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Family Law Amendment Bill 2003

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Family Law Amendment Bill 2003

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Contents

Family Law Amendment Bill 2003

Date Introduced: 12 February 2003

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal provisions commence on Royal Assent. The substantive provisions commence on various dates. Details are provided in the 'Main Provisions' section of this Digest.

Purpose

The Family Law Amendment Bill 2003 (the Bill) makes a wide range of amendments to the *Family Law Act 1975* (the Principal Act). These include amendments dealing with parenting plans, the use of video and audio links by the Family Court, the parenting compliance regime, financial agreements, court orders affecting third parties, the admissibility of disclosures made in counselling sessions, and child representatives.

Background

Parenting plans

Prior to the commencement of the *Family Law Reform Act 1995*, parents could make 'child agreements' which became legally enforceable once they were registered. However, registration occurred as of right, that is, without judicial scrutiny. The Family Law Reform Act amended the Principal Act to enable parents to make 'parenting plans' about their parental responsibilities. Like 'child agreements' they are enforceable on registration. Unlike the old 'child agreements', however, registration can only occur after judicial scrutiny. Parenting plans might cover matters such as who children will live with and who they will have contact with.

Once registered, a parenting plan has the effect of a court order and its terms can be enforced by a court. A registration application must be accompanied by a statement that each parent has obtained independent legal advice or consulted a counsellor or mediator. Additionally, before registration can occur, the court must be satisfied that registration is in the best interests of the child. It must look at the information accompanying the

application. It may, but is not required to, look at the matters set out in subsection 68F(2) of the Principal Act. These matters include the child's wishes, the nature of the child's relationship with each of their parents and other persons, the capacity of each parent to cater for the child's needs, issues of family violence and child protection, each parent's attitudes to the child and parental responsibility.

In 1997, the Family Law Council advised the Attorney-General that provisions in the Family Law Act enabling parenting plans to be registered should be removed. The Attorney-General expressed concern about this advice. In 1998, the Attorney asked the Family Law Council and the National Alternative Dispute Resolution Advisory Council (NADRAC) to examine the issue of parenting plans and the 'continuing need for section 63E of the Act'—the section that deals with the registration of parenting plans. In 2000, a Letter of Advice was provided to the Attorney-General which affirmed the Council's earlier position.

In that Advice, the Council and NADRAC concluded that parents should be encouraged to develop parenting plans in order to:

- ensure that the best interests of their children are addressed
- minimise conflict, and
- encourage them to regard the legal system as a last rather than as a first resort.

The Council and NADRAC opposed the registration of parenting plans on the grounds that it made them too inflexible and difficult to change, family lawyers were said to oppose registration, little use is made of registration, and the way that parenting plans are registered is cumbersome and expensive.

The Council and NADRAC concluded that parents who want enforceable arrangements should obtain consent orders because they 'allow sufficient opportunity to change the arrangements where necessary', they contain only the essential elements of parenting agreements, they are relatively easy to put in place; and they have the support of the legal profession.

The Letter of Advice recommended that:

> Division 4 of Part VII of the Act be amended to:
>
> - encourage the use of parenting plans, and the use of consent orders where a party requires an element or elements of the plan to be enforceable, and
> - repeal the registration provisions.[1]

While the removal of registrability appears to be generally supported, it has not been universally embraced. In a submission to the Senate Legal and Constitutional Legislation Committee, the Women's Legal Resources Centre said:

> We are concerned that if the requirement to register Parenting Plans is removed, clients will agree to the Plans without any legal advice and without scrutiny by the Court. We are concerned that Parenting Plans will be promoted through mediation services and agreed to 'in the shadow of the law' and we would not support such an outcome. An alternative to non-registration may be a reduction in the level of detail required for registration of a Parenting Plan together with provision which allows parties to vary the Plan without needing to revoke it.[2]

The amendments contained in **Schedule 1** of the Bill repeal provisions in the Principal Act that enable parenting plans to be registered in a court.

Parenting compliance regime[3]

The court can make a range of orders affecting children including parenting orders[4], certain injunctions, registered parenting plans and certain bonds.

There are various ways in which compliance with these orders can be secured including consensus following counselling or mediation, use of location and recovery orders, contempt proceedings, proceedings to vary a substantive order and use of the parenting compliance regime found in Part VII, Division 13A of the Principal Act.[5] The parenting compliance regime is a three-tiered approach to promoting compliance with orders affecting children.[6] These measures were inserted by the *Family Law Amendment Act 2000* and were designed to be a more sophisticated response to non-compliance than the traditional approaches of fines, community service orders, custodial sentences or bonds.

Stage 1 contains preventive measures. It aims to improve communication between separated parents and educate them about their parental responsibilities. The court is required to explain the obligations created by registered parenting plans or orders and the consequences of non-compliance. People must also be given information about the availability of programs that can assist them in complying with a parenting plan or meeting their responsibilities under a parenting order.

Stage 2 is a remedial regime designed to help parents negotiate issues of conflict. It applies where a person has contravened a parenting order without reasonable excuse. Among other things, the court may order such a person to attend a post-separation parenting program, make a compensatory contact order or allow the parties to apply for an order discharging, varying or suspending the order that has been breached. The Attorney-General is required to publish an annual list of post-separation parenting programs.

Stage 3 enables sanctions to be imposed. It covers the situation where a parent has contravened a parenting order and either the contravention is a first-time but serious contravention or the person has previously contravened the order. A parent who is caught

by the Stage 3 regime can be ordered to do community service or enter into a bond. A court can also vary the parenting order, fine the person or impose a custodial sentence.

The new parenting compliance regime has not been in operation for long. In 2001, the Family Law Pathways Advisory Group remarked that it was too early to tell how effective it will be in addressing concerns about enforcement and recommended that its impact be closely monitored.[7] In 2002, the Chief Justice of the Family Court said:

> Our figures show that since the implementation of the [parenting compliance] amendments in January 2001 the Court has made 71 post-separation parenting orders. Subsequently, 21 notices were received from providers informing the Court that the person ordered to attend was found to be unsuitable or failed to attend. In all, 30% of the orders made did not result in the parent actually attending a program.[8]

Other comments that have been made about the new regime are that:

- insufficient funding or training has been available to agencies involved and some are uncertain about what their function is[9]
- program providers have difficulties providing current and exhaustive lists of programs so that the Attorney-General can publish annual and updated lists of programs[10]
- the court has had difficulty obtaining and maintaining accurate lists of what programs are available from what agencies[11]
- it imposes 'quite onerous obligations' on the Court to explain the nature and consequences of its orders, especially in the context that many orders are made in the absence of the parties. Written explanations must therefore be provided and the attention paid to them by the parties has been questioned[12]
- even if effective, the new regime continues to rely on the capacity of people to take their enforcement application to a court. Non-litigious alternatives should be more readily available.[13]

The amendments in **Schedule 4** of the Bill remove the requirement that a court order a person to attend a particular post-separation parenting program and replace it with a requirement that court referrals are to a particular provider of post-separation parenting programs. They also extend the range of Stage 2 orders a court can make.

Orders and injunctions binding third parties

An ongoing issue in family law has been the restricted ability of the Family Court to make orders that bind third parties. The Court may need to make such orders if a third party holds property to which the husband or wife has a legitimate claim—for instance, the husband or wife may have an interest in a company or be the beneficiary of a trust.[14]

As Professor Anthony Dickey points out, there is no specific provision in the Principal Act which gives courts the power to issue injunctions against third parties and, more fundamentally, questions have been raised about the Commonwealth's constitutional power to pass such laws.[15]

In *Ascot Investments Pty Ltd v. Harper and Harper* (1981) 148 CLR 337 the High Court held that the Family Court had, in general, no power to issue an injunction under section 114 to affect an existing right of a third party or to impose a duty on a third party. The Court said that the exceptions to this general rule were shams and companies controlled by one of the parties to the marriage. In *Re Ross Jones; Ex parte Green* (1984) 156 CLR 185 the High Court held that the Family Court could not make interim orders against third parties, unless the third parties were 'shams' or 'alter egos'.

As one commentator has remarked:

> *Ex Parte Green* clearly restricted the ability of the Court to effectively deal with family trusts and family companies. While it is clear that where the third party submits to jurisdiction to have the claim heard, the court may proceed to deal with it, the Court continues to struggle with limitations imposed by cases such as *Ascot Investments* and *Ex Parte Green*. The Family Court must take account of the legitimate rights of third parties. However, as a matter of policy, it should also be able to determine more effectively the competing claims of the parties to a marriage as against the third parties.
>
> It [the Court] reaches into the third party structures by a series of devices such as section 85 orders, the puppet, alter ego and sham doctrines, the financial resources doctrine, and actions under section 85A.
>
> …
>
> Despite the avenues just described for dealing with third party interests, there remain a number of significant limitations on the court's powers. It cannot, for example, order company directors to transfer shares … where the company directors have the ultimate discretion. Further, where one of the parties is determined not to put property in the hands of their former partner, a successful shield can be constructed even to the point where the party is prepared to serve a term of imprisonment for contempt.[16]

Apart from the Commonwealth's constitutional powers over marriage and divorce and matrimonial causes, constitutional power over corporations may help extend the power of courts operating under the Family Law Act to make orders and grant injunctions relating to third parties. Accrued jurisdiction might also come to the court's assistance. However, the Commonwealth's constitutional powers may not be complete.

The amendments in **Schedule 6** are designed to allow the court to make orders binding third parties in property adjustment proceedings under the Principal Act.

Disclosure of allegations about child abuse

The Principal Act prevents anything said in:

- family and child counselling or mediation (section 19N)
- conferences with family and child counsellors or welfare officers (section 62F)

being admitted in court or other legal proceedings.

Additionally, anything said by a person ordered to attend a post-separation parenting program as part of the Stage 2 parenting compliance regime, cannot be admitted in court or other legal proceedings (section 70NI).

These provisions raise competing public policy issues relating to the benefits of confidentiality for participants and professionals on the one hand and the need to ensure the court has information that will enable it to protect children from abuse on the other.

Section 19N has been reviewed by the National Alternative Dispute Resolution Advisory Council[17] (NADRAC) and by a Working Party comprising officers of the Attorney-General's Department, the Family Court, the Law Council and the former Family Services Council.

The NADRAC review was part of a wider review of the alternative dispute resolution provisions in the Family Law Regulations. NADRAC commented that section 19N of the Family Law Act protected mediators from legal action but that 'the principal purpose of the confidentiality clause should be to protect the participants in mediation rather than the mediator'. That said, NADRAC reported that mediators considered section 19N to be integral to the integrity of the mediation process because it enabled participants in mediation to express themselves honestly and openly. Further, it was said that if the mediator was called to give evidence about what was said in mediation then trust in the mediator could be compromised and that the costs of mediation would increase because new training and record keeping would be needed. NADRAC did not examine the impact that section 19N might have in preventing disclosure of child abuse allegations in family law proceedings. NADRAC concluded that it did not want to pre-empt the deliberations of the Working Party established by the Attorney-General to consider the issues of inadmissibility and confidentiality.[18]

Most recently, the confidentiality provisions were considered in a report by the Family Law Council, Family Law and Child Protection. The Council remarked that a '… major issue in child protection in the context of family law proceedings is whether judges should be allowed to hear evidence which is vital to the protection of children but which arises from disclosures in the course of confidential counselling and mediation.'[19]

One effect of this legal regime is to prevent a judge, whose duty in children's matters is to regard the best interests of the child as the paramount consideration, from being presented

with evidence of child abuse. The rationale for the prohibitions on disclosure is so that parties undergoing counselling or mediation will discuss issues openly, without fear of legal action resulting and counselling files being routinely subpoenaed in 'fishing expeditions'.[20]

The Family Law Council commented:

> 7.21 It is conceded that there may well be some diminution in the incidence of otherwise unguarded comments or candid exchanges as a result of allowing an exception to section 19N. It is right to say that the drafting of appropriate prefatory remarks to make to clients and time taken to explain the exception to clients would be required. Similarly the encouragement of alternative dispute resolution mechanisms, what the Pathways report describes as the 'supported pathway', is to be commended and encouraged. Taking away the blanket prohibition may be considered undesirable in terms of promoting such services.
>
> 7.22 But these consequences and costs, are of a different type compared with child protection. They should not be reckoned against, or traded off with the protection of a child from serious harm, where a real and present danger has been shown to exist. The policy of the *Family Law Act* with respect to children is largely premised on firstly recognising and thereafter advancing their best interests - the so called 'paramountcy principle'.[21] This should be in the forefront of the minds of all decision-makers in the family law system. Council agrees with the proposition that prevention of harm to children should be the primary goal of public institutions and publicly funded services in the family law system and this approach should underpin institutional responses where a choice of 'public goods' is to be made.[22]

The Council recommended that all three confidentiality provisions be amended along similar lines so that the general prohibition on the admissibility of information obtained in counselling, mediation or post-separation parenting programs should not apply where:

> (a) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age has been seriously abused; or
>
> (b) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age is at risk of serious abuse
>
> unless in the opinion of the Court there is sufficient other evidence of an admission of the adult or disclosure of the child relating to such abuse which is available to the Court.[23]

Amendments in **Schedule 7** of the Bill provide limited exceptions to the general prohibitions on the admission of disclosures made in counselling and mediation sessions and in post-separation parenting programs.

Child representatives

In August 1996, the Family Law Council reported on *Involving and Representing Children in Family Law*. It remarked that involving children included giving them an opportunity to express their wishes about decisions that will affect them, involving them as far as appropriate in Family Law Act processes, and ensuring that they do not feel excluded from decisions about matters that directly affect them.[24]

The Family Law Act contains a number of provisions that enhance the involvement of children in family law matters. For instance, the court can hear evidence of statements made by children that would otherwise be inadmissible because of the rule against hearsay[25], the Principal Act provides for interviews and reports by family and child counsellors[26], and a child can institute proceedings in matters relevant to their own welfare.[27] Additionally, section 68L of the Family Law Act enables the Court to appoint a child representative in proceedings which involve the interests or welfare of a child. Such an order may be made at the court's own initiative or on the application of the child, a child welfare organisation or any other person.

The child representative is appointed to represent and promote the child's best interests. While the child representative will normally involve the child in decision making, the Family Court's guidelines state:

> … this does not mean that the child is the decision maker. Among the factors that indicate the appropriate degree of involvement in an individual case are:
>
> the extent that the child wishes to become involved; and
>
> the extent that is appropriate for the child having regard to the child's age, developmental level, cognitive abilities, emotional state and the child's wishes …[28]

In 1994, the Full Court of the Family Court handed down its decision in *Re K*.[29] As one commentator has remarked:

> The judgment in *Re K* establishes a broad general rule that the appointment of a child representative will be made when the court considers that the child's interests require independent and objective representation. The *Re K* criteria … makes it more likely than not that whenever a significant issue of dispute exists concerning a child, the court will favourably consider the appointment of a child representative.[30]

When appointed, child representatives are generally funded from legal aid commission budgets. In recent years, there has been a significant increase in the appointment of child representatives. For instance, in 1998-99, 2,561 legally aided separate representatives were appointed. In 2001-02, the figure was 3,508.[31]

While the extent of child representation flowing from the decision in *Re K*[32] is said to be in 'substantial compliance' with the Convention on the Rights of the Child, it does not necessarily represent full compliance with that convention.[33] Nevertheless, the issue of the

impact of child representative appointment on legal aid commission budgets is an ongoing one.

In 1996, the Family Law Council looked at ways in which funding issues could be addressed including:

1. making statutory provision for the circumstances in which a court can appoint a child representative
2. the development, by the court, of a consistent approach to the appointment of child representatives
3. provision of dedicated funding by the Commonwealth to legal aid commissions for the appointment of separate representatives, and
4. empowering the court to make orders for the recovery of costs of separate representation from parties where the parties are able to meet those costs.[34]

With the exception of the first option, the Family Law Council endorsed all these approaches.

Evidence to the Senate Legal and Constitutional Legislation Committee's inquiry into the Bill was that legal aid funding agreements contain a condition requiring legal aid commissions, except in the case of legally aided parties, 'to seek to recover costs [of appointing child representatives] from parties or advise parties that they may be asked for a contribution towards those costs.'[35] However, it appears that some State legal aid commissions attempt to recover their costs from the parties, while others do not.[36]

Amendments in **Schedule 7** empower the court to divide the costs of the child representative between the parties. Some concerns have been expressed that the amendments about the funding of child representatives have the potential to make the parties to Family Law Act proceedings hostile to the child representative.[37] Concerns have also been expressed that the amendments transfer the responsibility of protecting children from the Commonwealth to private citizens.[38]

Main Provisions

Schedule 1—Parenting plans

The amendments in **Schedule 1** commence 28 days after the date of Royal Assent (**clause 2**).

Section 63B of the Principal Act encourages parents to agree about matters concerning their children rather than litigate and to regard the best interests of the child as the foremost consideration when reaching an agreement. **Item 3** amends section 63B to encourage parents to additionally take responsibility for their parenting arrangements and for resolving parental conflict and to minimise potential conflict by making an agreement.

Other amendments in **Schedule 1** flow from the repeal of provisions enabling parenting plans to be registered in a court. Although the heading of **Schedule 1** is 'Removal of requirement to register parenting plans', there is no requirement at present to register a parenting plan in a court. However, failure to register means that the plan is not enforceable.

Item 5 provides that a parenting plan that is not registered can be varied or revoked if the parties agree in writing.

Item 6 repeals and replaces section 63DA of the Principal Act. As presently worded, section 63DA requires the person advising in the making of a parenting plan to explain:

1. the obligations of the plan
2. the consequences that flow from failure to comply with it, and
3. the availability of programs that help those experiencing difficulties in complying with parenting plans.

As a result of the repeal of the registration provisions, the amendments remove the requirement to explain items 1 and 2.

Item 8 repeals and replaces section 63E of the Principal Act, the section that deals with the registration of parenting plans. However, existing registered parenting plans can remain in force until set aside, varied or discharged by a court or until revoked by written agreement between the parties (**new section 63DB**). In the latter case, registration is necessary to make the revocation effective.

New section 63E, which is inserted by **item 8**, sets out how to register a revocation. An application for revocation must be lodged with a court and accompanied by a statement that each party has obtained independent legal advice about the effect of the revocation. The court may register the revocation agreement if it considers it is in the best interests of the child. In making this decision the court must look at the information accompanying the revocation application. It may, but is not required to look at the matters set out in

subsection 68F(2) of the Principal Act. These matters include the child's wishes, the nature of the child's relationship with their parents and others, the capacity of each parent to cater for the child's needs etc.

Schedule 2—Use of audio links, video links etc.

The amendments in **Schedule 2** commence 28 days after the date of Royal Assent (**clause 2**).

The Explanatory Memorandum comments:

> Schedule 2 facilitates the use of video and audio technology for the taking of submissions and evidence. It is expected that it will be common for parties to live, or have their place of business, in different towns or even different States. Use of audio and video links will reduce the need for parties to travel long distances to attend directions hearings or final hearings of their cases. It will also allow for different judges of the Court to be in different places in Australia for proceedings.[39]

Items 1 and 3 insert definitions of 'audio link' and 'video link', respectively.

New subsection 27(2) defines the term 'split court'—ie a court sitting at different places at the same time using video link, audio link or some other means. The law that applies in such a case is the law that applies where the presiding judge is sitting [**new subsection 27(3)**].

Item 5 amends subsection 93A(2) of the Principal Act so that an appeal court can hear evidence by video link, audio link or some other means.

Item 7 inserts new procedures dealing with the use of video or audio link to give testimony, appear or make submissions to the Family Court (**new Division 2** of **Part XI**). **New section 102C** will allow a person's testimony to be given by video link, audio link or other means. A party to proceedings can apply to the court for their evidence to be given in this way or the court can exercise its own initiative. Additionally, persons can appear and submissions can be made by video link (**new sections 102D and 102E**).

A court cannot allow video link to be used unless satisfied that:

- the 'courtroom' is equipped with facilities that enable all 'eligible persons' present in the 'courtroom' to see and hear the 'remote person' who is testifying, appearing or making a submission
- the place where the 'remote person' is located is equipped with facilities that enable all 'eligible persons' present in that place to see and hear each 'eligible person' present in the 'courtroom'
- any relevant Rules of Court are complied with, and

- any other conditions imposed by the court are complied with [**new subsection 102F(1)**].

If audio link is to be used, the court must be similarly satisfied in terms of people being able to hear the testimony, appearance or submission [**new subsection 102F(3)**].

If other electronic means—ie means other than video or audio link—are used, then any relevant Rules of Court and any additional conditions imposed by the court must be met [**new subsection 102F(5)**].

The expression 'eligible person' is defined as a person that the court thinks should be treated as an 'eligible person' [**new subsection 102F(6)**].

If the court is sitting as a split court, then each of the places where the court is sitting is a 'courtroom' for the purposes of **new section 102F**. If the court is not sitting as a split court then the place where the court is sitting is the 'courtroom' [**new subsection 102F(7)**].

New sections 102G and 102H deal with how documents are put to a person when a court is sitting as a split court. Normally a person cannot be questioned about a document unless they are given a copy of the document. The new provisions mean that when a person is 'attending' a court via video or audio link or when the court is sitting as a split court, a document can be put to the remote courtroom or person by being transmitted to them. **New section 102J** deals with the administration of oaths and affirmations when testimony is to be given by video link, audio link or other means.

New section 102K provides that the court may make such orders 'as the court considers just for the payment of expenses, including the court's expenses, incurred in connection with' the use of video or audio link etc or in connection with the court sitting as a split court. **New section 102K** has effect 'subject to the regulations' [**new subsection 102K(2)**].

If proceedings are to be heard and determined by two or more judges, then the Chief Justice or the Presiding Judge ('the directing Judge') decides whether the Family Court will sit as a split court in a particular case and which form of electronic communication will be used to facilitate the proceedings (**new section 102M**). Before determining what sort of electronic communication—for example, video link or audio link—is to be used, the directing Judge must be satisfied that each courtroom is equipped with facilities that enable eligible persons in one courtroom to 'communicate with'[40] eligible persons in the other courtrooms using the particular form of electronic communication and that any conditions set down in relevant Rules of Court are met (**new section 102N**).

Item 9 of **Schedule 2** provides that the 'split court amendments' apply in relation to proceedings instituted in the Family Court after the commencement of **item 9** (ie the 28th day after the date on which the legislation receives Royal Assent). The expression 'split courtroom amendments' is defined in **sub-item 9(3).**

Schedule 3—Management of the Family Court

Schedule 3 commences 28 days after the date of Royal Assent (**clause 2**).

The amendments in **Schedule 3** do a number of things:

- insert new definitions
- reflect restructuring that is occurring in the Family Court by replacing references to obsolete positions (such as Principal Director of Court Counselling of the Family Court)
- reassign duties previously carried out by the holders of the obsolete positions to either new professional positions (such as Principal Mediator) or to administrative officeholders (such as Registry Managers[41]), and
- transfer some administrative duties from Registrars[42] to Registry Managers.

Item 29 of **Schedule 3** enables transitional and savings regulations to be made dealing with the above. In general, regulations take effect from their date of notification in the *Gazette*. However, **item 29** enables regulations to be made with retrospective effect.

Schedule 4—Parenting compliance regime

As stated in the Background section of this Digest, the parenting compliance regime is a three-stage approach to securing compliance with orders affecting children. Stage 1 is preventive. Stage 2 is remedial. Stage 3 involves the use of traditional sanctions.

Items in **Schedule 4** have various commencement dates (**clause 2**).

Item 1 of **Schedule 4** inserts **new section 65LA** into the Principal Act. It will enable a court dealing with proceedings for a parenting order to make an order directing a party to:

- attend a 'provider' to be assessed to determine their suitability to attend a 'post-separation parenting program', and
- attend that program (if the party is found to be suitable to attend a particular program).

At present, orders can only be made when proceedings are taken under the Division 13A compliance regime (ie when parenting orders have been made and breached and enforcement action is taken).

A 'post-separation parenting order' is defined to mean a program designed to help people resolve problems that adversely affect their parenting responsibilities and which consists of lectures, discussions or other activities [**new subsection 65LA(3)**].

A 'provider' is a provider of post-separation parenting programs who is on a list compiled by the Attorney-General [**new subsection 65LA(3)**].

At present, the Attorney-General is required to produce an annual list of post-separation parenting programs. Amendments in **Schedule 4** replace this requirement with a requirement that the Attorney-General publish a list of providers of post-separation parenting programs (see, for example, **items 3, 7, 8, 17 and 19**). As a consequence, when Stage 2 of the compliance regime is activated, a court will order a person to attend a provider for assessment rather than order a person to go to a provider of a 'specified appropriate post-separation parenting program.'

Items 11-13 amend provisions of the Principal Act that deal with the operation of Stage 2 of the compliance regime. They are designed to ensure that Stage 2 will operate if no court has previously determined that the person has contravened the primary order or previously adjourned proceedings in respect of a contravention of the primary order—irrespective of whether a contravention occurred before or after the *Family Law Amendment Act 2000* came into force.[43]

One of the Stage 2 actions that a court can take if a person contravenes an 'order affecting children' is to make a compensatory contact order [paragraph 70NG(1)(b)]. **Item 15** will give a court an additional power to make a compensatory residence order.

Section 70NIA of the Principal Act provides that where, despite a Stage 2 order, a person has failed to attend all or part of a program, the court may make further orders about the person's attendance. **Item 18** gives the court a wider power to make 'such orders as it considers appropriate' and also to make such orders in respect of a person found to be unsuitable to attend a program. The amendment does not give the court power to make the sort of punitive orders that are envisaged under Stage 3 of the compliance regime.

The amendments made by **items 21 and 22** will mean that when a court is considering whether a person has previously contravened an order for the purposes of Stage 3 of the compliance regime, it will not matter whether the contravention occurred before or after the commencement of the *Family Law Amendment Act 2000*.

Schedule 5—Financial agreements

Items in **Schedule 5** commence on a variety of dates (**clause 2**).

Amendments to the Family Law Act that were made by the *Family Law Amendment Act 2000* enable couples to enter into legally binding financial agreements before, during and after marriage.[44]

A financial agreement can be terminated by the parties or set aside by the court, in certain circumstances. One such circumstance is where the court is satisfied that:

> when the agreement was made[45], the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party would have been unable to support himself or herself without an income tested pension, allowance or benefit [subsection 90F(1)].

This provision is designed to ensure that the social security system will not be burdened by people agreeing to waive their spousal maintenance entitlements. Subsection 90F(1) is amended so that rather than referring to the circumstances of the party when the agreement was made, the relevant time will be when the agreement comes into effect (**item 1** of **Schedule 5**). This amendment has a retrospective commencement date—27 December 2000 (**clause 2**). This is the date that the financial agreements provisions of the *Family Law Amendment Act 2000* came into effect.

Under the Principal Act, a number of requirements must be met before a financial agreement is binding. For instance, it must be signed by both parties. Further, independent legal advice must have been provided:

1. about the effect of the agreement
2. whether it was to the advantage of each party to enter the agreement
3. whether it was prudent for each party to do so, and
4. whether the agreement was fair and reasonable.

Item 2 of **Schedule 5** removes the last three requirements and substitutes a requirement that the advantages and disadvantages of the agreement have been explained by a lawyer. The Explanatory Memorandum states that the amendments ensure:

> … that legal practitioners are not required to certify that they have provided the party with financial advice …
>
> The amendments also remove the requirement for the legal practitioner to provide advice on whether it was prudent for the person to enter into the agreement and further whether looking into the future the terms of the agreement were fair and reasonable. It is clearly a very heavy onus on practitioners to provide advice that looks to the future and what is prudent from one person's view may not be prudent from another. The provision will now require the practitioner to certify about those things that they are expert. That is the actual effect of the agreement and the advantages and disadvantages of the agreement.[46]

Item 3 makes the same changes to the provisions governing the termination of financial agreements [**subparagraphs 90J(2)(b)(ii), (iii) & (iv)**].

Items 2 and 3 commence 28 days after the date of Royal Assent (**clause 2**).

Schedule 6—Orders and Injunctions Binding Third Parties

Schedule 6 commences on the 28th day after the date of Royal Assent (**clause 2**).

Item 1 of **Schedule 6** inserts **new Part VIIIAA** into the Principal Act—'Orders and injunctions binding third parties'.

New section 90AA is an objects provision. It states that the purpose of **new Part VIIIAA** is to enable the court in relation to the property of a party to a marriage to alter property interests and grant injunctions that affect the rights of third parties.

New section 90AB is a definitions provision. It defines 'third party' as a person who is not a party to the marriage.

New section 90AC provides that **new Part VIIIAA** overrides Commonwealth, State or Territory law, trust deeds and other instruments—whether made before or after the commencement of **new Part VIIIAA**.

New section 90AD provides that for the purposes of **new Part VIIIAA**, a debt owed by a party to a marriage is property under the definition of 'matrimonial cause' found in paragraph (ca) of section 4 of the Principal Act. Section 4 contains a list of proceedings that are 'matrimonial causes'. The Family Court has jurisdiction over these matters. The list attempts to keep exercises of jurisdiction within Commonwealth constitutional power.[47]

New section 90AE will enable a court, when adjusting the property interests of parties to a marriage, to:

- issue orders directed to a creditor of a party to a marriage
- direct a company to register a share transfer from one party to the marriage to the other party, or
- direct a third party to do something in relation to the property of a party to a marriage or that alters the property of a third party in relation to the marriage.

A court may only make such orders if it is 'reasonably necessary' or 'reasonably appropriate and adapted'[48] to divide the property of the parties to a marriage and after according the third party procedural fairness.

Under new section 90AF a court may make an order or injunction under section 114 of the Principal Act that:

- restrains a third party from repossessing the property of a party to a marriage
- restrains a person from commencing legal proceedings against a party to a marriage, or
- alters the rights of a third party.

Once again, such orders can only be made if they are reasonably necessary or reasonably appropriate and adapted to divide the property of the parties to a marriage and after the third party has been accorded procedural fairness.

New section 90AH provides that a third party is not liable for loss or damage suffered by another person in relation to things that are done by the third party in good faith in reliance on an order or injunction made under **new Part VIIIAA**.

Item 2 of **Schedule 6** deals with the application of these amendments. They wil1 apply to all marriages, including marriages dissolved before the commencement of **Schedule 6** (ie the 28th day after the day on which the legislation receives Royal Assent). An exception is where a section 79 order (a property adjustment order) or a section 87 agreement (an approved maintenance agreement) is already in force. However, if either an existing section 79 order or an existing section 87 agreement is later set aside or revoked, then the amendments made by **Schedule 6** apply from the time of the setting aside or revocation.

Schedule 7—Miscellaneous amendments

The items in **Schedule 7** commence on a variety of dates (**clause 2**). However, all the amendments described below commence 28 days after the date of Royal Assent.

Amendments relating to Rules of Court

A number of the amendments in **Schedule 7** (eg, **items 2-6, 8, 12, 14, 15, 17, 18, 21 & 23**) dispense with the need for the Family Court to have Rules of Court about a range of matters. For instance, section 68J enables a person to inform the court if a family violence order applies to a child or a member of the child's family 'subject to the applicable Rules of Court'. The amendment effected by **item 17** will mean that a person can inform the court of the family violence order. There will not need to be any Rules of Court about this subject.

The Bill's Second Reading Speech states that these amendments:

> … will assist in the implementation of the work of the Family Law Rules Revision Committee. The amendments make provisions relating to the Rule making powers of the court less proscriptive and reduce the details required in the Rules.[49]

Disclosure of allegations about child abuse

Items 7, 13 and 19 of **Schedule 7** amend sections 19N, 62F and 70NI, respectively so that:

- admissions by an adult indicating that a child has been abused or is at risk of abuse, or
- disclosures by a child indicating that the child has been abused or is at risk of abuse

is admissible in a court or in legal proceedings—unless the court considers there is sufficient evidence of the admission or disclosure available from other sources. 'Abuse' is defined to mean an assault, including a sexual assault or the use of a child as sexual object. A 'child' is a person under the age of 18.

The Explanatory Memorandum states that these amendments will not enable admission of 'disclosures by an adult that indicate that a child has been abused or is at risk of abuse by another person. It also does not apply to admissions of a child that indicate that another child has been abused or is at risk of abuse by that child'.[50]

Child Representatives

Item 29 amends section 117 of the Principal Act, the section dealing with costs. In general, the position under the Principal Act is that each party bears his or her own costs. However, the court can make costs orders taking into account subsection (2A) and any Rules of Court. Matters that the court must look at under subsection (2A) include the financial circumstances of each party, whether any of the parties is legally aided and their conduct in the proceedings.

The effect of **item 29** is that in proceedings where a child representative has been appointed, the court will determine how the costs of the child representative will be split between the parties. In making its assessment about the distribution of costs, the court must disregard the fact that the child representative is funded under a legal aid scheme. A party will not have to bear the costs of funding a child representative if they have been legally aided in the proceedings or if the court considers they would suffer financial hardship.

Publication of court proceedings

Section 121 of the Principal Act prohibits the publication or dissemination of Family Law Act proceedings that identify parties to the proceedings, witnesses or anyone who is related to or associated with a party to proceedings. Section 121 also contains exceptions to this general prohibition—for example, the publication of law reports or the provision of information to a lawyer in the course of their professional duties.

Items 32 and 33 ensure that no offence is committed if the court publishes lists of proceedings which identify the parties to those proceedings or if the court approves the publication of proceedings.

Concluding Comments

The Bill was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report. Its reporting date is 13 August 2003.

Most of the amendments proposed by the Family Law Amendment Bill 2003 appear uncontentious. However, some issues are raised by the Bill. These include:

- The amendments relating to section 63B of the Principal Act, a section which exhorts parents to reach agreement about matters concerning their children. The amendments additionally encourage parents to take responsibility for their parenting arrangements and for resolving parental conflict and also encourage them to minimise potential conflict by coming to an agreement. In a submission to the Senate Legal and Constitutional Legislation Committee inquiry, the NSW Commission for Children and Young People has suggested that section 63B also be amended to encourage parents to involve their children in the process of reaching their agreement.[51]

- The impact of provisions enabling the court to make orders for expenses incurred (including the court's expenses) when video or audio link is used or the court sits as a split court. These orders will be 'as the court thinks just'. Will they have a disproportionate impact on parties living in regional or remote Australia or on those experiencing financial hardship?

- Whether provisions for costs orders in relation to child representatives have the potential to make parties oppose the appointment of a child representative and to view the child representative with hostility or suspicion.

- The provisions enabling certain statements made in counselling or mediation sessions about actual or potential child abuse to be admitted as evidence. The Explanatory Memorandum states that the provisions will not cover disclosures by adults about other persons or, in the case of disclosures by children, about other children. The NSW Commission for Children and Young People has suggested that the amendments should be widened to cover:

  - a disclosure by an adult indicating that a child has been abused or is at risk of abuse by another person (such as the person's spouse)

  - a disclosure by a child indicating that another child (such as a sibling) has been abused or is at risk of abuse

  - an admission by a child that another child (such as a sibling) has been abused or is at risk of abuse by that child.[52]

Endnotes

1 Family Law Council & National Alternative Dispute Resolution Advisory Council, *Letter of Advice to the Attorney-General on Parenting Plans*, 16 March 2000.

2 Women's Legal Resources Centre, Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Family Law Amendment Bill 2003, 19 June 2003.

3 For a discussion of the background to the parenting compliance regime see Bills Digest No. 88, 1999–2000, Family Law Amendment Bill 1999.

4 Parenting orders are court orders that may cover such matters as who a child will live with, who a child will have contact with, and matters concerning the care, welfare and development of a child.

5 Ian Loughnan, 'Enforcement and contravention', *Family Law Updates*, UNSW Faculty of Law. Centre for Continuing Legal Education Seminar, 20 March 2003.

6 This expression is defined in section 70NB of the Principal Act.

7 Family Law Pathways Advisory Group, *Out of the Maze. Pathways to the future for families experiencing separation*, July 2001.

8 Chief Justice Alastair Nicholson, 'Australian initiatives: Enforcement in difficult contact cases', Address to the Royal Society, London, 27 March 2002.

9 ibid.

10 Attorney-General, Second Reading Speech, Family Law Amendment Bill 2003, House of Representatives, *Hansard*, 12 February 2003, p. 11572.

11 Nicholson, op.cit.

12 ibid.

13 Family Law Pathways Advisory Group, op.cit.

14 Stephen Parker, Patrick Parkinson & Juliet Behrens, *Australian Family Law in Context. Commentary and Materials*, 2nd ed, LBC Information Services, 1999.

15 Anthony Dickey, *Family Law*, 4th edition, Lawbook Co, 2002.

16 Stephen Bourke, 'Property and superannuation. An update', in 9th National Family Law Conference. *Proceedings*, July 2000, pp. 25–7.

17 *Primary Dispute Resolution in Family Law. A Report to the Attorney-General on Part 5 of the Family Law Regulations*, March 1997.

18 However, it suggested that section 19N should be retained but that it 'should be qualified by … a relatively simple exception with respect to proceedings against the mediator for serious misconduct.' ibid., p. 34.

19 Family Law Council, *Family Law and Child Protection*, September 2002, p. 96.

20 ibid., see the discussion at pages 102–107.

21 Section 65E provides that "In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration." Section 68F sets out how a court determines what is in a child's best interests, and includes 'the need to protect the child from physical or psychological harm…': subsection 68F(2)(g). See also section 68K - court to consider risk of family violence.

22 Family Law Council, 2002, op. cit, p. 106.

23 ibid., p. 108.

24 Family Law Council, *Involving and Representing Children in Family Law*, August 1996.

25 Section 100A, Family Law Act.

26 Section 62G, Family Law Act.

27 Section 63C, Family Law Act.

28 Family Court of Australia, *Guidelines for Child Representatives*, http://www.familycourt.gov.au/html/child_representative.html

29 (1994) FLC 92-461.

30 WJ Keough, *Child Representation in Family Law*, LBC Information Services, 2000, p. 56.

31 Evidence to the Senate Legal and Constitutional Legislation Committee Inquiry into the Family Law Amendment Bill 2003, 22 July 2003, Transcript of Hearing p. L&C 28.

32 (1994) FLC 92-461.

33 See the decision in *Re K* and also Keough, op. cit.

34 Family Law Council, 1996, op. cit.

35 Philippa Lynch, Evidence to the Senate Legal and Constitutional Legislation Committee Inquiry into the Family Law Amendment Bill 2003, Transcript of Hearing, 22 July 2003, p. L&C 29.

36 Women's Legal Resources Centre, op. cit.

37 Denis Farrar, Evidence to the Senate Legal and Constitutional Legislation Committee Inquiry into the Family Law Amendment Bill 2003, Transcript of Hearing, 22 July 2003, pp. L&C 2-3.

38 Women's Legal Resources Centre, op. cit.

39 Explanatory Memorandum, p. 8.

40 Defined in **new subsection 102N(4)**.

41 Registry Managers are responsible for the administrative management of Family Court registries.

42 Registrars exercise delegated quasi-judicial functions.

43 Explanatory Memorandum, p. 19.

44 For a discussion of the background to the financial agreements provisions see Bills Digest No. 88, 1999–2000, Family Law Amendment Bill 1999.

45 Emphasis added.

46 Explanatory Memorandum, pp. 22–3.

47 Parker et al, op. cit.

48 This language appears designed to signal that the purpose of the law and its legislative expression have a sufficient connection with relevant Commonwealth constitutional powers.

49 Attorney-General, Second Reading Speech, Family Law Amendment Bill 2003, House of Representatives, *Hansard*, 12 February 2003, p. 11572.

50 For example, Explanatory Memorandum, p. 30 (in relation to the amendments to section 70NJ).

51 NSW Commission for Children and Young People, Submission on the Family Law Amendment Bill 2003, 17 July 2003.

52 ibid.