MARRIAGE AMENDMENT BILL 1984

Date Introduced: 4 April 1984
House: Senate
Presented by: Senator the Hon. Gareth Evans, Q.C., Attorney-General

Short Digest of Bill

Purpose

To make provision for recognition of foreign marriages, consistently with Australia's signing of the Hague Convention on Celebration and Recognition of the Validity of Marriages; and to provide for the legitimacy of children, born through certain biological procedures, deemed under State or Territory law to be children of the relevant married couple.

Background

The Convention on Celebration and Recognition of the Validity of Marriages was concluded at The Hague on 23 October 1976 by the countries belonging to the Hague Conference on Private International Law. The convention has not yet entered into force; Article 29 provides for entry into force on the first day of the third calendar month after deposit of the third instrument of ratification. Entry into force in the territory of any later countries ratifying is on the first day of the third calendar month following its ratification or accession.

The Convention in Chapter I provides for the celebration of marriages. Article 3 permits a marriage to be celebrated, on grounds of compliance with local laws for marriage if one party is a national or domiciliary; and local "choice of law" rules otherwise. Application of this rule is indicated in the Second Reading Speech to overcome the difficulties of Australian celebrants who lack resources to determine whether parties who are not Australian nationals or domiciliaries have marital capacity under some applicable foreign law.

Chapter II (Articles 7 to 15) provides for the recognition of the validity of marriages celebrated in accordance with the requirement of the law of the State of celebration (Article 9). Exceptions in Article 8 include marriages celebrated by military authorities or aboard ships.
or aircraft, while Article 14 permits recognition of validity to be refused if it is manifestly incompatible with a State's public policy.

The only other grounds for refusing to recognize validity are set out in Article 11 and include existing prior marriage, a prohibited relationship between the parties, and lack of free consent or of mental capacity to consent. Article 15 provides for recognition of marriages existing at the entry into force of the Convention. Reservations preventing such application, or excluding the application of Chapter I entirely, are permitted by the Convention (Articles 15, 16).

Recent developments in medical techniques have had the effect of separating biological and genetic notions of parenthood. In-vitro fertilization (IVF) may use the genetic material only of the married couple. Even in this case, legislative amendment may assist to clarify the legal position resulting from biological procedures unknown to the common law. Where artificial insemination by donor (AID) is employed with the husband's consent, legislative amendment may establish the husband as the father of the child and prevent paternity or etc. proceedings. Similarly, the birthgiver and her husband may be deemed parents even though the original genetic material comprises an ovum from a third party or an embryo from third and fourth parties.

The techniques of embryo transfer (ET) used in IVF can also be used for the carriage to term of the genetic offspring of the married couple or one of them by a third party, a "surrogate mother". The legal position here, if it is provided for, differs significantly from legislation establishing the birthgiver and her husband as the child's parents.

Placita 51(xxi) and (xxii) of the Constitution give the Commonwealth Parliament legislative power with respect to marriage, divorce and matrimonial cases. Jurisdiction under the Family Law Act 1975 is limited by these constitutional provisions. The definition of "child of the marriage" in that Act was amended by the Family Law Amendment Act 1983, so that where State jurisdictions make statutory provision for a child born by AID or IVF or other medical procedure to be deemed to be the child of its mother's husband, such a child will be considered to be a child of the marriage in the appropriate circumstances.

The significance of children to the Marriage Act 1961 (Cth.) derives principally from Part VI of the Act's provisions for legitimation of children of void marriages or marriages occurring later than birth. Section 92 permits
application to the Family Court or to a State or Territory Supreme Court for a declaration of legitimacy. The Bill amends the Marriage Act to provide for legitimacy of children born as a result of medical procedures (AID, IVF) where the relevant State or Territory legislation treats the child as the child of the married couple.

Recommendations of the Joint Select Committee on the Family Law Act, which reported in July 1980, impinge on the Marriage Act 1961.[1] The Committee recommended that "marriage counselling" be widely defined under the Family Law Act and that "education for marriage and family life be further supported either by incorporating provisions in the [Family Law] Act or by reinforcing those in the Marriage Act" [2].

Main Provisions

The Bill is to commence with Royal Assent, except that clauses implementing the Hague Convention on Celebration and Recognition of the Validity of Marriages are to commence on a date fixed by Proclamation. These clauses comprise clauses 10-13 for division of Part III into provisions applying the Hague Convention (Division 2) from the date of commencement of clause 13; and Division 1 for marriages solemnized on or after 20 June 1977 and before the commencement of clause 13. Clause 17 ensures that marriages in Australia by foreign diplomatic or consular officers remain effective, while clause 19 inserts Part VA (new sections 88A-88F) for recognition of the validity of foreign marriages. Foreign marriages unaffected by the Convention will still be recognised if presently recognized under the common law rules of private international law (section 88D).

Clause 21 substitutes section 90, to provide for the legitimation by subsequent marriage of children born in a country, such as Israel, which does not recognize the status of illegitimacy. Provisions in the Marriage Act relating to legitimacy of children are further amended to cater for children born in those State or Territory jurisdictions which have enacted legislation to provide that the child is deemed the legitimate child of the married couple even though the child was born by artificial insemination by donor (AID) with or without IVF (sub-section 91A(1)); by IVF using a donor ovum (sub-section 91A(2)); or by IVF using a donor embryo (sub-section 91A(3)).

Following the recommendation of the Joint Select Committee on the Family Law Act, that more general marriage counselling be provided for, clauses 5 to 9 alter "pre-marital education" to refer to "marriage education".
Clause 24 adds section 106A, to provide that authorized celebrants who are not ministers of religion, may not charge more for their solemnization of a marriage than the prescribed fee.

For further information, if required, contact:

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Law & Government Group
LEGISLATIVE RESEARCH SERVICE

References

