LEGAL PROFESSION UNIFORM LAW APPLICATION BILL 2021
LEGAL PROFESSION UNIFORM LAW APPLICATION (LEVY) BILL 2021

Cognate Debate

Leave granted for the Legal Profession Uniform Law Application Bill 2021 and the Legal Profession Uniform Law Application (Levy) Bill 2021 to be considered cognately, and for the Legal Profession Uniform Law Application Bill 2021 to be the principal bill.

Second Reading — Cognate Debate

Resumed from 23 June.

The ACTING SPEAKER (Mrs L.A. Munday): Leader of the Opposition.

Mr R.H. Cook: Democracy is running smoothly tonight, isn't it!

MS M.J. DAVIES (Central Wheatbelt — Leader of the Opposition) [7.32 pm]: Thank you. It is going well, is it not?

The ACTING SPEAKER: If you are looking for leadership from me, I am sorry!

Ms M.J. DAVIES: It is going well!

I rise on behalf of the opposition, I note, again, that the shadow Attorney General for the WA National Party and Liberal Party alliance is in the Legislative Council. The Attorney General made some comments earlier about these bills and how interesting and exciting it will be for those watching at home. I am sure there is some interest and excitement, Attorney General.

Ms M.M. Quirk: Those that aren't into synchronised swimming, I suspect, member.

Ms M.J. DAVIES: I will get myself into a world of trouble if I make a comment on that, so we will focus on the task at hand!

My understanding is that this legislation has already been in our house during the previous term of this government. Essentially, we are joining with New South Wales and Victoria to ensure that we have equivalent legislation. This is a uniform law scheme for the regulation of the legal profession in Australia and is the subject of an intergovernmental agreement between Victoria, New South Wales and Western Australia. Other Australian jurisdictions may join the scheme. I wonder whether it becomes national once we join? Is there a threshold, Attorney General, if we get over two states, we can claim it as being national? Specifically, the bill will seek to apply the legal profession uniform law as a law of Western Australia and to provide for the tabling and disallowance of amendments made to that law. The bill will enact provisions to regulate legal practice, which have local application in WA, and repeal the Legal Profession Act 2008 and the Law Society Public Purposes Trust Act 1984. The bill will also seek to make savings, transitional and consequential amendments.

The bill was first introduced in the fortieth Parliament. This bill is almost identical to the first bill; it just failed to progress through the fortieth Parliament. From a timing perspective, it should be noted that the Legal Profession Uniform Law Application Bill 2020 and the Legal Profession Uniform Law Application (Levy) Bill 2020 were read for a third time in the Legislative Assembly on 16 June 2020. The bills were referred to the Standing Committee on Uniform Legislation and Statutes Review, which reported back to the Legislative Council on 15 September 2020. Notably, the report of the Standing Committee on Uniform Legislation and Statutes Review made 24 findings and 13 recommendations. As far as we can see, none of these findings or recommendations have been adopted by the government and an explanation has not been provided as to why.

A comparison between the two sets of bills has been provided—the ones introduced in the fortieth Parliament and the ones that we are dealing with now. There are some fairly minor changes, as I understand it, Attorney General. From an opposition perspective, we would like to understand how the recommendations and findings of the Standing Committee on Uniform Legislation and Statutes Review were incorporated, ignored or found not to be needed. Certainly, the opposition will support the bills, but the interest that we have is around the 129th report of the Standing Committee on Uniform Legislation and Statutes Review, those 13 recommendations and why we do not see them reflected here. If they are, I am happy to be dissuaded of that position. I will sit and let the Attorney General get on with it. That is really all we are looking for in this. The government has the opposition's support, notwithstanding an explanation on that front.

MR S.A. MILLMAN (Mount Lawley — Parliamentary Secretary) [7.36 pm]: I rise to make a brief contribution in support of this excellent legislation: the Legal Profession Uniform Law Application Bill 2021 and Legal Profession Uniform Law Application (Levy) Bill 2021. I have previously spoken on this legislation, back on 16 June 2020 when it was originally introduced into the fortieth Parliament. I do not propose to reprise what I said at that time. I thank the Leader of the Opposition for her contribution to the debate and for indicating that the opposition will support this legislation.

The reason I rise to contribute to the debate on the Legal Profession Uniform Law Application Bill 2021, heard cognately with the Legal Profession Uniform Law Application (Levy) Bill 2021, and I do not propose to take too long, is that in my community of Mount Lawley we have an incredibly auspicious occasion to celebrate. It turns out that last week, one of our members, a constituent of the electorate of Mount Lawley, was appointed to the high office of Justice of the Supreme Court. I rise to put my congratulations on the record to Marcus Solomon, SC, or the Honourable Mr Justice Solomon now, who is a shining light in the community of Mount Lawley. Marcus is a rabbi of the Jewish community at the Dianella Shule in this state seat of Mount Lawley, and he continues the fantastic tradition amongst the Jewish community of Perth by contributing to the practice of the legal profession. Therefore, I thought: what better opportunity than as we debate this Legal Profession Uniform Law Application Bill to put on the record my congratulations to Mr Solomon? I am sure that the Attorney General will provide a brief ministerial statement to this house, in due course, about the appointment of Mr Solomon, but I want to make the point that, as I say, Rabbi Solomon continues a fine tradition amongst Jewish legal practitioners in Western Australia.

In an article published by the ABC, he made the note that one of the first Jewish Supreme Court judges in Western Australia was Albert Wolff, who was appointed in 1938, which is precisely the time that the Nazis were ruling Germany and persecuting Jewish people in Europe. How blessed are we to live in a society like Western Australia where somebody like Albert Wolff could be appointed as a judge of the Supreme Court. I note that Albert Wolff's contribution to the legal profession in Western Australia has been recognised by the naming of Albert Wolff Chambers, on Barrack Street, in his honour. I acknowledge both Mark Trowell, QC, and Tom Percy, QC, head of chambers at Albert Wolff Chambers, and I acknowledge all the outstanding barristers currently practising at Albert Wolff Chambers. Whilst he was a pre-eminent jurist from the Jewish community, he was by no means the last significant contributor from that community. I refer in this point, of course, to Joe Berinson of blessed memory.

Joe Berinson ran for the state seat of Mount Lawley in the 1950s and campaigned solidly, but was unable to succeed in his pursuit for elected office as a member of the state Parliament. He directed his attentions to federal Parliament and was elected as the first Labor member for the federal seat of Perth. He was Minister for the Environment in the Whitlam government. Unfortunately, tragically and sadly, Mr Berinson passed away during the last term of the McGowan government, and a number of members of the Legislative Council spoke to a condolence motion that was held in the Legislative Council to honour the memory of Joe Berinson. After serving his term as the member for Perth, he returned to WA politics and was a member of the Legislative Council and a Labor Attorney General for the state of Western Australia.

I invoke Joe Berinson because he was one of the founders of Carmel School, which is in my electorate and is a Jewish day school. It is that link with Carmel School that brings us to Marcus Solomon, QC, because Marcus is currently the governor at Carmel School; a role that he has carried out with aplomb. He has served the community at Carmel School incredibly well for many, many years, going all the way back to 1985 when he started as a teacher in Jewish studies. His experience as an educator in the Jewish community is renowned, and his contribution to education is exactly the same as that of Mr Berinson. He has put such a focus on education because he sees it as such an important part of society and knows that an important contribution can be made. I know from my conversations with the people at Carmel School that they are incredibly proud of the appointment of Marcus Solomon from their community as a new Justice of the Supreme Court. Debbie Silbert, who has just finished her term as president of the Carmel School board, is incredibly proud of the fact that Marcus Solomon has been appointed, as is Mark Majzner, who now succeeds Debbie Silbert as the new president of the Carmel School board. Mark represents the first of a new generation of leaders at Carmel School. He was educated at Carmel School. I see the Minister for Health nodding. Mr Majzner accompanied the Minister for Health and me on a trip to Israel a couple of years ago to look at investment in medical research and how to get that. Mr Majzner's contribution to the greater good continues with his participation at Carmel School.

I come now to Marcus Solomon, a QC who has contributed greatly to our community. He is the latest of a number of outstanding appointments that this Attorney General has made to the Supreme Court. I speak here of course of Chief Justice Peter Quinlan, His Honour Justice Vaughan, Her Honour Justice Archer, Justice Derrick, Her Honour Justice Smith, Justice Hill and Justice Strk. These appointments have really invigorated the Supreme Court as the arbiters of justice in this state. I think that each of those appointments speaks volumes to the calibre of person who this Attorney General, this McGowan Labor government and the cabinet of the McGowan Labor government looks to in making appointments to the Supreme Court.

The Jewish community more broadly has also welcomed the appointment. Steve Lieblich is quoted in an article on the ABC website. Steve Lieblich, for those who do not know, is the director of public affairs for the Jewish Community Council of Western Australia. In the article he says —

> … it was a special moment in history.
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> "We're proud that a member of our community can contribute to the community in this way," he said.
>
> "It's an important senior role in our society and that's a source of pride."
>
> …

> "The freedoms that we enjoy and the cohesiveness of the society is something that is second to none," Mr Lieblich said.

I think that sentiment expressed by Mr Lieblich about the community coming together is, as I said earlier today, something that was reflected in the way the Western Australian community responded to the COVID pandemic. I think that when we talk about cohesion in society, we need to put to one side those people who would seek to strike that down, those ideological vandals, the racists, the fundamentalists and the no-mask-wearing protesters who are causing all sorts of grief and havoc in Sydney and so forth, and say that the vast majority of the Australian population see people like Rabbi Marcus Solomon as a great exposition of Australian values, Australian freedom and Australian democracy. His appointment is not just a testament to the community of Mount Lawley and the calibre of the legal profession amongst people in Mount Lawley, but it also speaks volumes to the calibre of the legal profession in Western Australia generally.

I seek, Acting Speaker, to put on the record my incredible sense of pride in Mr Solomon's appointment and my congratulations to him and my gratitude to the Attorney General for selecting such an eminent person to represent the community on the Supreme Court of Western Australia. With those comments, I commend the bills to the house.

MR D.A.E. SCAIFE (Cockburn) [7.45 pm]: I am very pleased today to rise to speak on the Legal Profession Uniform Law Application Bill 2021 and the Legal Profession Uniform Law Application (Levy) Bill 2021. I believe the Attorney General in previous debate said that people would be hanging from the rafters for the debate on these bills. I intend to have people on the edge of their seat. Choose your analogy! This is certainly, I think as the Leader of the Opposition said, the sort of stuff that can keep us all awake at night. As I said in my first speech, I am, unfortunately, yet another lawyer who has stumbled into this place. Unfortunately, today I am called upon in that capacity to make a contribution. I would like to note at this point that fortunately there are not actually that many lawyers in this chamber. Too few, says the member for Mount Lawley. Others might say too many. I think it is only five out of the 59 members in this chamber. May that greater diversity in this place continue.

It is fitting as well for me to follow the member for Mount Lawley. I have been following the member for Mount Lawley for about 10 years now. The member for Mount Lawley made an error of judgement in 2013 because he hired me as a law clerk in his team at Slater and Gordon and I then pestered him for a job as a lawyer and followed him elsewhere. In March 2017, he thought he had escaped to this chamber and in March 2021 I said, "No, thanks; I am coming after you." So, members get the pair of us tonight—the gruesome twosome unfortunately—ably led, obviously, by the top law officer of the state, the Attorney General. I commend him for bringing this legislation forward, which obviously lapsed when the previous Parliament was prorogued.

My comments tonight are going to be focused on how this legal profession uniform legislation, while it is dry in nature, is important in making changes that will facilitate access to justice. The starting point to understanding this legislation is to appreciate that there is a lot of discussion around how this legislation is a movement towards a national legal profession, but in reality we have had a national legal market in this country for some time now. I am going to get members on the edge of their seat, as I said, telling them a bit of the history of how we came to have a properly national legal market in this country. Really, it starts with the establishment of the Federal Court of Australia in 1976, which is obviously the first national court other than the High Court that sits at the apex of our court system. The Federal Court of Australia actually had a fairly limited jurisdiction to begin with. It was a court in which the jurisdiction could be conferred only by a particular federal statute, and at first only 13 statutes conferred jurisdiction on the Federal Court. That all changed in 1997, and this is the riveting part for everybody, when section 39B(1A)(c) was inserted into the Judiciary Act. This provision provides —

> The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
>
> …
>
> (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

That is important because this expansion to any matter arising under any law has resulted in a massive extension over the years of the jurisdiction of the Federal Court. Basically, if there is a dispute but a federal matter is part of the dispute, the Federal Court can pick up the whole dispute and resolve the whole dispute. There has been a huge explosion in the last 20 years in the types of civil matters that are being determined in the Federal Court. Most recently, we have seen that in cases like Geoffrey Rush's defamation case against Nationwide News and other defamation cases. One that is happening at the moment is obviously with Roberts-Smith and certain newspapers. The fact that we now have defamation matters in the Federal Court is evidence that what was originally a very limited jurisdiction is now a very broad jurisdiction that covers a range of issues and is accessed by litigants across the entire country.

As I said, the Federal Court is a national court. It has registries and judges in all states and territories, so it is a court that, unlike to some lesser extent the state Supreme Court, is very used to having interstate practitioners instructing and appearing in it and dealing with conflicts of law issues between different jurisdictions, particularly the states and the commonwealth.

My experience as a practitioner is that many of the best barristers in the federal practice areas are unfortunately not based in Western Australia. I can give some examples from the industrial relations field of law. Some of the best junior counsel in the country, such as Toby Borgeest and Lucy Saunders, are based in Victoria and New South Wales. Some of the best senior counsel, such as Rachel Doyle, SC, Ingmar Taylor, SC, and Craig Dowling, SC, are based on the east coast. Although we have some very talented local barristers in that space—for example, Heather Millar, a former colleague of mine in the profession, is an outstanding industrial relations barrister—it still is the case that the bar in WA is more limited. The result of that is that it is very normal now for solicitors in other states to engage practitioners in states like New South Wales and Victoria. That phenomenon has been pushed along by technological changes in recent years, with videoconferencing and the like. During the pandemic, it has become more and more accepted practice that things are done by videoconference. We have to accept that we are in a nationally competitive market for legal services, so in that context a national regulatory framework makes sense. I understand that once WA joins the uniform law, something like 77 per cent of Australian legal practitioners will be covered by the uniform law, so it is important for us to be part of that.

One of the other benefits that will come from joining the uniform law is that the uniform law has greater regulation over legal costs and also a more effective complaints resolution process. Those are important to me because, as a former industrial relations lawyer and a labour lawyer, I was always focused on ensuring that costs were kept under control for clients. Exorbitant fees being charged by lawyers is one of the greatest impediments to access to justice in this country at the moment. The member for Mount Lawley and I would go to professional development days and we would have all these Terrace lawyers complaining about the number of self-represented parties in courts.

Ms A. Sanderson: That's horrible!

Mr D.A.E. SCAIFE: I know; it was horrible, Minister for Environment. They would complain about all these self-represented litigants in courts and we would say to each other, "It's because no-one can afford most of the services that are being offered by lawyers in private practice."

I would like to point out some of the features of the uniform law that I think will be an improvement on the system we have now. Under the Legal Profession Act, there are some controls on costs, obviously, and there are professional obligations on lawyers as well. For example, section 271 provides that legal costs are recoverable according to the fair and reasonable value of the legal services provided, but that is only a fallback position if there is no costs agreement or no costs determination that applies to those costs. That can be contrasted with section 172 of the uniform law, which provides at the outset that a law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances. There is this immediate starting point that the obligation is on law practices not to charge other than fair and reasonable costs. It is also important to note that under that provision, one of the matters that needs to be taken into account in determining what is fair and reasonable is the quality of the work done. That is significant—this is where I will largely conclude—as we have seen costs blow out for clients in recent decades largely because lawyers apply time billing practices. Time billing practices are, in my opinion, an anachronism. Having a focus in the legislation on lawyers having to charge for the quality of the work done means that those lawyers will be more focused on thinking about what was invested, achieved and done for the client rather than just looking particularly at the amount of time that was invested. That is reflected in section 173 of the uniform law, which provides that a law practice must not act in a way that unnecessarily results in increased legal costs payable by a client and, in particular, must act reasonably to avoid unnecessary delay resulting in increased legal costs.

The last reflection I will leave the chamber with is that time billing has been under criticism for a long time, and that criticism has been increasing. I encourage members, if they are interested in this area, which I am sure many of them are, to look at the excellent address presented by the Honourable Wayne Martin on 17 May 2010 at the Perth Press Club for the launch of Law Week. The speech was entitled "Billable Hours — past their use-by date". His Honour, who was then the Chief Justice of the Supreme Court of Western Australia, gave the example of a legal joke that I will quote because obviously legal jokes are known for their great hilarity! He said —

> Time billing has also been the subject of a number of jokes. Many of you may have heard the one about the lawyer in his early 40s who arrived at the pearly gates and protested to St Peter that he had been taken too young and deserved to live longer. St Peter replied that while the lawyer might believe he was only in his early 40s, analysis of his time-sheets revealed that he must in fact be in his 90s.

Several members interjected.

Mr D.A.E. SCAIFE: That got more of a response than it deserved, but I thank members for that indulgence! The essential part is later in the address from His Honour, when he said —

> Time billing creates an inherent and irreconcilable conflict between the interest of the client in the achievement of an expeditious resolution, and the interest of the lawyer in billing time. In litigation, the client has an interest in minimising the steps and the time taken between the commencement of proceedings and their completion, whereas the lawyer has an interest in maximising them. The client has an interest in early resolution by agreement, which is antithetical to the lawyer's financial interests.

That quote raises for me the question of how we have allowed the time billing arrangement to go on for so long as the dominant form of determining legal costs, when clearly it presents a conflict of interest in the management of a client's best interests.

In my opinion, joining the uniform law will go some way to having a better regulatory framework around legal costs in Western Australia and that will, in my view, facilitate access to justice. I commend the bills to the house.

MR J.R. QUIGLEY (Butler — Attorney General) [7.59 pm] — in reply: I would like to briefly respond to the contributions to the second reading debate, especially to that of the Leader of the Opposition. She noted that the Legal Profession Uniform Law Application Bill 2021 and the Legal Profession Uniform Law Application (Levy) Bill 2021 had passed through this chamber before and that we would be joining New South Wales and Victoria in uniform law. That takes us to approximately 75 per cent of practising lawyers in Australia, so a critical mass will be forming. I know that the Legal Services Council has been in discussions with the Attorney-General; Deputy Premier of South Australia, who is expressing some interest in joining. Everyone is nervous about joining those two big states—Victoria and New South Wales—and being swamped. However, the medical profession, as members know, has national rules and the accounting profession has national rules. In his valedictory speech for his retirement from the High Court, His Honour Robert French, AO, commented that it might have taken 100 years but we ended up with the national standard-rail gauge!

For 120 years we have not been able to end up with a national legal profession, although in today's world, the businesses are transnational, the legal professions are transnational, and the clients they serve are transnational. Should we not all be operating under the same set of rules and guidance, applied locally? I stress it is to be applied locally. The first iterations of these bills, as I mentioned in my second reading speech, going back some years, were rejected by Western Australia—I believe Hon Christian Porter was the Attorney General—because we were being subsumed into a national body. Here, it is under a national set of rules, still with the local Legal Practice Board with its separate statutory legal profession complaints committee, a disciplinary body, but under a national set of rules. One of the significant things is that the people on the disciplinary body, although they used to stay there for decades, now have to turn over every five years so that the culture is renewed et cetera. It is under national rules.

In the Leader of the Opposition's contribution to the second reading debate, she noted that the Standing Committee on Uniform Legislation and Statutes Review made 24 findings and 13 recommendations. I will not deal with the findings so much; it is the recommendations that flowed from the findings that are important. Recommendations 2, 3 and 4 deal with the request to add a 10-year expiry clause to the bill if it does not become operational within 10 years of receiving royal assent. The government does not intend to adopt this recommendation, which the opposition made in the forty-first Parliament. It does not deal with the substantive matter covered by the bill. The bill will become operative, so long as we can get it out of the other place, on 1 January 2022. The whole profession is already conducting information sessions and whatnot to gear up for the new accounting rules et cetera.

Recommendation 5 deals with partial disallowance mechanisms. The question was asked why this bill does not include partial disallowance. Partial disallowance is when the Victorian Parliament passes a law, which will become law here and because it is the mother state, it amends the bill, and there is provision in the bill that we can move for disallowance of a regulation passed in Victoria. The committee suggested partial disallowance. The government does not accept that, in the same way that we did not accept it for the Fair Trading Amendment Bill 2018, as was recommended by the committee. There are no policy reasons for having a partial disallowance mechanism. If Victoria passes a new regulation or law, we can wholly disallow it, but not partially disallow it because to partially disallow it would mean there are further complications. If we are going to only partially disallow it, it may cause problems in relation to what is partially disallowed. For example, there may be non-disallowed provisions that rely on other provisions that have been disallowed. It all becomes confusing. We have cut it out. We disallow it wholly or let it go through—that is, an amendment passed by the Victorian mother Parliament. If a house of Parliament would like to disallow some part of the amending act and there was no mechanism for partial disallowance, the desired provisions could be incorporated into the Legal Profession Uniform Law Act by a bill passed in the ordinary way.

That would mean amending the act would be wholly disallowed and a bill would be drafted to incorporate the desired parts of the amending act and deal with any issues arising from not including the undesired parts. This would allow the government, including the instructors, the Parliamentary Counsel's Office and the Parliament, to consider any potential issues arising from the part that the Parliament considers should not be incorporated. If we are going to partially disallow something, it is better to disallow the whole lot that Victoria has passed by way of an amendment and amend the act to bring in the parts that we might want, but looking at consequential amendments that might be required. Partial disallowance mechanisms are not generally used in other jurisdictions. The only jurisdiction where it has been used is in the Australian Capital Territory and, even there, it is limited in circumstance to the Education and Care Services National Law Act 2011, the Co-operatives National Law Act 2017 and the Community Housing Providers National Law Act 2013. Otherwise, it is not used in the other jurisdictions.

Recommendation 6 looks at how amendments to the Legal Profession Uniform Law Act will be notified. It will be via the publication on the Western Australian legislation website, plus they will be tabled in Parliament in accordance with clause 8. Do not forget that any amendment that is passed in Victoria has to lay on the table here. When it lies on the table here and becomes law if it is not moved for disallowance within the time delimited for disallowance—I think it is 21 days in the other place—then it has to go on the website so the public will see it on the Parliamentary website or the government legislation website. That is the same as recommendation 7, which deals with publication of amendments. Recommendations 8 to 11 all relate to standing order 67 in the Legislative Council, which the government believes is more appropriately dealt with by the Legislative Council. I understand there will be some standing order amendments to facilitate the referral of such amending acts to committees. Recommendations 12 and 13 query why the explanatory memoranda and second reading speeches do not identify the Henry VIII clauses in the bill. There is no requirement to identify a clause in the bill as a Henry VIII clause in the explanatory memorandum or second reading speech. The effect of any such clause is clearly set out in the explanatory memorandum.

They were my brief reflections on the recommendations that came out of the Standing Committee on Uniform Legislation and Statutes Review. I have no doubt that these bills will have to go back and be considered by the committee. There will be a further report on these bills and what we adopted and why we did not adopt some recommendations of the previous bills.

Question put and passed.

Bill (Legal Profession Uniform Law Application Bill 2021) read a second time.

[Leave denied to proceed forthwith to third reading.]