

1998

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**BIRTH (EQUALITY OF STATUS) (AMENDMENT) BILL 1998**

**EXPLANATORY MEMORANDUM**

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## **BIRTH (EQUALITY OF STATUS) (AMENDMENT) BILL 1998**

### **BACKGROUND**

In 1993 the Standing Committee of Attorneys-General (SCAG) agreed to the introduction of uniform legislative provisions regarding legal presumptions as to parenthood. The *Birth (Equality of Status) Act 1988* contains parentage presumptions which are close to the model provisions agreed to by SCAG, so the amendments necessary to achieve uniformity are relatively minor. Those amendments are contained in the *Birth (Equality of Status) (Amendment) Bill 1998*

The parentage presumptions set out the basis on which parentage of a particular child is ascribed to a person in law. The presumptions are based on such things as marriage, cohabitation and the findings of courts. Except where a presumption is based on the finding of a court made during the lifetime of the parent, presumptions can be displaced by findings of fact in particular cases

### **THE BIRTH (EQUALITY OF STATUS) (AMENDMENT) BILL 1998 - SUMMARY**

The Bill amends the *Birth (Equality of Status) Act 1988* to make it consistent with the uniform provisions agreed to by the Standing Committee of Attorneys-General. The most important changes are.

- The time period used to relate the birth of a child to cohabitation or marriage is expressed in weeks rather than months,
- A presumption of parentage can arise from a period of cohabitation of any length,
- A presumption of parentage can arise from the finding of a court after the death of the person presumed to be the parent of a child; and
- A presumption arising from the finding of a court made during the lifetime of the person found to be the parent of a child cannot be rebutted

### **FINANCIAL CONSIDERATIONS**

The Bill has no financial implications.

### **DETAILS OF THE BIRTH (EQUALITY OF STATUS) (AMENDMENT) BILL 1998**

Clause 1 provides for the short title of the Act to be the *Birth (Equality of Status) (Amendment) Act 1998*

Clause 2 provides for sections 1 and 2 of the Bill to commence on the day it is notified in the *Gazette* and for the remainder of the Bill to commence on a day fixed by the Minister by notice in the *Gazette*

Clause 3 is an interpretation provision

Clause 4 amends section 3 of the *Birth (Equality of Status) Act*. That section is an interpretation section. The amendment extends the meaning of the terms "register of births" and "register of parentage information" to include registers of that sort kept under Commonwealth law

Clause 5 repeals section 7 of the *Birth (Equality of Status) Act* and replaces it with a new section 7 and section 7A. The old section 7 set out presumptions arising from the time of birth. It related presumptions of parentage to cohabitation of the mother of a child with her husband or with a man to whom she was not married. A period of 10 months was used to connect the cohabitation or marriage to the birth of a child and to create a presumption that the man with whom the mother of the child had cohabited or to whom she was married was the father of the child

The new section 7 provides presumptions arising from the marriage of the mother of a child. Although the effect is much the same as the old section 7, the critical period in the new section is 44 weeks

Section 7A provides presumptions of parentage arising from cohabitation. Previously this was dealt with in the old section 7. The new provisions are slightly different in that they do not require a set period of cohabitation before the presumption of parentage comes into operation. Under the old section 7 the period of cohabitation required was at least 6 months and it had to end not more than 10 months before the birth of the child. Section 7A simply requires cohabitation at some time not more than 44 weeks and not less than 20 weeks before the birth of the child

Clause 6 removes the old section 9 of the *Birth (Equality of Status) Act* and replaces it with a new section 9

Section 9 deals with presumptions arising from the findings of courts. The new provision makes it clear that a finding of a court, made during the life of a person, that the person is the parent of a particular child creates a conclusive presumption of parentage. As a result the finding of a court cannot be overridden by facts presented in subsequent proceedings. This is reinforced by subsection 16(1), inserted by clause 9, which says that a presumption arising under subsection 9(1) is not rebuttable

The new subsection 9(2) provides that a presumption of parentage arises from the finding of a court, made after the death of a person, that the person was the

parent of a particular child. Under the previous provisions no presumption arose from the finding of a court about a person after that person had died. Where the presumption arises from a court finding after the death of the person concerned it will not be a conclusive presumption and will be rebuttable by proof on the balance of probabilities in accordance with the new subsection 16(2).

As in the old section 9, there is provision for a court which makes a finding that a person is the parent of a particular child to direct that a copy of the order be sent to other persons with an interest in the finding.

Clause 7 inserts section 10A into the *Birth (Equality of Status) Act* to provide that a presumption of parentage arises from an instrument of acknowledgment of paternity executed in another State or Territory, or under a law of the Commonwealth or of a jurisdiction prescribed in regulations. This complements the provisions of section 10 of the *Birth (Equality of Status) Act* which provides for the making of acknowledgments of paternity in the ACT.

Clause 8 repeals section 13 of the *Birth (Equality of Status) Act*. Section 13 provided for a conclusive presumption of parentage to arise from a declaration of paternity by the Supreme Court. This is now covered by the provisions of the new section 9.

Clause 9 repeals section 16 of the *Birth (Equality of Status) Act* and replaces it with a new section 16. It also inserts section 16A.

The new section 16 provides that a presumption arising under section 9 from the finding of a court during the life of a person that the person is the parent of a particular child is not rebuttable. It provides that all other parentage presumptions arising under the *Birth (Equality of Status) Act* are rebuttable by proof on the balance of probabilities.

Section 16A provides rules for dealing with cases where more than one parentage presumption arises and those presumptions are conflicting. If one of the presumptions arises under section 9(1) out of the finding of a court made during a person's life then it will override any other presumption. If one of the presumptions arises under the *Artificial Conception Act 1985* which deals with parentage where donor gametes are used, that presumption will override any other presumption. In other cases the court is to select the presumption which appears most likely to be correct.

Clause 10 inserts subsection 8A into section 17 of the *Birth (Equality of Status) Act*. It allows the regulations under the Act to provide for the carrying out of specified medical tests and for the preparation of reports on those tests. The medical tests referred to are those used in determining parentage.

Clause 11 inserts subsection 1A in section 18 of the *Birth (Equality of Status) Act*. The effect is to make only reports of medical tests carried out in accordance with the regulations admissible in evidence in a matter relating to parentage.

Clause 12 amends section 49E of the *Administration and Probate Act 1929* to bring it into line with the amended provisions about parentage presumptions in the *Birth (Equality of Status) Act*. Section 49E deals with distribution of property when a person dies without having made a will. The property passes to relatives of the deceased. Previously, to have effect for inheritance purposes, a parentage presumption under the *Birth (Equality of Status) Act* had to arise before the death of the person. Under the new provisions a court finding after the death of the presumed parent creates a legal presumption of parentage. The present section 49E would be inconsistent with that provision. Clause 12 reduces the number of parentage presumptions covered by section 49E.

The only other presumption of parentage which could arise after the death of the person is that arising from inclusion of the person's name in a birth record in the Register of Births, Deaths and Marriages. To ensure that the insertion of a person's name on a birth record after that person's death could not, on its own, give rise to an interest in a deceased estate, section 49E is amended to specify that presumptions of parentage arising under section 8 of the *Birth (Equality of Status) Act* only operate in respect of an intestacy if they arose before the person died.

Clause 13 is a transitional provision.