



THIRTY-EIGHTH PARLIAMENT

REPORT 58

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW
CHILD SUPPORT (ADOPTION OF LAWS)
AMENDMENT BILL 2009**

Presented by Hon Adele Farina MLC (Chairman)

February 2011

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

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

“8. Uniform Legislation and Statutes Review Committee

- 8.1 *A Uniform Legislation and Statutes Review Committee is established.*
- 8.2 The Committee consists of 4 Members.
- 8.3 The functions of the Committee are -
- (a) to consider and report on Bills referred under SO 230A;
 - (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to review the form and content of the statute book;
 - (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
 - (f) to consider and report on any matter referred by the House or under SO 125A.
- 8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO THE

CHILD SUPPORT (ADOPTION OF LAWS) AMENDMENT BILL 2009

1 REFERENCE AND PROCEDURE

- 1.1 On 16 November 2010, Hon Michael Mischin MLC, Parliamentary Secretary representing the Attorney General (**Parliamentary Secretary**), introduced the Child Support (Adoption of Laws) Bill 2009 (**Bill**) into the Legislative Council.¹
- 1.2 Following its Second Reading, the Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 230A. The Committee is required to report to the Legislative Council on its inquiry into the Bill not later than 30 days of the day of referral pursuant to Standing Order 230A(4).

2 INQUIRY PROCEDURE

- 2.1 The Committee advertised the Inquiry in *The West Australian* on 4 December 2010, calling for submissions by 14 January 2011 but none were received. The Committee did not distribute stakeholder letters or conduct hearings. Details of the Inquiry were made available on the parliamentary website at: www.parliament.wa.gov.au.

3 UNIFORM LEGISLATION

- 3.1 The establishment of a committee to scrutinise uniform legislation arose from a concern that the Executive is, in effect, exercising supremacy over a State Parliament when it enters agreements that, in practical terms, bind a State Parliament to enact legislation to give effect to national uniform schemes or an intergovernmental agreement.
- 3.2 These national legislative schemes implementing uniform legislation take a variety of forms. Nine different structures, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The structures are summarised in **Appendix 1**. The Bill resembles *Structure 1: Complementary Commonwealth-State or Co-operative Legislation*. This is where the Commonwealth passes legislation, and each State or Territory passes legislation

¹ Hon Michael Mischin MLC, Parliamentary Secretary representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 November 2010, pp8802c-8803a.

which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

- 3.3 When scrutinising uniform legislation, the Committee considers various 'fundamental legislative scrutiny principles'. Although not formally adopted by the Legislative Council as part of the Committee's terms of reference, the Committee applies the principles as a convenient framework. These principles are set out in **Appendix 2**.

4 SUPPORTING DOCUMENTATION

- 4.1 The Department of the Attorney General advised that there is no supporting documentation for the legislative proposal.² The Committee noted that none is required as the Bill and its Explanatory Memorandum (**EM**) constitute the requisite documentation.

5 BACKGROUND TO THE BILL

- 5.1 The Bill has its genesis in the 1975 decision by Western Australia to avail itself of section 41 of the Commonwealth's *Family Law Act 1975* to create our own family court. There were four reasons for that decision.

(1) To provide a single court of unified jurisdiction, administering matters of family law, both federal and state.

(2) To enable the state to continue to exercise jurisdiction in family law matters which would otherwise have been removed into the Family Court of Australia, with the opportunity of retaining complementary action with other responsibilities in the areas of welfare and counselling services.

(3) In the public interest to keep the administration of justice as close as possible to the people it is designed to serve.

(4) To obviate the creation of a further Commonwealth court in the state.³

- 5.2 In 1986 there was a constitutional handing over or 'referral' of power in relation to child custody, guardianship, access and maintenance by NSW, Victoria and South Australia. Tasmania followed in 1987 and Queensland in 1990. These referrals were aimed at overcoming:

² Letter from Hon Christian Porter MLA, Attorney General, 30 November 2010, p1. That is, no intergovernmental agreement, memorandum of understanding or minutes of a Ministerial Council meeting or Standing Committee of Attorney Generals.

³ Lisa Young and Geoff Monahan, *Family Law in Australia, 7th Edition*, LexisNexis Butterworths, Sydney, 2009, pp97-98 quoting from the Western Australia, Legislative Council, *Parliamentary Debates (Hansard)* of 1975.

*the artificiality of constitutionally derived distinctions based upon the reservation of powers about those matters to State Parliaments. Western Australia, with a State-based Family Court capable of exercising federal jurisdiction, does not have the problem of jurisdictional divides that exist in the other States and required the referral.*⁴

- 5.3 The relevant legislation had the effect of referring state powers with respect to guardianship, custody, maintenance and access in relation to ex-nuptial children (including step children and other children who may have formed part of a family household⁵) to the Commonwealth but left state jurisdiction to deal with adoption and child welfare intact.⁶ Western Australia chose not to refer its power over family law, including matters such as child support payments for ex-nuptial children, to the Commonwealth.⁷ Instead, Western Australia preferred to adopt the Commonwealth's legislation which established the Child Support Scheme (**Scheme**).

- 5.4 Halsbury's Laws of Australia explains the historical context:

Prior to the (Cth) Child Support (Assessment) Act 1989 coming into operation, the (Cth) Family Law Act 1975 only applied in Western Australia to child maintenance claims concerning children of a marriage. All other claims for child maintenance in Western Australia were covered, at that time, by the (WA) Family Court Act 1975 (repealed).

When the (Cth) Child Support (Assessment) Act 1989 came into operation, it initially applied in Western Australia only to children of a marriage. However, by the (WA) Child Support (Adoption of Laws) Act 1990, and subsequent amendments to this statute, the federal legislation is now adopted. Therefore, the provisions of the (Cth) Child Support (Assessment) Act 1989 apply to all children in Western Australia.

The Commonwealth's Child Support Scheme

- 5.5 As is well known, the Commonwealth Child Support Scheme, established in 1988, enables maintenance payments to be collected and paid to parents having

⁴ Justice RS French, then Justice of the Federal Court of Australia, *Western Australia 2029; A Shared Journey State Conference 17-19 November 2004 Co-Operative Federalism - A Constitutional Reality or a Political Slogan*, p12.

⁵ CCH Australia Limited, *Australian Master Family Law Guide, 1st Edition*, p5.

⁶ Lisa Young and Geoff Monahan, *Family Law in Australia, 7th Edition*, LexisNexis Butterworths, Sydney, 2009, p105.

⁷ As a result of the decision not to refer, Western Australia kept and maintains an independently operating Family Court.

responsibility for a child whether nuptial or ex-nuptial. The Scheme operates under two main Commonwealth statutes: the *Child Support (Registration and Collection) Act 1988*; and the *Child Support (Assessment) Act 1989* (**Commonwealth child support legislation**).

- 5.6 The Second Reading Speech provides information about how the Scheme operates in practice:

Following the making of an assessment about child support, which includes the payments to be made for the maintenance of a child, the Child Support Registrar and the [Department], ensure those are either deducted from either salary payments or other income.⁸

- 5.7 The Scheme also establishes, through the legislation administered by the Commonwealth's Department of Families, Housing, Community Services and Indigenous Affairs, enforcement procedures to ensure payments can be collected on behalf of the child. The Child Support Agency in the Commonwealth's Department of Human Services administers the Scheme under child support legislation.
- 5.8 Western Australia's *Child Support (Adoption of Laws) Act 1990* (**Principal Act**) contains provisions relating to the form of adoption and the termination of adoption of the Commonwealth child support legislation.

The Constitutional Background

- 5.9 The Commonwealth can only legislate with respect to children of a marriage as a result of a constitutional limitation in paragraph 51(xxi) of the *Commonwealth Constitution* which states:

Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxi) marriage;

(xxii) divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants.⁹

⁸ Hon Michael Mischin MLC, Parliamentary Secretary representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 November 2010, pp8802c-8803a.

⁹ Paragraph 51 (xxxix) confers an incidental power to enable the making of legislation in matters incidental to the execution of any power vested in the Parliament.

- 5.10 Historically, responsibility for children lay with the States under the *parens patriae* common law doctrine.¹⁰ In each State, ex-nuptial children were subject to different laws about residence and contact if their parents' relationship broke down. States could choose to refer power with respect to ex-nuptial children pursuant to paragraph 51 (xxxvii) of the *Commonwealth Constitution* which states:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

- 5.11 In 2004, Justice French (as he was then) described paragraph 51 (xxxvii) as an “indicator of opportunity for cooperative federalism”¹¹ in the exercise of legislative powers. Its effect is to allow for a reallocation of powers from the States to the Commonwealth and, in doing so, injects a level of flexibility into an otherwise rigid Constitution.¹²
- 5.12 Since Federation, there have been a number of referrals of power to the Commonwealth with respect to a wide range of subject matters such as meat inspection, State banking, poultry processing and air navigation.¹³ In the past decade, by referral of power, the Commonwealth has assumed responsibility to legislate on issues with respect to corporate law and terrorism.
- 5.13 On occasion, some States have referred a particular matter to the Commonwealth, where others have declined. This may be either because of a lack of preparedness of

¹⁰ Literally, “parent of the nation”. It is a common law doctrine by which the Sovereign (now the State) has an obligation for the welfare of children. It is exercisable by the superior courts of the States and the Family Court. Historically, in each State, ex-nuptial children were subject to different laws about residence and contact if their parents' relationship broke down. (See: http://www.familycourt.gov.au/wps/wcm/connect/FCoA/home/about/FCoA/AFL_Overview).

¹¹ See http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj12.rtf viewed on 17 December 2010 Justice RS French, then Justice of the Federal Court of Australia, *Western Australia 2029; A Shared Journey State Conference 17-19 November 2004 Co-Operative Federalism - A Constitutional Reality or a Political Slogan*, p9.

¹² Anne Twomey, ‘Federalism and the use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia’, *Public Policy*, Vol 2 No 3 2007, p212.

¹³ 2010 Justice RS French, then Justice of the Federal Court of Australia, *Western Australia 2029; A Shared Journey State Conference 17-19 November 2004 Co-Operative Federalism - A Constitutional Reality or a Political Slogan*, p12.

some States to relinquish control over a certain matter, or a certain matter may not be relevant to a State and therefore the question of referral does not arise.¹⁴

5.14 The advantages of the power are clear. In circumstances where it is most appropriate that the Commonwealth has the power to legislate, it allows a quick and easy enabling of the Commonwealth to act without requiring a cumbersome referendum with limited prospects of success, or attempts at mirror legislation, which can be delayed or amended due to political particularities in each State. Generally, the result is legislation that is uniform across all referring States, an important feature for some areas of the law. Being consensus driven and with referrals requiring agreement between the States and the Commonwealth, referrals are generally viewed more in terms of practicality and necessity.

Referral of State Power to the Commonwealth

5.15 Paragraph 51 (xxxvii) of the *Commonwealth Constitution* makes clear that a State may refer a specific matter to the Commonwealth Parliament. Such referral may be on a particular topic or according to the text of a proposed bill, that is either:

- a general power by ‘subject matter’¹⁵ where a State gives the Commonwealth almost unlimited ability to legislate as it considers fit on a designated matter; or
- ‘text-based’, where a State announces the scope and extent of the Commonwealth’s ability to legislate on a matter that is being referred¹⁶ and, in turn, the Commonwealth may enact legislation with respect to the referred matter. The power that is referred here is confined to the text of a Bill.¹⁷

5.16 In a general referral, the State cannot direct the Commonwealth how to exercise the referred power. Once a matter is referred, the State in effect gives the Commonwealth unconditional authority to deal with the referred matter as it deems fit.¹⁸

5.17 The referral power is not a power to refer matters *per se* as the power does not enable the Commonwealth to refer to itself matters from the States that it deems desirable. Rather, the power enables the Commonwealth to make laws with respect to matters

¹⁴ For example, the creation of an integrated electricity grid on the east coast did not require Western Australia to refer its powers with respect to energy.

¹⁵ For example the reference of the matter of ‘air transport’ by Queensland to the Commonwealth in 1943 and 1950.

¹⁶ Jason Arditi, NSW Parliamentary Library Research Service *Industrial Relations: The Referral of Powers* by Briefing Paper No 7/09.

¹⁷ R S French, ‘The Referral of State Powers’, *University of Western Australia Law Review*, Vol. 31, No. 1, 2003, pp. 19–34 at p32.

¹⁸ Jason Arditi, NSW Parliamentary Library Research Service *Industrial Relations: The Referral of Powers* by Briefing Paper No 7/09.

referred to it by the States. The emphasis on the powers of the Commonwealth Parliament ensures that laws made by it subsequent to a referral are Commonwealth laws that prevail over inconsistent State laws. As for the States, they may refer to the Commonwealth any matter within their jurisdiction (such as ex-nuptial children).¹⁹

Effect of referral on State power

- 5.18 A reference of power by a State Parliament to the Commonwealth Parliament does not divest the State Parliament of legislative power over the subject matter.²⁰ However, legislation passed by the Commonwealth Parliament in the exercise of the referred power will displace any inconsistent State legislation.²¹

Western Australia's choice to adopt Commonwealth law

- 5.19 By virtue of the Principal Act, Western Australia adopted the Commonwealth child support legislation in the form that legislation stood at the time of adoption.²² The Preamble to the Principal Act usefully narrates what occurred in other States except Queensland.²³

WHEREAS the Parliaments of the States of New South Wales, Victoria, South Australia and Tasmania have referred to the Parliament of the Commonwealth the matter of the maintenance of children to the extent that that matter is not otherwise included in the legislative powers of the Parliament of the Commonwealth;

¹⁹ All States have referred matters to the Commonwealth at some point in their history, such as the nationwide referral of corporate matters and terrorism related matters. For example, in 1977, the South Australian and Tasmanian governments transferred ownership and control of their country railway systems. In 1996, the Victorian government referred wide ranging power over industrial relations (see Blackshield and Williams, *Australian Constitutional Law and Theory*, 5th edition, 2010, The Federation Press, p221. See: <http://www.ccentre.wa.gov.au/index.cfm?event=changingReferral> viewed on 3 December 2010. *Halsbury's Laws of Australia* lists referrals relating to the compulsory conversion of public securities; and intrastate air services.

²⁰ *Graham v Paterson* (1950) 81 CLR 1; [1950] ALR 324; (1950) 24 ALJR 71.

²¹ *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207; [1964] ALR 918; (1964) 37 ALJR 503.

²² This was 19 December 1989. The Long Title states that it is “An Act to adopt the Child Support (Registration and Collection) Act 1988, and the Child Support (Assessment) Act 1989, of the Commonwealth insofar as those Acts apply to or in relation to the maintenance of children and do not otherwise extend to Western Australia, to authorise the Governor to make certain arrangements for the purposes of section 20 of the Child Support (Registration and Collection) Act 1988 of the Commonwealth, to repeal the Child Support (Adoption) Act 1988 and to provide for matters incidental to or connected with the foregoing.”

²³ Queensland is excluded from the Preamble even though it referred its power in 1990. Its omission was explained by the Parliamentary Counsel Office in a letter dated 14 January 2011 at p2: “The Preamble as drafted is a correct statement of the historical sequence of events and does not require amendment. At the time the Commonwealth enacted the Child Support Act 1988 and the Child Support (Assessment Act 1989) Queensland had not referred its powers to the Commonwealth. It would not be correct to insert Queensland in the first paragraph of the preamble as the second paragraph (which states that the Parliament of the Commonwealth “subsequently” enacted those Acts) would be incorrect.”

AND WHEREAS the Parliament of the Commonwealth has subsequently enacted the Child Support (Registration and Collection) Act 1988 (formerly known as the Child Support Act 1988) and the Child Support (Assessment) Act 1989;

AND WHEREAS it is desired to adopt the Child Support (Registration and Collection) Act 1988, and the Child Support (Assessment) Act 1989, of the Commonwealth insofar as those Acts apply to or in relation to the maintenance of children and do not otherwise extend to Western Australia.

- 5.20 Subsequent amendments to the Commonwealth child support legislation have been made which then required further legislative adoption by the Western Australian Parliament. As the Attorney General explained, “*adoption of laws is not prospective*”,²⁴ therefore every time there is an amendment to the Commonwealth child support legislation governing child support, the amendments do not apply in the case of ex-nuptial children until adopted through amendments to our Principal Act.²⁵ Western Australia adopted amendments to the Commonwealth statutes in 1994, 2000, 2002 and 2007. However, of those previous amendment bills, only one has come before a parliamentary committee for scrutiny.²⁶
- 5.21 This Bill, as with previous amendment bills, adopts the most recent changes to the relevant Commonwealth child support legislation thereby continuing to enable ex-nuptial children to be treated in the same way as nuptial children in respect of child support.

6 STRUCTURE OF THE BILL

- 6.1 The Bill comprises six clauses.

7 KEY FEATURES OF THE BILL

- 7.1 The effect of Western Australia adopting 23 Commonwealth amendments and enactments listed in clause 4 is to capture financial resources currently inaccessible to children for the benefit of those children and their carers. For example, amongst other amendments and enactments:

²⁴ Letter from Hon Christian Porter MLA, Attorney General, 30 November 2010, p3.

²⁵ However, for child support legislation relating to overseas-related maintenance obligations with respect to Western Australian ex-nuptial children, there is no need for that legislation to be adopted by the Western Australian Parliament. This is because section 51 of the Commonwealth of Australia Constitution Act gives the Commonwealth constitutional power to make laws to manage Australia's external affairs.

²⁶ This was in 2001 when the former Legislation Committee (2001-2005) scrutinised the Child Support (Adoption of Laws) Bill 2001. Its report was tabled on 26 February 2002.

- Amendments to the *Child Support (Registration and Collection) Act 1988* made by the *New Business Tax System (Alienation of Personal Services Income) Act 2000* which amends the definition of “work and income support related withholding payments” in two places in the *Child Support (Registration and Collection) Act 1988*.²⁷ The EM states that these amendments “effectively extend the definition of money from which child support may be recovered”²⁸ to include payments in the form of a non-cash benefit that a ‘personal services entity’ receives.
- Amendments to the *Child Support (Registration and Collection) Act 1988* made by the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2008 Budget and Other Measures) Act 2008* which allows the Child Support Registrar to make prescribed periodic deductions from a person’s social security pension or social security benefit from a specified day until the debt is paid.²⁹
- Amendments to the *Child Support (Assessment) Act 1989* made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* which have effect from 1 July 2009. Parentage provisions there were amended to reflect the changes made to the *Family Law Act* to recognise that the members of a same sex couple may be the parents of a child, and if so, could be assessed as parents for child support.³⁰
- Amendments to the *Child Support (Assessment) Act 1989* made by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* which have effect from 1 July 2010. The care provisions were amended significantly to allow the Child Support Agency and the Family Assistance Office to share care determinations. Changes affect the way the Child Support Agency can make care decisions, apply care decisions and review care decisions. The estimate of income provisions were amended to allow those estimates to be made for a year of income, or part of a year of income.³¹ Previously, the child support period of 15 months could span three separate financial years which resulted in long delays before the estimate could be reconciled with a parent’s actual adjusted taxable income.³²

²⁷ One is a provision and the other a Note.

²⁸ The Explanatory Memorandum, p2.

²⁹ A specified lesser periodic deduction can be made in cases of financial hardship.

³⁰ See http://www.csa.gov.au/guidev2/TheGuideMaster.aspx?content=1_4_3.

³¹ See http://www.csa.gov.au/guidev2/TheGuideMaster.aspx?content=1_4_3.

³² The Explanatory Memorandum, p4.

- Amendments to the *Child Support (Registration and Collection) Act 1988* for when an instalment of parental leave pay is made to a person. From that pay, fortnightly deductions of an amount specified in a notice from the person's instalments of parental leave pay can be deducted until a child support debt is paid.
- Amendments made to both the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988* pursuant to the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further 2008 Budget and Other Measures) Act 2008*. Those amendments provide that a change in percentage of care of less than 7.1%, brought about by a new or varied agreement, plan or order as to care, will be able to be reflected in a child support assessment. This allows for the recognition of a change in care where it arises by one of these mechanisms in which the parents have agreed to the change in care. This amendment provides that, where parents come to a new agreement or obtain a new order about the care of a child, that care can be reflected in the child support assessment. A new care period will commence and a new percentage of care will be able to be calculated where a person's percentage of care has increased to, or risen above 35% or fallen below 35%.³³
- Amendments made by Part 3 of the *Tax Laws Amendment (2009 Measures No. 1) Act 2009* which amends the income test of the *Child Support (Assessment) Act 1989* to include a parent's reportable superannuation contributions.

8 FUNDAMENTAL LEGISLATIVE PRINCIPLES RAISED BY THE BILL

8.1 The Bill raises that fundamental legislative principle the Committee routinely considers - *Does the Bill have sufficient regard for the institution of Parliament?* As stated at paragraph 5.2, Western Australia chose not to refer power with respect to ex-nuptial children, preferring instead to adopt the Commonwealth child support legislation which established the Child Support Scheme. Thus this legislation applies to ex-nuptial children throughout Western Australia only to the extent that, pursuant to paragraph 51(xxxvii) of the *Commonwealth Constitution*, Western Australian legislation has *adopted* that Commonwealth legislation. That choice has clearly left Western Australia's state sovereignty intact, resulting in a *Family Court of Western*

³³ The Explanatory Memorandum to the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further 2008 Budget and Other Measures) Bill 2008, p15.

Australia exercising both federal and state jurisdiction, independent of the Commonwealth's *Family Court of Australia*.³⁴

8.2 The Bill reinforces that high regard for the institution of Parliament itself but arguably, at a financial cost. In those other States which have *referred* legislative power, amendments to the Commonwealth child support legislation and other enactments apply automatically and immediately in those jurisdictions, whereas in Western Australia, the amendments and other enactments lag. This means, as the Child Support Agency explains, “*the arrangement by which the WA Parliament has adopted the laws means that from time to time the [agency] must treat WA ex-nuptial cases differently to other cases.*”³⁵

8.3 The Committee noted the following from the Parliament of Western Australia ‘All bills’ website.

- The Child Support (Adoption of Laws) Bill 1999 was first read into the Parliament on 16 March 2000 and assented to on 30 June 2000, taking three months to passage.
- The Child Support (Adoption of Laws) Bill 2001 was first read into the Parliament on 29 August 2001, then referred to the former Standing Committee on Legislation (2001-2005) on 14 November 2001 for scrutiny. The bill lapsed with the prorogation of the 35th Parliament but was restored in the first session of the 36th Parliament on 14 August 2002. It was assented to on 9 December 2002, taking 15 months to passage.
- The Child Support (Adoption of Laws) Bill 2007 was first read into the Parliament on 16 May 2007 and assented to on 31 October 2007, taking five months to passage.
- This Bill was first read into the Parliament on 25 November 2009 and at the time of tabling this Report, is 15 months into its passage.

8.4 The Committee is of the view that given:

- the amount of lag time;
- the fact that the Bill is intended to update a significant number of Commonwealth enactments;

³⁴ One beneficial consequence of this is that the Family Court of Western Australia can exercise not only powers under the Commonwealth's *Family Law Act 1975*, but also powers and jurisdiction conferred by state legislation so that no jurisdictional disputes arise, for example, when ex-nuptial children are involved.

³⁵ See http://www.csa.gov.au/guidev2/TheGuideMaster.aspx?content=1_4_3. For information on aspects on the other enactments and amendments, see the EM.

- that the purpose of the Bill is to advantage Western Australian ex-nuptial children by placing them on an equal footing with nuptial children; and
- that the purpose of the Bill is to ensure consistency amongst the jurisdictions,

it would be useful for the Legislative Council to be advised how the Government proposes to expedite future amendments to the Principal Act through the Western Australian Parliament so that ex-nuptial children and their carers are not financially disadvantaged.

Recommendation 1: The Committee recommends that the Parliamentary Secretary representing the Attorney General inform the Legislative Council how the Government proposes to expedite future amendments to the *Child Support (Adoption of Laws) Act 1990* through the Western Australian Parliament.

9 SELECTED CLAUSES IN THE BILL

Clause 4

9.1 Clause 4 states:

4. Purpose of Act

The purpose of this Act is to provide that the adoption by the Child Support (Adoption of Laws) Act 1990 of—

(a) the Child Support (Registration and Collection) Act 1988 (Commonwealth) extends to that Act as amended by, or as a consequence of the enactment of, the following Commonwealth Acts—

(i) New Business Tax System (Alienation of Personal Services Income) Act 2000;

(ii) Financial Sector Legislation Amendment Act (No. 1) 2000;

...etc

(the clause then lists 12 other Commonwealth enactments and amendments)

(b) the Child Support (Assessment) Act 1989 (Commonwealth) extends to that Act as amended by, or as a

*consequence of the enactment of, the following
Commonwealth Acts —*

(i) Statute Law Revision Act 2007;

*(ii) Families, Housing, Community Services and
Indigenous Affairs and Other Legislation Amendment
(2008 Budget and Other Measures) Act 2008;*

... etc

(the clause then lists seven other Commonwealth
enactments and amendments)

9.2 The Committee queried whether the Bill effectively adopts the various Commonwealth amendments and enactments listed above, given that clause 4 is not an operative provision but a purpose clause. Parliamentary Counsel advised that clauses 5 and 6 of the Bill are the clauses that operate to adopt the Commonwealth amendments and enactments referred to in clause 4.³⁶ This occurs as a result of proposed amendments to sections 3(a) and 4(b) of the Principal Act.

- Clause 5 amends section 3(a) of the Principal Act by proposing that a reference in the Principal Act to the Commonwealth's *Child Support (Registration and Collection) Act 1988* is to be constructed as a reference to that Act in the form in which it exists on 1 October 2010 (currently it is 1 July 2008).
- Similarly, clause 6 amends section 4(b) of the Principal Act. It proposes that a reference in the Principal Act to the Commonwealth's *Child Support (Assessment) Act 1989* is to be constructed as a reference to that Act in the form in which it exists on 1 October 2010 (currently it is 1 July 2008).

9.3 Section 5 of the Principal Act then adopts the Commonwealth child support legislation as it is referred to in sections 3 and 4 of the Principal Act.³⁷ Section 5(1) states:

The State of Western Australia adopts the Child Support (Registration and Collection) Act 1988, and the Child Support (Assessment) Act 1989, of the Commonwealth insofar as those Acts apply to or in relation to the maintenance of children and do not otherwise extend to Western Australia.

³⁶ See **Appendix 3**, letter from the Parliamentary Counsel's Office, 14 January 2011, p1.

³⁷ See **Appendix 3**, letter from the Parliamentary Counsel's Office, 14 January 2011, p1.

10 CONCLUSION

10.1 The Committee accepts Parliamentary Counsel's advice that when read together:

- clause 4 of the Bill;
- clauses 5 and 6 of the Bill; and
- section 5 of the Principal Act

effectively adopt the Commonwealth's child support amendments and enactments. However, the Committee finds that the construction of these provisions is convoluted. A simpler approach is to be preferred and should be considered with future amendments to the Principal Act.

11 SUPPLEMENTARY AMENDMENTS

11.1 The Committee is unaware of any further amendments to the Bill.

12 RECOMMENDATION

12.1 The Committee makes the following recommendation.

Recommendation 2: The Committee recommends that, subject to Recommendation 1, the Child Support (Adoption of Laws) Bill 2009 be passed.



Hon Adele Farina MLC
Chairman

Date: 15 February 2011

APPENDIX 1
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

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The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation. These were endorsed in the *1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia*. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 2
FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

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FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

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Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 3
LETTER FROM THE PARLIAMENTARY COUNSEL'S
OFFICE

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Parliamentary Counsel's Office

PUBLIC

upon tabling of Committee's Report

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Hon Adele Farina
Chairman
Uniform Legislation and Statutes
Review Committee
Legislative Council Committee Office
Parliament House
Perth WA 6000

12 January 2011

Your ref A275761
Our ref PCO 09/00819

Dear Ms Farina

Child Support (Adoption of Laws) Amendment Bill 2009

I refer to your letter dated 10 January 2011 in relation to the *Child Support (Adoption of Laws) Amendment Bill 2009* (the Bill).

Clauses 5 and 6 of the Bill are the clauses that operate to adopt the Commonwealth's enactments referred to in clause 4 of the Bill.

Clause 5 amends the *Child Support (Adoption of Laws) Act 1990* (the Act) section 3(a) to provide that a reference in the Act to the *Child Support (Registration and Collection) Act 1988* of the Commonwealth is a reference to that Act in the form in which it exists on 1 October 2010.

Clause 6 amends section 4(a) of the Act to make similar provision in relation to the *Child Support (Assessment) Act 1989* of the Commonwealth.

Section 5 of the Act adopts the *Child Support (Registration and Collection) Act 1988* and the *Child Support (Assessment) Act 1989* as referred to in sections 3 and 4 of the Act respectively. The amendments to sections 3 and 4 means that the Commonwealth Acts are adopted as they exist on 1 October 2010.

The Preamble as drafted is a correct statement of the historical sequence of events and does not require amendment. At the time the Commonwealth enacted the *Child Support Act 1988* and the *Child Support (Assessment) Act 1989* Queensland had not referred its powers to the Commonwealth. It would not be correct to insert Queensland in the first paragraph of the preamble as the second paragraph (which states that the Parliament of the Commonwealth “subsequently” enacted those Acts) would be incorrect.

Yours faithfully



Lee Harvey
A/Parliamentary Counsel

cc Attorney General