



Speech by

Hon. R. WELFORD

MEMBER FOR EVERTON

Hansard 7 August 2001

COMMONWEALTH POWERS (FAMILY LAW—CHILDREN) AMENDMENT BILL

Hon. R. J. WELFORD (Evertton—ALP) (Attorney-General and Minister for Justice) (12.52 p.m.): I move—

That the bill be now read a second time.

The purpose of this bill is to make further reference of power to the Commonwealth for family law purposes. The bill tidies up some anomalies in relation to the handling of family law matters affecting children who are subject to child welfare laws. This further reference will confer jurisdiction on the Commonwealth to make laws about—

- custody, guardianship and access matters involving children who are subject to a child welfare law where the relevant state minister or authorised person consents;
- maintenance for children who are subject to a child welfare law; and
- declarations of parentage for Commonwealth purposes.

The bill will preserve the state's power in relation to child welfare laws and maintain the state's exclusive power to make adoption orders. In terms of Commonwealth/state jurisdiction, jurisdiction in relation to matters affecting children is shared between the Commonwealth and the states. Section 51 of the Commonwealth Constitution empowers the Commonwealth parliament to make laws with respect to divorce and matrimonial causes. This gives the Commonwealth the power to legislate for maintenance, custody, guardianship and access only in relation to children of a marriage. However, the constitution does not enable the Commonwealth to legislate for maintenance, custody, guardianship or access in respect of ex-nuptial children.

The Commonwealth Constitution therefore creates a distinction in the handling of matters relating to children whose parents were married, as compared to those whose parents were not married. This anomaly was largely resolved by the Goss government in 1990 with passage of the Commonwealth Powers (Family Law—Children) Act 1990. This act referred power to the Commonwealth to legislate with respect to—

- maintenance for ex-nuptial children, except where such children are subject to a state child welfare law (for example, children who are subject to an order under the Child Protection Act 1999); and
- custody, guardianship and access for ex-nuptial children, except where those children are the subject of child welfare law.

The only remaining distinction in the handling of matters regarding children relates to those children who are subject to child welfare orders. At the present time, the Family Court does not have the power to make orders in relation to these children. This bill addresses that distinction.

Regarding custody, guardianship and access matters, the bill responds to concerns about the appropriate jurisdiction for the resolution of cases involving children where there have been allegations of child abuse. The Family Court has no jurisdiction to make parenting orders about a child who is under the care of a person under the Child Protection Act 1999, unless those orders come into effect when the child is no longer subject to that care. This limitation on the jurisdiction of the Family Court limits the

range of options that can be considered when the Department of Families is conducting an assessment of a child's protective or other needs.

It is also common for proceedings involving the same allegedly abused child to be instituted in both the Family Court and a Children's Court. Obviously, this duplication can result in confusion, delay, expense, inconvenience and the possibility of a child being further abused. This bill allows the Family Court, therefore, to hear applications for parenting orders—previously known as custody, guardianship and access orders—where children are in the care of the state, with the consent of the relevant state minister.

In terms of child maintenance, the Commonwealth can legislate currently with respect to maintenance for any child not subject to a child welfare law. The reference to the Commonwealth of the residual maintenance power will therefore remove that vestige of discrimination against children who are subject to a child welfare law.

With regard to parentage declarations, this bill also includes a reference to the power to make declarations of parentage for Commonwealth purposes. The Family Court has no specific power currently to make declarations of parentage, although it does have power to order a person to undergo a parentage test. The Family Court currently makes parentage declarations in the context of applications for a parenting order. It cannot determine parentage where there are no other proceedings before the court. This bill will therefore confer concurrent jurisdiction on the Commonwealth to make laws with respect to parentage for Commonwealth purposes. I commend the bill to the House.
