

CONTENTS

- Executive summary i**
- 1 Introduction 1**
- 2 Inquiry procedure 2**
- 3 Supporting documents 2**
- 4 Background 2**
 - Legal Practice Act 2003* 3
 - National Model Bill on the Legal Profession 3
 - Legal Profession Act 2008* 3
 - National Legal Profession Reform Taskforce 4
 - Bilateral Agreement on the Legal Profession Uniform Framework* 4
 - Intergovernmental Agreement on the Legal Profession Uniform Framework* 5
- 5 Legal Profession Uniform Law 5**
 - Stated advantages 6
 - Stated disadvantages 7
- 6 Legal Profession Uniform Law Application Bill 2020 8**
 - Structure of the Legal Profession Uniform Law Application Bill 2020 8
 - Proposed scrutiny and disallowance mechanism 9
- 7 Clauses in the Legal Profession Uniform Law Application Bill 2020 that may impinge upon Parliamentary sovereignty and law-making powers 10**
 - Clause 2 – Commencement 10
 - Clause 3 – Terms used 14
 - Clause 5 – Application of *Interpretation Act 1984* to Act and Uniform Law 15
 - Clause 6 – Application of Uniform Law as law of the State 15
 - Clause 8 – Tabling amending Act 19
 - Clause 9 – Disallowance of amending Acts 23
 - Clause 11 – Tabling of amending Act taken to be publication for Standing Orders 25
 - Clause 16 – Tabling and disallowance of Uniform Regulations and Uniform Rules 26
 - Clause 126 – Local regulations in relation to government lawyers 31
 - Clause 328 – Transitional regulations 34
- 8 Legal Profession Uniform Law Application (Levy) Bill 2020 36**
- Appendix 1 Transcript of hearing on 12 August 2020 and letters of correction 38**
- Appendix 2 Letter from the Attorney General dated 1 July 2020 56**

Appendix 3 Extracts from Report 123 – paragraphs 5.60–5.63 and 5.82–5.88 62
Appendix 4 Extract from Report 123 – paragraphs 5.64–5.68..... 63
Glossary..... 64

EXECUTIVE SUMMARY

- 1 In 2013, the New South Wales and Victorian Governments agreed to participate in a new uniform regulatory scheme for the legal profession.
- 2 In 2014, the Parliaments of New South Wales and Victoria enacted uniform legal profession legislation pursuant to that agreement.
- 3 The Victorian Parliament enacted the Legal Profession Uniform Law and the New South Wales Parliament passed legislation to apply that law as a law of New South Wales. The Legal Profession Uniform Law came into operation in New South Wales and Victoria on 1 July 2015.
- 4 The purpose of the Legal Profession Uniform Law is to establish consistent regulation applying to the Australian legal profession in participating jurisdictions. It provides a means of licensing persons in one participating jurisdiction (a State or a Territory that has applied the Legal Profession Uniform Law) as Australian legal practitioners or Australian registered foreign lawyers so as to:
 - enable them to engage in legal practice in another participating jurisdiction without having to be licensed in the other jurisdiction
 - ensure that licensing enabling them to engage in legal practice and effected in one practising jurisdiction is equivalent in all respects to licensing in another jurisdiction.
- 5 In 2017, the Western Australian Government commenced negotiations with Victoria and New South Wales with a view to joining the legal profession uniform law scheme. This was effected in 2019 when Western Australia, Victoria and New South Wales signed the *Intergovernmental Agreement on the Legal Profession Uniform Framework* (IGA).
- 6 In order to join the legal profession uniform law scheme under the IGA, Western Australia must also enact legislation to apply the Legal Profession Uniform Law as a law of Western Australia. The legislation to achieve that is the Legal Profession Uniform Law Application Bill 2020 (Legal Profession Bill).
- 7 The Legal Profession Bill applies the Legal Profession Uniform Law as a law of Western Australia subject to certain modifications, including those concerning professional indemnity insurance.
- 8 The Legal Profession Uniform Law Application (Levy) Bill 2020 (Legal Profession Levy Bill) will amend section 243 of the *Legal Profession Uniform Law Application Act 2020* (Act) by the addition of a new subsection (9), which will provide for a levy to be imposed by section 243 or regulations made thereunder.
- 9 Under section 46(7) of the *Constitution Acts Amendment Act 1899*, bills imposing taxation must deal only with the imposition of the tax. The levy is in the nature of a tax.
- 10 The Legal Profession Levy Bill is timed to commence immediately after section 243 of the Act commences operation.
- 11 The Committee has identified that several clauses in the Legal Profession Bill impact upon the sovereignty and law-making powers of the Parliament of Western Australia.
- 12 The Committee has drawn these clauses to the Legislative Council's attention for consideration during debate on the bills.

Findings and recommendations

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

RECOMMENDATION 1

Page 9

The Legislative Council note, in its consideration of the Legal Profession Uniform Law Application Bill 2020, the Committee's recommendations in relation to the Fair Trading Amendment Bill 2019.

FINDING 1

Page 13

There is nothing in the Legal Profession Uniform Law Application Bill 2020 that would require a Proclamation to be issued within some specified time.

FINDING 2

Page 13

Clauses 2(1)(b), (c) and (d) of the Legal Profession Uniform Law Application Bill 2020, in providing that the Executive determines its commencement dates, erodes the Western Australian Parliament's sovereignty and law-making powers.

RECOMMENDATION 2

Page 13

Clause 2 of the Legal Profession Uniform Law Application Bill 2020 be amended to require the *Legal Profession Uniform Law Application Act 2020* to be automatically repealed, if not operational, at the expiration of 10 years of receiving Royal Assent.

RECOMMENDATION 3

Page 14

Clause 2 of the Legal Profession Uniform Law Application Bill 2020 be amended to require any provision of the *Legal Profession Uniform Law Application Act 2020* not operational within the expiration of 10 years of the Act receiving Royal Assent be automatically repealed on that date.

RECOMMENDATION 4

Page 14

Clause 2 of the Legal Profession Uniform Law Application (Levy) Bill 2020 be amended to require the *Legal Profession Uniform Law Application (Levy) Act 2020* be automatically repealed if the *Legal Profession Uniform Law Application Act 2020* section 243 is not operational within the expiration of 10 years of the *Legal Profession Uniform Law Application Act 2020* receiving Royal Assent.

FINDING 3

Page 15

Clause 5(b) of the Legal Profession Uniform Law Application Bill 2020, in providing that the *Interpretation Act 1984* does not apply to the *Legal Profession Uniform Law (WA)*, erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 4

Page 15

Applying the *Interpretation of Legislation Act 1984* (Vic) in Western Australia will be a necessary consequence of the uniform legislative scheme that underpins the Legal Profession Uniform Law.

FINDING 5

Page 18

The combined effect of clauses 3, 6(1)(a)(i) and 6(2) of the Legal Profession Uniform Law Application Bill 2020 is that the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria), which Victoria has not yet brought into operation, will be incorporated into the law of Western Australia without the Parliament of Western Australia being able to deal with it as a State Act of Parliament.

FINDING 6

Page 18

The *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) is available to the Parliament of Western Australia when considering the Legal Profession Uniform Law Application Bill 2020 and whether Western Australia should join the legal profession uniform law scheme.

RECOMMENDATION 5

Page 19

Clause 6(1)(a)(ii) of the Legal Profession Uniform Law Application Bill 2020 be amended as necessary to ensure the capacity for partial disallowance of amending Acts.

FINDING 7

Page 20

The Western Australian public is entitled to be given sufficient and timely notice of changes to the governance of its legal profession, incorporated from another jurisdiction, that are proposed to be applied as a law of Western Australia.

FINDING 8

Page 20

The availability of a tabled paper or access to a Western Australian Parliament or Victorian Parliament website does not, in practical terms, alert the public to a prospective law or the effect it may have.

FINDING 9

Page 21

A requirement for Victorian amending Acts to be gazetted will be expensive and may give rise to confusion as to whether they are part of Western Australian law.

RECOMMENDATION 6

Page 21

The Government explain to the Parliament the means by which the Western Australian public will be given sufficient and timely notice of proposed amendments to the *Legal Profession Uniform Law Act 2020* and their practical effect.

FINDING 10

Page 22

The Western Australian public is entitled to be given sufficient and timely notice of changes to the governance of its legal profession, incorporated from another jurisdiction, that are proposed to be applied as a law of Western Australia.

FINDING 11

Page 22

The Government's advice that there is no reason to suppose it would not table information that it considered would be of assistance, and its assurance that such information will be publicly available on, among other places, another jurisdiction's website, does not satisfy that entitlement.

RECOMMENDATION 7

Page 22

The Government formulate, and advise the Western Australian Parliament of, a satisfactory alternative means by which the Western Australian Parliament and the Western Australian public will be given sufficient and timely information explaining proposed amendments to the *Legal Profession Uniform Law Act 2020* and their practical effect.

RECOMMENDATION 8

Page 24

The Legislative Council amend Standing Order 67 of the Standing Orders of the Legislative Council as follows:

Delete Standing Orders 67(5)(a) and (b) and insert the following:

- (5) Where on the 17th sitting day after the motion was moved (exclusive of the day on which the motion was moved) a motion to disallow a regulation remains unresolved, then the question shall be put before the Council rises on that day.
- (6) Subject to (7), where on the proposed last sitting day prior to a general election, a motion to disallow a regulation remains unresolved, then the question shall be put before the Council rises on that day.
- (7) Where a written law provides that a motion to disallow a regulation does not lapse on prorogation, dissolution, or expiry of a House, and:
 - (a) a motion to disallow a regulation remains unresolved on the proposed last sitting day prior to a general election; and
 - (b) the last sitting day is the 16th or earlier sitting day after the motion was moved (exclusive of the day on which the motion was moved),

the motion to disallow shall be an order of the day in the next Parliament and unless disposed of earlier, the question shall be put in accordance with (5) in the next Parliament.

RECOMMENDATION 9

Page 25

The question on the third reading of the Legal Profession Uniform Law Application Bill 2020 not be put until Legislative Council Standing Order 67 is amended in the terms set out in Recommendation 8.

RECOMMENDATION 10

Page 26

The Legislative Council delete Standing Order 67(1) of the Standing Orders of the Legislative Council and replace it as follows:

For the purpose of this Standing Order, a “regulation” includes any instrument made subject to disallowance by a written law.

RECOMMENDATION 11

Page 26

The question on the third reading of the Legal Profession Uniform Law Application Bill 2020 not be put until Legislative Council Standing Order 67(1) is amended in the terms set out in Recommendation 10.

FINDING 12

Page 30

Uniform Regulations and Uniform Rules falling within paragraph (a) of the definition of ‘Uniform Regulations’ and ‘Uniform Rules’ in clause 3 of the Legal Profession Uniform Law Application Bill 2020 and made on or before 17 March 2020 are not subject to disallowance by the Western Australian Parliament. This is an erosion of Parliament sovereignty.

FINDING 13

Page 30

If the Western Australian Parliament does not agree to one or more of the Uniform Regulations or Uniform Rules falling within paragraph (a) of the definition of ‘Uniform Regulations’ and ‘Uniform Rules’ in clause 3 of the Legal Profession Uniform Law Application Bill 2020 and made on or before 17 March 2020, it can vote to delete those provisions during debate on clause 14 of the Legal Profession Bill so they do not apply as subsidiary legislation of Western Australia.

FINDING 14

Page 31

Uniform Regulations and Uniform Rules falling within paragraph (a) of the definition of ‘Uniform Regulations’ and ‘Uniform Rules’ in clause 3 of the Legal Profession Uniform Law Application Bill 2020 and made after 17 March 2020 but before commencement day are subject to disallowance by the Western Australian Parliament.

FINDING 15

Page 31

Uniform Regulations and Uniform Rules falling within paragraph (b) of the definition of ‘Uniform Regulations’ and ‘Uniform Rules’ in clause 3 of the Legal Profession Uniform Law Application Bill 2020 are subject to disallowance by the Western Australian Parliament.

FINDING 16

Page 31

Uniform Regulations and Uniform Rules falling within paragraph (c) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3 of the Legal Profession Uniform Law Application Bill 2020 are not disallowable by the Western Australian Parliament under clause 16, but are subject to the disallowance process for amending Acts in clauses 8 to 10 of the Legal Profession Uniform Law Application Bill 2020.

FINDING 17

Page 33

Clause 126(1)(b) of the Legal Profession Uniform Law Application Bill 2020 is a Henry VIII clause as it enables regulations, rather than an Act of Parliament, to modify the *Legal Profession Uniform Law (WA)*.

FINDING 18

Page 33

Clause 126(1)(b) of the Legal Profession Uniform Law Application Bill 2020 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 19

Page 34

The Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

FINDING 20

Page 34

Clause 126(1)(b) of the Legal Profession Uniform Law Application Bill 2020 is acceptable by reason of the ability to refine the national scheme to suit Western Australian requirements.

RECOMMENDATION 12

Page 34

The second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.

FINDING 21

Page 35

Clause 328(3) of the Legal Profession Uniform Law Application Bill 2020 is a Henry VIII clause as it enables regulations, rather than an Act of Parliament, to modify the *Legal Profession Uniform Law Application Act 2020*, the *Legal Profession Uniform Law (WA)* or another written law.

FINDING 22

Page 36

Clause 328(3) of the Legal Profession Uniform Law Application Bill 2020 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 23

Page 36

The Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

FINDING 24

Page 36

Clause 328(3) of the Legal Profession Uniform Law Application Bill 2020 is justifiable in order to effect a smooth transition to the new regulatory scheme and acceptable by reason of its focused operation.

RECOMMENDATION 13

Page 36

The second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.

1 Introduction

- 1.1 On 16 June 2020, the following two bills were introduced into the Legislative Council:¹
- Legal Profession Uniform Law Application Bill 2020 (Legal Profession Bill)
 - Legal Profession Uniform Law Application (Levy) Bill 2020 (Legal Profession Levy Bill)
- 1.2 The Legal Profession Bill and the Legal Profession Levy Bill were referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order (SO) 126. The Committee was required to report to the Legislative Council by 11 August 2020, being the first Legislative Council sitting day following the expiry of the 45 day reporting period.
- 1.3 On 12 August 2020, the Legislative Council extended the reporting date to 15 September 2020.²
- 1.4 The Legal Profession Bill and the Legal Profession Levy Bill are intended to be debated cognately in the Legislative Council.³ The Committee has considered both bills in this report.
- 1.5 The Legal Profession Bill seeks to:
- apply the Legal Profession Uniform Law⁴ as a law of Western Australia
 - introduce a mechanism for automatically incorporating future amendments to the Legal Profession Uniform Law as a law of Western Australia, subject to those amendments being disallowed by Parliament
 - enact provisions to regulate legal practice which will apply only in Western Australia
 - repeal the *Legal Profession Act 2008* and the *Law Society Public Purposes Trust Act 1984*.
- 1.6 When enacted, it will be the *Legal Profession Uniform Law Application Act 2020* (Act).
- 1.7 The Legal Profession Levy Bill amends the Act to insert a new subsection 243(9) to enable a levy to be imposed by section 243 of the Act, or regulations made under that section. The Legal Profession Levy Bill is timed to commence immediately after section 243 of the Act commences operation.
- 1.8 This report includes discussion and analysis of the:
- background to the Legal Profession Bill
 - *Intergovernmental Agreement on the Legal Profession Uniform Framework*
 - Legal Profession Uniform Law
 - Legal Profession Bill and its impact on Parliamentary sovereignty and law-making powers
 - Legal Profession Levy Bill.

¹ The bills were introduced by Hon Sue Ellery MLC, Leader of the House.

² Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 August 2020, p 4740.

³ Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 June 2020, p 3625.

⁴ The Legal Profession Uniform Law is Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Victoria). It is explained in Section 5 of this report.

2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its webpage at [Uniform Legislation Committee homepage](#). The general public was immediately notified of the referral via social media.⁵
- 2.2 Given the Committee's terms of reference, the Committee considered that any broader advertising or invitation for submissions from the public was neither necessary nor warranted.
- 2.3 The Committee conducted a hearing with representatives nominated by the office of the Attorney General on 12 August 2020, namely:
 - Carol Conley, Senior Assistant State Solicitor, State Solicitor's Office
 - Ben Fraser, Assistant Parliamentary Counsel, Parliamentary Counsel's Office
 - Mathew Stone, Assistant Parliamentary Counsel, Parliamentary Counsel's Office.
- 2.4 The Committee thanks them for their assistance with the inquiry.
- 2.5 The transcript from the hearing is attached as Appendix 1. Correspondence from the witnesses clarifying aspects of their evidence is included after the transcript in Appendix 1.

3 Supporting documents

- 3.1 The Committee received copies of both bills, their second reading speeches and Explanatory Memoranda when the bills were introduced into the Legislative Council.
- 3.2 SO 126(5) states:

The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral...
- 3.3 The Attorney General forwarded the information required under Ministerial Office Memorandum MM 2007/01⁶ to the Committee, which it received on 23 June 2020, the fifth working day after referral.

4 Background

- 4.1 The Committee has considered the following background information in its review of the Legal Profession Bill and Legal Profession Levy Bill:
 - *Legal Practice Act 2003*
 - National Model Bill on the Legal Profession
 - *Legal Profession Act 2008*
 - National Legal Profession Reform Taskforce

⁵ Legislative Council, 16 June 2020, retrieved from <https://twitter.com/WALegCouncil/status/1272896741873012737>.

⁶ Ministerial Office Memorandum MM 2007/01 requires the provision of information to the Committee such as a copy of the relevant intergovernmental agreement/memorandum of understanding or a copy of the communique from the Ministerial Council meeting at which it was agreed to introduce the legislation, a statement as to any timetable for the implementation of the legislation, the advantages and disadvantages to the State of Western Australia as a participant in the relevant scheme or agreement, any relevant constitutional issues, an explanation as to whether and by what mechanism the State can opt out of the scheme, the mechanisms by which the bill, once enacted, can be amended and, if the legislation has been developed by reference to a model bill, a copy of that model bill.

- *Bilateral Agreement on the Legal Profession Uniform Framework*
- *Intergovernmental Agreement on the Legal Profession Uniform Framework*

Legal Practice Act 2003

- 4.2 The *Legal Practice Act 2003* reformed the regulation of the legal profession in Western Australia. According to the Explanatory Memorandum for the *Legal Practice Act 2003*, the reforms:
- enabled legal firms to incorporate and to form multi-disciplinary partnerships
 - introduced national practising certificates for Western Australian lawyers and recognised those issued in other Australian jurisdictions
 - established the regulation of foreign lawyers advising Western Australian clients on matters of foreign law
 - strengthened the disciplinary powers of the regulatory bodies (the Legal Practice Board, the Complaints Committee and the Disciplinary Tribunal), redressed some anomalies relating to those bodies and provided a greater role for non-lawyers in the regulatory framework.⁷

National Model Bill on the Legal Profession

- 4.3 Between 2003 and 2008, Western Australia 'contributed to further reform of the regulation of the legal profession through its participation in the development of the national model bill on the legal profession.'⁸ The National Model Bill on the Legal Profession (National Model Bill) was publicly released on 4 May 2004.
- 4.4 In 2004, the then Attorney General signed a National Legal Profession Memorandum of Understanding (MOU) which committed Western Australia to adopting the provisions of the National Model Bill.⁹

Legal Profession Act 2008

- 4.5 The Legal Profession Bill 2007 (2007 Bill) was introduced into the Legislative Council in November 2007. The Minister who introduced the 2007 Bill said the commitment made in the MOU would 'be met through the enactment of the [2007 Bill]'¹⁰ and that it 'completes the legislative reform that the Parliament commenced when it enacted the *Legal Practice Act 2003*'.¹¹
- 4.6 The 2007 Bill followed the structure of the National Model Bill and brought Western Australia 'into the common national framework for the regulation of the legal profession'.¹²

⁷ Legal Practice Bill 2002, *Explanatory Memorandum*, Legislative Council, p 1.

⁸ Hon Sue Ellery MLC, Minister for Child Protection, representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 21 November 2007, p 7482.

⁹ National Legal Profession Memorandum of Understanding between the Attorneys-General of the Commonwealth and all States and Territories, undated but executed in 2004.

¹⁰ Hon Sue Ellery MLC, Minister for Child Protection, representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 21 November 2007, p 7483.

¹¹ *ibid.*, p 7482.

¹² Legal Profession Bill 2007, *Explanatory Memorandum*, Legislative Council, p 1.

4.7 It was said:

The need for a national approach to regulation is in recognition that the legal profession and legal services sector are increasingly adopting a national outlook.¹³

4.8 The 2007 Bill was referred to the Committee for consideration and report.¹⁴ The Committee found that the 2007 Bill was consistent with the MOU.¹⁵

4.9 The 2007 Bill was enacted as the *Legal Profession Act 2008*.

National Legal Profession Reform Taskforce

4.10 On 30 April 2009, the Council of Australian Governments (COAG) agreed to set up a National Legal Profession Reform Taskforce on 'reform of the regulation of the legal profession, with the objective of uniform laws across jurisdictions'.¹⁶

4.11 A draft Legal Profession National Law was presented to the COAG, but the project lacked support from States and Territories.¹⁷

Bilateral Agreement on the Legal Profession Uniform Framework

4.12 On 5 December 2013, the New South Wales and Victorian Governments executed a bilateral agreement formalising their joint participation in the new regulatory scheme.¹⁸

4.13 In 2014, New South Wales and Victoria enacted uniform legal profession legislation pursuant to that agreement to uniformly regulate the legal profession throughout participating jurisdictions in Australia. That legislation was the:

- *Legal Profession Uniform Law Application Act 2014* (Victoria)
- *Legal Profession Uniform Law Application Act 2014* (NSW).

4.14 The Legal Profession Uniform Law is Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Victoria) (Legal Profession Uniform Law). The *Legal Profession Uniform Law Application Act 2014* (NSW) applies that Schedule as a law of New South Wales. The *Legal Profession Uniform Law Application Act 2014* (NSW) provides for the tabling and disallowance of Uniform Regulations but does not provide for the disallowance of Victorian amending Acts.¹⁹

4.15 The Legal Profession Uniform Law came into operation in New South Wales and Victoria on 1 July 2015.

¹³ Hon Sue Ellery MLC, Minister for Child Protection, representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 21 November 2007, p 7483.

¹⁴ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 21 November 2007, p 7484.

¹⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 26, *Legal Profession Bill 2007*, February 2008, p 7.

¹⁶ Council of Australian Governments Meeting, Hobart, 30 April 2009, Communiqué, p 10.

¹⁷ Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 June 2020, p 3622.

¹⁸ *Bilateral Agreement on the Legal Profession Uniform Framework*, between the State of New South Wales and the State of Victoria, 5 December 2013.

¹⁹ Section 8 of the *Legal Profession Uniform Law Application Act 2014* (NSW) applies sections 40 and 41 of the *Interpretation Act 1987* (NSW) which deal with the tabling and disallowance of statutory rules (defined in section 21 of the *Interpretation Act 1987* (NSW) as regulations, by-laws, rules, ordinances or rules of court) and the provisions of the *Legislation Review Act 1987* (NSW).

Intergovernmental Agreement on the Legal Profession Uniform Framework

- 4.16 In 2017, the Western Australian State Government commenced negotiations with Victoria and New South Wales with a view to joining the legal profession uniform law scheme.²⁰ This was effected in 2019 when Western Australia, Victoria and New South Wales signed the *Intergovernmental Agreement on the Legal Profession Uniform Framework* (IGA).²¹
- 4.17 In September 2019, the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) (Victorian Act 2019) was given the Royal Assent, but is not yet operative. The amendments it will make to the Legal Profession Uniform Law will facilitate Western Australia's entry into the legal profession uniform law scheme in line with the IGA. Further detail on the Victorian Act 2019 and how the amendments to be made by it will facilitate Western Australia's entry into the legal profession uniform law scheme is provided at footnote 69.
- 4.18 In order to join the legal profession uniform law scheme under the IGA, Western Australia must enact legislation to apply the Legal Profession Uniform Law as a law of Western Australia. That legislation is the Legal Profession Bill, discussed in Section 6.
- 4.19 The IGA raises no Parliamentary sovereignty concerns. However, the Committee draws to the Legislative Council's attention that the IGA expects Western Australia to have enacted legislation applying the Legal Profession Uniform Law on or before 30 June 2020.²² Correspondence from the Attorney General's office states:

The deadline of 30 June 2020 will not be met. However, the IGA only ceases to operate after 1 July 2021 (unless extended by all parties) unless each Party has implemented the Framework by that date.

The Bill will not be operational before 1 January 2021.²³

5 Legal Profession Uniform Law

- 5.1 The purpose of the Legal Profession Uniform Law is to establish consistent regulation of the Australian legal profession in participating jurisdictions. It provides a means of licensing persons in one participating jurisdiction (a State or a Territory that has applied the Legal Profession Uniform Law) as Australian legal practitioners or Australian registered foreign lawyers so as to:
- enable them to engage in legal practice in another participating jurisdiction without having to be licensed in the other jurisdiction
 - ensure that licensing enabling them to engage in legal practice and effected in one practising jurisdiction is equivalent in all respects to licensing in another jurisdiction.²⁴

²⁰ Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 June 2020, p 3622.

²¹ *Intergovernmental Agreement on the Legal Profession Uniform Framework* between the State of New South Wales, the State of Victoria and the State of Western Australia, 20 February 2019.

²² *ibid.*, p 12.

²³ M Evans, Office of Hon John Quigley MLA, Attorney General, email, 23 June 2020, Attachment: *Legal Profession Uniform Law Application Bill 2020 (WA) – Referral to Standing Committee on Uniform Legislation and Statutes Review*, p 1.

²⁴ Legal Profession Uniform Law Application Bill 2013 (Vic), *Explanatory Memorandum*, Victorian Legislative Assembly, p 40.

- 5.2 There will be three national regulatory bodies:
- a standing committee consisting of the Attorneys-General of the participating jurisdictions (Standing Committee)
 - the Legal Services Council
 - the Commissioner for Uniform Legal Services Regulation.
- 5.3 Uniform Rules are to be made by the Legal Services Council, with the approval of the Standing Committee. The Uniform Rules may include Legal Practice Rules, Legal Profession Conduct Rules and Continuing Professional Development Rules.
- 5.4 On introducing the Legal Profession Bill into the Legislative Council, the Minister referred to key benefits of the legal profession uniform law scheme. These were said to be those identified by the Victorian and New South Wales Attorneys-General in their second reading speeches for their respective application Acts. They included:

lawyers will be able to practice seamlessly across jurisdictions under uniform legislation and regulatory standards rather than disparate legislation and that this will reduce compliance costs for firms operating across participating jurisdictions.

...

Consumers will enjoy the same protections, rights and remedies across participating jurisdictions. Consumers will have access to new low cost and informal ways to resolve service complaints with law practices.

...

for the courts, applications for admission will continue to be processed at the local level, but under uniform rules developed by the new statutory admissions committee applicants will know well in advance what standards they will need to meet to be admitted in each participating jurisdiction.²⁵

- 5.5 Correspondence from the Attorney General's office states:

The Legal Profession Uniform Law scheme currently operates in respect of 68% of the legal profession in Australia. This will increase to approximately 75% of the legal profession when Western Australia joins the scheme.²⁶

Stated advantages

- 5.6 Correspondence from the Attorney General's office states:

The Legal Profession Uniform Law will create a simpler and more efficient system for both law firms and their clients by cutting red tape, better protecting consumers and ensuring consistency across our borders.²⁷

²⁵ Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 June 2020, p 3623.

²⁶ M Evans, Office of Hon John Quigley MLA, Attorney General, email, 23 June 2020, Attachment: *Legal Profession Uniform Law Application Bill 2020 (WA) – Referral to Standing Committee on Uniform Legislation and Statutes Review*, p 2.

²⁷ *ibid.*, p 1.

- 5.7 The Legal Services Council has said other advantages include that:
- harmonisation of the regulation of the legal profession creates a seamless national legal market
 - a national legal profession furthers Australia's participation in the international demand for legal services
 - regulatory autonomy remains for States and Territories
 - admission rules are broadly the same everywhere and common Continuing Professional Development, Practice and Conduct Rules apply in all participating jurisdictions.²⁸

Stated disadvantages

- 5.8 Correspondence from the Attorney General's office indicates:

The only disadvantage is that Western Australia will be expected to share the operational costs when it joins the Uniform Law Scheme in accordance with the Intergovernmental Agreement.²⁹

- 5.9 Western Australia will be required to contribute a proportionate share of costs based upon the number of practitioners in participating jurisdictions.³⁰ Forty two percent of Australian legal practitioners are in New South Wales, 26 percent in Victoria and seven percent in Western Australia.³¹ The proportion of costs to be paid by each participating jurisdiction will be reduced if other jurisdictions join the legal profession uniform law scheme.

- 5.10 The Legal Services Council stated in its most recent annual report:

The notional cost of a national regulatory scheme covering all practitioners in Australia remains under \$30 per legal practitioner per year.³²

- 5.11 Clause 34 of the Legal Profession Bill requires the proposed Western Australian Legal Practice Board to pay the Legal Services Council the State's contribution to the funding of the Legal Profession Uniform Framework.³³ The cost of Western Australia's participation will be met by an increase in the cost of practising certificates. The current cost of practising certificates in Western Australia is \$1 250 per practitioner per year. It is said to be likely that the increase required in order to cover the State's contribution to the Legal Services Council's funding will be in the order of \$20 to \$30 per practitioner per year.³⁴

²⁸ Legal Services Council, Commissioner for Uniform Legal Services Regulation, *Annual Reports 2018/2019*, pp 22-3.

²⁹ M Evans, Office of Hon John Quigley MLA, Attorney General, email, 23 June 2020, Attachment: *Legal Profession Uniform Law Application Bill 2020 (WA) – Referral to Standing Committee on Uniform Legislation and Statutes Review*, p 4.

³⁰ *ibid.*

³¹ Legal Services Council, Commissioner for Uniform Legal Services Regulation, *Annual Reports 2018/2019*, p 68.

³² *ibid.*, p 15.

³³ Legal Profession Uniform Framework means the uniform framework for regulation of the legal profession as described in the Intergovernmental Agreement or any uniform or national framework for regulation of the legal profession that succeeds that framework: Legal Profession Uniform Law Application Bill 2020 cl 3.

³⁴ M Evans, Office of Hon John Quigley MLA, Attorney General, email, 23 June 2020, Attachment: *Legal Profession Uniform Law Application Bill 2020 (WA) – Referral to Standing Committee on Uniform Legislation and Statutes Review*, p 4.

Committee comment

- 5.12 By reason of its terms of reference, the Committee has not inquired into or assessed what are stated to be the advantages and disadvantages of Western Australia's entry into the proposed scheme.

6 Legal Profession Uniform Law Application Bill 2020

- 6.1 The Legal Profession Bill applies the Legal Profession Uniform Law (that is, Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Victoria)) as a law of Western Australia, subject to minor modifications such as for professional indemnity insurance (see paragraph 6.3). The Legal Profession Bill also contains provisions particular to Western Australia. The Victorian and New South Wales application Acts likewise contain provisions additional to the Legal Profession Uniform Law that apply specifically to their jurisdictions.
- 6.2 The Legal Profession Bill repeals the *Legal Profession Act 2008*³⁵, however many features of the current Act have been retained to the extent that those provisions are compatible with the Legal Profession Uniform Law.
- 6.3 For example, Part 7 of the Legal Profession Bill concerns professional indemnity insurance and supplements Part 4.4 of the Legal Profession Uniform Law. The Leader of the House said:

As far as possible, the current arrangements and schemes for professional indemnity insurance under the *Legal Profession Act 2008* have been retained, together with the law mutual fund. To ensure the current arrangements are not undermined by Western Australia's entry into the Legal Profession Uniform Law scheme, modifications have been made to the Legal Profession Uniform Law. Such modifications ensure that legal professional indemnity insurance provided in accordance with the [Legal Profession] bill is an approved insurance policy for the purposes of the Legal Profession Uniform Law and limit the exemptions from the requirement to hold professional indemnity insurance that are applicable to national law firms.³⁶

Structure of the Legal Profession Uniform Law Application Bill 2020

- 6.4 The Legal Profession Bill contains 420 clauses in 17 Parts.

Structure of uniform legislation

- 6.5 The Committee identified five structures for uniform legislation in its Report 64.³⁷ The Legal Profession Bill adopts *Structure 1 – Applied laws*. The Committee explained this structure as follows:

Also known as template, cooperative and complementary legislation, here legislation is enacted in one jurisdiction and applied (as in force from time to time) by other participating jurisdictions as a law of those other jurisdictions.³⁸

- 6.6 The Legal Profession Bill is an 'applied laws' structure of uniform legislation, as it applies a Victorian law (the Legal Profession Uniform Law) as a law of Western Australia.

³⁵ The Legal Profession Uniform Law Application Bill 2020 also repeals the *Law Society Public Purposes Trust Act 1985* – see cl 258.

³⁶ Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 June 2020, p 3623.

³⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 64, *Information Report on Uniform Scheme Structures*, August 2011, Appendix 1.

³⁸ *ibid.*

- 6.7 This approach impinges on Parliamentary sovereignty, as it applies the law of another jurisdiction in Western Australia. This is particularly so if any changes made from time to time to that other jurisdiction's law will also automatically apply in Western Australia.
- 6.8 The Legal Profession Bill includes a scrutiny and disallowance mechanism intended to preserve Western Australian Parliamentary sovereignty. It is discussed at paragraphs 6.9 to 6.14.

Proposed scrutiny and disallowance mechanism

- 6.9 The Legal Profession Bill proposes, in clauses 8 to 11, a disallowance mechanism based on that in the Fair Trading Amendment Bill 2019 (FTA Bill) along with amendments the Committee recommended to that bill.³⁹

Uniform Legislation and Statutes Review Committee Report on the Fair Trading Amendment Bill 2019 – Report 123

- 6.10 The Committee in its Report 123 on the FTA Bill identified that the disallowance mechanism proposed by the Government in that bill impacted upon the sovereignty and law-making powers of the Parliament of Western Australia. It recommended those sovereignty issues be addressed as follows:
- the Legislative Council decide whether Commonwealth Acts that amend a Western Australian law should be scrutinised by the Joint Standing Committee on Delegated Legislation⁴⁰ (Delegated Legislation Committee) or the Standing Committee on Legislation⁴¹, or some other committee of Parliament to be established for that purpose
 - amendments be made to the FTA Bill and to Legislative Council Standing Orders to enable that process.
- 6.11 As at 20 August 2020 the Legislative Council had yet to deal with the FTA Bill and the Committee's recommendations. They remain as Orders of the Day on the Legislative Council Notice Paper. The Legislative Council Standing Orders have not been amended.

RECOMMENDATION 1

The Legislative Council note, in its consideration of the Legal Profession Uniform Law Application Bill 2020, the Committee's recommendations in relation to the Fair Trading Amendment Bill 2019.

Proposed scrutiny and disallowance mechanism in the Legal Profession Bill

- 6.12 The scrutiny and disallowance mechanism in the Legal Profession Bill proposes that all future Victorian Acts amending the Legal Profession Uniform Law⁴² must be tabled in both Houses of the Western Australian Parliament and be subject to disallowance by either House. The proposed disallowance mechanism is to operate before the Victorian amending laws become laws of Western Australia. Significantly, the Legal Profession Bill provides capacity for Parliament to partially disallow an amending Act. This is consistent with the Committee's

³⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 123, *Fair Trading Amendment Bill 2019*, August 2019.

⁴⁰ The Joint Standing Committee on Delegated Legislation has the responsibility for inquiring into and recommending the disallowance of regulations and other subsidiary legislation: Item 10.4 of Schedule 1 of the Standing Orders of the Legislative Council.

⁴¹ The Legislation Committee currently considers and reports on any bill referred by the Council: Item 4.3 of Schedule 1 of the Standing Orders of the Legislative Council.

⁴² Other than the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria): see Legal Profession Uniform Law Application Bill 2020 clause 3 - the definition of 'amending Act' and clause 6(1)(a).

recommendations in Report 123⁴³ and preserves Western Australia's Parliamentary sovereignty.

- 6.13 The Parliamentary scrutiny and disallowance process proposed in the Legal Profession Bill provides for:
- a Victorian amending Act to be tabled in both Houses within 18 sitting days of it receiving Royal Assent⁴⁴
 - a 14 sitting day period following tabling for a notice of disallowance to be given ('notice period')⁴⁵
 - a 30 sitting day period within which the notice of disallowance can be resolved ('disallowance period')⁴⁶
 - the capacity for partial disallowance of Victorian amending Acts⁴⁷
 - the tabling of a Victorian amending Act to be taken as 'publication' for the purposes of the Legislative Council Standing Orders and triggers its referral to the Delegated Legislation Committee under Joint Rule 10.5.⁴⁸
- 6.14 The period within which Victorian amending Acts must be tabled before each House of Parliament, the 14 sitting day notice period and the 30 sitting day disallowance period, may span a prorogation, dissolution or expiry of a House.⁴⁹

7 Clauses in the Legal Profession Uniform Law Application Bill 2020 that may impinge upon Parliamentary sovereignty and law-making powers

Clause 2 – Commencement

- 7.1 The commencement provisions in the Legal Profession Bill are complex. Other than Part 1, all provisions are to come into operation on a day fixed by proclamation. These might be different days for different provisions and some are predicated on the commencement of provisions in other legislation. The Committee has summarised the various commencement provisions at paragraphs 7.2 to 7.8.
- 7.2 Clause 2 of the Legal Profession Bill provides that different provisions of the Act will come into operation on different days.
- 7.3 Part 1 (preliminary provisions, clauses 1 to 5) of the Legal Profession Bill will come into operation on the day of Royal Assent (clause 2(1)(a)).

⁴³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 123, *Fair Trading Amendment Bill 2019*, August 2019, paras 5.49 – 5.56, Recommendation 4 and Appendix 2.

⁴⁴ Legal Profession Uniform Law Application Bill 2020 cl 8.

⁴⁵ *ibid.* cl 9.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ Legal Profession Uniform Law Application Bill 2020 cl 11. Joint Rule 10.5 of Schedule 1 of the Standing Orders of the Legislative Council states: 'Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration'.

⁴⁹ Legal Profession Uniform Law Application Bill 2020 cl 9(4)(a).

- 7.4 The rest of the Act, subject to some minor variations⁵⁰ depending on whether the *Strata Titles Amendment Act 2018*⁵¹ comes into operation before the Act comes into operation, will come into operation on a day fixed by proclamation (clause 2(1)(d)).
- 7.5 Section 400⁵² comes into operation:
- with the rest of the Act on a day fixed by proclamation if section 7 of the *Strata Titles Amendment Act 2018* comes into operation on or before the day fixed by the proclamation (clause 2(1)(b)(i))
- or
- immediately after section 7 of the *Strata Titles Amendment Act 2018* comes into operation if that section has not come into operation on or before the day fixed by the proclamation (clause 2(1)(b)(ii)). Section 7 of the *Strata Titles Amendment Act 2018* is itself to come into operation on a day fixed by proclamation.⁵³
- 7.6 Sections 402⁵⁴ and 403⁵⁵ come into operation:
- with the rest of the Act on a day fixed by proclamation if section 83 of the *Strata Titles Amendment Act 2018* comes into operation on or before the day fixed by the proclamation (clause 2(1)(c)(i))
- or
- immediately after section 83 of the *Strata Titles Amendment Act 2018* comes into operation if that section has not come into operation on or before the day fixed by the

⁵⁰ Sections 400–404 of the proposed *Legal Profession Uniform Law Application Act 2020*, discussed at paragraphs 7.5 to 7.8.

⁵¹ Sections 1 and 2 of the *Strata Titles Amendment Act 2018* were proclaimed on 19 November 2018. The rest of the *Strata Titles Amendment Act 2018* is yet to be proclaimed.

⁵² Section 400 of the proposed *Legal Profession Uniform Law Application Act 2020* deletes the definition of ‘Australian legal practitioner’ (which refers to the *Legal Profession Act 2008*) in section 3(1) of the *Strata Titles Act 1985*. This is necessary as the *Legal Profession Act 2008* is to be repealed by the proposed *Legal Profession Uniform Law Application Act 2020*. The definition is not currently in force, however, but is contained in section 7 of the *Strata Titles Amendment Act 2018* which is yet to be proclaimed. The commencement of section 400 of the proposed *Legal Profession Uniform Law Application Act 2020* is therefore tied to the commencement of the as yet unproclaimed section 7 of the *Strata Titles Amendment Act 2018*.

⁵³ *Strata Titles Amendment Act 2018* s 2(b).

⁵⁴ Section 402 of the proposed *Legal Profession Uniform Law Application Act 2020* deletes section 143(4) of the *Strata Titles Act 1985* (which refers to the *Legal Profession Act 2008*) and replaces it with a new section 143(4) which refers to the *Legal Profession Uniform Law (WA)*. This is necessary as the *Legal Profession Act 2008* is to be repealed by the proposed *Legal Profession Uniform Law Application Act 2020*. Section 143(4) is not currently in force, however, is contained in section 83 of the *Strata Titles Amendment Act 2018* which is yet to be proclaimed. The commencement of section 402 of the proposed *Legal Profession Uniform Law Application Act 2020* is therefore tied to the commencement of the as yet unproclaimed section 83 of the *Strata Titles Amendment Act 2018*.

⁵⁵ Section 403 of the proposed *Legal Profession Uniform Law Application Act 2020* deletes the words ‘an Australian legal practitioner’ in section 163(2)(a) of the *Strata Titles Act 1985* and replaces them with ‘a legal practitioner’. This is necessary as the term ‘Australian legal practitioner’ will be deleted from the *Strata Titles Act 1985* by virtue of section 400 of the proposed *Legal Profession Uniform Law Application Act 2020*. Further, by virtue of clause 355 of the proposed *Legal Profession Uniform Law Application Act 2020*, a definition of the term ‘legal practitioner’ is to be inserted into the *Interpretation Act 1984* and that definition will apply to section 163 of the *Strata Titles Act 1985*. Section 163(2)(a) is not currently in force, however, is contained in section 83 of the *Strata Titles Amendment Act 2018* which is yet to be proclaimed. The commencement of section 403 of the proposed *Legal Profession Uniform Law Application Act 2020* is therefore tied to the commencement of the as yet unproclaimed section 83 of the *Strata Titles Amendment Act 2018*.

proclamation (clause 2(1)(c)(ii)). Section 83 of the *Strata Titles Amendment Act 2018* is itself to come into operation on a day fixed by proclamation.⁵⁶

- 7.7 Section 401⁵⁷ will not come into operation and will be repealed if section 84 of the *Strata Titles Amendment Act 2018*⁵⁸ comes into operation on or before the day fixed by the proclamation (clauses 2(2) and 399(a)). Section 84 of the *Strata Titles Amendment Act 2018* is itself to come into operation on a day fixed by proclamation.⁵⁹
- 7.8 Section 404⁶⁰ will not come into operation and will be repealed if section 84 of the *Strata Titles Amendment Act 2018* does not come into operation on or before the day fixed by the proclamation (clauses 2(2) and 399(b)).

Parliamentary sovereignty concerns

- 7.9 The Committee is concerned that other than Part 1, all provisions are to come into operation on a day fixed by proclamation, whether this be proclamation of the Legal Profession Bill or the *Strata Titles Amendment Act 2018*.
- 7.10 As the Committee has previously stated in its Report 115, proclamation is an Executive action and affects the Parliament's sovereignty as the commencement dates will be controlled by the Executive.⁶¹ There should be sound reasons for Parliament to permit commencement by proclamation.⁶²
- 7.11 There is nothing in the Legal Profession Bill that requires proclamation of the rest of the Act within a specified time. It is conceivable that a proclamation may never be made and the will of the Parliament, having been persuaded to pass the Legal Profession Bill, would be frustrated. While the Committee concedes that this scenario is unlikely to occur in relation to the Legal Profession Bill, it has occurred in the past with respect to other enacted bills.⁶³
- 7.12 The Explanatory Memorandum for the Legal Profession Bill provides no justification for this provision.

⁵⁶ *Strata Titles Amendment Act 2018* s 2(b).

⁵⁷ Section 401 of the proposed *Legal Profession Uniform Law Application Act 2020* deletes the words 'an Australian lawyer (within the meaning of that term in the *Legal Profession Act 2008* section 3)' in section 129B(1) of the *Strata Titles Act 1985* and inserts 'a lawyer'.

⁵⁸ Section 84 of the *Strata Titles Amendment Act 2018* renumbers and relocates various sections in the *Strata Titles Act 1985*. It is yet to be proclaimed. The commencement and possible repeal of section 401 of the proposed *Legal Profession Uniform Law Application Act 2020* is therefore tied to the commencement of the as yet unproclaimed section 84 of the *Strata Titles Amendment Act 2018*.

⁵⁹ *Strata Titles Amendment Act 2018* s 2(b).

⁶⁰ Section 404 of the proposed *Legal Profession Uniform Law Application Act 2020* deletes the words 'an Australian lawyer (within the meaning of that term in the *Legal Profession Act 2008* section 3)' in section 219(1) of the *Strata Titles Act 1985* and inserts 'a lawyer'.

⁶¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 115, *Education and Care Services National Law (WA) Amendment Bill 2018*, 14 August 2018, p 14.

⁶² Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 124, *Inquiry into the Form and Content of the Statute Book*, 19 November 2019, p 19, para 3.62, Finding 6 and Recommendation 5.

⁶³ For example, see Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 79, *Interim report: Inquiry into the Form and Content of the Statute Book*, 15 November 2012, p 7, Recommendation 4 and Appendix 7 (which lists 70 statutes with Royal Assent but not proclaimed) and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 124, *Inquiry into the Form and Content of the Statute Book*, 19 November 2019, p 19, para 3.62, Finding 6 and Recommendation 5 and p 26, paras 3.97-3.98 and Recommendation 6.

Attorney General's advice

- 7.13 The Committee asked the Attorney General:
- When he expected the Act in its entirety will have come into operation?
 - Whether there is any realistic prospect that any provision of the proposed Act will not come into operation within 10 years of the Act receiving Royal Assent? If not, is there any reason why the commencement clause for the Bill ought not to provide that any provision unproclaimed at the expiration of 10 years of the Act receiving Royal Assent will be automatically repealed?⁶⁴
- 7.14 The Attorney General's advice by letter dated 1 July 2020 is attached as Appendix 2, wherein he says he expects the Act in its entirety will come into operation by 1 July 2021, and that an automatic repeal after 10 years clause was therefore unnecessary.⁶⁵

Committee comment

- 7.15 There is nothing in the Legal Profession Bill that would require a Proclamation to be issued within some specified time. The commencement should not be open-ended.
- 7.16 The lack of express commencement date for the operational clauses in the Legal Profession Bill is an erosion of the Western Australian Parliament's sovereignty and law-making powers.
- 7.17 This can be addressed by the Parliament allowing the Government licence to bring the Legal Profession Bill into operation within 10 years of its Royal Assent. This would be consistent with this Committee's recommendations in its Report 124 (*Inquiry into the Form and Content of the Statute Book*), Report 126 (*Work Health and Safety Bill 2019 and Safety Levies Amendment Bill 2019*) and Report 127 (*Transport Legislation Amendment (Identity Matching Services) Bill 2020*) recommending the repeal of Acts or provisions of Acts unproclaimed at the expiration of 10 years of receiving Royal Assent.

FINDING 1

There is nothing in the Legal Profession Uniform Law Application Bill 2020 that would require a Proclamation to be issued within some specified time.

FINDING 2

Clauses 2(1)(b), (c) and (d) of the Legal Profession Uniform Law Application Bill 2020, in providing that the Executive determines its commencement dates, erodes the Western Australian Parliament's sovereignty and law-making powers.

RECOMMENDATION 2

Clause 2 of the Legal Profession Uniform Law Application Bill 2020 be amended to require the *Legal Profession Uniform Law Application Act 2020* to be automatically repealed, if not operational, at the expiration of 10 years of receiving Royal Assent.

⁶⁴ This is consistent with the Committee's recommendations in its Report 124, *Inquiry into the Form and Content of the Statute Book*, 19 November 2019.

⁶⁵ Hon John Quigley MLA, Attorney General, letter, 1 July 2020, p 1.

RECOMMENDATION 3

Clause 2 of the Legal Profession Uniform Law Application Bill 2020 be amended to require any provision of the *Legal Profession Uniform Law Application Act 2020* not operational within the expiration of 10 years of the Act receiving Royal Assent be automatically repealed on that date.

- 7.18 Clause 2(b) of the Legal Profession Levy Bill provides that the substance of the *Legal Profession Uniform Law Application (Levy) Act 2020* comes into operation immediately after the *Legal Profession Uniform Law Application Act 2020* section 243 comes into operation. If Recommendation 3 is adopted, section 243 would automatically be repealed if it does not come into operation within 10 years of the *Legal Profession Uniform Law Application Act 2020* receiving Royal Assent. The substantive provisions of the *Legal Profession Uniform Law Application (Levy) Act 2020* would not operate and that Act should also be removed from the statute book.

RECOMMENDATION 4

Clause 2 of the Legal Profession Uniform Law Application (Levy) Bill 2020 be amended to require the *Legal Profession Uniform Law Application (Levy) Act 2020* be automatically repealed if the *Legal Profession Uniform Law Application Act 2020* section 243 is not operational within the expiration of 10 years of the *Legal Profession Uniform Law Application Act 2020* receiving Royal Assent.

Clause 3 – Terms used

- 7.19 Clause 3 raises no Parliamentary sovereignty issues itself as it simply contains the definitions of terms used in the Act. However some definitions are relevant to Parliamentary sovereignty by way of clauses 6 and 16 of the Bill. These terms are:
- ‘amending Act’
 - ‘Uniform Regulations’
 - ‘Uniform Rules’.
- 7.20 ‘Amending Act’ means a Victorian Act, other than the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) (Victorian Act 2019), that amends the:
- *Legal Profession Uniform Law Application Amendment Act 2014* (Victoria) Schedule 1
 - Uniform Regulations
 - Uniform Rules.
- 7.21 ‘Amend’, in relation to a Victorian Act, includes replace a provision of the Act.
- 7.22 ‘Uniform Regulations’ means the Legal Profession Uniform Regulations:
- (a) as in force under the [Legal Profession Uniform Law] Part 9.1 immediately before the day on which this definition comes into operation (as amended or repealed by regulations to which paragraph (b), or an Act to which paragraph (c) applies); and
 - (b) made under the *Legal Profession Uniform Law (WA)*⁶⁶ Part 9.1 on and after the day on which this definition comes into operation; and
 - (c) made by a provision of an amending Act. (emphasis added)

⁶⁶ When the Legal Profession Uniform Law is applied in Western Australia it will be referred to as the *Legal Profession Uniform Law (WA)* - see clause 6(2)(b).

- 7.23 'Uniform Rules' means the Legal Profession Uniform Rules:
- (a) as in force under the [Legal Profession Uniform Law] Part 9.2 immediately before the day on which this definition comes into operation (as amended or repealed by rules to which paragraph (b), or an Act to which paragraph (c) applies); and
 - (b) made under the *Legal Profession Uniform Law (WA)* Part 9.2 on and after the day on which this definition comes into operation; and
 - (c) made by a provision of an amending Act. (emphasis added)

Clause 5 – Application of *Interpretation Act 1984* to Act and Uniform Law

- 7.24 Clause 5(a) provides that the *Interpretation Act 1984* applies to the Act, however clause 5(b) provides that it does not apply to the *Legal Profession Uniform Law (WA)*. Instead, the *Interpretation of Legislation Act 1984* (Vic), the Victorian equivalent of Western Australia's *Interpretation Act 1984*, applies to the *Legal Profession Uniform Law (WA)*.⁶⁷
- 7.25 While the provisions of the *Interpretation Act 1984* and the *Interpretation of Legislation Act 1984* (Vic) are largely consistent, the effect of clause 5(b) of the Legal Profession Bill and section 7 of the *Legal Profession Uniform Law (WA)* is that the law of another jurisdiction will apply in Western Australia.
- 7.26 The Western Australian Parliament is unable to amend or repeal the *Interpretation of Legislation Act 1984* (Vic).

Committee comment

- 7.27 The Committee acknowledges that one way uniformity is achieved is by applying the law of another jurisdiction. However, applying the laws of another jurisdiction which the Parliament of Western Australia cannot amend or repeal, and which may be inconsistent with Western Australian legislation, impacts on State Parliamentary sovereignty.
- 7.28 The Committee accepts, however, that uniformity also depends on consistent interpretation of the Legal Profession Uniform Law in the different jurisdictions in which it operates. For that to happen, the *Interpretation of Legislation Act 1984* (Vic) will need to apply to that law to the exclusion of the interpretation legislation of each participating jurisdiction.

FINDING 3

Clause 5(b) of the Legal Profession Uniform Law Application Bill 2020, in providing that the *Interpretation Act 1984* does not apply to the *Legal Profession Uniform Law (WA)*, erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 4

Applying the *Interpretation of Legislation Act 1984* (Vic) in Western Australia will be a necessary consequence of the uniform legislative scheme that underpins the Legal Profession Uniform Law.

Clause 6 – Application of Uniform Law as law of the State

- 7.29 The provisions in the Legal Profession Bill that apply the Legal Profession Uniform Law in Western Australia are complex.

⁶⁷ *Legal Profession Uniform Law (WA)* s 7.

7.30 Clause 6 of the Legal Profession Bill applies the Legal Profession Uniform Law (set out in the *Legal Profession Uniform Law Application Act 2014* (Victoria) Schedule 1) as in force on 17 March 2020⁶⁸:

- as amended by:
 - Part 2 of the Victorian Act 2019 when that Part comes into operation in Western Australia (clause 6(1)(a)(i))⁶⁹
 - all 'amending Acts'⁷⁰ that have effect under section 9⁷¹ and have come into operation under section 10 (clause 6(1)(a)(ii))

and

- as modified by:
 - Part 7 Division 3 Subdivision 1 (namely, clauses 170, 171⁷² and 172⁷³ of the Legal Profession Bill) (clause 6(1)(b))⁷⁴
 - Western Australia regulations (clause 6(1)(b))⁷⁵

as a law of Western Australia⁷⁶ as if it were an Act⁷⁷, to be referred to as the *Legal Profession Uniform Law (WA)*.⁷⁸

⁶⁸ The Legal Profession Uniform Law Application Bill 2020 was introduced and had its second reading in the Western Australian Legislative Assembly on 18 March 2020.

⁶⁹ Part 2 of the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) proposes to amend the Legal Profession Uniform Law to increase the number of members of the Legal Services Council from five to seven, ensure that the Legal Services Council's membership includes at least one member from each participating jurisdiction and ensure that the Admissions Committee's membership includes at least one current or former Supreme Court Judge from each participating jurisdiction. These amendments are being made to facilitate Western Australia's entry into the legal profession uniform law scheme in line with the IGA. The current governance arrangements for the scheme reflect the fact that when the scheme commenced there were only two participating jurisdictions. The amendments provide flexibility in the scheme's governance arrangements, so that it can accommodate the entry of additional jurisdictions to the legal profession uniform law scheme in the future. These amendments will apply to the *Legal Profession Uniform Law (WA)* when Part 2 of the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) comes into operation in Western Australia. By virtue of clause 7(2) of the Legal Profession Bill, a provision of Part 2 of the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) comes into operation in Western Australia on the day the Legal Profession Bill comes into operation (if the provision has come into operation in Victoria before commencement day) or on the day on which the provision comes into operation in Victoria (if the provision has not come into operation in Victoria before commencement day). As at 25 August 2020 the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) Part 2 had not come into operation in Victoria. The Committee considers the Parliamentary sovereignty issues arising from this clause at paragraphs 7.36 to 7.42.

⁷⁰ See paragraph 7.20.

⁷¹ See paragraphs 7.79 to 7.84.

⁷² Clause 171 of the Legal Profession Bill modifies section 215 of the *Legal Profession Uniform Law (WA)*. Section 215 deals with exemptions from professional indemnity insurance.

⁷³ Clause 172 of the Legal Profession Bill modifies section 216 of the *Legal Profession Uniform Law (WA)*. Section 216 deals with notification of proposed change of jurisdiction in which professional indemnity insurance is obtained.

⁷⁴ This aspect of clause 6(1)(b) is not a Henry VIII clause as the amendments are being made by the Act and not by subordinate legislation. The Committee has no Parliamentary sovereignty concerns about this aspect of clause 6(1)(b).

⁷⁵ The regulations are to be made under clause 126(1)(b). The Committee has Parliamentary sovereignty concerns about clause 126(1)(b) which is discussed at paragraphs 7.122 to 7.141.

⁷⁶ Legal Profession Uniform Law Application Bill 2020 cl 6(2)(a).

⁷⁷ *ibid.*, cl 6(2)(c).

⁷⁸ *ibid.*, cl 6(2)(b).

- 7.31 Clause 6 applies the Legal Profession Uniform Law as in force on a specified date (17 March 2020) rather than as amended from time to time. The Committee has previously found that attempts to apply a law from another jurisdiction as a law of Western Australia ‘from time to time’ derogate from Western Australia’s Parliamentary sovereignty.⁷⁹
- 7.32 The application of law mechanism in the Legal Profession Bill provides that the Legal Profession Uniform Law is only amended after Parliament is given the opportunity, and decides not, to disallow a Victorian amending Act (other than the Victorian Act 2019).⁸⁰ The disallowance mechanism is to operate before Victorian amending Acts commence operation in Western Australia.
- 7.33 Clause 262 of the Legal Profession Bill provides that the tabling, disallowance and commencement provisions in clauses 8 to 10 apply to Victorian amending Acts that receive the Royal Assent after 17 March 2020 but before commencement of the Act.⁸¹
- 7.34 Therefore, from 17 March 2020 a Victorian amending Act⁸² sought to be applied in Western Australia will be subject to Parliament’s consideration and possible disallowance before it becomes law in this jurisdiction. In this respect, clauses 6(1)(a)(ii) and 262 preserve the Western Australian Parliament’s sovereignty and law-making powers.
- 7.35 Nevertheless, the Committee has some Parliamentary sovereignty concerns about the process by which the Legal Profession Uniform Law is proposed to be applied as a law in Western Australia. Those concerns are set out at paragraphs 7.36 to 7.42.

Clause 3 and clause 6(1)(a)(i)

- 7.36 As previously noted, the Victorian Act 2019 is excluded from the definition of ‘amending Act’ in clause 3 (see paragraph 7.20). The Victorian Act 2019 is therefore not subject to the tabling, disallowance and commencement provisions in clauses 8 to 10 of the Legal Profession Bill.
- 7.37 The effect of this, together with clauses 6(1)(a) and 6(2), is to incorporate amendments to the Legal Profession Uniform Law made by the Victorian Act 2019 into the *Legal Profession Uniform Law (WA)* with no mechanism for Parliamentary scrutiny and possible disallowance of those amendments before they are applied as a law of the State. The Committee has previously said:

as a matter of general principle, the laws of another jurisdiction that the Government seeks to have applied in Western Australia should be subject to Parliament’s consideration and possible disallowance before they become laws of the State.⁸³

- 7.38 The amendments made by the Victorian Act 2019 are, arguably, relatively minor (see footnote 69). However, the Committee has said:

The principle of Parliamentary sovereignty ought not to be abrogated, whether in favour of amending laws that make small and technical changes...and which do

⁷⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 119, *Fair Trading Amendment Bill 2028*, November 2018, Finding 2.

⁸⁰ The Committee considers the Parliamentary sovereignty issues arising from this at paragraphs 7.36 to 7.42.

⁸¹ No Victorian amending Acts have received the Royal Assent between 17 March 2020 and 25 August 2020.

⁸² Other than the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria).

⁸³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 119, *Fair Trading Amendment Bill 2018*, November 2018, p 21.

not have a significant material impact on the law in Western Australia or those which make more substantial amendments.⁸⁴

- 7.39 The amendments made by the Victorian Act 2019 are to enable Western Australia's entry into the legal profession uniform law scheme in line with the IGA (see footnote 69).
- 7.40 Nevertheless Western Australia, if it wishes to join the legal profession uniform law scheme, will need to incorporate the law of another jurisdiction, which has not yet come into operation, as a law of our State without being able to deal with it as it would any other State Act of Parliament.
- 7.41 The Committee wrote to the Attorney General and asked him to explain:
- why the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) is excluded from the definition of 'amending Act' in clause 3 and therefore is not subject to the tabling, disallowance and commencement provisions in clauses 8 to 10 of the Bill?⁸⁵
- 7.42 The Attorney General's advice by letter dated 1 July 2020 is attached as Appendix 2, wherein he explains that the Victorian Act 2019 facilitates Western Australia's involvement in the legal profession uniform law scheme and gives effect to the IGA, has been tabled in the Western Australian Parliament and can be scrutinised by the Parliament in the course of debate on the Legal Profession Bill.⁸⁶

FINDING 5

The combined effect of clauses 3, 6(1)(a)(i) and 6(2) of the Legal Profession Uniform Law Application Bill 2020 is that the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria), which Victoria has not yet brought into operation, will be incorporated into the law of Western Australia without the Parliament of Western Australia being able to deal with it as a State Act of Parliament.

FINDING 6

The *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) is available to the Parliament of Western Australia when considering the Legal Profession Uniform Law Application Bill 2020 and whether Western Australia should join the legal profession uniform law scheme.

Clause 6(1)(a)(ii)

- 7.43 Clause 6(1)(a)(ii) allows 'all amending Acts that have effect for the purposes of [Part 2] under section 9 and have come into operation under section 10' made after 17 March 2020 to be applied in Western Australia.
- 7.44 Section 9 provides for the disallowance or partial disallowance of amending Acts and when they have effect, and section 10 provides for when they shall come into operation.
- 7.45 However, as currently drafted, clause 6(1)(a)(ii) is not limited to amending Acts only to the extent that they have effect under proposed section 9.
- 7.46 Proposed section 9 appears to be modelled on the Committee's Recommendation 4 in Report 123 on the Fair Trading Amendment Bill 2019 concerning clause 5(1) amending

⁸⁴ *ibid.*

⁸⁵ Hon Michael Mischin MLC, Chairman, Standing Committee on Uniform Legislation and Statutes Review, letter, 24 June 2020, p 2.

⁸⁶ Hon John Quigley MLA, Attorney General, letter, 1 July 2020, pp 1-2.

section 19(1)(a)(i) of the *Fair Trading Act 2010*, which recommends clause 5(1)(a)(i) should read 'to the extent that they have effect for the purposes of this section...'

- 7.47 However, in this case, the qualification 'to the extent that they' is omitted from clause 6(1)(a)(ii).

RECOMMENDATION 5

Clause 6(1)(a)(ii) of the Legal Profession Uniform Law Application Bill 2020 be amended as necessary to ensure the capacity for partial disallowance of amending Acts.

Clause 8 – Tabling amending Act

- 7.48 Clause 8 requires all amending Acts to be tabled in both Houses of the Western Australian Parliament within 18 sitting days of the House after the day on which the amending Act receives the Royal Assent.⁸⁷
- 7.49 Amending Acts not tabled within this time will not have effect in Western Australia.⁸⁸
- 7.50 The Committee has identified the following issues arising from clause 8 of the Legal Profession Bill.

No publication in Government Gazette prior to tabling

- 7.51 The Legal Profession Bill does not require a Victorian amending Act to be published in the *Government Gazette* prior to tabling in Parliament.⁸⁹
- 7.52 Publication in the *Government Gazette*, relevantly, serves two purposes. It officially alerts the public to proposed changes in the law and it initiates the referral of instruments to the Delegated Legislation Committee for its consideration.
- 7.53 The Committee asked the Attorney General about the lack of a requirement to publish prior to tabling in the Parliament.
- 7.54 The Attorney General's advice by letter dated 1 July 2020 is attached as Appendix 2, wherein he says it is unnecessary to do so. The tabling of an amending Act pursuant to clause 8 of the Legal Profession Bill would 'ordinarily' make it available to the public on the Western Australian Parliament website as a tabled paper. Further, publication of an amending Act on the Victorian Parliament's website and 'other online platforms together with tabling' would be sufficient notice to the public of an amending Act and its content.⁹⁰
- 7.55 The Committee asked '[i]s an alternative process contemplated by which the public can be informed of the proposed changes to the Legal Profession Uniform Law?'
- 7.56 The Attorney General's response suggests there is not.⁹¹

⁸⁷ The Legal Profession Uniform Law Application Bill 2020 was introduced and had its second reading in the Western Australian Legislative Assembly on 18 March 2020. Amending Acts that receive the Royal Assent after 17 March 2020 but before commencement day are subject to the tabling and disallowance provisions in clauses 8 to 10: clause 262 Legal Profession Uniform Law Application Bill 2020.

⁸⁸ Legal Profession Uniform Law Application Bill 2020 cl 9(2).

⁸⁹ This is contrary to Recommendation 2 of the Committee's Report 119: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 119, *Fair Trading Amendment Bill 2018*, November 2018.

⁹⁰ Hon John Quigley MLA, Attorney General, letter, 1 July 2020, pp 2-3.

⁹¹ *ibid.*, p 3.

7.57 The office of the Attorney General also advised:

Parliamentary Counsel's Office in Western Australia will publish on the WA Legislation Website a version of the Legal Profession Uniform Law as it applies in Western Australia, and keep the version up to date.⁹²

7.58 However, the Committee notes this will only be done after the Legal Profession Uniform Law has been amended and cannot serve the purpose of alerting the public to proposed changes to the law.

Committee comment

7.59 The Committee notes that the question of publishing amending legislation of another jurisdiction was considered in its Report 123 on the Fair Trading Amendment Bill 2019. On that occasion the Government explained:

This requirement has not been included based on recommendations by Parliamentary Counsel and the State Solicitor's Office that gazettal would be inconsistent with current practice for publication of principal legislation, could give rise to unnecessary expense, and could potentially cause confusion about the content of state laws. Confusion is likely, for example, if commonwealth legislation is published prior to scrutiny by Parliament, such that it is in the public domain for an extended period before coming into effect as part of the ACL WA. In terms of expense, some commonwealth ACL amendments are in omnibus bills that have hundreds of pages. In such circumstances, gazettal would be very expensive. For example, a recent regulation amendment with 68 pages cost \$7659.56 to publish in the *Government Gazette*.⁹³

7.60 The Committee was persuaded that, in the circumstances and despite its desirability, gazettal would not be justified due to the potential cost and confusion that might arise.

7.61 The Committee is satisfied with that as a rationale for the Government's reluctance to mandate the publication of Victorian amending Acts in the Western Australian *Government Gazette* prior to their tabling in the Parliament.

FINDING 7

The Western Australian public is entitled to be given sufficient and timely notice of changes to the governance of its legal profession, incorporated from another jurisdiction, that are proposed to be applied as a law of Western Australia.

FINDING 8

The availability of a tabled paper or access to a Western Australian Parliament or Victorian Parliament website does not, in practical terms, alert the public to a prospective law or the effect it may have.

⁹² M Evans, Office of Hon John Quigley MLA, Attorney General, email, 23 June 2020, Attachment: *Legal Profession Uniform Law Application Bill 2020 (WA) – Referral to Standing Committee on Uniform Legislation and Statutes Review*, p 5.

⁹³ Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 3 April 2019, p 1928.

FINDING 9

A requirement for Victorian amending Acts to be gazetted will be expensive and may give rise to confusion as to whether they are part of Western Australian law.

RECOMMENDATION 6

The Government explain to the Parliament the means by which the Western Australian public will be given sufficient and timely notice of proposed amendments to the *Legal Profession Uniform Law Act 2020* and their practical effect.

Tabling supporting information

- 7.62 While clause 8 requires a Victorian amending Act to be tabled in each House of Parliament, there is no requirement for supporting information for an amending Act to be tabled, such as the Victorian Explanatory Memorandum and second reading speech.
- 7.63 Second reading speeches inform Parliament of the policy underpinning a proposed law, the mischief sought to be addressed by it, and the objectives it seeks to achieve. Explanatory Memoranda are meant to assist Parliament in understanding how the legislation is to operate and its objectives attained.
- 7.64 It should be incumbent on Government to provide Parliament with sufficient explanatory material, such as the Victorian Explanatory Memorandum and the Victorian second reading speech for the amending Act, to be able to readily understand the effect of any amending Act.
- 7.65 The Committee asked the Attorney General:
- Is it the Government's intention to table the supporting information for each amending Act, such as the Explanatory Memorandum and second reading speech?
 - If not, please advise what alternative mechanism, if any, is intended by which the supporting information will be made publicly available or available for the information of Parliament.
- 7.66 The Attorney General's advice by letter dated 1 July 2020 is attached as Appendix 2, wherein he confirms that there is no requirement in the Legal Profession Bill to table supporting information for each amending Act but 'there is no reason to suppose that the Government would not table the supporting information if that information was considered to be of assistance. ... If the supporting information is not separately tabled, it will be publicly available on the Victorian Parliament website (and other online platforms)'.⁹⁴

Committee comment

- 7.67 The Legal Profession Uniform Law is complex. The Legal Profession Bill proposes a process to expedite incorporation into Western Australian law, subject to Parliament's decision to disallow, what may be far-ranging and complicated amendments.
- 7.68 It is therefore important that, at the time of tabling, the Parliament be provided with all material that it would ordinarily expect and rely upon to support a change to Western Australian law.

⁹⁴ Hon John Quigley MLA, Attorney General, letter, 1 July 2020, p 3.

- 7.69 Apart from the Parliament and the public's entitlement to be informed by its Government of proposed changes to the law of Western Australia governing its legal profession, provision of this information may make a notice of motion to disallow less likely.
- 7.70 The Attorney General's observation that there is no reason to suppose the Government would not table information that the Government considered would be of assistance, and his assurance that such information will be publicly available on (among other places) another jurisdiction's website, does not satisfy that entitlement.

FINDING 10

The Western Australian public is entitled to be given sufficient and timely notice of changes to the governance of its legal profession, incorporated from another jurisdiction, that are proposed to be applied as a law of Western Australia.

FINDING 11

The Government's advice that there is no reason to suppose it would not table information that it considered would be of assistance, and its assurance that such information will be publicly available on, among other places, another jurisdiction's website, does not satisfy that entitlement.

RECOMMENDATION 7

The Government formulate, and advise the Western Australian Parliament of, a satisfactory alternative means by which the Western Australian Parliament and the Western Australian public will be given sufficient and timely information explaining proposed amendments to the *Legal Profession Uniform Law Act 2020* and their practical effect.

Notification of the commencement of a Victorian amending Act

- 7.71 As noted in paragraphs 7.48 and 7.49, clause 8 requires all Victorian amending Acts to be tabled in both Houses of the Western Australian Parliament within 18 sitting days of the House after the day on which the amending Act receives the Royal Assent. Amending Acts not tabled within this time will not have effect in Western Australia.⁹⁵
- 7.72 To avail itself of the application of laws process under the Legal Profession Bill, the Government will need to be aware that a Victorian amending Act has received the Royal Assent.
- 7.73 The Committee asked the Attorney General how it is intended that Western Australia will receive notification of the commencement of a Victorian amending Act that amends the Legal Profession Uniform Law.
- 7.74 The Attorney General's advice by letter dated 1 July 2020 is attached as Appendix 2, wherein he provided a copy of a chart depicting the process leading to the passage of a Victorian amending Act. He advised that by way of its membership of the Standing Committee and representation on the Legal Services Council and Admissions Committee, Western Australia will be privy to and 'likely be updated on the progress of' any amendments.⁹⁶

⁹⁵ Legal Profession Uniform Law Application Bill 2020 cl 9(2).

⁹⁶ Hon John Quigley MLA, Attorney General, letter, 1 July 2020, p 3.

Committee comment

- 7.75 The application of laws process under the Legal Profession Bill is designed to expedite the incorporation into the law of Western Australia changes to a uniform law scheme in which the State wishes to participate.
- 7.76 The Legal Profession Bill seeks to preserve Parliamentary sovereignty by providing that the Western Australian Parliament will be notified of future amendments to the Legal Profession Uniform Law and given an opportunity to disallow those amendments. The process requires the Government to table Victorian amending Acts in the Western Australian Parliament within a specified time after they have received the Royal Assent. Failure to comply with the tabling requirements in clause 8 would result in the Victorian amending Act not having effect in Western Australia.⁹⁷
- 7.77 To avail itself of this application of laws process, the Government will need to be aware that a Victorian amending Act has received the Royal Assent.
- 7.78 The tabling requirement in clause 8 of the Legal Profession Bill therefore relies on the:
- diligent and timely monitoring by the Department of Justice of all Victorian amendments to the Legal Profession Uniform Law
 - tabling of those amendments in the Western Australian Parliament within the timeframe provided in clause 8.

Clause 9 – Disallowance of amending Acts

- 7.79 Clause 9 sets out the process by which a Victorian amending Act has effect in Western Australia; that is, it is laid before each House of Parliament⁹⁸ and either:
- no notice of a disallowance resolution is given in either House within the 'notice period'^{99,100}; or
 - if at least one notice of a disallowance resolution is given within the notice period and, for each such notice, the:
 - notice is withdrawn or discharged within the disallowance period;¹⁰¹ or
 - disallowance resolution is lost in the House or not agreed to within the disallowance period;¹⁰² or
 - disallowance resolution is a partial disallowance resolution and is agreed to within the disallowance period.¹⁰³
- 7.80 Clause 9(4)(b) provides that notices of a disallowance resolution and motions that an amending Act be disallowed do not lapse even though the House is prorogued, dissolved or expires.

⁹⁷ Legal Profession Uniform Law Application Bill 2020 cl 9(2).

⁹⁸ Amending Acts which are not tabled in time will cease to have effect. That is the effect of cl 16(2)(a) and 16(3) of the Legal Profession Uniform Law Application Bill 2020.

⁹⁹ 'Notice period' means a 14 sitting day period following tabling for a notice of disallowance to be given: Legal Profession Uniform Law Application Bill 2020 cl 9(1).

¹⁰⁰ Legal Profession Uniform Law Application Bill 2020 cl 9(2)(a).

¹⁰¹ *ibid.*, cl 9(2)(b)(i).

¹⁰² *ibid.*, cl 9(2)(b)(ii).

¹⁰³ *ibid.*, cl 9(2)(b)(iii).

7.81 The operation of SO 67 is relevant here. The Committee explained in detail how SO 67 operates in Report 123¹⁰⁴ and for convenience of reference the relevant extracts are attached as Appendix 3.

Amendment to Standing Order 67 required

7.82 In order to have a *pro forma* disallowance motion in the Legislative Council (that is, one moved automatically after two sitting days) survive into a new Parliament after a general election, as proposed by the Legal Profession Bill, an exception is needed to SO 67(5)(b). The Committee recommended an amendment to SO 67 in Report 123.¹⁰⁵ The Committee makes the same recommendation here.

RECOMMENDATION 8

The Legislative Council amend Standing Order 67 of the Standing Orders of the Legislative Council as follows:

Delete Standing Orders 67(5)(a) and (b) and insert the following:

- (5) Where on the 17th sitting day after the motion was moved (exclusive of the day on which the motion was moved) a motion to disallow a regulation remains unresolved, then the question shall be put before the Council rises on that day.
- (6) Subject to (7), where on the proposed last sitting day prior to a general election, a motion to disallow a regulation remains unresolved, then the question shall be put before the Council rises on that day.
- (7) Where a written law provides that a motion to disallow a regulation does not lapse on prorogation, dissolution, or expiry of a House, and:
 - (a) a motion to disallow a regulation remains unresolved on the proposed last sitting day prior to a general election; and
 - (b) the last sitting day is the 16th or earlier sitting day after the motion was moved (exclusive of the day on which the motion was moved),the motion to disallow shall be an order of the day in the next Parliament and unless disposed of earlier, the question shall be put in accordance with (5) in the next Parliament.

7.83 The effect of amending SO 67 in the terms in Recommendation 8, together with clause 9(4) of the Legal Profession Bill, is that the period for tabling amending Acts, notice periods, notices of disallowance resolutions and motions that an amending Act be disallowed will survive into a new Parliament. The same timeframe for disallowance will apply as presently, regardless of prorogation, dissolution or expiry; that is, a motion to disallow a Victorian amending Act, if not resolved earlier, must be resolved before the Council rises on the 17th sitting day after the motion was moved (exclusive of the day on which the motion was moved) and notwithstanding that it may occur in a new Parliament. This time period is shorter than, but not inconsistent with, the 30 sitting days provided in the Legal Profession Bill.

¹⁰⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 123, *Fair Trading Amendment Bill 2019*, August 2019, paragraphs 5.60 to 5.63 and paragraphs 5.82 to 5.88.

¹⁰⁵ *ibid.*, Recommendation 2.

- 7.84 In order that Parliament is in a position to utilise the disallowance mechanism proposed by the Legal Profession Bill, the amendments to SO 67 in the terms set out in Recommendation 8 should be coordinated with the passage of the Legal Profession Bill.

RECOMMENDATION 9

The question on the third reading of the Legal Profession Uniform Law Application Bill 2020 not be put until Legislative Council Standing Order 67 is amended in the terms set out in Recommendation 8.

Clause 11 – Tabling of amending Act taken to be publication for Standing Orders

- 7.85 By virtue of Joint Rule 10.5 of Schedule 1 of the Standing Orders of the Legislative Council, instruments stand referred to the Delegated Legislation Committee on ‘publication’. Victorian amending Acts must therefore be published under a written law of Western Australia to be referred to the Delegated Legislation Committee.
- 7.86 Clause 11(2) deems the tabling of amending Acts to be publication for the purposes of Standing Orders where Standing Orders provide that on publication of an instrument under a written law, the instrument is referred to a parliamentary committee for consideration.
- 7.87 The effect of this is to ensure that amending Acts are referred to the Delegated Legislation Committee under Joint Rule 10.5.
- 7.88 The Committee has no sovereignty concerns about clause 11 and draws to the Legislative Council’s attention that it adopts the wording recommended by the Committee in its Report 123.¹⁰⁶

Amendment to Standing Order 67(1) required

- 7.89 If the Delegated Legislation Committee is to scrutinise Victorian amending Acts, SO 67(1) requires amendment to allow the referral of those Acts to that committee. The Committee discussed this in detail in its Report 123¹⁰⁷, including:
- how SO 67 operates¹⁰⁸
 - why instruments of primary legislation would not be considered to be a ‘regulation’ under SO 67 and therefore not subject to the disallowance process in SO 67.¹⁰⁹
- 7.90 For convenience of reference the relevant extracts are attached as Appendix 3 and Appendix 4.
- 7.91 The Committee recommended an amendment to SO 67(1) to address this issue and make instruments of primary legislation subject to the scrutiny and disallowance process in SO 67.¹¹⁰ The Committee makes the same recommendation here.

¹⁰⁶ *ibid.*, paragraphs 5.60 to 5.113 and Recommendations 1-3.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*, paragraphs 5.60 to 5.63.

¹⁰⁹ *ibid.*, paragraphs 5.64 to 5.68.

¹¹⁰ This was contingent on a provision in an Act providing that the tabling of instruments of primary legislation is taken to be publication for the purposes of Standing Orders. Clause 11(2) of the Legal Profession Uniform Law Application Bill 2020 does that.

- 7.92 The Attorney General, in his letter of advice of 1 July 2020, stated that SO 67(1) had been amended consistently with Recommendation 1 in Report 123. As noted in paragraph 6.11, that is not so.

RECOMMENDATION 10

The Legislative Council delete Standing Order 67(1) of the Standing Orders of the Legislative Council and replace it as follows:

For the purpose of this Standing Order, a “regulation” includes any instrument made subject to disallowance by a written law.

- 7.93 As noted, clause 11(2) deems the tabling of amending Acts to be ‘publication’ for the purposes of Standing Orders. The effect of clause 11, together with the Committee’s recommended amendment to SO 67(1), is to ensure that Victorian amending Acts are referred to the Delegated Legislation Committee under Joint Rule 10.5.
- 7.94 In order that Parliament is in a position to utilise the disallowance mechanism proposed by the Legal Profession Bill, the amendments to SO 67(1) in the terms set out in Recommendation 10 should be coordinated with the passage of the Legal Profession Bill.

RECOMMENDATION 11

The question on the third reading of the Legal Profession Uniform Law Application Bill 2020 not be put until Legislative Council Standing Order 67(1) is amended in the terms set out in Recommendation 10.

Clause 16 – Tabling and disallowance of Uniform Regulations and Uniform Rules

- 7.95 Clauses 14, 15 and 16 deal with:
- the application of Uniform Regulations and Uniform Rules in Western Australia (clause 14)
 - their publication in the *Government Gazette* (clause 15)
 - their tabling in Parliament and the process by which they may be disallowed (clause 16).

Clause 14 – Application of Uniform Regulations and Uniform Rules as laws of the State for Uniform law and Act

- 7.96 Clause 14 applies the Uniform Regulations and Uniform Rules as subsidiary legislation of Western Australia, subject to various subsections (discussed at paragraphs 7.107 to 7.120).

Clause 15 – Publication of Uniform Regulations and Uniform Rules

- 7.97 Clause 15(1) provides that Uniform Regulations and Uniform Rules made on or after the day on which clause 15 comes into operation must be published in the *Government Gazette* no later than 18 days after the day on which they are made.
- 7.98 Clause 15(2) provides that this requirement to publish in the *Government Gazette* does not apply to a provision of a Victorian amending Act that amends the Uniform Regulations or Uniform Rules.

Clause 16 – Tabling and disallowance of Uniform Regulations and Uniform Rules

Tabling and disallowance mechanism

- 7.99 The tabling and disallowance provisions in the *Interpretation Act 1984*¹¹¹ do not apply to the Uniform Regulations and Uniform Rules.¹¹²
- 7.100 Instead, the Legal Profession Bill contains its own mechanism by which Uniform Regulations and Uniform Rules may be disallowed by the Western Australian Parliament. This is set out in clause 16 and applies to Uniform Regulations and Uniform Rules that have been published in the *Government Gazette* under clause 15(1).
- 7.101 The disallowance process in clause 16 is:
- The Uniform Regulations or Uniform Rules must be tabled in each House of Parliament within six sitting days of the House after publication in the *Government Gazette*.¹¹³ Uniform Regulations or Uniform Rules which are not tabled within this time will cease to have effect in Western Australia.¹¹⁴

If the Uniform Regulations or Uniform Rules published under clause 15 amended or repealed Uniform Regulations or Uniform Rules but cease to have effect, the pre-amendment or repeal Uniform Regulations or Uniform Rules are revived.¹¹⁵
 - A notice of a resolution to disallow the whole or part of the published Uniform Regulations or Uniform Rules must be given within 14 sitting days of the House after tabling.¹¹⁶ If the resolution to disallow is agreed to by the House,¹¹⁷ the Uniform Regulations or Uniform Rules cease to have effect in Western Australia.¹¹⁸

If the Uniform Regulations or Uniform Rules published under clause 15 amended or repealed Uniform Regulations or Uniform Rules but cease to have effect, the pre-amendment or repeal Uniform Regulations or Uniform Rules are revived.¹¹⁹

'Uniform Regulations' and 'Uniform Rules'

- 7.102 The definitions of 'Uniform Regulations' and 'Uniform Rules' in clause 3 of the Legal Profession Bill each contain three limbs. They are set out at paragraphs 7.103 and 7.104.
- 7.103 'Uniform Regulations' means the Legal Profession Uniform Regulations:
- (a) as in force under the [Legal Profession Uniform Law] Part 9.1 immediately before the day on which this definition comes into operation¹²⁰ (as amended or repealed by regulations to which paragraph (b), or an Act to which paragraph (c) applies); and

¹¹¹ *Interpretation Act 1984* ss 41 and 42.

¹¹² Legal Profession Uniform Law Application Bill 2020 cl 17.

¹¹³ *ibid.*, cl 16(1).

¹¹⁴ *ibid.*, cl 16(2)(a) and 16(3).

¹¹⁵ *ibid.*, cl 16(2)(a) and 16(4).

¹¹⁶ *ibid.*, cl 16(2)(b)(i).

¹¹⁷ *ibid.*, cl 16(2)(b)(ii).

¹¹⁸ *ibid.*, cl 16(2)(b) and 16(3).

¹¹⁹ *ibid.*, cl 16(2)(b) and 16(4).

¹²⁰ Clause 3 of the Legal Profession Uniform Law Application Bill 2020 will come into operation on the day it receives the Royal Assent – see clause 2(1)(a).

- (b) made under the *Legal Profession Uniform Law (WA)*¹²¹ Part 9.1 on and after the day on which this definition comes into operation; and
- (c) made by a provision of an amending Act. (emphasis added)

7.104 'Uniform Rules' means the Legal Profession Uniform Rules:

- (a) as in force under the [Legal Profession Uniform Law] Part 9.2 immediately before the day on which this definition comes into operation¹²² (as amended or repealed by rules to which paragraph (b), or an Act to which paragraph (c) applies); and
- (b) made under the *Legal Profession Uniform Law (WA)* Part 9.2 on and after the day on which this definition comes into operation; and
- (c) made by a provision of an amending Act. (emphasis added)

7.105 The provisions by which each of the three limbs of Uniform Regulations and Uniform Rules apply as subsidiary legislation in Western Australia, when they apply and whether they are disallowable by the Western Australian Parliament, are complex. At its hearing, the Committee sought an explanation of how these provisions will operate. The transcript is attached as Appendix 1.

7.106 The Committee's summary of how the provisions are intended to operate, and implications for Parliamentary sovereignty, are set out below.

Limb (a) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3

7.107 Uniform Regulations and Uniform Rules that fall within limb (a) are those that are in force in Victoria and New South Wales immediately before Part 1 of the Legal Profession Bill receives the Royal Assent. They will apply as subsidiary legislation of Western Australia by virtue of clause 14(1)(a) for Uniform Regulations and clause 14(2)(a) for Uniform Rules.

7.108 They will apply here on the day on which sections 14(1)(a) and 14(2)(a) come into operation. This will be on a day fixed by proclamation.¹²³

7.109 The Legal Profession Bill contains no provision by which Uniform Regulations or Uniform Rules falling within limb (a) and made on or before 17 March 2020¹²⁴ can be disallowed. However, if the Western Australian Parliament does not agree to one or more of these Uniform Regulations or Uniform Rules, it can vote to delete those provisions during debate on clause 14 of the Legal Profession Bill so they do not apply as subsidiary legislation of Western Australia. That is:

if, during debate on clause 14 of the [Legal Profession Bill], there was particular opposition to a specific regulation that was currently in existence that presumably could be carved out of clause 14. It would be the uniform regulations, save and except for this particular one, apply as subsidiary legislation of the state.¹²⁵

¹²¹ When the Legal Profession Uniform Law is applied in Western Australia it will be referred to as the *Legal Profession Uniform Law (WA)*—see clause 6(2)(b).

¹²² Clause 3 of the Legal Profession Uniform Law Application Bill 2020 will come into operation on the day it receives the Royal Assent—see clause 2(1)(a).

¹²³ Legal Profession Uniform Law Application Bill 2020 cl 2(d). Uniform Regulations and Uniform Rules have effect in accordance with their terms, so they may set a commencement date after the day on which section 14(1) comes into operation.

¹²⁴ The Legal Profession Uniform Law Application Bill 2020 was introduced and had its second reading in the Western Australian Legislative Assembly on 18 March 2020.

¹²⁵ C Conley, Senior Assistant State Solicitor, State Solicitor's Office, transcript of evidence, 12 August 2020, p 4.

Parliament could make a decision to say that particular portions of the subsidiary legislation under the scheme could be excluded or modified.¹²⁶

that effectively is the disallowance by Parliament or not being agreed to by Parliament....¹²⁷

- 7.110 Uniform Regulations and Uniform Rules falling within limb (a) and made after 17 March 2020 but before commencement day are subject to disallowance by the Western Australian Parliament by virtue of clause 263(1), which provides that the publication and disallowance provisions in clauses 15 and 16 apply. Accordingly, Uniform Regulations and Uniform Rules made in the period between when the Legal Profession Bill was introduced into the Legislative Assembly and when clause 263 comes into operation are subject to disallowance by the Western Australian Parliament.

Limb (b) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3

- 7.111 Uniform Regulations and Uniform Rules falling within limb (b) are those made by Western Australia on and after the day on which Part 1 of the Legal Profession Bill receives the Royal Assent. They will apply as subsidiary legislation of Western Australia by virtue of clause 14(1)(a) (for Uniform Regulations) and clause 14(2)(a) (for Uniform Rules), subject to clause 14(3).
- 7.112 Clause 14(3) provides that Uniform Regulations and Uniform Rules made on and after the day on which clause 14 comes into operation (that is, when it is proclaimed) apply as subsidiary legislation of Western Australia, subject to clause 14(5) and clause 16.
- 7.113 Uniform Regulations and Uniform Rules that are not reliant on an amending Act¹²⁸ come into operation on the day when the Uniform Regulation or Uniform Rule comes into operation, which will be the day or days specified in that Uniform Regulation or Uniform Rule.¹²⁹ They apply as subsidiary legislation of Western Australia on that day or days.¹³⁰
- 7.114 Uniform Regulations and Uniform Rules that are reliant on an amending Act come into operation on the day the amending Act provision comes into operation for the purposes of Part 2 under section 10 or the day the subsidiary provision comes into operation in Victoria, whichever is the later.¹³¹ They apply as subsidiary legislation of Western Australia on that day.¹³²
- 7.115 Uniform Regulations and Uniform Rules falling within limb (b) are subject to disallowance by the Western Australian Parliament. They are required to be published in the *Government*

¹²⁶ B Fraser, Assistant Parliamentary Counsel, Parliamentary Counsel's Office, transcript of evidence, 12 August 2020, p 4.

¹²⁷ C Conley, Senior Assistant State Solicitor, State Solicitor's Office, transcript of evidence, 12 August 2020, p 4.

¹²⁸ 'Amending Act' means a Victorian Act, other than the Victorian Act 2019, that amends the *Legal Profession Uniform Law Application Amendment Act 2014* (Victoria) Schedule 1, Uniform Regulations or Uniform Rules.

¹²⁹ Also see *Legal Profession Uniform Law Application Act 2014* (Victoria) Schedule 1 section 418(2): 'A Uniform Regulation commences on the day or days specified in the Regulation for its commencement (being not earlier than the date it is published)'. Section 431(2) is in similar terms for Uniform Rules.

¹³⁰ They apply by virtue of clauses 14(1)(a) and 14(3) for Uniform Regulations and clauses 14(2)(a) and 14(3) for Uniform Rules and section 418(2) of the *Legal Profession Uniform Law Application Act 2014* (Vic) Schedule 1 for Uniform Regulations and section 431(2) of the *Legal Profession Uniform Law Application Act 2014* (Vic) Schedule 1 for Uniform Rules.

¹³¹ Legal Profession Uniform Law Application Bill 2020 cl 14(5)(a).

¹³² They apply by virtue of clauses 14(1)(a) and 14(3) for Uniform Regulations and clauses 14(2)(a) and 14(3) for Uniform Rules.

Gazette in accordance with clause 15 and are subject to disallowance in accordance with clause 16 (see paragraphs 7.99 to 7.101).

- 7.116 The mechanism by which these 'local' Uniform Regulations and Uniform Rules are made and apply in Western Australia is the same as for subsidiary legislation made under a State Act. These Uniform Regulations and Uniform Rules apply as laws of Western Australia from the day they come into operation. If they are subsequently disallowed, they will cease operation on that date and those Uniform Regulations or Uniform Rules in force pre-amendment or repeal will be revived.

Limb (c) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3

- 7.117 Uniform Regulations and Uniform Rules falling within limb (c) are those made by a provision of an amending Act. They will apply as subsidiary legislation of Western Australia if the amending Act has effect and has come into operation here; that is, it has survived any disallowance resolution and been proclaimed.¹³³
- 7.118 If the provision of an amending Act has come into operation in Victoria before the proclamation referred to in clause 10(2) is published in the *Government Gazette*, the Uniform Regulations or Uniform Rules come into operation on a day fixed by the proclamation.¹³⁴
- 7.119 If the provision of an amending Act has not come into operation before the proclamation referred to in clause 10(2) is published in the *Government Gazette*, the Uniform Regulations or Uniform Rules come into operation when the provision of the amending Act is brought into operation in Victoria.¹³⁵
- 7.120 Uniform Regulations and Uniform Rules falling within limb (c) are not separately disallowable by the Western Australian Parliament under clause 16. However, they are subject to the disallowance process for amending Acts in clauses 8 to 10 of the Legal Profession Bill (discussed at paragraphs 7.48 to 7.84). The Western Australian Parliament could disallow a provision of an amending Act that relates to a particular Uniform Regulation or Uniform Rule.

FINDING 12

Uniform Regulations and Uniform Rules falling within paragraph (a) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3 of the Legal Profession Uniform Law Application Bill 2020 and made on or before 17 March 2020 are not subject to disallowance by the Western Australian Parliament. This is an erosion of Parliament sovereignty.

- 7.121 This erosion of Parliamentary sovereignty may be overcome as discussed in paragraph 7.109.

FINDING 13

If the Western Australian Parliament does not agree to one or more of the Uniform Regulations or Uniform Rules falling within paragraph (a) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3 of the Legal Profession Uniform Law Application Bill 2020 and made on or before 17 March 2020, it can vote to delete those provisions during debate on clause 14 of the Legal Profession Bill so they do not apply as subsidiary legislation of Western Australia.

¹³³ Legal Profession Uniform Law Application Bill 2020 cl 14(1)(a) and 14(4) for Uniform Regulations and cl 14(2)(a) and 14(4) for Uniform Rules.

¹³⁴ *ibid.*, cl 14(4) and 10(4).

¹³⁵ *ibid.*, cl 14(4) and 10(5).

FINDING 14

Uniform Regulations and Uniform Rules falling within paragraph (a) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3 of the Legal Profession Uniform Law Application Bill 2020 and made after 17 March 2020 but before commencement day are subject to disallowance by the Western Australian Parliament.

FINDING 15

Uniform Regulations and Uniform Rules falling within paragraph (b) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3 of the Legal Profession Uniform Law Application Bill 2020 are subject to disallowance by the Western Australian Parliament.

FINDING 16

Uniform Regulations and Uniform Rules falling within paragraph (c) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3 of the Legal Profession Uniform Law Application Bill 2020 are not disallowable by the Western Australian Parliament under clause 16, but are subject to the disallowance process for amending Acts in clauses 8 to 10 of the Legal Profession Uniform Law Application Bill 2020.

Clause 126 – Local regulations in relation to government lawyers

7.122 Clause 126(1)(b) provides that local regulations¹³⁶ may:

without limitation, exclude or modify the operation of specified provisions of the *Legal Profession Uniform Law (WA)* (including the provisions of Part 2.2 of the Law) to the extent that any of those provisions would otherwise be applicable to any persons, or classes of persons, as government lawyers;

Henry VIII clause

7.123 Clause 126(1)(b) is a 'Henry VIII clause'. A 'Henry VIII clause' is a section of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.¹³⁷ A Henry VIII clause gives a subordinate instrument (in this case, regulations) the same effect on an Act as an amendment to that Act.

7.124 Clause 126(1)(b) is a Henry VIII clause as it permits the modification of the operation of primary legislation¹³⁸ by regulation. It purports to enable Executive-made regulations to determine the operation of the proposed Act.

7.125 The Committee's position on Henry VIII clauses has been well documented in previous Committee reports.¹³⁹ Such clauses are objectionable as they offend the principle of the

¹³⁶ 'Local regulations' are those regulations made under the *Legal Profession Uniform Law (WA)* and only applicable in Western Australia.

¹³⁷ Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The use of "Henry VIII" Clauses in Queensland Legislation*, January 1997, p 24.

¹³⁸ *The Legal Profession Uniform Law (WA)*.

¹³⁹ See 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 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 121, *Child Support (Commonwealth Powers) Bill 2018*. 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.

separation of powers, give insufficient regard to the institution of Parliament as the supreme legislature and delegate to the Executive the Parliament's sovereign function to legislate.

Henry VIII clauses should be justified in explanatory materials

- 7.126 The Committee's approach is that Parliament ought not enact Henry VIII clauses without sound reason. 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.¹⁴⁰
- 7.127 The Executive is accountable to the Parliament as the law-making body in the Westminster system of government. Essential to achieving this accountability is its responsibility to fully disclose to Parliament any information relevant to the policy and intended operation of a bill. The Committee has said:

A quality explanatory memorandum, which should contain an explanation for any provision within a bill that appears to infringe the terms of reference of the relevant parliamentary committee scrutinising the proposed legislation, will assist the Executive in fulfilling this duty.¹⁴¹

- 7.128 The Committee made the following recommendation in its Report 55:

The Committee recommends that when introducing a bill to the Legislative Council that proposes a Henry VIII clause, the responsible Minister provide in the Explanatory Memorandum the rationale for that provision.¹⁴²

No justification in explanatory materials for Legal Profession Bill

- 7.129 The Explanatory Memorandum for the Legal Profession Bill does not identify clause 126(1)(b) as a Henry VIII clause.
- 7.130 The second reading speech for the Legal Profession Bill similarly failed to identify clause 126(1)(b) as a Henry VIII clause.

Attorney General's advice

- 7.131 The Committee asked the Attorney General:
- Why clause 126(1)(b) was not identified as a Henry VIII clause in the Explanatory Memorandum for the Legal Profession Bill?
 - Why is a clause in that form necessary, whether any alternatives have been considered and why they have been rejected?
- 7.132 The Attorney General's advice by letter dated 1 July 2020 is attached as Appendix 1, wherein he says there is no requirement to identify a clause as a Henry VIII clause in explanatory memoranda.

¹⁴⁰ 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.

¹⁴¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 89, *Gene Technology (Western Australia) Bill 2014*, 10 March 2015, p 18.

¹⁴² 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, Recommendation 2.

- 7.133 The Attorney General asserts that ‘the effect of clause 126(1)(b) is clearly set out in the Explanatory Memorandum’ and that ‘clause 6(1)(b) refers to the fact that the Legal Profession Uniform Law may be modified by local regulations made under clause 126(1)(b)’.¹⁴³
- 7.134 The Attorney General also states that clause 126(1)(b) gives effect to section 56 of the Legal Profession Uniform Law and provides ‘sufficient flexibility to make exemptions, exclusions or modifications as and when required’¹⁴⁴. He points out that any regulations made pursuant to clause 126(1)(b) will be subject to disallowance.

Committee comment

- 7.135 The Explanatory Memorandum for the Legal Profession Bill did not acknowledge and draw Parliament’s attention to clause 126(1)(b) being a Henry VIII clause and offer an explanation for its use.
- 7.136 While the Attorney General is correct that there is no ‘requirement’ to identify a clause as a Henry VIII clause in an explanatory memorandum, it would have been desirable, consistent with the purpose of an explanatory memorandum, and reflective of repeated observations and recommendations by Parliamentary committees to have done so. It is regrettable that the Attorney General has not had regard to those observations and recommendations.
- 7.137 While clause 126(1)(b) is mentioned in the Explanatory Memorandum, the text does no more than is apparent from a reading of the legislation and offers no explanation of the need or desirability of such a provision. It should not be for the Western Australian Parliament to have to research debates in other jurisdictions or Parliaments to try to understand the purpose and effect of a provision it is being asked to make a part of a law of Western Australia.
- 7.138 A significant service performed by an explanatory memorandum is to explain how the components of a bill interrelate and are intended to operate.
- 7.139 The Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.
- 7.140 So far as the Committee is able to tell, clause 126(1)(b) is focused in its operation, and places parameters on the extent to which the limitations, exclusions or modifications may apply to ‘any persons, or classes of persons, as government lawyers’. This is not an open-ended provision.
- 7.141 That being so, the Committee considers that clause 126(1)(b) is acceptable by reason of the ability to refine the national scheme to suit Western Australian requirements.

FINDING 17

Clause 126(1)(b) of the Legal Profession Uniform Law Application Bill 2020 is a Henry VIII clause as it enables regulations, rather than an Act of Parliament, to modify the *Legal Profession Uniform Law (WA)*.

FINDING 18

Clause 126(1)(b) of the Legal Profession Uniform Law Application Bill 2020 erodes the Western Australian Parliament’s sovereignty and law-making powers.

¹⁴³ Hon John Quigley MLA, Attorney General, letter, 1 July 2020, p 4.

¹⁴⁴ *ibid.*, p 5.

FINDING 19

The Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

FINDING 20

Clause 126(1)(b) of the Legal Profession Uniform Law Application Bill 2020 is acceptable by reason of the ability to refine the national scheme to suit Western Australian requirements.

RECOMMENDATION 12

The second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.

Clause 328 – Transitional regulations

7.142 Clause 328(3) provides that local regulations in relation to transitional matters may provide that specified provisions of the Act, the *Legal Profession Uniform Law (WA)* or another written law:

- (a) do not apply to or in relation to any matter; or
- (b) apply with specified modifications to or in relation to any matter.

Henry VIII clause

7.143 Clause 328(3) is a Henry VIII clause as it permits the modification of the operation of primary legislation by regulation.

7.144 Henry VIII clauses, and the Committee's position on them, is discussed at paragraphs 7.123 to 7.128.

7.145 The power for regulations to exclude or modify 'another written law' in relation to any matter is open-ended.

Henry VIII clauses should be justified in explanatory materials

7.146 The Committee has noted at paragraphs 7.126 to 7.128 its position with respect to Henry VIII clauses and that they should be explained and justified in the explanatory materials for a bill.

No justification in explanatory materials for Legal Profession Bill

7.147 The Explanatory Memorandum for the Legal Profession Bill does not identify clause 328(3) as a Henry VIII clause.

7.148 The second reading speech for the Legal Profession Bill similarly failed to identify clause 328(3) as a Henry VIII clause.

Attorney General's advice

7.149 The Committee asked the Attorney General:

- Why clause 328(3) was not identified as a Henry VIII clause in the Explanatory Memorandum for the Legal Profession Bill?
- Why is a clause in that form necessary, whether any alternatives have been considered and why they have been rejected?

- 7.150 The Attorney General's advice by letter dated 1 July 2020 is attached as Appendix 1, wherein he says there is no requirement to identify a clause as a Henry VIII clause in explanatory memoranda.
- 7.151 The Attorney General asserts that the 'effect of clause 328(3) is clearly set out in the Explanatory Memorandum'.¹⁴⁵

Committee comment

- 7.152 The Explanatory Memorandum for the Legal Profession Bill did not acknowledge and draw Parliament's attention to clause 328(3) being a Henry VIII clause and offer an explanation for its use.
- 7.153 While the Attorney General is correct that there is no 'requirement' to identify a clause as a Henry VIII clause in an explanatory memorandum, it would have been desirable, consistent with the purpose of an explanatory memorandum, and reflective of repeated observations and recommendations by Parliamentary committees to have done so. It is regrettable that the Attorney General has not had regard to those observations and recommendations.
- 7.154 While clause 328(3) is mentioned in the Explanatory Memorandum, the text does no more than is apparent from a reading of the legislation and offers no explanation of the need or desirability of such a provision. It should not be for the Western Australian Parliament to have to research debates in other jurisdictions or Parliaments to try to understand the purpose and effect of a provision it is being asked to make a part of a law of Western Australia.
- 7.155 A significant service performed by an explanatory memorandum is to explain how the components of a bill interrelate and are intended to operate.
- 7.156 The Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.
- 7.157 Clause 328(3) is focused in its operation, and places parameters on the extent to which local regulations may be made to provide that specified provisions of the Act, the *Legal Profession Uniform Law (WA)* or another written law do not apply, or apply with specified modifications, to or in relation to any matter.
- 7.158 They will have to be in relation to a 'transitional matter', namely 'a matter that needs to be dealt with for the purpose of effecting the transition from' the legislation repealed under the Act and the *Legal Profession Uniform Law (WA)* to the new scheme and which includes a savings or application matter. This is not an open-ended provision.
- 7.159 That being so, the Committee considers that clause 328(3) is justifiable in order to effect a smooth transition to the new regulatory scheme and acceptable by reason of its focused operation.

FINDING 21

Clause 328(3) of the Legal Profession Uniform Law Application Bill 2020 is a Henry VIII clause as it enables regulations, rather than an Act of Parliament, to modify the *Legal Profession Uniform Law Application Act 2020*, the *Legal Profession Uniform Law (WA)* or another written law.

¹⁴⁵ *ibid.*

FINDING 22

Clause 328(3) of the Legal Profession Uniform Law Application Bill 2020 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 23

The Explanatory Memorandum falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.

FINDING 24

Clause 328(3) of the Legal Profession Uniform Law Application Bill 2020 is justifiable in order to effect a smooth transition to the new regulatory scheme and acceptable by reason of its focused operation.

RECOMMENDATION 13

The second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.

8 Legal Profession Uniform Law Application (Levy) Bill 2020

- 8.1 In 2016, the Western Australian *Legal Profession Act 2008* was amended to:
- amalgamate the law library at the Supreme Court with the law library of the then Department of the Attorney General
 - impose an obligation on the Legal Practice Board to pay the State an annual amount as a contribution towards the cost of providing and maintaining the law library.
- 8.2 The amalgamated law library is currently situated at the David Malcolm Justice Centre and is operated by the Department of Justice on behalf of the State. The law library is for the use of the judiciary, local lawyers and other prescribed persons.
- 8.3 Under clause 242(1) of the Legal Profession Bill, the State may establish and manage a law library for the use of the judiciary, local lawyers and prescribed persons.
- 8.4 A transitional provision contained in clause 324 of the Legal Profession Bill continues the law library established under the *Legal Profession Act 2008* as the law library that may be established under clause 242.
- 8.5 Clause 243(2) of the Legal Profession Bill provides for the Legal Practice Board to pay to the State an annual amount as a contribution towards the cost of providing and maintaining the law library. The amount of the contribution will be calculated in accordance with regulations.
- 8.6 This contribution will be credited to the Law Library Fund, an agency special purpose account established under the *Financial Management Act 2006*.¹⁴⁶ The funds credited to that account must be used to provide and maintain the law library, provide library services and for other prescribed purposes.¹⁴⁷

¹⁴⁶ Legal Profession Uniform Law Application Bill 2020 cl 243(7).

¹⁴⁷ *ibid.*, cl 243(8).

- 8.7 The Legal Profession Levy Bill will amend section 243 of the Act by adding a new subsection (9), to provide for a levy to be imposed by section 243 or regulations made thereunder.¹⁴⁸
- 8.8 Under section 46(7) of the *Constitution Acts Amendment Act 1899*, bills imposing taxation must deal only with the imposition of the tax. The proposed levy is in the nature of a tax.
- 8.9 The Legal Profession Levy Bill is timed to commence immediately after section 243 of the Act commences operation (see paragraph 7.18 and Recommendation 4).
- 8.10 There are no Parliamentary sovereignty issues in the Legal Profession Levy Bill.

A handwritten signature in blue ink, appearing to read 'Mischin', with a stylized circular flourish to the left.

Hon Michael Mischin MLC
Chairman

¹⁴⁸ Legal Profession Uniform Law Application (Levy) Bill 2020 cl 4.

APPENDIX 1

TRANSCRIPT OF HEARING ON 12 AUGUST 2020 AND LETTERS OF CORRECTION

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

LEGAL PROFESSION UNIFORM LAW APPLICATION BILL 2020
LEGAL PROFESSION UNIFORM LAW APPLICATION (LEVY) BILL 2020



TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 12 AUGUST 2020

SESSION ONE

Members

Hon Michael Mischin (Chairman)
Hon Pierre Yang (Deputy Chairman)
Hon Laurie Graham
Hon Robin Scott

Hearing commenced at 10.02 am

Ms CAROL CONLEY

Senior Assistant State Solicitor, State Solicitor's Office, examined:

Mr BENJAMIN FRASER

Assistant Parliamentary Counsel, Parliamentary Counsel's Office, examined:

Mr MATHEW STONE

Assistant Parliamentary Counsel, Parliamentary Counsel's Office, examined:

The CHAIR: On behalf of the committee, I would like to welcome you to the hearing. Thank you for your time. Just to introduce ourselves, I am the Chair of the Standing Committee on Uniform Legislation and Statutes Review of the Legislative Council, Hon Michael Mischin. To my far right is Hon Pierre Yang, who is also of the Legislative Council and the Deputy Chair of the committee. To my left is Hon Robin Scott, to the far left is Hon Laurie Graham and immediately to my right is Ms Felicity Mackie who is the legal adviser to the committee. I think that you have probably had some dealings with her informally over the last couple of months. I ask that you keep your voices up so that Hansard can record your evidence clearly.

[Witnesses took the oath or affirmation.]

The CHAIR: You will have sighted and, I suspect, signed a document entitled "Information for Witnesses". Have you read and understood that document?

The WITNESSES: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, would you please quote the full title of any documents you refer to during the course of this hearing so that that can be recorded and identified in future. Please be aware of the microphone and try to talk into the microphone in front of you. Ensure that you do not cover the microphones with papers or make any loud noises near them. Please try to speak in turn and we will try not to interrupt you during your evidence so as to avoid any confusion for Hansard in preparing its transcript.

Even though it is a private hearing, you should note that the committee retains the power to publish any private evidence. The Legislative Council may also authorise publication. This means that your private evidence may become public. You should not publish or disclose any private evidence to any other person at any time unless the committee or the Legislative Council has already publicly released the evidence. I advise you that premature publication or disclosure of private evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

You might like to make an opening statement, otherwise we have some fairly specific questions as to the operation of the Legal Profession Uniform Law Application Bill 2020, in particular the uniform rules and regulations. Is there anything that you would like to say at the outset to set the scene as to how these things operate or would you prefer that we simply ask questions about it?

Ms CONLEY: I am happy to make a brief statement.

The CHAIR: Thank you.

Ms CONLEY: I thank the committee for the opportunity to speak today on the Legal Profession Uniform Law Application Bill 2020. The Solicitor-General and Mr Joshua Berson are unable to appear today due to a High Court directions hearing, which was listed at short notice. The Solicitor-General has asked me to convey their apologies to the committee for their inability to attend.

I understand that the committee has some questions about the uniform regulations and the uniform rules, in particular how they are applied, when they apply and whether they are subject to disallowance. At the outset, I advise the committee that the drafting of the provisions in part 2 of the bill took into account and were informed by the committee in their reports on the Fair Trading Amendment Bill; that is, the report on the Fair Trading Amendment Bill 2018 and the report on the Fair Trading Amendment Bill 2019. They are the 119th and 123rd reports respectively.

Would the committee like me to deal with each of the limbs of the definitions of uniform regulations and uniform laws or would you like to put the questions to me first?

The CHAIR: That might be helpful if you do. We have an understanding of it but it would help and we would be able to perhaps ask questions in context as we go along. Before you do, though, I just want to understand the meaning of the term “effect”, in a broader sense, because that is used in respect of also the uniform laws that are applicable and, essentially, the laws have “effect”, and then it is the Governor who will make a declaration of that fact by way of a proclamation and it is gazetted and then they will come “into operation”. What does “effect” mean, because it is also used in respect to the regulations and rules? What is the difference between that and “operation”?

Mr FRASER: I think that with the way the application provisions are set up, there are sort of two aspects: there is the “having effect” aspect and then there is the “coming into operation” aspect. Obviously, the laws in Victoria are passed and become laws of Victoria in the ordinary way. For Western Australia’s purposes, obviously, that does not have any effect because those laws do not mean anything here until, under the mechanism, they would have effect. I think the intention is to make a distinction between the idea of them being a law, so sort of an equivalent to passage, and then commencement being a second issue. So having effect and coming into operation are kind of the two ideas. As I say, “having effect” being essentially the passage of legislation.

The CHAIR: All right. It is just that on a quick reading, one tends to equate “effect” and “operation” as a similar thing. But, essentially, what you are driving at with the use of the word “effect” is a relevance or an application, potentially, to Western Australia that has to go then through a process in order to be brought into “operation”. Would that be a colloquial way of putting it?

[10.10 am]

Mr FRASER: Yes.

The CHAIR: So it is something that potentially can come into operation.

Mr FRASER: Yes.

The CHAIR: All right, thank you. Can you take us through then the various limbs applicable to the uniform regulations and rules so that we can be confident that we understand?

Ms CONLEY: As the committee would be aware, there are definitions of the terms “uniform regulations” and “uniform rules” in clause 3 of the bill. For each of those terms, there are three limbs to the definition which effectively mirror each other. I will take you through each one in terms of how they are applied, when they are applied and whether or not they are subject to disallowance.

The CHAIR: Yes, please.

Ms CONLEY: Firstly, we turn to paragraph (a) of the definition of “uniform regulations” —

the Legal Profession Uniform Regulations as in force under the *Legal Profession Uniform Law Application Act 2014* (Victoria) Schedule 1 Part 9.1 immediately before the day on which this definition comes into operation (as amended or repealed by regulations to which paragraph (b), or an Act to which paragraph (c), applies) ...

In terms of how this particular limb of the definition of uniform regulations applies, it applies by virtue of clause 14(1). You will see there that it says —

The Uniform Regulations —

(a) subject to subsections (3) and (4), apply as subsidiary legislation of the State ...

Subsections (3) and (4) relate to different limbs of the definition of uniform regulations. It is by virtue of that particular clause that paragraph (a) of the definition of uniform regulations has its application.

The CHAIR: Can I stop you there for a moment, because, again, we are getting back to the use of the terminology, using “effect” in one sense as quasi-applying in some sense. What is the difference between “effect” and “apply”, and why is there a difference?

Ms CONLEY: In this particular case they are subsidiary legislation of the state. They apply as subsidiary legislation by virtue of this particular clause. In terms of when they apply, that may be what you are referring to in terms of when they take effect, so the particular provision, clause 14(1)(a) simply says that the uniform regulations apply as subsidiary legislation of state. That is subject to subsections (3) and (4), but as I pointed out, they do not apply in the context of paragraph (a) of the definition of uniform regulations.

The CHAIR: As an analogous term or a synonymous term, can “apply” be considered “without actually coming into operation” as subsidiary legislation —

Ms CONLEY: In the context of this particular clause —

The CHAIR: — or treated as subsidiary legislation of the state? I am just trying to work out the difference between “applying”, “having effect” and “operation”.

Mr FRASER: I think in this context the idea is that anything that has been made under the Victorian law under parts 9.1 or 9.2 in relation to the regs and rules respectively, would be considered to be laws of the state, which then have effect—if we want to use the two, a sort of dichotomy—as in “be laws of the state”, and then the second concept of coming into operation. They would have effect as laws of the state and come into operation on their terms. Any uniform regulations and rules that were made under the Victorian legislation would be laws as if they were made as subsidiary legislation and then would come into operation—I will try not to use the word effect in that second context—on their terms.

The CHAIR: By “applying” as subsidiary legislation, they are treated as subsidiary legislation and they are going to be regarded as subsidiary legislation of the state, or something to that effect.

Mr FRASER: Yes.

Ms CONLEY: As to when the uniform regulations referred to in paragraph (a) of the definition apply, it would be the day on which section 14(1) of the Legal Profession Uniform Law Application Act comes into operation, and that is by virtue of clause 14(1).

The CHAIR: If I understand it then, or perhaps you can clarify that in those circumstances, they apply in Western Australia from the day that clause 14 of the bill comes into operation, which is the date of proclamation. They are not disallowable by Parliament—would that be right?

Ms CONLEY: Not by the same processes as other paragraphs. Having said that though, Parliament may decide, when this bill is being debated, that —

The CHAIR: They do not like some bit of it.

Ms CONLEY: — they do not like that clause, and then that effectively is the disallowance by Parliament or not being agreed to by Parliament because those particular regulations are those which are effectively currently in force and available to be seen, or in contemplation of Parliament when they are considering the bill. But for uniform regulations, which are made between 18 March and the commencement day, there is a specific transitional provision. If I could direct the committee to that, that is clause 263. Clause 263 is a transitional provision which says —

If the Uniform Regulations or Uniform Rules are made after 17 March 2020 but before commencement day, sections 15 and 16 apply to the regulations or rules as if they were made on commencement day.

The CHAIR: Okay.

Ms CONLEY: So there is a separate transitional provision to deal with that gap period from when the bill was introduced into Parliament but before this transitional provision commences.

The CHAIR: If Parliament says that most of these rules and everything are fine but they do not want a particular one, is there a way that Parliament can pick up that particular rule or regulation and not jeopardise entry into the scheme?

Ms CONLEY: The only way that I could see that occurring is if, during debate on clause 14 of the bill, there was particular opposition to a specific regulation that was currently in existence that presumably could be carved out of clause 14. It would be the uniform regulations, save and except for this particular one, apply as subsidiary legislation of the state.

Mr FRASER: I agree. I think Parliament could make a decision to say that particular portions of the subsidiary legislation under the scheme could be excluded or modified.

The CHAIR: All right. I presume that it could be done, rather than specifying it in clause 14, but with reference taken to a schedule saying that the following rules or whatever will not apply.

Mr FRASER: Yes, I think that is correct.

The CHAIR: Okay. By “applying” in Western Australia from that date, that also means “being operative” in Western Australia from that date?

Ms CONLEY: Yes. Specifically, in relation to paragraph (a) of the definition of uniform regulations, yes they apply from the day when that clause, which will be a section under the act, comes into operation.

Mr FRASER: I will just make a particular point. In the unlikely situation that there are uniform rules or regulations that are made the day before the thing comes into operation, they would have effect in accordance with their terms, which is to say they could set a commencement date after. So having effect and applying, they might commence after the day on which clause 14 comes into effect, if that is conceptually possible. I just thought I would make that point.

[10.20 am]

The CHAIR: It is just that, once again, we are saying here that by “applying”, and once the legislation comes into “operation”, not only is it applicable to WA, but it is also operative in WA.

Ms CONLEY: Bearing in mind the transitional provision that I referred to you earlier is to take that into account.

The CHAIR: Let us leave that one aside as a complication. Let us assume that there are no changes after that particular date and the time that the legislation is passed, proclaimed and becomes operative, the use of the term “applying” means that it would also be operative in Western Australia—the uniform rules and regulations.

Mr FRASER: To the extent that that was consistent with the terms of the subsidiary legislation, yes. If the rules and regulations said that they might come into operation in 2022 —

The CHAIR: Sure.

Mr FRASER: Leaving that aside, generally, yes.

The CHAIR: Is there anything else you would like to add to the way that limb (a) operates?

Ms CONLEY: No.

The CHAIR: We will move on to (b) then, if that is convenient?

Ms CONLEY: I did wonder whether it would assist the committee if we moved to paragraph (a) of the definition of uniform rules in the sense that it is effectively the rule equivalent of that which we have just discussed in the regulation, but I will be guided by the committee.

The CHAIR: No, that is fine. Whatever is convenient to you to complete the narrative and make it comprehensible.

Ms CONLEY: If I could direct you to paragraph (a) of the definition of uniform rules, which again is in clause 3 of the bill.

The CHAIR: Page 6.

Ms CONLEY: Paragraph (a) is referring to —

the Legal Profession Uniform Rules as in force under the *Legal Profession Uniform Law Application Act 2014* (Victoria) Schedule 1 Part 9.2 immediately before the day on which this definition comes into operation (as amended or repealed by rules to which paragraph (b), or an Act to which paragraph (c), applies) ...

You can see it is effectively the rule equivalent of paragraph (a) of the definition of uniform regulations. In terms of when this applies, again, if I can direct you to clause 14(2). You will see that it states —

(2) The Uniform Rules —

(a) subject to subsections (3) and (4), apply as subsidiary legislation of the State;

Again, subclauses (3) and (4) do not apply because they are referring to different paragraphs of the definition of uniform rules and regulations. Similarly, when they apply, it is on the day when section 14(2) of the Legal Profession Uniform Law Application Act 2020 comes into operation subject to the same provisos that Mr Fraser has indicated. That is, again, clause 14(2).

In terms of the disallowance, whether they are disallowable, for those uniform rules which are made on or before 17 March 2020, the answer is no. But again, Parliament may decide not to enact clause 14(2) in its current form when the bill is being debated.

For uniform rules made between 18 March and commencement day, again if I could refer you to clause 263, there is a transitional provision and that applies to rules in the same way as it applies to regulations.

The CHAIR: Thank you.

Ms CONLEY: In that case, as we pointed out, clauses 15 and 16 applies if those rules were made on commencement date.

The CHAIR: Yes. Rolling on, please.

Ms CONLEY: If we could turn again to clause 3 and paragraph (b) of the definition of uniform regulations. That refers to —

the Legal Profession Uniform Regulations made under the *Legal Profession Uniform Law (WA)* Part 9.1 on and after the day on which this definition comes into operation;

If you can then go to clause 14, you will see there, again —

(1) The Uniform Regulations —

(a) subject to subsections (3) and (4), apply as subsidiary legislation of the State;

In respect of paragraph (b), subclause (4) does not apply. However, subclause (3) is relevant, and that clause says —

The Uniform Regulations made under the *Legal Profession Uniform Law (WA)* Part 9.1 ... on and after the day on which this section comes into operation apply as subsidiary legislation of the State subject to subsection (5) and section 16.

In terms of when the uniform regulations referred to in paragraph (b) come into operation, if they are not reliant on an amending act, they come into operation on the day when the uniform regulation comes into operation, which will be specified in the uniform regulation itself, and that is by virtue of that particular subclause but also section 418(2) of the *Legal Profession Uniform Law*. Section 418(1) of the *Legal Profession Uniform Law* says —

The Uniform Regulations are to be published on the NSW legislation website in accordance with Part 6A of the *Interpretation Act 1987* of New South Wales.

They also say that —

A Uniform Regulation commences on the day or days specified in the Regulation for its commencement (being not earlier than the date it is published).

If the regulation is reliant on the amending act, then you need to refer to paragraph (a) of clause 14(5). It is the later of the day the amending provision comes into operation or the day the legislation comes into operation in Victoria.

In terms of whether or not these particular provisions are subject to disallowance, yes, they are. The uniform regulations have to be published in accordance with clause 15, and they are published in the *Government Gazette*, I should add, and then they are subject to disallowance in accordance with clause 16. Clause 16 requires that the uniform regulations, which are published under clause 15, have to be laid before Parliament and then they are subject to disallowance in accordance with the balance of that particular clause.

[10.30 am]

The CHAIR: All right. What, then, in practical legal terms, is the situation? Let us assume that going through the process, a uniform regulation or a uniform rule is disallowed. Up until that time, what are the consequences—I am trying to steer clear of using “effect”, “operation” or “application” and the like—or what is the status of them in Western Australia? If I am a legal practitioner, up until the time that that rule has been disallowed, when do I become bound to apply, bound to obey that rule—or do I? Am I bound to obey that rule from the time that it is—I am not expressing this particularly well. Let us say that we have a rule or a regulation made under the uniform law on or

after the day on which the definitions in section 3 come into operation. When am I, as a legal practitioner in Western Australia, bound to obey that rule?

Ms CONLEY: From the day on which it comes into operation, as specified in the regulation itself.

The CHAIR: Let us say that it says from today. It meets the process. It says that it takes immediate effect, and I, as a legal practitioner in WA, am then bound by that until such time as Parliament disallows it.

Ms CONLEY: Assuming they do disallow it, yes.

The CHAIR: Let us assume they do disallow it. It is a similar regime as to that with regulations under our Interpretation Act.

Ms CONLEY: Exactly. So the position is no different from the coming into operation of what I will call normal regulations—so, made under a state act—which are in operation until such time as they are disallowed.

The CHAIR: Can you take us through the legal reasoning to support that, so that we are clear on it?

Mr FRASER: When you say “legal reasoning”, do you mean the provisions?

The CHAIR: Yes, take us through the provisions that will show that that is the case. An amending act will not take effect. It will not have operation, effect—whatever. I am not bound by an amending act until such time as it goes through the process and either it is disallowed, in which case it will never have application, or the process is exhausted, and then it will come into operation in Western Australia, if that is the right term to use. With a rule or a regulation on the other hand, it will be operative—need to be obeyed—up until the time that it is either disallowed or the disallowance process is exhausted, in which case it continues to apply, be operative or have effect—whichever term you want to use. Correct?

Mr FRASER: Or it is failed to be tabled after gazettal, consistent with section 42.

The CHAIR: Can you just take us through the reason why that is the case? So far as the Interpretation Act 1984 is concerned, it is pretty plain, but I just want to make sure that we understand how the process works under this.

Mr FRASER: Leaving aside clause 14(5) for the moment, which deals with the interactions between an amending act and uniform regulations and uniform rules, in the ordinary course, there is a requirement to gazette the regulations—let us just call it regulations—under clause 15. Once the gazettal has occurred, there is a requirement to table the regulations under clause 16(1).

The CHAIR: That is the publication.

Mr FRASER: So gazettal—it is published in Parliament by tabling under clause 16(1). Presuming it is disallowed under clause 16(2)(b), the law ceases to have effect. I am sorry to use the “have effect” language—it is in clause 16(3). It has effect until the day on which it is disallowed.

The CHAIR: Just so that we understand it, can you point us to the provision that supports it coming into operation, pending disallowance, or the reasoning involved?

Ms CONLEY: That is clause 14(2)(a).

The CHAIR: Okay; that is saying it applies.

Mr FRASER: So the application would be on its terms. Because section 418 of the uniform law in respect of regulations provides that the uniform regulations may set its own commencement, then once it applies, the commencement provision applies as well, so that would set the commencement running for the uniform regulations. Section 418 would be a law of WA at the time, because this bill

has been passed, so section 418 of the uniform law would regulate the commencement for the purposes of our legislation. That would then mean the commencement is dealt with there, rather than in these provisions.

Ms CONLEY: Sorry, I think I incorrectly referred to subclause (2) of clause 14. It is subclause (1) of clause 14, because we are talking about uniform regulations.

The CHAIR: Do you have a copy of the uniform law handy?

Mr FRASER: I do. I should note that that is just schedule 1 of the Victorian act, which constitutes the uniform law.

The CHAIR: Just with reference to section 418—it is talking about commencement—I take it that that obviates the need to insert in the legislation a provision similar to section 41(1)(b) of the Interpretation Act 1984 of WA. Section 41(1) provides that —

Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall —

- (a) be published in the *Gazette*;
- (b) subject to section 42, come into operation on the day of publication, or where another day is specified or provided for in the subsidiary legislation, on that day.

Is that the equivalent of section 418 in practical terms?

[10.40 am]

Ms CONLEY: As far as possible, yes.

The CHAIR: So “commencement” and “operation” are being treated as commensurate terms, analogous terms?

Ms CONLEY: Yes. Bear in mind, I think that was one of the questions that was put to us: should clause 16 be amended to insert a provision similar to section 41(1)(b) of the Interpretation Act. Our view about that is that there are two reasons why we would say no. First, not all the uniform regulations and uniform rules have to be published in the *Gazette* under clause 15. It is only those referred to in clause 14(3). Second, the uniform regulations or uniform rules published under clause 15 do not come into operation in WA on the day of their publication in the *Gazette*. They come into operation in accordance with clause 14(3) and sections 418(2) and 431(2) of the Legal Profession Uniform Law.

The CHAIR: Thanks for clarifying that.

Ms CONLEY: If I could just add by way of clarification, when you look at clause 16 of the bill, in particular the consequences of not tabling the uniform regulations before each house of Parliament, it is made clear in subclause (3) that the published legislation ceases to have effect as subsidiary legislation of the state on the day on which subclause (2) starts to apply. In respect of where it is not tabled, or there is disallowance, either in whole or in part, then there is a clear statement that the published legislation ceases to have effect.

The CHAIR: Yes, it may be just me, but this is where I find that the use of several terms a little confusing—“ceases to have effect” rather than “ceases operation”. It is using the terms “application”, “effect” and “operation” in a variety of ways. They may be very nuanced, but they also seem to overlap a little, or am I simply not understanding the niceties of how it is being used? They seem to have sometimes overlapping meanings.

Mr FRASER: I guess application is consistent with the sense of having uniform laws, so I think application is used in these applied laws schemes, possible synonymously with having effect. That

is how I conceptualise it. “Coming into operation”, though, is much more synonymous with “commencement”. In Western Australian legislation, at least in my experience, “coming into operation” is used synonymously with the commencement provisions.

The CHAIR: Having legal consequences.

Mr FRASER: Yes, the laws do not have effect.

The CHAIR: This is the problem I am having!

Mr FRASER: Yes, laws do not bind people until they commence, or come into operation, in the Western Australian legislative parlance. I think “commencement” is used in other jurisdictions in a similar way to the way we use “come into operation”.

The CHAIR: In that respect then, “effect” is a more broad term: if you say that it does not have effect, then it also has no legal—what was the word you used a moment ago?—consequences?

Mr FRASER: Yes, if the law ceases to have effect under clause 16(3), then to the extent to which it is commenced or not commenced, it does not matter because it ceases to have operation and it ceases to have effect, so both of those things are the same, whether or not it is commenced.

The CHAIR: If it does not have “effect”, it is not going to have “operation”.

Mr FRASER: That is right.

The CHAIR: It embraces that; that is a broader term. To say that it “applies” in Western Australia or does not “apply” in Western Australia is more of a relevance, or is not material and is not relevant to Western Australia, but then you get on to whether it has “effect”. It may have “effect”, but not “operation”.

Mr FRASER: Yes. I think “application” and “effect” are largely synonymous. The difference, I think, is the way in which the subsidiary legislation applies, has effect, under this legislation as against the application of the laws that are made by Victoria. It is trying to keep those kinds of ideas separate in some ways.

The CHAIR: Can we just confirm then that insofar as limb (b) is concerned with regulations, it is also the same as for rules under paragraph (b) of the definition of rules; is that correct?

Ms CONLEY: Yes, except insofar as it is section 431(2) of the Legal Profession Uniform Law, which says when those provisions commence.

The CHAIR: As opposed to section 418?

Ms CONLEY: Yes.

Mr FRASER: I should just mention for completeness, I think Ms Conley mentioned clause 14(5) as well, which may affect when subsidiary legislation comes into operation, or does not have effect as well. But, leaving that aside, in that case, subsidiary legislation that is made under or for the purposes of an amending law that has not yet had effect under the other kind of mechanism, the subsidiary legislation there is preserved, effectively, until those amending laws are laws of WA. It is just making clear that there might be some other further delay if an amending law—I will try again. If an amending act is made in Victoria and that law says that regulations may be made in relation to something and those laws are made before the amending act has effect for the purpose of Western Australian law, then clause 14(5) deals with that situation. That is to say that while the amending act is not a law of Western Australia and does not have effect, the subsidiary legislation does not come into operation. That subsidiary legislation only comes into operation once the amending act has effect for the purposes of clauses 9 and 10. I suspect that that is a less likely case, and it is sort of a more subsidiary case, but I just thought I would mention that for completeness.

The CHAIR: Yes, otherwise you would have regulations made under an act that does not have any application having legal consequences. It is commonsense.

Mr FRASER: Yes, that is right.

The CHAIR: Moving on then to limb (c).

Ms CONLEY: Paragraph (c)? If I can again direct the committee to clause(3)(c) of the definition of uniform regulations, you will see there that that is a reference to the legal profession uniform regulations made by a provision of an amending act. In terms of application, it is clause 14(1)(a), which again is subject to subsections (3) and (4). Those uniform regulations apply subsidiary legislation of the state. You then also have to refer to subclause (4), which says —

The Uniform Regulations or Uniform Rules made by a provision of an amending Act apply as subsidiary legislation of the State if the amending Act has effect for the purposes of this Part under section 9 and has come into operation under section 10.

The CHAIR: And there the term “effect” is that it has already passed through the disallowance process successfully —

[10.50 am]

Ms CONLEY: Yes.

The CHAIR: — either because it has not been subject to disallowance within the time frame or because ultimately it has not been disallowed; and, by its terms, or through operation of a provision of this act, it specifies that it has come into legal operation.

Ms CONLEY: Yes.

The CHAIR: Okay. And there you have got “apply” as subsidiary legislation in the same sense that you are using “apply” for subsidiary legislation consistent then with the use of that term for subsidiary legislation in other contexts. Is that correct?

Mr FRASER: Yes, so that language matches clauses 14(1) and 14(2) in relation to application.

Ms CONLEY: In terms of when these particular uniform regulations come into operation, obviously they have to have effect for the purposes of part II. If the amending provision has come into operation in Victoria before the proclamation referred to in clause 10, it is published in the gazette. Then the uniform regulations come into operation on a day fixed by that proclamation. That is by virtue of clause 14(4) read with clause 10(4). However, if the amending provision has not come into operation before the proclamation is published in the gazette, then the uniform regulations come into operation the day when the amending provision comes into operation in Victoria in accordance with the amending act. That is clause 14(4) read with clause 10(5). Now, in terms of disallowance, the uniform regulations are not separately disallowable; however, the uniform regulations are subject to the amending act process in clauses 9 and 10 of the bill, so effectively those uniform regulations live or die with the amending act, if that makes sense.

The CHAIR: And there is an opportunity to partially disallow an amending act and so —

Ms CONLEY: Yes.

The CHAIR: To the extent that it is a head of power for a particular regulation or the like, then that can fall away without affecting the rest of that amending act and its potential operation.

Ms CONLEY: Yes. So you could disallow a provision of the amending act that relates to a particular uniform regulation.

The CHAIR: If, let us say, an amending act goes through the process and comes out the other side and has operation in Western Australia, and there is a uniform rule or uniform regulation as a consequence of that, Western Australia, nevertheless, has the power to pass its own local subsidiary legislation to modify the operation or exclude the operation of such part of that rule or regulation.

Ms CONLEY: What you are saying is that the uniform —

The CHAIR: Let us say there is an amending act in Victoria and it goes through the process in Western Australia. Parliament has a look at it and says it is fair enough. A uniform regulation or rule is made pursuant to that. We can still have a local regulation or rule made under the power available to suit Western Australian conditions that will qualify or exclude or add to the Victorian rule or regulations.

Ms CONLEY: My initial thought on that is that the local regulation would then be inconsistent with the amending act, in which case the local regulation would —

The CHAIR: I see; you are talking about cases where there is a rule or regulation that is by virtue of the amending act—a provision of the amending act. My mistake; yes, I am sorry.

Ms CONLEY: In that case, the local regulation would be inconsistent.

The CHAIR: But you can have an inconsistent local regulation with uniform rules and regulations in other circumstances.

Ms CONLEY: The primary purpose of the local regulations is to fill the gaps where effectively the uniform regulations and uniform rules do not deal with a particular topic, and I think by the very nature, “local” is specific to Western Australia. In certain cases, our bill has modified certain aspects of the operation of uniform regulations and rules, but that is specified in our bill to make it absolutely clear where there is a departure. One that comes to mind is that we have a provision in our act which makes it clear that barristers can accept direct briefs because that is something that occurs in WA. Now, at the current time, there is no provision in the uniform regulations or uniform rules, but that was accepted as part of—it is in the intergovernmental agreement that that would be the case. Generally, where there is going to be a departure from the uniform law scheme, it is specified in the bill, and the local regulations are specific to those matters where in the Legal Profession Uniform Law there is a call for local regulations. Generally, it is accepted, being a participant in this scheme, that we will follow the uniform regulations and uniform rules, and bearing in mind that Western Australia will have involvement in the development of any particular regulations or rules as they go along. Do you want to add anything to that?

Mr FRASER: I guess only just to point out that in clause 126 of the bill, there is a capacity to make local regulations that modify or exclude the operation of the Legal Profession Uniform Law. If I remember correctly, a reference to the uniform law would include reference to uniform rules and regulations, but I would need to check that to be sure. In my recollection, it is probably the only provision of the uniform law bill that allows for modifications by local regulations—well, with the exception of the transitional regulation-making power as well as.

Ms CONLEY: Yes, and the provision about the barristers, but that is futureproofing because there is not a uniform regulation in force, so it is basically that operates until such time as they may decide to go down that path.

The CHAIR: Okay; 126 applies specifically to government lawyers.

Mr FRASER: Yes, sorry, not in general.

The only other thing I just wanted to clarify as well is that when we are talking about paragraph (c), and regulations and rules made in relation to paragraph (c), we are talking about specific regulations

that are made by virtue of the amending act, so we are not talking about heads of power. That is addressed in clauses 9 and 10.

The CHAIR: The regulation would be itself a provision of the amending act. Is that right?

Mr FRASER: Yes. So, say, for example, the amending act itself amended a provision of regulations or rules, that is the kind of thing we are talking about here rather than the head of power, which is a provision of the actual amending act or inserted by the amending act, which would be dealt with in clauses 9 and 10.

Ms CONLEY: I think it is perhaps important to point out that it would probably be fairly rare for that to occur. Having said that, my understanding is that it was intended to make sure there were not any other avenues of amending uniform laws and regulations which would not be covered by what you would think the usual provisions would be, which is developing a uniform regulation or rule other than by an amending act.

[11.00 am]

The CHAIR: It is an unusual mechanism to specify changes to rules and regulations in statute that way.

Mr FRASER: It is unusual, but given the possibility of it and the fact that we cannot pick up those regulations or rules by any other provision, it is sort of a holistic kind of approach so that all Victorian or New South Wales laws made over there would apply here.

The CHAIR: Thank you very much. Is there anything else that you would like to add that has occurred to you that you think might assist us?

Ms CONLEY: I would perhaps just say, for the benefit of clarification, I think in our response to one of the questions raised by Ms Mackie, we misunderstood the question, which was in respect of paragraph (c) of the definition of uniform regulations and about how it was applied and the disallowance. I think I had read it to be: is it dealt with as an amending act? So, to that extent I think there was a misunderstanding. I hope that today we have managed to clarify that it is not separately disallowable as an amending act but it lives or dies with the amending act.

The CHAIR: That is fine.

The Advisory Officer: Was that in the letter of 6 July?

Ms CONLEY: Yes.

The CHAIR: Okay; thanks for that.

Ms CONLEY: I think we did clarify it in one of the subsequent questions to say how it all works and said something similar.

The CHAIR: Just to seal it off, because I do not think we dealt with it, but dealing with uniform regulations, paragraph (c) of the definition—you can see if you like—again, that is analogous to what is done for uniform rules. It operates the same way.

Mr FRASER: The only other thing I would mention is clause 262 of the bill, which is the transitional provision that is analogous to clause 263 in relation to amending acts. To the extent that uniform regulations or uniform laws are made between 18 March and commencement day, those amending acts would go through the processes in clauses 9 and 10 and, therefore, would also be subject to disallowance, just for completeness.

The CHAIR: Thank you for that. A transcript of the hearing will be forwarded to you for consideration and correction. If you believe that any corrections should be made because of typographical or transcription errors, please indicate these corrections on the transcript. Errors of fact or substance

must be corrected in a formal letter to the committee. If you wish to provide additional information or elaborate on particular points, you may provide supplementary evidence for the committee's consideration when you return your corrected transcript of evidence. I do not think there are any questions on notice. Thank you very much for your assistance and patience.

Ms CONLEY: There is one matter: does the committee have any objection, should the need arise, for us to discuss the proceeding with the Solicitor-General and Mr Berson, who are the other instructing officers?

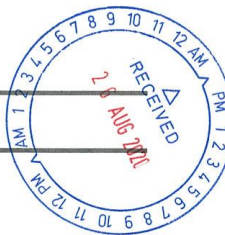
The CHAIR: I would have thought that that is fine; thank you.

Ms CONLEY: Thank you; I appreciate that.

Hearing concluded at 11.05 am



STATE SOLICITOR'S OFFICE



David Malcolm Justice Centre
28 Barrack Street
Perth, Western Australia 6000

GPO Box B83 Perth WA 6838
Telephone (08) 9264 1888
Fax (08) 9264 1440
Email sso@sso.wa.gov.au
DX 175

SSO Ref: 1446-17
Enquiries: Ms Carol Conley
Telephone: 6552 6382
Email: c.conley@sso.wa.gov.au

Date: 25 August 2020

Mr Mark Warner
Committee Clerk
Uniform Legislation and Statutes Review Committee
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

Dear Mr Warner

LEGAL PROFESSION UNIFORM LAW APPLICATION BILL 2020

Thank you for your email dated 18 August 2020.

Correction of factual information in respect of clause 14(5)(a)

At page 6 of the transcript, I stated:

If the regulation is reliant on the amending act, then you need to refer to paragraph (a) of clause 14(5). It is the later of the day the amending provision comes into operation or the day the legislation comes into operation in Victoria.

My corrected view is as follows:

*If the regulation is reliant on the amending act, then you need to refer to paragraph (a) of clause 14(5). It is the later of the day the amending **Act** provision comes into operation **for the purposes of Part 2 under section 10** or the day the **subsidiary provision** comes into operation in Victoria.*

Correction of factual information in respect of clause 118

At page 11 of the transcript, I stated:

...we have a provision in our act which makes it clear that barristers can accept direct briefs because that is something that occurs in WA.

1081265R1

My corrected view is as follows:

*...we have a provision in our **Bill** which makes it clear that **local regulations may modify the operation of the Legal Profession Conduct Rules as subsidiary legislation of the State so that barristers can accept direct briefs because that is something that occurs in WA.***

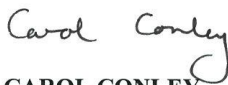
I note, for the information of the Committee, that the relevant provision is clause 118 of the Bill which provides:

- (1) *In this section-
Western Australian Barristers' Rules means the *Western Australian Barristers' Rules as in force on 23 February 2017.**
- (2) *The local regulations may modify the operation of the Legal Profession Conduct Rules as subsidiary legislation of the State so that a barrister may act in a way contemplated by the *Western Australian Barristers' Rules rule 18A* without breaching the *Legal Profession Conduct Rules.**

Approval for a provision of this nature is contained in clause 1 of Appendix 1 of the Intergovernmental Agreement on the Legal Profession Uniform Framework.

I trust that the above corrections clarify the evidence I gave at the hearing on 12 August 2020.

Yours faithfully



CAROL CONLEY
SENIOR ASSISTANT STATE SOLICITOR



Department of Justice
Parliamentary Counsel's Office

David Malcolm Justice Centre
28 Barrack Street
Perth Western Australia 6000
GPO Box F317
Perth WA 6841
Telephone: [08] 9264 1444
Email: pco@pco.wa.gov.au

Mark Warner
Committee Clerk
Uniform Legislation and Statutes Review Committee
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

26 August 2020

Dear Mr Warner

**Evidence to the Inquiry into the *Legal Profession Uniform Law Application Bill 2020*
and *Legal Profession Uniform Law Application (Levy) Bill 2020***

I refer to your email dated 18 August 2020. I have reviewed the transcript of evidence and I would like to clarify and correct my evidence.

Page 11 of the transcript states:

If I remember correctly, a reference to the uniform law would include reference to uniform rules and regulations, but I would need to check that to be sure.

I have now had the opportunity to check that evidence and confirm my view that a reference to the *Legal Profession Uniform Law (WA)* would include a reference to the Uniform Rules and Uniform Regulations. This is because the *Interpretation Act 1984 (Interpretation Act)* section 46 provides that a reference to a written law includes a reference to subsidiary legislation made under that law. I consider that the Interpretation Act section 46 applies because:

1. the *Legal Profession Uniform Law (WA)* applies as an Act under clause 6 of the Bill and is therefore a written law under the Interpretation Act; and
2. the Uniform Regulations and Uniform Rules apply as subsidiary legislation (because of clause 14(1)(a) and (2)(a) of the Bill) made under¹ the Uniform Law; and
3. the Interpretation Act applies to the Bill under clause 5(a).

Page 11 of the transcript states:

In my recollection, [clause 126] is probably the only provision of the uniform law bill that allows for modifications by local regulations—well, with the exception of the transitional regulation-making power ...

¹ See the definition of under in the Interpretation Act section 5.

The power to make transitional regulations is in Schedule 4 clause 5(2) of the Uniform Law and is supplemented by clause 328. Further, in addition to clause 126 and the transitional regulation-making provision in clause 328, clause 118 confers a power to modify the operation of the Legal Profession Conduct Rules by local regulations. I did not refer to clause 118 in the above quoted answer, although Ms Conley did refer to the effect of clause 118 immediately after this answer.

Please contact me if you would like me to further clarify these matters.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'B. Fraser', with a long horizontal flourish extending to the right.

Ben Fraser
Assistant Parliamentary Counsel

APPENDIX 2

LETTER FROM THE ATTORNEY GENERAL DATED 1 JULY 2020



Attorney General; Minister for Commerce

Our Ref: 67-18949
Your Ref: A812756

Hon Michael Mischin
Chairman
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council Committee Office
18-32 Parliament Place
West Perth WA 6005

By email: unileg@parliament.wa.gov.au

Dear Mr Mischin

LEGAL PROFESSION UNIFORM LAW APPLICATION BILL 2020

I refer to your letter dated 24 June 2020.

I advise as follows:

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

1 July 2021

1.2 Is there a realistic prospect that any provision of the proposed Act will not come into operation within 10 years of the Act receiving Royal Assent. If not, is there any reason why the commencement clause for the Bill ought not to provide that any provision unproclaimed at the expiration of 10 years of the Act receiving Royal Assent will be automatically repealed.

No. Such a clause is not necessary given the answer to 1.1 above.

1.3 Please explain why the *Legal Profession Uniform Law Application Amendment Act 2019 (Victoria)* is excluded from the definition of 'amending Act' in clause 3 and therefore is not subject to the tabling, disallowance and commencement provisions in clauses 8 to 10 of the Bill.

The *Legal Profession Uniform Law Application Amendment Act 2019 (Vic)* ("the 2019 Victorian Amending Act") is not included in the definition of "amending Act" in clause 3 because the amendments contained in the 2019 Victorian Amending Act form part of the Legal Profession Uniform Law and are expressly referred to in clause 6(1)(a)(i) of the Bill.

Level 5, Dumas House, 2 Havelock Street, West Perth, Western Australia, 6005
Telephone: +61 8 6552 6800 Facsimile: +61 8 6552 6801 Email: minister.quigley@dpc.wa.gov.au

The 2019 Victorian Amending Act facilitates Western Australia's involvement in the Legal Profession Uniform Law Scheme in accordance with the Intergovernmental Agreement on the Legal Profession Uniform Law Framework and is an integral part of the Legal Profession Uniform Law that is to apply in Western Australia. Although the 2019 Victorian Amending Act has not yet come into operation, it is a publicly available statute.

The 2019 Victorian Amending Act was tabled in the Western Australian Parliament on 18 March 2020.

The Western Australian Parliament will be in a position to scrutinise the 2019 Victorian Amending Act as the Bill is considered in the course of Parliamentary debate as it forms part of the Legal Profession Uniform Law scheme.

Clauses 8 to 10 of the Bill are directed to future Victorian Acts which amend the Legal Profession Uniform Law and which are not able to be scrutinised at the same time as the Bill. The 2019 Victorian Amending Act is in quite a different category as it is currently in existence but unproclaimed (pending the enactment of the Bill).

1.4. Why clause 6(1)(b) was not identified as a Henry VIII clause in the Explanatory Memorandum.

Clause 6(1)(b) is not a Henry VIII clause. It does not give power to amend the Act or the Legal Profession Uniform Law by way of regulation. The clause clearly states how the Legal Profession Uniform Law (set out in Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic)) is to apply as a law of this State. In particular, the subclause points to the provisions in the Bill which modify the Legal Profession Uniform Law which would otherwise apply in the State.

Clause 6(1)(b) highlights that:

- (a) the provisions in the Legal Profession Uniform Law relating to professional indemnity insurance have been modified by Part 7, Division 3 Subdivision 1 of the Bill. Those modifications are confirmed in clause 170 and are expressly set out in clauses 171-172 of the Bill; and
- (b) local regulations made under section 126(1)(b) of the Bill may modify the Legal Profession Uniform Law as is permitted by section 56 of the Legal Profession Uniform Law.

1.5 Why is a clause in this form necessary, whether any alternatives have been considered and why they have been rejected.

See the answer to 1.4 above.

No alternative have been considered.

1.6. Why the Bill does not include a requirement for a Victorian amending Act to be published in the Government Gazette prior to tabling in Parliament.

The Bill does not include a requirement for a Victorian amending Act to be published in the Government Gazette prior to tabling in Parliament because such a requirement is unnecessary.

The tabling of a Victorian amending Act as required by clause 8 of the Bill means that the amending Act will ordinarily be available to the public on the Western Australian Parliament website as a tabled paper.

Further, publication of a Victorian amending Act on the Victorian Parliament website and other online platforms together with tabling provides the public with sufficient notice of and access to a Victorian Amending Act.

I also draw your attention to clause 11 of the Bill. I note that Standing Order 67(1) of the Standing Orders of the Legislative Council has been amended consistently with recommendation 1 contained in Report 123 of the Standing Committee on Uniform Legislation and Statutes Review Fair Trading Amendment Bill 2019.

1.7 Is an alternative process contemplated by which the public can be informed of proposed changes to the Legal Profession Uniform Law?

See the answer to 1.6 above.

1.8. Is it the Government's intention to also table the supporting information for each amending Act such as Explanatory Memorandum and second reading speech?

There is no requirement in the Bill to table the supporting information for each amending Act. However, there is no reason to suppose that the Government would not table the supporting information if that information was considered to be of assistance (as it did in relation to the tabling of the Victorian Explanatory Memorandum for the *Legal Profession Uniform Law Application Act 2014 (Vic)*) for the purposes of assisting consideration of this Bill).

1.9. If not, please advise what alternative mechanism, if any, is intended by which the supporting information will be made publically available or available for the information of Parliament.

If the supporting information is not separately tabled, it will be publically available on the Victorian Parliament website (and other online platforms).

1.10. How is it intended that Western Australia will receive notification of the commencement of an amending Act that amends the Legal Profession Uniform Law?

As a participating jurisdiction in the Legal Profession Uniform Law scheme, Western Australia will be privy to any proposed amendments to the Legal Profession Uniform Law. Western Australia's Attorney General will be a member of the Standing Committee and will have representatives on the Legal Services Council and the Admissions Committee.

I have enclosed for the information of the Standing Committee a copy of a chart about Amending the Uniform Law which is in the Legal Services Council Annual Report for the 2018/2019. This shows the involvement of the Standing Committee and Legal Services Council in the amendment process.

Western Australia will likely be updated on the progress of any amendments by its representatives on the Standing Committee and the Legal Services Council, the Legal Services Council itself and the Victorian Attorney General.

It is my experience to date that Victoria and the Legal Services Council are assiduous in keeping Western Australia informed of any developments.

1.11 Please explain how it is intended that paragraphs (c) of the definitions of 'Uniform Regulations' and 'Uniform Rules' in clause 3 and clause 15(2) are intended to operate. That is, are the Uniform Regulations and Uniform Rules made by a provision of an amending Act disallowable by the Western Australian Parliament. If so, how? If not, why?

If an amending Act amends the Uniform Regulations or the Uniform Rules, then the amending Act is disallowable under clause 9 of the Bill (see paragraphs (b) and (c) of the definition of "amending Act" in clause 3 of the Bill). If the amending Act is disallowed under clause 9 the amendments to the Uniform Regulations or Uniform Rules cannot take effect.

Clause 14(4) of the Bill makes it clear that the Uniform Regulations or Uniform Rules made by a provision of an amending Act apply as subsidiary legislation of the State if the amending Act has effect for the purposes of Part 2 under section 9 and has come into operation under section 10.

Clause 14(5)(b) of the Bill provides that if a provision of the Uniform Regulations or the Uniform Rules (the subsidiary provision) is made under or for the purposes of a provision inserted into the *Legal Profession Uniform Law Application Act 2014* (Vic) Schedule 1 by any provision of an amending Act, then if the amending Act provision does not come into operation for the purposes of Part 2 under section 10 because the provision is the subject of a disallowance resolution of practical disallowance resolution under section 9, the subsidiary provision does not apply as subsidiary legislation of the State.

Otherwise, Uniform Regulations and Uniform Rules are disallowable pursuant to clause 16 of the Bill.

1.12. Why clause 126(1)(b) was not identified as a Henry VIII clause in the Explanatory Memorandum for the Bill.

There is no requirement to identify a clause as a Henry VIII clause in Explanatory Memoranda.

The effect of clause 126(1)(b) is clearly set out in the Explanatory Memorandum. Further, clause 6(1)(b) refers to the fact that the Legal Profession Uniform Law may be modified by local regulations made under clause 126(1)(b).

1.13 Why is a clause in that form necessary, whether any alternatives have been considered and why they have been rejected.

Section 56 of the Legal Profession Uniform Law provides that:

It is intended that jurisdictional legislation may-
(a) exempt persons or classes of persons from the requirement to hold Australian practising certificates, either generally or for specified periods, in respect of their official functions as government lawyers; and
(b) without limitation, exclude or modify the operation of specified provisions of this Law (including provisions of Part 2.2) to the extent that any of those provisions would otherwise be applicable to any persons, or class of persons, as government lawyers.

Clause 126(1)(b) gives effect to section 56 of the Legal Profession Uniform Law and the Explanatory Memorandum for clause 126 refers to section 56. The power to make regulations provides sufficient flexibility to make exemptions, exclusions or modifications as and when required.

Any regulations made pursuant to clause 126(1)(b) will be subject to disallowance.

No alternatives have been considered.

1.14. Why clause 328(3) was not identified as a Henry VIII clause in the Explanatory Memorandum for the Bill.

There is no requirement to identify a clause as a Henry VIII clause in Explanatory Memoranda.

The effect of clause 328(3) is clearly set out in the Explanatory Memorandum.

1.15 Why is a clause in that form necessary, whether any alternatives have been considered and why they have been rejected.

As the Standing Committee will have noted, there are comprehensive transitional provisions contained in Part 16 (clauses 258-327) of the Bill and, at this stage, no matters have been identified which would require transitional regulations to be made. However, clause 328 is a catch all provision to enable any matter inadvertently overlooked to be dealt with in such a way as to allow a smooth transition from one regime to the next. Any such regulations would be of limited duration given that they are transitional in nature.

It is noted that clause 328(3) is not a unique transitional provision. See, for example:

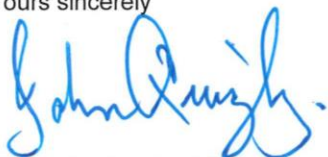
- o Section 5 of the *Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Act 2007 (WA)*
- o Section 205 of the *Health Services Act 2016 (WA)*

Any regulations made pursuant to clause 328(3) will be subject to disallowance.

No alternatives have been considered.

I trust that the above is of assistance to the Standing Committee.

Yours sincerely

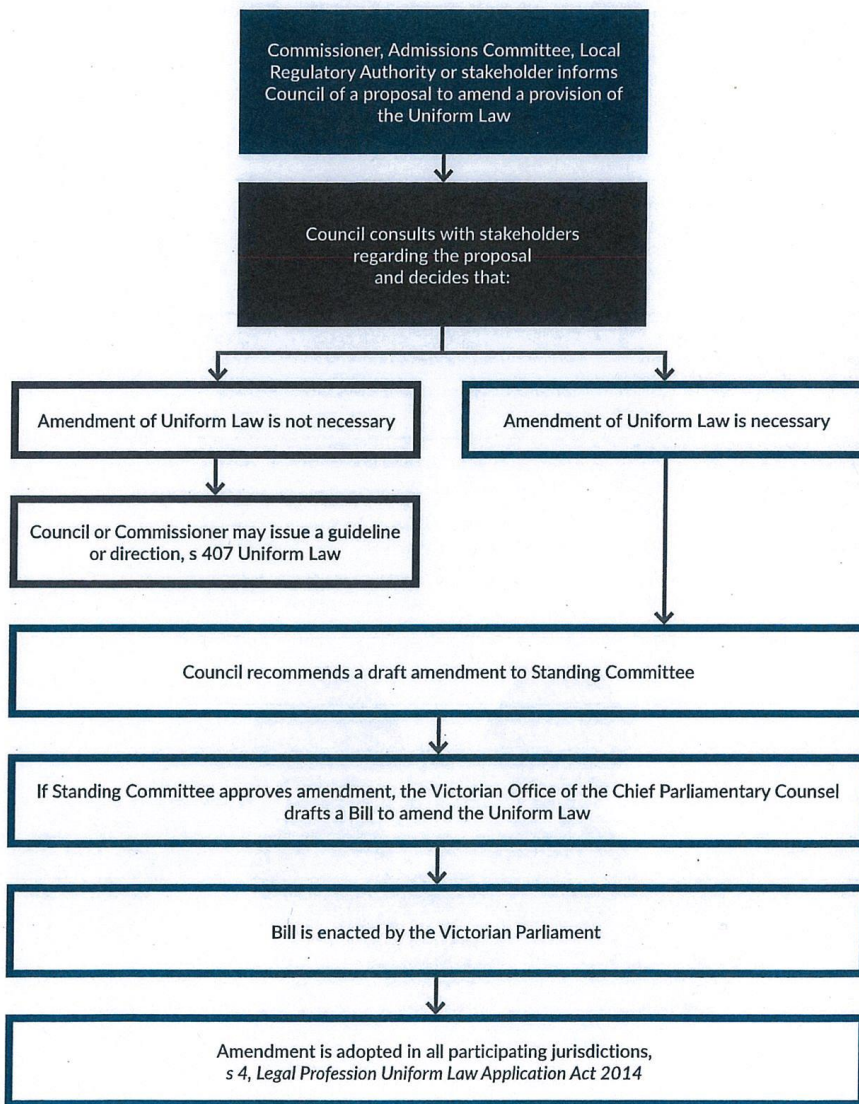


Hon. John Quigley MLA
ATTORNEY GENERAL; MINISTER FOR COMMERCE

1 JUL 2020

Att.

Amending the Uniform Law



APPENDIX 3

EXTRACTS FROM REPORT 123 – PARAGRAPHS 5.60–5.63 AND 5.82–5.88

Legislative Council Standing Order 67 and how it operates

- 5.60 SO 67(3) provides that a notice of motion for disallowance of regulations is moved automatically ('deemed to have been moved *pro forma*') after two sitting days and thereafter, by reason of SO 67(4), has precedence over other orders of the day.
- 5.61 Accordingly, orders of the day relating to disallowance of regulations are listed in precedence to other orders of the day on the Notice Paper and Daily Business Program.
- 5.62 If the House does not wish to debate a disallowance on any sitting day after it has been moved, it must agree to a motion to re-order its business so it can deal with other orders of the day. Importantly, SO 67(5) provides a default mechanism that prevents the repeated and indefinite postponement of a disallowance motion. For finality, it requires it to be dealt with on a certain day in the event that the question is not put earlier, namely either the:
- 17th sitting day after the disallowance motion was moved
 - proposed last sitting day prior to a general election.
- 5.63 This procedure ensures a vote on the disallowance motion. It prevents a disallowance motion remaining on the Notice Paper unresolved and, ultimately, expiring on prorogation of the House. Such an outcome would prevent the House exercising its responsibility to supervise the authority Parliament has delegated to the executive to make laws through subsidiary legislation.
- 5.82 Under Standing Orders, a Member may give a notice of motion to disallow a regulation. They may also withdraw that notice at any time before the expiration of two sitting days after the day it was given.¹ After that time, it is deemed to have been moved automatically and the disallowance procedure in SO 67(5) applies.
- 5.83 It is only if the notice moves automatically under SO 67(3) that it becomes subject to SO 67(5)(a) or (b) so that the question is put on either the:
- 17th sitting day after the notice moves (SO 67(5)(a))
 - last sitting day prior to a general election (SO 67(5)(b)).
- 5.84 A notice may survive into a new Parliament in certain situations depending on the time it is given. For example, if it is given on the proposed last, second last or third last sitting day prior to a general election it remains a notice because it has not yet been moved by operation of SO 67(3). If the last sitting week is three sitting days in length, any notice given that week will survive until the next Parliament.
- 5.85 Accordingly, notices of motion to disallow a regulation survive into a new Parliament by virtue of SO 67(2) and (3) if they are given on the proposed last, second last or third last sitting day prior to a general election.
- 5.87 As noted, the Committee's proposed section 19B(3)(b) provides that a motion that a Commonwealth amending law be disallowed does not lapse even though the House is prorogued, dissolved or expires. However, SO 67(5)(b) would ordinarily require a vote on the last sitting day prior to a general election.
- 5.88 Accordingly, should the House desire to have a *pro forma* disallowance motion in the Legislative Council (that is, one that has moved automatically after two sitting days) survive into a new Parliament after a general election, as proposed by the Bill, an exception is needed to SO 67(5)(b) and, so, the Committee makes the following recommendation.

APPENDIX 4

EXTRACT FROM REPORT 123 – PARAGRAPHS 5.64–5.68

- 5.64 SO 67(1) provides that for the purpose of the disallowance process in that standing order, a ‘regulation’ includes any ‘statutory instrument made subject to disallowance by a written law’.
- 5.65 The term ‘statutory instrument’ is not defined in the Standing Orders or in the *Interpretation Act 1984*.
- 5.66 The term ‘statutory instrument’ is not defined in the Standing Orders or in the *Interpretation Act 1984*.
- 5.67 A ‘statutory instrument’ is generally accepted to be:
a rule, order, or administrative regulation having the force of law promulgated by the crown in council, a minister, a local authority, a corporation or other body under power delegated by Parliament.
- 5.68 As Commonwealth amending laws are primary legislation (albeit of the Commonwealth), they would not be ‘regulations’ under SO 67. Accordingly, they would not be subject to the disallowance process in SO 67.

GLOSSARY

Term	Definition
Act	<i>Legal Profession Uniform Law Application Act 2020</i>
COAG	Council of Australian Governments
Committee	Standing Committee on Uniform Legislation and Statutes Review
Delegated Legislation Committee	Joint Standing Committee on Delegated Legislation
FTA Bill	Fair Trading Amendment Bill 2019
IGA	<i>Intergovernmental Agreement on the Legal Profession Uniform Framework</i>
Legal Profession Bill	Legal Profession Uniform Law Application Bill 2020
Legal Profession Levy Bill	Legal Profession Uniform Law Application (Levy) Bill 2020
Legal Profession Uniform Law	Schedule 1 to the <i>Legal Profession Uniform Law Application Act 2014</i> (Victoria)
Legal Profession Uniform Law (WA)	When the Legal Profession Uniform Law is applied in Western Australia it will be referred to as the <i>Legal Profession Uniform Law (WA)</i>
MOU	National Legal Profession Memorandum of Understanding
National Model Bill	National Model Bill on the Legal Profession
SO	The Standing Orders of the Legislative Council
Standing Committee	Standing Committee consisting of the Attorneys-General of the jurisdictions in which the Legal Profession Uniform Law applies or a jurisdiction in respect of which the Standing Committee decides that a law of the jurisdiction substantially corresponds to the provisions of the Legal Profession Uniform Law
Victorian Act 2019	<i>Legal Profession Uniform Law Application Amendment Act 2019</i> (Victoria)
2007 Bill	Legal Profession Bill 2007