Family Law Amendment Bill 1987

Date Introduced: 29 October 1987
House: House of Representatives
Presented by: The Hon. Lionel Bowen, M.P., Attorney-General

Digest of Bill

Purpose
To alter the laws applying to child maintenance; extend provisions of the Family Law Act 1975 (the Principal Act) relating to the maintenance, custody and guardianship, to extranuptial children in the States that referred power to the Commonwealth; allow child welfare agreements; and to insert various presumptions of parentage.

Background
The area of child maintenance has been subject to controversy since the introduction of the Principal Act and this matter has come to prominence in recent years. Most of the conjecture centers, first, on the allegations that child maintenance payments are, in effect, optional and, secondly, on the affect that various social security payments have on maintenance.

The Family Law Council examined the area in 1985 and submitted proposals to the Attorney-General in December of that year. The principal submissions were that the amount of maintenance should be determined by administrative, rather than judicial, means by reference to a formula; there should be a right of appeal against the administrative decision; a Child Maintenance Agency should be established in the Taxation Office; and that maintenance should be collected by the Agency along PAYE lines.1

Subsequently, a Cabinet sub-committee was established to review child maintenance. The Sub-Committee on Maintenance delivered its report, titled Child Support, A discussion paper on child maintenance, in October 1986. The report initially examined the growing incidence of single parent families. Between 1974 and 1985, the number of such families increased by 73% to 316,000 and the proportion of sole parents on a pension or benefit rose from 65% to 85%. The report also found that the major cause of single parent families was the breakdown of marriages and de facto relationships, with less than 20% involving parents who had never lived with the father.2 The effect of the growth of such families on government payments was noted, with expenditure on supporting parents and widow beneficiaries rising by 245% in the period 1973-74 to 1985-86.3
Supporting parents benefits and allowances are estimated to cost $1509.8 million in 1987–88, an increase of 10.5% over the previous year.  

Two major problems with the current maintenance system were noted. First, the non-payment of maintenance. Recent figures suggested that less than 30% of custodial parents received regular cash payments from the other parent, with approximately 10% of unmarried sole parents and 36% of divorced sole parents receiving such payments. It was also estimated that less than half of the court orders were complied with. Secondly, the low level of payments was noted. The taking into account of social security benefits available and the desire to fix payments at a level that would encourage payment was noted. Department of Social Security data showed that most sole parents who were in receipt of a benefit or allowance received between $10 and $30 per week with two thirds of payments being below $31 per week. As a result of these problems, the relatively low level of social security payments and the general lack of employment opportunities for sole parents, poverty is a serious problem.

Having examined the problems with the current system and concluded that there was a need for reform, the report examined the government’s proposed reforms. The major change was to make it clear that non-custodial parents have a responsibility to support their children. The proposals for the calculation and collection of maintenance were substantially the same as suggested by the Family Law Council and involved a legislative formula for calculating maintenance administered by a Child Support Agency under the control of the Commissioner of Taxation. Payments were to be collected, where possible, by automatically withholding the amount as is done in the PAYE tax collection system. The report also noted that a number of overseas countries, such as the US, Sweden and New Zealand, relied on a formula to determine maintenance payments rather than judicial decision in each case. It was also proposed to extend the scheme to all single parent families and not just social security recipients. In addition, the possibility of linking access with the payment of maintenance was considered, with maintenance not being payable if access was refused (except where access was denied by the courts) and vice versa. However, problems with the linking of maintenance and access were found, such as the exploitation of the linkage, and further community views were sought.

The report also dealt with the issue of presumptions of parentage. Some State and common law presumptions were listed, including the presumptions were the child is born during marriage or within 10 months of separation and where the man has cohabitated with the mother for at least six months and this period ended not more than ten months before the birth of the child. The report examined possible ways of proving parentage, including compulsory blood testing, as can currently be ordered by the courts, and notes potential problems, such as where the mother nominates a number of men.
The power for the Commonwealth to legislate to effect custody, maintenance etc. of children comes from paragraph 51(xxii) of the Constitution which deals with 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'. However, this head of power restricts the laws that can be made to children from a marriage, so that ex-nuptial children cannot be covered by the Principal Act and are dealt with under State law. This has lead not only to the different treatment of children depending upon whether their parents were married but also to the different treatment of ex-nuptial children in the various States. To overcome these problems the Commonwealth has been seeking to have the States refer their powers in this area to it. Under paragraph 51(xxxvii) of the Constitution, the Commonwealth will have power to legislate on matters referred to it by a State or States, but only to bind the State/States that have referred the power. In 1986, NSW, Victoria, Tasmania and South Australia passed legislation to refer their powers over ex-nuptial children's maintenance, custody, guardianship and access to the Commonwealth. As Western Australia and Queensland have not referred their powers in this area, such children in those States will still be subject to State law.

Outline

The Bill will make a number of minor amendments to the Principal Act as a consequence of the increased jurisdiction of the Family Court in relation to ex-nuptial children. In addition, a new Part VII will be inserted to group together the existing provisions relating to children. The new maintenance provisions will be contained in proposed Division 6 of the new Part, while the extended jurisdiction of the Principal Act in relation to ex-nuptial children will be carried out by proposed Division 2 of the new Part.

Main Provisions

Clause 24 of the Bill will repeal sections 60, 60A and 61 of the Principal Act and insert new sections. Proposed section 60E will extend the operation of proposed Part VII to NSW, Victoria, South Australia and Tasmania while an Act exists in those States to refer the powers to the Commonwealth. The proposed section will also provide for Queensland and Western Australia to adopt the provision. However, children subject to a State child welfare law will be outside the courts jurisdiction while subject to that law (proposed section 60H).

Proposed Division 4, which deals with the jurisdiction of courts, will be inserted by clause 25 which will also repeal existing section 63 of the principal Act. Jurisdiction under proposed Part VII will be conferred on the Family Court and State and Territory courts of summary jurisdiction. The Governor-General may, by Proclamation, fix a date after which proceedings under the proposed Part VII may not be commenced or transferred to a court of summary jurisdiction. Such a Proclamation may be expressed to apply only to certain classes of proceedings. Before proceedings may be bought in relation to a child, the child must be
present in Australia, an Australian citizen or resident, present in
Australia or a party to the proceedings must satisfy the same conditions
(proposed section 63B).

Clause 28 will insert new Divisions, including Division 6, into the
Principal Act.

Proposed Division 6 deals with the maintenance of children. The object
of the Division will be to ensure that children receive a proper level of
financial support from their parents and ensuring that their needs are met
from reasonable and adequate shares of the parents income, property,
financial resources and earning capacity of both parents. The parents are
also to share equitable in the support of the children (proposed section
66A).

Proposed section 66B will impose a duty on parents to maintain their
children. The duty is not to be of a lower priority than the upkeep of
another child, and will have priority over all commitments other than
commitments to allow the parent to support themselves or any other child
that they have a duty to support.

In child maintenance proceedings, the court is to consider the
financial support necessary for the maintenance of the child and then
determine the financial contributions of the parties to the proceedings
(proposed section 66C).

Proposed section 66D deals with the matters to be taken into account
in determining the financial support for the maintenance of the child. The
court is only to take into account the income, earning capacity, property
and financial resources of the child and the needs of the child. In
determining the former, no regard is to be paid as to the availability of
an allowance, pension or benefit. For the latter, regard is to be paid to
the child’s age, the manner in which the child is being educated, or in
which the parents expect the child to be educated, and any special needs
of the child.

Proposed section 66E deals with matters to be taken into account in
determining the contributions that should be made by the parties. The
court is to only consider the matters listed in proposed sections 66A, 66B
and 66D and the income, earning capacity, property and financial resources
of the parties, commitments to support themselves or other people that
they have a duty to support, the cost of caring for the child, and any
special circumstances. The entitlement of the child or the person with
custody of the child to a benefit or allowance is not to be considered.

Step - parents are to assist in the maintenance of a step-child in
certain circumstances. This is to occur where the step-parent is a
guardian, has custody under a court order, or if the court determines
that, having regard to the matters listed (e.g. the circumstances of the
relationship, the objects of proposed Part VII and pre-existing arrangements), that it is proper that such a duty be imposed (proposed section 66G).

The court is not to order maintenance in respect of a child who has attained 18 years unless it is necessary to enable the child to complete their education or because of mental or physical disability (proposed section 66H).

Proposed section 66J deals with the powers of the court. These include to order the payment of a lump sum, periodic payments, that property be transferred, order that a deed be executed and to make orders imposing terms and conditions.

Proposed Division 7 deals with presumptions of parentage. A child born during a marriage will be presumed to be the child of that marriage as will a child born within 10 months of the end of the marriage (proposed section 66P). Where parents have cohabited for at least six months and a child is born within 10 months of the end of the cohabitation, the man will be presumed to be the father of that child (proposed section 66Q). Where someone is registered as the parent of a child, they will be presumed to be the parent of that child (proposed section 66R). Presumptions under this Division may be rebutted on the balance of probabilities (proposed section 66U).

Under proposed Division 8, a court may order medical tests to determine parentage. Such orders may be made in relation to the child, the known mother or anyone else if the court determines that such information may assist in determining the parentage of the child (proposed section 66W).

Child bearing expenses are dealt with in proposed Division 9. The father of a child who is not married to the mother will be liable to contribute to the costs of maintenance for the childbirth period (generally two months before the child is born and ending three months after birth — proposed section 60), the mother's reasonable medical expenses in relation to the pregnancy and birth, and if the mother dies as a result of the pregnancy or birth, reasonable funeral expenses, or if the child dies in relation to birth, reasonable funeral expenses of the child (proposed section 66X).

Proposed Division 10 deals with child agreements which will deal with the child's welfare. Such agreements may be registered with a court and will prevent the parties to the agreement from seeking orders under proposed Part VII. The court may refuse to enforce part or all of the agreement if it is of the opinion that enforcement would not be in the best interests of the child (proposed section 66ZD). Such agreements are only to be set aside if the court is satisfied that the agreement was entered into due to fraud or undue influence, that all parties desire to
have it set aside or that the welfare of the child requires that it be set aside (proposed section 66ZE).

References

3. Ibid., p. 8.
5. Ibid., p. 12.
8. Ibid., p. 23.

For further information, if required, contact the Law and Government Group.

11 November 1987

Bills Digest Service
Legislative Research Service

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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