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1976

PARLIAMENT OF THE COMMONWEALTH  
OF AUSTRALIA

MARRIAGE AMENDMENT BILL 1976  
EXPLANATORY MEMORANDUM

(CIRCULATED BY THE ATTORNEY-GENERAL, THE  
HONOURABLE R.J. ELLICOTT, Q.C., M.P.)

MARRIAGE AMENDMENT BILL 1976NOTES ON CLAUSESClause 1 - Short title and citationClause 2 - Commencement

The Bill is to come into operation on a date to be fixed by Proclamation.

Clause 3 - Interpretation

"Approved organization" - This is a new definition to be inserted as a result of the provision in clause 8 for grants to organizations approved by the Attorney-General to subsidise the conduct of pre-marital education programs.

"Family Court of a State" - This is a new definition which is to be inserted to ensure that references in the Bill to such a court will be read as references only to those courts created, and given jurisdiction, pursuant to section 41 of the Family Law Act.

"Judge" - The existing definition is to be amended to include a Judge of the Family Court of Australia who is appointed by the Attorney-General to exercise a power or function under the Act. This power of appointment is at present contained in section 32 of the Family Law Act. To avoid conflict with this provision and to enable all powers relating to the

Marriage Act to be contained in the Marriage Act, Clause 27 of the Bill repeals section 32 of the Family Law Act. The existing definition is wide enough to include a Judge of a Family Court of a State.

Clause 4 - Act not to exclude operation of certain State and Territory Laws

Paragraph 6(b) of the Act provides that the Act does not exclude the operation of a law of a State or Territory making special provision for the welfare of aboriginals or other persons in so far as that law makes provision requiring the consent of an officer or authority to the marriage of any person over 21 years. The amendment omits this paragraph, which no longer seems appropriate. However, it remains doubtful whether, as a matter of constitutional law, the omission will exclude the operation of such State or Territory laws.

Clause 5 - Validity of certain marriages not affected

This is a formal, drafting amendment consequential upon the repeal of Part III of the Act.

Clause 6 - Arrangements with State

These are formal drafting amendments consequential upon the repeal of Part III of the Act and the amendment made by clause 10(a).

Clause 7 - Persons who may exercise certain powers may be restricted by Proclamation

The clause provides for the insertion of a new section, which contains the substance of sub-section 32(3) of the Family Law Act, in the Marriage Act where it more properly belongs. The new section will permit Proclamations to be issued declaring that a power or function exercisable under the Act by a Judge or magistrate is to be exercised only by a Judge of the Family Court of Australia or of a State Family Court in the whole or a part of Australia. Section 32 of the Family Law Act will be repealed by clause 27.

Clause 8 - Pre-marital education

A new Part IA is to be inserted to enable the Attorney-General to make grants to approved organizations upon such conditions as he thinks fit to subsidise the conduct of pre-marital education programs. The new Part corresponds to Part II of the Family Law Act enabling grants to approved marriage counselling organizations.

New section 9C enables a voluntary organization to apply to the Attorney-General for approval as an organization conducting programs of pre-marital education. If the Attorney-General is satisfied the organization is willing and able to conduct such programs, he may approve it with or without conditions, which may be varied, added

to or revoked from time to time. Sub-sections (5) and (6) provide for the grounds on which and the manner in which the Attorney-General may revoke the approval of an organization.

New section 9D provides that an approved marriage counselling organization under the Family Law Act is deemed to be an approved organization under the Act.

New section 9E, which corresponds to section 13 of the Family Law Act, provides for an approved organization to furnish an annual statement of receipts and payments in respect of pre-marital education activities and a report on those activities for any year in which it has received a grant. The Attorney-General has the power to exempt compliance in cases of hardship.

Clause 9 - Persons whose consent is required

Existing paragraph 14(2)(b) of the Act, which prescribes the circumstances in which a child born out of wedlock is legitimated by the subsequent marriage of his parents for the purposes of parental consent, is to be omitted in consequence of the omission of Part II of the Schedule to the Act by the Marriage Act 1973. As a result of that lastmentioned Act, the Principal Act no longer distinguishes between illegitimate and other children

for the purposes of the parental consent required to the marriage of a minor.

Clause 10 - Consent by magistrate where parent etc. refuses consent etc.

Paragraph (a) of this clause provides for the function under section 16 of the Act of hearing applications for consent to the marriage of a minor in place of parental consent where it is refused to be exercisable by a Judge as well as a magistrate.

Paragraph (b) of the clause is a formal, drafting amendment consequential upon the insertion of new subsection 16(2A).

Paragraph (c) of the clause inserts a new subsection 16(2A) providing that a Judge or magistrate cannot hear an application for his consent to the marriage of a minor who has been refused parental consent unless a certificate in the prescribed form is produced that the minor received marriage counselling from a marriage counsellor as defined by the Family Law Act. Provision is included to enable a Judge or magistrate to dispense with the requirement if he is satisfied that counselling facilities are not reasonably available to the minor.

Clause 11 - Rehearing of applications by a Judge

This amendment is consequential on the amendments made by paragraph (a) of clause 10 and the repeal of sub-

section 32(2) of the Family Law Act. The amendment restricts re-hearings under section 17 of the Act of applications under section 16 for consent in place of parental consent to re-hearings of decisions of magistrates.

Clause 12 - Void marriages

This clause repeals Part III of the Act which provides for the application of the prohibited degrees of relationship prescribed by the Matrimonial Causes Act which has now been repealed by the Family Law Act. At the moment, the circumstances in which a marriage is void are prescribed by sub-sections 51(2) to (7) of the Family Law Act, which provide for more limited prohibited degrees of relationship than the prohibited degrees that were prescribed by the Matrimonial Causes Act.

Since it is more appropriate that the law governing the circumstances in which a marriage is void should be found in the Marriage Act, clause 12 re-enacts the substance of sub-sections 51(2) to (7) of the Family Law Act in a proposed new Part III. Clause 27 provides for the repeal of those sub-sections of the Family Law Act.

Proposed new section 22 in the new Part III provides for the application of the law of another country in the determination of the validity of a marriage where it

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would be appropriate to do so under the common law rules of private international law. The effect of sub-section 51(7) of the Family Law Act is incorporated in this provision.

Proposed new section 23 in the new Part III substantially re-enacts sub-sections (2) to (6) of the Family Law Act.

Clause 13 - Notice to be given and declaration made

Paragraphs (a) and (b) of this clause provide for the extension of the minimum period for giving notice of intended marriage from 7 days to 1 month before the intended marriage.

Paragraph (c) inserts a new sub-section 42(5A) to require an authorized celebrant, on receiving a notice of intended marriage, to give to the parties a document in the prescribed form outlining the obligations and consequences of marriage and indicating the availability of pre-marital education and counselling.

Clause 14 - Solemnization of marriages in Australia by foreign diplomatic or consular officer

This is a formal amendment consequential on the repeal of the Matrimonial Causes Act and the amendments made by clause 12.



Clause 15 - Notice of marriage

This clause amends section 66 of the Principal Act, which prescribes the notice required to be given in the case of a marriage solemnized overseas by an Australian marriage officer. In consequence of the changes made by clause 13, the periods of notice of 7 days, in the case of British subjects, and 14 days, in other cases, have been replaced by one minimum period for all persons of 1 month.

Clause 16 - Additional consent to marriage of minor domiciled outside Australia

Section 76 forbids an Australian marriage officer or chaplain to solemnize a marriage abroad if, amongst other things, a party who is domiciled abroad and under 21 years old has not obtained any consent to the marriage required by the law of his or her domicile. Consistently with the change made by the Marriage Act 1973 in the minimum age of marriage without parental consent from 21 years to 18 years, this clause substitutes 18 years for 21 years as the age below which a party must have obtained any consent required by the law of his or her domicile.

Clause 17 - Declarations of legitimacy, etc.

At present section 92 of the Act permits an application for declaration as to the legitimacy of a person to be made to the Supreme Court of a State or Territory. Section 31 of the Family Law Act confers

jurisdiction on the Family Court of Australia in proceedings instituted or continued under the Marriage Act (except under Part VII). Accordingly, this clause amends section 92 to include reference to the Family Court of Australia - and also State Family Courts - as courts to which an application may be made under the section. Paragraph (b) invests State Family Courts with the necessary jurisdiction. Paragraph (c) is a formal, consequential amendment. Paragraph (d) enables the jurisdiction of State and Territory Supreme Courts, under section 92, to be terminated by Proclamation.

Clause 18 - False declaration etc.

This clause inserts a new sub-section 96(4) in the Act to make it an offence to present a document known to be forged in order to induce a person to solemnize a marriage.

New sub-section 96(5) makes it an offence to forge a certificate or a signature to a certificate of a marriage counsellor under new sub-section 16(2A) that a minor who has been refused parental consent to marry has attended marriage counselling.

Clause 19 - Presenting forged consent etc.

Paragraph (a) of this clause is intended to extend sub-section 98(1) to make it an offence for a

person to present to a Registrar of Marriages documents known to the former to be forged or obtained by fraud.

Paragraph (b) of this clause makes it an offence to produce to a marriage celebrant a birth certificate known to be forged or false, or to produce to him or forward to a Registrar of Marriages a statutory declaration under paragraph 42(1)(b) that is known to be forged or false.

Clause 20 - Solemnizing marriage where reason to believe there is a legal impediment

Section 100 forbids a person to solemnize a marriage if he has reason to believe there is a legal impediment to the marriage. This clause ensures that the prohibition extends to any case where a person solemnizing a marriage has reason to believe it would be void for any reason.

Clause 21 - Abolition of action for breach of promise

This clause inserts a new section 111A abolishing actions for breach of promise of marriage. Proposed subsections 111A(2) and (3) provide that the abolition of such actions does not affect an action that could otherwise have been brought for recovery of gifts given in contemplation of marriage. Nor does it affect any action for breach of promise of marriage pending at the commencement of the amending Act.

Clause 22 - Second marriage ceremonies

Where there is doubt whether a marriage was validly performed, whether it would be recognized in Australia or whether it could be proved in legal proceedings, sub-section 113(2) enables the parties to go through a second marriage ceremony subject to compliance with certain formalities required by sub-sections 113(3) and (4). The amendment made by this clause is intended to preserve the validity of a marriage solemnized pursuant to sub-section 113(2) where the parties have failed to comply with sub-sections (3) and (4). Proposed sub-section 113(4A) would complement sections 48 and 83, which preserve the validity of marriages performed in Australia and overseas under the Act notwithstanding non-compliance with certain formalities.

Clause 23 - Judicial notice of signatures of Registrar, celebrants etc.

This is a formal amendment consequential upon the repeal of Part III of the Act.

Clause 24 - Evidence of registration etc.

Sub-section 117(1) provides that a certificate of a Registrar of Ministers of Religion that a minister of religion was registered as a celebrant at a specified date is evidence of the fact. This clause complements sub-section 117(1) by providing that a certificate under the hand of the Attorney-General that a person was, at

a specified date, authorized under section 39 to solemnize marriages or a prescribed authority is prima facie evidence of the matters contained in the certificate.

Clause 25 - Regulations

Paragraph (a) of this clause repeals existing paragraph (b) of section 120 and substitutes a new paragraph omitting reference to section 24, which is to be repealed by clause 12. The new paragraph 120(b) also makes it clear that the regulations may provide for the payment to witnesses of not only expenses but also fees.

Paragraph (b) of the clause makes a formal drafting amendment.

Clause 26 - Additional amendments

These are formal drafting amendments which accord with current drafting practice.

Clause 27 - Amendments of Family Law Act

In consequence of amendments contained in clauses 3, 7, 10, and 11, this clause repeals section 32 of the Family Law Act.

In consequence of the amendments contained in clause 12, sub-clause (2) of this clause repeals section 51 of the Family Law Act and substitutes a new section 51 which re-enacts sub-section 51(1) providing for applications for nullity of marriage.