LEGAL PROFESSION UNIFORM LAW APPLICATION BILL 2021

Committee

Resumed from 17 March. The Deputy Chair of Committees (Hon Jackie Jarvis) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 216: Register of Australian practising certificates granted by the Board —

Progress was reported after the clause had been partly considered.

Hon MATTHEW SWINBOURN: I would like to address some outstanding issues from the last time we were in Committee of the Whole on this bill before we return to debating clause 216. The first relates to double jeopardy. During debate last week, Hon Nick Goiran queried whether clause 12, "No double jeopardy", could be considered as part of the statutory review of the double jeopardy provisions contained in part 5A of the Criminal Appeals Act 2004. I undertook to inquire with the Attorney General's staff whether consideration of clause 12 could be included in that review. Following the conclusion of debate last week, I did that and was informed that the statutory review had been completed and that the final report would be tabled imminently. As members would be aware, I have just tabled that *Statutory review of part 5A of the Criminal Appeals Act 2004 (WA): Final report*. As a consequence—this is for the sake of the completeness of the discussion in committee for those who follow the committee debates closely—the request of Hon Nick Goiran obviously cannot be actioned because that report has now been finalised and tabled. I am further advised that, had it not been finalised, as the statutory review was conducted under section 52 of the Criminal Appeals Act, the section confined the scope of the review to the operation of amendments made to the Criminal Appeals Act and the Criminal Code by the Criminal Appeals Amendment (Double Jeopardy) Act 2012. Given that section 52 significantly confines the scope of this statutory review, even if the review had not been completed, consideration of clause 12 of this bill would have been outside the scope of that particular review.

Hon Nick Goiran asked whether the Attorney General would consider amending the text of the Legal Profession Uniform Law Application Bill 2021 to expand the cost disclosure requirements in section 174(2) of the Legal Profession Uniform Law so that a law practice has to disclose, at the time of entering into a cost agreement, that a client can obtain a cost assessment in the event of a dispute, as currently required by section 260(1)(i) of the Legal Profession Act 2008. The government is sympathetic to the position that has been expressed by the honourable member that the cost disclosure requirement should not be weakened, even if temporarily, by Western Australia's entry into the Legal Profession Uniform Law scheme. However, the government's position is that it is preferable to await the amendments to the Legal Profession Uniform Law for a couple of reasons. The first is that, although that aspect of the cost disclosure requirement is slightly weaker, any risk to the consumer is offset or mitigated by two other disclosure requirements that a law practice must make in relation to cost. The first of those, as mentioned in debate on 17 March 2020, is that the law practice must disclose, at the time the cost agreement is entered into, that the client can seek the assistance of the designated local regulatory authority—in this case, the Legal Practice Board—in the event of a dispute about legal costs. The board is able to inform clients of the right to apply for a cost assessment and is statutorily required to do so if it is unable to deal with the cost dispute. I refer members to section 291(2) of the Legal Profession Uniform Law. The second relevant disclosure requirement comes at the time a bill is issued. When issuing a bill, a law practice is required to disclose to a client, either on the bill or in information accompanying the bill, that they have a right to apply for a cost assessment. I refer members to section 192 of the Legal Profession Uniform Law. An amendment to the bill to achieve the desired outcome would involve more than just expanding the cost disclosure requirement in section 174(2) of the Legal Profession Uniform Law Application Bill 2021 and may detrimentally impact the use of standard costs disclosure forms for matters costing between $750 and $3 000. Section 174(5) of the Legal Profession Uniform Law provides that a law practice may discharge its disclosure obligations for matters for which the cost estimate is between $750 and $3 000 by providing the client with the prescribed uniform standard disclosure form. To achieve the desired policy outcome, the disclosure form, which is prescribed by the Legal Profession Uniform General Rules 2015, would also need to be updated. In fact, the Legal Services Council consultation paper on proposed amendments to the Legal Profession Uniform Law notes that an amendment to section 174(2) would involve a consequential amendment to the uniform standard costs disclosure form. Finally, the amendment may lead to inconsistency with the Legal Profession Uniform Law and any amendments made to section 174(2) of the Legal Profession Uniform Law, and the uncertainty that accompanies such inconsistencies.

An additional issue that arose was whether there is a possibility of the acceptance of direct briefs by barristers in Victoria and New South Wales. Accepting direct briefs is allowed under the Legal Profession Uniform Law, but the work a barrister can do on direct brief is more limited than is allowed currently in Western Australia. Under both the Western Australian Bar Association rules and the Legal Profession Uniform Conduct (Barrister) Rules, barristers may take direct briefs. I refer members to rules 24A and 24B of the WA Bar Association rules, and rules 21 and 22 of the Legal Profession Uniform Conduct (Barrister) Rules 2015. However, when accepting such briefs, barristers are still prohibited from conducting correspondence in the barrister's name on behalf of any person otherwise than with the opponent; acting as a person's representative in dealings with any court otherwise than when actually

appearing as an advocate; being the address for service of any document or accepting service of any document; and, finally, commencing proceedings for file, other than file in court, or serving any process of any court. I refer members to rule 17 of the WA Bar Association rules, and rule 13 of the Legal Profession Uniform Conduct (Barrister) Rules 2015. Rule 18A of the WA Bar Association rules creates an exception to those prohibitions by allowing barristers to perform those basic solicitoral tasks when they are instructed directly by a person who is not a solicitor to act, firstly, pro bono; secondly, pursuant to a direct grant of legal aid in a criminal or quasi-criminal matter; thirdly, pursuant to a direct grant of legal aid to act for children when appointed in the Family Court of Western Australia as the independent children's lawyer, or in the Children's Court as the child representative; or, finally, pursuant to a direct grant of legal aid when acting for a parent or person in loco parentis in protection and care applications made by the department for child protection and family support and provided the matter in relation to which the barrister is acting does not reasonably require the services of an instructing solicitor. No such exemption exists under the Legal Profession Uniform Conduct (Barrister) Rules 2015 that would enable a barrister to perform such solicitoral tasks.

The final point of homework—if I can use that term—was an issue about whether someone who wanted to search for their own credentials or those of someone else would need to go to either the New South Wales or Victorian search engine because the Western Australian Legal Practice Board website will continue to deal with Western Australian admissions. I am not sure that is quite clear, but Hon Nick Goiran essentially asked about the current arrangement whereby a member of the public or anybody can go to the Legal Practice Board's website and search whether a person is on the role of practitioners and has a current practising certificate, and whether persons from New South Wales and Victoria would appear in that search. If a person wants to search for an individual's credentials, they can search the Legal Practice Board website, which will include information on individuals admitted in Victoria and New South Wales but to whom the Legal Practice Board of Western Australia has issued a practising certificate. If the person is a practitioner from New South Wales or Victoria, the Legal Services Council maintains an Australian legal profession register on its website, which contains a searchable list of Australian legal practitioners—that is, those with Australian practising certificates, the type of practising certificate issued, and the state or territory of issue. It is anticipated that the Legal Services Council will also include such information on Australian legal practitioners who are issued a practising certificate in Western Australia by the Legal Practice Board. This register is in addition to the register currently maintained by the Legal Practice Board. The website also refers the public to the relevant local regulatory authority for solicitors and barristers in New South Wales and Victoria.

Hon NICK GOIRAN: Thank you, parliamentary secretary, for a most comprehensive response to the four matters that were left outstanding when we last considered the package of bills before us. Can I deal firstly with a preliminary question that arises on the double jeopardy issue. I will take it up further when we get to clause 219, but I will ask while it is fresh in the parliamentary secretary's mind. I thank the parliamentary secretary for tabling the statutory review on the final report during formal business, which I note is dated October 2021. It was a review into the so-called double jeopardy provisions in the Criminal Appeals Act. It commenced some three and a half years prior—we are just one month shy of it being four years since the statutory review was conducted, but it is good to see that, nearly four years later, the document has arrived in Parliament.

Quite understandably, the parliamentary secretary indicated that the statutory review had already been completed, as I said, in October 2021, and therefore it was not possible for that review to consider the issue that arose from clause 12. In any event, as the parliamentary secretary pointed out, the terms of reference, which are constrained by the Criminal Appeals Act 2004, would not have permitted it to be expressly considered. Nevertheless, the parliamentary secretary indicated that the government has some sympathy for the concerns about the costs disclosure issue that has been raised. Has the government had any further discussion on the concerns raised on clause 12, which is described as double jeopardy but which appears to be more of a no-double-punishment provision? Is there sympathy for those concerns and is it something that the government intends to take up? Given that there is no amendment on the supplementary notice paper about this issue, I assume that the government has no intention of moving any amendments to address those concerns. However, does the government have any concerns about that; and, if so, what does the government intend to do about it?

Hon MATTHEW SWINBOURN: I do not think the government shares the member's level of concern regarding that. There are no moves to make any changes and, as the member noted, there is nothing on the supplementary notice paper. It is probably cold comfort, but the bill has a five-year review clause, so if issues with that provision become evident, it can obviously be subject to review. Also, if there are broader issues with the uniform law and with the practices that are occurring across Western Australia, Victoria and New South Wales, they could be raised with the Legal Services Council and the standing committee, but we will retain the right to make amendments to our own application bill. They are more general comments, but we do not share the same level of disquiet as the member about the double jeopardy clause. I do not want to misrepresent that for the sake of making progress. It will obviously be looked at in the course of looking at the bill overall.

Hon NICK GOIRAN: I thank the parliamentary secretary. I will take up that issue when we get to clause 219 to perhaps demonstrate the point and the reason that the concern still remains.

I thank the parliamentary secretary for indicating that the government has some sympathy for the concerns raised about weakening the law for cost disclosures. At the moment, legal practitioners in Western Australia are required to provide a specific type of disclosure to clients. That will not be the case once the uniform law passes, albeit that the Legal Services Council identified that this is an issue that led it to make a recommendation to amend the bill. The parliamentary secretary will appreciate the problem, which is that although the government expresses sympathy, at the same time, it is unwilling, or perhaps it might argue that it is unable, to disclose whether it intends to support the Legal Services Council's amendment, which is recommendation 17. That recommendation deals with the need to expand the disclosure obligations. The expansion that the Legal Services Council recommends would simply bring the uniform law in the other jurisdictions up to the standard Western Australia already has but is now temporarily abandoning. It is difficult to be sufficiently comforted by the government's response given that the government cannot disclose whether it supports recommendation 17 or whether the Attorney General intends to take it up with his colleagues who sit around the table of what I think has been described as the "standing committee". In response this afternoon, it has been said that the concern about the weakening of the Western Australian law, which will have an impact on clients, is partly offset by law practices having to disclose the existence of the Legal Practice Board as a place where clients can go to have their dispute considered or to contact the Legal Practice Board for assistance about a dispute. The parliamentary secretary indicated that that would be the case when entering into a cost agreement, but what will happen when no cost agreement is entered into and legal services are provided to the client?

Hon MATTHEW SWINBOURN: I am advised that the same disclosure obligation applies as if a cost agreement had been entered into.

Hon NICK GOIRAN: Further to that, the parliamentary secretary indicated that under the uniform law, there will be a requirement for a practitioner to disclose to the client the client's right to seek a cost assessment when a bill is issued. In response, the parliamentary secretary referred to a section of the uniform law. I think it might have been section 190, or something to that effect. Perhaps in due course the parliamentary secretary could clarify the provision. In any event, the substantive question is: how will that intersect with the Legal Services Council's concern that led to recommendation 17? If, under the uniform law, a practitioner will have to advise their client that the client has a right to a cost assessment, why is recommendation 17 even needed?

Hon MATTHEW SWINBOURN: Just to confirm, it was section 192 of the Legal Profession Uniform Law. I understand the point the member was trying to make—that if the agreement is already there when the practice issues its bill, why would it need to do it at the beginning when entering into the costs agreement? Essentially—it is not the word of the advisers; it is probably my word—it is a bit of boilerplate or doubling up of that requirement. If we think about it in terms of time, it is important at the time someone is entering into a costs agreement that they understand their rights. There can be some time between entering into that agreement, receiving the first bill and having that reinforced once they have received their bill, particularly if they are working with a firm that has a no-win, no-fee arrangement as well. That can be one of those more obvious ones. When a firm is dealing with sophisticated clients, it probably issues a bill every month, but if they are a small litigant—if I can use that term on that no-win, no-fee basis—chances are that most of their legal bill will not be incurred until they have been successful, which could be some years after they first commence. It is really about making sure that a consumer of legal services is aware of their rights up-front, that it is in their cost disclosure document, and then, if it comes to that point some time later, when the dispute is likely to arise at the issuing of the bill, that it is also reinforced at that particular point in time.

Hon NICK GOIRAN: With regard to the third matter arising, dealing with the taking on of direct briefs, I have no further questions following on from that. I thank the parliamentary secretary for confirming the distinction between the jurisdictions for barristers. But the fourth and final matter arising deals with the register. That, of course, is where we are up to in the bill. We are at clause 216, which is the commencement of part 10 and the provisions dealing with registers in general. The concern that I raised on Thursday last week was a scenario in which practitioners from New South Wales and Victoria would be able to practise in our state, notwithstanding that they have not been admitted in our state and, therefore, might not have a practising certificate issued to them by the Legal Practice Board of Western Australia. In the absence of one comprehensive register, it would then be difficult, or perhaps cumbersome or inefficient, for any person in Western Australia to satisfy themselves about whether this person who is purportedly in a position to give legal advice is authorised by law to do so.

It has been helpful for the parliamentary secretary this afternoon to indicate, as I understand it, that there is no intention, at least by the Legal Practice Board of Western Australia, to maintain such a comprehensive database. It will continue to maintain, if you like, its Western Australian database, but the responsibility for maintaining the comprehensive database will rest with the Legal Services Council. Can the parliamentary secretary confirm then, to tie up this loose end, that at the moment a register already exists; it is maintained by the Legal Services Council; the Legal Services Council register lists all those practitioners who are able at the moment to practise under the

uniform law, that being all the New South Wales and Victorian practitioners; the register at the moment does not include Western Australian practitioners, unless they so happen to also have been admitted in New South Wales and Victoria; and it is the intention, as the parliamentary secretary and the government understands it, that the Legal Services Council will update its database, its register, to include all the names of the practitioners who are currently registered with the Legal Practice Board of Western Australia? If the parliamentary secretary can clarify that that is the case, will what would then be, if you like, the updated Legal Services Council database include only Western Australian practitioners who have a practising certificate, or will it include all the practitioners on the roll of practitioners?

Hon MATTHEW SWINBOURN: The member had a lot in his question; I will hopefully be able to cover off all that. The register exists and it is maintained by the Legal Services Council. It lists all New South Wales and Victorian practitioners who hold practising certificates. It does not yet include any of our practitioners who have not registered as practitioners in those other jurisdictions. Our understanding is that it will be updated to include all Western Australian legal practitioners who hold practising certificates, but it will not include people on the roll who do not have a practising certificate. Our register in Western Australia will continue to have that information. If someone is on the roll of practitioners with the Supreme Court of Western Australia but they do not have a practising certificate, they will continue to be in our publicly available searchable information, but they will not be on that main Legal Services Council database. I hope that covers everything.

Hon NICK GOIRAN: Will that updating of the Legal Services Council register occur on or before the proposed commencement date that we know will not be any sooner than 1 July this year?

Hon MATTHEW SWINBOURN: We are not able to confirm as an absolute that that will be the case, because that is an administrative process that will occur between the Legal Practice Board and the Legal Services Council. They can start doing the work before the commencement of the regime. That is a matter that they will work out before then. That is an important element, and we can reasonably expect that they will start doing that work with a view to making sure that that happens, but it is not an absolute requirement that it happens before the commencement of the uniform law provisions.

Clause put and passed.

Clause 217 put and passed.

Clause 218: Terms used —

Hon NICK GOIRAN: We move now to division 2. Division 1 deals with the register or certificates—that is, who are the people who are admitted as practitioners and who are allowed to practise as practitioners under the uniform law? Division 2 deals with a different subcategory of individuals—that is, those who have been the subject of disciplinary action. It is intended that there be a register of disciplinary action. Does such a disciplinary action register currently exist in Western Australia?

Hon MATTHEW SWINBOURN: Yes, such a thing does exist, and it is available on the Legal Practice Board's website.

Hon NICK GOIRAN: Will it continue to exist once this bill passes and the operative provisions are commenced?

Hon MATTHEW SWINBOURN: Yes, that is provided for under clause 324 and the transitional provisions.

Clause put and passed.

Clause 219: Register of disciplinary action —

Hon NICK GOIRAN: We are dealing here with the register of disciplinary action. The parliamentary secretary indicated in the preceding clause that such a register exists and that it will continue to exist, in part because of the transitional provision—I think clause 324 was quoted. I turn specifically to clause 219. What particulars are intended to be prescribed under clause 219(4)(e)?

Hon MATTHEW SWINBOURN: For the purposes of clause 219(4)(e), the following particulars must be included in the register of disciplinary action: the date and jurisdiction of the disciplined person's first admission to the Australian legal profession, each subsequent admission of the disciplined person to the Australian legal profession, and the disciplined person's date of birth.

Hon NICK GOIRAN: Is the parliamentary secretary saying that the three things he just recited are the particulars that will be prescribed by the local regulations under clause 219(4)(e)?

Hon Matthew Swinbourn: By way of interjection, yes, that's what's currently intended.

Hon NICK GOIRAN: So why does it not say that here? Paragraph (e) just refers to "other particulars prescribed by the local regulations", but it seems that the government is very clear on what particulars it intends to prescribe. Clause 219(4) lists four other things that the register must include. If I add them to the three that the parliamentary secretary has already

mentioned, it is a list of seven. It is not clear why they are not included at this time. Is there some explanation as to why it is necessary to leave that to regulation rather than simply making it an amendment at clause 219(4)(e)?

Hon MATTHEW SWINBOURN: It is essentially for flexibility reasons if something else arises. What I read out earlier to the member is reflected in regulation 111 of the Legal Profession Regulations 2009. The same information is set out there. We do not currently intend to add anything, but there could be within the realm of possibility circumstances in which a further matter might be prescribed, so that is the rationale for why it is the way it currently is. I suppose another point could be that those things I mentioned are sufficiently certain that they could be included in the legislation, and it probably was open to us to do it that way, but I cannot take my answer any further as to why it was not included in the legislation. I will just appeal to the "PCO defence", if I can call it that, and say that that is probably why it has been done that way. There is no great mystery here.

Hon NICK GOIRAN: Amongst the information that must be included according to clause 219(4) is the full name of the person against whom the disciplinary action or previous disciplinary action was taken. It is my understanding that the parliamentary secretary is indicating that that is the case at the moment and that it is still the law in Western Australia that the full name of the person must be included in the disciplinary register, and that that will continue by virtue of clause 219(4)(a). Paragraph (b) then refers to "the disciplined person's business address or former business address". Again, I understand from the parliamentary secretary that that is just a continuation of the existing law in Western Australia and that if a legal practitioner has been disciplined, not only is their full name on the register, but also either their business address or former business address. Further, there is a provision that the disciplined person's home jurisdiction or most recent home jurisdiction will be included. I take it that that is a new provision. The register currently deals only with Western Australian practitioners, so it would not be necessary to list a person's home jurisdiction or most recent home jurisdiction.

Hon MATTHEW SWINBOURN: I think the member is making a broader point here, but on a point of clarification, I spoke about regulation 111 of the current Legal Profession Regulations, but the main operative part in the Legal Profession Act is section 252(2). That provides that the register is to include the full name of the person against whom the disciplinary action was taken, the person's business address or former business address, and the person's home jurisdiction or most recent home jurisdiction. That is not a new addition. Paragraph (d) refers to particulars of the disciplinary action taken and paragraph (e) refers to other particulars prescribed by the local regulations, which is what I just spoke about and will be reflected in the new local regulations. I think there are some additional words in here, but I do not think there is anything substantive. It is just form over substance in terms of any different wording. For example, proposed section 219(4)(a) refers to the full name of the person and then, in brackets, it has "the disciplined person". That is not in the current legislation, but it has no real carriage in that matter.

Hon NICK GOIRAN: That is very helpful, parliamentary secretary, and it takes me to the fourth of the five criteria that are currently in the Western Australian law and will continue by virtue of clause 219(4). The fourth paragraph refers to "particulars of the disciplinary action, or previous disciplinary action, taken". Does this phrase "particulars of the disciplinary action" include the sanction or the punishment?

Hon MATTHEW SWINBOURN: We are looking at the register now to give the member an answer. Without reviewing every single entry in the register, it appears that the particulars of the disciplinary action are included as an item, although because the register obviously covers a long period, some records do not include the particulars of the disciplinary action. I am not sure why that is the case. It may have something to do with when the action was taken and whether it was required, but I am just speculating and it is probably not worthwhile relying on that as the official answer. As I look at the current register, it includes particulars of the disciplinary action. The ones that I am looking at refer to "professional misconduct and reprimand", "unsatisfactory professional conduct" and things of that nature. It would obviously be our expectation that any future and ongoing register would include those particulars, because I think that is important for any consumer who is looking at the register and wishes to engage a legal practitioner to understand whether they have a history of discipline and the nature of that discipline in deciding whether they want to continue to engage that practitioner based on their history.

Hon NICK GOIRAN: However, parliamentary secretary, the question was about the particulars of the punishment or the sanction. Clause 219(4)(d) says that the register must include particulars of the disciplinary action, but it is not clear whether the particulars of the disciplinary action are intended to be broad enough to capture the sanction or the punishment. One could argue that the particulars of the disciplinary action might include the punishment or sanction, but it does not appear that that is currently captured. I wonder whether that is something that the government intends to have prescribed under clause 219(4)(e).

I will give the parliamentary secretary a practical example. At the moment on the register of disciplinary action, one of the entries has the full name of the practitioner as John Robert Quigley. It lists his date of birth as 1 December 1948. The business address is said to be level 7, International House, 26 St Georges Terrace, Perth, WA, 6000. The jurisdiction and date of admission are listed as Western Australia and 23 December 1975. The home jurisdiction is Western Australia, which is no surprise. The decision-maker is the State Administrative Tribunal.

It then has the particulars of the disciplinary action, which I will come back to in a moment. It says that the date of the disciplinary action decision was 13, 14 and 16 June 2005, which is interesting in and of itself as there are three dates for the disciplinary action decision. It then has the reference, which is Legal Practitioners Complaints Committee v Quigley [2005] WASAT 215. The register lists the particulars of the disciplinary action as unprofessional conduct. If a Western Australian goes to the disciplinary register, they will note that this practitioner by the name of John Robert Quigley has been found guilty of unprofessional conduct, but the sanction or penalty for this individual is not clear.

This goes to my earlier concern that the parliamentary secretary kindly took up while we were in recess over the last few days about the double jeopardy clause. He will recall that under the provisions that we are passing, a person is not liable to be punished for an offence against the Legal Profession Uniform Law (WA) if the act or omission that constitutes the offence also constitutes an offence against a law of another participating jurisdiction and the person has been punished for the offence under the law of the other jurisdiction. If we take this practitioner John Robert Quigley as a practical example, because the particulars of the disciplinary action on the register do not tell us at the moment what the sanction or penalty was—as the parliamentary secretary indicated when we were discussing clause 12, clause 12 seems to be more of a no double punishment than a no double jeopardy provision—it is not clear whether this John Robert Quigley practitioner may or may not be subject to further punishment by one of the other jurisdictions if it is considered that the act or omission that he is said to have committed in accordance with this decision on 13, 14 and 16 June 2005 might also be some kind of offence under that jurisdiction.

I wonder whether this might be cause for the government to consider either providing some definition of "particulars of the disciplinary action", as is the phrase at line 19 on page 117 of the bill, or prescribing in the local regulations some other particulars. The parliamentary secretary listed earlier in response to this line of questioning three matters that the government intends to include. Might it be worthwhile for the government to also include the punishment or sanction that is applied to the practitioner if for no other reason than to ameliorate the concern I raised earlier about the no double jeopardy provision?

Hon MATTHEW SWINBOURN: Obviously, the member gave a very interesting example to highlight the point that he is trying to make, and he will appreciate that I will not provide any particular commentary about those circumstances. I think the member's final question is the pertinent one: might it be worthwhile for the government to give consideration to including that information in the regulations? The two people sitting with me at the table are involved in the regulation drafting process, so I can confirm that we will give consideration to whether it is appropriate to include the matters that the member has identified as additional matters to be included on the register.

Hon NICK GOIRAN: I thank the parliamentary secretary for taking that on. I think that is important.

The government has expressed some intention to proceed down that path and, moving forward, the register might be slightly more enhanced. That is not intended to be a criticism of the existing register; it is just that the scrutiny of this bill has identified a way in which the register could be enhanced. I gave to the parliamentary secretary that practical example of that practitioner. Is the intention that all the elements of the current register of disciplinary action will continue to be maintained once this bill passes? I appreciate that the parliamentary secretary has indicated that the government is considering or will consider as it drafts the regulations the inclusion of an extra category that I would describe as an enhancement to the existing register. I want to make sure that we do not enhance with one hand and dilute with the other. That example I gave earlier consists of nine categories. Will those nine categories be maintained moving forward?

Hon MATTHEW SWINBOURN: Our understanding is that that is the intention, but I think for completeness of the answer, it is within the realm of the board's power to add more or have fewer, so long as they meet the statutory and regulatory requirements that are dictated. I will not say that the position is locked in concrete forever and a day, because I think that goes against what the act requires and permits. I think the member is trying to confirm the intention, and the government's intention is for that information to continue to be available. One of the policy considerations for the uniform law is empowering consumers of legal services to have a better understanding about who they are engaging, the terms in which they are engaging them and having consistency across Australia in that regard. Anything that steps away from that policy consideration is not consistent with our intention here, which is to make sure that consumers, particularly of legal services, understand who represents them and the terms and conditions under which they are represented so that they can make an informed decision about that person.

Hon NICK GOIRAN: The parliamentary secretary makes a good point. I appreciate that some of the information might be considered to be ancillary to all these things. I think that the parliamentary secretary picked it up in his very quick review at the table of the register; I note that the register is not, shall I say, consistent. Different provisions or elements have been put in, and I am just trying to get a grip on exactly what will be maintained, no matter what, moving forward. The parliamentary secretary has indicated that it will be simply whatever is in effect in the legislation, which means we can be certain that under clause 219(4) the disciplinary register will continue to have —

(a) the full name of the person …

(b) the disciplined person's business address or former business address; and

(c) the disciplined person's home jurisdiction …

(d) particulars of the disciplinary action …

(e) other particulars prescribed by the local regulations.

In theory, particulars prescribed by the local regulations could be nil, albeit the government has indicated it intends to include three things. A future regulation could be moved and amended that would remove those provisions. The only thing the chamber can be certain of when we pass clause 219 is that those four elements will be included: the full name, the business address, the home jurisdiction and the particulars of the disciplinary action.

When I look at, say, for example, the matter that I referred to earlier, nine elements are included here. Sure, it has the full name of the person. One of the things that is included at the moment is the date of birth of the person. It looks like it will not be a mandatory inclusion in the register. Does much turn on that? I do not know that too much turns on that, but I would like to think that to the extent that anything turns on it, maybe it is important to have the date of birth in conjunction with the date of the disciplinary action decision. That is what is included at the moment. As I said earlier, a practitioner had a date of disciplinary action decision as 13, 14 and 16 June 2005. Why that might be important is that, as the parliamentary secretary says, a consumer might go to the register and find out that somebody has had some disciplinary action very early in their legal career, maybe in the earliest of days, and many years have since passed and perhaps they can then satisfy themselves that it has been a long time since any indiscretions have occurred. The parliamentary secretary will see that the issue I have here is that neither the date of birth nor the date of the disciplinary action decision will be a mandated requirement under clause 219(4). Perhaps even by way of interjection, the parliamentary secretary might be able to confirm the three categories that the government intends to include in the regulations. Are any of them the date of the birth of the practitioner or the date of the disciplinary action decision?

Hon MATTHEW SWINBOURN: Yes. The disciplined person's date of birth is one of those issues. It is the date and jurisdiction of the additional person's first admission to the Australian legal profession and each additional admission to the legal profession. Obviously, some people come back into the profession. It would be a rare occurrence, but I suppose that can happen. The second one of those, the standalone one, is the disciplined person's date of birth. I think the member speculated about why that could be included. I suppose one of the other reasons to have included the date of birth may be that people have identical names and it might separate them. Obviously, the member and I will probably never face that possibility, but if someone's name is Jane Smith, they might come across that or something like that. But our plan is to prescribe that.

Hon NICK GOIRAN: That is a fair point in regard to identity because sometimes there will be one or more people or practitioners with the same name. Indeed, at the moment in the register of disciplinary action, there is another entry here also by the full name of practitioner John Robert Quigley. The birth date of 1 December 1948 is the same in that second entry, so I think that it is helpful to have the date of birth in there because if there were more than one John Robert Quigley who is a legal practitioner in Western Australia and who has been subject to disciplinary action, you would like to think that it is unlikely that it is a person who happened to also be born on the same day.

Looking at this, including the business address and, importantly, the date and jurisdiction of the admission, which is 23 December 1975, I would think that it is one and the same person who appears on the register. It just appears that this person has been the subject of two disciplinary matters and the only difference, it would appear, according to this register, is the date of the disciplinary action. The decision—the first one—was on 13, 14 and 16 June 2005 and then some six years later on 17 October 2011 this practitioner had a second disciplinary action decision go against them. This register tells us that, unlike the first one, which was for unprofessional conduct, this one was for unsatisfactory professional conduct. Therefore, the register seems to serve a purpose as it is at the moment. The only thing that seems to be missing is the sanction and punishments, and I am comforted by the parliamentary secretary's indication that the sanction or punishment will be things that the government will take on board as it drafts the local regulations.

Clause put and passed.

Clauses 220 to 223 put and passed.

Clause 224: Effect of secrecy provisions and non-disclosure orders —

Hon NICK GOIRAN: Clause 224 is the clause before us and here we are dealing with the effect of secrecy provisions and non-disclosure orders. As I understand it, this clause was amended by the other place; the parliamentary secretary might have indicated that during our consideration of clause 1. Who identified the need to amend clause 224? What brought this about?

Hon MATTHEW SWINBOURN: The member is correct. This is a matter that he raised at clause 1 and I confirmed that this clause was amended in the Legislative Assembly. I can confirm that the issue that led to the amendment was identified to the Attorney General by a senior counsel, but I cannot take the member any further than that in terms of who that person was and the circumstances in which it was identified. There was reference to it, I think, in the Attorney General's second reading speech, which is essentially that as a result of representations received by the government and, once again, conferring advice from the Solicitor-General, it was decided that the tribunal or court can keep a disciplinary finding a secret in only exceptional circumstances. Therefore, the process was that a senior counsel brought it to the attention of the Attorney General, the Attorney General then, obviously, considered it in conjunction with the Solicitor-General and a decision was made to amend the act to allow for this limited secrecy provision.

Hon NICK GOIRAN: Is the secrecy provision consistent with the existing law in our state?

Hon MATTHEW SWINBOURN: No. I am advised that this is a departure from the existing law.

Hon NICK GOIRAN: Is it consistent with the existing law in New South Wales and Victoria, which have the uniform law?

Hon MATTHEW SWINBOURN: It does not arise under the legal profession uniform law itself; there is not a provision that relates to this. But whether New South Wales or Victoria have provisions in their application acts, we at the table do not know the answer to that question because that would require us going over those acts. It would be fair to say that this issue arose as a local issue rather than as a uniform issue, and it clearly falls within one of those exceptions in which a local jurisdiction can depart from any uniformity on this particular point. We could get an answer for the member on what is in the Victorian and New South Wales acts. We probably have people listening to the broadcast who can confirm that. But, as I say, the people at the table obviously would have to trawl through those rather copious acts. However, as one comes through, I am happy to give it to the member at a later stage.

Hon NICK GOIRAN: This sounds like it is all new. The parliamentary secretary has indicated that it is not consistent with the existing law of Western Australia—that is, that there are no secrecy provisions—keeping in mind that we are talking about the disciplinary register. We have just had an extensive discussion around the existing disciplinary register. It is the intention for that to continue into the future under this uniform law. There are some encouraging signs that the disciplinary register might even be enhanced moving forward due to the work that will be undertaken with the regulations. But now at the eleventh hour we see this secrecy provision included at clause 224, which is not in place at the moment in Western Australia. It is not clear. It is certainly not part of the uniform law. We do not have any information at the table at the moment about whether it is part of the New South Wales or Victorian application laws, and there is an indication that maybe the government might not be able to help us understand what gave rise to this other than some general advocacy that was then considered by the Solicitor-General.

What are the circumstances that the government is intending to capture here? In what circumstances are we saying that it is important that these secrecy provisions be invoked? I see here that it appears that it will be subject to any order from the court or tribunal. I take the parliamentary secretary to clause 224(3), which states —

> A court or tribunal that makes an order or finding that constitutes, or results or may result in, disciplinary action against a person may make an order prohibiting the disciplinary action from being publicised.

I take it then, parliamentary secretary, that that will constrain this power. In other words, in the absence of a court or tribunal ordering that the information not be publicised, it will be on the register.

Hon MATTHEW SWINBOURN: The member is correct; it is the court or tribunal. Perhaps if I can just give the member some additional information about what circumstances we are contemplating that this might apply to. The clause was amended after it became apparent that a practitioner's name and the disciplinary action would need to be published in the register even if such publication posed a threat to the life and safety of the practitioner or practitioners associated with the practitioner, the subject of disciplinary action. It is anticipated that this power will be exercised rarely. Overwhelmingly, it is in the public interest for these matters to be published. We are not about protecting practitioners. The member has mentioned on a number of occasions the disciplinary action against the Attorney General in previous years. It is in the public interest that that information remains on the public record in those circumstances. However, there would be rare circumstances in which publishing the kind of information that is prescribed and statutorily required could place the life of the practitioner or their associates at risk, and we want to avoid those circumstances. So the balance tips in favour of secrecy, which, as I have said, should be a rare and exceptional circumstance.

Hon NICK GOIRAN: I agree with the parliamentary secretary that the circumstances in which clause 224 would be invoked should be rare and exceptional. I am intrigued by it, because the parliamentary secretary has indicated that there is no such provision in the existing law in Western Australia, and yet there has been some advocacy by some mysterious person to the government that this is an important provision to include. Even though there is no

secrecy provision at the moment, somebody has said to the government that this really needs to be included, and the government has gone to the Solicitor-General, who has agreed that it is an important provision. Has a court or tribunal in Western Australia previously made an order prohibiting a disciplinary action being publicised?

Hon MATTHEW SWINBOURN: We are not aware of any such orders having been made. I refer the member to section 457 of the Legal Profession Act 2008, "Effect of secrecy provisions and non-disclosure orders". These are the same provisions as are set out in clauses 224(1) and (2), to some degree. Section 457(1) of the Legal Profession Act 2008 states —

> The provisions of this Division are subject to any order made by —
>
> (a) the State Administrative Tribunal in relation to disciplinary action taken under this Part; or
>
> (b) a corresponding disciplinary body in relation to disciplinary action taken under provisions of a corresponding law that correspond to this Part; or
>
> (c) a court or tribunal of this or another jurisdiction,
>
> so far as the order prohibits or restricts the disclosure of information.

I am not sure whether that made any sense, but it states that provisions of this division are subject to any order, and the division we are referring to is division 13 of the Legal Profession Act, which deals with the current register. A court or a tribunal could make an order that stopped the publishing of a disciplinary action in *The West Australian* or publication of that kind. Section 457(2) of the Legal Profession Act states —

> Despite subsection (1), the name and other identifying particulars of the person against whom the disciplinary action was taken, and the kind of disciplinary action taken, must be recorded in the Register …

Notwithstanding that a court or tribunal could have made an order that stopped the publication of the action, this does not stop the entry of the information into the register. Essentially, the mischief that this provision deals with are circumstances whereby the court or tribunal has exercised its discretion to prevent publication through a newspaper or any other means not being undermined by consequently having that information recorded on the disciplinary register itself, which is a public document, to which anyone would have access or reference.

Hon NICK GOIRAN: I appreciate that the parliamentary secretary and his advisers are not aware of any such order having been made under section 457 of the Legal Profession Act. However, at the moment in Western Australia, if an order has been made by a court or tribunal prohibiting publication of the disciplinary action, some general information about that matter is included in the register but not in the public register. In other words, it could be said that there are two registers: the complete register that is presumably held and maintained by the Legal Practice Board of Western Australia, and effectively a redacted form made available via the website.

I do not know whether the parliamentary secretary has information at his disposal on whether that is the case at the moment in Western Australia, but regardless of that, will clause 224 allow that to happen in the future; that is, might a practitioner's disciplinary actions not be able to be published because of an order of a court or a tribunal, but there will still be a record of it? I put it to the parliamentary secretary that even though, as he indicated, there might be a situation in which there are risks to the life of the practitioner or one of their associates, and so forth, and so it might not be appropriate for the information to be publicised—he said that provision would be rarely used—surely the disciplinary body or the regulator would still need to know that person X had committed offence Y and had been punished in accordance with Z, despite the fact that it had not been published to the public. The regulator certainly needs to know. Otherwise, a "rogue" legal practitioner could continue to go about their business under the protection of this non-publication order and not even the regulator—if you like, the governors of the whole scheme—would be aware of it. That would be a perverse outcome. I want to be satisfied at this point that if we pass clause 224, just because the public might not be aware of an exceptional circumstance, somebody responsible for regulation of the scheme will be aware of the outcome, particularly in view of the succession of people such as the chair of the Legal Practice Board or the complaints committee officer. These are positions that shift from time to time between different individuals.

Hon MATTHEW SWINBOURN: As far as we are aware, there is only one current register; there is no such redacted register. I take the member to clause 224(5), which states —

> If an order has been made under subsection (3) —
>
> (a) the name and other identifying particulars of the person against whom disciplinary action is taken, and the kind of disciplinary action taken, must be recorded in the register of disciplinary action in accordance with the requirements of this Division …

It must be recorded in the division. It then has the following qualification —

> (b) that information must not be —

(i) made available for public inspection on the register or provided to members of the public under section 220; or

(ii) otherwise publicised under this Division; or

(iii) given to a corresponding authority unless the authority gives an undertaking to the Board that the information will remain confidential and will not be made available for public inspection or otherwise publicised.

The member has concerns about corporate knowledge and making sure that those who are responsible understand which legal practitioners have been subject to disciplinary action. It is relevant if a practitioner is subject to further disciplinary action in terms of any corresponding punishment that might be issued against them, in that the escalation of behaviours can be looked at. It is simply that it is not published in that way. If we provide that information to the other jurisdictions—New South Wales and Victoria—they will also be subject to those confidentiality requirements, but their internal bodies will be aware of the disciplinary actions and all those other material elements that must be recorded. I hope that addresses the member's concern. In effect, a redacted version of the register will be made publicly available. We have both been on committees when similar things have happened for very good reason. However, an actual register will contain all the information, including of those who are protected in only exceptional and, hopefully, rare circumstances.

Hon NICK GOIRAN: To conclude consideration of this point, the parliamentary secretary indicated that there was some advocacy to government. The government took that on board, having consulted with the Solicitor-General. Was the Legal Practice Board consulted on clause 224? If so, what was the nature of its feedback? If the parliamentary secretary is not in a position to indicate what its feedback was, is he at least able to indicate whether it raised any concerns about clause 224?

Hon MATTHEW SWINBOURN: I am advised that consultation did occur with the Legal Practice Board on clause 224 and the amendment that was passed in the other place, which is now reflected in the bill. I am told that no concerns were raised with the substance of what we are trying to achieve—the policy of it. Its concerns were only of a practical nature about how to have the two registers. That is a matter that the board will have to deal with ultimately because it will have to deal with all the practicalities of this bill, and we are confident it will have the capacity to deal with this. As I said, it supported the policy of what we are trying to achieve here.

Clause put and passed.

Clauses 225 and 226 put and passed.

Clause 227: Application for search warrants under Uniform Law s. 377 —

Hon NICK GOIRAN: To assist with the passage of the bill, I indicate that following this clause, my next clauses for consideration, subject to the views of any other members, are 238, 243 and 245.

Clause 227 comes under part 11, the enforcement provisions, which covers some 11 clauses. Will any provision in part 11 either enhance or dilute the existing enforcement powers held by the Legal Practice Board of Western Australia?

Hon MATTHEW SWINBOURN: The member's question was essentially about the enhancement and dilution of the Legal Practice Board's powers. I can confirm that we do not think there will be any dilution of its powers as such. We think there has been some clarification around its powers with the use of force. I have some information that I hope will cover any additional follow-up questions. The pertinent clause is clause 229, which states —

> An investigator executing a search warrant issued under the *Legal Profession Uniform Law (WA)* section 377 may, in addition to the powers that may be exercised under section 375 of the Law, use force under the *Criminal Investigation Act 2006* section 16 as if the powers exercised under section 375 of the Law were a power exercised under that Act.

Section 16(1) of the Criminal Investigation Act contemplates that when exercising a power under that act, a person may use any force against any person or thing that is reasonably necessary to use in the circumstances to exercise a power and overcome any resistance to exercising the power that is offered or that the person exercising the power reasonably suspects will be offered by any person. There is no equivalent provision in the current Legal Profession Act. This force is able to be used in the conduct of a search warrant, even if it will cause property damage. For example, force may be used to open locked cupboards or other storage areas to access documents the subject of the warrant. That is really just contemplating the most obvious circumstances in which we think that force would be necessary.

My advice is that it was unclear whether that was a power that somebody exercising a warrant had under the Legal Profession Act; it was not certain. We have tried to make clear that that is a power that somebody will have when exercising a search warrant. We are not talking about bikies here. We talking about lawyers, although some of them are a bit dodgy, I suppose, at times. It is more likely to be about matters that are contained within a locked

filing cabinet and a warrant is issued to open or jemmy open a filing cabinet by way of force. We want to make it clear that that is an appropriate use of that power.

Clause 230 provides that an investigator executing a search warrant issued under section 377 of the legal profession uniform law must endorse the warrant or a copy or form of the warrant referred to in the Criminal Investigation Act. We have been very specific about who will have those particular powers. Let me cover this fully so it does not get confused. Clause 230 provides —

> An investigator executing a search warrant issued under the *Legal Profession Uniform Law (WA)* section 377 must endorse the warrant, or a copy or form of the warrant referred to in the *Criminal Investigation Act 2006* section 13(8), with the time and day when the warrant was executed.

There was no equivalent provision in the current Legal Profession Act; that is the point I am getting at here. However, clause 230 is consistent with section 45(3) of the Criminal Investigation Act, which provides that, on completing execution of a search warrant, the officer in charge of executing it must record certain matters on it. It provides what those matters are, including the date and time when the warrant was executed.

Under clause 232, if the Legal Practice Board suspects, on reasonable grounds, that a person has —

> (a) committed an offence under this Act; or
>
> (b) committed an offence against the *Legal Profession Uniform Law (WA)* or contravened a civil penalty provision, other than an offence or civil penalty provision in Part 4.2 of the Law.
>
> (2) The Board may appoint a person to investigate the suspected commission of the offence or contravention of the penalty provision.

This is for the sake of clarity because there is no equivalent provision to this one in the current Legal Profession Act.

Clause 234 provides that a prosecution for an offence against section 10 or 11 of the legal profession uniform law may be commenced within 24 months after the day on which the alleged offence was committed or, in certain circumstances, within 24 months after the day on which the evidence first came to the attention of the board. I think there is a key distinction there between the time since the offence was committed—24 months—and when the board became aware of it, because obviously, the board will not be aware of offending behaviour for some time after the behaviour has occurred so it cannot reasonably be expected to have commenced proceedings. The limitation period for prosecuting offences under sections 10 and 11 of the uniform law, which relate to engaging in legal practice when not qualified or representing an entitlement to engage in legal practice when someone is not qualified, will be extended from one year to two years, or two years from the date on which evidence of the offence came to the attention of the Legal Practice Board. This clause has been inserted at the request of the board following a number of instances in which prosecutions for such offences under the Legal Profession Act 2008 have been time-barred by the time the board has been made aware of the alleged offence, or prior to the board being able to undertake a proper investigation.

Clause 236 references section 456 of the uniform law, which provides that if the designated tribunal orders a person to pay a pecuniary penalty, firstly, the penalty is to be paid to a fund specified in the legal profession uniform law act of that jurisdiction, or is to be dealt with in another manner so specified and, secondly, the order is enforceable as a judgement or order of the court. Clause 236 provides that for the purposes of section 456(a) of the legal profession uniform law, the Legal Practice Board may enforce an order to pay a pecuniary penalty made under the law. There is no equivalent provision in the current Legal Profession Act. With the member's indulgence, I shall continue.

Clause 237, which we are describing as an enhancement, is headed "Effect of notice under Uniform Law s. 371(1)(a) or (b)". It provides that an investigator may, by notice, require a lawyer or legal associate of a law practice to produce any specified documents or to provide written information. This clause provides that —

> (1) A notice served under the *Legal Profession Uniform Law (WA)* section 371(1)(a) or (b) has the same effect as a subpoena to produce documents or attend to give evidence, as the case may be, issued by the Supreme Court for the attendance of a witness for examination or production of documents in a civil action.
>
> (2) Obedience to, or non-observance of, a notice served under the *Legal Profession Uniform Law (WA)* section 371(1)(a) or (b) may be enforced and punished by a judge in chambers in the same manner as in the case of obedience to, or non-observance of, a subpoena issued by the Supreme Court.

However, a person cannot be punished by a judge in chambers and sentenced for an offence contrary to section 373 of the law. As I said, there is no equivalent provision in the Legal Profession Act and we are describing it as an enhancement.

The DEPUTY CHAIR (Hon Dr Sally Talbot): Hon Nick Goiran.

Hon NICK GOIRAN: Thank you very much, Deputy Chair. Should I be wishing the Deputy Chair a happy birthday?

The DEPUTY CHAIR: You may.

Hon NICK GOIRAN: Happy birthday.

I thank the parliamentary secretary for that comprehensive explanation. On clause 229 and the use of force, although there is no dilution of the existing enforcement powers for the Legal Practice Board, I thank the parliamentary secretary in particular for setting out to what extent some provisions clarify those powers or, indeed, enhance them. With regard to the use of force provision in clause 229, what body will receive any complaints about excessive use of force by an investigator?

Hon MATTHEW SWINBOURN: Thank you, Deputy Chair, and happy birthday from me as well.

No specific use-of-force complaint process is identified under the application act. If a person who is unhappy about an excessive use of force, which went beyond the powers of the warrant, could make a complaint to the board itself if they are not prepared to complain to the court. A complaint could be made to the Corruption and Crime Commission if it were also a complaint about misconduct or corruption, and the complaint could also be made to the Ombudsman, otherwise known as the Parliamentary Commissioner for Administrative Investigations. Those actions would be available, but there is no specific provision within the bill that provides for a complaint process itself.

Clause put and passed.

Clauses 228 to 237 put and passed.

Clause 238: Terms used —

Hon NICK GOIRAN: We move to part 12 of the bill, "Law Society Public Purposes Trust". Is there any provision in part 12 of the bill—its five clauses—that will modify the law in our state regulating the Law Society public purposes trust?

Hon MATTHEW SWINBOURN: I am advised that the effect of these provisions is, in effect, to repeal the Law Society Public Purposes Trust Act 1985 and that those provisions have therefore been incorporated into the application bill itself. There are some changes. Section 4 of the Law Society Public Purposes Trust Act provides that if any of the trusts declared by the trust deed or declared by that deed as it may at any time is, in respect, revoked, added to or otherwise varied in accordance with the trust deed, the Law Society of Western Australia shall, within 14 days of the variation, submit a copy of the instrument to the Attorney General, who shall cause a copy of that instrument to be laid before each house of Parliament without delay. Pursuant to clause 242 of this bill, the Law Society of Western Australia will now publish any instrument varying the trust on its website and provide the Attorney General with a copy of the instrument. The Attorney General must then cause a copy to be tabled in each house of Parliament. It is not an earth-shattering change. It is probably more reflecting an update to current practice, which is the requirement to publish on the website. Obviously, the obligation will remain on the Attorney General to table it in both houses of Parliament.

Clause put and passed.

Clauses 239 to 242 put and passed.

Clause 243: Law library —

Hon NICK GOIRAN: Moving now to part 13 and the provision for the law library, to what extent will this part of the bill change the way in which our law library or law libraries will be governed in our state?

Hon MATTHEW SWINBOURN: I am advised that our much loved law libraries will not be significantly affected, so the status quo will be maintained. There are no particular changes to the law library. I will mention clause 245 because it contains a regulation-making power. I confirm to the member that it is our view that it is a simple regulation-making power and is not one of the Henry VIII clauses of the bill.

Clause put and passed.

Clauses 244 and 245 put and passed.

Clause 246: Information sharing —

Hon NICK GOIRAN: For the clarification of members, I had intended to ask questions on clause 245, but the hardworking parliamentary secretary was so comprehensive in his response to clause 243 that there was no longer a need for me to ask questions on clause 245.

Clause 246 now moves into "Part 14 — Miscellaneous". The first provision that I think is worth considering, parliamentary secretary, is the information-sharing provision. This attracted the attention of the Standing Committee on Uniform Legislation and Statutes Review in its 136th report. In particular, pages 19 and 20 of the report deal with

clause 126(1)(b), "Local regulations in relation to government lawyers", and clause 246(c), "Information sharing". It is clause 246(c) that I would particularly like us to consider at this point. At page 19 of the 136th report, the committee sets out the position of the Attorney General.

For the benefit of Hansard, I refer to paragraph 5.77, which states —

> The Committee wrote to the Attorney General to ask questions about the wide regulation-making powers in clause 246(c). The Attorney General responded with the following information:
>
> > Clause 246(c) of the Bill is consistent with section 586(3) of the current *Legal Profession Act 2008* which provides:
> >
> > > The regulations may authorise a local regulatory authority to disclose information to a person or body prescribed, or of a class prescribed, by the regulations relating to or arising under this Act or a corresponding law, subject to any conditions specified in the regulations.
> >
> > There are currently no regulations in the *Legal Profession Regulations 2009* made pursuant to that section.
> >
> > It is anticipated that a number of persons including, but not limited to, the Law Society of Western Australia and the Western Australian Bar Association will be prescribed in the local regulations for the purposes of clause 246(c).
> >
> > It is possible that relevant stakeholders (including those in other jurisdictions) might for example change business names from time to time. This regulation-making power provides sufficient flexibility to prescribe relevant persons for the disclosure of information as and when required. Any regulations made pursuant to clause 246(c) will be subject to disallowance.

The Attorney General's response was from 2 September 2021 in a letter from him to the Standing Committee on Uniform Legislation and Statutes Review. The parliamentary secretary will note that the Attorney General identified a few things, including that there are no regulations made under the like provisions of the existing law, but, notwithstanding that, the government intends to make regulations under this provision moving forward. The Attorney General specifically identified the Law Society of Western Australia and the Western Australian Bar Association as the bodies that are anticipated to be prescribed in the local regulations. Is that now the government's fixed position on those two bodies? Further, has there been any more consideration since 2 September 2021 about other bodies that might be subject to these local regulations?

Hon MATTHEW SWINBOURN: In respect of the member's first point, about whether it is a fixed position, the regulations have not yet been finalised. It remains our intention to include the Law Society and the WA Bar Association. For the sake of the chamber, I can disclose that there have been additions to that list since that time. I said that Law Mutual WA is included; there is also the WA Bar Association, as I have already mentioned; the Legal Aid Commission; a judge, registrar or master of the Supreme Court, or a person appointed or employed, as referred to in section 155 or 155A of the Supreme Court Act 1935; a member of the State Administrative Tribunal or a member of staff, as defined in section 3(1) of the State Administrative Tribunal Act; and the Attorney General. That is the current list of people who will be prescribed in relation to that regulation. We do not have any others at this stage, but obviously, on the finalisation of the regulations, if any more are added, I could not really think of too many more people outside the profession who would be added to that list.

Clause put and passed.

Clauses 247 to 250 put and passed.

Clause 251: Local regulations —

Hon NICK GOIRAN: Clause 251 also attracted the attention of the Standing Committee on Uniform Legislation and Statutes Review in its 136th report, tabled in October last year. This is the local regulation provision, and the committee at page 21 of its report sets out, at paragraph 5.87, the Attorney General's position. It states —

> 5.87 The Committee asked the Attorney General a number of questions in relation to clauses 251(2)(d) and 251(3)(b) and (c) and the use of the regulation-making power.
>
> 5.88 The Attorney General responded:
>
> > This Bill, together with the Uniform Law, provides a substantial change to the regulatory framework governing the legal profession in Western Australia. Despite the careful consideration that has been given to this Bill and the Uniform Law, due to the Bill's complexity, there is the potential for inadvertent consequences to arise. Clause 251(2)(d) is a mechanism by which any unintended consequences or inadvertent hardships can be addressed.

> It is contemplated that a local regulation will be made enabling me, as Attorney General, to exempt persons, or classes of persons, in whole or in part from the provisions of the Act, in consultation with key stakeholders such as the Legal Practice Board and the Law Society, and that any exemption granted by me, as Attorney General may subject to such conditions as I, as Attorney General, think fit.

That sounds very Henry VIII-ish I might add, just by way of interjection into the quote from the Attorney General. The report continues —

> Such regulations made pursuant to clause 251(2)(d) will be subject to disallowance.

My recollection is that in our consideration of clause 1, the parliamentary secretary addressed the recommendation of the committee, and specifically the fourth recommendation, which is for the parliamentary secretary to explain to the Legislative Council the persons or classes of person who may be exempt from part or all of the provisions of the legislation; the types of discretions that may be conferred on a person, and in what circumstances; and the types of conditions that may be imposed or authorised to be imposed, and the circumstances of those conditions. I think, at the very least, he provided a list of the persons or classes of person.

My question is in two parts. First of all: was that list of persons or classes of person subject to the consultation foreshadowed by the Attorney General in his letter of 2 September 2021, particularly with the Legal Practice Board and the Law Society, or any other key stakeholders included in that consultation process? I have a second question, but it is on a separate issue.

Hon MATTHEW SWINBOURN: Firstly, I confirm that we accept that this is a Henry VIII clause. It was not explicitly identified separate to the overall list of regulation powers that I gave, but we concede that this is, clearly, a Henry VIII clause. In relation to the member's discussion about the class of persons, there is currently no list of additional classes of persons, so there has not been any further consultation with stakeholders, including the Legal Practice Board or the Law Society, because no such classes of person have yet been come up with, for want of a better phrase. However, as I confirmed in consideration of clause 1, it is currently envisaged that if the power in clause 251(2)(d) is to be exercised, the Attorney General will first consult with key stakeholders such as the Legal Practice Board and the Law Society before including the exemption in the local regulations. I think that may have been a slight departure from what was put to the committee. In this instance, before any classes of people are identified, consultation will occur with key stakeholders, and then the regulation will be promulgated or drafted, rather than drafting the regulation and then going into consultation. I suppose that in this instance that would probably be a more qualitative approach, to make sure that things are dealt with before people get carried away with their drafting.

Hon NICK GOIRAN: That is good to hear. This is just one example of a local regulation that might be able to be made under the power conferred under clause 251. Is it the government's intention to make any other regulations at this time?

Hon MATTHEW SWINBOURN: No, member, we do not have any other plans, other than the ones I think were referred to in an earlier part of the debate, when we talked about the regulations being approximately 70 clauses, once they are properly proclaimed.

Hon NICK GOIRAN: I will conclude with a comment about clause 251 and in doing so, I hasten to add that the next clause I would like to consider is clause 255. I think it is reasonable to conclude that perhaps, in any other Parliament, a Henry VIII clause of this type would not be tolerated, but in this forty-first Parliament things are a little different and it appears that these types of provisions are considered to be acceptable. I draw members' attention to page 22 of the Standing Committee on Uniform Legislation and Statutes Review's 136th report. I note in passing that Hon Pierre Yang was the substitute for the parliamentary secretary on that committee, or maybe vice versa.

Hon Matthew Swinbourn interjected.

Hon NICK GOIRAN: It was because the parliamentary secretary had carriage of the bill. That is fair enough. During his period of substitution, the committee came to the conclusions that are found at page 22. There are four pertinent paragraphs starting at paragraph 589, for the benefit of *Hansard*. They state —

> The Committee considers that the wide regulation-making powers in clause 251(2)(d) and 251(3)(b) and (c) erode Parliament's sovereignty.
>
> In relation to clause 251(2)(d), the circumstances of any exemptions from the Act and the persons or classes of persons to be exempt should be set out in the Act. The Committee notes the Attorney General's position but considers that clause 251(2)(d) authorises Government to change the application of the Act through regulation. There is a lack of criteria or guidance within the Bill governing what sort of person is

> intended to be exempt from parts or all of the Act. Such exemptions should be contained in primary legislation and considered by Parliament.
>
> The Committee understands that regulations are scrutinised by the JSCDL and subject to possible disallowance by the Parliament. However, the JSCDL has limited power to recommend disallowance of a regulation if the governing Act authorises the regulation-making power. Clause 251(2)(d) does not place any limitations on the power to exclude persons from the Act and may have serious implications. The need for flexibility may not justify the use of such a wide regulation-making power.
>
> Clauses 251(3)(b) and (c) also contain wide regulation-making powers and the Attorney General has not provided adequate justification for those powers. The language used in clauses 251(3)(b) and (c) imposes a wide power for regulations to confer a discretion on a person and impose conditions or authorise or permit a person to impose conditions, in relation to a matter. There is no limitation or description of what a 'matter' is or the persons or classes of persons.

With those four paragraphs, the committee then made the seventh finding, which reads —

> The open-ended regulation-making powers in clauses 251(2)(d) and 251(3)(b) and (c) of the Legal Profession Uniform Law Application Bill 2021 erode the Western Australian Parliament's sovereignty and law-making powers.

I simply conclude by making this point: those members who have been here for longer than just the forty-first Parliament will know full well that this type of provision would not be accepted in any other Parliament.

Clause put and passed.

Clauses 252 to 254 put and passed.

Clause 255: Certain witnesses compellable despite Uniform Law s. 468 —

Hon NICK GOIRAN: As we move to clause 255 in part 14 of the bill, we are dealing with a provision about certain witnesses being compelled or, indeed, being exempt from that with regard to section 468 of the uniform law. Is it intended that the former staff of the Legal Practice Board will or will not be able to be compelled to give evidence or produce documents in light of clause 255 when read with section 468 of the uniform law?

Hon MATTHEW SWINBOURN: When the member asks whether it is our intention, it goes to a state of mind and, as the parliamentary secretary in a representative capacity, I find it difficult to go to the state of mind, as such. I think the better way for me to answer the member's question of whether former staff can be compelled to give evidence is just to say that yes, they can be compelled because they do not fall within the definition of "relevant person" under section 467(2), which provides that "relevant person" means the council or the commissioner; or a local regulatory authority; or a committee of the council. It goes on, but I do not think it refers to "retrospectively". If the member's question is whether a former staff member could be compelled, the answer would be yes.

Hon NICK GOIRAN: That makes sense, because in the Legal Services Council's consultation paper on proposed amendments to the Legal Profession Uniform Law published in January 2020, it made quite a number of recommendations, as the parliamentary secretary might recall. Its penultimate recommendation, which was recommendation 35, was that there should be an amendment to section 467 to provide former staff members with the benefit of non-compellability as witnesses. The parliamentary secretary has confirmed that at the moment they can be compelled, yet the Legal Services Council has recommended that they have the benefit of not being compelled. Here we are continuing with a course of action that would see them be compelled. Is that indicative that the government does not support recommendation 35?

Hon MATTHEW SWINBOURN: I think the short answer is no, and I do not know that I can take it a lot further. As we discussed at an earlier stage of debate, the recommendations of the Legal Services Council have gone to the standing committee, and the standing committee has made a decision based on those recommendations for the Victorian equivalent of parliamentary counsel to draft an amendment to the Legal Profession Uniform Law, but that process is currently in train and subject to Victorian cabinet-in-confidentiality. As I say, the initial answer to the member's first proposition is no.

Clause put and passed.

Clauses 256 to 260 put and passed.

Clause 261: Terms used —

Hon NICK GOIRAN: We have flown to the sixteenth part of the 17 parts of this bill, and passed over part 15 that was simply dealing with the repeal of some acts. Part 16 before us deals with the transitional provisions. During the reasonably long course of this bill, the Law Society made multiple representations. I note that in October of last year, the Law Society held a meeting. At that meeting it resolved to write to the Attorney General to request an

urgent meeting to be arranged with the key stakeholders that were to include, at the very least, the Law Society, the Legal Practice Board, the Western Australian Bar Association and the Legal Contribution Trust. Specifically, the purpose behind that proposed meeting was to consider the then anticipated date for the commencement of this uniform law scheme that Western Australia was about to embrace, which, at the time, was going to be 1 January 2022.

The advocacy from the Law Society and others was that that date should be moved to 1 April. The reasons that they gave included the following. Firstly, the regulations and rules are yet to be finalised, and, to date, there has been no consultation on either. Secondly, from the date of proclamation, the stakeholders understood that there will be changes to the conduct rules and continuing professional development rules, how firms deal with cost agreements and cost disclosure, and broadly speaking, there had been limited communications and/or CPD provided to educate the Western Australian legal profession on these changes in 2021. It was the view of the stakeholders, certainly as at October of last year, that the date of 1 April, rather than 1 January, would enable the implementation of professional education on the legal profession uniform law prior to the end of the CPD deadline of 31 March. It was also their view in October that it would be unfortunate if the legal profession were to be advised as late as December that a new bill would take effect from 1 January 2022, because their view was that that would be too short a time frame to introduce a new regulatory framework for the legal profession. They felt that that would be further compounded by the fact that there is an ordinary business shutdown during the December and January period. This takes me to the transitional provisions, because the final reason that they were calling on the Attorney General for this meeting in October of last year was that it was not clear how any of the transitional provisions would alleviate these concerns.

Did the Attorney General receive a request to hold such a meeting on or after October last year? Did the meeting take place? Have the stakeholders' concerns, with respects to whether the transitional pre-provisions will alleviate their concerns, been addressed?

Hon MATTHEW SWINBOURN: We are seeking some advice from people external to who are at the table. None of us were at any such meeting, so we do not know. Until I get that advice, I will have to sit tight.

We are still working on an answer. Before we are interrupted by question time, which is only a matter of minutes away, I am able to confirm for the member that one of the issues discussed early on in this debate was about the commencement date of this uniform scheme. I was very clear that the Attorney General's position is that it will not be before 1 July and I was also very clear that it will be in consultation with the relevant stakeholders, being the Law Society, the WA Bar Association and the like. The reason for that is because—and we had some debate about the commencement of this change—although it is not as earth-shattering as the 2008 reforms, it is a significant change for the profession. Obviously, it is important that we carry the profession with us for this change. Whilst the member has identified the Law Society and other stakeholders identified issues in October, they have at the same time been identifying to us their eagerness to get on and get this particular thing done.

Committee interrupted, pursuant to standing orders.

[Continued on page 1145.]