

**41ST PARLIAMENT**



## **Report 137**

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

*Mutual Recognition (Western Australia) Amendment Bill 2021*

---

Presented by  
Hon Donna Faragher MLC (Chair)

February 2022

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

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

Hon Donna Faragher MLC (Chair)

Hon Martin Pritchard MLC (Deputy Chair)

Hon Matthew Swinbourn MLC

Hon Rosie Sahanna MLC

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

Shoshanna McNerney (Advisory Officer (Legal))

Jemma Grayson (Committee Clerk)

### **Address:**

Parliament House

4 Harvest Terrace, West Perth WA 6005

Telephone: 08 9222 7300

Email: [lcco@parliament.wa.gov.au](mailto:lcco@parliament.wa.gov.au)

Website: [www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)

**ISBN 978-1-925580-53-2**



# CONTENTS

---

- Executive summary** ..... i
- 1 Introduction** ..... 1
- 2 Inquiry procedure** ..... 1
- 3 Supporting documents** ..... 1
- 4 Mutual Recognition (Western Australia) Amendment Bill 2021** ..... 2
- 5 Clauses that impinge upon Parliamentary sovereignty and law-making powers** ..... 3
  - Clause 2(b) – Commencement clause ..... 3
  - Clause 6 – Section 6 replaced ..... 5
  - Review clause ..... 10
- Appendix 1 Premier’s response to committee’s questions** ..... 13
- Glossary** ..... 18

## EXECUTIVE SUMMARY

---

- 1 The Mutual Recognition (Western Australia) Amendment Bill 2021 (Bill) proposes to:
  - re-adopt the *Mutual Recognition Act 1992* (Cth) and adopt the *Mutual Recognition Amendment Act 2021* (Cth) by referring the state's powers in relation to these Acts to the Commonwealth pursuant to section 51 (xxxvii) of the Constitution
  - consequentially amend a number of Western Australian Acts.
- 2 The purpose of the re-adoption of the *Mutual Recognition Act 1992* (Cth) and the adoption of the *Mutual Recognition Amendment Act 2021* (Cth) is to enter into the Automatic Mutual Recognition Scheme for occupational licenses and registrations (AMR Scheme). The AMR Scheme allows a person who is registered or licenced for an occupation in one state or territory to be allowed to perform the same work in another state or territory, without having to re-apply for a licence in a different jurisdiction.
- 3 The Bill amends the *Mutual Recognition (Western Australia) Act 2020* and consequentially amends 13 Western Australian Acts.
- 4 The Bill impacts upon the Parliamentary sovereignty and law-making powers of the Western Australian Parliament in the following ways:
  - The commencement clause provides that the majority of the Bill comes into operation on a day fixed by proclamation.
  - The Bill introduces a clause with a Henry VIII effect, providing the Executive with the power to terminate the adoptions of the *Mutual Recognition Act 1992* (Cth) and/or the *Mutual Recognition Amendment Act 2021* (Cth).
  - The Bill does not contain any clauses to allow Parliament the opportunity to review the operation and effectiveness of the *Mutual Recognition (Western Australia) Act 2020*.
- 5 The Committee has proposed two recommendations to address some of these sovereignty issues.
- 6 The Committee draws these clauses to the Legislative Council's attention for consideration during debate on the Bill.

### Findings and recommendations

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

#### FINDING 1

Page 4

The lack of an express commencement date in clause 2(b) of the Mutual Recognition (Western Australia) Amendment Bill 2021 is an erosion of the Parliament's sovereignty and law-making powers.

#### FINDING 2

Page 9

Clause 6, proposed section 8 of the Mutual Recognition (Western Australia) Amendment Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

**RECOMMENDATION 1**

Page 9

The Mutual Recognition (Western Australia) Amendment Bill 2021 be amended as follows:

Page 6, lines 29 to 31 — To delete the lines and insert:

(2) However, the Governor cannot —

(a) make a proclamation under subsection (1) unless a draft of the proclamation has first been approved by a resolution passed by both Houses of Parliament; or

(b) fix a day under subsection (1)(b) that is before a day fixed under subsection (1)(c).

Page 7, after line 9 — To insert:

(1A) However, the Governor cannot make a revoking proclamation unless a draft of the revoking proclamation has first been approved by a resolution passed by both Houses of Parliament.

**FINDING 3**

Page 11

The lack of a review provision in the Mutual Recognition (Western Australia) Amendment Bill 2021 impacts Parliamentary sovereignty.

The Mutual Recognition (Western Australia) Amendment Bill 2021 be amended as follows:

Page 6, after line 19 — To insert:

#### **7A. Tabling documents relating to scheme reviews**

(1) In this section —

***intergovernmental agreement*** means the Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration entered into by the Commonwealth, the States and the Northern Territory on 11 December 2020, as in force from time to time;

***scheme review*** means a review of the operation and effectiveness of the intergovernmental agreement and the Commonwealth Act carried out under clause 12 of the intergovernmental agreement.

(2) Subsection (3) applies if —

- (a) a scheme review is carried out; and
- (b) a report is prepared by the person carrying out the review; and
- (c) the Minister receives the report.

(3) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after the Minister receives the report, but not later than 6 sitting days of the House after the Minister receives it.

(4) If a report to which subsection (3) applies contains sensitive, confidential or personal information, the Minister may comply with subsection (3) by removing the sensitive, confidential or personal information from the report before causing the document to be laid before each House.

# 1 Introduction

- 1.1 On 17 November 2021 the Mutual Recognition (Western Australia) Amendment Bill 2021 (Bill) was introduced into the Legislative Council.<sup>1</sup>
- 1.2 The Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126(1). The Committee is required to report by 15 February 2022, being the first Legislative Council sitting day following the expiry of the 45 day reporting period.
- 1.3 The Bill facilitates Western Australia's participation in the Automatic Mutual Recognition Scheme for occupational licenses and registrations (AMR Scheme). Western Australia entered into the AMR Scheme through the Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration signed by the Commonwealth and all states and territories except the Australian Capital Territory on 11 December 2020 (IGA).
- 1.4 The AMR Scheme streamlines occupational registration processes where individuals want to work in a second or subsequent jurisdiction:

The new scheme allows a person who is registered or licensed for an occupation in one state or territory to be authorised to perform the same work in another state or territory, without the need to apply for recognition and pay for a further licence.<sup>2</sup>
- 1.5 The objective of the AMR Scheme is to:
  - promote the freedom of movement of service providers across jurisdictions by reducing unnecessary regulatory burden
  - maintain high standards of consumer protection, and the health and safety of workers and the public.<sup>3</sup>

## 2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its webpage at [Uniform Legislation Committee homepage](#). The general public was notified of the referral via social media.<sup>4</sup>
- 2.2 Under its terms of reference, the Committee is confined to investigating whether a Bill has an impact on the Parliamentary sovereignty and law-making powers of the Parliament of Western Australia. The Committee is not able to consider any other matter, including the policy of the Bill.
- 2.3 Given the Committee's terms of reference, the Committee did not seek further submissions.

## 3 Supporting documents

- 3.1 The Committee received copies of the Bill, its second reading speech and Explanatory Memorandum (EM) when the Bill was introduced into the Legislative Council.

---

<sup>1</sup> By Hon Sue Ellery MLC, Leader of the House.

<sup>2</sup> Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 17 November 2021, p 5522b-5523a.

<sup>3</sup> Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration, page 2.

<sup>4</sup> Legislative Council, 9 August 2021, retrieved from <https://twitter.com/WALegCouncil/status/1460897546776113152?cxt=HHwWgMCjjYSIk8YoAAAA>

3.2 Standing Order 126(5) states:

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

3.3 The Committee received the documentation required under Ministerial Office Memorandum MM 2007/01 on 25 November 2021, the 6<sup>th</sup> business day after referral.

3.4 Given the time constraints that are placed on the Committee, it is critical that the documentation is provided to the Committee in accordance with Standing Order 126(5).

## **4 Mutual Recognition (Western Australia) Amendment Bill 2021**

4.1 The *Mutual Recognition Act 1992* (Cth) (Commonwealth Act) is the overarching Commonwealth legislation for all states and territories regarding mutual recognition. Each state and territory has its own mutual recognition legislation.

4.2 In 1995, Western Australia began to participate in mutual recognition arrangements for the free movement for goods and services and re-adopted that participation in 2020 with the *Mutual Recognition (Western Australia) Act 2020* (WA Act).

4.3 The Bill proposes to amend the WA Act to adopt amendments made to the Commonwealth Act introducing the AMR Scheme.<sup>5</sup> The Bill does not alter the operation of the mutual recognition of goods.<sup>6</sup>

4.4 The Leader of the House explained:

The new scheme will allow a person who is registered or licensed for an occupation in one state or territory to be authorised to perform the same work in another state or territory, without the need to apply for recognition and pay for a further licence.

This scheme will make it easier for registered and licensed workers to respond to job opportunities in Western Australia and assist in addressing current skills needs. For example, a registered builder from Victoria could begin work immediately in WA after notifying the regulator. The individual would not have to pay a fee to undertake the same activity. This would save the individual over \$900 and the time it would have taken to have their licence recognised, and will help them to start work without delay to support our thriving construction industry.<sup>7</sup>

4.5 The Bill adopts the Commonwealth Act and the *Mutual Recognition Amendment Act 2021* (Cth) (Commonwealth Amendment Act) for the purposes of section 51 (xxxvii) of the *Australian Constitution*<sup>8</sup> (Constitution).

---

<sup>5</sup> The amendments were made in the *Mutual Recognition Amendment Act 2021* (Cth). Mutual recognition of goods allows goods sold in one Australian state or territory to be sold in another without needing to meet further requirements.

<sup>6</sup> Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 17 November 2021, pp 5522b-23a.

<sup>7</sup> *ibid.*

<sup>8</sup> *Commonwealth of Australia Constitution Act.*



- 4.6 Section 51 (xxxvii) of the Constitution provides that the Commonwealth Parliament has power to make laws with respect to:
- matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.
- 4.7 The Bill provides that the Commonwealth Act is adopted as originally enacted and any amendments made to it before the Bill receives Royal Assent.<sup>9</sup> The referral of State power to the Commonwealth under the Bill is limited to provisions of the Commonwealth Act and the Commonwealth Amendment Act.
- 4.8 The Bill comprises 3 Parts and has 54 clauses. Part 2 of the Bill amends the WA Act to continue to adopt the Commonwealth Act and to adopt the Commonwealth Amendment Act. Part 3 of the Bill amends the following Western Australia Acts:
- *Architects Act 2004*
  - *Betting Control Act 1954*
  - *Debt Collectors Licensing Act 1964*
  - *Electricity Act 1945*
  - *Employment Agents Act 1976*
  - *Food Act 2008*
  - *Gas Standards Act 1972*
  - *Land Valuers Licensing Act 1978*
  - *Motor Vehicle Dealers Act 1973*
  - *Motor Vehicle Repairers Act 2003*
  - *Real Estate and Business Agents Act 1978*
  - *Settlement Agents Act 1981*
  - *Teacher Registration Act 2012*

## 5 Clauses that impinge upon Parliamentary sovereignty and law-making powers

### Clause 2(b) – Commencement clause

- 5.1 Clause 2 of the Bill reads:

#### **Commencement**

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation.

---

<sup>9</sup> Mutual Recognition (Western Australia) Amendment Bill 2021 cl 4.

5.2 Clause 2(b) provides that the entirety of the Act apart from Part 1 will come into operation on a day fixed by proclamation. The Committee considers this is an erosion of Parliamentary sovereignty because the Executive controls the commencement date, not Parliament. The Committee has previously stated there should be sound reasons for Parliament to permit commencement by proclamation.<sup>10</sup>

#### *Premier's position*

5.3 The Committee asked the Premier:

- when the Act in its entirety will come into operation
- why the Bill does not contain a commencement date.

5.4 In response, the Premier stated:

The Western Australian Government is working towards commencing the Act in its entirety on 1 July 2022, pending the passage of the Bill and the finalisation of consequential amendments to subsidiary legislation.

A specific commencement date has not been prescribed in the Bill to allow for some minor flexibility for any unexpected delays, such as the drafting of subsidiary legislation and any related legislative instruments.<sup>11</sup>

5.5 The Premier also stated that the AMR Scheme is a priority for the Western Australian Government and the IGA provides for implementation of the AMR Scheme by 1 July 2021 or as soon as the legislative amendments can be made.<sup>12</sup>

#### *Committee comment*

5.6 The Committee notes the Premier's position in relation to this commencement clause. The lack of an express commencement clause in a Bill is an erosion of Parliamentary sovereignty. However, the Committee considers that due to the following, there is minimal risk that the Bill will not become operational:

- the Bill is a priority for the Western Australian Government
- the IGA requires the legislation to be implemented as soon as the legislative amendments can be made.

5.7 The Committee draws the lack of an express commencement date to the attention of the Legislative Council for consideration during debate on the Bill.

#### **FINDING 1**

The lack of an express commencement date in clause 2(b) of the Mutual Recognition (Western Australia) Amendment Bill 2021 is an erosion of the Parliament's sovereignty and law-making powers.

---

<sup>10</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, p 12; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 136, *Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application (Levy) Bill 2021*, 12 October 2021, p 6.

<sup>11</sup> Hon Mark McGowan MLA, Premier, letter, 22 December 2021, p 2.

<sup>12</sup> *ibid.*

## Clause 6 – Section 6 replaced

5.8 Clause 6 replaces section 6 of the WA Act. Section 6 currently provides that the adoption of the Commonwealth Act under the WA Act ends on 28 February 2031 or if the Governor fixes an earlier day (sunset clause).

5.9 Clause 6 proposes sections 6, 7, 8 and 9. Proposed section 8 reads:

### 8. Termination of adoptions

(1) The Governor may by proclamation fix a day as the day on which —

(a) the adoptions under both section 4(1) and (1A) are to terminate; or

(b) the adoption under section 4(1) is to terminate; or

(c) the adoption under section 4(1A) is to terminate.

(2) However, the Governor cannot fix a day under subsection (1)(b) that is before a day fixed under subsection (1)(c).

(3) If the adoption under section 4(1A) terminates before the adoption under section 4(1), the termination of the adoption under section 4(1A) does not affect the continued operation in the State of the Commonwealth Act as adopted under section 4(1).

5.10 Section 4(1) of the WA Act reads:

The State of Western Australia adopts the Commonwealth Act as originally enacted and any amendments made to it before this Act receives the Royal Assent.

5.11 Proposed section 4(1A) has been inserted into the WA Act by clause 5 of the Bill and reads:

Without limiting subsection (1), the State adopts the amendments made to the Commonwealth Act by the *Mutual Recognition Amendment Act 2021* (Commonwealth).

5.12 The EM provides that:

This section removes the ending of the adoption on 28 February 2031 and the automatic expiry on termination and replaces it with the Governor being able to terminate the adoption by proclamation.

This section allows the Governor to terminate both adoptions under Section 4, or one or the other. This provides the State with the option to cease participation in the AMR scheme whilst continuing to participate in the existing mutual recognition of goods and occupations.<sup>13</sup>

5.13 Currently, the adoption of the Commonwealth Act under the WA Act ends on 28 February 2031 and will need to be extended by the operation of another bill.

5.14 Clause 6 gives the Governor power to terminate the adoptions of the Commonwealth legislation by proclamation. This results in Parliament's legislative power being sub-delegated to the Executive. Western Australia generally does not allow for the disallowance of proclamations.<sup>14</sup> As a result, Parliament will be giving up the power to decide whether the adoptions of the Commonwealth legislation should be extended.

---

<sup>13</sup> Mutual Recognition (Western Australia) Amendment Bill 2021, *Explanatory Memorandum*, Legislative Council, p 3.

<sup>14</sup> *Interpretation Act 1984* s 42(8). However there are some exceptions: see *Registration of Deeds Act 1856* s 22AB(5), *Strata Titles Act 1985* s 131B(5), *Transfer of Land Act 1893* s 182AB(5) and *Valuation of Land Act 1978* s 51(5).

- 5.15 Clause 6 has a Henry VIII effect. A 'Henry VIII clause' is a section in an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.<sup>15</sup> The Committee's position on Henry VIII clauses has been well documented in previous reports.<sup>16</sup> Henry VIII clauses:
- offend the principle of the separation of powers
  - limit Parliamentary oversight and subvert the appropriate relationship between Parliament and the Executive<sup>17</sup>
  - give insufficient regard to the institution of Parliament as the supreme legislature
  - delegate to the Executive the Parliament's sovereign function to legislate.
- 5.16 The purpose of a proposed Henry VIII clause should be clearly explained and justified in the Government's explanatory materials in support of its bill. This enables the Legislative Council to weigh the desirability of such a clause in the particular circumstances against its impact on the institution of Parliament.<sup>18</sup>
- 5.17 The former committee examined a similar clause in report 121 on the Child Support (Commonwealth Powers) Bill 2018 (Now the *Child Support (Commonwealth Powers) Act 2019*).
- 5.18 Section 6 of the *Child Support (Commonwealth Powers) Act 2019* reads:
- (1) The Governor may, at any time, by proclamation, fix a day (the termination day) as the day on which the adoption and the reference are to terminate.
  - (2) The termination day must be no earlier than the first day after the end of the period of 12 months beginning with the day on which the proclamation is published in the Gazette.
  - (3) The Governor may, by proclamation (a revoking proclamation), revoke a proclamation made under subsection (1).
  - (4) A revoking proclamation has effect only if published before the termination day.
  - (5) If a revoking proclamation has effect the revoked proclamation is taken never to have been made for the purposes of sections 4(2) and 5(5).

---

<sup>15</sup> The Senate, Standing Committee for the Scrutiny of Delegated Legislation, Exemption of delegated legislation from parliamentary oversight, 16 March 2021, pp 77 - 8. See: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Exemptfromoversight/Final\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report)

<sup>16</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 70, *Business Names (Commonwealth Powers) Bill 2011*, March 2012, p 7, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 91, *Rail Safety National Law (WA) Bill 2014*, March 2015, pp 19–20, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 121, *Child Support (Commonwealth Powers) Bill 2018*, 12 March 2019, p 13, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, pp 31-2. A detailed review of Henry VIII clauses is also contained in Western Australia, Legislative Council, Standing Committee on Legislation, report 19, *Revenue Laws Amendment Bill 2012*, September 2012.

<sup>17</sup> The Senate, Standing Committee for the Scrutiny of Delegated Legislation, Exemption of delegated legislation from parliamentary oversight, 16 March 2021, p 120, para 7.110. See: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Exemptfromoversight/Final\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report).

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

(6) A revoking proclamation does not prevent the making of a further proclamation under subsection (1).

(7) A proclamation cannot be made under subsection (1) or (3) unless a draft of the proclamation has first been approved by a resolution passed by both Houses of the Parliament of the State.

5.19 Section 6(7) of the *Child Support (Commonwealth Powers) Act 2019* provides that a proclamation cannot be made under subsection (1) or (3) unless a draft of the proclamation has been approved by a resolution passed by both Houses of the Parliament of the State. This subsection is missing from proposed section 8 of the Bill.

5.20 The former committee held hearings with the Solicitor-General and asked why the clause required the draft proclamation to be approved by both Houses of Parliament before it can be made. The Solicitor-General stated:

The referral of power is something that has to occur by Parliament and it is something that is a referral of legislative power. Because of that, and to maintain the sovereignty of Parliament, I understand the policy decision may well be driven by the fact that if Parliament is referring it, it should be the body that takes it back because we are dealing here with legislative power and it is not appropriate for the executive to be making that decision.<sup>19</sup>

...if there is a termination and it is to occur only by executive proclamation and without the approval of Parliament, the legal validity of that is at greater risk than one where Parliament is exercising its own control over the return of legislative power.<sup>20</sup>

5.21 Sections similar to section 6 of the *Child Support (Commonwealth Powers) Act 2019* have been used in the following Western Australia Acts. All contain the requirement for both Houses of Parliament to approve the draft proclamation before it can be made:

- *Terrorism (Commonwealth Powers) Act 2002*
- *Personal Property Securities (Commonwealth Laws) Act 2011*
- *Business Names (Commonwealth Powers) Act 2012*.

5.22 The former committee found that:

On the basis of advice from the Solicitor-General, and notwithstanding that the processes proposed involve Henry VIII clauses, it is preferable that any termination of the adoption and reference should be by way of proclamation first approved by both Houses of Parliament, as is provided for in clause 6(7) of the *Child Support (Commonwealth Powers) Bill 2018*.<sup>21</sup>

The risk to the State's Parliamentary sovereignty and its citizens is, on balance, acceptable having regard to the safeguards that have been proposed in the *Child Support (Commonwealth Powers) Bill 2018*.<sup>22</sup>

---

<sup>19</sup> Joshua Thomson, Solicitor-General, Department of Justice, transcript of evidence, 11 February 2019, p 5.

<sup>20</sup> *ibid.*

<sup>21</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 121, *Child Support (Commonwealth Powers) Bill 2018*, Finding 3, p 17.

<sup>22</sup> *ibid*, Finding 4, p 17.

### *Premier's position*

5.23 The Committee asked the Premier why:

- section 6 has been deleted from the WA Act
- the requirement for both Houses of Parliament to approve the draft proclamation has not been included in proposed section 8 of the Bill?

5.24 In response, the Premier stated:

The sunset provision of 28 February 2031 has been removed and replaced with termination by proclamation, based on the following rationale.

- The AMR scheme builds on the MR scheme [mutual recognition scheme]; Western Australia has successfully participated in the MR since 1995.
- It reduces the risk of adverse effects to interstate trade and labour mobility if mutual recognition lapsed or was delayed due to the sunset provision.
- It reflects approaches taken in other jurisdictions participating in the AMR scheme and other State legislation that refers powers to the Commonwealth, including:
  - *Mutual Recognition (Victoria) Act 1998 (Vic)*;
  - *Mutual Recognition (South Australia) Act 1993 (SA) (once it is amended by the Mutual Recognition (South Australia) (Further Adoption) Amendment Act 2021)*;
  - *Mutual Recognition (Tasmania) Act 1993 (Tas) (once amended by the Mutual Recognition (Tasmania) Amendment Act 2021)*;
  - *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018 (WA)*; and
  - *Credit (Commonwealth Powers) Act 2010 (WA)*.<sup>23</sup>

The provision for both Houses of Parliament to approve the draft proclamation has not been included in the event the State was required to take action quickly in the interests of Western Australia.<sup>24</sup>

Although unlikely, if it was to become apparent that there were disadvantages for Western Australia in participating in the MR and/or the AMR, the State could take decisive action within a short time frame to terminate the adoption/s. In such a case, and particularly if Parliament is in recess or prorogued, it would not be practical for the State Government to obtain prior parliamentary approval for the proclamation.<sup>25</sup>

### *Committee comment*

5.25 Proposed section 8 is a Henry VIII clause. The Committee considers however, that Parliament's sovereignty would be preserved if there was a clause requiring both Houses of Parliament to review a draft proclamation to terminate the adoptions of Commonwealth legislation. Without this requirement, the legislative power to terminate the adoptions is placed solely in the hands of the Governor (and therefore the Executive).

---

<sup>23</sup> Hon Mark McGowan MLA, Premier, letter, 22 December 2021, p 3.

<sup>24</sup> *ibid.*, p 4.

<sup>25</sup> *ibid.*

- 5.26 The Committee acknowledges that other acts contain similar provisions permitting the Governor to terminate adoptions of Commonwealth legislation by way of proclamation.<sup>26</sup> The Committee also notes the Premier’s position that the State may need to terminate the adoptions quickly but the Committee considers a proclamation should not be made without Parliament’s review. Parliament must exercise control over the return of legislative power.
- 5.27 It is the Committee’s view that that any such proclamation must first be passed by both Houses. In forming this view, the Committee has noted the Solicitor-General’s evidence at paragraph 6.20. This evidence, which was provided to the former committee in report 121, shows that it is appropriate for Parliament to exercise control over the return of legislative power.<sup>27</sup>
- 5.28 Any termination of the adoptions of the Commonwealth Act and the Commonwealth Amendment Act under the WA Act should be by way of proclamation first approved by both Houses of Parliament.

## **FINDING 2**

Clause 6, proposed section 8 of the Mutual Recognition (Western Australia) Amendment Bill 2021 erodes the Western Australian Parliament’s sovereignty and law-making powers.

## **RECOMMENDATION 1**

The Mutual Recognition (Western Australia) Amendment Bill 2021 be amended as follows:

Page 6, lines 29 to 31 — To delete the lines and insert:

(2) However, the Governor cannot —

(a) make a proclamation under subsection (1) unless a draft of the proclamation has first been approved by a resolution passed by both Houses of Parliament; or

(b) fix a day under subsection (1)(b) that is before a day fixed under subsection (1)(c).

Page 7, after line 9 — To insert:

(1A) However, the Governor cannot make a revoking proclamation unless a draft of the revoking proclamation has first been approved by a resolution passed by both Houses of Parliament.

---

<sup>26</sup> *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018 (WA)* and the *Credit (Commonwealth Powers) Act 2010 (WA)* both contain provisions similar to proposed section 8 of the Bill. Parliament has passed these Acts without a clause requiring both Houses of Parliament to approve the Governor’s proclamation.

<sup>27</sup> Paragraph 6.20.

## Review clause

5.29 The Bill does not contain a review clause. Thornton defines a review clause as:

a clause [t]he purpose of [which] is to oblige the responsible Minister or some other identified authority or person to review the operation of legislation after a specified period and to report to Parliament with appropriate recommendations.<sup>28</sup>

A review clause also has the advantage, when compared with a sunset clause, that no attempt to speculate on the likely state of affairs years ahead is necessary; in other words the clause does not presume to legislate in the early dawn for the post-sunset night.<sup>29</sup>

5.30 The Committee has previously commented on the importance of review clauses in uniform legislation.<sup>30</sup>

5.31 The IGA provides that the operation and effectiveness of the IGA and the Commonwealth Act should be reviewed by the Council on Federal Financial Relations every five years. The review is in consultation with other relevant ministerial bodies, supported by an independent evaluation by a body such as the Australian Government Productivity Commission.<sup>31</sup> The five yearly review in the IGA is not required to be tabled in either House of Parliament.

### *Premier's position*

5.32 The Committee wrote to the Premier to ask why there are no review clauses included in the Bill.

5.33 In response, the Premier stated:

The Bill builds on the existing *Mutual Recognition (Western Australia) Act 2020* which does not require the review referred to in Part VII of the Intergovernmental Agreement Relating to Mutual Recognition to be tabled in both Houses of Parliament.

No other participating jurisdiction has included this clause and other Western Australian legislation that refers powers to the Commonwealth does not include this clause, such as the *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* and the *Credit (Commonwealth Powers) Act 2010*.

As the Committee has noted in its correspondence of 9 December 2021, there are a number of review mechanisms outlined in the Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration (IGA). Clause 12 of the IGA provides that a review of the IGA and the *Mutual Recognition (Commonwealth) Act 1992* more broadly be undertaken every five years, in consultation with other relevant ministerial bodies, supported by an independent evaluation by a body such as the Australian Government Productivity Commission.

Noting the above, a separate review mechanism at the State level would result in duplication. No other jurisdiction has included a review clause in their referral or adoption legislation and there are other examples of Western Australian legislation

---

<sup>28</sup> Professor Helen Xanthaki, *Thornton's, Legislative Drafting*, (Fifth Edition, 2013) Bloomsbury Professional, London, p 265.

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

<sup>30</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 134, *Transport Legislation Amendment (Identity Matching Services) Bill 2021*, 10 August 2021, pp 13-5.

<sup>31</sup> Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration, clause 12, p 5.



referring powers to the Commonwealth that do not have a review clause, such as the *Child Support (Commonwealth Powers) Act 2019*, the *Terrorism (Commonwealth Powers) Act 2002*, the *Personal Property Securities (Commonwealth Laws) Act 2011* and the *Credit (Commonwealth Powers) Act 2010*.<sup>32</sup>

*Committee comment*

- 5.34 The Committee notes that the existing WA Act does not contain a review clause. Nevertheless, the sunset clause ensures that the adoptions are terminated by 28 February 2031 at the latest. This ensures that any continuation of the referral of legislative power after 28 February 2031 is considered by Parliament. Without the termination date in the sunset clause, the referral of legislative power could endure indefinitely without Parliament's consideration.
- 5.35 The Committee notes the Premier's view that a separate review mechanism at State level would result in duplication but there should be some form of Parliamentary oversight given that the review required by the IGA is not required to be tabled in Parliament. Parliamentary sovereignty is impacted if there is no review mechanism.
- 5.36 In this instance, the Committee considers that Parliamentary sovereignty would be enhanced by the tabling of the review referred to in clause 12 of the IGA in both Houses of Parliament. This will avoid duplication but provide Parliament with the information from the review.

**FINDING 3**

The lack of a review provision in the Mutual Recognition (Western Australia) Amendment Bill 2021 impacts Parliamentary sovereignty.

---

<sup>32</sup> Hon Mark McGowan MLA, Premier, letter, 22 December 2021, p 4.

## RECOMMENDATION 2

The Mutual Recognition (Western Australia) Amendment Bill 2021 be amended as follows:

Page 6, after line 19 — To insert:

### 7A. Tabling documents relating to scheme reviews

(1) In this section —

***intergovernmental agreement*** means the Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration entered into by the Commonwealth, the States and the Northern Territory on 11 December 2020, as in force from time to time;


***scheme review*** means a review of the operation and effectiveness of the intergovernmental agreement and the Commonwealth Act carried out under clause 12 of the intergovernmental agreement.

(2) Subsection (3) applies if —

- (a) a scheme review is carried out; and
- (b) a report is prepared by the person carrying out the review; and
- (c) the Minister receives the report.

(3) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after the Minister receives the report, but not later than 6 sitting days of the House after the Minister receives it.

(4) If a report to which subsection (3) applies contains sensitive, confidential or personal information, the Minister may comply with subsection (3) by removing the sensitive, confidential or personal information from the report before causing the document to be laid before each House.



Hon Donna Faragher MLC

**Chair**

# APPENDIX 1

---

## PREMIER'S RESPONSE TO COMMITTEE'S QUESTIONS



---

### Premier of Western Australia

Our Ref: 59-305922

Hon Donna Faragher MLC  
Chair  
Standing Committee on Uniform Legislation and Statutes Review  
[unileg@parliament.wa.gov.au](mailto:unileg@parliament.wa.gov.au)

Dear Ms Faragher

#### **MUTUAL RECOGNITION (WESTERN AUSTRALIA) AMENDMENT BILL 2021**

Thank you for your correspondence of 9 December 2021 seeking further information about the Mutual Recognition (Western Australia) Amendment Bill 2021.

Please find responses to the Committee's questions at **Attachment A**.

Should the Committee require any further information, please contact Mrs Ashley Sakala, Principal Policy Officer, at [Ashley.Sakala@dpc.wa.gov.au](mailto:Ashley.Sakala@dpc.wa.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mark McGowan'.

Mark McGowan MLA  
**PREMIER**

22 DEC 2021

2 Havelock Street, West Perth, Western Australia 6005  
Telephone: +61 8 6552 5000 Facsimile: +61 8 6552 5001 Email: [WA-Government@dpc.wa.gov.au](mailto:WA-Government@dpc.wa.gov.au)  
[www.premier.wa.gov.au](http://www.premier.wa.gov.au)

**Attachment A – Response to queries of 9 December 2021 from the Standing Committee on Uniform Legislation and Statutes Review (Committee) on the Mutual Recognition (Western Australia) Amendment Bill 2021 (Bill)**

**CLAUSE 2(B) – COMMENCEMENT CLAUSE**

**1.1 By when do you expect that the Act in its entirety will have come into operation?**

The Western Australian Government is working towards commencing the Act in its entirety on 1 July 2022, pending the passage of the Bill and the finalisation of consequential amendments to subsidiary legislation.

The Committee's concerns are noted in relation to unproclaimed Acts and provisions, however the Automatic Mutual Recognition (AMR) scheme:

- is a priority for the Western Australian Government;
- aligns with other priorities such as addressing skills shortages; and
- is the subject of an Intergovernmental Agreement under which parties agreed to implementation by 1 July 2021 or as soon as the legislative amendments can be made.

**1.2 What are the reasons, if any, for the Bill not containing a commencement date?**

As outlined above, the Western Australian Government is committed to implementing the AMR scheme and has publicly announced 1 July 2022 as the expected commencement date. A specific commencement date has not been prescribed in the Bill to allow for some minor flexibility for any unexpected delays, such as the drafting of subsidiary legislation and any related legislative instruments.

**CLAUSE 6 – SECTION 6 REPLACED**

**1.1 What is the rationale for deleting section 6 of the *Mutual Recognition (Western Australia) Act 2020* and replacing it with clause 6 (particularly proposed section 8) of the Bill?**

Section 6 of the current *Mutual Recognition (Western Australia) Act 2020* provides for the termination of the adoption on 28 February 2031, or earlier by proclamation made by the Governor.

The Bill removes section 6 and replaces it with clause 6 which inserts:

- section 6 (disclosure to registration authorities in participating jurisdictions);
- section 7 (protection from liability for giving information);
- section 8 (termination of adoptions); and
- section 9 (revoking termination proclamations).

The termination of adoptions provision (proposed section 8) was amended to:

- remove the sunset date of 28 February 2031;
- provide that the Governor can terminate the adoption by proclamation;
- allow the adoption provided in section 4(1A) (which introduces the AMR scheme) to be terminated separately from the existing mutual recognition (MR) adoption provided by section 4(1); and
- ensure that the existing MR adoption 4(1) cannot be terminated without also terminating the new adoption 4(1A), noting the AMR scheme uses MR provisions as its legislative foundation and cannot operate without the existing MR adoption.

These amendments give effect to the desired policy outcome, which is to provide the State with the option to cease participation in the AMR scheme whilst continuing to participate in the existing MR scheme.

### **1.2 Why has the termination of adoption date of 28 February 2031 been removed from the *Mutual Recognition (Western Australia) Act 2020*?**

The sunset provision of 28 February 2031 has been removed and replaced with termination by proclamation, based on the following rationale.

- The AMR scheme builds on the MR scheme; Western Australia has successfully participated in the MR since 1995.
- It reduces the risk of adverse effects to interstate trade and labour mobility if mutual recognition lapsed or was delayed due to the sunset provision.
- It reflects approaches taken in other jurisdictions participating in the AMR scheme and other State legislation that refers powers to the Commonwealth, including:
  - *Mutual Recognition (Victoria) Act 1998* (Vic);
  - *Mutual Recognition (South Australia) Act 1993* (SA) (once it is amended by the *Mutual Recognition (South Australia) (Further Adoption) Amendment Act 2021*;
  - *Mutual Recognition (Tasmania) Act 1993* (Tas) (once amended by the *Mutual Recognition (Tasmania) Amendment Act 2021*);
  - *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (WA); and
  - *Credit (Commonwealth Powers) Act 2010* (WA).

I note that the Committee has previously commented that “it is rare for a Western Australian Act of Parliament to contain a sunset provision” and has recommended these provisions are used in subsidiary legislation.<sup>1</sup>

### **1.3 Has the Government considered that it is an erosion of Parliamentary sovereignty to delete section 6 of the *Mutual Recognition (Western Australia) Act 2020* given that Parliament loses the power to review the operation of the adoptions referred to in clause 6, proposed section 8 of the Bill?**

<sup>1</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 124, *Inquiry into the Form and Content of the Statute Book*, November 2019, p 16 & 19.

As noted at 1.2, the Committee has previously commented that “it is rare for a Western Australian Act of Parliament to contain a sunset provision”<sup>2</sup>.

The amendments being made reflect arrangements in other participating jurisdictions and in other Western Australian legislation that refers powers to the Commonwealth, such as the *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* and the *Credit (Commonwealth Powers) Act 2010*.

Other parliamentary mechanisms are available to review the operation and effectiveness of the adoption if required, such as the committee inquiry process.

#### **1.4 Why has the requirement for both Houses of Parliament to approve the draft proclamation not been included in proposed section 8 of the Bill?**

The provision for both Houses of Parliament to approve the draft proclamation has not been included in the event the State was required to take action quickly in the interests of Western Australia.

Although unlikely, if it was to become apparent that there were disadvantages for Western Australia in participating in the MR and/or the AMR, the State could take decisive action within a short time frame to terminate the adoption/s. In such a case, and particularly if Parliament is in recess or prorogued, it would not be practical for the State Government to obtain prior parliamentary approval for the proclamation.

The proposed section 8 of the Bill is in line with other participating jurisdictions (with the exception of Tasmania) and other Western Australian legislation that refers power to the Commonwealth, such as the *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (WA) and the *Credit (Commonwealth Powers) Act 2010*.

### **REVIEW CLAUSE**

#### **1.1 Why is there no clause in the Bill that requires the review referred to in clause 12 of the intergovernmental agreement to be tabled in both Houses of Parliament?**

The Bill builds on the existing *Mutual Recognition (Western Australia) Act 2020* which does not require the review referred to in Part VII of the *Intergovernmental Agreement Relating to Mutual Recognition*<sup>3</sup> to be tabled in both Houses of Parliament.

No other participating jurisdiction has included this clause and other Western Australian legislation that refers powers to the Commonwealth does not include this clause, such as the *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* and the *Credit (Commonwealth Powers) Act 2010*.

#### **1.2 Why is there no clause in the Bill that requires the Government to perform a review on the operation and effectiveness of the WA Act every five years and have that review tabled in both Houses of Parliament?**

---

<sup>2</sup> Ibid.

<sup>3</sup> *Agreement Relating to Mutual Recognition*, 5 November 1992, p13

The Bill builds on the existing *Mutual Recognition (Western Australia) Act 2020*, which does not include a review to be undertaken every five years and have that review tabled in both Houses of Parliament.

As the Committee has noted in its correspondence of 9 December 2021, there are a number of review mechanisms outlined in the *Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration (IGA)*. Clause 12 of the IGA provides that a review of the IGA and the *Mutual Recognition (Commonwealth) Act 1992* more broadly be undertaken every five years, in consultation with other relevant ministerial bodies, supported by an independent evaluation by a body such as the Australian Government Productivity Commission.<sup>4</sup>

Noting the above, a separate review mechanism at the State level would result in duplication. No other jurisdiction has included a review clause in their referral or adoption legislation and there are other examples of Western Australian legislation referring powers to the Commonwealth that do not have a review clause, such as the *Child Support (Commonwealth Powers) Act 2019*, the *Terrorism (Commonwealth Powers) Act 2002*, the *Personal Property Securities (Commonwealth Laws) Act 2011* and the *Credit (Commonwealth Powers) Act 2010*.

As mentioned above, it is considered there are other parliamentary mechanisms available to review the operation and effectiveness of the adoption where required.

---

<sup>4</sup> *Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration*, 17 December 2020, p 5.

## GLOSSARY

---

Term	Definition
<b>AMR Scheme</b>	Automatic Mutual Recognition Scheme for occupational licenses and registrations
<b>Bill</b>	Mutual Recognition (Western Australia) Amendment Bill 2021
<b>Committee</b>	Standing Committee on Uniform Legislation and Statutes Review
<b>Commonwealth Act</b>	<i>Mutual Recognition Act 1992 (Cth)</i>
<b>Commonwealth Amendment Act</b>	<i>Mutual Recognition Amendment Act 2021 (Cth)</i>
<b>WA Act</b>	<i>Mutual Recognition (Western Australia) Act 2020</i>
<b>IGA</b>	<i>Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration Services</i> signed by the Commonwealth and all states and territories (except ACT) on 11 December 2020
<b>Premier</b>	Hon Mark McGowan MLA



## Standing Committee on Uniform Legislation and Statutes Review

### Date first appointed:

17 August 2005

### Terms of Reference:

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

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

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



---

Parliament House,  
4 Harvest Terrace, West Perth WA 6005  
Telephone: +61 8 9222 7300  
Email: [lcco@parliament.wa.gov.au](mailto:lcco@parliament.wa.gov.au)  
Website: <http://www.parliament.wa.gov.au>