

REVIEW OF THE LEGAL PROFESSION UNIFORM LAW

THE LAW SOCIETY OF WESTERN AUSTRALIA

Report Prepared for the Legal Profession Uniform
Framework Ad Hoc Committee of The Law Society of
Western Australia

To
Legal Profession Uniform Framework Ad Hoc Committee

Society Contact
Executive Director

Date
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Introduction

1. The Victorian and New South Wales governments have agreed on a uniform scheme for regulation of the legal profession in their two States. The uniform scheme is expected to come into force in Victoria and New South Wales early next year.
2. The Law Society of Western Australia established an Ad Hoc Committee to review:
 - the Legal Profession Uniform Law (Uniform Law);
 - the Legal Profession Uniform Law Application Act 2013 (Vic); and
 - the Legal Profession Uniform Law Application Act 2014 (NSW).
3. The Ad Hoc Committee consists of:
 - (a) Konrad de Kerloy, President of the Law Society, Partner Herbert Smith Freehills;
 - (b) Stewart Forbes, Law Society Costs Committee Chair, Managing Director of WA Costs Consultancy;
 - (c) Graeme Geldart, Executive Director of the Legal Practice Board of Western Australia;
 - (d) Matthew Keogh, Senior Vice President of the Law Society, Senior Associate Herbert Smith Freehills and member of numerous Law Society committees
 - (e) Ashley Macknay; member of Law Society Ethics Committee and Law Society representative to the Law Council of Australia Professional Ethics Committee, Director of MDS Legal;
 - (f) Hylton Quail, former President of the Law Society, Barrister at Francis Burt Chambers. Mr Quail resigned from the Committee on 19 August 2014; and
 - (g) Laurie Shervington, Chair of the Legal Contribution Trust, Special Counsel Squire Patton Boggs.

Scope of Review

4. The Ad Hoc Committee produced a discussion draft of this report for the purpose of consulting the wider legal profession and various stakeholders in considering whether, and to what extent, enacting legislation to apply the Uniform Law in Western Australia would:
 - address the concerns expressed by the Attorney General the Hon. Michael Mischin MLC in his speech of November 2011; and
 - be consistent with the 13 points articulated in the Law Society of Western Australia's National Regulatory Framework Policy Positions (LSPPs).

Consultation Process

5. The discussion draft of this report was widely circulated including by direct email to almost all Western Australian legal practitioners (copy attached) and by publication on the Society's web site and through LinkedIn.

In addition, the discussion draft was sent directly to the following key stakeholders for comment:

- The Hon Wayne Martin AC, Chief Justice of Western Australia
Supreme Court of Western Australia
- Mr Grant Donaldson SC, Solicitor General
Department of the Attorney General
- Ms Cheryl Gwilliam, Director General
Department of the Attorney General
- Mr John Syminton, Chair
Legal Practice Board of Western Australia

LAW SOCIETY AND BAR ASSOCIATIONS IN AUSTRALIA

- Mr Michael Colbran QC, President
Law Council of Australia
- Mr Gregory Stretton SC, President
ACT Bar Association
- Mr Martin Hockridg, President
ACT Law Society
- Mr Phillip Boulten SC, President
NSW Bar Association
- Ms Ros Everett, President
Law Society of New South Wales
- Mr John Lawrence SC, President
Northern Territory Bar Association
- Ms Peggy Cheong, President
Law Society Northern Territory
- Mr Peter Davies QC, President
Bar Association of Queensland
- Mr Ian Brown, President
Queensland Law Society
- Mr Patrick O'Sullivan SC, President
South Australian Bar Association
- Mr Morry Bailes, President
Law Society of South Australia
- Mr Anthony Mihal, President
Law Society of Tasmania
- Mr Bruce McTaggart SC, President
The Tasmanian Independent Bar
- Mr William Alstergren SC, Chairman
The Victorian Bar
- Mr Geoff Bowyer, President
The Law Institute of Victoria
- Mr Peter Quinlan SC, President
Western Australian Bar Association

OTHER LEGAL ASSOCIATIONS IN WA

- Mr Stuart Clark, Large Law Firm Group
Clayton Utz, Sydney
 - Mr Gregory Stitt
Amnesty International Legal Group
 - Mark Gregory, State President/Branch Director
AMPLA Limited
 - Amanda Davidson, WA President
Australian Corporate Lawyers Association (ACLA)
 - Shash Nigam, WA Director
Australian Lawyers Alliance (WA)
 - Jean Shaw, WA Chapter
Australian Institute of Administrative Law
 - Susan Courthope, WA President
Australian Insurance Law Association
 - Ms Karen Merrin, Chair
Community Legal Centres Association WA Inc
 - Mr Adam Levine, Convenor
Corporate Law Firms Association of Perth (CLAP)
 - Ms Linda Black, President
Criminal Lawyers Association
 - Greg McIntyre SC, Chair, WA Branch, Australian Section
International Commission of Jurists
 - Ms Teresa Farmer, President
Family Law Practitioners Association (FLPA)
 - Mr P Maughan JP, Registrar
Royal Association of Justices of Western Australia Inc
 - Ms Cathryn Greville, President
Women Lawyers WA Inc
 - Susan Fielding, Chair
Society of Trust and Estate Practitioners
 - Mr Clive Young, Convenor
The South West and Great Southern Law Society Inc
6. Feedback was received from a number of stakeholder groups, firms, organisations and individual practitioners, as listed in Schedule 3. Copies of this feedback are annexed to this report.
7. Having considered feedback and comments received from the Law Society's members, the wider profession and various stakeholders, the Ad Hoc Committee has now produced this report.
8. The Ad-Hoc Committee were assisted in preparing this report by Scott Ivey and Yun Yong, lawyers of Herbert Smith Freehills.

Background

9. On 5 December 2013, the Attorneys-General for New South Wales and Victoria executed an intergovernmental agreement entitled 'Bilateral Agreement on the Uniform Legal Profession Framework between New South Wales and Victoria' (the **Intergovernmental Agreement**) formalising their joint participation in a new regulatory scheme for the legal profession in the two States.
10. The Victorian Act was assented to on 26 March 2014. It has yet to be proclaimed. The full text of the Uniform Law is contained in Schedule 1 to the Victorian Act.
11. The NSW Act, to apply the Uniform Law as set out in Schedule 1 to the Victorian Act, as a law of New South Wales, was assented to on 20 May 2014.
12. It is anticipated that the Victorian and NSW Acts will come into operation in early 2015.¹

Purpose and Key Features of the Uniform Law

13. The Second Reading speech for the NSW Act explained the purpose of the Uniform Law as follows:

*The uniform law aims to simplify and standardise regulatory obligations, cutting red tape for law firms, especially those operating across jurisdictions, while still providing for a significant degree of local involvement in the performance of regulatory functions. The principles of co-regulation, with involvement for the profession in critical areas of regulatory responsibility, are preserved, while consumers of legal services will also benefit from greater consistency of experience across jurisdictions and from improvements to key regulatory requirements.*²
14. The governments of New South Wales and Victoria have expressed their hope that the other States and Territories will choose to adopt the Uniform Law after having the opportunity to observe it in operation.³ There is a unique opportunity for WA at this point to be involved in the establishment of the national profession before it commences operation.
15. The Uniform Law provides for the establishment of two new national bodies:
 - (a) a Legal Services Council (**Council**); and
 - (b) an Admissions Committee (**Admissions Committee**), together with a Commissioner for Uniform Legal Services Regulation (**Commissioner**).
16. In addition, the Attorneys-General of the participating jurisdictions will act jointly as a standing committee (**Standing Committee**) in relation to various aspects of the scheme.

¹ *Legal Profession Uniform Law Application Bill 2014* (NSW) 2nd Reading Speech, 26 March 2014.

² *Legal Profession Uniform Law Application Bill 2013* (Vic), 2nd Reading Speech (Legislative Assembly), 12 December 2013 p. 4662-4663.

³ *Legal Profession Uniform Law Application Bill 2013* (Vic), 2nd Reading Speech (Legislative Assembly), 12 December 2013 p. 4662; *Legal Profession Uniform Law Application Bill 2014* (NSW), 2nd Reading Speech, p. 19, 26 March 2014.

17. The composition and functions of each of these new bodies is analysed in detail below. For ease of reference, attached as Schedule 1 to this report is a table listing the authorities responsible for the administration of the legal profession:
- (a) in New South Wales and Victoria pursuant to the NSW Act and Victorian Act respectively; and
 - (b) in Western Australia under existing state legislation; and
 - (c) in Western Australia if the Uniform Law is adopted.

Standing Committee

18. The Standing Committee will comprise the Attorneys-General of the participating jurisdictions.
19. It will have a general supervisory role in relation to the Council, the Commissioner and local regulatory authorities to ensure that they are fulfilling their duties under the Uniform Law.⁴ The Standing Committee's role includes:
- (a) overseeing the finances of the Council and approving its budget;⁵
 - (b) making Uniform Regulations with respect to any matter expressly required or permitted by the Uniform Law to be prescribed by regulation;⁶
 - (c) requesting reports from the Council, the Commissioner or any local regulatory authority regarding specified aspects of their operations under the Uniform Law;⁷
 - (d) considering, approving or vetoing proposed Uniform Rules submitted by the Council which include:⁸
 - (1) Admission Rules;
 - (2) Legal Practice Rules;
 - (3) Legal Profession Conduct Rules; and
 - (4) Continuing Professional Development Rules.
20. The Standing Committee's veto powers are extremely limited and may only be exercised where the proposed rule would:⁹
- (a) impose restrictive or anti-competitive practices;
 - (b) otherwise not be in the public interest because they conflict with the objectives of the Uniform Law; or
 - (c) impact on the public funding of the national scheme.
21. The Standing Committee's powers are further limited by the Intergovernmental Agreement pursuant to which the parties agree that the Standing Committee will not intervene in the day-to-day operations of the Council, the Commissioner or local regulatory authorities, including in decisions relating to:
- (a) the determination of applications for admission to the legal profession;
 - (b) the grant, renewal, suspension, variation or cancellation of an Australian practising certificate; or
 - (c) individual complaints or disciplinary matters.¹⁰

⁴ *Legal Profession Uniform Law Application Bill 2013* (Vic), Explanatory Memorandum, page 156; Uniform Law section 391(1).

⁵ Uniform Law section 391(2).

⁶ Uniform Law section 417.

⁷ Uniform Law section 393.

⁸ Uniform Law sections 420(1) and 428

⁹ Uniform Law section 428(3).

¹⁰ Bilateral Agreement on the Uniform Legal Profession Framework clause 3.1.2.

Legal Services Council

22. The Council is to consist of 5 members selected from the participating jurisdictions as follows:¹¹
- (a) one member appointed by the Victorian Attorney-General on the recommendation of the Law Council of Australia (**LCA**);
 - (b) one member appointed by the Victorian Attorney-General on the recommendation of the Australian Bar Association (**ABA**);
 - (c) two members appointed by the Victorian Attorney-General on the recommendation of the Standing Committee on the basis of their expertise in one or more of the following areas:
 - (i) the practice of law;
 - (ii) consumer protection;
 - (iii) regulation of the legal profession;
 - (iv) financial management; and
 - (d) one member appointed as Chair by the Victorian Attorney-General on the recommendation of the Standing Committee. In recommending the Chair, the Standing Committee must obtain the concurrence of the Presidents of the LCA and ABA.¹²
23. The Standing Committee must ensure, as far as practicable, that the composition of the Council reflects a balance of participating jurisdictions and expertise.¹³
24. The Council's offices will be based in Sydney.¹⁴
25. The Council is to be charged with monitoring the implementation of the Uniform Law and ensuring its consistent application by participating jurisdictions.¹⁵ Its functions include:
- (a) making Uniform Rules (subject to the Standing Committee's approval and veto powers);¹⁶ and
 - (b) establishing advisory committees to provide advice, recommendations or assistance to the Council in the exercise of its functions.¹⁷
26. While the Council's offices will be based in Sydney, it will draw its membership initially from both New South Wales and Victoria and, in due course, from other participating jurisdictions.¹⁸

Admissions Committee

27. The Uniform Law provides that an Admissions Committee is to be established by the Council.¹⁹ The Admissions Committee has the following responsibilities:

¹¹ Uniform Law Schedule 1 section 2

¹² Uniform Law schedule 1 clause 2(1)(a)-(b) and 2(2)(c).

¹³ Uniform Law schedule 1 clause 2(3).

¹⁴ Uniform Law section 395 and schedule 1 clause 2.

¹⁵ Uniform Law section 394(2).

¹⁶ Uniform Law sections 419 and 428.

¹⁷ Uniform Law schedule 1 clause 22.

¹⁸ *Legal Profession Uniform Law Application Bill 2014* (NSW), 2nd Reading Speech, p. 19, 26 March 2014.

¹⁹ Uniform Law section 402.

- (a) developing admission rules;²⁰ and
- (b) advising the Council on guidelines and directions of the Council relating to admission.²¹

28. The authority to admit practitioners remains vested in each participating jurisdiction's Supreme Court.

29. The Admissions Committee is to consist of 7 individuals comprising:

- (a) two current or former Supreme Court Judges from different jurisdictions nominated by the Chief Justice of Victoria with the concurrence of the Chief Justices of each other participating jurisdiction;
- (b) one member nominated by the LCA;
- (c) one member nominated by the ABA;
- (d) two individuals from different jurisdictions, each of whom is to be nominated by a Law School Dean (or equivalent); and
- (e) one member nominated by the Standing Committee.²²

30. The Council is to ensure that there is at least 1 member on the Admissions Committee from each participating jurisdiction.²³

Commissioner for Uniform Legal Services Regulation

31. The Commissioner is to be the CEO of the Council appointed by the Attorney-General of Victoria on the recommendation of the Standing Committee and with the concurrence of the Council.²⁴

32. The office of the Commissioner is independent of the Council and is responsible for administering the Council's affairs in accordance with the policies and directions of the Council.²⁵

Designated local regulatory authorities

33. In addition to establishing new national legal professional bodies, the Uniform Law provides that certain powers are to be exercised by the relevant 'designated local regulatory authority' of each participating jurisdiction. The 'designated local regulatory authority' is defined in the Uniform Law²⁶ as:

a person or body specified or described in a law of this jurisdiction for the purposes of a provision, or part of a provision, of this Law in which the term is used.

34. The effect of this is that many of the existing local regulatory authorities of participating jurisdictions will continue exercising their current functions.

²⁰ Uniform Law sections 402 and 403.

²¹ Uniform Law section 402(2)(b).

²² Uniform Law schedule 1 clause 21(1).

²³ Uniform Law schedule 1 clause 21(2).

²⁴ Uniform Law schedule 1 clause 17(1) and (3) and schedule 2 clause 2.

²⁵ Uniform Law schedule 1 clause 17(2).

²⁶ Uniform Law section 6(1).

35. For example, under the Victorian Act, the Victorian Legal Services Board retains its authority to grant or renew practising certificates and to exempt legal practitioners from the requirement to obtain professional indemnity insurance.²⁷
36. The nature of the powers that a designated local regulatory authority may exercise is set out in the table below.

Continuing role of the State Supreme Courts

37. The Uniform Law does not abrogate the existing function and role of participating jurisdictions' Supreme Courts which are to retain:
- (a) the function of admitting legal professionals;²⁸ and
 - (b) inherent jurisdiction and power in respect to the control and discipline of Australian lawyers, including removal of practitioners from the roll.²⁹

Table summarising the composition and functions of the new entities to be established by the Uniform Law

Entity	Membership	Function
Standing Committee	Attorneys-General of participating jurisdictions.	<ol style="list-style-type: none"> 1 General supervisory role over the Council, the Commissioner and local regulatory authorities. 2 Overseeing the finances of the Council and approving its budget. 3 Enacting Uniform Regulations. 4 Approving or vetoing proposed Uniform Rules submitted by the Council. 5 Recommending the appointment of the Commissioner.
Legal Services Council	<p>Five members from participating jurisdictions appointed by the Attorney-General of Victoria as follows:</p> <ol style="list-style-type: none"> 1 one LCA nominee; 2 one ABA nominee; 3 two Standing Committee nominees; and 4 one Chair nominated by the Standing Committee with the concurrence of the LCA and ABA. 	<ol style="list-style-type: none"> 1 Monitoring the implementation of the Uniform Law and ensuring its consistent application by the participating jurisdictions. 2 Making Uniform Rules (subject to the Standing Committee's approval). 3 Concurring the appointment of the Commissioner based on the Standing Committee's recommendation. 4 Establishing an Admissions Committee.
Admissions	Seven members	<ol style="list-style-type: none"> 1 Developing admission rules.

²⁷ *Legal Profession Uniform Law Application Act 2014* (Vic) section 10(1); Uniform Law sections 45 and 215(2).

²⁸ Uniform Law section 16(1).

²⁹ Uniform Law section 264.

Entity	Membership	Function
Committee	comprising: 1 two current / former Supreme Court justices nominated by the Chief Justice of Victoria; 2 one LCA nominee; 3 one ABA nominee; 4 two nominees from different jurisdictions, each nominated by a Law School Dean; and 5 one Standing Committee nominee.	2 Advising the Council on guidelines and directions of the Council relating to admission.
Commissioner	CEO of the Council appointed by the Attorney-General of Victoria on the recommendation of the Standing Committee and with the concurrence of the Council.	Administering the Council's affairs in accordance with the policies and directions of the Council.
Designated local regulatory authority	Various	1 Investigating and prosecuting unqualified legal practice. 2 Providing compliance certificates to the Supreme Court of each participating jurisdiction for the purpose of admission, 3 Granting or renewing Australian practising certificates. 4 Granting Australian registration certificates to foreign lawyers. 5 Determining the status of money held by a law practice (as being trust money or not). 6 Examine a law practice's trust records (and initiating external intervention where appropriate) and investigate a law practice's affairs. 7 Resolving costs disputes and arranging for costs assessments. 8 Exempting legal practitioners from obtaining professional indemnity insurance. 9 Conduct audits of a law practice's compliance with the Uniform Law, Uniform Rules and other applicable professional obligations. 10 Hearing, investigating, resolving or dismissing complaints relating to

Entity	Membership	Function
		consumer (including costs disputes) or disciplinary matters. 11 Enforcing the civil penalty provisions of the Uniform Law.

Concerns identified in the Attorney-General's speech of November 2011

Relevant extracts from the Attorney-General's speech

38. The Attorney-General relevantly stated as follows:

Western Australia has decided not to participate in the model law by adopting the template legislation, and at this stage I feel it will be worthwhile to reiterate why WA adopted the position it has.

This is because the template legislation, as drafted effectively picks up 'by reference' substantive legislation enacted in another jurisdiction. Under the template legislation alteration of the law in the host jurisdiction would mean that the law in Western Australia will also be altered, possibly without being considered by the Western Australian Parliament and arguably against Western Australian wishes.

The basic position of the WA Government is that any legislation, if it can be, should be State, and not Commonwealth, legislation. That is, any attempt by the Commonwealth Government and Parliament to use its powers, such as the corporations power, as had been intimated from time to time by the Commonwealth Attorney-General, to unilaterally impose Commonwealth legal profession legislation on the States will be vigorously opposed. This philosophical opposition extends to this State not referring any power to the Commonwealth Parliament which would be necessary to enable such legislation to comprehensively cover the field.

From the outset, the Western Australian position was that, instead of Commonwealth legislation or a State template scheme, each State should have enacted the substantive reforms agreed to by the jurisdictions.

Given the immediate opposition to this position from the Commonwealth, WA could not participate any further in the reform process and I here note that WA has now been joined in its withdrawal from the centralising process by South Australia and Queensland. The remaining participants in the 'national reform project' are New South Wales and Victoria.

From today's perspective, the extent to which the Western Australian legislation utilises provisions in the model Bill and which areas or subject matter in which that will occur has yet to be decided.

This will depend not only on the final form of the Model Bill introduced in Victoria, and the extent to which it is picked up by other jurisdictions, but also on the particular needs and conditions relating to the Western Australian legal profession.

Analysis of the issues raised in the Attorney-General's speech

39. The Attorney-General's concerns can be broken down into the following three issues:

Issue 1

There must be no referral of power by the State government to the Commonwealth.

Issue 2

Western Australian laws must not be altered without first being considered by the Western Australian Parliament.

Issue 3

The Uniform Law must be suited to the particular needs and conditions of the Western Australian legal profession if it is to be adopted by the State.

Issue 1

40. Section 51 (xxxvii) of the Commonwealth Constitution empowers the Commonwealth Parliament to make laws with respect to:

[m]atters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopts the law.

41. Matters are referred to the Commonwealth by an Act of Parliament of the State concerned. An example is the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) pursuant to which, among other matters:

*The matter of conciliation and arbitration for the prevention and settlement of industrial disputes within the limits of the State, tho the extent to which it is not otherwise included in the legislative powers of the Commonwealth, is referred to the Parliament of the Commonwealth...*³⁰

(our emphasis)

42. Once power has been referred by State legislation, the Commonwealth is given concurrent power to make laws with respect to the referred matter(s). The Commonwealth law then operates as a federal law in each referring State and will prevail over any inconsistent State law by operation of section 109 of the Commonwealth Constitution.³¹

43. The national scheme contemplated by the Uniform Law does not involve any referral of power to the Commonwealth by the governments of the participating jurisdictions.

44. There is no overarching Commonwealth legal profession legislation. The Victorian Act simply applies the Uniform Law, as set out in the Schedule to the Victorian Act, as a law of Victoria. The NSW Act, in turn, picks up the Uniform Law by reference to the Victorian Act. As stated in section 4 of the NSW Act:

The Legal Profession Uniform Law set out in Schedule 1 to the Legal Profession Uniform Law Application Act 2014 of Victoria:

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

45. The Uniform Law is an ‘applied law scheme’ whereby the text of the Uniform Law, enacted in Victoria as the host jurisdiction, is applied or adopted in each participating State or Territory jurisdiction. The Explanatory Memorandum to the Victorian Act relevantly provides as follows:³²

The [Uniform Law] is template legislation intended to be implemented in multiple states and territories in the same form. Victoria will act as “host

³⁰ *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) section 4(2).

³¹ John Ledda ‘The Drafter’s Guide to Co-Operative Schemes’ paper presented at session 3 of the Drafting Forum 2001, Melbourne (2 August 2001) citing *R v The Public Vehicles Licensing Appeal Tribunal (Tas); ex parte ANA Pty Ltd* (1965) 113 CLR 207 at 223-224 and *Graham v Paterson* (1950) 81 CLR 1.

³² *Legal Profession Uniform Law Application Bill 2013* (Vic) Explanatory Memorandum at page 4.

jurisdiction” by being the first state or territory to pass the Uniform Law. Other participating states and territories will then “apply” the law of the “host jurisdiction” as a law of their own jurisdiction.

46. The adoption of the Uniform Law as a law of Western Australia would not, therefore, involve any referral of power by the State Government to the Commonwealth Parliament.

Issue 2

The Uniform Law

47. The Intergovernmental Agreement, together with the NSW and Victorian Acts, contemplates a centralised approach to amending the Uniform Law.

48. Pursuant to clause 5.3.1 of the Intergovernmental Agreement, the decision to amend the Uniform Law rests with the Standing Committee. Once the Standing Committee has decided on an amendment, Victoria is then obliged, as the host jurisdiction, to:

- submit a Bill to Parliament (in a form agreed by the Standing Committee) which has the effect of amending the Uniform Law in the agreed manner; and
- take all reasonable steps to secure the passage of the Bill and bring it into force in accordance with a timetable agreed to by the Standing Committee.³³

49. The NSW Act relevantly provides that:³⁴

The text of the [Uniform Law] set out in Schedule 1 to the [Victorian Act]...(as in force from time to time) is applied as a law of New South Wales.

(our emphasis)

50. Consequently, any amendments made to the Uniform Law by the Victorian Parliament will automatically apply in New South Wales. This approach ensures uniformity but also means that the New South Wales Parliament does not have control over any changes to the Uniform Law proposed by the Standing Committee and implemented by the Victorian Parliament.³⁵

51. If Western Australia was to become a participating jurisdiction on the same terms as New South Wales, then amendments made in Victoria to the Uniform Law would automatically apply in Western Australia. The approach taken in New South Wales would not address the Attorney-General's concerns of Western Australian laws being altered without having been considered by the Western Australian Parliament.

³³ Bilateral Agreement on the Uniform Legal Profession Framework between New South Wales and Victoria clause 5.3.1 a and b.

³⁴ Legal Profession Uniform Law Application Act 2014 (NSW) Note Legal Profession Uniform Law. Pursuant to section 36(3A)(3) of the *Interpretation of Legislation Act 1984* (Vic), this 'Note' forms part of the NSW Act. (The Victorian interpretation legislation applies to the interpretation of the NSW Act by virtue of section 5(1)(a) of the NSW Act and section 7 of the Uniform Law).

³⁵ See: John Ledda 'The Drafter's Guide to Co-Operative Schemes' paper presented at session 3 of the Drafting Forum 2001, Melbourne (2 August 2001) at page 7.

52. The Attorney-General's concerns could be accommodated if Western Australia were to:

- (i) apply the Uniform Law in Western Australia only as in force at a particular point in time. For example, the relevant clause could read as follows:
The Legal Profession Uniform Law set out in Schedule 1 to the Legal Profession Uniform Law Application Act 2014 of Victoria, as in force on [a particular date]:
 - (a) *applies as a law of this jurisdiction, 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.*
- (ii) take the same approach to proposed amendments to the Uniform Law as that taken in Victoria, namely agreeing in an intergovernmental agreement to:
 - (1) submit a Bill to the Western Australian Parliament (in a form agreed by the Standing Committee) which has the effect of amending the Uniform Law in the agreed manner; and
 - (2) take all reasonable steps to secure the passage of the Bill and bring it into force in accordance with a timetable agreed to by the Standing Committee.³⁶

53. Either approach is a plausible alternative that preserves Western Australia's control over changes to the Uniform Law while allowing Western Australia to participate in national legal profession regulation.

54. While these alternatives would maintain uniformity across the participating jurisdictions as much as possible, there would be occasions of difference that arise.

Uniform Regulations and Uniform Rules

55. The Standing Committee has the power to make Uniform Regulations which prevail, to the extent of any inconsistency, over Uniform Rules.³⁷ Subject to the Standing Committee's veto, the power to make, amend or repeal Uniform Rules is vested in the Council.³⁸

56. The Victorian and NSW Acts each provide that the disallowance of a Uniform Regulation by their respective Parliaments will not be effective unless and until the same regulation is disallowed in a majority of the participating jurisdictions.³⁹ Since New South Wales and Victoria are presently the only participating jurisdictions, the disallowance of a Uniform Regulation would require the agreement of both states in order to be effective.⁴⁰

³⁶ Bilateral Agreement on the Uniform Legal Profession Framework between New South Wales and Victoria clause 5.3.1 a and b.

³⁷ Uniform Law section 417.

³⁸ Uniform Law sections 419(1) and (7) and 428.

³⁹ *Legal Profession Uniform Law Application Act 2014* (Vic) section 7(2); *Legal Profession Uniform Law Application Act 2014* (NSW) section 8(2).

⁴⁰ See the note to section 8 of the *Legal Profession Uniform Law Application Act 2014* (NSW) section 8(2).

57. Accordingly, amendments to Uniform Regulations and Rules can be promulgated and come into force without direct Parliamentary approval for each amendment. Of course, by enacting the Uniform Law each participating jurisdiction has permitted the Regulations and Rules to be altered in this way.
58. If Western Australia becomes the third participating jurisdiction and a similar provision is included in the WA legislation applying the Uniform Law, then the disallowance of a Uniform Regulation by the Western Australian Parliament would not be effective until that same regulation is also disallowed by either the New South Wales or Victorian Parliament. If Western Australia were to pursue such approaches, this would require agreement with both Victoria and New South Wales.
59. Whether this approach would be unacceptable to the Western Australian government is unclear as the Attorney-General's concerns appeared to be directed primarily to alteration of the primary rather than secondary legislation without the approval of the Western Australian parliament.
60. If this approach does not meet the Attorney-General's approval, an alternative would be to have an intergovernmental agreement with the other participating jurisdictions whereby the WA legislation expressly provides that the Western Australian Parliament may disallow Uniform Regulations and Uniform Rules.

Issue 3

61. There is support for the application of the Uniform Law in Western Australia. However, it must be acknowledged that there is concern by and for practitioners whose practices are contained wholly within Western Australia, who constitute the majority of lawyers in this State, to ensure that moving to a national model is not detrimental to their practices. In particular, there is concern that moving to a national model may result in:
 - (a) higher costs of practice through either increased practicing certificate or admission fees;
 - (b) higher regulatory costs due to a more complex regulatory environment; and
 - (c) less input and control over practice in Western Australia.
62. The President of the Law Society of WA has been reporting regularly to members of the Law Society on the proposed national legal profession reforms. In his Report to Members in the April edition of Brief, the President observed:

A first review of the Legal Professions Uniform Law Application Bill 2013 (which was introduced into the Victorian Parliament late last year) indicates that it has many features which should commend themselves to the Western Australian Government and the profession in Western Australia.

In particular the Bill contains provisions which will result in:

1. *a structure for the regulation of the profession which respects the primacy of the Supreme Court of a State in relation to the admission to and removal from the Roll and the role of local regulatory authorities in relation to discipline;*
2. *uniform admission criteria;*
3. *a uniform code of conduct;*
4. *uniform disclosure obligations in relation to costs;*
5. *uniform continuing professional development rules; and*

6. a more liberal regime for the admission of foreign lawyers.

These are all of the elements which the Law Society sees as beneficial to our members and which the Society believes will be necessary to meet the challenges referred to above. Many of the objectionable elements of the original proposal appear to have been dealt with or removed.

The Society is in the process of establishing its own Ad-Hoc Committee to urgently undertake a detailed review of the Bill in order to be in a position deliver its recommendations to the Government (either directly or through its membership of the Solicitor-General's committee).

63. The President has advised that prior to the consultation period he had not received any feedback from members which is opposed to the enactment of the Uniform Law in Western Australia.
64. During the consultation period, two submissions from the profession that voiced concerns about some aspects of the national profession scheme were received. In addition, a detailed submission was received from the Legal Practice Board of Western Australia that expressed a large number of concerns.
65. The Western Australian legal profession includes a number of multi-jurisdictional law practices. Their representative bodies (the Large Law Firm Group and CLAP) strongly support the implementation of the Uniform Law as uniformity in the rules and regulations governing the profession is expected to significantly reduce compliance costs for these practices.
66. Smaller WA-based law firms and sole practitioners also stand to benefit from the Uniform Law, which simplifies, relevantly, processes relating to costs disclosure and complaints relating to costs. These issues and the ways in which they stand to benefit smaller, WA based firms, are analysed in the next section of this report in response to **LSPP 3** below.

Law Society Policy Positions

Introduction

67. Following is a substantive analysis of each of the LSPPs and the degree to which the Uniform Law satisfies each one.
68. For ease of reference, a table summarising the findings in this section is enclosed as Schedule 2 to this report.

LSPP 1: There must remain an independent legal profession with a substantial role in its own regulation

Analysis

69. Prior to the drafting of the Uniform Law, a uniform legal profession model was proposed that would have involved the creation of a national board to regulate the legal profession. A committee of Attorneys-General would have advised on the appointment of this national board.⁴¹
70. In late 2009, the Honourable Chief Justice of Western Australia expressed concern over this proposed arrangement.⁴² His Honour observed that the Western Australian executive government has never directly regulated the legal profession and that the profession should preserve its independence from executive control in the practical operation of the rule of law.
71. Under the Uniform Law, the executive, in the form of the Standing Committee and through the nomination process for Council members, does have a regulatory role. However, it is a limited one and the legal profession maintains a substantial role in its own regulation. This is best illustrated by the process through which Uniform Rules are made.
72. The legal profession, in the form of the LCA and ABA, has a legislatively enshrined role under Part 9.2 of the Uniform Law to develop rules relating to:
- (a) admission;
 - (b) legal professional conduct;
 - (c) continuing professional development; and
 - (d) legal practice generally.
73. Admission Rules are developed by the Admissions Committee in consultation with, among others, the Chief Justices of the participating jurisdictions, the LCA and the ABA.⁴³ Of the 7 members sitting on the Admissions Committee, only 1 is appointed by the Standing Committee.⁴⁴
74. Uniform Rules relating to professional conduct, legal practice and continuing professional development are to be developed by the ABA and LCA.⁴⁵

⁴¹ Letter from Martin CJ to the Hon. Attorney General Christian Porter dated 23 October 2009.

⁴² Letter from Martin CJ to the Hon. Attorney General Christian Porter dated 23 October 2009.

⁴³ Uniform Law section 426.

⁴⁴ Uniform Law schedule 1 clause 21(1).

⁴⁵ Uniform Law section 427.

75. The power to make Uniform Rules (and to develop ‘general’ Uniform Rules⁴⁶) is vested in the Council rather than the ABA or LCA and ultimately subject to the Standing Committee’s veto power.⁴⁷ However, while all 5 members of the Council are appointed by the Victorian Attorney-General, only 2 may be appointed without the support of the LCA or ABA.⁴⁸ This ensures that Council decisions to develop or make Uniform Rules (which, like all its decisions, are made by majority vote⁴⁹) reflect the views of the legal profession. While the Standing Committee is a purely executive body with the discretion to veto Uniform Rules, its veto powers are extremely limited and may only be exercised where the proposed rule would:⁵⁰
- (a) impose restrictive or anti-competitive practices;
 - (b) otherwise not be in the public interest because they conflict with the objectives of the Uniform Law; or
 - (c) impact on the public funding of the national scheme.
76. The Standing Committee’s powers are further limited by the Intergovernmental Agreement pursuant to which the parties agree that the Standing Committee will not intervene in the day to day operations of the Council, the Commissioner or local regulatory authorities including in decisions relating to:
- (a) the determination of applications for admission to the legal profession;
 - (b) the grant, renewal, suspension, variation or cancellation of an Australian practising certificate; or
 - (c) individual complaints or disciplinary matters.⁵¹
77. Under the current regulatory regime in Western Australia, the Legal Practice Board of Western Australia can make rules regulating the legal profession. The power of the Legal Practice Board of Western Australia to make rules, such as the *Legal Profession Conduct Rules 2010*, is subject, as with all subsidiary legislation, to scrutiny and possible disallowance by either house of the Western Australian Parliament. Although the Legal Services Council’s power under the Uniform Law is subject to veto by the Standing Committee, in Western Australia, due to the Government controlling by majority the Legislative Assembly, the Executive can veto subsidiary legislation developed by the Legal Practice Board of Western Australia. In this way, the independence of the profession in making rules for its own regulation will not change. It should be noted that there have been recent examples of the Executive doing this in respect of Supreme Court rules.
78. Finally, the independence of local regulatory authorities is preserved with these bodies said to be ‘independent of the Council and the Commissioner.’⁵² While local regulatory authorities are required to comply with directions issued by the Council or Commissioner regarding the exercise of their functions under the Uniform Law, neither the Council nor the Commissioner can issue directions in relation to the outcome of a particular matter.⁵³

⁴⁶ Uniform Law section 425.

⁴⁷ Uniform Law section 428.

⁴⁸ The LCA and ABA must each nominate 1 member and must approve the appointment of the Chair: Uniform Law schedule 1 clauses 2(1)(a), (b) and (d) and 2(2).

⁴⁹ Uniform Law schedule 1 clause 13.

⁵⁰ Uniform Law section 428(3).

⁵¹ Bilateral Agreement on the Uniform Legal Profession Framework clause 3.1.2.

⁵² Uniform Law section 404.

⁵³ Uniform Law section 407(5) and (6).

Findings

Does the Uniform Law satisfy this LSPP?

79. Yes.

Explanation of findings

80. The independence afforded to local regulatory authorities, the legislatively enshrined role of the LCA and ABA under the Uniform Law in nominating members of the Council and the Admissions Committee combined with their role in promulgating Uniform Rules and the Standing Committee's limited power to veto those rules, should ensure that the legal profession will continue to have a substantial role in its own regulation.

LSPP 2: Professional conduct rules should be determined by the legal profession at a national level

Analysis

81. Under the Uniform Law, Legal Profession Conduct Rules are a subset of the national Uniform Rules that the Council is empowered to make under section 419(1) of the Uniform Law.⁵⁴ Section 419(1) authorises the Council to make, amend or repeal Uniform Rules where:

- required or permitted by the Uniform Law; or
- necessary or convenient to be specified for carrying out or giving effect to the Uniform Law.⁵⁵

82. The Uniform Rules cannot be inconsistent with the Uniform Law or Uniform Regulations.⁵⁶

83. Section 423(1) of the Uniform Law provides that the Legal Profession Conduct Rules may provide for any aspect of the professional conduct of:

- Australian legal practitioners;
- Australian-registered foreign lawyers; and
- law practices.

84. Subsection 423(2) of the Uniform Law outlines examples of areas that may be appropriately regulated by the Legal Profession Conduct Rules and reads as follows:

- (2) *Without limitation, the Legal Profession Conduct Rules may include provisions with respect to what Australian legal practitioners, Australian-registered foreign lawyers and law practices must do, or refrain from doing, in order to—*
- (a) *uphold their duty to the courts and the administration of justice, including rules relating to—*
 - (i) *advocacy; and*
 - (ii) *obeying and upholding the law; and*
 - (iii) *maintaining professional independence; and*
 - (iv) *maintaining the integrity of the legal profession; and*
 - (b) *promote and protect the interests of clients, including—*

⁵⁴ Uniform Law section 420(1)(c). See also the definition of 'Legal Profession Conduct Rules' in section 6(1) of the Uniform Law.

⁵⁵ Uniform Law section 419(1).

⁵⁶ See: Uniform Law ss 417(2) and 419(1).

- (i) rules relating to client confidentiality; and
- (ii) rules for informing clients about reasonably available alternatives to fully contested adjudication of cases; and
- (d) avoid conflicts of interest.

85. Pursuant to section 427 of the Uniform Law, the LCA and the ABA may develop professional conduct rules for, respectively, Australian solicitors and barristers. Pursuant to subsection 427(5), the LCA or ABA (as the case may be) is required to:
- consult with the Council, the Commissioner and such local regulatory authorities as the Council considers appropriate for a minimum period of 30 days;⁵⁷
 - release, with the Council's approval, a draft of any proposed conduct rules for a period of public consultation of at least 30 days;⁵⁸
 - consider all reasonable submissions received and provide the Council with a copy of those submissions;⁵⁹ and
 - (after considering the submissions received and making any amendments to the draft rules) submit a final draft to the Council together with a report demonstrating compliance with the requirements of subsection 427(5).⁶⁰
86. If the Council approves the final draft or a draft with amendments agreed to by the LCA and/or the ABA as the case requires, the Council may submit the proposed conduct rules to the Standing Committee.⁶¹ The Council may then make the proposed conduct rules if the Standing Committee approves (alternatively does not veto) the proposed rule(s) within 30 days.⁶²
87. We note that national conduct rules currently exist, prepared by the LCA and ABA for solicitors and barristers respectively.⁶³ However, these rules which are supported by the Law Society have not to date been adopted in WA by the Legal Practice Board of Western Australia, which has instead its own Professional Conduct Rules, that differ in material ways to the existing national rules.

Findings

Does the Uniform Law satisfy this LSPP?

88. Yes.

Explanation of findings

89. Under the Uniform Law, Legal Profession Conduct Rules are developed by the legal profession at the national level though a collaborative process between the ABA, the LCA, local regulatory bodies, and the Council.

⁵⁷ Uniform Law subsection 427(5)(a).

⁵⁸ Uniform Law subsection 427(5)(b).

⁵⁹ Uniform Law subsection 427(5)(c).

⁶⁰ Uniform Law subsection 427(5)(d).

⁶¹ Uniform Law section 427(6).

⁶² Uniform Law section 428(1) and (2).

⁶³ In relation to solicitors, please see the Australian Solicitors' Conduct Rules as published by the LCA. In relation to barristers, please see Barristers' Conduct Rules as published by the ABA.

LSPP 3: Existing legislation regulating the legal profession must be substantially simplified, thereby easing the regulatory burden on practitioners, especially on those who engage in multi-jurisdictional legal practices (i.e. law practices operating in more than one State or Territory)

Analysis

Existing legislation regulating the legal profession in WA

90. Currently, the following legislation regulates the legal profession in WA:

- Legal Profession Act 2008 (WA);
- Legal Profession Regulations 2009 (WA);
- Legal Profession Rules 2009 (WA);
- Legal Profession (Admission) Rules 2009 (WA); and
- Legal Profession Conduct Rules 2009 (WA).

New legislation likely to be introduced if the Uniform Law is applied in Western Australia

91. Both New South Wales and Victoria, in implementing the Uniform Law, have opted to repeal existing legal profession legislation in their jurisdictions.⁶⁴

92. Assuming that Western Australia takes the same approach, the existing legislative regime would be replaced by the following new Acts, rules and regulations:

- an Act equivalent to the Victorian and NSW Acts applying the Uniform Law in Western Australia;
- Legal Profession Uniform Regulations;
- Admission Rules;
- Legal Practice Rules;
- Legal Profession Conduct Rules;
- Continuing Professional Development Rules; and
- General Uniform Rules.

Whether existing legislation would be ‘substantially simplified’

93. In terms of sheer length, the Uniform Law is almost as long as the 433 page *Legal Profession Act 2008* (WA). Assuming that a similarly detailed Act applying the Uniform Law is enacted in Western Australia as has been passed in Victoria and proposed in New South Wales, it will be some 130-odd pages longer than the *Legal Profession Act 2008*.

94. The length of the legislation aside, one area that is substantially simplified is the process for complaints handling and discipline. The Uniform Law expands the role of local regulatory authorities to deal quickly and efficiently with these matters. Details of the changes and the impact they are likely to have on consumers of legal services are discussed in detail under **LSPP 4** below.

95. While the processes for professional discipline are simplified under the Uniform Law, these changes stand to benefit consumers more than legal practitioners. In terms of whether the regulatory burdens on practitioners have been eased at all, the Uniform Law is something of a mixed bag.

⁶⁴ *Legal Profession Uniform Law Application Act 2014* (Vic) section 157; *Legal Profession Uniform Law Application Act 2014* (NSW) section 167.

Examples of the Uniform Law easing the regulatory burdens on legal practitioners

96. The harmonisation of regulatory standards through national Uniform Rules in areas ranging from admissions to professional conduct and continuing professional development should lead to substantial reductions in compliance costs only for multi-jurisdictional law practices. For example, under uniform Admission Rules applicants will only need to satisfy one set of admission standards regardless of where they practice law.
97. A positive development in the area of legal costs is that a short standard-form of costs disclosure may be provided as an alternative to full costs disclosure on matters where total costs are not likely to exceed \$3000⁶⁵ (in WA, costs disclosure is not currently required for matters with costs of less than \$1,500).⁶⁶
98. In respect of small law practices, the benefits include:
- (a) reduction in the time for making a costs complaint to 60 days after costs become payable or 30 days after an itemised bill is provided;⁶⁷
 - (b) the designated local regulatory authority can close a costs-related complaint after a preliminary assessment if the complaint is vexatious, misconceived, frivolous or lacking in substance;⁶⁸ and
 - (c) compliance audits of law practices can only be carried out if the relevant local authority has reasonable grounds to do so based on either the conduct of the practice or complaints made against it.⁶⁹
99. It is likely that national CPD rules would be less prescriptive than those presently in place in WA both for practitioners and CPD providers, thereby reducing the cost of mandatory CPD compliance on all practitioners. However the Society notes that having less prescriptive rules may not necessarily be in the best interests of the profession or the users of legal services.

Examples of increased regulatory burdens on legal practitioners – the obligation to take ‘reasonable steps’ to ensure a client has understood the potential legal costs

100. Under the *Legal Profession Act 2008* (WA), a law practice must, for matters where costs are likely to exceed \$1500,⁷⁰ disclose to a client:⁷¹
- the basis on which legal costs will be calculated;
 - the client’s right to negotiate a cost agreement, receive an itemised bill and be notified of any substantial changes in costs;
 - an estimate of total legal costs (if reasonably practicable);
 - details of the intervals at which the client will be billed;
 - the rate of interest the practice charges on overdue legal costs;
 - (for litigious matters) the range of costs likely to be recovered or payable by the client;

⁶⁵ Uniform Law section 174(5) and clause 18(4) of schedule 4.

⁶⁶ *Legal Profession Act 2008* (WA) section 263(2)(a).

⁶⁷ Uniform Law sections 272(2) and 272(3).

⁶⁸ Uniform Law section 277.

⁶⁹ Uniform Law section 256.

⁷⁰ See: *Legal Profession Act 2008* (WA) section 263(2).

⁷¹ *Legal Profession Act 2008* (WA) section 260.

- the client's right to progress reports;
- details of the person whom the client may contact to discuss the legal costs; and
- details of the options open to a client to challenge a costs agreement or make a complaint about costs.

101. Pursuant to section 174(3) of the Uniform Law, a law practice:

...must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

102. It is unclear the extent to which a law practice must enquire into a client's financial position in order to satisfy the obligation to take 'reasonable steps.' The Second Reading speech for the Victorian Act describes the obligation in the following terms:

In practice, this will require law practices to make reasonable inquiries to ensure that, after mandatory written disclosure has been made, clients understand the basis on which legal costs will be charged, how the initial estimate was calculated, factors likely to alter the estimated legal costs, and their rights in relation to challenging legal costs. Legal practitioners will be expected to exercise professional judgement regarding the level of detail needed by a client to understand the options available and costs involved.⁷²

103. The Second Reading Speech to the NSW Act suggests that the obligations imposed on practitioners by section 174(3) of the Uniform Law will 'foster better communication and lead to fewer disputes.'⁷³

104. Subsection 174(3) is virtually identical to section 4.3.7(4) of the Draft National Law that was released by the Taskforce for public consultation in May 2010. At that time, the Law Society of Western Australia submitted that the section should be deleted as it imposed a subjective test regardless of any 'reasonable steps' that an amendment might specify.⁷⁴ The Law Society at the time cited the example of the independent solicitors' certificates of some banks that require solicitors to certify that the bank's customer has understood the advice given by the solicitor. The difficulty with these certificates was said to be that, in the event of a dispute between the customer and the bank, lack of understanding by the bank's customer of the solicitor's advice is a standard defence.

Findings

Does the Uniform Law satisfy this LSPP?

105. In part.

Explanation of findings

106. The new uniform legislation has not substantially simplified regulation of the legal profession.

⁷² *Legal Profession Uniform Law Application Bill 2013 (Vic)*, 2nd Reading Speech (Legislative Assembly), 12 December 2013 at page 4665.

⁷³ *Legal Profession Uniform Law Application Bill 2014 (NSW)*, 2nd Reading Speech, p. 19, 26 March 2014.

⁷⁴ Hylton Quail, *Submission of the Law Society of Western Australia National Law National Rules*, 13 August 2010 at page 2.

107. However, the harmonisation of regulatory standards by the Uniform Rules and the relaxing of formal costs disclosure for smaller matters will substantially reduce many of the regulatory burdens on multi-jurisdictional law practices.

108. On the other hand, there is an obligation for a law practice to take 'reasonable steps' to satisfy itself that a client understands the estimated costs of a matter will impose a regulatory burden on firms and practitioners.

LSPP 4: Any simplified system of regulation of the profession should not result in an increase in the cost of regulation for either consumers or legal practitioners

Analysis

Costs for legal practitioners

109. The Second Reading Speeches to both the Victorian and NSW Acts suggest that the Uniform Law will 'substantially reduce regulatory costs'.⁷⁵

110. The harmonisation of regulatory standards through national Uniform Rules will lead to a decrease in compliance costs in many areas for multi-jurisdictional law practices. As observed in the second reading speech of the New South Wales Bill:

*Lawyers will practise seamlessly across jurisdictions under uniform legislation and regulatory standards which replace disparate legislation, regulations and rules across the participating jurisdictions. This will reduce compliance costs for firms operating across New South Wales and Victoria... For example, these firms will be able to maintain a single cost agreement for both States and the same trust account management software.*⁷⁶

111. Quantification of the exact amount of compliance costs which will be saved is difficult.⁷⁷

112. The national scheme will impose some additional regulatory costs. Initial estimates of ongoing costs of the national regulatory structure were at \$3.44 million. More recently, in the course of the Second Reading debate for the Victorian Act, the projected ongoing cost of the national scheme was \$1.19 million per annum⁷⁸ For the purposes of this report, the ad hoc Committee has adopted a more conservative estimate by increasing this amount by ~10%⁷⁹ and assuming an ongoing annual cost \$1.3 million, this should also allow for any other contingencies or increase that may result from WA joining the scheme.

113. The Intergovernmental Agreement contemplates that these ongoing costs will be funded in accordance with each participating jurisdiction's proportion of the total

⁷⁵ *Legal Profession Uniform Law Application Bill 2013* (Vic) Second Reading Speech (12 December 2013) at page 4662; *Legal Profession Uniform Law Application Bill 2014* (NSW) Second Reading Speech (26 March 2014).

⁷⁶ *Legal Profession Uniform Law Application Bill 2014* (NSW), 2nd Reading Speech, p. 19, 26 March 2014.

⁷⁷ The WA Attorney-General has commissioned a study undertaken by ACIL Tasman. The study identified various cost savings to be had by adopting the Uniform Law. However, many of the savings identified will not apply in WA.

⁷⁸ *Legal Profession Uniform Law Application Bill 2013* (Vic) Second Reading Speech (19 February 2014) Mr McCurdy (Murray Valley) page 397 and Mr Wakeling (Ferntree Gully) at page 406.

⁷⁹ A 10% increase on \$1.19 million is \$1.309 million but for simplicity in this report a figure of \$1.3 million has been used.

number of legal practitioners to whom practising certificates were issued in participating jurisdictions over the immediately preceding financial year.⁸⁰

114. If Western Australia joins Victoria and New South Wales as a participating jurisdiction under the same cost-allocation arrangement, its proportion of the total ongoing costs (assuming \$1.3 million per annum) would total around \$156,000 per annum. Based on this estimate, the cost would equate to:⁸¹

- an additional cost of \$27 for every practising certificate issued or renewed in WA;⁸² or
- a levy of \$322 on admission fees (based on 485 admissions in WA in 2012/2013).⁸³

115. We note that the additional costs of adopting the uniform national scheme are likely to be offset by cost savings resulting from the fact that some of the existing functions currently undertaken by the local regulatory bodies being undertaken by the bodies established under the uniform national scheme.

Costs for consumers

116. The primary method of reducing costs to consumers is through reducing costs to legal practitioners which are passed on to consumers through legal fees. Harmonisation of regulatory standards should reduce compliance costs for firms which should, in turn, result in savings being passed on to consumers of the services of multi-jurisdictional law practices.

117. One specific way in which the Uniform Law stands to reduce costs for consumers is through its simplified complaints handling and disciplinary framework in Chapter 5, the purpose of which is to facilitate the timely and efficient resolution of consumer disputes while still providing a rigorous framework for dealing with serious disciplinary matters.⁸⁴

118. The Uniform Law vests local regulatory authorities with a determinative power to facilitate the efficient resolution of certain low-level disciplinary complaints without recourse to a lengthy and potentially costly process through a court or tribunal.⁸⁵

119. Local regulatory authorities are required by the Uniform Law to deal with complaints as efficiently and expeditiously as possible.⁸⁶ The Uniform Law achieves this by giving local regulatory authorities the power to resolve complaints and disciplinary matters by making determinations that are 'fair and reasonable in all the circumstances.' Local regulatory authorities can make orders:

- cautioning or requiring an apology from a practitioner;

⁸⁰ Bilateral Agreement on the Uniform Legal Profession Framework clause 8.2.2.

⁸¹ Calculations are based on statistics on practising certificates issued and admissions from the Legal Practice Board of Western Australia's 2012-2013 Annual Report.

⁸² Assumed practicing certificate numbers, based on 2012-13 year are NSW: 25,500; Victoria: 17,000; and WA: 5,800.

⁸³ At a minimum, admission presently costs \$360 application fee to the Legal Practice Board and a \$272 admission fee to the Supreme Court of Western Australia (totalling \$632) plus initial practicing certificate (\$~1,000).

⁸⁴ *Legal Profession Uniform Law Application Bill 2014* (NSW), 2nd Reading Speech, p. 19, 26 March 2014.

⁸⁵ *Legal Profession Uniform Law Application Bill 2013* (Vic), 2nd Reading Speech (Legislative Assembly), 12 December 2013 page 4666.

⁸⁶ Uniform Law section 317.

- requiring the practitioner redo the work the subject of the complaint at no (or reduced) cost;
- that a practitioner or law practice undertake training, education, counselling or be supervised; or
- for compensation of up to \$25,000.⁸⁷

120. Local regulatory authorities may deal with costs disputes in the same manner where the total bill is less than \$100,000 or the total amount in dispute is less than \$10,000.⁸⁸ This will provide an inexpensive alternative to a formal costs assessment.⁸⁹

121. While the streamlining of complaints procedures is a positive step for consumers, concerns have been expressed that, if a levy on newly issued practising certificates proves insufficient, consumers may end up covering the ongoing costs of the Uniform Law.⁹⁰

Findings

Does the Uniform Law satisfy this LSPP?

122. Yes

Explanation of findings

123. There will be an additional cost for the legal profession in participating jurisdictions in the form of funding for the new national bodies to be established by the Uniform Law. It is expected that these addition costs will be offset by reduction in the cost of local regulatory bodies undertaking certain existing functions and savings in the form of reduced compliance costs (which, in turn, would lead to reduced costs for consumers). The extent of the off-set cannot be determined without a detailed costing analysis.

LSPP 5: Any new system of regulatory reform should be costed and should not be commenced until this costing is made publically available

Analysis

Start-up costs

124. The Intergovernmental Agreement provides that Victoria and New South Wales will agree to a budget for the start-up costs.⁹¹

125. According to statements of the President of the Law Institute of Victoria in late 2013, the start-up costs of establishing the national scheme contemplated by the Uniform

⁸⁷ Uniform Law sections 290 and 308.

⁸⁸ Uniform Law section 291.

⁸⁹ *Legal Profession Uniform Law Application Bill 2013 (Vic)*, 2nd Reading Speech (Legislative Assembly), 12 December 2013 page 4666.

⁹⁰ *Legal Profession Uniform Law Application Act 2014 (NSW)* sections 46 and 56; Chris Merritt 'Greg Smith wins on uniformity drive' *The Australian* (28 March 2014) accessed online.

⁹¹ Bilateral Agreement on the Uniform Legal Profession Framework clause 8.1.

Law will be \$800,000.⁹² No explanation is provided as to how this amount was calculated, however this is understood to be at the higher end of the range of anticipated start up costs.

126. The Law Society of New South Wales will contribute over 50% of the start-up costs from its reserves as well as providing in-kind support in the form of temporary accommodation for national regulatory bodies at the Law Society of New South Wales premises.

Ongoing costs

127. As discussed under **LSP 4** above, the estimated ongoing cost of the national scheme is \$1.3 million per annum.

128. The Intergovernmental Agreement contemplates that the Council is to submit an operating budget for its first year to the Standing Committee for consideration and approval following which it is to submit budgets on a triennial basis or such other basis as the Standing Committee directs.⁹³

129. Operating budgets submitted by the Council may include a requirement for a direct funding contribution which is to be paid by each participating jurisdiction in accordance with each participating jurisdiction's proportion of the total number of legal practitioners to whom practising certificates were issued in participating jurisdictions over the preceding financial year.⁹⁴

130. Assuming that the estimated ongoing cost of \$1.3 million per annum is accurate, and New South Wales and Victoria remain the only participating jurisdictions, this will result in an estimated annual cost allocation approximately as follows:⁹⁵

States	NSW	VIC
Proportion	60%	40%
Total Cost	\$780,000	\$520,000
Additional cost per practitioner⁹⁶	\$31	\$31
Additional cost per new admittee⁹⁷	\$381	unknown

131. Western Australia becomes a participating jurisdiction, the estimated cost allocation between the three states will be approximately as follows:⁹⁸

States	NSW	VIC	WA
Proportion	53%	35%	12%

⁹² E Kerrigan, 'LIV welcomes commitment to uniform legal profession laws' Media Release (25 November 2013) accessed online.

⁹³ Bilateral Agreement on the Uniform Legal Profession Framework clause 8.2.1.

⁹⁴ Bilateral Agreement on the Uniform Legal Profession Framework clause 8.2.2.

⁹⁵ Based on data from: 2013 Law Society of New South Wales Annual Report; Legal Practice Board of Western Australia Annual Report 2012-2013; and Legal Services Board of Victoria Annual Report 2012.

⁹⁶ Provided for comparison purposes only, NSW intends to collect such funds by an additional levy on new admittees.

⁹⁷ Based on following figures: NSW: 2047 in 2011-12 and no information was available for Victoria.

⁹⁸ Based on data from: 2013 Law Society of New South Wales Annual Report; Legal Practice Board of Western Australia Annual Report 2012-2013; and Legal Services Board of Victoria Annual Report 2012.

Total Cost	\$689,000	\$455,000	\$156,000
Additional cost per practitioner	\$27	\$27	\$27
Additional cost per new admittee⁹⁹	\$337	unknown	\$322

132. The Intergovernmental Agreement provides that it is up to each participating jurisdiction to determine how it meets its share of the ongoing costs.¹⁰⁰

133. Concerns have been expressed that with levies on practising certificates or admissions, consumers of legal services may end up covering the additional costs.

134. Concerns have also been raised as to how any shortfall in the collection of required funding from admission fees will be made up. In relation to NSW, should revenue from admission fees be insufficient to cover the costs of the Legal Services Council and the Commissioner, then funds from the NSW 'Public Purpose Fund' may be used to cover New South Wales' proportion of these costs.¹⁰¹ In Victoria, the State Government will be responsible for any shortfall under the terms of the Intergovernmental Agreement, however it is not yet clear from where it is intended such funds for any such shortfall may be drawn.

Findings

Does the Uniform Law satisfy this LSPP?

135. Yes

Explanation of findings

136. Estimates of the start-up and ongoing costs of the national scheme contemplated by the Uniform Law are publically available. A breakdown of how these estimates were calculated is not.

137. While there is no publically available explanation for the cost estimates, the estimates themselves when read with the cost allocation model contemplated by the Intergovernmental Agreement provide a sense of what the new regime may cost for Western Australia.

138. Although the estimates of the ongoing costs of the uniform national scheme to date have been accurate in providing a sense of the cost of the new regime, it is unknown what additional cost may arise if the number of participating jurisdictions increase beyond New South Wales and Victoria.

⁹⁹ Based on following figures: NSW: 2047 in 2011-12; no information available for Victoria; and WA: 485 in 2012-13.

¹⁰⁰ Bilateral Agreement on the Uniform Legal Profession Framework clause 8.2.3.

¹⁰¹ NSW Act Section 56.

LSPP 6: In accordance with national standards set by the National Standards body, existing legal professional bodies should continue to issue legal practitioners with practising certificates

Analysis

139. Section 57 of the Uniform Law provides that the Uniform Rules may make provision with respect to any aspect of 'Australian practising certificates,' including:

- their grant and renewal;
- the disclosure of matters relevant to an applicant's eligibility to obtain one; and
- the refusal of applications and the imposition of conditions on practising certificates.

140. An 'Australian practising certificate' is defined as:

- (a) *a practising certificate granted to an Australian lawyer under Part 3.3 of [the Uniform Law] as applied in a participating jurisdiction; or*
- (b) *a practising certificate granted to an Australian lawyer under a law of a non-participating jurisdiction entitling the lawyer to engage in legal practice.*¹⁰²

141. Under the Uniform Law, the Admissions Committee has the function of developing Admission Rules and advising the Council in relation to admission matters.¹⁰³

142. However, the power to actually issue practising certificates, applying the standards set nationally by the Admission Rules, rests at the local jurisdictional level. Applications for the grant or renewal of an Australian practising certificate are to be made in the jurisdiction that is the applicant's principal place of practice.¹⁰⁴

143. The power to grant, renew and impose conditions on an Australian practising certificate is vested in the 'designated local regulatory authority' of each participating jurisdiction.¹⁰⁵ The designated local regulatory authorities under the Victorian Act and NSW Act are, respectively, the Victorian Legal Services Board¹⁰⁶ and the Law Society of New South Wales Council.¹⁰⁷

Findings

Does the Uniform Law satisfy this LSPP?

144. Yes

Explanation of findings

145. Local regulatory authorities will continue to issue practising certificates and will do so in accordance with standards set at the national level in the Admission Rules.

¹⁰² Uniform Law section 6(1).

¹⁰³ Uniform Law section 402(2).

¹⁰⁴ Uniform Law section 44(4).

¹⁰⁵ Uniform Law section 44(1), 47, 53-54.

¹⁰⁶ *Legal Profession Uniform Law Application Act 2014* (Vic) section 10(1).

¹⁰⁷ *Legal Profession Uniform Law Application Bill 2014* (NSW) clauses 3(1) (definition of 'appropriate Council') and 11(1).

LSPP 7: In accordance with standards set by the National Standards body, discipline of legal practitioners should be performed by bodies determined by each State and Territory

Analysis

146. As detailed under **LSPP 2** (above), Legal Profession Conduct Rules are to be set at the national level under the Uniform Law.

147. Complaints about the conduct of an Australian lawyer or legal practice are to be made to or by the 'designated local regulatory authority'¹⁰⁸ of the jurisdiction with which the complaint has the closest connection.¹⁰⁹

148. The 'designated local regulatory authority' in Victoria is the Victorian Legal Services Commissioner.¹¹⁰ Pursuant to the transitional provisions of the Victorian Act, the person who was the Legal Services Commissioner under the *Legal Profession Act 2004* (Vic) (and who, under that legislation, was charged with the receipt of complaints¹¹¹) becomes the Victorian Legal Services Commissioner upon the commencement of the Victorian Act.¹¹²

149. Similarly, in New South Wales, the Legal Services Commissioner appointed under the *Legal Profession Act 2004* (NSW) is to continue its previous function of receiving and reviewing complaints against New South Wales practitioners.¹¹³

150. The prerequisites and processes for the appointment of Legal Services Commissioners in New South Wales and Victoria under the Uniform Law is substantially identical to the procedures in place under the previous legal profession legislation of both states.¹¹⁴

151. The 'designated local regulatory authority':

- (a) is to conduct a preliminary assessment of a complaint;¹¹⁵
- (b) may investigate the whole or part of a complaint;¹¹⁶
- (c) may close a complaint without further consideration of its merits in certain circumstances including where the complaint is vexatious, made out of time or has already been investigated;¹¹⁷
- (d) may recommend that a lawyer's practising certificate be immediately suspended if it deems it to be in the public interest due to the seriousness of the alleged conduct;¹¹⁸ and

¹⁰⁸ Uniform Law section 267(1).

¹⁰⁹ Uniform Law section 274.

¹¹⁰ *Legal Profession Uniform Law Application Act 2014* (Vic) section 10(1).

¹¹¹ *Legal Profession Act 2004* (Vic) section 4.2.5.

¹¹² *Legal Profession Uniform Law Application Act 2014* (Vic) section 166(1).

¹¹³ *Legal Profession Uniform Law Application Bill 2014* (NSW) clause 11(1) and schedule 9 clause 5; *Legal Profession Act 2004* (NSW) section 505-513.

¹¹⁴ See: *Legal Profession Act 2004* (Vic) section 6.3.6; *Legal Profession Uniform Law Application Act 2014* (Vic) section 51;

¹¹⁵ Uniform Law section 276(1).

¹¹⁶ Uniform Law section 282(1).

¹¹⁷ Uniform Law section 277(1).

¹¹⁸ Uniform Law section 278(1).

- (e) may make a finding that a lawyer has engaged in unsatisfactory professional conduct and make disciplinary orders including issuing a caution, reprimanding or requiring an apology from the lawyer or ordering the payment of a fine of up to \$25,000.¹¹⁹

152. Where the alleged conduct may constitute professional misconduct or, for other reasons, is more appropriately dealt with by a tribunal, the local authority may initiate and prosecute proceedings in the 'designated tribunal.'¹²⁰ The Uniform Law defines a 'designated tribunal' as:¹²¹

- (a) a court or tribunal specified or described in a law of this jurisdiction for the purposes of a provision, or part of a provision, of this Law in which the term is used; or
(b) a member or officer so specified or described of such a court or tribunal.

153. The Civil and Administrative Tribunal of NSW and the Victorian Civil and Administrative Tribunal have historically been tasked with the resolution of professional complaints in their respective jurisdictions.¹²² The NSW Act and Victorian Act preserve each tribunal's role in this respect by nominating them as the 'designated tribunal' for the handling of complaints.¹²³

154. On finding that a lawyer is guilty of either unsatisfactory professional conduct or professional misconduct, the designated tribunal may make any orders it thinks fit including the imposition of a fine not exceeding \$100,000 or an order that the lawyer's practising certificate be cancelled.¹²⁴

155. The Uniform Law does not affect the inherent jurisdiction of the state and territory Supreme Courts with respect to the discipline of Australian lawyers¹²⁵ nor does it affect any other right of a person to complain about the conduct of a lawyer or a law practice under any other legislation or to seek a remedy at common law or in equity in relation to that conduct.¹²⁶

Findings

Does the Uniform Law satisfy this LSPP?

156. Yes

Explanation of findings

157. In accordance with the standards set in the national Legal Profession Conduct Rules, the discipline of legal practitioners will be performed by bodies determined by each participating jurisdiction, to be determined by that jurisdiction.

¹¹⁹ Uniform Law section 299(1).

¹²⁰ Uniform Law section 300(1).

¹²¹ Uniform Law section 6(1).

¹²² *Legal Profession Act 2004* (NSW) Part 4.8; *Legal Profession Act 2004* (Vic) Part 4.4 Division 4.

¹²³ *Legal Profession Uniform Law Application Bill 2014* (NSW) clause 11(3); *Legal Profession Uniform Law Application Act 2014* (Vic) section 10(3).

¹²⁴ Uniform Law section 302(1).

¹²⁵ Uniform Law section 264.

¹²⁶ Uniform Law section 275.

LSPP 8: In accordance with standards set by the National Standards body, trust account regulation and supervision should be retained by existing bodies which regulate trust accounts in each State and Territory

Analysis

158. The Uniform Law contemplates that the standards for handling trust money are to be set at the national level. Section 135(1) of the Uniform Law provides that:

A law practice must deal with trust money in accordance with this Law and the Uniform Rules and not otherwise.

159. Pursuant to section 168 of the Uniform Law, the Uniform Rules may make provision with respect to any aspect of trust money received by law practises and trust accounts including the establishment and maintenance of trust accounts.¹²⁷

160. Chapter 4 Part 4.2 of the Uniform Law prescribes the standards for the regulation of trust accounts and trust money and confers on the 'designated local regulatory authority' the power to:

- require reports from authorised deposit taking institutions (**ADIs**) and law practices of any trust accounts maintained by the practice;¹²⁸
- examine a law practice's trust records;¹²⁹
- investigate the affairs of a law practice;¹³⁰
- determine that money held by a law practice is or is not trust money where there is a dispute about its status;¹³¹
- permit a law practice to mix trust money with other money in accordance with specified conditions;¹³² and
- exempt a law practice from complying with the provisions of Part 4.2 subject to any conditions the authority may impose.¹³³

161. Legal practitioners and ADIs are required to report any irregularities in trust accounts to the designated local regulatory authority.¹³⁴

Findings

Does the Uniform Law satisfy this LSPP?

162. Yes

Explanation of findings

¹²⁷ Uniform Law subsections 168(1) and (2)(b).

¹²⁸ Uniform Law sections 149(3) and 151(1).

¹²⁹ Uniform Law section 155(2).

¹³⁰ Uniform Law sections 162, 163 and 165.

¹³¹ Uniform Law section 152(1).

¹³² Uniform Law section 146.

¹³³ Uniform Law section 130(4).

¹³⁴ Uniform Law section 154.

163. Standards for the handling of trust money are to be set at the national level while the regulation and supervision of trust accounts will be retained by existing local regulatory bodies.

LSPP 9: Multi-jurisdictional law practices must be permitted to have a single trust account

Analysis

164. Pursuant to Part 4.2 of the Uniform Law, a law practice must maintain a general trust account in every participating jurisdiction in which it both:

- has an office from which it engages in legal practice; and
- receives trust money.¹³⁵

165. Consequently, the only instance in which a national law firm would not be required to maintain a trust account in each participating jurisdiction would be where the practice only receives trust money in one of those jurisdictions.

Findings

Does the Uniform Law satisfy this LSPP?

166. No

Explanation of findings

167. Multi-jurisdictional law practices are required to maintain a general trust account in each jurisdiction where they are based and receive trust moneys.

LSPP 10: Existing bodies and Attorneys-General in each State and Territory should continue to allocate interest earned on trust deposits as currently provided for

Analysis

168. The Uniform Law does not prescribe any procedure for the allocation of interest earned on trust deposits.

169. The only reference to interest on trust deposits is in section 149(1) of the Uniform Law which relevantly provides that an ADI is authorised to maintain trust accounts if it has entered an arrangement with a 'nominated trust authority'. Such an arrangement may provide for, among other things, the payment of interest on trust deposits to the 'nominated trust authority on account of the nominated fund of the relevant jurisdiction.'¹³⁶

170. The Victorian Act provides that the Victorian Legal Services Board (as the 'nominated trust authority'¹³⁷) is to maintain a Public Purpose Fund (the 'nominated fund'¹³⁸) into

¹³⁵ Uniform Law sections 130(1)(a) and (5) and 136(1).

¹³⁶ Uniform Law section 149(1)(b)(i).

¹³⁷ *Legal Profession Uniform Law Application Act 2014* (Vic) section 11(b).

¹³⁸ *Legal Profession Uniform Law Application Act 2014* (Vic) section 11(a).

which interest on trust deposits is to be paid¹³⁹ and, from there, distributed in accordance with the procedures in Part 9 of the Victorian Act.

Findings

Does the Uniform Law satisfy this LSPP?

171.Yes

Explanation of findings

172.The Uniform Law allows participating jurisdictions to select the authority to which interest on trust deposits are to be paid. Each jurisdiction is free to make its own arrangements regarding the allocation of the moneys from there.

LSPP 11: For interest earned on trust account deposits in respect of multi-jurisdictional law practices, there will need to be an appropriate method for apportionment of interest between each State and Territory, and a review of the methodology must be undertaken at regular intervals.

Analysis

173.As discussed in relation to **LSPP 9**, above, the Uniform Law requires multi-jurisdictional law practices to maintain a general trust account in each jurisdiction where they are based and receive trust moneys.

174.Consequently, there is no provision for **LSPP 11** in the Uniform Law.

Findings

Does the Uniform Law satisfy this LSPP?

175.Not applicable

Explanation of findings

176.The Uniform Law requires multi-jurisdictional law practices to maintain a general trust account in each jurisdiction (as discussed in **LSPP 9** above) where they are based and receive trust moneys. Consequently there is no provision for LSPP 11 in the Uniform Law.

LSPP 12: In accordance with standards set by the National Standards body, the administration of fidelity funds should remain in the States and Territories

Analysis

177.Part 4.5 of the Uniform Law establishes a fidelity cover scheme to provide compensation for persons who suffer pecuniary loss as a result of fraudulent or dishonest dealings (referred to as 'defaults') by law practises with trust money or trust

¹³⁹ See *Legal Profession Uniform Law Application Act 2014* (Vic) section 87(2) and (3).

property.¹⁴⁰ Part 4.5 provides that the Uniform Rules may make provision with respect to any aspect of the fidelity cover scheme including:¹⁴¹

- the minimum terms and conditions of fidelity cover;
- the requirements and processes for making a claim against a fidelity fund; and
- the procedure by which a claim against a fidelity fund is to be processed.

178. Legal practitioners are required to pay an annual contribution to the relevant 'fidelity fund' with the amount of the required contribution to be determined by the 'fidelity authority'.¹⁴² The 'fidelity authority' is also charged with determining claims made against the fidelity fund.¹⁴³

179. Each jurisdiction is to nominate its own 'fidelity fund' and 'fidelity authority'.¹⁴⁴

180. The Victorian Act and the NSW Act nominate, respectively, the Victorian Legal Services Board¹⁴⁵ and the Council of the Law Society of New South Wales¹⁴⁶ as the 'fidelity authority', with each required to maintain a 'fidelity fund'.¹⁴⁷

181. Depending on the circumstances, a claim may be made against the fidelity fund:

- of the jurisdiction in which the last Australian trust account in which the trust money was held before the default was maintained; or
- the defaulting associate's home jurisdiction.¹⁴⁸

Findings

Does the Uniform Law satisfy this LSPP?

182. Yes

Explanation of findings

183. The administration of fidelity funds in accordance with national standards set by the Uniform Rules remains with the states and territories.

¹⁴⁰ Uniform Law sections 218 and 219 (definition of 'default').

¹⁴¹ See Uniform Law subsections 255(1) and (2)(a)-(c).

¹⁴² Uniform Law subsections 255(1) and (2).

¹⁴³ Uniform Law sections 237 and 240.

¹⁴⁴ Uniform Law sections 6(1) (definition of 'fidelity authority') and 222.

¹⁴⁵ *Legal Profession Uniform Law Application Act 2014* (Vic) section 14(2).

¹⁴⁶ *Legal Profession Uniform Law Application Bill 2014* (NSW) clause 16.

¹⁴⁷ *Legal Profession Uniform Law Application Act 2014* (Vic) section 121(1); *Legal Profession Uniform Law Application Bill 2014* (NSW) clause 115(1).

¹⁴⁸ Uniform Law section 220.

LSPP 13: In accordance with standards set by the National Standards body, existing legal professional bodies should maintain the management of lawyers' professional indemnity insurance

Analysis

184. Standards for the management of professional indemnity insurance are to be set at the national level by the Uniform Rules.¹⁴⁹

185. Section 211 of the Uniform Law prohibits an Australian legal practitioner from engaging in legal practice unless the practitioner holds or is covered by an 'approved insurance policy.' Incorporated legal practises and community legal services are also prohibited from engaging in legal practice unless they hold an approved insurance policy.¹⁵⁰

186. An 'approved insurance policy' is one issued or provided by an insurer approved under or selected in accordance with the legislation of the relevant jurisdiction.¹⁵¹ Both the Victorian Act and the NSW Act preserve the role of existing state-based legal professional bodies in managing lawyers' professional indemnity insurance.¹⁵²

187. The only circumstance in which the approval of an insurance policy will not be left to existing legal professional bodies is where there is no nominated insurer, alternatively, no legislative arrangement for the approval of insurers in a particular jurisdiction. In that situation, the Council may approve the insurer.¹⁵³

Findings

Does the Uniform Law satisfy this LSPP?

188. Yes

Explanation of findings

189. Existing state and territory legal professional bodies are to maintain the management of lawyer's professional indemnity insurance in accordance with standards set at the national level by the Uniform Rules.

¹⁴⁹ Uniform Law section 217.

¹⁵⁰ Uniform Law sections 212 ('Incorporated legal practices') and 213 ('Community legal services').

¹⁵¹ Uniform Law section 210(1)(a)(i).

¹⁵² *Legal Profession Uniform Law Application Act 2014* (Vic) Part 7 (continues the existing role of the Victorian Legal Practitioners' Liability Committee under Part 6.6 of the *Legal Profession Act 2004* (Vic)); *Legal Profession Uniform Law Application Bill 2014* (NSW) Part 8 (corresponds with the existing professional indemnity insurance arrangements under Part 3.3 of the *Legal Profession Act 2004* (NSW)).

¹⁵³ Uniform Law section 210(1)(a)(ii).

Further relevant matters

Admission of international¹⁵⁴ lawyers

190. The Society has received a number of complaints regarding the present admission and certification requirements in Western Australia as they apply to senior and experienced lawyers being temporarily located in Perth or Australia from international locations, where they are admitted, as part of working arrangements with either their international firm (this mostly applies to partners or legal practitioner directors) or with multi-national corporate in-house legal teams.

191. At present, the powers of the Legal Practice Board are limited due to the present requirements for admission to practice, with admission being a necessary prerequisite to the issuing of a practising certificate. These issues appear to be addressed through the approach taken by the Uniform Law, which allows a more case by case approach to allowing for admission with restrictions on how a lawyer practises.

192. Under the Uniform Law, the Supreme Court may admit an individual if the designated local authority (in NSW, the Legal Profession Admissions Board) has provided the Supreme Court with a compliance certificate in respect of the person. The prerequisites for the issue of a compliance certificate are:

- the attainment of the academic qualifications specified in the Admissions Rules
- the satisfactory completion of the practical legal training requirements specified in the Admissions Rules
- the applicant is a fit and proper person to be admitted to the Australian legal profession.

193. The designated local authority may exempt a person from satisfying the academic qualifications or the practical legal training prerequisites where satisfied that the person has sufficient legal skills or relevant experience so as to render the person eligible for admission. The legal skills or relevant experience can be obtained in legal practice, in service with a government authority or in another way considered appropriate by the designated local authority with responsibility for admissions. They can be obtained in Australia or overseas. The intention of this section is to allow the designated local authority to mitigate the requirements imposed on experienced foreign lawyers when seeking admission to the Australian legal profession.

194. The designated local authority may also recommend in a compliance certificate for an international lawyer that the lawyer be admitted subject to one or more of the following conditions:

- a condition limiting the period of the international lawyer's admission;
- a condition requiring the international lawyer to undertake particular academic or practical legal training or both;
- a condition requiring the international lawyer to engage in supervised legal practice;
- a condition limiting the area of law in which the foreign lawyer may engage in legal practice; or

¹⁵⁴ International is used in this context to differentiate this discussion of lawyers from other jurisdictions practicing Australian and foreign law in Australia from that of Foreign Lawyers, being lawyers practicing only foreign law in Australia.

- a condition otherwise restricting the foreign lawyer's practising entitlements.

WA Representation on the Legal Services Council

- 195.If joining the national regulatory scheme, Western Australia should require that part of the relevant intergovernmental agreement include an entrenchment of a Western Australian representative as a member of the Legal Services Council.
- 196.The inclusion of such a position on the Council would constitute a recognition of the regional variations and local conditions that occur through the profession and around the country as well as ensuring that issues unique to smaller jurisdictions are given proper consideration and a voice at a national level.
- 197.Alternatively, if and when other smaller States (i.e. South Australia or Tasmania) join the national profession regime, it may be that instead of an entrenched position for Western Australia that instead such entrenched position rotate around the three small States (WA, SA and Tasmania) to continue to ensure that local issues are raised and heard at a national level.

Designated Local Authority

- 198.The Law Society supports the continuation of local regulatory bodies that are run by representatives of the legal profession and independent of Government.

Legal Costs

- 199.Some concern was raised that the Uniform Law does not preserve the Legal Costs Committee and its power to make determine costs scales which are provided for under existing WA legislation. WA can preserve the Legal Costs Committee and its power to determine cost scales by providing for it in the legislation applying the Uniform Law. This is consistent with the Victorian approach; Victoria retains its version of the Legal Costs Committee in the Victorian Act (while NSW does not have one).
- 200.In respect to special costs orders, such power should be retained by providing for it in either WA's application legislation or by amendment to the Supreme Court and other relevant court legislation.
- 201.Further, it should be noted that the Uniform Law provides that a costs agreement that fails to comply with the necessary disclosure obligations is void, as opposed to voidable (the latter being the current situation in Western Australia which allows the Supreme Court discretion in respect of non-compliant costs agreements). The adoption of such a position in the Uniform Law should be recommended by Western Australia as part of joining the uniform national scheme.

Conclusion and recommendations

- 202.Adoption of the Uniform Law in Western Australia does not have to involve any referral of power by the State government to the Commonwealth Parliament.
- 203.The Intergovernmental Agreement in place between New South Wales and Victoria contemplates a centralised approach to amending the Uniform Law with all amendments to be made by the Victorian Parliament at the direction of the Standing

Committee. Nevertheless, it is possible for the Uniform Law to be adopted by Western Australia in a manner that would avoid the law being altered without first being considered by the Western Australian Parliament.

204. The simplest way to achieve this would be for the WA application legislation to expressly adopt the Uniform Law only as at a particular point in time. Similarly, concerns that Uniform Rules and Regulations may not be appropriately adapted for application in Western Australia could be addressed by express provision in the WA application legislation preserving the WA Parliament's discretion to disallow Uniform Rules and Regulations without the concurrence of any other participating jurisdiction.

205. There is support from the Western Australian legal profession for the introduction of the Uniform Law.

206. In addition, the majority of the LSPPs are satisfied by the Uniform Law, specifically:

(a) **The Uniform Law preserves the independence of the legal profession (LSPP 1).**

The majority of the individuals sitting on the Council and the Admissions Committee must be nominated or approved by the LCA, the ABA, members of the judiciary or legal academics. Both the LCA and ABA are to play an active role in promulgating Uniform Rules in relation to all aspects of legal practice while the Standing Committee's power to veto such rules is very limited.

(b) **Professional conduct rules are to be determined by the legal profession at the national level (LSPP 2).**

(c) **Existing legal professional bodies will continue to issue practising certificates (LSPP 6).**

'Designated local regulatory authorities' are to issue practising certificates in accordance with the national Admission Rules.

(d) **Discipline of legal practitioners is to be performed at the State / Territory level (LSPP 7).**

Designated local regulatory authorities and tribunals are to manage the discipline of legal practitioners.

(e) **Trust account supervision and regulation is to be retained by existing State / Territory bodies (LSPP 8).**

(f) **Existing arrangements for the allocation of interest earned on trust deposits remain unchanged (LSPP 10).**

(g) **The administration of fidelity funds remains with the States and Territories (LSPP 12).**

(h) **Existing State and Territory legal professional bodies are to maintain the management of lawyers' professional indemnity insurance in accordance with standards to be set at the national level (LSPP 13).**

207. LSPP 3 and 5 are partially satisfied only because there is a possibility that the 'reasonable steps' tests for costs disclosure may reduce some of the savings achieved by the reduction in regulatory burdens (LSPP 3) and because the cost

estimates of the national scheme are not accompanied by publically available detailed costing reports (LSPP 5). These are not major issues.

208. The Uniform Law fails to satisfy the LSPPs in only two respects:

- (a) **Multi-jurisdictional law practices are not permitted to maintain a single trust account where they receive trust money in more than one jurisdiction (LSPP 9); and**
- (b) **There is no method prescribed for the apportionment of interest earned on trust account deposits between each State and Territory (LSPP 11).**

209. In summary:

- (a) Enacting the Uniform Law as a law of Western Australia benefits multi-jurisdictional law practices as it reduces the regulatory and compliance burden on such practices.
- (b) The Uniform Law also benefits WA only legal practitioners, such as:
 - (1) reducing the time for making a costs complaint;
 - (2) the ability for the designated local regulatory authority to dismiss vexatious, misconceived, frivolous, or unsubstantial complaints; and
 - (3) compliance audits can only be carried out if there are reasonable grounds to do so.
- (c) In addition, there are minor to no negatives for WA only legal practitioners.
- (d) While not simple, the proposed uniform legislation is not materially more complicated than the existing WA regulatory regime.
- (e) There are a number of differences between the Uniform Law and the current WA regime, such as:
 - (1) the Legal Costs Committee, nor its power to determine scales of costs, are not provided for in the Uniform Law. However, provision can be made for it in the WA application legislation, as is the case in Victoria;
 - (2) the concept of special costs orders is not preserved in the Uniform Law. However, it can be retained by providing for it in either WA's application legislation or by amending the Supreme Court and other relevant court legislation; and
 - (3) a costs agreement that is non-compliant with the Uniform Law is void, as opposed to voidable (the latter being WA's approach which affords the courts discretion in respect of such costs agreements). WA could recommend such a position as part of joining the uniform national scheme; and
 - (4) which local professional and regulatory bodies will be preserved under the uniform national scheme is not yet clear.

210. On the basis of all of the above, the Ad Hoc Committee makes the following recommendation:

Recommendation

That the Law Society of Western Australia recommends to the Attorney General of Western Australia the adoption of the Uniform Law as a law of Western Australia with the following variations:

- *the entrenchment of a Western Australian representative on the national Legal Services Council;*
- *the continuation of a local regulatory body that is run by representatives of the legal profession and that is independent of government; and*
- *maintenance of the following aspects Western Australian legal costs regime:*
 - *a legal costs committee with the power to determine costs scales;*
 - *the power of courts to make special costs orders; and*
 - *that costs agreements that are not compliant with disclosure obligations are voidable but not automatically void.*

Schedule 1 – Comparative table of authorities responsible for the administration of the legal profession in Victoria, NSW and WA

The table below lists the bodies charged with administering the various areas of legal practice in:

- Victoria (pursuant to the *Legal Profession Uniform Law Application Act 2014* (Vic));
- NSW (pursuant to the *Legal Profession Uniform Law Application Act 2014* (NSW)); and
- WA (under its existing legal profession legislation).

AREA OF PRACTICE	VIC	NSW	WA (current)	WA (under the uniform scheme)
Admission Rules	Admissions Committee	Admissions Committee	Legal Practice Board of WA	Admissions Committee
Admission Approval	1 Victorian Legal Admissions Board 2 Supreme Court of Victoria	1 NSW Legal Profession Admission Board 2 Supreme Court of NSW	1 Legal Practice Board WA 2 Supreme Court of WA	1 Designated local regulatory authority 2 Supreme Court of WA
Issuing practising certificates	Victorian Legal Services Board	NSW Law Society	1 Legal Practice Board	Designated local regulatory authority
Professional conduct, discipline and complaints	1 Victorian Legal Services Commissioner 2 Victorian Legal Services Board	1 NSW Legal Services Commissioner 2 NSW Law Society (under delegation from the NSW Commissioner) 3 NSW Bar Association (under delegation from the NSW Commissioner)	1 Legal Practice Board of WA 2 Legal Profession Complaints Committee	Designated local regulatory authority
Monitoring of trust accounts	Victorian Legal Services Board	1 NSW Law Society 2 NSW Bar Association	Legal Practice Board of WA	Designated local regulatory authority

Drafting Uniform Regulations	Standing Committee	Standing Committee	N/A	Standing Committee
Implementing uniform legal profession regulation	Legal Services Council	Legal Services Council	N/A	Legal Services Council
Professional indemnity insurance arrangement	Legal Practitioners Liability Committee	Law Society of NSW	Law Society of WA	Designated local regulatory authority
Professional indemnity insurance exemption	Legal Services Board	Law Society of NSW	Law Society of WA	Designated local regulatory authority

Schedule 2 – Summary of findings on the Law Society Policy Positions

Law Society Policy Position	The degree to which the Uniform Law satisfies the Law Society Policy Position
1 There must remain an independent legal profession with a substantial role in its own regulation.	Satisfied
2 Professional conduct rules should be determined by the legal profession at a national level.	Satisfied
3 Existing legislation regulating the legal profession must be substantially simplified, thereby easing the regulatory burden on practitioners, especially on those who engage in multi-jurisdictional legal practices (i.e. law practices operating in more than one State or Territory).	Partially satisfied
4 Any simplified system of regulation of the profession should not result in an increase in the cost of regulation for either consumers or legal practitioners.	Satisfied
5 Any new system of regulatory reform should be costed and should not be commenced until this costing is made publically available.	Satisfied
6 In accordance with national standards set by the National Standards body, existing legal professional bodies should continue to issue legal practitioners with practising certificates.	Satisfied
7 In accordance with standards set by the National Standards body, discipline of legal practitioners should be performed by bodies determined by each State and Territory.	Satisfied
8 In accordance with standards set by the National Standards body, trust account regulation and supervision should be retained by existing bodies which regulate trust accounts in each State and Territory.	Satisfied
9 Multi-jurisdictional law practices must be permitted to have a single trust account.	Not satisfied

10 Existing bodies and Attorneys-General in each State and Territory should continue to allocate interest earned on trust deposits as currently provided for.	Satisfied
11 For interest earned on trust account deposits in respect of multi-jurisdictional law practices, there will need to be an appropriate method for apportionment of interest between each State and Territory, and a review of the methodology must be undertaken at regular intervals.	Not applicable
12 In accordance with standards set by the National Standards body, the administration of fidelity funds should remain in the States and Territories.	Satisfied
13 In accordance with standards set by the National Standards body, existing legal professional bodies should maintain the management of lawyers' professional indemnity insurance.	Satisfied

Schedule 3 – Submissions received

- Allens Linklaters
- Ashurst
- Australian Insurance Law Association
- Australian Lawyers Alliance
- BHP Billiton
- Corrs Chambers Westgarth
- David Garnsworthy
- King & Wood Mallesons
- Bevan Lawrence
- Legal Practice Board of Western Australia
- Norton Rose Fulbright
- Society of Trust and Estate Practitioners (STEP)
- Steven Stevens
- Ian Temby AO QC

Sue Langmair

Subject: FW: Consultation Draft Report on Whether The Legal Profession Uniform Law Application Bill 2013 Should Be Enacted as a Law of Western Australia - Preview

From: The Law Society of Western Australia [<mailto:communicationsofficer=lawsocietywa.asn.au@cmail2.com>] **On**

Behalf Of The Law Society of Western Australia

Sent: Monday, 30 June 2014 11:42 AM

To: Lauren Winter

Subject: Consultation Draft Report on Whether The Legal Profession Uniform Law Application Bill 2013 Should Be Enacted as a Law of Western Australia - Preview

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30 June 2014

Consultation Draft Report on Whether The Legal Profession Uniform Law Application Bill 2013 Should Be Enacted as a Law of Western Australia

The Victorian and New South Wales governments have agreed on a uniform scheme for regulation of the legal profession in their two States.

The scheme originated in a COAG proposal in 2009 that sought uniform national regulation for the legal profession. In its final form, the COAG proposal had elements which were not acceptable to the Western Australian Government and the Law Society of Western Australia. The proposal was rejected in other jurisdictions as well.



Victoria and NSW have agreed upon substantial changes to improve the original COAG proposal in order to avoid duplication of regulatory bodies and functions, reduce the costs of the scheme and decentralise its administration with greater autonomy for each jurisdiction in how their local regulators are structured.

The scheme will see the establishment of a new Legal Services Council with members drawn from participating jurisdictions. The Council will have responsibility for recommending any future changes to the Uniform Framework, and for making Uniform Rules and, along with the Commissioner for Uniform Legal Services Regulation, issuing guidelines under the scheme.

An Admissions Committee is also to be established, which will include judicial representatives nominated by various office holders and bodies. The Committee will be responsible for developing the Admissions Rules and advising the Council on matters relating to admissions.

Local regulatory bodies, including professional associations and legal services commissioners, will continue to carry out regulation in each jurisdiction in accordance with the uniform laws, rules and policies.

Under the uniform arrangements there will be:

- uniform conduct rules;
- a single set of rules governing matters such as the requirements for maintaining and auditing trust accounts, continuing professional development requirements and billing requirements;
- a simplified process for admitting foreign lawyers to practise Australian law;
- a short, standard-form of costs disclosure which may be provided as an alternative to full costs disclosure in matters where total costs are not likely to exceed \$3,000 (currently, in WA, no costs disclosure is required for matters worth less than \$1,500);
- clarification that in-house practitioners may act for related entities; and
- a single set of admissions requirements.

The Law Society established an Ad Hoc Committee of the Society to review:

- the Legal Profession Uniform Law (Uniform Law);
- the *Legal Profession Uniform Law Application Act 2013* (Vic); and
- the *Legal Profession Uniform Law Application Act 2014* (NSW).

The Ad-Hoc Committee was asked to prepare a report for the purpose of considering whether, and to what extent, enacting legislation to apply the Uniform Law in Western Australia would:

- address the concerns expressed by the Attorney General, the Hon Michael Mischin MLC, in his [speech](#) of November 2011; and
- be consistent with the 13 points articulated in the [Law Society of Western Australia's National Regulatory Framework Policy Positions](#) adopted by the Society in November 2009.

The Ad Hoc Committee has prepared a comprehensive [Consultation Draft Report – Review of the Legal Profession Uniform Law](#).

The Society's Council has now resolved that the Report be made available to the Society's members, to the wider profession and various stakeholders for feedback and comment. It is the Society's desire to consult as widely as possible.

The Society would be most grateful to receive any comments or feedback from you on the Report or any other issues which you consider may be relevant to the question as to whether Western Australia should adopt the Uniform Law.

Submissions may either be submitted by [email](#) or may be posted to the following address:

The President
The Law Society of Western Australia
PO Box Z5345
PERTH WA 6831

The consultation period will close on **31 July 2014** to enable the Ad-Hoc Committee to review and consider any feedback and to prepare and submit a final report for the consideration of the Council of the Society prior to its meeting in late August 2014. At this

stage the Society's is aiming to present a final report and the Society's recommendations to the Attorney General for the State of Western Australia shortly thereafter.

Yours sincerely

Konrad de Kerloy
President

The Law Society of Western Australia, Level 4, 160 St Georges Tce, Perth

Phone: (08) 9324 8600, Fax: (08) 9324 8699

Email: info@lawsocietywa.asn.au, Web: www.lawsocietywa.asn.au

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