

**LEGAL PROFESSION UNIFORM LAW APPLICATION BILL 2021**

*Committee*

The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

**Clause 1: Short title —**

**Hon MATTHEW SWINBOURN:** Members may recall that in the last sitting period we finished the second reading speeches and my reply. In that reply I did not address matters relating to the recommendations of the 136<sup>th</sup> report of the Standing Committee on Uniform Legislation and Statutes Review. Recommendations 1 and 2 have already been disposed of by the amendments that were made by the house to the standing orders. However, recommendations 3, 4 and 5 have not yet been responded to formally by the government. I am in a position now to give the government's position on that. It is a little long, so I ask members to bear with me as I get through this. Hopefully, it will be of assistance to members and the progress of this bill. Supplementary notice paper 31–1 contains a number of amendments in my name, and some of those relate to the issues on which I am about to speak. The government supports the committee's recommendation 3 in substance, but not in form. The committee has made a recommendation to delete "Assent" and insert —

Assent and upon being laid before each House is taken to be published under this Act.

The government's preference is for different wording, which will be dealt with in new clause 10A. The principle underpinning recommendation 3—that the Victorian amending acts be referred to the Joint Standing Committee on Delegated Legislation for consideration—is supported by the government. However, the government's position is that this purpose is best achieved by alternative drafting prepared by the Parliamentary Counsel's Office, which is reflected on the supplementary notice paper. The alternative drafting is consistent with the relevant portion of recommendation 4 of the 123<sup>rd</sup> report of the then Standing Committee on Uniform Legislation and Statutes Review on the Fair Trading Amendment Bill 2019. Further, in our view, the alternative drafting is to be preferred because new clause 10A(2) makes clear that the reference to a Victorian amending act being taken to be published is for the purposes of a relevant standing order—in this case, paragraph 10.5 under "Joint Delegated Legislation Committee" in schedule 1 of the Legislative Council standing orders—thereby ensuring that the Victorian amending act falls within the terms of reference of that committee. New clause 10A(3) will facilitate the standing orders providing that a different committee be responsible for considering Victorian amending acts. The preferred drafting ensures that this outcome can be achieved without the need to amend the Legal Profession Uniform Law Application Bill 2021 once passed. I hope that is of some benefit to members to help them understand where the government is coming from on that matter. I reiterate that we support the gravitas of the recommendation, but not its form.

Recommendation 4 asks the parliamentary secretary to explain to the Legislative Council the following —

- the persons or classes of persons who may be exempt from whole or part of the provisions of the Act;
- the types of discretions that may be conferred on a person and in what circumstances; and
- the types of conditions which may be imposed or authorised to be imposed and the circumstances of those conditions

which could be prescribed by local regulation pursuant to clauses 251(2)(d) and 251(3)(b) and (c) of the Legal Profession Uniform Law Application Bill 2021.

The government's response to that is that the bill, together with the legal profession uniform law, provides a substantial change to the regulatory framework governing the legal profession in Western Australia. Despite the careful consideration that has been given to this bill and the uniform law, due to the bill's complexity there is the potential for inadvertent consequences to arise. Clause 251 of the bill will permit local regulations to be made prescribing matters required or permitted by the act to be prescribed, or necessary or convenient to be prescribed for giving effect to the act. Clause 251(2)(d) will allow local regulations to be made to exempt persons or classes of persons in whole or in part from the provisions of the act. It is a mechanism by which any unintended consequences for inadvertent hardships can be addressed by a local regulation. The exempt person or classes of persons are not set out in the bill as any inadvertent consequences of the bill on a person or a classes of persons may not be known until such time as the bill comes into effect.

It will also enable the bill to respond to uniform rules made under section 419(3) of the uniform law, which may have flow-on effects for the bill. Section 419(3) of the uniform law provides that the uniform rules may provide for the modification of provisions of the uniform law for various categories of law practices and legal practitioners. It was previously contemplated that a local regulation would be made enabling the Attorney General to exempt persons or classes of persons in whole or in part from the provisions of the act in consultation with key stakeholders, such as the Legal Practice Board and the Law Society of Western Australia, and that any exemption granted by the Attorney General may be subject to such conditions as the Attorney General thinks fits. However, it is currently

envisaged that if the power in clause 251(2)(d) is to be exercised, the Attorney General will first consult with key stakeholders such as the Legal Practice Board and the Law Society before including the exemption in the local regulations. Such regulations will, of course, be subject to disallowance. Paragraphs (b) and (c) of clause 251(3) permit the local regulations to confer a discretion on a person or imposed conditions, or permit a person to impose conditions in relation to a matter. These general regulation-making powers have been inserted to be consistent with various other regulation-making powers contained within the bill, such as clause 126(2). Paragraphs (b) and (c) of clause 251(3) are also consistent with section 43(8)(c) and (d) of the Interpretation Act 1984, which provides that subsidiary legislation may be made —

- (c) so as to confer a discretionary authority on a specified person or body or a specified class of person or body; and
- (d) so as to provide, in a specified case or class of case for the exemption of persons or things or a class of persons or things from the provisions of the subsidiary legislation, whether unconditionally or on specified conditions or conditions additionally imposed and either wholly or to such an extent as is specified or otherwise determined.

However, by way of example, clause 165(6) of the bill provides that the local regulations may make provision for how a person, including the nominated person, may recover the costs of an appeal under clause 165(1). The regulation-making power in clause 251(3)(b) would empower the making of a local regulation conferring a discretion on the nominated person about whether the costs of an appeal are to be recovered. That deals with recommendation 4.

Regarding recommendation 5, the committee asked that the second reading speech or explanatory memorandum for a bill should identify any Henry VIII clauses in that bill, provide a rationale for it and explain its practical effect. Obviously, the explanatory memorandum has already been tabled and the second reading speech has already been given. We will do our best, in this forum, to provide a response to that recommendation. While noting that 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. The EM identifies the clauses of the bill that provide for the making of local regulations on various topics and the rationale and effect of granting such regulation-making powers is generally self-evident. The regulation-making powers in the bill are contained in the following clauses and are identified in the explanatory memorandum. I will go through a number of clauses here.

Under clause 55, local regulations may be made relating to the Legal Practice Board being matters concerning the election of board members, the annual election of the chairperson and the meetings and proceedings of the board or a committee of the board. Under clause 77 are local regulations relating to the functions of the legal services and complaints committee. Under clause 114, local regulations may prescribe matters about admission under the uniform law. Under clause 118, local regulations may modify the operation of the Legal Profession Conduct Rules for barristers so as to allow them to receive direct briefs. Under clause 124, local regulations may exempt a court, tribunal or commission established by the commonwealth, a state or a territory, or the commonwealth or a state or a territory or government authority from a requirement to be accredited in accordance with the board rules in relation to a continuing professional development activity that is not an excluded activity. Under clause 125, local regulations may provide that legislative contract drafters are government lawyers. Under clause 126, local regulations may be made in relation to government lawyers. Under clause 129, local regulations are about receipt or holding of money by barristers. Under clause 151 are local regulations about cost assessments. Under clause 161, local regulations may provide for approval of professional indemnity insurance schemes. Under clause 165, local regulations may provide for how a person, including the nominated person, may recover the costs of an appeal under clause 165(1). Under clause 182, local regulations may be made about winding-up the law mutual fund. Under clause 245 are local regulations for provision, operation and management of the law library. Finally, under clause 251 is that the general power to make local regulations is granted to the Governor.

**Hon NICK GOIRAN:** At the outset as we commence our consideration of the Legal Profession Uniform Law Application Bill 2021 and the first clause, I put on the record my thanks to the parliamentary secretary for taking a few moments to provide the government's complete response to the 136<sup>th</sup> report of the Standing Committee on Uniform Legislation and Statutes Review and, in particular, a response to recommendations 3, 4 and 5, noting that the first two recommendations are no longer relevant, having already been, in effect, implemented at an earlier stage when we were last sitting.

A lot of information was just provided. Regarding the identification of clauses in response to recommendation 5, I got the list from clause 77 through to 251, but I think there may have been a small number of clauses that the parliamentary secretary referred to prior to clause 77. Could I just get him to repeat that please?

**Hon MATTHEW SWINBOURN:** I think it was only one clause, clause 55, that local regulations may be made relating to the Legal Practice Board being matters concerning the election of board members, the annual election

of the chairperson and the meetings and proceedings of the board or a committee of the board. It went to clause 77 from there.

**Hon NICK GOIRAN:** I thank the parliamentary secretary for that indulgence. Moving to clause 1, the parliamentary secretary will note that the bill before us is marked 31–2. It is a bill in excess of 400 clauses, with 421 clauses. Which of the clauses were amended by the other place?

**Hon MATTHEW SWINBOURN:** The clause amended in the other place was clause 224. I am sure the member is going to ask me the nature of the amendment, so if that is what he is interested in, I will explain that. In the Legislative Assembly, the Attorney General moved amendments to clause 224 of the application bill. Clause 224 was amended to provide that a court or tribunal that orders disciplinary action may make an order prohibiting the publicising of the name, identifying particulars and the disciplinary action, if taken, against an Australian lawyer if exceptional circumstances exist. This clause was amended after it became apparent that a practitioner's name and the disciplinary action would need to be published in the register, even if such publication posed a threat to the life and safety of the practitioner or practitioners associated with the practitioner, the subject of the disciplinary action, or the practitioner's family. As advised by the Attorney General in the other place, the amendment goes to issues of safety and not to keeping secret issues of embarrassment to a practitioner. It is anticipated that this power would be exercised rarely.

**Hon NICK GOIRAN:** This bill seeks to establish a scheme for the regulation of legal practitioners in Western Australia. In fact, it is in effect a replacement for the existing scheme for practitioners. What are the costs to the profession of participating in the current scheme, and will that change, or perhaps even increase, as a result of the passage of this bill?

**Hon MATTHEW SWINBOURN:** Member, I have quite a comprehensive answer in front of me about the cost of joining the legal profession uniform law scheme. If the member is happy, I will give him a comprehensive answer at this stage, because that will hopefully cover off on a number of the issues that the member might be pursuing. The initial start-up costs for the legal profession uniform law scheme were borne by New South Wales and Victoria in shares of 60 per cent and 40 per cent respectively. The annual operating costs of the Legal Services Council are currently shared by these two states. Western Australia is not required to contribute to the initial start-up costs under the intergovernmental agreement. The Legal Services Council is required to submit an operating budget, which may include a requirement for a direct funding contribution from the parties to the bilateral agreement on the legal profession uniform framework. Any direct funding contribution will be in accordance with each participating jurisdiction's proportion of the total number of legal practitioners to whom practising certificates were issued in the previous financial year, unless the standing committee agrees otherwise.

Each party will individually determine how it will meet any funding obligations that arise in respect of direct funding contributions. Western Australia will be expected to share the operational cost when it joins the uniform law scheme in accordance with the intergovernmental agreement. In the council's 2020–21 annual report, it was reported that 42 per cent of Australian legal practitioners are in New South Wales, 25 per cent are in Victoria and seven per cent are in Western Australia. Given that the number of legal practitioners in Western Australia is significantly lower than in Victoria and New South Wales, Western Australia's contribution to the funding of the uniform law scheme will be significantly lower than the contributions of Victoria and New South Wales.

More specifically, based on those figures, Western Australia will be required to contribute a proportionate share of costs based on the number of practitioners in participating jurisdictions. This means that Western Australia will pay approximately 9.33 per cent of the cost, because we have seven per cent of the total of 75 per cent of legal practitioners who are included in the uniform scheme. In other words, 75 per cent of legal practitioners are in New South Wales and Victoria, and Western Australia has seven per cent, so of the total of 100 per cent in New South Wales, Victoria and Western Australia, we have approximately 9.33 per cent.

**Hon Nick Goiran:** Why is 75 per cent used as the base figure? What is intended by the other 25 per cent?

**Hon MATTHEW SWINBOURN:** That 25 per cent makes up Queensland, South Australia and Tasmania, and the two territories, in terms of the number. That figure is quite important, because it indicates the coverage of the profession across Australia. This uniform scheme will cover 75 per cent of the legal profession; the other 25 per cent sits outside that. The proportionate costs to be paid by each participating jurisdiction will be reduced if other jurisdictions join the legal profession uniform law scheme. If every other state and territory were to join the scheme, our contribution would be approximately seven per cent, which is equivalent to our number of practitioners.

In the 2014 *Review of the legal profession uniform law*, the Law Society of Western Australia reported that if Western Australia became a participating jurisdiction, its proportion of the total ongoing cost based on the number of practising certificates would be about \$156 000 each year. That was based on the assumption of an ongoing annual cost of \$1.3 million. That was from 2014. The Legal Services Council and the Commissioner for Uniform Legal Services Regulation operate on a triennial budget. Currently, that is the 2019–21 budget; the next triennial budget will follow on from that. The annual report of the Legal Services Council for the 2018–19 financial year outlined that an operating budget of \$1 569 703 was approved by the standing committee. That is the cost from the

last time around. In 2018–19, the New South Wales Department of Communities and Justice contributed \$1 052 550 and the Victorian Legal Services Board contributed \$609 063 by way of funding.

The expenditure for the council was \$1 436 363 in the 2017–18 financial year; \$1 405 832 in the 2018–19 financial year; \$1 531 961 in the 2019–20 financial year; and \$1 586 964 in the 2020–21 financial year. The council stated in its most recent annual report that the notional cost of a national regulatory scheme covering all practitioners in Australia—I think this gets to what the member is actually asking—will remain under \$30 per practitioner per year.

Under the bill, the Legal Practice Board will be required to pay to the council the state's contribution to the funding of the legal profession uniform framework as required by the intergovernmental agreement. The cost of Western Australia's participation will be met by an increase in the cost of a practising certificate. The current cost of a practising certificate in Western Australia is \$1 250 per practitioner per year. There are obviously exceptions for low fee earners and things of that kind. For example, I have a practising certificate, and the conditions on my certificate are for voluntary and pro bono work, so the board waives my fee; I do not have to pay the \$1 250. That is obviously what the overwhelming number of practitioners pay.

**Hon Nick Goiran:** To the extent that you can answer this by way of interjection, in that scenario that you talk about of the fee being waived for a pro bono practitioner, will that still be the case under the new scheme?

**Hon MATTHEW SWINBOURN:** We will take that one under some consideration. I am interested to know the answer to that one as well.

The cost is \$1 250 per practitioner per year. The increase that will be required to cover the state's contribution to the council funding is likely to be in the order of \$20 to \$30 per practitioner per year. If other states and territories join the legal profession uniform law scheme, Western Australia's direct funding contribution will be reduced, as those jurisdictions will also be required to contribute to the funding of the scheme. The Law Society also noted in its report that the additional costs of adopting the legal profession uniform law are likely to be offset by cost savings resulting from the fact that some of the functions currently undertaken by the local regulatory bodies would be undertaken by the regulatory bodies established under the uniform law. Finally, the Law Society reported that there will be a decrease in the compliance cost for law firms that operate across jurisdictions and participate in the legal profession uniform law scheme. This will result in savings being passed on to consumers of the services of those law firms—not the practitioners themselves necessarily, but the consumers of the law firms.

In New South Wales, the costs are recovered through the payment of admission fees. Further, the trustees may, at the request of the Attorney General, pay from the public purpose fund amounts for such parts of the costs of the council and the commission as the Attorney General is satisfied cannot be reasonably recovered through admission fees. The current fee for admission to the legal profession in Australia is \$950, of which \$550 is allocated to the New South Wales Legal Profession Admission Board and \$400 is allocated to the department of justice.

**Hon NICK GOIRAN:** I thank the parliamentary secretary for his most comprehensive response to this important issue about the costs to the profession. In summary, do I understand that, in effect, for an individual practitioner we are talking about an increase of about \$20 to \$30 per annum?

**Hon Matthew Swinbourn:** By way of interjection, yes.

**Hon NICK GOIRAN:** Is the benefit to the practitioner of paying this additional fee that they will be able to practise in New South Wales, Victoria and Western Australia, rather than potentially having to have multiple registrations?

**Hon Matthew Swinbourn:** Yes, again.

**Hon NICK GOIRAN:** I make this observation before I move to my next theme of questions. The parliamentary secretary mentioned that the Law Society or somebody had suggested that there might be some cost savings, particularly for those who are practising across jurisdictions, and that somehow might then flow through to the consumer. My general observation is that I am highly sceptical that that would be the case. I think that any savings will be small in nature, and I doubt any law firm will provide a discount on their fees or even a reduction in their hourly rate as a result of participation in the new scheme. Nevertheless, it is always useful to hear feedback from stakeholders when we are considering these bills.

In the parliamentary secretary's reply to the second reading debate, when we last considered this bill on 24 February 2022, he mentioned that the Legal Practice Board has maintained a frequently asked questions page, and at the time the parliamentary secretary said it had published fact sheets on the uniform law, transitional arrangements, costs disclosure and dispute resolution. Are those frequently asked questions documents able to be tabled?

**Hon MATTHEW SWINBOURN:** We do not have those with us. I do not anticipate an issue with tabling them. We will take it into consideration and we will either table them or explain to the member why we will not. I am only being cautious at this stage, but I cannot see any reason, because they are publicly available, we would not table them. Practically, we do not have them with us at the moment to table them. We want to make sure that if we table them, we table them comprehensively and nothing is missing.

**Hon NICK GOIRAN:** I thank the parliamentary secretary for that. In doing so, could we find out what the current fact sheets look like? The reason I ask for them to be tabled is that the ones that I have managed to access appear to refer to the 2020 bill; that is the bill that was introduced in the previous Parliament. The parliamentary secretary kindly indicated during our consideration of clause 1 that there has been one amendment to the 2021 bill; that is, the bill that was introduced in the Legislative Assembly in this Parliament has had one clause amended, being clause 224. Perhaps I would not describe it as being a substantial number, but I am aware that a not insubstantial number of amendments were made between the 2020 bill and the bill that is before us. If those fact sheets prepared by the Legal Practice Board are to be current, it would be good for them to be tabled, because, as I said, the versions I have refer to the 2020 bill.

Further, the parliamentary secretary indicated on that same day that the Law Society had also helpfully published fact sheets. The fact sheets from the Law Society that I have seen refer to an anticipated commencement date of 1 January 2022. Of course, that time has now passed. Has there been any further consultation with the Law Society since that date?

**Hon MATTHEW SWINBOURN:** The two advisers I have at the table with me are both from the State Solicitor's Office and have been engaged with this bill for some years. One might say they are building a career around it, but maybe they would not like me saying that.

I cannot speak to what the Attorney General's office has been doing, although people watching can confirm that for us. Consultation with the Law Society has been an ongoing exercise, and the Law Society was consulted after I gave my reply speech. How much detail we can get into about the consultation is obviously subject to what has been said in confidence, but it has been an ongoing process with the society, which has been very public about its interest in seeing the progress of this legislation. As the member knows, it wrote to all of us about the progress of this reform.

**Hon NICK GOIRAN:** I thank the parliamentary secretary for that. We know that there has been some consultation with the Law Society since the originally anticipated commencement date of 1 January and, more specifically, there has been some consultation since we last considered this bill on 24 February. I have in the back of my mind that a further iteration of the supplementary notice paper might have circulated since then. Indeed, if I look at the Legal Profession Uniform Law Application Bill 2021, I see that the latest version that I am aware of is supplementary notice paper, issue 3, and that appears to be dated 9 March 2022. In other words, the parliamentary secretary indicated that since we last considered this bill on 24 February, there has been some consultation with the Law Society, and I am identifying that a further supplementary notice paper has been issued. Are one or more of the amendments on the supplementary notice paper a result of those consultations?

**Hon MATTHEW SWINBOURN:** I am advised no, member. The only addition to the supplementary notice paper since issue 2 is the insertion of clause 10A, which relates to recommendation 3.

**Hon NICK GOIRAN:** That being the case, what has been the nature of this consultation with the Law Society and, more specifically, what is the current understanding with regard to the proposed commencement date, which once upon a time was 1 January 2022?

**Hon MATTHEW SWINBOURN:** The consultation since my reply, but perhaps throughout the year, has primarily been about the appropriate commencement date. I can advise that consultation also happened with the Legal Practice Board; it was not only the Law Society. Both bodies have expressed a preference for a commencement of 1 July 2022 and not before that time. The government's position on commencement is that it does not have a fixed date at this time, because it is dependent on the passage of the bill. We cannot commit to a date with the Law Society and the Legal Practice Board until we are certain that the bill has passed this place. Obviously, there was a previous date—1 January—and that created issues. I will not be able to take the member any further on the government's position on a specific commencement date, but it is working with the Legal Practice Board and the Law Society on that; it is in consultation with them. The reason for 1 July, as I understand it, is that they want time to finalise, with the government, the local regulations and make sure that there is a proper transition for bodies like the Legal Practice Board to go from its current regime into the new regime so that it is as smooth as possible.

The member knows that 1 July is a significant date in the legal profession because it is the switchover for practising certificates from one year to the next, so there is some synergy around that. I understand why the profession would want 1 July for that particular reason, with members of the Legal Practice Board, Law Mutual and the Law Society working towards meeting the current requirements for the continuation of their practising certificates. I disclose to the house that I submitted my application to Law Mutual for my insurance last night before I left the office, just to make sure, because it has the date of 31 March. It is all tied up with that, but that is the nature of the ongoing discussions between the government, the Law Society and the Legal Practice Board.

**Hon NICK GOIRAN:** That is excellent. I acknowledge what the parliamentary secretary has said; it is undesirable, from the government's point of view at the current time, to commit to a date when we do not necessarily know when the bill is going to be passed. Is it fair to say, though, that the date will not be any sooner than 1 July 2022?

**Hon MATTHEW SWINBOURN:** I do not have an answer right now only because, as I indicated before, the advisers at the table are all from the State Solicitor's Office, so we are communicating remotely with the Attorney General's staff. That decision, of course, is not a matter for State Solicitor's Office advisers; it is a matter for the government. As soon as I have confirmation about the member's characterisation—whether it is fair to say that—I will be able to provide him with an answer, but I do not want to hold up debate while I am fiddling around, or perhaps, more precisely, fumbling around, trying to confirm that.

**Hon NICK GOIRAN:** Perhaps this information could be made available to the chamber when we consider clause 2, the commencement clause. That would seem appropriate. I make the passing observation that it is always important for the government to have available all the advice and advisers it needs when it is trying to transact a bill, and if there are different specialties or areas of expertise or jurisdiction, then those people need to be available. The parliamentary secretary will recall debate on a bill during which police advisers would have been crucial, but they unfortunately were never made available because the office of the Minister for Police, for reasons still not clear, could not pick up the phone and arrange it.

The consultations that the government has had with the Law Society, the Legal Practice Board and the like all seem to primarily revolve around the commencement date, which is understandable. I understand from stakeholders that they are broadly supportive of the bill and the substituted scheme. The scheme itself, as I understand it, has a history dating back some seven years in, I think, New South Wales. Does the government have any information on the experience of the scheme over that seven-year period, and particularly whether any areas of the scheme have been identified as needing improvement?

**Hon MATTHEW SWINBOURN:** I think the member's question was about the experience of the scheme in other jurisdictions. It would be fair to say that the scheme in those jurisdictions has been working, in a general sense, as intended, and that there are no—this is my term—"sore thumb"-type issues that are sticking out. The Legal Services Council commenced a process in either 2019 or 2020, issuing a consultation paper on proposed amendments to the legal profession uniform law, and that consultation paper, after working with the stakeholders, is dated January 2020. The process of that consultation, in respect of proposed amendments, is an ongoing one; it has not been finalised, so it is not reflected in the bill we have before us. I am told that any amendments in relation to that would be subject to cabinet-in-confidence in those jurisdictions, because nobody has committed to them at this stage, so I would not be able to get into what the outcome of that is. However, I am told that the proposed amendments are of a minor nature rather than anything significant. As we often do with bills in this place, we have a review clause to see where things are going, what needs to be tidied up and all those sorts of things. As I say, there are no particular "sore thumb" issues sticking out that I am aware of or that the advisers at the table have made me aware of.

**Hon NICK GOIRAN:** Thanks, parliamentary secretary; yes, you are quite right, because the Legal Services Council issued a consultation paper on proposed amendments to the legal profession uniform law and, as the parliamentary secretary identified, that consultation paper was published in January 2020. Interestingly, at page 6 of that document, it states —

The Uniform Law is now in its fifth year of operation.

Keeping in mind that that is now some two years ago, hence my earlier reference to seven years —

The Council observes that, in general, the provisions operate effectively. However, there are areas where opportunities for legislative improvement have arisen.

This consultation paper covers 29 pages and consists of 36 recommendations. I do not propose to take the parliamentary secretary through all 36 recommendations but, as an example, I want to highlight one recommendation with a view to then having a better understanding of how the government intends to deal with these matters. I will look at recommendation 18. As I mentioned to the parliamentary secretary, 36 recommendations have been made for improvements. I think that if the Council is to do its job properly as the house of review, we ought to give some consideration to what these improvements are, given that we are about to take in and embrace this scheme that has been in operation elsewhere for seven years, with those other jurisdictions identifying after five years 36 areas for improvement. It should become apparent shortly why I am specifically selecting recommendation 18 of the consultation paper, which is under the heading "Section 198: Applications for costs assessment". I will pause there for a moment and turn to section 198 of the bill before us, which is titled "Audit under Uniform Law s 232". I will come back to that in a moment. In the consultation paper, under the heading "Section 198: Applications for costs assessment"—evidently the section referred to there is the uniform law itself—it states —

Section 197 provides that a costs assessment under Division 7 is not available in relation to legal costs that have been the subject of a costs dispute under Chapter 5, unless the DLRA is unable to resolve the costs dispute and has notified the parties of their entitlement to seek a costs assessment, or the DLRA arranges for a costs assessment under s 284.

Section 198 allows for applications for assessment of legal costs by clients, third parties and certain law practices. Beneficiaries are not third party payers within the meaning of s 171 and there is no disclosure required to a beneficiary under s 176. However, the beneficiaries will ultimately pay the legal costs which are borne by the estate.

Under the Uniform Law, beneficiaries have fewer rights than third party payers—disputes over costs payable by the executors do not fall within the definition of a ‘costs dispute’ in subs 269(2). Subsections 198(8) and (9) provide beneficiaries as ‘any other person whom the costs assessor thinks it appropriate to notify’ with the right to participate in the costs assessment process as a party once so notified. Beyond this, their only recourse is to apply to the Supreme Court under probate legislation for filing and passing of executors’ accounts (including legal costs incurred by the executors).

### **Recommendation 18**

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

I have raised recommendation 18 as an example not because we will be dealing with the administration bill and its related interests in the estate of deceased persons immediately after the passage of this bill, but more because I stumbled across a submission from the Law Council of Australia dated 26 March 2020. I should hasten to add for the benefit of *Hansard* that what I was quoting from earlier was pages 18 and 19 of the Legal Services Council’s consultation paper and its assessment, which led to recommendation 18. In any event, the Law Council of Australia then made a submission—I think 14 submissions were made to the consultation paper—and as the parliamentary secretary indicated, that process seems to be ongoing. Perhaps the parliamentary secretary can take this question on notice: do we have some indication as to when this consultation improvement project will eventually come to a conclusion? The Law Council of Australia, in its submission of 26 March 2020, which consists of some 16 pages, included a portion dealing with this eighteenth recommendation. This is what it had to say at page 10, at paragraphs 52 to 55 —

Section 198 of the Uniform Law allows for applications for assessment of legal costs by clients, third parties and certain law practices. The Consultation Paper proposes to amend subsection 198(1) to add beneficiaries of deceased estates or “potential beneficiaries” arising from intestacy.

The Law Council’s ESLC has made the following comments in respect of the proposed amendments:

- (a) The statement [in the Consultation Paper] that “*the beneficiaries will ultimately pay the legal costs which is borne by the estate*” is both too broad and potentially incorrect—for more information, please see the discussion in relation to Recommendation 23 below.
- (b) The statement that “*the only recourse*” is to apply for an accounting, overlooks a number of other options, including action against a legal personal representative for *devastavit*—

We will both have to get to the bottom of another Latin term —

and the ability of a person with standing to take derivative action on behalf of the estate.

- (c) The reference to “or potential beneficiaries arising from intestacy” is superfluous, as a person is either a beneficiary or not.

Then it states at paragraph 54 —

The Law Society of Western Australia supports the above position and emphasised in relation recourse that beneficiaries who have an interest in the estate can both request a passing of accounts and a taxation of costs. These remedies can be used, including when the executor is a member of the firm who is acting for the executor.

It then goes on to talk about the position of the Law Society of New South Wales. Noting that we will shortly be interrupted for the taking of questions without notice, I wonder, parliamentary secretary, whether during the short recess we could receive an indication as to what extent these types of matters have been taken into account in the drafting of the bill. Recommendation 18 is an example of a specific recommendation for improvement. We know what the Law Society of Western Australia thinks about this. To what extent has that been considered by the government in drafting this bill? Further to my earlier question, what is happening with this consultation process and project for improvement? Is a final report ultimately scheduled to be provided? If it is, will the Western Australian government be in possession of that document? Is it the intention of the Attorney General to table that document in this place? If we could have some indication as to where this improvement project is headed, it would give some assurance to the stakeholders who have obviously already been participating in this particular round since 2020.

**The PRESIDENT:** Parliamentary secretary, noting the time, I will interrupt debate for question time so you do not need to seek the call to respond to that question. When we return from question time, you will have the call to respond.

**Hon MATTHEW SWINBOURN:** Thank you.

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

[Continued on page 777.]