CHILD SUPPORT (COMMONWEALTH POWERS) BILL 2018

Second Reading

Resumed from 5 December 2018.

HON MICHAEL MISCHIN (North Metropolitan — Deputy Leader of the Opposition) [7.50 pm]: I rise as the lead speaker on the Child Support (Commonwealth Powers) Bill 2018 on behalf of the opposition and indicate our support for the bill. I also rise in my capacity as the Chair of the Standing Committee on Uniform Legislation and Statutes Review to make some remarks about the committee's report on this bill, the 121st report, "Child Support (Commonwealth Powers) Bill 2018", which was tabled in March this year. Ordinarily, there would not be a great deal to say about this type of bill; we have seen several such bills in the past. Their purpose is to bring up to date the child support regime in Western Australia so that it aligns with those applicable in other states by adopting certain commonwealth laws in relation to that matter in order that provision can be made for the support of exnuptial children within the state. I will descend into a bit more detail about that in due course. I will spend a bit more time than usual on this legislation because it is a departure from the practice that we have adopted in the past. It involves this Parliament taking a step that it is rarely keen to take, which is a referral of the powers of this Parliament and the state of Western Australia to legislate for its own interests to the commonwealth. Such an occasion does not often arise and, when it does, it is something that needs to be carefully considered and understood by members of this place in order that the reasons for that course are both understood and appreciated and that the risks to parliamentary sovereignty by taking that course are properly appreciated. I will take some time to go through the report that the Standing Committee on Uniform Legislation and Statutes Review tabled because I think it is important that the house understands the implications of what we are doing and is comfortable, having regard for each member's responsibility to do their duty in the interests of the peace, order and good government of this state, to take that step. This Parliament, particularly this Legislative Council, has always been very jealous of its authority and responsibility as the sovereign lawmaking body of the state of Western Australia, which is a sovereign state of our Federation. Only rarely has it taken the course of referring powers or steps along similar lines.

A recent occasion on which that has been considered was only a matter of weeks ago when we dealt with the Fair Trading Amendment Bill 2018, which adopted a slightly different mechanism to bring us into line with the national fair trading regime. It involved the Australian Consumer Law, a law that is essentially a code of practice that has been established by the commonwealth and legislated for by the commonwealth with collaboration between the states and other sovereign jurisdictions, such as the territories, in order that there be a uniform scheme of consumer protection law across the nation. In that case, Western Australia chose to adopt changes to those laws from time to time and to be jealous once again of its sovereignty and its ability to accept or reject what the commonwealth proposes—so, too, in this case. In the Fair Trading Amendment Bill instance, what was proposed was a mechanism by which any changes to the laws would be adopted automatically, subject to some form of rejection by one house or the other of this Parliament. Members will recall that the Standing Committee on Uniform Legislation and Statutes Review considered that scheme. It had significant concerns about what was being proposed and suggested that it be hived off from the other objective of the bill, which was to bring our laws up to date. After some turmoiling, the government accepted the proposition and the bill was passed on the basis that it would bring up to date the laws that had been made since the last adoption, which, I think, was in January or July 2013. However, it introduced separate legislation for the scheme for future adoptions for further consideration by the standing committee. That is currently underway.

What has been proposed in this case, however, is not merely a mechanism for the adoption of any future changes to the law but an actual referral of state power. That is fundamentally not only a different mechanism but also one that requires the careful consideration of this house and of the Parliament generally to determine whether it is in the best interests of the state to do so. There is always the prospect of regaining those powers down the track but these things have a certain inertia and momentum of their own, and once a power is referred, it is rarely the case that the state withdraws that referral in due course. The number of instances in which that occurred is referred to in the standing committee's report. I will come to those in due course.

Firstly, I will summarise the opposition's position on this legislation by referencing the standing committee's report, which makes four findings and one recommendation. The recommendation is that the Council note the committee's findings during the consideration of this bill. Rather than simply endorsing what is proposed and saying, "Yes, let's go along with what is proposed in the bill with or without qualifications", the practice of our committee has been to make observations about the implications of the legislation, make certain findings and invite the house to make up its own mind about the merits or otherwise. We have chosen that course not because we do not have a particular view, but because it is not our place to necessarily say to this house, "Yes, as a matter of policy go into a particular scheme by way of a referral or otherwise." Members will recall that we made recommendations not to adopt the scheme proposed in the Fair Trading Amendment Bill for the prospective and progressive adoption of any changes of law that occur in the future, because of the risks involved. In this particular

case, we have left it to the house to decide whether as a matter of policy, judgement and conscience on the part of each member, it is thought fit to refer powers. We have made certain observations and findings about the manner in which the bill operates and the benefits and risks involved in the referral of power.

By way of history, the bill was introduced into this place on 5 December 2018 by the Leader of the House representing the Attorney General. It was referred to the Standing Committee on Uniform Legislation and Statutes Review on the same day under standing order 126, and we were required to report by 12 February this year, being the first sitting day following the expiry of the 45-day reporting time frame set out under the standing orders. It was also the first sitting day after the summer recess, so we could not have done it any earlier than that. On 6 December 2018, before we rose for the end of the year, the committee sought an extension of time from 12 February 2019 through to 19 March 2019, and that extension was granted. The reason for that was explained at the time, but essentially it involved a need to consider more carefully the evidence and to deal with the issues that were thrown up by the bill. As I recall, certain advices were provided to us during that period. In fact, one of the advices that was particularly important was that of the Solicitor-General for Western Australia, Mr Joshua Thomson, SC, on 19 February, which appears as appendix 2 to the committee's report. The bill provides in essence for Western Australia to adopt certain commonwealth laws relating to the maintenance of exnuptial children that will then apply in Western Australia. The bill also provides for the referral of powers, as I have mentioned, and more specifically, as a term of art, the referral of the "matter of the maintenance" of exnuptial children to the commonwealth Parliament that will enable the commonwealth Parliament to amend or affect the operation of those laws in Western Australia. The bill seeks to address what has become a continuing problem not only in this scheme, but also with various schemes in which Western Australia has elected to become part of a national regime for which we have not referred power and the commonwealth does not possess the power, but on which we would like some uniformity, some comity, with other states and territories in the commonwealth in respect of a particular regime administered by the commonwealth—that is, the delay between the passage of amending laws by the commonwealth and their adoption in this state. We have seen that situation in the Fair Trading Bill. I have already mentioned the problem with respect to changes to the Australian Consumer Law that take place from time to time. Sometimes these quite involved and complex changes occur after a great deal of discussion, negotiation and debate at the ministerial level, after enormous consultation with interest groups, and finally the refinement and passage of laws by the commonwealth with the concurrence of the states that are part of the Federation and part of that scheme. But after that comes the question of whether Western Australia adopts those changes, and that takes time. There is a delay that involves not only the consideration of those provisions that have been amended, but also the drafting of appropriate legislation by the state of Western Australia, its passage through the cabinet process, and, ultimately, its introduction into each of the houses of this Parliament. Then there is its consideration following its appropriate prioritisation by the government in amongst other elements of the government's legislative program, and, finally, debate, consideration, passage, and eventual royal assent and the like. Often that can be an inordinate length of time. I will make some further comment about that in due course. But in respect of the maintenance of children, that can have significant consequences that go beyond simply adopting the laws in this state and having uniformity between the laws that apply for the maintenance of nuptial children and those who are not covered by the commonwealth powers, which is exnuptial children in Western Australia. That is because there will be different regimes operating concurrently. I refer to ones that will be administered by the commonwealth nevertheless under its system—it has established bureaucratic and administrative systems—but will be different depending on whether a child of a particular relationship is being dealt with by the relevant laws applicable to them. There may be a mixture of nuptial and exnuptial children within a particular relationship. There may be different laws for children in a relationship being administered by the same government departments but in a different way, and the complications that arise from that have been a significant difficulty over the years.

It is a worthy exercise to determine whether there was a better way of going about this. There were certain refinements that could be implemented without a formal referral of powers. One of those, under the previous government, is that because of the nature of the legislation, there was a short-circuiting of the cabinet approval process. For members who are not familiar with the manner in which these things work, it is essentially a two-stage process. There is a submission to cabinet by the responsible minister seeking approval to draft a bill in particular terms. Once that exercise is completed and is to the satisfaction of the responsible minister, there is a further cabinet submission seeking the cabinet's approval to print a bill in its final form and introduce it into Parliament. To try to cut short that process, it went straight through to an approval to print stage. That achieved some small economy of time and effort, but, of course, still presented the problem that there would be a hierarchy of importance and legislative priorities on the part of government that would still involve a delay in the introduction and consideration of those adoption bills and amendments that would cause a delay and a hiatus between changes to the commonwealth law dealing with one set of children, their support and the administration of that support, and the same applying to exnuptial children. That is what this bill seeks to address, not only by bringing the laws up to date, but also by the limited referral of power.

In the context of that, the committee and its report considered not only the commonwealth child support scheme and the constitutional context for the bill, but also the impact of the bill on parliamentary sovereignty and lawmaking powers. As I mentioned, ultimately it will be a decision for members of this house whether they consider that the benefits to the state of Western Australia outweigh the risks to parliamentary sovereignty. Our conclusion was that they did, but it will ultimately be a matter for each of the members and the parties concerned to make their own judgement on that.

I should also say that we are indebted to the assistance we received from Ms Ilse Petersen, an adviser from the State Solicitor's Office, and the Solicitor-General, Joshua Thomson, SC, for the work they did and the information they provided to our inquiry. I also make mention of the Attorney General's timely provision of supporting documentation and information to our committee; we are obliged for the cooperation that we received from the Attorney General and his office in that regard.

What sort of a scheme are we dealing with? The commonwealth child support scheme was established in 1988. Its stated object was —

> … ensuring that separated parents shared equitably in the financial cost of supporting their children.

The scheme itself involves an assessment of child support as well as the collection of support under and enforcement of child support assessments, child support agreements and court orders. It operates under two commonwealth acts—the Child Support (Registration and Collection) Act 1988 and the Child Support (Assessment) Act 1989. I will refer to them as the "child support laws" for ease during the course of my contribution when I am referring to the scheme itself. The Child Support (Registration and Collection) Act 1988 came into operation on 1 June 1988. It established a scheme on that date that provides for the registration, collection and enforcement of child support liabilities, including court orders and court registered agreements for child and spousal maintenance, and from 1 October 1989 for administrative assessments of child support. The related act, the Child Support (Assessment) Act 1989, implemented administrative assessment of child support in accordance with a particular formula. That took effect from 1 October 1989. It applies uniformly to Australian children, other than exnuptial children in Western Australia. An exnuptial child is generally considered to mean a child who has not acquired the status of a child of a marriage, either through birth, legitimation or adoption. The scheme, as enacted by the commonwealth and as amended from time to time, is limited by the commonwealth's legislative powers. That is the reason that it does not apply to exnuptial children of Western Australia. The commonwealth Parliament can legislate only with respect to children of a marriage as opposed to exnuptial children as a result of a constitutional limitation in section 51(xxi) of the Commonwealth of Australia Constitution Act that 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:
>
> (xxi) marriage;
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> (xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;

That being so, the Western Australian Parliament retains legislative power in relation to unmarried parents and their exnuptial children. Members will be aware that in addition to the Family Law Act of the commonwealth, we have a Family Court Act of Western Australia, which reflects many of the powers that are available to the commonwealth's family courts, but administered by our Family Court, which is a state court vested with commonwealth powers. Over the years it has been a very useful formula for Western Australia. Its operation and ability to deal with the broad range of human relationships and the disposition of property of relationships, whether marriage formally or de facto, has proved very valuable to Western Australia and has been the envy of other states. It was a wise decision, again, based on the jealousy of our Parliament to retain its parliamentary sovereignty, that when the Family Court of Australia was established and the Family Law Act came into force on a commonwealth basis—relying on the marriage, divorce and matrimonial causes powers vested in the commonwealth by the commonwealth Constitution—that Western Australia chose to be separate from that and establish its own court with responsibility broadly over relationships, but reflecting the commonwealth's powers and that scheme. That was allowed to operate in a way that was seamless in respect of relationships within the state. A considerable amount of difficulty was encountered by other states, which had parallel regimes and complications about how they related. In some cases, when de facto relationships needed to be considered, people would head to the wrong court, or find that there was a technicality that in their particular matter did not fall within the regime of the Family Law Act 1975, as it then was, and the jurisdiction of the Family Court, and then they would have to go off and start proceedings in their relevant Supreme Courts using those matrimonial causes powers that were vested in those particular states. Western Australia did not have that problem. Vice versa, some people commencing proceedings in the Supreme Court of, say, New South Wales found that the matter fell within the federal jurisdiction in some manner or other, causing difficulties and expense and aggravating the circumstances that they were facing. Family and relationship breakdowns at the best of times are fraught with emotion, stress, disappointment and

dissatisfaction. We continually hear complaints about our Family Court system here in Western Australia. One can only imagine the distress that was caused in other jurisdictions that had that dual passage toward resolving disputes. Be that as it may, the Western Australian Parliament retains legislative power, and continues to retain legislative power in relation to unmarried parents and their exnuptial children.

Under section 51(xxxvii) of the Constitution, the commonwealth Parliament has power to make laws with regard to —

> 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.

Laws made by the commonwealth Parliament subsequent to a referral are commonwealth laws that prevail over inconsistent state laws by virtue of section 109 of the commonwealth Constitution. For the commonwealth child support laws, and therefore the scheme that we are seeking to adopt and in which we are seeking to refer powers under this bill to apply to unmarried parents and their exnuptial children, state Parliaments must do one of three things. They must either refer state legislative power in respect of the maintenance of exnuptial children to the commonwealth Parliament; adopt by state legislation the commonwealth child support laws under which the scheme operates so that the commonwealth legislation will apply to exnuptial children in the adopting state, which is the current position in Western Australia; or, adopt those commonwealth child support laws and refer state legislative power in respect of the maintenance of exnuptial children to the commonwealth Parliament. That is part of what is involved in this case.

In 1986, there was a constitutional handing over or referral of powers by New South Wales, Victoria and South Australia. Tasmania followed in 1987 and Queensland in 1990. The territories, as a matter of course, not being sovereign states, were governed by any changes to the commonwealth law in this regard. In effect, the relevant legislation in those jurisdictions had the effect of referring their state's powers of custody, guardianship, access and maintenance in relation to exnuptial children to the commonwealth. This means that whenever one or both of the commonwealth child support laws is amended, those amendments have immediate application in those jurisdictions and to all affected children, whether parents are married or unmarried in those referring states. Members will note that the nature of those referrals was much broader than what we are contemplating in this case, because questions of custody, guardianship and the like were also being referred in those instances. Western Australia has not, as I have mentioned, gone down that path. Western Australia chose instead to retain its power, not to refer its power over family law, including matters such as child support payments or exnuptial children, to the commonwealth. Instead, it chose to adopt the commonwealth legislation, which established that scheme in the form that the legislation existed at the time of adoption. It did that by enacting the Child Support (Adoption of Laws) Act 1990, which commenced operation on 19 January 1991. I digress for a moment to note that as part of the scheme that is proposed by this bill, proposed section 9, clause 9 of the bill before us, seeks the repeal of that Child Support (Adoption of Laws) Act 1990 for reasons that will become apparent in due course, because it will no longer be necessary to have a particular adoption act. Under this bill, should it become law, we will adopt the scheme until the date that this bill becomes law, receives royal assent, by virtue of proposed section 2—that is, clause 2 of the bill—when it comes into effect on the date of royal assent and any laws into the future or any amendments to those laws into the future.

That is the situation as it is at the moment; however, we adopted the laws as at the time of adoption, in January 1991, and that was recognised in the commonwealth child support laws quite specifically. The preservation of the state's parliamentary sovereignty, and the fact that it was operating a different regime, was acknowledged by the commonwealth in the Child Support (Registration and Collection) Act 1988 in section 5(1), which provides that subject to subsections (4) and (5) of that section, that act, insofar as it relates to the maintenance of exnuptial children, extended only to New South Wales, Victoria, Queensland, South Australia and Tasmania. Section 5 of the Child Support (Registration and Collection) Act 1988 states that its operation can be extended to Western Australia —

> (2) If:
>
> (a) the Parliament of Western Australia refers to the Parliament of the Commonwealth the matter of the maintenance of exnuptial children or matters that include that matter; or
>
> (b) Western Australia adopts this Act in so far as it relates to the maintenance of exnuptial children;

Notwithstanding that Western Australia was not part of the scheme at the time, it was well understood by the commonwealth that we were a special case and that we would operate distinctly; that the powers under the scheme and the commonwealth powers did not extend to us. However, it left the door open to Western Australia to become part of the scheme by referring "the matter of the maintenance of exnuptial children or matters that include that matter". That term of art is reflected in the bill before us. I will come to that in due course.

Under section 5(5A) of the Child Support (Registration and Collection) Act 1988, the commonwealth affirms that the act, so far as it is amended by one or more acts in relation to the maintenance of exnuptial children, does not extend to Western Australia unless and until the Parliament of Western Australia refers the matter of the maintenance of exnuptial children or matters that include that matter, and Western Australia adopts the act as so amended. There are equivalent provisions for that in section 13 of the complementary commonwealth act—the Child Support (Assessment) Act 1989. As I have mentioned, subsequent amendments have been made to the commonwealth child support laws from time to time, which have required legislative adoption by the Western Australian Parliament. The commonwealth amendments are adopted on a particular date. For example, in Western Australia, the last legislative adoption occurred on 1 September 2017. Members will recall that when that bill was dealt with, it brought up to date our laws that had been out of step for some years.

It is notable that notwithstanding we have to deal with these amendments from time to time, the Western Australian Parliament has always adopted all commonwealth amendments made to the commonwealth child support laws, albeit with some delay. That of course is no guarantee that there will not be something objectionable in one or other of those laws in the future. However, I should say that the Standing Committee on Uniform Legislation and Statutes Review was given some comfort by the fact that up until now changes to the commonwealth child support regime have been acceptable to the state of Western Australia and we have seen no cause not to adopt an amendment that would in any event be applicable to the children of a marriage but not applicable to exnuptial children. It raises the problem—which the committee considered—that we would be in a difficult position were we not to adopt a change to the laws because we would, as a matter of course, unless we departed from the scheme entirely, have two sets of laws operating within Western Australia, depending on the nature of the child of that union.

The adoption of commonwealth child support laws by Western Australia is not prospective. Every time an amendment is made to the commonwealth child support laws, the amendments do not apply in the case of exnuptial children in Western Australia until the laws are adopted through amendments to the act. The Leader of the House acknowledged as much during the course of her second reading speech. She mentioned that up until the time of the introduction of this bill into this place, the Parliament had passed eight bills adopting current versions, at those particular times, of the commonwealth child support laws. She also noted—this is something I think we have all come to appreciate over time—there seemed to be numerous amendments, many of them relatively minor but nevertheless a nuisance in keeping up with these things, to commonwealth legislation, to which we are subject. There seems to be a desire on the part of the commonwealth, indeed I suppose one could argue on the part of the state, to tweak legislation. Days are long past when an act was passed and it might be many decades before it was thought fit or necessary to interfere with it or make some adjustment. We seem to be constantly dealing with rafts of amendments to legislation. The commonwealth is no stranger to that. It seems to be more enthusiastic about getting adjustments through. These regimes have become more complicated over time in any event. Many of the sorts of things that are being dealt with by the changes to the commonwealth child support laws are the implications on taxation and superannuation, and a variety of complex financial provisions. The commonwealth makes those adjustments. In the scheme of things they may not be enormously impactful on the state of Western Australia but they do require some consideration and adoption by this jurisdiction in order to ensure that there is uniformity between the laws applying to children in the rest of the country and exnuptial children here. The Leader of the House noted that there had been three such Western Australian bills adopting changes to the commonwealth child support laws in the past four years alone.

Until the Western Australian Parliament adopts the commonwealth child support laws as amended, two versions operate in Western Australia—the amended version that applies to all states and territories for all children, and the version that applies to exnuptial children within this state alone. The Attorney General reinforced, through the Leader of the House, that that hiatus can create potential difficulties, and disadvantage exnuptial children in Western Australia. It also has implications of a practical nature in administrative legal difficulties and complexities that arise from government agencies having to administer two sets of laws depending on whether a child falls within the commonwealth jurisdiction or whether the child is an exnuptial child. As time goes on, it is a mischief that needs to be addressed. In the days when there were only a few amendments, and infrequently, it may have been something that was not particularly of moment, but given that laws are changing far more frequently nowadays, it is something that needs to be looked at and addressed. I congratulate the government for having made the attempt to do so.

What does this bill do? It adopts all the child support laws that the Western Australian Parliament has previously adopted. The last Western Australian legislative adoption occurred on 1 September 2017. It also adopts all commonwealth amendments to the commonwealth child support laws that the Western Australian Parliament has not yet adopted—that is, those that have been passed by the commonwealth since 1 July 2017—and also, by implication, because of the manner of the operation of clause 4 of the bill, it will adopt any laws that the commonwealth may have made between the time that this bill was introduced into this Parliament and the date that it receives royal assent. I mention that because it has the implication that it may very well be that there will be laws passed by the commonwealth that, if this bill is passed, this Parliament will not ever be able to scrutinise, let

alone make comment on or seek to disallow. I accept that it is in a caretaker period at the moment, but if a law related to the child support scheme was amended at the commonwealth level between the date that we tabled our committee report and the date that this bill completes its passage through this Parliament and receives royal assent, none of us will formally know anything about it, let alone be able to debate and consider whether it is in the best interests of Western Australia. I mention that for members' consideration. It is one of the consequences of the acceptance of the scheme that is being proposed by the bill.

The third thing this bill will do is refer the state's legislative power for the matter of the maintenance of exnuptial children to the commonwealth Parliament. As a consequence of those first three stages I mentioned, it will also repeal the Child Support (Adoption of Laws) Act 1990, because there will be no further need for that legislation. Upon receiving royal assent, this bill will adopt all the previous commonwealth child support laws. The significant operative provisions of the bill are clauses 4 and 5. Clause 6 provides a mechanism that will allow us to disentangle ourselves or attempt to depart from the commonwealth child support scheme if, sometime in the future, the government of Western Australia sees fit to do so. I will deal with that clause, but for our present purposes the operative provisions are clauses 4 and 5.

As I have mentioned, clause 4 removes the opportunity for the Western Australian Parliament to scrutinise laws prior to those laws coming into operation. Clause 5 is the subject matter referral provision. Each of those involves risks. Because clause 4 seeks to adopt laws up to the time that this bill will take effect as the law of the state, there is the absence of scrutiny by this Parliament of legislation that may have been passed in the interim. Clause 5, the subject matter referral, has the potential for being interpreted rather widely by the commonwealth. I will come to each of those issues in due course.

Clause 4(1) of the bill provides for the adoption of the commonwealth child support laws in the form they exist at the end of the day before the commencement date. The effect of that is that Western Australia will adopt all commonwealth child support laws that the WA Parliament has previously adopted—that is, at 1 July 2017—and the commonwealth amendments to the commonwealth child support laws that have been enacted between 1 July 2017 and the day on which the bill receives royal assent. The commonwealth child support laws have been amended since 1 July 2017 and the committee reviewed those amendments, which are set out in appendix 1. They are changes to the Child Support (Registration and Collection) Act 1988 and the Child Support (Assessment) Act 1989. The amendments to the Child Support (Registration and Collection) Act 1988 include amendments to provide that deductions can be taken from a person's veteran payment if they owe a child support debt; align the registrar's ability to recover a child support overpayment from a payee with the methods currently available for recovering a child support debt from a payer; ensure that backdated reductions to a child support assessment collected by the registrar are recoverable from the payee; and include new provisions on backdating assessments, providing a fairer basis for retrospectively creating a child support overpayment or underpayment due to some changes of circumstances.

The amendments to the Child Support (Assessment) Act 1989 that have been made since 1 July 2017 are fourfold. They extend the interim period that applies for recently established court-ordered care arrangements and provide incentives for the person with increased care to take reasonable action to participate in family dispute resolution if a care dispute relates to an older court order, a parenting plan or a written agreement; allow the registrar to take into account an amended tax assessment in an administrative assessment of child support, if it results in a higher taxable income or in a lower taxable income if certain conditions are met, based on the reason for the amended tax assessment and the timeliness of action taken to obtain an amended tax assessment; allow for courts to set aside child support agreements made before 1 July 2008, as well as allowing all child support agreements to be set aside without having to go to court if certain circumstances change; and disregard, for child support purposes, first home super saver scheme released amounts from a parent's adjusted taxable income for the last relevant year of income in relation to the child support and the income component amounts as estimated by a parent for the year. As I have mentioned, a summary of those amendments is attached to the report as appendix 1.

The evidence that the committee received on 11 February this year before we tabled the report was that no further commonwealth amendments to the child support laws were at the time understood to be contemplated. I confess that I do not know what the situation has been since our report was tabled. Notwithstanding that those amendments have been passed by the commonwealth and are applicable to children across Australia, none of them apply to exnuptial children in Western Australia as the law now stands. By virtue of clause 4(1) of the bill, when and if it is passed and the bill receives royal assent, all those amendments will be automatically adopted. Any amendments that have been passed by the commonwealth in the interim before that occurs will not have been the subject of parliamentary consideration or scrutiny, but will also be adopted.

The Attorney General advised that there were two reasons for not providing for this unlikely event. They would involve complications that would require further legislation to adopt any such changes. The government acknowledged that a risk was involved, but considered that the benefits outweighed the risks. In due course I would like the minister to inform us whether any changes to commonwealth child support laws have been passed by the commonwealth

since the last evidence the committee received on the subject in February 2019, so that we know whether there have been any changes that will be automatically adopted upon the passage and royal assent of this bill.

The Attorney General advised us that options to expedite the adoption procedure had been considered. I have already mentioned one of the refinements that was in place under the previous government, which was skipping the approval to draft stage of the cabinet process and going straight to approval to print. I acknowledge that it is not by any means the most efficient way of dealing with the issue, but it maintained parliamentary sovereignty. It was also based on advice that I had received in my capacity as Attorney General about the risks of a referral of power of the nature of that we are contemplating at the moment. I will come to that in a moment. It is to do with the potential broad interpretation that may be applied to the matter of the support of exnuptial children. For a variety of reasons, proceeding down this path did not occur at the time, but that was one of the risks that we, as a committee, needed to consider in deciding whether, on balance, the benefits to the state of Western Australia outweigh the risks inherent in referring these powers to the commonwealth. To bring it up to this point, we found, as part of our committee consideration, that clause 4(1) of this bill has the potential to exclude parliamentary oversight, and as a result derogates from Western Australia's parliamentary sovereignty. I think the government would acknowledge that, but the question is a value judgement that members need to make in due course about whether that risk is balanced or outweighs the benefits that will accrue to Western Australia, and to exnuptial children and those administering the scheme, by having this adoption and the referral of power.

This brings me to clause 5, "Referral of maintenance of exnuptial children". Clause 5(1) of the bill is what is known as a subject matter referral of state legislative power to the commonwealth Parliament, and it defines the scope of that referral. It states —

> The matter of the maintenance of exnuptial children is referred to the Parliament of the Commonwealth.

It is further refined by subclause (2), which reads —

> To avoid doubt, the matter referred includes the matter of amending, or otherwise affecting the operation of, the Commonwealth Child Support laws.

There are certain qualifications to that in subclause (3), and I will come to those in due course. It is important to note that the subject matter referral is limited in those two respects. It is limited to the matter of the maintenance of exnuptial children—it is not extended, as in other states, to matters of guardianship, custody and the like—and it is narrower than referrals made by all the other state Parliaments.

Clause 5 defines the scope of the referral in three ways. Firstly, it expressly provides that the matter referred will enable the commonwealth Parliament to amend or affect the operation of the commonwealth child support laws. Secondly, it expressly indicates that the matter referred does not include any matter addressed in the commonwealth Family Law Act 1975. The purpose of that is to prevent part VII of that act applying as commonwealth law in Western Australia, which will preserve the similar provisions in part 5 of our Family Court Act 1997. I will not descend into the detail of it—it is rather a complex issue—but it is to preserve certain powers provided for under that legislation and to avoid potential conflicts that would bring into operation section 109 of the commonwealth Constitution. Lastly, it recognises that the Western Australian Parliament cannot refer to the commonwealth Parliament legislative power over matters that are already within the commonwealth Parliament's legislative authority. Again, that is to accommodate the precedence and priority of commonwealth legislation over state legislation, and to avoid the kinds of conflicts and complexities that might arise from them.

Clause 5(2) of the bill, as I have mentioned, specifically provides that a matter referred includes "the matter of amending, or otherwise affecting the operation of the Commonwealth Child Support laws." I place some emphasis on the words "amending, or otherwise affecting". The committee was concerned about "otherwise affecting". Amending is one thing; that is fairly straightforward. An amendment is a change to an existing statute made by an amending act—no problem there. It leaves open the question of what that amendment might be and, once this legislation is passed, if it becomes law, we will not have the opportunity to give consideration to that. But the question arose for us about what may be encompassed by the reference to "otherwise affecting", which seems to be a very broad referral of legislative authority, with boundaries being unfixed. We were informed that a law may affect the commonwealth child support laws if it does not expressly amend, but incidentally affects, their scope of operation. An example given by the Solicitor-General in his evidence on 11 February 2019 was that there might be some form of taxation consequence that relates to the payment of a contribution that might be affected by some changes to the Income Tax Assessment Act, but it may not directly amend the commonwealth child support laws, and so that might "otherwise affect". Paragraph 5.26 of the committee report reads —

> The Attorney General advised that 'Consideration has been given to the type and scope of a referral that the WA Parliament might consider'. He advised that the Government has sought to achieve several objectives:

> First, the avoidance of referring all WA legislative powers over unmarried persons and their children in family law proceedings to the Commonwealth Parliament.

I interject here to say that it is comforting to know that that was one of the matters that the government had given due consideration to, and it reinforces the narrow scope of the referral that I have already mentioned. The report continues —

> Second, the referral of a narrow and limited State legislative power.

After due consideration, the committee came to the conclusion that it was about as narrow as it could get, while achieving the objectives that the government has in mind. The report continues —

> Third, the referral of a State legislative power which is consistent with and contemplated by the provisions in the Commonwealth [Child Support laws].

Paragraph 5.27 of the report reads —

> Notwithstanding the narrowness of the type and scope of the proposed referral, the Attorney General recognised that:
>
> > The Commonwealth Parliament might attempt to use a reference of power to legislate for the "maintenance of ex-nuptial children" to deal with matters beyond child support.

This raises one of the issues that I had foreshadowed at the beginning. I have emphasised that each member here, no doubt appreciative of the responsibility they carry as legislators, exercising their authority for the purpose of making laws for the peace, order and good government of Western Australia—never mind other states, territories and the commonwealth—ensures that we are comfortable with the referral of power that carries with it the potential that the commonwealth might push the boundaries. One of the matters that exercised my mind and attracted my concern in my capacity as Attorney General in the previous government was whether there was a risk of that occurring. The term "maintenance", the current Attorney General tells us, is not exhaustively defined. It is used in the commonwealth child support laws, but it is not a clear and fixed definition and is not exhaustively defined. Again I quote the Attorney General from the Standing Committee on Uniform Legislation and Statutes Review report —

> In the context of family law more generally, "maintenance" has been treated as capable of including not only the making of regular payments of income but also, for example, the direct provision of lodging, food and clothing. A court order to maintain a child could conceivably be, for example, an order to provide a child with a home. The Commonwealth Parliament might endeavour to rely on a reference of power to legislate for "maintenance" to enact a law dealing with, for example, the custody of, or responsibility for, ex-nuptial children more broadly.

That might seem fine from the narrow perspective of looking after an exnuptial child, bearing in mind it would also be for any other children across Australia. If that obligation is far broader than we would ordinarily consider to be the subject of child support and an obligation on the part of a parent, adoptive or otherwise, to look after and ensure the maintenance and support of a child in the manner that we are normally accustomed to, but create obligations that are far more onerous and broad, it may be something that we as a Parliament would not consider to be in the best interests of our citizens. We would need to explain that that would be forfeited to the commonwealth by this referral power. Members need to understand that there is that risk.

The Solicitor-General's evidence to our committee confirmed that there is no clear legal authority for the meaning of maintenance. He stated that if there were a clear definition, we would be in a better position than we are now. So there is perhaps a slightly more than theoretical risk—whether it is an existential risk, I do not know—but it is not a fanciful risk. There is a lack of clear definition of the scope and bounds of what maintenance may mean. In the referral of this particular power, we need to be conscious of that and appreciate, on a risk analysis, whether it is a realistic problem. As outlined in the report, the Solicitor-General further expressed the view —

> a referral of power of this nature would be read in the context of a referral of power to the commonwealth, which is of a similar nature to those heads of power that are read in section 51 [of the Constitution]. So the principles of construction that would be adopted in respect of a reference of power would be similar to the way in which you would approach the construction of the heads of power set out in section 51. If you were to only refer power in respect of financial payments, then you would be referring power for a purpose—that purpose would have to be in respect of financial payments for the maintenance of exnuptial children.

On the issue of the lack of a definition of maintenance he said:

> there is no authority of which I am aware at constitutional level that goes into the question of how you would define maintenance. There are authorities, of course, in various contexts that do look at what maintenance might mean, but I do not think you would necessarily conclude that those authorities would govern how the High Court would go about looking at a reference of power, because, as I say, I think it comes in a particular constitutional framework.

However he also noted that in other contexts, such as wills and charitable trusts:

> maintenance is a term of wide import, and I would expect that the High Court would not adopt any narrow view of maintenance. Even if you were to refer it on the basis of financial payments in respect of maintenance, then I think a court would look at the substance of that and you would have, no doubt, some flexibility as to interpreting what financial payments might mean …

The report also states —

> The lack of a definition of 'maintenance' and the consequent possibility that the Commonwealth might attempt to use the reference to expand its legislative power beyond what is currently contemplated is therefore a risk for Western Australia.

I mentioned one of the witnesses who assisted our committee, Ilse Petersen, who is an adviser and solicitor at the State Solicitor's Office. She commented on this risk, saying —

> Previously, we have adopted every commonwealth amendment so certainly historically there has not been any cause for alarm. The commonwealth has not done things in this sphere that the state is uncomfortable with. To that extent, we can have some comfort going forward.

She confirmed that the government had been given advice on the risk. I make the comment, of course, that in the early stages of any legislation, the commonwealth may very well take a conservative approach to how it applies the powers referred to it; however, over time, there may be an element of arrogance, complacency or some cockiness that might creep into its judgement and it decides it will go further than has been done in the past and expand the scope of its powers and rely on such a referral to extend its legislative authority. I can see that Mr Acting President (Hon Dr Steve Thomas) is sceptical of that prospect—or perhaps not. I hope that that will never be the case, but there is always that risk. I have to say that over the last century since Federation, we have seen the commonwealth pushing its legislative boundaries quite considerably and engaging in attracting into its net authority and lawmaking power in a way that would never have been contemplated by those who drafted the Constitution and entrusted the commonwealth with the powers that they did on behalf of the colonies that federated as states of this nation. So there is a risk.

For completeness, I should comment on the Solicitor-General's comments in that regard. The report states that he noted —

> … that the purpose of the Bill is to facilitate the equal application of legislation in respect of the maintenance of children, whether they are children of a marriage or exnuptial children. In this respect he said:
>
> > So if the commonwealth were to play games, if you like, in terms of taking a referral of power and expanding it, it would be likely that it would be doing that in respect of children of a marriage as well as exnuptial children. What would occur is that there would then be the equivalence of children who are of a married couple and exnuptial children. We, in a substantive way, if we had not referred the power, would probably follow it anyway because we would not want to see the distinction between children of a marriage and exnuptial children. So then it becomes a question, and perhaps a legal question, about which Parliament enacts the mirror legislation, or the legislation that applies to exnuptial children, to achieve parity between the two. It would almost be unthinkable that the commonwealth would be legislating to act in a different way in relation to exnuptial children than children of a marriage. If it were to do that, then we could terminate the reference of course, and that would provide the safeguard.

That may be right. There is the potential that the commonwealth could do it anyway for children of a marriage under the powers it is vested with under the Constitution. If that were valid, even if we did not refer power, we would face the problem of whether we allow two regimes of child support to operate. Having said that, what we cannot stop the commonwealth doing is not a good reason for simply falling into line with it. If the commonwealth does something that is completely unacceptable to us and contrary to commonsense, we would at least put a brake on that by saying that we would not go along with that for exnuptial children in this state. If the commonwealth wants to mess it up for the rest of the country's citizens, that is on it. There are practical as well as legal difficulties with that. I accept that there are constitutional and comity difficulties with all of that. That is a factor that members will need to balance. The Solicitor-General observed that that had to be balanced against the purpose of the bill. He stated —

> … the whole purpose of this legislation is to ensure that children of exnuptial couples are treated identically to children of married couples, and that risk has itself been a big problem because there has to be catch-up legislation each and every time there has been an amendment.

The report also states —

> It is a balancing of two different risks: the risk of exnuptial children in Western Australia being treated differently to and less favourably than children of a marriage and exnuptial children in other Australian jurisdictions (as is currently the case … against the risk of the Commonwealth legislating in an undesirably expansive way in relation to child maintenance.

That is one of the balancing exercises that members will have to undertake. The Solicitor-General seemed to think that we would inevitably follow suit in any event. I do not think that is necessarily the case, but to get down to the essentials, the state entered into a scheme in 1990. To date, it has adopted all amendments to that scheme. It is well established and well entrenched in the Australian family law and child maintenance system. That scheme puts the state of Western Australia under considerable pressure to be consistent. The arguments for remaining part of that scheme, we suggest, are compelling. The interests of exnuptial children in Western Australia ought to be treated uniformly with not only the children of a marriage in other jurisdictions but also all exnuptial children in other jurisdictions. Finding 2 states —

> Subject to appropriate safeguards, the balance of convenience and the interests of citizens in having a seamless application of child support laws for the benefit of children and those providing support for them leans in favour of the proposed limited referral of legislative power to the Commonwealth.

However, ultimately, it will be a matter for members to decide whether they agree with that finding.

The Attorney General indicated that there were safeguards to protect WA's parliamentary sovereignty. Those are reflected in not only the terms of the referral but also clause 6, "Termination of adoption and reference". Firstly, the Western Australian Governor, with the approval of both the Legislative Assembly and the Legislative Council, will be able, by proclamation, to terminate the reference. The second safeguard is that the WA Parliament may legislate to repeal its referral legislation. Thirdly, the validity of commonwealth legislation can be challenged in court as being beyond the scope of the referral. Fourthly, the scope of the term "maintenance" is a matter of statutory interpretation and may be influenced by the context in which it is used; namely, the child support scheme, which, until now, has always related only to monetary payments. If it is sought to be expanded, given the accepted use of that term in the current scheme from its inception and to date, we could run the argument that it refers to monetary payments rather than payments and support in kind. Those were the several safeguards that the Attorney General posited as being available to restrict the terms of the referral and as a protection, potentially, against the commonwealth going further than we currently contemplate.

Leading on from that, there are the statutory preservations of WA's parliamentary sovereignty.

Hon Sue Ellery interjected.

Hon MICHAEL MISCHIN: Thank you for the encouragement, Leader of the House!

The most important is that set out in clause 6 of the bill. As I mentioned, clause 6 is headed "Termination of adoption and reference". By operation of clause 6(1) and (3), the Governor may at any time by proclamation fix a day as the day on which the adoption and the reference are to terminate. The Governor may, by proclamation, revoke such a proclamation. Clause 6(1) requires simultaneous termination of the adoption and referral rather than enabling separate terminations of the referral and adoption. This is because we are told that it is uncertain what would be the legal effect of maintaining the adoption if only the referral were to be terminated. However, these clauses delegate power from the Parliament to the Governor—that is, the executive—to terminate the adoption and reference by proclamation. As such, they are strictly Henry VIII clauses. Henry VIII clauses, as members will by now be familiar with, are clauses in an act of Parliament that enable the act to be amended by subordinate or delegated legislation or an instrument. The committee's position on Henry VIII clauses has been well documented in previous committee reports. I am sure that other committees, and probably all members by now who have served any time in this place, will be familiar with them and have looked at them askance. Henry VIII clauses are objectionable. They offend the principle of the separation of powers. They give insufficient regard to the institution of Parliament as the supreme legislature by eroding the sovereign function of Parliament to legislate. They are prima facie objectionable. They transfer the power to make or repeal laws from Parliament to the executive. The Governor, as the supreme executive head of state and supreme symbol of the executive, acts on the advice of ministers and without consideration by Parliament. The Governor will be able to terminate the application of commonwealth laws for the maintenance of exnuptial children in Western Australia. Generally, WA legislation does not provide for the disallowance of proclamations. However, certain safeguards and mechanisms have been incorporated into this bill to respect the sovereignty of Parliament and to acknowledge the risks and the prima facie objectionable nature of Henry VIII clauses and the ability of the Governor to, essentially, repeal the legislative scheme this Parliament will pass by its passage of the bill before us, which refers powers to the commonwealth.

Clause 6(7) of the bill proposes that a proclamation cannot be made unless a draft of the proclamation has first been approved by a resolution passed by both houses of the Parliament of the state. Although the Governor would

have the authority to terminate the operation of what is proposed, he—or she, if it is another lady in due course—cannot do so without the draft having first been approved by each house of Parliament.

Western Australia is the only jurisdiction to include a requirement for a proclamation terminating an adoption and reference to be first approved by both houses of Parliament. We were told that this mechanism was chosen to give respect to parliamentary sovereignty and to overcome any potential constitutional legal issues that might arise by simply allowing what has been the case in some of the other jurisdictions—that it simply be by proclamation of the Governor. It was a policy decision to give Parliament input into the termination process. The Solicitor-General told us that the referral of power has to be done by Parliament, and there is a referral of legislative power because of that. He understood that to maintain the sovereignty of Parliament, the policy decision was driven by the fact that if Parliament is referring it, it should be the body that takes it back, because we are dealing with legislative power and it is not appropriate for the executive to make that decision. For that reason and, hopefully, to reinforce the legal validity of any such termination, the scheme that would be adopted is one in which a draft proclamation has to be approved by both houses of Parliament, on the advice of a minister. The Governor would then issue the proclamation to terminate the referral and adoption. By necessary implication, that particular scheme can be initiated only by the government of the day; only the government can instruct—or advise, I suppose, is more accurate—the Governor to exercise a power. The procedure would involve the Governor making a draft proclamation in Executive Council, which would be published in the *Government Gazette*—all of this is contained in clause 6—and the draft proclamation would be tabled in both houses of Parliament. A member, most likely the responsible minister, would give notice of motion to approve the draft proclamation. The member would move the motion when the order of the day is called and the house would debate and vote on it. Of course, the government would have control over which orders of the day are dealt with at any particular time. If the motion were agreed to by that house, a message would be sent to the other house advising it of the resolution and requesting that it pass a similar resolution. The message would be made an order of the day in the other house and listed on the notice paper. The order of the day would be brought on by the leader of the government and a motion moved in similar terms. If the motion were agreed to, the two houses would have approved the draft proclamation. The Governor would make a proclamation in Executive Council and it would be published in the gazette and become effective.

There is no requirement that the process commence in one house or the other. The responsible minister may be a member of either house and the process would usually be initiated in the house in which that minister sits, but it is not required by the legislation. We were advised that there is probably limited value in specifying time limits in the procedure as the termination is initiated by government and would occur only with the support of the government and the Legislative Assembly, in which the government would usually have a majority of members. No times are prescribed in clause 6 for this process. If the government is keen to terminate the state's involvement in this scheme, it would have the initiative and the timing would be a matter for the government. The use of the procedure in clause 6(7) preserves WA Parliament's ability to terminate the reference of power to the commonwealth and therefore safeguards our parliamentary sovereignty. We were informed that identical provisions appear in three other pieces of legislation—namely, section 5 of the Terrorism Commonwealth Powers Act 2002; sections 7 and 9 of the Personal Property Securities (Commonwealth Laws) Act 2011; and section 8 of the Business Names (Commonwealth Powers) Act 2012. However, to date, those provisions have been unused.

Clause 6(2) provides that the termination day mentioned in the proclamation must be no earlier than the first day after the end of 12 months, beginning with the day on which the proclamation is published in the gazette. We queried why 12 months was required. If there was an urgency, for example, to disengage ourselves from the child support scheme, 12 months might be a considerable time to have to wait for that to happen using the process set out in the bill. We were informed that the reason for that is primarily because terminating an adoption and reference means that we would have to set up our own child support scheme, and 12 months would not be an unreasonable period for us to put that in place. That would require legislation and the passage of that legislation through both houses of this Parliament. It would have to be given effect and the government would need to set up the administering system to deal with it. Twelve months was considered a realistic period.

As the Solicitor-General pointed out, what is terminated is not simply the referral but also the adoption, because the adoption is terminated and all the things that happened previously need to be validated or dealt with through a legislative regime that is put in place by state Parliament. Our committee accepted that advice. On balance, if we use this process, it seems sensible that there be some time to effect it. I should add that it may very well be that 12 months is not required for something like that. One would hope, think and expect that if a government were to take the course of disengaging the state of Western Australia from such a scheme of complexity, administrative expense and refinement and set up its own scheme, it would have thought it through in advance of assisting the Governor with drafting a resolution that would ultimately be put before the Parliament. It would have done that work in the background. Be that as it may, we take the advice that it is not an unreasonable period and there is also notice to the commonwealth and everyone that there is now a proclamation that in 12 months at the very least, Western Australia would not be a part of the child support scheme for exnuptial children. I stress "exnuptial children"

because we would not be able to terminate our involvement in the commonwealth support scheme for children of a marriage because that is solely in the commonwealth's remit.

Hon Rick Mazza: If there was a more urgent reason to terminate the scheme, we couldn't repeal this act, could we?

Hon MICHAEL MISCHIN: I thank the member for the interjection. I was about to come to that. There is also the prospect of terminating the scheme by way of statute. We considered whether it would still be possible for Parliament to enact legislation to appeal the adoption and reference. We sought advice on that subject and the Solicitor-General, in a letter dated 19 February, which appears in appendix 2 of our report, advised us that Western Australian Parliament has repealed six statutes that referred matters to the commonwealth Parliament. That avenue is still available should it be thought necessary to adopt that course. There is some element of not so much doubt but simply inexperience with that course of action, because it has not occurred with any frequency. Six statutes have been repealed, as I mentioned, but those statutes specified matters referred during the Second World War and were all repealed in 1965, 20 years after the end of the war. They were all out of force at the time of their repeal. They were repealed for the purpose of simply removing them from the statute book. They were not active pieces of legislation with an active referral of powers still being exercised by the commonwealth that were being repealed by the state. They were effectively exhausted statutes. The Solicitor-General did mention that the six statutes were repealed by an absolute majority in both the Legislative Council and Assembly. The second reading speeches in both houses noted that the statutes included a requirement for an absolute majority to amend or appeal the statutes. That is different here. Consequently, as a matter of caution, an absolute majority was sought to repeal the act despite the act being out of force. There have been no instances of WA repealing legislation that referred matters to the commonwealth other than those. Yes, we would think that we could do that. The mechanism under the act is a fairly clear and specific one. There is the prospect we would have thought of also repealing it by way of specially crafted legislation. There is still, of course, the element of Western Australia having to put something in place for exnuptial children in the event that it did choose to divorce itself—no pun intended but one understood—from the commonwealth child support scheme. That option has not been used in respect of any active referrals, but we see no reason why it could not be done.

Our third finding was on the basis of the advice from the Solicitor-General. Notwithstanding that the processes involved Henry VIII clauses, it was preferable that any termination of the adoption and reference should be by way of proclamation, first approved by both houses of Parliament, as provided in clause 6(7) of the Child Support (Commonwealth Powers) Bill 2018. That option seemed to be the neatest, but to my mind there is no reason that it could not be done by way of appeal and enactment of substitute legislation as thought fit by Parliament.

Ultimately, both the Solicitor-General and the adviser from the State Solicitor's Office were satisfied, and satisfied us, that the adoption referral mechanism provided in the bill was the best method to achieve the aim of the bill, but also preserve parliamentary sovereignty. We found that the risk to the state's parliamentary sovereignty and its citizens is, on balance, acceptable, having regard to the safeguards that have been proposed in the Child Support (Commonwealth Powers) Bill 2018.

I will conclude by saying that—I think all members would agree—it is desirable to eliminate the delay in the application in WA of commonwealth laws relating to the maintenance of exnuptial children. The committee was conscious of its responsibility as an extension of this house to inform Parliament of the risks to its sovereignty and its lawmaking powers. Given the purpose of the bill and safeguards therein, the committee concluded that a proposed referral of lawmaking power at the expense of Western Australia's parliamentary sovereignty was, on balance, justified to enable the commonwealth child support laws to apply equally and in a timely fashion to all Western Australian children without the current difficulties that are being experienced. I say that particularly in light of the accelerated rate of amendment, adjustment and refinement of the commonwealth child support laws that will, I think, over time increasingly put us out of step with the current adoption process that we thought prudent and important back in 1990. This is not by any means a criticism of what has happened to date.

I speak here in my capacity as lead speaker for the opposition and as a member of this place. To my mind, it is preferable to take the conservative and cautious approach to these issues when they first come up—that is, entry and participation in untried and untested commonwealth schemes. Taking a conservative approach, as was done in 1975 with our Family Court Act in this state and as was done in the child support regime in 1990, is preferable. It allows us to see how the scheme runs and to ensure our ability to escape it if it proves undesirable, contrary to the interests of Western Australians, not to serve the purposes that we had hoped, or to be administered badly. That is very important.

This scheme has proved to be one of merit. I am sure that improvements will continue to be made in due course, but it has become anomalous for us at this point after all these years. It has been in excess of—what are we looking at?—29 years. I think it is now proper that we take a different approach to ensure that there is uniformity and efficiency in the administration of that scheme for the benefit of the exnuptial children of this state and those who are required to support them. If there is only one scheme in operation, it will ensure there is certainty and clarity about how it operates and its administration is more efficient.

On the basis of the report, I indicate the opposition's support for the bill. I also indicate that as Chair of the Standing Committee on Uniform Legislation and Statutes Review, following our analysis of the bill and from the point of view of the opposition, I commend the bill to the house and indicate our support for it. It is a worthy mechanism. On the best advice available, it not only preserves parliamentary sovereignty, but also will serve the interests of Western Australian citizens.

HON ALISON XAMON (North Metropolitan) [9.26 pm]: I rise as the lead speaker for the Greens and I indicate that we will support the Child Support (Commonwealth Powers) Bill 2018. I was quite pleased when I saw that this bill had been developed. I have called for this move in the last couple of times that we have adopted the various child support commonwealth laws. As has already been discussed, section 51 of the Australian Constitution sets out a long list of the matters about which the Australian Parliament has the power to make laws. Relevant to this bill, this includes the power to legislate on child support, but only for children who have been born within a legal marriage. The Australian Parliament has so legislated, passing the Child Support (Registration and Collection) Act and the Child Support (Assessment) Act. For children who are born outside a legally recognised marriage, children known as exnuptial children, in Western Australia, the Australian Parliament has the power to legislate only as long as the WA Parliament either refers that matter to it or passes its own law by adopting the commonwealth law after it has been passed. To date, the WA Parliament has chosen to go down the latter path and has been passing its own laws to adopt commonwealth child support laws so that they apply to exnuptial children in WA as well as children born of a marriage. As I have mentioned, I have been party to debating two lots of that type of legislation in this place to date.

As the commonwealth law has been amended repeatedly, WA has repeatedly had to legislate to adopt those laws. I note that WA has never not adopted a commonwealth amendment. But, unfortunately, this means that necessarily there is always a time lag between the commonwealth law changing and the WA Parliament getting the opportunity to pass the laws in order to adopt them. During those time lags, the child support laws are applicable to those WA children who are born within a legal marriage, whereas exnuptial children are effectively operating under different child support laws. That is a problem. It is a problem for families and I think it is also unfair for those children. Apart from treating some WA children differently from other children based solely on the marital status of their parents, it also creates particular complications for blended families who are trying to navigate the child support system, which is complicated enough as it is.

The other Australian states that have been faced with the same problem referred their child support powers for exnuptial children to the commonwealth years ago. New South Wales, Victoria and South Australia did it in 1986; Tasmania in 1987; and Queensland in 1990. It has taken us a long time to get to this point. I recognise that WA, for a lot of good reasons, as has been outlined by the previous speaker, likes to hold on jealously to its right to make its own laws, but this bill finally brings WA in line with what the other states have been doing for decades. I note that the bill is also supported by the Family Law Practitioners Association of Western Australia, which deals with people in this situation all the time.

This bill will adopt the commonwealth child support laws, as they stand, on the date of royal assent, which is when the whole act will come into operation. I note that the very helpful report by the Standing Committee on Uniform Legislation and Statutes Review, which was tabled on 12 March this year, identifies what new commonwealth laws will be adopted. From the point of adoption on, the bill refers power to the commonwealth to legislate on child support for exnuptial Western Australian children. The adoption and referral can, together but not separately, be terminated by proclamation by the WA Governor with the prior approval by resolution of both houses of the Western Australian Parliament. The requirement for parliamentary approval is unique to this state and safeguards parliamentary sovereignty. Termination in the other states is by executive proclamation without parliamentary approval. At paragraph 5.60, the committee report noted that three WA referring statues contain an identical requirement for parliamentary approval of termination. The date for termination in the proclamation cannot be any earlier than 12 months after publication of the proclamation in the *Government Gazette*. This is to make sure that WA has the time to establish any replacement child support regime for exnuptial children, including any necessary validation of child support–related acts done under the regime that is being terminated. That is a sensible provision. Any terminating proclamation can be revoked, and the process again is proclamation by the Governor, with prior approval by resolution of both houses of the WA Parliament.

The bill relates only to child support, which is termed as "maintenance" for exnuptial children. Unlike the other states, it does not also refer power over other family law matters relating to exnuptial children; WA will be retaining its authority in that regard. The committee report identifies that "maintenance" is not defined and so, in theory, the commonwealth might try to expand its legislative power—for example, to include provision of a home for a child—and thereby encroach on what is normally covered by a residence or custody order. I think it is unlikely that the meaning of "maintenance" in this bill would be interpreted as broad as that in order to cover that. In any case, the committee report goes on to note that even if the commonwealth did legislate in that way, this state could well adopt this change too, in the interest of treating exnuptial WA children the same as other children.

Although finding 1 of the uniform legislation committee report found that the bill derogates from parliamentary sovereignty through its potential to exclude parliamentary oversight, the report identified the safeguards for parliamentary sovereignty and outlined the termination process, which, as noted, necessitates parliamentary approval. It refers to Parliament's ability to repeal the referral legislation. This has happened before, although in each case the statutes were already out of force. The committee report notes that repealing a current law is a different matter and might create uncertainty about the validity of commonwealth laws already passed under the referral legislation. For that reason, appeal is less preferable than the termination process in the bill. That is finding 3. Another safeguard that the committee identified is challenging in court the validity of any commonwealth law that may be considered to be out of scope. The last safeguard the committee identified is the statutory interpretation of the term "maintenance" in this referring bill as meaning child support only, as already noted.

The Greens have quite easily formed the opinion that on balance, and given the desirability of commonwealth laws applying equally to exnuptial children in Western Australia in a timely way, we agree with the committee that this bill is justifiable and acceptable. It has been unfortunate that to date, even though WA has wanted to retain its own authority in this space, the net result has meant that exnuptial children have been subject to considerable lag. This is a smart move for an area that is rightfully placed within commonwealth jurisdiction as a whole. All children should be treated equally, regardless of the marital status of their parents. With those few notes, and noting that it is important that we try, where appropriate, to maintain the sovereignty of the Western Australian parliamentary process, I am happy to support this legislation.

HON SUE ELLERY (South Metropolitan — Leader of the House) [9.35 pm] — in reply: I thank both members for their contribution to the debate on the Child Support (Commonwealth Powers) Bill 2018. The importance of the committee's report cannot be underestimated. If members have not read the committee's report, I strongly urge them to do it because it sets out the Parliament's historical views to clauses that impinge on the sovereignty of the Parliament. It examines the detail of this particular bill, tests the proposition that was put by the government that in fact we have built into the bill measures that will mitigate any impingement on the sovereignty, and, in addition to that, there is a policy question that was enunciated by both members that goes to the discriminatory, if you like, treatment of children sometimes living in the same familial residence. It is a good report and it sets out all the relevant things to be tested.

As Hon Michael Mischin noted in his comments when he tabled the committee's report, the committee found that clause 4(1) of the bill has the potential to exclude parliamentary oversight and as a result derogates from Western Australia's parliamentary sovereignty. However, the committee concluded that given the purpose of the bill and the safeguards that have been identified and proposed to ameliorate the risk to the state's parliamentary sovereignty and lawmaking powers, those limitations on parliamentary sovereignty are acceptable on balance to enable the timely application of like laws to the maintenance of both children of a marriage and exnuptial children in Western Australia. That was the policy issue that Hon Alison Xamon just touched on as well.

Hon Michael Mischin asked me whether there have been any changes to commonwealth law since the committee last considered this bill. No, there have been no changes since February 19, and, of course, the federal government is in caretaker mode, so there are unlikely to be any changes until after the federal election.

I thank members for their consideration of this bill. Again, I thank the committee for the report. Those people who do not understand or are not familiar with the history of Henry VIII clauses, I recommend that they read the committee's report because it sets it out quite well. With those comments, I commend the bill to the house.

Question put and passed.

Bill read a second time.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and passed.