

1991

THE PARLIAMENT OF THE  
COMMONWEALTH OF AUSTRALIA

SENATE

FAMILY LAW AMENDMENT BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
The Honourable Michael Duffy MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE  
OF REPRESENTATIVES TO THE BILL AS INTRODUCED.



FAMILY LAW AMENDMENT BILL 1990

OUTLINE

The main purposes of the Family Law Amendment Bill 1990 are:

- (a) to implement recommendations made by the Family Law Council for improvements in the handling of child abuse allegations in child custody and access proceedings;
- (b) to clarify the effect which a step-parent adoption of a child has on the custody, guardianship or access rights of the child's natural parents under the Family Law Act;
- (c) to limit the conferral of child custody or guardianship rights, on a person who is not a parent of the child, by use of child agreements or consent orders;
- (d) to allow police to enter premises and search for a person when they are authorised under the Family Law Act to arrest that person;
- (e) to extend the protection given by the Family Law Act from State or Territory stamp duties to child maintenance agreements and certain other instruments;
- (f) to update the level of penalties for offences under the Family Law Act; and
- (g) to make other technical amendments to the Family Law Act.

Financial Impact

The amendments made by the Bill will not have any significant financial impact.

Clause 1 - Short Title

1. When the Bill is enacted it will be cited as the Family Law Amendment Act 1990.

Clause 2 - Principal Act

2. The Principal Act, which is amended by the Bill, is the Family Law Act 1975.

Clause 3 - Approval of marriage counselling organisations

3. Clause 3 will omit references to 'Attorney-General' in section 12 of the Family Law Act (approval of marriage counselling organisations) and substitute the word 'Minister'. This amendment is necessary as the Minister for Justice and Consumer Affairs now has ministerial responsibility for the marriage counselling grants program. Clause 3 also amends sub-section 12(7) of the Family Law Act. Sub-section 12(7) at present requires a notice to be published in the Gazette whenever the Attorney-General approves, or revokes the approval, of an organisation as a marriage counselling organisation to which grants of financial assistance may be made. The cost of Gazette notification has increased because of the user pays principle and Gazette notices are not the best means of notifying the public of approvals. Clause 3 amends sub-section 12(7) to require notification in an annual directory of approved marriage counselling, marriage education and family mediation organisations. The directory will be available to the public from those organisations, marriage celebrants, the Family Court and many other referral agencies.

Clause 4 - Interpretation

4. Clause 4 amends section 60 of the Family Law Act to insert a definition of abuse for the purposes of new paragraph 64(1) (bb)(va) (inserted by clause 8 of the Bill), new Division 12A (inserted by clause 12 of the Bill) new section 92A (inserted by clause 14 of the Bill) and new section 102A (inserted by clause 17 of the Bill).

5. Clause 4 also amends section 60 of the Act to insert a definition of 'court personnel' for the purposes of new Division 12A (inserted by clause 12 of the Bill).

6. Clause 4 also amends section 60 of the Act to insert a definition of "de facto relationship" for the purposes of the definition of 'prescribed adopting parent' (inserted by this clause) and new section 70F (inserted by clause 13 of the Bill).

7. Clause 4 also amends section 60 of the Act to insert a definition of 'prescribed adopting parent' for the purposes of new sub-sections 60A(3) and (4) (inserted by clause 5 of the Bill), new section 60AA (inserted by clause 6 of the Bill) and new sub-section 63F(4) (inserted by clause 7 of the Bill).

8. Clause 4 also amends section 60 of the Act to insert new definitions of 'prescribed child welfare authority' and 'professional ethics' for the purposes of new Division 12A (inserted by clause 12 of the Bill) and new section 92A (inserted by clause 14 of the Bill).

Clause 5 - Certain children are children of a marriage

Clause 6 - Family Court may permit adoption by prescribed adopting parent

Clause 7 - Rights of custody and guardianship of children

9. Clauses 5, 6, and 7 amend existing provisions of the Family Law Act and introduce a new provision in the Act to clarify the effect that a 'step-parent adoption' has on custody, guardianship and access rights under the Family Law Act. A 'step-parent adoption' is an adoption (following irretrievable breakdown of a marriage or a de facto relationship) of a child of that marriage or relationship by a parent and/or his or her new spouse. Clauses 5 and 7 will amend existing references in the Act to adoption to make it clear that, in the case of a step-parent adoption, rights of custody, guardianship and access in existence under the Family Law Act prior to the adoption do not cease to exist if the Family Court has not given leave for the step-parent adoption proceedings to be commenced. Clause 6 will provide for the Family Court to give leave in appropriate cases. The amendments will not affect adoptions other than step-parent adoptions.

10. Clause 5 omits and replaces sub-section 60A(3) of the Act. The Family Law Act confers jurisdiction on the Family Court and certain other courts to determine custody, guardianship and access questions in relation to a child. To an extent, that jurisdiction depends on the child being a 'child of a marriage'. For this purpose section 60A of the Family Law Act provides a definition of 'child of a marriage' and in particular sub-section 60A(3) provides that a child ceases to be a child of a marriage if the child is adopted by a person who is not a party to the marriage. Clause 5 omits existing sub-section 60A(3) and inserts a new sub-section 60A(3) to provide that a child ceases to be a child of a marriage for the purposes of the Act if the child is adopted by a person who is not a prescribed adopting parent. Clause 5 also inserts a new sub-section 60A(4) to provide that a child ceases to be a child of a marriage if the child is adopted by a person who is a prescribed adopting parent and a court has granted leave under new section 60AA for the adoption proceedings to be commenced. The child continues to be a child of a marriage if the leave has not been given by a court. The words 'prescribed adopting parent' are defined by clause 4 of the Bill to mean a parent of the child and/or the parent's new spouse.

11. Clause 6 inserts a new section 60AA in the Family Law Act to provide that the Family Court of Australia, the Family Court of Western Australia and the Supreme Court of the Northern Territory may give leave for proceedings for an adoption by a prescribed adopting parent to be commenced. In determining whether to grant leave, new paragraph 64(1)(a) of the Act will require the Court to consider whether the adoption will advance the welfare of the child. The words 'prescribed adopting parent' are defined by clause 4 of the Bill to mean a parent of the child and/or the parent's new spouse.

12. Clause 7 omits and substitutes sub-section 63F(4) of the Family Law Act. Sub-section 63F(4) provides that a custody, guardianship or access order made under the Act in relation to a child ceases to be in force if the child is adopted. Clause 7 inserts a new sub-section 63F(4) to provide that rights of custody, guardianship or access existing before the adoption:

- (a) cease following the adoption if the child is adopted by a person who is not a prescribed adopting parent, or
- (b) cease following the adoption if the child is adopted by a prescribed adopting parent and a court has given leave under new section 60AA for the adoption proceedings to be commenced, or
- (c) do not cease following the adoption if the child is adopted by a prescribed adopting parent and a court has not given leave under new section 60AA.

The words 'prescribed adopting parent' are defined by clause 4 of the Bill to mean a parent of the child and/or the parent's new spouse.

#### Clause 8 - Powers of court in custodial proceedings

13. Sub-clause 8(a) of the Bill inserts a new paragraph 64(1)(a) in the Family Law Act to replace section 60D of the Act, which is repealed by the schedule to this Bill. Section 60D at present provides that the welfare of a child is the paramount consideration in any proceedings under Part VII of the Act. In custody, guardianship, welfare and access proceedings the child's interests are properly the paramount consideration for the Court. But in other proceedings, such as child maintenance or injunction proceedings, the child's interests are properly only one of a number of relevant considerations. Paragraph 64(1)(a) will limit the paramount interest of the child principle to custody, guardianship, welfare and access proceedings under the Act.

14. Sub-clause 8(b) amends paragraph 64(1)(ba) of the Family Law Act consequentially upon the repeal of section 60D by the schedule to this Bill and its replacement by new paragraph 64(1)(a) by sub-clause 8(a) of the Bill.

15. Sub-clause 8(ba) inserts a new sub-paragraph 64(1)(bb)(va) in the Family Law Act to provide that in proceedings under the Act in relation to the custody, guardianship, welfare or access to a child the Court must take into account the need to protect the child from abuse, ill treatment, or exposure or subjection to psychological harm. This consideration will be one of a number of matters already listed in section 64 which the Court must take into account in making any decision on custody, guardianship, welfare or access to a child.

16. Sub-clause 8(bc) amends paragraph 64(1)(c) of the Family Law Act consequentially upon the repeal of section 60D by the schedule to this Bill and its replacement by new paragraph 64(1)(a) by sub-clause 8(a) of the Bill.

17. Sub-clause 8(c) inserts two new sub-sections 64(1C) and 64(1D) in the Family Law Act. Under existing provisions of the Act a person may apply to a court for an order transferring custody or guardianship of a child from parents to another person and, if the parents consent to the order, the order may be made without appropriate scrutiny of the suitability of that person to have custody or guardianship of the child. New sub-sections 64(1C) and 64(1D) will require the parties to attend a conference with a court counsellor or welfare officer who will then prepare a report for the court about the guardianship or custody arrangements proposed by the parties. The purpose of the report will be to advise the court whether the parents are making an informed decision and whether any inappropriate custody or guardianship arrangements are proposed.

Clause 9 - Power of Court to require provision of information

18. Clause 9 omits and substitutes sub-section 64A(10) of the Family Law Act. Section 64A provides that a court may order a person to provide the court with information about the whereabouts of a child, for the purpose of enforcing a custody or access order made by the court. For the purpose of protecting the confidentiality of information obtained to the court, new sub-section 64A(10) will provide that the information given to the court may be disclosed only to registrars of other courts, to persons to whom the court has addressed warrants for the enforcement of custody and access orders, to a person who is entitled to the custody of, or access to, a child in relation to whom a warrant has been issued or to a legal practitioner representing that person. Information may be released to persons entitled to custody or access and their legal representatives only by leave of a court.

Clause 10 - Child welfare provisions of registered child agreements

19. Clause 10 amends section 66ZD of the Family Law Act. Section 66ZC of the Act provides that an agreement may be registered with a court which makes provision in relation to the custody, guardianship, maintenance, welfare or access to a child. The effect of registration is that the agreement has legal effect and can be enforced as if it were an order of the court. Clause 10 amends section 66ZD to insert a new sub-section 66ZD(3A) to provide that an agreement registered under section 66ZC has no effect to the extent that it purports to confer rights of custody or guardianship on a person who is not a parent of the child. The purpose of this amendment is to ensure that child agreements are not used to transfer legal custody or guardianship of a child except between the parents of the child. Arrangements for the transfer of custody or guardianship of a child to non-parents should be subject to scrutiny by a court before they are given legal effect under the Family Law Act. Child agreements may not be scrutinised by the court when they are registered. Proper scrutiny can only be ensured by requiring the parties to apply to the court for a custody or guardianship order instead of registering a child agreement.

Clause 11 - Child maintenance provisions of registered child agreements

20. Clause 11 omits sub-section 66ZDA(2) and substitutes a new sub-section. Section 66ZDA was inserted in the Family Law Act in 1989 to provide for the parents of ex-nuptial children to be able to register child agreements with the court. New sub-section 66ZDA(2) provides that a child agreement which makes provision in relation to the maintenance of a child shall have effect as if it were an order made by consent in the court in which the agreement is registered.

21. Clause 11 also inserts a new sub-section (5) in section 66ZDA. The new sub-section provides that a child agreement, in so far as it makes provision in relation to the maintenance of a child, is of no effect if an application for administrative assessment of child support could be made in relation to the child under the provisions of the Child Support (Assessment) Act 1989. The new sub-section is consistent with existing sub-sections 66BA, 86(3B) and 87(4D) of the Family Law Act which give primacy to the provisions of the Child Support (Assessment) Act 1989 in relation to the maintenance of children to which the Assessment Act applies.

Clause 12 - Allegations of child abuse

22. Clause 12 inserts a new Division 12A in Part VII of the Family Law Act making provision in relation to the handling of allegations of child abuse in custody, guardianship and access proceedings.

23. Clause 12 inserts a new section 70BA in the Family Law Act to provide that where a party to proceedings under the Act will allege in the proceedings that a child has been abused or is at risk of abuse, that party must file a notice with the court. That party must also arrange for a copy of the notice to be served on the alleged abuser. The alleged abuser will have a right under new section 92A to intervene in the proceedings. The form of the notice will be prescribed by rules made by judges of the Family Court under section 123 of the Act. When the notice is filed, the Registrar of the court must, as soon as practicable, notify the child welfare authority prescribed under section 60 of the Act (see clause 4 of the Bill). The child welfare authority will have a right under new section 92A to intervene in the proceedings between the parents to argue for the outcome which protects the child.

24. Clause 12 also inserts a new section 70BB in the Family Law Act. Sub-section 70BB(1) will provide that where a member of court personnel has reasonable grounds to suspect that a child has been abused or is at risk of abuse, the member must as soon as practicable notify the child welfare authority prescribed under section 60 of both the suspicion and the basis for that suspicion. This mandatory reporting requirement is limited to the most serious abuse as defined in clause 4. It is also limited to abuse which the member becomes aware of in the course of carrying out or exercising duties, functions and powers under the Act.

25. New sub-section 70BB(2) will provide that where a member of court personnel has reasonable grounds to suspect that a child has been or is at risk of being ill treated, or has been or is at risk of being exposed or subjected to psychological harm, the member may notify the child welfare authority of the suspicion and the basis for the suspicion.

26. New sub-section 70BB(3) will provide that the member need not notify a child welfare authority if the authority has previously been notified of the abuse or risk of abuse. New sub-section 70BB(4) provides that an oral notification is to be followed by a written notice as soon as practicable. Where Family Court personnel notify child welfare authorities, they may subsequently disclose any other matters which the personnel reasonably believe are necessary for the authority to properly manage the case (s.70BB(5)). Disclosure of these further matters may be to the child welfare authority or to other persons (for example disclosure in case conferences involving child welfare authority staff, police or other professionals).

27. Clause 12 also inserts a new section 70BC to complement new sections 70BA and 70BB. New sub-section 70BC(1) provides that a member of Court personnel must or may notify a child welfare authority, or may otherwise disclose information, pursuant to new sections 70BA or 70BB notwithstanding any obligation of confidence to which the member may be subject. New sub-section 70BC(1A) provides that where a member of court personnel must notify a child welfare authority under s.70BA(3) or 70BB(1), he is not to be liable in civil or criminal proceedings and is not to be considered to have breached professional ethics or any standard of professional conduct. Sub-section 70BC(1B) gives similar protection to voluntary disclosures under s.70BB(2) and (3) which are made in good faith.

Clause 13 - Certain instruments not liable to duty

28. Clause 13 inserts a new section 70F into Part VII of the Family Law Act. The purpose of the section is to exempt certain agreements, deeds and other instruments from duties or charges under State laws, Territory laws or Commonwealth laws consistent with existing section 90 of the Family Law Act which already exempts similar instruments from duties under State and Territory laws.

29. New sub-section 70F(1) provides that a deed or instrument executed under, or for the purposes of an order made under Part VII of the Act; an eligible child agreement, to the extent that it confers benefits in relation to a child; and any deed or instrument executed under, or for the purposes of, an eligible child agreement, to the extent that a benefit is conferred in relation to a child, is not subject to any duty or charge under the law of a State or Territory or under a Commonwealth law that applies only in relation to a Territory.

30. New sub-section 70F(2) specifies the type of child agreement which is an eligible child agreement for the purpose of sub-section 70F(1). The exemption provided by sub-section 70F(1) is intended only to be available if the relationship of the parents of a child to whom the agreement relates has irretrievably broken down. The type of agreement which is an eligible child agreement is a child agreement which has been registered under section 662C of the Act; is not a maintenance agreement for the purposes of Part VIII of the Act, or if it is the agreement makes provision in relation to a child who is not a child of a marriage for the purposes of the Act; and is made in connection with the breakdown of the parent's relationship as de facto husband and wife, or relates to a child whose parents were not living as husband and wife at the time the child was conceived.

31. New sub-section 70F(3) provides that for the purposes of section 70F an agreement will be taken to confer a benefit in relation to a child even though the agreement also deprives the child or a person of an entitlement of equal or greater value.

32. New sub-section 70F(4) provides that a reference in section 70F to a de facto relationship is a reference to the de facto relationship of the parties to the agreement. A de facto relationship will be defined in section 60 the Act for the purpose of section 70F as a relationship in which a man and a woman live as husband and wife on a genuine domestic basis although they are not married to each other (see clause 4 of the Bill).

Clause 14 - Intervention in child abuse cases

33. Clause 14 inserts a new section 92A in the Family Law Act to provide that in any proceedings under the Act in which an allegation is made that a child has been abused or is at risk of abuse, five categories of persons are to be entitled to intervene in the proceedings. These persons are the guardian

of the child, a person entitled to custody of the child, a person responsible for daily care and control of the child, a prescribed child welfare authority and the person who is alleged to have abused the child. Child welfare authorities will be prescribed under section 60 of the Act (see clause 4 of the Bill.)

Clause 15 - Evidence of children

34. Clause 15 inserts a new section 100A in the Family Law Act to provide that in proceedings in relation to children, evidence of a representation made by a child about a matter that is relevant to the welfare of a child is not inadmissible solely because of the law against hearsay. Although evidence of the representation is admissible, the judge hearing the proceedings will exercise a discretion to decide whether to exclude the evidence. New sub-section 100A(2) makes it clear that the weight to be given to any such evidence is a matter for the court to decide in each case. The word representation is defined by new sub-section 100A(4) to include written or oral statements and representations to be inferred from the conduct of a child.

Clause 16 - Protection of witnesses

35. Clause 16 amends section 101 of the Family Law Act. Section 101 provides for a court to protect a witness from offensive, scandalous, insulting or humiliating questions. Clause 16 inserts a new sub-section 101(2) to extend the protection of witnesses to protection from abusive, oppressive, repetitive or hectoring questions.

Clause 17 - Restrictions on the examination of children

36. Clause 17 inserts a new section 102A in the Family Law Act to provide that unless the court gives leave for a medical, psychiatric or psychological examination of a child, evidence resulting from the examination which relates to abuse or risk of abuse of the child is not admissible. Abuse will be defined by section 60 of the Act (see clause 4). Where a person contemplates bringing proceedings involving abuse or contemplates making an allegation of abuse in proceedings, and the person obtains evidence for that purpose from one or more examinations, the evidence obtained from the first examination is admissible. In deciding whether to give leave for an examination the court is required to have regard to the likely relevance of the information to be obtained, the qualifications of the examiner, the distress to the child and any other matters the court considers relevant. Evidence obtained in breach of new section 102A is not admissible in proceedings under the Act unless the court is satisfied that special circumstances exist.

Clause 18 - Operation of State and Territory laws

37. Clause 18 amends section 114AB of the Family Law Act. Section 114AB prohibits a person instituting a proceeding for an injunction under the Act where a proceeding has been instituted under a prescribed State or Territory domestic violence law in respect of the same matter. Clause 18 amends section 114AB to allow proceedings to be instituted under the Family Law Act where the proceedings under the State or Territory law have lapsed, been discontinued, been dismissed or where the order made by the State or Territory court has been set aside or is no longer in force.

Clause 19 - Powers of entry and search for purposes of arresting persons

38. Clause 19 inserts new section 122A into the Family Law Act. The purpose of the new section is to provide entry and search powers for police under sections 70D and 114AA of the Act.

39. New sub-section 122A(1) provides that where a person is authorised, by the Family Law Act or by a warrant issued under the Act, to arrest a person and reasonably believes that the person to be arrested is in or on a particular searchable place, the person may enter and search that place.

40. New sub-section 122A(2) provides that if a person has power to enter and search a vehicle, vessel or aircraft the person may also stop and detain the vehicle, vessel or aircraft in order to enter and make a search.

41. New sub-section 122A(3) provides that a person may use such force and assistance as is necessary and reasonable to enable the exercise of entry and search powers.

42. New sub-section 122A(4) provides a definition of the term 'searchable place', which means premises or a place, or a vehicle, vessel or aircraft.

Clause 20 and Schedule - Further amendments

43. Clause 20 and the schedule make a number of minor technical amendments to the Family Law Act.

44. The schedule will amend sections 11 and 13 of the Act to replace references to 'Attorney-General' with the word 'Minister'. This change is necessary as the Minister for Justice and Consumer Affairs now has responsibility for the marriage counselling grants program.

45. The schedule repeals section 60D of the Family Law Act consequential on the insertion of new paragraph s.64(1)(a) by clause 8 of the Bill. The schedule also makes consequential amendments to sections 66D, 66E, 66N and 66ZE.

46. The schedule amends sub-section 63(2) of the Family Law Act. Section 63 specifies which courts are to exercise jurisdiction in proceedings under the Act relating to the custody, guardianship, welfare or access to a child. The schedule amends sub-section 63(2) to make it clear that courts of summary jurisdiction are not to have power to grant leave under proposed new section 60AA (inserted by clause 6 of the Bill) for proceedings for a step-parent adoption to be commenced.

47. The schedule makes minor changes to sub-sections 70AA(5) and 70AA(6). Section 70AA makes provision for courts to issue warrants for the arrest of a person for interfering with rights exercisable under a custody or access order. Sub-sections 70AA(5) and (6) make provision for the arrested person to be dealt with by the court in various ways, depending on whether there is an application before the court under section 112AD for the person to be dealt with for breaching the custody or access order. Sub-sections 70AA(5) and (6) are amended by the schedule to avoid any ambiguity between the requirement that proceedings under section 112AD be on foot at the time the arrested person is brought before the court and the possibility that there are no such proceedings before a court at the time that a person has been arrested.

48. The schedule will amend sub-sections 70A(1) and 70A(2) of the Family Law Act. Subsections 70A(1) and (2) provide for a maximum \$10,000 fine or imprisonment for 3 years or both for the offence of removing a child from Australia without the consent of persons entitled to custody, guardianship or access to the child. The amendments made by the schedule to sub-sections 70A(1) and (2), together with sub-section 4B(2) of the Crimes Act 1914, have the effect of increasing the maximum fine under sub-section 70A(1) and (2) to \$18,000.

49. Sub-section 70A(3), which provides that an offence against section 70A is an indictable offence, is repealed by the schedule because section 4G of the Crimes Act now provides that any offence punishable by imprisonment exceeding 12 months is an indictable offence.

50. Sub-sections 70A(4) and 70A(5), which provide for an offence against section 70A to be heard by a court of summary jurisdiction, are repealed by the schedule because section 4J of the Crimes Act now provides for courts of summary jurisdiction to hear and determine indictable offences against laws of the Commonwealth.

51. Sub-section 70A(6), which provides that a person who commits an offence under the Family Law Act is not liable to be punished twice in respect of the same act or omission, is repealed by the schedule because section 4C of the Crimes Act now provides that a person who commits any offence under laws of the Commonwealth shall not be liable to be punished twice for the same act or omission.

52. The schedule amends sub-sections 70B(1) and (2) which provide a maximum penalty of \$5,000 for a master or owner of a vessel removing a child from Australia without the consent of persons entitled to custody, guardianship or access to the child. The schedule increases the maximum penalty for a breach of sub-sections 70B(1) or (2) to \$6,000.

53. The schedule amends section 90 of the Family Law Act consequentially on the insertion by clause 13 of the Bill of new section 70F in the Act. The schedule removes from paragraph 90(1)(a) a reference to orders made under Part VII of the Act.

54. The schedule amends sub-section 112AD(2) which provides that the maximum fine for contravention of a court order under the Family Law Act is \$2,000 for a natural person or \$10,000 for a body corporate. The schedule increases the maximum fine under s.112AD(2) to \$6,000 for a natural person and \$30,000 for a body corporate.

55. The schedule amends section 112AL of Act consequentially upon the repeal of section 60D of the Act and its replacement with new paragraph 64(1)(a) by sub-clause 8(a) of the Bill.

56. The schedule makes a number of amendments to section 121. Sub-sections 121(1) and (2) provide that the maximum penalties for publication of an account identifying parties or witnesses in proceedings under the Act is a fine of \$10,000 for a body corporate or, in the case of a natural person, a fine of \$5,000 and/or imprisonment for one year. The amendments made by the schedule, together with section 4B of the Crimes Act, have the effect of increasing the maximum fine under sub-sections 121(1) and (2) to \$6,000 for a natural person and \$30,000 for a body corporate .

57. Sub-sections 121(6) and (7), which provide for an offence against section 121 to be heard by a court of summary jurisdiction, are repealed by the schedule because section 4J of the Crimes Act now provides for courts of summary jurisdiction to hear and determine indictable offences against the laws of the Commonwealth.

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