



THIRTY-EIGHTH PARLIAMENT

REPORT 72

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**WILLS AMENDMENT (INTERNATIONAL WILLS)
BILL 2012**

Presented by Hon Adele Farina MLC (Chairman)

June 2012

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:

“5. Uniform Legislation and Statutes Review Committee

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

5.2 The Committee consists of 4 Members.

5.3 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.

5.4 In relation to function 5.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill, proposal or agreement may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)	Hon Donna Faragher MLC (Deputy Chairman)
Hon Michael Mischin MLC	Hon Linda Savage MLC

Staff as at the time of this inquiry:

Cherelyn Brearley (Committee Clerk)	Irina Lobeto-Ortega (Advisory Officer (Legal))
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Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

lcco@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

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CONTENTS

REPORT	1
1 BACKGROUND TO THE BILL.....	1
Referral.....	1
Term of Reference 5.3(c)	1
2 IMPACT OF THE BILL UPON PARLIAMENTARY SOVEREIGNTY AND LAW-MAKING POWERS.....	2
Clause 5 – Part XA inserted, proposed section 32B	2
3 CONCLUSION	4

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

WILLS AMENDMENT (INTERNATIONAL WILLS) BILL 2012

1 BACKGROUND TO THE BILL

Referral

- 1.1 On 16 May 2012, Hon Michael Mischin MLC, Parliamentary Secretary representing the Attorney General, introduced the Wills Amendment (International Wills) Bill 2012 (**Bill**) into the Legislative Council.
- 1.2 Following its Second Reading on the same date, the Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 126(4).
- 1.3 The Bill amends the *Wills Act 1970* (**Act**) by attaching the Annex to the *Convention Providing a Uniform Law on the Form of an International Will* (**Convention**) as a Schedule to the Act. Copies of the Convention and related documents are available for download on the Committee's website at www.parliament.wa.gov.au/uni.

Term of Reference 5.3(c)

- 1.4 This Bill deals with uniform legislation and also triggers the operation of the Committee's Term of Reference 5.3(c) related to treaties.
- 1.5 The Convention entered into force generally on 9 February 1978¹. Its purpose is to introduce a new form of will – an 'international will' – into each contracting party's jurisdiction. This is achieved by each signatory adopting the Annex to the Convention, namely the *Uniform Law on the Form of an International Will* (**Uniform Law**), into domestic legislation.
- 1.6 Australia is not yet a signatory to the Convention. The decision to accede to the Convention was made by the then Standing Committee of Attorneys-General in 2010

¹ National Interest Analysis [2012] ATNIA 5 with attachment on consultation, Department of Foreign Affairs and Trade, paragraph 2. The Convention was tabled in the House of Representatives on 28 February 2012.

through a process where all State and Territory Parliaments will pass similar legislation adopting the Uniform Law into statute.²

- 1.7 The Committee considers that the Convention has no impact upon the sovereignty and law-making powers of the Parliament of Western Australia. The Convention itself does not override any of the formal evidentiary requirements for a will set out in the Act, nor does it affect revocation or capacity provisions in Western Australian legislation. Substantive provisions dealing with the construction of wills or interpretation have been omitted from the Convention in order to preserve the procedures and law of each contracting party.
- 1.8 In Australia's case, this works to strengthen the sovereignty of State and Territory Parliaments as the differences between each State and Territory's succession laws are maintained.³ Australia will become a signatory to the Convention six months after all States and Territories have enacted legislation incorporating the Uniform Law into their domestic succession Acts.

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

Clause 5 – Part XA inserted, proposed section 32B

- 2.1 Proposed section 32B of the Bill (contained in clause 5) may impact on the sovereignty of Parliament by specifying that “*the Annex to the Convention [the Uniform Law] has the force of law in this jurisdiction*”⁴. The Uniform Law therefore will become part of the legislative framework dealing with wills and succession in Western Australia, without Parliament being able to amend the content of the Uniform Law.
- 2.2 The Committee raised the issue of the currency of the Uniform Law at the hearing with Ms Ilse Petersen, Senior Assistant State Solicitor, State Solicitor's Office and questioned the wording of section 32B:

Hon MICHAEL MISCHIN: I refer to proposed section 32B ... There is a note which says that the annex to the convention is set out in schedule 1. By the terms of section 32B, were the convention to be changed overseas by UNIDROIT, would the terms of section 32B result in an automatic change to Western Australian law,

² The only other State and Territory Parliaments which have introduced very similar legislation incorporating the Uniform Law thus far are Victoria, Tasmania and the Australian Capital Territory. The Bills are all based on the Australasian Parliamentary Counsel Committee's Succession Amendment (International Wills) Bill 2012, drafted to amend the *Succession Act 2006* (NSW).

³ National Interest Analysis [2012] ATNIA 5 with attachment on consultation, Department of Foreign Affairs and Trade, para 23.

⁴ “*This jurisdiction*” is defined in proposed section 32A as meaning Western Australia.

notwithstanding the fact that the terms of the convention are attached because it does not say the annex to the convention as set out in schedule 1 has force of law? What I am concerned about is that there may be a change to the convention that would flow through automatically to this bill, notwithstanding the note.

...

The CHAIR: Also, clause 32B does not say the annex to the convention as it is amended from time to time has the force of law in this jurisdiction, which would then suggest that it would automatically apply as it was amended in Australia. We have two issues here. Does the exclusion of those words as it is amended from time to time mean that it is just the annex to the convention as it is currently drafted that we are acceding to when we pass this law and also does the fact that it will be a schedule to the act mean that it requires an amendment by the Parliament to amend it?⁵

- 2.3 The State Solicitor's Office has advised the Committee that the Schedule to the Bill (the Uniform Law) will not automatically change if the Annex to the Convention is changed.⁶ The sovereignty of the Parliament of Western Australia is therefore preserved, as any changes would need to be incorporated as amendments to the Act and passed by the Parliament.
- 2.4 The Western Australian Parliament retains at all times the power to amend or repeal the Act.
- 2.5 This was confirmed by the Attorney General:

state Parliament can, in the exercise of its legislative power, amend or repeal the WA legislation which forms part of this uniform model legislative scheme. There is no legal or constitutional reason which is part of this proposal which would inhibit the ability of the WA Parliament to do this.⁷

- 2.6 Notwithstanding this, it should be noted that the Convention is silent on the effect of a repeal of any of the domestic laws of a signatory on the Convention's continuing operation. There would, however, undoubtedly be pressure from the Commonwealth Government as well as other States and Territories to not amend or repeal the Uniform

⁵ Hon Adele Farina MLC, Chairman and Hon Michael Mischin MLC, *Transcript of Evidence*, 13 June 2012, p6.

⁶ Letter from Ms Ilse Petersen, Senior Assistant State Solicitor, State Solicitor's Office, 18 June, p3.

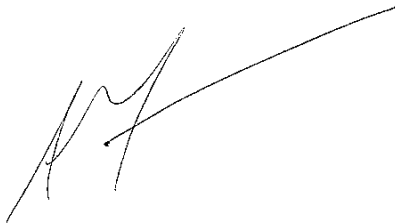
⁷ Letter from Hon Christian Porter MLA, Attorney General, 7 June 2012, pp2-3.

Law. The State Solicitor's Office has advised that the consequences could include the following:

First, the Commonwealth Executive might endeavour to persuade the State Executive and the State Parliament either not to so repeal or amend the State law or, if that had already been done, to change the State law so that it was again in conformity with the Convention. Second, the Commonwealth Executive might endeavour to have the Commonwealth Parliament enact Commonwealth legislation, for example under the external affairs power of the Commonwealth Constitution, to implement the Convention and, therefore, the Commonwealth law, rather than the State law, applying in Western Australia ... By avoiding the situation the State Parliament retains and can exercise its State legislative powers.⁸

3 CONCLUSION

- 3.1 The Committee finds that the Bill gives effect to the decision of the then Standing Committee of Attorneys-General to implement the provisions of the Convention through amendments to State and Territory succession legislation. The scope of the Uniform Law covers only the form of a will, leaving any questions of construction and revocation firmly under the jurisdiction of this Parliament.



Hon Adele Farina MLC
Chairman

28 June 2012

⁸ Letter from Ms Ilse Petersen, Senior Assistant State Solicitor, State Solicitor's Office, 18 June, p2.