1984

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

MARRIAGE AMENDMENT BILL 1984

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
Senator the Honourable Gareth Evans, Q.C.)

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The main purpose of the Bill is to amend the Marriage Act 1961 (the Act) to give legislative effect in Australia to the Convention on Celebration and Recognition of the Validity of Marriages signed by Australia in July 1980.

This involves the insertion of a new Part VA in the Act and the making of a number of other amendments to certain provisions of the Act.

In addition, the Bill proposes amendments to the Act

- to provide for the legitimacy of children born as a result of artificial insemination by donor and in vitro fertilisation procedures, where State or Territory law provides for their parentage;

- to extend the maximum period within which a notice of intended marriage may be received from 3 to 6 months before the date of the marriage:

- to provide specifically that the fee prescribed for solemnisation of a marriage by a civil celebrant shall be a maximum fee;

- to extend the operation of the legitimation provisions of the Act to countries where the status of illegitimacy does not exist;

- to extend the concept of Pre-marital Education in the Act to encompass a wider concept of Marriage Education, to give effect to a recommendation of the Joint Select Committee on the Family Law Act; and

- to make miscellaneous formal, machinery and drafting changes.

Notes on Clauses

Clause 1 - Short Title, etc

Clause 2 - Commencement

The provisions of the Bill relating to the Hague Convention on Celebration and Recognition of the Validity of Marriage (the Convention), or consequential upon the adoption of the Convention, are to come into operation on such date as is fixed by Proclamation. The remaining provisions of the Bill are to come into operation on the day on which the Bill receives the Royal assent.

Clause 3 - Interpretation

This clause makes a textual amendment to the definition of "Judge" in sub-section 5(1)of the Act, and inserts a definition of "medical procedure" which will be used in clauses 20(b) and 22.

Clause 4 - Extension of Act to Territories, etc.

This clause amends sub-section 8(4) of the Act to extend proposed new Part VA to all the external Territories, in accordance with Australia's obligations under the Convention.

Clauses 5, 6, 7, 8 and 9 - Amendments to Part IA

These clauses omit the term "pre-marital" wherever appearing in Part IA of the Act and substitute the word "marriage" in its place, so that reference will be made to the extended concept of "marriage education". This change is part of the Government's response to recommendation 61 of the Joint Select Committee on the Family Law Act. (See also sub-clause 16(d)).

Clauses 10, 11 and 12 - Amendments to Part III of Principal Act to create Division 1 of that Part

These clauses make the existing Part III of the Principal Act into a Division 1 of that Part and specifically deal with the application of that Division between 20 June 1977 and the commencement of Clause 13 when enacted. They will eliminate uncertainty in the application of sections 22 and 23 in Part III of the Act arising because of the form of words originally used in section 23. The rules preceding the insertion of sections 22 and 23 in the Act will, as a result, apply up to 19 June 1977. Sections 22 and 23 will apply from 20 June 1977 to the date of commencement of clause 13, when enacted, and the new Division 2 Part III to be inserted by that clause will apply after that date.

Clause 13 - Application of Part III

This clause inserts a new Division 2 into Part III of the Act to accord with Chapter I of the Convention. This Chapter imposes an obligation on Australia to allow the celebration of a marriage where either -

- the parties to the intended marriage both comply with the requirements of Australian law dealing with the capacity of people domiciled in Australia to marrry and one of them is an Australian citizen or habitually resides in Australia; or

- the parties to the intended marriage each comply with the law of the relevant country determined by what are called the "choice of law" rules of Australia; i.e. the rules of law which choose for a particular area of law, which country should be regarded as relevant for that area.

The new Division will not change the law as to validity of marriage which now applies to the marriage of parties whose home (or "domicile") is Australia. It will simply apply the requirements of that law to all marriages solemnized in Australia (other than foreign marriages solemnized in Australia under Division 3 of Part IV) and to marriages solemnized by Australian marriage officers in overseas countries under Part V. The operation of the rules as to void marriages will no longer be subject to the common law rules of private international law.

The result is that the question of the capacity of parties to enter into a marriage under Australian law will not be decided by reference to the laws of their respective domiciles but wholly by reference to Australian law. Australia will thereby satisfy its obligation under Chapter I of the Convention by extending the provisions which formerly applied to the marriage of people domiciled in Australia to all marriages solemnized in Australia (regardless of the nationality or habitual residence of the parties), and by designating that under Australian "choice of law" rules the parties to a mariage only have to satisfy Australian law on the question of capacity to marry. This change in the operation of choice of law rules was recommended in his Report to the Government by Professor Nygh (now Mr Justice Nygh of the Family Court), Australia's delegate to the Hague Conference.

Clause 14 - Review of refusal to register or removal from register

This clause repeals sub-section 34(2) of the Act with the result that for the purposes of a review of a decision as to registration of a celebrant under sub-section 34(1), the Administrative Appeals Tribunal will be constituted pursuant to the relevant provisions of the Administrative Appeals

Tribunal Act 1975, rather than having special provision made in the Marriage Act. This amendment implements a recommendation made by the Administrative Review Council in its Third Annual Report (1979), at paragraph 84.

Clause 15 - Authorisation of other celebrants

This clause effects a drafting amendment to sub-section 39(2) of the Act so that the criterion for authorisation of celebrants under that provision is brought into line with the policy expressed in sub-paragraph 33(1)(d)(iii) regarding ministers of religion of recognized denominations, namely that the celebrant be a "fit and proper" person.

Clause 16 - Notice to be given and declaration made

This clause makes a number of amendments to section 42 of the Act, which requires a notice of intended marriage and declaration to be provided before a marriage is solemnized.

Sub-clause 16(a) amends paragraph 42(1)(a) to extend the maximum period within which a notice of intended marriage may be received by the authorized celebrant solemnizing the marriage from 3 months to 6 months before the date of the marriage. This extension will allow more flexibility in arrangements, and is supported by religious, official and civil celebrants, as well as the Family Law Council. (See also clause 18).

Sub-clause 16(b) amends paragraph 42(2)(b) to enable an Australian diplomat or consular officer to witness a notice of intended marriage, to assist parties who are overseas who wish to marry in Australia.

Sub-clause 16(c) inserts sub-section 42(5AA) which will require a prescribed authority, before exercising his powers under sub-section 42(5) to shorten the time in which a notice of intended marriage must be filed, to inquire of the parties whether any other prescribed authority has refused to exercise his powers under sub-section 42(5) in relation to their intended marriage and, if so, the name of that prescribed authority. The amendment will reduce the incidence of 'shopping around' prescribed authorities.

Sub-clause 16(d) is consequential upon the adoption of the wider concept of 'marriage education' in lieu of 'pre-marital education'.

Clause 17 - Solemnization of marriage in Australia by foreign diplomatic or consular officer

This clause amends section 55 of the Act to apply the same rules for the recognition of the validity of foreign consular marriages solemnized in Australia under Division 3 of Part IV as will apply in relation to the validity of all marriages, under Division 2 of Part III, except for the provisions as to

formalities. In short, a marriage solemnized in Australia by a foreign diplomatic or consular officer will only be valid if the parties would have capacity to marry under the law generally applicable to marriages in Australia, except that the formalities of Australian law do not have to be compiled with.

Clause 18 - Notice to become void after 6 months

This clause amends section 67 of the Act in consequence of the amendment contained in sub-clause 13(a).

Clause 19 - New Part VA: Recognition of Foreign Marriages

This clause inserts into the Act new Part VA, which will enable Australia to ratify Chapter II of the Convention. This Chapter imposes an obligation on Australia to recognize the validity of certain marriages celebrated in other countries.

Sections 88A, 88B and 88C - Validity of marriages

The rules of the Part deal with four categories of marriages solemnized in a country outside Australia. They do not affect the validity of marriages solemnized by Australian embassy officials overseas; these are dealt with under Part V of the Act. New Part VA deals with marriages solemnized under the law of other countries.

The four categories of overseas marriage which are to be recognized as valid in accordance with Article 9 of the Convention are:

(i) marriages recognized as valid by the law of the country of solemnization (the 'local law') at the time of the ceremony (paragraph 88B(1)(a));

(ii) marriages which were initially invalid under local law, but which have subsequently become valid (paragraph 88B(2)(a));

(iii) marriages solemnized in a foreign country by an embassy official of another foreign country and recognized as valid at the time of the ceremony by that other foreign country, provided that the local law did not prohibit the solemnization (paragraph 88B(1)(b));

(iv) marriages in category (iii) which were initially invalid under the law of the other foreign country, but which have subsequently become valid (paragraph 88B(2)(b)).

Categories (ii) and (iv) will cover the situation where a marriage is subsequently validated by legislation (a number of such acts were passed in Europe following the Second World War), and also the more usual case where, under some foreign laws, marriages initially invalid (e.g. for duress) may be validated by the subsequent conduct of the parties. However, unless the marriage has actually been validated by that law, it will not be recognized in Australia as valid.

As the vast majority of such marriages will have been entered into prior to Australia's adoption of these provisions, the recognition provisions extend to marriages whenever solemnised.

Sub-section 88C(1) confers basic recognition on marriages to which the new Part applies. The recognition given by sub-section 88C(1) will, however, be subject to some exceptions permitted by Article 11 of the Convention, contained in other sub-sections of section 88C. A marriage solemnized in a country outside Australia will not be required to be recognized as valid under sub-section 88C(1) where -

. either of the parties was, at the time of the marriage, a party to a marriage with some other person that would have been, if its validity had fallen to be determined at that time, recognized as valid in Australia;

- if one of the parties was domiciled in Australia, either of the parties was not of marriageable age as provided by sections 11 and 12 (or if neither party was domiciled in Australia, at any time when either of the parties is below the absolute minimum ages under Australian law i.e. 14 for females and 16 for males);

- the parties are within a prohibited relationship as provided by new section 23B; or

- the consent of either of the parties was not a real consent as provided by new section 23B.

Sub-section 88C(4) deals with the special case of a foreign marriage voidable under the relevant foreign law and provides that it shall not be recognised as valid while it remains voidable.

Sub-section 88C(5) will ensure that a marriage solemnized in a country outside Australia, the validity of which falls to be determined at a particular time, is not to be recognized as valid if either party to that foreign marriage has, before that particular time, entered into another marriage that would, under any provisions of the Act, have been recognized as valid in Australia at the time when it was entered into.

This provision is necessary because some foreign countries allow a marriage which was initially invalid to be 'validated' by a subsequent event. In such a case it is important to protect a party who may have entered into another marriage in reliance on the invalidity of the first marriage. In this limited situation the subsequent 'validation' of the first marriage will not be recognized under Australian law.

Sub-section 88C(7) is necessary because of the decision to apply the provisions of Part VA to marriages solemnized before the commencment of the Part. This may mean that some formerly invalid marriages will be validated. As a result there is a need to protect the position of parties who may have re-married, prior to the commencement of the Part, in reliance on the invalidity of the first marriage. In those limited circumstances the first marriage will not be recognised as valid.

Section 88D - Validity under private international law of foreign marriages not affected by this Part

This section contains a number of supplementary provisions to ensure that the widest possible class of marriages are valid, in accordance with Article 13 of the Convention.

Sub-sections 88D(1)and (2) will ensure that the recognition to be given to foreign marriages under Part VA, in accordance with Chapter II of the Convention, does not, subject to the minimum marriageable age limits for parties to a marriage where one party is domiciled in Australia, affect the recognition given to a marriage solemnized in a country outside Australia under the common law rules of private international law, where the application of such rules would provide for the validity of the marriage.

Sub-section 88D(3) will ensure that the operation of Commonwealth, State or Territory law deeming marriages to be valid for particular purposes is not impaired.

Sub-section 88D(4) ensures that the provisions of Part VA do not limit or exclude the operation of a provision of any other law of the Commonwealth, a State or Territory that provides, expressly or impliedly, for polygamous marriages to be recognized as marriages for particular purposes. Section 6 of the Family Law Act 1975 is such a provision.

Section 88E - Incidental determination of recognition of certain foreign marriages

In accordance with the basic policy expressed in Article 12 of the Convention, section 88E provides that where the determination of the question of the validity of a marriage is incidental to the determination of another matter, then the determination of the question of the validity of the marriage is to be determined in accordance with the rules in part VA, subject again to the residual role of the common law rules of private international law. Such 'incidental questions' may arise in connection with matters such as inheritance. It is desirable that the same rules for determination of marriage validity apply, generally, to all situations.

Section 88F - Evidence

Section 88F provides, in accordance with Article 10 of the Convention, that a document purporting to be either the original or a certified copy of a certificate of marriage in a foreign country and purporting to have been issued by an authority of that country is to be prima facie evidence of the marriage and its validity , except if it is proved that the

authority of the foreign country by which the document purports to have been issued was not, at the time of issue, a competent authority. Article 23 of the Convention provides a mechanism for identifying such authorities, in convention countries. Sub-section 88F(3) enables regulations to be made prescribing these authorities.

Clause 20 - Legitimation by virtue of marriage of parents

This clause amends section 89 of the Act, which provides for legitimation of a child by the subsequent marriage of his parents, in two ways.

Sub-clause 20(a) alters the application provisions in sub-section (3) so that reference is made to the domicile of either parent, rather than of the father alone.

Sub-clause 20(b) deals with the special situation where a child is born to an unmarried couple as a result of a medical procedure (see clause 22 for further details) and the law of a State or Territory makes specific provision as to the parentage of that child. (It is anticipated that such laws will deem the couple into whose family the child is born, to be the parents). In that case the child will be legitimated by virtue of the subsequent marriage of that couple. This provision is complementary to clause 22.

Clause 21 - Legitimacy of Children of Certain Foreign Marriages

This clause amends section 90 of the Act, which provides for legitimation of a child who is legitimated in certain circumstances under foreign law. It fills a gap in the legitimation provisions arising where the relevant foreign law does not legitimate a child because it does not recognise the status of illegitimacy. A case involving the law of Israel prompted this amendment. The clause also amends the application provisions to refer to the domicile of either parent, rather than that of the father alone.

Sub-clause 21(2) preserves the effect of legitimations under section 90 as it stood previously.

Clause 22 - Legitimacy of children born as a result of certain medical procedures

This clause inserts new sections 91A and 91B, whose purpose is to clarify the legitimate status of children born as a result of certain medical procedures, where State or Territory law makes provision as to the parentage of these children.

The medical procedures referred to are artifical insemination or in vitro fertilization (see clause 3(b)). Various States have indicated that they propose in certain circumstances to

require a child born to a couple as a result of those procedures to be treated as the child of the couple, rather than the child of its biological parents (e.g. the sperm or ovum donor). As there is some doubt as to the legitimacy of these children, these new sections will clarify the situation in the case of married couples.

New section 91A provides for legitimacy in three separate cases. Sub-section 91A(1) deals with the case of sperm donation where there is no ovum donation. Sub-section 91A(2) deals with the case of ovum donation where there is no sperm donation. Sub-section 91A(3) deals with the case where both ovum and sperm have been donated from other parties. Sub-section 91A(4) provides that the section will operate where the couple were married under Australian law, or where the marriage is recognized as valid in Australia. Sub-sections 91A(5) and (6) contain savings provisions analogous to those in existing section 89.

New section 91B applies the provisions of section 91A to void Australian marriages where, at the time of the medical procedure, one party believed on reasonable grounds that the marriage was valid (see existing sub-section 91(1)).

Clause 23 - Solemnizing marriage where notice or declaration not given or made

This clause contains a textual amendment to section 99.

Clause 24 - Celebrants not to demand more than prescribed fee

This clause inserts new section 106A into Part VII of the Act. The purpose of this section is to clarify the existing law that the fee prescribed by the Fifth Schedule to the Marriage Regulations for solemnization of marriage by a civil marriage celebrant, is the maximum fee that can be charged. It will be an offence for a celebrant to demand a higher fee. The particularly vulnerable position of parties about to be married requires a clear legislative statement for the benefit of both parties and celebrants. The prescribed fees for solemnization have been recently increased.

Clause 25 - Certain marriages and legitimations to be valid in all the Territories

This clause amends section 111 of the Act consequential upon the insertion of new section 91A (see clause 22).

Clause 26 - Regulations

This clause amends section 120 of the Act to enable regulations to be made, if necessary, in relation to the registration of legitimations effected by new section 91A (see clause 22).

Clause 27 - Further amendments

This clause effects further amendments to the Act contained in a schedule to the Bill, all of which are textual amendments.