THIRTY-EIGHTH PARLIAMENT

REPORT 77

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

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

Presented by Hon Adele Farina MLC (Chairman)

November 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)
(Did not participate due to leave being granted)

Hon Robin Chapple MLC

Hon Nick Goiran MLC

Staff as at the time of this inquiry:

Susan O'Brien (Advisory Officer (Legal))

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REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

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

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1 EXECUTIVE SUMMARY (PARLIAMENTARY SOVEREIGNTY AND LAW-MAKING QUESTIONS IDENTIFIED)

1.1 The Standing Committee on Uniform Legislation and Statutes Review (**Committee**) has identified two clauses of the Family Court Amendment (Family Violence and Other Measures) Bill 2012 (**FV Bill**) that may impact on Parliamentary sovereignty and law-making:

- clause 8 - which raises the question of whether inclusion of an object of "*giving effect*" to the Convention on the Rights of the Child (**Convention**) "*done at New York on 20 November 1989*" constitutes delegation of the State's law-making powers to international bodies or the State judiciary; and

- clause 39 – which proposes a Henry VIII clause, item 13 of Schedule 2, Division 2 (**Item 13**).

1.2 The House's position with respect to Henry VIII clauses is well established. For reasons set out in Part 4, the Committee has recommended that Item 13 be deleted.

1.3 The Committee has found that clause 8 elevates the status of the Convention in interpreting Part 5 of the *Family Court Act 1997* (WA) (**FC Act**). However, the underlying ambiguities and legal controversies preclude it making a conclusive determination as to clause 8's impact on Parliamentary sovereignty and law-making powers.

1.4 As Part 3 explains, there are differing views and legal arguments on the version of the Convention captured by the phrase "*done at New York on 20 November 1989*". In particular it is not clear, whether:

- clause 8 is limited to Australia's legal obligations under the Convention (Australia has entered a reservation and not accepted a 2002 amendment); and

- the Convention always speaks, so that future amendments are also captured.

Related to this, there are differing views and legal arguments on the impact of inserting an object of "*giving effect*" to the Convention. So, for example, if clause 8

does always speak, does clause 8's status as an interpretative rather than substantive clause mean that it has no impact for Parliamentary sovereignty and law-making?

1.5 As Drs Carolyn Evans and Simon Evans observe: "*the content of rights and their application are inherently controversial and political*".[1] Many of the Articles of the Convention are aspirational, with their content to be guided by rulings of bodies such as the United Nations' Committee on the Rights of the Child.[2] An analogy can be made with skeletal legislation that provides insufficient guidance to the legislative scheme that will be established in regulations.

1.6 With some jurisdictions enacting charters of human rights, the question of whether the judiciary rather than the legislature is determining the content of human rights has been the subject of much recent controversy in Australia. It has also been controversial in the United Kingdom with enactment of section 3(1) of the *Human Rights Act 1998* (UK), which provides:

> *So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention right.*[3]

This provision has been held by the House of Lords to be "*apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention compliant.*"[4]

1.7 It has been observed that the House of Lords interpretation of section 3(1) raises a question of whether there has been a shift in the constitutional relationship between the United Kingdom courts and the United Kingdom Parliament.[5] While they are not in precisely the same terms, and constitutional arrangements differ, there are obvious similarities between clause 8 and section 3(1).

1.8 For reasons set out in Part 3 the Committee is not satisfied that (in the event it is technically correct) the statement in the Explanatory Memorandum that clause 8:

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1 Evans, Dr Carolyn and Evans, Dr Simon, *The effectiveness of Australian Parliaments in the protection of rights*, Paper delivered at the Legislatures and the Protection of Human Rights Conference, Melbourne Law School, 20-22 June 2006, p1.

2 See footnote 33 for an overview of the different sources for international law and footnote 35 for the Third Optional Protocol to the Convention, which will permit individuals to make complaints that the Convention has been breached to the Committee on the Rights of the Child.

3 http://www.legislation.gov.uk/ukpga/1998/42/section/3, (viewed on 4 October 2012).

4 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, p571-2 per Lord Nicholls of Birkenhead quoted by French CJ in *Momcilovic v The Queen* [2011] HCA 34 (8 September 2011) (***Momcilovic* case**) paragraph 47.

5 See French CJ and Gummow J in the *Momcilovic* case, respectively paragraphs 47-9 and 150-8. (See also Heydon J at paragraph 446.)

> *does not incorporate the Convention into domestic law,*[6]

disposes of Parliamentary sovereignty and law-making concerns.

1.9 The Committee has, therefore, reported the differing views and outlined the main legal controversies. It has made some findings to assist the House in its consideration of the impact of clause 8. It has also made a recommendation for an amendment that minimises potential for impact on Parliamentary sovereignty and law-making.

1.10 In the course of this inquiry, the Committee's attention has been drawn to a possible systemic issue in the State's replication of Commonwealth legislation citing a convention. Different Commonwealth and State drafting practices, in combination with different Commonwealth and State interpretation Act treatment of notes in an Act, may result in different versions of a convention being captured when identical words are used. This matter, which is relevant to the Committee's 'treaty' Term of Reference, as well as the House's consideration of uniform legislation, is drawn to the attention of the House in Part 5.

2 REFERRAL , LEGISLATIVE SCHEME AND INQUIRY PROCESS

Referral

2.1 The FV Bill was referred to the Committee on 19 September 2012.[7] It proposes changes to the FC Act to render State legislation regarding ex-nuptial children consistent with the *Family Law Act 1975* (Cwth) as amended by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cwth) (**Commonwealth FV Act**).

2.2 The Commonwealth FV Act commenced on 7 June 2012 when, the explanatory materials to the FV Bill advises, it introduced substantial changes regarding the protection of children and families at risk of violence.[8] These changes currently apply in Western Australia to children of a marriage but not to ex-nuptial children (see Legislative Scheme section below for why this occurs). If enacted, the FV Bill will apply the Commonwealth FV Act changes to ex-nuptial children.

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6 Explanatory Memorandum to the Family Court Amendment (Family Violence and Other Measures) Bill 2012 (**Explanatory Memorandum to the FV Bill**), p4.

7 The Attorney General Hon Michael Mischin MLC introduced the FV Bill into the Legislative Council on 19 September 2012 and nominated it as a Uniform Legislation bill pursuant to Standing Order 126(2). (Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 19 September 2012, pp6116-7.) The FV Bill accordingly stood referred to the Committee pursuant to Standing Order 126(4).

8 Explanatory Memorandum to the FV Bill, p1.

Legislative Scheme

2.3 The *Commonwealth of Australia Constitution Act 1901* (**Constitution**) confers power on the Commonwealth to legislate with respect to marriage, divorce and matrimonial causes. The latter includes legislative power with respect to children of a marriage.[9] However, the Commonwealth has no equivalent power to legislate with respect to ex-nuptial children, who remain within the legislative competence of the States.

2.4 When making the *Family Law Act 1975* (Cwth), the Commonwealth established the Family Court of Australia, with power to resolve disputes throughout Australia in respect of child custody, guardianship, access and maintenance involving a child of a marriage. However, the *Family Law Act 1975* (Cwth) also provides the option to confer federal jurisdiction on a State court.[10] Where this occurs, the *Family Law Act 1975* (Cwth) jurisdiction runs in conjunction with the State court's jurisdiction in respect of ex-nuptial children.

2.5 Between 1986 and 1990, the States other than Western Australia opted to refer their power to legislate with respect to ex-nuptial children to the Commonwealth rather than continue with State courts. The Family Court of Australia now resolves any divorce or matrimonial disputes involving those children.[11]

2.6 Western Australia, however, continues to operate a State family court, the Family Court of Western Australia, with State jurisdiction over ex nuptial children under the FC Act and federal jurisdiction over children of a marriage under the *Family Law Act 1975* (Cwth).

2.7 Whenever the Commonwealth alters the *Family Law Act 1975* (Cwth), those changes apply to the Family Court of Western Australia when exercising its federal jurisdiction – that is, in respect of children of a marriage. Western Australia endeavours to keep the FC Act consistent with the *Family Law Act 1975* (Cwth) so that no different treatment is accorded to ex-nuptial children in the State.

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9 Sections 51(xxi) and (xxii) of the *Commonwealth of Australia Constitution Act 1901* (Cwth). The power with respect to children is related to the divorce and matrimonial clauses power and is in respect of "*parental rights, and the custody and guardianship of infants*".

10 See section 41 of the *Family Law Act 1975* (Cwth) relating to provision for the establishment of State Family Courts.

11 In 1986 the States of NSW, Victoria and SA referred power in relation to child custody, guardianship, access and maintenance to the Commonwealth. Tasmania followed in 1987 and Queensland in 1990, giving the Commonwealth legislative power in relation to parenting disputes regarding ex-nuptial children in those States in the Family Court of Australia. (CCH Australia Limited, *Australian Master Family Law Guide, 1st Edition*, p5 quoted in Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 58, *Child Support (Adoption of Laws) Amendment Bill 2009*, 15 February 2011, p3.)

Inquiry process

2.8 The Committee's inquiry was advertised on its website. A hearing was held on 15 October 2012 with:

- Mr David Monaghan, Principal Registrar of the Family Court of Western Australia (**Principal Registrar**); and

- Ms Lesley McComish, Manager, Legislation Reform, Courts and Tribunal Services, Department of the Attorney General.

At the hearing, the Department of the Attorney General (**Department**) tabled an "*officer level*" written response to Committee questions provided shortly prior to the hearing (**Department's Written Response**).[12] The Department subsequently provided a written answer to a question taken on notice at the hearing (**Answer to Question Taken on Notice**).[13]

2.9 The Committee expresses its appreciation to the Principal Registrar for his appearance before the Committee, which was the result of the Attorney General's nomination of him as the expert available to answer the Committee's questions[14] and the Department's proposal that he be a witness. As is apparent from this report, the Principal Registrar's evidence was of great assistance to the Committee. The Committee also expresses its appreciation to Ms McComish, in particular for her attention to providing relevant information in response to the Committee's questions, which she received at very short notice.

3 CLAUSE 8: WHETHER IT CONSTITUTES A DELEGATION OF PARLIAMENT'S LAW-MAKING POWER

LEGISLATIVE CONTEXT FOR CLAUSE 8 QUESTIONS

3.1 Clause 8 of the FV Bill inserts a new object to section 66 of the FC Act. Proposed subsection 66(4) will provide:

> *An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.*

The current text of the Convention is attached as **Appendix 1**.

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12 Written response to questions provided by the Standing Committee on Uniform Legislation and Statutes Review, dated 15 October 2012 (**Department's Written Response**).

13 Email from Ms Lesley McComish, Manager, Legislation Reform, Courts and Tribunal Services, Department of the Attorney General, 18 October 2012 (**Answer to Question Taken on Notice**).

14 Submission from Hon Michael Mischin MLC, Attorney General, 19 September 2012, unnumbered third page.

3.2 The relevant Part of the FC Act, Part 5, is some 138 pages long. It provides for matters such as parental responsibility, maintenance and parenting orders, dealing with people who have been arrested, independent representation of a child's interests and court treatment of family violence.

WHETHER CONVENTION IS "*INCORPORATED*" INTO DOMESTIC LAW

Explanatory Memorandum and differing views on whether Convention incorporated

3.3 The Explanatory Memorandum to the FV Bill asserts that clause 8:

> *is an interpretive matter with the purpose of confirming, in cases of ambiguity, the obligation on decision makers to interpret Part VII* [sic] *of the Act, to the extent its language permits, consistently with Australia's obligations under the Convention. To the extent that the Act departs from the Convention, the Act would prevail. This provision does not incorporate the Convention into WA domestic law.*[15]

3.4 The Australian Parliamentary Library Bill Digest in respect of the Commonwealth FV Bill, however, points to differing views on whether the equivalent federal clause incorporates the Convention into domestic law. These views included a suggestion that the wording "*give effect to*" be changed to "*is to have regard to*" as more accurately reflecting the existing status of the Convention.[16]

3.5 The Senate Committee examining the Commonwealth FV Bill noted those views but did not make any comment or finding (beyond agreeing the formulation "*done New York on 20 November 1989*" was "*inelegant*").[17]

3.6 Underlying the statements in the Explanatory Memorandum to the FV Bill (which were directly copied from the Explanatory Memorandum to the Commonwealth FV Bill[18] – even to the point of referring to Part VII, the relevant Part of the *Family Law*

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15 Explanatory Memorandum to the FV Bill, p4.

16 Parliament of Australia Department of Parliamentary Services, Bill Digest, Family Law Legislation (Family Violence and Other Measures) Bill 2011, 24 March 2011, p19 referring to the submission of The Law Society of New South Wales Family Issues Committee. (http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/790923/upload_binary/790923.pdf;fileType=application%2Fpdf#search=%22r4562%22 (viewed on 31 October 2012).) Other submissions were: "*The Shared Parenting Council of Australia recommends against the inclusion of the Convention arguing that, amongst other things, the Convention would 'operate to create a parental rights free zone in Family Law'. Furthermore, the Council questions the Explanatory Memorandum's denial that this amendment is not equivalent to incorporating the Convention into domestic law. Associate Professor Juliet Behrens and Professor Belinda Fehlberg note that further legislation is necessary to fully implement this Convention and that the practical implications of the reference to the Convention in the Bill are not clear.*"

17 Commonwealth of Australia, Senate, Standing Committee on Legal and Constitutional Affairs, Legislation Committee, *Family Law Legislation (Family Violence and Other Measures) Bill 2011*, 22 August 2011, pp18 and 64-5.

18 Department's Written Response, p3.

Act 1975 (Cwlth)) are a narrow, literal approach to interpretation and a technical distinction between:

- "*incorporation*" and "*giving effect*" - that the former only occurs when domestic legislation enables a convention, or article of a convention, to be directly enforced; and
- interpretive provisions and substantive law.[19]

3.7 From a legal perspective, the 'separation of powers' question is whether clause 8:

> *confer*[s] *upon the courts a law-making function of a character which is repugnant to the exercise of* ***judicial*** *power.*[20] (Committee emphasis)

3.8 The issue for the Committee under its Terms of Reference is not whether judges do alter substantive law, or even whether it is appropriate for them to do so, but whether clause 8 impacts on **Parliamentary** sovereignty and law-making power. This question is not necessarily answered by technical legal approaches to determining what constitutes an appropriate exercise of judicial power.

Department's view

3.9 The Department takes a narrow, literal (and somewhat theoretical) approach to the impact of clause 8. (See footnote 21 for an overview of the different approaches to interpretation.)[21] Reflecting the statement in the Explanatory Memorandum that

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19 The 'narrow' view is that purpose clauses do not override plain words or create rights and obligations but give practical content to abstract terms such as "*reasonable*", "*satisfactory*" etcetera in the legislation. (Pearce D and Geddes R, Statutory Interpretation in Australia, 7th Ed (**Pearce and Geddes**), pp156-7 referring to *Gibb v Federal Commissioner of Taxation* [1966] HCA 74; (1966) 118 CLR 628 at 635; *Hurstville City Council v Hutchison 3G Australia Pty Ltd* (2003) 200 ALR 308 at [63]; *Secretary, Department of Family and Community Services v Laurent* [2003] FCA 1017; (2003) 132 FCR 211 at [31]- [32]; *Kelly v R* [2004] HCA 12; (2004) 218 CLR 216 at [84]).

20 Gummow J in the *Momcilovic* case, paragraph 146 (step (vi). See also French CJ in the same case paragraph 93.

21 In Australia, at common law, there are two main approaches to interpretation: literal and purposive. The first tries to ascertain the meaning of a provision from the 'plain words' of the legislative text; the latter tries to identify the legislative purpose and uses that to give meaning to the legislative text. **The literal approach** is: "*a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.*" (*Amalgamated Society of Engineers* v Adelaide Steamship CO Ltd (1920) 28 CLR 129, per Know CJ and Isaacs, Rich and Starke JJ at pp161-2) **The purposive approach** is to identify the purpose and apply a meaning consistent with it: "*for the sure and true interpretation of all statutes .... Four things are to be discerned and considered: 1st what was the common law before the*

clause 8 will only come into play in cases of ambiguity, it states in its Written Response that:

> *the Convention is only to be used in the statutory process of elucidating and determining what Parliament meant or intended by the words in the legislation rather than the Convention determining the meaning of the legislation's text for the content of the rights and obligations that the legislation creates .... rather than making the Convention the source of, or the determinant of, the substantive meaning or content of the law.*[22]

3.10 However, the courts do not require ambiguity to refer to the Convention. In *B & B: Family Law Reform Act 1995*, (a case concerning Part VII of the *Family Court Act 1975* (Cwth) - the equivalent of Part 5 of the FC Act), even in the absence of a reference to the Convention in the legislation at that time, the Full Family Court rejected the Commonwealth Attorney General's argument that, as there was no ambiguity, it could not look at the Convention when deciding how to apply the 'best interests of the child' principle to substantive provisions. The judges found that while express reference to the Convention might "*elevate it*", absence of an express reference did not render it irrelevant for interpretation purposes.[23]

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making of the Act. 2nd What was the mischief and defect for which the common law did not provide. 3rd What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth and 4th The true reason of the remedy and then the office of the Judges is always to make such construction as shall suppress the mischief and advance the remedy ..." (*Heydon's* case 1584 3 Co Rep &a, 76 ER 637, at p638) (See Pearce and Geddes, pp25-67). These approaches are not rigidly defined categories but broad classifications that overlap and capture many variations. Corcoran observes: *"Frickey and Eskridge refer to a "Funnel of Abstraction" moving from the most concrete inquiry (statutory text) out (specific legislative intent, imaginative reconstruction, legislative purpose, evolution of statute) to the most abstract inquiry current values) .... It is an 'interactive process by which a practical interpreter will think about the various sources of statutory meaning' sliding up and down the funnel considering, rethinking and weighing the various criteria".* (Corcoran Suzanne, 'Theories of Statutory Interpretation' in Corcoran Suzanne and Bottomley Stephen, *Interpreting Statutes*, The Federation Press, Sydney, 2005, p24.) Even on the narrowest literal approach, a statutory provision is interpreted in the context of the legislation, with an Act being considered as a whole including any purposes stated in the legislation. Even on the broadest purpose approach, the words cannot be given a meaning that they cannot bear. (*Al-Kateb v Godwin* 219 CLR 562.) While neither approach has ever been absent, the 'traditional' approach to interpretation has been a 'literal' approach, with a 'purposive' being used when the 'literal' approach 'fails' by producing options for different meanings. Since the enactment of provisions such as section 18 of Interpretation Act 1984 (see footnote 31 for the text of this section) in all jurisdictions in the 1980s, a 'purposive' approach has been prevalent. (See Pearce and Geddes, pp30ff) However, as Charlesworth says: *"[The] introduction to this book notes the lack of interest in theories of statutory interpretation by the Australian judiciary. Australian practice is a patchwork of approaches leading to inconsistent and contentious results*". (Charlesworth, Hilary, *'Human Rights and Statutory Interpretation'*, in Corcoran Suzanne and Bottomley Stephen, Interpreting Statutes, The Federation Press, Sydney, 2005, p100).

22 Department's Written Response, p4.

23 [1997] Fam CA 33 (19 July 1997): for the Commonwealth Attorney General's submissions regarding lack of ambiguity – paragraph 6.35; for the Full Court's specific findings – paragraphs 10.14 and 10.16. The Commonwealth Attorney-General objected to reliance upon the Convention, which at that time was not referred to in the legislation, submitting that there was no ambiguity or obscurity in the legislation and

3.11 Also, reflecting the more prevalent purposive approach to interpretation (see footnote 21), in the High Court case of *Mills v Meeking*, Dawson J approached a purpose clause in the following way:

> *the purposes set out in Pt 5 of the Road Safety Act are to be taken into account in construing the provisions of that Part,* ***not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open***. [24] (Committee emphasis)

3.12 The courts can be quite impatient when a party seeks to rely on technical distinctions between whether an object or purpose provision creates or alters a right or has no impact because the substantive provision that it applies to only has meaning on consideration of the purpose clause – in practical effect, a circular argument. Again in *B &B: Family Law Reform Act 1995,* the Full Family Court said:

> *Although the Attorney-General submitted that the inter-relationship between the three sections* [the principle, object and substantive provisions] *was as much about procedure as it was about substantive law, we think it would be a mistake for this essential exercise to be clouded by procedural or semantic issues.*[25]

3.13 As the Department correctly acknowledges in its Written Response:

> *there is, no clear right line between statutory interpretation and alterations to the substantive law. ... there may be occasions when judges, despite as a matter of form indicating that* [they] *are only, or merely, interpreting the words of a statute they are in reality changing the meaning of the words in a statutory provision. ... (... this interpretative methodology* [progressivism] *could substantively alter the law).*[26]

3.14 The difficulty in distinguishing between 'interpretation' and giving content to rights is particularly apparent with the "*ample*" interpretation to be applied to legislation giving effect to human rights.[27]

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that Part VII was "*effectively*" a code. The Full Court observed that the rights of a child are not static and in enacting the principles provision, the Parliament expected the Court to have regard to those rights as identified from time to time. It found that even if the Convention had no recognition beyond ratification, section 60B was not a code and the Court could look outside it for assistance in interpreting its broad terms and dealing with matters the legislation did not address. (See generally, paragraphs 10.9 to 10.27)

24 (1990) 169 CLR 214 at p235, cited in Pearce and Geddes, p10.

25 [1997] Fam CA 33 (19 July 1997), paragraph 9.55.

26 Department's Written Response, pp3-4.

27 Hayne J observed in the *Momcilovic* case: "*s32 of the Charter, which relates to the interpretation of statutory provisions in a way that is compatible with human rights, being a statutory provision, must*

3.15 The way in which object clauses may have a substantive impact is illustrated by the case of *IW v City of Perth.* In that case Brennan CJ and McHugh J noted one of the objects of the *Equal Opportunity Act 1984* was to eliminate discrimination on the ground of impairment in provision of services and said:

> *Consequently, the provisions of the Act should as far as possible be given a construction that would eliminate discrimination on the ground of impairment.*
>
> *.... But subject to that proviso* [that the meaning not be unnatural], *if the term "service", read in the context of the Act and its object, is capable of applying to an activity, a court or tribunal, exercising jurisdiction under the Act, should hold that that activity is a "service" for the purpose of the Act.*[28]

3.16 Once a provision for which the Convention may suggest a meaning is identified, a different meaning may result than that the plain words of the provision would otherwise have had. The Department itself acknowledges that this has potential to alter the substantive law. As Hughes J observed in *Al-Kateb v Godwin*:

> *If Australian courts interpreted the Constitution by reference to the rules of international law now in force, they would be* ***amending*** *the Constitution ... Attempts to suggest that a rule of international law is merely a factor that can be taken into account in interpreting the Constitution cannot hide the fact that, if that is done, the meaning of the Constitution is changed whenever that rule changes what would otherwise be the case.*[29] (Original emphasis)

Principal Registrar's explanation of how clause 8 will be used by the court

3.17 The Principal Registrar provided the following explanation of how the Convention will actually be used by the Family Court of Western Australia:

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itself be interpreted in a way that is compatible with human rights – that is, amply". Hayne J also approved Cook P in *R v Butcher* [1992] 2 NZLR 257 at p264, where he said: "*What can and should now be said unequivocally is that a parliamentary declaration of human rights and individual freedoms, intended partly to affirm ... commitment to internationally proclaimed standards, is not to be construed narrowly or technically*." [Paragraphs 386 and 385].

28 191 CLR 1.

29 219 CLR 562; [2004] HCA 37 (***Al-Kateb* case**), paragraph 68. Hughes J makes a distinction between taking into account political, social and economic development, including the making of a convention, to "*elucidate*" the meaning of a head of power, and taking into account rules of international law to control that meaning. So that, on his view, the World Trade Agreement's prohibition on tariffs does not limit the *Constitutional* trade and commerce power. However, as seen in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* 194 CLR 355, where legislation requires functions to be exercised in accord with treaty requirements, and these requirements include equal trade, subsidiary legislation providing for local content in media programmes cannot be in conflict with that requirement.

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

***Mr Monaghan**: That is a good question. I think whenever the courts would be faced with an interpretation issue, under the Interpretation Act we would have to prefer or we would have to use an interpretation that was consistent with the convention and not inconsistent with the convention. In day-to-day cases, is that going to make a significant difference? No, it is not. Part of the reason is that a lot of the tenets of the convention are already enshrined in the Family Law Act and the Family Court Act in any event. …*

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

***Mr Monaghan**: **I think what it does is it elevates a bit**, as I indicated before, instead of just relying on the common law to be able to say when interpreting that **because it is now in a purpose or objects provision that the courts must do that**. But is it going to make any significant difference to the substantive law? The answer, I think, is probably not.*[30] (Committee emphasis)

3.18 Later in his evidence:

***Hon NICK GOIRAN**: Sorry; can I just ask then, Principal Registrar: just going back to the earlier discussion around whether this clause, clause 8 in the bill, really adds anything substantively, I take it that when you say that it could be helpful to amend it, that is in the event that it was included at first instance* [see paragraphs 3.40ff for discussion of this amendment] —

***Mr Monaghan**: That is right.*

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

***Mr Monaghan**: Well, as I say, I think it does elevate it a bit. It elevates it from the common law at the present time to put it in the objects provision. I think it is* [section 18 of the *Interpretation Act 1984*] *that actually talks about objects and purposes of acts, and so it would require us to do that as opposed to it being a tool you may use — an extrinsic tool you may use if there is a question of interpretation. But the issue that has been raised previously, "What*

[30] Mr David Monaghan, Magistrate and Principal Registrar, Family Court of Western Australia, *Transcript of Evidence*, 15 October 2012, p2.

> *effect is it going to have?"*— ***it will be in very few cases that it will have effect, but I suppose the cases, which would be an issue that would be raised before your standing committee all the time — there is that issue about, "Well, should it have a different meaning for children of a marriage as opposed to ex nuptial children?"*** *But you deal with that issue all of the time*.[31] (Committee emphasis)

Conclusions and finding

3.19 Technically, as clause 8 does not directly transpose the Convention or any of its Articles as substantive provisions of the FC Act, the Convention has not been "*incorporated*" into Western Australian domestic law. Again from a technical perspective, there is no **direct** delegation of law-making powers. When Parliament passes legislation stating that it is an object to give effect to the Convention it is taken to have endorsed the Convention text.

3.20 However, whether these technical distinctions answer the question of whether clause 8 operates to confer law-making powers on the domestic judiciary or international bodies is open to question. (The impact of uncertainty in what constitutes the relevant Convention text on this position is discussed below.)

3.21 Even on a technical view, the Convention may be used by judges to create (or limit) rights and obligations that would not otherwise exist through its operation on other provisions of the FC Act.[32] As previously noted, the Department acknowledges this has potential to alter the substantive law.[33]

3.22 The degree to which the aspirational language of the Convention may be given unexpected content by decisions of international bodies such as the Committee on the Rights of the Child[34] (which, as noted in Part 1, also raises a Parliamentary

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31 Mr David Monaghan, Magistrate and Principal Registrar, Family Court of Western Australia, *Transcript of Evidence*, 15 October 2012, p4. Section 18 of the *Interpretation Act 1984* states: "*In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object*".

32 In the *Momocilovic* case, the High Court considered section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). French CJ found section 32(1), which provides: "*So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights*" did not add to the common law, and that section 32(2), which provides: "*International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision*" did not create a mechanism for international law to become part of the law of Victoria. However, he found: "*the content of the human right will affect the potential application of the interpretive requirement in section 32(1) in relation to that right*" [paragraphs 19 and 50].

33 See paragraph 3.13 above.

34 In the *Al-Kateb* case, Hughes J noted that the rule that legislation be interpreted consistently with Australia's international obligations was "*a rule of construction of long standing*". In questioning

sovereignty concern) is not clear. The Committee notes that Convention obligations are likely to become more concrete when the Optional Protocol permitting individuals to make complaints to the Committee on the Rights of the Child comes into effect.[35]

3.23 The Committee is concerned that - in the circumstance that "*the content of rights and their application are inherently controversial and political*"[36] – there is potential for clause 8 to impact on Parliamentary sovereignty and law-making.

3.24 The extent to which the courts refer to the Convention in any event when interpreting the FC Act (for example, as seen in *B & B: Family Law Reform Act 1995*) is relevant to this concern. On this, in addition to the pointing out that clause 8 **requires** the courts to have regard to the Convention, rather than reference only occurring when permitted by the common law, the Principal Registrar observed an important qualitative element to clause 8. He said (making it clear that he expressed no opinion on the policy merits of the FV Bill):

> *If you asked me, "Did the court need specifically to be told in the legislation that if you are balancing up protection from harm and safety of a child against a meaningful relationship", you would have hoped that most judicial officers would actually give that preference and you would say okay,* ***but to have it there*** [in the legislation] ***is really important. It is really important as well for lawyers, advisers,***

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whether the rationale was still plausible, he observed the plethora of bodies that may make international law: "*No doubt the rule of construction had some validity when the rules of international law were few and well-known. Under modern conditions, however, this rule of construction is based on a fiction. Gone are the days when the rules of international law were to be found in the writings of a few well-known jurists. Under Art 38 of the Statute of the International Court of Justice, international law includes: (1) international conventions establishing rules recognised by contesting states, (2) international custom, as evidence of a general practice accepted as law and (3) the general principles of law recognised by civilised nations. International custom may be based on "diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions ... executive decisions and practices, orders to naval forces etc, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. Given the widespread nature of the sources of international law under modern conditions, it is impossible to believe that, when the Parliament now legislates, it has in mind or is even aware of all the rules of international law"* [Paragraphs 63-5].

[35] This Optional Protocol was adopted by the United Nations General Assembly on 19 December 2011 and opened for signature in February 2012. It will come into effect 3 months after it is ratified by the tenth State (UN Doc A/RES/66/138). Optional Protocols are not incorporated into the text of a convention. However, individual complaints procedures can result in specific rulings that give substance to convention articles - as evidenced by the *Toonen v Australia* complaint. In this case, Mr Toonen successfully complained to the United Nations Human Rights Committee that Tasmanian laws criminalising homosexual contact between men breached certain Articles of the International Covenant of Civil and Political Rights including the right to privacy (UN DOC CCPR/C/50/D/488/1992. As a response to the UN ruling, the Commonwealth used its external affairs power to pass the *Human Rights (Sexual Conduct) Act 1994* (Cwth) prohibiting the criminalisation of private homosexual contact.

[36] Evans, Dr Carolyn and Evans, Dr Simon, *The effectiveness of Australian Parliaments in the protection of rights*, Paper delivered at the Legislatures and the Protection of Human Rights Conference, Melbourne Law School, 20-22 June 2006, p1.

> ***consultants and the public in particular to know that that is the law — not just in how it is administered, but that it is the law and that is how highly it is rated as a matter of policy.***[37] (Committee emphasis)

3.25 The Committee agrees with the Principal Registrar that clause 8 "*elevates*" use of the Convention for interpretation purposes.

Finding 1: The Committee finds that clause 8 elevates the legal status of the Convention on the Rights of the Child in Western Australian law.

3.26 That is, there is no longer a basis to argue, as the Department does, that the Convention is an extrinsic tool that may be used only if there is ambiguity in the statutory text. Instead, it is a document that may suggest a novel meaning for a provision and determine the 'correct' meaning to apply (to the extent that the text of the provision can bear that meaning). While the courts may previously have had the option of referring to the Convention to determine the meaning of a provision of Part 5 of the FC Act, they now must do so.

3.27 In the *Teoh* case, Mason CJ and Deane J, cautioned:

> *The courts should* [develop the common law] *with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law.*[38]

While not technically incorporated, clause 8 provides a basis for a less cautious approach to development of the law.

3.28 The Department's response to the Committee's concern as to the impact of clause 8 on Parliamentary sovereignty was:

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37 Mr David Monaghan, Magistrate and Principal Registrar, Family Court of Western Australia, *Transcript of Evidence*, 15 October 2012, p7.

38 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353; [1995] HCA 20, paragraph 28.

> *If judges under the guise of statutory interpretation alter the substantive law in a way not intended, or disfavoured by the Parliament, then the Parliament can amend the legislation.*[39]

This is the convenient 'technical' response.

3.29 Parliament has no opportunity to amend legislation if it is not made aware of judicial alteration of the law. The Department's response ignores the reality that Parliamentarians do not trawl court judgements to see whether a law is being administered as intended. Further, while Members may introduce Private Bills, largely Parliament's opportunity to amend Acts depends on whether the Attorney General of the day, or other relevant Minister, is persuaded to introduce legislation. Even if amending legislation were introduced, and passed, this would not address the situation of persons who may have been affected in the intervening period.

3.30 This response also does not address the importance and significance of a clear statement as to the law, which the Principal Registrar advised the Committee was a "*really important*" feature of the FV Bill.

3.31 The Executive's response assumes Parliament should rubber stamp 'bad' law presented by the Executive ('bad' in the sense that it may permit alteration of the law in a way unintended by the Parliament) on the basis that it may be 'fixed up' later, rather than recognises Parliament's power and responsibility to make its intention clear in the legislation it makes.

3.32 The impact of clause 8 on Parliamentary sovereignty and law-making is considered further below.

"DONE AT NEW YORK ON 20 NOVEMBER 1989"

Introduction

3.33 On a 'plain reading', clause 8 appeared to the Committee to identify the Convention as that "*done*" at New York "*on*" 20 November 1989, rather than fix any particular date for the intended text – as may have occurred, for example, by identification of the Convention "*as at*" 20 November 1989.

3.34 The usual position when a document is 'adopted' in legislation is that the relevant text is that applying when the legislation comes into effect.

3.35 However, if this 'fall back' position is used, clause 8 is not in accord with the statement in the Explanatory Memorandum that it is intended to confirm (or, more correctly, impose) an obligation on decision makers to interpret Part 5 of the FC Act

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39 Department's Written Response, p4.

"*consistently with Australia's obligations under the Convention*". This is because the current Convention text, due to:

- a reservation entered by Australia to Article 37(c) when ratifying the Convention in 1990; and
- the 2002 amendment (to Article 43(2)) not accepted by Australia,[40]

differs from the obligations Australia has under the Convention.

3.36 The Committee also noted the possibility that a court might consider absence of a specified date or version of the Convention to be deliberate, so that clause 8 is taken to refer to the Convention text as that text is amended from time to time. (In the same way as the Full Family Court of Australia considered the 'best interests of the child' principle in *B &B: Family Law Reform Act 1995*. In that case, the Full Family Court found that the rights of a child are not static and that in enacting the 'best interests of the child' principle provision, Parliament expected the Court to have regard to those rights as identified from time to time. The Full Family Court observed that the Convention was the best place to start in identifying those rights.)[41] The legal principle that reforming and human rights legislation is to be interpreted amply could foster this interpretation of clause 8.[42]

3.37 If clause 8 were interpreted in this way, it might operate as a delegation of law-making power. Potential for capture of amendments agreed by the Commonwealth Executive raises a sovereignty issue:

> *The Courts adopt the view that an act of the executive in adopting an international treaty does not create a domestic law which the Courts must administer, because that is the function of the Parliament.*[43]

Potential for capture of amendments that Australia does not accept raises the question of delegation of law-making to international bodies.

3.38 The Committee, therefore, sought clarification of the intent of clause 8 and views as to its effect.

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40 By article 50 of the Convention, amendments are not binding on States until accepted. (See Appendix 1) However, on the specified number of States accepting an amendment, the Convention text is amended.

41 See footnote 23.

42 See footnote 27. Also, section 16(1) of the *Interpretation Act 1984* provides: *A reference in a written law to a written law shall be deemed to include a reference to such written law as it may from time to time be amended."* Without incorporation, the Convention is not a written law for the purposes of that Act but section 16 reflects a common law approach that could be applied to it.

43 McIntyre, Greg SC, '*The Impact of Human Rights in Administrative Decision-Making'*,, Legalwise Seminar, 25 March 1990, p1.

Differing views on which text applies

Principal Registrar's view

3.39 The Principal Registrar was not comfortable with clause 8 applying a version of the Convention that was different from that ratified by Australia or applying the Convention as it may be from time to time. When asked what he read into or understood by the description of the Convention in the FV Bill, he approached clause 8 'purposively'. He said:

> *When I first saw that I had not given consideration to it. I think it is odd. It surely could not have been the intention of Parliament to do anything other than as ratified by Australia; and as you are well aware, there are a couple of reservations* (sic)*, particularly in respect of children in prison with their parents et cetera. I looked as far as I could, and I must confess to having limited time over the weekend to do this, but I thought "Is there some sort of tenet of statutory construction that actually says "Oh, no, that really means as ratified by Australia'?", but I could not find one.*[44]

3.40 Given this disconnect between understood intention and the wording of clause 8, the Principal Registrar confirmed that an amendment of clause 8 so that it referred to the Convention as ratified by Australia on the date of ratification would "*make it much easier for the judicial officers*".[45]

3.41 When asked whether there needed to be a specified date, the Principal Registrar confirmed the Committee's preliminary concerns, saying:

> *I do not know the answer to that because there might be concerns about perhaps putting something in that you do not know what Australia is going to ratify in the future.*

He also referred to the prospect of future amendments becoming binding.[46]

3.42 The Committee considered whether, if a court were prepared to take a 'broad' or 'ample' purposive approach, the FV Bill might be interpreted as implying the Convention text as ratified by Australia on the basis that:

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44 Mr David Monaghan, Magistrate and Principal Registrar, Family Court of Western Australia, *Transcript of Evidence*, 15 October 2012, p3.

45 Ibid, pp3-4.

46 Ibid, p5.

> *the purposes of the statute, may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.*[47]

However, to 'read in' words such as "*as ratified by Australia*" may amount to amending legislation, rather than giving a purposive meaning to words already in the text.[48]

3.43 As a judicial officer charged with interpreting clause 8, the Principal Registrar's advice that he has difficulty interpreting clause 8 and that a specific date or version of the Convention would ensure it is not picked up as amended from to time to time, is of concern.

Department's view

3.44 In its Written Response, the Department asserts an interpretation of clause 8 not proposed by the Principal Registrar - that the relevant Convention text is that "***at** 20 November 1989*". (In this, the Department substitutes "*at*" for "*on*" in the legislative text. In fact, the usual drafting practice to indicate that a document is being incorporated at a particular date is to provide that it is incorporated as "*at*" the date.)

3.45 The Department's Written Response states:

> *clause 8 directs attention to the Convention's text as at 20 November 1989 and does not direct attention to the reservation. Therefore, for interpretative purposes, it is article 37(c) as at 20 November 1989 which is relevant and is to be used. The reason is that the WA*

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47 Per McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355, [2004] HCA 37, paragraph 78. The quoted excerpt followed the passage: "*the duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, ...*" The *Project Blue Sky* case involved interpreting a legislative requirement that the Australian Broadcasting Authority perform its functions consistent with treaty obligations, with an alleged inconsistency between a provision allowing standards to be made 'related to' Australian content in programs and a treaty obligation for equal access to markets. The majority 'read down' the Australian content provision to find it only authorised content standards that did not discriminate against New Zealand.

48 While there are cases in which a judge has implied words into legislation, this occurs in very limited circumstances where a court considers it is giving legislation effect, rather than amending it. That is, where it is necessary for legislation to have effect and where the court is certain what words Parliament would have used. (See Pearce D and Geddes pp54-6 and the cases referred to therein.) Neither of these circumstances applies to clause 8. In *Saeed v Minister for Immigration and Citizenship*, in a six judge joint judgement, the High Court interpreted a provision in clear contradiction to statements in the EM and Parliament as to what was intended: "*Statement as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning. ... The presumption is that words are used in a statute for a reason...*". ([2012] HCA 23 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ paragraphs 31 and 39 quoted in Moe Tim '*Context and Construction: Western Australian and Commonwealth Statutory Interpretation Decisions'* paper presented at Australian Government Solicitor seminar Perth 7 September 2010.)

> *legislation, as indicated above, follow* (sic) *the Commonwealth legislation and the Commonwealth Parliament has* ***decided*** *in 2011 not, for these interpretative process* (sic), *to mirror the Commonwealth Executive's earlier decision to make a reservation to article 37(c).*[49] (Committee emphasis)

3.46 The Department developed this view in its Answer to Question Taken on Notice, asserting that the Commonwealth Parliament is "*clearly indicating*" in its legislation that those who interpret the *Family Law Act 1975* (Cwlth) are to use Article 37(c) "*as it stands in the text of the Convention without reference to the reservation*" and:

> *To the extent that this indicates that there is a different policy position between the Commonwealth Parliament and the Commonwealth Executive,* ***the position of the Commonwealth Parliament*** *(for the purposes of Commonwealth domestic law)* ***would prevail****.*[50] (Committee emphasis)

3.47 While an argument based on the position of Parliament prevailing over that of the Executive is naturally appealing to the Committee, there are a number of problems with the Department's assertions – not least, that they appear inconsistent with the Explanatory Memorandum's statement of State Executive intent.

3.48 As noted above, the Principal Registrar took a purposive approach to interpreting clause 8. The Department's argument reflects a narrow 'literal' approach to interpretation, with legislative purpose being divined solely from the text of the FV Bill (see footnote 21). It is also based on the technical, theoretical way in which judges identify Parliamentary intent.[51]

3.49 The Parliament is not bound by the legal approach to identifying Parliamentary intent. In any event, the Committee notes that even from a narrowest literal legal perspective, where legislation is ambiguous, regard may be had to purpose, context and extrinsic

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49 Department's Written Response, p6. In considering the proposition that the Commonwealth Parliament has legislated outside Australia's Convention obligations, it is important to note that the Commonwealth is not restricted to its 'external affairs' power in making its legislation. It may rely on its power to legislate with respect to divorce and matrimonial causes to make legislation different from Australia's Convention obligations.

50 Answer to Question Taken on Notice, p1.

51 In identifying Parliamentary intent, both literal and purposive approaches are objective, not subjective. In the *Momcilovic* case, Gummow J quotes *Zheng v Chai* [2009] HCA 52: ""*It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpreting and application of laws.*" *In that context* "[a]*scertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.*" (Paragraph 146.)

materials to assist in interpretation.[52] Where there are differing views as to what clause 8 means, it is clearly ambiguous.

3.50 Although presented as a statement of fact, the assertion that the Commonwealth Parliament "*decided*" to direct attention to the 1989 text rather than the Convention as ratified is in reality **a legal argument** for the Committee to consider or, given the declaratory tone, **the Department's conclusion** that the Committee is expected to accept. The legal argument is relevant to the Committee's question as to the way in which a court may interpret clause 8. It does not, however, reflect the facts pertaining to the passage of the Commonwealth FV Bill or (on the evidence presented to the Committee) actual knowledge of the Commonwealth Executive's, or Commonwealth Parliament's, intent.

3.51 At the hearing the Department's position was that clause 8 merely replicated the equivalent Commonwealth FV Act provision.[53] It took the question, of whether the Commonwealth had given consideration to Australia's reservation and the 2002 Amendment to the Convention, on notice. The Department subsequently advised the Committee that it did not know whether the Commonwealth drafting officers did not know about the reservation or knew about it and decided not to refer to it in the Commonwealth FV Bill.[54]

3.52 The Department did not draw attention to, and the Committee has not identified, any material in the relevant Senate Committee report or Commonwealth Parliamentary debates to support the assertion that the Commonwealth Parliament intended to implement a different policy from the Commonwealth Executive.

3.53 Importantly, the Department's Written Response draws attention to Commonwealth Parliamentary Drafting Direction (**Commonwealth Drafting Direction 3.11**). Commonwealth Drafting Direction 3.11 is **Appendix 2**. The formulation "*done at New York on 20 November 1989*" is consistent with this direction but that direction also requires legislation to add a note to a bill identifying the relevant text of the Convention cited. The Department's Written Response also advises that the relevant provision of the Commonwealth FV Bill included the following note when considered by the Commonwealth Parliament:

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52 Sections 18 and 19 of the *Interpretation Act 1984*. While courts may have regard to Second Reading Speeches and Explanatory Memoranda when interpreting legislation, they rarely do so. The general approach is summed up by Heydon J when he says: "*Fifthly, although normally recourse to travaux preparatories is barren and useless, the generality and obscurity of the Charter requires them to be considered*". (The *Momcilovic* case, paragraph 389)

53 Ms Lesley McComish, Manager, Legislation Reform, Courts and Tribunal Services, Department of the Attorney General, *Transcript of Evidence*, 15 October 2012, p3. See also Department's Written Response, p1.

54 In its Answer to Question Taken on Notice, the Department advised the Committee: "*It may be that either the particular commonwealth officer or officers involved in the drafting instructions and drafting of the Commonwealth Bill either (for some unknown reason) did not know about this reservation or knew about this reservation but decided not to refer to it in Section 60B(4) of the Commonwealth Bill*" (p1).

> *The text of the convention is set out in Australian Treaty Series 1991 No. 4 ([1991] ATS 4* (**the Note**),

and advised that the Convention text could be found on the Austlii website.[55] The Note remained in the Commonwealth FV Act as proclaimed.

3.54 Unlike the situation in Western Australia, notes form part of Commonwealth legislation.[56] The *Australian Treaty Series 1991 No. 4 ([1991] ATS 4* website text of the Convention notes Australia's reservation to Article 37(c) in a footnote but includes the amendment to Article 43 not accepted by Australia.[57]

3.55 These two notes, one in the Commonwealth FV Act the other in the Australian Treaty Series Text may operate to confine the Commonwealth FV Act in respect of Article 37(c) of the Convention to the obligations accepted by Australia. This could explain why the Commonwealth FV Act does not require an explicit statement that the Convention is "*as ratified by Australia*".

3.56 The Department does not explain how its argument (or conclusion), as to the Commonwealth Parliament's intent, takes this Note into account. (It is not apparent on the evidence that in copying the Commonwealth FV Act, the Department gave any consideration to whether the Note might have some relevance to interpreting the Commonwealth legislation.)

3.57 As a consequence, the Committee is not persuaded that the Commonwealth Parliament decided to refer to the 20 November 1989 text, rather than the Convention as ratified by Australia, in its legislation. Nor is the Committee persuaded that a court would necessarily interpret the Commonwealth FV Act as asserted by the Department.

3.58 However, as it does not have an equivalent to the Note in the Commonwealth FV Act,[58] the Department's argument may be more persuasive to a court interpreting the FV Bill.

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55 Department's Written Response, p1.

56 Section 13 of the *Acts Interpretation Act 1901* (Cwth). This provision was inserted in 2011. The Explanatory Memorandum to the amending bill states: "*New section 13 states that all material in an Act, from the first section to the end of the last Schedule, is part of the Act. ... . New section 13 is intended to capture all headings (including the heading to the first section of the Act) and explanatory notes within the Act. ... It is appropriate for this material to be treated as part of the Act, and given appropriate weight in interpreting the terms of the Act. This weight will ordinarily be less than the words of the section itself, given the function of such notes and section headings (see Wacando v The Commonwealth (1981) 148 CLR 1 at 16, Gibbs CJ)*". (Explanatory Memorandum to the Acts Interpretation Amendment Bill 2011 (Cwth))

57 The note is to Article 47, which deals with ratifications, and reads: "*Instrument of ratification deposited for Australia 17 December 1990 subject to the following reservation*: …." The reservation set out at paragraph is then set out in the Treaty text. (The Australian Treaty Series text can be found at: http://www.austlii.edu.au/, (viewed on 17 October 2012).)

58 On this omission, the Department states: "*The inclusion of such notes in Commonwealth legislation is not a practice used in WA legislations* (sic)". (Department's Written Response, p1).

Conclusions, findings and recommendation

3.59 While there is consistency in the Explanatory Memorandum and Department's Written Response in the desire to do whatever it is that the Commonwealth has done, what the Commonwealth has done is inconsistently identified in those documents. The former suggests that it is an object to give effect to Australia's obligations under the Convention; the latter to the Convention without Australia's reservation.

3.60 The Department has asserted a narrow technical interpretation of clause 8 which, in the Committee's opinion, pays insufficient regard to context.

3.61 The Committee is of the view that the Commonwealth FV Act would be interpreted as referring to the Convention text recognising Australia's reservation - due to the Note in that legislation and absence of contrary intent.

3.62 However, as the different views and arguments canvassed above illustrate, the Convention text referred to in the FV Bill is unclear. This ambiguity means that which text is applied when interpreting Part 5 of the FC Act will be determined by the Judiciary.

Finding 2: The Committee finds that the lack of clarity in the FV Bill will result in the Judiciary determining the relevant Convention text for the purposes of clause 8 of the FV Bill and, therefore, Part 5 of the FC Act.

3.63 The Convention text determined by the Judiciary may be a different Convention text from that intended by Parliament. (As Hughes J observed:

> *Questions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong.*[59]

And as Professor Charlesworth notes:

> *the lack of interest in theories of statutory interpretation by the Australian judiciary* [means] *Australian practice is a patchwork of approaches leading to inconsistent and contentious results.*)[60]

59 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at p 1524 quoted by Kirby J in the *Al-Kateb* case, paragraph 190.

60 Charlesworth, Hilary, *'Human Rights and Statutory Interpretation'*, in Corcoran Suzanne and Bottomley Stephen, Interpreting Statutes, The Federation Press, Sydney, 2005, p100.

It may also be the Convention text as it is amended from time to time. Whether this is the case will depend on the approach taken to statutory interpretation and whether Parliament clarifies its intent.

3.64 The Committee considers that there is potential for clause 8 to operate as a delegation of law-making powers to the Judiciary, the Commonwealth Executive or international bodies but the ambiguities as to the Convention text intended and range of different legal approaches to interpretation preclude the Committee reaching a conclusion as to its impact on Parliamentary sovereignty and law-making.

Finding 3: The Committee finds that there is potential for clause 8 to impact on Parliamentary sovereignty and law-making.

However, the ambiguities as to the Convention text intended and range of different legal approaches to interpretation preclude the Committee reaching a conclusion.

3.65 To this point, the analysis has been on a 'principle' basis. The Committee notes that while the 2002 amendment, which reduces membership of the Committee on the Rights of the Child (the entity to which States report on implementation of the Convention) from 18 to 10,[61] may not have any practical effect on the way the FC Act is interpreted, the same cannot be said with confidence of Australia's reservation.

3.66 Article 37(c) provides that children deprived of liberty are to be separated from adults unless it is in the child's best interests not to do so. Australia reservation is that it accepts this obligation:

> *only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.*[62]

61 The General Assembly, in its resolution 50/155 of 21 December 1995, approved the amendment to article 43, paragraph 2, of the Convention on the Rights of the Child, replacing the word "*ten*" with the word "*eighteen*". The amendment entered into force on 18 November 2002 when it had been accepted by a two-thirds majority of the States parties (128 out of 191). (UN Treaties, Status as at 26 September 2012,(http://www2.ohchr.org/english/law/crc.htm, viewed on 27 September 2012).

62 UN Treaties, Status as at 26 September 2012 http://treaties.un.org/Pages/ViewDetails.aspx?src, (viewed on 27 September 2012).

The reason for the reservation is that there are occasions when children are taken into custody in remote or regional areas and it can be preferable for them to remain where they are in touch with their families.[63]

3.67 The Family Court of Western Australia does not, of course, imprison children but it may nonetheless have matters that call Article 37(c) into play. The Principal Registrar referred to children in prison with their parents in his evidence and when the fact that the Court does not imprison children was observed, said this did not detract from his position that clause 8 should be amended to ensure that it referred to the Convention as ratified by Australia.[64]

3.68 The Committee considers that clause 8 should be amended to give clear direction to the Judiciary on the Convention text to which it refers. This will limit the potential for clause 8 to impact on Parliamentary sovereignty and law-making.

Finding 4: The Committee finds that, to minimise its potential for delegation of law-making, that clause 8 of the FV Bill should be amended to give clear direction to the Judiciary on the specific Convention text to which it refers.

3.69 The Principal Registrar was in his evidence careful to ensure that he did not suggest to Parliament what law it should make.

3.70 However, in response to questions from the Committee his evidence is that an amendment of clause 8 to identify the intended Convention text would "*make it much easier for judicial officers*".[65] On his understanding that the intent is to refer to Australia's Convention obligations, and to avoid anticipated Parliamentary problems with a text that can be amended from time to time without reference to Parliament, he identified the most helpful text as that "*as ratified by Australia*" whenever ratification occurred.

3.71 The Department did not suggest any different view at hearing. In its Answer to Question Taken on Notice, however, it did not support an amendment. It informed the Committee that it was "*more appropriate*" for clause 8 to "*follow*" the

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63 Ms Lesley McComish, Manager, Legislation Reform, Courts and Tribunal Services, Department of the Attorney General, *Transcript of Evidence*, 15 October 2012, p4.

64 "*No, no. However, I stand by my earlier evidence. I agree; I think it would make it much easier for the judicial officers if it said "as ratified by Australia"...*" (Mr David Monaghan, Magistrate and Principal Registrar, Family Court of Western Australia, *Transcript of Evidence*, 15 October 2012, pp3 and 4.)

65 The Department's response to the "*incorporation*" issue set out issue below was: "*If judges under guise of statutory interpretation alter the substantive law in a way not intended, or disfavoured by the Parliament, then the Parliament can amend the legislation"*. (Department's Written Response, p4.)

Commonwealth FV Act on the basis that consistency with Commonwealth legislation is necessary to ensure uniform treatment of ex-nuptial children.[66]

3.72 However, as noted above, the Commonwealth FV Act refers to a particular Convention text that notes Australia's reservation. Given this, **it may be necessary to amend clause 8 to ensure that it is consistent with the Commonwealth legislation**.

3.73 In any event, the Principal Registrar was not disturbed at the prospect of inconsistency. Albeit in a different context, he said:

> *there is that issue about, "Well, should it have a different meaning for children of a marriage as opposed to exnuptial children?" But you deal with that issue all of the time.*[67]

3.74 It is the Committee's view that to maintain consistency in wording with the Commonwealth FV Act, clause 8 should refer to the Australian Treaty Series Convention text. (Due to different interpretation Act provisions, a note is not part of a written law in Western Australian legislation. To achieve uniformity with the Commonwealth FV Act, clause 8 itself would require amendment.)

3.75 However, the Committee does not know whether Australian Treaty Series Convention text may be altered from time to time. There would obviously be a problem if the Convention text applied by clause 8 altered without the concurrence of the State Parliament. Identification of the Convention text "*as ratified*" by Australia at the date of ratification would pinpoint a text that capture Australia's reservation without the risk of inadvertently authorising its alteration.

3.76 While there will be a difference between State and Commonwealth legislation, as the latter applies a Convention text that recognises the 2002 amendment, as noted above, due to the nature of that amendment, this difference will not have any practical or legal affect in interpreting Part 5 of the FC Act. As presently drafted, clause 8 delivers uniformity in wording but not in the Convention text that will be used to interpret provisions relating to marital and ex nuptial children. The Committee's recommendation is for authentic uniformity.

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66 The Department's opposition to amendment of clause 8 to reflect Australia's reservation is also predicated on the version of the Convention text being significant. It argues that the 'correct' text is that at 20 November 1989 and that amendment to refer to what it regards a different text, would mean that "*uniformity*" with the Commonwealth FV Act would be lost. (Answer to Question Taken on Notice, p1)

67 Mr David Monaghan, Magistrate and Principal Registrar, Family Court of Western Australia, *Transcript of Evidence*, 15 October 2012, p4.

Recommendation 1: The Committee recommends that clause 8 of the FV Bill be amended to specify that the Convention text to which it refers is the Convention text as ratified by Australia. This may be effected in the following manner:

Page 6, line 31 – To delete “1989.”and insert -

1989 as ratified by Australia at 17 December 1990.

4 CLAUSE 39: HENRY VIII CLAUSE

Item 13

4.1 Clause 39 inserts Division 2, dealing with transitional matters relating to the FV Bill, into Schedule 2 of the FC Act. Item 13 of Division 2 provides a regulation-making power that may be exercised to make transitional regulations regarding the FV Bill:

- subsection (2) - providing that specified provisions of the FC Act do not apply or apply with modifications; and
- subsection (3) – with retrospective effect.

The retrospective power cannot be exercised to make regulations with effect prior to the date the FV Bill comes into effect. It also cannot be exercised in a manner prejudicial to the rights of a person as they existed, or to impose additional liabilities in respect of things done, prior to a regulation being published.

Finding 5: The Committee finds that Item 13 of Division 2 of Schedule 2 to the Family Court Act 1997, proposed by clause 39 of the FV Bill, is a Henry VIII clause. It also authorises regulations having retrospective effect.

4.2 The Committee has considered the circumstances in which Henry VIII clauses are appropriate in previous reports. Largely relying on the Committee’s reports, the Standing Committee on Legislation has recently tabled a report summarising the Parliamentary sovereignty and law-making issues Henry VIII clauses pose and the House’s approach to those clauses. On the latter, it said:

> *The House generally considers Henry VIII clauses objectionable,*[7] *only passing such clauses when they have a cogent justification and are limited in scope and longevity or, on limited occasions, provide a*

> *mechanism for increased Parliamentary scrutiny of the subsidiary legislation made under them.8 In recent debate in the House, this approach to questioning Henry VIII clauses has been described as having "basically become a convention".*[68]

Justification out of date

4.3 The Explanatory Memorandum states in respect of item 13:

> *The purpose of this amendment is to allow the rules to be adjusted to take account of any unexpected transitional, application and savings matters or to take other action such as to carve out proceedings that are part heard or where judgement is reserved if that is considered appropriate.*[69]

4.4 In answer to a question on how Item 13 would operate in practice, the Department Written Response refers to comment in the Senate Standing Committee on Legal and Constitutional Affairs report on the Commonwealth FV Bill that it was satisfied the Henry VIII clause will "*in this instance serve a useful and practical function*". The Senate Committee observed the need to excise part heard, reserved judgement, appeal or filed matters that had been commenced but not disposed of prior to the Commonwealth FV Bill commencing.[70] This observation was made on the basis of the Commonwealth FV Bill as it was at that time. When before the Senate Committee, the Commonwealth FV Bill proposed that it would commence on a fixed date and apply to all extant family law proceedings, whether they commenced before or after the bill came into effect. Hence the need to "*carve out*" certain proceedings.

4.5 However, the Principal Registrar advised the Committee, the relevant provision was amended "*very, very late in the stage*". As passed, the Commonwealth FV Act only applies prospectively, to cases that start at or after commencement of that bill.[71]

4.6 The Commonwealth equivalent to Item 13 remained in the Commonwealth FV Act. The Principal Registrar did not know why it remained.[72] The Committee has reviewed Hansard records of the Commonwealth Parliament's passage of the Commonwealth

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68 Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, *Revenue Laws Amendment Bill 2012*, 12 September 2012, pp3-4.

69 Explanatory Memorandum to the FV Bill, p15.

70 See Department's Written Response, pp8-9 and Commonwealth of Australia, Senate, Standing Committee on Legal and Constitutional Affairs, Legislation Committee, *Family Law Legislation (Family Violence and Other Measures) Bill 2011*, 22 August 2011, p64.

71 Mr David Monaghan, Magistrate and Principal Registrar, Family Court of Western Australia, *Transcript of Evidence*, 15 October 2012, pp5-6.

72 "*The next question will be: why did they still keep it there? I cannot answer that question; I do not know.*" (Ibid, 15 October 2012, p6.)

FV Bill and can find no consideration of the impact of removing its retrospective effect on the relevant clause.

4.7 The FV Bill replicates the Commonwealth FV Bill as passed and also only applies prospectively. The Department has not provided any justification for Item 13 beyond the statements noted above. The Principal Registrar advised the Committee that Item 13 serves no purpose. He said:

> ***The Chairman**: ... Is your evidence to the committee that* [this item in] *clause 39 is not required?*
>
> ***Mr Monaghan**: Yes, it is. I mean you can keep it if you want, but for the reasons I have just set out I do not think it necessary and I think, had it been thought of, the commonwealth probably would also have thought, "We don't need it now," because as you have said, carving proceedings up just does not have to happen.*[73]

Conclusions

4.8 It appears Item 13 is in the FV Bill for no other reason than the equivalent clause was not deleted from the Commonwealth FV Bill. This is not a "*cogent justification*".

Finding 6: The Committee finds that Item 13 of Division 2 of Schedule 2 to the *Family Court Act 1997*, proposed by clause 39 of the FV Bill, serves no identified purpose.

4.9 Deleting Item 13 would mean the FV Bill is different from the Commonwealth FV Bill. The Principal Registrar did not seem to consider this would cause any problems. After the passage cited in paragraph 4.7 above, he said:

> *If you were not to put it in, yes, it would be different because it is in, in the commonwealth, but it is not being utilised. There have been no regulations made.*[74]

4.10 It seems to the Committee that replicating what appears to be an error in the Commonwealth FV Act for the sake of uniformity would undermine a rationale for the State keeping control of its own legislation.

[73] Ibid.

[74] Ibid.

4.11 Consistent with the House's approach to Henry VIII clauses that have not been justified, the Committee concludes that Item 13 of proposed Division 2 for Schedule 2 to the FC Act should be deleted.

Recommendation 2: The Committee recommends that clause 39 of the FV Bill be amended to delete Item 13 from proposed Schedule 2 Division 2 to the *Family Court Act 1997*. This may be effected in the following manner:

Page 29, line 5 to Page 30, line 5 – To delete the lines

5 ISSUES WITH 'COPYING AND PASTING' COMMONWEALTH BILLS AND EXPLANATORY MATERIALS

5.1 The Committee is concerned at the extent of reliance on 'copying and pasting' from Commonwealth documents in drafting and explaining the FV Bill. As seen in earlier Parts of this report:

- the FV Bill replicates a redundant Henry VIII clause (Item 13) found in the Commonwealth FV Act, with the Explanatory Memorandum replicating an obsolete Commonwealth rationale for that clause; and
- clause 8, and its explanation in the Explanatory Memorandum, appear to have been approached with greater regard to jurisdictional drafting practices than substance.[75]

5.2 Replication of the redundant Henry VIII clause occurred even though the Executive paid some attention to proposed Item 13. The equivalent Commonwealth provision, drafted in accord with Commonwealth drafting practices, was amended to reflect State Executive drafting practices for transitional Henry VIII clauses.[76] Yet no independent consideration appears to have been given to whether Item 13 was actually required in the FV Bill. On the evidence presented at the hearing, it was apparent that the Commonwealth rationale for its equivalent of Item 13 had lapsed during passage of the Commonwealth FV Act and did not apply to the FV Bill.

75 The Committee was advised that "*the WA Explanatory Memorandum with respect to Clause 8 was copied (in virtually identical terms) from the Commonwealth Explanatory Memorandum*" (Department's Written Response, p3). On the omission of the Commonwealth FV Bill Note referring to a particular Convention text, the Committee was told: "*The inclusion of such notes in Commonwealth legislation is not a practice used in WA legislations* (sic)". (Department's Written Response, p1).

76 Department's Written Response, p7. The Department advises Item 13 is more "*circumscribed*" than the Commonwealth provision.

5.3 Omission of the Commonwealth FV Act's Note identifying the relevant Convention text from clause 8 is also explained as purely a matter of different jurisdictional drafting practices with respect to notes. Yet the Committee's inquiry suggests that there are occasions when inclusion or omission of a note may have consequences for the law Parliament makes.

5.4 Notes form part of Commonwealth legislation.[77] They do not form part of Western Australian legislation. However, even in Western Australia notes are extrinsic material that may be considered to confirm the meaning of a provision or when interpreting legislation that is ambiguous or obscure.[78]

5.5 The Department makes no reference to the impact of the Commonwealth FV Act's Note referring to a different text than that at 20 November 1989 in asserting to the Committee that that Act refers to the Convention text as at 20 November 1989. Nor does the Department address the difference between the Commonwealth and State legislation in this respect when asserting that the FV Bill refers to the same Convention text as the Commonwealth legislation. The Explanatory Memorandum and Department's Written Response are also inconsistent in their identification of whether the Convention text to which clause 8 refers is limited to Australia's obligations under the Convention.[79]

5.6 This suggests no clear understanding of the Commonwealth legislation that clause 8 proposes be replicated as a provision of Western Australian law.

5.7 'Copying and pasting' without consideration of the appropriateness of the copied material extends even to the Attorney General's submission to the Committee on the FV Bill. That document states under the heading "*An explanation as to whether and if so by what mechanism the State can opt out of the scheme*":

> *The State Parliament could refer power to the Commonwealth Parliament* ***for the limited purpose of child support*** *for ex nuptial children and their carers in Western Australia.*[80] (Committee emphasis)

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77 Section 13 of the *Acts Interpretation Act 1901* (Cwth).

78 Respectively sections 32(2) and 19 of the *Interpretation Act 1984*.

79 While in part the assertion in the Department's Written Response that the relevant Convention text is that as at 20 November 1989 can be understood as a 'black letter law' legal argument, it does not acknowledge or explain: the significance of the Note to the Commonwealth legislation identifying the Convention text as one noting Australia's reservation to Article 37(c) and absence of a Note in the Western Australian legislation; or why the Explanatory Memorandum advises the Parliament that the intent is to impose an obligation on decision-makers to interpret "*Part VII*" (sic – in fact, Part 5) of the FC Act "*consistently with Australia's obligations under the Convention*" – that is the asserted Commonwealth Executive intent - rather than advises the Parliament that clause 8 refers to a Convention text that differs from Australia's obligations and explain why that is the case.

80 Submission from Hon Michael Mischin MLC with respect to the FVA Bill, 19 September 2012, unnumbered third page.

This statement has no relevance to the FV Bill but appears to be copied from the Attorney General's submission to the Committee on the Child Support (Adoption of Laws) Amendment Bill 2012.[81]

5.8 The Executive's 'copy and paste' approach to the FV Bill is particularly concerning where the State Parliament has decided to maintain its sovereignty and law-making powers through a mirror uniform scheme, rather than refer legislation-making power to the Commonwealth. The **structure** of this uniform scheme is **predicated** on the State Parliament not being willing to simply accept whatever legislation the Commonwealth wishes to make. The approach taken to the FV Bill is antithetical to the uniform scheme.

5.9 That Item 13 is redundant, and the ambiguity inherent in the way clause 8 has been drafted – including the Department's argument that (inconsistent with the advice in the Explanatory Memorandum) the FV Bill follows the Commonwealth Parliament's decision **not** to insert an object to give effect to Australia's obligations under the Convention, but to the Convention **without** Australia's reservation - has only come to Parliament's attention as a result of the Committee's inquiry.

5.10 The Committee sees no intent to mislead Parliament in the FV Bill explanatory materials but the focus on 'copying and pasting' from Commonwealth legislation and Commonwealth explanatory materials, and consideration of drafting practices rather than intent of a provision, could, but for the Committee's inquiry, have had that result.

5.11 The Committee and the Parliament need to have confidence in the explanatory materials relating to a bill that the Parliament is asked to consider.

5.12 The Committee can only endorse the Standing Committee on Legislation's recent statement:

> *the Committee expects explanatory materials to be up to date when presented to the House. The House should not be required to make decisions on any legislation on the basis of inaccurate information. …*[82]

5.13 Asking Parliament to make law, and especially to delegate power to amend primary legislation, on the basis of inaccurate and incomplete information, while it does not technically limit Parliament's sovereignty and law-making powers, impedes Parliament's exercise of those powers.

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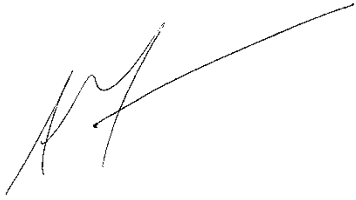
81 Submission from Hon Michael Mischin MLC with respect to the Child Support (Adoption of Laws) Amendment Bill 2012, 19 September 2012, unnumbered fourth page.

82 Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, *Revenue Laws Amendment Bill 2012*, 12 September 2012, p9.

6 REPORT COMMENDED TO THE HOUSE

6.1 The Committee commends its report and recommendations to the Legislative Council.



Hon Adele Farina MLC
Chairman
Date: 6 November 2012

APPENDIX 1

CONVENTION ON THE RIGHTS OF THE CHILD

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

3

1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their

own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

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Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy

throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

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2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute

a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any

amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

APPENDIX 2

COMMONWEALTH DRAFTING DIRECTION 3.11

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.11 Implementing Commonwealth agreements (including treaties and conventions etc.)

Note: This Drafting Direction contains references to the "head drafter". It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC for Bills and the PLC for instruments.

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Part 1—Introduction

1 This Drafting Direction deals with agreements entered into by the Commonwealth. Agreements that the Commonwealth enters will generally fall into one of the following broad categories:

(a) international agreements that are binding at international law (e.g. treaties and conventions);

(b) non-binding international agreements;

(c) domestic agreements between the Commonwealth and other domestic bodies politic such as the States and Territories;

(d) informal agreements or contracts between the Commonwealth and private parties (these agreements may involve either domestic or foreign private parties but would be governed by private, not public, law).

2 The matters you need to consider vary according to the kind of agreement in question. Part 2 of this Drafting Direction deals with agreements covered by paragraphs 1(a) and (b). Part 3 deals with agreements covered by paragraphs 1(c) and (d).

Part 2—International agreements (e.g. treaties and conventions)

Role of Parliament

3 Legislation relating to international treaties and conventions, or other non-binding international agreements, should not include provisions providing for parliamentary approval of the treaty or convention (see the *Legislation Handbook*). If you are requested to include such a provision, you should refer the matter to the head drafter.

4 As a matter of procedure, your instructors should be aware of the government policy in relation to parliamentary review of binding international agreements. In particular:

(a) agreements should, unless urgent or sensitive, be tabled before both Houses of Parliament at least 15 sittings days before they are entered into; and

(b) all agreements are to be referred to the Joint Standing Committee on Treaties.

5 You should also ensure your instructors are aware of the comments made by the Senate Scrutiny of Bills Committee in Report 11 of 2004 in relation to the commencement of the *US Free Trade Agreement Implementation Act 2004*.

Note: The report provides (in part):

> The Committee takes the view that the Parliament is responsible for determining when laws are to come into force and has consistently opposed the inclusion in legislation of open-ended proclamation provisions. The commencement provisions in these bills have all the hallmarks of open-ended proclamation provisions. They provide for commencement on the date of an 'uncertain event' without providing the means for determining conclusively that the event has not occurred or will not occur. The choice of the date of commencement is delegated by the Parliament to the Executive, without limitation.
>
> . . .

> The Committee does not see why legislation implementing international treaty obligations should be treated differently from any other legislation susceptible to delay, namely, by including a date (or period) after which the legislation must commence or be taken to be repealed and providing an explanation where a particular date (or period) represents a significant delay in commencement. . . .

Identifying international agreements

6 There can be no mistake about identifying the agreement if the text of it is included in the legislation. However, if this is done, the text included must be checked at some point in the drafting process. Ideally, it should be checked against the text of the original instrument; but usually that instrument will not be available. If it is not, you should use the copy of the text available in the Australian Treaties Library at www.austlii.edu.au. If you need a printer-friendly copy of the text, contact the Treaties Secretariat at the Department of Foreign Affairs and Trade (***DFAT***) on 6261 3072. If in doubt about whether the copy that is made available to you is adequate, you should consult the head drafter.

7 As discussed above, setting out the text of an agreement in a Schedule can involve a lot of work in obtaining the authoritative text of the treaty, formatting it and checking it, even though it is convenient for the reader. Since international agreements are now ordinarily available on the internet, it is probably less important for legislation to include the text of agreements. Word Note 25 deals with the formatting of agreements.

8 However, if the text of the agreement is not included in the legislation, it is important that the agreement is clearly identified. This should be done by giving:

(a) the name of the agreement;

(b) the place and date the agreement was made; and

(c) if the agreement is in force—the agreement's formal Australian Treaties Series citation (the Australian Treaties Series is maintained by DFAT).

9 The Office of International Law (***OIL***) has advised that when giving the place and date the agreement was made it is acceptable to use the description "done at [place] on [date]" as long as this sufficiently identifies the agreement. Cases in which a drafter considers that this form of description is not appropriate for a particular agreement should be discussed with OIL.

10 The description "done at [place] on [date]" should refer to the place and date at which the agreement was adopted and not the place and date that the agreement opened for signature. You should be aware that the introductory text at the start of a particular Australian Treaty Series number may refer to the place and date that the agreement opened for signature.

11 The legislation should include a note informing readers where to find the text of the agreement.

Finding the text of an agreement that is in force

12 If the agreement is in force, it will be published in the Australian Treaty Series. The Series can be accessed:

(a) by using the Australian Treaties Database on DFAT's website; or

(b) by using the Australian Treaties Library, to which DFAT's website also has a link, on www.austlii.edu.au.

13 The note informing readers how to find the text of an agreement that is in force (which, if you are using a defined term as a shorthand way of referring to the agreement, may conveniently be added after that term) should be consistent with the following example:

> ***Convention*** means the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, done at Strasbourg on 8 November 1990.
>
> Note: The text of the Convention is set out in Australian Treaty Series 1997 No. 21 ([1997] ATS 21). In 2008, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Finding the text of an agreement that is not yet in force

14 If the agreement is not yet in force, but Australia is a signatory, it will not be published in the Australian Treaties Series. However, it may be accessible using the Australian Treaties Library. If it is, the note informing readers how to find the text of the agreement should be consistent with the following example:

> ***Convention*** means the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997.
>
> Note: In 2008, the text of the Convention was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Part 3—Domestic agreements and agreements with private parties

Authority to enter these kinds of agreements

15 Agreements made using the executive power of the Commonwealth do not need parliamentary approval. Accordingly, it is not necessary to include a provision in legislation that purports to authorise the making of such an agreement by the Commonwealth.

16 However, the inclusion of an authorising provision may be justified if it improves the coherence of the legislation. As well, for reasons of policy or presentation, your instructors may prefer to see such a provision in the draft.

17 If you include an authorising provision in a draft, you should consider whether it is also desirable to provide that the authorising provision does not, by implication, limit the executive power of the Commonwealth to enter into agreements.

Payments under agreements

18 If you draft a Bill that authorises the making of an agreement under which payments are to be made by the Commonwealth, those payments (like any expenditure of public money) require legislative authority (an express or implied appropriation). You should discuss with your instructors what appropriation is to be relied on to authorise the payments. It may be necessary to include in the Bill an express appropriation for payments to be made under the agreement.

19 If the agreement has not been entered into when the Bill is introduced, you may need to set some limits to the authority provided by the Bill. If the form of the agreement has been decided upon, this may be achieved by providing that, if an agreement is entered into

substantially in accordance with the form set out in the Bill (usually in a Schedule to the Bill), payments may be made in accordance with the agreement. Alternatively, it may be sufficient to set out the important elements of the proposed agreement in the Bill (see, for instance, sections 20E and 21 of the *Rural Adjustment Act 1992*).

Agreements entered into by Ministers and other Commonwealth officers

20 Generally, if legislation authorises a Minister, or any other Commonwealth officer, to enter into an agreement, it should specify that the person does so on behalf of the Commonwealth. This makes it clear that the Commonwealth is the party to the agreement, and that the Minister or other officer is not bound in a personal capacity.

Identifying domestic or private agreements

21 The comments at paragraph 6 in relation to including the text of agreements in legislation (except so far as they mention DFAT) apply equally to these kinds of agreements.

22 Because these agreements are likely to be less readily available than international agreements, the arguments in favour of including the text in the legislation may be stronger. However, if the text of the agreement is not included in the legislation, drafters should ensure that the description of the agreement is sufficient to precisely identify it.

Peter Quiggin
First Parliamentary Counsel
2 October 2012

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 8 of 2005.