

1983

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIATHE HOUSE OF REPRESENTATIVESFAMILY LAW AMENDMENT BILL 1983EXPLANATORY MEMORANDUM

(Circulated by authority of the Hon. L.F. Bowen, Deputy
Prime Minister and Minister representing the Attorney-General)

The main purpose of the Bill is to amend the Family Law Act 1975 to implement the majority of the recommendations of the Joint Select Committee on the Family Law Act that are capable of legislative implementation. In addition the Bill implements other recommendations for desirable amendments to the Act which have been made by the Family Law Council, the Law Council of Australia and the judiciary.

Significant amendments to be made to the Principal Act by the Bill include -

- . expanding the exclusive jurisdiction of courts exercising jurisdiction under the Act to include -
 - (a) property proceedings between parties to a marriage at any time during the marriage;
 - (b) custody and similar proceedings in respect of a wider class of children; and
 - (c) custody and similar proceedings in relation to a child of a marriage brought by a party other than a party to the marriage;
- . provision that proceedings under the Act be heard in open court;
- . replacement of the absolute prohibition on the publication of details of proceedings under the Act by a prohibition on the publication of details that identify individuals involved in those proceedings;
- . creation of an Appeal Division of the Family Court from which a majority of judges constituting any Full Court are to be selected;
- . removal of the requirement for parties or their legal representatives to attend the Family Court in undefended divorce applications where there are no children of the marriage under 18;
- . provision to enable courts having jurisdiction under the Act to attach a power of arrest to injunctions for the personal protection of a party to, or a child of, a marriage or excluding a person from premises;

- . specifying criteria relevant to the welfare of the child that a court will be required to take into account in custody and like proceedings;
- . inserting definitions for the purpose of the Act of "guardianship" and "custody" and providing that certain proceedings relating to the welfare of a child of a marriage may be brought under the Act;
- . replacement of the requirement for a court to give effect in custody and like proceedings to the wishes of a child who has attained the age of 14 years by a provision enabling any wishes expressed by children of any age to be taken into account to the extent appropriate;
- . expanding the grounds on which property settlement orders under the Act may be varied;
- . clarification of the powers of courts exercising jurisdiction under the Act to adjourn property settlement proceedings to enable orders to be made with respect to vested superannuation benefits;
- . widening of the grounds on which the approval of maintenance agreements entered into in substitution for rights under the Family Law Act may be revoked and conferral of wider powers on the court in proceedings with respect to such agreements; and
- . revision and relocation in the Family Law Act 1975 of the provisions of Part III of the Migration Act 1958, which provide for offences in relation to the removal from Australia of children in respect of whom custody or access orders have been made or sought. This measure was recommended by the Report of the Interdepartmental Committee on Prevention of Removal of Children from Australia by One Parent.

NOTES ON CLAUSES

Part I - Preliminary

Clause 1 - Short Title, &c.

This clause provides for the citation of the Bill.

Clause 2 - Commencement

This clause provides for the commencement of operation of Parts I, II and III of the Bill.

Part II - Miscellaneous Amendments

Clause 3 - Interpretation

Sub-clause 3(1) amends sub-section 4(1) as follows -

"Appeal Division" - A definition is inserted. The expression is used in Part IV which, as amended, creates an Appeal and General Division of the Family Court of Australia.

"Commonwealth instrumentality" - A definition is inserted. The expression is used in new sub-section 64(11B) and new section 117A.

"financial or custodial proceedings" - A consequential amendment is made.

"Full Court" - An amended definition is inserted, in consequence of the creation in Part IV of an Appeal and General Division of the Family Court of Australia. The definition was formerly in section 20.

"General Division" - A definition is inserted. The expression is used in Part IV which, as amended, creates an Appeal and General Division of the Family Court of Australia.

"guardian" - A definition is inserted. The term is used in Part VII and new sub-section 99A(4).

"maintenance agreement" - The definition is amended to clarify that all maintenance agreements, wherever made, fall within the term.

"marriage counselling" - A definition is inserted. The expression is used in Part II.

"matrimonial cause" - The existing definition is amended to expand the exclusive jurisdiction of courts exercising jurisdiction under the Act to include -

- . property settlement proceedings between parties to a marriage being proceedings arising out of the marital relationship - sub-paragraph (ca)(i);
- . property settlement proceedings between parties to a marriage being proceedings in relation to overseas decrees of dissolution or annulment of marriage, or legal separation of the parties, recognised as valid in Australia under section 104 - sub-paragraph (ca)(iii);

- . custody and like proceedings and maintenance proceedings relating to a child of a marriage, being proceedings by or on behalf of that child against one or both parties to the marriage - paragraph (cc);
- . custody and like proceedings and maintenance proceedings relating to a child of a marriage where only one party to the marriage is a party to the proceedings, other than child welfare proceedings under State law - paragraph (ce);
- . proceedings between parties to a marriage with respect to the welfare of a child of the marriage - paragraph (cf);
- . proceedings by or on behalf of a child of a marriage against one or both parties to the marriage with respect to the welfare of the child - paragraph (cg);
- . proceedings with respect to the welfare of a child of a marriage where only one party to the marriage is a party to the proceedings, other than child welfare proceedings under State law - paragraph (ch);
- . proceedings between parties to a marriage or, where one party to a marriage has died, proceedings between the other party to the marriage and the legal personal representative of the deceased party to the marriage, being proceedings with respect to the enforcement of, or otherwise in relation to, a maintenance agreement approved under section 87; or in relation to a maintenance agreement the approval of which under section 87 has been revoked; or with respect to a maintenance agreement, registered under section 86 or an overseas maintenance agreement registered under regulations made pursuant to section 89 - paragraph (ea);
- . proceedings for the enforcement of a decree made under the law of an overseas country in proceedings of a kind referred to in certain paragraphs of the definition of "matrimonial cause" - paragraph (eb);

"overseas country" - A definition is inserted. The definition was formerly in sub-section 104(1).

Sub-clause 3(1) also amends sub-section 4(2) and inserts a new sub-section 4(3) to put it beyond doubt that the references in the Act to "a party to a marriage" and "a child of a marriage" include a party to, or a child of, a marriage that has been terminated by death. The sub-clause also inserts a new sub-section 4(4) to clarify that a reference in the Act to proceedings under the Act includes a reference to proceedings under the Regulations.

Sub-clause 3(2) is a transitional provision, necessary as a consequence to the creation in Part IV of an Appeal Division of the Family Court of Australia, providing for the continuation of appeal proceedings not determined at the date of commencement of Part II of the Bill.

Clause 4 - Certain Children Deemed to be Children of a Marriage

This clause repeals section 5 and substitutes new sections 5 and 5A to widen the class of children deemed to be children of a marriage to include -

- a child adopted since the marriage by either party to the marriage with the consent of the other - amended paragraph 5(1)(a);
- certain children born as a result of either artificial insemination by donor or invitro fertilization - new paragraphs 5(1)(c) and (d) and new section 5A; and
- a child of either party to the marriage who is at the relevant time ordinarily a member of their household - new paragraph 5(1)(e)
- a foster child who is at the relevant time ordinarily a member of the household of the parties to the marriage - new paragraph 5(1)(f)

New sub-section 5(2) specifies the relevant time for the purpose of new paragraphs 5(1)(d), (e) and (f). New sub-section 5(3) is a revised form of repealed sub-section 5(4) and it extends the provisions of section 5 to void marriages.

.../7

Clause 5 - Child Welfare Law Not Affected

This clause amends sub-sections 10(2) and 10(3) to provide that maintenance, custody or guardianship orders made under the Act with respect to a child of a marriage do not override orders made with respect to the child under what is commonly termed State Child Welfare law.

Clause 6 - Conciliation

This clause repeals sub-section 14(6), in consequence of insertion of new sub-sections 44(1B) and (1C).

Clause 7 - Notice Seeking Counselling

This clause amends sub-section 15(2) to require the relevant Court officer to arrange a counselling conference when a party files a notice under sub-section 15(1).

Clause 8 - Advice as to Counselling

This clause amends sub-section 16(2) to enable a child of a marriage and all parties to proceedings under the Act to seek the assistance of the counselling facilities of the Family Court or of a State Family Court.

Clause 9 - Conciliation Counselling

This clause inserts new section 16A to require Courts and legal practitioners to have regard to the need to direct the attention of parties to counselling and conciliatory facilities available under the Act.

Clause 10 - Admissions made to marriage counsellors

This clause amends paragraph 18(1)(b) in consequence of the repeal of sub-section 14(6) and the insertion of new sub-section 44(1B).

Clause 11 to 14 - Part IV The Family Court of Australia

These clauses made various amendments to Part IV to create an Appeal Division of the Family Court of Australia.

A Full Court of the Family Court of Australia is, under the amended definition of "Full Court" relocated in sub-section 4(1), to consist of a majority of Judges who are members of the Appeal Division.

Clause 11 omits from section 20 the definition of "Full Court", which is amended and now located in sub-section 4(1).

Clause 12 inserts two new sections (sections 21A and 21B). New section 21A will divide the Court for the purpose of the organisation and conduct of its business into 2 divisions - the Appeal Division and the General Division. New Section 21B will enable the Chief Judge to make arrangements in relation to the constitution of the Court, or the Full Court, in particular matters.

Clause 13 inserts new sub-sections 22(2AA), (2AB), (2AC), (2AD), (2AE) and (2AF) which will enable the assignment of Judges of the Family Court to the Appeal Division and the General Division of the Court. There are to be rotating and non-rotating members of the Appeal Division. Non-rotating members of the Appeal Division are not to exceed 5 in number - new sub-section 22(2AC). Rotating members of the Appeal Division are to be assigned to the Division for a period of 2 years - new sub-section 22(2AD). Clause 9 also inserts new sub-sections 22(2AG) and (2AH) which will permit Judges of the Family Court to be appointed to other federal courts.

Clause 14 amends sub-sections 28(2) and (4) and inserts new sub-section 28(2A). Sub-section 28(2) is amended to provide that appeals from courts of summary jurisdiction can be heard by either a single Judge or by the Full Court. New sub-section

28(2A) makes it clear that a Judge who is a member of the Appeal Division may exercise the original jurisdiction of the Court or the jurisdiction of the Court in an appeal from a court of summary jurisdiction. Sub-section 28(4) is amended as a consequence of the creation of the Appeal Division to provide for the continuation, in certain circumstances, of the hearing and determination of proceedings by the Full Court when one of the Judges constituting the Full Court dies, resigns his office or otherwise is no longer able to continue as a member of the Full Court in the proceedings. Sub-section 28(4A) is omitted in consequence of the amendment to sub-section 28(4).

Clause 15 - Repeal of Section 29

This clause repeals section 29 which sets out the appellate jurisdiction of the Family Court, now dealt with in new section 93A.

Clause 16 - Original Jurisdiction of Family Court

This clause amends paragraph 31(1)(c) to expand the jurisdiction of the Family Court, in matters arising under a law of a Territory, to include all property proceedings between parties to a marriage involving the rights and status of an ex-nuptial child and that child's relationship with its parents.

Clause 17 - Officers of Court

This clause -

- . inserts new sub-section 37(3A) to clarify the powers of the Principal Registrar and Registrars of the Family Court;

- . inserts new paragraphs 37(5)(aa) and (ab) to specify further duties of the Marshal of the Family Court in preparation for the appointment of a full-time Marshal.

Clause 18 - Jurisdiction in Matrimonial Causes

This clause amends section 39 to -

- . enable proceedings other than dissolution proceedings to be instituted when either party to the marriage is ordinarily resident in Australia - amended sub-section 39(4);
- . to make it clear that the date on which the jurisdictional requirements must be satisfied when an oral application is made direct to the Court is the date on which the application is made - amended sub-section 39(4) read with new sub-section 39(4A);
- . confer jurisdiction on the appropriate courts mentioned in sub-sections 39(5) and (6) to hear proceedings for enforcement of orders for custody of ex-nuptial children registered in the Court pursuant to section 67, proceedings instituted under new section 117A or arising under regulations that will be made pursuant to new sections 111A and 111B - amended sub-sections 39(5) and (6); and
- . enable Proclamations to be made selectively terminating the jurisdiction of courts of summary jurisdiction in specified classes of proceedings under the Act - amended sub-section 39(7).

This clause also makes drafting, consequential and transitional amendments.

Clause 19 - Jurisdiction of Family Court

Sub-clause (1) amends sub-section 40(3) in consequence of the amendments to section 39 and inserts new sub-section 40(4A) which will enable Proclamations made under sub-section 40(3) in relation to the jurisdiction of Supreme Courts to be revoked.

Sub-clause (2) is a saving provision in relation to Proclamations already made under sub-section 40(3).

Clause 20 - Law to be Applied

This clause amends sub-section 42(2) to make it clear that the Court shall apply the common law rules of private international law subject to the provisions of the Marriage Act 1961.

Clause 21 - Institution of Proceedings

This clause -

- . inserts new sub-section 44(1A) to permit joint applications for dissolution or nullity of marriage to be made by parties to a marriage;
- . inserts new sub-sections 44(1B) and (1C). These provisions replace repealed sub-section 14(6) and require that where parties to a marriage have been married for less than two years, an application for dissolution of the marriage cannot be filed unless the parties have considered reconciliation with a marriage counsellor. The court may dispense with this requirement in special circumstances;
- . amends sub-section 44(2) to put it beyond doubt that the limitation periods in sub-sections 44(3) and (3A) do not apply to cross-applications;
- . amends sub-section 44(3) both to extend the period during which financial proceedings between parties to a marriage may be instituted without the leave of the Court to, where the parties have been divorced, 12 months from the date on which the decree nisi becomes absolute and also to exclude proceedings under sections 78 or 79A from the limitation period; and

. inserts a new sub-section 44(3A) to provide that where the approval of a maintenance agreement under section 87 is revoked the parties have a period of 12 months from the date of revocation of the approval, the date of the decree absolute of dissolution of their marriage or the date of the making of the decree of nullity at their marriage (whichever is later), in which to commence proceedings for a property settlement or maintenance order under the Act.

Clause 22 - Stay and Transfer of Proceedings

This clause amends section 45 as a consequence of the insertion of new sub-section 4(4).

Clause 23 - Transfer of Proceedings from Court of Summary Jurisdiction in Certain Cases

This clause amends section 46 to specify a procedure to be followed by a Magistrate in proceedings under the Act capable of transfer to an appropriate superior Court to ensure that objections to the exercise of jurisdiction by the Magistrate are made at the outset of the proceedings.

Under the procedure the Magistrate who hears the contested proceedings in question is required, pursuant to amended sub-section 46(1), to advise all the parties, at the outset of the proceedings, that unless they all consent to his hearing and determining the matter, then it must be transferred to the appropriate superior court. Any later objection can only be made with the leave of the court - new sub-section 46(1B).

New sub-section 46(1A) will confirm that proceedings with respect to arrears of maintenance cannot be transferred from a Magistrate.

Clause 24 - Dissolution of Marriage

This clause makes amendments to section 48 in consequence of the insertion of new sub-section 44(1A).

Clause 25 - Interpretation

This clause amends the definition in section 60 of "overseas custody order" as a consequence of the insertion in the Act of definitions of "guardianship" and "custody". The term is used in section 68 and 69.

Clause 26 - Guardianship and Custody

This clause inserts new section 60A to define, for the purposes of the Act, the terms "guardianship" and "custody".

Under new sub-section 60A(1) a person who is a guardian of a child under the Act has the responsibility for the long-term welfare of the child together with all the powers, rights and duties vested by law or custom in the guardian of a child except for the right to have the daily care and control of the child and the right and responsibility to make decisions concerning the daily care and control of the child.

Under new sub-section 60A(2) a person granted custody of a child under the Act has (a) the right to have the daily care and control of the child; and (b) the right and responsibility to make decisions concerning the daily care and control of the child.

New sub-section 60A(3) enables the court to make orders in relation to a child varying the operation of new sub-sections 60A(1) and (2). New sub-sections 60A(4) and (5) are transitional provisions preserving the operation of orders made before the commencement of operation of the clause that grant to a person custody or care and control of a child.

Clause 27 and 28 - Conferences and Reports by Court Counsellors

These clauses amend section 62 and insert a new section 62A to distinguish between a counselling conference with a court counsellor (or welfare officer), the purpose of which is to assist the parties to resolve differences between them as to matters affecting the welfare of the child (which, under section 62, is to remain confidential), and a counselling

14.

conference, the purpose of which is to enable a court counsellor (or welfare officer) to furnish a report to the Court on relevant matters (which, under new section 62A, may be received in evidence in any proceedings under the Act and, thus, be the subject of cross-examination).

The amended sub-section 62(1) will enable the Court to make the order under that sub-section upon the request of a person representing a child pursuant to section 65. New sub-section 62(4) will enable the Court to give appropriate further directions when a party to proceedings fails to attend a conference under the section.

New sub-section 62A(1) will enable the Court in proceedings under the Act where the welfare of a child under 18 years is relevant, to request a court counsellor (or welfare officer) to furnish a report to the Court on relevant matters. Any matter relating to the welfare of the child may be included in the report - new sub-section 62A(2). New sub-section 62A(3) will enable the Court to make orders or give further directions in relation to the preparation of the report, including a direction to a party to the proceedings or the child to attend a conference with the court counsellor or welfare officer. New sub-section 62A(4) imposes a duty upon court counsellors or welfare officers to report failures to comply with orders or directions under sub-section 62A(3), whereupon the Court may give, under new sub-section 62A(5), further directions in relation to the preparation of the report. New sub-section 62A(6) will enable a report furnished to the Court under the section to be received in any proceedings under the Act.

Clause 29 - Powers of Court in Custodial Proceedings

This clause amends section 64 to -

- require the Court, in custody and like proceedings, to consider any wishes expressed by the child and to

15.

give these wishes such weight as the Court considers appropriate in the circumstances of the case - amended paragraph 64(1)(b) and repealed sub-section 64(8);

provide that the Court shall as far as practicable make such order as is least likely to lead to the institution of further proceedings with respect to the custody or guardianship of the child - new paragraph 64(1)(ba);

provide that the Court shall take into account the matters specified in new sub-paragraph 64(1)(bb) in custody and like proceedings;

provide that the Court shall not make an order, save in certain circumstances, in custody and like matters, unless the parties have attended a counselling conference - new sub-section 64(1B);

amend sub-section 64(2) and repeal sub-sections 64(3) and (4) in consequence of the definitions of "guardianship" and "custody" inserted in new section 60A;

enable the Court to make orders that a Court counsellor or welfare officer assist a party to comply with a custody or like order - amended sub-section 64(5); and

enable the Court, when issuing a warrant to take possession of a child subject to a custody or like order, to order persons, Permanent Heads of Commonwealth Departments or officers of Commonwealth instrumentalities to provide information concerning the whereabouts of the child - new sub-sections 64(11A) and (11B).

Clause 30 - Separate Representation of the Child

This clause amends section 65 to enable a child of a marriage to be separately represented in any proceedings under the Act where its welfare is relevant.

Clause 31 - Overseas Custody Orders

This clause amends sub-section 68(4) and inserts new sub-sections 68(5), (6) and (7). Section 68 covers the registration and enforcement in Australia of overseas custody orders.

Sub-section 68(4) is amended to clarify that once the court is satisfied of the matters in paragraphs 68(4)(a) and (b) it may make an order under the sub-section and also to clarify that paragraph 68(4)(b) refers to changes of circumstances since the making of the overseas custody order. New sub-section 68(5) requires the Court, when making an order under sub-section 68(4), to cancel the registration of the overseas custody order.

New sub-section 68(6) will enable the Court, on the basis of the principles set out in the paragraphs 68(6)(e), (f) and (g), to either discharge an Australian custody or access order or cancel the registration of an overseas custody order where the respective orders conflict.

New sub-section 68(7) will prevent the registration under the section of an interim or ex parte overseas custody order.

Clause 32 - Interfering with Child Subject to Custody Order

This clause amends sub-section 70(1) in consequence of the definition of "custody" inserted in new section 60A and also contains textual amendments to sub-section 70(7).

Clause 33 - Certain Children Not to be Taken Out of Australia. Obligations on Owners, &c., of Vessels

This clause inserts two sections (sections 70A and 70B) which will re-enact, in slightly revised form, in the Family Law Act, the provisions of Part III of the Migration Act 1958. The provisions prescribe certain offences relating to the removal from Australia of a child subject to either an existing order or pending proceedings for custody, or guardianship, of or access to that child.

- Certain Children not to be taken out of Australia

Section 70A creates an offence for the removal from Australia of such a child except with either the consent in writing of certain persons (being either each party to the pending proceedings or each person entitled, under the existing order, to the custody or guardianship of, or access to, the relevant child) or in accordance with a court order.

- Obligation on owners, &c., of vessels

Section 70B creates an offence where a master, owner, or charterer of a vessel, or the agent of the owner of a vessel, after being served with a statutory declaration containing details of the order or proceedings, as the case may be, in relation to the child, permits, in certain circumstances, the child referred to in the declaration to leave Australia in the vessel for an overseas destination.

Clause 34 - Right of Spouse to Maintenance

This clause revises section 72 to clarify the meaning of the section.

Clause 35 - Matters to be Taken into Consideration with respect To Maintenance

This clause amends paragraphs (f), (l) and (m) of sub-section 75(2) as follows -

paragraph 75(2)(f): to enable the Court in financial proceedings to take into account the eligibility of either party for an overseas pension, superannuation or like benefits as well as similar Australian benefits;

18.

- paragraph 75(2)(l): to enable the court in financial proceedings to take into account the parenting wishes of not only a former wife but also a former husband; and
- paragraph 75(2)(m): to enable the Court in financial proceedings to take into account the financial circumstances relating to the cohabitation with another person of either party to the proceedings.

Clause 36 - Alteration of Property Interests

This clause amends section 79 to -

- enable a property settlement order made in proceedings under section 79 to be enforced after the death of a party to those proceedings, either against or for the benefit of the estate of the deceased - new sub-section 79(1A);
- permit the Court to adjourn property settlement proceedings brought prior to dissolution proceedings, to enable the parties to the proceedings to consider the likely effects of the proceedings on the marriage or on a child of the marriage - new sub-sections 79(1B) and (1C);
- revise sub-section 79(4) to remove the possibility of an interpretation of the sub-section requiring that there be a nexus between a spouse's contribution and a specific item of property in section 79 proceedings and also to put it beyond

19.

doubt that a contribution to property subsequently disposed of can be taken into account in such proceedings - sub-section 79(4);

- permit the Court to adjourn section 79 proceedings to defer the making of an order in respect of contingent interests of a party in property (e.g. superannuation entitlements) until those interests vest in the party - new sub-sections 79(5) to (7);
- enable the continuation of property settlement proceedings, under section 79, where either party to the proceedings dies before the proceedings are completed and the making and enforcement of an order in such proceedings - new sub-section 79(8); and
- to provide that the Family Court of Australia or a Family Court of a State shall not, save in special circumstances, make a final order in contested property settlement proceedings unless the parties have attended a conciliation conference with a Registrar or Deputy-Registrar of that Court - new sub-section 79(9).

Clause 37 - Setting aside of Orders altering Property Interests

This clause amends section 79A to provide -

- that property settlement orders made under section 79 may be varied or set aside on the additional grounds specified in paragraphs 79A(1)(b) to (d) and also where all parties to the section 79 proceedings consent - sub-sections 79A(1) and (1A);

. that an order made in proceedings under section 79A may be enforced after the death of a party to those proceedings, either against or for the benefit of the estate of the deceased - new sub-section 79A(1B); and

. for the continuation of proceedings under section 79A where either party to the proceedings dies before the proceedings are completed and the making and enforcement of an order in such proceedings - new sub-section 79A(1C).

Clause 38 - Cessation of orders

This clause amends sub-section 82(3) to provide that maintenance orders made after the commencement of operation of the clause cease to have effect upon the death of the person liable to make payments under the order.

Clause 39 - Modification of Maintenance Orders

This clause -

. makes a clarifying amendment to sub-paragraph 83(2)(a)(iii) relating to the variation of maintenance orders in favour of a legal personal representative; and

. inserts new sub-sections 83(6A) and (6B) relating to the recovery of moneys paid under maintenance orders decreased retrospectively under sub-section 83(6).

Clause 40 - Execution of Instruments by order of court

This clause amends section 84 to -

. permit the Court to order the execution by a Court officer of an instrument required by a maintenance agreement - new sub-section 84(1A) and (2); and

. enable the Court to exercise its powers under section 84 to order the execution of documents in all proceedings under the Act and regulations - amended sub-section 84(1).

Clause 41 - Transactions to defeat claims

This clause amends sub-section 85 to enable the Court to deal with transactions likely to defeat any order of the Court in all proceedings under the Act or regulations.

Clause 42 - Ante-nuptial and post-nuptial Settlements

This clause inserts new section 85A which is similar in terms to sub-section 86(2) of the Matrimonial Causes Act 1959. The new section will enable the Court to make property settlement orders with respect to property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage - new sub-section 85A(1). In making such orders, the Court shall take into account the matters referred to in sub-section 79(4) - new sub-section 85A(2).

Clause 43 - Registration of Maintenance Agreements

This clause inserts a new sub-section 86(3A) which deals with the effect upon a maintenance agreement registered under section 86 of the death of a party to the agreement. The sub-section provides that the agreement (other than a provision providing for periodic maintenance payments), unless it provides otherwise, continues to operate notwithstanding the death of a party to the agreement. In the case of provisions providing for periodic maintenance payments, the sub-section provides that, if the agreement so provides, the provision continues to operate notwithstanding the death of the party liable to make payments but, notwithstanding any provision in the agreement, the provision does not continue to operate after the death of a party to the agreement entitled to receive those payments.

Clause 44 - Operation of Maintenance Agreements Entered into in Substitution for Rights under the Act.

This clause revises section 87. The new section 87 will contain the provisions contained in existing sub-sections 87(1), (2), (4), (7), (8), (9), (10) and (11). In addition it will insert some revised and entirely new sub-sections the effect of which will be to:

- extend the grounds upon which a court may revoke the approval of a maintenance agreement approved under section 87 - new sub-section 87(8);

- provide that where its approval is revoked, a maintenance agreement ceases for all purposes to be in force and empowers the court in such circumstances to make such orders as are just and equitable - new sub-section 87(9);
- confer upon courts exercising jurisdiction under the Family Law Act all the powers of the High Court to determine according to the principles of law and equity the validity, enforceability and effect of a maintenance agreement that has been approved under section 87 - new sub-sections 87(11) and (12). (New paragraph (ea) of the definition of "matrimonial cause" in sub-section 4(1) will ensure that such proceedings are now exclusive to the Family Law Act and cannot be brought in the State Courts.);
- permit the court to make orders in respect of the maintenance of a child of a marriage over 18 years of age where maintenance is necessary to enable the child to complete his education or because he is physically or mentally handicapped and the arrangements for him in a maintenance agreement approved under section 87 are no longer proper - new sub-section 87(14);
- provide that a maintenance agreement approved under section 87 continues (unless it provides otherwise) to operate notwithstanding the death of a party to the agreement. However, although any provision in such an agreement for periodic maintenance payments can, if the agreement so provides, operate after the death of the person liable to make the payments, such a provision cannot operate (notwithstanding any provision to the contrary in the agreement) after the death of the person entitled to receive those payments - new sub-section 87(10).

Sub-clauses 44(2) and (3) are transitional provisions.

Clause 45 - Enforcement of Maintenance Agreements

This clause inserts a new sub-section 88(2) which is a necessary consequential amendment on account of the amendments made to section 87 by clause 44.

Clause 46 - Instruments Not Liable to Duty

This clause revises section 90, which provides an exemption from State stamp duties for documents executed under the Act.

Under revised section 90, the following instruments will be exempt from State, Territory or Commonwealth duties or charges -

- . a deed or instrument executed pursuant to an order under Part VIII;
- . a maintenance agreement registered or approved under the Act or regulations made either in connection with or in contemplation of the dissolution or annulment of the marriage to which the agreement relates, or made in connection with the breakdown of the marriage to which the agreement relates, that confers a benefit upon a party to, or a child of, the marriage to which the agreement relates, to the extent that the agreement confers that benefit; and

. a deed or instrument executed pursuant to such a maintenance agreement, that confers a benefit upon a party to, or a child of, the marriage to which the agreement relates, to the extent that the deed or instrument confers that benefit.

Clause 47- Intervention by Child Welfare Officer

This clause inserts new section 91B to enable the Court in any proceedings that affect the welfare of a child, to request the intervention in the proceedings of a State, Territory or Commonwealth Child Welfare Officer.

Clause 48 - Intervention by Other Persons

This clause inserts new sub-section 92(1A) to provide that persons directed in proceedings for principal relief to submit to paternity tests under new section 99A may apply to the Court for leave to intervene in the proceedings.

Clause 49 - Appellate Jurisdiction of Family Court

This clause inserts new section 93A, in similar form to repealed section 29, conferring appellate jurisdiction on the Family Court. New sub-section 93A(2), in similar form to repealed sub-section 29(2), prescribes the evidence that may be considered by the Family Court in an appeal.

Clause 50 - Appeals to Family Court

This clause amends sub-section 94(1) to provide that an appeal also lies to the Full Court of the Family Court from a decree of a Family Court (constituted otherwise than as a Full Court) exercising original or appellate jurisdiction under any law.

Clause 51 - Appeals from Courts of Summary Jurisdiction

This clause -

. makes a textual amendment to sub-section 96(2);
and

. confirms that the Proclamation made under sub-section 96(3), terminating the jurisdiction of State and Territory Supreme Courts to hear and determine appeals instituted under section 96, continues to have effect notwithstanding the amendments made by Section 18 of the Act No. 23 of 1979 in repealing the then sub-section 96(1) and substituting the present sub-sections 96(1) and (1A).

Clause 52 - Procedure

This clause amends sub-sections 97(1) and (2) to provide that, subject to a discretion in the Court to exclude certain persons, proceedings in the Family Court or in a Court of a Territory (other than the Northern Territory) shall be heard in open Court.

Clause 53 - Proceedings in Absence of Parties

This clause inserts new section 98A to enable regulations to be made to provide that undefended divorce proceedings may, in certain circumstances, be dealt with by the Court notwithstanding that neither the parties to the proceedings nor their legal representatives are present in Court.

Clause 54 - Paternity Tests

This clause inserts new section 99A to enable a Court, where the paternity of a child is a question in issue in proceedings under the Act, to direct persons to submit to paternity tests to enable the preparation of a report concerning the paternity of the child - new sub-section 99A(1).

New sub-sections 99A(2) and (3) list the persons who may be directed to submit to paternity tests - the child, the mother of the child and, if the Court is of the opinion that the information that could be obtained from the tests being carried out on another person might assist the preparation of the paternity report, that other person.

New sub-section 99A(4) provides that a person is not to be liable to any penalty for failure to comply with a direction to submit to paternity tests, but the Court may draw such inferences from the failure to comply as appear proper in the circumstances.

New sub-section 99A(5) provides that where a child under 18 years old has been directed to submit to paternity tests, the tests shall not be performed on the child except with the consent of a guardian of the child. The Court may draw such inferences from a guardian's refusal or failure to consent to the tests as appear proper in the circumstances.

Where a guardian consents to paternity tests being performed on the child, the person who performs the tests are not to be subject to criminal or civil actions in respect of the proper performance of the tests (e.g. assault), but may still be liable for the negligent performance of the tests - new sub-section 99A(6).

New sub-section 99A(7) will enable the report concerning the paternity of the child to be received in evidence. Under new sub-sections 99A(8) and (9) the Court may, or a party to the proceedings with the leave of the Court may, require a person to attend before the Court for examination or cross-examination.

New sub-section 99A(10) will enable the Court to make such order as it thinks just in relation to the cost of the paternity tests.

Clause 55 - Overseas Decrees

This clause makes the following amendments to section 104 which are necessary to enable Australia to accede to the Hague Convention on the Recognition of Divorces and Legal Separations dated 1 June 1970 -

- . provisions for the recognition of overseas decrees of legal separation in sub-sections 104(1) (3), (4), (5), (7), (8) and (10);
- . provision in sub-sections 104(7) for a discretion in the Australian Court to treat as proved any facts found by an overseas court or otherwise established for the purposes of the overseas law where the respondent did not appear in the overseas proceedings;
- . provision in sub-section 104(7) for the Australian court to be bound by the findings of fact on the basis of which the overseas court assumed jurisdiction to grant the overseas decree and for a discretion in the Australian court to treat as proved any other facts found by the court where the respondent appeared in the overseas proceedings;
- . deletion of the provision in paragraph 104(4)(a) which permitted refusal of recognition of an overseas decree on the ground that it was obtained by fraud.

The clause also amends sub-section 104(1) and (3) to provide for recognition of an overseas decree of dissolution, annulment or legal separation which was obtained as a result of a joint application by the parties to the marriage.

Clause 56 - Enforcement Generally

This clause amends sub-section 105(3) to permit, where a person bound by a decree under the Act has died, any Court in which the decree is registered to grant leave pursuant to the sub-section to enforce the decree to the extent permitted against the estate of the deceased person bound by it.

Clause 57 - Persons Not to Be Imprisoned for Failure to Comply with Certain Orders

This clause amends sub-section 107(3) to put it beyond doubt that section 108 permits the Court to imprison persons for contempt constituted by failure to obey a Court order relating to the payment of maintenance.

Clause 58 - Contempt

This clause amends section 108 to make it clear that a Court exercising jurisdiction under the Act has power to punish persons for any contempt of that Court.

Clause 59 - Overseas Enforcement of Maintenance Orders and Enforcement of Overseas Maintenance Orders

This clause amends section 110 -

- . by widening the definition of "maintenance order" in sub-section 110(1), to enable an overseas maintenance order made with respect to a child over 18 years for the purpose of education or because the child is handicapped to be enforced in Australia and an Australian order to a like effect enforced overseas;

- . to provide for confirmation and enforcement of overseas maintenance orders to be prosecuted by Commonwealth or State Officers at their discretion.

Clause 60 - Convention on Recovery Abroad of Maintenance

This clause amends section 111 to clarify the regulation making power to permit regulations to be made to enable Australia to accede to the Convention on the Recovery Abroad of Maintenance signed at New York on 20 June 1956.

Clause 61 - Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations Convention on Civil Aspects of International Child Abduction

This clause -

- . inserts new section 111A which will permit regulations to be made to enable Australia to accede to the Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations signed at The Hague on 2 October 1973; and
- . inserts new section 111B which will permit regulations to be made to enable Australia to accede to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980.

Clause 62 - Arrangements with the States

This clause amends section 112 to enable arrangements to be made for the performance of functions under the Act, as well as under the regulations, by State and Territory officers, including the holders of judicial office.

Clause 63 - Interpretation

This clause inserts a new section 112A which will put it beyond doubt that courts exercising jurisdiction under the Family Law Act can entertain proceedings between parties to a marriage for declarations, orders and injunctions in circumstances where the marriage is void.

Clause 64 - Injunctions

This clause amends section 114(1) to include in the list of injunctions a Court may grant, in proceedings of the kind referred

to in paragraph (e) of the definition of matrimonial cause in sub-section 4(1), injunctions referred to in new paragraphs 114(1)(b) and (c). It also makes textual amendments to sub-section 114(6).

Clause 65 - Powers of Arrest

This clause inserts new section 114AA to enable a Court by order to attach a power of arrest to an injunction granted by it or another court either for -

- . the personal protection of a party to, or a child of, a marriage; or
- . to restrain one party from entering the residential premises or place of work of the other party or the residential premises or place of work or education of the child

where the Court is satisfied that the person against whom the injunction is directed has -

- . threatened or caused bodily harm to the party, or a child of, the marriage;
- . is likely to cause bodily harm to the party or child; and
- . has been given notice of the application for the attachment of a power of arrest to the injunction (unless, where bodily harm has already been caused, the Court considers that in the circumstances of the case it is appropriate to attach the power of arrest without notice of the application having been given) - new sub-section 114AA(1).

Under new sub-section 114AA(2), once a power of arrest has been attached to an injunction a police officer may, if he believes on reasonable grounds that the person against whom the injunction is directed has, since the order attaching the power of arrest was made, breached the injunction, arrest that person without warrant.

New sub-sections 114AA(3), (4), (5) and (7) deal with the bringing of persons arrested under the section before a Court to be dealt with for breach of the injunction.

Under new sub-section 114AA(6) a power of arrest attached to an injunction ceases to have effect either six months after the court order or on the date specified by the Court if that date is less than six months from the date of the order.

The clause also inserts new section 114AB to enable preservation of the operation of State or Territory domestic violence law.

Clause 66 - Establishment of Institute

This clause amends paragraph 114B(2)(A) to make it clear that the functions of the Institute of Family Studies include conducting research.

Clause 67 - Annual Report

This clause inserts new section 114N, which is in similar terms to regulation 5 of the Family Law (Institute of Family Studies) Regulations, to include in the Act a provision requiring the Institute of Family Studies to submit an Annual Report to the Attorney-General as soon as practicable after 30 June in each year. New sub-section 114N(2) will require the Report to be tabled in Parliament within a specified time.

Clause 68 - Family Law Council

This clause amends section 115 to -

- clarify that the function of the Council specified in paragraph 115(3)(b) includes the working of legal aid in relation to any aspect of family law;
- insert new sub-sections 115(5), (5A), (5B), (5C), (6A), and (6B) dealing with the remuneration and the term of appointment of members of the Family Law Council;

revise sub-section 115(9) and insert a new sub-section 115(10) to make the reporting requirements for the Family Law Council the same as for the Institute of Family Studies

Clause 69 - Costs

This clause amends sub-section 117(2) to provide that where a Court, in proceedings under the Act or regulations, proposes to make an order for costs under sub-section 117(2), it shall have regard to the factors listed in new sub-section 117(2A).

Clause 70

This clause inserts three new sections (section 117A, 117B and 117C) as follows -

• New section 117A: Reparation for certain losses and expenses relating to Children: The new section will enable orders to be made against a person who has been found to have removed without just cause a child to another part of Australia or overseas to make reparation to the Commonwealth, a Commonwealth instrumentality or any other person for the loss suffered or expense incurred in restoring the child to the possession of the person entitled to the possession of the child.

• New section 117B: Interest on Moneys Ordered to be Paid: The new section will provide for interest to accrue, at a prescribed or other rate, on lump sums of money ordered to be paid under the Act unless the Court otherwise orders; and

• New Section 117C: Offers of Settlement: The new section will provide a procedure for the filing in court of offers of settlement in financial proceedings under the Act (other than proceedings to enforce a decree in such proceedings) which may be taken into account by a Court in making an order for costs.

Clause 71 - Frivolous or Vexatious Proceedings

This clause amends section 118 to enable a Court, when dismissing proceedings as frivolous or vexatious, to make an order preventing the person whose proceedings were dismissed from instituting further proceedings of the type dismissed without the leave of the Court.

Clause 72 - Restrictions on Publication of Court Proceedings

This clause repeals section 121 and substitutes a new section 121.

New sub-section 121(1) creates an offence where a person publishes in a newspaper or periodical publication or by radio broadcast or television, or otherwise disseminates by any means to the public (or a section of it), any account of any proceedings (or any part of the proceedings), including proceedings commenced before the commencement of the new section, that identifies either a party to the proceedings, a person related to or associated with a party to the proceedings, a person who is alleged to be in any other way concerned in the matter to which the proceedings relate or a witness in the proceedings.

New sub-section 121(2) creates a similar offence in relation to a publication of court lists (except as permitted by the Rules of Court) identifying names of parties to proceedings under the Act. The penalties for an offence against section 121 are increased.

New sub-section 121(3) lists certain particulars which, if contained in any account of proceedings, shall be taken to identify a person.

The offences are indictable offences but, pursuant to new sub-section 121(6) and (7), proceedings in respect of the offences may be heard by a court of summary jurisdiction. New sub-section 121(9) contains certain exceptions to the offences created in the section. New sub-section 121(11) contains a definition of the word "court" for the purposes of the section. Under sub-section 121(8), proceedings for an offence against the section shall not be commenced except by, or with the written consent of, the Attorney-General.

Part III - Amendments Relating to
Rules of Court and Regulations

Clause 73 - Powers of Registrars.
Independence of Registrars

This clause inserts new sections 37A and 37B.

New section 37A provides that Registrars and Deputy Registrars may exercise the powers specified in new paragraphs 37A(1)(a) to (m) and, under new paragraph 37A(1)(n), a power of the Court prescribed by the Rules. New sub-sections 37A(6) and (7) provide that the court may review an exercise of power by a Registrar either on the application of a party or of its own motion. New sub-section 37A(5) provides that a Registrar is not subject to the direction or control of any person or body in relation to the manner in which he exercises the powers specified in new sub-section 37A(1). New sub-section 37A(8) provides for the transfer of applications from a Registrar to the Court.

New section 37B clarifies the powers of the Chief Judge, Principal Registrar and Registrars in relation to the performance of functions and exercise of powers under the Act - new sub-sections 37B(1) to (3). New sub-section 37B(4) provides that the Principal Registrar, a Registrar or Deputy Registrar may be subject to disciplinary proceedings under the Public Service Act 1922 in respect of the performance of functions or exercise of powers under the Principal Act (other than a power under new sub-section 37A(1)) upon the request of the Chief Judge only.

Clause 74 - Repeal of Section 106

This clause repeals section 106 in consequence of the provisions of new section 123 which will enable Rules of Court to be made providing for the enforcement and execution of decrees of the Family Court and other Courts exercising jurisdiction under the Act.

Clause 75

This clause repeals section 123 and inserts new sections 123, 124 and 125 as follows -

. Section 123: Rules of Court: The new section provides for the making, by Judges of the Family Court and of State Family Courts, of Rules which may prescribe the practice or procedure that is to be followed in the Family Court and any other Courts exercising jurisdiction under the Act. Paragraphs (a) to (u) of sub-section 123(1) list particular matters that the Rules of Court may provide for. The Rules are subject to disallowance by Parliament.

. Section 124: Rules Advisory Committee: The new section provides for the establishment of a Rules Advisory Committee to provide advice in relation to the making of Rules of Court.

. Section 125: Regulations: The new section enables the Governor-General to make regulations not inconsistent with the Act. Paragraphs (a) to (g) of new sub-section 125(1) list the particular matters which the regulations may prescribe.

Clause 76 - Further amendments

This clause sets out further amendments to the Act contained in a Schedule to the Bill, all of which are consequential on the insertion of new sections 123 and 125.

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

Received from the Senate and read a first time, 6 October 1983

(Minister representing the Attorney-General)

A BILL

FOR

An Act to amend the *Family Law Act 1975* to provide for grants to the States and to the Northern Territory for legal aid to be made subject to conditions, to provide for payments for legal aid to be made subject to conditions and to provide for the making of regulations with respect to fees payable to legal practitioners by bodies providing legal aid

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title, &c.

1. (1) This Act may be cited as the *Family Law Amendment (Legal Aid Costs) Act 1983*.
- (2) The *Family Law Act 1975* is in this Act referred to as the Principal Act.

Commencement

2. This Act shall come into operation on the day on which it receives the Royal Assent.

3. Before section 117 of the Principal Act the following sections are inserted:

Financial assistance subject to conditions

"116A. (1) Payments by way of financial assistance, for the purposes of, or in connection with, the provision of legal assistance in connection with matters arising under this Act or under the regulations, may be made to a State or to the Northern Territory—

- (a) out of moneys lawfully available; and
- (b) on such conditions (if any) as are specified by the Minister by instrument in writing, being conditions relating to the provision of legal assistance in connection with such matters.

"(2) A payment by way of financial assistance that is made on conditions specified by the Minister in an instrument made under sub-section (1) is made on the additional condition that, if a condition so specified is not fulfilled, the State or the Northern Territory, as the case requires, will, if the Minister so determines, repay to the Commonwealth such amount (not being an amount greater than the amount of the payment) as the Minister specifies in the determination as the amount that should be repaid by the State or by the Northern Territory, as the case may be.

"(3) An amount repayable by a State or by the Northern Territory to the Commonwealth in accordance with the condition provided for in sub-section (2) is a debt due by the State or by the Northern Territory, as the case may be, to the Commonwealth.

"(4) This section binds the Crown in right of the Commonwealth, of each of the States and of the Northern Territory.

Payments subject to conditions

"116B. (1) Payments may be made by the Commonwealth, for the purposes of, or in connection with, the provision of legal assistance in connection with matters arising under this Act or under the regulations—

- (a) out of moneys lawfully available; and
- (b) on such conditions (if any) as are specified by the Minister by instrument in writing, being conditions relating to the provision of legal assistance in connection with such matters.

"(2) A payment that is made on conditions specified by the Minister in an instrument made under sub-section (1) is made on the additional condition that, if a condition so specified is not fulfilled, the person to whom, or the authority or body to which, the payment was made will, if the Minister so determines, repay to the Commonwealth such amount (not being an amount greater than the amount of the payment) as the Minister specifies in the determination as the amount that should be repaid by the person, authority or body, as the case may be.

"(3) An amount repayable by a person, authority or body to the Commonwealth in accordance with the condition provided for in sub-section (2) is a debt due by the person, authority or body, as the case may be, to the Commonwealth.

"(4) This section binds the Crown in right of the Commonwealth, of each of the States, of the Northern Territory and of Norfolk Island.

Payments to legal practitioners by legal aid bodies

"116C. (1) The regulations may, in relation to matters included in a class of matters arising under this Act or under the regulations, fix or limit, or provide for the fixing or limiting of, the amounts that may be paid by relevant authorities to legal practitioners acting in such matters.

"(2) A relevant authority that pays, to a legal practitioner acting in a matter arising under this Act or under the regulations, an amount that exceeds the amount that the relevant authority is permitted, by regulations made under sub-section (1), to pay to that legal practitioner in respect of that matter is, if the Minister so determines by instrument in writing, liable to pay to the Commonwealth such amount as the Minister specifies in the instrument, not being an amount greater than the amount of the excess.

"(3) An amount payable by a relevant authority to the Commonwealth in accordance with a determination of the Minister under sub-section (2) is a debt due by the relevant authority to the Commonwealth.

"(4) This section, and regulations made under sub-section (1), bind the Crown in right of the Commonwealth, of each of the States, of the Northern Territory and of Norfolk Island.

"(5) In this section—

'relevant authority' means a person, authority or body (including an authority or body established by or under a law of a State or Territory) that, from time to time, receives relevant funding;

'relevant funding', in relation to a person, authority or body, means funding received, whether directly or indirectly, by the person, authority or body from the Commonwealth for the purposes of, or in connection with, the provision of legal assistance by the person, authority or body in connection with matters arising under this Act or under the regulations."

NOTE

1. No. 53, 1975, as amended. For previous amendments, see Nos. 63, 95 and 209, 1976; No. 102, 1977; No. 23, 1979; and No. 2, 1982.