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HOUSE OF REPRESENTATIVES

FAMILY LAW REFORM (CONSEQUENTIAL AMENDMENTS) BILL 1995

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Michael Lavarch, M.P.)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY
THE SENATE TO THE BILL AS INTRODUCED



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FAMILY LAW REFORM (CONSEQUENTIAL AMENDMENTS) BILL 1995

GENERAL OUTLINE

1. This Bill makes amendments to a number of Commonwealth Acts as a consequence of the enactment of the *Family Law Reform Bill 1994*. The *Family Law Reform Bill 1994* makes substantial changes to the Family Law Act 1975, in particular, it repeals and substitutes Part VII which establishes the relationships between children and their parents. It seeks to change the approach taken by parents towards their children and emphasises the concept of parental responsibility for the care, welfare and development of their children rather than the current concepts of guardianship, custody and access which are typified by notions of ownership of children. The new approach also established rights in children for their care and development which are consistent with the principles of the UN Convention on the Rights of the Child. The new Part also places a greater emphasis on the non litigious resolution of issues affecting children by facilitating the development of parenting plans with the use of court parenting orders as a secondary approach.

2. A number of Acts administered by other portfolios have as their foundation or as a part of their foundation the outmoded concepts which need to be replaced. The *Family Law Reform (Consequential Amendments) Bill 1995* gives effect to the changes in terminology in other Commonwealth legislation. It will bring other Commonwealth legislation, such as the *Social Security Act 1991* and the *Passports Act 1938* in line with the reforms and facilitate the operation of the associated legislation applying the new concepts.

3. The changes being effected by this Bill do not change the substance or application of those other Acts.

4. The Bill will amend -

- (i) the *Australian Citizenship Act 1948* to bring the terminology of that Act in line with the new concepts by changing the definition of the word "responsible parent" for the purposes of that Act to include people who have a parenting agreement or parenting orders under the new system.
- (ii) the *Child Support Assessment Act 1988* to replace the word "custodian" and its variants with the word "carer" and its variants, and the word "access" with the word "contact". These amendments will maintain consistency and avoid potential confusion in the operation of the *Child Support (Assessment) Act 1989*, so the "eligible

custodian" entitled to child support becomes the "eligible carer" entitled to child support.

- (iii) the *Child Support (Registration and Collection) Act 1988* to omit the words "non-custodial", include parenting plans in the definition of a maintenance agreement, and substitute renumbered sections.
- (iv) the *Childcare Rebate Act 1993* to bring the concepts and terminology related to the definitions of "parent" and "dependent child" into line with the new concepts and terminology in the *Family Law Act 1975*.
- (v) the *Commonwealth Legal Aid Act 1977* to remove references to repealed and omitted provisions.
- (vi) the *Jurisdiction of Courts (Cross-Vesting) Act 1987* to make reference to what will be the equivalent section as a consequence of the renumbering effected by the *Family Law Reform Act 1995*.
- (vii) the *Marriage Act 1961* to ensure terminology in that Act is consistent with the *Family Law Act 1975*.
- (viii) the *Migration Act 1958* to change the definition of the responsible parent for the purposes of that Act to bring it into line with the new concepts and terminology in the *Family Law Act 1975*.
- (ix) the *Passports Act 1938* to maintain consistency in terminology and avoid potential confusion in the operation of the *Passports Act 1938*, which makes substantial reference to the current Part VII of the *Family Law Act 1975*. In particular, section 5(5) of the *Passports Act 1938* refers to the registration of overseas orders within the meaning of section 68 of Part VII of the *Family Law Act 1975*. Also sections 7A(2)(c)(ii)(B) of the *Passports Act 1938* rely upon the terms "custody", "guardianship" and "access" as defined in the former legislation.
- (x) the *Social Security Act 1991* to make it consistent with the new concepts that are being introduced into the *Family Law Act 1975*. The amendments omit references to "rights" and "control" and replace them, as appropriate, with references to the new concept of parental responsibility for a child's day to day care, welfare and development and to new types of parenting orders that may be made under the Act.

the provisions of the *Social Security Act 1991* which are amended include subsection 5(2) which deals with the definition of a dependent child who is under 16 years of age, and subsection 250(1) in relation to a sole parent pension child.

The amendments are not intended in any way, to result in any changes to the qualification for, or entitlement to , any social security payments.

- (xi) correct various technical and drafting matters including the consequences of the altered numbering of parts of the *Family Law Act 1975*.
- (xii) the *Evidence Act 1995* to apply that Act to appeals to the Family Court of Australia from a court of summary jurisdiction exercising jurisdiction under the *Family Law Act 1975*.

FINANCIAL IMPACT STATEMENT

5. The proposed amendments will not have any significant financial impact.

NOTES ON CLAUSES

Clause 1 - Short title

6. This clause provides for the Act to be cited as the *Family Law Reform (Consequential Amendments) Act 1995*.

Clause 2 - Commencement

7. Three sections of the *Family Law Reform Act 1995* commence on the day on which that Act receives Royal Assent. The balance of that Act commences on a day, or days, to be fixed by Proclamation, or if not Proclaimed, at the expiry of 12 months after Proclamation. This clause links the commencement of the various clauses in this Bill with the commencement of relevant provisions in the *Family Law Reform Act 1995*.

Clause 3 - Amendment of Acts

8. Clause 3 is a technical amendment which clarifies that the Acts referred to in the Schedules are amended only in accordance with the applicable items in the Schedules.

SCHEDULE - AMENDMENT OF ACTS

Part 1 - Amendment of the Australian Citizenship Act 1948

9. Item 1 of the Schedule omits from subsection 5(1) of the *Australian Citizenship Act 1948* the definition of responsible parent in subsection 5(1) and substitutes a new definition by reference to the concepts set out in new subsection 5(2).
10. Item 2 inserts new subsections 5(2) and 5(2A). New subsection 5(2) defines the meaning of responsible parent for the purposes of the Act. The new definition has regard to the new concepts under the Family Law Act for establishing the relationship between children and their parents. New subsection 5(2A) ensures that terms used are consistent with the like terms in the *Family Law Act 1975*.

Part 2 - Amendment of the Child Support (Assessment) Act 1989

11. Item 3 replaces a reference to section 60B of the Family Law Act 1975 in paragraph (b) of the definition of parent in the Child Support

(Assessment) Act 1989 with section 60H, the equivalent section on the commencement of the Family Law Reform Act 1995.

12. Item 4 omits "access to" and replaces it with "contact with" in section 5 of the *Child Support (Assessment) Act 1989*. Effectively the provisions of the *Child Support (Assessment) Act 1989* remain the same, but these changes reflect the terminology introduced by the amendments to the *Family Law Act 1975*.
13. Item 5 omits from section 5 the definitions of "custodian entitled to child support", "eligible custodian", "major access" "shared custody child" and "substantial access".
14. Item 6 inserts in section 5 definitions of "**carer entitled to child support**", "**eligible carer**", "**major contact**", "**shared care child**" and "**substantial contact**". The new definitions reinsert the provisions of the definitions omitted by Item 5 taking account of the new terminology of the *Family Law Act 1975*.
15. Item 7 omits from paragraph 8(3)(c) the definition of "**major access to**" and replaces it with a definition of "**major contact with**".
16. Item 8 omits from paragraph 8(3)(d) the definition of "**substantial access to**" and replaces it with a definition of "**substantial contact with**".
17. Item 9 omits from subsection 22(1) the reference to "in the custody of, or under the guardianship, care and control or supervision of" and replaces it with "under the care (however described) of".
18. Item 10 omits from subsection 25(2) the reference to "**joint custodians**" and replaces it with a reference to "**joint carers**".
19. Item 11 omits from subsection 25(4) the reference to "in the custody of, or under the guardianship, care and control or supervision of" and replaces it with "under the care (however described) of".
20. Item 12 omits from paragraph 31(1)(a) the reference to "custodian entitled to child support" and replaces it with "**carer entitled to child support**".
21. Item 13 makes a drafting change to paragraph 31(1)(b) by omitting "liable parent" and replaces it with 'liable parent'.
22. Item 14 omits from the heading in Subdivision D of Division 2 of Part 5 the reference to "*Custodial*" and replaces it with "*Carer*".
23. Item 15 omits from section 43 the reference to "entitled custodian" and replaces it with "entitled carer".

24. Item 16 omits from paragraph 48(b) the reference to "Custodial" and replaces it with "Carer".
25. Item 17 omits from paragraph 48(da) the reference "to whom the parent has substantial access" and replaces it with "with whom the parent has substantial contact".
26. Item 18 omits from paragraph 48(e) the reference "to whom a parent has major access" and replaces it with "with whom a parent has major contact".
27. Item 19 omits from paragraph 48(e) the reference "to whom a parent has substantial access" and replaces it with "with whom a parent has substantial contact".
28. Item 20 omits from the heading to Subdivision G of Division 2 of Part 5 the reference to "custodians" and replaces it with "carers".
29. Item 21 substitutes new paragraph 54(1)(b) in identical terms other than with changed references from "custodian" to "carer", "custodians" to "carers", "custodian's" to "carer's" and "access" to "contact" wherever those terms are used.
30. Item 22 adds a note to section 81 to the effect that a parenting plan made under the *Family Law Act 1975* may be a child support agreement.
31. Item 23 omits "child agreement" and replaces it with "parenting plan" in paragraph 84(7)(a).
32. Item 24 omits "custodian entitled to child support" and replaces it with "**carer entitled to child support**" in paragraph 93(1)(d).
33. Item 25 omits from paragraph 93(1)(e) the reference to "liable parent" and makes a drafting change to replace it with '**liable parent**'.
34. Item 26 omits from subparagraph 117(2)(a)(iv) the reference to "access to" and replaces it with "contact with".
35. Item 27 omits from subparagraph 117(2)(b)(i)(A) the reference to "access to" and replaces it with "contact with".
36. Item 28 omits from subparagraph 117(3) the reference to "access to" and replaces it with "contact with".
37. Item 29 omits from the heading to Division 5 of Part 7 the reference to "*custodian*" and replaces it with "*carer*".
38. Item 30 replaces a reference to sub-section 64A(9) of the *Family Law Act 1975* in sub-section 150(9) of the *Child Support (Assessment) Act 1989* with

a reference to sub-section 67M(6), the equivalent section on the commencement of the *Family Law Reform Act 1995*.

39. Item 31 omits references to "custodian" and replaces it with reference to "carer" in a large number of provisions of the *Child Support (Assessment) Act 1989*.
40. Item 32 omits references to "custodians" and replaces it with references to "carers" in a number of provisions of the *Child Support (Assessment) Act 1989*.
41. Item 33 omits references to "custodian's" and replaces it with references to "carer's" in a number of provisions of the *Child Support (Assessment) Act 1989*.
42. Item 34 omits "custody" and replaces it with "care" in a number of provisions of the *Child Support (Assessment) Act 1989*.

Part 3 Amendment of the Child Support (Registration and Collection) Act 1988

43. Item 35 omits from paragraph 3(1)(b) the term "non-custodial" so that it removes the concept of custody from the objects of child support liability for the maintenance of children.
44. Item 36 adds to the definition of a maintenance agreement in subsection 4(1) a note to the foot of that definition which recognises that a parenting plan under the *Family Law Act 1975* can satisfy that definition.
45. Item 37 replaces a reference to sub-section 64A(9) of the *Family Law Act 1975* in sub-section 16(9) of the *Child Support (Registration and Collection) Act 1988* with sub-section 67M(6), the equivalent section on the commencement of the *Family Law Reform Act 1995*.
46. Item 38 replaces a reference to section 66K of the *Family Law Act 1975* in sub-paragraph 19(2)(b)(iv) of the *Child Support (Registration and Collection) Act 1988* with section 66Q, the equivalent section on the commencement of the *Family Law Reform Act 1995*.

Part 4 - Amendments of the Childcare Rebate Act 1993

47. Item 39 amends paragraph 10(a), which is part of the definition of a parent for the purposes of the Act, by replacing the concept of care and control of the child with the concept of legal responsibility for day-to-day care, welfare and development.
48. Item 40 amends paragraph 10(b), which is the part of the definition of a parent for the purposes of the Act, by removing reference to control over a child.
49. Item 41 amends paragraph 11(1)(a), which is part of the definition of a dependent child for the purposes of the Act, by replacing the concept of care and control of the child with the concept of legal responsibility for day to day care, welfare and development.
50. Item 42 amends subparagraph 11(1)(b)(ii), which is part of the definition of a dependent child for the purposes of the Act, by removing reference to control over a child.

Part 5 - Amendment of the Commonwealth Legal Aid Act 1977

51. Item 43 omits the words "section 8 of the Interim Forces Benefits Act 1947 and subsections 117(3) & (4) of the *Family Law Act 1975*" from subsection 32 (3) of the *Commonwealth Legal Aid Act 1977*. The *Interim Forces Benefits Act 1947* has been repealed and subsections 117 (3) & (4) of the *Family Law Act 1975* have been omitted by the *Family Law Reform Bill 1994*.

Part 6 - Amendment of the Jurisdiction of Courts (Cross-Vesting) Act 1987

52. Item 44 replaces the reference to section 60AA in subsection 3(1) (paragraph (ab) of the definition of 'special federal matter') of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* with 60G, the equivalent section on the commencement of the *Family Law Reform Act 1995*.

Part 7 - Amendment of the Marriage Act 1961

53. Items 45 - 48 amend the *Marriage Act 1961* to ensure the terminology in that Act is consistent with the *Family Law Act 1975*.
54. In particular;
- the reference to "marriage counselling organisation" in subsection 9D(1) is substituted by "approved counselling organisation".
 - at the end of subsection 9D(2) the following is added "These conditions count as conditions of the organisation's approval for the purposes of section 13D of the *Family law Act 1975*".
 - the reference to "marriage counsellor" in subsection 16(2A) is substituted by "family and child counsellor".
 - the reference to "marriage counsellor" in subsection 16(7) is substituted by "family and child counsellor".

Part 8 - Amendment of the Migration Act 1958

55. Item 49 of Part 8 of the Schedule amends section 192 of the *Migration Act 1958* by inserting a new subsection (8) which defines the meaning of the term "guardian" in paragraph 192(7)(b) to include a person who has a specific issues order, within the meaning of the *Family Law Act 1975*, in relation to the detainee under which the person is responsible for the detainee's long-term care, welfare and development.

Part 9 - Amendments of Passports Act 1938

56. Item 50 amends subsection 5(5) of the *Passports Act 1938* by omitting the phrase "custody order within the meaning of Part VII" and substituting "child order as defined in section 70F" to reflect the change in terminology in the *Family Law Reform Bill 1995*.
57. Item 51 substitutes in section 5(5) the reference to section "68" with a reference to section "70G".

58. Item 52 omits in paragraph 7A(2)(a) the phrase "is entitled to custody, guardianship of, or access to," and substitutes "has caring responsibility (as defined in subsection (8)) for". The purpose of this substitution is to eradicate from the *Passports Act 1938* reference to the terms custody, guardianship and access to a minor, and replace those terms with the notion of caring responsibility for a minor which is introduced by the amendments to the *Family Law Act 1975*.
59. Item 53 amends the terminology in subparagraph 7(2)(c)(ii)(B) to provide that before a minor can be issued with a passport it will be necessary to first obtain the consent of those persons with the caring responsibility for the child, or establish good reasons for the absence of their consent. Effectively the processes under the *Passports Act 1938* will remain the same, but the *Passports Act 1938* will reflect the terminology introduced by the amendments to the *Family Law Act 1975*.
60. Item 54 amends section 7A by inserting a new subsection 8 which contains a broad definition of persons who have caring responsibility of the child as including:
- a person who is a parent of a minor where there are no other orders held in relation to that child;
 - a person who has a residence order in relation to the minor;
 - a person who has a specific issues order in relation to the minor;
 - a person who has a contact order in relation to the minor; or
 - a person who is entitled to custody, guardianship of, or access to, the minor under a law of the Commonwealth or of a State or Territory.
61. The Item also inserts a new subsection 9 which ensures that the terms used in section 7A of the *Passports Act 1938* are consistent with the like terms in the *Family Law Act 1975*. The above list of persons with caring responsibility in relation to a minor does not, however, expand the existing practices of the *Passports Act 1938*. The amendments only reflect the changes to terminology in the *Family Law Act 1975* introduced by the *Family Law Reform Bill 1995*. It sets out the categories of persons with caring responsibility in order to avoid any confusion.

Part 10 -Amendment of the Social Security Act 1992

62. Items 55 - 65 make amendments to subsections 5(2) and 250(1) of the *Social Security Act 1991* to achieve consistency with the new concepts that

are being introduced into Part VII of the *Family Law Act 1975* by the *Family Law Reform Bill 1994*. It omits references to "rights" and "control" and replace them, as appropriate, with references to the new concept of legal responsibility for a child's day to day care, welfare and development and to a new type of order that may be made under the Act.

63. The provisions of the *Social Security Act 1991* that are amended deal with the definition of a dependent child who is aged under 16(subsection 5(2)) and with the definition of a SPP(sole parent pension) child (subsection 250(1)).
64. The amendments are not intended, in any way , to result in any changes to the qualification for, or entitlement to, any social security payments.

SCHEDULE 2 - AMENDMENT OF THE EVIDENCE ACT

65. Item 1 amends the Evidence Act 1995. This amendment provides for the Evidence Act 1995 to apply that Act to appeals to the Family Court of Australia from a court of summary jurisdiction of a State or Territory exercising jurisdiction under the Family Law Act. Such appeals are heard de novo.

