STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

FAMILY COURT AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2012

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 15 OCTOBER 2012

SESSION THREE

Members

Hon Adele Farina (Chair)
Hon Donna Faragher (Deputy Chair)
Hon Nick Goiran
Hon Robin Chapple

Hearing commenced at 2.40 pm

MONAGHAN, MR DAVID,
Magistrate/Principal Registrar, Family Court of Western Australia, sworn and examined:

McCOMISH, MS LESLEY
Manager, Legislation Reform, Courts and Tribunals Services, Department of the Attorney General, sworn and examined:

The CHAIRMAN: My name is at Hon Adele Farina, I am chair of the committee. To my far left is Hon Robin Chapple, who is also a member of the committee, and to my immediate right is Hon Nick Goiran, who is also a member of the committee. To my immediate left is our advisory officer Susan O'Brien, who you may have already had a discussion with.

I would like to welcome you today's hearing and thank you on behalf of the committee for taking the time to appear before the committee at very short notice. There are a few formalities I need to go through at the beginning and I ask for your forbearance with those. We need you to give either the oath or the affirmation and Pamela will assist.

[Witnesses took the oath or affirmation.]

The CHAIRMAN: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you may refer to during the hearing. Also, please be aware of the microphones, speak into them and do not cover them with papers. I remind you that the transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

I understand that Susan has provided you with an outline of the questions that the committee intends to ask today, I am just wondering whether you would like to make an opening statement before we begin.

Ms McComish: Yes, I thank the committee and staff very much for those questions, which arrived on Friday. I have prepared some written responses, which were settled by State Solicitor's Office counsel this morning. Unfortunately Mr Monaghan was unable to look them until he came out of court, which was at about 1.30 pm, and I think he will have some additions. I have printed out seven copies. Again, please forgive the typography. I have some documents to which the written responses refer, maybe not all.

The CHAIRMAN: Thank you very much. Lesley, did you want to add anything further?

Ms McComish: Not really, except that State Solicitor's counsel are standing by and are ready to assist with answers to further questions if you have any.

The CHAIRMAN: What I might do then is just go through the questions so we can get them formally on the record. I just indicate that our preference is that you do not read the answers that you have provided us with, but that we just have a dialogue, and Principal Registrar, feel free to jump in at any point you would like to make a contribution to any of the questions.

I turn first to clause 8. Please advise the basis for the statement in the explanatory memorandum to the bill that clause 8 does not incorporate the convention into domestic law.

Mr Monaghan: The position, I think, at law is fairly clear that courts are able to use conventions that Australia has ratified in terms of interpreting. I think putting it in the purposes and objects provision of the legislation does elevate it a bit, particularly bearing in mind the provisions of the state Interpretation Act, which specifically provides how you interpret purposes in legislation. As Lesley has said, I was not involved in drafting this, but I have had the opportunity to read it. I think that the law is very clear that you need to evidence a very strong intention to incorporate a treaty to become domestic law. In family law one of the examples of that is the child abduction regulations and the Hague Convention. What happened there was that a specific provision to make regulations in accordance with that treaty was put into the Family Law Act and then they became self-standing regulations that were based on that. I support the view that has been put in the letter that has been tendered that including reference to a convention in an objects provision does not incorporate it into domestic law as a convention or as a treaty.

The CHAIRMAN: What is the effect of referring to it in the objects in terms of the day-to-day operations of the courts?

Mr Monaghan: That is a good question. I think whenever the courts would be faced with an interpretation issue, under the Interpretation Act we would have to prefer or we would have to use an interpretation that was consistent with the convention and not inconsistent with the convention. In day-to-day cases, is that going to make a significant difference? No, it is not. Part of the reason is that a lot of the tenets of the convention are already enshrined in the Family Law Act and the Family Court Act in any event. So for instance, the convention says that the best interests of children should be a primary consideration. In our legislation, as you know, it is the paramount consideration. There is actually not a lot—in fact, I am not aware of anything—that is inconsistent in our domestic family law legislation with the convention itself.

The CHAIRMAN: By adding these words into the bill, it does not actually make any difference.

Mr Monaghan: I think what it does is it elevates a bit, as I indicated before, instead of just relying on the common law to be able to say when interpreting that because it is now in a purpose or objects provision that the courts must do that. But is it going to make any significant difference to the substantive law? The answer, I think, is probably not.

The CHAIRMAN: I noticed when I read the convention that a number of the articles in the convention are actually very general in nature and actually require the member states, or the states that are participating and have signed the convention, to actually flesh those out in relation to their own domestic law. So where you have an object provision that requires you to have regard to the convention and you are looking at those articles that actually require the state to have fleshed those out and develop them into law, and it has not, what further guidance is provided by referring to the convention?

[2.50 pm]

Mr Monaghan: Normally what you would do when interpreting it is you would have put before you two or more differing interpretations, so it is not as though you are at large. You would choose then the one that promoted the particular purpose of the convention. So I do not think that you are sort of looking at it in terms of saying, "All right; well, I'm starting afresh in terms of interpreting this particular provision"; you are normally making a determination as to which to prefer out of two or three potential interpretations.

Hon NICK GOIRAN: Principal Registrar, is it the case, then, that if Parliament were inclined to pass the bill in its current form, it would be saying to the judiciary, "Where there are circumstances of ambiguity in interpretation, we oblige you to give effect to this convention"?

Mr Monaghan: I do not think it would oblige them to give effect to the convention, no; I think it would oblige that if there were two different interpretations, it would be the one that was consistent with it but not give effect to the actual convention. So, if you had two different ones, you would have to use the one that was not inconsistent but not give effect to the convention.

The CHAIRMAN: Also, continuing to look at clause 8, clause 8 proposes that the convention "done at New York on 20 November 1989" be given effect, not the convention as ratified or adopted by Australia. It seems to me to be an odd thing to do.

Mr Monaghan: I agree.

The CHAIRMAN: You would either have regard to the convention as it was adopted by Australia or as it is in effect at the date that the bill passes the Parliament and is proclaimed. It just seems very odd wording. What do you read into that or what do you understand by that?

Mr Monaghan: When I first saw that I had not given consideration to it. I think it is odd. It surely could not have been the intention of Parliament to do anything other than as ratified by Australia; and, as you are well aware, there are a couple of reservations, particularly in respect of the children in prison with their parents et cetera. I looked as far as I could, and I must confess to having limited time over the weekend to do this, but I thought, "Is there some sort of tenet of statutory construction that actually says, 'Oh, no, that really means as ratified by Australia'?", but I could not find one.

The CHAIRMAN: Would it be more helpful if the committee were to recommend an amendment to that to make it clear that the judiciary should have regard to the convention as adopted by Australia or as —

Hon NICK GOIRAN: Ratified.

The CHAIRMAN: Yes, sorry—as ratified by Australia or is in effect at the date of the proclamation of the bill?

Mr Monaghan: Yes, I think so.

Ms McComish: From inquiries this morning it seems that the parliamentary counsel in the commonwealth have been advised by the Office of International Law that that is the appropriate way to express it. I mean, when the matter came before the Senate committee, they agreed with the submission of the Australian law reform council that it was a very inelegant way of expressing it, to say the least.

Hon NICK GOIRAN: Sorry, that it was elegant or not —

Ms McComish: Inelegant.

Hon NICK GOIRAN: Inelegant, yes.

Ms McComish: But, yes, it is a problem.

The CHAIRMAN: Sorry; who gave advice that these were the appropriate form of words? I am sorry, I missed —

Ms McComish: Parliamentary counsel—WA parliamentary counsel followed the lead of the commonwealth parliamentary counsel, and that was from where they derived the instruction, apparently.

The CHAIRMAN: From the commonwealth parliamentary counsel?

Ms McComish: Yes.

The CHAIRMAN: I thought you mentioned that the commonwealth parliamentary counsel derived it from some international —

Ms McComish: I am sorry; yes, from the Office of International Law.

The CHAIRMAN: I would be interested to know whether the Office of International Law, when they were asked that question, it was actually brought to their attention that Australia ratified the convention with some reservations, because it just seems odd to me that that would be completely overlooked. I am wondering whether it would be possible to take that as question on notice number one, and perhaps you could pursue that just to see whether that advice was given with the full knowledge that Australia had not ratified the convention in total; that there were some reservations that were stipulated by Australia at the time, because, reading the plain words as they will appear in the legislation would suggest that Australia expressed no reservations to that convention and we have adopted it as it was done in New York on 20 November, which would be totally inconsistent with the facts of the matter.

Ms McComish: As a matter of practice, the reservation in respect to article 37 is about not, as a matter of policy, disagreeing with it. Australia did not disagree with it; we just cannot provide that on some occasions when children are taken into custody in remote or regional areas, and it can be far preferable for them to remain there where they are in touch with their family rather than be sent down here.

The CHAIRMAN: I accept that. However, I do also understand that our judiciary are very time constrained and they do amazing work with very limited resources, and when they are having to look to legislation for guidance in forming their decisions, they will look to this piece of legislation which says that they are to have regard to the convention done in New York on 20 November 1989. Now, without further words, they would not be prompted to check whether Australia ratified the full convention or ratified it with some reservation, and surely that would be a concern.

Ms McComish: Most certainly; but the Family Court never actually imprisons children, does it?

Mr Monaghan: No, no. However, I stand by my earlier evidence. I agree; I think it would make it much easier for the judicial officers if it said "as ratified by Australia" whenever.

The CHAIRMAN: Okay; thank you. I am just wondering —

Hon NICK GOIRAN: Sorry; can I just ask then, Principal Registrar: just going back to the earlier discussion around whether this clause, clause 8 in the bill, really adds anything substantively, I take it that when you say that it could be helpful to amend it, that is in the event that it was included at first instance —

Mr Monaghan: That is right.

Hon NICK GOIRAN: — which may not in itself be necessary.

Mr Monaghan: Well, as I say, I think it does elevate it a bit. It elevates it from the common law at the present time to put it in the objects provision. I think it is section 16 of the Interpretation Act that actually talks about objects and purposes of acts, and so it would require us to do that as opposed to it being a tool you may use—an extrinsic tool you may use if there is a question of interpretation. But the issue that has been raised previously, "What effect is it going to have?"—it will be in very few cases that it will have effect, but I suppose the cases, which would be an issue that would be raised before your standing committee all the time—there is that issue about, "Well, should it have a different meaning for children of a marriage as opposed to exnuptial children?" But you deal with that issue all of the time.

The CHAIRMAN: Before I move off clause 8, can I just check that other members of the committee do not have any further questions in relation to clause 8?

Hon NICK GOIRAN: Perhaps if I could just ask, in terms of an amendment to clause 8, whether it is necessary to not only indicate that it is as ratified by Australia but whether it is ratified by Australia from time to time, or whether it needs to be a specific date.

[3.00 pm]

Mr Monaghan: I do not know the answer to that because there might be concerns about perhaps putting something in that you do not know what Australia is going to ratify in the future. I am not aware of any amendments to the convention itself that are on the table, but there are what they have called "optional protocols" that do not automatically bind a state. I am not an expert on this, but I think what they do if they are amending is they have what are called optional protocols that you can ratify and adopt, but they do not automatically bind a state which has ratified the convention. I am aware that there is at the moment, I think, a third optional protocol that Australia has ratified, but I do not know whether that then forms part of the convention; I just do not know.

The CHAIRMAN: It is my understanding that the optional protocols will not form part of the convention.

Mr Monaghan: Right.

Hon NICK GOIRAN: But any uncertainty in that regard is unhelpful.

Mr Monaghan: It is.

Hon NICK GOIRAN: The plain purpose of including this clause is to provide clarity and certainty, not uncertainty. If a date, rather than the option of amending it to state as ratified at the date of proclamation —

Mr Monaghan: At the date of commencement of the amendments, you mean?

Hon NICK GOIRAN: Yes. What would be the historical date that one could use to specify that Australia ratified it at a particular time?

Mr Monaghan: As I understand, it was ratified by the Australian government on 17 December 1990 and came into force on 16 January 1991.

Hon NICK GOIRAN: So if those dates were referred to in an amendment, you would see no disadvantage in that regard?

Mr Monaghan: I am not aware of any changes except those optional protocols that we have discussed to that convention and Australia's ratification since then.

The CHAIRMAN: Just turning to clause 39, the explanatory memorandum states in respect of item 13 of the schedule of the bill that the purpose of this amendment is to allow the rules to be adjusted to take account of any unexpected transitional application and savings matters, or to take other action such as to carve out proceedings that are half heard or where judgement is reserved if that is considered appropriate. The committee is interested to know: how will the proviso that the retrospective power not be exercised in a manner prejudicial to the rights of a person as they exist prior to the regulations, or to impose additional liabilities in respect of things done prior to the regulations being published, operate in practice where the proceedings are being carved out and where judgement is reserved?

Mr Monaghan: Can I just go back one step? I managed to put this into the letter that has been handed to the committee. When the commonwealth family violence amendments were first put up, the relevant item was item 45, and it was proposed that all the substantive amendments to the Family Law Act about family violence, so that the expanded definition would give greater weight to protection over the meaningful relationship, would apply to proceedings whether commenced before, at or after the start of this. It did not matter whether the case was still on foot; your law would change midstream. So what would happen then is that if the court had heard a case or part heard a case before, and had reserved decision, submissions and evidence would be led on the basis

of different laws, and so that was seen as necessary for there to be this provision. Very, very late in the stage—I am sorry that I did not get the opportunity of being able to look at it for you, and it was, from memory, only days before it was passed—the Senate made further amendments, and one of those amendments was to say, "No, no: they will only commence the cases that start at or after the commencement". So there was no need to carve out proceedings or make regulations about it because they changed it; it was not going to have retrospective effect, it was only going to have prospective effect. That is why it has not been used, and because the proposal in this legislation, as you would be aware, is exactly the same—that the new law start only in respect of cases starting after that time—my view is that it is actually unnecessary. The reason that it was in there was taken away by very, very late amendments. The next question will be: why did they still keep it there? I cannot answer that question; I do not know.

The CHAIRMAN: I think those of us who are in the Parliament can answer that question, and that is that it being an amendment that was dealt with very late in the piece, consequential amendments were overlooked, as occurs in the heat of debate at the time. Is your evidence to the committee that clause 39 is not required?

Mr Monaghan: Yes, it is. I mean, you can keep it in if you want, but for the reasons I have just set out I do not think it is necessary and I think, had it been thought of, the commonwealth probably would also have thought, "We don't need it now," because as you have said, carving proceedings up just does not have to happen.

Hon NICK GOIRAN: Do I understand, then, that if the Western Australian Parliament were to leave clause 39 as it is, it would have the ironic effect of being inconsistent with the legislation passed at the commonwealth level?

Mr Monaghan: If you were not to put it in, yes, it would be different because it is in, in the commonwealth, but it is not being utilised. There have been no regulations made.

The CHAIRMAN: Lesley, did you want to make any further comment from the department's perspective about the need for clause 39?

Ms McComish: No, Mr Monaghan is the expert.

The CHAIRMAN: You are in furious agreement with the Principal Registrar? Okay!

That concludes the formal questions that the committee wanted to explore with you today. Now that the Principal Registrar is before us I would be interested to hear about, from your viewpoint, the difficulties that are raised by having the commonwealth deal with nuptial children and the state continuing to legislate for ex-nuptial children, and the sorts of delays that are often encountered by bringing those changes into line with each other, and what practical impact that has.

Mr Monaghan: There are obviously a number of areas where there are differences with ex-nuptial and nuptial children. Child support, I think, is a major issue because it is primarily administrative now and there is very little that the court does. The court makes departure orders and also hears appeals from the SSAT, but a lot of the court's jurisdiction has been taken away since the inception of the child support legislation in 1988, 1989 and 1990. A lot of the amendments to the child support legislation are consequential amendments upon new tax laws, for instance, or new social security laws or, as we are seeing at the present time, just changes in the administration of the Australian Bureau of Statistics, when those things happen. For instance, in the ABS issue, the current law is that the assessments are issued on the basis of ABS stats that, as I understand it, are given quarterly. Now they have made a change to say that they are only going to give them annually. If WA cannot organise that, we are going to be in real trouble and they are not going to know how to do that—to generate and issue child support assessments on figures that are just not being published anymore. I am not shirking, but they are very technical amendments in child support, as I say, and have the potential to cause the child support agencies some really great concerns about how they are going to issue child support assessments for ex-nuptial children in WA

where there is a lag between our Adoption Act being updated and here. Insofar as the other areas are concerned, but more particularly what we are talking about now, it is almost trite to say—I do not mean to be trite—that to the extent that this legislation makes a difference, it has not been able to make a difference to ex-nuptial children for the period since it came into effect on 7 June.

[3.10 pm]

To the extent that it is good policy, which is clearly your decision, exnuptial children in WA have not been able to benefit from it. If you asked me, "Did the court need specifically to be told in the legislation that if you are balancing up protection from harm and safety of a child against a meaningful relationship", you would have hoped that most judicial officers would actually give that preference and you would say okay, but to have it there is really important. It is really important as well for lawyers, advisers, consultants and the public in particular to know that that is the law—not just in how it is administered, but that it is the law and that is how highly it is rated as a matter of policy. To the extent that the policy is good, it is prejudicial because we are not getting the benefit of it. I understand there is a whole range of other political issues in respect of referral, but child support is, I think, one that is pressing for consideration.

The CHAIRMAN: This is a bit outside of the terms of reference of the committee, but an issue that often comes up before the committee is the division of authority between the commonwealth and the states, so I will grab this opportunity to ask you questions while you are here. Has there been any discussion about how we can improve the situation to ensure that the state is able to respond more quickly to bring any changes at the commonwealth level for nuptial children into effect for ex-nuptial children at the state level more judiciously than currently?

Mr Monaghan: You would be surprised to learn that things have improved over the last five, six or however many years. It would sometimes be a complete fluke that either myself or somebody from the department would come across the fact that the commonwealth is looking at amending their legislation. There does not appear to be any direct link between either the Australian government and state governments or Australian government departmental officers and state departmental officers. There does not appear to be, as part of just normal process, the commonwealth saying to us, "Hey, we're thinking about doing this", so that we can be on board right from the get-go. We often do not find out about the legislation until it is done or a bill is presented to Parliament. That has gotten better but it is really personality based in a sense; it is not systemic or part of the system. I think there could certainly be some improvement.

The CHAIRMAN: On behalf of the committee, I thank you very much for the time you have taken at very short notice to make yourself available to the committee and for your assistance to the committee for this inquiry. Just to confirm, there was one question taken on notice and Susan will be in contact with Lesley at the end of the day to confirm the one question that was taken on notice and the due date for that response.

Hearing concluded at 3.13 pm