

1976

PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

FAMILY LAW AMENDMENT BILL 1976

Explanatory Memorandum of amendments and new clause
to be moved by the Attorney-General.

(Circulated by the Attorney-General)

Amendment No. (1)

The opportunity is being taken to alter the commencement provisions. The proposal is that the bulk of the amendments will come into operation on 1 July 1976. This will provide a period in which the legal profession will be able to obtain copies of the legislation. To meet the Western Australian situation, the amendments to sections 39 and 41 would come into operation on the day on which the Act receives the Royal Assent.

Amendment No. (2)

The new sub-section 39(9) will provide expressly that every court having jurisdiction under the Act has jurisdiction to deal with matters transferred to the court. At present this jurisdiction to deal with transferred matters arises only by implication.

Amendment No. (3)

This amendment, together with amendment No. (2), will make it clear beyond doubt that the Family Court of Western Australia will have jurisdiction to deal with all the cases that it is proposed will be transferred to that Court in accordance with new sub-section 41(4A).

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EXPLANATORY MEMORANDUM

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

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NOTES ON CLAUSES

Clause 1 - Short title and citation

Clause 2 - Commencement

Except for Clauses 28 and 29, which are to operate retrospectively to 5 January 1976 (the date of commencement of the Family Law Act), the Bill would come into operation on the day on which it receives the Royal Assent.

Clause 3 - Interpretation

"Court of summary jurisdiction" - The existing definition is to be omitted because it is unnecessary. Also, it could be confusing in its reference to "a Family Court of a State" because it has been specifically prevented by sub-section 41(5) from applying to State Family Courts established pursuant to that section.

"Family Court" - The existing definition is to be omitted from sub-section 4(1) because it is to be covered in a proposed new paragraph 4(1A)(a).

"Financial or custodial proceedings" - This is a formal amendment consequential on the amendment to the definition of "matrimonial cause".

"Marriage counsellor" - The existing definition in the Act is to be amended in two ways. First, the definition is

specifically to include the Principal Director of Court Counselling (the new title for the Director of Counselling and Welfare - see clause 16 below) and Directors of Court Counselling, as well as court counsellors (the new title for counsellors and welfare officers appointed under section 37 - see clause 16 below). Second, the definition has been expanded to include marriage counsellors attached to State Family Courts established pursuant to section 41.

"Matrimonial cause" - The existing definition is to be amended as a result of the High Court's decision on the validity of the Act. The existing paragraph (c) of the definition is replaced by new paragraphs (c), (ca) and (cb). The changes made are as follows.

- . Proceedings for maintenance of a party and for guardianship or custody of or access to a child are limited to proceedings between the parties to a marriage.
- . Proceedings regarding property of the parties to a marriage are limited to pending or completed proceedings between them for principal relief.
- . Proceedings for maintenance of a child are limited to proceedings between the parties to the marriage and proceedings by or on behalf of the child against one or both of them.

Paragraph (e) is replaced by a new paragraph (e) which limits proceedings for an injunction to proceedings between the parties to the marriage.

"Registrar" - The existing definition is to be amended in consequence of the amendment to section 37 to redesignate

the Registrar of the Family Court as the "Principal Registrar", and to ensure that references in the Act and Regulations to a "Registrar" of a court are applicable to Registrars and Deputy Registrars of the Family Court.

"Voluntary organisation" - This is a new definition to be inserted to enable the Attorney-General to grant money to a branch of an organisation which is engaged in marriage counselling, where the organisation as a whole is not predominantly engaged in marriage counselling and could not therefore be approved under section 12 for the purposes of granting it a subsidy. This brings the range of organisations which can be so approved into line with that under the superseded Matrimonial Causes Act.

"Welfare Officer" - This definition is to be amended in two ways. First, the definition is to be expanded to include the Principal Director of Court Counselling (the proposed new title for the Director of Counselling and Welfare - see clause 16 below), Directors of Court Counselling and court counsellors (the proposed new title for both counsellors and welfare officers appointed under section 37 - see clause 16 below). Second, the definition is to include welfare officers attached to State Family Courts established pursuant to section 41.

Proposed new sub-section (1A) provides that references in the Act to "the Family Court" are references to the Family Court of Australia, and references to "a Family Court of a State" are references to a State Family Court established pursuant to section 41. (Western Australia has passed legislation to establish such a State Family Court.)

Clause 4 - Certain children deemed to be children of a marriage

As a result of the High Court's decision on the validity of the Act, section 5 is to be replaced by a new section 5 which, for the purposes of the Act, limits "children of a marriage" to natural born and adopted children of both parties to the marriage. For the purposes of section 63, under which a decree nisi does not become absolute unless the court has declared its satisfaction regarding the welfare of children under 18, "children of the marriage" is defined in the wider terms of existing section 5.

Clause 5 - Transitional

The amendment made by paragraph (a) of this clause would enable either party to pending divorce proceedings at the commencement of the Family Law Act who had been separated for at least 12 months to apply to have the case dealt with as if the proceedings had been instituted under the Act on the no-fault ground of divorce. At present, under sub-section 9(2) of the Act, only an "applicant" (defined in sub-section 4(1) to include a petitioner or cross-petitioner) may make such an application.

Paragraph (b) of the clause inserts a new sub-section (7A) to ensure that decrees nisi made after 5 January 1976 in proceedings continued under the transitional provisions of the Family Law Act are subject to section 63 of that Act regarding proper arrangements for the welfare of children and not to section 71 of the repealed Matrimonial Causes Act,

which contained a similar, but not identical, provision. The amendment preserves any orders already made under section 71 of the repealed Act in proceedings continued under section 9 of the Family Law Act.

Paragraph (b) of the new sub-section (7A) provides that decrees nisi made after 5 January 1976 in such continued proceedings become absolute in 1 month consistently with decrees nisi made before the commencement of the Act that had not become absolute by that date, instead of 3 months as provided under the repealed Act.

Clause 6 - Child welfare law not affected

Section 10 of the Act exempts from the operation of the maintenance and custody provisions of the Act children who are State wards or under the care and control of a State Welfare Minister. The amendment extends these categories of children exempted to include children who are awaiting adoption and are under the guardianship of a State Director of Child Welfare or an approved adoption agency.

Paragraph (c) of the clause provides for the exceptional power to make an order in respect of children exempted under section 10, which is conferred on the Family Court of Australia and Supreme Courts, to be extended to State Family Courts.

Clause 7 - Conciliation

The amendments made to paragraphs (a) and (b) of sub-section 14(2) of the Act are merely drafting ones. Paragraph (c) of sub-section 14(2) has been repealed to

take away the responsibility for nominating a marriage counsellor from a Judge or magistrate who has adjourned proceedings to enable parties to attempt a reconciliation. Instead, a new sub-section 14(2A) gives him the option in those circumstances of advising parties to attend a marriage counsellor or to request the Principal Director of Court Counselling or the appropriate officer in a State Family Court to nominate some other suitable person to help them attempt a reconciliation.

Paragraph (c) of the clause substitutes a new paragraph 6(a) to provide for the new title of "Principal Director of Court Counselling" of the Family Court (see clause 16 below) and to include reference to the counselling service attached to State Family Courts.

Clause 8 - Notice seeking counselling

The amendments to be made by this clause would enable a notice seeking counselling, which section 15 provides may be filed in the Family Court of Australia, to be filed in a State Family Court. The clause also makes a formal amendment to sub-section (2) to provide for the new title of "Principal Director of Court Counselling" of the Family Court (see clause 16 below).

Clause 9 - Advice as to counselling

The amendments made by this clause provide for the new title "Principal Director of Court Counselling" of the Family Court (see clause 16 below), and add a reference to the counselling facilities of State Family Courts.

Clause 10 - Admissions made to marriage counsellors, etc.

This is a formal amendment consequential upon the amendments made by clause 7.

Clause 11 - Appointment, removal and resignation of Judges

The new sub-section (2A) to be inserted in section 22 by this clause would permit a person to be appointed and hold office as a Judge of the Family Court while continuing to hold office as a Judge of a State Family Court. The new sub-section (2B) would enable a Judge of the Family Court of Australia to accept an appointment and hold office as a Judge of a State Family Court without disqualifying himself from continuing in his existing office. These amendments have been included at the request of Western Australia, which has established its own State Family Court pursuant to section 41.

Clause 12 - Salary and allowances

This clause repeals existing section 25 and substitutes a new section providing for the rates of salaries and allowances of Judges of the Family Court of Australia to be such as are fixed from time to time by Parliament. The rates will, in fact, be fixed in the Remuneration and Allowances Act as a result of an amendment being made to that Act. New sub-section 25(3) provides for a standing appropriation of the Consolidated Revenue Fund for the payment of Judges' salaries and allowances.

Clause 13 - Exercise of Jurisdiction

The amendment made by paragraph (a) ensures that

appeals from Territory Supreme Courts to the Family Court, as in the case of appeals from State Supreme Courts, will be heard by a Full Court of the Family Court.

Paragraph (b) of the clause inserts a new sub-section (3A) to provide that the Court's jurisdiction to hear and determine a case stated under proposed new section 94A (see clause 30 below) is to be exercised by a Full Court. Paragraph (c) ensures that sub-section 28(4), which enables the remaining Judges of a Full Court to complete the hearing of an appeal if one Judge becomes unable to continue, applies also to the hearing of a case stated under section 94A (see clause 30 below).

Clause 14 - Appellate jurisdiction

This clause omits sub-section 29(2), which gives the Family Court jurisdiction to hear appeals under section 96 only where the Supreme Court of a State has no such jurisdiction, to preclude the possibility of a conflict between it and sub-section 96(2), which confers the same jurisdiction on the Family Court to hear appeals under section 96 without, however, qualifying that jurisdiction in the way that sub-section 29(2) does.

Clause 15 - Court divided in opinion

This amendment provides that an evenly divided Full Court of the Family Court will decide an appeal from a State Family Court or Territory Supreme Court in the same way as appeals from single Judge decisions of the Family Court and appeals from State Supreme Courts.

Clause 16 - Officers of Court

Paragraph (a) of the clause provides for the new office of "Principal Registrar" (which will replace the existing office of Registrar) and for such Registrars and Deputy Registrars as are necessary. Paragraph (b) of the clause substitutes the new office of "Principal Director of Court Counselling" for the existing office of Director of Counselling and Welfare and provides for Directors of Court Counselling and court counsellors in substitution for counsellors and welfare officers. The clause also adds a new sub-section (9) providing that officers of the Family Court are to be employed under the Public Service Act or are to be holders of offices in State Courts.

Clause 17 - Establishment of State Family Courts

Paragraph (a) of the clause ensures that the Commonwealth Government may provide funds for the provision of counselling facilities for State Family Courts.

Paragraph (b) has been included because a Proclamation under section 41 enabling a State Family Court to exercise jurisdiction under the Act has the effect of terminating the jurisdiction of the Supreme Court of the State concerned to hear new matters from the date of operation of the Proclamation. Paragraph (b) enables certain proceedings to be instituted after the commencement of the Proclamation in the Supreme Court where they are related to, or between parties to, proceedings that are pending in the Supreme Court at the commencement of the Proclamation.

The amendment made by paragraph (c) of the clause would allow a Proclamation to be made declaring that section 41 applies to a State Family Court in which there are available counselling facilities that are not necessarily the same counselling facilities that are available to the Family Court of Australia.

Paragraph (d) of the clause provides for a party to proceedings before a Supreme Court to have the same right to apply for their transfer to a State Family Court as he now has under sub-section 40(6) to apply for their transfer to the Family Court of Australia.

Clause 18 - Institution of proceedings

Paragraph (a) of sub-clause (1) amends sub-section 44(1) to make it clear that regulations may prescribe other ways of instituting proceedings besides by application. Sub-clause (2) preserves any regulations made under the Act before the commencement of the clause that might have been invalid for want of the amendment made by the clause.

The amendment made by paragraph (1)(b) of the clause is a formal amendment consequential upon the amendment of the definition of "matrimonial cause" effected by clause 3.

Clause 19 - Staying and transfer of proceedings

Paragraph (a) is a formal drafting amendment. Paragraph (b) is also a formal amendment to ensure that sub-section 45(2) can apply to all proceedings continued in accordance with section 9.

Clause 20 - Rights of guardianship and custody of children

The amendment made by this clause abolishes a court's power to order the continuance of the operation of a custody order in respect of a child after the child has been adopted by someone who is not a party to the marriage.

Clause 21 - Powers of court in custodial proceedings

Paragraphs (a) and (b) of this clause make formal, drafting amendments. The amendment made by paragraph (c) ensures that a custody order may be varied by a court other than the court that made it.

Paragraph (d) substitutes re-drafted sub-sections (9) and (10) in section 64 to spell out the powers that may be given to a person to execute a warrant issued to enforce a custody or access order. They include powers to search vehicles, vessels, aircraft or places by force if necessary, and to take possession of the child by force if necessary. Paragraph (d) also inserts new sub-sections (10A) and (10B) to make it clear that warrants under sub-sections (9) and (10) may be addressed to named persons or the holders for the time being of specified offices, and that they may or may not be enforcement officers appointed under sub-section 12.

The amendment effected by paragraph (e) of the clause enables the appointment as enforcement officers of either named persons or the holders for the time being of specified offices.

Clause 22 - Registration inter-State of orders for custody of ex-nuptial children

This clause omits the definition of "court" in section 67, because it is unnecessary and because it excludes from the operation of the section orders made in a State Family Court. Paragraph (b) of the clause omits words, which, as a matter of drafting, are unnecessary.

Clause 23 - Matters to be taken into consideration with respect to maintenance

This is a formal amendment to preclude the possibility of a conflict between this section and other sections of Part VIII which direct the court to take matters other than those listed in sub-section 75(2) into account, e.g., sub-section 79(4).

Clause 24 - Alteration of property interests

Sub-section 79(3) limits the jurisdiction of a court to order a property settlement to applications by a party to pending or completed divorce proceedings or a party who has filed a notice seeking counselling. The clause omits the sub-section in consequence of the amendment to the definition of "matrimonial cause" limiting its application to property to proceedings between the parties to a marriage that are related to proceedings for principal relief (see clause 3 above).

Clause 25 - Setting aside of orders altering property interests

This clause adds a new section 79A which enables a court to set aside an order under section 79 altering

interests in property where the court is satisfied that the order has been obtained by fraud, duress, false evidence or suppression of evidence. In exercising this power, the court is to have regard to the interests of bona fide purchasers or persons interested.

Clause 26 - Modification of maintenance orders

This is a formal amendment to insert a reference to section 73 in the interests of consistency.

Clause 27 - Institution of maintenance proceedings by authorized authority or person

This clause provides for a new section 89A to enable regulations to be made authorizing prescribed authorities or persons to institute and prosecute maintenance proceedings on behalf of a party to, or a child of, a marriage.

Clause 28 - Instruments not liable to duty

This amendment would ensure that the exemption of agreements, deeds and instruments executed under Part VIII from duty under State or Territory law would extend to duty imposed by any law of the Commonwealth that applies only to a Territory.

Clause 29 - Appeals to Family Court

This clause provides for the substitution of a re-drafted sub-section 94(1) which provides that appeals may be taken to a Full Court of the Family Court from decisions of Territory Supreme Courts as well as those of the Family Court, State Family Court and State Supreme Courts. It also ensures that an appeal may be taken from

a decree made in any proceedings continued in accordance with section 9 of the Act.

Clause 30 - Case stated

This clause inserts a new section 94A which enables a question of law arising in proceedings in the Family Court to be referred to a Full Court of the Family Court without the need for appeal.

Clause 31 - Appeals to High Court

Paragraph (a) of this clause ensures that the restrictions provided for in section 95 on appeals to the High Court apply to appeals from Territory Supreme Courts (which are provided for in Acts other than the Judiciary Act) as well as those from State Supreme Courts. Paragraph (b) of the clause substitutes for "judgment, decree or order" the word "decree", which is defined in sub-section 4(1) and includes "judgment" and "order". Paragraph (c) makes a drafting amendment.

Clause 32 - Appeals from courts of summary jurisdiction

Both these amendments are formal, drafting amendments.

Clause 33 - Decrees under this Act

This is a formal, drafting amendment, consequential upon the attainment of independence by Papua New Guinea.

Clause 34 - Methods of enforcement

Paragraph 106(a) has been re-drafted to ensure beyond any doubt that the jurisdiction to enforce decrees made under the Act can be conferred by regulation on the Family Court as well as on State and Territory courts.

Paragraph 106(b) has been re-drafted to enable prescribed authorities or persons of the same kind as are referred to in new section 89A (see clause 27 above) to institute and prosecute proceedings for the enforcement of maintenance orders.

Clause 35 - Contempt

This is an amendment to provide that wilful disobedience of a decree of a court made in the exercise of jurisdiction under the Act constitutes contempt of that court and would be punishable as such.

Clause 36 - Overseas enforcement of maintenance orders

The proposed paragraph 110(2)(ba) is to be inserted to ensure that there is power under the Act to make regulations to confer jurisdiction on courts to make provisional maintenance orders for confirmation and enforcement overseas. The amendment contained in paragraph (b) of the clause is consequential upon the insertion of the new paragraph 110(2)(ba).

Clause 37 - Regulations

This is a formal, drafting amendment to replace "judgments" with "decrees", which is widely defined in sub-section 4(1) and includes "judgments".

Clause 38 - Additional amendments

This clause gives effect to the Government's decision to revert for internal purposes to the title "Commonwealth of Australia" or derived expressions such as "Commonwealth Government", and to amend existing legislation accordingly when the legislation is being amended for other reasons.