

41ST PARLIAMENT



Report 136

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

*Legal Profession Uniform Law Application Bill 2021 and Legal
Profession Uniform Law Application (Levy) Bill 2021*

Presented by
Hon Donna Faragher MLC (Chair)
October 2021

Standing Committee on Uniform Legislation and Statutes Review

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EXECUTIVE SUMMARY

- 1 The Legal Profession Uniform Law Application Bill 2021 (Bill) gives effect to Western Australia's commitment to the Intergovernmental Agreement on the Legal Profession Uniform Framework dated 20 February 2019 (IGA) between Western Australia, Victoria and New South Wales. The IGA facilitates Western Australia's entry into the Legal Profession Uniform Law scheme.
- 2 The Bill proposes to:
 - provide consistency between the laws governing Western Australia's legal profession and the laws in Victoria and New South Wales
 - apply the *Legal Profession Uniform Law Application Act 2014* (Victoria) Schedule 1 (with some modifications) as a law of Western Australia (Legal Profession Uniform Law (WA))
 - automatically incorporate Victorian amending Acts into the Legal Profession Uniform Law (WA)
 - provide a disallowance mechanism for amendments to the Legal Profession Uniform Law (WA).
- 3 The Bill impacts upon the Parliamentary sovereignty and law-making powers of the Western Australian Parliament in the following ways:
 - The commencement clause provides that the majority of the Act comes into operation on a day fixed by proclamation.
 - The *Interpretation of Legislation Act 1984* (Vic) will apply to the Legal Profession Uniform Law (WA) instead of the *Interpretation Act 1984* (WA).
 - Once a disallowance motion is moved, there is nothing in the Bill to trigger a debate on the disallowance motion.
 - The Victorian amending Acts do not come within the terms of reference of any Legislative Council standing committee and will not be automatically scrutinised by a committee.
 - The Bill contains wide regulation-making powers with a Henry VIII effect.
- 4 The Committee has proposed recommendations to address some of these sovereignty and law-making issues.
- 5 The Committee draws these clauses to the Legislative Council's attention for consideration during debate on the Bill.
- 6 The Legal Profession Uniform Law Application (Levy) Bill 2021 (Levy Bill) amends section 244 of the *Legal Profession Uniform Law Application Act 2021* by the addition of a new subsection (9), which will provide for a levy to be imposed by section 244 or local regulations. The levy will be a contribution towards the cost of providing and maintaining the law library currently situated in the David Malcolm Justice Centre.
- 7 The Committee did not identify any Parliamentary sovereignty or law-making issues in the Levy Bill.

Findings and recommendations

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

FINDING 1

Page 6

The lack of an express commencement date in clause 2(b) of the Legal Profession Uniform Law Application Bill 2021 is an erosion of the Parliament's sovereignty and law-making powers.

FINDING 2

Page 13

Clause 9 of the Legal Profession Uniform Law Application Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 3

Page 13

Standing Order 67 will apply to Victorian amending Acts that are made subject to disallowance in a Western Australian Act of Parliament if Standing Order 67(1) is amended to remove the word 'statutory'.

RECOMMENDATION 1

Page 13

The Legislative Council delete Standing Order 67(1) of the Standing Orders of the Legislative Council and replace it as follows:

For the purpose of this Standing Order, a "regulation" includes any instrument made subject to disallowance by a written law.

RECOMMENDATION 2

Page 13

The Parliamentary Secretary responsible for the Bill does not move the third reading of the Legal Profession Uniform Law Application Bill 2021 until Legislative Council Standing Order 67(1) is amended in the terms set out in Recommendation 1.

FINDING 4

Page 15

Referral of Victorian amending Acts to the Joint Standing Committee on Delegated Legislation provides extra scrutiny of those enactments.

RECOMMENDATION 3

Page 15

The Legal Profession Uniform Application Bill 2021 be amended as follows:

Clause 8

Page 8, line 19 – To delete "Assent." and insert:

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

FINDING 5

Page 20

Clause 246(c) of the Legal Profession Uniform Law Application Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 6

Page 20

Clause 246(c) of the Legal Profession Uniform Law Application Bill 2021 can be justified on the basis that flexibility is required and similar provisions are already contained in the *Legal Profession Act 2008*.

FINDING 7

Page 22

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

RECOMMENDATION 4

Page 22

The Parliamentary Secretary explain to the Legislative Council:

- 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.

RECOMMENDATION 5

Page 23

The second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.

1 Introduction

- 1.1 On 4 August 2021, the Legal Profession Uniform Law Application Bill 2021 (Bill) and the Legal Profession Uniform Law Application (Levy) Bill 2021 (Levy Bill) were introduced into the Legislative Council by the Parliamentary Secretary to the Attorney General, Hon Matthew Swinbourn MLC.
- 1.2 The Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126(1). The Committee is required to report by 12 October 2021, being the first Legislative Council sitting day following the expiry of the 45 day reporting period.
- 1.3 At the outset of the inquiry, one Member of the Committee was substituted under Standing Order 163 of the Standing Orders for the duration of the inquiry into the Bill. Hon Pierre Yang MLC replaced Hon Matthew Swinbourn MLC. The substitution was reported to the House by the President.¹
- 1.4 The Legal Profession Uniform Law is contained in Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic). The Bill applies the Legal Profession Uniform Law as a law of Western Australia as of 21 June 2021 subject to three categories of modifications.²
- 1.5 The Bill will become the *Legal Profession Uniform Law Application Act 2021* if passed (Act). The amendments to the Legal Profession Uniform Law will originate from the Victorian Parliament. The Victorian amending Acts will be tabled in the Western Australian Parliament pursuant to clause 8 and automatically incorporated into the Act unless disallowed by Parliament. This incorporation and disallowance mechanism is the same as the mechanism reviewed in report 133 on the Fair Trading Amendment Bill 2021.³
- 1.6 The Levy Bill will amend section 244 of the Act by the addition of a new subsection (9), which will provide for a levy to be imposed by section 244 or local regulations. The levy will be a contribution towards the cost of providing and maintaining the law library currently situated in the David Malcolm Justice Centre.⁴ The Levy Bill is necessary because section 46(7) of the *Western Australian Constitution Acts Amendment Act 1899*, states that bills imposing taxation must deal only with the imposition of taxation.
- 1.7 The former Committee reported on the lapsed Legal Profession Uniform Law Application Bill 2020 and the lapsed Legal Profession Uniform Law Application (Levy) Bill 2020 and made 13 recommendations.⁵ None of the recommendations were followed.
- 1.8 If the Bill and the Levy Bill are enacted, the scheme will operate in respect of 77 per cent of the legal profession in Australia.⁶

¹ Hon Alanna Clohesy MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 August 2021, p 3063.

² See clause 6(1)(a)(b) and (c) of the Bill.

³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 133, *Fair Trading Amendment Bill 2021*, 10 August 2021, pp 5 – 11.

⁴ Hon Matthew Swinbourn MLC, Parliamentary Secretary to the Attorney General, Legislative Council, *Parliamentary Debates (Hansard)*, 4 August 2021, p 2297.

⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, pp ii-vii.

⁶ Hon Matthew Swinbourn MLC, Parliamentary Secretary to the Attorney General, Legislative Council, *Parliamentary Debates (Hansard)*, 4 August 2021, pp 2298-2300.

- 1.9 The Government has provided that the Bill and Levy Bill have the support of:
- the legal profession
 - the Legal Practice Board of Western Australia
 - the Legal Profession Complaints Committee of Western Australia
 - the Law Society of Western Australia and the Western Australian Bar Association, together with many other stakeholders who have contributed to the development of this legislation.⁷

The Legal Profession Uniform Law scheme

- 1.10 The purpose of the Legal Profession Uniform Law is to establish consistent regulation applying to the Australian legal profession in participating jurisdictions. It provides a means of licensing persons in a participating jurisdiction as Australian legal practitioners or Australian-registered foreign lawyers to:
- enable them to engage in legal practice in another participating jurisdiction without having to be licensed in the other jurisdiction
 - ensure that licensing enabling them to engage in legal practice and effected in one practising jurisdiction is equivalent in all respects to licensing in another jurisdiction.⁸
- 1.11 There will be three national regulatory bodies:
- a Standing Committee consisting of the Attorneys-General of the participating jurisdictions (Standing Committee)
 - the Legal Services Council
 - the Commissioner for Uniform Legal Services Regulation.
- 1.12 The advantages of a national scheme include⁹:
- Benefits for consumers such as short form cost agreements, harmonisation of regulation, the Legal Services Council, common framework for law practices and an Australian Legal Profession Register.
 - Local autonomy remains. The Legal Practice Board, Legal Services and Complaints Committee are largely unchanged.
 - Low cost of governance and operations.
 - A collaborative national approach.

⁷ Hon Matthew Swinbourn MLC, Parliamentary Secretary to the Attorney General, Legislative Council, *Parliamentary Debates (Hansard)*, 4 August 2021, p 2298-2300.

⁸ Legal Profession Uniform Law Application Bill 2013 (Victoria), *Explanatory Memorandum*, Victorian Legislative Assembly, p 40.

⁹ Listed in the *Legal Services Council Annual Report 2018/2019* pp 22-23 (provided to the Committee in the Information from the Hon John Quigley MLA provided pursuant to MM2007/01).

- Consultation requirements on any amendments to the Legal Profession Uniform Law including:
 - all Attorneys-General of the participating jurisdictions are members of the Standing Committee
 - the Legal Services Council and the Commissioner for Uniform Legal Services Regulation hold regular local regulatory authority liaison meetings and an annual Uniform Law summit
 - there are 30 plus day mandated consultation periods for rule changes
 - the Legal Services Council publishes an online annual report which is available on its website.
- 1.13 The Legal Services Council makes Uniform Rules, with the approval of the Standing Committee. The Uniform Rules may include Legal Practice Rules, Legal Profession Conduct Rules and Continuing Professional Development Rules.
- 1.14 A disadvantage of the scheme is that Western Australia will share the costs of the scheme when it commences. Correspondence from the Attorney General states that the current cost of practising certificates will increase by around \$20 to \$30 annually for each certificate.¹⁰

2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its webpage at [Uniform Legislation Committee homepage](#). The general public was notified of the referral via social media.¹¹
- 2.2 Under its terms of reference, the Committee is confined to investigating whether a Bill has an impact on the Parliamentary sovereignty and law-making powers of the Parliament of Western Australia. The Committee is not able to consider any other matter, including the policy of the Bill.
- 2.3 Given the Committee's terms of reference, the Committee did not seek further submissions.

3 Supporting documents

- 3.1 The Committee received copies of the Bill, its second reading speech and Explanatory Memorandum (EM) when the Bill was introduced into the Legislative Council.
- 3.2 Standing Order 126(5) states:
- The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral...
- 3.3 The Attorney General forwarded the information required under Ministerial Office Memorandum MM 2007/01 on 9 August 2021, the 3rd working day after referral. The Committee extends its appreciation to the Attorney General for the timely provision of the supporting documentation and information.

¹⁰ Information from the Hon John Quigley MLA provided pursuant to MM2007/01, p 4.

¹¹ Legislative Council, 9 August 2021, retrieved from <https://twitter.com/WALegCouncil/status/1424556948951871492>

4 Legal Profession Uniform Law Application Bill 2021

Background to the Bill

4.1 The Bill:

- contains 17 parts
- applies the *Legal Profession Uniform Law Application Act 2014* (Victoria) Schedule 1 (with some modifications) as a law of Western Australia (Legal Profession Uniform Law (WA))
- provides for the tabling and disallowance of amendments made to the Legal Profession Uniform Law
- provides for local matters that are ancillary to, or affect the operation of, the Legal Profession Uniform Law as a law of Western Australia
- otherwise provides for the regulation of legal practice in Western Australia
- repeals the *Legal Profession Act 2008* and the *Law Society Public Purposes Trust Act 1985*
- retains the effect of certain provisions of the *Legal Profession Act 2008* and provides for transitional arrangements
- makes consequential amendments to various Acts.

4.2 The legal profession uniform framework originally commenced as a bilateral agreement between New South Wales and Victoria.

In December 2013, Victoria and New South Wales entered into a bilateral agreement on the legal profession uniform framework, and legislation was enacted in both Victoria and New South Wales to give effect to the agreement. The Victorian Legal Profession Uniform Law Application Act 2014 and the New South Wales Legal Profession Uniform Law Application Act 2014 were enacted in March 2014 and May 2014 respectively. The Legal Profession Uniform Law is schedule 1 to the Victorian act and that schedule is applied as a law of New South Wales. The uniform law scheme came into operation in Victoria and New South Wales in July 2015.¹²

4.3 On 20 February 2019, Western Australia entered into an intergovernmental agreement with New South Wales and Victoria to enter into a legal profession uniform framework (IGA).¹³ The objectives of the IGA are

to establish an efficient and effective Australian legal profession, by:

- a. providing and promoting uniformity in the law applying to the Australian legal profession;
- b. ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services;
- c. enhancing the protection of clients of law practices and the protection of the public generally;
- d. empowering clients of law practices to make informed choices about the services they access and the costs involved;

¹² Hon Matthew Swinbourn MLC, Parliamentary Secretary to the Attorney General, Legislative Council, *Parliamentary Debates (Hansard)*, 4 August 2021, pp 2298-2300.

¹³ Intergovernmental Agreement on the Legal Profession Uniform Framework, 20 February 2019.

- e. promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and
- f. providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.¹⁴

4.4 The Government has drafted the Bill to apply the Legal Profession Uniform Law set out in schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Victoria) as a law of Western Australia, subject to minor modifications concerning professional indemnity insurance.¹⁵ Many of the provisions of the Bill retain features of the *Legal Profession Act 2008*.¹⁶

4.5 The IGA requires Western Australia to use its best endeavours to enact legislation to apply the Legal Profession Uniform Law by 30 June 2020. However, the Government has informed the Committee:

The deadline of 30 June 2020 has not been met. However, the parties to the Intergovernmental Agreement have been kept informed of WA's progress and the Intergovernmental agreement only ceases to operate after 1 July 2022 (unless further extended by all parties), unless each Party has implemented the Framework by that date.¹⁷

4.6 Subject to the Bill's passage, the Government intends to have the Legal Profession Uniform Law (WA) operative on and from 1 January 2022.¹⁸ The Government has provided that the advantages of the legal profession uniform framework are:

- consumers will enjoy the same protections, rights and remedies across participating jurisdictions
- consumers will have access to new low cost and informal ways to resolve service complaints with law practices
- a tailored set of consumer-friendly orders will give consumers access to the kinds of practical remedies they need—such as a simple apology or an order that work be done at a reduced cost
- the legislative duty on law practices to charge fair and reasonable costs and new, streamlined costs disclosure requirements will foster better communication and lead to fewer disputes
- billing practices have been strengthened to ensure that principals are responsible for the legal costs charged by their law practices.¹⁹

4.7 The Bill is not based on model legislation but follows the structure of the *Legal Profession Uniform Law Application Act 2014* (Vic) and the *Legal Profession Uniform Law Application Act 2014* (NSW).

¹⁴ Intergovernmental Agreement on the Legal Profession Uniform Framework, 20 February 2019, pp 1-2.

¹⁵ Hon Matthew Swinbourn MLC, Parliamentary Secretary to the Attorney General, Legislative Council, *Parliamentary Debates (Hansard)*, 4 August 2021, pp 2298-2300.

¹⁶ *ibid.*

¹⁷ Information from the Hon John Quigley MLA provided pursuant to MM2007/01, p 1.

¹⁸ *ibid.*

¹⁹ Hon Matthew Swinbourn MLC, Parliamentary Secretary to the Attorney General, Legislative Council, *Parliamentary Debates (Hansard)*, 4 August 2021, pp 2298-2300.

5 Clauses that impinge upon Parliamentary sovereignty and law-making powers

Clause 2 – Commencement

5.1 Clause 2 of the Bill reads:

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation.

5.2 Clause 2(b) provides that the entirety of the Act apart from Part 1 will come into operation on a day fixed by proclamation. The Committee considers this is an erosion of Parliamentary sovereignty because the Executive controls the commencement date, not Parliament. The Committee has previously stated that there should be sound reasons for Parliament to permit commencement by proclamation.²⁰

Attorney General's position

5.3 The Attorney General said:

The Bill is intended to become law on and from 1 January 2022, and the intergovernmental agreement requires the Bill to be operational no later than 1 July 2022. There is no prospect of this Bill languishing and not becoming operational very soon after it receives Royal Assent.²¹

Committee comment

5.4 The Committee notes the Attorney General's position in relation to this commencement clause. The Committee considers there is minimal risk that the Bill will not become operational. The Committee draws the lack of an express commencement date to the attention of the Legislative Council for consideration during debate on the Legal Profession Uniform Law Application Bill 2021.

FINDING 1

The lack of an express commencement date in clause 2(b) of the Legal Profession Uniform Law Application Bill 2021 is an erosion of the Parliament's sovereignty and law-making powers.

Clause 5 – Application of *Interpretation Act 1984* to Act and Uniform Law

5.5 Clause 5 states:

The *Interpretation Act 1984* –

- (a) applies to this Act; but
- (b) does not apply to the Legal Profession Uniform Law (WA).

5.6 The effect of clause 5(b) is that the *Interpretation of Legislation Act 1984* (Vic) will apply to the Legal Profession Uniform Law (WA). The Western Australian Parliament is not able to amend

²⁰ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, p 12.

²¹ Information from the Hon John Quigley MLA provided pursuant to MM2007/01, p 6.

the *Interpretation of Legislation Act 1984* (Vic). The Victorian Parliament may amend its *Interpretation of Legislation Act 1984* (Vic) in the future and the Western Australian Parliament will be bound by amendments in relation to the Legal Profession Uniform Law (WA). As a result, clause 5(b) is an erosion of the Western Australian Parliament's sovereignty and law-making powers.

- 5.7 However, the Committee considers that consistent interpretation of the legislation in each participating jurisdiction is important. For the sake of consistency, the *Interpretation of Legislation Act 1984* (Vic) will need to apply.

Clause 6 – Application of Uniform Law as law of the State

- 5.8 Clause 6 states:

(1) In this section –

Legal Profession Uniform Law means the Legal Profession Uniform Law set out in the *Legal Profession Uniform Law Application Act 2014* (Victoria) Schedule 1 as in force on 21 June 2021 –

- (a) as amended by the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria) Part 2 (when that Part comes into operation in the State under section 7(2)); and
- (b) as amended by each provision that –
 - (i) is an amending Act that has effect for the purposes of this Part under section 9; and
 - (ii) has come into operation for the purposes of this Part under section 10;and
- (c) as modified by Part 7 Division 3 Subdivision 1 and the local regulations made under section 126(1)(b).

(2) The Legal Profession Uniform Law –

- (a) applies as a law of the State; and
- (b) as so applying, may be referred to as the *Legal Profession Uniform Law (WA)*; and
- (c) so applies as if it were an Act.

- 5.9 Under clause 6, the Legal Profession Uniform Law (WA) consists of:
- Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic).
 - The *Legal Profession Uniform Law Application Amendment Act 2019* (Vic), Part 2.
 - Amending Acts tabled in the Victorian Parliament from time to time and automatically incorporated into the Legal Profession Uniform Law (WA) (clause 8), provided they are not disallowed pursuant to the disallowance mechanism in clause 9.
 - Exemptions from obtaining professional indemnity insurance (sections modified for the Legal Profession Uniform Law (WA)) (Part 7, Division 3, Subdivision 1).
 - Local regulations that may exclude or modify the operations of the Legal Profession Uniform Law (WA) in relation to government lawyers (clause 126(1)(b)).
- 5.10 This section of the report discusses the integration of Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) and the *Legal Profession Uniform Law Application Amendment Act 2019* (Vic) into the Legal Profession Uniform Law (WA). In order:
- clause 8 and the tabling of Victorian amending Acts
 - clause 9, the disallowance mechanism
 - local regulations and other regulations.

Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) and the *Legal Profession Uniform Law Application Amendment Act 2019* (Vic)

- 5.11 Pursuant to clause 6(1), Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) is adopted into the Legal Profession Uniform Law (WA) as is in force on 21 June 2021.
- 5.12 The *Legal Profession Uniform Law Application Amendment Act 2019* (Vic) was given Royal Assent on 17 September 2019. Part 2 of this Act will become part of the Legal Profession Uniform Law (WA) upon enactment of the Bill.²²
- 5.13 Part 2 of the *Legal Profession Uniform Law Application Amendment Act 2019* (Vic) will not come into operation until the Bill is passed by the Western Australia Parliament. Part 2 contains amendments that Victoria is required to make to the *Legal Profession Uniform Law Application Act 2014* (Vic) to facilitate Western Australia's entry into the scheme.
- 5.14 The effect of clauses 6(1) and 6(1)(a) is to incorporate Victorian amending Acts into Western Australian law without a mechanism for Parliamentary scrutiny or disallowance. The Committee has previously commented that:
- ...the laws of another jurisdiction that the Government seeks to have applied in Western Australia should be subject to Parliament's consideration and possible disallowance before they become laws of the State.²³

Committee comment

- 5.15 The inability to amend or disallow Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) and the *Legal Profession Uniform Law Application Amendment Act 2019* (Vic) does impinge upon Parliament's sovereignty and law-making powers. However, it is necessary for Parliament to adopt Schedule 1 of the *Legal Profession Uniform Law*

²² Legal Profession Uniform Law Application Bill 2021, cl 6(1)(a).

²³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 119, *Fair Trading Amendment Bill 2018*, November 2018, p 21.

Application Act 2014 (Vic) and the *Legal Profession Uniform Law Application Amendment Act 2019* (Vic) if Western Australia is to join the Legal Profession Uniform Law scheme.

- 5.16 The Committee considers that Parliament should be aware that Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) and the *Legal Profession Uniform Law Application Amendment Act 2019* (Vic) will be incorporated into the Act upon the passing of the Bill.

Clause 8 – Tabling amending Acts

- 5.17 ‘amending Act’ is defined in the Bill as:

amending Act means a Victorian Act, other than the *Legal Profession Uniform Law Application Amendment Act 2019* (Victoria), that amends –

- (a) the *Legal Profession Uniform Law Application Act 2014* (Victoria) Schedule 1; or
- (b) the Uniform Regulations; or
- (c) the Uniform Rules;

- 5.18 Clause 6(1)(b) provides that Victorian amending Acts will become part of the Legal Profession Uniform Law (WA) if they are not disallowed pursuant to clause 9 and have come into operation under clause 10. Clause 263 captures all amending Acts that come into effect in Victoria before the Bill has commenced but after 21 June 2021. These amending Acts are treated as if they have received Royal Assent on the commencement day of the Bill.

- 5.19 Victorian amending Acts can be disallowed by Parliament before they come into operation. This will be discussed later in relation to clause 9.

- 5.20 Clause 8 provides that a Victorian amending Act must be tabled in each House of Parliament within 18 sitting days of the House after the day on which the Act receives Royal Assent. Clause 8 does not require that explanatory material be tabled in Parliament. Clause 8 is identical to clause 8 in the 2020 Bill.

- 5.21 The former Committee was concerned that clause 8 in the 2020 Bill did not compel the Government to provide any explanatory materials upon the tabling of an amending Act. The Attorney General confirmed there is no requirement for the Government to table supporting information with the amending Act but:

there is no reason to suppose that the Government would not table the supporting information if that information was considered to be of assistance. ... If the supporting information is not separately tabled, it will be publicly available on the Victorian Parliament website (and other online platforms).²⁴

- 5.22 The former Committee was not satisfied with the Attorney General’s response and made recommendations that:

- the Government explain to the Parliament the means by which the Western Australian public will be given sufficient and timely notice of proposed amendments to the Legal Profession Uniform Law Act 2020 and their practical effect

²⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, Appendix 2.

- the Parliament should be informed about any proposed amendments to the Act and their practical effect.²⁵

5.23 The Attorney General provided the following information about clause 8 of the Bill:

The Parliamentary Counsel's Office in Western Australia will publish on the WA Legislation Website a version of the Legal Profession Uniform Law as it applies in Western Australia, and keep the version up to date. The Amending Acts from Victoria will also be tabled in Parliament in accordance with clause 8 and be subject to disallowance as provided in clause 9.²⁶

Committee comment

5.24 The Victorian amending Acts and any supporting material are public and can be easily accessible to members of Parliament. The Committee considers that Parliament has sufficient notice of the effect of a Victorian amending Act, given:

- the accessibility of explanatory material on the Victorian Parliament's website
- the Attorney General has indicated that the Parliamentary Counsel's Office in Western Australia will publish on the WA legislation website a version of the Legal Profession Uniform Law as it applies in Western Australia, and keep the version up to date.

²⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, recommendations 6 and 7.

²⁶ Information from the Hon John Quigley MLA provided pursuant to MM2007/01, p 6.

Clause 9 – Disallowance of amending Acts

- 5.25 Clause 9 sets out the process for how a Victorian amending Act becomes part of the Legal Profession Uniform Law (WA) and the mechanism for Parliament to disallow it.
- 5.26 The disallowance mechanism allows Parliament to scrutinise a Victorian amending Act before it becomes a law of Western Australia. The process is outlined below.

Figure 1. *Disallowance process in clauses 8, 9 and 10 of the Legal Profession Uniform Law Application Bill 2021*

An amending Act is tabled in Parliament within 18 sitting days of the House after the day on which the amending Act receives Royal Assent (8)

A member of Parliament has 14 sitting days to move a notice of motion to disallow an amending Act (9(1))

There is a period of 30 sitting days after the notice of motion to disallow is given in which the motion can be debated (9(1))

The 18 day sitting period in 8, the 14 day sitting period and the 30 day sitting period in 9(1) continue to run even though a House of Parliament is prorogued or dissolved or expires and a notice of motion to disallow does not lapse even though the House of Parliament is prorogued or dissolved or expires (9(3)(a) and (b))

If a motion to disallow is not withdrawn or discharged and an amending Act is not disallowed at the end of the 30 sitting day period, the amending Act has effect (9(2))
The Governor is to declare the effect by proclamation as soon as possible (10(2))

If an amending Act has come into operation in Victoria before proclamation, then it comes into operation upon proclamation.

If an amending Act is not in operation in Victoria upon proclamation, it does not come into operation in Western Australia until it comes into operation in Victoria. (10(3) and (4))

- 5.27 There are two Parliamentary sovereignty matters in clause 9:
- Once a disallowance motion is moved, there is nothing in the Bill to trigger a debate on the disallowance motion.
 - The amending Act does not come within the terms of reference of any Legislative Council standing committee and thus will not be scrutinised.
- 5.28 These two matters are the same as those raised in report 133 on the Fair Trading Amendment Bill 2021.

No mechanism to trigger debate in the House

5.29 If a Member or Parliamentary committee wishes to move a motion to disallow a regulation or item of subsidiary legislation, the disallowance motion will usually fall within the ambit of Standing Order 67 (SO 67). It states:

(1) For the purposes of this Standing Order, a “regulation” includes any statutory instrument made subject to disallowance by a written law.

(2) A notice of motion to disallow a regulation shall have precedence over other notices of motion.

(3) If a notice of motion to disallow a regulation has not been moved at the expiration of 2 sitting days after the day on which notice was given, that motion shall be deemed to have been moved *pro forma* upon that expiration.

(4) An order of the day to disallow a regulation has precedence over other orders of the day.

(5) Where –

(a) on the 17th sitting day after the motion was moved (exclusive of the day on which the motion was moved); or

(b) on the proposed last sitting day prior to a general election,

a motion to disallow remains unresolved, then the question shall be put before the Council rises on that day.

5.30 A Victorian amending Act would not fall within the ambit of SO 67(1) because it is not a statutory instrument. There is no definition of statutory instrument in the Standing Orders or the *Interpretation Act 1984*. A statutory instrument is generally accepted to be:

a rule, order, or administrative regulation having the force of law promulgated by the crown in council, a minister, a local authority, a corporation or other body under power delegated by Parliament.²⁷

5.31 If the term ‘statutory instrument’ in SO 67 is interpreted in accordance with its ordinary and usual meaning, then primary legislation would not be included in this definition. Victorian amending Acts are primary legislation and thus do not fall within the definition of ‘regulation’ in SO 67(1).

5.32 SO 67 states that a disallowance motion automatically moves after two sitting days and has precedence over other orders of the day.²⁸ This ensures that they are not overlooked or ignored.

5.33 A default mechanism that prevents the repeated and indefinite postponement of a disallowance motion is contained in SO 67.²⁹ It requires the disallowance motion to be dealt with on a certain day in the event that the question is not put earlier:

- 17th sitting day after the disallowance motion was moved or
- proposed last sitting day prior to a general election.

²⁷ Merriam-Webster online dictionary, See: <https://www.merriam-webster.com/dictionary/statutory%20instrument>. Viewed 21 July 2021.

²⁸ Standing Orders of the Legislative Council – Standing Order 67(3) and Standing Order 67(4).

²⁹ Standing Orders of the Legislative Council – Standing Order 67(5).

- 5.34 This procedure ensures a vote on the disallowance motion. It prevents a disallowance motion remaining on the Notice Paper unresolved.
- 5.35 If an amending Act does not come within the ambit of SO 67, a disallowance motion may be overlooked by the House and not be debated before the 30 day disallowance period has expired in the Bill. This scenario frustrates Parliament's law-making powers because Parliament would not have an opportunity to decide whether the Victorian amending Act should be disallowed.
- 5.36 If the amending Act came within the ambit of SO 67, then any disallowance motion moved in respect to it would be given priority on the Notice Paper and be brought on for debate pursuant to the timeframes in SO 67(5).

Committee comment

- 5.37 Parliament's sovereignty and law-making powers are diminished if there is nothing in the Bill to ensure that a disallowance motion will be debated. Parliament may be denied the opportunity to consider the amending Act, thus eroding Parliamentary sovereignty.

FINDING 2

Clause 9 of the Legal Profession Uniform Law Application Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

- 5.38 Bringing Victorian amending Acts within the ambit of SO 67(1), ensures that disallowance motions are automatically moved under SO 67(3) and brought on for debate.
- 5.39 Victorian amending Acts would be included in the definition of 'regulation' in SO 67 if the word 'statutory' is deleted because they are instruments made subject to disallowance by a written law.

FINDING 3

Standing Order 67 will apply to Victorian amending Acts that are made subject to disallowance in a Western Australian Act of Parliament if Standing Order 67(1) is amended to remove the word 'statutory'.

- 5.40 Amending SO 67(1) ensures that Victorian amending Acts are included in the definition of 'regulation'. This means Parliament is given an opportunity to debate a disallowance motion regarding a Victorian amending Act the same as most other disallowable 'regulations'.

RECOMMENDATION 1

The Legislative Council delete Standing Order 67(1) of the Standing Orders of the Legislative Council and replace it as follows:

For the purpose of this Standing Order, a "regulation" includes any instrument made subject to disallowance by a written law.

- 5.41 The amendment to SO 67(1) pursuant to Recommendation 1 should be coordinated with the passage of the Bill. This ensures that all future disallowance motions made under section 9 of the Act fall within the ambit of SO 67.

RECOMMENDATION 2

The Parliamentary Secretary responsible for the Bill does not move the third reading of the Legal Profession Uniform Law Application Bill 2021 until Legislative Council Standing Order 67(1) is amended in the terms set out in Recommendation 1.

- 5.42 The Committee made the same findings and recommendations regarding amendment of SO 67(1) in report 133 on the Fair Trading Amendment Bill 2021. As of the printing of this report, the Legislative Council has not addressed the recommendations contained in report 133.

Scrutiny of Victorian amending Acts by a Parliamentary committee

- 5.43 The Bill does not provide for a Parliamentary committee to scrutinise a Victorian amending Act. Currently, Victorian amending Acts do not fall within the terms of reference of any Legislative Council standing committee. Parliamentary sovereignty will be enhanced if a Parliamentary committee has oversight over Victorian amending Acts. Parliament can only benefit from additional scrutiny and the ability for the Joint Standing Committee on Delegated Legislation (JSCDL) to be able to move a disallowance motion.

Joint Standing Committee on Delegated Legislation

- 5.44 Most regulations and subsidiary legislation fall within the terms of reference of the JSCDL. This provides Parliament with JSCDL oversight for the majority of subsidiary legislation tabled in Parliament.

- 5.45 The JSCDL scrutinises instruments referred to it in accordance with Joint Rule 10.6 which require the committee to consider whether an instrument:

- is within power
- has no unintended effect on any person's existing rights or interests
- provides an effective mechanism for the review of administrative decisions
- contains only matter that is appropriate for subsidiary legislation.³⁰

- 5.46 The JSCDL scrutinises instruments referred to it under Joint Rule 10.5:

Upon its publication, whether under s41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.³¹

- 5.47 The *Interpretation Act 1984* defines 'written law' in section 5:

written law means all Acts for the time being in force and all subsidiary legislation for the time being in force.

- 5.48 Victorian amending Acts are not published under a written law of Western Australia and they do not come within section 41(1)(a) of the *Interpretation Act 1984*. This is why they do not fall under the terms of reference of the JSCDL.

- 5.49 For Victorian amending Acts to come within the terms of reference of the JSCDL, the Bill needs to be amended to include that the laying of amending Acts on the table in the House is taken to constitute 'publication' under the Act.

Committee comment

- 5.50 The Bill implements a system where Victorian amending Acts are incorporated into Western Australian law without the need for a bill to be considered by the House each time the Legal Profession Uniform Law (WA) is updated. The majority of the Legislative Council may be unaware of changes to the Legal Profession Uniform Law (WA) unless a Member of the Council brings those changes to their attention.

³⁰ Standing Orders of the Legislative Council – Schedule 1: Committees Joint Rule 10.6.

³¹ Standing Orders of the Legislative Council – Schedule 1: Committees Joint Rule 10.5.

FINDING 4

Referral of Victorian amending Acts to the Joint Standing Committee on Delegated Legislation provides extra scrutiny of those enactments.

- 5.51 The Committee considers that the Bill should be amended to include a clause that amending Acts are taken to be published upon being laid before each House of Parliament. The effect is to ensure that amending Acts are referred to the JSCDL under Joint Rule 10.5.

RECOMMENDATION 3

The Legal Profession Uniform Application Bill 2021 be amended as follows:

Clause 8

Page 8, line 19 – To delete “Assent.” and insert:

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

Partial disallowance

- 5.52 A partial disallowance mechanism was included in the 2020 Bill but has not been included in the current Bill. The Attorney General has provided reasons for this:

There is no policy reason for having a partial disallowance mechanism in the Legal Profession Uniform Law Application Bill 2021, where there is no partial disallowance mechanism in the Fair Trading Amendment Bill 2021.

The rationale for not including a partial disallowance mechanism is that allowing for partial disallowance may cause problems in relation to what is partially disallowed – for example there may be non-disallowed provisions that rely on other provisions that are disallowed.

If a House of Parliament would like to disallow some part of the amending Act and there were no mechanism for partial disallowance, the desired provisions could be incorporated in the Legal Profession Uniform Law by a Bill passed in the ordinary way. That would mean the amending 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 for the Government (including the instructors and PCO) and the Parliament to consider any potential issues arising from the part that Parliament considers should not be incorporated.

Partial disallowance mechanisms are not generally used in other jurisdictions. The only jurisdiction where it has been used is in the ACT, and even there, it is in limited circumstances - in the *Education and Care Services National Law (ACT) Act 2011* s 6(2) to (4); *Co-operatives National Law (ACT) Act 2017* s 7(2) to (4) and *Community Housing Providers National Law (ACT) Act 2013* s 7(2) to (4).³²

- 5.53 The inability to partially disallow a Victorian amending Act constrains Western Australia's Parliamentary sovereignty by obliging it to either entirely accept or entirely reject changes to the Legal Profession Uniform Law so far as it applies in Western Australia.
- 5.54 The Committee notes the Government's position. The need to provide consistency with the Legal Profession Uniform Law must be balanced against the impact on Parliamentary sovereignty.

³² Information from the Hon John Quigley MLA provided pursuant to MM2007/01, p 6.

- 5.55 It would have been preferable to provide the Western Australian Parliament with the power to partially disallow a Victorian amending Act. However, the Committee considers that, on balance, an inability to partially disallow a Victorian amending Act can be justified in this case due to the risk of a lack of consistency between the Legal Profession Uniform Law (WA) and the Legal Profession Uniform Law.

Clauses 13 to 16 – Division 2, Application of Uniform Regulations and Uniform Rules

- 5.56 In clause 3(1), Uniform Regulations and Uniform Rules are defined as:

Uniform Regulations means the Legal Profession Uniform Regulations:

- (a) as in force under the [Legal Profession Uniform Law] Part 9.1 immediately before the day on which this definition comes into operation (as amended or repealed by regulations to which paragraph (b), or an Act to which paragraph (c) applies); and
- (b) made under the *Legal Profession Uniform Law (WA)*³³ Part 9.1 on and after the day on which this definition comes into operation; and
- (c) made by a provision of an amending Act.

Uniform Rules means the Legal Profession Uniform Rules:

- (a) as in force under the [Legal Profession Uniform Law] Part 9.2 immediately before the day on which this definition comes into operation (as amended or repealed by rules to which paragraph (b), or an Act to which paragraph (c) applies); and
- (b) made under the *Legal Profession Uniform Law (WA)* Part 9.2 on and after the day on which this definition comes into operation; and
- (c) made by a provision of an amending Act.

- 5.57 Clauses 13, 14 and 15 provide for:

- the application of Uniform Regulations and Uniform Rules in Western Australia (clause 13)
- publication in the *Gazette* (clause 14)
- tabling in Parliament and the process by which they may be disallowed (clause 15).

- 5.58 Clause 16 states that sections 41 and 42 of the *Interpretation Act 1984* (disallowance provisions for regulations) do not apply to Uniform Regulations and Uniform Rules. Clause 16 is necessary because clause 15 provides disallowance provisions for Uniform Regulations and Uniform Rules that differs from sections 41 and 42 of the *Interpretation Act 1984*.

- 5.59 The Uniform Regulations and Uniform Rules in force in Victoria immediately before Part 1 of the Bill receives the Royal Assent apply as subsidiary legislation of Western Australia.³⁴ They will apply on the day on which sections 13(1)(a) and 13(2)(a) come into operation. This will be on a day fixed by proclamation.³⁵

³³ When the Legal Profession Uniform Law is applied in Western Australia it will be referred to as the *Legal Profession Uniform Law (WA)* - see clause 6(2)(b).

³⁴ Subparagraph (a) of both the definitions of **Uniform Regulations** and **Uniform Rules**.

³⁵ Legal Profession Uniform Law Application Bill 2021 cl 2(b).

- 5.60 Uniform Regulations or Uniform Rules made before 21 June 2021 cannot be disallowed by Parliament. The former Committee noted that if the Western Australian Parliament does not agree to one or more of the non-disallowable Uniform Regulations or Uniform Rules, it can vote to delete those provisions during debate on clause 14 of the Bill.³⁶
- 5.61 Uniform Regulations or Uniform Rules made after 21 June 2021 are subject to disallowance pursuant to clause 15 of the Bill.
- 5.62 The former Committee found:
- Uniform Regulations and Uniform Rules falling within paragraph (a) of the definition of 'Uniform Regulations' and 'Uniform Rules' in clause 3 of the Legal Profession Uniform Law Application Bill 2020 and made on or before 17 March 2020 are not subject to disallowance by the Western Australian Parliament. This is an erosion of Parliament sovereignty.³⁷
- 5.63 The same situation applies in relation to the Bill, but for Uniform Regulations or Uniform Rules made before 21 June 2021.

Committee comment

- 5.64 Subparagraphs (a) of both the definitions of **Uniform Regulations** and **Uniform Rules** in clause 3(1) erodes Parliament's sovereignty and law-making powers because Parliament cannot vote to disallow Uniform Regulations or Uniform Rules made before 21 June 2021.
- 5.65 However, if the Western Australian Parliament does not agree to one or more of these Uniform Regulations or Uniform Rules, it can vote to delete those provisions during debate on clause 14 of the Bill so they do not apply as subsidiary legislation of Western Australia. The Committee draws this to the attention of the Legislative Council for consideration during debate.

³⁶ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, pp 28 – 29.

³⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, finding 12.

Henry VIII clauses

- 5.66 There are several clauses in the Bill that have a Henry VIII effect. A ‘Henry VIII clause’ is a section in an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.³⁸
- 5.67 The Committee’s position on Henry VIII clauses has been well documented in previous reports.³⁹ Henry VIII clauses:
- offend the principle of the separation of powers
 - limit Parliamentary oversight and subvert the appropriate relationship between Parliament and the Executive⁴⁰
 - give insufficient regard to the institution of Parliament as the supreme legislature
 - delegate to the Executive the Parliament’s sovereign function to legislate.
- 5.68 The purpose of a proposed Henry VIII clause should be clearly explained and justified in the Government’s explanatory materials in support of its bill. This enables the Legislative Council to weigh the desirability of such a clause in the particular circumstances against its impact on the institution of Parliament.⁴¹
- 5.69 In report 129, the former Committee recommended that the second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.⁴² Despite the Committee’s request for the Government to identify Henry VIII clauses in explanatory materials, this has not happened.
- 5.70 In response to the former Committee’s recommendations in report 129, the Attorney General stated:
- There is no requirement to identify a clause in a Bill as Henry VIII clause in the Explanatory Memorandum or Second Reading Speech and the effect of such clause is clearly set out in the Explanatory Memorandum.⁴³

³⁸ Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The use of “Henry VIII Clauses” in Queensland Legislation*, January 1997, p 24.

³⁹ See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 70, *Business Names (Commonwealth Powers) Bill 2011*, March 2012, p 7, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 91, *Rail Safety National Law (WA) Bill 2014*, March 2015, pp 19–20, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 121, *Child Support (Commonwealth Powers) Bill 2018*, 12 March 2019, p 13, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review and Report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, pp 31–32. A detailed review of Henry VIII clauses is also contained in Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, *Revenue Laws Amendment Bill 2012*, September 2012.

⁴⁰ The Senate, Standing Committee for the Scrutiny of Delegated Legislation, Exemption of delegated legislation from parliamentary oversight, 16 March 2021, p 120, para 7.110. See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report.

⁴¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry) Bill 2010*, 11 November 2010, p 12.

⁴² Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review and Report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, recommendations 12 and 13.

⁴³ Information from the Attorney General provided pursuant to MM2007/01, p 7.

- 5.71 The Committee understands there is no requirement for Henry VIII clauses to be identified in explanatory materials, but is requesting the Government identify any Henry VIII clause in a bill, provide a rationale for it and explain its practical effect. This assists the Committee and Parliament in assessing whether a clause should permit the modification of primary legislation by subsidiary legislation. The Committee remains of the view that Henry VIII clauses can have serious effects and should be identified clearly in each bill.

Clause 126(1)(b) – Local regulations in relation to government lawyers

- 5.72 Clause 126(1)(b) states:

(1) The local regulations⁴⁴ may –

(b) without limitation, exclude or modify the operation of specified provisions of the *Legal Profession Uniform Law (WA)* (including the provisions of Part 2.2 of the Law) to the extent that any of those provisions would otherwise be applicable to any persons, or classes of persons, as government lawyers...

- 5.73 Clause 126(1)(b) permits the modification of primary legislation and has a Henry VIII effect. In report 129, the former Committee found that clause 126(1)(b) erodes Parliament's sovereignty and law-making powers but it is acceptable by reason of the ability to refine the national scheme to suit Western Australian requirements.⁴⁵ The Committee agrees with findings 18 and 20 in report 129.

Clause 246(c) – Information sharing

- 5.74 Clause 246(c) provides:

The Board, the Legal Services and Complaints Committee and the Legal Contribution Trust (each of which is a **relevant authority**) may disclose information to –

(c) a person or class of persons prescribed by the local regulations about any matter relating to or arising under an Act, the *Legal Profession Uniform Law (WA)* or a corresponding law, subject to any conditions prescribed by the local regulations.

- 5.75 Pursuant to clause 246(c) the Government may prescribe that the Legal Practice Board, Legal Services and Complaints Committee and the Legal Contribution Trust may:
- disclose information to a person or class of persons without any limitation
 - impose any conditions regarding the disclosure of information.
- 5.76 This is a wide regulation-making power that the Committee considers to be an erosion of Parliament's sovereignty. Such powers are analogous to "Henry VIII" clauses, authorising the making of regulations which may amend the Act under which they are made.

Attorney General's position

- 5.77 The Committee wrote to the Attorney General to ask questions about the wide regulation-making powers in clause 246(c). The Attorney General responded with the following information:

⁴⁴ 'local regulations' are those regulations made under the *Legal Profession Uniform Law (WA)* and are only applicable in Western Australia.

⁴⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review and Report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, findings 18 and 20.

Clause 246(c) of the Bill is consistent with section 586(3) of the current *Legal Profession Act 2008* which provides:

The regulations may authorise a local regulatory authority to disclose information to a person or body prescribed, or of a class prescribed, by the regulations relating to or arising under this Act or a corresponding law, subject to any conditions specified in the regulations.

There are currently no regulations in the *Legal Profession Regulations 2009* made pursuant to that section.

It is anticipated that a number of persons including, but not limited to, the Law Society of Western Australia and the Western Australian Bar Association will be prescribed in the local regulations for the purposes of clause 246(c).

It is possible that relevant stakeholders (including those in other jurisdictions) might for example change business names from time to time. This regulation-making power provides sufficient flexibility to prescribe relevant persons for the disclosure of information as and when required. Any regulations made pursuant to clause 246(c) will be subject to disallowance.⁴⁶

Committee Comment

- 5.78 The Committee considers that an open-ended regulation-making power erodes Parliament's sovereignty. The persons or classes of persons and the types of conditions to be imposed should be prescribed in the primary legislation.
- 5.79 However, the Committee notes the Attorney General's position in relation to this clause. The need to provide flexibility must be balanced against the impact on Parliamentary sovereignty. This flexibility is required when relevant stakeholders are located across jurisdictions.
- 5.80 The Committee also notes that section 586(3) of the *Legal Profession Act 2008* already contains a similar regulation-making power.
- 5.81 The Committee further notes any regulations made pursuant to this power will be subject to scrutiny by the JSCDL and possible disallowance by the Parliament.
- 5.82 Given the above, the Committee considers that the open-ended regulation-making power can be justified in this case due to the need for flexibility and that similar provisions are already contained in the *Legal Profession Act 2008*.

FINDING 5

Clause 246(c) of the Legal Profession Uniform Law Application Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

FINDING 6

Clause 246(c) of the Legal Profession Uniform Law Application Bill 2021 can be justified on the basis that flexibility is required and similar provisions are already contained in the *Legal Profession Act 2008*.

Clause 251 – Local regulations

- 5.83 Clause 251 states:

⁴⁶ Hon John Quigley MLA, Attorney General, letter, 2 September 2021, pp 1-2.

- (1) The Governor may make regulations prescribing matters —
 - (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for giving effect to this Act.
- (2) Without limiting subsection (1), the local regulations may make provision for or in relation to —
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) the exempting of persons, or classes of persons, in whole or part from provisions of this Act.
- (3) Without limiting subsection (1), the local regulations may —
 - (a) ...
 - (b) confer a discretion on a person; and
 - (c) impose conditions, or authorise or permit a person to impose conditions, in relation to a matter.

5.84 Clause 251(2)(d) permits the Government, by regulation, to exempt persons, or classes of persons, in whole or part from provisions of the Act. Clauses 251(3)(b) and (c) permit the Government, by regulation, to confer a discretion on a person and impose conditions or authorise or permit a person to impose conditions, in relation to a matter. These clauses have a Henry VIII effect.

No description in Explanatory Memorandum

5.85 The Attorney General's response to the former Committee's recommendations in report 129⁴⁷ that Henry VIII clauses be set out in explanatory materials is that 'the effect of any such clause is clearly set out in the Explanatory Memorandum'.⁴⁸ However, the Explanatory Memorandum refers to clause 251 and states the following:

This clause provides for the making of regulations by the Governor.

5.86 There is no description of what regulation-making powers are included in clause 251 or that there is a wide regulation-making power for the Government to exclude any persons or classes of persons from the application of any parts of the Act. The effect of clause 251 is not set out in the Explanatory Memorandum and this clause is a cogent example of why Henry VIII clauses should be clearly identified in explanatory materials.

Attorney General's position

5.87 The Committee asked the Attorney General a number of questions in relation to clauses 251(2)(d) and 251(3)(b) and (c) and the use of the regulation-making power.

5.88 The Attorney General responded:

⁴⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review and Report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, recommendations 12 and 13.

⁴⁸ Information from the Hon John Quigley MLA provided pursuant to MM2007/01, p 7.

This Bill, together with the Uniform Law, provides a substantial change to the regulatory framework governing the legal profession in Western Australia. Despite the careful consideration that has been given to this Bill and the Uniform Law, due to the Bill's complexity, there is the potential for inadvertent consequences to arise. Clause 251(2)(d) is a mechanism by which any unintended consequences or inadvertent hardships can be addressed.

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

Such regulations made pursuant to clause 251(2)(d) will be subject to disallowance.⁴⁹

Committee comment

- 5.89 The Committee considers that the wide regulation-making powers in clause 251(2)(d) and 251(3)(b) and (c) erode Parliament's sovereignty.
- 5.90 In relation to clause 251(2)(d), the circumstances of any exemptions from the Act and the persons or classes of persons to be exempt should be set out in the Act. The Committee notes the Attorney General's position but considers that clause 251(2)(d) authorises Government to change the application of the Act through regulation. There is a lack of criteria or guidance within the Bill governing what sort of person is intended to be exempt from parts or all of the Act. Such exemptions should be contained in primary legislation and considered by Parliament.
- 5.91 The Committee understands that regulations are scrutinised by the JSCDL and subject to possible disallowance by the Parliament. However, the JSCDL has limited power to recommend disallowance of a regulation if the governing Act authorises the regulation-making power. Clause 251(2)(d) does not place any limitations on the power to exclude persons from the Act and may have serious implications. The need for flexibility may not justify the use of such a wide regulation-making power.
- 5.92 Clauses 251(3)(b) and (c) also contain wide regulation-making powers and the Attorney General has not provided adequate justification for those powers. The language used in clauses 251(3)(b) and (c) imposes a wide power for regulations to confer a discretion on a person and impose conditions or authorise or permit a person to impose conditions, in relation to a matter. There is no limitation or description of what a 'matter' is or the persons or classes of persons.

FINDING 7

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

RECOMMENDATION 4

The Parliamentary Secretary explain to the Legislative Council:

- the persons or classes of persons who may be exempt from whole or part of the provisions of the Act;

⁴⁹ Hon John Quigley MLA, Attorney General, letter, 2 September 2021, p 2.

- 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.

RECOMMENDATION 5

The second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.

Clause 329 – Transitional regulations

5.93 Clause 329(3) provides:

The local regulations in relation to transitional matters may provide that specified provisions of the Act, the *Legal Profession Uniform Law (WA)* or another written law

–

- (a) do not apply to or in relation to any matter; or
- (b) apply with specified modifications to or in relation to any matter.

5.94 Clause 329(3) has a Henry VIII effect as it permits the modification of the operation of primary legislation by local regulation. In report 129, the former Committee found that clause 329(3) erodes the Western Australian Parliament's sovereignty and law-making powers but is justifiable in order to effect a smooth transition to the new regulatory scheme and acceptable by reason of its focused operation.⁵⁰ The Committee agrees with findings 22 and 24 in report 129.

6 Legal Profession Uniform Law Application (Levy) Bill

- 6.1 The Levy Bill is the same as the Legal Profession Uniform Law Application (Levy) Bill 2020. The former Committee did not find any sovereignty issues with the Legal Profession Uniform Law Application (Levy) Bill 2020.
- 6.2 The Levy Bill has been introduced as a separate Bill because under section 46(7) of the *Western Australian Constitution Acts Amendment Act 1899*, bills imposing taxation must deal only with the imposition of taxation. The proposed levy is in the nature of a tax.
- 6.3 A transitional provision contained in clause 325 of the Bill continues the law library established under the *Legal Profession Act 2008* as the law library that may be established under clause 243.
- 6.4 Clause 244(2) of the Bill provides for the Legal Practice Board to pay to the State an annual amount as a contribution towards the cost of providing and maintaining the law library. The amount of the contribution will be calculated in accordance with local regulations.⁵¹

⁵⁰ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review and Report 129, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, 15 September 2020, findings 22 and 24.

⁵¹ Legal Profession Uniform Law Application Bill 2021 cl 244(3).

- 6.5 This contribution will be credited to the Law Library Fund, an agency special purpose account established under the *Financial Management Act 2006*.⁵² The funds credited to that account must be used to provide and maintain the law library, provide library services and for other prescribed purposes.⁵³
- 6.6 The Levy Bill will amend section 244 of the Act by adding a new subsection (9), to provide for a levy to be imposed by section 244 or local regulations made thereunder.⁵⁴
- 6.7 There are no Parliamentary sovereignty or law-making issues in the Levy Bill.



Hon Donna Faragher MLC
Chair

⁵² *ibid.*, cl 244(7).

⁵³ *ibid.*, cl 244(8).

⁵⁴ Legal Profession Uniform Law Application (Levy) Bill 2020 cl 4.

APPENDIX 1

LETTER FROM THE ATTORNEY GENERAL DATED 2 SEPTEMBER 2021



Attorney General; Minister for Electoral Affairs

Our Ref: 67-25982
Your Ref: A909286



Hon Donna Faragher MLC
Chair
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council Committee Office
18-32 Parliament Place
WEST PERTH WA 6005

Dear Ms Faragher

LEGAL PROFESSION UNIFORM LAW APPLICATION BILL 2021

I refer to your letter dated 19 August 2021 in relation to the Legal Profession Uniform Law Application Bill 2021 (**the Bill**).

I advise as follows.

Clause 246(c)

1.1 Why have these wide regulation making powers been included in clause 246(c)?

Clause 246(c) of the Bill is consistent with section 586(3) of the current *Legal Profession Act 2008*, which provides:

- (3) *The regulations may authorise a local regulatory authority to disclose information to a person or body prescribed, or of a class prescribed, by the regulations relating to or arising under this Act or a corresponding law, subject to any conditions specified in the regulations.*

There are currently no regulations in the *Legal Profession Regulations 2009* made pursuant to that section.

As mentioned in the Second Reading Speech for the Bill, many of the existing features of the *Legal Profession Act* have been retained to the extent that those provisions are compatible with the Legal Profession Uniform Law (**Uniform Law**).

1.2 Why are the person or class of persons not set out in the Bill?

See the answer to 1.1 above.

It is anticipated that a number of persons including, but not limited to, the Law Society of Western Australia and the Western Australian Bar Association will be prescribed in the local regulations for the purposes of clause 246(c).

It is possible that relevant stakeholders (including those in other jurisdictions) might, for example, change business names from time to time. This regulation-making power provides sufficient flexibility to prescribe relevant persons for the disclosure of information as and when required. Any regulations made pursuant to clause 246(c) will be subject to disallowance.

1.3 Why are the conditions that the person or class of persons may be subjected to not set out in the Bill?

See the answer to 1.1 above.

The conditions that a person, or class of persons, may be subjected to are not set out in the Bill because it is appropriate that there be sufficient flexibility for any conditions that are imposed to respond to the circumstances that exist at the time. This regulation-making power provides sufficient flexibility to specify conditions as and when required.

Any regulations made pursuant to clause 246(c) will be subject to disallowance.

Clause 251

1.1 Why is a regulation making power to exempt persons, or classes of persons, in whole or part from provisions of the Act necessary?

This Bill, together with the Uniform Law, provides a substantial change to the regulatory framework governing the legal profession in Western Australia. Despite the careful consideration that has been given to this Bill and the Uniform Law, due to the Bill's complexity, there is the potential for inadvertent consequences to arise. Clause 251(2)(d) is a mechanism by which any unintended consequences or inadvertent hardships can be addressed.

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

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

1.2 Why are the exempt persons, or classes of persons referred to in clause 251(2)(d) not set out in the Bill?

See the answer to 1.1 above.

Any inadvertent consequences of the Bill on a person, or class of persons, may not be known until such time as the Bill comes into effect.

1.3 Why are clauses 251(3)(b) and (c) necessary?

Clause 251(1) provides that regulations may 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(3)(b) and (c) have been inserted to be consistent with various regulation-making powers contained within the Bill, such as clause 126(2).

Clause 251(3)(b) and (c) is 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.*

I do not consider that clause 251(3)(b) and (c) has a Henry VIII effect.

1.4 Why is the discretion referred to in clause 251(3)(b) not set out in the Bill, along with the classes of people to whom a discretion may be conferred on?

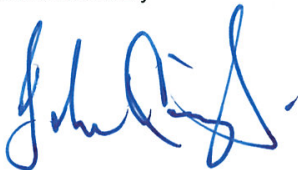
See the answer to 1.3 above.

1.5 Why are the conditions referred to in clause 251(3)(c) not set out in the Bill, along with the classes of people who may impose such conditions?

See the answer to 1.3 above.

I trust that the above is of assistance to the Standing Committee.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'John Quigley', with a stylized flourish at the end.

Hon. John Quigley MLA
ATTORNEY GENERAL; MINISTER FOR ELECTORAL AFFAIRS

- 2 SEP 2021

GLOSSARY

Term	Definition
Act	Legal Profession Uniform Law Application Act 2021
amending Acts	See clause 3(1) of the Bill
Attorney General	Hon John Quigley MLA
Bill	Legal Profession Uniform Law Application Bill 2021
Committee	Standing Committee on Uniform Legislation and Statutes Review
House	Legislative Council of Western Australia
IGA	Intergovernmental Agreement on the Legal Profession Uniform Framework dated 20 February 2019
JSCDL	Joint Standing Committee on Delegated Legislation
Legal Profession Uniform Law	Schedule 1 to the <i>Legal Profession Uniform Law Application Act 2014</i> (Victoria)
Legal Profession Uniform Law (WA)	See clause 6 of the Bill
Legislative Council	Legislative Council of Western Australia
Levy Bill	Legal Profession Uniform Law Application (Levy) Bill 2021
SO 67	Legislative Council Standing Order 67
Uniform Regulations	See clause 3(1) of the Bill
Uniform Rules	See clause 3(1) of the Bill
2020 Bill	Legal Profession Uniform Law Application Bill 2020
2020 Levy Bill	Legal Profession Uniform Law Application (Levy) Bill 2020

Standing Committee on Uniform Legislation and Statutes Review

Date first appointed:

17 August 2005

Terms of Reference:

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

'6. Uniform Legislation and Statutes Review Committee

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



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