



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE

STANDING COMMITTEE ON
UNIFORM LEGISLATION
AND GENERAL PURPOSES

IN RELATION TO THE

COMMONWEALTH POWERS (DE FACTO
RELATIONSHIPS) BILL 2003

Presented by Hon Adele Farina MLC (Chairman)

Report 14
April 2004

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed: April 11 2002

Terms of Reference:

The following are extracts from Schedule 1 of the Legislative Council Standing Orders:

“7. Uniform Legislation and General Purposes Committee

- 7.1 *A Uniform Legislation and General Purposes Committee* is established.
- 7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.
- 7.3 The functions of the Committee are –
- (a) to consider and report on bills referred under SO 230A;
 - (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to consider and report on any matter referred by the House.
- 7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)

Hon Simon O’Brien MLC

Hon Paddy Embry MLC

Staff as at the time of this inquiry:

Mia Betjeman, Clerk Assistant

Sheena Hutchison, Committee Clerk

Gary Cooper, Articled Clerk

Address:

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

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

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES

IN RELATION TO THE

COMMONWEALTH POWERS (DE FACTO RELATIONSHIPS) BILL 2003

EXECUTIVE SUMMARY

1. The purpose of the Commonwealth Powers (De Facto Relationships) Bill 2003 is reflected in the Long Title of the Bill which states that it is an Act “... *to refer certain superannuation matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth for the purposes of section 51 (xxxvii) of the Constitution of the Commonwealth.*”
2. The Uniform Legislation and General Purposes Committee has recommended one amendment and commends its report to the House.

RECOMMENDATIONS

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Recommendation 1: The Committee recommends that clause 5 of the Commonwealth Powers (De Facto Relationships) Bill 2003 be amended to provide for greater parliamentary scrutiny of the termination of the reference of powers. This may be effected in the following manner:

Page 3, after line 30 – To insert –

“

(6) A proclamation is to be made under this section if and only if the making of that proclamation has been recommended by resolution passed by both Houses of Parliament of this State.

”.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES**

IN RELATION TO THE

COMMONWEALTH POWERS (DE FACTO RELATIONSHIPS) BILL 2003

1 REFERRAL OF THE BILL

- 1.1 On December 4 2003 the Commonwealth Powers (De Facto Relationships) Bill 2003 (**Bill**) stood referred to the Uniform Legislation and General Purposes Committee (**Committee**) pursuant to standing order 230A. Standing order 230A(4) requires that the Committee report to the Legislative Council (**Council** or **House**) within 30 days of the first reading of the Bill. Pursuant to standing order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee. As a result of extensions of time granted by the Council on December 9 2003 and March 30 2004 the Committee is to report the Bill by April 6 2004.
- 1.2 The purpose of the Bill, as indicated by the Long Title of the Bill is “... *to refer certain superannuation matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth for the purposes of section 51 (xxvii) of the Constitution of the Commonwealth.*”

2 INQUIRY PROCEDURE

- 2.1 The Committee was aware that the Bill would be subject to standing order 230A when it was introduced into the Council and would probably stand referred to the Committee. In anticipation of such referral the Committee, of its own motion, commenced preliminary research into the background of the Bill.¹
- 2.2 On November 28 2003 the Committee wrote to Hon Jim McGinty MLA, Attorney General (**Attorney General**) seeking specific information about a number of aspects of the Bill. A copy of the Committee’s letter, and Attorney General’s reply dated January 20 2004 is attached as Appendix 2. The Committee sought further information from the Attorney General. A copy of the Committee’s letter dated March 9 2004 and Attorney General’s reply dated March 11 2004 is attached as Appendix 3.

¹ The Committee’s Term of Reference 7.3(b) states “*The functions of the Committee are...(b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;*”.

- 2.3 The Committee invited submissions from the Family Law Foundation, Legal Aid WA, Pride WA Inc., the Law Society WA, Gay and Lesbian Equality WA (Inc) and the Chief Judge of the Family Court of WA. A copy of the submission from the Law Society dated February 12 2004 is attached at Appendix 4.
- 2.4 Details of the inquiry were also placed on the parliamentary website at: www.parliament.wa.gov.au.

3 UNIFORM LEGISLATION

- 3.1 The Bill is an example of 'uniform legislation'. Uniform legislation arises out of national uniform schemes of legislation or may ratify or give effect to an intergovernmental agreement to which Western Australia is a party.

Scrutiny of uniform legislation in the Western Australian Parliament

- 3.2 The scrutiny of uniform legislation is not new to the Western Australian Parliament. Since 1991 both the Council and Legislative Assembly have established procedures to assist Parliament in the scrutiny of uniform legislation.²
- 3.3 More recently during the Thirty-Sixth Parliament until the appointment of the Committee, the scrutiny of uniform legislation fell within the terms of reference for the Council Standing Committee on Legislation. In November 2001 the relevant Council standing order (standing order 230A) was amended to consolidate matters relevant to uniform legislation and to facilitate automatic referral of such bills to the Committee for inquiry and report within 30 days.

Legislative structures

- 3.4 National legislative schemes of uniform legislation have been addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (**1996 Position Paper**). The 1996 Position Paper emphasises that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. It does, however, question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.
- 3.5 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive that

² For discussion of the history behind the scrutiny of uniform legislation and standing order 230A refer to: Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, Western Australia, August 2002, pp5 - 6.

consistency with the legislative form agreed among the various Executive Governments is a 'given'.³

- 3.6 National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth (refer to standing order 230A(1)(b)), can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The legislative structures are summarised in Appendix 1.⁴
- 3.7 The Bill is 'uniform legislation' within the meaning of standing order 230A by virtue of it being pursuant to an intergovernmental agreement to which the Government of the State is a party: standing order 230A(1)(a). The Bill reflects the legislative structure identified at Structure 4 in Appendix 1 - Referral of Power.

Scrutiny principles

- 3.8 One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:
- Does the Bill trespass unduly on personal rights and liberties?⁵
 - Does the Bill inappropriately delegate legislative powers?⁶
- 3.9 In addition, in recent times, the Committee has considered the impact of any proposed legislation on the application of parliamentary privilege.⁷ Although not adopted formally by the Council as part of the Committee's terms of reference, the principles can be applied as a convenient framework for the scrutiny of legislation.

³ For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp7 – 12.

⁴ Ibid. Also see reports of the Parliament of Western Australia, Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

⁵ For example: strict liability offences, reversal of the onus of proof, abrogation of the privilege against self-incrimination, inappropriate search and seizure powers, decision-making safeguards (that is: written decisions and reasons for decisions), personal privacy, decisions unduly dependent on administrative decisions.

⁶ For example: 'Henry VIII clauses', insufficient parliamentary scrutiny of the exercise of legislative power.

⁷ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, pp7 – 10; and *Report No 11: Higher Education Bill 2003*, Western Australia, September 2003, pp 24-34.

4 OVERVIEW OF THE BILL

4.1 The Bill contains 5 clauses:

- a) Clause 1 – Short title and purpose.
- b) Clause 2 – Commencement.
- c) Clause 3 – Definitions.
- d) Clause 4 – References.
- e) Clause 5 – Termination of references.

4.2 The Second Reading Speech of Hon Nick Griffiths MLC, the Minister for Housing and Works representing the Attorney General in the Council (**Minister**) stated that the purpose of the Bill is to refer certain legislative power to the Commonwealth Parliament. The Minister further stated that:

*“...this will enable the Commonwealth Parliament to legislate to give the Family Court of Western Australia the same jurisdiction and powers in relation to de facto partners as it now has in relation to married couples under the superannuation splitting arrangements contained in the Family Law Act (Cth)...”*⁸

4.3 The Minister advised the House that the amendments to the *Family Law Act 1997* (WA) allowed the Family Court of Western Australia to deal with issues arising from the breakdown of a de facto relationship, including property disputes. This did not, however, include superannuation. This is because the provisions of the Commonwealth *Superannuation Industry (Supervision) Act 1993*, which governs the way in which superannuation funds may be dealt with, would prevail and prevent the amendments from operating. Similarly, the heads of power under the Commonwealth Constitution dealing with ‘corporations’, ‘pensions’, ‘taxation’, ‘marriage’ and ‘matrimonial causes’ would not support the division of superannuation in relation to de facto couples.⁹

4.4 The Minister went on to say that while it would be possible for the Commonwealth to amend the regulatory regime that governs superannuation to ensure that any orders made under State de facto relationships legislation could be given effect to, this would be a complex exercise and involve unnecessary risk. Accordingly, it was agreed by the Standing Committee of the Attorneys General (**SCAG**) that there should be a reference of power by the States to the Commonwealth in relation to de facto couples.

⁸ Hon N Griffiths MLC, Minister for Housing and Works, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14154.

⁹ *Ibid.*

The Minister advised the House that in the case of Western Australia, the reference of power would be limited to the superannuation interests of de facto couples, as everything else is covered by the reforms introduced by the government last year.¹⁰

- 4.5 The Bill provides for two separate referrals, one in respect of heterosexual de facto relationships and the other in respect of same sex de facto relationships. The Minister advised the House that this is because the Commonwealth Government has made it clear that it will only legislate in respect of heterosexual couples. The separate referral in respect of same sex de facto couples is to enable a future Commonwealth government to extend the operation of the legislation if so minded.¹¹

5 BACKGROUND TO THE BILL

- 5.1 On July 25 2001, at the meeting of SCAG in Darwin, the then Commonwealth Attorney General Darryl Williams QC, MP called on the States to refer powers to the Commonwealth Parliament so that national laws governing the property of de facto couples could be enacted.¹² The Commonwealth Attorney General has given an undertaking to introduce a bill to amend the *Family Law Act 1975* (Cth) once the States have referred their powers, so that its provisions regarding matrimonial property will also apply to the property of heterosexual de facto couples.¹³

The SCAG Agreement

- 5.2 On November 8 2002, at the meeting of SCAG in Fremantle, the States agreed to refer their powers paving the way for couples to resolve disputes over property, residence and contact for children in the same court. The Committee was advised by the Attorney General that the referral is to be in the form of option 3 of the model Commonwealth Powers (De Facto Relationships) Bill 2002 prepared by the Parliamentary Counsel's Committee and which provided for separate references for heterosexual de facto couples and same sex couples.¹⁴

Availability of Constating Documents

- 5.3 The Attorney General advised the Committee that there is no intergovernmental agreement/memorandum of understanding 'as such' relating to the Bill although extracts from the minutes of the relevant SCAG meeting were provided.¹⁵

¹⁰ Ibid.

¹¹ Ibid.

¹² Attorney General's Department, Media Release, July 25 2001.

¹³ Letter to the Committee from the Attorney General, January 20 2004, p2.

¹⁴ Ibid, p1.

¹⁵ Letters to the Committee from the Attorney General, dated January 20 2004 and March 11 2004.

5.4 The Committee has previously reported its concerns to the House where there is little or no written material which records the original agreement between the Commonwealth, State and Territories when uniform legislation is proposed.¹⁶

5.5 As was noted in the Committee's Fifth Report:¹⁷

“When dealing with originating or amending legislation promoted by the governments of the participating jurisdictions, the Committee, not unreasonably in its opinion, expects the State Minister to provide the Committee with a copy of the memorandum of understanding or other instrument that recites what the several governments have agreed to and a description of the legislation that each jurisdiction will need to have enacted if the agreement is to have lawful effect.”

and further:

“The Committee's examination of the relevant inter-governmental agreement and supporting documents is not a perfunctory exercise. First, the governments' policy should be stated in obvious terms. Second, the legislation should reflect that policy accurately. Third, the advantages and disadvantages to the State as a participant should be listed and examined. Fourth, the constitutional issues affecting each jurisdiction should be identified. The same considerations apply to subsequent amending legislation such as this Bill.”

5.6 As previously noted in the Committee's Fifth Report, the importance the Committee attaches to the source documentation as an aid to interpretation is supported by the High Court when, speaking in context of the *Corporations Law*, the joint judgment in *R v Hughes* stated:¹⁸

“The national scheme was implemented by legislation of the legislatures of all the polities that were parties to the Alice Springs Agreement. In construing that legislation, regard may be had to the Alice Springs Agreement as part of the relevant context.”

¹⁶ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purpose, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p1. In the case of that bill there were no documents available to the Committee on the National Crime Authority (State Provisions) Amendment Bill 2002. In addition there was no state held record of why that bill had been introduced, whether its provisions accorded with the agreement of the Inter-Governmental Committee and whether other options had been considered.

¹⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purpose, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, pp1-2.

¹⁸ *R v Hughes* [2000] HCA 22. Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purpose, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p2.

5.7 The Committee emphasises the importance of the existence and availability of constating documents to the implementation, justification, understanding and interpretation of uniform legislative schemes.

5.8 Whilst the extracts of the SCAG minutes of November 8 2002 provided by the Attorney General are indicative of the type of legislation, it is a matter of concern to the Committee that it has had to rely on the extracts of minutes rather than an intergovernmental agreement/memorandum of understanding. As a preliminary note the Committee observes that when state governments implement an agreement reached with another jurisdiction which affects the people of Western Australia, that such agreements might be reduced to a readily identifiable form accessible to the State's public.

6 THE LEGISLATIVE RESPONSE OF OTHER PARTICIPATING JURISDICTIONS

6.1 As at February 26 2003 the legislative response in other participating jurisdictions was:

- a) ACT: No Bill introduced into Parliament. Referral of powers to Commonwealth last debated in the Legislative Assembly May 8 2002. There was a reluctance to refer powers to the Commonwealth unless it included all couples regardless of their sex. The matter stands adjourned.¹⁹
- b) NT: The *De Facto Relationships (Northern Territory Request) Act 2003* received assent in November 2003.²⁰
- c) NSW: The Commonwealth Powers (De Facto Relationships) Bill 2003 received its second reading in Parliament on September 5 2003.
- d) QLD: The *Commonwealth Powers (De Facto Relationships) Act 2003* received assent on November 6 2003.
- e) SA: No Bill introduced into Parliament.
- f) Tasmania: No Bill introduced into Parliament.
- g) Victoria: No Bill introduced into Parliament.

¹⁹ ACT, Legislative Assembly, *Parliamentary Debates (Hansard)*, May 8 2002, p1286-1300.

²⁰ NT, Legislative Assembly, *Parliamentary Debates (Hansard)*, November 25 2003, Record No 16.

7 SELECTED CLAUSES OF THE BILL

Clause 1(2) – Purpose

- 7.1 Clause 1(2) of the Bill states that the purpose of the Act is to refer certain matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth. This is achieved using the head of power under section 51(xxxvii) of Part V of the *Constitution of the Commonwealth of Australia Act 1900 (Constitution)* which states:

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

...

(xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.”

- 7.2 In addition, clause 1(2) facilitates the vesting of federal jurisdiction in the Family Court of Western Australia to deal with these matters under section 77(iii) of the Constitution:

“77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

...

(iii) investing any court of a State with Federal jurisdiction.”

Clause 3 – Definitions

- 7.3 The definition of “de facto partner”, “de facto relationship” and “superannuation matters” in clause 3(1) provides:

“ “de facto partner” means a person who lives or has lived in a de facto relationship;

“de facto relationship” means a marriage-like relationship (other than a legal marriage) between 2 persons;

“superannuation matters”, in relation to de facto partners, means the distribution of superannuation benefits or prospective superannuation entitlements of or relating to de facto partners. ”

7.4 The Committee notes that the definitions of “de facto partner” and “de facto relationship” differ with the definitions found in section 13A of the *Interpretation Act 1984*:

“s.13A(4) A reference in a written law to a de facto partner shall be construed as a reference to a person who lives, or where the context requires, has lived, in a de facto relationship.

s.13A(1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.”

7.5 However, the Committee also notes that the definitions contained in clause 3 of the Bill are identical with the definitions contained in similar legislation of the Northern Territory, Queensland and New South Wales.

7.6 The Committee explored this issue with the Attorney General who advised “*The definitions are those contained in the model bill and they do not differ materially from the definitions in section 13A of the Interpretation Act 1984.*”²¹

7.7 The definition of de facto partner, by the use of the word ‘person’, is clearly intended to cater for heterosexual and same sex relationships.

7.8 Clause 3(2) expands on the definition of de facto relationship by stating that – “*a de facto relationship exists even if a de facto partner is legally married to someone else or is in another de facto relationship*”. [underlining added]

7.9 Clause 3(3) deals with the reference with regard to superannuation benefits:

“(3) A reference in this Act —

(a) to the superannuation benefits or prospective superannuation entitlements of de facto partners includes a reference to the superannuation entitlements of either or both of them; and

(b) to the distribution of any such superannuation benefits or prospective superannuation entitlements includes a reference to the conferral of rights or obligations in relation to the superannuation benefits or prospective superannuation entitlements.”

²¹ Letter to the Committee from the Attorney General dated March 11 2004.

Clause 3 - Retrospective Application

- 7.10 Clause 3(4) states that “...*this Act extends to de facto relationships that ended before the commencement of the Act.*” This provides the Act with retrospective effect. This issue was addressed by the Attorney General who stated:

*“If the referral power is made prospective only then it is assumed all the States will need to settle on a future date by which time all the States must have their referral legislation passed, so that the common date can be proclaimed for the commencement of their legislation. This is never an easy task”.*²²

- 7.11 The Attorney General went on to say:

“The main concern appears to be that couples who have separated may delay using the State provisions in the expectation of the Commonwealth passing retrospective laws. This might be a silly thing to do, because the Commonwealth may take some time to legislate and when they do they may decide not to do so retrospectively. A separated person who does not want to wait can always apply to the State courts under the current law

...

*In any case even if we provide a referral of power that applies only to couples whose relationship “broke down” after the referral of power, it may take some months or years after that date for the Commonwealth to pass legislation to take up the reference in all areas. If that occurs, then the Commonwealth legislation can be retrospective to the date of the referral, the same issues of concern will then arise that have been raised about the referral applying to breakdowns before the passage of the referral legislation.”*²³

- 7.12 The Committee observes that the Bill may adversely affect rights and liberties retrospectively. In particular the Committee was interested in how the Act would be applied in the event that a final order has already been made in Family Court proceedings, and whether the court order or the legislation would prevail.

- 7.13 In this respect, the Scrutiny of Legislation Committee of the Queensland Parliament were advised in the Explanatory Memorandum relating to their Bill that the Commonwealth had indicated that it will not legislate retrospectively pursuant to this reference, in cases where a final order has been made in a state court in relation to the

²² Attorney General, Legislative Assembly, *Parliamentary Debates (Hansard)*, December 3 2003, p14079.

²³ *Ibid.*

relevant matters.²⁴ The Queensland committee was further advised that the Commonwealth:

- a) is likely to allow applications for such orders to be made where previous orders are later set aside; and
- b) does not envisage any other retrospective effect and final orders in State courts would be a bar to applying to a court exercising jurisdiction under the *Family Law Act 1975 (Cth)*.²⁵

7.14 The Committee wrote to the Attorney General in relation to this issue, in particular how the Act would be applied in the event that a final order has already been made in Family Court proceedings under state law, and whether the court order or the legislation would prevail. The Attorney General advised:

*“The model bill is to be retrospective in order to achieve uniformity. It must be borne in mind that the referral legislation of each of the States will be passed at different times. Ultimately, whether a person’s rights will be affected will be determined by the Family Court, which would no doubt take into account all relevant factors including retrospectivity.”*²⁶

7.15 The Attorney General also drew the Committee’s attention to *R v Corbett* (2004) 1 QR 146 which held that “...legislation enacted by the Commonwealth pursuant to s 51(xxvii) of the Commonwealth Constitution was not limited to a prospective operation.”²⁷

7.16 The Committee draws this issue to the attention of the House.

Clause 4 – References

7.17 Clause 4 details the legislative powers to the extent to which they are not otherwise included in the legislative powers of the Parliament of the Commonwealth, that are to be referred to the Parliament of the Commonwealth for a period beginning on the day fixed under clause (section) 5, as the day on which the references under this legislation are to terminate:

²⁴ Queensland Parliament, Scrutiny of Legislation Committee, *Alert Digest No.10*, October 7 2003, p4 and Commonwealth Powers (De Facto Relationships), Queensland, Explanatory Notes, September 9 2003, p3.

²⁵ Ibid.

²⁶ Letter to the Committee from Attorney General, March 11 2004, p1.

²⁷ Ibid, p1.

“(a) superannuation matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of different sexes;

(b) superannuation matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of the same sex.”
[underlining added]

7.18 Clause 4(2) states “...the operation of each paragraph of subsection (1) is not affected by the other paragraph”. That is, the powers in paragraphs (a) and (b) while referred to the Commonwealth Parliament together, can be enacted independently.

7.19 The Attorney General commented on this issue, providing the following rationale:

*“The Bill provides for two separate referrals: first, a referral of power in respect of heterosexual de facto relationships; and, secondly, a referral of power in respect of same-sex de facto relationships. This separation has been drafted specifically because the Commonwealth Government has made it clear that it will legislate only in respect of heterosexual couples. Therefore, the separate referral in respect of same-sex de facto couples will enable a future Commonwealth Government to introduce legislation to extend the operation of the commonwealth legislation to provide for superannuation-splitting arrangements for same-sex de facto couples”.*²⁸ [underlining added]

7.20 The Attorney General went on to say:

“This approach has several benefits. First, there will not be a gap in the jurisdiction of the Family Court of Western Australia in relation to the superannuation interests of de facto couples; that is, when the Commonwealth Parliament enacts legislation based on the first reference in this Bill, heterosexual de facto couples and married couples, but not same-sex de facto couples, will be able to have their superannuation interests dealt with in the Family Court of Western Australia...

Secondly, at least for the present, heterosexual de facto couples will get the benefit of national uniform superannuation-splitting legislation...

Thirdly, this State will be seen to be acting on the basis of equality between persons, whether in heterosexual or same-sex relationships.

²⁸ Attorney General, Legislative Assembly, *Parliamentary Debates (Hansard)*, October 22 2003, p12450.

If the Commonwealth does not utilise the referred power over same-sex de facto couples, it will bear the burden of discriminating against same-sex de facto couples...

Fourthly, hopefully a future Commonwealth Government will agree to commonwealth legislation giving the Family Court of Western Australia power over the superannuation disputes of same-sex de facto couples. When it does so, enactment of this Bill will allow that to occur.”²⁹

- 7.21 The Committee notes the submission of the Law Society of Western Australia (with which the Attorney General agreed)³⁰ which although supporting the legislation and recognising that the present Commonwealth Government will not pass legislation in relation to same sex couples, made the following comment:

“This will mean that, in Western Australia, de facto partners of the same sex will be dealt with differently from de facto partners of different sex, because in the former case the Family Court of Western Australia will be unable, on the breakdown of the relationship, to make orders concerning superannuation. This seems an undesirable result and is contrary to the general intention of the recent changes to the law in Western Australia dealing with de facto relationships.”³¹

Clause 5 – Termination of References

- 7.22 Clause 2 of the Bill states that the Act will come into operation on a day fixed by proclamation.
- 7.23 Clause 5(1) provides that the Governor may at any time fix a day as the day on which the references are to terminate. Under clause 5(2) this must be no earlier than the first day after the end of the period of 3 months beginning with the day on which the proclamation is gazetted.
- 7.24 Clause 5(3) allows the Governor to revoke a proclamation made under clause 5(1) in which case the revoked proclamation is taken (for the purposes of clause 4) never to have been published.
- 7.25 Clause 5(4) states that a revoking proclamation has effect only if published before the day fixed under clause 5(1).

²⁹ Ibid.

³⁰ Letter to the Committee from the Attorney General dated March 11 2004.

³¹ Submission to the Committee from the Law Society of Western Australia – refer to Appendix 4.

- 7.26 Clause 5(5) states that the revocation of a proclamation published under clause 5(1) does not prevent publication of a further proclamation under that clause.
- 7.27 The Committee notes that the conferral of the referred power is made by Parliament, whereas the termination of one or both of the referred powers is by executive action of the Governor by proclamation.
- 7.28 By way of a comparison, the Committee notes that Queensland's legislation³² with regard to termination of references is virtually identical save for additional clause 5(6):
- “ 5(6) A proclamation made under this section is subordinate legislation.”³³
- 7.29 The inclusion of section 5(6) provides that the Queensland Parliament may disallow the proclamation prior to its taking effect, thereby enabling the reference to continue. Accordingly, the role of Parliament in scrutinising delegated legislation is preserved.
- 7.30 In Western Australia, section 42(8)(b) of the *Interpretation Act 1984* states that regulations include rules, local laws and by-laws. On the other hand proclamations, as a form of subsidiary legislation, are not specifically included and therefore would not be disallowable under the provision of section 42 of the *Interpretation Act 1984*. The Committee wrote to the Attorney General in relation to this matter.
- 7.31 The Attorney General advised that the legislation follows the model bill, and that it has been the general practice in this State to permit termination of a reference by proclamation.³⁴
- 7.32 In this respect the Committee recalls that the termination of references pursuant to s. 51(xxxvii) of the Commonwealth Constitution were considered in its Sixth Report in relation to the *Terrorism (Commonwealth Powers) Bill 2002*.³⁵ However that bill contained an additional clause:

“5(6) A proclamation is to be made under this section if and only if the making of that proclamation has been recommended by resolution passed by both Houses of Parliament of this State.”³⁶

³² *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld).

³³ Section 4, *Legislative Standards Act 1992* (Qld), as a 'fundamental legislative principle' requires that legislation has sufficient regard to the institution of Parliament.

³⁴ Letter to the Committee from the Attorney General, March 11 2004, p2.

³⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 6: Terrorism (Commonwealth Powers) Bill 2002*, December 2002, pp6-7.

³⁶ Now s. 5(6) *Terrorism (Commonwealth Powers) Act 2002*.

- 7.33 The bill was enacted in that form as the *Terrorism (Commonwealth Powers) Act 2002*. Therefore although that Act provides for a termination of a reference of power by proclamation, a proclamation can only be made after its making has been recommended by an affirmative resolution of both the Council and the Legislative Assembly. The Committee observes that this affords parliamentary scrutiny to the termination of a reference by executive act.
- 7.34 The Committee is of the view that the Bill would be greatly enhanced if it were to provide for parliamentary scrutiny of the proposed termination of the reference. The Committee has discussed means of affording greater parliamentary scrutiny in the context of subsidiary legislation and executive action in earlier reports.³⁷
- 7.35 The Committee brings to the attention of the House the following ways in which the Bill might be amended to facilitate parliamentary scrutiny in this instance:

- a) ***Affirmative resolution procedure:*** Clause 5 could be amended to enable the House to affirm by resolution whether the proposed termination is to have effect. Affirmation will provide Parliament with an opportunity to consider the policy behind the expiry.

Both Houses of Parliament would need to affirm (within a stated period of time) before the proclamation can come into effect. If Parliament affirms the proclamation then it would take effect from the date of the later of the resolutions passed by each House. If either House fails to pass a resolution within the time stated the question is resolved in the negative and the termination will not take effect.

On occasion this procedure might be applied to ‘draft instruments’ or legislative ‘proposals’.

- b) ***Negative resolution procedure:*** Clause 5 could be amended to provide that unless Parliament resolves, within a period or date specified, to disallow the operation of the proclamation it is to have effect.

In contrast to the affirmative resolution procedure, with a negative resolution the proclamation (and termination) would take effect unless Parliament (within a stated period of time) resolved otherwise. If Parliament resolved to ‘disallow’ the proclamation then it could not take effect. If either House fails to pass a resolution within the time stated then the question is resolved in the

³⁷ For example in Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, Western Australia, June 25 2002, Chapter 4 especially pp62–64. See also Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 13: Human Reproductive Technology Amendment Bill 2003 and the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003*, Western Australia, December 2003, pp12-14.

affirmative and the termination may take effect after the last day that a House was able to 'disallow'.

7.36 The Committee is supportive of the procedure utilised in the *Terrorism (Commonwealth Powers) Act 2002* as it is a variant on the philosophy behind the affirmative resolution procedure discussed above. That is, the proclamation may only be made if both Houses of Parliament has so recommended.

Recommendation 1: The Committee recommends that clause 5 of the Commonwealth Powers (De Facto Relationships) Bill 2003 be amended to provide for greater parliamentary scrutiny of the termination of the reference of powers. This may be effected in the following manner:

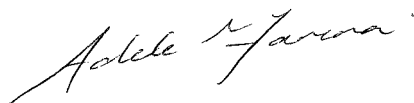
Page 3, after line 30 – To insert –

“

(6) A proclamation is to be made under this section if and only if the making of that proclamation has been recommended by resolution passed by both Houses of Parliament of this State.

”.

7.37 The Committee commends its report to the House.



Hon Adele Farina MLC
Chairman

April 6 2004

APPENDIX 1
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

- Structure 1:** *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.
- Structure 2:** *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.
- Structure 3:** *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.
- Structure 4:** *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.
- Structure 5:** *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.
- Structure 6:** *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 2
COMMITTEE'S LETTER DATED NOVEMBER 28 2003
AND THE ATTORNEY GENERALS' REPLY DATED
JANUARY 20 2004

APPENDIX 2
COMMITTEE'S LETTER DATED NOVEMBER 28 2003 AND THE
ATTORNEY GENERAL'S REPLY DATED JANUARY 20 2004



STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Hon Jim McGinty MLA
Attorney General
30th Floor Allendale Square
77 St George's Terrace
Perth WA 6000

Dear Minister

Commonwealth Powers (De Facto Relationships) Bill 2003

The Committee has been advised that the above bill may be referred to the Uniform Legislation and General Purposes Committee (Committee) by operation of the Standing Orders of the Legislative Council.

In order to facilitate preliminary research to the background of the bill, the Committee requests that the following information is immediately provided to the Committee:

- a) a copy of the relevant intergovernmental agreement/memorandum of understanding or, if one is not available, a copy of the most recent draft with a statement as to the status of that draft;
- b) if (a) is not available, the minutes of the Ministerial Council meeting at which it was agreed to introduce the legislation;
- c) a statement as to any timetable for the implementation of the legislation;
- d) the Government's clearly stated policy on the bill;
- e) the advantages and disadvantages to the State as a participant in the scheme;
- f) the constitutional issues affecting each jurisdiction;
- g) an explanation as to whether and by what mechanism the State can opt out of the scheme; and

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FACSIMILE: HOUSE +61 8 9222 7809 COMMITTEES +61 8 9222 7805
E-MAIL (GENERAL OFFICE): council@parliament.wa.gov.au

- h) the mechanisms by which the bill, once enacted, can be amended. That is, whether the Commonwealth has power to amend the bill of its own volition, or whether the agreement of the State, or a majority of States and Territories, is required.

Material should be lodged with:

Ms Sheena Hutchison
Committee Clerk
Uniform Legislation and General Purposes Committee
Legislative Council Committee Office
Parliament House
Perth WA 6000

Legislative Council standing committees may authorise the publication of material received by the committee at some stage during its inquiry. This material is then available to the public on request.

It is important that any request for the Committee to prohibit publication of all or part of the information provided be made in your reply. State why you want it confidential. If you want part of it kept confidential please put that part on a separate page(s). The Committee will consider requests for confidentiality, but retains the power to publish any material. The Legislative Council may also authorise publication.

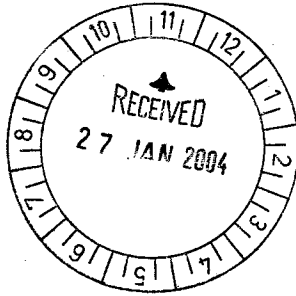
If you have any questions, require further information or have difficulties with promptly supplying the requested material, please contact Ms Hutchison on 9222 7300. If you wish to discuss substantive issues please contact Felicity Mackie, Advisory Officer (Legal) on 9222 7409.

Yours sincerely



Hon Adele Farina MLC
Chairman

November 28 2003



ATTORNEY GENERAL
MINISTER FOR HEALTH, ELECTORAL AFFAIRS
FOR WESTERN AUSTRALIA

Our ref: 9-24747

Hon Adele Farina MLC
Chairman
Standing Committee on Uniform Legislation and General Purposes
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Farina

COMMONWEALTH POWERS (DE FACTO RELATIONSHIPS) BILL 2003

I refer to your letter dated 28 November 2003 requesting information concerning the above Bill. I will deal with each of the questions you have raised in turn:

- (a) There is no intergovernmental agreement/memorandum of understanding as such relating to this legislation. It was agreed at a meeting of the Standing Committee of Attorneys General (SCAG) in November 2002 that the States should refer power in relation to the property interests of de facto couples to the Commonwealth. The referral was to be in the form of option 3 of the model *Commonwealth Powers (De Facto Relationships) Bill 2002* prepared by the Parliamentary Counsel's Committee and which provided for separate references for heterosexual de facto couples and same sex couples.¹ The Commonwealth Attorney General indicated that the Commonwealth only intended to legislate in respect of heterosexual de facto couples.

In subsequent discussions with the Commonwealth Attorney General, following advice he had received from Chief General Counsel of the Australian Government Solicitor, it was agreed that there was no legal impediment to a reference from Western Australia limited to the superannuation interests of de facto couples. The Bill is therefore limited superannuation interests to take account of the fact that the other property interests of de facto couples, both heterosexual and same sex, can be

¹ Both New South Wales and Queensland have already enacted legislation in this form. I am informed that Victoria, South Australia and Tasmania will be introducing legislation in the Autumn Session of their Parliaments.

30th Floor Allendale Square
77 St George's Terrace Perth WA 6000
Tel: +61 8 9220 5000 Fax: +61 8 9221 2068
ABN: 61313082730

dealt with by the Family Court of Western Australia under amendments to the *Family Court Act 1997* (WA) enacted in 2002.²

- (b) Relevant extracts from the Minutes of SCAG meetings relating to the matter can be made available if this is considered necessary.
- (c) The Commonwealth Attorney General stated in a letter to me dated 29 May 2003 that once the States had referred powers he intended to introduce a bill to amend the *Family Law Act 1975* so that its provisions regarding matrimonial property also apply to the property of heterosexual de facto relationships.
- (d) There is no specific Government policy on the Bill, but the measure is consistent with Government policy to legislate to recognise the property rights of de facto spouses in opposite or same sex relationships without discrimination³ and to eliminate discrimination on the ground of sexuality.⁴
- (e) By participating in the scheme the State will be able to ensure that couples in de facto relationships enjoy the same rights under the *Family Law Act 1975* (Cth) in relation to their superannuation interests as married couples.
- (f) The referral of power is to be made under section 51(xxxvii) of the Commonwealth *Constitution* and is required because the marriage⁵ and matrimonial causes⁶ powers in the Commonwealth *Constitution* do not confer power on the Commonwealth Parliament to legislate with respect to the property interests of de facto couples. Legal advice provided to the Commonwealth was to the effect that the corporations⁷, pensions⁸ and taxation⁹ powers, which support Commonwealth laws relating to superannuation, could not be relied upon to support a Commonwealth law purporting to regulate the division of the superannuation interests of de facto couples in the same manner applicable to married couples. On the other hand, because the Commonwealth has legislated in the field of superannuation, it would not be open to the State to legislate to confer jurisdiction on the Family Court of Western Australia to effect a division of the superannuation interests of de facto couples without complementary Commonwealth legislation. The Commonwealth has made it clear that it is not prepared to make amendments to its superannuation legislation to give effect to State legislation for the division of the superannuation interests of de facto couples. The State was therefore left with no alternative but to accede to a reference of power if de facto couples are to enjoy the same property rights as married couples.

² *Family Court Amendment Act 2002*.

³ See Australian Labor Party, WA Branch, policy paper 'Better Opportunities for Women' at page 11 -- 'Fairness in Law'. The policy paper can be found at <http://www.wa.alp.org.au>.

⁴ See Australian Labor Party, WA Branch, Platform, paragraph 16 of the policy paper 'Basic Principles and Social Justice Strategy', to achieve the elimination of discrimination and exploitation on the ground of sexuality. The Platform can be found at <http://www.wa.alp.org.au>.

⁵ Section 51(xxi).

⁶ Section 51(xxii).

⁷ Section 51(xx).

⁸ Section 51(xxiii).

⁹ Section 51(ii).

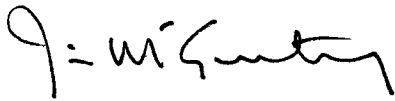
(g) As is evident from Clause 5 of the Bill, the reference may be terminated by the State by proclamation on 3 months notice.

(h) Once enacted, only State Parliament could amend the Bill.

Any legislation enacted under the reference could be amended by the Commonwealth Parliament by legislation within the scope of the power referred and any other relevant head of legislative power available to the Commonwealth, but not otherwise.

I trust you find the above responsive to the Standing Committee's requests.

Yours sincerely

A handwritten signature in black ink, appearing to read "Jim McGinty". The signature is fluid and cursive, with a large initial "J" and "M".

JIM MCGINTY MLA
ATTORNEY GENERAL

20 JAN 2004

APPENDIX 3
COMMITTEE'S LETTER DATED MARCH 9 2004 AND
ATTORNEY GENERAL'S REPLY DATED MARCH 11 2004.

APPENDIX 3
COMMITTEE'S LETTER DATED MARCH 9 2004 AND
ATTORNEY GENERAL'S REPLY DATED MARCH 11 2004



STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Hon. Jim McGinty MLA
Attorney General
30th Floor, Allendale Square
77 St George's Terrace
PERTH WA 6000

By Facsimile: 9221 2068

Dear Attorney General

Commonwealth Powers (De Facto Relationships) Bill 2003

I refer to previous correspondence.

To assist with its deliberations the Committee would be grateful if you could provide advice with regard to the following matters, and clauses of the Bill. The Committee apologises for the very short notice but given the reporting constraints, it would appreciate your response to these matters by **4pm, Thursday, March 11 2004.**

The Committee notes from your letter dated January 20 2004 that is no intergovernmental agreement/memorandum of understanding relating to this legislation. The Committee would, therefore, appreciate a copy of relevant extracts from the minutes from the SCAG meeting.

The Committee has received a submission from the Law Society of Western Australia who support the legislation and recognise that the present Commonwealth Government will not pass legislation in relation to same sex couples, with the following comment:

"This will mean that, in Western Australia, de facto partners of the same sex will be dealt with differently from de facto partners of different sex, because in the former case the Family Court of Western Australia will be unable, on the breakdown of the relationship, to make orders concerning superannuation. This seems an undesirable result and is contrary to the general intention of the recent changes to the law in Western Australia dealing with de facto relationships."

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The Committee would be interested to receive your comments on this issue.

Clause 3(1) - Definitions

Clause 3(1) of the Bill defines “de facto partner” and “de facto relationship” as follows -

“de facto partner” means a person who lives or has lived in a de facto relationship;

“de facto relationship” means a marriage-like relationship (other than a legal marriage) between 2 persons;

The Committee notes that the wording of the definitions contained within the Bill differ from the definitions found in section 13A of the *Interpretation Act 1984* -

s.13A(4) ...a de facto partner shall be construed as a reference to a person who lives, or where the context requires, has lived, in a de facto relationship.

s.13A(1) ...a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.

The Committee also notes that the definitions contained in clause 3(1) of the Bill are identical with the definitions contained in same legislation of some of the States and Territories who have introduced legislation. The Committee appreciates that the difference in the wording of the definitions may be for the sake of uniformity, but it would be interested to know why there has been a departure from the definitions contained in the *Interpretation Act 1984*.

Clause 3(4) - Retrospective Effect

Clause 3(4) of the Bill states -

This Act extends to de facto relationships that ended before the commencement of the Act.

The Committee notes that while you addressed the issue of retrospectivity in the Legislative Assembly on December 3 2003, the Committee considers that clause 3(4) may adversely affect a person’s rights and liberties retrospectively. For example, it is not clear how the Act would be applied in circumstances where a final order has already been made in Family Court proceedings, or whether the order or the legislation would prevail.

The Committee also seeks clarification on the justification for making the legislation retrospective.

Clause 5 - Termination of References

Clause 5 provides the Governor with the executive power to terminate the references, made under clause 4, by proclamation. The Committee notes that the conferral of the referred power is made by Parliament, whereas the termination of one or both of the referred powers is by executive action of the

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Governor. The Committee notes section 42(8)(b) of the *Interpretation Act 1984*, which states that “regulations” include rules, local laws and by-laws. Proclamations on the other hand are not specifically classified as “regulations” and are therefore not subject to the scrutiny of Parliament by, for example, disallowance procedures.

The Committee notes that the Queensland Parliament has included an additional clause in their legislation, clause 5(6), which provides that any proclamation made under that section is subordinate legislation. Accordingly, such a proclamation would be subject to the scrutiny of Parliament pursuant to the fundamental legislative principles enshrined in the *Legislative Standards Act 1992* (Qld). A copy of the relevant part of the Queensland Legislation and Alert Digest of the Scrutiny of Legislation Committee No.10 of 2003 is attached for your information.

Please comment on why a similar clause, such as clause 5(6) of the Queensland legislation is not in the Bill. For example:

5(6) - Section 42 of the Interpretation Act 1984 applies in relation to a proclamation made under subsection (1) as if the proclamation were regulations within the meaning of section 42 and the reference in section 42(2) to regulations ceasing to have effect were a reference to the proclamation not coming into operation.

If you require any further information, please contact the Committee’s Articled Clerk, Mr Gary Cooper on 9220 7250.

Yours sincerely



Adele Farina MLC
Chairman

March 9 2004

relationships that ended prior to its commencement.

32. However, on the information presently available to the committee, it does not appear that this retrospectivity will be adverse to any affected individual.
33. The committee makes no further comment in relation to the retrospective aspects of this bill.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?¹⁰

◆ **Clause 5**

34. As mentioned earlier, the purpose of this bill is to refer certain legislative powers of Queensland, relative to the breakdown of de facto relationships, to the Commonwealth Parliament in order that it may legislate in relation to those matters.
35. Although the reference of power is itself achieved by this bill, which will be passed by Parliament, cl.5 of the bill provides that the references may be terminated at any time by the Governor by proclamation.
36. Clause 5 is a significant provision, which effectively places in the hands of the Executive the power to terminate the relevant references.¹¹ However, cl.5(6) provides that such a proclamation is subordinate legislation, and accordingly Parliament (provided it sits within the 3 month period mentioned in cl.5(2)), may disallow the proclamation prior to its taking effect, thereby enabling the reference to continue.¹²

37. The committee notes that cl.5 of the bill enables the relevant references to the Commonwealth to be terminated by a proclamation by the Queensland Governor. That proclamation is subordinate legislation, which can be disallowed by Parliament.
38. In the circumstances, the delegation of power effected by cl.5 is probably not objectionable.

¹⁰ Section 4(4)(a) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

¹¹ As commented on earlier in this chapter, cl.2 of the bill effectively confers a similar power upon the Executive in relation to the commencement of the reference.

¹² If Parliament did not sit until after the 3 month period it could still in theory disallow the proclamation, although in practical terms doing so after the termination had taken effect might be problematical.



ATTORNEY GENERAL

MINISTER FOR HEALTH, ELECTORAL AFFAIRS

FOR WESTERN AUSTRALIA

Our ref: 9-26040

Hon Adele Farina MLC
Chairman
Standing Committee on Uniform Legislation and General Purposes
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Farina

COMMONWEALTH POWERS (DE FACTO RELATIONSHIPS) BILL 2003

I refer to your letter dated 9 March 2004 and respond as follows:

1. A copy of the relevant SCAG Minutes for the meeting held on 7/8 November 2002 is attached.
2. I would agree with the Law Society's comment.
3. The definitions are those contained in the model bill. They do not differ materially from the definitions in section 13A of the *Interpretation Act 1984*.
4. The model bill is to be retrospective in order to achieve uniformity. It must be borne in mind that the referral legislation of each of the States will be passed at different times. Ultimately, whether a person's rights will be affected will be a matter to be determined by the Family Court, which would no doubt take into account all relevant factors including retrospectivity.
5. It is of interest to note that the Queensland Court of Appeal recently held in *R v Corbett (2004) 1 QR p146*, that legislation enacted by the Commonwealth pursuant to s51(xxxvii) of the Commonwealth Constitution was not limited to a prospective operation.

30th Floor Allendale Square
77 St George's Terrace Perth WA 6000
Tel: +61 8 9220 5000 Fax: +61 8 9221 2066
ABN: 61313082730

MINUTES: SCAG: 7-8 Nov. 2002

5. De facto relationships law (Cth)

Introducing this item, Mr Williams indicated that it was highly desirable to have references from all states including WA and that the Commonwealth preferred option 1 in the draft bill, but could live with option 3.

Mr McGinty noted that at the last meeting States and Territories had expressed their disappointment at the Commonwealth's opposition to exercising power in relation to same sex couples.

Ms Jackson stated that Tasmania supported option 3 and agreed that the Commonwealth's attitude to same sex relationships was disappointing.

The ACT, Queensland, NT and NSW Attorneys-General all indicated their support for option 3.

Mr Debus noted that NSW shared Tasmania's views, and that he was particularly disappointed by the Commonwealth's refusal to amend its superannuation legislation to permit states to legislate for superannuation splitting for same sex de factos.

Mr McInty advised that WA has legislated to put de facto property and custody disputes into the family court for both heterosexual and same sex couples. It will provide a comprehensive scheme from 1 December for all ex nuptial children and property disputes. WA will not refer power in relation to de factos unless the Commonwealth picks up the same sex reference. Mr Williams noted that this position will prevent all de factos having access to superannuation splitting.

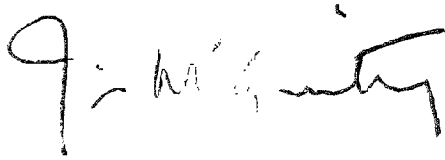
Ministers:

1. Noted the information in the officers' paper and the terms of the three options in the attached Bill for the referral of power to the Commonwealth;
2. Noted the Commonwealth's preference for a reference of power in relation to heterosexual de facto couples only; and

State and Territory Ministers identified option 3 in the attached Bill as the preferred model for referring power to the Commonwealth.

- 2 -

6. On the issue of proclamation, the legislation follows the model bill. It has been the general practice in this State to permit termination of a reference by proclamation.

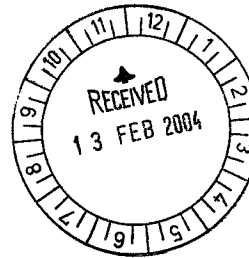


JIM McGINTY MLA
ATTORNEY GENERAL

11 MAR 2004

APPENDIX 4
SUBMISSION FROM THE LAW SOCIETY OF WESTERN
AUSTRALIA

APPENDIX 4
SUBMISSION FROM THE LAW SOCIETY OF WESTERN
AUSTRALIA



12 February 2004

Ms Sheena Hutchison
Committee Clerk
Uniform Legislation and General Purposes Committee
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Hutchison

I refer to your letter dated 16 December 2003 inviting the Society's comments on the above legislation.

The stated purpose of this Bill is to refer to the Commonwealth Parliament legislative power in relation to the superannuation interests of de facto partners whose relationship has broken down. The explanatory memorandum notes that the Bill refers power only in relation to superannuation interests of de facto couples and not other financial matters, which have already been dealt with in amendments to the Family Court Act 1997 (WA).

Seemingly the requirement for this legislation arises from some doubt as to whether a law of this sort is properly characterised as a law relating to superannuation, which would fall within the legislative competence of the Commonwealth Parliament or, alternatively, as law relating to the property of a de facto relationship, which is within a matter for the State Parliament. The Society accepts that this is an area in which there is room for some uncertainty. Plainly, if the matter were unequivocally within the competence of the Commonwealth Parliament, then no referral under s 51(xxxvii) of the Constitution would be required. Equally, unless there is a suggestion that some aspect of the Bill may fall within State legislative power, there would be nothing to refer.

With one important reservation, the Society supports this legislation, insofar as it is designed to remove uncertainty and to place de facto couples on the same footing as parties to a marriage. That of course was broadly the intent of the recent amendments to the Family Court Act 1997 (WA) dealing with de facto couples generally.

The reservation arises because, although the Commonwealth Bill will enable the Commonwealth Parliament to deal with de facto couples of both the same sex and of different sexes, it seems clear that the present Commonwealth Government will choose not to legislate in respect of same sex de facto relationships. This will then mean that, in Western Australia, de facto partners of the same sex will be dealt with differently from de facto partners of different sex, because in the former case the Family Court of Western Australia will be unable, on the breakdown of the relationship, to make orders concerning superannuation. This seems an undesirable result and is contrary to the general intention of the recent changes to the law in Western Australia dealing with de facto relationships.


Level 4, 89 St Georges Terrace Perth WA 6000, Dx 173 Perth

Telephone: (08) 9322 7877 Facsimile: (08) 9322 7899 Email: info@lawsocietywa.asn.au

Please address all correspondence to The Law Society of Western Australia PO Box Z5345, St Georges Terrace Perth WA 6831

Thank you for the opportunity to comment on this legislation.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ian Weldon', written in a cursive style.

Ian Weldon
President