FAMILY COURT AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2013

First Reading

Bill read a first time, on motion by **Dr K.D. Hames (Minister for Health)**.

Explanatory memorandum presented by the minister.

Second Reading

DR K.D. HAMES (Dawesville — Minister for Health) [12.24 pm]: I move —

That the bill be now read a second time.

With three exceptions, this bill is identical to the Family Court Amendment (Family Violence and Other Measures) Bill 2012, which was introduced into the other place on 19 September 2012. The 2012 bill was referred to the Standing Committee on Uniform Legislation and Statutes Review pursuant to Legislative Council standing order 126(1). The committee's seventy-seventh report was tabled on 6 November 2012 and proposed two amendments, which were tabled on 6 November 2012 in supplementary notice paper 307. However, the bill was not disposed of before Parliament rose at the end of last year and lapsed when Parliament was prorogued. The government has accepted and adopted the amendments proposed by the standing committee and thanks the committee for its consideration of the 2012 bill.

The present bill incorporates the recommendations of the committee. For the assistance of new members I will outline the main provisions of the bill as well as the additional matters. The commonwealth Family Law Act 1976 has been amended by the commonwealth Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011. The amendments, which came into operation on 7 June 2012, significantly affect the law to be applied in Family Court proceedings with respect to protection from family violence. However, under the provisions of the commonwealth Constitution the commonwealth Parliament has legislative power in respect to marriage —

Sorry, I have lost my spot.

Several members interjected.

The SPEAKER: Members!

Dr K.D. HAMES: I just tried to organise myself a drink, but I cannot find where the words are. I will start again.

The amendments, which came into operation on 7 June 2012, significantly affect the law to be applied in Family Court proceedings with respect to protection from family violence. However, under the provisions of the commonwealth Constitution the commonwealth Parliament has legislative power in respect to marriage—that is where I was—divorce, matrimonial causes and in relation thereto parental rights and the custody and guardianship of infants, as stated in sections 51(xxii) and (xxiii). Consequent upon High Court decisions that determined that commonwealth legislative power did not extend to exnuptial children, all states except Western Australia referred legislative power to the commonwealth Parliament in respect to exnuptial children in family law proceedings. The Commonwealth Family Law Act 1975—which for ease of reference I shall henceforth refer to as the commonwealth act—therefore has no application to exnuptial children in Western Australia. In Western Australia, exnuptial children in family court proceedings remain subject to the legislative power of the Western Australian Parliament and come under the jurisdiction of the Western Australian Family Court Act 1997, which for convenience I shall refer to as the WA act.

Only a lawyer could have written this!

Ms M.M. Quirk: At least we could read the writing!

Several members interjected.

Dr K.D. HAMES: I should have had the member read out the speech!

It has been the policy of successive governments to amend the WA act to correspond with the changes to the commonwealth act to ensure that the law applicable to exnuptial children in Western Australia is consistent with the law applicable to the children of a marriage and with that of all other jurisdictions, while preserving the legislative sovereignty of the Western Australian Parliament.

Until the WA act is amended to correspond with the commonwealth amendments, the changes that came into effect on 7 June 2012 will not apply to benefit exnuptial children in Western Australia. The government considers it proper and desirable that the WA act be amended to incorporate the recent commonwealth amendments as proposed in this bill. The particular reforms to the commonwealth legislation, which this bill

reflects, are consequent upon public consultation and reports received by the commonwealth government into the efficacy of the 2006 family law amendments and how the family law system deals with family violence. Those reports are the "Evaluation of the 2006 family law reforms" by the Australian Institute of Family Studies; the "Family Courts Violence Review" by Professor Richard Chisholm, AM; and "Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues" by the Family Law Council. The findings were that there was inadequate protection from family violence and abuse of children and other family members.

To provide better protection from family violence, the bill makes explicit that when the Family Court is required to determine a child's best interests, the protection of children takes precedence over all other relevant considerations. It also deletes the present provision commonly known as the "friendly parent provision" from consideration in determining the best interests of the child. That provision that required the court to consider the extent to which a parent actively encouraged the child's relationship with the other parent was widely considered to have the potential to discourage a parent from appropriately protecting the child in order to avoid being judged as unfriendly. Instead, the court will now be required to consider the extent to which each parent has taken the opportunity to contribute to important decision-making about the child, to communicate and spend time with the child and to acquit his or her obligation to maintain the child.

Secondly, the bill will change the definitions of "family violence" and "abuse" to better reflect the known profile of family violence and recognises the elements of control and coercion. The new definition is consistent with the recommendations of the Australian and New South Wales Law Reform Commissions and includes examples such as assault, sexual assault and other sexually abusive behaviours; stalking, intentionally destroying or damaging property, or causing injury or death to an animal; and emotional and economic abuse. The definition of abuse in relation to a child is also broadened and will include serious psychological harm as a result of exposure to family violence and serious neglect. The bill includes a non-exclusive list of situations that may constitute exposure to family violence.

Thirdly, the bill will strengthen the obligations of lawyers, family dispute resolution practitioners, family consultants and family counsellors to prioritise the safety of children. Under the proposed reforms, advisers must inform parties that the paramount consideration in the making of a parenting order is the best interests of the child in the proceedings, and encourages them to recognise, and act on, the importance of a meaningful relationship with both parents, but that the safety of the child takes precedence. Fourthly, the bill extends the relevant inferences the court may draw from any family violence order in respect of the parties, including any evidence admitted in the proceedings for that order or any other relevant matter.

I now turn to the amendments consequent upon the recommendations of the Standing Committee on Uniform Legislation and Statutes Review. Clause 8 inserts a new subsection (4) into section 66 of the WA act to provide that a further object of part 5 is to give effect to the United Nations Convention on the Rights of the Child—"the convention"—as ratified by Australia on 17 December 1990.

According to the explanatory memorandum to the commonwealth amending bill, the intention of the commonwealth Parliament was to confirm the obligation on decision-makers to interpret the provisions of part VII, "Children", of the commonwealth Family Law Act 1975, so far as the language of the statute permits, consistently with the convention—that is, to use the convention as an interpretative aid. The explanatory memorandum states further —

> "To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into law".

In considering the proposed corresponding amendment to the Western Australian Family Court Act 1997, the Standing Committee for Uniform Legislation and Statutes Review took the view that the accuracy of the commonwealth statement on the effect of the provision was not without doubt. The committee had concerns that the provision, in fact, had the potential to "operate as a delegation of law-making powers to the judiciary, the commonwealth executive or international bodies". Further, the committee found that that there was some confusion as to the exact text of the convention to which the provision referred. Accordingly, to minimise the potential for delegation of law-making power, the committee recommended that the clause be amended to clarify that the applicable convention text be that ratified by Australia on 17 December 1990.

The second change, consistent with the committee's recommendation, of the present bill deletes from the 2012 bill the transition matters that are no longer necessary in the light of an amendment in the Senate on the proposed commencement date of the commonwealth legislation. Prior to that amendment, the commonwealth bill had retrospective application necessitating the inclusion of a regulation-making power in the nature of a Henry VIII clause to allow for any unforeseen consequences. Notwithstanding the amendment agreed to by both houses of the commonwealth Parliament, the provision appears to have inadvertently remained in the commonwealth bill. Accordingly, the equivalent provision in this bill has now been deleted.

A third difference between this bill and the 2012 bill concerns proposed sections 214B and 214C in this bill. Formerly, these two provisions in the 2012 bill were numbered 215A and 215B. When the 2013 bill was prepared, parliamentary counsel considered that, from a drafting perspective, the sequence of section numbers would be clearer if the proposed provisions were numbered 214B and 214C given that they follow on from existing section 214A. Accordingly, the difference is merely one of form rather than substance—neither changing the text or meaning of the provisions nor having any consequences with respect to statutory interpretation.

I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman.**