

1974

AUSTRALIA

THE SENATE

FAMILY LAW BILL 1974

EXPLANATORY MEMORANDUM

(Circulated by the Attorney-General,
Senator the Honourable Lionel Murphy, Q.C.)

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The Bill is to replace the Matrimonial Causes Act 1959-1966, and to deal with additional areas of family law presently dealt with by State legislation.

Differences between provisions of Bill and the Matrimonial Causes Act.

2. The main differences of substance between the Family Law Bill and the present Act are -
- (a) The concept of matrimonial fault is eliminated.
 - (b) The 14 existing grounds of divorce are replaced by a single ground of irretrievable breakdown of marriage.
 - (c) The existing bars to relief have been abolished.
 - (d) It will no longer be possible to obtain decrees of judicial separation, restitution of conjugal rights, jactitation of marriage or annulment of a voidable marriage.
 - (e) The provisions relating to void marriages will be transferred to the marriage legislation.
 - (f) The prohibition against divorce proceedings within three years of marriage has been removed.
 - (g) The Bill deals with as many areas of family law as is constitutionally possible, including maintenance, custody and property disputes in a non-divorce situation.
 - (h) The conciliation provisions have been strengthened.

- (i) Greater use will be made of welfare officers.
- (j) All proceedings will be instituted by application.
- (k) Procedures will be simplified, hearings will be less formal and costs will be reduced.

PART I - PRELIMINARY

- 3. Of the external Territories, the Act will extend only to Norfolk Island - as does the present Act (clause 7).
- 4. State and Territory laws on all matters covered by the Bill are superseded (clause 8).
- 5. Divorce proceedings commenced before the commencement of the Family Law Act may be continued as if the Act had not been passed or, at the option of the applicant, where the parties have lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the hearing, the proceedings may be continued as if they were proceedings for dissolution instituted under the new Act. Pending proceedings for maintenance and custody may be continued as if they had been instituted under the new Act (clause 9).
- 6. It will be possible for relief to be obtained under the Act where the marriage concerned has been entered into outside Australia and is potentially polygamous or in fact polygamous (clause 6).

PART II - MARRIAGE COUNSELLING ORGANIZATIONS

- 7. This Part is similar to Part II of the Matrimonial Causes Act (clauses 11 to 13).

PART III - RECONCILIATION

- 8. The existing reconciliation provisions have been extended so as to apply to proceedings for maintenance, custody, etc. not connected with divorce proceedings (clause 14). Moreover, a court will have the power, in proceedings for an injunction to restrain a party to a marriage from some form of conduct towards the other party, to direct either or both to attend upon a Marriage Counsellor.
- 9. It is proposed that a suitable document setting out the consequences of divorce - particularly the consequences to the children of the marriage - will be made available for court officers, welfare officers and solicitors to give to persons proposing to institute proceedings under the new Act and to the spouses of such persons (clause 15).
- 10. Admissions made to marriage counsellors or medical or other professional persons to whom a party has been referred are to be privileged (clause 16).

PART IV - JURISDICTION

- 11. The Superior Court and the Supreme Courts will have concurrent jurisdiction to deal with all matrimonial causes (clause 18(5)). Provision is made in clause 19 to phase in the jurisdiction of the Superior Court and to phase out the jurisdiction of the Supreme Courts.
- 12. Courts of summary jurisdiction throughout Australia will have concurrent jurisdiction to deal with all matrimonial causes except -

- (a) principal relief (dissolution and nullity);
- (b) defended custody cases, unless the parties agree to the lower court exercising jurisdiction;
- (c) disputes over property exceeding \$1,000, except where the parties agree to the lower court exercising jurisdiction (clauses 18(6),24).

13. A court of summary jurisdiction may not hear proceedings relating to property, custody or guardianship if there are proceedings with respect to the same matter pending in the Superior Court or in a Supreme Court, or if there is an order of one of those courts in force (clause 20).

14. A court may transfer proceedings to another court when it seems in the interests of justice to do so (clause 23(2)) and all custody and certain property matters instituted in a court of summary jurisdiction must be transferred to the Superior Court or the appropriate Supreme Court if they become defended (unless, as indicated above, the parties agree to the lower courts exercising jurisdiction) (clause 24).

15. In divorce proceedings it will not be necessary for the applicant to institute proceedings for maintenance and custody at the same time as the divorce proceedings but they will have to be instituted within 12 months after decree nisi (clause 22(3)).

16. Jurisdiction to dissolve marriages will depend upon Australian citizenship, domicile or residence of either party in Australia for one year before the date of application for divorce (clause 18(3)). The basis of jurisdiction for all other proceedings will be Australian citizenship, the presence of either

party in Australia or, where the proceedings are in relation to a child, the presence of the child in Australia (clause 18(4)).

PART V - DISSOLUTION AND NULLITY OF MARRIAGE

17. Clause 26(1) specifies the sole ground of divorce under the Bill - that the marriage has broken down irretrievably. Clause 26(2) provides that irretrievable breakdown can be established only if the court is satisfied that the parties have been separated for a continuous period of 12 months before the hearing of the application. However, the court is not to grant a decree if there is a reasonable likelihood of cohabitation being resumed (clause 26(3)).

18. The parties may be taken to have separated notwithstanding that they continue to live in the same residence (clause 27(2)).

19. One resumption of cohabitation for a period not exceeding three months does not bring to an end the period of separation but this period of cohabitation is to be excluded in computing the 12 months separation period (clause 29).

20. Clauses 27, 28 and 30 to 38 are similar to provisions in the present Act.

21. A person will be able to file an application for dissolution before having been separated for the 12 months required to establish the ground of divorce. On filing such application, the person can then obtain interim relief, including an injunction against molestation (e.g. where violence is feared) pending the hearing of the divorce proceedings. Alternatively, the person could apply to a court of summary jurisdiction for such an injunction.

PART VI - WELFARE AND CUSTODY OF CHILDREN

22. Clause 40(1) lays down the basic principle that both parties are guardians of their children under 18 and have the joint custody of the children. Clause 40(2) provides that either parent may apply for an order for guardianship or custody of, or access to, a child of the marriage. In such proceedings, the court shall regard the welfare of the child as the paramount consideration and, in so doing, shall take into account the wishes of the child (clause 43(1)). An order is not to be made contrary to the wishes of a child over 14, unless the court thinks there are special circumstances for doing so.

23. Clause 41(1) provides for compulsory conferences with a welfare officer. The report of a welfare officer may be received in evidence (clause 41(4)).

24. The court may grant a child separate representation in proceedings affecting the child (clause 44). It is envisaged that the cost of representation will normally come from legal aid sources.

25. Clause 46 provides for the registration of interstate orders for custody of ex-nuptial children, and clause 47 for the registration of overseas custody orders. Orders registered are to have effect as if they were an order made by the court in which they were registered. Clause 48 provides for the transmission of Australian custody orders to overseas countries for enforcement.

26. Interfering with a child who is subject to a custody order, failing to give up a child to a person entitled to custody, or refusal to grant a person access to a child in accordance with a court order is punishable as an offence (clause 49).

27. The court is given power to direct supervision of custody or access by a welfare officer, and to issue a warrant authorizing a person to take possession of a child pursuant to a custody or access order (clause 43(4), (8), (9)).

PART VII - MAINTENANCE AND PROPERTY

28. Clause 51 lays down the principle that a party to a marriage is liable to maintain the other spouse so far as he or she is reasonably able to do so if, and only if, the spouse is unable to support himself or herself adequately, whether by reason of having the care or control of a child of the marriage under 18 years or by reason of age or physical or mental incapacity for gainful employment or for any other adequate reason. Both parties are liable to maintain their children according to their respective financial resources (clause 52).

29. Extensive guidelines to which the court must have regard in determining maintenance applications are laid down in clauses 54 and 55. These guidelines may be disregarded in making interim orders in urgent cases (clause 56). The court is under a duty to make, as far as practicable, orders that will put an end to the financial relations between the parties (clause 60).

30. The conduct of the parties during the marriage will no longer be a factor to be taken into consideration in regard to maintenance. However, such conduct may be relevant in dividing the matrimonial property after divorce.

31. Clause 57 enables the court to make a declaration as to the interests of the parties to a marriage in property. This provision will take the place of the State Married Women's Property Act provisions dealing with property disputes. Clause 58

enables the court to alter the interests of a party in property after divorce and lays down guidelines to which the court must have regard in determining the order that should be made.

32. Maintenance for a child will cease automatically at age 18, except for the purpose of enabling the child to complete his education, or because he is mentally or physically handicapped (clause 55). Improved provisions dealing with other circumstances where maintenance orders would cease are contained in clause 61.

33. Improved provisions for the modification of maintenance orders are in clause 62. A substantial change in the cost of living is made a specific ground for variation, the court being required to have regard to any changes in the Consumer Price Index (clause 62(4)).

34. Clause 63, dealing with the execution of instruments by order of the court, is in the present Act as is clause 64, dealing with transactions intended to defeat claims. Clause 67 is a new provision exempting instruments executed for the purposes of the Act from State stamp duty.

35. Under clause 65, a maintenance agreement approved by the court may be registered. Upon registration, the agreement may be enforced as an order of the court. Clause 66 enables overseas maintenance agreements to be registered in Australia and for Australian agreements to be transferred overseas for enforcement.

PART VIII - INTERVENTION

36. The Attorney-General will still be able to intervene in certain proceedings (clause 68) and other persons will be able to seek leave to intervene in proceedings for custody, maintenance, etc. (clause 69).

PART IX - APPEALS

37. Appeals by way of case stated to the High Court have been abolished. Ordinary appeals to the High Court will, as now, be only by special leave (clause 72).

38. Appeals from Judges of State Supreme Courts are dealt with in clause 71. Appeals in the Superior Court are dealt with in the Superior Court Bill.

39. Appeals from courts of summary jurisdiction are to be to the Superior Court or the Supreme Court of the appropriate State or Territory (clause 73)

PART X - PROCEDURE AND EVIDENCE

40. All proceedings are to be heard in closed court, that is, only relatives or friends of either party, marriage counsellors, welfare officers and legal practitioners may be present in court, and the court has power to exclude any of these persons. The Judge and counsel are not to robe and the court is to proceed without undue formality. It is to endeavour to keep proceedings from being protracted (clause 74).

41. In proceedings for maintenance, custody, etc. and in undefended proceedings for divorce and nullity it will be possible for evidence to be given on affidavit, thus relieving the parties from having to be present at the hearing (clause 75).

42. Various evidentiary provisions are contained within clauses 76 to 79.

PART XI - RECOGNITION OF DECREES

43. A decree under the Act will naturally have effect throughout Australia (clause 80). A code of recognition of overseas decrees which takes account of recent private international law decisions and a Hague international convention is contained in clause 81.

PART XII - ENFORCEMENT OF DECREES

44. Imprisonment for failure to comply with a maintenance order made under the Act or under the superseded law is abolished. Any person who is in prison at the date of commencement of the Act as the result of such a failure is to be released forthwith (clause 84(1)).

45. Any decree or order made by a court having jurisdiction under the Act is to be enforceable by any court having jurisdiction under the Act, but it is enforceable only if it is registered in that court (clause 82).

46. Clause 83 enables regulations to be made providing for the manner of enforcement of orders for the payment of money (execution against property, charging orders, garnishee orders and attachment of earnings). In addition, the regulations will provide for -

- . the interstate enforcement of affiliation orders and ancillary orders (clause 85);
- . the enforcement of overseas maintenance orders from prescribed countries (clause 86); and
- . the enforcement in Australia of overseas orders under the United Nations Convention on the Recovery Abroad of Maintenance, and for making claims in Australia under the Convention (clause 87);
- . sending Australian orders and claims for maintenance to overseas countries for enforcement (clauses 86 and 87).

47. It is proposed that arrangements will be made with the States under clause 88 for the use of State Collectors of Maintenance (who will, in any event, continue to collect

maintenance under affiliation orders) until our own officers are appointed.

PART XIII - DECLARATIONS AND INJUNCTIONS

48. Any court having jurisdiction under the Act, including a court of summary jurisdiction, will have power to grant an injunction, including an interlocutory order. Sanctions for failing to comply with an injunction or order are contained in the section (clause 90).

PART XIV - MISCELLANEOUS

49. Clause 91 provides for the establishment of a Family Law Advisory Committee consisting of a Judge of the Family Division of the Superior Court and of such other Judges, magistrates, public servants, representatives of marriage counselling organizations and other persons as the Attorney-General thinks fit. The function of the committee will be to advise the Attorney-General on the working of the Act and on other matters relating to family law.

50. To encourage persons to settle their differences, each party is to bear his or her own costs of any proceedings, unless the court in an exceptional case makes some other order (clause 92).

51. Clause 94 provides expressly that spouses may bring proceedings in contract or in tort against each other.

52. Stricter restrictions on the publication of reports of proceedings under the Act are contained in clause 95.

53. Provision for the Governor-General to make regulations, rather than rules, is contained in clause 96.

