THIRTY-NINTH PARLIAMENT

REPORT 88

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

SUCCESSION TO THE CROWN BILL 2014

Presented by Hon Kate Doust MLC (Chair)

February 2015

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

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

"**6. Uniform Legislation and Statutes Review Committee**

6.1 A *Uniform Legislation and Statutes Review Committee* is established.

6.2 The Committee consists of 4 Members.

6.3 The functions of the Committee are –

(a) to consider and report on Bills referred under Standing Order 126;

(b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;

(c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;

(d) to review the form and content of the statute book; and

(e) to consider and report on any matter referred by the Council.

6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia."

Members as at the time of this inquiry:

Hon Kate Doust MLC (Chair)
Hon Brian Ellis MLC (Deputy Chair)
Hon Mark Lewis MLC
Hon Amber-Jade Sanderson MLC

Staff as at the time of this inquiry:

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IN RELATION TO THE

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EXECUTIVE SUMMARY

1 The Succession to the Crown Bill 2014 (**Bill**) proposes to implement, as part of Western Australian law, three reforms to the rules of royal succession introduced by the *Succession to the Crown Act 2013* (UK).

2 It also proposes to request that the Parliament of the Commonwealth, pursuant to section 51 (xxxviii) of the *Commonwealth Constitution*, legislate to ensure these reforms become part of Australian law.

3 The three reforms are as follows:

- Removal of the rule of male preference over females in the line of succession;
- Removal of the rule disqualifying a person from succeeding to the Crown due to their marriage to a Roman Catholic; and
- Limiting the rule requiring the consent of the Monarch for marriage to the first six people in the line of succession.

4 The Committee has inquired into the Bill and considered issues of parliamentary sovereignty and law-making powers.

5 The Committee has also recommended amendments to the Bill to implement the recommendations of the Western Australian Law Reform Commission relating to the application of United Kingdom statutes concerning the demise of the Crown that may still apply to Western Australia.

Recommendation 1: The Committee recommends that the Succession to the Crown Bill 2014 be amended to implement the recommendations of the Law Reform Commission in its report *Project No 75 on United Kingdom Statutes in Force in Western Australia,* October 1994 relating to the demise of the Crown. This may be effected by inserting a new Part 5 in the following manner:

Part 5 — Demise of the Crown

Division 1 — Constitution Act 1889 amended

16. Act amended
This Division amends the *Constitution Act 1889*.

17. Section 75A inserted
After section 74 insert:

75A. Demise of the Crown

(1) The demise of the Crown does not affect the continuation of the Parliament of Western Australia and does not give rise to or necessitate the prorogation or dissolution of either House.

(2) The demise of the Crown does not affect the existence and use of the Public Seal of the State.

(3) The demise of the Crown does not discontinue or affect —

(a) any civil, criminal or other proceeding in any court or tribunal; or

(b) any civil, criminal or other proceeding to which the Crown is a party or which has been commenced or carried on in the name of or with the authority of the Crown.

Division 2 — Other provisions

18. Certain enactments passed before 1 June 1829 repealed

So far as any Imperial Act enacted before 1 June 1829 —

(a) is part of the law of this State; and

(b) purports to deal with or relate to the effect or consequences of the demise of the Crown,

it is repealed.

Recommendation 2: The Committee recommends that, subject the implementation of Recommendation 1 above, the *Succession to the Crown Bill 2014* be passed.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

SUCCESSION TO THE CROWN BILL 2014

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1 REFERENCE

1.1 On 18 November 2014 the Legislative Council referred the Succession to the Crown Bill 2014 (**Bill**) to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) for inquiry and report by 17 February 2015.

2 INQUIRY PROCEDURE

2.1 The Committee called for submissions by contacting six stakeholders directly and also by way of an advertisement in *The West Australian* on Saturday 29 November 2014.

2.2 Submissions closed on Friday 19 December 2014, with one submission received from a Mr Geoff Taylor, a private citizen, which is available on the Committee's website.

2.3 Details of stakeholders invited to make a submission, submissions received and the hearing of witnesses, are contained in **Appendix 1**. The Committee held a hearing with the Department of Premier and Cabinet on 1 December 2014 to receive a briefing on the Bill, attended by Mr David Smith, Deputy Director General, Ms Lyn Genoni, Executive Director, Economic and Deregulation and Ms Lucy Halligan, Principal Policy Officer. A copy of the transcript of the hearing is available on the Committee's website.

2.4 The Committee wishes to thank all submitters and witnesses who made themselves available.

3 UNIFORM LEGISLATION

3.1 The Leader of the House stated in the Second Reading Speech:

> *Pursuant to standing order 126(1), I advise that the bill is a uniform legislation bill. It is a bill that ratifies or gives effect to an intergovernmental or multilateral agreement to which the government of the state is the party. The bill is a request by this state Parliament for the commonwealth government to legislate under section 51(xxxviii) of the commonwealth Constitution to ensure the United Kingdom's changes to the rules of royal succession become part of Australian law and to reflect those changes to the extent they are part*

> *of state law. The bill does not involve a transfer of power from the state to the commonwealth.*[1]

3.2 While the intergovernmental agreement underpinning the Bill referred to in the Second Reading Speech is not of the kind often encountered by the Committee (such as a written agreement signed by all parties), the Bill constitutes uniform legislation by virtue of the agreement reached at the Council of Australian Governments (**COAG**) meetings referred to below in section 6.[2]

4 SUPPORTING DOCUMENTS

4.1 Following the introduction of the Bill into the Legislative Council, the Committee received from the Hon Peter Collier MLC a letter outlining constitutional issues relevant to the Bill as well as attaching the following documentation pursuant to Ministerial Office Memorandum 2007/01:

- "Agreement in Principle among the Realms";
- "COAG Communiqué 25 July 2012";
- "COAG Communiqué 7 December 2012"; and
- Explanatory Memorandum to the Bill.[3]

4.2 The Committee was also provided with a copy of the Bill and the Second Reading Speech.

5 BACKGROUND TO THE BILL

Existing rules for Crown succession

5.1 The rules for succession to the British Crown and, hence, the Crown in the 16 Commonwealth Realms which maintain the British Crown as their Head of State, are currently dealt with under the common law and the following United Kingdom legislation:

5.1.1 The *Act of Settlement 1701*;

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1 Hon Peter Collier MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 18 November 2014, p4.

2 See the discussion on the issue of what constitutes an intergovernmental agreement in Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 63, *Information Report: Scrutiny of Uniform Legislation*, 30 June 2011, pp8-12. See also *When a Nod and a Wink Amounts to an Intergovernmental Agreement: Issues faced by the Legislative Council of Western Australia in the identification and scrutiny of uniform legisl*ation, a paper presented by Hon Barry House MLC, President of the Legislative Council, Parliament of Western Australia, Darwin, July 2010, p12.

3 Letter from Hon Peter Collier MLC, Leader of the House, 21 November 2014.

5.1.2 The *Bill of Rights 1689*; and

5.1.3 The *Royal Marriages Act 1772*.

Primogeniture

5.2 Under the common law rule of primogeniture, succession to the Crown is passed first to the Monarch's legitimate sons and subsequently to daughters, both in birth order. This is reflected in the *Act of Settlement 1701*, which provides that the Crown "*be remain and continue*" "*with the Heirs of Her Body being Protestants*" because "*Heirs of Her Body*" has been interpreted consistently with this common law rule.[4]

Disqualification of Roman Catholics

5.3 The disqualification of those from succeeding or holding the Crown who are Roman Catholic or marry a Roman Catholic, in addition to the *Act of Settlement 1701*, is also contained in section 1 of the *Bill of Rights 1689*.

Consent to marriage

5.4 The *Royal Marriages Act 1772* prohibits a descendant of King George II from entering a valid marriage without the consent of the Sovereign.

Changes to Crown succession

5.5 At the Commonwealth Heads of Government Meeting (**CHOGM**) in October 2011 in Perth, leaders of the 16 Commonwealth Realms (of which the Queen is Head of State) agreed to the following two reforms to the rules of Royal succession:

- Removal of the rule of male preference over females in the line of succession; and
- Removal of the rule disqualifying a person from succeeding to the Crown due to their marriage to a Roman Catholic.[5]

5.6 Australia's support for these changes was confirmed at a COAG meeting on 25 July 2012.[6]

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4 See Farnan, Maria, '*Changing the law relating to Royal Succession: Paper delivered at Australasian Drafting Conference Perth 2014*', p3. Further historical background information on the rules of succession can be found in a research paper produced by the UK House of Commons Library at *Research Paper 12/81 on the* Succession to the Crown Bill 2012-13 *(UK)*, 19 December 2012.

5 Succession to the Crown Bill 2014, *Explanatory Memorandum*, p1; Hon Peter Collier MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 November 2014, p4.

6 Council of Australian Governments Meeting – Communiqué, Canberra, 25 July 2012, p5 (accessible at http://www.coag.gov.au/node/431).

5.7 A further reform was subsequently proposed by the United Kingdom Government to limit the rule requiring the consent of the Monarch for marriage to the first six people in the line of succession and provided for in the *Succession to the Crown Act 2013* (UK).

5.8 Australia's support for this further change was confirmed at a COAG meeting on 7 December 2012.[7]

5.9 Implementation of the changes was agreed at a COAG meeting on 19 April 2013 as follows:

> ***Royal Succession***
>
> *COAG agreed to a hybrid model to implement the previously agreed changes to the rules of Royal succession in Australia. Under the hybrid model, States may choose to enact State legislation dealing with the rules of Royal succession. States have agreed that they will request the Commonwealth under s.51(38) of the Constitution to enact legislation, and that any State legislation will be consistent with their requests to the Commonwealth under s.51(38).*[8]

5.10 Section 51(xxxviii) of the *Commonwealth Constitution* provides as follows:

> ***Legislative powers of the Parliament***
>
> *(xxxviii) the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.*

5.11 The Committee understands Western Australia is the only jurisdiction in the 16 Commonwealth Realms that has yet to respond to the changes proposed by the *Succession to the Crown Act 2013* (UK).

The requirement for legislation

5.12 With the passing by the Commonwealth Parliament of the *Statute of Westminster Adoption Act 1942*, the ability of the United Kingdom to legislate for Australia was removed other than by the request and consent of the Commonwealth Government. However, section 9 of *Statute of Westminster 1931* retained the ability of the United

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7 Council of Australian Governments Meeting – Communiqué, Canberra, 7 December 2012, p4 (accessible at: http://www.coag.gov.au/node/475).

8 Council of Australian Governments Meeting – Communiqué, Canberra, 19 April 2013, p4 (accessible at: http://www.coag.gov.au/node/498).

Kingdom to legislate for the States and the Australian Capital Territory (pursuant to the *Colonial Laws Validity Act 1865*).

5.13 The passing of the *Australia Acts* in 1986 by the parliaments of the United Kingdom and the Commonwealth removed any ability for the United Kingdom to legislate for any jurisdiction in Australia and enabled all Australian jurisdictions to repeal or amend any United Kingdom legislation applying to that jurisdiction.[9]

5.14 Accordingly, given the effect of the *Australia Acts*, the indivisibility of the Crown[10] and the role the Crown plays in the constitutional framework in the Commonwealth and the States, for the *Succession to the Crown Act 2013* (UK) to apply in Australia, uniform legislation is required to be enacted by the Commonwealth and the States.

6 SUMMARY OF THE BILL

6.1 The Bill proposes a hybrid model of the type described in paragraph 5.9 above by not only providing for a request pursuant to section 51 (xxxviii) of the *Commonwealth Constitution* but also enacting complementary legislation to deal with the rules of succession as an exercise of State legislative power.[11] The Second Reading Speech states:

> *The Crown plays a key role in the constitutional framework of this State, and Part 3 of the Bill reinforces this State's direct relationship with the Crown. Queensland has implemented the hybrid model. New South Wales, Victoria, Tasmania and South Australia have implemented the pure request model*.[12]

6.2 The Preamble to the Bill records the agreement of the Realms and the further reform set out in paragraph 5.7 above as well as the hybrid model adopted by the Bill.

6.3 Part 1 of the Bill contains preliminary clauses, including:

- a clause providing for the commencement of the Bill at different times;[13] and

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9 Sections 1 and 3(2), *Australia Act 1986* (Commonwealth); sections 1 and 3(2), *Australia Act 1986* (UK).

10 The doctrine of the indivisibility of the Crown was identified as an important principle of constitutional law in Australia in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 128, where Knox CJ, Isaacs, Rich and Starke JJ stated:

> *Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown.*

11 Hon Peter Collier MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 November 2014, p4.

12 Ibid. The hybrid model has been adopted by Queensland and is reflected in the *Succession to the Crown Act 2013* (Queensland), which is in similar terms to the Bill.

13 Succession to the Crown Bill 2014, *Explanatory Memorandum*, p2.

- an objects clause, which provides for the changes outlined above to be consistent across Australia and in the United Kingdom to ensure the Sovereign of Australia and the United Kingdom is the same person.

6.4 Part 2 contains the request to the Commonwealth pursuant to section 51 (xxxviii) of the *Commonwealth Constitution*. It requests the Commonwealth pass legislation in the terms or substantially in the terms, as set out in Schedule 1 to the Bill.[14]

6.5 Part 3 gives effect to the three reforms to the rules of royal succession set out above, as follows:

- Clause 7 provides that for persons born after 28 October 2011 (the date of the CHOGM meeting on which the reform proposals were agreed), succession to the Crown will be determined by order of birth, not gender.

- Clause 8 provides that a person will no longer be disqualified from succeeding to the Crown as a result of them marrying someone of the Roman Catholic faith. This applies to any marriages occurring before the commencement of this clause if the relevant person is still alive.[15]

- Clause 9 applies section 3(3) of the *Succession to the Crown Act 2013* (UK). This disqualifies a person and their descendants from succeeding to the Crown if they have not obtained the consent of the Sovereign before marrying if they are one of the first six persons in the line of succession.

- Clause 10 complements clause 8 by making appropriate amendments to the *Act of Settlement 1701* and the *Bill of Rights 1689*.[16] This clause is retrospective to the same extent as clause 8.

- Clause 11 provides for the repeal of the *Royal Marriages Act 1772* (UK), which complements clause 9, as this Act voids the marriage of any descendant of King George II who fails to obtain the consent of the Sovereign to the marriage before the marriage.

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14 See Hon Colin Barnett MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 November 2014, p7986, where the following reason for the appearance of the word "*substantially*" was given by the Premier:

> ***Mr C.J. BARNETT****: The basic reason is the differences in the drafting format of commonwealth legislation versus state legislation. Words will be difficult because it happens to be a commonwealth bill; but the intent, the content, is the same.*

15 Note this does not remove the disqualification from succeeding to the Crown if the person is a Roman Catholic pursuant to the *Bill of Rights 1689*.

16 This clause makes reference to a "*papist*", which is a term used at the time of the enactment of the *Act of Settlement 1701* and the *Bill of Rights 1689* to refer to a Roman Catholic.

- Clause 12 provides, subject to four conditions, for the retrospective validation of marriages that were void under the *Royal Marriages Act 1772* (UK) for lack of consent obtained from the Sovereign. The four conditions are as follows:

  i) Neither party to the marriage was one of the six persons next in the line of succession to the Crown at the time of the marriage;

  ii) No consent was sought under section 1 of that Act, or notice given under section 2 of that Act, in respect of the marriage;

  iii) In all the circumstances it was reasonable for the person concerned not to have been aware at the time of the marriage that the Act applied to it;

  iv) No person acted, before the commencement of this subsection, on the basis that the marriage was void.

  While this clause validates previously void marriages, its purpose is not to allow a party to regain their place in the line of succession.

- Clause 13 ensures the changes made by the Bill apply to relevant parts of those Acts governing the union between England, Scotland and Ireland which address royal succession, namely:

  a) Article II of the *Union with Scotland Act 1706* of England;

  b) Article II of the *Union with England Act 1707* of Scotland;

  c) Article Second of the *Union with Ireland Act 1800* of Great Britain;

  d) Article Second of the *Act of Union (Ireland) 1800* of Ireland.

6.6 Part 4, clause 14 provides for all references to the *Bill of Rights* or the *Act of Settlement* in any Western Australian law relating to succession to or possession of the Crown to be read as including references to the Bill and the requested Commonwealth Act contained in Schedule 1.

6.7 Schedule 1 contains the Act that Western Australia is requesting the Commonwealth pass pursuant to section 51 (xxxviii) of the *Commonwealth Constitution*. It is in similar terms to Parts 1 and 3 of the Bill, with the exception of Part 5 of Schedule 1, which states:

Part 5 — Repeal or amendment of this Act

12 Repeal or amendment of this Act

> *This Act may be expressly or impliedly repealed or amended only by an Act passed at the request or with the concurrence of the Parliaments of all the States.*

7 RECOMMENDATIONS OF THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

7.1 In its report on United Kingdom statutes in force in Western Australia, the Law Reform Commission of Western Australia (**Commission**) identified a number of such statutes relevant to the demise of the Crown and made recommendations regarding their repeal and re-enactment. An extract from the report is attached as **Appendix 2**.[17]

7.2 In its Interim Report No79, the Committee detailed the history of the work to implement the Commission's recommendations.[18] The relevant extract from this report is set out in **Appendix 3**.

7.3 The Committee made the following recommendation:

> *Recommendation 3: The Committee recommends that the Government's next omnibus bill include those obsolete imperial enactments identified by the Western Australian Law Reform Commission's Report Project No 75 on United Kingdom Statutes in Force in Western Australia in 1994.*[19]

7.4 It appears this recommendation has yet to be implemented.[20] Accordingly, the Committee asked the Department whether it plans to take legislative action based on the recommendations of the Commission with respect to those United Kingdom statutes that relate to the demise of the Crown.[21]

7.5 In its reply, the Department stated:

> *None of these changes relate to the demise of the Crown or require amendments to the United Kingdom statutes identified by Law Reform Commission on pages 90-91 of its report. Therefore, in developing the Succession to the Crown Bill 2014 (WA) to make the changes, this Department has not needed to consider the currency of the information in the Law Reform Commission's report or whether*

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17 Western Australian Law Reform Commission, *Report Project No 75 on United Kingdom Statutes in Force in Western Australia*, October 1994.

18 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 79, *Inquiry into the Form and Content of the Statute Book*, 15 November 2012, pp4-7.

19 Ibid, p8.

20 The Statutes (Repeals and Minor Amendments) Bill 2013 did not address the recommendations.

21 Letter from Hon Kate Doust, MLC to Mr Peter Conran, Director General, Department of Premier and Cabinet, 15 December 2014.

> *legislative action should be taken to implement the Commission's recommendations. Therefore, the Department is unable to assist the Committee any further in this matter*.[22]

7.6 The Committee disagrees with this position. The demise of the Crown, as well as abdication, will trigger royal succession and is a condition precedent to this occurring.

7.7 It would appear that one implication of the relevant law identified by the Commission is that Parliament would need to be prorogued and a new sitting held within six months of the demise of the Crown. Parliament has a unique interest in ensuring legal certainty in this respect.

7.8 Furthermore, the matters identified by the Commission as requiring legislative action have, as stated in the Commission's report, been dealt with in most other Australian jurisdictions. This explains why the COAG consultations relating to reform of Australian succession legislation did not extend to the demise of the Crown.

7.9 The Committee is of the view the Commission's recommendations would ensure that the Parliament of Western Australia is fully prepared, on the demise of the Crown, to continue to function with Constitutional certainty through the process of succession.

7.10 Amendments to the Bill designed to implement the Commission's recommendations appear to fall within the long title of the Bill as a related purpose. The Bill provides the most convenient opportunity to make the following recommended legislative changes.

[22] Letter from Mr Peter Conran, Director General, Department of Premier and Cabinet, 15 December 2014.

Recommendation 1: The Committee recommends that the Succession to the Crown Bill 2014 be amended to implement the recommendations of the Law Reform Commission in its report *Project No 75 on United Kingdom Statutes in Force in Western Australia,* October 1994 relating to the demise of the Crown. This may be effected by inserting a new Part 5 in the following terms:

Part 5 — Demise of the Crown

Division 1 — Constitution Act 1889 amended

16. Act amended
This Division amends the *Constitution Act 1889*.

17. Section 75A inserted
After section 74 insert:

75A. Demise of the Crown

(1) The demise of the Crown does not affect the continuation of the Parliament of Western Australia and does not give rise to or necessitate the prorogation or dissolution of either House.

(2) The demise of the Crown does not affect the existence and use of the Public Seal of the State.

(3) The demise of the Crown does not discontinue or affect —

(a) any civil, criminal or other proceeding in any court or tribunal; or

(b) any civil, criminal or other proceeding to which the Crown is a party or which has been commenced or carried on in the name of or with the authority of the Crown.

Division 2 — Other provisions

18. Certain enactments passed before 1 June 1829 repealed

So far as any Imperial Act enacted before 1 June 1829 —

(a) is part of the law of this State; and

(b) purports to deal with or relate to the effect or consequences of the demise of the Crown,

it is repealed.

8 IMPACT OF THE BILL UPON PARLIAMENTARY SOVEREIGNTY AND LAW-MAKING POWERS

Amendment of the Bill

8.1 In a letter addressing the matters set out in Ministerial Office Memorandum MM2007/01, the Government stated:

> *If the State Parliament requests the Commonwealth to legislate (as other States have done) and the legislation is enacted by the Commonwealth Parliament, this may limit the power of the State to later amend its substantive Act by reason of section 109 of the Commonwealth Constitution, which provides that State laws that are inconsistent with Commonwealth laws are invalid to the extent of the inconsistency.*[23]

8.2 Accordingly, once the Bill is passed, the ability of the Parliament to amend it is constrained by section 109 of the *Commonwealth Constitution* should any amendment be inconsistent with the Commonwealth Act.

8.3 To deal with the risk of any inconsistency, Western Australia would have to obtain the agreement of the parliaments of other states to request the Commonwealth Parliament to amend its legislation, pursuant to section 51(xxxviii) of the *Commonwealth Constitution*.

Repeal of the Bill

8.4 While there are no constraints on the ability of the Parliament to repeal the Bill once it is passed, such a repeal would have the following consequences:

- The changes to Crown succession proposed by the Bill would, arguably, no longer apply in Western Australia. If so, this could result, in due course, in Western Australia having a different Sovereign to the rest of Australia.[24]

- As any repeal would also repeal the State's request to the Commonwealth to pass the Act set out in the Schedule to the Bill, this would raise the question of whether any request under section 51(xxxviii) of the *Commonwealth Constitution* is capable of being revoked, as is the case with a referral of power under section 51(xxxvii). The Committee does not intend to express a view on this issue, but merely raises it for the information of the Legislative Council.

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23 Letter from Hon Peter Collier MLC, Leader of the Government in the Legislative Council, 21 November 2014, p3.

24 See Hon Colin Barnett MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 November 2014, p17.

9 SUBMISSIONS

9.1 The Committee acknowledges the submission made by Mr Geoff Taylor, which appears on the Committee's webpage. While the matters he has raised may be salient and the subject of policy debate, they are not within the scope of the Committee's inquiry into the Bill.

10 CONCLUSION

10.1 The Committee finds that the Bill gives effect to the agreement reached at CHOGM and subsequent COAG meetings. It also notes the importance of consistency of laws of all Australian jurisdictions to ensure the Sovereign of Australia is the same person as the Sovereign of the United Kingdom, as stated in clause 4 of the Bill.

10.2 The Committee has also recommended the Bill be amended to implement the recommendations of the Western Australian Law Reform Commission in its Report on its Project No 75 relating to the demise of the Crown for the reasons set out in paragraphs 7.6 to 7.10 above.

Recommendation 2: The Committee recommends that, subject the implementation of Recommendation 1 above, the *Succession to the Crown Bill 2014* be passed.

Hon Kate Doust MLC
Chair

17 February 2015

APPENDIX 1

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED AND HEARINGS

APPENDIX 1

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED AND HEARINGS

Stakeholders invited to provide a submission

1. Department of Premier and Cabinet of Western Australia
2. The Law Reform Commission of Western Australia
3. The Law Society of Western Australia
4. The Constitutional Centre of Western Australia
5. Associate Professor Sarah Murray
6. Professor Greg Craven

Submissions received

1. Mr Geoff Taylor, private citizen

Hearings

1. Department of Premier and Cabinet, 1 December 2014.

APPENDIX 2

EXTRACT FROM THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA REPORT ON PROJECT NO 75

APPENDIX 2

EXTRACT FROM THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA REPORT ON PROJECT NO 75

24 George III Sess 2 chapter 35 (1784): Ordination of aliens

This statute deals with the ordination of deacons and priests who are not British subjects. It has been repealed in England.[520]

55 George III chapter 147 (1815): Glebe exchange
56 George III chapter 52 (1816): Glebe exchange

These statutes relate to glebe land, land possessed as part of the property of an ecclesiastical benefice. Both statutes are still partly in force in England.

DEMISE OF THE CROWN

The statutes dealt with in this section relate to demise of the Crown. The Commission recommends that consideration be given to enacting a general Demise of the Crown Act.[521] A similar recommendation was made by the South Australian Committee.[522] The Commission makes recommendations below as to how each statute should be dealt with in the absence of such general legislation.

1 Edward VI chapter 7 (1547): Justices of the peace

Section 4 of this statute was repealed in Western Australia by the *Miscellaneous Repeals Act 1991*. Of the other sections, only section 1, which deals with the continuation of actions in the courts after the death of the Monarch, is of any importance and it should be re-enacted. It has been continued in force in the Australian Capital Territory.[523]

7 & 8 William III chapter 15 (1695): Parliament

This statute provides that Parliament is to continue to sit for six months after the demise of the King, unless it is sooner dissolved by his successor. If there is no Parliament in existence at the time of the demise, then the last preceding Parliament is to be revived. The power of the King to prorogue or dissolve Parliament is not altered by these provisions.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. It may have been impliedly repealed in 1707 by 6 Anne chapter 41,[524] in which case it would not be part of the law of this State. The South Australian Committee proceeded on the basis that it had been received in South Australia for the purpose of its report. Although there were arguments that no legislation was necessary to ensure that Parliament continues to sit upon demise of the Crown,[525] it recommended that express provision be made for the continued sitting of Parliament and that the 1696 statute be repealed. The Commission agrees.

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520 The South Australian Committee concluded that it could be repealed because it would be contrary to the ethnic laws in the State: SA86 9.

521 See for example, *Demise of the Crown Act 1901* (UK) and *Demise of the Crown Act 1910* (Qld). In Victoria, provisions as to demise of the Crown have been incorporated in the *Constitution Act 1975* (ss 9-11). This is also the case in Tasmania: *Constitution Act 1934* ss 4-7.

522 SA55 16-17 and SA81 14.

523 *Imperial Acts Application Act 1986* Schedule 3 Part 7. The ACTAG's Report (at 83) recommended that it be repealed and the substantive provisions incorporated into Australian Capital Territory legislation dealing with proceedings.

524 SA81 6-7.

525 Id 7.

1 Anne chapter 2 (1702): Demise of the Crown

Sections 4 and part of sections 5 and 6 of this statute are still important because they provide the basis for the continuation of legal proceedings notwithstanding the demise of the Crown.

While the statute should be repealed, the effect of the sections should be preserved by the enactment of a provision to the same effect. This has been done in Victoria and the Australian Capital Territory.[526] Section 4 has been preserved in New South Wales and Queensland.[527] The South Australian Committee recommended that a modern version of the sections should be included in South Australian legislation.[528]

6 Anne chapter 41 (1707): Succession to the Crown

The only section of this statute which has been preserved in the other jurisdictions studied is section 9 which provides that the Great Seal and other public seals in being at the demise of the Crown continue until further order.[529] It should also be preserved in this State.

1 George III chapter 23 (1760): Commissions and salaries of judges

Section 1 of this statute provides that the commissions of judges shall continue during their good behaviour notwithstanding the demise of the Sovereign. Section 2 provides for the removal of judges upon the address of both Houses of Parliament. Section 3 provides for judges' salaries.

It should be repealed: sections 1 and 2 are superseded by sections 54 and 55 of the *Constitution Act 1889*.[530] Judges' salaries are set under *the Judges' Salaries and Pensions Act 1950*. It has been repealed in New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. Section 1 has been continued in force in the Australian Capital Territory.[531]

37 George III chapter 127 (1797): Meeting of Parliament

This statute provides for shortening of notice for summoning Parliament and for the meeting of Parliament in the case of demise of the Crown.

It should be repealed: section 3 of the *Constitution Act 1889* provides for the Governor to fix the place and time for holding sessions of the Parliament and from time to time to vary the same giving sufficient notice of the variation. It has been repealed in the Australian Capital

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526 *Constitution Act 1975* (Vic) s 11; *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 13. The ACTAG's Report (at 86) recommended that the statute should be repealed and the substantive provisions incorporated into Australian Capital Territory legislation dealing with proceedings.

527 NSW Act s 6; Qld Act s 5.

528 SA81 7.

529 S 11(3) of the *Constitution Act 1975* (Vic) provides; for example:
"The Public Seal of the State and other Public Seals in being at the time of the demise of the Crown shall continue and be made use of as if no such demise had happened."
The ACTAG's Report (at 87) recommended that the statute should be repealed because it is irrelevant to the Australian Capital Territory; the Crown in the right of the Australian Capital Territory is an abstract notion rather than an office capable of being filled by a person.

530 See also *Supreme Court Act 1935* s 9(1); *District Court of Western Australia Act 1969* ss 11(1) and 14; *Family Court Act 1975* ss 12 and 16; *Stipendiary Magistrates Act 1957* s 5.

531 *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 17.

Territory, New South Wales, Queensland, Victoria, New Zealand and partly repealed in the United Kingdom.[532]

STATUTES RELATING TO PARLIAMENTARY PRIVILEGE

The following statutes relating to parliamentary privilege should be repealed because parliamentary privilege is dealt with in the *Parliamentary Privileges Act 1891*.

The repeal of the statutes would not affect the privileges because section 1 of the *Parliamentary Privileges Act 1891* provides:

> "The Legislative Council and Legislative Assembly of Western Australia respectively, and the Committees and members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as, and the privileges, immunities, and powers of the said Council and Assembly, and of the Committees and members thereof, respectively, are hereby defined to be the same as are, at the time of the passing of this Act, or shall hereafter for the time being be, held enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland and by the Committees and members thereof, so far as the same are not inconsistent with the said recited Act or this Act, whether such privileges, immunities, or powers are or shall be, held, possessed, or enjoyed by custom statute or otherwise. Provided always, that with respect to the powers hereinafter more particularly defined by this Act, the provisions of this Act shall prevail."

This provision incorporates such of the privileges, immunities and powers conferred by the following statutes that are in force in the United Kingdom, that is, the statutes of 1512,[533] 1603, 1737,[534] 1770[535] and Article 9 of the Bill of Rights 1688.[536] Repealing them in Western Australia would not affect this incorporation. In any case, the statutes might not have been inherited when the colony of Western Australia was founded because they were not reasonably capable of being applied under local conditions, there being no local legislature.

4 Henry VIII chapter 8 (1512): Privilege of Parliament

This statute is treated as establishing the right of a member of Parliament to speak freely in Parliament without being called to account anywhere else for his freedom of speech.

1 James I chapter 13 (1603): Privilege of Parliament

This statute deals with a case where a writ of execution is discharged because a member of Parliament has his privilege during the session of Parliament and the filing of a second execution later.

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532 The South Australian Committee recommended that it be repealed if a provision were enacted in South Australia as suggested in the discussion of 6 Anne c 41 (93 above): SA81 10.

533 Parts of this statute were repealed in the United Kingdom in 1888 and 1948.

534 Parts of this statute have been repealed in the United Kingdom in 1867.

535 Parts of this statute have been repealed in the United Kingdom.

536 56-57 above. The 1700 and 1703 statutes were repealed in the United Kingdom in 1867, The 1805 and 1807 statutes were repealed in the United Kingdom in 1872.

APPENDIX 3

EXTRACT FROM THE COMMITTEE'S INTERIM REPORT 79

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removal of five superseded Acts.[6] According to the Long Title, these are Acts that give effect to agreements between the State and other parties dating back to 1952.

4.4 Of this first Repeal Day, the Premier described the concept as being similar to the 'Corrections Calendar' procedure of the United States House of Representatives. The Premier also stated that the findings of the Committee are to be taken into account in the operation of Repeal Day.[7]

5 IMPERIAL STATUTES

5.1 In October 1994, the Western Australian Law Reform Commission (**Commission**) published *Report Project No 75 on United Kingdom Statutes in Force in Western Australia* (**WALRC Report**). That project sought to evaluate those United Kingdom statutes that were still in force in Western Australia and recommended which of these statutes should be:

- repealed;
- repealed and re-enacted in whole or in part;
- preserved because of their historical interest; or
- preserved pending further review.

5.2 The Commission recommended that:

> *most United Kingdom statutes which have been inherited should cease to be in force in Western Australia. Exceptions are statutes of historical interest or statutes where a reform of the law in the area has been undertaken or is needed; and statutes which contain provisions which are still relevant in Western Australia. Statutes which contain principles still relevant in this State should be repealed and re-enacted by the Parliament of Western Australia.*[8]

5.3 Mr Walter Munyard, Parliamentary Counsel, said the WALRC Report was submitted to the then Attorney General in 1994.

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6 The five Acts are the (1) *Broken Hill Proprietary Company Limited Agreements (Variation) Act 1980*; (2) *Broken Hill Proprietary Company's Integrated Steel Works Agreement Act 1960*; (3) *Broken Hill Proprietary Steel Industry Agreement Act 1952; (4) Iron and Steel (Mid West) Agreement Act 1997*; and (5) *Nickel Refinery (Western Mining Corporation Limited) Agreement Act 1968*.

7 Premier's Ministerial Statement, 8 November 2012.

8 Western Australian Law Reform Commission, *Report Project No 75 on United Kingdom Statutes in Force in Western Australia*, October 1994, p4.

> *The Commission's recommendations dealt with over 200 imperial Acts. Work commenced the following year on implementing the recommendations of that report.*[9]

5.4 In 1995 Cabinet approved the drafting of legislation to implement the WALRC Report. Parliamentary Counsel prepared a first draft, the Imperial Acts (Law Reform) Bill, and requested comments from the Commission. In August 1996, representatives of the Commission, the Solicitor-General and Parliamentary Counsel met with the then Attorney General to discuss the proposed legislation. However, no further action was taken.[10]

The Statutes (Repeals and Minor Amendments) Bill 2006

5.5 The first statutory glimpse of the WALRC Report recommendations being implemented came when the Statutes (Repeals and Minor Amendments) Bill 2006 was introduced. According to the Leader of the House, that bill was earlier introduced into the Parliament in 2004 but lapsed in 2005 due to the State Election.[11] In 2006 the bill was introduced again, then adjourned and referred to the former Committee for scrutiny.[12]

5.6 The former Committee scrutinised that bill in 2007. Part 4 included provisions to either repeal or repeal provisions of eight imperial Acts. The former Committee tabled its Report on 16 October 2007 noting that:

> *Part 4 repeals a number of imperial acts, or provisions of imperial acts, that either have been superseded by other legislation or are now obsolete.*
>
> *Part 4 also repeals three imperial acts that have for a long time been treated as having been impliedly repealed by Western Australian acts but have in fact never been expressly repealed.*[13]

5.7 The bill did not progress.

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9 Letter from Mr Walter Munyard, Parliamentary Counsel, Parliamentary Counsel's Office, 11 December 2008.

10 The Western Australian Law Reform Commission, *Outcomes of the WALRC Report*, viewed on 13 November 2012, http://www.lrc.justice.wa.gov.au/075o.html.

11 Hon Norman Moore, MLC, Leader of the House, on behalf of the Minister for Transport, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 November 2008, p157a-157a.

12 That committee was also called the Standing Committee on Uniform Legislation and Statutes Review. At the time it was under the Chairmanship of Hon Simon O'Brien MLC.

13 Hon Kim Chance MLC then Leader of the House, Minister Representing the Premier, Minister for Public Sector Management, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 18 October 2006, p7143.

The Statutes (Repeals and Miscellaneous Amendments) Bill 2008

5.8 The Statutes (Repeals and Minor Amendments) Bill 2006 (above) was renamed as the Statutes (Repeals and Miscellaneous Amendments) Bill 2008 and introduced into the Legislative Council on 12 November 2008. It was not referred to the Committee for scrutiny and report. The Leader of the House said:

> *It is usual practice for omnibus bills to be referred to the Standing Committee on Uniform Legislation and Statutes Review; however, given that this bill has already been scrutinised by this committee in great detail, it would be duplicative for this to again occur, when the majority of amendments are in accordance with the committee's recommendations.*[14]

5.9 Relevantly, the bill omitted the clauses concerning the eight imperial Acts.

5.10 In December 2008, Mr Walter Munyard, Parliamentary Counsel, told the Committee that:

> *When the 2008 bill was prepared it was considered that the provisions affecting the 8 imperial Acts would be better incorporated into the law reform exercise, which we understood had progressed during the previous 2 years. That is why the provisions were not included in the 2008 bill.*[15]

5.11 In July 2009, the Committee wrote to the Attorney General requesting an update on implementing the recommendations of the WALRC Report. The Attorney General said he was proceeding with the reform project and would introduce the necessary legislation in the 2010 Autumn Session of Parliament.[16] However, that did not occur.

5.12 During the course of this Inquiry, the Committee twice requested an update on the implementation of the recommendations in the WALRC Report. To date, there has been no response. However, three imperial enactments listed in the WARLC Report

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14 Hon Norman Moore MLC Leader of the House, on behalf of the Minister for Transport, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 12 November 2008, p157a-157a.

15 Letter from Mr Walter Munyard, Parliamentary Counsel, Parliamentary Counsel's Office, 11 December 2008.

16 Letter from the then Attorney General, Hon Christian Porter MLA, 13 July 2009.

were identified and confirmed as obsolete by the Attorney General in his response to 21 imperial enactments within his own portfolio.[17]

5.13 It is now 18 years since the WALRC Report was published.

6 STATUTES NOT YET PROCLAIMED

6.1 The Committee noted that between 1970 and 2012, 70 statutes with Royal Assent have still not been proclaimed.[18] A list of these statutes was obtained from the Parliamentary Counsel Office Access Database.[19] The statutes are listed in **Appendix 7**. That list provides details of legislation that:

- has not yet commenced;
- is either awaiting proclamation, coming into operation on the commencement of another Act; or
- commences on a specified date.

6.2 Of the 70 statutes, 21 have not been substantively proclaimed other than sections 1 and 2. These two sections are the short title and commencement. The Committee is of the view that if there is no intention to proclaim these statutes, they should be repealed.

7 CONCLUSIONS

7.1 From its investigations the Committee is of the view that a significant number of enactments could be removed from the statute book in an omnibus bill. The Committee therefore makes the following recommendations.

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17 These are the Factors (1823) (Imp), Factors (1825) (Imp) and Factors (1842) (Imp) identified by Hon Michael Mischin MLC, Attorney General, 5 September 2012. Of these, the WARLC Report at p81 states: "*The statutes 4 George IV chapter 83 (1823) and 6 George IV chapter 94 (1825) together with the Factors Act 1842 (UK) (5 & 6 Victoria chapter 39) (adopted by 7 Victoria No 13 (1844)) and 29 Vict No 5 (1865) and 42 Vict No 3 (1878) govern the law relating to factors in Western Australia. In the United Kingdom the Factors Acts of 1823 and 1825, together with further Factors Acts of 1842 and 1877, were repealed by the Factors Act 1889. This statute, which is still in force, consolidated and to some extent extended the earlier Acts. The law is in need of review: it is unsatisfactory that the law in this State is based on inherited and adopted United Kingdom statutes which have been subsequently repealed in the United Kingdom. Pending a review, the 1823 and 1825 statutes should be preserved.*" According to the Parliamentary Counsel Office Access Database, there are only 21 Imperial Acts currently in force. Email from Ms Sandy Williams, Acting Manager, Legislation and Publications, Parliamentary Counsel's Office, 8 November 2012.

18 Email from Ms Sandy Williams, Acting Manager, Legislation and Publications, Parliamentary Counsel's Office, 5 November 2012.

19 Email from Ms Sandy Williams, Acting Manager, Legislation and Publications, Parliamentary Counsel's Office, 6 November 2012.