
4. OVERVIEW OF THE BILL .....	3
5. MATTERS WHICH MAY IMPACT UPON THE SOVEREIGNTY AND LAW-MAKING	
POWERS OF THE PARLIAMENT.....	4
Scrutiny of Uniform Legislation generally .....	4
The Intergovernmental Agreement .....	6
Clauses of the Bill.....	7
Clauses 6 and 7 – Removal and Suspension of the Administrator.....	7
Clauses 10(3) and 10(4) – Directions to the Administrator by the Council of Australian Governments (COAG).....	8
Clause 17 – Financial Management Policies and Procedures .....	9
Clause 24(5) – Release of Information about one jurisdiction to another jurisdiction .....	10
Clauses 25 and 26(1) – Commonwealth oversight and administrative laws to apply	12
Clauses 25 and 26.....	12
Impact of inconsistent legislation on oversight functions .....	14
Non-exclusion of Corruption and Crime Commission Act 2003 .....	15
Exclusion of Public Sector Management Act 1994.....	15
Clause 26(2) – Henry VIII clause concerning modification of applied	
Commonwealth legislation by regulation.....	17
Henry VIII clauses.....	17
Proposed amendment to clause 26(2).....	19
Affirmative resolution process for regulations .....	21
Proposed Addition of subclause 26(3).....	23
<b>APPENDIX 1 LIST OF STAKEHOLDERS AND SUBMISSIONS .....</b>	<b>27</b>
<b>APPENDIX 2 DIFFERENCES BETWEEN THE BILL AND THE MODEL BILL.....</b>	<b>29</b>
<b>APPENDIX 3 PREVIOUS NATIONAL SCHEMES APPLYING COMMONWEALTH OVERSIGHT AND ADMINISTRATIVE LAWS .....</b>	<b>31</b>



**EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS OF THE**  
**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES**  
**REVIEW**  
**IN RELATION TO THE**  
**NATIONAL HEALTH FUNDING POOL BILL 2012**

---

**EXECUTIVE SUMMARY**

- 1 The National Health Funding Pool Bill 2012 forms part of a uniform national scheme creating, amongst other things, the office of Administrator of the National Health Funding Pool. The Bill also proposes the establishment of a State Pool Account and State Managed Funds for Western Australia and sets out matters concerning the operation of the State Pool Account and the role of the Administrator.
- 2 The Committee has inquired into the Bill and considered issues of parliamentary sovereignty and law-making power.
- 3 The Committee made six findings and six statutory-form recommendations.

**FINDINGS AND RECOMMENDATIONS**

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

Page 6

**Finding 1: The Committee finds that the requirement in clause B39 of the National Health Reform Agreement that the Commonwealth and States seek agreement of the Council of Australian Governments (COAG) to any proposed amendments to legislation establishing:**

- **the position and functions of the Administrator; and**
- **the operation of the National Health Funding Pool;**

**impacts on the sovereignty and law-making powers of the Parliament.**

Page 9

**Recommendation 1: The Committee recommends that:**

**Clause 10 of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 9, after line 21 – To insert -**

**(5) When the Administrator is given a direction under subsection (3) –**

- (a) the Administrator must give a copy of the direction to the responsible Minister for the State; and**
- (b) the responsible Minister must, as soon as practicable after receiving the copy, cause it to be tabled in each House of the Parliament.**

**and**

**Clause 19 of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 17, line 17 – To insert after “tabled in”–**

**each House of**

Page 10

**Recommendation 2: The Committee recommends that Part 5 of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 15, after clause 17 – To insert –**

**17A. (1) The Administrator must give a copy of any policies or procedures developed pursuant to section 17(a) to the responsible Minister for the State.**

- (2) The responsible Minister must, as soon as practicable after receiving the copy, cause it to be tabled in each House of Parliament.**

Page 11

**Finding 2: The Committee finds that the *Freedom of Information Act 1992 (WA)* would apply to information relating to Western Australia provided by the Administrator to another jurisdiction notwithstanding the restriction on public release of such information contained in clause 24(5) of the Bill.**



Page 12

**Finding 3: The Committee finds that the delegation of the power to make the arrangements referred to in clause 24(5) impacts upon the sovereignty and law-making powers of the Parliament.**

Page 12

**Recommendation 3: The Committee recommends that clause 24(5) of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 19, line 24 – To delete “in accordance with arrangements” and insert –  
if**

Page 17

**Finding 4: The Committee finds that clause 26(2) of the Bill proposes a Henry VIII clause.**

Page 19

**Finding 5: The Committee finds that as a matter of general principle, where a uniform Bill applies Commonwealth oversight and administrative legislation as a law of Western Australia, any necessary modifications to the Commonwealth legislation should be included in the Bill itself and not left to delegated legislation.**

Page 20

**Finding 6: The Committee finds that if the regulation-making power is to be retained in clause 26(2), it should be limited, as described in the Explanatory Memorandum, to such modifications as are necessary to give effect to the application of the Commonwealth Acts.**

Page 21

**Recommendation 4: The Committee recommends that clause 26(2) of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 20, line 20 – To delete “the modifications” and insert –  
any modifications necessary to give effect to subsection (1) that are**

Page 22

**Recommendation 5: The Committee recommends that clause 26 of the National Health Funding Pool Bill 2012 be amended to provide for greater parliamentary scrutiny of any regulations that may be made pursuant to clause 26(2). This may be effected in the following manner:**

**Page 20, after line 21 – To insert -**

**(3) The regulations cannot be made in accordance with subsection (1) or (2) unless a draft of the regulations has first been approved by a resolution passed by both Houses of the Parliament of the State.**

Page 25

**Recommendation 6: The Committee recommends that clause 26 of the National Health Funding Pool Bill 2012 be further amended in the following manner:**

**Page 20, after line 21 – To insert the following subclause –**

**Until regulations referred to in subsection (2) are made, subsection (1) does not have effect and instead the legislation referred to in section 25 (a), (b) and (d) applies to or in respect of the Administrator and any function exercised or performed by the Administrator.**

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES  
REVIEW**

**IN RELATION TO THE**

**NATIONAL HEALTH FUNDING POOL BILL 2012**

---

**1. REFERRAL**

- 1.1 On 14 August 2012 the National Health Funding Pool Bill 2012 (**Bill**) was referred to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**).<sup>1</sup>

**2. CONDUCT OF THE INQUIRY**

- 2.1 The inquiry was advertised in *The West Australian* on Saturday, 18 August 2012. The Committee also invited submissions from stakeholders and four submissions were received. These are listed at Appendix 1.
- 2.2 The Committee considered the Bill at public hearings held in Perth on 22 and 27 August 2012. The submissions and transcripts of evidence may be accessed through the Committee's website at <http://www.parliament.wa.gov.au/uni>.

**3. BACKGROUND TO THE BILL**

**National Health Reform Agreement 2011**

- 3.1 The Bill implements parts of the National Health Reform Agreement 2011 (**NHRA**), an intergovernmental agreement reached between States, Territories and the Commonwealth in relation to health reform.<sup>2</sup> The NHRA must be read in conjunction with the National Healthcare Agreement 2011.<sup>3</sup>
- 3.2 An object of the NHRA is to establish Commonwealth/State funding arrangements for public hospital and other health services through the establishment of a number of new funding and administrative bodies.
- 3.3 Specifically, the NHRA provides for the establishment of:

---

<sup>1</sup> Hon Helen Morton MLC, Minister for Mental Health, introduced the Bill into the Legislative Council on 14 August 2012 and nominated the Bill as a Uniform Legislation Bill. The Bill stood referred pursuant to Standing Order 126(4).

<sup>2</sup> A copy of the NHRA can be accessed online at: <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/nhra-agreement> (viewed on 10 October 2012).

<sup>3</sup> NHRA, clause 1(g). The National Healthcare Agreement can be accessed online at: <http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/nha-agreement> (viewed on 10 October 2012).

- 3.3.1 The National Health Funding Pool and National Health Funding Body (**NHFB**),<sup>4</sup> overseen by an Administrator, who is to be an independent statutory office holder to be jointly appointed by legislation of the Commonwealth and States;<sup>5</sup>
- 3.3.2 The Independent Hospital Pricing Authority (**IHPA**), composed of a Chairperson appointed by the Commonwealth, a Deputy Chairperson appointed by the States; and five members to be agreed by COAG, with at least one member having regional and rural expertise;<sup>6</sup> and
- 3.3.3 The National Health Performance Authority.<sup>7</sup>
- 3.4 The NHRA provides that in recognition of the implementation by the States of the reforms set out in the Agreement, the Commonwealth will provide at least \$16.4 billion in growth funding between 2014-15 and 2019-20.<sup>8</sup>
- 3.5 The Bill itself is concerned only with the establishment and appointment of an Administrator of the National Health Funding Pool (**Administrator**) and the establishment of the relevant State accounts and directly related matters.

### **The Legislative Scheme**

- 3.6 The NHRA requires the enactment of separate Commonwealth and State legislation establishing the “National Health Funding arrangements”.<sup>9</sup> In other words, it adopts the “mirror legislation” model of Uniform Legislation.
- 3.7 A model Bill has been prepared nationally by the Australasian Parliamentary Counsels’ Committee based on instructions from officers representing all States and Territories and the Commonwealth (**Model Bill**).<sup>10</sup> A copy of the Model Bill is available on the Committee’s webpage.<sup>11</sup>

---

<sup>4</sup> Ibid, clauses B18 – B22.

<sup>5</sup> Ibid, clauses B23 – B45.

<sup>6</sup> Ibid, clause B1. The IHPA will set the National Efficient Price (NEP), which will form the basis for the calculation of the Commonwealth funding contributions.

<sup>7</sup> Ibid, clauses B76 – B79.

<sup>8</sup> Ibid, clause 12.

<sup>9</sup> Ibid, clause 14. The term “National Health Funding arrangements” is not defined, but logically refers to the arrangements set out in the NHRA as summarised in paragraphs 3.2 and 3.3 above.

<sup>10</sup> Letter from Hon Kim Hames MLA, Minister for Health, undated, received by the Committee on 22 June 2012, para(j).

<sup>11</sup> <http://www.parliament.wa.gov.au/uni>.

3.8 Legislation based on the Model Bill has been passed by the Commonwealth and all other States and Territories with the exception of the Australian Capital Territory.<sup>12</sup>

3.9 The Bill is substantially based on the Model Bill. The Committee has noted some differences, which are set out in Appendix 2.

#### **4. OVERVIEW OF THE BILL**

4.1 The Bill implements the National Health Funding arrangements for Western Australia. Specifically, it provides for:

4.1.1 The appointment of, and conferral of functions on, the Administrator.<sup>13</sup>

4.1.2 Suspension and removal of the Administrator.<sup>14</sup>

4.1.3 The establishment of the State Pool Account for Western Australia, for the purpose of:

1. Receiving monies paid or made available by the Commonwealth or the State under the NHRA; and
2. The application of money to fund health services under the NHRA.<sup>15</sup>

4.1.4 The establishment of State Managed Funds for Western Australia, for the purposes of block grant funding of health services under the NHRA.<sup>16</sup>

4.1.5 The Administrator's financial and reporting obligations.<sup>17</sup>

4.1.6 The exclusion of specified State oversight and administrative laws in respect of the Administrator and the application of specified Commonwealth oversight and administrative laws.<sup>18</sup>

---

<sup>12</sup> *National Health Reform Amendment (Administrator and National Health Funding Body) Act 2012* (Cth) (amends the *National Health Reform Act 2011* (Cth)); *Health Services Amendment (National Health Reform Agreement) Act 2012* (NSW) (amends the *Health Services Act 1997* (NSW)), *Health (Commonwealth State Funding Arrangements) Act 2012* (Vic); *Health and Hospitals Network and Other Legislation Amendment Act 2012* (Qld); *National Health Funding Administration Act 2012* (Tas); *National Health Funding Pool and Administration (National Uniform Legislation) Act 2012* (NT) and *National Health Funding Pool Administration (South Australia) Act 2012* (SA).

<sup>13</sup> Part 2.

<sup>14</sup> Clauses 6 and 7.

<sup>15</sup> Part 3.

<sup>16</sup> Part 4.

<sup>17</sup> Part 5.

<sup>18</sup> Clauses 25 and 26.

4.2 Clause 4(2) of the Bill states that it is the intention of Parliament that the same individual holds the office of Administrator established under the Bill and under the corresponding provisions of the law of the Commonwealth and the other States.<sup>19</sup>

4.3 Accordingly, clause 5 of the Bill provides that although the Administrator is to be appointed by the responsible Minister for Western Australia, the appointment is not to be made unless all members of the Standing Council on Health have agreed on the individual who will be appointed.

4.4 The Standing Council on Health (SCoH) means:

*the Ministerial Council by that name or, if there is no such Ministerial Council, the standing Ministerial Council established or recognised by COAG whose members include all Ministers in Australia having portfolio responsibility for health;*<sup>20</sup>

and is comprised of a single Minister for the Commonwealth and a single Minister for each State.<sup>21</sup>

4.5 Staff and facilities to assist the Administrator are to be provided by the National Health Funding Body constituted under the *National Health Reform Act 2011* (Commonwealth).<sup>22</sup>

## **5. MATTERS WHICH MAY IMPACT UPON THE SOVEREIGNTY AND LAW-MAKING POWERS OF THE PARLIAMENT**

### **Scrutiny of Uniform Legislation generally**

5.1 As the Standing Committee on Uniform Legislation and General Purposes pointed out in its Report 19:

*Where a State Parliament is not informed of the negotiations prior to entering the agreement and is pressured to pass uniform bills by the actions of the Executive, its superiority to the Executive can be undermined.*<sup>23</sup>

---

<sup>19</sup> See also the Explanatory Memorandum for the Bill, p2 “clause 4”.

<sup>20</sup> Clause 3(1) of the Bill.

<sup>21</sup> See clause 3(2) of the Bill, but note also clause 3(3) which provides that if there 2 or more Ministers for the Commonwealth or any State who are members of the SCoH, the relevant Minister for the purposes of the Bill is the Minister with primary responsibility for health.

<sup>22</sup> Clause 9 of the Bill.

<sup>23</sup> Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, 27 August 2004, p11.

- 5.2 The Standing Committee on Legislation, after referring to concerns as to uniform legislation representing an erosion of State power, pointed out that in scrutinising uniform legislation it is:

*important to take into account the role of the Western Australian Parliament in determining the appropriate balance between the advantages to the State in enacting uniform laws, and the degree to which Parliament, as legislature, loses its autonomy through the mechanisms used to achieve uniform laws.*<sup>24</sup>

- 5.3 The advantages to the State, as a participant in the NHRA, in implementing legislation establishing the National Health Funding arrangements were identified by the Minister for Health as follows:<sup>25</sup>

5.3.1 The NHRA confirms and upholds the role of the State as the manager of each State's public hospital system, which is reflected in the design of the new funding arrangements (specifically the creation of individual State Pool Accounts for each jurisdiction) and the accountability arrangements for the Administrator of the State Pool Account;

5.3.2 The NHRA improves transparency in the determination and allocation of Commonwealth and State funding for public hospital services; and

5.3.3 The additional funding which the Commonwealth has committed to provide for public hospital services between 2014/15 and 2019/20,<sup>26</sup> Western Australia's share of which is estimated at \$1.7 billion over this period.

- 5.4 The Minister for Health also identified some concerns about the NHRA in relation to:

5.4.1 The growth in the number and scope of the national bodies being established in connection with the NHRA, and the potential for additional Commonwealth incursion into State service delivery responsibilities (for example in respect of the National Health Performance Authority); and

5.4.2 The basis on which prices for public hospital services are to be determined and the possibility that, given the significant and legitimate cost disabilities

<sup>24</sup> Legislative Council, Standing Committee on Legislation, *Special Report of the Standing Committee on Legislation in relation to Intergovernmental Agreements, Uniform Schemes and Uniform Laws: amendment to Standing Orders 230(c) and (d)*, 6 November 2001, p2.

<sup>25</sup> Letter from Hon Kim Hames MLA, Minister for Health, undated, received by the Committee on 22 June 2012, para(f).

<sup>26</sup> See paragraph 3.4.

involved in the delivery of services in a state the size of Western Australia, the State will be left to meet a shortfall in funding.<sup>27</sup>

### **The Intergovernmental Agreement**

- 5.5 Schedule B of the NHRA sets out the detailed agreement to establish the various national bodies, including the National Health Funding Pool, the National Health Funding Body and the Administrator. Clause B33 provides that the SCoH will agree on a list of persons who may act in the role of Administrator from time to time as required.<sup>28</sup>
- 5.6 Clause B38 provides that any jurisdiction that enacts or amends legislation that is inconsistent with the provisions of the NHRA relating to the new National Health Reform funding arrangements, including the establishment, appointment, powers and functions of the Administrator will be in breach of the NHRA.
- 5.7 Clause B39 requires that the Commonwealth and States seek COAG agreement to any proposed amendments to legislation establishing the position and functions of the Administrator and the operation of the National Health Funding Pool. The Committee notes the potential for this requirement to impact upon the sovereignty and law-making powers of the Western Australian Parliament as it may limit the extent to which Parliament may amend the Bill once enacted, and makes the following finding.

**Finding 1: The Committee finds that the requirement in clause B39 of the National Health Reform Agreement that the Commonwealth and States seek agreement of the Council of Australian Governments (COAG) to any proposed amendments to legislation establishing:**

- **the position and functions of the Administrator; and**
- **the operation of the National Health Funding Pool;**

**impacts on the sovereignty and law-making powers of the Parliament.**

---

<sup>27</sup> Ibid.

<sup>28</sup> This appears to conflict with clause 5 of the Bill, which provides that the Minister is to appoint the Administrator, providing that the appointment is not to be made unless all members of the SCoH have agreed on the individual who will be appointed as Administrator.



---

**Clauses of the Bill**

5.8 The Committee has considered the following clauses of the Bill which may impact upon the sovereignty and law-making powers of the Parliament:

- 5.8.1 Clauses 6 and 7;
- 5.8.2 Clauses 10(3) and 10(4);
- 5.8.3 Clauses 17 and 31;
- 5.8.4 Clause 24(5);
- 5.8.5 Clauses 25 and 26(1); and
- 5.8.6 Clause 26(2).

**Clauses 6 and 7 – Removal and Suspension of the Administrator**

5.9 Clause 6 of the Bill provides for suspension of the Administrator in specified circumstances.<sup>29</sup> Clause 7 of the Bill provides for the removal or resignation of the Administrator.

5.10 In response to questioning by the Committee as to whether clause 6 of the Bill had the effect that the Administrator, as a WA statutory office holder,<sup>30</sup> could be suspended at the sole request of the Commonwealth Minister, the Department of Health confirmed that:

*...on the face of the law, the Commonwealth Minister is able to act unilaterally in this particular case [ie. in the case of suspension]. We also put into the legislation some restrictions on the time limit within which the Administrator may be suspended in this circumstance, and we are also insistent on stating grounds for suspension that would have to apply before the election could be taken.<sup>31</sup>*

5.11 As to clause 7, the Department confirmed that the WA Minister for Health would have to remove the Administrator as a State office holder if a majority of the members of the SCoH agree to the Administrator's removal. The Department added that:

---

<sup>29</sup> As to the available grounds for suspension, see clause 6(2) of the Bill.

<sup>30</sup> Pursuant to clause 4(2) of the Bill.

<sup>31</sup> Mr Wayne Salvage, Acting Executive Director, Resource Strategy, Department of Health, *Transcript of Evidence*, 22 August 2012, pp 6-7.

*If you start from the proposition that you will have one person essentially doing the same job across the nation, you have to deal with mechanisms for the termination and suspension of them from their role. We felt that a majority decision through SCoH set the bar pretty high in relation to when such a circumstance might be contemplated.<sup>32</sup>*

### **Clauses 10(3) and 10(4) – Directions to the Administrator by the Council of Australian Governments (COAG)**

- 5.12 Clause 10(3) provides that “the Administrator is required to comply with any directions given by COAG in relation to the manner in which the Administrator exercises or performs his or her functions under this Act (including in relation to the preparation or provision of annual or monthly reports, financial statements or information under Part 5).”
- 5.13 Clause 10(4)(a) provides that directions made by COAG under subclause 3 “are to be given in accordance with a written resolution of COAG *“passed in accordance with the procedures determined by COAG”* (emphasis added).
- 5.14 In response to the Committee’s questions about the details of the COAG procedures referred to in clause 10(4)(a), the Department of Health advised that a need had not yet been identified for COAG to issue directions under clause 10(4) and its equivalents, and that should such a need arise, COAG would at that time determine what procedures are to be put in place to enable directions to be issued to the Administrator.<sup>33</sup>
- 5.15 Hon Kim Hames MLA, Minister for Health, has subsequently advised that he supports an amendment to clause 10(3) of the Bill by the addition of the following:

*When the Administrator is given a direction under subsection (3) –*

*(a) the Administrator must give a copy of the direction to the responsible Minister for the State; and*

*(b) the responsible Minister must, as soon as practicable after receiving the copy, cause it to be tabled in each House of the Parliament.<sup>34</sup>*

and the Committee accordingly makes the following recommendation.

---

<sup>32</sup> Ibid, p8.

<sup>33</sup> Ibid, and answer to Question on Notice 1 provided by the Department of Health on 24 August 2012.

<sup>34</sup> Letter from Hon Kim Hames MLA, Minister for Health, dated 13 September 2012.

---

**Recommendation 1: The Committee recommends that:**

**Clause 10 of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 9, after line 21 – To insert -**

**(5) When the Administrator is given a direction under subsection (3) –**

- (a) the Administrator must give a copy of the direction to the responsible Minister for the State; and**
- (b) the responsible Minister must, as soon as practicable after receiving the copy, cause it to be tabled in each House of the Parliament.**

**and**

**Clause 19 of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 17, line 17 – To insert after “tabled in”–**

**each House of**

5.16 The Committee notes that the government has placed an amendment in those terms before the Legislative Council.<sup>35</sup>

**Clause 17 – Financial Management Policies and Procedures**

5.17 Clause 20 of the Bill requires the Administrator to prepare a financial statement for each State Pool Account for each financial year.

5.18 Clause 17 requires the Administrator to:

- (a) develop and apply policies and procedures with respect to the State Pool Accounts (including policies and procedures to ensure payments from those Accounts are made in accordance with the directions of the responsible Ministers);

<sup>35</sup> Supplementary Notice Paper No.286 dated 19 September 2012.

- (b) keep proper records in relation to the Administration of State Pool Accounts; and
- (c) prepare the financial statements required by Part 5 in relation to the State Pool Accounts and arrange for them to be audited in accordance with Part 5.

5.19 The Bill does not require the financial statements prepared pursuant to clause 20 to be tabled in Parliament. After questioning by the Committee on this issue, the Department indicated that it would have no objection to an amendment to the Bill to require the policies developed pursuant to clause 17(a) to be tabled in Parliament.<sup>36</sup> Accordingly, the Committee makes the following recommendation.

**Recommendation 2: The Committee recommends that Part 5 of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 15, after clause 17 – To insert –**

**17A. (1) The Administrator must give a copy of any policies or procedures developed pursuant to section 17(a) to the responsible Minister for the State.**

**(2) The responsible Minister must, as soon as practicable after receiving the copy, cause it to be tabled in each House of Parliament.**

**Clause 24(5) – Release of Information about one jurisdiction to another jurisdiction**

5.20 Clause 24(5) of the Bill provides that “any information relating to a jurisdiction that is provided under this section to another jurisdiction *may only be publicly released by that other jurisdiction in accordance with arrangements approved by the responsible Minister for the jurisdiction to which the information relates*” (emphasis added).<sup>37</sup>

5.21 Hon Giz Watson MLC raised concerns that this provision appears to give the Minister power to refuse to allow publication of information about his/her jurisdiction despite

---

<sup>36</sup> Mr Wayne Salvage, Acting Executive Director, Resource Strategy, Department of Health, *Transcript of Evidence*, 22 August 2012, p11.

<sup>37</sup> It should be noted that clause 24(5) differs from the equivalent provision in the Model Bill. Clause 24(5) is more confined in its operation than cl 23(5) of the Model Bill, in that it only refers to “*information...provided under this section*”, where the Model Bill refers to “*information...provided by the Administrator*”.

anything to the contrary in that jurisdiction's own Freedom of Information laws, or the Commonwealth Freedom of Information laws.<sup>38</sup>

- 5.22 The evidence from the Department of Health in relation to this issue was that “if access was denied through the administrative arrangements, that would not stop a relevant jurisdiction going through an FOI process to get that information in any event”.<sup>39</sup>

**Finding 2: The Committee finds that the *Freedom of Information Act 1992 (WA)* would apply to information relating to Western Australia provided by the Administrator to another jurisdiction notwithstanding the restriction on public release of such information contained in clause 24(5) of the Bill.**

- 5.23 The Committee further notes that any such “arrangements” would not be subject to Parliamentary scrutiny.
- 5.24 At the hearing on 22 August 2012, the Committee questioned the Department of Health on this matter. It responded that it had not determined what the arrangements would be, and that:

*...the provision is yet to be tested. The Administrator will be holding information in his various capacities from essentially eight jurisdictions. If we go back to the situation of cross-border arrangements, he will hold information about the quantum of service that is delivered by hospital X in jurisdiction Y. Before releasing information that relates to a State's financial obligations or to the State's service provision, there will be a process of consultation with the Minister concerned before that occurs. If we were to say we would be quite interested to know how much money is being spent in hospital X in Sydney, the Minister for Health in New South Wales might want to know why we want to know that. It is a mechanism that allows for the policing of that release of that sort of information by the Administrator.*<sup>40</sup>

<sup>38</sup> Submission No 1 from Hon Giz Watson MLC, 20 July 2012, p2.

<sup>39</sup> Mr Wayne Salvage, Acting Executive Director, Resource Strategy, Department of Health, in response to a question asked by Hon Donna Faragher MLC, *Transcript of Evidence*, 22 August 2012, p13.

<sup>40</sup> Mr Wayne Salvage, Acting Executive Director, Resource Strategy, Department of Health, *Transcript of Evidence*, 22 August 2012, p12.

5.25 Further evidence from the officers of the Department of Health clarified that in their understanding these arrangements would be merely administrative in nature and would not be made by regulation.<sup>41</sup>

5.26 The Committee takes the view that the Bill should not refer to “arrangements approved by the responsible Minister” without setting out the substance or scope of those arrangements in the Bill itself.

**Finding 3: The Committee finds that the delegation of the power to make the arrangements referred to in clause 24(5) impacts upon the sovereignty and law-making powers of the Parliament.**

**Recommendation 3: The Committee recommends that clause 24(5) of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 19, line 24 – To delete “in accordance with arrangements” and insert –**

**if**

### **Clauses 25 and 26(1) – Commonwealth oversight and administrative laws to apply**

#### *Clauses 25 and 26*

5.27 Clause 25 of the Bill provides that the following Western Australian Acts do not apply to or in respect of the Administrator or any function exercised or performed by the Administrator:

- a) the *Freedom of Information Act 1992*;
- b) the *Parliamentary Commissioner Act 1971*;
- c) the *Public Sector Management Act 1994*; and
- d) the *State Records Act 2000*.

5.28 In their place, clause 26 provides that, subject to subsection (2),<sup>42</sup> the following Commonwealth Acts apply as laws of Western Australia to the Administrator and the performance of the Administrator’s functions:

---

<sup>41</sup> Ibid, p13.

- 
- a) the *Archives Act 1983*;
  - b) the *Australian Information Commissioner Act 2010*;
  - c) the *Freedom of Information Act 1982*;
  - d) the *Ombudsman Act 1976*; and
  - e) the *Privacy Act 1988*.

5.29 The Bill's Explanatory Memorandum states:<sup>43</sup>

*Clause 26 Application of Commonwealth Acts*

*This clause provides for Commonwealth Acts to be applied as Western Australian laws in place of the State Acts listed in clause 25 of the Bill for the purpose of establishing a consistent set of administrative laws in relation to the Administrator.*

5.30 This arrangement is required by clause B31 of the NHRA, which provides that:

*Subject to clause B36<sup>[44]</sup> and any necessary modifications required to enact this Agreement, the Commonwealth's administrative law arrangements will apply to the Administrator and the National Health Funding Body. All relevant and applicable Commonwealth administrative legislation, such as the Administrative Appeals Tribunal Act 1975, the Administrative Decisions (Judicial Review) Act 1977, the Legislative Instruments Act 2003, the Ombudsman Act 1976, the Freedom of Information Act 1982, the Australian Information Commissioner Act 2010, and the Privacy Act 1988 will apply to the functions of the Administrator detailed in the legislation of the Commonwealth and the States.*

5.31 In his evidence to the Committee at the hearing held on 22 August 2012, Mr Wayne Salvage, Acting Executive Director, Resource Strategy, Department of Health, stated as follows:

*It comes back to the idea that we have one person performing the role of Administrator under essentially nine different enactments. When the model was decided upon as part of the negotiation of the National Health Reform Agreement, it was again collectively agreed between*

---

<sup>42</sup> See paragraphs 5.41 – 5.54.

<sup>43</sup> At page 9.

<sup>44</sup> See paragraph 5.35.

*the States and the Commonwealth that a single regime of administrative law should apply to that individual. There are a number of acts that we have agreed through that agreement to set aside, solely in relation to the appointment of the Administrator as a statutory office holder of the State. In their place, we apply the equivalent Commonwealth acts with the intention that that administrative law regime will be consistent in relation to that individual, irrespective of the jurisdiction or capacity in which he or she is acting.*<sup>45</sup>

#### *Impact of inconsistent legislation on oversight functions*

5.32 As has been noted in past reports, the Committee has previously received a letter from Mr Sven Bluemmel, Information Commissioner, enclosing an Issues Paper prepared by the Office of the Information Commissioner entitled “COAG Regulatory Reform Agenda: Potential Impact on State Oversight Laws and Mechanisms”.<sup>46</sup> The letter noted that between December 2010 and December 2011, an increasing number of proposed COAG reforms were being progressed, resulting in the Information Commissioner having serious concerns as to the efficacy of State oversight laws.

5.33 In summary, the concerns raised by the Information Commissioner are:

5.33.1 Recently introduced national schemes have not adopted a consistent approach to how oversight laws apply to the people and organisations which play a role under the national schemes. Instead, different oversight models have been developed for education and child care services, occupational licensing and health practitioner regulation. The use of different oversight models for different regulatory schemes will increase the complexity and fragmentation of oversight laws and will result in inefficiencies and unnecessary duplication of effort and expenditure.

5.33.2 An increase in the number of oversight bodies is likely to create confusion for the public as well as increasing overall bureaucracy.

5.33.3 The application of Commonwealth laws to state entities may raise complex jurisdictional issues and will increase the regulatory burden on State agencies, requiring affected officers to have an adequate understanding of both state and Commonwealth FOI Acts and to apply and comply with two

---

<sup>45</sup> *Transcript of Evidence*, 22 August 2012, p13.

<sup>46</sup> Letter from Sven Bluemmel, Information Commissioner, 14 December 2011. Appended to Standing Committee on Uniform Legislation and Statutes Review, Report 69, *Criminal Investigation (Covert Powers) Bill 2011*, March 2012, as Appendix 5; and Report 71, *Education and Care Services National Law (WA) Bill 2011*, May 2012, as Appendix 3 (available on the Committee’s webpage at [http://www.parliament.wa.gov.au/uni>>Reports>>Education and Care Services National Law \(WA\) Bill 2011](http://www.parliament.wa.gov.au/uni>>Reports>>Education and Care Services National Law (WA) Bill 2011)).



different laws. While there are similarities between the WA FOI Act and the Commonwealth FOI Act, there are substantial differences.

5.33.4 The application of the Commonwealth FOI Act under the national laws can generally be modified by regulations to be made by the relevant ministerial council. This approach could result in the potential dilution of the current provisions in the Commonwealth FOI Act and the fragmentation of oversight arrangements. It can also be argued that this allows regulations to make legislative determinations of a kind that should properly be the preserve of Parliaments.<sup>47</sup>

5.34 However, the Committee was advised by the Information Commissioner in the course of this inquiry that, although his general concerns remain, in light of the narrow role of the Administrator, he does not object to the application of the Commonwealth *Freedom of Information Act* and to the disapplication of the Western Australian *Freedom of Information Act* to the activities of the Administrator.<sup>48</sup>

*Non-exclusion of Corruption and Crime Commission Act 2003*

5.35 Clause B36 of the NHRA additionally provides that “*State legislation may provide for the Administrator to be subject to state-specific anti-corruption legislation.*” The Committee notes that this option has not been pursued in the Bill. In its evidence before the Committee, the Department confirmed that this had not been included in the Bill “because it speaks for itself in the sense that the Administrator as the WA statutory office holder would be considered to be a public officer and therefore it is not needed to be specified in the Bill.”<sup>49</sup>

*Exclusion of Public Sector Management Act 1994*

5.36 Mr M C Wauchope, Public Sector Commissioner, has advised that in place of the *Public Sector Management Act 1994 (WA) (PSM Act)*, “the Administrator’s office and staff are expected to be subject to similar requirements applicable to them as Commonwealth officers under the *Public Service Act 1999 (Cth)*”.<sup>50</sup> The Committee considered the extent to which the Commonwealth Act will replace the PSM Act in relation to the Administrator.

<sup>47</sup> This concern relates to the Henry VIII clause issue arising from clause 26(2) of the Bill. See paragraphs 5.41 – 5.52.

<sup>48</sup> Submission No 4 from the Mr Sven Bluemmel, Information Commissioner, 30 August 2012.

<sup>49</sup> Ms Lisa Briggs, Senior Legal Advisor, Department of Health, in response to a question from Hon Nick Goiran MLC, *Transcript of Evidence*, 22 August 2012, p21. The Committee also notes the comments of the Public Sector Commissioner in his submission observing that the *Corruption and Crime Commission Act 2003* is “notably” not excluded by clause 25 of the Bill (Submission No 2 from Mr M C Wauchope, Public Sector Commissioner, 24 August 2012, p2).

<sup>50</sup> Submission No 2 from Mr M C Wauchope, Public Sector Commissioner, 24 August 2012, p2.

5.37 The *National Health Reform Act 2011* (Cth) (as amended by the *National Health Reform Amendment (Administrator and National Health Funding Body) Act 2012*):

5.37.1 establishes the NHFB to assist the Administrator in the performance of the Administrator's functions under a National Health Reform law of a State;<sup>51</sup> and

5.37.2 provides that the CEO and staff of the Funding Body constitute a Statutory Agency for the purposes of the *Public Service Act 1999* (Cth).<sup>52</sup>

5.38 There is no corresponding provision that the Administrator is the Head of a Statutory Agency for the purposes of the *Public Service Act 1999* (Cth).

5.39 Notwithstanding this, and assuming that it is intended that the *Public Service Act 1999* (Cth) apply to the Administrator as appointed by the Commonwealth under section 231 of the *National Health Reform Act 2011* (Cth), it appeared to the Committee that there may still be situations where neither the PSM Act (by virtue of clause 25(c) of the Bill) nor the *Public Service Act 1999* (Cth) apply to the Administrator as a State appointee.

5.40 Hon Kim Hames MLA, Minister for Health, has advised:<sup>53</sup>

5.40.1 The rationale for the non-application of the *Public Sector Management Act 1994* (WA) to the Administrator is because the appointment, conferral of functions, and mechanisms for suspension and termination of employment of the Administrator are determined under the Bill (specifically Part 2). This is intended to ensure consistency in relation to these matters in each jurisdiction.

5.40.2 The NHFB will be staffed by Commonwealth public servants under the *Public Service Act 1999* (Cth) (see clause 9 of the Bill and National Health Reform Agreement, clause B44), and their employment will be governed by that statutory framework.

5.40.3 The primary function of the NHFB is to assist the Administrator in the performance of his/her functions under Commonwealth and State/Territory law.

5.40.4 Safeguards incorporated into the WA Bill to appropriately delineate the role of the NHFB in relation to the State Pool Account are:

---

<sup>51</sup> *National Health Reform Act 2011* (Cth), sections 251 and 252.

<sup>52</sup> *Ibid*, section 264(2).

<sup>53</sup> Answer to Supplementary Question on Notice 1 from 27 August 2012, provided on 18 September 2012.

- Clause 9(2) of the WA Bill prevents the Administrator (acting in his or her capacity as the WA Administrator) from delegating functions conferred by the WA Bill to staff of the NHFB.
- Clause 10(2) further provides that the Administrator and staff of the NHFB cannot be directed by a Commonwealth Minister in relation to the exercise by the Administrator of his or her functions under the WA Bill.

**Clause 26(2) – Henry VIII clause concerning modification of applied Commonwealth legislation by regulation**

*Henry VIII clauses*

- 5.41 Clause 26(2) of the Bill is a Henry VIII clause,<sup>54</sup> providing that each of the Commonwealth Acts applying as Western Australian law by virtue of clause 26(1) “so applies subject to the modifications made by the regulations”. “The regulations” refers to regulations made under this Bill.<sup>55</sup>

**Finding 4: The Committee finds that clause 26(2) of the Bill proposes a Henry VIII clause.**

- 5.42 The House generally considers Henry VIII clauses objectionable,<sup>56</sup> only passing such clauses when they have a cogent justification and are limited in scope and longevity or, on limited occasions, provide a mechanism for increased Parliamentary scrutiny of the subsidiary legislation made under them.<sup>57</sup> In recent debate in the House, this

<sup>54</sup> A Henry VIII clause is a clause of an Act of Parliament which enables an Act to be expressly or impliedly amended by subordinate legislation or Executive action. See Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The Use of “Henry VIII” clauses in Queensland Legislation*, January 1997, p24. See also Report 19 of the Standing Committee on Legislation, September 2012, paragraph 2.1 and Appendix 1.

<sup>55</sup> See the Explanatory Memorandum for the Bill, at page 9.

<sup>56</sup> See for example, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry) Bill 2010*, 11 November 2010, pp9-11 and recommendation 2. See also Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 November 2010, pp9249.) and the House’s consideration of the Personal Property Securities (Commonwealth Laws) Bill 2011 (Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 August 2011, pp6109-13) during which Henry VIII clauses were deleted.

<sup>57</sup> See for example, the House’s approach to the Water Resources Legislation Amendment Bill 2006 in which the House sought an assurance from the responsible Minister that it would be advised on each occasion of use of a Henry VIII clause and the amendment imposing a sunset provision. (Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 5 December 2007, p8185.)

approach to questioning Henry VIII clauses has been described as having “*basically become a convention*”.<sup>58</sup> Such a clause appears to be becoming a usual provision for uniform schemes relying on State entities for administration. The Committee has considered previous instances of uniform legislative schemes in which Commonwealth Acts were applied as laws of Western Australia, with a provision for modification of those Commonwealth Acts by regulation. The details of these schemes and some comments from the Committee’s previous reports are set out in Appendix 3.<sup>59</sup>

5.43 The Committee notes that unlike clause 26(2), the Model Bill and each of the corresponding provisions in the legislation of the Commonwealth and the other States provides for modification of the specified Commonwealth Acts “by Regulations made under the *National Health Reform Act 2011* of the Commonwealth with the agreement of all the members of the Standing Council on Health”.<sup>60</sup> A similar approach was taken in the previous schemes set out in Appendix 3.

5.44 In his submission to the Committee, Mr Sven Bluemmel, Information Commissioner, expressed the view that clause 26(2) “could result in the potential dilution of the current provisions of the Commonwealth laws and the fragmentation of oversight arrangements. It could also be argued that this approach allows regulations to make legislative determinations of a kind that should properly be the preserve of the Parliament.”<sup>61</sup>

5.45 The Committee has considered whether the proposed delegated power in clause 26(2):

5.45.1 is an appropriate delegation of legislative power; and

5.45.2 would in its exercise be sufficiently subject to the scrutiny of the Parliament.

5.46 As a matter of general principle, the Committee does not support the inclusion of a provision allowing for the amendment of Acts by way of regulation, even if those regulations are made under Western Australian legislation. The Committee’s view is that if modifications are required to applied Commonwealth legislation, such modifications should, where possible, be set out in the Bill itself.

---

<sup>58</sup> Hon Simon O’Brien MLC, Minister for Finance, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 March 2012, p 811.

<sup>59</sup> The Committee again notes the concern raised by Mr Sven Bluemmel, Information Commissioner, that recently introduced national schemes have not adopted a consistent approach to how oversight laws apply to people and organisations which play a role in national schemes: See paragraph 5.33.1.

<sup>60</sup> Clause 25(2) of the Model Bill.

<sup>61</sup> Submission No 4 from Information Commissioner of Western Australia, 30 August 2012, p1-2.

**Finding 5: The Committee finds that as a matter of general principle, where a uniform Bill applies Commonwealth oversight and administrative legislation as a law of Western Australia, any necessary modifications to the Commonwealth legislation should be included in the Bill itself and not left to delegated legislation.**

*Proposed amendment to clause 26(2)*

- 5.47 The Department of Health was asked by the Committee Chairman why clause 26(2) did not limit the scope of the modifications that could be made by regulation to such modifications necessary to ensure the Commonwealth Acts are administratively workable as laws of the State, as described in the Explanatory Memorandum for the Bill.<sup>62</sup> The Department of Health responded:

*The intent is to provide a mechanism whereby in applying, say, the Commonwealth's Freedom of Information legislation, if there is an administrative process in the Commonwealth that does not quite fit the State's process, you are allowed to vary the application of the law to make it administratively workable in Western Australia. I must admit that that form of words is a general form of words that is applied by parliamentary counsel. In preparing this legislation as a set of common legislation to be applied across the nation, the default position was that those Commonwealth enactments would be modified by regulations made under the Commonwealth's equivalent of this Bill. Western Australia made it very clear that it would not be acceptable in this State and modified and applied Western Australian law by Commonwealth regulation so the mechanism selected was by regulations made under this Bill [...] I emphasise that is not to tamper with in any way the substantive intent of those enactments; it is to make them practically workable in this State.<sup>63</sup>*

- 5.48 The following example was provided as to the regulations which may be required under clause 26(2):

*For example, the Commonwealth Ombudsman Act 1976 has a provision that requires that the Ombudsman provide an Annual Report to the relevant Commonwealth Minister. The proposal is that it should be modified so that not only is the Annual Report provided to the Commonwealth Minister but it is provided to the Chair of the Standing Council on Health. It is the nature of those types of*

<sup>62</sup> At page 9, "Clause 26 – Application of Commonwealth Acts".

<sup>63</sup> Mr Wayne Salvage, Acting Executive Director, Department of Health, *Transcript of Evidence*, 22 August 2012, p15.

*amendments to make it relevant to the Administrator's functions. The characterisation of the modifications are really administrative in nature and not meant to be anything more than that.*<sup>64</sup>

5.49 The rationale for the inclusion of clause 26(2) in the Bill has been explained in some detail by the officers of the Department of Health. However, the Committee notes the comments of the officers of the Department of Health in their evidence that the necessary modifications are still being determined in consultation with three inter-governmental sub-committees.<sup>65</sup>

5.50 In response to the Committee's concern as to the breadth of clause 26(2),<sup>66</sup> and whether it is inconsistent with the intention, as stated in the Explanatory Memorandum, that the regulations may modify the applied Commonwealth laws so as to make them administratively workable, the Department advised that Parliamentary Counsel has indicated that subclause 26(2) could be amended in the following way:

*(2) Each of those Acts so applies subject to any modifications necessary to give effect to subsection (1) that are made by the regulations (proposed amendments underlined).*<sup>67</sup>

5.51 The Committee takes the view that the regulation-making power in clause 26(2) should be limited, as described in the Explanatory Memorandum, to such modifications as are necessary to give effect to the application of the Commonwealth Acts.

**Finding 6: The Committee finds that if the regulation-making power is to be retained in clause 26(2), it should be limited, as described in the Explanatory Memorandum, to such modifications as are necessary to give effect to the application of the Commonwealth Acts.**

5.52 The Committee accepts that the proposed amendment to clause 26(2) appropriately limits the regulation-making power and makes the following recommendation.

---

<sup>64</sup> Ms Lisa Briggs, Senior Legal Advisor, Department of Health, *Transcript of Evidence*, 22 August 2012, p16.

<sup>65</sup> *Ibid*, p16.

<sup>66</sup> *Transcript of Evidence*, 22 August 2012, p15.

<sup>67</sup> Answer to Question on Notice 3 from the hearing on 22 August 2012.

**Recommendation 4: The Committee recommends that clause 26(2) of the National Health Funding Pool Bill 2012 be amended in the following manner:**

**Page 20, line 20 – To delete “the modifications” and insert –  
any modifications necessary to give effect to subsection (1) that are**

*Affirmative resolution process for regulations*

5.53 The Committee asked a number of questions of the officers of the Department of Health about whether the affirmative resolution process for the making of regulations had been considered in the context of the Bill. The Department responded that it had been advised by Parliamentary Counsel that:

*Disallowance of regulations is the usual, longstanding procedure if the Parliament objects to the making of a regulation. The procedure is prescribed in detail under section 42 of the Interpretation Act 1984. This enables regulations to be made and come into operation in a timely manner. The complications of providing otherwise are considerable, particularly in relation to times when Parliament is not sitting.<sup>68</sup>*

5.54 Clause 30(2) of the Bill applies to regulations made under clause 26(2), and provides that nothing in sections 3(5) or (6) affects the operation of the *Interpretation Act 1984* Part VI in relation to regulations made under this Act. This has the effect of incorporating the disallowance process for the making of regulations set out in section 42 of the *Interpretation Act 1984*.

5.55 As the Committee has noted in some past reports,<sup>69</sup> the affirmative resolution process by contrast requires that when regulations are made and gazetted, both Houses of Parliament must approve the regulations before they can come into operation. During that interval they may be subject to criticism and objection.<sup>70</sup>

5.56 Mr Stephen Argument in a paper titled “Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation” said:

<sup>68</sup> Answer to Question on Notice 5 from the hearing on 22 August 2012.

<sup>69</sup> For example, Report 69, *Criminal Investigation (Covert Powers) Bill 2011*, March 2011, pp27 – 29, and Report 70, *Business Names (Commonwealth Powers) Bill 2011*, pp 10-11.

<sup>70</sup> *Ibid*, p 27.

*The obvious advantage, for the Parliament, of requiring affirmative resolution of both Houses before subordinate legislation can take effect is the capacity to amend such legislation.*

*Another advantage is that affirmative resolution procedures prevent subordinate legislation from operating until such time as the Parliament sits and moves to disallow the subordinate legislation (which can take several months, particularly when subordinate legislation is made in a long parliamentary recess).<sup>71</sup>*

- 5.57 As a general principle, the Committee is of the view that the affirmative resolution process should be adopted in relation to specific regulation-making powers.
- 5.58 The Committee notes that as a result of its recommendation in relation to the specific regulation-making power in clause 11 of the Business Names (Commonwealth Powers) Bill 2011, the Parliament, by way of amendment to the Bill, adopted the affirmative resolution process.<sup>72</sup>
- 5.59 The Committee has not sought to extend the affirmative resolution process to the general regulation-making power in clause 30(1) of the Bill.
- 5.60 The Committee is of the view that an affirmative resolution procedure applying to regulations made under clause 26(2) will enhance the sovereignty of the Parliament and makes the following recommendation.

**Recommendation 5: The Committee recommends that clause 26 of the National Health Funding Pool Bill 2012 be amended to provide for greater parliamentary scrutiny of any regulations that may be made pursuant to clause 26(2). This may be effected in the following manner:**

**Page 20, after line 21 – To insert -**

**(3) The regulations cannot be made in accordance with subsection (1) or (2) unless a draft of the regulations has first been approved by a resolution passed by both Houses of the Parliament of the State.**

---

<sup>71</sup> Stephen Argument, “Leaving it to the Regs” – The pros and cons of dealing with issues in subordinate legislation”, *Paper for Australia-New Zealand Scrutiny of Legislation Conference*, Brisbane, 26-28 July 2011, p19.

<sup>72</sup> As a result of the Committee’s recommendation in relation to the regulation-making power in clause 11 of the Business Names (Commonwealth Powers) Bill 2011, sub-clause (3) was added to the Bill as follows: “(3) The regulations cannot be made in accordance with subsection (1) or (2) unless a draft of the regulations has first been approved by a resolution passed by both Houses of the Parliament of the State.”



**Proposed Addition of subclause 26(3)**

- 5.61 The Department of Health has indicated that it was intended that the regulations would be ready for consideration by members of the SCoH in November 2012.<sup>73</sup> There would therefore be a considerable period of time after the coming into operation of clauses 25 and 26 of the Bill and the making of regulations under clause 26(2).
- 5.62 The Committee queried what would happen if the necessary modifications to the applied Commonwealth laws have not been made (by reason of disallowance of regulations or otherwise) at the time when the specified State Acts are excluded by operation of clause 26(2) of the Bill.<sup>74</sup>
- 5.63 In the Department's written response,<sup>75</sup> it was noted that the equivalent clause in the New South Wales version of the Bill, unlike the Model Bill and the corresponding legislation of the Commonwealth and the other States, addresses this situation. Clauses 22 and 23 of Schedule 6A of the *Health Services Act 1997* (NSW), as inserted by Schedule 1 of the *Health Services Amendment (National Health Reform Agreement) Act 2012* (NSW), provide as follows:

**22 Exclusion of legislation of this jurisdiction**

*The following Acts of this jurisdiction do not apply to or in respect of the Administrator or any function exercised or performed by the Administrator:*

- (a) *the Government Information (Public Access) Act 2009,*
- (b) *the Health Records and Information Privacy Act 2002,*
- (c) *the Ombudsman Act 1974,*
- (d) *the Privacy and Personal Information Protection Act 1998,*
- (e) *the Public Finance and Audit Act 1983,*
- (f) *the State Records Act 1998.*

<sup>73</sup> Answer to Question on Notice 3 from the hearing held on 22 August 2012.

<sup>74</sup> *Transcript of Evidence*, 22 August 2012, p17.

<sup>75</sup> Answer to Question on Notice 3 from the hearing held on 22 August 2012.

### **23 Application of Commonwealth Acts**

(1) *The following Acts apply (subject to subclause (2)) as laws of this jurisdiction to or in respect of the Administrator and any function exercised or performed by the Administrator:*

- (a) *the Archives Act 1983 of the Commonwealth,*
- (b) *the Australian Information Commissioner Act 2010 of the Commonwealth,*
- (c) *the Freedom of Information Act 1982 of the Commonwealth,*
- (d) *the Ombudsman Act 1976 of the Commonwealth,*
- (e) *the Privacy Act 1988 of the Commonwealth.*

(2) *Each of those Acts so applies subject to the modifications made by regulations made under the National Health Reform Act 2011 of the Commonwealth with the agreement of all the members of the Standing Council on Health.*

(3) *Until regulations referred to in subclause (2) are made, subclause (1) does not have effect and instead the legislation referred to in clause 22 (a)–(d) and (f) applies to or in respect of the Administrator and any function exercised or performed by the Administrator.*

5.64 The Department advised that Hon Kim Hames MLA, Minister for Health has indicated that he would support an amendment to the Bill having the same effect as clause 23(3).<sup>76</sup>

5.65 This would appear to deal with the Committee's concerns but would also have the effect that the Administrator may at one time be governed by three sets of oversight and administrative legislation. Namely:

---

<sup>76</sup> Ibid.

- i) the specified Commonwealth Acts in relation to functions exercised under the Commonwealth, Victorian, Tasmanian, South Australian, Queensland, Australian Capital Territory and Northern Territory NHRA legislation;
- ii) applicable New South Wales legislation in relation to functions exercised under the *Health Services Act 1997* (NSW); and
- iii) applicable Western Australian legislation in relation to functions exercised under the current Bill if enacted.

5.66 In this context, the Committee again notes the comments of the Information Commissioner that the use of different oversight models for different regulatory schemes will increase the complexity and fragmentation of oversight laws and will result in inefficiencies and unnecessary duplication of effort and expenditure.<sup>77</sup>

5.67 Notwithstanding these comments, the Committee takes the view that the proposed addition of subclause 26(3) is an appropriate amendment and makes the following recommendation.

**Recommendation 6: The Committee recommends that clause 26 of the National Health Funding Pool Bill 2012 be further amended in the following manner:**

**Page 20, after line 21 – To insert the following subclause –**

**Until regulations referred to in subsection (2) are made, subsection (1) does not have effect and instead the legislation referred to in section 25 (a), (b) and (d) applies to or in respect of the Administrator and any function exercised or performed by the Administrator.**

5.68 The Committee commends its report and recommendations to the Legislative Council.



**Hon Adele Farina MLC**  
**Chairman**  
**Date: 16 October 2012**

<sup>77</sup> See paragraph 5.33.1.



# APPENDIX 1

## LIST OF STAKEHOLDERS AND SUBMISSIONS

---

Mr Sven Bluemmel <b>(Submission number 4)</b> Information Commissioner Office of the Information Commissioner
Mr Chris Fields Ombudsman Western Australia
Ms Cathrin Cassarchis State Archivist and Executive Director State Records Office of Western Australia
Mr Mal Wauchope <b>(Submission number 2)</b> Public Sector Commissioner Public Sector Commission
Mr Tim Marney Under Treasurer Department of Treasury
Mr Malcolm Peacock Clerk of the Legislative Council and Clerk of the Parliaments Parliament of Western Australia
<b>Other submissions received</b>
Ms Sandra Boulter <b>(Submission number 3)</b> Principal Solicitor and General Manager Mental Health Law Centre (WA) Inc
Hon Giz Watson MLC, North Metropolitan Region <b>(Submission number 1)</b>



## APPENDIX 2

### DIFFERENCES BETWEEN THE BILL AND THE MODEL BILL

*\*Denotes minor or inconsequential change*

*\*\*Denotes not common provision – jurisdictions are required to include provisions on the establishment and operation of their own pool accounts that give effect to the policy of the NHRA. Part 3 of the Model Bill is an example only of how those provisions could be drafted. It is essential that the State provisions be located with the common provisions and that the Pool Account is a bank account rather than a ledger.*

Model Bill Provision		National Health Funding Pool Bill	
Clause		Clause	
*3(1)	No definition of “CEO”	3(1)	Definition of “CEO”(used in clause 12(1) and 13(1) – Not common provisions)
3(6)	“The [Name of local Interpretation Act of jurisdiction] does not apply to or in respect of this Act”	3(6)	Addition of the words “Except in Parts 7 and 8 <sup>78</sup> and as provided in section 30(2) <sup>79</sup> ...”
*5(2)	“Chair of the Standing Council on Health”	5(2)	“Chair of the Standing Council”
*10(1)(b)	“Part 5”	10(1)(b)	“Part 4”
10(4)	Jurisdictional note. “Jurisdictions may need to declare that the above directions are not legislative, statutory or other specified instruments to avoid local jurisdiction laws that may require tabling/disallowance etc.”	10(4)	No such declaration provided.
Part 3**	State Pool Accounts – the National Health Funding Pool [clause 11 – 14 inclusive are not common provisions]	Part 3	Extensive differences allowed for as set out below.
11**	Establishment of the State Pool Account with the Reserve Bank.	12	Establishment of State Pool Account with Reserve Bank or another bank specified under the NHRA.
Part 3**	No equivalent provision.	13(1)	“The State Pool Account is to be administered by the CEO.” <sup>80</sup>

<sup>78</sup> Dealing with the repeal and amendment of existing legislation.

<sup>79</sup> Refers to the operation of the *Interpretation Act 1984* Part VI in relation to regulations made under the Act.

Part 3**	No equivalent provision.	13(2)(d)	There is to be credited to the State Pool Account [...] any other amount required by law to be credited to the State Pool Account.
12(d)**	Interest paid on money deposited in the State Pool Account is payable into the State Pool Account unless directed otherwise by the responsible Minister.	14(2)	Interest earned on money in the State Pool Account is to be credited to the Consolidated Account.
13(7)**	For the purposes of section 13 the funding of a local hospital network includes the funding of another party on behalf of the network for corporate or other services provided to the network by that other party,		No equivalent provision.
14**	Establishment of State Managed Funds.	Part 4	Detailed provisions establishing two agency special purposes accounts as State Managed Funds for assisting in the administration of the <i>Hospitals and Health Services Act 1927</i> and the <i>Mental Health Act 1996</i> , and for money to be credited and debited to the State Managed Funds.
23(5)	“Any information relating to a jurisdiction that is provided <b>by the Administrator</b> to another jurisdiction...”	24(5)	“Any information relating to a jurisdiction that is provided <b>under this section</b> to another jurisdiction...”
25(2)	“...the regulations made under the <i>National Health Reform Act 2011</i> of the Commonwealth with the agreement of all the members of the Standing Council on Health.”	26(2)	“... <b>the regulations.</b> ” <sup>81</sup>

<sup>80</sup> Note clause 10(1)(c): The Administrator is to make payments from each State Pool Account in accordance with the directions of the State concerned, and clause 14(3): Payments from the State Pool Account are to be made by the Administrator strictly in accordance with the directions of the responsible Minister.

<sup>81</sup> Note that the *Interpretation Act 1984*, s1 definition of “the regulations” is excluded by virtue of clause 3(6), but that the Explanatory Memorandum states that it is intended to refer to State regulations made under this Act.



## APPENDIX 3

### PREVIOUS NATIONAL SCHEMES APPLYING COMMONWEALTH OVERSIGHT AND ADMINISTRATIVE LAWS

---

In the course of this inquiry, the Committee has considered previous instances of uniform legislative schemes in which Commonwealth Acts were applied as laws of Western Australia, with a provision for modification of those Commonwealth Acts by regulation. Specifically, the Committee considered the approaches taken in the following Bills:

- *Occupational Licensing National Law (WA) Bill 2010*;
- *Health Practitioner Regulation National Law (WA) Bill 2010*.

#### ***Occupational Licensing National Law (WA) Bill 2010***

The *Occupational Licensing National Law (WA) Bill 2010*, the subject of this Committee's sixty-first report, contained provisions similar in effect to clauses 25 and 26 of the current Bill.

The *Occupational Licensing National Law (WA) Bill* provided that Commonwealth Acts - the *Privacy Act 1988*, *Freedom of Information Act 1982* and *Archives Act 1983* - applied to the Occupational Licensing National Law, which was applied by the Bill as Western Australian legislation. Equivalent State Acts were excluded except to the extent that functions were exercised by State entities. On each occasion of application of a Commonwealth Act, power was conferred for "national regulations" to be made by the Ministerial Council amending the primary legislation as it applied to the national law.

As in the case of the current Bill, the Departmental officers with the conduct of the *Occupational Licensing National Law (WA) Bill* indicated in their evidence that they did not know what provisions it was proposed to alter as the work had not been done.<sup>82</sup>

This issue was highlighted in the Committee's report on the *Occupational Licensing National Law (WA) Bill* as an illustration of the reasons why the Committee recommended the Bill not be passed.

#### ***Health Practitioner Regulation National Law (WA) Act 2010***

The *Health Practitioner Regulation National Law (WA) Act 2010* applies the Health Practitioner Regulation National Law (set out in the Schedule to the Act) as a law of Western Australia.

---

<sup>82</sup> Standing Committee on Uniform Legislation and Statutes Review, Report 61, *Occupational Licensing National Law (WA) Bill 2010*, paragraph 3.15.

Section 7(1) of the *Health Practitioner Regulation National Law (WA) Bill (Health Practitioner Bill)*, as considered by this Committee in its fifty-second report, provided that various Western Australian oversight and administrative Acts do not apply to the Health Practitioner Regulation National Law (Western Australia) or to the instruments made under that Law. In their place, various sections of the Health Practitioner Regulation National Law (Western Australia) provided for the application of Commonwealth laws, including the *Privacy Act 1988 (Cth)*, *Freedom of Information Act 1982 (Cth)* and *Ombudsman Act 1976 (Cth)*.

The Committee noted that the Health Practitioner National Law provided that regulations published by the Victorian Government Printer would have effect in Western Australia on the date or dates specified in the regulation regardless of whether or not the Western Australian Parliament and community have been informed of the publication of the regulation.<sup>83</sup>

As a result of recommendations made by this Committee in its report, to ensure that regulations made under the National Law were subject to the scrutiny of the Western Australian parliament,<sup>84</sup> sections 7(2) and 245(3) of the Act were added with the effect that sections 41 and 42 of the Interpretation Act 1894 applied to require tabling of the regulations in the Western Australian Parliament.

---

<sup>83</sup> Standing Committee on Uniform Legislation and Statutes Review, Report 52, *Health Practitioner Regulation National Law (WA) Bill 2010*, paragraph 3.28.

<sup>84</sup> *Ibid*, pp 35-37.