



## Current Changes Before the Senate affecting Australian Family Law – the Civil Law and Justice Legislation Amendment Bill 2017

The Civil Law and Justice Legislation Amendment Bill 2017 (Bill)<sup>1</sup> was tabled in parliament on 10 May 2017 and is currently before the Senate.

This Bill contains includes proposed changes to five pieces of legislation, including three relevant to family law: the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**), the *Family Law Act 1975* (Cth) (**Family Law Act**) and the *Marriage Act 1961* (Cth) (**Marriage Act**).

### THE BANKRUPTCY AND FAMILY LAW ACTS

#### Financial Agreements and de facto jurisdiction

The Bill proposes an amendment to the *Bankruptcy Act* that would clarify that the Family Court of Australia has bankruptcy jurisdiction in both married and de facto causes where the party to a marriage or de facto is bankrupt and the trustee of the bankrupt's estate applies to have a financial agreement set aside under the *Family Law Act*.<sup>2</sup> Such an amendment would improve the consistency of financial and other provisions for de facto and married couples. The Law Council of Australia has made a submission for the legislation to include the circumstances where a person has been discharged from bankruptcy, but whose estate remains vested in the trustee of their estate.<sup>3</sup> This would further enlarge the scope of the Family Court's jurisdiction in bankruptcy.

#### Instituting proceedings out of time

Proposed amendments to section 44 of the *Family Law Act* would remedy inconsistencies between de facto and married couples in relation to instituting proceedings for property and maintenance or when a financial agreement has been set aside. The current limitation period for married couples to institute maintenance or property proceedings is 12 months

<sup>1</sup> Parliament of Australia, Civil Law and Justice Legislation Amendment Bill 2017, <[http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1057\\_first-senate/toc\\_pdf/1703120.pdf;fileType=application%2Fpdf#search=%22legislation/bills/s1057\\_first-senate/0000%22](http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1057_first-senate/toc_pdf/1703120.pdf;fileType=application%2Fpdf#search=%22legislation/bills/s1057_first-senate/0000%22)>, accessed 10 July 2017.

<sup>2</sup> Parliament of Australia, Civil Law and Justice Legislation Amendment Bill 2017, Explanatory Memorandum, p.30 <[http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1057\\_ems\\_915e218a-ac02-41b6-875d-a7371bc8a4c0/upload\\_pdf/621363em.pdf;fileType=application%2Fpdf#search=%22legislation/ems/s1057\\_ems\\_915e218a-ac02-41b6-875d-a7371bc8a4c0%22](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1057_ems_915e218a-ac02-41b6-875d-a7371bc8a4c0/upload_pdf/621363em.pdf;fileType=application%2Fpdf#search=%22legislation/ems/s1057_ems_915e218a-ac02-41b6-875d-a7371bc8a4c0%22)>, accessed 10 July 2017.

<sup>3</sup> Parliament of Australia, Department of Parliamentary Services, Bills Digest, 29 June 2017, Civil Law and Justice Legislation Amendment Bill 2017, p. 13, <[http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload\\_binary/5364899.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload_binary/5364899.pdf;fileType=application/pdf)>, accessed 10 July 2017.



from the date of divorce, or within 12 months of the day on which a financial agreement between the parties was set aside under section 90K of the *Family Law Act*. Married parties may apply outside the limitation period with leave of the court or by the consent of both parties. De facto couples are not permitted to institute proceedings after expiration of the limitation period even if both parties consent. De facto parties must first seek leave of the court even if they mutually consent to the proceedings. Effectively, de facto couples are prevented from filing for consent orders and must file an initiating application and appear before a Judge to be granted leave.

There is no mirror provision in the *Family Law Act* for de facto couples that would allow them to institute proceedings if they have been a party to a financial agreement that has been set aside or found to be invalid. A proposed new subsection 44(5) would provide (subject to the court's power to grant leave) that a party to a de facto relationship may apply for an order under the financial agreement provisions if the application is made: within 2 years of the end of the de facto relationship; or within 12 months after the day a financial agreement was set aside or found to be invalid; or both parties consent to the application.

### **Settlement Offers and Costs**

Existing section 117C of the *Family Law Act* prohibits parties from disclosing to the courts the fact that an offer of settlement has been made and the terms of any such offer, except for the purpose of considering a costs order under existing subsection 117(2). Amendment to this provision would allow parties to disclose to the courts simply the fact that an offer to settle has been made. Disclosing the terms of the offer would remain prohibited. The amendment is intended to promote early settlement of matters. The Senate will consider the concerns about the potential retrospective application of this measure.<sup>4</sup>

### **Equity of Access for Family Counselling**

Family counselling involves a process by which a family counsellor helps one or more persons who may be applying for a parenting order under section 65C of the *Family Law Act*, to deal with issues relating to the care of children. The existing s10F definition does not capture parents who have never lived together or been married. An amendment to this section would broaden the definition to apply to parents who have never lived together or been married. All families involved in disputes will then have access to quality family counselling services so they can attempt to resolve their disputes outside of court and avoid the adversarial system.

### **Evidence and Admissibility of Communications with Family Consultants**

The proposed amendments aim to strengthen the detection of family abuse and violence and clarify the admissibility provisions in the *Evidence Act 1995* (Cth). Provision 11C(3) currently provides that anything said, or any admission made, in the company of a family consultant or a person to whom a family consultant refers a person is admissible in

---

<sup>4</sup> Parliament of Australia, Parliament of Australia, Department of Parliamentary Services, Bills Digest, 29 June 2017, Civil Law and Justice Legislation Amendment Bill 2017, p. 4, <[http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload\\_binary/5364899.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload_binary/5364899.pdf;fileType=application/pdf)> accessed 10 July 2017.



proceedings under the Act. The provision does not apply if a person has not been informed of this provision (with the exception of abuse). An amendment would extend the provision so that it applies to an admission by any person (including a child) indicating that a child is being abused or at risk of abuse. This would include an admission by a child that indicates they are at risk of being abused.

### International Child Abduction

The 2017 bill introduces a new offence of *retaining* a child overseas. The penalty is 3 years' imprisonment. The new offence would remedy an identified gap in the existing legislation. It is currently an offence under section 65Y of the *Family Law Act* to *remove* a child in relation to whom a parenting order is in force if there is no relevant court order or consent in writing permitting this to occur. A person, however, does not currently commit an offence if they *retain* a child beyond the expiry of an order or consent.

The new offences are intended to be a deterrent to the wrongful retention of a child and apply to any person (regardless of whether they have Australian citizenship or residency) who wrongfully retains a child. The proposed amendments aim to address the wrongful removal or retention of children regardless of the intended country of destination or the country of retention.

The Senate Legal and Constitutional Affairs Legislation Committee has recommended that the bill be amended to amend the *Family Law Act* to include a defence of 'fleeing from family violence' to ensure that the existing and proposed offences of unlawful removal and retention of children abroad do not apply in circumstances of family violence. Further, they have recommended that the *Family Law Act* be amended to include a defence of 'consent' to ensure that the existing and proposed offences of unlawful removal and retention of children abroad do not apply in circumstances where written consent has not been given, but there is oral consent or another form of consent.<sup>5</sup>

### Compliance with Parenting Orders

Existing subsection 65L(1) of the *Family Law Act* empowers the court to make orders requiring a family consultant to supervise or assist with compliance of a parenting order. The proposed amendment provides that the court may only make an order under subsection 65L(1) in respect of a final parenting order where the court considers there are exceptional circumstances, which warrant the order. This provision aims to ensure that the courts are not unduly burdened with ongoing obligations to supervise the compliance with court orders.

---

<sup>5</sup> Parliament of Australia, Parliament of Australia, Parliament of Australia, Department of Parliamentary Services, Bills Digest, 29 June 2017, Civil Law and Justice Legislation Amendment Bill 2017, p.21, <[http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload\\_binary/5364899.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload_binary/5364899.pdf;fileType=application/pdf)>, accessed 10 July 2017.



Interestingly, the Hon Chief Justice Diana Bryant AO QC of the Family Court of Australia (Family Court) has submitted to the Law Council of Australia<sup>6</sup> that she has altered her position regarding proposed changes to section 65L. The Chief Justice has given consideration to the issue of court resources and in particular the number of contravention applications being heard by Judges. The Chief Justice proposes that one method of achieving an improvement to the workload of Judges may be to introduce a kind of triage system, whereby such applications are resolved by a team comprised of a Family Consultant acting under s65L and a Registrar exercising delegated powers.<sup>7</sup>

## MARRIAGE ACT 1961

### Marriage and Disability

The Convention on the Rights of Persons with a Disability (**CRPD**) recognises the right of persons with disabilities to marry.<sup>8</sup> The Bill includes amendments to the *Marriage Act* regarding consent to marry. Currently, consent is not “real consent” where a person is ‘mentally incapable of understanding the nature and effect of the marriage ceremony’. The amendments will move the focus from whether a person has a disability to, simply, whether the person understands the nature and effect of the marriage ceremony. These amendments will ensure that persons with a disability are not unnecessarily prevented from entering a marriage, and therefore will promote the rights of persons with a disability as set out in article 23 of the CRPD.

---

<sup>6</sup> Parliament of Australia, Parliament of Australia, Parliament of Australia, Parliament of Australia, Department of Parliamentary Services, Bills Digest, 29 June 2017, Civil Law and Justice Legislation Amendment Bill 2017, p.6, <[http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload\\_binary/5364899.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload_binary/5364899.pdf;fileType=application/pdf)> accessed 10 July 2017.

<sup>7</sup> Parliament of Australia, Parliament of Australia, Parliament of Australia, Parliament of Australia, Department of Parliamentary Services, Bills Digest, 29 June 2017, Civil Law and Justice Legislation Amendment Bill 2017, p.6, <[http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload\\_binary/5364899.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/5364899/upload_binary/5364899.pdf;fileType=application/pdf)> accessed 10 July 2017.

<sup>8</sup> United Nations, Convention on the Rights of Persons with Disabilities, 2006, <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>> accessed 10 July 2017.