

41ST PARLIAMENT



Report 132

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Veterinary Practice Bill 2021

Presented by
Hon Donna Faragher MLC (Chair)
August 2021

Standing Committee on Uniform Legislation and Statutes Review

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EXECUTIVE SUMMARY

- 1 The *Veterinary Surgeons Act 1960* currently regulates veterinary practice in Western Australia but in 2006 the Council of Australian Governments Primary Industries Ministerial Council endorsed a proposed model for the national recognition of veterinary registration.
- 2 The Veterinary Practice Bill 2021 (Bill) reflects the Agreement Relating to Mutual Recognition entered into in 1992 between the Commonwealth and all States and Territories and the proposed model endorsed by the Ministerial Council in 2006. It introduces the recognition of veterinarians registered in other Australian jurisdictions. It provides for the registration in Western Australia for an interstate veterinarian holding primary registration in another Australian jurisdiction to practice in Western Australia, subject to the same conditions, restrictions or limitations that apply to their primary registration. After three months, the veterinarian must apply for Western Australian registration.
- 3 Key features of the Bill include:
 - formalising a process for identifying and dealing with veterinarians suffering an impairment separate from the current practice of dealing with it as a complaint or unprofessional conduct matter
 - allowing non-veterinarians to own and operate veterinary practices, provided a registered veterinarian makes decisions relating to veterinary treatment and care
 - establishing a new Veterinary Practice Board of Western Australia (Board) to replace the current Veterinary Surgeons' Board
 - returning to the new Board the power to deal with minor disciplinary matters it had previously held but which resided with the State Administrative Tribunal since 2005
 - increasing Board membership from five to eight, including a consumer representative, a legal practitioner and a veterinary nurse for balance.
- 4 The Standing Committee on Uniform Legislation and Statutes Review (Committee) has identified several clauses in the Bill that impact the sovereignty and law-making powers of the Western Australian Parliament.
- 5 The Committee draws these clauses to the Legislative Council's attention for consideration during debate on the Bill.

Findings and recommendations

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

FINDING 1

Page 6

The lack of an express commencement date for the operational clauses of the Veterinary Practice Bill 2021 is an erosion of the Parliament's sovereignty and law-making powers.

FINDING 2

Page 6

The Committee notes the Minister's position that it is intended that the *Veterinary Practice Act 2021* in its entirety will be proclaimed by 2022. Notwithstanding this advice, the Committee draws the lack of an express commencement date to the attention of the Legislative Council for consideration during debate on the Veterinary Practice Bill 2021.

FINDING 2

Page 9

The combined effect of the definition of 'authorised person' in clause 3 and the regulation-making powers in clause 196(2)(d) and (k) of the Veterinary Practice Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 3

Page 9

Clauses 3, 56(1) and 196(2)(d) and (k) of the Veterinary Practice Bill 2021 can be justified by reason of the need for flexibility to ensure the specific circumstances of each situation are properly and fully captured, and to prevent authorising persons who are not fit for the category.

FINDING 4

Page 11

The combined effect of the definition of 'veterinary medicine' in clause 3 and the regulation-making power of clause 196(2)(a) of the Veterinary Practice Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

RECOMMENDATION 1

Page 11

The Government amend the Veterinary Practice Bill 2021 to provide clear limits to the regulation-making power.

FINDING 5

Page 13

Clause 60(2) of the Veterinary Practice Bill 2021 is a Henry VIII clause enabling regulations, rather than an Act of Parliament, to modify the proposed *Veterinary Practice Act 2021*.

FINDING 6

Page 13

Clause 60(2) of the Veterinary Practice Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 7

Page 13

Clause 60(2) of the Veterinary Practice Bill 2021 can be justified due to the rapidly changing manner in which veterinary services are being dispensed and may be dispensed in the future.

FINDING 8

Page 15

Clause 223(3) of the Veterinary Practice Bill 2021 is a Henry VIII clause enabling regulations, rather than an Act of Parliament, to modify the proposed *Veterinary Practice Act 2021*.

FINDING 9

Page 15

Clause 223(3) of the Veterinary Practice Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 10

Page 15

It would have been desirable if the Explanatory Memorandum had identified clause 223(3) as a Henry VIII clause and thereby inform the Parliament of Western Australia of the need or desirability for, and effect of, a significant regulation-making power in clause 223(3).

FINDING 11

Page 15

Clause 223(3) can be justified due to the possibility that the transitional provisions of the Veterinary Practice Bill 2021 have failed to identify and address one or more matters that may cause unintended inconvenience, hardship, cost or inconsistency.

RECOMMENDATION 2

Page 15

The Minister for Agriculture and Food consider amending the Explanatory Memorandum for the Veterinary Practice Bill 2021 to identify all Henry VIII clauses and the rationale for them.

1 Introduction

- 1.1 On 12 May 2021, the Veterinary Practice Bill 2021 (Bill) was introduced into the Legislative Council.¹
- 1.2 The Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126. The Committee was required to report to the Legislative Council by 3 August 2021, being the first Legislative Council sitting day following the expiry of the 45 day reporting period.
- 1.3 The Bill was introduced in a very similar format in the previous Parliament. It was referred to the Committee for consideration and report, but lapsed when the Legislative Council was prorogued prior to the 2021 state election.
- 1.4 The Bill seeks to:
 - establish a statutory scheme for regulating veterinary medicine practice in Western Australia, including the registration of veterinarians, veterinary nurses and veterinary premises
 - facilitate the regulation of veterinary medicine practice on a national basis
 - repeal the *Veterinary Surgeons Act 1960* and the *Veterinary Surgeons Regulations 1979*.
- 1.5 When enacted, it will be the *Veterinary Practice Act 2021* (Act).
- 1.6 This report includes discussion and analysis of the:
 - background to the Bill
 - Bill and its impact on Parliamentary sovereignty and law-making powers.

2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its webpage at [Uniform Legislation Committee homepage](#). The general public was notified of the referral via social media.²
- 2.2 Given its terms of reference, the Committee considered that any broader advertising or invitation for submissions from the public was neither necessary nor warranted.

3 Supporting documents

- 3.1 The Committee received copies of the Bill, its second reading speech and Explanatory Memorandum (EM) when the Bill was introduced into the Legislative Council.
- 3.2 Standing Order 126(5) states:

The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral...
- 3.3 An advisor from the office of Hon Alannah MacTiernan MLC, Minister for Agriculture and Food (Minister) forwarded the information required under Ministerial Office Memorandum MM 2007/01³ on 21 May 2021, the 7th working day after referral.

¹ Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, introduced the Bill.

² Legislative Council, 12 May 2021, retrieved from <https://twitter.com/WALegCouncil/status/1392392588393472001>.

³ 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

4 Background

- 4.1 The *Veterinary Surgeons Act 1960* currently regulates veterinary practice in Western Australia but in 2006 the Council of Australian Governments Primary Industries Ministerial Council endorsed a proposed model for the national recognition of veterinary registration.⁴
- 4.2 In its 2015 report on mutual recognition schemes, the Productivity Commission described the resulting National Recognition of Veterinarians scheme (Scheme) as an automatic mutual recognition arrangement under which a veterinarian registered in one of the participating states – New South Wales, Victoria, Queensland, South Australia or Tasmania – is able to temporarily practise in another participating jurisdiction without having to register again.⁵
- 4.3 The Productivity Commission found that automatic mutual recognition ‘is a flexible, low cost way of facilitating service provision across borders on a temporary basis’.⁶
- 4.4 The Productivity Commission noted that the other Australian jurisdictions have committed to adopting the Scheme,⁷ and recommended that the Governments of Western Australia, the Northern Territory and the ACT legislate to extend the Scheme to their jurisdictions.⁸
- 4.5 The Productivity Commission also noted that implementation of the Scheme in Western Australia has been slowed by its inclusion in a broader update of the State’s veterinary legislation.⁹
- 4.6 A consultation draft of the Bill was released in May 2020, and the Department of Primary Industries and Regional Development released a consultation summary report in September 2020.¹⁰
- 4.7 The Minister said the Bill will:
- modernise the regulation of veterinary practice in Western Australia. It is now 60 years since the current act, the *Veterinary Surgeons Act* [1960], was passed by the WA Parliament. Bringing it into line with current practices in other Australian jurisdictions and the modern-day economy is long overdue.¹¹

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.

⁴ Primary Industries Ministerial Council, *Record and Resolutions of the Primary Industries Ministerial Council Eleventh Meeting*, 24 November 2006, pp 83–4.

⁵ Australian Government, Productivity Commission, *Mutual Recognition Schemes*, Productivity Commission Research Report, September 2015, p 169.

⁶ *ibid.*, p 191 (finding 6.1).

⁷ *ibid.*, p 169.

⁸ *ibid.*, p 178 (recommendation 6.1). The Australian Capital Territory has since legislated to implement the Scheme through the *Veterinary Practice Act 2018* (ACT).

⁹ *ibid.*, p 176.

¹⁰ Department of Primary Industries and Regional Development, *Veterinary Practice Bill 2020 consultation*. See: <https://talkingbiosecurity.dpird.wa.gov.au/veterinary-practice-bill-2020>. Viewed 17 May 2021.

¹¹ Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 May 2021, p 455.

Agreement Relating to Mutual Recognition

- 4.8 The Commonwealth and all States and Territories entered into an Agreement Relating to Mutual Recognition on 11 May 1992 (Mutual Recognition Agreement).
- 4.9 The parties to the Mutual Recognition Agreement agreed to 'establish a scheme for implementation of mutual recognition principles for goods and occupations for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia'.¹²
- 4.10 The Bill reflects the Mutual Recognition Agreement by introducing interstate recognition of veterinarians registered in other Australian jurisdictions and facilitating the regulation of the practice of veterinary medicine on a national basis.
- 4.11 The Mutual Recognition Agreement is the 'multilateral intergovernmental agreement to which the Government of the State is a party' referred to in Standing Order 126(2)(a), and which triggered referral of the Bill to the Committee for consideration and report.

Timetable for implementing the Veterinary Practice Bill 2021

- 4.12 The Minister's office advised:
- It is anticipated that, subject to the election outcomes and any changes to the current BX legislative priority rating, the Bill will be debated and passed in the first half of 2021 and come into effect on the making of regulations.¹³
- 4.13 The Minister's office advised that significant progress has been made in regards to the drafting instructions for the regulations:
- We expect to finalise them at a broad level within the next few months. There is the need to consult on a couple of the more contentious issues such as spraying and cattle pregnancy testing.¹⁴

5 Veterinary Practice Bill 2021

- 5.1 Part 2, Division 4 of the Bill introduces interstate recognition of veterinarians registered in other Australian jurisdictions.¹⁵ It provides for registration in Western Australia of an interstate veterinarian holding primary registration in another Australian jurisdiction to practice in Western Australia, subject to the same conditions, restrictions or limitations that apply to their primary registration.
- 5.2 The registration applies to an interstate veterinarian whose primary place of residence is not in Western Australia or who resides in Western Australia for no more than three months.¹⁶ After three months, the veterinarian must apply for Western Australian registration.

¹² *Agreement Relating to Mutual Recognition* entered into between the Commonwealth of Australia and all States and Territories, 11 May 1992, p 1.

¹³ J Smith, Senior Policy Advisor, Office of the Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, email, 1 December 2020 p 1. Priority Code BX means 'Bill to be introduced in the second half of the current year but not necessarily passed before the end of the current year': *Getting Government Legislation Drafted and Enacted: Guidelines and Procedures*, Department of Justice, Parliamentary Counsel's Office, 4 September 2020, p 10.

¹⁴ J Smith, Senior Policy Advisor, Office of the Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, email, 21 May 2021, p 1.

¹⁵ Veterinary Practice Bill 2021 cl 22.

¹⁶ *ibid.*, cl 22(3).

5.3 Key features of the Bill include:

- formalising a process for identifying and dealing with veterinarians suffering an impairment¹⁷ separate from the current practice of dealing with it as a complaint or unprofessional conduct matter¹⁸
- allowing non-veterinarians to own and operate veterinary practices¹⁹, provided a registered veterinarian makes decisions relating to veterinary treatment and care
- establishing a new Veterinary Practice Board of Western Australia (Board) to replace the current Veterinary Surgeons' Board
- returning to the new Board the power to deal with minor disciplinary matters it had previously held but which resided with the State Administrative Tribunal since 2005²⁰
- increasing Board membership from five to eight, including a consumer representative, a legal practitioner and a veterinary nurse for balance²¹.

Structure of the Veterinary Practice Bill 2021

5.4 The Bill contains 236 clauses in 17 Parts.

Structure of uniform legislation

5.5 The Bill is 'model legislation'. This involves enacting Western Australian legislation that reflects relevant national policy and, as far as possible, the laws of other jurisdictions, but with variations accommodating local requirements. Former President of the Legislative Council, Hon Barry House MLC, described this structure as, theoretically, the least disadvantageous to State legislative sovereignty because:

it is the only structure where the legislation and any amendments are always within the control of each jurisdiction's own Parliament, as they each implement their own version of an agreed model law.²²

5.6 This particular structure of uniform legislation maintains Western Australia's sovereignty. The Western Australian Parliament can amend the Bill, once enacted, to suit the State's requirements.

¹⁷ Impairment means 'a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect...the person's capacity to practice veterinary medicine or...the person's capacity to practice as a veterinary nurse': Veterinary Practice Bill 2021 cl 3. See also ABC News, posted 13 January 2019, 'Veterinarians abandon profession as suicide rate remains alarmingly high' at <https://www.abc.net.au/news/2019-01-13/vet-shortage-as-suicide-rates-high/10708686> (viewed 17 May 2021).

¹⁸ Veterinary Practice Bill 2021 Parts 9 and 10.

¹⁹ *ibid.*, cl 3, definition of 'practice owner'.

²⁰ *ibid.*, Part 7.

²¹ *ibid.*, Part 13.

²² *When a Nod and a Wink Amounts to an Intergovernmental Agreement. Issues faced by the Legislative Council of Western Australia in the identification and scrutiny of uniform legislation.* A paper presented by former President of the Legislative Council, Hon Barry House MLC, Parliament of Western Australia, Darwin, July 2010.

6 Clauses in the Veterinary Practice Bill 2021 impinging upon Parliamentary sovereignty and law-making powers

Parliamentary sovereignty

6.1 The traditional and most often applied definition of parliamentary sovereignty is that of Albert Venn Dicey, who stated Parliament has the right to:

make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.²³

6.2 In Australia, the concept of Parliamentary sovereignty is taken to mean Parliament:

- has the right to make, amend or repeal any law within the limits of the Constitution
- cannot make a law that a future parliament cannot change
- takes priority over the executive and judicial arms of government; that is, the courts cannot question the validity of an Act of Parliament or declare it void.

Clause 2 – Commencement

6.3 Clause 2 of the Bill states:

This Act comes into operation as follows –

- (a) Part 1²⁴ – on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act – on a day fixed by proclamation.

6.4 Gazetting a proclamation is an Executive action impinging on the Parliament's sovereignty. The Executive controls the commencement date because no time frame is specified. There is nothing in the Bill that requires proclamation within a specified time. It is conceivable that a proclamation may never be made and the will of the Parliament, in passing the Bill, would be frustrated.

6.5 Relevantly, the EM provides no justification for this provision.

Minister's position

6.6 The Committee asked the Minister a number of questions relating to the operation of the commencement clause.

6.7 The Minister's position by letter dated 14 June 2021, which is attached as Appendix 1, is that:

It is anticipated that the...[Act] in its entirety will have come into effect by mid-2022 at the latest.

...

There is no prospect that any provision of the proposed Act will not come into operation within 10 years of receiving Royal Assent. It is therefore unnecessary for

²³ A V Dicey, *An Introduction to the Study of the Law of the Constitution*, Macmillan, London, first published 1885, 10th edn, pp 39-40.

²⁴ Part 1 of the Veterinary Practice Bill 2021 contains four clauses: the short title, commencement, terms used and how the *Veterinary Practice Act 2021* binds the Crown in right of Western Australia.

the commencement clause to provide for repeal of any provision that remains unproclaimed at the expiration of 10 years.²⁵

FINDING 1

The lack of an express commencement date for the operational clauses of the Veterinary Practice Bill 2021 is an erosion of the Parliament's sovereignty and law-making powers.

FINDING 2

The Committee notes the Minister's position that it is intended that the *Veterinary Practice Act 2021* in its entirety will be proclaimed by 2022. Notwithstanding this advice, the Committee draws the lack of an express commencement date to the attention of the Legislative Council for consideration during debate on the Veterinary Practice Bill 2021.

Clause 3 – Terms used

- 6.8 Clause 3 raises no Parliamentary sovereignty issues. It simply contains the definitions of terms used in the Bill. However, the following definitions are relevant to Parliamentary sovereignty by way of the regulation making power in clause 196(2):
- 'authorised person'
 - 'veterinary medicine'.

'Authorised person'

- 6.9 Clause 56(1) of the Bill makes it an offence for a person to carry out an act of veterinary medicine unless the person is:
- (a) a veterinarian; or
 - (b) a veterinary nurse; or
 - (c) an authorised person.
- 6.10 Clause 3 of the Bill provides the following definition of 'authorised person':
- (a) a person who is authorised by the Board, in accordance with the regulations, to carry out —
 - (i) an act of veterinary medicine; or
 - (ii) an act of veterinary medicine of a prescribed class;or
 - (b) a person of a prescribed class who is authorised by the regulations to carry out —
 - (i) an act of veterinary medicine; or
 - (ii) an act of veterinary medicine of a prescribed class.
- 6.11 The Bill does not specify which persons, or classes or persons, are 'authorised persons' and does not contain any criteria to govern which people, or classes of people, may be prescribed as 'authorised' to carry out acts of veterinary medicine.

²⁵ Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, letter, 14 June 2021, p 1.

- 6.12 Clause 196(2)(d) empowers the Governor to make regulations about:
- (d) authorised persons, including —
 - (i) applications for, and the grant of, authorisations; and
 - (ii) conditions of authorisations; and
 - (iii) the renewal, suspension or cancellation of authorisations.²⁶
- 6.13 Clause 196(2)(k) specifies that the Governor may make regulations about:
- (k) acts of veterinary medicine that may be carried out, and the circumstances or conditions under which they may be carried out, by ... authorised persons.
- 6.14 The Committee notes the broad nature of the regulation-making power and the lack of criteria or guidance within the Bill governing what sort of person is intended to fall under the category of a 'authorised person'.
- 6.15 In contrast, the Bill contains extensive provisions regarding the registration of veterinarians and veterinary nurses, including matters such as:
- how an application for registration must be made²⁷
 - requirements for registration, such as the person:
 - holding a veterinary qualification/veterinary nursing qualification recognised by the Board²⁸
 - having sufficient physical and mental capacity to practise veterinary medicine/veterinary nursing competently and safely²⁹
 - being sufficiently proficient in the English language, both written and oral, to practise veterinary medicine/veterinary nursing competently and safely³⁰
 - being a fit and proper person³¹ by reference to the matters that must be considered by the Board pursuant to clause 18³²
 - conditions that may be imposed on a person's registration³³
 - cancellation and suspension of registration.³⁴
- 6.16 The EM states:
- [an authorised person] is a person who is, or who belongs to a class of persons that is authorised under the regulations to perform acts of veterinary medicine. It is intended that authorised persons will include veterinary students from veterinary schools recognised by the New Board, trainee veterinary nurses, and international veterinarians. An authorised person may be under the direction of a registered veterinarian or a veterinary nurse, depending on the act of veterinary medicine

²⁶ Veterinary Practice Bill 2021, cl 196(2)(d)(i)-(iii).

²⁷ *ibid.*, cl 5(2).

²⁸ *ibid.*, cl 10(a); cl 14(a).

²⁹ *ibid.*, cl 10(c); cl 14(b)

³⁰ *ibid.*, cl 10(d); cl 14(c)

³¹ *ibid.*, cl 10(e); cl 14(d)

³² *ibid.*, cl 18(a)-(g).

³³ *ibid.*, cl 25.

³⁴ *ibid.*, cl 28.

being carried out, and will be authorised to carry out only those acts prescribed in the regulations and specified in the person's authorisation.³⁵

- 6.17 Given the above explanation, the Committee is of the view that Parliament's sovereignty is enhanced by the inclusion of veterinary students, trainee veterinary nurses and international veterinarians in clause 56.

Minister's position

- 6.18 The Committee asked the Minister a number of questions in relation to 'authorised person' and the use of the regulation making power.

- 6.19 The Minister's position is:

It is not considered possible to set out parameters for exercising the regulation-making power to prescribe 'authorised persons' because:

- a) The types of persons or classes of persons may vary into the future depending on the needs of the time, place, circumstance or community expectation, with some needing to be considered on a case-by-case basis.
- b) Similarly, the circumstances for authorisation may vary and be identified only when the need arises.
- c) Flexibility is imperative to ensure the specific circumstances of each situation are properly and fully captured, and the relevant regulation does not result in unintended consequences of authorising persons who are not fit for the category. In addition, revocation of authorised person appointments due to changing circumstances in the future can also be efficiently achieved.
- d) Notably, regulations made pursuant to this power will take the usual course of being subject to community and industry consultation and requiring Ministerial support. They will be tabled in Parliament and be subject to disallowance.³⁶

Committee comment

- 6.20 Clause 56(1) places parameters on the persons or classes of persons who may be 'authorised persons' by including veterinarians and veterinary nurses prior to the term 'authorised person'. It is not an open-ended provision.
- 6.21 The Committee notes the Minister's position in relation to this clause. The need to provide flexibility must be balanced against the impact on Parliamentary sovereignty.
- 6.22 The Committee notes that any regulations made pursuant to this power will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament.
- 6.23 It would have been preferable to have authorised persons and classes of authorised persons identified by statute rather than regulations. However, the Committee considers that, on balance, prescription by regulation can be justified in this case by the need for flexibility to ensure the specific circumstances of each situation are properly and fully captured, and to prevent authorising persons who are not fit for the category.

³⁵ Veterinary Practice Bill 2021, *Explanatory Memorandum*, Legislative Council, p 3.

³⁶ Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, letter, 14 June 2021, p 2.

FINDING 2

The combined effect of the definition of 'authorised person' in clause 3 and the regulation-making powers in clause 196(2)(d) and (k) of the Veterinary Practice Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 3

Clauses 3, 56(1) and 196(2)(d) and (k) of the Veterinary Practice Bill 2021 can be justified by reason of the need for flexibility to ensure the specific circumstances of each situation are properly and fully captured, and to prevent authorising persons who are not fit for the category.

'Veterinary medicine'

- 6.24 The Long Title states that one purpose of the Bill is to regulate veterinary medicine practice in Western Australia, and facilitate the regulation of veterinary medicine practice on a national basis.
- 6.25 Clause 3 provides the definition of veterinary medicine as follows:
- (a) includes, but is not limited to, the following —
 - (i) diagnosing diseases or physiological conditions in, and injuries to, animals;
 - (ii) medical treatment of animals;
 - (iii) performing surgical procedures on animals;
 - (iv) administering anaesthetics to animals;
 - (v) an act of a kind prescribed as being an act of veterinary medicine;
 - but
 - (b) does not include an act of a kind prescribed as not being an act of veterinary medicine.
- 6.26 Clause 196(2)(a) of the Bill authorises the Governor to make regulations about veterinary medicine.

Henry VIII clause

- 6.27 The power for regulations made under clause 196(2)(a) to modify the definition of 'veterinary medicine' is a 'Henry VIII clause'. A 'Henry VIII clause' is a section in an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.³⁷ A Henry VIII clause gives a subordinate instrument (in this case, regulations) the same effect on an Act as an amendment to that Act.
- 6.28 A Senate committee has recently reported that Henry VIII clauses:
- limit parliamentary oversight and subvert the appropriate relationship between the

³⁷ Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The use of "Henry VIII Clauses" in Queensland Legislation*, January 1997, p 24.

Parliament and the executive.³⁸

- 6.29 The Committee's position on Henry VIII clauses has been well documented in previous reports.³⁹ Such clauses are objectionable as they offend the separation of powers principle, 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

- 6.30 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.⁴⁰

- 6.31 The EM only advises that the definition of veterinary medicine:

sets out criteria for carrying on the practise of veterinary medicine, including general activities such as examining animals for the purpose of diagnosing diseases or physiological conditions (such as diagnosing pregnancy), treating animals, performing surgery, and administering anaesthetic agents. Veterinary medicine can include or exclude anything else prescribed by regulation.⁴¹

- 6.32 Absent is any justification for the definition as drafted or acknowledgement of its Henry VIII character.

- 6.33 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.⁴²

³⁸ The Senate, Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of delegated legislation from parliamentary oversight*, 16 March 2021, p 120, para 7.110. See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report

³⁹ 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.

⁴⁰ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 130, *National Disability Insurance Scheme (Worker Screening) Bill 2020*, October 2020, p 10.

⁴¹ Veterinary Practice Bill 2021, *Explanatory Memorandum*, Legislative Council, pp 3–4.

⁴² 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.

6.34 The Committee made the following recommendation in 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.⁴³

Minister's position

6.35 The Committee asked the Minister a number of questions in relation to 'veterinary medicine' and the use of the regulation making power.

6.36 The Minister's position is:

- a) It is envisaged that...some acts of veterinary medicine may change into the future...based on changing technology and needs.
- b) It is not possible to set out exhaustively in the Bill what acts of veterinary medicine will be excluded from the operation of the Act into the future because this is a rapidly changing area of science, and community and industry expectation.

...

- (v) Regulations made pursuant to this power will take the usual course of being subject to community and industry consultation and requiring Ministerial support. They will be tabled in Parliament and be subject to disallowance.⁴⁴

Committee comment

6.37 The power for regulations made under clause 196(2)(a) to modify the definition of 'veterinary medicine' is a Henry VIII clause empowering the Executive, by regulation, to qualify, limit or expand the operation of the proposed Act. In this case, regulations will be able to diminish a statutory prohibition on carrying out acts of veterinary medicine without being authorised to do so, by excluding certain acts from the definition of 'veterinary medicine.' If it is considered necessary to exclude certain acts from the definition of 'veterinary medicine', then these acts should be set out in the Bill.

FINDING 4

The combined effect of the definition of 'veterinary medicine' in clause 3 and the regulation-making power of clause 196(2)(a) of the Veterinary Practice Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

RECOMMENDATION 1

The Government amend the Veterinary Practice Bill 2021 to provide clear limits to the regulation-making power.

⁴³ 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).

⁴⁴ Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, letter, 14 June 2021, pp 2-3.

Clause 60(2) – Registered veterinary premises

- 6.38 Clause 60(1) of the Bill makes it an offence for a person to:
- carry on a veterinary practice business at or from any premises other than veterinary premises.
- 6.39 The penalty is a fine of \$10 000 for a first offence, and a fine of \$20 000 for a second or subsequent offence.
- 6.40 Clause 3 defines a ‘veterinary practice business’ as a business that
- (a) involves the practice of veterinary medicine by 1 or more veterinarians; and
 - (b) may supply goods and services relating to the practice of veterinary medicine.
- 6.41 Clause 3 defines ‘premises’ as including:
- (a) land;
 - (b) the whole or part of a building or structure (whether of a permanent or temporary nature);
 - (c) a vehicle.
- 6.42 A person who is, or proposes to be, a practice owner, may apply to the Board for registration of premises as ‘veterinary premises’.⁴⁵ The Bill sets out the requirements for registration, which includes, for example, the premises being in a satisfactory use condition and that there is a veterinary supervisor for the premises.⁴⁶
- 6.43 However, clause 60(2) states:
- The regulations may exclude a veterinary practice business of a prescribed kind, or carried on in prescribed circumstances, from the application of subsection (1).

No justification in the explanatory materials

- 6.44 The EM does not identify clause 60(2) as a Henry VIII clause. It states:
- the regulations may allow the use of other premises in specific circumstances, which may, for example, permit other business activities, such as administrative work, to be undertaken from alternative premises.⁴⁷
- 6.45 The Committee is of the view that Parliament’s sovereignty is enhanced by the insertion of the above example into the Bill.
- 6.46 The second reading speech similarly failed to identify or justify clause 60(2) as a Henry VIII clause.

Minister’s position

- 6.47 The Committee asked the Minister a number of questions in relation to ‘registered veterinary premises’ and the use of the regulation making power.
- 6.48 The Minister’s position is:
- It is not possible to accurately set out all the types of premises or circumstances which may be excluded from the operation of the Act by such regulations because

⁴⁵ Veterinary Practice Bill 2021, cl 35(1).

⁴⁶ *ibid.*, cl 39(a) and (d).

⁴⁷ Veterinary Practice Bill 2021, *Explanatory Memorandum*, Legislative Council, p 14.

of the rapidly changing manner in which veterinary services are being dispensed and may be dispensed in the future.

...

It is not viable to set out parameters for regulations that will need to be made by considering circumstances on a case-by-case basis. However, regulations made pursuant to this power will take the usual course of being subject to community and industry consultation and requiring Ministerial support. They will be tabled in Parliament and be subject to disallowance.⁴⁸

Committee comment

- 6.49 Clause 60(2) is a Henry VIII clause enabling the Executive, by regulation, to exclude the Act's operation without limitation.
- 6.50 Henry VIII clauses, and the Committee's position on them, are discussed at paragraphs 6.27 to 6.34.
- 6.51 The regulation-making power in clause 60(2) lacks any parameters.
- 6.52 The Committee accepts that clause 60(2) is not intended to expand the types of registered veterinary premises captured by the Act; rather, it excludes some premises from the operation of the Act.
- 6.53 The Committee notes the Minister's position in relation to this clause. The need to provide flexibility must be balanced against the impact on Parliamentary sovereignty.
- 6.54 The Committee notes that any regulations made pursuant to this power will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament.
- 6.55 It would have been preferable to have premises to be excluded from the operation of the Act identified by statute rather than regulations. However, the Committee considers that, on balance, prescription by regulation can be justified in this case due to the rapidly changing manner in which veterinary services are being dispensed and may be dispensed in the future.

FINDING 5

Clause 60(2) of the Veterinary Practice Bill 2021 is a Henry VIII clause enabling regulations, rather than an Act of Parliament, to modify the proposed Veterinary Practice Act 2021.

FINDING 6

Clause 60(2) of the Veterinary Practice Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 7

Clause 60(2) of the Veterinary Practice Bill 2021 can be justified due to the rapidly changing manner in which veterinary services are being dispensed and may be dispensed in the future.

Clause 223 – Transitional regulations

- 6.56 When legislation is amended or replaced, provisions are often needed to deal with the transition from the old law to the new law. These are called transitional provisions. They may

⁴⁸ Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, letter, 14 June 2021, pp 3-4.

deal with things such as ensuring people who are licensed under the old law continue to be licensed under the new law.

- 6.57 Clause 223(3) states that transitional regulations may provide that specified provisions of the Act:
- (a) do not apply to or in relation to a specified matter; or
 - (b) apply with specified modifications to or in relation to a specified matter.

Henry VIII clause

- 6.58 Clause 223(3) is a Henry VIII clause as it modifies primary legislation by regulation. Henry VIII clauses, and the Committee's position on them, are discussed at paragraphs 6.27 to 6.34.

No justification in explanatory materials

- 6.59 The EM explains clause 223 in the following manner:

This clause permits the making of transitional regulations to address any deficiencies in the transitional provisions of the Bill, subject to protecting a person from prejudice or liability that would otherwise arise from their impact.⁴⁹

- 6.60 The EM does not identify clause 223(3) as a Henry VIII clause, or identify with any specificity the potential deficiencies in the transitional provisions of the Bill that may necessitate an erosion of the Western Australian Parliament's sovereignty through a Henry VIII clause. The second reading speech similarly failed to identify or justify clause 223(2) as a Henry VIII clause.
- 6.61 The Committee recently reported on a similar lack of justification for an identical clause in the National Disability Insurance Scheme (Worker Screening) Bill 2020.⁵⁰

Minister's position

- 6.62 The Committee asked the Minister a number of questions about transitional regulations.
- 6.63 The Minister's position is that clause 223(3):

- a) is necessary due to the possibility that the transitional provisions of the Bill have, inadvertently and despite best endeavours, failed to identify and address one or more matters that may cause inconvenience, hardship, cost or inconsistency which is unintended;
- b) is in the form recommended by PCO;
- c) was not considered in the context of alternative forms as the current form as drafted is commonly found in the statute books and is suitable to the circumstances.

It is not expected that regulations will need to be made under clause 223(3). However, if made they will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance from Parliament.⁵¹

⁴⁹ Veterinary Practice Bill 2021, *Explanatory Memorandum*, Legislative Council, p 39.

⁵⁰ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 130, *National Disability Insurance Scheme (Worker Screening) Bill 2020*, October 2020, p 15.

⁵¹ Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, letter, 14 June 2021, p 4.

Committee comment

- 6.64 The EM did not acknowledge and draw Parliament's attention to clause 223(3) as a Henry VIII clause or offer an explanation for its need.
- 6.65 While clause 223 is mentioned in the EM, the text offers no explanation of the need or desirability of such a provision. It should not be the Western Australian Parliament's task to identify the purpose and effect of a provision it is being asked to make a part of Western Australian law.
- 6.66 Clause 223(3) is focused in its operation. It limits the purpose for which transitional regulations may be made.⁵² This is not an open-ended provision.
- 6.67 The Committee notes that any regulations made pursuant to clause 223(3) will be subject to scrutiny by the Joint Standing Committee on Delegated Legislation and possible disallowance by the Parliament.
- 6.68 That being so, the Committee considers that clause 223(3) can be justified due to the possibility that the transitional provisions of the Bill have failed to identify and address one or more matters that may cause unintended inconvenience, hardship, cost or inconsistency.

FINDING 8

Clause 223(3) of the Veterinary Practice Bill 2021 is a Henry VIII clause enabling regulations, rather than an Act of Parliament, to modify the proposed *Veterinary Practice Act 2021*.

FINDING 9

Clause 223(3) of the Veterinary Practice Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 10

It would have been desirable if the Explanatory Memorandum had identified clause 223(3) as a Henry VIII clause and thereby inform the Parliament of Western Australia of the need or desirability for, and effect of, a significant regulation-making power in clause 223(3).

FINDING 11

Clause 223(3) can be justified due to the possibility that the transitional provisions of the Veterinary Practice Bill 2021 have failed to identify and address one or more matters that may cause unintended inconvenience, hardship, cost or inconsistency.

RECOMMENDATION 2

The Minister for Agriculture and Food consider amending the Explanatory Memorandum for the Veterinary Practice Bill 2021 to identify all Henry VIII clauses and the rationale for them.



Hon Donna Faragher MLC
Chair

⁵² See Veterinary Practice Bill 2021, cl 223(2) and the definition of 'transitional matter' in cl 223(1).

GLOSSARY

Term	Definition
Act	<i>Veterinary Practice Act 2021</i>
Bill	Veterinary Practice Bill 2021
Board	Veterinary Practice Board of Western Australia
Committee	Standing Committee on Uniform Legislation and Statutes Review
EM	Explanatory Memorandum for the Veterinary Practice Bill 2021
Minister	Hon Alannah MacTiernan MLC, Minister for Agriculture and Food
Mutual Recognition Agreement	Agreement Relating to Mutual Recognition entered into between the Commonwealth and the States and Territories on 11 May 1992
Scheme	National Recognition of Veterinarians scheme

Standing Committee on Uniform Legislation and Statutes Review

Date first appointed:

17 August 2005

Terms of Reference:

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

'6. Uniform Legislation and Statutes Review Committee

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



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