## LEGAL PROFESSION UNIFORM LAW APPLICATION BILL 2021

*Committee*

Resumed from 15 March. The Deputy Chair of Committees (Hon Peter Foster) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Progress was reported after clause 112 had been agreed to.

**Clause 113: Full Bench of Supreme Court to admit individuals under Uniform Law s. 16 —**

**Hon MATTHEW SWINBOURN**: We are now back to the Legal Profession Uniform Law Application Bill 2021 after that raucous interruption by a far less civilised bunch of members of this house! If I can do so with my tongue in cheek, we are now back to the civility and reviewing process.

On the last sitting day that we dealt with this matter, and prior to that, I said that I would seek to take advice on some matters. I wish to address those now. I also have some documents that I will table. It will take me some time to go through those, so I beg the indulgence of members while I work my way through that.

One of the first issues was whether the fees for practising certificates for pro bono practitioners would still be waived by the Legal Practice Board. We sought advice from the Legal Practice Board, which advised that it will continue to waive practising certificate fees for pro bono practitioners.

As to the additional estimated charge of $20 to $30 resulting from joining the Legal Profession Uniform Law Scheme, the starting position is that such practitioners will be liable for the $20 to $30 charge. That is because they are included in the calculation of the funding contribution owed by Western Australia, which is determined by the proportion of the total number of legal practitioners to whom practising certificates have been issued in the participating jurisdictions over the immediate preceding financial year. For the benefit of the chamber, clause 8.1.2 of the intergovernmental agreement provides for that. It is anticipated that the board will be empowered by the local regulations to waive, reduce, postpone or refund a fee payable by a person under the act or the Legal Profession Uniform Law WA. There may be circumstances in which it is appropriate to waive the per capita contribution. But, as I said, the board has indicated that it is its intention to continue to waive those fees for pro bono lawyers.

Another issue we were asked to take on notice was how many Queens Council and Senior Counsel have nominated themselves to be members of the Legal Practice Board. The Legal Practice Board has provided advice that there are currently 40 such members. That is a few more than I thought, but that is the number. I would like to clarify.

**Hon Nick Goiran**: The problem is there is probably a need for a large enough boardroom to fit them in.

**Hon MATTHEW SWINBOURN**: That is right; maybe they will need to have an outside meeting, member.

In addition to the rules tabled in Parliament on 15 March 2022, there are two additional amending uniform rules to table, which have been made. The documents I previously tabled were not a complete set, so I am adding these additional documents. The first is the Legal Profession Uniform Conduct (Barristers) Amendment Rule 2022. I table that.

[See paper 1137.]

**Hon MATTHEW SWINBOURN**: This commenced on 4 March 2022, but has not yet been included in the consolidated Legal Profession Uniform Conduct (Barrister) Rules 2015.

The second document I table is the Legal Profession Uniform Law Australian Solicitors' Conduct Amendment Rules 2022, which commences on 1 April 2022. I seek to table that document.

[See paper 1138.]

**Hon MATTHEW SWINBOURN**: There were some other documents that we were not able to table at our last sitting, so I will table them now. The first of those voluminous documents is schedule 1 of the Victorian Legal Profession Uniform Law Application Act 2014.

[See paper 1139.]

**Hon Nick Goiran**: That is a uniform scheme itself.

**Hon MATTHEW SWINBOURN**: Yes. It is conveniently wrapped in red tape. I also table the Legal Profession Uniform Regulations 2015; the Legal Practice Board Uniform Law frequently asked questions document; Legal Practice Board of Western Australia cost disclosures fact sheet; the Legal Practice Board of Western Australia dispute resolution and complaints fact sheet; the Legal Practice Board of Western Australia uniform law transitional arrangements fact sheet; and the Legal Practice Board Uniform Law fact sheet.

[See papers 1140 to 1145.]

**Hon MATTHEW SWINBOURN**: They are all the documents that I need to table at this stage. I note that the fact sheets are a matter Hon Nick Goiran raised in relation to the 2020 reference. The member is correct that the documents

I just tabled refer to the 2020 bill, but the focus of the fact sheets are on the uniform law itself and not the application bill. We would expect, of course, those documents to be updated in due course to have the correct reference.

A further point of clarification is about dates and the relevant date for application of schedule 1 to the Victorian Legal Profession Uniform Law Application Act 2014. Reference was made to the relevant date of application in the 2020 bill being 7 March 2020, with the introduction of that bill into the other place on or about 8 March 2020. I have to correct that because the correct relevant dates are 17 March 2020 and 18 March 2020 respectively. I apologise for any error or misleading of the chamber in that regard. It was inadvertent, nevertheless I still extend that apology to the chamber.

Also, for the sake of completeness, I wish to clarify some matters in relation to the Legal Costs Committee under part 3, division 5. In response to a question on clause 82, Hon Nick Goiran—I think he has been the only member who has asked questions on this very important piece of law reform, so we can safely assume it was him, but I know it was him—asked —

> Is there anything substantive in division 5 that will change the functions, powers, roles, responsibilities or jurisdiction of the Legal Costs Committee?

The answer that was given was —

> … the only addition relates to clause 83.

That concerns the statutory conferral functions.

**Hon Nick Goiran**: That answer was given while you were away on urgent parliamentary business.

**Hon MATTHEW SWINBOURN**: Was it?

**Hon Nick Goiran**: I seem to recall posing the question about the Legal Costs Committee to the deputy leader.

**Hon MATTHEW SWINBOURN**: He is otherwise indisposed on urgent parliamentary business at the moment.

The Legal Costs Committee has no equivalent provision in the Legal Profession Act. Although it does not substantially change the functions, powers, roles, responsibilities or jurisdictions of the Legal Costs Committee, clause 84 simply sets out that the Legal Costs Committee has all the powers it needs to perform its functions and similarly is a provision with no equivalent position in the Legal Profession Act 2008. Although it does not change, in effect, the original question, which is whether it changed anything that substantially mattered, for the sake of completion, we wanted to bring to the attention of the chamber that clause 84 does not have a similar equivalent in the Legal Profession Act 2008.

One final clarification is the timing of the Legal Contribution Trust and the Legal Practice Board. When the issue was raised in the 2020 version of clause 102, I think at the time I qualified my answer on that. In response to the question about when the request was made to include clause 102(1)(d), I was advised that it was raised either in the second half of 2020 or the first half of 2021, but that my advisers required access to their files to get a specific date. They have had an opportunity to review their files and the advisers at the table have informed me that the issue was first raised on 18 June 2020, two days after the 2020 bill passed the Legislative Assembly on 16 June 2020.

**Hon NICK GOIRAN**: We are on part 4 of the bill. Specifically, we are dealing with division 1, the matters pertaining to the admission of practitioners. Clause 113 deals with the Full Bench of the Supreme Court admitting various practitioners under the uniform law. To round out some of the matters that the parliamentary secretary kindly brought to our attention, I thank him and his advisers for their most comprehensive response. I only wish we would get that all the time from the McGowan government, but it seems it is the luck of the draw who happens to be the member with carriage of the bill. It was certainly an appropriate and fulsome response to the house of review. Two matters arise from that. When the parliamentary secretary tabled the amendment rules so that the full package of uniform rules could be tabled, he said that one of them, as I understand it, was to commence on 4 March 2022, and that although the other one—I think it is the latest one—had passed, it would commence only on 1 April 2022. I think the parliamentary secretary said that back in 2020 or earlier. The point I simply make about that is I take it that those rules—whether they are the amendment rules that commenced some 13 days ago or the amendment rules that will commence in 15 days—would all have had the concurrence of the Attorney General of Western Australia, because he would have sat around the table of the standing committee and approved those amendments.

**Hon Matthew Swinbourn**: Yes.

**Hon NICK GOIRAN**: That is excellent. The only other question that arises on that point is: to what extent did the Attorney General consult with the stakeholders prior to agreeing to those two amendments? As I said, one of them commenced 13 days ago and one will commence in another 15 days.

**Hon MATTHEW SWINBOURN**: The consultation was undertaken by the Legal Services Council, which consulted the Legal Practice Board of Western Australia as well as the Law Society of Western Australia. There was also an element of public consultation with those amendments before they were progressed. I am also advised that the Western Australian Bar Association was consulted.

**Hon NICK GOIRAN**: Thank you, parliamentary secretary. As I indicated, we are now on clause 113. Courtesy of the work of the parliamentary secretary and the advisers, it seems to me that all the matters that have arisen have been taken care of, so I pass on my thanks for that. However, one matter potentially remains outstanding. In no way am I suggesting that there was an undertaking to report back on this particular issue, but the parliamentary secretary might recall the quite lengthy examination that took place on clause 12 and what I would describe as the double jeopardy dilemma. Can the parliamentary secretary provide any further information on that matter? In particular, is the matter under active consideration? Has the Attorney General, for example, turned his mind to this matter, and does he share any of the concerns that I raised about the possibility that someone might be tried twice?

**Hon MATTHEW SWINBOURN**: I have not really had a chance to ventilate it fully with the Attorney General in an appropriate forum. I do not want to do a disservice to it, but I understand that it does not need to be resolved before the passage of this bill. It is a broader issue that relates to the review of the provisions elsewhere. My answer is that I have had a brief discussion with the Attorney General, but not to the extent to which I am comfortable to say that I have properly ventilated it with him.

**Clause put and passed.**

**Clause 114: Local regulations may prescribe matters about admission under Uniform Law —**

**Hon NICK GOIRAN**: We are considering part 4 of the bill, and specifically clause 114. To assist the parliamentary secretary facilitate the passage of this bill, I can indicate that as well as clause 114, which we are considering at the moment, I would also like to examine clauses 118, 124, 125 and 126 of part 4 of the bill.

As I understand it, clause 114(1)(a) on page 55 of the bill and clause 114(1)(e) on page 56 of the bill, starting at line 8, have been amended to ensure consistency with the anticipated amendments to the uniform law. That was certainly my understanding at an earlier stage during the briefings that the opposition received. I am conscious that this afternoon the parliamentary secretary has kindly tabled some amendments. Are they the anticipated amendments that relate to clause 114(1)(a) and (e) or are there some other anticipated amendments; and, if so, what are they?

**Hon MATTHEW SWINBOURN**: The answer is no, member, that does not relate to those things that were just tabled. My advice is that they relate to the process that we spoke about on Tuesday, which is the consultation and review process that the Legal Services Council had undertaken when the discussion paper was issued, which we said was at the stage of being with the Victorian drafters. We do not have a copy of that draft bill yet. Those provisions are there to continue to facilitate any of those amendments that might come through that process.

**Hon NICK GOIRAN**: I thank the parliamentary secretary. It is helpful to know that the amendments that are currently under active drafting by the Victorian parliamentary counsel will eventually make their way, one would assume, through the Parliament of Victoria. The opposition has been told through the briefing that clauses 114(1)(a) and (e) have been specifically amended to ensure consistency with anticipated amendments. How can that be done? How does one amend provisions to be consistent with anticipated amendments if one does not know what the anticipated amendments are?

**Hon MATTHEW SWINBOURN**: I think that the member makes a good point, but there is an explanation. The drafting that we have here has been done by our Parliamentary Counsel's Office so that if the amendments in the proposed bill are made, there will not be any inconsistency with our bill. They take into account the range of amendments that are possible. It is worth noting, though, that the policy of the amendments that are under consideration by the Victorian drafters has been agreed by the standing committee, which is made up of the Attorneys General. The form of those amendments has not been settled at this stage, which we are taking into account. We know what those amendments will relate to, but we do not know the form of the wording. Obviously, I cannot disclose any of that because it is all cabinet-in-confidence for both our cabinet and the Victorian cabinet because of the stage that we are at, but the government understands what the policy of those amendments will be.

**Hon NICK GOIRAN**: Just so I can better understand that, if I take clause 114(1)(a) as an example, it states —

> (1) The local regulations —

That is ours in Western Australia —

> may make provision for or in relation to …
>
> (a) providing practical legal training for the purposes of the *Legal Profession Uniform Law (WA)* section 17(1)(b);

Apparently, clause 114(1)(a), which I have just read out, has in some fashion been amended to ensure consistency with anticipated amendments to the uniform law. I understand that the parliamentary secretary says that these matters are cabinet-in-confidence and he cannot at this time disclose precisely what those amendments will be, but on a reading of this provision, it is just not apparent what needed to be amended. Perhaps the question can be phrased

in this way: what was the problem with the original drafting of 114(1)(a) that is now remedied by the form of the words found in this bill at page 55, lines 24 and 25?

**Hon MATTHEW SWINBOURN**: Member, I will do my best here because, I must admit, it is a bit beyond me. I am not trying to play ducks and drakes with the member—I do not know whether that is the right analogy! I am told that these provisions are facilitative of a change we anticipate occurring. The purpose of their existence is to avoid inconsistency between our application law and the uniform law as it will be amended by the Victorian Parliament. That is what we are trying to avoid. As to what they specifically relate to in terms of this legislation, I know the member is probably aware that there is a difference between the 2020 bill and the 2021 bill. A part has been removed because obviously some work has been done. I do not know whether "narrow" is the right word, but we can limit it to section 117 (1)(b) of the Legal Profession Uniform Law. I do not know whether that has answered the member's question. I am sure he will seek further clarification from me. I do not want to delay the progress of this bill, and I know the member does not. I suspect that in the course of time if the bill was kicked down the road a year, we could understand exactly what this related to because it is going to be resolved, but it is a matter that is in motion. It is probably a problem with uniform laws in that regard in that we are dealing with other jurisdictions and their processes, and there is a range of broader policy discussions around suitability of uniform laws and that sort of thing, which I do not think either of us want to get into. But it is really there to facilitate the change in that regard.

**Hon NICK GOIRAN**: It is a mystery, is it not? It is not readily apparent what clause 114(1)(a) and (e) seek to do in terms of ensuring this so-called consistency with anticipated amendments. I make this observation that the explanatory memorandum for the mysterious clause 114 states —

> This clause provides that the local regulations may make provision for or in relation to matters concerning admission under the Legal Profession Uniform Law (WA). For example, providing practical legal training, issuing compliance certificates and making declarations of early assessment of suitability.

None of that provides any explanation for this alleged inconsistency and, as was referred to in the briefing, the anticipated amendments. I agree with the parliamentary secretary that, notwithstanding the mystery of clause 114(1)(a) and (e), there is no mischief I can see that should concern members. However, I note that in our consideration of clause 1, the parliamentary secretary kindly provided a list of clauses the government had identified in response to recommendation 5, I think it was, of the Standing Committee on Uniform Legislation and Statutes Review. It had said, "Please identify in second reading speeches and explanatory memorandums any Henry VIII clauses." Clause 114 was one of the clauses the parliamentary secretary identified. However, as he explained in discussion on a previous clause, he was simply listing all the regulation-making clauses, not necessarily identifying the Henry VIII clauses. I cannot see anything in clause 114 that gives rise to concern with respect to its being a Henry VIII provision. However, I note that clause 114(2)(b) refers to fees being payable in relation to those matters. Of course, those are the matters pertaining to admission. In our consideration of an earlier clause—I cannot recall which one it was; possibly clause 1—the parliamentary secretary provided to the chamber information about any change in the costs for legal practitioners as a result of our moving to this substituted scheme. The change we were talking about—correct me if I am wrong—was to the cost of practising certificates. I think the cost of the practising certificate was in the realm of $1 200, or something of that sort, and in any event the uplift will be $20 to $30. That matter is firmly put to bed.

With respect to clause 114(2)(b), what are the types of fees the government intends to prescribe that will be payable for those seeking admission or seeking to make applications for exemptions and the like for their admission? More particularly, I am interested to know whether there will be any change in the uplift as a result of us moving to the uniform scheme.

**Hon MATTHEW SWINBOURN**: As the member can appreciate, this provision falls under the admissions practising certificate and registration certificates part, so the fees that would be payable in relation to that would pertain to that. As the member would know, the practising certificate fee is, I think, $1 250.

**Hon Nick Goiran**: Is that not in the next division though? We are only in division 1, dealing with admissions at this point. I had understood that clause 114 was limited to local regulations dealing with admission, according to the title of the clause.

**Hon MATTHEW SWINBOURN**: Yes. I was making a broader point about fees generally in the general part we are dealing with, but the member is right that we are talking about only admission fees. As we both know, we paid our admission fees some years ago! I am told that this provision is reflective of the power that the Legal Practice Board already has to charge fees for those particular things. We do not anticipate there being any material difference between what people are currently charged for admission under the Legal Practice Act and the fee once we join the uniform scheme. I think the member was asking about uplifts. As I say, it is a facilitative power to give the board the right to set those fees. The cost for the uniform scheme is obviously in relation to practising certificates and not for admission itself, so there should not necessarily be a correlation between those things.

**Clause put and passed.**

**Clauses 115 to 117 put and passed.**

**Clause 118: Local regulations may modify operation of Legal Profession Conduct Rules for barristers —**

**Hon NICK GOIRAN**: This provision seeks to modify the operation of the law, specifically the conduct rules. Are the conduct rules that have been referred to here the uniform scheme's conduct rules?

**Hon Matthew Swinbourn**: Yes.

**Hon NICK GOIRAN**: The uniform scheme's conduct rules would be one of the package of rules that the parliamentary secretary has tabled so that we know what the conduct rules will be. What we are saying in clause 118 is that before those conduct rules become law in Western Australia, we are going to modify them, and that pertains to rule 18A of the Western Australian Barristers' Rules. I can see from the explanatory memorandum that apparently rule 18A, which I confess I did not know off the top of my head, enables barristers to accept direct briefs. Are we therefore saying that that is not a practice that is allowed in Victoria and New South Wales?

**Hon MATTHEW SWINBOURN**: We do not have an answer at the table at this time. Is this a matter that the member wants to explore in further depth, because we will keep looking for an answer now? Otherwise, I can undertake to give him an answer when we are in a position to answer it.

**Hon Nick Goiran**: Yes, that is fine.

**Clause put and passed.**

**Clauses 119 to 123 put and passed.**

**Clause 124: Accreditation in relation to continuing professional development activities or other legal education and training —**

**Hon NICK GOIRAN**: I am just making a note of the matter arising under clause 118.

Clause 124, "Accreditation in relation to continuing professional development activities or other legal education and training", differs from that in the 2020 bill. What brought about this change?

**Hon MATTHEW SWINBOURN**: The amendment to clause 124 provides that the regulations may exclude CPD activities from the application of the board rules. For example, the regulations may exclude CPD activities that are not provided or presented by another person from the application of the board rules. This will ensure that practitioners will still complete a continuing professional development activity under the continuing professional development rules if they complete an activity that is not provided or presented by another person. For non-excluded activities, practitioners will not obtain a point if preparing or presenting a CPD, or attending a CPD, unless the presenter is an authorised CPD provider or is acting on behalf of an authorised CPD provider.

**Hon NICK GOIRAN**: There were so many double, triple and quadruple negatives in that response that it made it a little difficult to follow. Perhaps I can ask the question in this way: as we know, in Western Australia legal practitioners currently need to comply with the CPD program or scheme. There is a certain amount of points that one must obtain.

**Hon Matthew Swinbourn**: Ten.

**Hon NICK GOIRAN**: It is 10 points by, I think, 31 March or 1 April.

**Hon Matthew Swinbourn**: It is by 31 March. I have one to go.

**Hon NICK GOIRAN**: So the parliamentary secretary will have to quickly deliver a seminar or read a paper or something between now and the next 14 or 15 days. To what extent will clause 124 modify the arrangements for CPD for practitioners in Western Australia as they currently stand? There was a version in the 2020 bill, but this is different from that. I am trying to understand whether there will be any substantive change to the CPD scheme in Western Australia.

**Hon MATTHEW SWINBOURN**: As the member understands, because he would have done continuing professional development over the years, lawyers can accrue points in a number of ways, such as participating in a seminar, publishing a scholarly legal article and attending certain events. We have done those sorts of things ourselves. As I understand it, under the current regime, for somebody to get points for those non-in-person activities, they have to get approval from the board, but under the uniform scheme they will not have to get board pre-approval to do that. It is an advantage and less red tape. That is what the change from the 2020 to the 2021 application bill picks up. That is what is happening here.

**Hon NICK GOIRAN**: That sounds like an excellent improvement. If we will make it simpler for practitioners to comply with the CPD scheme, I think that is a good thing. CPD is an important element for our profession, but sometimes these things can become a beast of their own. It does trouble me when people sometimes see this as an opportunity to create an industry all of its own, which misses the spirit and the point of these things. It all becomes very onerous for practitioners. If we will make it simpler and easier for them to comply with what is already a highly regulated scheme, that is a good thing. I think a lot of people do not appreciate how regulated legal practitioners

are. It would probably have to be one of the most regulated professions going around. If this will make that slightly easier with regard to the famous 10 points, that is a good thing.

I might just mention in passing that there is an excellent seminar happening this Friday, by the Law Society, on whether employers are able to mandate vaccinations for their employees. I think it is on at 1.30, so if the parliamentary secretary happens to be online, I will see him there.

**Clause put and passed.**

**Clause 125: Local regulations may provide contract legislative drafters are government lawyers —**

**Hon NICK GOIRAN**: I might, with the parliamentary secretary's concurrence, deal with clauses 125 and 126 as a package. The purpose of the question is to identify that the parliamentary secretary mentioned in his answer to a question on clause 1, with respect to recommendation 5 of the Standing Committee on Uniform Legislation and Statutes Review, that this clause provides regulation-making power. It certainly does that. Does the government consider either clause 125 or 126 to be a Henry VIII clause?

**The CHAIR**: I remind members that although we have some unusual seating arrangements, it is discourteous to turn your back to the chair for extended periods of time.

**Hon MATTHEW SWINBOURN**: My advisers here are comfortable to say that they may very well be Henry VIII clauses, because they have the effect of modifying the operation of the bill that has been passed by Parliament. It is a qualified answer in that regard, but it is probably more leaning on the side of yes, they fall within the category of all things that can be described as Henry VIII clauses. It was described to me from the table here that the definition of a Henry VIII clause is a technical kind of thing in that regard, but, yes, it sits on that side. It falls within that ambit.

**Hon NICK GOIRAN**: I agree. I think clause 126 requires more consideration than clause 125. Clause 125 is a curious beast. Obviously, someone at Parliamentary Counsel's Office is on a contract for services with the state and wanted to make sure they are definitely being defined as a government lawyer, because if we leave things as they sit under the uniform law, it appears that they would not be considered a government lawyer and they very much would like to be considered a government lawyer. So they have kindly put together some 14 lines of statute for us that comprises clause 125. I do not think too much turns on that.

But if we look at clause 126, if the parliamentary secretary is happy to continue to deal with them as a package, it seems to provide very substantial opportunities for the law to be modified. What is the government's concern that gives rise to clause 126? Specifically, if we look at clause 126(1)(b), we see —

> without limitation, exclude or modify the operation of specified provisions of the *Legal Profession Uniform Law* …

I pause there to note we are not merely talking about one of the sets of rules or regulations. We looked a little earlier at the barristers' rules; the parliamentary secretary has kindly agreed to take that issue on notice. What we are trying to deal with there is very specific, and the explanatory memorandum identifies that it would appear that in Western Australia there is a difference in the jurisdictions whereby barristers can take on briefs directly; we want to retain that so we are seeking to modify the arrangement with respect to that matter. But this is far broader than that. There is no indication of what drives the concern. It is not as though a barrister is trying to take on a brief directly. Is there any further information that the parliamentary secretary might be able to provide to the chamber about what gave rise to the necessity for clause 126?

**Hon MATTHEW SWINBOURN**: Section 56 of the Legal Profession Uniform Law, which is headed "**Government lawyers**", states —

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

The application bill will give effect to section 56 in that regard. I have been given the example of when the policy decision has been to include the requirement that government lawyers have to have a practising certificate, which is not, I believe, the arrangement under the current scheme. A future government may have a different policy position and not require government lawyers to have practising certificates. In a sense, this provision will facilitate that kind of arrangement.

**Hon NICK GOIRAN**: That does help, parliamentary secretary. The parliamentary secretary is indicating—I am happy to take this by way of interjection—that it is not the current government's intention to change that. At the moment, Western Australian government lawyers need to have a practising certificate and although this provision

will allow for an exemption to that, the position of the current government is not to do that, but this provision will allow for that if it changes its mind at a later stage.

**Hon Matthew Swinbourn**: Yes.

**Hon NICK GOIRAN**: Thank you.

I note that we are dealing with clauses 125 and 126. To assist the Chair of Committees in the passage of this, in a moment we will move to part 5 and I flag that in part of 5 of the bill, I have questions about clauses 127 and 129.

**Clause put and passed.**

**Clause 126 put and passed.**

**Clause 127: Application for exemption under Uniform Law s. 130 —**

**Hon NICK GOIRAN**: We are moving on to part 5 of this mammoth bill, which deals with trust accounts. Of course, trust accounts already operate in Western Australia and lawyers who have the conduct or management responsibility of their clients' trust moneys in these trust accounts are already subject to substantial regulation, and rightly so. Is there anything materially different in part 5 under this uniform scheme in contrast with the current arrangements for practitioners running trust accounts?

**Hon MATTHEW SWINBOURN**: Because Hon Nick Goiran telegraphed us about the way he is progressing through the bill, the advisers have helpfully prepared some material for me. I will read through that material.

**Hon Nick Goiran**: Can we have these advisers for future bills?

**Hon MATTHEW SWINBOURN**: You never know! They will be freed up, I suppose, once we get past this one. We never know where they might end up, but I think their boss probably has other work for them. Enough of that.

I refer to the material changes under the application bills and the legal profession uniform bills in relation to trust accounts. Once section 134 of the uniform law authorises the designated local regulatory—that is, the Legal Practice Board of Western Australia—to exempt a particular law practice from complying with any of the provisions of the part, subject to any conditions that the designated local regulatory authority may impose, clause 128 provides that if the board grants an exemption to a law practice under section 134 of the Legal Profession Uniform Law, the board must give the law practice a written notice setting out the particulars of the law practice, the provisions of part 4(2) from which the law practice is exempt and any conditions to which the exemption is subject. There is presently no much requirement under the Legal Profession Act 2008 in relation to those things that I mentioned. Clause 129 provides that for the purposes of section 133 of the Legal Profession Uniform Law, local regulations may include provisions prohibiting, regulating or otherwise providing for the receipt or holding of money by or on behalf of barristers on account of legal costs for legal services in advance of the provisions of those services.

Section 134 of the uniform law provides that it is intended that jurisdictional legislation may include provisions prohibiting, regulating or otherwise providing for the receiving or holding of money by or on behalf of a barrister on account of legal costs for legal services in advance of the provision by the barrister of the legal services. This provision will preserve the current position in rule 18A, which is the one we referred to before, of the Western Australian Barristers' Rules, which relates to the receipt of direct briefs. That is not change but a preservation clause, if I can describe it that way, of an existing practice. Turning to clause 130, under proposed sections 160(3) and 166(3) of the legal professional uniform law WA, the amount of the cost of an external examination and an external investigation may be recovered by the designated local regulatory authority as a debt payable to it by the law practice, subject to any appeal or review mechanism provided in applicable jurisdictional legislation. Clause 130 provides that a person may apply to the State Administrative Tribunal for review of a decision made under proposed sections 160 and 166. There is presently no such review mechanism under the Legal Profession Act so I think we would both agree that that is an improvement.

I have some more information that deals with trust money protocols and deficiencies in trust accounts. Currently under section 209(1) of the Legal Profession Act 2008, the Legal Practice Board may enter into arrangements referred to as trust money protocols with corresponding authorities about any or all of the following: first, determining the jurisdiction where a law practice receives trust money and, second, sharing information about whether and if so how trust money is being dealt with under this act or a corresponding law. Under rule 58(1) of the uniform general rules, it is Legal Services Council that may enter into arrangements referred to as protocols with local regulatory authorities, such as the Legal Practice Board, and corresponding authorities about either or both of the following: first, determining the jurisdiction where a law practice receives trust money and, second, sharing information about whether and if so how trust money is being dealt with under the uniform law or corresponding law. Obviously, that is a consequence of going into an almost national uniform scheme. A deficiency in a trust account currently under section 226 of the Legal Profession Act means that an Australian legal practitioner commits an offence if the practitioner, without reasonable excuse, causes a deficiency in any trust account or trust ledger account or a failure to pay or deliver any trust money. The statutory penalty is a fine of $25 000. However, under section 148

of the uniform law, a law practice, an Australian legal practitioner or any other person must not, without reasonable excuse, cause a deficiency in any trust account or trust ledger account or a failure to pay or deliver any trust money. The statutory penalty is 500 penalty units, with a penalty unit currently worth $181.74 or imprisonment for five years or both. I do not know what 500 times $181.74 is, but there will also be a term of imprisonment. The clause will extend an arrangement that previously applied only to legal practitioners, to both a law practice and another person. For example, in a corporate firm, an accountant rather than a legal practitioner may be engaged with trust accounts; this clause will extend that obligation to them. I imagine we both agree that is an appropriate extension of the responsibility.

**Clause put and passed.**

**Clause 128 put and passed.**

**Clause 129: Local regulations about receipt or holding of money by barristers: Uniform Law s. 133 —**

**Hon NICK GOIRAN**: Is my understanding correct that clause 129 will allow for a local regulation to be made in Western Australia that will prohibit the provision of a receipt for money held on behalf of a barrister? If that is what clause 129 contemplates, why would we do that?

**Hon MATTHEW SWINBOURN**: I am guessing that the member just wants some clarity here. I think he mentioned prohibiting the issuing of a receipt, but contextually the clause refers to the receipt or holding of money. It would not prohibit the issuing of a receipt, such as a receipt for fuel purchased at a service station. I think the member was seeking clarification, because we are starting to dig deeper here, and he was asking whether that word would be extended to that.

**Hon NICK GOIRAN**: That is quite right, but the question still arises: why would we want to have a regulation that prohibited the receiving of moneys to be held on behalf of a barrister in advance of the barrister undertaking legal services? I am trying to understand the circumstance in which we would ever want to prohibit that. After all, is it not a good thing if a solicitor takes on a client, briefs a barrister, and receives the money that will be held on account of the fees of the barrister? I would think we would want to encourage that rather than look to prohibit it. Is there a reason the government decided to expressly provide for this type of regulation-making power?

**Hon MATTHEW SWINBOURN**: Section 133 of the Uniform Law provides this power, and we are seeking to be consistent with those provisions. I am advised that we have no intention to make a regulation prohibiting the receiving of moneys for barristers. Obviously, because of the Uniform Law provisions, we do not want our application bill to take away the ability of this or future governments to do that if it is deemed desirable or necessary for any reason. There has been ongoing consultation with the Legal Practice Board and the WA Bar Association, so this will not spring out at them without their awareness.

**Hon NICK GOIRAN**: I will just make this observation. It is curious that in large bills such as this, we include provisions that are not consistent with the current practice of our state, that the government of the day has no intention of using, and that no example can be provided of why it would ever be necessary. There is no reason that this clause could not have simply said that the local regulations may include provisions regulating or otherwise providing for the receipt or holding of money by or on behalf of a barrister on account of the legal costs in advance of the provision by the barrister of legal services. The choice has been made not to have such a provision, and to expressly provide for regulation-making powers to prohibit that, but no case can be made for why we would possibly need to do that. I find that odd. I would not even call it a belt-and-braces approach by the decision-makers on this matter. I do not think that anyone has specifically turned their mind to this, because I cannot contemplate a scenario in which we would want to do that. If it is to be the case that the drafting conventions from now on are to cover every single possible permutation known to man, bills are going to get larger and larger. I am comforted, at the very least, that the government has indicated that it has no intention to use this local regulation-making power to prohibit that, and I cannot see a case where any government would want to do that.

**Clause put and passed.**

**Clause 130 put and passed.**

**Clause 131: Term used: court —**

**Hon NICK GOIRAN**: We now move to part 6 of the bill dealing with legal costs. The legal costs provision of the bill is split in two, between legal costs determinations made by the Legal Costs Committee that we discussed earlier and costs assessments, which I think was formerly known as the process of taxation of costs. To any substantial or material extent, will there be any change to the way in which the Legal Costs Committee will make legal costs determinations? We can deal with divisions 1 and 2 as a package. Is it contemplated that there will be some uniformity in the costs determinations across the jurisdictions? Equally, are any material changes intended to costs assessments here? If we look at costs assessments in division 2, clause 146(a) is materially different from the earlier version of

the bill. Can the parliamentary secretary provide some clarification of the extent to which the legal costs regime will change as a result of our embracing of the uniform law?

**Hon MATTHEW SWINBOURN**: Hon Nick Goiran asked whether some uniformity of costs determinations across jurisdictions had been contemplated. I took that to mean —

**Hon Nick Goiran**: I am just wondering whether your colleagues are as interested as us in the passage of this bill.

**Hon MATTHEW SWINBOURN**: I am sure everyone is fascinated by our constant speaking about the legal profession.

A member: Riveting!

**Hon Nick Goiran**: There is expected to be 12 people in the chamber at all times.

**Hon MATTHEW SWINBOURN**: Okay. I think the member was getting at whether a set of precedents will apply across Victoria, New South Wales and WA. I am advised that that will probably not be the case. The advisers are not sure whether, as a matter of principle, regard is had to New South Wales, Victoria or other jurisdictions in determining costs, but the system that will apply is the one that is in place now. The principles that apply in that regard and have developed here will continue to be the ones that will apply in the future. There is a change to the publishing of costs determinations. The Chair of Committees is probably not going to like this, but the current requirement to publish outcomes in newspapers will be removed and they will only need to be published on a website. We know how the Chair of Committees feels about websites! Thankfully, he is in a position in which he cannot pass comment.

Hon Nick Goiran also asked about clause 146. The amendment to clause 146, being the new clause 146(a), requires the costs assessor to include in the certificate the amount of costs determined, including any GST component the costs assessor determines is payable, which will enable the enforcement of the actual costs assessment itself. Under clause 149(1), such a certificate —

> … may be enforced against any person liable to pay as if it were a judgment of the Supreme Court for the payment of the amount specified in the certificate.

The amendment to clause 146(b), although the member did not ask about that, removes an extraneous "the" from the clause.

I have a little extra to add about clause 150, because we are talking about both divisions. Clause 150 of the bill was not included in the 2020 bill; however, it was inserted in the 2021 bill to clarify the recovery of costs for clients and lawyers. In some cases, a person will have paid legal costs before a costs assessment is undertaken. If the amount of the costs assessed on a costs assessment is less than the amount they have paid, the person will be entitled to receive the excess amount back. Clause 150 provides that in such circumstances, the person may recover the excess amount in a court of competent jurisdiction as a debt due to the person. This provision is akin, in substance, to section 70(4) of the New South Wales Legal Profession Uniform Law Application Act 2014, which provides —

> In the case of an amount of money specified in a certificate that has been paid, the amount (if any) by which the amount paid exceeds the amount specified in the certificate may be recovered as a debt in a court of competent jurisdiction.

**Clause put and passed.**

**Clauses 132 to 141 put and passed.**

**Clause 142: Law practice to disclose whether costs determination applies to calculating costs under Uniform Law s. 174 —**

**Hon NICK GOIRAN**: Clause 142 states —

> When a law practice provides a client with information under the *Legal Profession Uniform Law (WA)* section 174(1)(a), the law practice must provide the client with information about whether the legal costs are subject to a costs determination.

I again draw to the attention of the parliamentary secretary the Legal Services Council consultation paper of January 2020, which we have previously discussed, and in particular recommendation 17. Recommendation 17 deals with this clause of the uniform law on the disclosure obligations of law practices to clients. Without going into the dissertation of the council, I just draw to the parliamentary secretary's attention recommendation 17, which states —

> Expand the disclosure obligations in subs 174(2) to include the right to apply for a costs assessment; as well as disclosure obligations of law practices that relate to costs and are provided for in the *Legal Profession Uniform Law Application Act* of the relevant jurisdiction and the Uniform Law.

Is recommendation 17 captured by this clause; and, if not, is it captured by the bill in any way?

**Hon MATTHEW SWINBOURN**: I am told that this clause picks up on section 260 of the Legal Profession Act, which provides —

> (1) A law practice must disclose to a client in accordance with this Division —
>
> (a) the basis on which legal costs will be calculated, including whether a costs determination applies to any of the legal costs;

That is just the background. The answer to the member's specific questions about whether this clause or bill will pick up recommendation 17 is no. If recommendation 17 is adopted, that process will still be in train through the Legal Services Council's recommendations, the standing committee and, subsequently, any drafting that the Victorians do.

**Hon NICK GOIRAN**: It seems that this clause, I think at best, partly implements recommendation 17—at least the second part of that recommendation, which refers to expanding disclosure obligations. That is certainly what clause 142 will do—it will expand the disclosure obligations. It addresses that second part—that is, to expand the disclosure obligations of law practices relating to costs, which are provided for in the Legal Profession Uniform Law Application Act of the relevant jurisdiction and the uniform law.

It is a bit like asking—I do not know—whether it is the chicken or the egg that comes first. It seems as though there will be no need for it. The Victorian provision will have no particular relevance to us because our application act will provide that a law practice must provide information to a client. The Victorian amendment that a practitioner must also disclose what is in the application act of the relevant jurisdiction is a bit pointless because our application act will already say that. Nevertheless, it is the first part that I seek clarification on.

Is it not the case in Western Australia at the moment that practitioners must inform their clients—in other words, they must disclose to their clients—that they have a right to apply for a costs assessment? I understood that that was already the case. It is certainly my recollection that when a practitioner issues an invoice, they must advise their client that they can have an itemisation—if it is a lump sum account—within 30 days of receiving the lump sum account, and that upon receiving an itemised account, they can apply for a taxation of costs, or what is now referred to as a costs assessment, within that further 30-day period. It is my understanding that that is already the law of Western Australia. Is that law being retained in some fashion by this bill, because it would seem that recommendation 17 of the Legal Services Council is making sure that that will be the case?

**Hon MATTHEW SWINBOURN**: I am trying to cover this off. Hon Nick Goiran's first proposition was about the obligations under the existing arrangements to disclose certain things to a client in relation to costs. I take him back to section 260(1), which states —

> A law practice must disclose to a client in accordance with this Division —
>
> …
>
> (i) the following avenues that are open to the client in the event of a dispute in relation to legal costs —
>
> (i) costs assessment under Division 8;
>
> (ii) the setting aside of a costs agreement under section 288;
>
> (iii) making a complaint under Part 13;

**Hon Nick Goiran** interjected.

**Hon MATTHEW SWINBOURN**: These are the current obligations. Hon Nick Goiran's memory serves him correctly. I am sure that he signed off on a lot of these in the past. I must admit that I never had to worry about costs in my practice because I worked for a union and it absorbed any costs in that regard, but the provision exists.

However, there is a change to the current arrangements under the new uniform law. I take the member to division 3, "Costs disclosure", and section 174(2), which states —

> (2) Additional information to be provided Information provided under —
>
> (a) subsection (1)(a) must include information about the client's rights —
>
> (i) to negotiate a costs agreement with the law practice; and

**Hon Nick Goiran** interjected.

**Hon MATTHEW SWINBOURN**: That is right; to the uniform law —

> (ii) to negotiate the billing method (for example, by reference to timing or task); and
>
> (iii) to receive a bill from the law practice and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised;

I think the key here is paragraph (iv) —

(iv) to seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs; or

That will be the Legal Practice Board; whereas, no such requirement exists under the current provisions to make that reference. When the Legal Practice Board cannot deal with that dispute, there are provisions under the uniform law at section 291, titled "General role of local regulatory authority in cost disputes", which states —

(2) If a complaint contains a costs dispute that cannot be dealt with under subsection (1) —

Subsection (1) deals with limits —

the designated local regulatory authority is not to deal with or continue to deal with the dispute, but is to inform the parties of the right to apply for a costs assessment or to make an application under jurisdictional legislation for the matter to be determined.

There are some changes to those disclosure requirements and also the process that is followed if people go into dispute.

**Hon NICK GOIRAN**: That is helpful. I want to clarify at this point: when this passes, the Victorian amendments, as we are loosely referring to them, most likely will not have passed, so we cannot rely on that. There is going to be a window of time, potentially, in which a Western Australian client will still be entitled to an itemised account I gather from your reading of the uniform law. But if they wanted to go beyond an itemised account and have what will be considered a costs assessment, they will continue to be able to have a costs assessment, presumably, because of the parts that we are about to move to momentarily under "Division 2 — Costs assessments". However, the obligation on the law firm to disclose or notify to the client that the client has a right to a costs assessment will not be mandated for a period of time. To some extent, it appears that there will be a dilution of the information that will be provided to clients in Western Australia until recommendation 17 of the Legal Services Council is given effect, which would then return the existing right for a client to be provided, by way of disclosure, information about their right to apply for a costs assessment.

**Hon MATTHEW SWINBOURN**: I think what the member has described is a fair assessment of what will effectively happen.

**Hon NICK GOIRAN**: I make this observation: I do not think that is satisfactory. I do not think that people are aware that we will pass a clause that will reduce the amount of information that will be provided to clients. I doubt very much whether any legal practice in Western Australia will be devastated by this news, because costs assessments are a major pain in the backside for legal firms and legal practitioners to deal with. They can be very onerous exercises, particularly for longstanding, contentious matters. I doubt whether any law practice will be deeply disturbed that for a time they will not need to wave in front of their client information to say, "Guess what? You can take me for a taxation of costs if you are not happy with my itemised account." But they are not the only stakeholders we need to be mindful of. Certainly, those of us who do practise or have practised in this profession might have an interest or a bias one way or another, but I know that the exceptionally large majority of legal practitioners in Western Australia are interested in serving the best interests of their clients. I am not sure whether we are doing them a service right now because legal practices have been required for decades to disclose a client's rights and suddenly we will take that away.

I am somewhat comforted that this has been picked up by the Legal Services Council, but there is no indicative time frame for when this will be remedied. My dream scenario, and probably the parliamentary secretary's, is that we get this bill done today. But if that does not happen, depending on what progress we can make today, I ask the Attorney General and his staff to consider this matter over the relatively short recess of a few days before we come back to this bill, potentially next week, because there will be an opportunity then for us to fix that. I cannot see any good reason why we would want to dilute those rights of clients of Western Australian law firms. I doubt that is the policy intent of the government or anybody. That seems like an easy fix rather than having to wait for the Victorians to do our work for us.

**Clause put and passed.**

**Clause 143 put and passed.**

**Clause 144: Requirements for applications for costs assessment: Uniform Law s. 198 —**

**Hon NICK GOIRAN**: Clause 144 is in the same vein as the issue we were looking at in clause 142. Some pertinent recommendations arise from the Legal Services Council. I draw the parliamentary secretary's attention to the recommendations that apply. Maybe he can indicate whether those recommendations are captured in any way by the bill that is before us; and, if not, whether this is another example when the existing law of Western Australia will provide for this and that there may be a gap that will emerge until such time as these recommendations are picked up. The Legal Services Council consultation paper from January 2020 has three relevant recommendations. Recommendation 18 states —

Amend subs 198(1) to add beneficiaries of deceased estates or potential beneficiaries arising from intestacy.

That is talking about these beneficiaries or potential beneficiaries being able to make an application for a costs assessment. The council is saying that we should include them in these provisions. Just to reiterate my question: is that the case at the moment in Western Australia? Can beneficiaries and potential beneficiaries apply for a costs assessment at the moment; and, if so, is that captured by this bill? If not, again, is that something that the parliamentary secretary is willing to take up with the Attorney General to see if we cannot fix that up between now and next week? Recommendation 19 states —

> Amend subs 198(3) to stop time running for an application by a law practice for an assessment of costs while a complaint about those costs is being dealt with …

That seems to touch on the point made by the parliamentary secretary earlier that, at the moment, once this law comes into effect, a client will first need to ask for an itemised account. Thereafter, they would need to go to the relevant regulatory body, which in this case is the Legal Practice Board, to seek assistance to resolve this type of dispute. In the event that the regulatory body cannot assist for whatever reason, they will have to draw to people's attention the costs assessment process. But what they are talking about here is actually stopping time running for an application of a costs assessment by a law practice while a particular complaint process is underway. It is not my recollection that that provision exists in Western Australian law at the moment. Perhaps the parliamentary secretary can check if that is the case. If it is not a provision that exists at the moment—in other words, it is not what I would describe as a right of a law practice or a benefit for a law practice to be able to have time stopped—then I am not concerned about that. All I seek here is confirmation that no gaps will emerge when we have these existing rights, whether for clients or lawyers in Western Australia, which, for a period, of time will disappear. The third and final recommendation is recommendation 20, which states —

> Include law practices in subs 198(4) as a party entitled to apply for a costs assessment out of time.

Perhaps the parliamentary secretary can again give an indication whether it is the law of Western Australia at the moment that a law practice can apply for a costs assessment out of time?

**Hon MATTHEW SWINBOURN**: The member asked quite a lot, and we are trying to get as comprehensive an answer as possible. All three of us at the table are at a disadvantage; we have never engaged in any billing or costs determinations because it is not the nature of the practice that we have been engaged in.

**Hon Nick Goiran**: You will be pleased to know that my first real job in law was as a costs clerk.

**Hon MATTHEW SWINBOURN**: Really? I am not sure I am pleased to hear that! Let us deal with recommendation 8. Section 295 of the Legal Profession Act deals generally with clients or third party payers for costs assessment. Those definitions do not include those beneficiaries whom the member identified, but we will qualify that to say that we do not know whether some common law case law will extend that to them so that there is a limit. From a statutory point of view, there is no gap, because there is no current right under these provisions for them to do that; but, as I say, I do not know whether that comes under common law. As a former costs clerk, the member will know that those things can go back many, many years.

**Hon Nick Goiran**: I think it is the person who ultimately has to pay the bill who has the right, and the beneficiary doesn't pay the bill.

**Hon MATTHEW SWINBOURN**: No. I take the member to section 297 and to recommendation 19, which relates to stopping time running for the assessment of costs while the applicant process is underway for a legal practice. Sorry, I am getting ahead of myself. I am dealing with recommendation 20.

I refer to recommendation 19, which dealt with stopping time from running. Because there is no current process in place, there are no provisions that relate to that, so there is no gap. In effect, we are introducing a new arrangement that will come into play. That will not affect the current arrangements.

Regarding recommendation 20, we cannot be absolutely certain about whether there is a gap, but section 297 deals with applications for costs. This is under the current Legal Profession Act 2008. There is no provision under section 297 that provides for what recommendation 20 sets out, which is giving a law practice the right to apply for a costs assessment out of time. That provision does not deal with the time limit, therefore, as I said, we cannot be certain that there is not a gap. But from the point of view of what the current law provides, it is not something in which there is an explicit right to do that or not to do that.

**Hon NICK GOIRAN**: In terms of those matters that I am asking the Attorney General to potentially consider over a potential break that might emerge, can I indicate then that on the basis of the information that has just been provided and with no new information emerging, I am happy to leave all those recommendations to be dealt with in due course by the Victorian amendment process. I reiterate the point that I made with regard to recommendation 17, in which it appears that there is a gap and ask for that to be considered.

**Clause put and passed.**

**Clauses 145 to 149 put and passed.**

**Clause 150: Recovery of amounts paid as legal costs above costs assessments —**

**Hon NICK GOIRAN**: The parliamentary secretary indicated earlier and provided an explanation about why clause 150 is now in this bill but was not in the 2020 bill. That said, this business about an excess amount—that is, costs that have been paid over and above a costs assessment, which once this bill passes will be able to be recovered as a debt due in a court of competent jurisdiction—how are such moneys currently recovered?

**Hon MATTHEW SWINBOURN**: I am told that the current amount would still be recoverable as a debt, but it would be as a breach of contract. It would be that a contractual debt has arisen, so one might have to then prove all the elements of the contract rather than now, which would simply be an action in debt when one just has to prove the amount that they say is owing. I think that is a simplification of that process.

**Clause put and passed.**

Clause 151 put and passed.

**Clause 152: Terms used —**

**Hon NICK GOIRAN**: We now move to part 7 of the bill, "Professional indemnity insurance". Western Australia already has a professional indemnity insurance scheme. Can the parliamentary secretary confirm whether there is any clause or provision in part 7—which runs from clause 152 all the way to clause 191—that would materially change the existing arrangements for the compulsory professional indemnity insurance scheme in our state?

**Hon MATTHEW SWINBOURN**: The provisions in the bill relating to professional indemnity insurance are substantially the same as in part 11 of the Legal Profession Act 2008 and part 9 of the Legal Profession Regulations 2009. The bill seeks to modify the Legal Profession Uniform Law to achieve this end. However, the following provisions are substantively new provisions. In division 1, "Preliminary", clauses 153 and 154 have been inserted to enable the Attorney General to approve an insurance policy as an approved insurance policy notwithstanding that the insurance does not meet the requirements of the Legal Profession Uniform Law.

In division 2, "Insurance and insurance policies", clause 156 provides —

> For the purposes of the *Competition and Consumer Act 2010* (Commonwealth) section 51(1)(b), the Law Society is authorised to enter into a PII arrangement under this Act.

This clause makes it clear that the Law Society's entry into a PII arrangement is to be disregarded in deciding whether a person has contravened part IV, "Restrictive Trade Practices", of the Competition and Consumer Act 2010. I think we probably both know that Law Mutual (WA) has a bit of a monopoly on professional indemnity insurance in this state. I add that in a previous practice—this is completely unrelated to this bill—I was required to get insurance through another insurer, because Law Mutual would not insure me as I was a low-fee earner when working with the union. As I say, it is a complete aside, just as Hon Nick Goiran was—what did he say?—a legal costs clerk. We have to spice this debate up a bit for the other members in the chamber by personalising it a bit!

Division 3, "Exemptions from obtaining professional indemnity insurance under the Legal Profession Uniform Law (WA)", also contains some substantive new provisions. Clause 171, "Modification of uniform law", is a new provision. Clause 172 seeks to modify section 215 of the Legal Profession Uniform Law to preserve the current situation so that law practices that are based primarily in Western Australia will remain part of the Western Australian insurance arrangement and are not able to obtain the benefit of the exemptions in the Legal Professional Uniform Law. The rationale is that if a significant number of Western Australian practices with interstate offices were to leave the professional indemnity insurance arrangement in favour of insurers based in New South Wales and Victoria, it might result in significantly increased costs for the remaining practices and ultimately threaten the viability of the professional indemnity insurance arrangements themselves.

I guess that point goes to the possibility that the economies of scale that we currently have in Western Australia might be significantly reduced by practices fleeing to those other jurisdictions to get their indemnity insurance, therefore raising the costs for those of us who have to stay within the Western Australian jurisdiction. As I say, that only applies to those firms whose practices are primarily based in Western Australia. Obviously, a firm that has its main office and most of its practitioners in New South Wales and has a satellite office in Perth will not be covered by that, but a Perth-based firm, of which there are many, that establishes a satellite office in New South Wales or Victoria cannot then use the provisions to escape our local professional indemnity insurance arrangements.

**Hon Nick Goiran** interjected.

**Hon MATTHEW SWINBOURN**: I can imagine that, too.

Clause 173 modifies section 216 of the uniform law to reflect the modifications to section 215 of the uniform law. Clause 174 applications for exemption to the requirements to hold professional indemnity insurance are now to be

made to the Legal Practice Board, not to Law Mutual. The board is expected to maintain the current exemptions contained in the Legal Profession Regulations 2009. Clause 175 is a new clause. It allows for practitioners who are, as a matter of law under the uniform law, exempt from the requirement to obtain professional indemnity insurance, to obtain a certificate of exemption. Such a certificate is then evidence in the absence of evidence to the contrary that the practitioner has a relevant exemption.

Under division 4, "Law Mutual (WA) and Law Mutual Fund", clause 180 is, in part, new insofar as it expressly provides for how the Law Society may apply the money in the Law Mutual fund with the provisions insofar as it relates to surplus funds substantially the same as the current provisions in the Legal Profession Regulations—that is, regulation 86. Clause 181 is new and provides that the Law Society must ensure that the Law Mutual fund is audited in each financial year by a registered company auditor. Clause 182 is new, and provides that local regulations may make provision for, or in relation to, the winding-up of the Law Mutual fund. This provision was inserted at the request of the Law Society, I am told.

Finally, under division 5, "PII management committee", clause 185 deals with the membership of the Professional Indemnity Insurance Management Committee and is substantially the same as section 331(2) of the Legal Profession Act, as it was proposed to be amended by the Legal Profession Amendment (Professional Indemnity Insurance Management Committee) Bill 2018. That bill would have enabled more than seven members on the committee and deleted the requirement that at least four members be members of the Law Society council. Finally, clause 161 provides for local regulations to provide for approval of the PII schemes. Such schemes are intended to be ancillary to the Law Mutual arrangements and capture practitioners who cannot otherwise claim professional indemnity insurance through Law Mutual, which was the example I had given when I was in-house counsel for a trade union.

**Hon NICK GOIRAN**: We are dealing with this part as a package. One clause the parliamentary secretary raised as a new provision is clause 181, "Audit of Law Mutual Fund". Is it the case that the Law Mutual fund is not currently being audited each financial year?

**Hon MATTHEW SWINBOURN**: The advisers at the table are 99.9 per cent sure that it is being audited, but we are seeking clarification that that is, in fact, the case. It would seem very odd if it were not. I think the key point here is that there is no statutory obligation for it to be audited, as opposed to good practices and whether or not there might be other requirements under other legislation—for example, commonwealth legislation—that requires entities such as Law Mutual to be audited, and things of that kind. If it is super-critical for the member to get an answer —

**Hon Nick Goiran** interjected.

**Hon MATTHEW SWINBOURN**: Yes.

**Clause put and passed.**

**Clauses 153 to 164 put and passed.**

**Clause 165: Appeal against review of annual contribution assessment —**

**Hon NICK GOIRAN**: During debate on clause 1, the parliamentary secretary identified clause 165 in a list of prospective Henry VIII clauses, as requested by recommendation 5 of the Standing Committee on Uniform Legislation and Statutes Review. Clause 165 does not appear to be a Henry VIII clause. As I indicated earlier, the parliamentary secretary specified that the list of clauses he was providing were not necessarily Henry VIII clauses, but, rather, regulation-making powers. Clause 165(6) indicates —

> The local regulations may make provision for how a person, including the nominated person, may recover the costs of an appeal under subsection (1).

Earlier in debate on a different part, we dealt with the concept of somebody recovering the excess amount they had paid after a costs assessment in a court of competent jurisdiction as a debt due. Why are we not providing for the same thing here in lieu of clause 165(6)?

**Hon MATTHEW SWINBOURN**: I think it really comes back to the lack of certainty over the amount. Under the other provisions, the amount would be certain because the assessment of costs would have been done and an amount would have been paid in excess; whereas in this instance, there is obviously a process in place—that is, reviewing the contribution assessment and, through the course of that, costs being incurred as a consequence of engaging in that process. The regulations will make provisions for who might bear those costs, what proportion of costs might go to one party over another and, obviously, how those costs might be determined. They could include, for example, legal costs and those matters. It was really the issue of certainty rather than, in the other circumstance, when an amount has already been paid in excess, because the quantum of that amount is certain.

**Clause put and passed.**

**Clauses 166 to 191 put and passed.**

**Clause 192: Term used: claim —**

**Hon NICK GOIRAN**: We now move to part 8 of the bill, which deals with fidelity cover. Two questions emerge here. First, the general question is about any substantive changes to the law of our state that might be effected by clauses 192 to 201, which comprise part 8 of the bill. In addition, could the parliamentary secretary take the opportunity to deal with a specific question about clause 194, "Payments out of Guarantee Fund"? It also refers to the payment of any costs of an external investigation. Apart from providing to the chamber information about any substantive changes to the law of Western Australia on fidelity cover as set out in part 8 of the bill, could he also give an indication of how external investigations are currently covered by the legal contribution trust?

**Hon MATTHEW SWINBOURN**: I refer to the material changes under part A in relation to fidelity cover, and the order of the accounts of the Legal Contribution Trust. Under section 232 of the Legal Profession Uniform Law, the fidelity authority—that is, the Legal Contribution Trust—must cause the accounts relating to the fidelity fund to be audited annually and must forward a copy of the audit report to the designated local regulatory authority—that is, the Legal Practice Board. As per clause 198 of the bill, an audit required under section 232 of the Legal Profession Uniform Law must be carried out by accountants approved by the Attorney General and a copy of the report must be given to the Attorney General and the Law Society of Western Australia. These differ slightly from the current audit requirements under section 390 of the Legal Profession Act, which requires the trust to report twice a year.

In relation to the time limit for making claims, section 352(1) of the Legal Profession Act provides —

> (1) Subject to section 354, a claim does not lie against the Guarantee Fund unless the prospective claimant notifies the Trust of the default concerned —
>
> (a) within the period of 6 months after the prospective claimant becomes aware of the default; or
>
> (b) within a further period allowed by the Trust; or
>
> (c) if, on an application for review of the Trust's decision, the State Administrative Tribunal allows a further time after the Trust refuses to do so—within a period allowed by the Tribunal.

Section 236 of the Legal Profession Uniform Law provides similarly that —

> Subject to subsection (2), a claim does not lie against the fidelity fund unless the prospective claimant notifies the fidelity authority of the default concerned within —
>
> (a) the period of 6 months after the prospective claimant becomes aware of the default; or
>
> (b) a further period allowed fidelity authority; or —

This is where the difference lies —

> (c) a further period allowed by the Supreme Court of the jurisdiction, and not the State Administrative Tribunal, to which the fidelity authority belongs where the authority refuses to allow a further period under paragraph (b).

Obviously, the difference is in the change of jurisdiction making that appeal.

I turn to caps on payments for claims. Section 371 of the Legal Profession Act provides that the legal contribution trust may, with the approval of the minister, fix either or both of the following —

> (a) the maximum amounts, or the method of calculating maximum amounts, that may be paid from the Guarantee Fund in respect of individual claims or classes of individual claims;
>
> (b) the maximum aggregate amount, or the method of calculating the maximum aggregate amount, that may be paid from the Guarantee Fund in respect of all claims made in relation to individual law practices or classes of law practices.

However, under section 231 of the Legal Profession Uniform Law, the local regulations may fix either or both of the following —

> (a) the maximum amounts or the method of calculating the maximum amounts that may be paid from the fidelity fund in respect of individual claims or classes of individual claims;
>
> (b) the maximum aggregate amount or the method of calculating the maximum aggregate amount that may be paid from the fidelity fund in respect of all claims made in relation to individual law practices or classes of law practice.

I will hopefully get an answer for the member on his last point.

**Committee interrupted, pursuant to standing orders.**

[Continued on page 1059.]