



## Family Law Amendment Bill 2005

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## Family Law Amendment Bill 2005

**Date Introduced:** 16 March 2005

**House:** Senate

**Portfolio:** Attorney-General

**Commencement:** The formal provisions commence on Royal Assent. Parts 1 to 15 of Schedule 1 commence 28 days after Royal Assent, and Part 16 of Schedule 1 commences at the same time as Schedule 1 to the *Bankruptcy and Family Law Legislation Amendment Act 2005* (namely on Proclamation or 19 September 2005, whichever occurs first).

### Purpose

The Bill seeks to amend existing provisions of the *Family Law Act 1975* ('the Act') dealing with contravention of parenting orders, appeals, offers of settlement and transfer of matters from state courts. It also simplifies the language of the Act (for example, by replacing references to 'dissolution of marriage' with the term 'divorce'), and gives effect to a recommendation contained in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax (2002).<sup>1</sup>

The Bill also seeks to amend the *Bankruptcy Act 1966* ('the Bankruptcy Act') to empower the Family Court of Western Australia to deal with bankruptcy in the same way as the Family Court will be able to when the *Bankruptcy and Family Law Legislation Amendment Act 2005* commences.

### Background

This Bill is in large part the same as the Family Law Amendment Bill 2004. That Bill was introduced in the House of Representatives on 1 April 2004 but lapsed at the end of the 40<sup>th</sup> Parliament. It was the subject of an inquiry by the Senate Legal and Constitutional Committee. A copy of the committee's report (tabled on 30 July 2004) is available electronically at: [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/family\\_law\\_04/report/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/family_law_04/report/index.htm).

However, the current Bill is not identical to the 2004 Bill. For example, parts dealing with frivolous or vexatious proceedings, and the interaction of family law and bankruptcy law have been omitted from the current Bill—the latter because it is the subject of the *Bankruptcy and Family Law Legislation Amendment Act 2005*—and there is new material dealing with the jurisdiction of the Family Court of Western Australia under the *Bankruptcy Act 1966* (Cwlth) (see **item 138**).

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The Bill is part of the Howard Government's general reform of family law rather than a response to any particular inquiry or report. For example, as the Minister for Justice and Customs stated in the second reading speech for the Bill, 'it does not represent the package of family law reforms that respond to the House of Representatives Standing Committee on Family and Community Affairs *Every Picture tells a Story* Report'.<sup>2</sup> Nonetheless, it can be said that the Bill does give effect to some of the themes raised by that committee, in terms of simplifying language and providing litigants (particularly self-represented litigants) with greater access to justice. For example, the Bill extends the types of matters where private arbitration is permitted under the Act (see **items 15–18**) and permits state courts of summary jurisdiction to transfer family law proceedings to the Federal Magistrates Court (as well as to the Family Court of Australia and the Supreme Court of a state or territory) (see **items 28–35**). It also extends the types of applications concerning the conduct of an appeal which may be heard by a single judge of the Appeal Division of the Family Court (see **item 24**).

## Main Provisions

The Bill is organised by subject matter. There are 16 parts to Schedule 1 to the Bill and it is convenient to deal with each part in turn.

### Part 1—Parenting compliance regime

**Part 1 (items 1-4)** deals with contravention of parenting orders. **Item 1** amends section 65F of the Act to provide that the general power of the court to require parties to attend counselling before a parenting order is made extends to proceedings for the enforcement of a parenting order and proceedings where contravention of a parenting order is alleged. **Item 2** amends section 65LA to provide that the power of the court (in proceedings for a parenting order) to require parties to attend a post-separation parenting program extends to proceedings for the enforcement of a parenting order and proceedings where contravention of a parenting order is alleged.

**Item 3** inserts **proposed Subdivision AA** of Division 13A of Part VII of the Act. Part VII deals with children. Division 13A sets out the consequences of failure to comply with orders and other obligations that affect children. **Proposed Subdivision AA** deals with the court's powers where contravention without reasonable excuse is not established. It comprises one provision: **proposed section 70NEB**. Where, in proceedings alleging contravention of a parenting order, either the court is not satisfied that contravention occurred or the court is satisfied that contravention occurred but the respondent had a reasonable excuse, **proposed subsection 70NEB** provides that the court may vary the parenting order. This seems to be a sensible provision, which may have the effect of providing the court with the opportunity of clarifying or varying an earlier, possibly vague or unworkable, order. It may also eliminate the opportunity for further contraventions and court proceedings.

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Notably, by **item 4**, the amendments made by **Part 1** have retrospective application. In other contexts, retrospectivity tends to be seen as an infringement on rights. Here, however, the reason for retrospectivity is to extend the application of **proposed section 70NEB** to existing parenting orders, and thus to extend the benefits conferred by the provision (by permitting a judge to vary an order rather than simply dismissing the application for alleged contravention of a court order).

## **Part 2—Costs and offers of settlement**

**Item 5** amends subsection 117(2A) of the Act which sets out the matters relevant to the making of a costs order. **Item 5** removes the phrase ‘in accordance with section 117C or otherwise’ from paragraph 117(2A)(f), but the meaning of the paragraph seems to be unchanged. The Explanatory Memorandum states that ‘there is no longer a requirement [for judges] to consider whether the parties have made an offer of settlement in accordance with section 117C’.<sup>3</sup> However, the words ‘or otherwise’ in the current provision already mean that judges do not have to consider whether any offer of settlement is in accordance with section 117C.

**Item 6** amends section 117C, which deals with offers of settlement. It repeals the whole section and replaces it with a similar provision written in clearer language. It removes reference to the filing of notice of offers of settlement and notices of withdrawal of offers of settlement. Such matters are now contained in Chapter 10 of the *Family Law Rules 2004*, which came into effect on 29 March 2004. Chapter 10 is entitled ‘Ending a case without a trial’.<sup>4</sup>

## **Part 3—Suspension of sentences of imprisonment**

**Items 8 and 9** amend sections 70NO and 112AE of the Act to provide that where a person breaches a court order without reasonable excuse and the court sentences the person to imprisonment, the court may suspend the sentence ‘upon the terms and conditions determined by the court’. Alternatively, the court may also terminate a suspension. Section 70NO deals with sentences of imprisonment where a person fails to comply with a parenting order or a compliance regime. Section 112AE is the general section dealing with sentences of imprisonment for failure to comply with court orders. The amendments seem to complement existing sentencing provisions (such as good behaviour bonds). They also seem to reduce the need for appeals or the bringing of further court proceedings (if, for example, the person complies with the order or obligation during the period of imprisonment).

## **Part 4—Enforcement (removal of information procedure)**

**Items 10 and 11** amend section 70NN, which deals with the procedure for enforcing community service orders or bonds which have been made where a person has failed to comply with a parenting order. The amendments remove the need for an information alleging contravention to be laid before a magistrate and the need to issue a summons for

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the ‘defendant’ to attend court or to issue a warrant for the person’s arrest. While the amendments simplify the procedure, it is not clear how the defendant becomes aware of the court proceedings (assuming the person is not arrested and brought before the court) and/or whether the enforcement proceedings can occur in the person’s absence (which raises issues of natural justice, particularly the right to be heard). Such matters are currently covered in subsections 70NN(2)–(7) and (10) but are the subject of repeal by **items 10 and 11**. The Explanatory Memorandum offers no assistance on this point.

**Items 12 and 13** make similar amendments to section 112AH, which is the general provision relating to failure to comply with a sentence or order made under section 112AD. Section 112AD provides for sanctions for failure to comply with orders.

### **Part 5—Private arbitration**

**Item 15** inserts a definition of ‘Part VIIIA proceedings’ into section 4, which is the interpretation section of the Act. As Part VIIIA deals with financial agreements, the term ‘Part VIIIA proceedings’ is therefore defined as ‘proceedings in relation to a financial agreement’.

**Item 16** inserts a definition of ‘Part VIIIB proceedings’ into section 4. Part VIIIB deals with superannuation interests, including superannuation agreements and payment splitting/flagging. (Note that the Explanatory Memorandum erroneously refers to ‘[item] 17’ when discussing this item.)

**Item 17** inserts a definition of ‘section 106A proceedings’ into section 4. Section 106A deals with the execution of deeds or instruments to assist in the enforcement of court orders. Such instruments include those required to transfer real estate.

Currently section 19E provides that only Part VIII proceedings are amenable to private arbitration. Part VIII deals with property, spousal maintenance and maintenance agreements. **Item 18** amends section 19E to provide that Part VIII proceedings, Part VIIIA proceedings, Part VIIIB proceedings or section 106A proceedings are all amenable to private arbitration. Section 19D provides that the court may only order arbitration with the consent of all parties to the proceedings. Arbitration may be cheaper and less formal than court proceedings (for example, if the parties agree, the rules of evidence do not apply). It may prevent the need for a final court hearing (trial) and/or reduce delays in the resolution of the dispute. It may therefore also reduce costs.

### **Part 6—Change of venue**

**Item 19** inserts **proposed section 27A** into the Act. It empowers the court or a judge to change the venue for the conduct of proceedings (or part of the proceedings). The power is a discretionary one and can be used at any stage of a proceeding. Further, it can be used ‘subject to such conditions (if any)’ as the court or judge may impose.

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Historically, Order 27 of the Family Law Rules 1984 dealt with applications for change of venue and the matters which the court should consider in determining any application. The provisions of former Order 27 were more detailed than **proposed section 27A**. The current (2004) Rules make no reference to change of venue.

## Part 7—Definition of disposition

**Part 7** (being **items 20–22**) gives effect to Recommendation 7 contained in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax (2002). Recommendation 7 provided:

It is recommended that s.106B of the Family Law Act be widened to allow third parties to apply to the court for an order or injunction preventing the disposition of property pending an application to set aside or overturn a s.79 order.<sup>5</sup>

**Item 20** amends subsection 106B(5) to replace the current definition of ‘disposition’ (which is currently defined to include ‘a sale and a gift’) with a more expansive definition which includes reference to the ‘issue, grant, creation, transfer or cancellation of ... an interest in a company or a trust’.

**Item 21** inserts a comprehensive definition of ‘interest’ into subsection 106B(5). It is defined to include shares or debentures in a company; options over shares or debentures; a beneficial interest in a trust; and any interest in a trust that is ‘conditional, contingent or deferred’.

## Part 8—Appeals

As mentioned earlier, **Part 8** amends the Act to extend the situations where a single judge can hear an application of a procedural nature in an appeal. Such applications will include (for example) an application to extend time in which to file an application for leave to appeal, and an application to vacate the hearing date of an appeal.

**Items 23 and 24** amend section 94, which deals with appeals to the Family Court from courts other than the Federal Magistrates Court (but including appeals from a decision of a single judge of the Family Court).

**Items 25 and 26** amend section 94AAA, which deals with appeals to the Family Court from the Federal Magistrates Court.

**Item 27** inserts **proposed section 94AAB**, which provides for the hearing of appeals under section 94 or 94AAA without an oral hearing if all parties consent to the appeal being dealt with in that way. (Note that while a similar provision in the 2004 Bill also referred to applications under section 94AA for leave to appeal, such reference has been deleted in the current (2005) Bill. It is therefore not clear why the heading to **proposed section 94AAB** is not confined to *appeals* without oral hearing, given that sections 94 and

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94AAA only mention applications for leave to amend grounds of appeal and not more substantive applications.

**Proposed section 94AAB** seems to reduce the need for court hearings and attendance at court, and thereby to reduce costs to the parties.

## **Part 9—Transfer of matters from state courts of summary jurisdiction to the Federal Magistrates Court**

As mentioned earlier, **Part 9** (being **items 28–35**) amends section 46 of the Act to provide for the transfer of property proceedings from a state court of summary jurisdiction to the Federal Magistrates Court (in addition to the Family Court and the state Supreme Courts). It also amends section 69N to provide for the transfer of proceedings for a parenting order.

The amendments may have the effect of reducing any delay in having a matter heard (by removing the need for the state court to transfer the proceedings to the Family Court, which could then transfer it to the Federal Magistrates Court). The amendments may therefore also reduce costs (but it may depend on the type of case and the particular facts of the case).

## **Part 10—Terminology relating to divorce and principal relief**

As mentioned earlier, **Part 10** amends various provisions in the Act (particularly sections 4, 44, 48, 55 and 55A) to replace references to ‘dissolution of marriage’ with the shorter, and perhaps better known, expression ‘divorce’. It also replaces the term ‘decree nisi’ (meaning an order which does not take effect until the happening of a specified event) with the more common term ‘order’.

## **Part 11—Leave to appeal**

**Item 130** amends section 94AA to provide a comprehensive table of the requirements for leave to appeal (particularly whether the Full Court of the Family Court or a single judge of the Family Court determines the application for leave to appeal). The amendment does not alter the requirements currently set out in subsections 94AA(1)–(2C), but provides the same information in tabular form, which may be more readily understood.

## **Part 12—Power to dismiss appeal**

**Item 132** inserts **proposed section 96AA** to empower a court which is hearing an appeal to order the stay or dismissal of the appeal if the notice of appeal does not disclose proper grounds of appeal ‘(whether generally, or in relation to a particular ground of appeal)’.

The amendment would seem to be predicated on the need for grounds of appeal to be drafted clearly and concisely; with particularity and precision; and with an eye to long-established appellate principles and the law.<sup>6</sup> Seen in this light, the effect of the

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amendment may be to reduce court hearing and preparation time, and thereby costs, not only for litigants but for the court too. If a notice of appeal discloses proper grounds of appeal, the respondent is in a better position to know what arguments will be raised and the case he or she has to meet. Further, the court is in a better position to assess whether the evidence presented by the parties (including matters contained in the transcript of the trial at first instance) establishes the ground or grounds of appeal.

**Item 133** provides that the amendments made by Part 12 have retrospective operation insofar as they apply to appeals that have already been initiated.

### **Part 13—Appeals to High Court**

**Item 134** amends section 95 of the Act to provide that an appeal only lies to the High Court of Australia from the Full Court of the Family Court with special leave of the High Court.

Currently section 95 provides that an appeal also lies to the High Court ‘upon a certificate of a Full Court of the Family Court that an important question of law or public interest is involved’. According to the second reading speech for the Bill, the amendment is made in response to a recommendation by the Australian Law Reform Commission with the agreement of the High Court and the Family Court.<sup>7</sup> Nonetheless, the Full Court rarely issued a certificate under the existing provision. Among other things, one reason for this fact is the view that it is for the High Court to determine what matters it will hear, rather than the Full Court of the Family Court usurping that role and determining that an important question of law or public interest is involved.

**Item 135** provides that **Part 13** applies retrospectively.

### **Part 14—Recovery of amounts paid under maintenance orders**

**Item 136** inserts **proposed Subdivision G** into Division 7 of Part VII. Division 7 deals with child maintenance orders. **Proposed Subdivision G** deals with the recovery of amounts paid under maintenance orders. It presently comprises only one provision: **proposed section 66X**. **Proposed section 66X** is far more detailed in the current Bill than it was in the 2004 Bill, mainly as a result of the recommendation by the Senate Legal and Constitutional Legislation Committee that Part 14 (of the original Bill) should be amended ‘to clarify that the recovery of payments is possible where part payment of an order has been made’.<sup>8</sup>

A recent news release issued by the Attorney-General in relation to the current Bill refers specifically to people who ‘through the use of DNA testing, have found they are not the parent of a child’ being able to recover child maintenance payments.<sup>9</sup> While parentage testing may provide evidence of fraud giving rise to a claim to recover maintenance payments, the Court could also accept other evidence. Further, it should be noted that **proposed section 66X** empowers a court to make ‘such order as it considers just and

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equitable in the circumstances', which could mean that the court, exercising its discretion, makes no order for repayment.

**Proposed section 66X** provides that where a court has made an order that a person pay a sum of money or transfer property by way of child maintenance under paragraph 66(1)(a), (b) or (c), and the person has paid that maintenance, but the court later determines that the person is not a parent or step-parent of the child (and therefore not a person whom the court can order to pay maintenance), the amount paid may be recovered in a court having jurisdiction under Part VII of the Act (which deals with children). There is a similar provision for the recovery of child support in the *Child Support (Assessment) Act 1989*.

The amendment enables the person to recover the amount in the Family Court, Federal Magistrates Court or state court of summary jurisdiction, instead of taking debt recovery action under state laws.

### **Part 15—Powers of judicial registrars**

**Part 15** (being **item 137**) extends the powers of judicial registrars to include the power (in **proposed section 70NEB**) to vary an order in contravention proceedings where contravention without reasonable excuse is not proved (see **item 3** above).

### **Part 16—Jurisdiction of Family Court of Western Australia**

**Part 16** amends the Bankruptcy Act and comprises one item. **Item 138** inserts proposed section 35B into the Bankruptcy Act to provide that sections 27, 35 and 35A apply to the Family Court of Western Australia (a state court) in the same way as those sections apply to the Family Court of Australia.

The amendment is necessary because the Family Court of Western Australia exercises both state and federal jurisdiction in family law matters. There is no entity in Western Australia known as the 'Family Court of Australia'—although the Full Court of the Family Court of Australia hears and determines appeals from single judges of the Family Court of Western Australia. Thus, it is necessary to amend the Bankruptcy Act to refer specifically to the Family Court of Western Australia so that the recent changes to the Family Law Act and the Bankruptcy Act (concerning the interaction of family law and bankruptcy) apply to that court too.<sup>10</sup>

Section 27 of the Bankruptcy Act currently provides that the Federal Court of Australia and the Federal Magistrates Court have concurrent jurisdiction in bankruptcy. From the commencement of the *Bankruptcy and Family Law Legislation Amendment Act 2005* (on Proclamation or 19 September 2005, whichever occurs first), the Family Court of Australia will also be a bankruptcy court and have concurrent jurisdiction in bankruptcy with the Federal Court and Federal Magistrates Court.

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Section 35 of the Bankruptcy Act (which does not commence until proclamation or 19 September 2005, whichever occurs first) gives the Family Court jurisdiction in bankruptcy if a party to a marriage is a bankrupt, and the bankrupt's trustee is a party to property settlement or spousal maintenance proceedings (including proceedings under section 79A for the variation or setting aside of a property settlement order made under section 79 of the Family Law Act).

Section 35A of the Bankruptcy Act provides that the Federal Court (and the Federal Magistrates Court) may transfer proceedings to the Family Court with the consent of the parties to the proceedings. The Family Court then has jurisdiction to hear and determine the proceedings (including matters not otherwise within its jurisdiction).

## Concluding Comments

The Bill amends various provisions in the Family Law Act, either to insert new provisions where there have been gaps or to clarify or improve existing provisions. None of the amendments seems controversial.

The amendment to the Bankruptcy Act simply extends the effect of changes made by the *Bankruptcy and Family Law Legislation Amendment Act 2005* to the Family Court of Western Australia.

## Endnotes

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- 1 The report is available electronically at:  
[http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/1A2C7BFEEC7AB954CA256D1900822B9D/\\$file/2FINAL%20REPORT%2002.02%20FOIXXX.pdf](http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/1A2C7BFEEC7AB954CA256D1900822B9D/$file/2FINAL%20REPORT%2002.02%20FOIXXX.pdf).
- 2 Senator Ellison, Minister for Justice and Customs, 'Second reading speech: Family Law Amendment Bill 2004', Senate, *Debates*, 16 March 2005, p. 3, available electronically at:  
<http://www.aph.gov.au/hansard/senate/dailys/ds160305.pdf>. The report by the House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation* is available electronically at:  
<http://www.aph.gov.au/house/committee/fca/childcustody/report/fullreport.pdf>.
- 3 Explanatory memorandum for the Family Law Amendment Bill 2005, p. 4.
- 4 The Family Law Rules 2004 can be accessed electronically at:  
[http://www.austlii.edu.au/au/legis/cth/consol\\_reg/flr2004163/index.html](http://www.austlii.edu.au/au/legis/cth/consol_reg/flr2004163/index.html).
- 5 See endnote 1.

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- 6 For a discussion of appellate principles, see, for example, the decision of the High Court of Australia in *House v The King* (1936) 55 CLR 499 at 504–505, available electronically at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/55clr499.html?query=title+%28+house+v+the+king%22+%29>.
- 7 Senator Ellison, Minister for Justice and Customs, ‘Second reading speech: Family Law Amendment Bill 2004’, Senate, *Debates*, 16 March 2005, p. 4. See also Australian Law Reform Commission, *Report 92: The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Chapter 19: Appellate Jurisdiction of the High Court at paragraphs 19.30–19.54. The report is available electronically at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/92/ch19.html>.
- 8 Senate Legal and Constitutional Committee, ‘Provisions of the Family Law Amendment Bill 2005’, *Senate report*, tabled 30 July 2004, p. ix, available electronically at: [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/family\\_law\\_04/report/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/family_law_04/report/index.htm).
- 9 The Hon Philip Ruddock, MP, Attorney-General, ‘Government acts on child maintenance recovery in cases of paternity fraud’, *News release*, No. 042/2005, 17 March 2005. The news release also refers to recent changes made by the Government to parentage testing procedures to ‘reduce the risk of inaccuracy and fraud by tightening up the identification aspects of these procedures’.
- 10 For further information about the jurisdiction and operation of the Family Court of Western Australia, see its web site at: <http://www.familycourt.wa.gov.au/>.

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