

1985

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

MARRIAGE AMENDMENT BILL 1985

EXPLANATORY MEMORANDUM

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

Outline

The main purpose of the Bill is to amend the Marriage Act 1961 (the Act) to give legislative effect in Australia to the Hague Convention on Celebration and Recognition of the Validity of Marriages (1978), which was 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 ensure that the legitimization provisions of the Act do not affect the validity or effect of State and Territory law dealing with the parentage of children born as a result of artificial insemination by donor and in vitro fertilization;
- . 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 extend the provisions for the legitimization of a child by the subsequent marriage of its parents to the case where either parent was domiciled in Australia at the date of the marriage;

- . to recognize as legitimate in Australia a child of parents who were married outside Australia and neither of whom was domiciled in Australia at the date of the marriage if the law of the place where either parent was then domiciled did not recognize the status of illegitimacy;
- . to extend the provisions of the Act empowering the grant of subsidies for pre-marital education to enable grants to be made for marriage education;
- . to provide that a civil marriage celebrant is not entitled to charge more than the fees prescribed by the regulations; and
- . to make miscellaneous formal, machinery and drafting changes.

This legislation has no financial impact.

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 Marriages (the Convention), or consequential upon the adoption of the Convention, are to come into operation on a date to be fixed by Proclamation. The remaining provisions of the Bill are to come into operation on the 28th day after 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 clause 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(c)). Clause 8 contains transitional provisions preserving the status of organizations already approved under Part IA.

Amendments to Part III of the Principal Act - Void Marriages

The purpose of clauses 10, 11 and 12 is to confine the operation of sections 22 and 23 of the Act to marriages taking place after the date on which those sections commenced, i.e. 20 June 1977, and before the date on which clause 13 of the Bill is to come into force. The validity of these marriages is to be determined according to the provisions of sections 22 and 23. The validity of marriages taking place after the commencement of clause 13 will be determined according to the provisions of proposed new Division 2.

Clause 13 inserts a new Division 2 into Part III of the Act to accord with Chapter I of the Convention.

This Division deals with the conditions of validity of marriages solemnized after the amendments made by clause 13 come into operation. The marriages to which the Division applies are specified in new section 23A. These are all marriages solemnized in Australia (other than marriages conducted by foreign diplomatic or consular officers involving persons who are not Australian citizens), and marriages conducted overseas by or in the presence of marriage officers appointed under section 62 of the Act. The grounds on which the marriages concerned are void are specified in new section 23B. These grounds are the same as those specified in section 23 of the Act in relation to marriages which now take place.

The change which will be effected by the new Division is that the provisions as to validity will no longer be subject, as are the existing provisions as to validity, to the rules of private international law. That is, 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.

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

This clause repeals sub-section 34(2) of the Act, which requires that, for the purposes of a review under sub-section 34(1) of a decision as to registration of a celebrant, the Administrative Appeals Tribunal be constituted by a

presidential member alone. In future the Tribunal will, for the purposes of such a review, be constituted according to the relevant provisions of the Administrative Appeals Tribunal Act 1975.

Clause 15 - Authorization of other celebrants

Paragraph 15(a) effects a drafting amendment to sub-section 39(2) of the Act so that the criterion for authorization of celebrants under that provision is brought into line with that applied by sub-paragraph 33(1)(d)(iii) of the Act in relation to ministers of religion of recognized denominations, namely that the celebrant be a "fit and proper" person. Paragraph 15(b) adds new sub-section 39(4), which will provide that a civil celebrant is not entitled to charge more than the fee prescribed by the regulations for the solemnization of a marriage.

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.

Paragraph 16(a) amends paragraph 42(1)(a) of the Act 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.

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

Paragraph 16(c) is consequential upon clauses 5 to 9.

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

This clause amends section 55 of the Act to remove reference to the now-redundant concept of "Australian protected person".

Clause 18 - Recognition of marriages

This clause amends section 56 of the Act to provide that a marriage solemnized by a foreign diplomatic or consular officer involving persons who are not Australian citizens will be void in the absence of real consent by one of the parties. The result will be to bring the provisions governing the validity of such marriages (other than the form of marriage ceremony) into line with the provisions of Part III governing the validity of other marriages in Australia.

Clause 19 - Notice of marriage

This clause amends section 66 of the Act, which deals with the notice to be provided to an Australian diplomatic or consular officer prior to a marriage under Australian law overseas. The amendment removes a redundant provision that, where one of the parties to an intended marriage is a British subject, notice of the intended marriage need not be posted up in the office of the officer concerned.

Clause 20 - Notice to become void after 6 months

This clause amends section 67 of the Act in consequence of the amendment contained in paragraph 16(a) of the Bill. The effect of this amendment will be that a notice of intended marriage overseas under Australian law will become void at the expiration of 6 months from the date on which it was received (instead of 3 months).

Clause 21 - Caveats

This is consequential upon the amendment made by clause 19.

Clause 22 - Restriction on solemnization of marriages under

Part V

This clause replaces references to "British subject" in section 77 of the Act with references to "Australian citizen".

Clause 23 - 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. 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 88C(1)(a));
- (ii) marriages which were initially invalid under local law, but which have subsequently become valid under that law (paragraph 88C(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 88C(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 under that law (paragraph 88C(2)(b)).

Object of Part - New section 88A sets out the object of the Part, as being to give effect to Chapter II of the Convention.

Interpretation - New section 88B contains provisions for the interpretation of new Part VA. The Part is to extend to all external Territories.

Application of Part - New section 88C provides that the recognition of validity of foreign marriages in accordance with new Part VA extends to existing marriages as well as those entered into after the commencement of the Part, where the existing marriage was recognized as valid under the relevant foreign law at the time it was solemnized, or is so recognized as valid at the time in relation to which the validity of the marriage falls to be determined.

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

- . where either of the parties was, at the time of the marriage, a party to a marriage with some other person that was, at that time, recognized as valid in Australia (paragraph 88D(2)(a));
- . where, if one of the parties was at the time of the marriage domiciled in Australia, either of the parties was not of marriageable age as provided by sections 11 and 12 (paragraph 88D(2)(b));
- . if neither party was at the time of the marriage domiciled in Australia, at any time while either of the parties is below the absolute minimum age under Australian law i.e. 14 for females and 16 for males (sub-section 88D(3));
- . where the parties are within a prohibited relationship as provided by new section 23B (paragraph 88D(2)(c)); or
- . where the consent of either of the parties was not a real consent as provided by new section 23B (paragraph 88D(2)(d)).

Sub-section 88D(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 under the new rules while it remains voidable under that law.

Sub-section 88D(5) will resolve a conflict which inevitably arises where marriages which were initially invalid are subsequently validated but in the meantime one of the parties has entered into a marriage recognized in Australia as valid. The conflict is resolved by giving preference to the second marriage, and denying any validity that the first marriage would otherwise have been given. In doing so it also resolves a doubt as to the operation of the common law left by the decision of the House of Lords in Starkowski v. Attorney-General (1954) AC 155, at 168.

Validity of certain marriages not affected by this Part - New section 88E gives effect to Article 13 of the Convention, which provides that the Convention shall not prevent the application of rules of law more favourable to the recognition of foreign marriages than those set out in the Convention.

Sub-sections 88E(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 in Australia to a marriage solemnized in a country outside Australia where the application of the common law rules of private international law would provide for the marriage to be recognized as valid.

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

Sub-section 88E(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 for unions not recognized by the common law as marriages (e.g. polygamous marriages) to be recognized as marriages for particular purposes.

Incidental determination of recognition of certain foreign marriages - New section 88F, in accordance with the basic policy expressed in Article 12 of the Convention, 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 that question for all purposes is to be in accordance with the rules in Part VA, including, where appropriate, the common law rules of private international law. Such incidental questions may arise in connection with matters such as inheritance.

Evidence - New section 88G 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 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. The term "competent authority" is defined in sub-section 88G(3) as being either an authority prescribed by the regulations in relation to a foreign country or part of a foreign country, or any other authority competent under the law of that foreign country to issue the original certificate or a certified copy thereof. Article 23 of the Convention provides a mechanism for identifying such authorities in Convention countries.

Clause 24 - 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 the child's parents, to provide that the section applies where, in the case of a marriage taking place after the amendment comes into force, either parent was domiciled in Australia at the date of the marriage.

Clause 25 - Legitimacy of Children of Certain Foreign Marriages

This clause substitutes a new section 90 of the Act, which provides for recognition in Australia of the legitimacy of a child who is legitimated under foreign law by virtue of the subsequent marriage of its parents. The amendment fills a gap

in the legitimation provision arising where the relevant foreign law does not recognise the status of illegitimacy, so that section 90 has no application.

The amendment will provide that, in such a case, a child will be recognized as legitimate in Australia if its parents have subsequently married. The recognition will date from the date of commencement of the amendment or the subsequent marriage, whichever is the later.

The substituted section 90 will also provide that the section applies only where neither parent was domiciled in Australia at the date of the marriage instead of, as at present, only where the father was not domiciled in Australia at the date of the marriage.

Sub-clause 25(2) preserves the effect of legitimations under section 90 as it stood previously.

Clause 26 - Operation of certain State and Territory laws

This clause adds new sub-section 93(3) to the Act, which will express the intention that the legitimation provisions of the Act are not to affect the validity or effect of State and Territory law dealing with the parentage of children born as a result of certain medical procedures. The medical procedures referred to are artificial insemination and in vitro fertilization (see paragraph 3(b) of the Bill).

Clause 27 - Solemnizing marriage where notice or declaration
not given or made

This clause corrects an incorrect reference in section 99 to a sub-section which has been repealed.

Clause 28 - Further amendments

This clause effects further amendments to the Act contained in the Schedule to the Bill. Except for the repeal of sub-section 92(3) and section 119, which are no longer necessary in light of sections 39A and 68 of the Judiciary Act 1903, the amendments are of a formal or drafting nature, to bring the language of the Act into conformity with current drafting practice.

THE HISTORY OF THE

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