

1990

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

Presented and read a first time, 16 May 1990

(Attorney-General)

A BILL

FOR

An Act to amend the *Family Law Act 1975*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title

1. This Act may be cited as the *Family Law Amendment Act 1990*.

5 **Principal Act**

2. In this Act, “**Principal Act**” means the *Family Law Act 1975*¹.

Approval of marriage counselling organisations

3. Section 12 of the Principal Act is amended by omitting subsection (7) and substituting the following subsection:

10 “(7) A list of all organisations approved under this section (other than organisations whose approvals have been revoked) must be published annually in such manner as the Attorney-General considers appropriate.”.

Interpretation

4. Section 60 of the Principal Act is amended by inserting the following definitions:

“ **‘abuse’**, in relation to a child, means:

- (a) an assault of the child which is an offence under State or Territory law; or 5
- (b) a sexual assault of the child; or
- (c) ill-treatment of the child; or
- (d) exposure or subjection of the child to behaviour which psychologically harms the child; 10

‘de facto relationship’ means the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other;

‘prescribed adopting parent’, in relation to a child, means:

- (a) a parent of the child; or 15
- (b) the spouse of, or a person in a de facto relationship with, a parent of the child; or
- (c) a parent of the child and either his or her spouse or a person in a de facto relationship with the parent;

‘prescribed child welfare authority’, in relation to abuse of a child, means: 20

- (a) where the child is the subject of proceedings under this Part in a State or Territory—an officer of the State or Territory (being an officer responsible for the administration of the child welfare laws of the State or Territory) or other prescribed person; or 25
- (b) where the child is not the subject of proceedings under this Part—an officer of the State or Territory in which the child is located or is believed to be located (being an officer responsible for the administration of the child welfare laws of the State or Territory) or other prescribed person; 30

‘professional ethics’ includes:

- (a) rules of professional conduct; and
- (b) rules of professional etiquette; and
- (c) a code of ethics; and
- (d) standards of professional conduct.”. 35

Certain children are children of marriage etc.

5. Section 60A of the Principal Act is amended by omitting subsection (3) and substituting the following subsections:

“(3) A child of a marriage who is adopted by a person who, before the adoption, is not a prescribed adopting parent ceases to be a child of that marriage for the purposes of this Act. 40

“(4) A child of a marriage who is adopted by a prescribed adopting parent ceases to be a child of that marriage for the purposes of this Act where a court granted leave under section 60AA for the adoption proceedings to be commenced.”.

5 6. After section 60A of the Principal Act the following section is inserted:

Family Court may permit adoption by prescribed adopting parent

10 “60AA. The Family Court, the Supreme Court of the Northern Territory or the Family Court of a State may grant leave for proceedings to be commenced for the adoption of a child by a prescribed adopting parent.”.

Rights of custody and guardianship of children

7. Section 63F of the Principal Act is amended by omitting subsection (4) and substituting the following subsection:

15 “(4) An order made under this Part in relation to the custody or guardianship of, or access to, a child ceases to be in force if:

(a) the child is adopted by a person who, before the adoption, is not a prescribed adopting parent; or

20 (b) the child is adopted by a prescribed adopting parent, where a court granted leave under section 60AA for the adoption proceedings to be commenced.”.

Powers of court in custodial proceedings

8. Section 64 of the Principal Act is amended:

25 (a) by inserting before paragraph (1) (b) the following paragraph:

“(a) the court must regard the welfare of the child as the paramount consideration;”;

(b) by inserting after subparagraph (1) (bb) (v) the following subparagraph:

“(va) the need to protect the child from abuse;”;

30 (c) by inserting after subsection (1B) the following subsections:

“(1C) A court must not make an order with the consent of all the parties to the proceedings, being an order placing a child in the guardianship or custody of a person who is not the child’s parent, or 2 or more persons none of whom is the child’s parent, unless:

(a) the requirements of subsection (1D) are satisfied; or

(b) the court is satisfied, having regard to the special circumstances of the proceedings, that it is appropriate to make the order even though the requirements of subsection (1D) are not satisfied.

“(1D) The requirements for the purposes of subsection (1C) are that:

- (a) the parties to the proceedings have attended a conference in relation to the proposed guardianship or custody arrangements with a court counsellor or welfare officer; and 5
- (b) the court has considered a report prepared by the court counsellor or welfare officer about the proposed guardianship or custody arrangements.”.

Power of court to require provision of information 10

9. Section 64A of the Principal Act is amended by omitting subsection (10) and substituting the following subsection:

“(10) Information provided to the Registrar of a court pursuant to this section must not be divulged by the Registrar, or by any other person who has obtained the information because of the provision of the information to the Registrar, except: 15

- (a) to the Registrar of another court; or
- (b) to a person to whom the warrant referred to in paragraph (1) (a) or (4) (a) is addressed; or
- (c) with leave of the court, to a person who is, under an order made by a court (including a court of a prescribed overseas jurisdiction), entitled to custody of, or access to, the child in relation to whom that warrant was issued.”. 20

Child welfare provisions of registered child agreements

10. Section 66ZD of the Principal Act is amended by inserting after subsection (3) the following subsection: 25

“(3A) Subsections (1) and (3) do not apply to a child agreement (whether registered before or after the commencement of the *Family Law Amendment Act 1990*) to the extent (if any) that the agreement purports to confer the custody or guardianship of the child concerned upon a person who is not a parent of the child.”. 30

Child maintenance provisions of registered child agreements—where not enforceable as maintenance agreements

11. Section 66ZDA of the Principal Act is amended:

- (a) by omitting subsection (2) and substituting the following subsection: 35

“(2) The agreement, in so far as it makes provision in relation to the maintenance of the child, has effect (including for the purposes of section 66N) as if the agreement were an order made by consent under this Part by the court in which the agreement is registered.”; 40

(b) by adding at the end the following subsection:

5 “(5) The agreement, so far as it makes provision for the
maintenance of the child, has no effect and is not enforceable
in any way at any time when an application could properly be
made under the *Child Support (Assessment) Act 1989* by one of
the parties to the agreement for administrative assessment of
child support (within the meaning of that Act) for the child,
10 seeking payment of the child support by the other party to the
agreement (whether or not such an application has in fact been
made by the party or by another person).”

12. After Division 12 of Part VII of the Principal Act the following
Division is inserted:

“Division 12A—Allegations of Child Abuse

Allegation by party to proceedings

15 “70BA. (1) This section applies where a party to proceedings under
this Act alleges that a child to whom the proceedings relate has been
abused or is at risk of being abused.

“ (2) The party must file a notice in the prescribed form in the court
hearing the proceedings.

20 “ (3) Where a notice under subsection (2) is filed in a court, the
Registrar must, as soon as practicable, notify a prescribed child welfare
authority.

“ (4) In this section:

‘prescribed’ means prescribed by the Rules;

25 ‘Registrar’ means:

(a) in relation to the Family Court, or the Family Court of Western
Australia—the Registrar, or a Deputy Registrar, of that Court;
and

30 (b) in relation to any other court—the principal officer of that
court.

Court counsellor who suspects certain child abuse

35 “70BB. (1) Where a court counsellor has reasonable grounds for
suspecting that a child has been abused, or is at risk of being abused
(whether or not the court counsellor became aware of the grounds for
so suspecting while he or she was carrying out the duties of that office)
the court counsellor must, as soon as practicable, notify a prescribed
child welfare authority.

Penalty: \$6,000.

40 “ (2) A notice under subsection (1) may be in writing or oral but
must include a statement of the court counsellor’s suspicion and the
basis for the suspicion.

“(3) Subsection (2) applies in spite of any obligation of confidentiality imposed on the court counsellor by:

- (a) this or any other Act; or
- (b) any other law; or
- (c) anything else, including a contract or professional ethics. 5

“(4) In this section:

‘**abuse**’ does not include exposure or subjection of a child to behaviour which psychologically harms the child.

No liability for notification pursuant to section 70BA or 70BB

“70BC. (1) A person who notifies a prescribed child welfare authority pursuant to section 70BA or 70BB: 10

- (a) is not liable to any civil or criminal proceedings in respect of that notification; and
- (b) is not to be considered to have breached any professional ethics.

“(2) Evidence that a prescribed child welfare authority was notified pursuant to section 70BA or 70BB is not admissible in any court except where that evidence is given by the person who notified the prescribed child welfare authority. 15

“(3) In this section:

‘**court**’ means a court (whether or not exercising jurisdiction under this Act) and includes a tribunal or other body concerned with professional ethics.”. 20

13. After section 70E of the Principal Act the following section is inserted in Division 14 of Part VII:

Certain instruments not liable to duty 25

“70F. (1) The following agreements, deeds and other instruments are not subject to any duty or charge under any law of a State or Territory or any law of the Commonwealth that applies only in relation to a Territory:

- (a) a deed or other instrument executed by a person under, or for the purposes of, an order made under this Part; 30
- (b) an eligible child agreement that confers a benefit in relation to a child, to the extent to which the agreement confers the benefit;
- (c) a deed or other instrument:
 - (i) that is executed by a person under, or for the purposes of, an eligible child agreement; and 35
 - (ii) that confers a benefit in relation to a child; to the extent to which it confers the benefit.

“(2) A child agreement is an eligible child agreement for the purposes of this section if: 40

- (a) it has been registered under section 66ZC; and

(b) it is not a maintenance agreement or, if it is a maintenance agreement, it relates to a child who is not a child of the relevant marriage; and

(c) it is a child agreement of either of the following kinds:

- (i) a child agreement made in connection with the breakdown of the de facto relationship to which the agreement relates;
- (ii) a child agreement (other than a child agreement falling within subparagraph (i)) that relates to a child whose parents were not:

(A) married to each other; or

(B) living with each other in a de facto relationship; at the time the child was conceived.

“(3) For the purposes of this section, a child agreement, deed or other instrument that confers an entitlement to property in relation to a child may be taken to confer a benefit in relation to the child even though the agreement, deed or other instrument also deprives the child or another person of an entitlement to other property (being property of an equal or greater value) in relation to the child.

“(4) In this section, a reference to the de facto relationship to which a child agreement relates is a reference to the de facto relationship the parties to which are parties to the agreement.”.

14. After section 92 of the Principal Act the following section is inserted in Part IX:

Intervention in child abuse cases

“92A. (1) This section applies to proceedings under this Act in which it has been alleged that a child has been abused or is at risk of being abused.

“(2) Each of the following persons is entitled to intervene in the proceedings:

- (a) a guardian of the child;
- (b) a person who is entitled to the custody of the child;
- (c) a person who is responsible for the daily care and control of the child;
- (d) a prescribed child welfare authority;
- (e) a person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

“(3) Where a person intervenes in proceedings pursuant to this section, the person is, unless the court otherwise orders, to be taken to be a party to the proceedings with all the rights, duties and liabilities of a party.”.

15. After section 100 of the Principal Act the following section is inserted:

Evidence of children

“100A. (1) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is admissible in any proceedings under Part VII. 5

“(2) A court may give such weight (if any) as it thinks fit to evidence admitted pursuant to subsection (1).

“(3) This section applies in spite of any other Act or rule of law.

“(4) In this section:

‘child’ means a child under 18 years of age; 10

‘representation’ includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.”.

Protection of witnesses

16. Section 101 of the Principal Act is amended:

(a) by inserting “, abusive” after “insulting”; 15

(b) by adding at the end the following subsection:

“(2) The court must forbid an examination of a witness that it regards as oppressive, repetitive or hectoring, or excuse a witness from answering questions asked during such an examination, unless the court is satisfied that it is essential in the interests of justice for the examination to continue or for the questions to be answered.”. 20

17. After section 102 of the Principal Act the following section is inserted in Part XI:

Restrictions on examination of children 25

“102A. (1) A party to proceedings under this Act must not cause or permit a child to be examined by a person to enable the person to give evidence about the child, or the child’s welfare, in the proceedings.

“(2) Subsection (1) does not apply where the court has given leave.

“(3) In considering whether to give leave for a child to be examined, the court must have regard to the following matters: 30

(a) whether the proposed examination is likely to provide relevant information that is unlikely to be obtained otherwise;

(b) the qualifications of the person who proposes to conduct the examination to conduct that examination; 35

(c) whether any distress likely to be caused to the child by the examination will be outweighed by the value of the information that might be obtained from the examination;

(d) any distress already caused to the child by any previous examination associated with the proceedings or with related proceedings; 40

(e) any other matter that the court thinks is relevant.

“(4) Evidence that has been obtained through a breach of subsection (1) is not admissible in proceedings under this Act unless the court is satisfied that:

- 5 (a) the evidence relates to relevant matters on which the evidence already before the court is inadequate; and
(b) the court will not be able to determine the proceedings properly unless the evidence is admitted; and
10 (c) the welfare of the child concerned is likely to be served by the admission of the evidence.

“(5) In this section:

‘**examined**’ includes subjected to a medical procedure, but does not include psychologically examined or assessed by a court counsellor;

15 ‘**party to proceedings under this Act**’ includes a person entitled to intervene in the proceedings under subsection 92A (2).”.

Operation of State and Territory laws

18. Section 114AB of the Principal Act is amended by omitting subsections (2) and (3) and substituting the following subsection:

20 “(2) Where a person has instituted a proceeding or taken any other action under a prescribed law of a State or Territory in respect of a matter in respect of which the person would, but for this subsection, have been entitled to institute a proceeding under section 70C or 114, the person is not entitled to institute a proceeding under section 70C or 114 in respect of that matter, unless:

- 25 (a) where the person instituted a proceeding:
(i) the proceeding has lapsed, been discontinued, or been dismissed; or
(ii) the orders (if any) made as a result of the institution of
30 the proceeding have been set aside or are no longer in force; and
(b) where the person took other action—neither that person nor any other person is required, at the time that the person institutes a proceeding under section 70C or 114, to do an act, or to refrain from doing an act.”.

35 19. After section 122 of the Principal Act the following section is inserted:

Powers of entry and search for purposes of arresting persons

“122A. (1) Where:

- 40 (a) a person (in this subsection called the ‘**authorised person**’) is, by a provision of this Act, or by a warrant issued under a provision of this Act, authorised to arrest another person; and

(b) the authorised person reasonably believes that the other person is in or on a particular searchable place;

the authorised person may, without warrant, enter and search the searchable place.

“(2) Where a person may enter and search a vehicle, vessel or aircraft under subsection (1), the person may, for the purposes of effecting the entry and search, stop and detain the vehicle, vessel or aircraft. 5

“(3) In exercising powers under this section, a person may use such force and assistance as is necessary and reasonable to enable the exercise of the powers. 10

“(4) In this section:

‘searchable place’ means:

(a) premises or a place; or

(b) a vehicle, vessel or aircraft.”. 15

Further amendments

20. The Principal Act is further amended as set out in the Schedule.

SCHEDULE

Section 20

FURTHER AMENDMENTS

Section 60D:

Repeal the section.

Subsection 63 (2):

Insert “but not including proceedings for leave under section 60AA” after “70D”.

Paragraphs 70AA (5) (b), (6) (b) and (6) (c):

Insert “, or no longer any application,” after “application” (wherever occurring).

Paragraph 90 (1) (a):

Omit “or Part VII”.

Section 112AL:

Omit “an order under Part VII, or”.

NOTE

1. No. 53, 1975, as amended. For previous amendments, see Nos. 63, 95 and 209, 1976; No. 102, 1977; No. 23, 1979; No. 2, 1982; Nos. 67 and 72, 1983; Nos. 63, 72 and 165, 1984; Nos. 65, 166 and 193, 1985; Nos. 76 and 168, 1986; No. 141, 1987; No. 181, 1987 (as amended by No. 8, 1988); Nos. 8 and 120, 1988; and Nos. 124, 157 and 182, 1989.



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