

40TH PARLIAMENT



Report 121

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Child Support (Commonwealth Powers) Bill 2018

Presented by
Hon Michael Mischin MLC (Chairman)
March 2019

Standing Committee on Uniform Legislation and Statutes Review

Members as at the time of this inquiry:

Hon Michael Mischin MLC (Chairman)

Hon Pierre Yang MLC (Deputy Chair)

Hon Laurie Graham MLC

Hon Robin Scott MLC

Staff as at the time of this inquiry:

Felicity Mackie (Advisory Officer (Legal))

Tracey Sharpe (Committee Clerk)

Address:

Parliament House

4 Harvest Terrace, West Perth WA 6005

Telephone: 08 9222 7300

Email: lcco@parliament.wa.gov.au

Website: www.parliament.wa.gov.au

ISBN 978-1-925578-59-1



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EXECUTIVE SUMMARY

- 1 The Commonwealth Child Support Scheme (Scheme) was established in 1988 ‘with the object of ensuring that separated parents shared equitably in the financial cost of supporting their children’.¹ The Scheme involves the assessment of child support, as well as the collection of support under, and enforcement of, child support assessments, child support agreements and court orders.
- 2 The Scheme operates under two Commonwealth Acts:
 - *Child Support (Registration and Collection) Act 1988* (Cth)
 - *Child Support (Assessment) Act 1989* (Cth)together referred to as the Commonwealth Child Support laws.
- 3 The Commonwealth Parliament can only legislate 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* (Constitution).
- 4 Other States in Australia have referred power in relation to child custody, guardianship, access and maintenance of exnuptial children to the Commonwealth Parliament. This means that whenever one, or both, of the Commonwealth Child Support laws is amended, those amendments have immediate application to all affected children (whether their parents are married or unmarried) in those referring States.
- 5 Western Australia is the only Australian State that has not referred to the Commonwealth its power to make laws about children whose parents are not married.² Instead, Western Australia chose to adopt the Commonwealth’s legislation which established the Scheme in the form that legislation existed at the time of the adoption. It did this by enacting the *Child Support (Adoption of Laws) Act 1990* (Act).
- 6 Amendments to the Commonwealth Child Support laws do not apply in the case of exnuptial children in Western Australia until they are adopted by the Western Australian Parliament through amendments to the Act.³
- 7 There is often a delay between amendments to the Commonwealth Child Support laws and adoption of those amendments by the Western Australian Parliament. As a result, during this period two versions of the Commonwealth Child Support laws apply in Western Australia:
 - the amended version which applies to children of a marriage
 - the pre–amendment version which continues to apply only to exnuptial children.
- 8 The Government has advised that this inequality can disadvantage exnuptial children, especially financially.⁴
- 9 Historically, the Western Australian Parliament has always adopted, albeit with some delay, all Commonwealth amendments made to the Commonwealth Child Support laws.

¹ Child Support (Commonwealth Powers) Bill 2018, *Explanatory Memorandum*, Legislative Council, p 1.

² Australian Government, 21 March 2016, <http://guides.dss.gov.au/child-support-guide/1/4/1>, Viewed 6 February 2019, and Ilse Petersen, Adviser, State Solicitor’s Office, *Transcript of evidence*, 11 February 2019, p 9.

³ The Commonwealth amendments are adopted as at a particular date: for example, the last Western Australian legislative adoption occurred on 1 September 2017.

⁴ Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 5 December 2018, p 9185.

- 10 The Child Support (Commonwealth Powers) Bill 2018 (Bill) seeks to address the inequities caused by this delay. It provides for Western Australia to:
- adopt all current Commonwealth Child Support laws so as to bring the maintenance laws applicable to exnuptial children into line with the laws applying to children of a marriage
 - refer the matter of the maintenance of exnuptial children to the Commonwealth Parliament to bring them under the operation of the Commonwealth Child Support laws.
- 11 The Bill also repeals the *Child Support (Adoption of Laws) Act 1990* because there will be no further need for the Western Australian Parliament to adopt Commonwealth amendments to the Commonwealth Child Support laws.

Findings and recommendations

Findings and the recommendation are grouped as they appear in the text at the page number indicated:

FINDING 1

Page 9

Clause 4(1) of the Child Support (Commonwealth Powers) Bill 2018 has the potential to exclude Parliamentary oversight and as a result derogates from Western Australia's Parliamentary sovereignty.

FINDING 2

Page 12

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.

FINDING 3

Page 17

On the basis of advice from the Solicitor-General, and notwithstanding that the processes proposed involve Henry VIII clauses, it is preferable that any termination of the adoption and reference should be by way of proclamation first approved by both Houses of Parliament, as is provided for in clause 6(7) of the Child Support (Commonwealth Powers) Bill 2018.

FINDING 4

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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.

RECOMMENDATION 1

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The Legislative Council note the Committee's findings during consideration of the Child Support (Commonwealth Powers) Bill 2018.

1 Introduction

- 1.1 On 5 December 2018, Hon Sue Ellery MLC, Leader of the House representing the Attorney General introduced the Child Support (Commonwealth Powers) Bill 2018 (Bill) into the Legislative Council. The Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126.
- 1.2 The Committee was required to report to the Legislative Council by 12 February 2019, being the first Legislative Council sitting day following the expiry of the 45 day reporting timeframe. The 12 February 2019 was also the first sitting day after the summer recess.
- 1.3 On 6 December 2018, the Committee sought an extension of the time in which to report to the Legislative Council from 12 February 2019 to 19 March 2019.⁵ That extension of time was granted on 6 December 2018.⁶
- 1.4 The Bill provides for Western Australia to adopt certain Commonwealth laws relating to the maintenance of exnuptial children which will then apply in Western Australia.
- 1.5 The Bill also provides for Western Australia to refer the matter of the maintenance of exnuptial children to the Commonwealth Parliament, which will enable the Commonwealth Parliament to amend or affect the operation of those laws in Western Australia.
- 1.6 There is no intergovernmental agreement for the Bill.
- 1.7 The Bill seeks to address the continuing problem of the delay between the commencement of Commonwealth amendments to laws for the maintenance of children and the adoption of those amendments by the Western Australian Parliament for exnuptial children. These delays mean that for significant periods of time in Western Australia there are different laws for the maintenance of children of a marriage and for the maintenance of exnuptial children.
- 1.8 This report includes discussion and analysis of the:
 - Commonwealth Child Support Scheme
 - constitutional context for the Bill
 - impact of the Bill on Parliamentary sovereignty and law-making powers.

2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its website at [Uniform Legislation Committee homepage](#). The general public was immediately notified of the referral via social media.⁷
- 2.2 Given the Committee's terms of reference, the Committee considered that any broader advertising or invitation for submissions from the public was neither necessary nor warranted.
- 2.3 The Committee conducted a hearing with representatives from the Department of Justice on 11 February 2019: Ilse Petersen, Adviser, State Solicitor's Office and Joshua Thomson SC, Solicitor-General.
- 2.4 The Committee thanks them for their assistance with the inquiry.

⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 120, *Child Support (Commonwealth Powers) Bill 2018 – Extension of time*, December 2018.

⁶ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 December 2018, p 9246.

⁷ Legislative Council, 5 December 2018, retrieved from <https://twitter.com/WALegCouncil/status/1070311013956804609>.

3 Supporting documents

- 3.1 The Committee received copies of the Bill, the second reading speech and the Explanatory Memorandum when the Bill was introduced into the Legislative Council.
- 3.2 Before the Bill was introduced into the Legislative Council, Hon John Quigley MLA, Attorney General, forwarded to the Committee the information required pursuant to Ministerial Office Memorandum MM 2007/01.⁸
- 3.3 Legislative Council Standing Order 126(5) states:
- The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral ...
- 3.4 The Committee extends its appreciation to the Attorney General for the timely provision of the supporting documentation and information.

4 Background

- 4.1 This section of the report explains the background to the Bill. It includes information on the:
- Commonwealth Child Support Scheme
 - Constitutional context for the Bill
 - Effect of the current legislative process in Western Australia.

The Commonwealth Child Support Scheme

- 4.2 The Commonwealth Child Support Scheme (Scheme) was established in 1988 'with the object of ensuring that separated parents shared equitably in the financial cost of supporting their children'.⁹ The Scheme involves the assessment of child support, as well as the collection of support under, and enforcement of, child support assessments, child support agreements and court orders.
- 4.3 The Scheme operates under two Commonwealth Acts: the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) (Commonwealth Child Support laws).
- 4.4 The *Child Support (Registration and Collection) Act 1988* (Cth) came into operation on 1 June 1988 and established the Scheme on that date. It 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, of administrative assessments of child support.
- 4.5 The *Child Support (Assessment) Act 1989* (Cth) implemented administrative assessment of child support in accordance with a formula. It took effect from 1 October 1989.
- 4.6 The Scheme applies uniformly to Australian children other than exnuptial children in Western Australia.
- 4.7 An exnuptial child is generally considered to mean a child who has not acquired the status of a child of a marriage through birth, legitimation or adoption.¹⁰

⁸ Hon John Quigley MLA, Attorney General, Letter, 3 December 2018.

⁹ Child Support (Commonwealth Powers) Bill 2018, *Explanatory Memorandum*, Legislative Council, p 1.

¹⁰ See *inter alia* the definition of 'child of a marriage' in section 4(1) of the *Family Law Act 1975* (Cth) referring to section 60F; section 89 of the *Marriage Act 1961* (Cth) (a child whose parents were not married to each other at

Constitutional context for the Bill

4.8 The Scheme, as enacted by the Commonwealth and amended from time to time, is limited by the Commonwealth's legislative powers.

4.9 The Commonwealth Parliament can only legislate with respect to children of a marriage (as opposed to exnuptial children) as a result of a constitutional limitation in section 51(xxii) of the *Commonwealth of Australia Constitution Act* (Constitution) which states:

Legislative powers of the Parliament

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

(xxi) marriage;

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

4.10 The Western Australian Parliament retains legislative power in relation to unmarried parents and their exnuptial children.

4.11 However, section 51(xxxvii) of the Constitution provides that the Commonwealth Parliament has power to make laws with respect 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.

4.12 Laws made by the Commonwealth Parliament subsequent to a referral are Commonwealth laws that prevail over inconsistent State laws.

4.13 For the Commonwealth Child Support laws, and therefore the Scheme, to apply to unmarried parents and their exnuptial children, State Parliaments 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 (the current situation in Western Australia; see paragraph 4.15)
- adopt those Commonwealth Child Support laws and refer State legislative power in respect of the maintenance of exnuptial children to the Commonwealth Parliament.

4.14 In 1986, there was a constitutional 'handing over' or referral of power by New South Wales, Victoria and South Australia. Tasmania followed in 1987 and Queensland in 1990. The relevant legislation in those jurisdictions had the effect of referring State powers with respect to 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 to all affected children (whether their parents are married or unmarried) in those referring States.

4.15 Western Australia chose not to refer its power over family law, including matters such as child support payments for exnuptial children, to the Commonwealth. Instead, Western Australia chose to adopt the Commonwealth's legislation which established the Scheme in

the time of his or her birth but have subsequently married each other is, by virtue of the marriage, for all purposes the legitimate child of his or her parents); Gibbs CJ in *Re Cook and Maxwell; Ex parte C* (1985) 156 CLR 249 at para 5.

the form that legislation existed at the time of the adoption.¹¹ It did this by enacting the *Child Support (Adoption of Laws) Act 1990* (Act). The Act commenced operation on 19 January 1991.

- 4.16 This was recognised within the Commonwealth Child Support laws.
- 4.17 Section 5(1) of the *Child Support (Registration and Collection) Act 1988* (Cth) provides that subject to subsections (4) and (5), that Act in so far as it relates to the maintenance of exnuptial children extends to New South Wales, Victoria, Queensland, South Australia and Tasmania.
- 4.18 By section 5(2) of the *Child Support (Registration and Collection) Act 1988* (Cth), its operation can be extended to Western Australia if:
- 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
 - Western Australia adopts it in so far as it relates to the maintenance of exnuptial children.
- 4.19 Under section 5(5A) of the *Child Support (Registration and Collection) Act 1988* (Cth), the Commonwealth affirms that that Act, so far as it is amended by one or more other Acts in relation to the maintenance of exnuptial children, does not extend to Western Australia unless and until:
- 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
 - Western Australia adopts the *Child Support (Registration and Collection) Act 1988* (Cth) as so amended.
- 4.20 There are equivalent provisions in section 13 of the *Child Support (Assessment) Act 1989* (Cth).
- 4.21 Subsequent amendments to the Commonwealth Child Support laws have been made which have then required legislative adoption by the Western Australian Parliament. The Commonwealth amendments are adopted as at a particular date: for example, the last Western Australian legislative adoption occurred on 1 September 2017.
- 4.22 The Western Australian Parliament has always adopted, albeit with some delay, all Commonwealth amendments made to the Commonwealth Child Support laws.

Effect of the current legislative process in Western Australia

- 4.23 Adoption of Commonwealth Child Support laws by Western Australia is not prospective. This means that 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 they are adopted through amendments to the Act.

- 4.24 Hon Sue Ellery MLC said:

This Parliament regularly has to pass bills adopting current versions of the commonwealth child support acts. Since 1990, this Parliament has passed eight such bills. As amendments at commonwealth level are becoming more frequent, the need for adopting bills in Western Australia is correspondingly greater.

¹¹ This was the *Child Support Act 1988* (Cth) which later became the *Child Support (Registration and Collection) Act 1988* (Cth).

For example, there have been three such Western Australian bills in the past four years.¹²

4.25 Until the Western Australian Parliament adopts the Commonwealth Child Support laws as amended, two versions of those laws operate in Western Australia:

- the amended version, which applies in all States and Territories (including in Western Australia) in respect to children of a marriage and exnuptial children in every State and Territory other than Western Australia
- the pre-amendment version, which continues to apply only to exnuptial children in Western Australia as though the Commonwealth amendments had never been made.

4.26 The Attorney General advised:

Often, for example, because of the WA Parliament's time constraints, priorities and sessions and Government legislative programs and priorities, there is a hiatus between amendments of the [Commonwealth Child Support laws] and adoption by the WA Parliament.¹³

4.27 In her second reading speech, Hon Sue Ellery MLC said:

During the hiatus between amendment of the commonwealth acts and adoption by the Western Australian Parliament, often ex-nuptial children in Western Australia do not have the benefits of the commonwealth amendments. Until this Parliament adopts the commonwealth acts as amended, two versions of the commonwealth legislation operate in WA.

...

This inequality can disadvantage [exnuptial children], especially financially.¹⁴

4.28 The Attorney General advised that, as far as possible, to conform with the different application of the Commonwealth Child Support laws in Western Australia the Commonwealth Department of Human Services operates two separate schemes. This is required to assess the maintenance payable in respect of children of a marriage and exnuptial children in Western Australia and to ensure that payment is collected and provided to the supporting parent.¹⁵

4.29 The Attorney General noted that this 'presents practical, administrative and legal difficulties and complexities'.¹⁶ He submitted:

the adoption of laws mechanism is inadequate to ensure that ex-nuptial children in WA whose parents have separated have the same access to the [Commonwealth Child Support] Scheme that is available to all other children in Australia whose parents have separated.¹⁷

¹² Hon Sue Ellery MLC, Leader of the House representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 5 December 2018, p 9185.

¹³ Hon John Quigley MLA, Attorney General, Letter, 3 December 2018, p 3.

¹⁴ Hon Sue Ellery MLC, Leader of the House representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 5 December 2018, p 9185.

¹⁵ Hon John Quigley MLA, Attorney General, Letter, 3 December 2018, p 4.

¹⁶ *ibid.*

¹⁷ *ibid.*

5 Child Support (Commonwealth Powers) Bill 2018

5.1 The Bill:

- Adopts all Commonwealth Child Support laws that the Western Australian Parliament has previously adopted. As noted at paragraph 4.21, the last Western Australian legislative adoption occurred on 1 September 2017.
- Adopts all Commonwealth amendments to the Commonwealth Child Support laws which the Western Australian Parliament has not yet adopted (that is, those amendments made since 1 July 2017), including any Commonwealth amendments which may be enacted after the Bill has passed the Legislative Assembly and the Legislative Council but before the Bill receives Royal Assent.¹⁸
- Refers State legislative power for the matter of the maintenance of exnuptial children to the Commonwealth Parliament.

5.2 The Bill also repeals the *Child Support (Adoption of Laws) Act 1990*. This is because there will be no further need for the Western Australian Parliament to adopt Commonwealth amendments to the Commonwealth Child Support laws. Further, the Bill will, upon receiving Royal Assent, adopt all of the previous Commonwealth Child Support laws.

Clauses that may impinge upon Parliamentary sovereignty and law-making powers

5.3 Clauses 4 and 5 of the Bill have an impact upon Parliamentary sovereignty and law-making powers.

5.4 Clause 4 removes the opportunity for the Western Australian Parliament to scrutinise laws prior to those laws coming into operation.

5.5 Clause 5 is the subject matter referral and has the potential to be interpreted broadly by the Commonwealth.

Clause 4—Adoption of the Commonwealth Child Support laws as in force immediately before commencement day

5.6 Clause 4(1) of the Bill provides for the adoption of the Commonwealth Child Support laws in the form in which they exist at the end of the day before commencement day.

5.7 The effect of clause 4(1) is that Western Australia will adopt all the Commonwealth Child Support laws which the Western Australian Parliament has previously adopted (that is, at 1 July 2017) and the Commonwealth amendments to the Commonwealth Child Support laws which have been enacted between 1 July 2017 and the day on which the Bill receives Royal Assent.

5.8 Commonwealth legislation to amend the Commonwealth Child Support laws has been enacted since 1 July 2017.

5.9 The Committee has reviewed those amendments. They are succinctly summarised on the Commonwealth Department of Social Services website and set out in paragraphs 5.10 and 5.11.

¹⁸ The *Child Support (Adoption of Laws) Act 1990* was last amended by the *Child Support (Adoption of Laws) Amendment Act 2017* which adopted the *Child Support (Registration and Collection) Act 1988* (Cth) and *Child Support (Assessment) Act 1989* (Cth) as they existed on 1 July 2017. The *Child Support (Adoption of Laws) Amendment Act 2017* commenced operation on 1 September 2017.

- 5.10 Amendments to the *Child Support (Registration and Collection) Act 1988* (Cth) made since 1 July 2017 include amendments to:
- provide that deductions can be taken from a person’s Veteran Payment where they owe a child support debt¹⁹
 - align the Registrar’s ability to recover a child support overpayment from a payee with the methods for recovering a child support debt from a payer²⁰
 - ensure that backdated reductions to a child support assessment collected by the Registrar are recoverable from the payee²¹
 - include new provisions in relation to backdating of assessments, providing a fairer basis for retrospectively creating a child support overpayment or underpayment due to some changes of circumstances.²²
- 5.11 Amendments to the *Child Support (Assessment) Act 1989* (Cth) made since 1 July 2017 include amendments to:
- 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 where a care dispute relates to an older court order, a parenting plan or a written agreement²³
 - 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, where it results 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 assessment²⁴
 - 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 change²⁵
 - 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 period and in relation to the income component amounts as estimated by a parent for the year.²⁶

¹⁹ *Veterans’ Affairs Legislation Amendment (Veteran-centric Reforms No. 1) Act 2018* (Cth) Schedule 2 Part 2 item 42.

²⁰ Australian Government, 2 July 2018, <http://guides.dss.gov.au/child-support-guide/1/4/2> Viewed 5 February 2019 and *Family Assistance and Child Support Legislation Amendment (Protecting Children) Act 2018* (Cth) Schedule 1 Part 4.

²¹ *ibid.*

²² *ibid.*

²³ Australian Government, 13 August 2018, <http://guides.dss.gov.au/child-support-guide/1/4/3> Viewed 5 February 2019 and *Family Assistance and Child Support Legislation Amendment (Protecting Children) Act 2018* (Cth).

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ Australian Government, 13 August 2018, <http://guides.dss.gov.au/child-support-guide/1/4/3> Viewed 5 February 2019 and *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* (Cth).

- 5.12 A summary of all of the Commonwealth amendments to the Commonwealth Child Support laws which the Western Australian Parliament will adopt should the Bill be passed is attached as Appendix 1. Evidence to the Committee given on 11 February 2019 was that no further Commonwealth amendments to the Child Support laws were at that time understood to be contemplated.²⁷
- 5.13 As the amendments referred to in paragraphs 5.10 and 5.11 occurred after the Western Australian Parliament adopted the Commonwealth Child Support laws as they existed on 1 July 2017, these provisions do not currently apply to ex-nuptial children in Western Australia.
- 5.14 By virtue of clause 4(1) of the Bill, Western Australia will adopt these amendments to the Commonwealth Child Support laws when the Bill receives Royal Assent.
- 5.15 Other amendments to the Commonwealth Child Support laws may be enacted in the period after the Bill is passed by the Legislative Assembly and the Legislative Council but before the Bill receives the Royal Assent. If this occurs, those amendments will also be adopted by Western Australia without the Western Australian Parliament having considered the Commonwealth legislation.
- 5.16 The Attorney General advised:
- There are two reasons for providing for this “unlikely event”.
- First, if the WA Bill after its Assent does not adopt that Commonwealth legislation, the WA referral cannot, as a matter of law, be used by the Commonwealth Parliament to apply that Commonwealth Act to ex-nuptial children in WA; and
- Second, if this occurs, then the WA Parliament would have to enact further legislation to adopt that Commonwealth legislation.²⁸
- 5.17 The Attorney General advised that options to expedite the adoption procedure have been considered.²⁹ He advised:
- One example which has been explored by WA and Commonwealth Officers was prospective adoption. That is, the WA Parliament enacting adoption legislation which prospectively sought to adopt future amendments to the [Scheme]. This was an endeavour to avoid the WA Parliament having to legislate when Commonwealth amendments were enacted. The difficulties which arose included, firstly, the difficulty that the WA Parliament enacting prospective adoption legislation would not know what amendments might be made in the future by the Commonwealth Parliament and, therefore, would not know, what precise Commonwealth law would be adopted. Secondly, a constitutional law difficulty; namely that section 51(xxxvii) expressly uses the terminology “afterwards adopt”.³⁰
- 5.18 Notwithstanding that the alternatives may be less desirable, the Committee is of the view that clause 4(1) unquestionably erodes Western Australian Parliamentary sovereignty as there will be no opportunity for Parliamentary consideration of laws adopted by Western Australia before those laws come into operation.

²⁷ Ilse Petersen, Adviser, State Solicitor’s Office, *Transcript of evidence*, 11 February 2019, p 7.

²⁸ Hon John Quigley MLA, Attorney General, Letter, 3 December 2018, pp 6-7.

²⁹ *ibid.*, p 4.

³⁰ *ibid.*

FINDING 1

Clause 4(1) of the Child Support (Commonwealth Powers) Bill 2018 has the potential to exclude Parliamentary oversight and as a result derogates from Western Australia's Parliamentary sovereignty.

Clause 5–Referral of maintenance of exnuptial children

- 5.19 Clause 5(1) of the Bill is a subject matter referral of State legislative power to the Commonwealth Parliament and defines the scope of the referral.
- 5.20 The 'matter' being referred is the maintenance of exnuptial children.
- 5.21 The scope of the subject matter referral proposed by the Bill is limited in two respects. It is:
- limited to 'The matter of the maintenance of exnuptial children'³¹
 - narrower than referrals made by all the other State Parliaments.³²
- 5.22 Clause 5 defines the scope of the referral in three ways, namely by:
- Expressly providing that the matter referred will enable the Commonwealth Parliament to amend or affect the operation of the Commonwealth Child Support laws.³³
 - Expressly indicating that the matter referred does not include any matter addressed in the *Family Law Act 1975* (Cth).³⁴ This is to prevent Part VII applying, as Commonwealth law, in Western Australia. This will preserve the similar provisions in Part 5 of the *Family Court Act 1997*.³⁵
 - Recognising that the Western Australian State Parliament cannot refer to the Commonwealth Parliament legislative power over matters which are already within the Commonwealth Parliament's legislative authority.³⁶
- 5.23 Clause 5(2) of the Bill specifically provides that a matter referred includes 'the matter of amending, or otherwise affecting the operation of, the Commonwealth Child Support laws'. [Emphasis added]
- 5.24 An amendment is a 'change to an existing statute made by an amending Act.'³⁷

³¹ Child Support (Commonwealth Powers) Bill 2018 cl 5(1).

³² For example, the *Commonwealth Powers (Family Law – Children) Act 1986* (NSW) s 3 refers power to the Commonwealth Parliament over the maintenance of children and the payment of expenses in relation to children or child bearing, the custody and guardianship of, and access to, children and the determination of a child's parentage for the purposes of the law of the Commonwealth.

³³ Child Support (Commonwealth Powers) Bill 2018 cl 5(2).

³⁴ *ibid.*, cl 5(3).

³⁵ Part 5 of the *Family Court Act 1997* deals with the same matters as Part VII of the *Family Law Act 1975* (Cth). The objects of both Parts are identical: 'to ensure that the best interests of children are met by: (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.'

³⁶ Child Support (Commonwealth Powers) Bill 2018 cl 5(4).

³⁷ *Australian Legal Dictionary*, Butterworths, Sydney, 1997, p 52.

- 5.25 The Committee was informed that a law may 'affect' the Commonwealth Child Support laws if it does not expressly amend, but incidentally affects, their scope or operation. For example:
- 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".³⁸
- 5.26 The Attorney General advised that 'Consideration has been given to the type and scope of a referral that the WA Parliament might consider'.³⁹ 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.
- Second, the referral of a narrow and limited State legislative power.
- Third, the referral of a State legislative power which is consistent with and contemplated by the provisions in the Commonwealth [Child Support laws].⁴⁰
- 5.27 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.⁴¹
- 5.28 The Attorney General informed the Committee that 'the term "maintenance" is used in the Commonwealth [Child Support laws],⁴² however, it is not exhaustively defined.
- 5.29 He stated:
- 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.⁴³
- 5.30 The Solicitor-General confirmed that there is no clear legal authority for the meaning of maintenance and stated 'if there was a clear definition, we would be in a better position than we are now.'⁴⁴
- 5.31 The Solicitor-General expressed the view that:
- 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

³⁸ Joshua Thomson, Solicitor-General, Department of Justice, *Transcript of evidence*, 11 February 2019, p 8.

³⁹ Hon John Quigley MLA, Attorney General, Letter, 3 December 2018, p 5.

⁴⁰ *ibid.* See paragraphs 4.17 – 4.20.

⁴¹ Hon John Quigley MLA, Attorney General, Letter, 3 December 2018, p 6.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ Joshua Thomson, Solicitor-General, Department of Justice, *Transcript of evidence*, 11 February 2019, p 2.

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.⁴⁵

5.32 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.⁴⁶

5.33 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...⁴⁷

5.34 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.

5.35 Ilse Petersen commented on this risk when she said:

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.⁴⁸

5.36 She also advised that the Government has been given advice on this risk.⁴⁹

5.37 In commenting on the question of risk, the Solicitor-General 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

⁴⁵ *ibid.*, p 3.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ Ilse Petersen, Adviser, State Solicitor's Office, *Transcript of evidence*, 11 February 2019, p 2.

⁴⁹ *ibid.*, p 3. The advice was given in March 2018.

children of a marriage. If it were to do that, then we could terminate the reference of course, and that would provide the safeguard.⁵⁰

- 5.38 The Solicitor-General noted the importance of State sovereignty, but observed that had to be balanced against the purpose of the Bill:

We are, of course, very concerned about preserving the role of the state and the state's powers in respect of generally vis-a-vis commonwealth power, but in this case 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 had to be catch-up legislation each and every time there has been an amendment.⁵¹

- 5.39 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 in Western Australia until amendments to the Commonwealth Child Support laws are adopted here), against the risk of the Commonwealth legislating in an undesirably expansive way in relation to child maintenance.
- 5.40 As to the latter, the Committee notes the Solicitor-General's advice that 'inevitably the state would follow suit in any event.'⁵²
- 5.41 The Committee does not necessarily accept the proposition that in the absence of a referral of power the State of Western Australia would adopt every potential amendment to the Commonwealth Child Support laws.
- 5.42 Nevertheless, the State has entered into the Scheme and has adopted, to date, all amendments to that Scheme. The arguments for remaining part of the Scheme, and ensuring it applies equally and in a timely fashion to all Western Australian children, are compelling.

FINDING 2

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.

- 5.43 The Attorney General advised that safeguards to protect the Western Australian Parliament's sovereignty include:

First, the WA Governor, with the approval of both the Legislative Assembly and Legislative Council, can, by proclamation, terminate the reference.

Second, the WA Parliament may repeal its referral legislation as the High Court has, in obiter, indicated ...

Third, the validity of Commonwealth legislation can be challenged in Court, as being beyond the scope of referral.

⁵⁰ Joshua Thomson, Solicitor-General, Department of Justice, *Transcript of evidence*, 11 February 2019, p 4.

⁵¹ *ibid.*

⁵² *ibid.*

Fourth, the scope of the term “maintenance”, as a matter of statutory interpretation, may be influenced by the context in which it is used; namely, the child support scheme which relates only to monetary payments.⁵³

Clauses that preserve Parliamentary sovereignty and law-making powers

5.44 The Western Australia Parliament’s sovereignty is preserved by the following mechanisms.

Clause 6–Termination of adoption and reference

Proclamation to terminate a reference and adoption to first be approved by both Houses of Parliament

5.45 Clauses 6(1) and 6(3) of the Bill provide for the termination of the adoption and reference by proclamation, and the revocation of such proclamation:

(1) The Governor may, at any time, by proclamation, fix a day (the **termination day**) as the day on which the adoption and the reference are to terminate.

...

(3) The Governor may, by proclamation (a **revoking proclamation**), revoke a proclamation made under subsection (1).

5.46 Clause 6(1) requires simultaneous termination of the adoption and referral, rather than enabling separate terminations of the referral and adoption. This is because ‘it is uncertain what would be the legal effect of maintaining the adoption if only the referral were to be terminated’.⁵⁴

5.47 Clauses such as 6(1) and 6(3) delegate power from the Parliament to the Governor (that is, the Executive) to terminate the adoption and reference by proclamation and as such are Henry VIII clauses.⁵⁵ Henry VIII clauses are clauses in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.

5.48 The Committee’s position on Henry VIII clauses has been well documented in previous Committee reports.⁵⁶ Such clauses are objectionable as they offend the principle of the separation of powers and give insufficient regard to the institution of Parliament as the supreme legislature by eroding the sovereign function of Parliament to legislate.

5.49 Henry VIII clauses are therefore objectionable as they transfer the power to make or repeal laws from the Parliament to the Executive. It is the Governor, on the advice of Ministers and without consideration by Parliament, who it is proposed will be able to terminate the application of Commonwealth laws for the maintenance of exnuptial children in Western Australia.

5.50 Generally, Western Australian legislation does not allow for disallowance of proclamations.⁵⁷

⁵³ Hon John Quigley MLA, Attorney General, Letter, 3 December 2018, p 6.

⁵⁴ *ibid.*

⁵⁵ A proclamation is subsidiary legislation: see s 5 *Interpretation Act 1984*.

⁵⁶ See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 70, *Business Names (Commonwealth Powers) Bill 2011*, March 2012, p 7 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 91, *Rail Safety National Law (WA) Bill 2014*, March 2015, pp 19–20. A detailed review of Henry VIII clauses is also contained in Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, *Revenue Laws Amendment Bill 2012*, September 2012.

⁵⁷ *Interpretation Act 1984* s 42(8). However there are some exceptions: see *Registration of Deeds Act 1856* s 22AB(5), *Strata Titles Act 1985* s 131B(5), *Transfer of Land Act 1893* s 182AB(5) and *Valuation of Land Act 1978* s 51(5).

5.51 Clause 6(7) of the Bill proposes that:

A proclamation cannot be made under subsection (1) or (3) unless a draft of the proclamation has first been approved by a resolution passed by both Houses of the Parliament of the State.

5.52 Western Australia is the only jurisdiction to include a requirement for a proclamation terminating an adoption and reference to first be approved by both Houses of Parliament. Legislation in other jurisdictions does not require prior Parliamentary approval, but simply provides for a termination by way of Executive proclamation. Ilse Petersen commented on this and said:

It was a policy decision and it was to give the Parliament an input into the termination process.⁵⁸

5.53 The Solicitor-General added:

the referral of power is something that has to occur by Parliament and it is something that is a referral of legislative power. Because of that, and to maintain the sovereignty of Parliament, I understand the policy decision may well be driven by the fact that if Parliament is referring it, it should be the body that takes it back because we are dealing here with legislative power and it is not appropriate for the executive to be making that decision.⁵⁹

...

if there is a termination and it is to occur only by executive proclamation and without the approval of Parliament, the legal validity of that is at greater risk than one where Parliament is exercising its own control over the return of legislative power.⁶⁰

5.54 The Committee accepts the Solicitor-General's advice.

5.55 The process of termination under clause 6 would commence with a draft proclamation by the Governor. It would only be a Government that could initiate a termination as the Governor acts on the advice and with the consent of the Executive Council (other than in respect to any reserve powers). This is expressly provided for in section 60 of the *Interpretation Act 1984*.⁶¹

5.56 The procedure for dealing with the draft proclamation in Parliament would likely be as follows:

- The Governor makes a draft proclamation in Executive Council.
- The draft proclamation is published in the *Gazette*.
- The draft proclamation is tabled in both Houses of State Parliament.
- A Member, most likely the responsible Minister, gives 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.

⁵⁸ Ilse Petersen, Adviser, State Solicitor's Office, *Transcript of evidence*, 11 February 2019, p 5.

⁵⁹ Joshua Thomson, Solicitor-General, Department of Justice, *Transcript of evidence*, 11 February 2019, p 5.

⁶⁰ *ibid*.

⁶¹ Nigel Pratt, Clerk of the Legislative Council, Advice to the Standing Committee on Uniform Legislation and Statutes Review, 12 February 2019, p 1.

- If the motion is 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 is agreed to the two Houses have approved the draft proclamation.
 - The Governor makes a proclamation in Executive Council.
 - The proclamation is published in the *Gazette* and becomes effective.⁶²
- 5.57 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.⁶³
- 5.58 Advice to the Committee was that there is 'probably limited value in specifying time limits in a procedure as the termination is initiated by Government and would only occur with the support of Government and the Legislative Assembly where the Government would usually have a majority of Members'.⁶⁴
- 5.59 The use of the procedure in clause 6(7) preserves the Western Australian Parliament's ability to terminate the reference of power to the Commonwealth. This safeguards Parliamentary sovereignty.
- 5.60 Provisions identical to clause 6(7) appear in the:
- *Terrorism (Commonwealth Powers) Act 2002* – section 5.
 - *Personal Property Securities (Commonwealth Laws) Act 2011* – sections 7 and 9.
 - *Business Names (Commonwealth Powers) Act 2012* – section 8.
- 5.61 However to date these provisions remain unused.

Twelve months before termination is effective

- 5.62 Clause 6(2) provides:
- The termination day must be no earlier than the first day after the end of the period of 12 months beginning with the day on which the proclamation is published in the *Gazette*.
- 5.63 The Committee queried the need for a period of 12 months between the publication of a proclamation to terminate an adoption and reference and that proclamation coming into effect. Ms Petersen advised:
- It was to give time to set up a whole new administrative legal system for which child support can be put in place. It was considered that 12 months would be a realistic time.⁶⁵

⁶² *ibid.*, p 2.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ Ilse Petersen, Adviser, State Solicitor's Office, *Transcript of evidence*, 11 February 2019, p 9.

5.64 The Solicitor-General added:

what is terminated is not simply the referral but also the adoption. Because the adoption is terminated, then all of the things that have happened previously need to be validated or dealt with through a legislative regime—put into place by the state Parliament.⁶⁶

5.65 The Committee accepts this advice.

Can the adoption and reference be terminated by statute?

5.66 The Committee considered whether, in addition to the termination power in clause 6 of the Bill, it would still be possible for the Parliament to enact legislation to repeal the adoption and reference.

5.67 The Chairman asked the Solicitor-General:

I take it that the Parliament of Western Australia can still enact legislation to repeal the reference. There is that safeguard, albeit rather more involved.⁶⁷

5.68 The Committee also sought advice as to whether Western Australia has ever referred but subsequently repealed that referral of power to the Commonwealth.

5.69 The Solicitor-General, by letter dated 19 February 2019 (Appendix 2), advised that the Western Australian Parliament has repealed six statutes that referred matters to the Commonwealth Parliament. These statutes referred specified matters during World War II and were all repealed in 1965. The statutes were all out of force at the time of the repeal, but were repealed for the purposes of removing the Acts from the Statute book.⁶⁸

5.70 The Solicitor-General further informed the Committee:

Notably, 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 of an absolute majority to amend or repeal the statutes. Consequently, as a matter of caution, an absolute majority was sought to repeal the acts, despite the acts being out of force.⁶⁹

5.71 His letter also advised that 'No other instances of WA repealing legislation that referred matters to the Commonwealth were found'.⁷⁰

5.72 The Solicitor-General testified that the termination mechanism in the Bill provided greater certainty in relation to the validity of Commonwealth laws passed during the reference and adoption period:

Put it this way, the referral of power here is limited by the terms of the legislation. If what happens is that the state Parliament enacts legislation subsequently to terminate a reference, that might be a less good position in terms of the ongoing validity of commonwealth laws passed in that intervening period. Now that is a matter of debate. That has never been tested but that is one reason why you might want to prefer to have the limit expressed in the legislation that does the reference.⁷¹

⁶⁶ Joshua Thomson, Solicitor-General, Department of Justice, *Transcript of evidence*, 11 February 2019, p 9.

⁶⁷ Hon Michael Mischin MLC, Chairman, *Transcript of evidence*, 11 February 2019, p 6.

⁶⁸ Joshua Thomson, Solicitor-General, Department of Justice, Letter, 19 February 2019, p 1.

⁶⁹ *ibid.*, pp 1-2.

⁷⁰ *ibid.*, p 2.

⁷¹ Joshua Thomson, Solicitor-General, Department of Justice, *Transcript of evidence*, 11 February 2019, p 6.

FINDING 3

On the basis of advice from the Solicitor-General, and notwithstanding that the processes proposed involve Henry VIII clauses, it is preferable that any termination of the adoption and reference should be by way of proclamation first approved by both Houses of Parliament, as is provided for in clause 6(7) of the Child Support (Commonwealth Powers) Bill 2018.

Adoption, referral and Parliamentary sovereignty

- 5.73 Both the Solicitor-General and the adviser from the State Solicitor's Office were satisfied that the adoption and referral mechanism provided in the Bill is the best method to achieve the aim of the Bill but also to preserve Parliamentary sovereignty.⁷²

FINDING 4

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.

6 Conclusions

- 6.1 The Committee understands the desirability of eliminating the delay in the application to Western Australia of Commonwealth laws relating to the maintenance of exnuptial children. However, it is also conscious of its responsibility, as an extension of the Parliament, to inform Parliament of risks to its sovereignty and law-making powers.
- 6.2 Given the purpose of the Bill and the safeguards therein, the Committee concludes that the proposed referral of law-making power at the expense of Western Australia's Parliamentary sovereignty is, on balance, justified to enable Commonwealth Child Support laws to apply equally and in a timely fashion to all Western Australian children.

RECOMMENDATION 1

The Legislative Council note the Committee's findings during consideration of the Child Support (Commonwealth Powers) Bill 2018.



Hon Michael Mischin MLC
Chairman

⁷² Joshua Thomson, Solicitor-General, Department of Justice, *Transcript of evidence*, 11 February 2019, p 11 and Ilse Petersen, Adviser, State Solicitor's Office, *Transcript of evidence*, 11 February 2019, p 11.

APPENDIX 1

ANNEXURE A TO THE EXPLANATORY MEMORANDUM

ANNEXURE A

The *Family Assistance and Child Support Legislation Amendment (Protecting Children) Act 2018* (Cth) (the Act) received Royal Assent 22 May 2018 and, as noted below, some provisions commenced the day after and others 1 July 2018.

This Act:

- implements recommendations of the House of Representatives Standing Committee Social Policy and Legal Affairs (the Committee) report *From conflict to cooperation: Inquiry into the Child Support Program*; and
- amends four statutes –
 - the *A New Tax System (Family Assistance) Act 1999* (Cth);
 - the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth);
 - the *Child Support (Assessment) Act 1989* (Cth); and
 - the *Child Support (Registration and Collection) Act 1988* (Cth).

Schedule 1 Parts 1, 2 and 3 of the Act amend the *Child Support (Assessment) Act 1989* (Cth) and commence on the day after the Act receives the Royal Assent which was 22 May 2018.

Schedule 1 Part 4 Division 1 commences 1 July 2018 and amends both the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth).

Schedule 1 Part 4 Division 3 amends the *Child Support (Assessment) Act 1989* (Cth) and commences 1 July 2018.

Schedule 1 Part 1—Interim care determination periods

The formula for a child support assessment is based in part on the amount of time the child spends with each parent. When subsequent to the assessment a parent disputes the assessment on the grounds that the level of care has changed an interim care determination can be made until the matter is resolved. Previously, that interim determination was for a period of up to 14 weeks, or up to 26 weeks in special circumstances.

The Committee considered that the fourteen week period did not provide sufficient time for relevant legal proceedings to be completed or for prior agreed arrangements to be enforced by a court or for revised arrangements to be agreed upon. The Committee recommended legislative amendment.

Part 1 of Schedule 1 will:

- allow for interim care determinations to be extended to a maximum period of 52 weeks where the disputed care change occurs within the first year of a court ordered care arrangement;
- in the case of older court orders, allow for interim care determinations to be extended to up to 26 weeks if the person with increased care does not take reasonable action to participate in dispute resolution;
- maintain the maximum 14-week interim care determination period for care arrangements that take the form of care agreements or parenting plans, where the disputed care change occurs in the first year after the agreement or plan is made; and
- apply a shortened maximum interim care determination period where the agreement or plan is older than a year, and the person with increased care continuously takes reasonable action to participate in family dispute resolution.

Schedule 1 Part 2 Amended tax assessments

Previously where a parent's tax assessment was amended after it had been used in an assessment to calculate child support, the Registrar could not amend the assessment to take into account the amended tax assessment except in restricted circumstances – for example where the tax assessment was amended due to fraud or tax evasion.

The Committee noted that the Commonwealth Ombudsman "raised concern around the rigidity of rules around the Registrar's ability to amend an assessment when a tax assessment turns out to be incorrect".¹ The Ombudsman related a case study where, as the result of an error by his accountant the ATO assessed the taxable income of the payer of child support to be \$292,000 when in fact it should have been \$92,000. His child support assessment increased accordingly. The ATO informed the Registrar of the error but under the existing legislation, the Registrar was unable to correct the error unless the payer made an application for a "Change of Assessment in special circumstances" which the Ombudsman said is a "complex, intrusive and time consuming process to rectify a simple error".

The Committee shared this concern and at Recommendation 12 recommended an amendment to section 56(2) of the *Child Support (Assessment) Act 1989* (Cth) to facilitate the Registrar's power to take into account amended tax assessments.

This amendment to section 56 the *Child Support (Assessment) Act 1989* (Cth) allows for amended tax assessments to be taken into account by the Child Support Registrar in a broader range of circumstances than previously.

Schedule 1 Part 3 – Child Support agreements

The child support legislation allows parents to reach agreement on the amount of child support to be paid. A child support agreement has to meet the requirements of the Child Support legislation and has to include matters that can be dealt with in a Child Support Agreement. Once parents have made a child support agreement, either parent can apply to the Registrar to have it accepted.

Prior to 1 July 2008, when the legislation changed, there were two types of child support agreements: binding agreements for which legal advice was required and limited agreements for which the parties were not required to receive legal advice.

Post 1 July 2008 limited agreements were transitioned by Child Support as "deemed binding agreements" even though they had not met the criterion of legal advice before execution of the agreement. Transitional child support agreements can be terminated by an agreement in writing by both parties. Or, as with binding agreements a new binding agreement that includes a provision that the previous one is terminated.

A court may set aside either a binding agreement or a transitional agreement on the application of a party only where it can be established that the agreement of one of the parties was obtained by fraud, undue influence or unconscionable conduct, or there are exceptional circumstances resulting in a party to the agreement or a child suffering hardship if the agreement is not set aside. Thus even though transitional agreements were made under different legislation when there was no requirement for legal advice the courts were given no discretion to treat them differently.

The Law Council of Australia submitted to the Committee that the reported decisions of the Family Courts illustrate that setting aside such Agreements requires the applicant "to jump a very high hurdle: there is a need to establish 'exceptional circumstances' and 'consequential

¹ House Standing Committee on Social Policy and Legal Affairs Inquiry into the Child Support Program *From Conflict to Cooperation* at 3.99 page 73

hardship' if the Agreement is not set aside"². The Committee recommended at Recommendation 12 that the Government consider matters pertaining to this restriction.

The amendments introduce a separate and less restrictive test for courts to set aside child support agreements entered into prior to 1 July 2008 under the then rules for limited agreements where neither of the parties obtained legal advice. It allows also for all child support agreements to be set aside without having to go to court if the person who is entitled to child support under the agreement ceases to be an eligible carer of the child – that is, where the level of care falls below 35%.

Schedule 1 Part 4 Divisions 1 and 3 - Overpayments

Responding to complaints that, while child support debts by payers due to under payments or non-payment were always followed up, child support debts by recipients due to overpayments being made were almost never followed up, the Committee recommended "that the Australian Government ensure that the collection of debts relating to overpayments is given equivalent treatment to instances where underpayments are made"³.

The resulting amendments align the Registrar's ability to recover a child support overpayment from a payee with the methods for recovering a child support debt from a payer.

² House Standing Committee on Social Policy and Legal Affairs Inquiry into the Child Support Program *From Conflict to Cooperation* at 3.134 page 83

³ *Ibid* 4.144 at page 139

APPENDIX 2

LETTER FROM THE SOLICITOR-GENERAL DATED 19 FEBRUARY 2019



19 February 2019

Tracey Sharpe
Committee Clerk
Standing Committee on Uniform Legislation and Statutes Review
Parliament House
GPO Box A11
Perth WA 6837

Dear Ms Sharpe,

Child Support (Commonwealth Powers) Bill 2018 – Hearing 11 February 2019

In answer to your email dated 13 February 2019, please find attached a copy with my corrections of the draft transcript from the Standing Committee on Uniform Legislation and Statutes Review hearing on 11 February 2019.

Additionally, during the hearing there was one question taken on notice. The Chairman of the Committee requested I identify and report any instances of WA repealing statutes that referred matters to the Commonwealth.

The WA Parliament has repealed 6 statutes that referred matters to the Commonwealth Parliament (under s51(xxxvii) of the *Commonwealth Constitution*):

- *Commonwealth Powers Act, 1943*
- *Commonwealth Powers Act, 1945*
- *Commonwealth Powers Act, 1943, Amendment Act 1947*
- *Commonwealth Powers Act, 1945, Amendment Act, 1947*
- *Commonwealth Powers Act, 1945, Amendment Act (No. 2) 1947*
- *Commonwealth Powers Act, 1945-1947, Amendment (Continuance) Act, 1947*

These six statutes referred specified matters to the Commonwealth during WWII. They were all repealed by the *Statute Law Revision Act (No. 2) 1965*. Additionally, the statutes were all out of force at the time of repeal: the 1943 and 1945 acts due to sunset clauses. The six statutes were repealed for the purposes of removing the Acts from the Statute book.

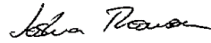
Notably, the statutes were repealed by an absolute majority in both the Legislative Council and Assembly. The second reading speeches (in both Houses) noted that the statutes included a requirement of an absolute majority to amend or repeal the

Level 28, David Malcolm Justice Centre, 28 Barrack Street, Perth, Western Australia 6000
Telephone: (08) 9264 1806 Facsimile: (08) 9321 1385
e-mail: solgen@justice.wa.gov.au

statutes. Consequently, as a matter of caution, an absolute majority was sought to repeal the acts, despite the acts being out of force.

No other instances of WA repealing legislation that referred matters to the Commonwealth were found.

Yours sincerely,



JOSHUA THOMSON SC
SOLICITOR-GENERAL

[enc]

GLOSSARY

Term	Definition
Act	<i>Child Support (Adoption of Laws) Act 1990</i>
Bill	Child Support (Commonwealth Powers) Bill 2018
Committee	Standing Committee on Uniform Legislation and Statutes Review
Commonwealth Child Support laws	<i>Child Support (Registration and Collection) Act 1988</i> (Cth) and the <i>Child Support (Assessment) Act 1989</i> (Cth)
Constitution	<i>Commonwealth of Australia Constitution Act</i>
Scheme	Commonwealth Child Support Scheme

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 review the form and content of the statute book; and
 - (d) 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.'



Parliament House,
4 Harvest Terrace, West Perth WA 6005
Telephone: +61 8 9222 7222
Email: lcco@parliament.wa.gov.au
Website: <http://www.parliament.wa.gov.au>