



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON UNIFORM
LEGISLATION AND GENERAL PURPOSES
IN RELATION TO THE
HUMAN REPRODUCTIVE TECHNOLOGY
AMENDMENT BILL 2003 AND
HUMAN REPRODUCTIVE TECHNOLOGY
AMENDMENT (PROHIBITION OF
HUMAN CLONING) BILL 2003**

Presented by Hon Adele Farina MLC (Chairman)

Report 13
December 2003

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 Paddy Embry MLC

Hon Simon O’Brien MLC

Staff as at the time of this inquiry:

Mia Betjeman, Clerk Assistant

Sheena Hutchison, Committee Clerk

Anthony Sullivan, Articled Clerk

Address:

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

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

ISBN 1 9208 8604 4

CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS	I
EXECUTIVE SUMMARY	I
RECOMMENDATIONS.....	I
REPORT	1
1. REFERRAL OF THE BILLS.....	1
2. INQUIRY PROCEDURE.....	1
3. UNIFORM LEGISLATION	2
Scrutiny of uniform legislation in the Western Australian Parliament	2
Legislative structures	3
Scrutiny principles	3
4. OVERVIEW OF THE BILL.....	4
The Human Reproductive Technology Amendment Bill 2003	4
Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003.....	5
5. THE INTERGOVERNMENTAL AGREEMENT	6
Overview of the draft Intergovernmental Agreement: Research Involving Human Embryos and Prohibition of Human Cloning.....	6
6. CONFORMITY WITH INTENT OF IGA AND COMMUNIQUE	8
Maintenance of scheme and ability to amend legislation	8
7. THE LEGISLATIVE RESPONSE OF OTHER PARTICIPATING JURISDICTIONS.....	9
The Human Reproductive Technology Amendment Bill 2003	9
Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003.....	10
8. SELECTED CLAUSES OF THE BILL	10
Definition of human embryo/embryo.....	10
Proposed section 53ZV - Expiry of limitation on use of excess ART embryos.....	12
Tabling of Review of Legislation.....	14
9. CONCLUSION.....	16
APPENDIX 1 COPY OF MINISTER’S LETTER TO COMMITTEE DATED SEPTEMBER 1 2003.....	19
APPENDIX 2 IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION.....	23
APPENDIX 3 DEFINITIONS AS CONTAINED IN THE HUMAN REPRODUCTIVE TECHNOLOGY AMENDMENT BILL 2003.....	27

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

IN RELATION TO THE

HUMAN REPRODUCTIVE TECHNOLOGY AMENDMENT BILL 2003 AND HUMAN
REPRODUCTIVE TECHNOLOGY AMENDMENT (PROHIBITION OF HUMAN CLONING) BILL
2003

EXECUTIVE SUMMARY

- 1 On November 11 2003 the Human Reproductive Technology Amendment Bill 2003 (**HRT Amendment Bill**) and the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003 (**Prohibition of Human Cloning Bill**) (together referred to as **Bills**) stood referred to the Uniform Legislation and General Purposes Committee (**Committee**) pursuant to standing order 230A.
- 2 The purposes of the Bills are to “*prohibit human cloning and other unacceptable practices* [Prohibition of Human Cloning Bill]” and to “*regulate research involving human embryos* [HRT Amendment Bill]” in conjunction with a national scheme.
- 3 The Committee considered the following issues:
 - the expiry provision of proposed section 53ZW in clause 36;
 - the change in the definition of ‘embryo’ to ‘human embryo’; and
 - the review provisions of the Bills.

RECOMMENDATIONS

Page 13

Recommendation 1: The Committee recommends that during debate in the Council on proposed section 53ZV in clause 36 of the Human Reproductive Technology Amendment Bill 2003, the House consider the adequacy of parliamentary scrutiny in respect of the proposed expiry of the limitation on the use of embryos created before April 5 2002. To assist debate the Committee draws the attention of the House to paragraphs 8.6 to 8.10 of this report.

Recommendation 2: The Committee recommends that the proposed Part 4B, Division 11 in clause 36 of the Human Reproductive Technology Amendment Bill 2003 be amended in the following manner:

Page 60, after line 9 - To insert the following -

“

- (4) The Minister is to prepare a report based on the review made under subsection (1) and cause the report to be laid before each House of Parliament not later than 12 months from the date on which the review is first commenced.
- (5) The Minister must cause a copy of the report based on the review conducted under section 47 of the Commonwealth Human Embryo Act to be laid before each House of Parliament not later than six sitting days from the date of receipt of the report.

”

Recommendation 3: The Committee recommends that the proposed Part 4A, Division 4 in clause 9 of the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003 be amended in the following manner:

Page 12, after line 21 - to insert the following -

“

- (4) The Minister is to prepare a report based on the review made under subsection (1) and cause the report to be laid before each House of Parliament not later than 12 months from the date on which the review is first commenced.
- (5) The Minister must cause a copy of the report based on the review conducted under section 25 of the *Prohibition of Human Cloning Act 2002* of the Commonwealth to be laid before each House of Parliament not later than six sitting days from the date of receipt of the report.

”.

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

IN RELATION TO THE

**HUMAN REPRODUCTIVE TECHNOLOGY AMENDMENT BILL 2003 AND HUMAN
REPRODUCTIVE TECHNOLOGY AMENDMENT (PROHIBITION OF HUMAN CLONING) BILL
2003**

1. REFERRAL OF THE BILLS

- 1.2 On November 11 2003 the Human Reproductive Technology Amendment Bill 2003 (**HRT Amendment Bill**) and the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003 (**Prohibition of Human Cloning Bill**) (together referred to as **Bills**) 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 Bills, being December 11 2003. Pursuant to standing order 230A(5) the policy of the Bills is not a matter for inquiry by the Committee.
- 1.3 The purposes of the Bills are to “*prohibit human cloning and other unacceptable practices* [Prohibition of Human Cloning Bill]”¹ and to “*regulate research involving human embryos* [HRT Amendment Bill]”² in conjunction with a national scheme.

2 INQUIRY PROCEDURE

- 2.1 The Committee was aware that the Bills would be subject to standing order 230A when they were 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 Bills.³
- 2.2 On August 8 2002 the Committee wrote to Hon Jim McGinty MLA, Minister for Health (**Minister**) seeking specific information about a number of aspects of the Human Reproductive Technology Amendment Bill 2003 when it was first introduced

¹ Hon Sue Ellery MLC, *Parliamentary Debates (Hansard)*, Thirty-Sixth Parliament, Second Session, November 11 2003, p12917.

² Ibid p12916.

³ 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;*”.

into the Legislative Assembly. A copy of the Minister's reply is attached as Appendix 1.

2.3 Details of the inquiry were also placed on the parliamentary website at: www.parliament.wa.gov.au.

2.4 Time constraints prevented detailed consideration of the Bills in their entirety. The Committee therefore restricted its examination to a number of issues of concern. The Committee considered the following issues:

- the expiry provision of proposed section 53ZW in clause 36;
- the change in the definition of 'embryo' to 'human embryo'; and
- the review provisions of the Bills.⁴

2.5 Pursuant to standing order 230A(5) the policy of the Bills was not a matter for inquiry by the Committee. The Committee also wishes to note that the Bills are subject to a conscience vote.⁵

2.6 The Committee acknowledges the receipt of three unsolicited submissions.⁶

3 UNIFORM LEGISLATION

3.1 The Bills are 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.⁷

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

⁴ Proposed section 53ZW of the HRT Amendment Bill and proposed section 53R of the Prohibition of Human Cloning Bill.

⁵ Hon Sue Ellery MLC, *Parliamentary Debates (Hansard)*, Thirty-Sixth Parliament, Second Session, November 11 2003, p12917.

⁶ Letter dated November 27 2003 to the Committee from Pat Shea, submission dated November 27 2003 to the Committee from Mr Richard Egan of the Coalition for the Defence of Human Life and letter dated December 4 2003 to the Committee from Ms Wendy Bartlett.

⁷ 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.

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 consistency with the legislative form agreed among the various Executive Governments is a 'given'.⁸
- 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 2.⁹
- 3.7 The Bills are 'uniform legislation' within the meaning of standing order 230A by virtue of being pursuant to an intergovernmental agreement to which the Government of the State is a party: standing order 230A(1)(a).

Scrutiny principles

- 3.8 One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:

⁸ 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.

⁹ Ibid. Also see reports of the Parliament of Western Australia, Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

- Does the Bill trespass unduly on personal rights and liberties?¹⁰
- and

- Does the Bill inappropriately delegate legislative powers?¹¹

3.9 In addition, in recent times, the Committee has considered the impact of any proposed legislation on the application of parliamentary privilege.¹² 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.

4 OVERVIEW OF THE BILL

4.1 The Human Reproductive Technology Bill 2003 (**Bill**) was introduced in the Legislative Assembly on June 26 2003 to amend the Western Australian *Human Reproductive Technology Act 1991 (Act)*. The Bill was subsequently split into the HRT Amendment Bill and Prohibition of Human Cloning Bill on September 25 2003.

The Human Reproductive Technology Amendment Bill 2003

4.2 The HRT Amendment Bill contains 40 clauses.

4.3 In her Second Reading Speech Hon Sue Ellery MLC stated that "*The [HRT Amendment] Bill forms part of a package of legislative amendments necessary for Western Australia to participate in a national scheme to regulate research involving human embryos ... under strict criteria to be administered by the National Health and Medical Research Council [NHMRC]. They also agreed to nationally consistent standards for ART [assisted reproductive technology] clinical practice.*"¹³

4.4 "*The [HRT Amendment] Bill amends the Human Reproductive Technology Act 1991 to provide consistency with the approach agreed by COAG [Council of Australian Governments] and the Commonwealth legislation.*"¹⁴

¹⁰ 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.

¹¹ For example: 'Henry VIII clauses', insufficient parliamentary scrutiny of the exercise of legislative power.

¹² 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.

¹³ Hon Sue Ellery MLC, *Parliamentary Debates (Hansard)*, Thirty-Sixth Parliament, Second Session, November 11 2003, p12916.

¹⁴ Ibid

- 4.5 A number of the proposed changes to the Act are to terminology used in order to provide consistency with, or avoid confusion with, terms that have been used in the Commonwealth legislation.
- 4.6 The HRT Amendment Bill amends some of the functions of the Western Australian Reproductive Technology Council (**RT Council**) to allow it to perform its function under the new regime provided for by the amendments and to allow the RT Council to effectively interact in the regulation of the amended Act with the NHMRC.
- 4.7 The amendments impose limitations on research and specify guidelines to follow when determining if research is allowable. Either the RT Council or the NHMRC makes this determination.
- 4.8 Proposed section 53ZW requires the Minister for Health to cause an independent review of Part 4B (Regulation of certain uses involving excess ART embryos¹⁵) to commence on December 19 2004.¹⁶ The provision provides that a review may be undertaken as part of the review of the Commonwealth *Research Involving Human Embryos Act 2002*.¹⁷
- 4.9 Proposed section 53ZV provides that the use of excess ART embryos in a manner which may damage or destroy the embryo may only be performed on embryos created before April 5 2002. This limitation will continue until April 5 2005 when a sunset clause removes this limitation and all excess ART embryos (whenever created) may be subject to damaging or destructive use.¹⁸ This is discussed in more detail in section 8 of this report.

Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003

- 4.10 The Prohibition of Human Cloning Bill contains 10 clauses.
- 4.11 In her Second Reading Speech Hon Sue Ellery MLC stated that “*The [Prohibition of Human Cloning] Bill contains the legislative amendments necessary for Western Australia to be part of the national legislative scheme to prohibit human cloning and other unacceptable practices related to assisted reproductive technology.*”¹⁹

¹⁵ The definition of ‘excess ART embryos’ is contained in proposed section 53T(1) and (2) and is attached as Appendix 3.

¹⁶ Proposed Division 11 in clause 36.

¹⁷ Proposed section 53ZW(3) in clause 36.

¹⁸ Proposed sections 53ZB(3), 53ZE(1)(c) and (3) and 53ZV in clause 36.

¹⁹ Hon Sue Ellery MLC, *Parliamentary Debates (Hansard)*, Thirty-Sixth Parliament, Second Session, November 11 2003, p12917.

- 4.12 Hon Sue Ellery MLC further stated: “*Agreement was reached at a meeting of the Council of Australian Governments on 5 April 2002 on the introduction of nationally consistent legislation to ban human cloning and other unacceptable practices.*”²⁰
- 4.13 The central amendment of the Prohibition of Human Cloning Bill is the insertion of Part 4A into the Act, which prohibits human cloning, and a number of other practices that have been deemed similarly offensive.
- 4.14 A review clause obligates the Minister for Health to cause an independent review of Part 4A (Prohibited Practices) to commence on December 19 2004.²¹

5 THE INTERGOVERNMENTAL AGREEMENT

Overview of the draft Intergovernmental Agreement: Research Involving Human Embryos and Prohibition of Human Cloning

5.1 The Minister advised the Committee that “*The agreement to introduce legislation arose from a decision of the Council of Australian Governments (COAG) on 5 April 2002*”.²² The Minister further advised that “[a] *draft of an inter-governmental agreement between the Commonwealth and each of the States, ... is due to be considered by COAG at its next meeting*”.²³ Further inquiries of the Minister reveal that:²⁴

1. *COAG did not discuss the agenda item relating to the intergovernmental agreement (IGA) on research involving human embryos and the prohibition of human cloning at its 29 August 2003 meeting.*
2. *The IGA was discussed at a Heads of Government Forum held in conjunction with the COAG meeting. That group agreed that the IGA would be dealt with as an out of session item and circulated to all Premiers and Chief Ministers for signature.*
3. *It is intended that those jurisdictions that have already passed legislation will be prioritised when the IGA is circulated. On that basis WA, being one of the few remaining jurisdictions not to have passed legislation, will be one of the last to receive the document.*

²⁰ Ibid.

²¹ Proposed section 53R in clause 9.

²² Letter from Hon Jim McGinty MLA, Minister for Health to the Committee, September 1 2003.

²³ Ibid.

²⁴ Letter from Hon Jim McGinty MLA, Minister for Health to the Committee, December 5 2003

- 5.2 The Committee notes that the draft Intergovernmental Agreement: Research Involving Human Embryos and Prohibition of Human Cloning (**IGA**) is not very detailed in relation to the content of any national legislative scheme. It is the COAG Communique, dated April 2 2002 that sets out the substance of any nationally consistent legislative scheme. The Committee notes that the ambiguous nature of the IGA means that it does not adequately inform Parliament of the expected extent of the State's legislative response. Furthermore, the fact that the IGA is still a draft agreement should also be noted as a matter for concern.
- 5.3 Specifically, the IGA requires that the states must:
- a) ban human cloning and other practices regarded as unacceptable;²⁵
 - b) establish a national regulatory regime in relation to the use of excess ART embryos to be administered by the NHMRC;²⁶
 - c) use their best endeavours to submit to its Parliament within 12 months of December 19 2002 a bill/s that would have the effect of achieving national consistency with the Commonwealth;²⁷
 - d) confer monitoring powers to NHMRC and ensure that these monitoring powers are nationally consistent;²⁸
 - e) ensure responsibility for monitoring routine ART clinical practice continues to rest with individual States and Territories;²⁹ and
 - f) ensure a review of their legislation within three years of December 19 2002.³⁰
- 5.4 The Prohibition of Human Cloning Bill prohibits human cloning and other unacceptable practices, for example: creating a human embryo for a purpose other than achieving pregnancy in a woman and creating or developing a human embryo containing genetic material provided by more than two persons.³¹
- 5.5 The HRT Amendment Bill establishes a national regulatory regime in relation to the use of excess ART embryos. The powers of administration and monitoring are conferred on the NHMRC while retaining state responsibility for the monitoring of routine ART clinical practice.

²⁵ Recital A, IGA.

²⁶ Recital B, IGA.

²⁷ Clause 6, IGA.

²⁸ Clause 9(a), IGA.

²⁹ Clause 9(c), IGA.

³⁰ Clause 15, IGA.

- 5.6 Both Bills as received by the Legislative Council, were introduced as a single bill to Parliament within 12 months of December 19 2002. Both Bills ensure a review of the legislation within three years of December 19 2002 (“*a review [must] be undertaken as soon as possible after 19 December 2004.*”³²).

6 CONFORMITY WITH INTENT OF IGA AND COMMUNIQUE

Maintenance of scheme and ability to amend legislation

- 6.1 Part 4 of the IGA is pivotal to the ability of a participating jurisdiction to make amendments to its own legislation (which includes regulations).
- 6.2 Each participating jurisdiction must use their ‘best endeavours’ to ensure that the legislation forming part of the scheme remains nationally consistent.³³
- 6.3 The responsible Commonwealth Minister will consider a law that a State or Territory has enacted to correspond with the *Research Involving Human Embryos Act 2002* (Cth). If the Commonwealth Minister decides that the State law corresponds and should be so declared, the Commonwealth Minister will arrange for a notice to be published in the *Commonwealth of Australia Gazette* declaring the State or Territory law to be a corresponding State or Territory law for the purposes of the *Research Involving Human Embryos Act 2002* (Cth).³⁴
- 6.4 Any participating jurisdiction that proposes to amend its legislation or introduce new legislation so as to affect the operation of the scheme must submit the proposed amendment to the Australian Health Ministers Conference (AHMC) or COAG. The participating jurisdictions³⁵ agree that no amendments will be introduced (into Parliament) unless the AHMC or COAG has considered the legislation.³⁶
- 6.5 If the legislation has been approved by either AHMC or COAG then all other participating jurisdictions must introduce appropriate amendments to ensure that the scheme remains consistent (unless otherwise agreed by COAG).³⁷

³¹ Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003 (WA) clause 8.

³² Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003 (WA) clause 8; Human Reproductive Technology Amendment Bill 2002 (WA) clause 36.

³³ Clause 11, IGA.

³⁴ Clause 7, IGA.

³⁵ The undertakings in the IGA (which in any event are not legally enforceable) do not prevent persons other than the Western Australian Government (who is the only ‘Party’ to the IGA) from introducing amendments.

³⁶ Clause 12, IGA.

³⁷ Clause 13, IGA.

For example, if the Western Australian Government voted against an amendment proposed by another jurisdiction but that proposal was accepted by COAG then Western Australia, as a participating jurisdiction, must introduce appropriate amendments to ensure that the scheme remains nationally consistent.

- 6.6 If the legislation has either not been considered by AHMC or COAG, or was considered and found that it should not form part of the scheme, the Commonwealth Minister may, if he or she is of the opinion that the amendments adversely affect the nationally consistent operation of the scheme, arrange for a notice to be published in the *Commonwealth of Australia Gazette*. This notice will revoke any previous declaration that a law of the State or Territory is a corresponding State law for the purposes of the IGA.³⁸

For example, if the State law was not declared a ‘corresponding State law’ or a declaration was revoked, s43 of the *Research Involving Human Embryos Act 2002* (Cth) would not apply and there would be no authority for the conferral of powers on Commonwealth officers. This would leave the State law incapable of operating.

- 6.7 If a party considers that a variation to the IGA would be desirable, it may request consultations with the other Parties.³⁹ Any variation to the IGA agreed upon by all Parties will be contained in a notice signed by and given to all Parties, and the notice will include the date on which the variation will come into force.⁴⁰

7 THE LEGISLATIVE RESPONSE OF OTHER PARTICIPATING JURISDICTIONS

The Human Reproductive Technology Amendment Bill 2003

- 7.1 ACT: Has not introduced a similar bill into its Parliament.⁴¹
- 7.2 NSW: The *Research Involving Human Embryos (New South Wales) Act 2003* was assented to July 7 2003 and commenced on October 1 2003.
- 7.3 Queensland: The *Research Involving Human Embryos and Prohibition of Human Cloning Act 2003* was assented to on March 18 2003.
- 7.4 SA: The *Research Involving Human Embryos Act 2003* was assented to on June 19 2003.
- 7.5 Tasmania: The *Human Embryonic Research Regulation Act 2003* was assented to on September 25 2003.

³⁸ Clause 14, IGA.

³⁹ Clause 16, IGA.

⁴⁰ Clause 17, IGA.

⁴¹ ACT Parliament website at <http://www.legassembly.act.gov.au> (current at November 25 2003).

- 7.6 Victoria: The *Health Legislation (Research Involving Human Embryos and Prohibition of Human Cloning) Act 2003* was assented to on May 6 2003.
- 7.7 Northern Territory: There is no indication of progress.⁴²
- 7.8 Commonwealth: The *Research Involving Human Embryos Act 2002* was assented to on December 19 2002 and all sections are commenced by June 19 2003.

Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003

- 7.9 ACT: Has not introduced a similar bill into its Parliament.⁴³
- 7.10 NSW: The *Human Cloning and Other Prohibited Practices Act 2003* was assented to July 7 2003 and commenced on October 1 2003.
- 7.11 Queensland: The *Research Involving Human Embryos and Prohibition of Human Cloning Act 2003* was assented to on March 18 2003.
- 7.12 SA: The *Prohibition of Human Cloning Act 2003* was assented to on June 19 2003.
- 7.13 Tasmania: The *Human Cloning and Other Prohibited Practices Act 2003* was assented to on September 25 2003.
- 7.14 Victoria: The *Health Legislation (Research Involving Human Embryos and Prohibition of Human Cloning) Act 2003* was assented to on May 6 2003.
- 7.15 Northern Territory: There is no indication of progress.⁴⁴
- 7.16 Commonwealth: The *Prohibition of Human Cloning Act 2002* was assented to on December 19 2002 and all sections commenced by January 16 2003.

8 SELECTED CLAUSES OF THE BILL

- 8.1 As mentioned at paragraph 2.4, time constraints have prevented the Committee from giving full consideration of the Bills in their entirety. However, the Committee did specifically examine the definition of ‘embryo’ in the Bills.

Definition of human embryo/embryo

- 8.2 Under the current Act the definition of ‘embryo’ is:

⁴² Telephone call from Victoria Anderson, Policy Officer, Office of the Minister Health to Felicity Mackie, Advisory Officer (Legal), November 18 2003.

⁴³ ACT Parliament website at <http://www.legassembly.act.gov.au> (current at November 25 2003).

⁴⁴ Telephone call from Victoria Anderson, Policy Officer, Office of the Minister Health to Felicity Mackie, Advisory Officer (Legal), November 18 2003.

...a live human embryo, in the stage of development which occurs from -

(a) the completion of the fertilisation of the egg; or

(b) the initiation of parthenogenesis

to the time when, excluding any period of storage, 7 completed weeks of the development have occurred;”⁴⁵

- 8.3 The Prohibition of Human Cloning Bill does not actually affect the definition of ‘embryo’ used. However the HRT Amendment Bill in clause 5(9) deletes ‘embryo’ and clause 6 inserts a new definition, that of ‘human embryo’. The word ‘embryo’ is replaced throughout the amended Act by the words ‘human embryo’. The proposed new definition of ‘human embryo’ is:

“(1)...“human embryo” means a live embryo that has a human genome or an altered human genome and that has been developing for less than 8 weeks since the appearance of 2 pro-nuclei or the initiation of its development by other means.

(2) For the purposes of the definition of “human embryo” in subsection (1), in working out the length of the period of development of a human embryo, any period when the development of the embryo is suspended is to be disregarded.”

- 8.4 The clause notes to proposed section 3A state that the consequence of using the appearance of two pro-nuclei as the basis for the definition “...is that the embryo is defined from an earlier stage of development than under the current Act.”⁴⁶
- 8.5 Furthermore, the use of “...initiation of development by other means”⁴⁷ is intended to widen the original definition of means other than fertilisation from parthenogenesis⁴⁸ in the Act to include various other examples, such as somatic cell transfer⁴⁹.

⁴⁵ Section 3 of the *Human Reproductive Technology Act 1991* (WA).

⁴⁶ Clause notes of the HRT Amendment Bill, p7.

⁴⁷ Proposed section 3A of the HRT Amendment Bill.

⁴⁸ A form of biological reproduction that involves the development of a female (rarely a male) gamete (sex cell) without fertilization - *Parthenogenesis* (2003) Encyclopedia Britannica <<http://search.eb.com/eb/article?eu=60052&tocid=0&query=parthenogenesis&ct=>> (current at December 3 2003).

⁴⁹ A human egg that has had its nucleus replaced by the nucleus of a somatic cell - see p7 of clause notes.

Proposed section 53ZV - Expiry of limitation on use of excess ART embryos

8.6 The use of excess ART embryos in a manner which may damage or destroy the embryo may only be performed on embryos created before April 5 2002. This limitation will continue until April 5 2005 when a sunset clause removes this limitation and all excess ART embryos (whenever created) may be subject to damaging or destructive use.⁵⁰

8.7 The Committee observes that the Communique of the COAG meeting dated April 5 2002 states that the restriction on the use of embryos created before April 5 2002:

...will cease to have effect in three years, unless an earlier time is agreed by the Council. The Council also agreed to establish an Ethics Committee with membership jointly agreed by the Council to report to the Council within 12 months on protocols to preclude the creation of embryos specifically for research purposes, with a view to reviewing the necessity for retaining the restriction on embryos created on or after 5 April 2002. The Council also agreed to request the National Health and Medical Research Council (NHMRC) to report within 12 months on the adequacy of supply and distribution for research of excess ART embryos which would otherwise have been destroyed.

8.8 The Committee has concerns with proposed section 53ZV, as it automatically operates on April 5 2005, regardless of what the review of the HRT Amendment Bill concludes or whether the review has even concluded.

8.9 The Committee is of the view that the HRT Amendment Bill would be greatly enhanced if it were to provide for greater parliamentary scrutiny of this matter. The Committee has discussed means of affording greater parliamentary scrutiny in the context of subsidiary legislation and executive action in earlier reports.⁵¹

8.10 The Committee brings to the attention of the House the following ways in which the HRT Amendment Bill might be amended to facilitate parliamentary scrutiny in this instance:

- a) ***Deletion of the sunset clause:*** Division 9 of Part 4B in clause 36 of the HRT Amendment Bill (which contains the sunset clause) could be deleted in its entirety. Separate amending legislation would then need to be introduced and passed if subsections 53ZB(3), 53ZE(1)(c) and (3) were to be removed. This

⁵⁰ Proposed sections 53ZB(3), 53ZE(1)(c) and (3) and 53ZV in clause 36.

⁵¹ 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.

provides the strongest form of parliamentary scrutiny and control as separate amending legislation to repeal the subsections would need to be introduced and pass through the legislative process in both Houses of Parliament before the limitations are removed. This would enable Parliament to give proper consideration of the removal of the limitation at a time when more information is available.

- b) ***Affirmative resolution procedure:*** Division 9 of Part 4B in clause 36 of the HRT Amendment Bill (containing proposed section 53ZV) could be amended to enable the House to affirm by resolution whether subsections 53ZB(3), 53ZE(1)(c) and (3) should expire. 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) any expiry of subsections 53ZB(3), 53ZE(1)(c) and (3) that is provided for in the HRT Amendment Bill before the expiry can come into effect. If Parliament affirms the expiry 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 expiry will not take effect.

- c) ***Negative resolution procedure:*** Division 9 of Part 4B in clause 36 of the HRT Amendment Bill (containing proposed section 53ZV) could be amended to provide for the expiry of subsections 53ZB(3), 53ZE(1)(c) and (3) unless Parliament resolves, within a period or date specified, to disallow the operation of the section.

In contrast to the affirmative resolution procedure, with a negative resolution the expiry would come into effect unless Parliament (within a stated period of time) resolved otherwise. If Parliament resolved to ‘disallow’ the expiry 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 affirmative and the expiry may take effect after the last day that a House was able to ‘disallow’.

Recommendation 1: The Committee recommends that during debate in the Council on proposed section 53ZV in clause 36 of the Human Reproductive Technology Amendment Bill 2003, the House consider the adequacy of parliamentary scrutiny in respect of the proposed expiry of the limitation on the use of embryos created before April 5 2002. To assist debate the Committee draws the attention of the House to paragraphs 8.6 to 8.10 of this report.

Tabling of Review of Legislation

- 8.11 Both the *Research Involving Human Embryos Act 2002 (Cth)*⁵² and the *Prohibition of Human Cloning Act 2002 (Cth)*⁵³ (**Commonwealth Acts**) set out requirements for the review of each respective Act. The Commonwealth Acts provide that the review reports must be given to COAG and both Federal Houses of Parliament before the third anniversary of the day on which the *Prohibition of Human Cloning Act 2002 (Cth)* received royal assent.⁵⁴
- 8.12 The Bills require that the Minister must cause a review to be undertaken as soon as possible after December 19 2004.⁵⁵ The State review may be undertaken as part of the Commonwealth review. However, the Bills do not specify a requirement that the State review (or the Commonwealth review if the two are combined) be tabled in State Parliament, only that the Minister must cause a review to be undertaken.
- 8.13 The Committee notes that the Bills reflect the Commonwealth Acts and that any review of the Commonwealth provisions would assist in any discussion of the operation and effectiveness of the provisions proposed to be inserted into the State Act by the Bills.
- 8.14 In light of the contentious issues raised by the Bills, the Committee recommends that the Bills be amended to ensure the tabling of any reviews in State Parliament to ensure accountability and scrutiny.

⁵² Section 47 states that the NHMRC must cause a independent review as soon as possible after the second anniversary of the day on which the Act received Royal Assent.

⁵³ Section 25 states that the Minister must cause a independent review as soon as possible after the second anniversary of the day on which the Act received Royal Assent.

⁵⁴ Which according to s2 of the *Prohibition of Human Cloning Act 2002 (Cth)* would be December 19 2005.

⁵⁵ Clause 36 of the HRT Amendment Bill and Clause 8 of the Prohibition of Human Cloning Bill.

Recommendation 2: The Committee recommends that the proposed Part 4B, Division 11 in clause 36 of the Human Reproductive Technology Amendment Bill 2003 be amended in the following manner:

Page 60, after line 9 - To insert the following -

“

- (4) The Minister is to prepare a report based on the review made under subsection (1) and cause the report to be laid before each House of Parliament not later than 12 months from the date on which the review is first commenced.
- (5) The Minister must cause a copy of the report based on the review conducted under section 47 of the Commonwealth Human Embryo Act to be laid before each House of Parliament not later than six sitting days from the date of receipt of the report.

”.

Recommendation 3: The Committee recommends that the proposed Part 4A, Division 4 in clause 9 of the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003 be amended in the following manner:

Page 12, after line 21 - to insert the following -

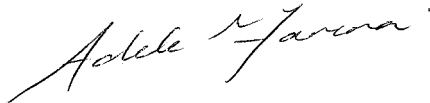
“

- (4) The Minister is to prepare a report based on the review made under subsection (1) and cause the report to be laid before each House of Parliament not later than 12 months from the date on which the review is first commenced.
- (5) The Minister must cause a copy of the report based on the review conducted under section 25 of the *Prohibition of Human Cloning Act 2002* of the Commonwealth to be laid before each House of Parliament not later than six sitting days from the date of receipt of the report.

”

9 CONCLUSION

9.1 The Committee commends its report to the House for its consideration.



Hon Adele Farina MLC
Chairman

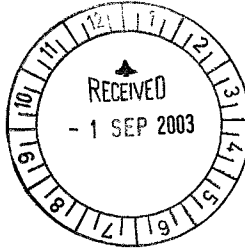
Date: December 10 2003

APPENDIX 1
COPY OF MINISTER'S LETTER TO COMMITTEE DATED
SEPTEMBER 1 2003

APPENDIX 1
COPY OF MINISTER'S LETTER TO COMMITTEE DATED
SEPTEMBER 1 2003

Our Ref: 4-22257

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



MINISTER FOR HEALTH
ATTORNEY GENERAL: ELECTORAL AFFAIRS
FOR WESTERN AUSTRALIA

Dear Adele

Thank you for your letter dated 8 August concerning the *Human Reproductive Technology Amendment Bill 2003* (the Bill).

I provide the following information as requested.

- (a) The agreement to introduce legislation arose from a decision of the Council of Australian Governments (COAG) on 5 April 2002. It is intended that there will also be an inter-governmental agreement entered into. A copy of the COAG Communiqué is attached.
- (b) A draft of an inter-governmental agreement between the Commonwealth and each of the States, which is due to be considered by COAG at its next meeting, is attached.
- (c) The Commonwealth has passed the *Prohibition of Human Cloning Act 2002* and the *Research Involving Human Embryos Act 2002* (collectively "the Commonwealth legislation") in accordance with the COAG agreement. Offence provisions relating to embryo research came in to effect on 19 June 2003. The inter-governmental agreement provides that each jurisdiction will use its best endeavours to introduce a Bill to its Parliament by 19 December 2003. Queensland, Victoria, South Australia and New South Wales have all passed legislation in substantially the same terms as the Commonwealth legislation.
- (d) The Government's policy is set out in the second reading speech for the Bill, a copy of which is attached. The Premier has announced that all Government members will have a conscience vote on the Bill.
- (e) The advantages and disadvantages of a nationally consistent scheme of legislation covering human cloning and human embryo research are canvassed in the Regulation Impact Statements for the Commonwealth legislation (attached).
- (f) The Commonwealth does not have a clear head of power to legislate in relation to reproductive technology, human cloning and human embryo research. The Commonwealth legislation relies on a variety of heads of power to give as wide a scope as possible to the Commonwealth legislation. These are:
 - the Corporations power (paragraph 51(xx) of the Constitution). This means that the Act will apply to all things done by corporations formed within the limits of the Commonwealth;

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

- 2 -

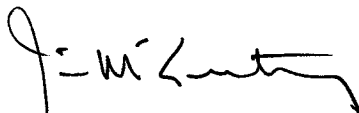
- the trade and commerce power (paragraph 51(i) of the Constitution). This means that the Act will apply to all things done in the course of trade and commerce;
- the external affairs power (paragraph 51(xxix) of the Constitution). This enables the Act to apply to matters of Australia's obligations under international treaty arrangement with other countries;
- powers of the Parliament in relation to the Commonwealth (section 52 of the Constitution). This means the Act will apply to all things done by the Commonwealth and Commonwealth authorities (including Commonwealth Departments such as the Department of Health and Ageing, Commonwealth statutory authorities and Commonwealth companies);
- the census and statistics power (paragraph 51(xi) of the Constitution). This enables the Act to apply for purposes relating to the collection, compilation, analysis and dissemination of statistics (such as the provisions relating to the establishment of a database of licences issued by the NHMRC Licensing Committee); and
- incidental power (paragraph 51(xxxix) of the Constitution). This enables the establishment of the infrastructure necessary to support the regulatory system.

The States and Territories have the constitutional power to legislate to regulate reproductive technology, human cloning and human embryo research within their jurisdictions. South Australia, Victoria and Western Australia had pre-existing legislation covering the matters included in the Commonwealth legislation, although to different effect. The existing Western Australian *Human Reproductive Technology Act 1991* (the HRT Act) is not, at a practical level, consistent with the Commonwealth legislation. In particular, the Commonwealth legislation allows human embryo research subject to a licensing requirement, while the HRT Act effectively prohibits human embryo research. The Bill amends the HRT Act to mirror the relevant provisions in the Commonwealth legislation.

- (g) The State can withdraw from the scheme as set out in the inter-governmental agreement (attached). In the event of the State's withdrawal from the scheme, the Commonwealth legislation would continue to apply in Western Australia, to the extent of the Commonwealth's power.
- (h) The mechanism for amending the Bill, once enacted is set out in the draft inter-governmental agreement (attached). Any proposed amendment is to be considered by COAG or the Australian Health Ministers Conference prior to introduction.

I am happy to arrange for your Committee to be provided with further information, or a briefing on the Bill if this is required.

Yours sincerely



JIM MCGINTY MLA
MINISTER FOR HEALTH

Att:
20 AUG 2003

APPENDIX 2
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 2

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 3
DEFINITIONS AS CONTAINED IN THE HUMAN
REPRODUCTIVE TECHNOLOGY AMENDMENT BILL 2003

APPENDIX 3
DEFINITIONS AS CONTAINED IN THE HUMAN REPRODUCTIVE
TECHNOLOGY AMENDMENT BILL 2003

Human Reproductive Technology Amendment Bill 2003

s. 36

36. Part 4B inserted

Before Part 5 the following Part is inserted —

“

**Part 4B — Regulation of certain uses involving
excess ART embryos**

Division 1 — General

53S. Object of this Part

(1) The object of this Part is —

(a) to address concerns, including ethical concerns,
about scientific developments in relation to
human reproduction and the utilisation of
human embryos by regulating activities that
involve the use of certain human embryos
created by assisted reproductive technology;
and

(b) to adopt in this State a uniform Australian
approach to the regulation of activities that
involve the use of certain human embryos
created by assisted reproductive technology.

(2) For that purpose, this Part contains a number of
provisions that are similar to provisions in the
Commonwealth Human Embryo Act.

53T. Definitions

(1) In this Part, unless the contrary intention appears —

“AHEC” means the Australian Health Ethics
Committee established by the *National Health and
Medical Research Council Act 1992* of the
Commonwealth;

page 36

Human Reproductive Technology Amendment Bill 2003

s. 36

“Commonwealth Human Embryo regulations”
means the regulations in force under the
Commonwealth Human Embryo Act;

“confer” includes to impose;

5 **“confidential commercial information”** means
information that has a commercial or other value
that would be, or could reasonably be expected to
be, destroyed or diminished if the information
were disclosed;

10 **“corresponding law”** means —

- (a) the Commonwealth Human Embryo Act; or
- (b) an Act of another State that is a
corresponding State law as defined in the
Commonwealth Human Embryo Act;

15 **“disclose”**, in relation to information, means give or
communicate in any way;

“excess ART embryo” means a human embryo that —

- 20 (a) was created, by assisted reproductive
technology, for use in the assisted
reproductive technology treatment of a
woman; and
- (b) is excess to the needs of —
 - (i) the woman for whom it was created;
and
 - 25 (ii) her spouse or de facto partner (if any) at
the time the embryo was created;

“HREC” means a Human Research Ethics Committee;

“inspector” means a person appointed as an inspector
under section 53ZN(1);

30 **“licence”** means a licence issued under section 53ZB;

“licensed ART centre” means a person licensed under
Part 4;

page 37

Human Reproductive Technology Amendment Bill 2003**s. 36**

“NHMRC Licensing Committee” means the Committee of that name established under section 13 of the Commonwealth Human Embryo Act;

5 **“proper consent”**, in relation to the use of an excess ART embryo, means —

(a) consent obtained in accordance with the *Ethical Guidelines on Assisted Reproductive Technology* (1996) issued by the NHMRC;

10 or

(b) if other guidelines are issued by the NHMRC under the *National Health and Medical Research Council Act 1992* of the Commonwealth and prescribed by the Commonwealth Human Embryo regulations for the purposes of paragraph (b) of the definition of “proper consent” in section 8 of the Commonwealth Human Embryo Act —

15 consent obtained in accordance with those other guidelines, rather than the guidelines mentioned in paragraph (a);

20

“responsible person”, in relation to an excess ART embryo, means —

(a) each person who provided the egg or sperm from which the embryo was created;

25

(b) the woman for whom the embryo was created, for the purpose of achieving her pregnancy;

(c) any person who was the spouse or de facto partner of a person mentioned in paragraph (a) at the time the egg or sperm mentioned in that paragraph was provided; and

30

(d) any person who was the spouse or de facto partner of the woman mentioned in paragraph (b) at the time the embryo was created;

35

Human Reproductive Technology Amendment Bill 2003

s. 36

“State” includes the Australian Capital Territory and the Northern Territory.

(2) For the purposes of paragraph (b) of the definition of “excess ART embryo”, a human embryo is excess to the needs of the persons mentioned in that paragraph at a particular time if —

(a) each such person has given written authority for use of the embryo for a purpose other than a purpose relating to the assisted reproductive technology treatment of the woman concerned, and the authority is in force at that time; or

(b) each such person has determined in writing that the embryo is excess to their needs, and the determination is in force at that time.

(3) A reference in this Part to a number of penalty units is a reference to the amount calculated in accordance with the following formula —

A × B

where —

A is that number of penalty units; and

B is the amount (in dollars) that is for the time being a penalty unit under section 4AA of the *Crimes Act 1914* of the Commonwealth.

(4) In this Part, a reference to a Commonwealth Act includes a reference to —

(a) that Commonwealth Act, as amended and in force for the time being; and

(b) an Act enacted in substitution for that Act and, if it is amended, as amended and in force for the time being.