

1991

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 2) 1991

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, the Hon. Michael Duffy, MP)



(i)

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SCHEDULE

AMENDMENTS OF ACTS

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LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 2) 1991

GENERAL OUTLINE

This Bill makes amendments of a minor policy nature to legislation within the Attorney-General's portfolio and also makes some minor technical amendments to legislation.

The amendments to be made by the Bill will:-

- (i) amend the Family Law Act 1975 to widen the power of the Family Court to make custody, guardianship, access and maintenance orders for children subject to State child welfare legislation;
- (ii) also amend the Family Law Act to ensure that a Family Court judge is not disqualified from hearing a case simply because the judge becomes aware that one of the parties has made an offer of settlement;
- (iii) make amendments to section 64 of the Judiciary Act 1903 designed to prevent the application to the Commonwealth and the States, in civil suits, of laws to which the Commonwealth and the States are not themselves subject; and
- (iv) amend section 5 of the Commonwealth Places (Application of Laws) Act 1970 to ensure that State Police, when investigating applied Commonwealth offences, are not bound by Part 1C of the Crimes Act 1914.

FINANCIAL IMPACT STATEMENT

Most of the the proposed amendments will not have any financial impact, while the amendments to the Judiciary Act 1903 may result in savings on outlays by the Commonwealth, insofar as they reduce the potential for claims against the Commonwealth.

NOTES ON CLAUSES

PART I - INTRODUCTORY

Clause 1 - Short title

1. This clause provides for the Act to be cited as the Law and Justice Legislation Amendment Act (No. 2) 1991.

Clause 2 - Commencement

2. This clause provides for the commencement of the Act.

3. Subclause 2(2) provides that the amendments to section 64 of the Judiciary Act 1903 (Part 2 of the Schedule) will not commence until a date fixed by proclamation. A proclamation will not be made until proposed amendments to the Crown Proceedings legislation of the States are in force. For example, the Crown Proceedings Acts of certain of the States do not at present subject the Crown in right of another State to liability in tort or to ordinary actions in contract. States propose to remove those general immunities. It would not be appropriate to amend section 64 as proposed until that is done.

4. Subclause 2(3) ensures that the amendment to section 5 of the Commonwealth Places (Application of Laws) Act 1970 shall be taken to have commenced retrospectively on 1 November 1991, the date fixed by proclamation for the commencement of section 3 of the Crimes (Investigation of Commonwealth Offences) Amendment Act 1991 which inserts Part 1C into the Crimes Act 1914.

5. The amendments to other Acts included in the Bill will commence on the day on which the Act receives Royal Assent (subclause 2(1)).

Clause 3 - Application

6. This clause contains application provisions related to the amendments being made by this Bill. The effect of these provisions is described in paragraphs 7 and 8 below.

Judiciary Act 1903

7. Subclause 3(1) has the effect of preventing the amendments to the Judiciary Act 1903 set out in Part (1) of the Schedule from applying to new suits begun before the commencement of those amendments.

8. Subclause 3(2) has the effect of preventing the amendment of the Judiciary Act 1903 set out in Part (2) of the Schedule from applying to new suits begun after the commencement of that amendment.

Clause 4 - Amendments of Acts

9. This clause provides that the Acts specified in the Schedule are to be amended as set out in the Schedule.

SCHEDULE

AMENDMENTS OF ACTS

Commonwealth Places (Application of Laws) Act 1970

10. This amendment to s.5 of the Commonwealth Places (Application of Laws) Act ("the Act") will ensure that when State Police are investigating 'an applied Commonwealth offence' (created by the operation of subs.4(1) of the Act), which is treated for all other purposes as a State offence, they are not bound by the provisions of the new Part 1C of the Crimes Act 1914 which establishes a scheme of rights, duties and obligations that apply when an "investigating official" investigates a "Commonwealth offence".

Family Law Act 1975

Section 60 - Interpretation

11. The schedule will insert a new definition of 'child welfare officer' in section 60 of the Family Law Act for the purposes of the amendments made by the schedule to section 60H and new section 66FA. Child welfare officer will mean a person who holds or performs the duties of a prescribed office of a State or territory which has responsibilities in relation to a child welfare law, or a person authorised in writing by such a person. Regulations under the Family Law Act will prescribe appropriate offices of State child welfare Ministers or of State Departmental officials.

Section 60E - Extension of Part VII of the Family Law Act

12. At present section 60E of the Family Law Act provides that the provisions of Part VII of the Act relating to children have additional operation if the States refer certain powers over children to the Commonwealth. Five States have referred certain powers to the Commonwealth in relation to children.

13. The schedule will make amendments to section 60H, and insert new section 66FA in Part VII of the Act in the expectation that the States will refer to the Commonwealth further powers in relation to children. As soon as any State passes legislation to refer those further powers to the Commonwealth the Governor-General will make a

proclamation that the amendments made by the schedule extend to that State. The schedule therefore will insert a new subsection 60E(6) to provide that the Governor-General by proclamation may declare that Part VII of the Family Law Act as amended by the schedule extends to a State specified in the proclamation. The schedule will insert a new subsection 60E(7) to provide that the amendments made to Part VII by the schedule do not operate in relation to a State unless there is a proclamation in force under subsection 60E(6) in relation to that State.

Section 60H - Child Welfare Laws Not Affected

14. Section 60H of the Family Law Act at present provides that courts exercising jurisdiction under the Act must not make orders in relation to a child in the custody, care and control, guardianship or under the supervision of a person under a State or Territory child welfare law. The schedule will amend section 60H to allow courts exercising Family Law Act jurisdiction to make orders in relation to such children in certain circumstances. First, the courts will be empowered to make an order for the maintenance of any such child. Second, the courts will be empowered to make a custody, guardianship or access order for a child subject to supervision under a child welfare law. Third, the courts will be empowered to make Family Law Act orders in relation to a child subject to a guardianship, custody or care and control order under a child welfare law where the relevant State or Territory child welfare officer consents to the institution or continuation of the Family Law Act proceedings.

Section 66FA - Limitation in Relation to Maintenance Proceedings

15. The schedule will amend the Family Law Act to insert new section 66FA to provide that an application relating to the maintenance of a child subject to a child welfare law can only be made by the child, the relevant child welfare officer, a parent or a relative who has the daily care and control of the child.

16. A new subsection 117C(4) will be inserted into the Family Law Act which will provide that a judge who becomes aware of the existence of an offer of settlement is not thereby disqualified from continuing to hear the matter.

Judiciary Act 1903

17. Section 64 of the Judiciary Act provides that, in any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject. The application of this provision is to be qualified in the light of certain anomalies highlighted by the High Court's decision in The Commonwealth v. Evans Deakin Industries (1986) 161 CLR 254.

18. Section 64 of the Judiciary Act is to be amended by adding new subsections 64(2) and (3) and making subsection 64(1) subject to them.

New subsection (2)

19. This subsection will provide that, in a suit to which the Commonwealth is a party, subsection (1) does not give to another party, as against the Commonwealth:

- (a) any right under the provisions of a law of a State or of a self-governing Territory unless that party would have had that right, as against the State or Territory, in a suit to which the State or Territory was a party in similar circumstances;
- (b) any right to sue for damages for breach of a statutory duty under the provisions of a prescribed law of a State or of a self-governing Territory.

20. Paragraph (a) will overcome one of the main anomalies of the Evans Deakin case, i.e. that the Commonwealth may in effect be bound by a State or Territory law which the enacting State or Territory legislature has decided is not suitable to bind the State or Territory itself.

21. Paragraph (b) will act as a reserve mechanism by which the Commonwealth may prevent itself from becoming liable for damages for breach of a duty under a State or Territory law (whether or not the law applies to the enacting State or Territory). This mechanism is designed to deal with State or Territory laws that are enacted from a State or Territory viewpoint and do not adequately address the Commonwealth's special problems and needs. A regulation made for the purpose of the paragraph will only operate prospectively and will not affect accrued rights against the Commonwealth.

New subsection (3)

22. This subsection will provide that in a suit to which a State is a party, subsection (1) does not give to another party, as against the State, any right, under a statute, that the party would not otherwise have.

23. Section 64, in its present form, purports to alter the statutory law applicable to the States in civil proceedings in federal jurisdiction. The Commonwealth agrees with the States that this is inappropriate.

Trade Practices Act 1974

24. The amendment to section 50A of the Trade Practices Act will involve the insertion of the disjunctive "or" between paragraphs 50A(1)(a) and (b) and some consequential paragraph renumbering in order to correct a previous drafting omission.

