



**THIRTY-NINTH PARLIAMENT**

**REPORT 28**  
**STANDING COMMITTEE ON LEGISLATION**  
**DEMISE OF THE CROWN**

Presented by Hon Robyn McSweeney MLC (Chair)

August 2015

## STANDING COMMITTEE ON LEGISLATION

### **Date first appointed:**

**17 August 2005**

### **Terms of Reference:**

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

#### **“4. Legislation Committee**

- 4.1 *A Legislation Committee* is established.
- 4.2 The Committee consists of 5 Members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
- 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of a Bill.”

### **Members as at the time of this inquiry:**

Hon Robyn McSweeney MLC (Chair)

Hon Sally Talbot MLC (Deputy Chair)

Hon Donna Faragher MLC

Hon Dave Grills MLC

Hon Lynn MacLaren MLC

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## **Government Response**

This Report is subject to Standing Order 191(1):

*Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.*

The two-month period commences on the date of tabling.



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**EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE**

**REPORT OF THE STANDING COMMITTEE ON LEGISLATION**

**IN RELATION TO THE**

**DEMISE OF THE CROWN**

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**EXECUTIVE SUMMARY**

- 1 Demise of the Crown refers to the end of the reign of one King or Queen resulting in the transfer of sovereignty to another King or Queen.
- 2 Historically, the demise of the Crown had consequences including Parliament being dissolved, offices held at the pleasure of the Crown being terminated and legal proceedings being discontinued. The inconveniences and hardship arising from the effect of the demise of the Crown were dealt with in piecemeal fashion by Imperial acts and colonial acts enacted in the United Kingdom and Australia.
- 3 On 26 February 2015, the Legislative Council referred the inquiry into a Demise of the Crown Statute to the Standing Committee on Legislation. The Committee was charged with investigating and reporting to the Legislative Council on whether Western Australia should adopt demise of the Crown legislation provisions as recommended by The Law Reform Commission of Western Australia in its 1994 report *Project No 75: United Kingdom Statutes in Force in Western Australia*. The Law Reform Commission identified Imperial acts relevant to the demise of the Crown and recommended statutory reform to re-enact or address these Imperial acts.
- 4 The delay by successive Governments in implementing the recommendations of the Law Reform Commission was brought to the attention of the House by the Standing Committee on Uniform Legislation and Statutes Review in its Report 88 *Succession to the Crown Bill 2014*. That Committee (and the Law Reform Commission) recommended statutory reform that would ensure that the demise of the Crown did not affect the continuation of the Parliament of Western Australia, the Public Seal of the State and legal proceedings.
- 5 The focus of debate in the Legislative Council was on whether the demise of the Crown has any impact on the continuation of the Parliament. Imperial law, if it applied in Western Australia, would have the effect of requiring Parliament to prorogue within six months of the demise of the Crown. During debate in the Legislative Council Hon Michael Mischin MLC, Attorney General, questioned

- whether legislation was required to deal with the demise of the Crown, noting a number of complexities in this area of the law.<sup>1</sup>
- 6 The law is complex and uncertain. There is doubt as to whether the relevant Imperial act relating to Parliament identified by the Law Reform Commission (7&8 William III (1695) c. 15), which requires Parliament to be prorogued or dissolved within six months of a demise of the Crown, applies in Western Australia. While there is an argument that legislation is not required to address any legal impact of the demise of the Crown, there remains doubt.
- 7 Parliament moving to single session Parliaments since the 37<sup>th</sup> Parliament (which commenced on 29 March 2005) raises the potential for a person to challenge the validity of Parliament in the Courts if Parliament is not prorogued within six months of the next demise of the Crown.
- 8 The Committee is of the view that Western Australia should pass a demise of the Crown Bill and recommends that the Legislative Council pass a Demise of the Crown Bill in the terms of the recommended Bill at Appendix 5 of this report.
- 9 In July 2015, the Attorney General advised that Committee that he supports a demise of the Crown Bill. Nigel Pratt, Clerk of the Legislative Council, Professor Anne Twomey, and The Law Society of Western Australia also support the Government enacting demise of the Crown legislation.
- 10 The recommended Bill will have the effect of making it absolutely certain that the Parliament of Western Australia continues in the event of a demise of the Crown and does not need to be prorogued or dissolved in the event of the demise of the Crown. It will make certain what ought to be certain, and address the risk that Imperial laws may apply in this State.
- 11 The recommended Bill will also address the risk of litigation and challenges to the Courts in the event of a demise of the Crown.
- 12 A demise of the Crown has not occurred in 62 years. The Committee recommends that the Legislative Council pass a Demise of the Crown Bill as soon as possible.
- 13 The Committee thanks all witnesses who provided assistance during this inquiry. The Committee also commends the Uniform Legislation Committee for bringing this issue to the attention of Parliament.

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<sup>1</sup> Hon Michael Mischin MLC, Attorney General, Legislative Council, *Parliamentary Debates (Hansard)*, 24 February 2015, p507.



**RECOMMENDATIONS**

1 Recommendations are grouped as they appear in the text at the page number indicated:

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**Recommendation 1: The Committee recommends that the Legislative Council pass a Constitution Amendment (Demise of the Crown) Bill in the terms of the draft Bill at Appendix 5 to this report.**

The substantive legislative provision in the recommended Constitution Amendment (Demise of the Crown) Bill reflects the terms of section 5(1) of the *Constitution Act 1986* (NZ) and provides:

*The demise of the Sovereign —*

*(a) has the effect of transferring all the functions, duties, powers, authorities, rights, privileges and dignities belonging to the Crown to the Sovereign's successor; but*

*(b) has no other effect in law for any purpose.*

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**Recommendation 2: The Committee recommends that the Legislative Council pass the Constitution Amendment (Demise of the Crown) Bill as soon as possible.**



# REPORT OF THE STANDING COMMITTEE ON LEGISLATION

## IN RELATION TO THE

### DEMISE OF THE CROWN

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#### 1 REFERENCE AND PROCEDURE

1.1 On 26 February 2015, the Legislative Council referred the Demise of the Crown Statute inquiry to the Standing Committee on Legislation (**Committee**).

1.2 The inquiry's terms of reference are:<sup>2</sup>

*That the Standing Committee on Legislation:*

1. *inquire into and report on whether Western Australia should adopt a general demise of the Crown Statute such as that recommended by the October 1994 report of the Western Australian Law Reform Commission on "Project No 75: United Kingdom Statutes in Force in Western Australia";*
2. *should it recommend that a general demise of the Crown statute be adopted, the committee include in a schedule to its report a draft bill for this purpose; and*
3. *report to the House on or before 14 May 2015.*

1.3 On 23 April 2015, the Legislative Council agreed to extend the Committee's time to report to 13 August 2015.<sup>3</sup>

1.4 The inquiry was referred following debate in the Legislative Council on whether to pass a recommendation made by the Standing Committee on Uniform Legislation and Statutes Review (**Uniform Legislation Committee**) in its Report 88 *Succession to the Crown Bill 2014*<sup>4</sup> (**Report 88**). During its inquiry into that bill, the Uniform Legislation Committee identified that successive Governments had yet to implement the recommendations that The Law Reform Commission of Western Australia (**Law Reform Commission**) made in its 1994 report *Project No 75: United Kingdom Statutes in Force in Western Australia* relevant to the demise of the Crown.<sup>5</sup>

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<sup>2</sup> Legislative Council, *Parliamentary Debates (Hansard)*, 26 February 2015, p738.

<sup>3</sup> Legislative Council, *Parliamentary Debates (Hansard)*, 23 April 2015, p2764.

<sup>4</sup> Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 88, *Succession to the Crown Bill 2014*, 17 February 2015.

<sup>5</sup> Demise of the Crown should not be confused with the Succession of the Crown. Succession of the Crown is a related, but separate, question of law. A demise of the Crown will trigger royal succession.

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- 1.5 The relevant extract from the Law Reform Commission report is attached at Appendix 1.<sup>6</sup> The Uniform Legislation Committee's Recommendation 1,<sup>7</sup> recommending that the Legislative Council adopt legislation to implement the recommendations of the Law Reform Commission and the terms of the legislation it proposed, is copied at Appendix 2.
- 1.6 The Uniform Legislation Committee (and the Law Reform Commission) recommended legislation that provided that the demise of the Crown will not affect the continuation of the Parliament of Western Australia, the existence or use of the Public Seal of the State and the continuation of civil, criminal or other proceedings.
- 1.7 Whether legislation was required to ensure that the Parliament of Western Australia continued in the event of a demise of the Crown was the focus of debate in the Legislative Council. Hon Michael Mischin MLC, Attorney General, questioned whether legislation was required, noting a number of complexities in this area of the law.<sup>8</sup> As such, the Legislative Council requested that the Committee further investigate the matters noted in the terms of reference.
- 1.8 In March 2015, the Committee sought submissions from stakeholders and corresponded with the Hon Colin Barnett MLA, Premier, the Attorney General and the Uniform Legislation Committee in relation to the inquiry. The Committee received four submissions. Stakeholders invited to make a submission and submissions received are listed at Appendix 3.
- 1.9 The Committee also wrote to all Australian jurisdictions seeking information on demise of the Crown legislation and reports in their jurisdiction. The Governments of New South Wales, Victoria, Tasmania and the Northern Territory responded. Inquiry submissions and responses from other Governments are posted on the Committee's internet page at [www.parliament.wa.gov.au/leg](http://www.parliament.wa.gov.au/leg).
- 1.10 In May and July 2015, the Committee asked the Attorney General specific questions raised by the Committee's research and inquiries. The Attorney General's response in July 2015 advised the Committee that, in his view, Parliament should enact legislation dealing with the demise of the Crown. A further response from the Attorney General clarified aspects of the Government's views. The responses from the Attorney General dated 3 July 2015 and 22 July 2015, and the Committee's letter to the Attorney General dated 10 July 2015, are attached at Appendix 4.

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<sup>6</sup> The Law Reform Commission of Western Australia, *Project No 75: United Kingdom Statutes in Force in Western Australia*, October 1994, pp90-92.

<sup>7</sup> Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 88, *Succession to the Crown Bill 2014*, 17 February 2015, p10.

<sup>8</sup> Hon Michael Mischin MLC, Attorney General, Legislative Council, *Parliamentary Debates (Hansard)*, 24 February 2015, p507.

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**2 DEMISE OF THE CROWN**

- 2.1 Demise of the Crown refers to the end of the reign of one King or Queen, whether by death or abdication, resulting in the transfer of sovereignty to another King or Queen.
- 2.2 A demise of the Crown has consequences. Historically, the position of the Crown had the result that on the death of the reigning monarch virtually all public activities came to an end.<sup>9</sup> Consequences included the Parliament being dissolved, offices held at the pleasure of the Crown being terminated (for example, Ministers, judges, public officials and military officers) and legal proceedings were discontinued.<sup>10</sup>
- 2.3 The inconveniences and hardship arising from the effect of a demise of the Crown were dealt with in piecemeal fashion by Imperial acts<sup>11</sup> and colonial acts enacted in the United Kingdom and Australia so that the day to day business of government and judicial functions would continue, notwithstanding the demise of the Crown.

**Imperial acts relating to a demise of the Crown**

- 2.4 As Western Australia was a settled colony, it inherited certain laws of the United Kingdom. Imperial acts of general application in force, if suitable to local conditions,<sup>12</sup> were received in Western Australia on 1 June 1829.<sup>13</sup>
- 2.5 It is not possible to state with confidence if Imperial acts relevant to the demise of the Crown apply in Western Australia. Whether an Imperial act applies in Western Australia involves asking, firstly, if the Imperial act was inherited on 1 June 1829 and, secondly, if that law has since been expressly or impliedly repealed by a law applying in Western Australia.
- 2.6 The Law Reform Commission captured the difficulty in determining if an Imperial act applies when it stated that *'it is not always possible to do more than speculate on*

<sup>9</sup> Cumbrae-Stewart, 'The Demise of the Crown' (1952) 25 Australian Law Journal, p633.

<sup>10</sup> B Selway, *The Constitution of South Australia*, Federation Press, 1999, p27.

<sup>11</sup> In this report, the term 'Imperial act' (often referred to as an imperial statute) refers to an act of the English Parliament, the Parliament of Great Britain (from 1707) or the Parliament of the United Kingdom and Ireland (from 1801) enacted prior to 1 June 1829 (Western Australia's 'receival' date).

<sup>12</sup> See *Quan Yick v Hinds* (1905) 2 CLR 345, *Rogers v Squire* (1978) 34 ALR 111.

<sup>13</sup> Western Australia is deemed to have been established and received certain Imperial acts on 1 June 1829: Section 73 of the *Interpretation Act 1943*. An Imperial act may become part of the law of Western Australia in a number of ways including by virtue of provisions in the acts themselves. These laws are often referred to as Statutes applying by 'paramount force'. (The *Colonial Laws Validity Act 1865* provided that Acts of the United Kingdom Parliament extending to the colonies could override contrary colonial legislation and would apply by 'paramount force'. The *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK) terminated the remaining possibilities for the United Kingdom to legislate with effect in Australia). An act of the Parliament of Western Australia could also expressly adopt or apply an Imperial or United Kingdom act.

*whether a particular [Imperial] statute is in force.*<sup>14</sup> It is also a challenge to interpret Imperial acts (which use the language of the time), how they interact and whether part of an act has been impliedly repealed by another Imperial or other act.

2.7 Imperial acts received in Western Australia that have not been expressly or impliedly repealed are in force, even if they are in a state of disuse, as legislation does not cease to operate merely by the effluxion of time.<sup>15</sup> In exercising its legislative function, the Parliament does nothing in vain.<sup>16</sup>

2.8 The Law Reform Commission identified the following Imperial acts dealing with the demise of the Crown as requiring statutory reform.<sup>17</sup>

<b>Imperial Act</b>	<b>Effect of Imperial Act</b> (if the law applies in Western Australia)	<b>Law Reform Commission Recommendation</b>
7&8 William III (1695) c.15 <sup>18</sup>  (As noted at paragraph 3.3, 1707 6 Anne c. 7 also deals with the effect of a demise of the Crown on Parliament).	Parliament may continue to sit for six months after the demise of the Crown, unless it is sooner dissolved by his or her successor, or must be revived where between sessions.	Address the impact of this Imperial Act in legislation.
1 Edward VI (1547) c.7	Actions in the courts continue after the demise of the Crown.	Preserve the effect of this law in new legislation.
1 Anne (1702) c.2	Legal proceedings continue on the demise of the Crown.	Preserve the effect of this law in new legislation.
6 Anne (1707) c. 41	The Great Seal and Public Seals remain valid on the demise of the Crown until further Order. <sup>19</sup>	Preserve the effect of this law in new legislation.

<sup>14</sup> The Law Reform Commission of Western Australia, *United Kingdom Statutes in Force in Western Australia*, October 1994, p3.

<sup>15</sup> The principle of desuetude has never been a part of the English common law: *Stewart v Lawton* (1823) 1 Bing 374 at 376; 130 ER 151 at 152.

<sup>16</sup> *Halki Shipping Corp v Sopex Oils Ltd* [1998] 2 All ER 23 at 43-44.

<sup>17</sup> The Law Reform Commission of Western Australia, *Project No 75: United Kingdom Statutes in Force in Western Australia*, October 1994, pp90-92 (copied at Appendix 1 of this report). The Law Reform Commission also identified 1 George III (1760) c. 23 (dealing with the Commissions of Judges) and 37 George III (1797) c.27 (which shortened the notice for summoning Parliament) as acts relevant to a demise of the Crown but only recommended that these laws be repealed as they had been superseded by Western Australian legislation.

<sup>18</sup> The 'c.' refers to the chapter of the law.

<sup>19</sup> The Attorney General expressed the view that it '*does not occur to me that there is any issue concerning the continuation of the Public Seal on a demise of the Crown*': Letter from Hon Michael Mischin MLC, Attorney General, 22 July 2015, p2.

- 2.9 The Law Reform Commission recommended that ‘*consideration be given to enacting a general Demise of the Crown Act*’<sup>20</sup> and that the Government enact laws dealing with the effect of the demise of the Crown on Parliament, the use of the Public Seal of the State, and civil, criminal or other proceedings.
- 2.10 The recommended laws would:
- In the case of Parliament, address any effect of the relevant Imperial act/s, which, if they applied in Western Australia, would require Parliament to prorogue within six months of the demise of the Crown.
  - In the case of the Public Seal and legal proceedings, enact a law with substantially the same effect as the Imperial acts.
- 2.11 The Law Reform Commission relied on the work undertaken by other law reform bodies dealing with similar references and, in particular, the work of the Law Reform Committee of South Australia in this area of the law as reported in its *Eighty First Report of the Law Reform Committee of South Australia to the Attorney-General - Relating to the Demise of the Crown*.<sup>21</sup> Most jurisdictions in Australia undertook analysis on what law reform was required to deal with Imperial acts prior to the Law Reform Commission report.

### **State acts and provisions in other jurisdictions relevant to a demise of the Crown**

- 2.12 Western Australia’s constitutional arrangements are broadly similar to those of other States in Australia.<sup>22</sup> While no one single document contains Western Australia’s constitution, the principal constitutional acts are the *Constitution Act 1889* and *Constitution Acts Amendment Act 1899*.
- 2.13 The *Constitution Act 1889* provides the statutory basis for the Parliament of Western Australia.<sup>23</sup> The statutory basis of our Parliament is one reason why it is argued that the common law requirement to dissolve Parliament and the requirements of Imperial acts relating to Parliament do not apply in Western Australia (see paragraph 3.11).
- 2.14 The *Constitution Act 1889* contains only one reference to the demise of the Crown when it provides that commissions of Judges shall continue notwithstanding the

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<sup>20</sup> The Law Reform Commission of Western Australia, *Project No 75: United Kingdom Statutes in Force in Western Australia*, October 1994, p90 (copied at Appendix 1 of this report).

<sup>21</sup> Law Reform Committee of South Australia, *Eighty First Report of the Law Reform Committee of South Australia to the Attorney-General - Relating to the Demise of the Crown*, 1984. South Australia has not enacted the recommendations of this Committee.

<sup>22</sup> *The Western Australian Constitution*, Wayne Martin QC, *Government of Western Australia*, 1998, p3.

<sup>23</sup> ‘*The Parliament of Western Australia consists of the Queen and the Legislative Council and the Legislative Assembly*’: Section 2(2), *Constitution Act 1889*.

demise of the Crown.<sup>24</sup> Western Australian law does not expressly contain a provision addressing the areas of concern raised by the Law Reform Commission in 1994.

2.15 The constitutions of New South Wales, Victoria, Queensland, South Australia and Tasmania and New Zealand make specific provision for the demise of the Crown.<sup>25</sup>

2.16 In New Zealand, the *Constitution Act 1986* (NZ) contains a provision that deals with a broad range of potential consequences of a demise of the Crown. Section 5 provides:

**5. Demise of the Crown**

(1) *The death of the Sovereign shall have the effect of transferring all the functions, duties, powers, authorities, rights, privileges, and dignities belonging to the Crown to the Sovereign's successor, as determined in accordance with the enactment of the Parliament of England intituled The Act of Settlement (12 & 13 Will 3, c 2) and any other law relating to the succession to the Throne, but shall otherwise have no effect in law for any purpose.*

(2) *Every reference to the Sovereign in any document or instrument in force on or after the commencement of this Act shall, unless the context otherwise requires, be deemed to include a reference to the Sovereign's heirs and successors.*

2.17 The *Constitution Act 1975* (Vic) contains another example of a demise of the Crown legislative provision more general in its scope:

**10. Certain acts not to be affected by a demise of the Crown**

*All things done within Victoria at any time after any demise of the Crown but before the Governor by his proclamation published in the Government Gazette has notified such demise and which but for this Act might be affected by such demise shall have the same effect and be of the same force as if no such demise had happened.*

2.18 Other jurisdictions have enacted legislation that expressly deals with the consequences of a demise of the Crown on the Parliament, Public Seal and legal proceedings. For

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<sup>24</sup> Section 54, *Constitution Act 1889*.

<sup>25</sup> Legislative provisions in these constitutions differ. While some constitutions contain demise of the Crown provisions relating to Parliament, the Public Seal of the State and legal proceedings, the South Australian constitution only refers to demise of the Crown when providing that it is not necessary for a Member of Parliament who has taken the oath to take the oath again in the event of a demise of the Crown: s42(2), *Constitution Act 1934* (SA). The Government of South Australia has not implemented the recommendations of The Law Reform Committee of South Australia in its *Eighty First Report of the Law Reform Committee of South Australia to the Attorney-General - Relating to the Demise of the Crown* (1984).



example, legislation in the United Kingdom and other States expressly providing for the continuation of Parliament in the event of a demise of the Crown follow.

- Section 51 of the *Representation of the People Act 1867* (UK)

***51. Not necessary to dissolve Parliament on any future demise of the Crown.***

*The Parliament in being at any future demise of the Crown shall not be determined or dissolve by such demise, but shall continue so long as it would have continued but for such demise, unless it should be sooner prorogued or dissolved by the Crown.*

- Section 9 of the *Constitution Act 1975* (Vic)

***9. Demise of the Crown not to dissolve Parliament***

*The Parliament in being at any demise of the Crown shall not be determined or dissolved by such demise, but shall continue so long as it would have continued but for such demise, unless it is sooner prorogued or dissolved by the Governor.*

- Section 4 of the *Constitution Act 1934* (Tas)

***4. Parliament not dissolved by demise of the Crown***

*The Legislative Council and House of Assembly of Tasmania in being at any future demise of the Crown shall not be determined or dissolved by such demise, but, subject to the provisions of this Act, shall continue so long as they would have continued respectively but for such demise.*

- Section 17 of the *Constitution of Queensland Act 2001* (Qld)

***17. Continuation of Legislative Assembly despite end of Sovereign's reign***

*If the Sovereign's reign ends, the Legislative Assembly, as constituted immediately before the end of the reign, continues in existence, subject to dissolution under section 15(2), for as long as it would have continued if the Sovereign's reign had not ended.*

- 2.19 Legislation in other Australian jurisdictions providing for the continuation of the Public Seal and legal proceedings follow.

*The continuation of the Public Seal on a demise of the Crown*

- Section 38 of the *Constitution of Queensland 2001 (Qld)*:

**38. Continued use of seal despite end of Sovereign's reign**

(1) *This section applies if the Sovereign's reign ends and, immediately before the end of the reign, a seal for Queensland issued by the Sovereign is in existence.*

(2) *The seal, until a new seal is issued by the next Sovereign, may continue to be used as if the Sovereign's reign had not ended.*

- Section 11(3) of the *Constitution Act 1975 (Vic)*:

(3) *The Public Seal of the State and other Public Seals in being at the time of the demise of the Crown shall continue and be made use of as if no such demise had happened.*

*The continuation of legal proceedings on a demise of the Crown*

- Section 8 of the *Crown Proceedings Act 1988 (NSW)*:

**8. Demise of the Crown**

(1) *No proceedings (whether civil or criminal) involving the Crown shall abate or be affected by the demise of the Crown.*

(2) *For the purposes of this section, demise includes a demise by or on abdication.*

- Section 11(2) of the *Constitution Act 1975 (Vic)*:

(2) *No action suit or other process or proceeding civil or criminal in or to which Her Majesty is a party or which has been commenced or carried on in her name or by her authority shall by reason of her demise abate discontinue or be in any manner affected; but every such action suit process or proceeding shall be carried on enforced or otherwise completed or acted on in the name of the reigning Sovereign for the time being and as if such demise had not happened.*

- Section 7 of the *Constitution Act 1934* (Tas):

***7. All process, &c., and engagements with or on behalf of His Majesty, to subsist and continue notwithstanding demise***

*(1) No action, suit, or other process or proceeding, civil or criminal, in or to which His Majesty shall be a party, or which shall have been commenced or carried on in His name or by His authority, shall, by reason of His demise, abate, discontinue, or be in any manner affected; but every such action, suit, process, or proceeding shall and may be carried on, enforced, or otherwise completed or acted on in the name of His successor, and as if such demise had not happened.*

*(2) All contracts of every kind lawfully entered into by or on behalf of His Majesty with any person, body, or authority, and all benefit and advantage thereof, and all liability in respect thereof, shall respectively attach and belong to the heirs and successors of His Majesty, although they be not expressly named in any such contract.*

2.20 The *Demise of the Crown Act 1901* (UK) is an example of an act applying to the colonies by paramount force (see footnote 13). This provides that offices of the Crown are not affected by a demise of the Crown:

*(1) The holding of any office under the Crown, whether within or without His Majesty's dominions, shall not be affected, nor shall any fresh appointment thereto be rendered necessary, by the demise of the Crown.*

2.21 With other States legislating in relation to the specific concerns raised by the Law Reform Commission, questions may arise as to why Western Australia has not enacted similar legislation dealing with these aspects of a demise of the Crown.

### **3 THE EFFECT OF THE DEMISE OF THE CROWN ON PARLIAMENT**

#### **Imperial acts**

3.1 Historically, the effect of the demise of the Crown was to dissolve Parliament. Imperial laws altered this position.

3.2 Commentary referring to Imperial acts relevant to the effect of the demise of the Crown on Parliament refer to different Imperial acts. This reflects how difficult it is to interpret Imperial acts.

- 3.3 As noted above, the Law Reform Commission referred to the provisions in 7&8 William III c. 15 (1695) relating to the effect of a demise of the Crown on Parliament (this law included the 6 month sitting limit). There is an argument, but it is not certain, that 7&8 William III c. 15 (1695) was impliedly repealed by 6 Anne c. 7 (1707) (also known as the *Succession to the Crown Act 1707*), which provided for the continuation of Parliament in the event of a demise of the Crown. The respected constitutional expert Professor Anne Twomey refers to the *Succession to the Crown Act 1707* in her commentary on the effect of the demise of the Crown on Parliament.<sup>26</sup> The Law Reform Committee of South Australia, while noting the argument that 7&8 William III c. 15 (1695) was impliedly repealed by the *Succession of the Crown Act 1707*, proceeded on the basis that both Imperial acts were received in South Australia.<sup>27</sup> *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* also refers to both Imperial acts:

*Before the Revolution of 1688 a Parliament was dissolved by the demise of the Crown, but by the Act 7 & 8 Will 3, cl 15, and by the Succession to the Crown Act 1707, a Parliament was dissolved six months after the demise of the Crown.*<sup>28</sup>

- 3.4 The Imperial act 7&8 William III c. 15 (1695) provided for the continuation of a sitting Parliament (for six months) in the following language of the time.<sup>29</sup>

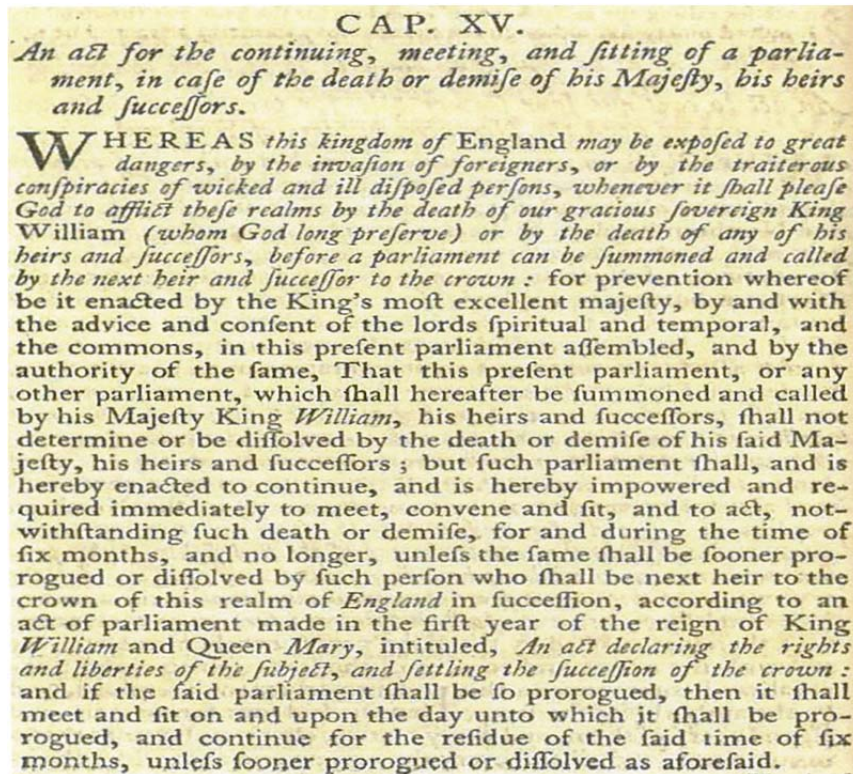
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<sup>26</sup> A Twomey, *The Constitution of New South Wales*, Federation Press, 2004, p387. Also Submission No 2, 23 March 2015, p1.

<sup>27</sup> The Law Reform Committee of South Australia, *Eighty First Report of the Law Reform Committee of South Australia to the Attorney-General - Relating to the Demise of the Crown*, 1984, pp7, 9.

<sup>28</sup> *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21<sup>st</sup> edition, 1989. London, Butterworths, p62.

<sup>29</sup> Sourced from Danby Pickering of Gray's Inn, Efq, *The Statutes at Large from the Thirty-fecond Year of King Henry VII. to the Seventh Year of King Edward VI. inclusive*, Volume V, Printed by Joseph Bentham, Printer to the University, for Charles Bathurst, London, 1763, p410.



- 3.5 The relevant effect of this Imperial law was that Parliament may continue to sit for six months after the demise of the Crown, unless it was sooner dissolved by the King or Queen's successor, but it must be prorogued or dissolved within six months of the demise of the Crown.
- 3.6 The Committee is of the view that any requirement to prorogue Parliament would cause significant inconvenience to the operation of the Parliament. It is also possible that questions may arise as to the validity of laws enacted by the Parliament of Western Australia if it were not prorogued or convened in accordance with the Imperial law.

**The effect of the demise of the Crown on the Parliament of Western Australia**

- 3.7 There are differing views on whether the Parliament of Western Australia may be required to dissolve on the demise of the Crown (the common law position, prior to the Imperial acts), or prorogue within six months of a demise of the Crown (as provided by 7&8 William III c. 15 (1695)).
- 3.8 This is a complex and uncertain area of the law. It is uncertain if Parliament is required to comply with the above Imperial law.
- 3.9 There are arguments that, firstly, the relevant Imperial laws were not received in Western Australia and, secondly, if received, that they have since been impliedly repealed locally applying legislation and, in particular, by the *Constitution Act 1889*. There are differences in legal opinions on both of these arguments.

3.10 Professor Anne Twomey submitted to the Committee that there are doubts about whether Imperial acts relating to the dissolution of Parliament were intended to extend to the colonies.<sup>30</sup> Professor Twomey noted that Joseph Chitty in 1820 argued that there were cogent reasons why the demise of the Crown did not dissolve colonial legislatures.<sup>31</sup> Mr Chitty's views were:

*With respect to the colonial assemblies ... it is most important that any idea that they stand on the same footing as the English House of Commons should be excluded from considerations. The principles on which the English Parliament rests its rights, powers, and privileges cannot be extended to a provincial assembly. Parliament stands on its own laws ... The constitutions of the English Parliament and the colonial assemblies necessarily differ: the latter cannot in general even adjourn themselves; this is done by the governor ... Though the statute 7 & 8 Wm. 3. c. 15. as to the continuance of Parliament after the demise of the Crown, does not extend to the plantations [this is a reference to the colonies] several very cogent reasons have been urged in support of the doctrine, that the demise of the Crown does not dissolve a colonial assembly.<sup>32</sup>*

3.11 Others have expressed the view that relevant Imperial laws were received law in Australia.<sup>33</sup> There is then the argument that the statutory basis and specific provisions in Australian constitutions with respect to the duration of Parliament exclude the automatic dissolution of Parliament<sup>34</sup> and that, even if the common law required Parliament to dissolve in the event of the demise, Parliament could continue for six months by virtue of imperial laws.<sup>35</sup> There is also the view that any Imperial laws received have been impliedly repealed by our constitutional arrangements.<sup>36</sup>

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<sup>30</sup> Submission No 2 from Dr Anne Twomey, Professor of Constitutional Law, University of Sydney, 23 March 2015, p1.

<sup>31</sup> Ibid, p1.

<sup>32</sup> J Chitty, *A Treatise on the Law of Prerogatives of the Crown: and the Relative Duties and Rights of the Subject*, J Butterworth and Son, 1820, pp36-37.

<sup>33</sup> B Selway, *The Constitution of South Australia*, Federation Press, 1999, p. 27, footnote 41 'This statute [The Succession to the Crown Act 1707] was received into the Australian colonies', and The Law Reform Committee of South Australia, *Eighty First Report of the Law Reform Committee of South Australia to the Attorney-General - Relating to the Demise of the Crown*, 1984, p9.

<sup>34</sup> Cumbrae-Stewart, 'The Demise of the Crown', (1952) 25 *Australian Law Journal*, p634.

<sup>35</sup> B Selway, *The Constitution of South Australia*, Federation Press, 1999, p27, footnote 41.

<sup>36</sup> Bradley Selway was of the view that imperial laws received have 'largely' been since cured by statute: Ibid, p27. The constitutional expert was of the view that Parliaments in Australia 'are all statutory Parliaments, and all the conditions of their existence and periodical duration must be sought in the statutes that brought them into being': A Inglis Clark, *Studies in Australian Constitution Law*, 2<sup>nd</sup> edition, 1905, p208.

- 3.12 The Privy Council in *Devine v Holloway*<sup>37</sup> held that the authority of the Governor and Legislative Council of New South Wales was not terminated by the death of King William IV. Unfortunately, the decision did not explain the basis for this view.<sup>38</sup>
- 3.13 As far back as 1867, when Victoria passed an act to provide that a demise of the Crown should not dissolve Parliament, questions have been raised as to whether demise of the Crown provisions were necessary to continue an Australian Parliament.<sup>39</sup> While there is an argument that legislation is not necessary to continue Parliament, many States in Australia with similar constitutional arrangements have legislated to expressly state that their Parliaments continue in the event of the demise of the Crown (see paragraph 2.18).
- 3.14 Professor Twomey submitted to the Committee that:
- It seems to me most unlikely that the demise of the Crown would have any substantive effect upon Parliament, or indeed upon the offices of persons appointment under the Crown or litigation involving the Crown.*<sup>40</sup>
- 3.15 The Committee accepts that the demise of the Crown may not affect the Parliament of Western Australia. However, the Committee is concerned about the lack of certainty in this important area of the law.
- 3.16 There is an unacceptable risk that a demise of the Crown may have legal consequences for the Parliament of Western Australia.
- 3.17 While there are cogent legal reasons for recommending that the Government enact a Demise of the Crown Bill, there are also other reasons why the Committee recommends enacting such a law (noted in paragraphs 4.1 to 4.9).
- 3.18 In relation to a Members' Oath in Parliament, regardless of any legal requirement, the practice of the Parliament is to require Members to take the oath to the new sovereign on the first sitting day following the demise of the Crown.<sup>41</sup>

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<sup>37</sup> (1861) 14 Moore 290.

<sup>38</sup> The Privy Council only stated that '*In the course of the argument we expressed our clear opinion that, under this Statute, the Colonial Legislature had the right to make the Act in question; and we now avert to the point only for the purpose of repeating our unqualified adherence to the opinion we have already expressed*': The Right Honourable Lord Cranworth, *Devine v Holloway* (1861) 15 E.R. 314 at 321. Professor Anne Twomey submitted to the Committee that this decision was not clear as to the basis of the decision: Submission No 2, 23 March 2015, p1.

<sup>39</sup> Sir Robert Garran (1867-1957), *Commentaries on the Constitution of the Commonwealth of Australia*, University of Sydney Library, 2000, paragraph 117.

<sup>40</sup> Submission No 2 from Dr Anne Twomey, Professor of Constitutional Law, University of Sydney, 23 March 2015, p2.

<sup>41</sup> *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21<sup>st</sup> edition, 1989, London, Butterworths, p229.

**The Parliament of Western Australia at the time of previous demises of the Crown**

3.19 At the time of past demises of the Crown, the Parliament of Western Australia was either prorogued or, if sitting, was prorogued within six months of the demise, as demonstrated below.

*The Parliament of Western Australia at the time of the demise of the Crown*

Date of demise	Parliament of Western Australia
22 January 1901 King Edward VII succeeded Queen Victoria	The Legislative Assembly prorogued and dissolved on 15 March 1901 (end of the 3 <sup>rd</sup> Parliament). General election held 24 April 1901. 4 <sup>th</sup> Parliament commenced on 28 June 1901.
6 May 1910 King George V succeeded	7 <sup>th</sup> Parliament not in Session at the time of the demise of the Crown. 3 <sup>rd</sup> Session of the 7 <sup>th</sup> Parliament commenced on 28 July 1910.
20 January 1936 King Edward VIII succeeded (abdicated on 11 December 1936)	The Legislative Assembly prorogued and dissolved on 15 January 1936 (end of the 15 <sup>th</sup> Parliament). General election held 15 February 1936.
11 December 1936 King George VI succeeded	1 <sup>st</sup> Session of the 16 <sup>th</sup> Parliament prorogued on 11 December 1936. 2 <sup>nd</sup> Session opened on 5 August 1937.
6 February 1952 Queen Elizabeth II succeeded	3 <sup>rd</sup> Session of the 20 <sup>th</sup> Parliament prorogued on 10 July 1952. 4 <sup>th</sup> Session of the 20 <sup>th</sup> Parliament commenced on 31 July 1952.

3.20 In the past there has been no opportunity to argue that the Parliament of Western Australia has breached any Imperial law that applied to this State because:

- Prior to the 36<sup>th</sup> Parliament (which commenced on 1 May 2001), Parliament was prorogued approximately annually, which resulted in several sessions in one Parliament. This past practice meant that Parliament was more likely to be prorogued, in any event, within six months of a demise of the Crown.<sup>42</sup>
- There have been coincidentally timed State general elections.
- Parliament was prorogued on the day of the 1936 abdication.

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<sup>42</sup> The practice of Parliament being prorogued once every several years began in the 37<sup>th</sup> Parliament, which commenced on 29 March 2005. That Parliament was prorogued on 7 August 2008. The 36<sup>th</sup> Parliament, which commenced on 1 May 2001 and was prorogued on 9 August 2002 and 23 January 2005, had two sessions.



**4 THE NEED FOR CLARITY, THE RISK OF LITIGATION AND OTHER REASONS TO PASS DEMISE OF THE CROWN LEGISLATION**

4.1 The Committee is of the view that the Legislative Council should pass legislation dealing with the demise of the Crown. This is an appropriate cautionary approach which will make clear what is presently not clear but should be: that the demise of the Crown has no impact on any aspect of the law and, in particular, no impact on the Parliament of Western Australia.

4.2 The Attorney General advised the Committee:

*In my view, Parliament should enact specific legislative provisions dealing with the demise of the Crown. My reasons for holding this view is singular and simply; that it would make clear and readily apparent that which should be clear and readily apparent, which is presently not (necessarily) so.*<sup>43</sup>

4.3 Submissions to the Committee from the Clerk of the Legislative Council, the Law Society of Western Australia and Professor Twomey supported enacting demise of the Crown legislation.<sup>44</sup> Nigel Pratt, Clerk of Legislative Council, advised that:

*both the balance of convenience and the cautionary principle taken together, favour legislative action to remove all doubt.*<sup>45</sup>

4.4 The Uniform Legislation Committee expressed its view in Report 88 as follows:

*The Committee is of the view that the [Law Reform] Commission's recommendations [to enact demise of the Crown legislation] would ensure that the Parliament of Western Australia is fully prepared, on the demise of the Crown, to continue to function with Constitutional certainty through the process of succession.*<sup>46</sup>

4.5 The Committee is of the view that demise of the Crown legislation is also required to discourage litigation on this issue when a demise of the Crown occurs. As Professor Twomey submitted:

*this is precisely the sort of thing that obsessed people like to litigate about. The strongest reason for having express provisions to clear*

<sup>43</sup> Letter from Hon Michael Mischin MLC, 3 July 2015, p1. (Appendix 4 to this report).

<sup>44</sup> Dr Peter Handford's submission did not expressly state his support: Submission No 1 from Dr Peter Handford, The University of Western Australia, 14 March 2015. However, Dr Handford was a Member of the Commission when it submitted its report on Project No 75.

<sup>45</sup> Submission No 3 from Nigel Pratt, Clerk of the Legislative Council, 25 March 2015, p4.

<sup>46</sup> Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 88, *Succession to the Crown Bill 2014*, 17 February 2015, p9.

*away any doubts is to discourage litigation about the issue when a demise of the Crown occurs.*<sup>47</sup>

- 4.6 The Parliament of Western Australia moving to single session Parliaments since the 37<sup>th</sup> Parliament (which commenced on 29 March 2005), raises the potential for a person to challenge the validity of Parliament in the Courts if Parliament is not prorogued within six months of the next demise of the Crown (see paragraphs 3.19 and 3.20).
- 4.7 It is important to remove doubt in this area of the law because the potential impact of any successful challenge in the Courts on the validity of Parliament may have significant consequences for Parliament and the people of Western Australia.
- 4.8 New legislation will provide a clear, settled and accessible law in a State act. Clear legislation also assists in educating the public about the effect of a demise of the Crown, an event that has not occurred in 62 years. The public can point to a law that makes it clear that a demise of the Crown has no significant consequences on the ongoing functions and business of the State.
- 4.9 The Committee's view regarding the passing of demise of the Crown legislation is consistent with the recommendations of the Law Reform Commission (who recommended statutory reform in 1994), and other States who enacted demise of the Crown legislation many years ago.

## **5 THE TERMS OF A DEMISE OF THE CROWN BILL**

- 5.1 The Uniform Legislation Committee recommended demise of the Crown legislation in the terms copied at Appendix 2 of this report. Parliamentary Counsel's Office drafted this proposed legislation, from the Uniform Legislation Committee's instructions to draft legislation to implement the recommendations of the Law Reform Commission.
- 5.2 This draft legislation expressly deals with the three aspects of the demise of the Crown that the Law Reform Commission recommended be addressed by legislation: the impact of a demise of the Crown on Parliament, the Public Seal of the State, and legal proceedings.
- 5.3 Paragraphs 2.18 and 2.19 of this report note legislation in other jurisdictions providing that a demise of the Crown shall have no effect on specific matters to ensure that they are not affected by the demise of the Crown. In contrast, the *Constitution Act 1986* (NZ) (paragraph 2.16) contains a general, broad demise of the Crown provision which

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<sup>47</sup> Submission No. 2 from Dr Anne Twomey, Professor of Constitutional Law, The University of Sydney, 23 March 2015, p2. The interest that people may take in constitutional issues is demonstrated by the motion recently filed in the Quebec Superior Court by two law professors from The University of Laval who argue that the federal law dealing with the succession of the Crown was unconstitutional and violated the Canadian Charter of Rights.

provides that a demise of the Crown shall ‘*have no effect in law for any purpose*’ (see paragraph 2.16). Such legislation will deal with the issues raised by the Law Reform Commission and any other aspects of the demise of the Crown.

- 5.4 The Committee agrees with the Attorney General and recommends that a law in the same terms (though in a different format) as section 5(1) of this *Constitution Act 1986* (NZ) (see paragraph 2.16), with the redaction suggested by the Attorney General.<sup>48</sup> The Demise of the Crown Bill recommended by the Committee, at Appendix 5 of this report, was drafted by Parliamentary Counsel’s Office acting on the instructions of the Committee. The Committee also takes no issue with the view of the Attorney General that a repeal provision<sup>49</sup> is unnecessary and that a savings clause is not required.<sup>50</sup>

**A separate Demise of the Crown Act or insert a legislative provision into an existing act**

- 5.5 The Law Reform Commission recommended that ‘*consideration be given to enacting a general Demise of the Crown Act.*’<sup>51</sup> The Law Reform Commission also recommended that re-enacted laws be incorporated into existing acts wherever that is possible.<sup>52</sup> The Law Society of Western Australia noted with approval in its submission that this was the Law Reform Commission’s approach.<sup>53</sup>
- 5.6 The Uniform Legislation Committee recommended that demise of the Crown legislation be inserted into a new section 75A in the *Constitution Act 1889*. Section 75A would be contained in Part VII, the ‘Miscellaneous’ part of the State’s principal constitutional act.
- 5.7 The Committee agrees that legislation dealing with the demise of the Crown should be inserted into the *Constitution Act 1889* rather than enacting a separate stand-alone Demise of the Crown Act. Given the subject matter of the proposed amendment, the Committee is of the view that it is logical and appropriate to insert the above provision into the *Constitution Act 1889*. The Attorney General is of the same view.<sup>54</sup>

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<sup>48</sup> The redaction is noted in the letter from Hon Michael Mischin MLC, Attorney General, 3 July 2015, p2. The Attorney General also advised that a law in the terms of section 5(2) of the *Constitution Act 1986* (NZ) is strictly unnecessary: Letter from Hon Michael Mischin MLC, Attorney General, 22 July 2015, p3.

<sup>49</sup> See Recommendation 1 proposed by the Uniform Legislation Committee (Appendix 2).

<sup>50</sup> Letter from Hon Michael Mischin MLC, Attorney General, 22 July 2015, p3.

<sup>51</sup> The Law Reform Commission of Western Australia, *Project No 75: United Kingdom Statutes in Force in Western Australia*, October 1994, p90 (Appendix 1).

<sup>52</sup> Ibid, p9.

<sup>53</sup> Submission No 3 from The Law Society of Western Australia, 8 April 2015, p1.

<sup>54</sup> Letter from Hon Michael Mischin MLC, Attorney General, 3 July 2015, p1 (Appendix 2).

**Recommendation 1:** The Committee recommends that the Legislative Council pass a Constitution Amendment (Demise of the Crown) Bill in the terms of the draft Bill at Appendix 5 to this report.

The substantive legislative provision in the recommended Constitution Amendment (Demise of the Crown) Bill reflects the terms of section 5(1) of the *Constitution Act 1986* (NZ) and provides:

*The demise of the Sovereign —*

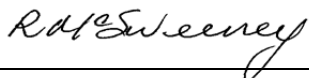
*(a) has the effect of transferring all the functions, duties, powers, authorities, rights, privileges and dignities belonging to the Crown to the Sovereign's successor; but*

*(b) has no other effect in law for any purpose.*

5.8 The law should be enacted as soon as possible.

**Recommendation 2:** The Committee recommends that the Legislative Council pass the Constitution Amendment (Demise of the Crown) Bill as soon as possible.

5.9 The Committee commends its report to the House.



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**Hon Robyn McSweeney MLC**

**Chair**

**13 August 2015**

# APPENDIX 1

## EXTRACT FROM THE LAW REFORM COMMISSION REPORT

### PROJECT NO 75: UNITED KINGDOM STATUTES IN FORCE IN

### WESTERN AUSTRALIA

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#### DEMISE OF THE CROWN

The statutes dealt with in this section relate to demise of the Crown. The Commission recommends that consideration be given to enacting a general Demise of the Crown Act.<sup>521</sup> A similar recommendation was made by the South Australian Committee.<sup>522</sup> The Commission makes recommendations below as to how each statute should be dealt with in the absence of such general legislation.

#### **1 Edward VI chapter 7 (1547): Justices of the peace**

Section 4 of this statute was repealed in Western Australia by the *Miscellaneous Repeals Act 1991*. Of the other sections, only section 1, which deals with the continuation of actions in the courts after the death of the Monarch, is of any importance and it should be re-enacted. It has been continued in force in the Australian Capital Territory.<sup>523</sup>

#### **7 & 8 William III chapter 15 (1695): Parliament**

This statute provides that Parliament is to continue to sit for six months after the demise of the King, unless it is sooner dissolved by his successor. If there is no Parliament in existence at the time of the demise, then the last preceding Parliament is to be revived. The power of the King to prorogue or dissolve Parliament is not altered by these provisions.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. It may have been impliedly repealed in 1707 by 6 Anne chapter 41,<sup>524</sup> in which case it would not be part of the law of this State. The South Australian Committee proceeded on the basis that it had been received in South Australia for the purpose of its report. Although there were arguments that no legislation was necessary to ensure that Parliament continues to sit upon demise of the Crown,<sup>525</sup> it recommended that express provision be made for the continued sitting of Parliament and that the 1696 statute be repealed. The Commission agrees.

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<sup>520</sup> The South Australian Committee concluded that it could be repealed because it would be contrary to the ethnic laws in the State: SA86 9.

<sup>521</sup> See for example, *Demise of the Crown Act 1901* (UK) and *Demise of the Crown Act 1910* (Qld). In Victoria, provisions as to demise of the Crown have been incorporated in the *Constitution Act 1975* (ss 9-11). This is also the case in Tasmania: *Constitution Act 1934* ss 4-7.

<sup>522</sup> SA55 16-17 and SA81 14.

<sup>523</sup> *Imperial Acts Application Act 1986* Schedule 3 Part 7. The ACTAG's Report (at 83) recommended that it be repealed and the substantive provisions incorporated into Australian Capital Territory legislation dealing with proceedings.

<sup>524</sup> SA81 6-7.

<sup>525</sup> Id 7.

**1 Anne chapter 2 (1702): Demise of the Crown**

Sections 4 and part of sections 5 and 6 of this statute are still important because they provide the basis for the continuation of legal proceedings notwithstanding the demise of the Crown.

While the statute should be repealed, the effect of the sections should be preserved by the enactment of a provision to the same effect. This has been done in Victoria and the Australian Capital Territory.<sup>526</sup> Section 4 has been preserved in New South Wales and Queensland.<sup>527</sup> The South Australian Committee recommended that a modern version of the sections should be included in South Australian legislation.<sup>528</sup>

**6 Anne chapter 41 (1707): Succession to the Crown**

The only section of this statute which has been preserved in the other jurisdictions studied is section 9 which provides that the Great Seal and other public seals in being at the demise of the Crown continue until further order.<sup>529</sup> It should also be preserved in this State.

**1 George III chapter 23 (1760): Commissions and salaries of judges**

Section 1 of this statute provides that the commissions of judges shall continue during their good behaviour notwithstanding the demise of the Sovereign. Section 2 provides for the removal of judges upon the address of both Houses of Parliament. Section 3 provides for judges' salaries.

It should be repealed: sections 1 and 2 are superseded by sections 54 and 55 of the *Constitution Act 1889*.<sup>530</sup> Judges' salaries are set under the *Judges' Salaries and Pensions Act 1950*. It has been repealed in New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. Section 1 has been continued in force in the Australian Capital Territory.<sup>531</sup>

**37 George III chapter 127 (1797): Meeting of Parliament**

This statute provides for shortening of notice for summoning Parliament and for the meeting of Parliament in the case of demise of the Crown.

It should be repealed: section 3 of the *Constitution Act 1889* provides for the Governor to fix the place and time for holding sessions of the Parliament and from time to time to vary the same giving sufficient notice of the variation. It has been repealed in the Australian Capital

<sup>526</sup> *Constitution Act 1975* (Vic) s 11; *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 13. The ACTAG's Report (at 86) recommended that the statute should be repealed and the substantive provisions incorporated into Australian Capital Territory legislation dealing with proceedings.

<sup>527</sup> NSW Act s 6; Qld Act s 5.

<sup>528</sup> SA81 7.

<sup>529</sup> S 11(3) of the *Constitution Act 1975* (Vic) provides; for example:  
"The Public Seal of the State and other Public Seals in being at the time of the demise of the Crown shall continue and be made use of as if no such demise had happened."

The ACTAG's Report (at 87) recommended that the statute should be repealed because it is irrelevant to the Australian Capital Territory; the Crown in the right of the Australian Capital Territory is an abstract notion rather than an office capable of being filled by a person.

<sup>530</sup> See also *Supreme Court Act 1935* s 9(1); *District Court of Western Australia Act 1969* ss 11(1) and 14; *Family Court Act 1975* ss 12 and 16; *Stipendiary Magistrates Act 1957* s 5.

<sup>531</sup> *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 17.

Territory, New South Wales, Queensland, Victoria, New Zealand and partly repealed in the United Kingdom.<sup>532</sup>

<sup>532</sup> The South Australian Committee recommended that it be repealed if a provision were enacted in South Australia as suggested in the discussion of 6 Anne c 41 (93 above): SA81 10.

**APPENDIX 2**  
**RECOMMENDATION OF THE UNIFORM LEGISLATION**  
**COMMITTEE IN REPORT 88: *SUCCESSION TO THE CROWN BILL***  
**2014**

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**Recommendation 1:** The Committee recommends that the Succession to the Crown Bill 2014 be amended to implement the recommendations of the Law Reform Commission in its report *Project No 75 on United Kingdom Statutes in Force in Western Australia*, October 1994 relating to the demise of the Crown. This may be effected by inserting a new Part 5 in the following manner:

**Part 5 — Demise of the Crown**

**Division 1 — Constitution Act 1889 amended**

**16. Act amended**

This Division amends the *Constitution Act 1889*.

**17. Section 75A inserted**

After section 74 insert:

**75A. Demise of the Crown**

- (1) The demise of the Crown does not affect the continuation of the Parliament of Western Australia and does not give rise to or necessitate the prorogation or dissolution of either House.**
- (2) The demise of the Crown does not affect the existence and use of the Public Seal of the State.**
- (3) The demise of the Crown does not discontinue or affect —**
  - (a) any civil, criminal or other proceeding in any court or tribunal; or**
  - (b) any civil, criminal or other proceeding to which the Crown is a party or which has been commenced or carried on in the name of or with the authority of the Crown.**

**Division 2 — Other provisions**

**18. Certain enactments passed before 1 June 1829 repealed**

So far as any Imperial Act enacted before 1 June 1829 —

- (a) is part of the law of this State; and**
- (b) purports to deal with or relate to the effect or consequences of the demise of the Crown,**

**it is repealed.**





## **APPENDIX 3**

### **LISTS OF STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION AND SUBMISSIONS RECEIVED**

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#### **Stakeholders invited to provide a submission**

1. Department of the Attorney General.
2. Department of the Premier and Cabinet.
3. Nigel Pratt, Clerk of the Legislative Council.
4. The Law Society of Western Australia.
5. Western Australian Bar Association.
6. Malcolm McCusker QC.
7. Peter Quinlan SC.
8. Dr Anne Twomey, Professor of Constitutional Law, Director, Constitutional Reform Unit, The University of Sydney.
9. Dr Peter Handford, Winthrop Professor, Law School, The University of Western Australia.
10. Dr Sarah Murray, Law School, The University of Western Australia.
11. Lorraine Finlay, School of Law, Murdoch University.
12. Associate Professor Joan Squelch, School of Law, The University of Notre Dame Australia, Fremantle.
13. Laureate Professor Cheryl Saunders AO, Melbourne Law School, The University of Melbourne.
14. Dr John Williams, Chair, Law School, University of Adelaide.
15. Peter Black, Senior Lecturer, Faculty of Law, Law School, Queensland University of Technology.

#### **Submissions received**

1. Dr Peter Handford, The University of Western Australia.
2. Dr Anne Twomey, Professor of Constitutional Law, Director, Constitutional Reform Unit, The University of Sydney.
3. Nigel Pratt, Clerk of the Legislative Council.
4. The Law Society of Western Australia.



**APPENDIX 4**  
**LETTERS FROM THE ATTORNEY GENERAL DATED 3 JULY**  
**2015 AND 22 JULY 2015, AND THE COMMITTEE'S LETTER**  
**DATED 10 JULY 2015**

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**ATTORNEY GENERAL; MINISTER FOR COMMERCE**

Our ref: 44-16338



Hon Robyn McSweeney MLC  
Chair  
Standing Committee on Legislation  
Parliament House  
PERTH WA 6000

Dear Ms McSweeney

**INQUIRY INTO A DEMISE OF THE CROWN STATUTE**

Thank you for your letter of 6 May 2015.

In it you have asked for my response to a series of questions. After seeking input from the Solicitor-General and Parliamentary Counsel, it occurs to me that the best response to your request is as follows, even if it does not specifically address every issue that you raised.

The term 'demise of the Crown' refers specifically to the cessation of the monarch's reign by death or abdication. Such demise has consequences. In times past, consequences included dissolution of Parliament, vacation of Crown offices and discontinuance of proceedings brought on behalf of and in the name of the Crown.

There has been a good deal of United Kingdom legislation that has dealt with these various matters. The Constitutions of Victoria, Queensland, New South Wales, South Australia and Tasmania make specific provision for the demise of the Crown. I know that the Committee has the 1994 report of the Western Australian Law Reform Commission (in respect of Project No.75) which recommended that "consideration be given to enacting a general *Demise of the Crown Act*" (page 92 of the report). The Commission also reported as to Imperial legislation that applied in Western Australia in respect of the demise.

In my view, Parliament should enact specific legislative provisions dealing with the demise of the Crown. My reason for holding this view is singular and simple; that it would make clear and readily apparent that which should be clear and readily apparent, which is presently not (necessarily) so.

Contrary to the recommendation of the Law Reform Commission, to which I have referred, it occurs to me that it is preferable to have the relevant provision/s included in the *Constitution Act 1889* rather than in the form of "a general *Demise of the Crown Act*". My reason for holding this view is that legislative provisions of this constitutional nature are most sensibly to be included in the State's principal constitutional instrument.

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Telephone: +61 8 6552 5600 Facsimile: +61 8 6552 5601 Email: Minister.Mischin@dpc.wa.gov.au

I have alluded above to instruments of the United Kingdom and various Australian States that deal with the demise of the Crown. For the benefit of the Committee, below is re-produced s.5 of the *Constitution Act 1986* (NZ). It occurs to me that a provision in this form (with the marked up change) is perhaps the best to achieve the end of effectiveness, clarity and simplicity.

5 Demise of the Crown

- (1) The death of the Sovereign shall have the effect of transferring all the functions, duties, powers, authorities, rights, privileges, and dignities belonging to the Crown to the Sovereign's successor, ~~as determined in accordance with the enactment of the Parliament of England intituled The Act of Settlement (12 & 13 Will 3, c 2) and any other law relating to the succession to the Throne,~~ but shall otherwise have no effect in law for any purpose.
- (2) Every reference to the Sovereign in any document or instrument in force on or after the commencement of this Act shall, unless the context otherwise requires, be deemed to include a reference to the Sovereign's heirs and successors.

Yours sincerely



Hon. Michael Mischin MLC  
**ATTORNEY GENERAL; MINISTER FOR COMMERCE**  
- 3 JUL 2015



## STANDING COMMITTEE ON LEGISLATION

Hon Michael Mischin MLC  
Attorney General  
10<sup>th</sup> Floor Dumas House  
2 Havelock St  
WEST PERTH WA 6005

Email: [Minister.Mischin@dpc.wa.gov.au](mailto:Minister.Mischin@dpc.wa.gov.au)

10 July 2015

Dear Attorney General

### **Inquiry into a Demise of the Crown Statute**

Thank you for your letter dated 3 July 2015.

The Committee respectfully requests your response to the questions in this letter to enable it to consider all matters relevant to the inquiry's terms of reference and discharge its obligation to the House. The Committee is acutely aware of the importance of minimising the unintended consequences of any law.

#### *Section 73 of the Constitution Act 1889*

During debate in the Legislative Council on 25 February 2015 you raised the potential issue of the impact of section 73 of the *Constitution Act 1889* on a Demise of the Crown Bill. As you are aware, section 73(2)(e) requires that certain bills be submitted to a referendum of electors before the bill is given Royal Assent including a bill that expressly or impliedly in any way affects sections 2, 3, 4, 50, 51 and 73 of that Act. Section 3, in particular, deals with the date and time for sessions of Parliament and the proroguing of the Houses. The Committee is also aware of the High Court of Australia decision in *Attorney-General (WA) and Another v Marquet* (2003) 217 CLR 545.

The Committee requests your views on:

- Whether the demise of the Crown amendment proposed in your letter dated 3 July 2015 would engage the operation of section 73(2)(e)? Please explain your legal reasoning.
- Whether the answer to the above question would be different if the Demise of the Crown Bill proposed a stand-alone Demise of the Crown Act as opposed to an amendment to the *Constitution Act 1889*?

#### *The terms of the Demise of the Crown bill*

The amendment to the *Constitution Act 1889* proposed in your letter dated 3 July 2015 does not include express repeal or saving provisions.

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The Standing Committee on Uniform Legislation and Statute Review recommended, in its Report 88 *Succession to the Crown Bill 2014*, that the demise of the Crown amendment include proposed section 75A and the following repeal provision (then recommended to be inserted into clause 18 of the Succession to the Crown Bill):

**18. Certain enactments passed before 1 June 1829 repealed**

*So far as any Imperial Act enacted before 1 June 1829 —*

- (a) *is part of the law of this State; and*
- (b) *proposes to deal with or relate to the effect or consequences of the demise of the Crown,*

*it is repealed.*

Further, The Law Society of Western Australia considered it appropriate to note in its submission to the Committee that the preferred approach of the Law Reform Commission of Western Australia (in its 1994 Report) was that:

[A Demise of the Crown] *statute should contain a general savings clause:*

- (i) *along the lines of section 37(1)(a) of the Interpretation Act 1984 to ensure that the repeal does not revive the common law ie. the repeal does not, unless the contrary intention appears, revive anything not in fore of existing at the time at which the repeal takes effect; and*
- (ii) *in line with the New South Wales savings clause which provides that the repeal of a United Kingdom statute "does not affect any rules of law or equity not enacted by the repealed enactment."*

The Committee also seeks clarification on whether the amendment you propose addresses concerns about the effect of a demise of the Crown on the Public Seal.

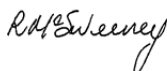
The Committee requests your response to the following questions:

- Should a Demise of the Crown Bill include:
  - A repeal clause in the terms of clause 18? If not, why not?
  - A savings clause? If not, why not?
- Does the clause proposed in your letter dated 3 July 2015 address issues concerning the continuation of the Public Seal on a demise of the Crown?

In light of your consideration of the matters raised in this letter, the Committee requests that you submit your proposal on the terms of a draft Demise of the Crown Bill.

The Committee requests your response by **Monday, 20 July 2015**. If you have any questions, please contact Suzanne Veletta, Advisory Officer (Legal), on 9222 7250 or at [lclc@parliament.wa.gov.au](mailto:lclc@parliament.wa.gov.au).

Yours sincerely



**Hon Robyn McSweeney MLC**

Chair

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**ATTORNEY GENERAL; MINISTER FOR COMMERCE**

Our ref: 44-17569



Hon Robyn McSweeney MLC  
Chair  
Standing Committee on Legislation  
Parliament House  
PERTH WA 6000

Dear Ms McSweeney

**INQUIRY INTO A DEMISE OF THE CROWN STATUTE**

Thank you for your letter of 10 July 2015. I will deal with each of your requests in turn.

**The first bullet point on page 1 of your letter - section 73(2)(e) of the *Constitution Act 1889***

This request relates to section 73(2)(e) of the *Constitution Act 1889*. It provides that:

A Bill that —

...

- (e) expressly or impliedly in any way affects any of the following sections of this Act, namely —

sections 2, 3, 4, 50, 51 and 73,

shall not be presented for assent by or in the name of the Queen unless

[particular manner and form are followed]

Plainly, nothing in the draft provision to which I referred in my letter of 3 July 2015 (call this, "my draft") has any effect on any provision of sections 2, 4 or 73 of the *Constitution Act 1889*.

Section 3 of the *Constitution Act 1889* is an empowering provision, empowering the Governor to fix the place and time of sessions of, and the prorogation and dissolution of, the Legislative Council and Legislative Assembly. Nothing in my draft has any effect on this power, exercisable by the Governor.

Section 50 of the *Constitution Act 1889* deals generally with the office of Governor. Section 50(1) provides that, "The Queen's representative in Western Australia is the Governor who shall hold office during Her Majesty's pleasure". Nothing in my draft affects this provision. The Governor does hold office during Her Majesty's pleasure.

Section 50(3) is, in essence, a definition provision extending the definition of Governor in Western Australian legislation to include the person appointed by the Queen by Commission under Her Majesty's Royal Sign Manual, any other person appointed by dormant or other Commission under the Royal Sign Manual and any person appointed to exercise powers and authorities of the Governor by the Governor. Nothing in my draft affects these provisions. The Governor is and would remain, for the purpose of Western Australian legislation, the person appointed by Commission under Her Majesty's Royal Sign Manual, a person appointed by dormant or other Commission and a person appointed to exercise powers and authorities of the Governor by the Governor.

Section 51 of the *Constitution Act 1889* defines the Royal Sign Manual for the purpose of section 50. Were my draft enacted, the Royal Sign Manual for the purpose of section 50 of the *Constitution Act 1889* would continue to be the signature or royal hand of the Sovereign.

**The second bullet point on page 1 of your letter**

No. It makes no difference, for the purpose of section 73 of the *Constitution Act 1889*, whether any enactment is in the form of "a general *Demise of the Crown Act*", or in the *Constitution Act 1889*.

**The first bullet point on page 2 of your letter**

This asks whether there is a need for a repeal clause in terms of the form of 'clause 18' included in the Standing Committee's Report 88, and a savings clause as recommended by the WA Law Reform Commission in its 1994 Report on Project No 75.

In my opinion, a repeal clause is unnecessary. A provision in the terms of my draft would displace any Imperial legislation applicable in Western Australia that deals with the consequences of the demise of the Crown. With no repeal clause, a savings provision would not be required.

The task of expressly 'dis-applying' in Western Australia 'unwanted' Imperial legislation, including any relating to the demise of the Crown, is best dealt with as part of the general legislative exercise to implement the recommendations in the WA Law Reform Commission's 1994 Report on Project No 75. This exercise is ongoing. I can provide details of progress made in the drafting of implementing legislation if you wish.

As you are aware, generally when Imperial enactments are repealed, a provision that applies the *Interpretation Act 1984* Part V is included. An example is the *Statutes (Repeals) Act 2014* section 14, which provides as follows:

- (1) The following Imperial Acts are repealed in so far as they are part of the law of Western Australia -
  - (a) 3 & 4 Will. IV c.105 (1833)  
[An Act for the Amendment of the Law relating to Dower]  
[Adopted by *Imperial Acts Adopting Act 1836*];

...



- (2) In respect of each Imperial Act referred to in subsection (1), the *Interpretation Act 1984* Part V applies as if a reference in that Part to the repeal of a written law or to the repeal of an enactment were a reference to the repeal of the Imperial Act.

**The second bullet point on page 2 of your letter**

This asks whether my draft addresses issues concerning the Public Seal. It does not occur to me that there is any issue concerning the continuation of the Public Seal on a demise of the Crown. Clause IV of the *Letters Patent Relating to the Office of Governor of the State of Western Australia* (of 14th February, 1986) provides that "The Governor shall keep the Public Seal of the State for sealing all instruments required to bear the Seal."

This power will be unaffected.

I have also reflected further on sub-clause (2) in my draft. Such a clause is strictly unnecessary due to section 11 of the *Interpretation Act 1984*.

Yours sincerely



Hon. Michael Mischin MLC  
**ATTORNEY GENERAL; MINISTER FOR COMMERCE**

22 JUL 2015



**APPENDIX 5**  
**THE RECOMMENDED CONSTITUTION AMENDMENT (DEMISE**  
**OF THE CROWN) BILL**

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Western Australia

**Constitution Amendment (Demise of the Crown)**  
**Bill 2015**

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Western Australia

LEGISLATIVE ASSEMBLY/COUNCIL

**Constitution Amendment (Demise of the Crown)  
Bill 2015**

**A Bill for**

**An Act to amend the *Constitution Act 1889* with respect to the demise  
of the Crown.**

The Parliament of Western Australia enacts as follows:

**Constitution Amendment (Demise of the Crown) Bill 2015**

**s. 1**

---

- 1   **1.     Short title**  
 2         This is the *Constitution Amendment (Demise of the Crown)*  
 3         *Act 2015*.
- 4   **2.     Commencement**  
 5         This Act comes into operation as follows —  
 6             (a) sections 1 and 2 — on the day on which this Act  
 7             receives the Royal Assent;  
 8             (b) the rest of the Act — on the day after that day.
- 9   **3.     Act amended**  
 10         This Act amends the *Constitution Act 1889*.
- 11 **4.     Section 75A inserted**  
 12         After section 74 insert:  
 13
- 14         **75A.    Demise of the Crown**  
 15             The demise of the Sovereign —  
 16             (a) has the effect of transferring all the functions,  
 17             duties, powers, authorities, rights, privileges  
 18             and dignities belonging to the Crown to the  
 19             Sovereign’s successor; but  
 20             (b) has no other effect in law for any purpose.  
 21

