

# CHILD SUPPORT (COMMONWEALTH POWERS) BILL 2018 (WA)

## EXPLANATORY MEMORANDUM

### Overview of the Bill

The Commonwealth Child Support Scheme was introduced with the object of ensuring that separated parents shared equitably in the financial cost of supporting their children. The scheme enables the collection of child support payments from a parent and the payment of that maintenance to the person having responsibility for the child and operates under two Commonwealth statutes:

- the *Child Support (Registration and Collection) Act 1988* (Cth); and
- the *Child Support (Assessment) Act 1989* (Cth).

Under the Commonwealth Constitution, the Commonwealth Parliament's legislative power does not extend to ex-nuptial children. To ensure that the Child Support Scheme operates in respect to ex-nuptial children as well as to children of a marriage, all State Parliaments, except the Western Australian Parliament, referred power in respect to ex-nuptial children to the Commonwealth Parliament. Accordingly, the Commonwealth statutes that govern the Child Support Scheme apply, via section 51 (xxxvii), to all children in those States.

Instead of referring power to the Commonwealth, the WA Parliament has adopted, via section 51 (xxxvii) of the Commonwealth Constitution, the Commonwealth Child Support legislation, initially by the *Child Support (Adoption) Act 1988* (WA) which adopted the *Child Support Act 1988* (Cth). Subsequently, when the Commonwealth child support legislation became two statutes - the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) - the WA Parliament adopted those statutes by the *Child Support (Adoption of Laws) Act 1990* (WA) and the *Child Support (Adoption) Act 1988* (WA) was repealed.

The Commonwealth Acts have been amended many times.

For the amended Commonwealth Acts to apply to ex-nuptial children in Western Australia, the WA Parliament must again adopt the Acts as they are at a stated date after the commencement of the Commonwealth amendments.

Since the first 1988 adoption by the WA Parliament of the Commonwealth legislation relating to the Child Support Scheme, the WA Parliament has always adopted all Commonwealth amendments.

Under section 51(xxxvii) of the Commonwealth Constitution, the WA Parliament can only adopt Commonwealth amendments after they have commenced. There are two aspects. First, in practice, from a practical perspective, this occurs only when WA Parliamentary time is available. Second the Commonwealth and State legislative amendments are complex in their substance, drafting and timeframes. As a result the delay between commencement of the Commonwealth amendments and adoption by the WA Parliament and, therefore, their applicability to ex- nuptial children in WA, can be substantial.

These delays mean that, most of the time, the scheme does not apply equally to marital and ex-nuptial children in WA. This inequality between marital and ex-nuptial children in WA can disadvantage the latter, especially financially. These problems associated with the adoption method can be avoided or overcome by the WA Parliament making a limited referral of State legislative power to the Commonwealth Parliament.

## **Clause Notes**

### **Clause 1 Short title**

Clause 1 provides that the Bill, once enacted, will be known as the *Child Support (Commonwealth Powers) Act 2018*.

### **Clause 2: Commencement**

Clause 2 makes provision for the commencement of the Act and all of its provisions on the day on which it receives the Royal Assent.

### **Clause 3 Terms used**

Clause 3 defines certain terms in used in the Act.

### **Clause 4 Adoption of the Child Support laws as in force immediately before commencement day.**

Under the adoption method, the WA Parliament has not adopted the specific amendments to the Commonwealth Child Support legislation. Rather, it adopts the Commonwealth Child Support legislation as amended at the date specified in the WA Bill to amend the *Child Support (Adoption of Laws) Act 1990 (WA)*.

The adoption of Commonwealth Child Support legislation, via clause 4, will occur when the Bill receives the Royal Assent. This will ensure that the adoption extends to those Commonwealth Acts as, and in the form they exist before the referral of power.

Therefore, clause 4 will adopt all of the Commonwealth Child Support laws as they exist when the Bill receives Assent. That is:

- all of the Commonwealth legislation which the WA Parliament has previously adopted; and
- Commonwealth amendments which the WA Parliament has not yet adopted, including Commonwealth amendments which are enacted (that is, finalised) after the Bill has passed the Legislative Assembly and Legislative Council but before the Bill receives Assent.

That is, the Bill will adopt Commonwealth amendments which have been enacted since 1 September 2017 (when the last WA legislative adoption occurred) and the day on which the Bill received assent.

Currently, there is in existence such Commonwealth legislation and other Commonwealth legislation may be enacted. For example the *Family Assistance and Child Support Legislation Amendment (Protecting Children) Act 2018 (Cth)* received Royal Assent 22 May 2018. This Commonwealth Act implements recommendations of the House of Representatives Standing Committee Social Policy and Legal Affairs (the Committee) report *From conflict to cooperation: Inquiry into the Child Support Program*.

The Child Support amendments contained in the *Family Assistance and Child Support Legislation Amendment (Protecting Children) Act 2018 (Cth)* address long-standing policy issues around disputed care changes, amended tax assessments, child support agreements and payee overpayments. Adoption by the WA Parliament of these changes is required to ensure that WA ex-nuptial children and their parents are not disadvantaged.

Details of this Commonwealth legislation are provided in Annexure A.

Additionally, there may be Commonwealth legislation which might be enacted in the period after the Bill is passed by the Legislative Assembly and the Legislative Council but before the Bill receives Royal Assent. In this unlikely event the Legislative Assembly and the Legislative Council may not have seen the very final Commonwealth legislation before they agree to the Bill. However, as a matter of law, the Commonwealth legislation, if it is in existence before Assent, will be, within the section 51(xxxvii) requirements, adopted after the Commonwealth legislation is enacted.

There are two reasons for providing for this unlikely event. First, if the WA Bill after its Assent does not adopt that Commonwealth legislation, the WA referral cannot, as a matter of law, be used by the Commonwealth Parliament to apply that Commonwealth legislation to ex-nuptial children in WA. Second, if this occurs, then the WA Parliament would have to enact further legislation to adopt that Commonwealth legislation.

The Bill will repeal the *Child Support (Adoption of Laws) Act 1990 (WA)*. There are two reasons. First, because there will be no further need for the WA Parliament to adopt Commonwealth amendments to the Child Support legislation. Second, because the Bill upon Assent will adopt all of the previous Commonwealth Child Support laws.

#### **Clause 5 Referral of maintenance of ex nuptial children**

This clause delineates the scope of the referral.

It does so in three ways. First, by expressly providing that the matter referred will enable the Commonwealth Parliament to amend or affect the operation of the Child Support laws. Second, by expressly indicating that the referred matter does not include matters in Part VII of the *Family Law Act 1975 (Cth)*. This is to prevent Part VII applying, as Commonwealth law, in Western Australia. This will preserve the similar provisions in the *Family Court Act 1977 (WA)*. Third, is the standard provision in State referral legislation which recognises that the State Parliament cannot refer to the Commonwealth Parliament legislative over matters which are already within the Commonwealth Parliament's legislative authority.

To avoid referring all WA legislative powers over unmarried persons and their children in family law proceedings to the Commonwealth, while achieving the objective of ensuring that ex-nuptial children in WA are treated equally with other children, the Bill, firstly, has a narrow referral, secondly, is consistent with provisions in the Commonwealth Acts and thirdly, is contemplated by those Acts.

Section 13(5A) of the *Child Support (Assessment) Act (Cth)* states:

“The Parliament of the Commonwealth intends that this Act, so far as it is amended by one or more other Acts in relation to the maintenance of ex-nuptial children, not extend to Western Australia, unless and until one of the following events occurs:

(a) the Parliament of Western Australia refers to the Parliament of the Commonwealth the matter of the maintenance of ex-nuptial children or matters that include that matter;

(b) Western Australia adopts this Act, as so amended.”

Section 5 subsections (2)(a) and (b) of the *Child Support (Registration and Collection) Act 1988 (Cth)* are in identical terms.

That is, sections 13(5A)(a) of the *Child Support (Assessment) Act 1989* (Cth) and section 5(2) of the *Child Support (Registration and Collection) Act 1988* (Cth) provide that if the WA Parliament makes a referral of “the matter of the maintenance of ex-nuptial children”, then the Commonwealth Child Support legislation will apply in WA to ex-nuptial children without the need for additional Commonwealth legislation.

This is a subject matter referral, not a text referral. However, the proposed referral is limited to “the matter of the maintenance of ex-nuptial children” and the proposed referral is narrower than referrals made by all the other State Parliaments.

#### **Clause 6 Termination of adoption and reference**

Section 7 of the *Child Support (Adoption of Laws) Act 1990* (WA), to be repealed under clause 9 of this Bill, allows for termination of the adoption by proclamation by the Governor.

Clause 6 reflects that termination power and also provides that a proclamation terminating the adoption and referral cannot be made unless that proclamation has been considered and approved by resolution passed by the Legislative Assembly and the Legislative Council.

### **Part 3 *Family Court Act 1997* amended**

#### **Clauses 7 and 8**

Currently, the *Family Court Act 1997* (WA) defines the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) by reference to the *Child Support (Adoption of Laws) Act 1990* (WA).

Clauses 7 and 8 change that cross reference to the *Child Support (Commonwealth Powers) Act 2018* (WA).

### **Part 4 - Repeal**

#### **Clause 9**

Clause 9 repeals the *Child Support (Adoption of Laws) Act 1990* (WA).