STATUS OF CHILDREN AMENDMENT BILL 2001

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

To provide a more rational set of presumptions of parentage that currently exists and to achieve national uniformity as agreed to by the Standing Committee of Attorneys-General (SCAG) in October 1992.

To repeal the evidentiary provisions in s. 30 of the *Maintenance Act 1965*.

Reasons for the objectives and how they will be achieved

Parentage presumptions need to be uniform to avoid forum shopping, and to minimise the possibility of different courts making different findings of parentage. In addition, the Family Court is becoming the predominant court in this area, so it is especially desirable that the presumptions in States and Territories match those used by the Family Court. Queensland courts may have to consider issues of parentage in a variety of circumstances, including:

- intestacy distributions and family maintenance applications
- maintenance applications
- applications for a declaration of parentage

Presumptions of parentage currently arise from:

- marriage
- registrations of birth
- findings of courts
- acknowledgments from the parent

With one significant addition, the new presumptions (set out in clause 17—new part 3, division 3 of the Bill) essentially re-enact Queensland's present legislative presumptions. That addition is a presumption arising from de facto cohabitation. The new de facto rule presumes that a man, who cohabited with the mother of the child between 44 and 20 weeks prior to the birth, is the father of the child.

This Bill is based on a model bill proposed by the Parliamentary Counsel's Committee of SCAG and which has been approved by SCAG. All jurisdictions have enacted this legislation except for South Australia where it is under consideration. By enacting this uniform legislation throughout Australia, the policy objective will be achieved.

The passing of this uniform legislation by the States and Territories is the only option available to ensure implementation of the policy objective and uniform application of that objective throughout Australia. There is no other reasonable alternative way of achieving this policy objective.

The evidentiary provisions in s. 30 of the *Maintenance Act 1965* are being repealed because they are archaic and discriminatory and no longer have any practical application.

Administrative cost to Government of implementation

None.

Fundamental legislative principles

Presumptions are rules of evidence for the courts. They facilitate proof by allowing certain facts to be inferred when other secondary facts are established. Courts have long applied such presumptions, for example, if a woman gives birth during or within 44 weeks of the end of her marriage, the husband is presumed to be the father.

All the presumptions (except for presumptions based on the findings of a court that are made while the parent is alive (clause 17, new section 18C (1) & (2)) are not conclusive. They can be rebutted by other more direct evidence. With the advent of blood and genetic testing, much of the uncertainty in proving paternity has been removed. However, there remain cases where such testing is unavailable, for example if the putative father or child is dead or where one of the parties will not consent to the testing. In those cases the presumptions remain important.

A presumption arising from a court finding made when a person is alive, that is not altered, set aside or reversed, is irrebuttable. This is because all the parties are alive at the time the finding was either made, altered, set aside or reversed and are able to contest the finding.

Reverse onus in criminal proceedings without adequate justification

Section 4(3)(d) of the *Legislative Standards Act 1992* requires adequate justification for a reversal of the onus of proof in criminal proceedings. The existence of the presumptions places an onus on the person seeking to rebut the presumptions to prove facts contrary to the presumed facts. Under clause 17, new section 18F the burden of proof to rebut a rebuttable presumption is on the civil balance of probability.

It is possible that an issue of parenthood may be raised in a criminal proceedings - for example, in relation to incest and sexual offences against children where it is alleged as a circumstance of aggravation that the offence was committed against a child who is a lineal descendant of the accused. The accused bears the onus of rebutting the presumption. The reversal of onus is justified on the following basis:

- Section 636 of the *Criminal Code 1899* already reverses the onus of proof where a blood relationship is reputed to exist in relation to incest and sexual offences against children.
- The current *Status of Children Act 1978* also reverses the onus of proof through the current presumptions. The only new presumption is the presumption arising from cohabitation.
- In addition, s. 8(4B) of the *Status of Children Act 1978* currently establishes that for the purpose of criminal proceedings, a declaration of paternity made by a court is evidence, and in the absence of evidence to the contrary, conclusive evidence of the matters contained in it. Clause 12 moves this provision into new section 10 (5).
- A protection for the accused also exists in s. 10(3) of the *Status of Children Act 1978* which provides that a court declaration may be re-opened if new evidence comes to light at a later time. In addition, under new sections 18C(1)(b) and 18C(3)(b) any presumption arising from a court finding can be altered set aside or reversed.
- The ability to rebut the presumption rests solely with the accused through blood or DNA testing. The court can only order testing

with the consent of the accused and is entitled to draw an adverse inference if the accused refuses to consent.

- The interests of justice are properly served with this reversal of onus. If there is no presumption, the criminal cases could fail because the accused is the only one with the evidence to establish the blood relationship.

Sufficient regard to Aboriginal tradition and Island custom

Section 4(3)(j) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to Aboriginal tradition and Island custom.

This Bill is the result of a uniform legislative package developed by SCAG. During the development of this uniform legislation, consideration was not given to this issue. The issues are much broader than the ambit of this legislation. Until there is legal recognition of customary practices in relation to marriage and children, the need for special presumptions of parentage cannot be assessed. However, children born of a traditional marriage may come under the presumption arising from co-habitation in clause 17, section 18E of the Bill.

Consultation

The Status of Children Amendment Bill 1995 was introduced on 9 June 1995, 7 September 1995 and 19 July 2000, but in all cases lapsed with the prorogation of Parliament. The substantive provisions of both 1995 bills were the same as the 2000 bill and this Bill, except for the changes to effect the uniform provisions on parentage testing procedures.

The Family Law Practitioners' Association and the Family Law Committee of the Queensland Law Society were consulted on the 1995 bills as were the Family and Administrative Law Branch of the Attorney-General's Department (Cwth) and the Officers Committee advising the Standing Committee of Attorneys-General.

Additional consultation has occurred with:

- Department of Health
- John Tonge Centre for Forensic Science
- Department of Families Youth and Community Care
- Department of Aboriginal and Torres Strait Islander Policy and Development
- Registrar of Births, Deaths & Marriages

NOTES ON PROVISIONS

The format to this statute follows the following format:

- There is a long and short title; and
- The Act is divided into parts, each part containing within it all the matters relevant to the purpose of implementing the objectives of the Bill.

Part 1—Preliminary

Clause 1 sets out the short title of the Act.

Clause 2 provides for the Act to commence on a date to be fixed by proclamation. Proclamation will be delayed until uniform regulations are prepared on parental testing procedures.

Part 2—Amendment of *Status of Children Act 1978*

Clause 3 provides for the amendment of the *Status of Children Act 1978*.

Clause 4 amends the long title of the *Status of Children Act 1978*.

Clause 5 replaces s.1 with a new short title and application clauses.

Clause 6 replaces part 2 heading and s. 2 and adds new definitions related to parentage testing.

Clause 7 omits s. 3(4). It is covered by new section 1A, added by clause 5.

Clause 8 changes the headings to s. 4, renumbers s. 4(3) as s. 4A, relocates and renumbers sections 4 and 4A to part 5, division 1, sections 22 and 23 (as inserted by this Bill) and makes other consequential amendments.

Clause 9 omits s. 5, the current presumption arising from marriage. It is replaced by a new presumption. See clause 17, which inserts a new part 3, divisions 3 and 4 and adds a new section 18A.

Clause 10 makes a minor drafting amendment to s. 7(1)(b).

Clause 11 omits s. 8. It is replaced by the new presumptions. See clause 17, which inserts a new part 3, divisions 3 and 4—

- s. 8(1) is replaced by new section 18B
- s. 8(2) is replaced by new section 18D
- s. 8(3) is covered by the extended reference to a court finding in new section 18C
- s. 8(4) & (4A) are replaced by new section 18C
- s. 8(4B) is moved into new section 10(5) by clause 12
- ss. 8(5) to (8) are replaced by new section 18C.

Clause 12 moves the existing provisions of s. 8(4B) into new section 10(5) and makes some minor drafting changes.

Clause 13 replaces s. 11 to incorporate the concepts of parentage testing procedures and orders and to remove provisions that will go into the regulations and forms.

The concept of "care and control" over children or persons lacking capacity in relation to the carrying out and consenting to parentage testing procedures is now outdated. It is replaced with the current concepts of:

- if the person is a child under 16 years, or is a child who is 16 or 17 years old with impaired capacity—the child's parent or guardian or person exercising parental responsibility.
- if the person is an adult with impaired capacity—a person who may exercise powers in relation to personal matters for the adult under a power of attorney under the *Powers of Attorney Act 1998* or a guardian for the adult under the *Guardianship and Administration Act 2000*.

Clause 14 inserts new division headings in part 3, divisions 1 and 2.

Clause 15 makes consequential amendments to s. 13 and relocates s. 13 to division 2 as s. 14A.

Clause 16 makes consequential amendments to s. 14 and provides for transitional arrangements that apply to the new parentage presumptions under divisions 3 and 4.

Clause 17 inserts new part 3, divisions 3 and 4 as follows:

Division 3—Other parentage presumptions

New section 18A is the presumption arising from marriage. A child born during a marriage is presumed to be a child of the married woman and her husband. A child born to a woman within 44 weeks of:

- her being widowed
- the annulment of her marriage
- the married couple separating, then cohabiting for up to three months and then separating again

is presumed to be a child of the woman and the former husband. This replaces the current presumption of marriage in s. 5 of the Act and makes two changes:

- The time the presumption applies is extended from 10 months (which is equivalent to 43 weeks) to 44 weeks.
- The presumption now covers the time when a married couple separate, resume cohabitation for up to three months and then separate again. This three month cohabitation period is recognised in s. 50 of the *Family Law Act 1975*. It permits a married couple to attempt a reconciliation for three months without the time being considered as part of the one year period the couple must live separate and apart prior to commencing divorce proceedings. A child born to a woman within 44 weeks of this cohabitation will fall under the presumption.

New section 18B is the presumption arising from birth registration. The man and woman named as parents in the birth register of any Australian state or prescribed overseas jurisdiction will be presumed to be the parents of that child.

This replaces the current presumption in s. 8(1) of the Act and makes two changes:

- The new presumption covers the named mother. Section 8(1) is currently limited to the named father.
- The new presumption extends to birth registers in any Australian or prescribed overseas jurisdictions. The current presumption only applies to births registered in Queensland.

New section 18C is the presumption arising from a finding of a court. The new presumption is that if another court, during the lifetime of a person, found that person to be the parent of a particular child, the finding (if not altered, set aside or reversed), is irrebutable. The prescribed courts will be a court of the Commonwealth or a State or a prescribed overseas jurisdiction. A finding made after the death of the alleged parent will raise a rebuttable presumption.

In addition, under s. 10(3) a declaration may be re-opened by the court if new evidence comes to light at a later time.

The current presumption is found in ss. 8(4) to 8(8) and s. 10 of the Act. Under the current law a court finding is considered conclusive evidence regardless of whether it was made during the lifetime of a person. In addition, court orders from other States and Territories within Australia or New Zealand are currently recognised by ss. 8(5) and (6) of the Act. Under s. 8(7) the Governor in Council may declare, by order in council, that s. 8(5) applies to countries outside Australia. There are no orders in council in existence.

New section 18D is the presumption arising from acknowledgments. If a man executes a deed acknowledging that he is the father of a child, there is a presumption he is the father. This document may be required, for example, under s. 25 of the *Registration of Births, Deaths and Marriages Act 1962*. If the child's parents are not married to each other, the father's name can only appear on the birth register if the father executes an acknowledgment that he is the father. This provision re-enacts the current presumption in s. 8(2).

New section 18E is the presumption arising from co-habitation. This is new. A child born to a woman who cohabited with a man (not her husband) at any time between 44 to 20 weeks prior to the birth, is presumed to be a child of that man. This time is intended to cover the conception of the child, recognising that the minimum period of sustainable life is 20 weeks from conception.

Division 4—Other provisions about presumptions

New section 18F provides that all rebuttable presumptions are rebuttable on a balance of probability.

New section 18G sets out the formula for resolving conflicting presumptions under division 3. It provides that if two or more of the presumptions conflict and are not rebutted, the presumption appearing to the court to be the most likely to be correct prevails. However, a presumption under new section 18C(1), arising from a court finding made while a person is alive, will prevail.

Clause 18 omits section 19 and adds a number of miscellaneous and transitional provisions.

New section 19 permits the chief executive to approve forms.

New section 20 clarifies that regulations may be made about parentage testing procedures.

New section 21 provides for the numbering and renumbering of this Act in the next reprint and adds the headings for a new part 5 on transitional provisions.

Clause 19 inserts a transitional provision.

Part 3—Amendment of *Maintenance Act 1965*

Clause 20 provides for the amendment of the *Maintenance Act 1965*.

Clause 21 omits part 2, division 3, subdivision 2. This repeals s. 30 of the *Maintenance Act 1965*. Clause 17, new section 18C re-enacts the parentage presumptions arising from a court finding, which includes an order under ss. 14 and 16 of the *Maintenance Act 1965*. These are maintenance orders against unmarried fathers where the court is satisfied that the defendant is the father of the child. In making these orders, the court is entitled to rely upon the evidentiary provisions in s. 30 of the *Maintenance Act 1965*. Section 30 provides that a maintenance order shall not be made:

(i) "*upon the evidence of the mother (or, as the case may be, woman) unless her evidence is corroborated in some material particular; or*

(ii) *if the court is satisfied that, at about the time the child was conceived, the mother (or, as the case may be, woman) was a common prostitute or had intercourse with men other than the defendant*."

Section 30 is to be repealed because it is archaic and discriminatory and no longer has any practical application. Since the referral of power to the Commonwealth in June 1990, all applications for maintenance of ex-nuptial children are brought under the *Commonwealth Family Law Act 1975* and *Child Support (Assessment) Act 1989*. No similar provisions exists in either the *Evidence Act 1977* or in the *Family Law Act 1975*.

SCHEDULE

Minor and Consequential Amendments

The schedule makes a number of minor and consequential amendments to various sections.