

1981

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

FAMILY LAW AMENDMENT BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by the Attorney-General,  
Senator the Honourable P.D. Durack, Q.C.)

## Outline

The main purpose of the Bill is to amend the Family Law Act 1975 to implement a substantial number of the recommendations of the Joint Select Committee on the Family Law Act, as well as certain recommendations of the Family Law Council.

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

- . expanding the jurisdiction of courts exercising jurisdiction under the Act to entertain -
  - (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;

. 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;

. replacement of the requirement for a court to give effect in custody proceedings to the wishes of a child who has attained the age of 14 years by a provision enabling the wishes of children of all ages to be taken into account to the extent appropriate;

. 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 CLAUSESPart I - PreliminaryClause 1 - Short Title, &c.

This clause provides for the citation of the Bill.

Clause 2 - Commencement

Part I of the Act is to come into operation on the date the Act receives the Royal Assent. Part II of the Act is to come into operation on the twenty-eighth day after the day on which the Act receives the Royal Assent. Part III of the Act is to come into operation on such date as is fixed by Proclamation.

Part II - Miscellaneous AmendmentsClause 3 - Interpretation

This clause amends sub-section 4(1) as follows -

"financial or custodial proceedings" - An amendment is made to the definition in consequence of the insertion of paragraphs (ea) and (eb) in the definition of "matrimonial cause".

"marriage counselling" - A definition is to be inserted. The expression is used in Part II of the Principal Act in relation to the approval by the Attorney-General of marriage counselling organisations and financial assistance to such approved organisations.

"matrimonial cause" - The existing definition is to be amended to expand the jurisdiction of courts exercising jurisdiction under the Act to deal with -

- . proceedings between the parties to the marriage with respect to the property of parties to the marriage being proceedings arising out of the marital relationship (sub-paragraph (ca)(i) of the definition);

- . proceedings for the custody, guardianship or maintenance of, or access 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) of the definition);

- . proceedings for the custody, guardianship or maintenance of, or access to, a child of a marriage where only one party to the marriage is a party to the proceedings (paragraph (ce) of the definition);

- . where one of the parties 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 with respect to the enforcement of a maintenance agreement registered in a court under section 86 or deemed to be registered in a court under section 87 (paragraph (ea) of the definition);

. proceedings between the parties to the marriage in relation to the property of parties to a marriage being proceedings in relation to overseas decrees of dissolution or annulment of marriage, or legal separation of parties to a marriage, recognized as valid in Australia under section 104 (sub-paragraph (ca)(iii) of the definition);

. proceedings for the enforcement of either a decree, made under the law of an overseas country in certain proceedings of a kind referred to in the definition of "matrimonial cause", or a maintenance agreement made in an overseas country (paragraph (eb)).

"medical procedure" - A definition is to be inserted. The new section 5A uses this term.

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

Clause 3 also inserts sub-sections 4(2A) and (2B). Sub-section 4(2A) makes it clear that a child of a marriage includes a child who is a child of a marriage that has been dissolved or annulled.

Sub-section (2B) provides that a reference in the Act to proceedings under the Act includes a reference to proceedings under the Regulations.

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

This clause repeals section 5 and substitutes new sections 5 and 5A. Paragraphs 5(1)(a), (b) and (e) are in similar terms to section 5 of the Family Law Act 1975 as originally enacted. Those paragraphs widen the class of children deemed to be children of a marriage to include a child adopted since the marriage by either the husband or the wife with the consent of the other, a child of both parties born before the marriage and a child of either party who is ordinarily a member of their household. Paragraphs 5(1)(c) and (d), read with section 5A and the definition of "medical procedure" in sub-section 4(1), deem a child born as a result of either artificial insemination or in vitro fertilization to be a child of a marriage. Sub-section 5(2) determines the relevant time for the purpose of the application of paragraphs 5(1)(d), (e) and (f). Sub-section 5(3) is a revised form of the repealed sub-section 5(4), and it extends the provisions of section 5 to void marriages.

Clause 5 - Advice as to Counselling

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

Clause 6 - Interpretation

This clause amends section 20, which contains definitions of certain terms used in Part IV of the Principal

Act, by amending the definition of "Full Court" and inserting definitions of "Appeal Division" and "General Division".

Sub-clause 6(2) is a transitional provision which will permit the continuation of appeal proceedings, not determined at the date of commencement of Part II of the Bill as if the amendment made by Part II of the Bill in relation to the constitution of the Full Court of the Family Court had not been made.

Clause 7 - Appointment, Removal and Resignation of Judges

This clause inserts sub-section 22(2AA), (2AB), and (2AC), which will provide for the appointment of Judges of the Family Court to the Appeal Division of that Court, and sub-sections (2AD) and (2AE) which will permit Judges of the Family Court to be appointed to other federal courts.

Clause 8 - Divisions of Court

This clause inserts two sections (sections 26A and 26B). Section 26A will divide the Court for the purposes of the organization and conduct of its business into 2 divisions - the Appeal Division and the General Division. Section 26B will enable the Chief Judge to make arrangements in relation to the constitution of the Court, or the Full Court, in particular matters.

Clause 9 - Exercise of Jurisdiction

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



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 10 - Repeal of Section 29

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

Clause 11 - Original Jurisdiction of Family Court

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

Clause 12 - Officers of Court

This clause inserts sub-section 37(3A) which will enable the Principal Registrar to give directions to officers of the Court in relation to the manner of performance of their functions and duties and the operation of the Court Registry.

Clause 13 - Jurisdiction in Matrimonial Causes

Sub-clause (1) makes certain amendments to sub-sections 39(1), (2) and (3) necessary as a consequence of the provisions permitting joint applications for divorce and applications by third parties in relation to a child of a marriage; and amends sub-sections 39(5), (6) and (7) to confer jurisdiction on the Family Court, and on certain Supreme Courts and courts of summary jurisdiction in relation to the enforcement of orders for the custody of ex-nuptial children registered in the Court, pursuant to regulations made under section 67, and in relation to proceedings instituted under new section 117A. It also provides for the making of Proclamations in relation to the exercise of jurisdiction under the Act by courts of summary jurisdiction.

Sub-clauses (2), (3) and (4) are transitional and saving provisions necessary due to the amendments contained in sub-clause (1).

Clause 14 - 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 15 - Institution of Proceedings

This clause amends sub-section 44(3) and inserts sub-section 44(1A). Sub-section 44(1A) will permit joint applications for dissolution or nullity of marriage to be made by parties to the marriage. The amendment to sub-section 44(3) will extend the period during which property and maintenance proceedings between parties to a marriage may be instituted without the leave of the court to, in the case of the dissolution of a marriage, 12 months from the date on which the decree nisi of dissolution of marriage becomes absolute.

Clause 16 - Staying and Transfer of Proceedings

This clause amends section 45 as a consequence of the insertion of new sub-section 4(2B).

Clause 17 - Transfer of Proceedings from Court of Summary Jurisdiction in Certain Cases

This clause amends sub-section 46(1) and inserts sub-sections 46(1A), (1B) and (1C). Under sub-sections 46(1), 46(1B) and 46(1C) in order to have the proceedings transferred from the court of summary jurisdiction to the Family Court or a Supreme Court, the respondent must object to the proceedings being heard by the court of summary jurisdiction at the commencement of those proceedings. Any later objection can only be made with the leave of the court. Sub-section 46(1A) will confirm that proceedings with respect to arrears of maintenance cannot be transferred from a court of summary jurisdiction.

Clause 18 - Dissolution of Marriage

This clause makes amendments in consequence of the amendment to section 44.

Clause 19 - Conferences with Court Counsellors or Welfare Officers

This clause amends sub-section 62(1) to enable a person representing a child pursuant to an order under section 65 to request the Court to make an order directing that the parties to proceedings under the Act attend a conference with a court counsellor or welfare officer. The clause also repeals sub-section 62(4) with the result that evidence of statements made at conferences ordered under section 62 will not be admissible in any court. The clause inserts a new sub-section 62(4) to enable the Court to give appropriate further directions when a party to proceedings fails to attend a conference ordered under the section.

Clause 20 - Reports by Court Counsellors and Welfare Officers

This clause inserts a new section (section 62A) which will enable the Court, in proceedings under the Act where the welfare of a child under the age of 18 years is relevant, to direct a court counsellor or welfare officer to furnish a report to the Court on relevant matters. Under sub-section 62A(6), the report will be able to be received in evidence in the proceedings in which the direction was given. 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 the conference. Under sub-section 62A(5) the Court will be able to give further directions if a party to the proceedings fails to attend the conference or if a person fails to comply with a direction of the Court. Sub-section 62A(4) will impose a duty upon the court counsellor or welfare officer to report those failures to the Court.

Clause 21 - Powers of Court in Custodial Proceedings

This clause repeals paragraph 64(1)(b) and sub-section 64(8) and inserts in their place new paragraph 64(1)(b) and sub-section 64(1A). New paragraph 64(1)(b) provides that, in custody, guardianship or access proceedings, the Court shall consider any relevant wishes of the child and give those wishes such weight as the court considers appropriate in the circumstances of the case. Sub-section 64(1A) will enable the Court to use other appropriate means to inform itself of the wishes of a child and to have regard to reports furnished to the court in accordance with sub-section 62A(1). But the sub-section will also provide that there is to be no obligation on the child to express those wishes.

The clause also amends sub-section 64(5) to enable the Court to order that a court counsellor or welfare officer give such assistance to a party to an order under Part VII of the Principal Act as is reasonably requested by that party in relation to the compliance with, and carrying out, of that order.

Clause 22 - Separate Representation of the Child

This clause amends section 65 to enable the court to order that a child of a marriage, who has not attained the age of 18 years, be separately represented in any proceedings under the Act in which the welfare of that child is relevant, rather than only in proceedings with respect to the custody, guardianship, maintenance of, or access to the child, as at present.

Clause 23 - Overseas Custody Orders

This clause inserts two sub-sections (sub-sections 68(5) and 68(6)) which will enable the court, where there has been an overseas custody order registered under section 68, in relation to a child the subject of an order for custody or access made in Australia, either to discharge the custody order made in Australia or cancel the registration of the overseas custody order, according to the principles set out in sub-section 68(5).

Clause 24 - Interfering with Child Subject to Custody Order

This clause contains textual amendments to sub-section 70(7).

Clause 25 -

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 the subject of either an existing order or pending proceedings in relation to the 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 26 - Matters to be taken into consideration with respect to maintenance

This clause amends paragraphs (f) and (m) of sub-section 75(2). The amendment to paragraph 75(2)(f) will enable a court, in proceedings for the maintenance of a party to a marriage or a child of the marriage, to take into account the eligibility of either party for a pension, allowance or benefit under the law of, or under a superannuation fund

based in, an overseas country as well as such eligibility under Australian law or under a superannuation fund based in Australia. The amendment to paragraph 75(2)(m) will enable a court, in such proceedings, to take into account the financial circumstances relating to the cohabitation with another person of either party to the proceedings.

Clause 27 - Alteration of property interests

This clause amends sub-section 79(4) and inserts six sub-sections (sub-sections 79(1A), (1B), (5), (6), (7) and (8)). The amendment to sub-section 79(4) removes the possibility of an interpretation of the sub-section which would require a nexus between a spouse's contribution and a specific item of property in property settlement proceedings.

Sub-section 79(1A) will permit the court in a case where property settlement proceedings are brought prior to dissolution proceedings to adjourn the property settlement proceedings to enable the parties to the proceedings to consider the likely effects of an order in the proceedings on the marriage or on a child of the marriage. Sub-section 79(1B) will enable the parties to apply to the court for the hearing of the proceedings to be continued notwithstanding that the period of adjournment under sub-section 79(1A) has not expired, once proceedings for dissolution or annulment of the marriage of the parties are instituted.

Sub-section 79(5) will permit the court to adjourn property proceedings where it is of the opinion that



there is likely to be a significant change in the financial circumstances of the parties to the marriage or either of them in the reasonably near future and that an order that the court could make if that change occurs is more likely to do justice as between the parties to the marriage than an order that the court could make immediately. Sub-section 79(7) provides that in forming its opinion under sub-section 79(5) of the likelihood of a change in financial circumstances occurring the court may have regard to any such change that may occur by reason that the party is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme, or may become entitled to property as the result of the exercise in his favour, by the trustee of a discretionary trust, of a power to distribute trust property.

Sub-section 79(6) will allow the court, where it proposes to adjourn property proceedings as provided by sub-section 79(5), to make orders as it considers appropriate with respect to the property of the parties to the marriage or either of them.

Section 79(8) provides for the continuation of property proceedings where either party to the proceedings dies before the proceedings are completed and for the making and enforcement of an order in the proceedings where considered appropriate by the Court.

Clause 28 - Setting aside of orders altering  
property interests

This clause amends sub-section 79A(1) and (2) and inserts three sub-sections (sub-sections 79A(1A), (1B) and (3)). The amendment to sub-section 79A(1) and the insertion of sub-section 79(1A) will allow the court to vary, set aside, or make an order in substitution for, a property settlement order made under section 79 on the following grounds, additional to those at present provided -

- that circumstances have arisen since the order was made rendering it impracticable for the order to be carried out in whole or in part;
- that a person has defaulted in carrying out an obligation under the order and that, as a result of that default, it is just and equitable to change the order;
- that circumstances of an exceptional nature relating to the welfare of a child of the marriage have arisen since the making of the order that will result in the child or the applicant (where the applicant has care and control of the child) suffering hardship if the order is not changed;
- that both the parties to the proceedings have made a joint application for the variation.

The amendment to sub-section 79A(2) is in consequence of other amendments to section 79A.

Section 79A(1B) provides for the continuation of proceedings under section 79A where either party to the proceedings dies before the proceedings are completed, and for the making and enforcement of an order in the proceedings where considered appropriate by the Court.

Section 79A(3) is a clarifying amendment to put beyond doubt that a reference in section 79A to an order by a court under section 79 includes a reference to an order made by a court under section 86 of the Matrimonial Causes Act 1959.

Clause 29 - Cessation of orders

This clause repeals sub-section 82(3) with the result that an order with respect to the maintenance of a party to, or a child of, a marriage ceases to have effect upon the death of the person liable to make payments under the order. An amendment is made to sub-section 82(2) in consequence of the repeal of sub-section 82(3).

Clause 30 - Modification of maintenance orders

This clause amends sub-paragraph 83(2)(a)(iii) and inserts two sub-sections (sub-sections 83(6A) and (6B)). The amendment to sub-paragraph 83(2)(a)(iii) is in consequence of an amendment to section 86. Sub-sections 83(6A) and (6B) provide that where, under sub-section 83(6), a court has ordered that the discharge of an order or the decrease of the amount of a periodic sum payable under an order is to be retrospective to a specified date -

- in the event of an order discharged retrospectively, any moneys paid under the initial order since the specified date may be recovered in a court having jurisdiction under the Act;

- in the event of a retrospective decrease of the amount of a periodic sum payable under an order, any money paid under that order since the specified date, being moneys that would not have been required to be paid under the order due to the retrospective decrease, may be recovered in a court having jurisdiction under the Act.

Clause 31 - Execution of instruments by order of court

This clause amends sub-section 84(1) to enable the Court to exercise its powers under section 84 to order the execution of documents, in certain circumstances, in all proceedings under the Act and Regulations.

Clause 32 - Transactions to defeat claims

This clause amends sub-section 85(1) to enable the court to exercise its powers under section 85 to set aside transactions likely to defeat its orders in all proceedings under the Act and Regulations.

Clause 33 - Ante-nuptial and post-nuptial settlements

This clause inserts section 85A which is similar in terms to sub-sections 86(2) of the Matrimonial Causes Act 1959. The new section will enable the court to make such orders as it considers just and equitable with respect to the

application for the benefit of all or any of the parties to, and children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them. Sub-section 85A(2) requires the court to take into account the matters referred to in sub-section 79(4) in considering what order it should make under section 85A.

Clause 34 - Registration of maintenance agreements

This clause inserts two sub-sections (sub-sections 86(3A) and (3B)) which deal with the effect upon a maintenance agreement registered under sub-section 86(1) of the death of a party to the agreement. Paragraph (a) of sub-section 86(3A) provides that the agreement (other than a periodic maintenance provision in it), unless it provides otherwise, continues to operate notwithstanding the death of a party to the agreement. In the case of a periodic maintenance provision in such an agreement, paragraph (b) of sub-section 86(3A) provides that, if the agreement so provides, the provision continues to operate notwithstanding the death of the party who is liable to make payments but, notwithstanding any provision in the agreement, it does not continue to operate after the death of a party to the agreement entitled to receive those payments. Sub-section 86(3B) defines 'periodic maintenance provision' for the purposes of sub-section 86(3A).

Clause 35 - Approval of maintenance agreement entered into in substitution for rights under Act

This clause omits sub-section 87(5) and inserts two sub-sections (sub-sections 87(5) and (5A)). The two sub-sections deal with the effect upon a maintenance agreement approved by a Court under section 87 of the death of a party to the agreement. Paragraph (a) of sub-section 87(5) provides that the agreement (other than a periodic maintenance provision in it), unless it provides otherwise, continues to operate notwithstanding the death of a party to the agreement. In the case of a periodic maintenance provision in such an agreement sub-section 87(5) provides that, if the agreement so provides, the provision continues to operate notwithstanding the death of the party who is liable to make payments but, notwithstanding any provision in the agreement, it does not continue to operate after the death of a party to the agreement entitled to receive those payments. Sub-section 87(5A) defines 'periodic maintenance provision' for the purposes of sub-section 87(5).

Clause 36 - Intervention by child welfare officer

This clause inserts section 91B which enables 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 37 - Appellate jurisdiction of Family Court

This clause inserts section 93A which confers the appellate jurisdiction on the Family Court. This section is in similar form to repealed section 29. Sub-section 93A(2) prescribes the evidence that may be considered by the Family Court in an appeal.

Clause 38 - Appeals to Family Court

This clause amends sub-section 94(1) to provide that an appeal lies to the Full Court of the Family Court from a decree of that Court, constituted other than as a Full Court, exercising jurisdiction under the Family Law Act or under any other law, and from a decree of a State Family Court or of a State or Territory Supreme Court Judge exercising jurisdiction under the Family Law Act.

Clause 39 - Appeals from courts of summary jurisdiction

Sub-clause (1) makes a purely textual amendment to sub-section 96(2).

Sub-clause (2) confirms that the Proclamation made under sub-section 96(3), terminating the jurisdiction of State and Territory Supreme Courts as from 1 June 1976 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 40 - Procedure

This clause repeals sub-sections 97(1) and (2) and substitutes new sub-sections 97(1) and (2) which 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 41 - Proceedings in absence of parties

This clause inserts section 98A which enables the regulations to provide that undefended proceedings for the dissolution of marriage may, in certain circumstances, be determined by the court notwithstanding that neither the parties to the proceedings nor their legal representatives are present in court.

Clause 42 - Overseas decrees

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

- provision for the recognition of overseas decrees of legal separation in sub-sections 104(1), (3), (4), (5), (7), (8) and (10);
- provision in sub-section 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.

This 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 43 - Enforcement generally

This clause amends sub-section 105(3) to permit, where a person bound by a decree made 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 44 - Persons not to be imprisoned for failure to comply with certain orders

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

#### Clause 45 - Overseas enforcement of maintenance orders and enforcement of overseas maintenance orders

This clause inserts paragraph 110(2)(aa) which permits regulations to be made to enable certain Commonwealth, State or Territory officers to institute and prosecute proceedings either for the enforcement in Australia of

maintenance orders made in certain overseas countries or for the confirmation in Australia of certain provisional overseas maintenance orders.

Clause 46 - Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations

This clause inserts new section 111A which will permit the regulations to make such provision as is necessary to enable Australia to implement the Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations signed at The Hague on 2 October 1973.

Clause 47 - 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 or Territory officers, including the holders of judicial office.

Clause 48 - Injunctions

This clause inserts paragraph 114(1)(b) 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) -

- an injunction restraining a party to the marriage from entering the matrimonial home or other premises in which the other party to the marriage resides or restraining a party to the marriage from entering a specified area, being an area in which either the matrimonial home or other premises in which the other party to the marriage resides, is situated;

- an injunction restraining a party to the marriage from entering the place of work of the other party to the marriage or of a child of the marriage.

#### Clause 49 - Powers of Arrest

This clause inserts section 114AA which will enable a Court to attach a power of arrest to an injunction granted either for the personal protection of a party to, or a child of, a marriage or to exclude a person from certain premises, in circumstances where the Court is satisfied that bodily harm has been caused to the party to, or to a child of, the marriage by the person against whom the injunction is directed and that that person is likely to cause bodily harm to a party to, or to a child of, a marriage. Once a power of arrest order is made, a police officer may, if he believes on reasonable grounds that the person against whom the injunction was granted has since the power of arrest order was made, breached the injunction, arrest that person without warrant.

Sub-sections 114AA(3), (4), (5) and (7) deal with the bringing of a person arrested under the section before a court to be dealt with for breach of the injunction. Under sub-section 114AA(6) a power of arrest attached to the injunction ceases to have effect 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.

#### Clause 50 - 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 51 - Annual Report

This clause inserts 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. Sub-section 114N(2) will require the Attorney-General to table the Report in each House of Parliament within a specified time.

Clause 52 - Family Law Council

Sub-clause 52(1) amends paragraph 115(3)(b), omits sub-section 115(5) and inserts six sub-sections (sub-sections 115(5), (5A), (5B), (5C), (6A) and (6B)). The amendment to paragraph 115(3)(b) omits the reference to 'proceedings', so that the paragraph refers to the working of legal aid in relation to any aspect of family law. The other sub-sections, and sub-clause 52(2), relate to the remuneration and the term of appointment of members of the Family Law Council

Clause 53 - Costs

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

Clause 54 -

This clause inserts three sections (section 117A, 117B and 117C).

Reparation for certain losses and expenses relating to children

Section 117A enables a court having jurisdiction under the Act to order, in certain circumstances relating to the removal of a child from the care and control of a person entitled to its care and control or the failure of a person to deliver a child to another person entitled to its care and control, that the person who removed or failed to deliver the child make reparation to the Commonwealth, a public authority under the Commonwealth or to any other person, in respect of any loss suffered or expense incurred by the Commonwealth, the authority or that other person in restoring the child to the care and control of the person entitled to that care and control.

Interest on moneys ordered to be paid

Sub-section 117B(1) provides that unless the court otherwise orders, interest is to be payable at a prescribed rate on so much of money as is from time to time unpaid on an order made under the Act for the payment of money (other than an order for the payment by way of maintenance of a periodic sum). Sub-section 117B(2) provides that such interest is to be recoverable in proceedings for the recovery of money.

Offers of settlement

Sub-section 117C(1) enables a party to certain proceedings under the Act or under the regulations to file in the court a copy of an offer to the other party to the proceedings to settle the proceedings on terms specified

in the offer. Sub-section 117C(3) provides that after the offer has been filed, it may be accepted by the other party at any time before the proceedings are determined or the offer is withdrawn in accordance with sub-section 117C(2). Under sub-section 117C(4), the fact that the offer has been filed under the section shall not be disclosed to the court except for the purposes of the consideration by the court of whether it should make an order for costs under sub-section 117(2).

#### Clause 55 - Frivolous and vexatious proceedings

This clause amends section 118 to enable the court, where it is satisfied that the proceedings are frivolous or vexatious, to order that the person who instituted the proceedings shall not, without leave of a court having jurisdiction under the Act, institute proceedings under the Act of the kind specified in the order. The court is able to discharge or vary such an order.

#### Clause 56 - Restriction on publication of court proceedings

This clause repeals section 121 and substitutes a new section 121. The new provision 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, or a witness in the proceedings. Sub-section 121(2)

lists certain particulars which, if contained in any account of proceedings, shall be taken to identify a person. The offence is an indictable offence but, pursuant to sub-sections 121(5) and (6), proceedings in respect of the offence may be heard by a court of summary jurisdiction. Sub-section 121(8) contains certain exceptions to the offence created in the section. Sub-section 121(9) contains a definition, for the purposes of the section, of the word 'court'. Under sub-section 121(7), 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 57 -

This clause repeals section 123 and inserts three sections (sections 123, 124 and 125).

#### Rules of Court

The new section 123 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 (q) of sub-section 123(1) lists particular matters that the Rules of Court may provide for.

#### Rules Advisory Committee

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

Regulations

Section 125 enables the Governor-General to make regulations not inconsistent with the Act. Paragraphs (a) to (e) of sub-section 124(1) list particular matters that the regulations may prescribe.

Clause 58 - Further Amendments

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