

EXPLANATORY MEMORANDUM

CHILD SUPPORT (ADOPTION OF LAWS) AMENDMENT BILL 2017

Overview of the Bill

The Commonwealth Child Support Scheme is an administrative scheme which was introduced by the Commonwealth *Child Support Act 1988* (Cth) (later the *Child Support Registration and Collection Act 1988* (Cth)) and was part of a suite of reforms which included the *Family Law Amendment Act 1987* (Cth), related amendments to the *Social Security Act 1947* (Cth) and the enactment of the *Child Support (Assessment) Act 1989* (Cth).

The introduction of the Child Support Scheme in 1988 was in response to the recommendations of several inquiries into, and widespread community concern about, the inadequacies of the existing system which was governed by the *Family Law Act 1975* (Cth). That is, unless separating parents could agree as to their respective financial obligation in respect to child support and honour that agreement then the only recourse was to institute family law proceedings for an order of the Court and subsequently, if required, further court proceedings to institute enforcement of that order. Such proceedings were expensive, beyond the resources of most, and the amounts ordered by the Court were generally inadequate. It was estimated that more than 70 per cent of non-custodial parents did not pay regular child support and as a result the standard of living of the children and the custodial parent was at least lower than should have been the case and often resulted in their being dependent upon social security.

The *Family Law Amendment Act 1987* (Cth) amended the *Family Law Act 1975* (Cth) with the object of ensuring that the Family Court awarded adequate levels of child support and ending the practice of the Court taking into account eligibility for social security so that the amount ordered in effect just “topped up” social security benefits available to the custodial parent. It was considered that in this way, responsibility for the child was improperly borne by the social security system.

The amendments imposed on the Family Court a legislative requirement to apply certain principles when determining child support orders. Those principles included: that the parents of a child have the primary duty to maintain the child; that the Court must ensure that children receive a proper level of financial support from their parents; and that children have their proper needs met from reasonable and adequate share of the financial resources of both parents.

The *Child Support Act 1988* (Cth) (later the *Child Support (Registration and Collection) Act 1988* (Cth)) established the Child Support Agency as part of the Australian Taxation Office with the Commissioner for Taxation as Child Support Registrar. The Child Support Registrar was required to administer the Act and to establish and keep a Child Support Register to enable the registration of court orders for child support or court registered child support agreements. Amounts payable under registered child support orders or agreements became a debt to the Agency which enforced and collected those amounts for distribution to the custodial parent via the Department of Social Security.

Subsequently with the enactment of the *Child Support (Assessment) Act 1989* (Cth) administrative assessment of child support liabilities was introduced by reference to a formula recommended by the child Support Consultative Group chaired by the then Justice Fogarty of the Family Court of Australia. The method of administrative assessment removed the necessity for parents to institute court proceedings for child support orders while preserving the right have the administrative assessment reviewed by the court. In 2007 this review jurisdiction was transferred to the Social Securities Administrative Review Tribunal.

The Commonwealth Child Support Scheme has become more and more administrative since its inception and the role of the courts progressively diminished. The administration of the scheme is complex, the amendments frequent, often consequential upon taxation and social security legislation and much of it technical.

The legislative powers of the Commonwealth Parliament are, for example, set out in section 51 of the Commonwealth Constitution. The Commonwealth Parliament has constitutional power to legislate with respect to marriage, divorce, matrimonial causes and "in relation thereto parental rights and the custody and guardianship of infants" (sections 51(xxii) and 51(xxiii) of the Constitution).

Legislative power in respect to unmarried parents and their children vests in State Parliaments.

However, section 51(xxxvii) of the Commonwealth Constitution provides that the Commonwealth Parliament may legislate with respect to matters referred to it by the Parliament of any State but so that the law will extend only to States by whose Parliaments the matter is referred or which afterwards adopts the law.

That is, for the Commonwealth statutes, and therefore the Commonwealth Child Support Scheme, to apply uniformly to married and unmarried couples and their children, State Parliaments must refer their State Parliament's legislative power to Commonwealth Parliament or afterwards adopt the Commonwealth statutes by State legislation.

All States except Western Australia have referred legislative power on this matter to the Parliament of the Commonwealth. WA has not referred power but has adopted the Commonwealth child support legislation, initially by the *Child Support (Adoption) Act 1988* (WA) which adopted the *Child Support Act 1988* (Cth).

Subsequently, when the Commonwealth child support legislation became the two statutes: the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989*; the WA Parliament adopted those statutes by the *Child Support (Adoption of Laws) Act 1990* (WA) and the *Child Support (Adoption) Act 1988* (WA) was repealed.

Until the Parliament of Western Australia amends the *Child Support (Adoption of Laws) Act 1990* (WA) to adopt again the Commonwealth statutes, as amended, those Commonwealth amendments which effect change to the child support scheme do not apply to unmarried couples and their ex-nuptial children in WA.

Under the Constitution, and the provisions of the Commonwealth statutes themselves, adoption by a State Parliament cannot occur until after the Commonwealth amendments have come into operation.

Consequently, the adoption method means there is necessarily a hiatus between commencement of the Commonwealth amendments, and consequent changes to the scheme, and adoption by the WA Parliament so that the scheme applies uniformly to all affected children and their parents.

Since the last adoption by the WA State Parliament, the Commonwealth Parliament has amended the Child Support Scheme governing legislation by the enactment of the *Norfolk Island Legislation Amendment Act 2015* (Cth); the *Territories Legislation Amendment Act 2016* (Cth); the *Statute Law Revision Act (No.1) 2016* (Cth) the *Civil Law and Justice (Omnibus Amendments Act 2015* (Cth) and the *Australian Immunisation Register Act 2015* (Cth).

The Child Support (Adoption of Laws) Amendment Bill 2016 will adopt the Commonwealth Acts as they stand on 1 July 2016.

Clause Notes Clause 1: Short title

Clause 1 provides that the Bill, once enacted, will be known as the *Child Support (Adoption of Laws) Amendment Act 2017*

Clause 2: Commencement

Clause 2 makes provision for the commencement of the Act. Clause 2(a) provides that sections 1 and 2 of the Act will commence on the day the Act receives the Royal Assent. Clause 2(b) provides that the rest of the Act will commence on the day after Royal Assent.

Clause 3 The Act amended

Clause 3 provides that the amendments are to the *Child Support (Adoption of Laws) Amendment Act 1990*.

Clause 4 Section 3 amended

The WA Parliament does not adopt just the specific amendments to the Commonwealth legislation; instead, it adopts the Commonwealth legislation as amended at the date specified in the Bill to amend the *Child Support (Adoption of Laws) Act 1990* (WA).

Thus, Clause 4 provides that section 3(a) of the *Child Support (Adoption of Laws) Act 1990* is amended so that the date 1 July 2015 is deleted and replaced by 1 July 2017.

This amendment ensures that the adoption by the WA Parliament of the ***Child Support (Registration and Collection) Act 1988 (Cth)*** extends to that Act as amended:

(a) on 14 October 2015 by the *Civil Law and Justice (Omnibus Amendments Act 2015 (Cth)*
The *Civil Law and Justice (Omnibus Amendments Act 2015 (Cth)* made what was described as minor and technical amendments to, amongst other statutes, the *Administrative Appeals Tribunal Act 1975 (Cth)*. A new sub section(c) of 29AC (1) was inserted and provides that the Tribunal must give notice of receiving an application, to any person who is made a party to the review by another enactment that authorised the application. .

Subsection 96B (2) of the *Child Support (Registration and Collection) Act 1988 (Cth)*, now repealed, modified the application of the *Administrative Appeals Tribunal Act 1975 (Cth)* (AAT) by providing that when an applicant applied for AAT second review, the reference to the person who made the decision, was a reference to each person who was a party to the first review (other than the applicant for AAT second review).

As both provisions achieve the same outcome, subsection 96B (2) is repealed because it has become redundant.

(b) on 12 November 2015 by the *Australian Immunisation Register Act 2015 (Cth)*
The *Australian Immunisation Register Act 2015 (Cth)* expanded the Australian Childhood Immunisation Register to become the Australian Immunisation Register the purpose of which is to record all vaccines given from birth to death through general practice and other immunisation providers. A consequential amendment to the *Child Support (Registration and Collection) Act 1988 (Cth)* includes the *Australian Immunisation Register Act 2015 (Cth)* in the definition of ***designated program Act*** in section 16AB which proscribes disclosure of certain information.

(c) on 10 March 2016 by the Statute Law Revision Act (No.1) 2016 (Cth)

Minor amendments are made by the *Statute Law Revision Act (No.1) 2016 (Cth)* Schedule 1 to the *Child Support (Registration and Collection) Act 1988 (Cth)* to correct cross references and a typographical error; by Schedule 3 to clarify that the Crown in the right of the Australian Capital Territory and of the Northern Territory is bound and modernises the form of the sub section statement as to whether the Crown is liable to be prosecuted for an offence. Schedule 4 Part 1 amends both Child Support Acts to modernise language by repealing where it occurs “guilty of an offence” and replacing it with “commits an offence.” Schedule 4 Part 2 amends Subsection 72U (4) of the *Child Support (Registration and Collection) Act 1988 (Cth)* by replacing the expression “shall be guilty of” with “is taken to have committed”. Schedule 5 replaces “reference base wherever occurring to “index reference period”.

(d) on 1 July 2016 by the Courts Administration Legislation Amendment Act (Cth).

The principle purpose of this Act is to merge into a single administrative entity the corporate services functions of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia. Responsibility for the administration of all three Courts will be with the Chief Executive Officer of the Federal Court. The core functions of each court are unaffected and each retains its autonomy and independence in its judicial power.

As part of the changes there are several alterations to names of court offices for example: the Registrar of the Federal Court becomes the Chief Executive officer; and, relevant to the Commonwealth Child Support Acts, the *Family Law Act 1975 (Cth)* was amended to substitute the title Chief Judge of the Family Court with Chief Justice of the Family Court. A consequential amendment is to make that title change where required in the Commonwealth Child Support Acts.

(e) on 1 July 2016 by the Norfolk Island Legislation Amendment Act 2015 (Cth). Norfolk Island has been an external territory of Australia since 1913. The *Norfolk Island Act 1979 (Cth)* established a limited form of self-government for Norfolk Island and imposed responsibility for all local and state and some federal services.

The reports of many inquiries over many years and culminating with the 2014 report of the Commonwealth Parliament Joint Standing Committee on the National Capital and External Territories (the Parliamentary Committee): *Same Country: Different World - the future of Norfolk Island*, found that Norfolk Island is unable to deliver the services for which it has responsibility with deleterious consequences for the population. The Parliamentary Committee determined that Norfolk Island is now dependent on the Commonwealth for economic survival and concluded that sustainability for Norfolk Island depended upon governance and economic reforms occurring together and its report was the impetus for the *Norfolk Island Legislation Amendment Act 2015 (Cth)*. The Act commences the transition of the governance of Norfolk Island from self-government to a local government type body and the extension of Commonwealth social security legislation to Norfolk Island.

As a result of changes to the governance arrangements, Norfolk Island is to be included in the operation of the Child Support Scheme as of 1 July 2016.

The *Child Support (Registration and Collection) Act 1988 (Cth)* is amended to reflect that residents of Norfolk Island are now considered to be residents of Australia for the purposes of the *Child Support (Registration and Collection) Act 1988 (Cth)* and as a result references to Norfolk Island have become redundant and are removed.

(f) on 1 July 2016 by the Territories Legislation Amendment Act 2016 (Cth).

The *Territories Legislation Amendment Act 2016 (Cth)*, together with the *Passenger Movement Charge Amendment (Norfolk Island) Act 2016 (Cth)*, continue the process of extending Australian law to Norfolk Island. It also amends the *Norfolk Island Legislation Amendment Act 2015 (Cth)* to correct an anomaly and align the early claims period for family assistance with the early claims period for social security and child support payments.

Schedule 3 Part 1 of the *Territories Legislation Amendment Act 2016 (Cth)* corrects what was considered to be another anomaly by extending the Child Support Scheme to residents of Christmas Island and Cocos (Keeling) Island. The commencement date is 1 July 2016. Transitional provisions relating to applications commenced 24 March 2016.

(g) on 21 October 2016 by the Statute Update Act 2016 (Cth)

Minor amendments are made by the *Statute Update Act 2016 (Cth)* Schedule 1 to the *Child Support (Registration and Collection) Act 1988 (Cth)* replace penalties expressed as a number of dollars with penalties expressed as a number of penalty units; and to replace references to 'maximum penalty' with references to 'penalty';

(h) on 17 November 2016 by the Statute Law Revision (Spring 2016) Act 2016 (Cth).

The *Statute Law Revision (Spring 2016) Act 2016 (Cth)* made corrections of a technical nature to several statutes. The *Child Support (Registration and Collection) Act 1988 (Cth)* was amended to rectify text to include a section number and heading that had been missed when amended by the *Tribunals Amalgamation Act 1988 (Cth)*.

Clause 5: Section 4 amended

Clause 5 provides that section 4(b) of the *Child Support (Adoption of Laws) Act 1990 (WA)* is amended so that the date 1 July 2015 is deleted and replaced by 1 July 2017.

This amendment ensures that the adoption by the Western Australian Parliament of the ***Child Support (Assessment) Act 1989 (Cth)*** extends to that Act as amended:

(a) on 10 March 2016 by the Statute Law Revision Act (No.1) 2016 (Cth)

The *Child Support (Assessment) Act 1989 (Cth)* is amended to omit wherever it occurs "is guilty of" and replaced with "commits."

(b) on 1 July 2016 by the Courts Administration Legislation Amendment Act (Cth).

Consequential upon an amendment to the *Family Law Act 1975 (Cth)* the *Child Support (Assessment) Act 1989 (Cth)* is amended to replace Chief Judge of the Family Court wherever it occurs with Chief Justice of the Family Court.

(c) on 1 July 2016 by the Norfolk Island Legislation Amendment Act 2015 (Cth).

The *Child Support (Assessment) Act 1989 (Cth)* is amended: to reflect that residents of Norfolk Island are now considered to be residents of Australia for the purposes of the *Child Support (Assessment) Act 1989 (Cth)*; to remove references to Norfolk Island which have become redundant; and to insert a new section 16A which extends the *Child Support (Assessment) Act 1989 (Cth)* to Norfolk Island.

A transitional provision allows for lodgment of claims for an application for administrative assessment of child support for up to 8 weeks prior to commencement. Those early claims will be taken to have been made immediately after the final transition time (1 July 2016).

(d) on 1 July 2016 by the Territories Legislation Amendment Act 2016 (Cth).

The *Child Support (Assessment) Act 1989 (Cth)* is amended to include Christmas Island and Cocos (Keeling) Island in the Child Support Scheme.

(e) on 21 October 2016 by the Statute Update Act 2016 (Cth)
The Statute Update Act 2016 (Cth) effected minor changes to ensure drafting consistency and both Commonwealth Acts were amended to substitute references to penalties in dollar amounts to penalty units.