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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

FAMILY LAW AMENDMENT BILL 2005

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

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FAMILY LAW AMENDMENT BILL 2005

GENERAL OUTLINE

In line with the Government's ongoing reform agenda in family law, most of this Bill deals with a range of amendments to substantive and procedural aspects of the *Family Law Act 1975* (the Act). In particular the Bill deals with the enforcement of court orders, introduces the term 'divorce' and allows for recovery of child maintenance paid by a person found not to be a parent. The Bill also makes a range of largely technical amendments intended to improve the operation of the Act.

Part 16 of the Bill amends the *Bankruptcy Act 1966* (Bankruptcy Act), to supplement reforms relating to bankruptcy and family law interaction presently contained in the Bankruptcy and Family Law Legislation Amendment Bill 2005. These amendments will ensure that the Family Court of Western Australia, along with the Family Court of Australia, will acquire jurisdiction under the Bankruptcy Act in relation to bankruptcy matters arising in concurrent family law proceedings where a party is a bankrupt.

Own motion orders in enforcement proceedings under Part VII

Following introduction of the three-stage parenting compliance regime in the *Family Law Amendment Act 2000*, it has become apparent that many parenting orders by consent do not work for practical reasons. Instead of bringing applications to vary the 'unworkable order', the experience of courts exercising jurisdiction under the Act is that parties tend instead to bring contravention applications.

A new subdivision is to be created in Division 13A of Part VII of the Act to provide courts with the power to vary on its own motion orders relating to children at a hearing on a contravention application. The amendments also clarify the court's power to send parties in contravention proceedings to counselling and post-separation parenting programs.

Divorce order – replacing the terms 'dissolution of marriage', 'decree nisi' and 'decree absolute'

These provisions are intended to replace outdated and legalistic terms in the Act relating to the termination of marriage with more modern language including the use of the term divorce.

'Decrees nisi' and 'absolute' are replaced by the term 'divorce order'. Just as 'decree absolute' takes effect one month after the 'decree nisi', the divorce order would take effect one month after it is made. In that month, proceedings can be brought to have the divorce order rescinded.

The term 'dissolution of marriage' is replaced by the concept of 'divorce'. A definition of divorce is set out in the definition section of the Act.

Proceedings for principal relief – replacing with a concept of 'divorce or validity of marriage proceedings'

The Act refers to proceedings for principal relief in a number of places. That concept describes proceedings for a decree of dissolution or a decree of nullity or proceedings for a declaration of the validity of a marriage or the validity of a decree of dissolution.

In keeping with the intention of making the language of the Act clearer, minor amendments are inserted throughout the Act to refer, where appropriate, to either ‘divorce proceedings’ or ‘validity of marriage proceedings’.

Empower the Court to order the repayment of monies paid under a child maintenance order where the person is found not to have been the ‘parent’ of the child

A person who has been determined not to be a parent (for example through DNA testing) is unable to recover under section 66 amounts of child maintenance paid under a child maintenance order made under the Act. This is because under this section only people who could apply for a maintenance order in relation to a child can seek a modification of that order. A person who is not a parent is not able to seek such an order. Effectively this means that such a person can only recover maintenance payments made by taking debt recovery action in a State court.

Generally, only parents who separated before 1989 and whose children were born before that date could have applied for and can still apply to the court for a parenting order in relation to the maintenance of a child under the Act. All other child support applications must be made under the *Child Support (Assessment) Act 1989*.

A new section 66X provides that where a court determines that a party to a child maintenance order is found not to have been a parent or a liable step-parent of the child to whom the order relates, and that person has made payments under the purported order in respect of the child, the amount paid may be recovered in a court having jurisdiction under Part VII of the Act.

FINANCIAL IMPACT STATEMENT

These measures will have little or no financial impact.

CONSULTATION STATEMENT

The Bill has been subject to consultation with both the Family Court of Australia and the Federal Magistrates Court of Australia over a period of several months. The Family Law Section of the Law Council of Australia has also been consulted and the views of a range of key stakeholders were provided to the Senate Legal and Constitutional Legislation Committee in its consideration of the earlier version of this Bill.

The Family Court of Western Australia and the Family Court of Australia have been consulted in relation to the proposed amendments in Part 16 of the Bill, which confer parallel jurisdiction in bankruptcy on the Family Court of Western Australia, in the same terms as that conferred on the Family Court of Australia under proposed amendments in item 2 of the Bankruptcy and Family Law Legislation Amendment Bill 2005.

NOTES ON ITEMS

Clause 1 – Short title

1. Clause 1 provides for the Act to be cited as the *Family Law Amendment Act 2005*.

Clause 2 – Commencement

2. Clause 2 provides for the commencement of the Act. Subclause 2(1) provides that each provision in Column 1 of the table will commence on the day or at the time specified in Column 2 of the table.
3. Sections 1-3 and anything in the Act not covered elsewhere in the table commence when the Act receives Royal Assent.
4. The items in Parts 1 to 15 of Schedule 1 to the Bill commence 28 days after the Act receives Royal Assent.
5. The item in Part 16 of Schedule 1 to the Bill commences at the same time as amendments contained in Schedule 1 to the Bankruptcy and Family Law Legislation Amendment Bill 2005 would commence.

SCHEDULE 1 – AMENDMENTS

Part 1 – Parenting compliance regime

Family Law Act 1975

Item 1: At the end of section 65F

6. A new subsection 65(4) is inserted to define ‘proceedings for a parenting order’ to make it clear that the court has power to order a party to attend counselling in proceedings for enforcement of a parenting order under Division 13A of Part VII of the Act, or where contravention of such an order is alleged.

Item 2: Subsection 65LA(3)

7. A new definition of ‘proceedings for a parenting order’ is inserted, to make it clear that the court has power to order a party to attend post-separation parenting programs in proceedings for enforcement of a parenting order under Division 13A of Part VII of the Act, or where contravention of such an order is alleged.

Item 3: After Subdivision A of Division 13A of Part VII

Subdivision AA: Court’s powers where contravention without reasonable excuse not established:

Section 70NEB Court’s power to vary parenting order

8. A new subdivision AA is inserted after Subdivision A of Part VII of the Act. Subdivision AA is to include a new section 70NEB which provides that a court may vary a parenting order if there

is an alleged contravention of a parenting order and either the court is not satisfied that there was a contravention, or the court is satisfied there was a contravention but that there was a reasonable excuse.

Item 4: Application

9. The new section 70NEB inserted by Item 3 is to apply whether the parenting order is made before or after the commencement of the Subdivision.
10. The reason for the provision applying to parenting orders made before the provision commences is that without this provision a court dealing with a contravention of a parenting order application is left with little it can do, when it does not find the contravention proven, except to dismiss the proceedings. This will be the case even though it is clear that what is really required is a variation of the original parenting order so that it operates more effectively.

Part 2 – Costs and offers of settlement

Family Law Act 1975

Item 5: Paragraph 117(2A)(f)

11. This item amends paragraph 117(2A)(f) so that when a judge is determining whether to make a costs order (under subsection 117(2)), there is no longer a requirement to consider whether the parties have made an offer of settlement in accordance with section 117C.

Item 6: Section 117C

12. Section 117C relates to offers of settlement in family law proceedings. This item substitutes a new section 117C, which restates a number of the previous provisions regarding how offers of settlement operate under the Act, but removes previous requirements in section 117C for parties to file notices of offers to settle and withdrawal of such offers in the court.
13. Provisions dealing with filing of offers are now comprehensively dealt with under the new Family Law Rules which came into effect on 29 March 2004.

Item 7: Application

14. This item deals with the way the amendments under this Part will be applied. It specifies that the changes made regarding offers of settlement will apply on or after the commencement of the changes.

Part 3 – Suspension of sentences of imprisonment

Family Law Act 1975

Item 8: After subsection 70NO(4)

15. This item inserts a new subsection 70NO(4A), which gives the court an express power to suspend or terminate a suspension of an imprisonment order where a sentence of imprisonment has been made under paragraph 70NJ(3)(e).

Item 9: After subsection 112AE(4)

16. This item replicates the provision inserted in Item 8 (above) in relation to the court's power to suspend or terminate a suspension of an imprisonment order under subsection 112AD(1). Importantly, the power in subsection 112AE(4) relates to the court's broader power to imprison, rather than being restricted to the parenting order compliance regime relating to children, as subsection 70NO(4) does.

Part 4 – Enforcement (removal of information procedure)

Family Law Act 1975

Item 10: Subsections 70NN(2) to (7)

17. This item repeals subsections (2) to (7), and substitutes a new subsection (2). The repealed subsections deal with what happens after information is laid before a magistrate in the context of proceedings that relate wholly or partly to a parenting order. Currently a magistrate can proceed to issue a summons or warrant for the arrest of a person.
18. The amendment provides that, where a court that has made a community service order or required a bond to be entered into is satisfied that a person failed to comply with the order or bond without reasonable excuse, then it can exercise its powers under subsection (8) without having to go through the information procedure.

Item 11: Subsection 70NN(10)

19. This item repeals subsection (10) which has no operation following the repeal of the provisions requiring procedures for laying of information.

Item 12: Subsections 112AH(2) to (7)

20. This item repeals subsections (2) to (7) and replaces them with a new subsection (2). The amendments are in the same terms as in Item 10 above. Section 112AH applies more broadly to orders made under the Act, than proceedings that relate to parenting orders, as section 70NN does in Item 10.

Item 13: Subsection 112AH(10)

21. This item repeals subsection (10) which has no operation following the repeal of the laying of information procedures.

Item 14: Application

22. This item provides that the amendments contained in this Part come into operation on or after the commencement of this Part.

Part 5 – Private arbitration

Family Law Act 1975

Item 15: Subsection 4(1)

23. This Part provides for the expansion of matters that can be dealt with by private arbitration, which is dealt with in section 19E of the Act.
24. Item 15 inserts a definition of Part VIIIA proceedings. This definition supports the amendment in Item 18 relating to the definition of 'dispute' for the purpose of private arbitration. For the purposes of this definition, Part VIIIA proceedings relate to financial agreements.

Item 16: Subsection 4(1)

25. Item 17 inserts a definition of Part VIIIB proceedings. This definition supports the amendment in Item 18 relating to the definition of 'dispute' for the purpose of private arbitration. For the purposes of this definition, Part VIIIB proceedings relate to proceedings within the meaning of that Part, including superannuation agreements and proceedings relating to a payment spilt or flag.

Item 17: Subsection 4(1)

26. This item inserts a definition of section 106A proceedings. This definition supports the amendment in Item 18 relating to private arbitration. For the purposes of this definition, section 106A proceedings relate to the execution of instruments by order of the court to assist in the enforcement of orders made by the court.

Item 18: Subsection 19E(3) (paragraph (a) of the definition of *dispute*)

27. This item repeals the current provision and inserts a substitute which retains reference to Part VIII proceedings, and adds three new types of proceedings which may be subject to a private arbitration under the Act. Under this change, Part VIIIA proceedings relating to financial agreements, Part VIIIB proceedings relating to superannuation and section 106A proceedings relating to execution of instruments by order of the court, are now included in the definition of 'dispute' for the purposes of subsection 19E(3), relating to private arbitration under section 19E.

Part 6 – Change of venue

Family Law Act 1975

Item 19: After section 27

28. This item inserts a new section 27A which gives an express power to the Court to make an order for a change of venue. This is a discretionary power as it can be used at any point during a proceeding being heard, and any such order can be made subject to *any* term or condition as determined by the Court or Judge. The Court also has the capacity to direct that only part of the proceedings be subject to a change of venue.

Part 7 – Definition of disposition

Family Law Act 1975

Item 20: Subsection 106B(5) (definition of *disposition*)

29. This item repeals the definition of disposition and substitutes an expanded definition which includes the issue, grant, creation, transfer or cancellation or variation of rights in an interest in a company or a trust.

Item 21: Subsection 106B(5)

30. This item inserts definitions of what is an interest in a company, and what is an interest in a trust. An interest in a company is broadly defined and includes a share in or debenture of the company and an option over a share in or debenture of the company.

31. An interest in a trust is broadly defined and includes: a beneficial interest; the interest of a settlor in property subject to the trust; a power of appointment under the trust; a power to rescind or vary a provision or the exercise of a power under the trust; and an interest that is conditional, contingent or deferred.

Item 22: Application

32. This item provides that the amendments in this Part come into operation on or after the commencement of this Part.

Part 8 – Appeals

Family Law Act 1975

Item 23: Subsection 94(2D)

33. The amendment in this item indicates that the range of matters for which an application can be made under subsection 94(2D) are of a procedural nature.

Item 24: After paragraph 94(2D)(d)

34. This item brings under subsection 94(2D) six additional types of procedural applications which concern the conduct of an appeal to the Family Court from courts other than the Federal Magistrates Court. The new paragraphs 94(2D)(e) to (j) provide for procedural applications: for an extension of time within which to file an application for leave to appeal; for security for costs in relation to an appeal; to reinstate an appeal dismissed under a provision of the Rules of Court; to adjourn the hearing of an appeal; to vacate the hearing date of an appeal; or to expedite the hearing of an appeal.

Item 25: Subsection 94AAA(10)

35. This amendment in this item indicates that the range of matters for which an application can be made under subsection 94AAA(10) are of a procedural nature.

Item 26: After paragraph 94AAA(10)(d)

36. This item brings under subsection 94AAA(10) six additional types of procedural application which concern the conduct of appeals to the Family Court from the Federal Magistrates Court. The new paragraphs 94AAA(10)(e) to (j) provide for procedural applications: for an extension of time within which to file an application for leave to appeal; for security for costs in relation to an appeal; to reinstate an appeal dismissed under a provision of the Rules of Court; to adjourn the hearing of an appeal; to vacate the hearing date of an appeal; or to expedite the hearing of an appeal.

Item 27: After section 94AAA

37. This item inserts a new section 94AAB which provides that parties to an appeal to the Family Court from either the Federal Magistrates Court or a court other than the Federal Magistrates Court can elect for the appeal, or leave to appeal, to proceed without an oral hearing. The court has discretion not to provide for an oral hearing. Subsection (3) provides that once the parties consent to the appeal or application being dealt with by oral hearing, that consent can only be withdrawn with the leave of the court.

Part 9 – Transfer of matters from State courts of summary jurisdiction to the Federal Magistrates Court

Family Law Act 1975

Item 28: Paragraphs 46(1)(a) and (b)

38. This item repeals paragraphs (a) and (b) and substitutes them with re-formatted paragraphs which expressly provide that the Federal Magistrates Court may be one of the courts to which, in certain cases, a court of summary jurisdiction is required to transfer proceedings.

Item 29: Subsection 46(1B)

39. This item repeals subsection (1B) and substitutes new subsections (1B) and (1C). Subsection (1B) provides that if proceedings are instituted in a court of summary jurisdiction and the parties consent to the proceedings being heard and determined in that court, a party is not entitled subsequently to object to the proceedings so heard and determined.
40. Subsection (1C) provides that if the court of summary jurisdiction subsequently gives leave to a party to object to the proceedings being heard and determined, the Federal Magistrates Court is one of the courts to which the court shall transfer proceedings.

Item 30: Subsection 46(2A)

41. This item repeals subsection (2A) and substitutes a new subsection which provides that where a court of summary jurisdiction hears defended proceedings for a divorce order the Federal Magistrates Court is one of the courts to which the court must transfer proceedings.

Item 31: Subsection 46(3A)

42. This item repeals subsection (3A) and substitutes a new subsection which provides that the Federal Magistrates Court is one of the courts which may, on the application of a party or on its

own motion, order that proceedings pending under the Act or continued under section 9 be transferred from a court of summary jurisdiction.

Item 32: Subsections 69N(2) and (3)

43. Section 69 generally requires that where contested proceedings for a parenting order are instituted in a court of summary jurisdiction, that court is required to transfer the proceedings to the Family Court, the Family Court of a State, or the Supreme Court of the Northern Territory unless the parties consent to the proceeding being heard in that court. The requirement that proceedings be transferred where there is not consent is provided in subsections (2) and (3).
44. This item repeals subsections (2) and (3) and substitutes new subsections which provide for the addition of the Federal Magistrates Court as being one of the courts to which a court of summary jurisdiction must transfer a proceeding for a parenting order in contested proceedings.

Item 33: Paragraph 69N(5)(b)

45. This item repeals paragraph (b) and substitutes a new paragraph which provides that, even if parties consent to a court of summary jurisdiction hearing the matter, the court may still transfer the proceeding to another court (one of which is the Federal Magistrates Court) on its own motion.

Item 34: Subsection 69N(6)

46. This item repeals subsection (6) and substitutes a new subsection. The provision currently provides that if the parties consent to a court of summary jurisdiction hearing an application for parenting orders, the court can subsequently give leave for a party to object to the proceeding being heard in that court. If an objection is made, the court can, under the new provision, transfer the proceeding to the Federal Magistrates Court or any of the other courts referred to in item 31.

Item 35: Application

47. This item provides that the amendments apply to proceedings initiated before or after commencement. The reason for the provisions applying to proceedings initiated prior to the commencement of these provisions is that under the current provisions many matters are now referred from courts of summary jurisdiction to the Family Court which then transfers them to the Federal Magistrates Court. This simply delays the proceedings unnecessarily.

Part 10 – Terminology relating to divorce and principal relief

Family Law Act 1975

Item 36: Subsection 4(1) (definition of *decree*)

48. This item repeals the current definition of decree and inserts a substitute. The purpose of replacing this definition is not to change the meaning but rather the terminology of the concept. The change is from ‘decree *nisi*’ to the more generic term ‘order’. This is consonant with other changes to the Act to replace legalistic terminology with language that gives a more accessible meaning to concepts, effects and procedures relating to divorce under the Act.

Item 37: Subsection 4(1)

49. This item inserts a definition of divorce, which has not been previously included in the Act. The effect is to make a distinction between divorce and annulment, to emphasise that divorce refers to a *termination* of a marriage rather than declaring a purported marriage void. Having a definition of *divorce* provides clarity for greater understanding of the effect of the Act and the concept itself. This is an expansive definition of divorce, and is intended to cover divorces obtained overseas in circumstances where the marital status of the parties is relevant to proceedings under this Act.

Item 38: Subsection 4(1)

50. This item inserts a definition of *divorce or validity of marriage proceedings*. This definition supports other changes to the Act, relating to terminology, to replace the phrase ‘principal relief’ with divorce or validity of marriage proceedings. The concept of divorce or validity of marriage proceedings describes the various matrimonial causes available for parties to end their marriage. Parties can seek a divorce order, a decree of nullity and declarations as to the validity of a marriage.

Item 39: Subsection 4(1) (paragraphs (d) and (e) of the definition of *marriage counselling*)

51. This item repeals current paragraphs (d) and (e) of the definition of *marriage counselling* and inserts a substitute. The purpose of replacing this Part of the definition is not to change the meaning but rather the terminology. The phrase ‘dissolution of marriage’ has been replaced with the more accessible term ‘divorce’. This is consonant with other changes to the Act regarding terminology.

Item 40: Subsection 4(1) (paragraphs (a) and (b) of the definition of *matrimonial cause*)

52. This item repeals current paragraphs (a) and (b) of the definition of *matrimonial cause* and inserts a substitute. The purpose of replacing this Part of the definition is not to change the meaning but rather the terminology of the concept. In the new paragraph (a) the phrase ‘decree of dissolution of marriage’ has been replaced with ‘divorce order’. For paragraph (b) ‘dissolution of marriage’ has been replaced with ‘divorce’ and the format has been changed to more clearly set out the matters on which a declaration as to validity can be made. These changes are consonant with other changes to the Act regarding terminology.

Item 41: Subsection 4(1) (subparagraph (ca)(ii) of the definition of *matrimonial cause*)

53. This item amends the current provision to replace the phrase ‘proceedings between those parties for principal relief’ with ‘divorce or validity of marriage proceedings between those parties’. These changes are consonant with other changes to the Act regarding terminology.

Item 42: Subsection 4(1) (subparagraph (ca)(iii) of the definition of *matrimonial cause*)

54. This item repeals the current subparagraph (ca)(iii) of the definition of *matrimonial cause* and inserts a substitute. The purpose of replacing this definition is not to change the meaning but rather the terminology of the concept. These changes substitute the word ‘divorce’ in all instances where ‘dissolution’ and ‘dissolution of marriage’ are used, consonant with other

changes to the Act. No change has been made to the effect of subparagraph (ca)(iii) in the definition of *matrimonial cause*.

Item 43: Subsection 4(1) (definition of *prescribed proceedings*)

55. This item repeals the current definition of prescribed proceedings and inserts a substitute. The purpose of replacing this definition is not to change the meaning but rather the terminology of the concept and the previous definition has been substantially retained. These changes substitute the phrase ‘principal relief’ with ‘divorce or validity of marriage proceedings’ (wherever occurring), consonant with other changes to the Act.

Item 44: Subsection 4(2)

56. This item repeals the current definition of a party to a marriage and inserts a substitute. The purpose of replacing this definition is to change the terminology of the concept. The phrase ‘marriage that has been dissolved’ has been replaced with the phrase, ‘terminated by divorce’ consonant with other changes to the Act relating to terminology. The format of the new definition has been changed to make the definition clearer.

Item 45: Section 14B (paragraph (a) of the definition of *Division 2 proceedings*)

57. This item repeals the current paragraph and its use of the term ‘dissolution of marriage’. The purpose of replacing this term is not to change the operation but rather the terminology of the provision. This change is aimed to ensure the accessible term ‘divorce order’ operates, consonant with other changes to the Act relating to terminology.

Item 46: Paragraph 33A(2)(a)

58. This item repeals the current paragraph and its use of the term ‘decree of dissolution of marriage’ to ensure the more accessible ‘divorce order’ operates, consonant with other changes to the Act relating to terminology.

Item 47: Paragraph 37A(2)(a)

59. This item repeals the current paragraph and its use of the term ‘decree of dissolution of marriage’ to ensure the more accessible term ‘divorce order’ operates, consonant with other changes to the Act relating to terminology.

Item 48: Paragraph 37A(2)(c)

60. This item amends the current provision to replace the term ‘dissolution of marriage’ with ‘divorce order’. The purpose of replacing this term is to make the terminology of the provision more accessible. The paragraph has also been reformatted to make clearer the matters about which a declaration of validity can be made.

Item 49: Subsection 39(3)

61. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’ which provides a more accessible meaning of what proceedings are being instituted, consonant with other changes to the Act relating to terminology.

Item 50: Subsection 39(3)

62. This item amends the current provision to replace ‘the decree’ with ‘the order’ which provides a more accessible meaning of what the effect of proceedings will be, consonant with other changes made to the Act relating to terminology.

Item 51: Subsection 39(4)

63. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’ which provides a more accessible meaning of what the proceeding is intended for, consonant with other changes to the Act relating to terminology.

Item 52: Subsection 44(1A)

64. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order in relation to a marriage’, which provides a more accessible meaning of the purpose of the proceeding, consonant with other changes to the Act. The format of the section has also been changed to make clearer what alternative proceedings may be instituted.

Item 53: Subsection 44(1B)

65. This item amends the current provision to replace the term ‘dissolution of marriage’ with the phrase ‘a divorce order in relation to a marriage’, which provides a more accessible meaning of the objective of proceedings under this provision, consonant with other changes to the Act relating to terminology.

Item 54: Subsection 44(1C)

66. This item amends the current provision to replace the term ‘dissolution of marriage’ with the phrase ‘a divorce order in relation to a marriage’, which provides a more accessible meaning of the objective of proceedings under this provision, consonant with other changes to the Act relating to terminology.

Item 55: Paragraph 44(3)(a)

67. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘a decree *nisi* of dissolution of marriage has become absolute’ with ‘a divorce order has taken effect’ which provides a clearer explanation of the same process, consonant with other changes to the Act relating to terminology.

Item 56: Paragraph 44(3)(c)

68. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘date of the making of a decree *nisi* became absolute’ with ‘date on which the divorce order took effect’.

Item 57: Paragraph 44(3A)(a)

69. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘a decree *nisi* of dissolution of marriage has become absolute’ with ‘a divorce order has taken effect’. Consonant with other changes to the Act regarding terminology, this provides a more accessible meaning of the concepts, without altering the operation of the provision.

Item 58: Subparagraph 44(3A)(c)(i)

70. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘the decree *nisi* became absolute’ with ‘the divorce order took effect’.

Item 59: Paragraph 44(3B)(a)

71. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘a decree *nisi* of dissolution of marriage has become absolute’ with ‘a divorce order has taken effect’.

Item 60: Subparagraph 44(3B)(c)(i)

72. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘the decree *nisi* became absolute’ with ‘the divorce order took effect’.

Item 61: Section 44A

73. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’ which provides a more accessible meaning of what proceedings are being instituted, consonant with other changes to the Act regarding clarity of language.

Item 62: Paragraph 46(2A)(a)

74. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’ which provides a more accessible meaning of what proceedings are being instituted. This is consonant with other changes to the Act relating to terminology.

Item 63: Part VI (heading)

75. This item repeals the current heading and inserts a substitute. The purpose of replacing this heading is not to change the operation of the Part but rather to complement the terminology used

in it. This change replaces the word ‘Dissolution’ with ‘Divorce’, consonant with other changes to the Act relating to terminology, which provides greater clarity of language and meaning.

Item 64: Subsection 48(1)

76. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order in relation to a marriage’ which provides a more precise meaning of what the application is intended to achieve, consonant with other changes to the Act relating to terminology.

Item 65: Subsection 48(2)

77. This item amends the current provision to replace the phrase ‘a decree of dissolution of the marriage’ with ‘the divorce order’. Consonant with other changes to the Act regarding terminology, this change provides clarity of language relating to divorce.

Item 66: Subsection 48(2)

78. This item amends the current provision to replace the phrase ‘dissolution of marriage’ with ‘the divorce order’, consonant with other changes to the Act regarding terminology.

Item 67: Subsection 48(3)

79. This item amends the current provision to replace the phrase ‘decree of dissolution of marriage’ with ‘divorce order’. This change is consonant with other changes to the Act regarding the terminology.

Item 68: Subsection 50(1)

80. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’. Consonant with other changes to the Act regarding the terminology of divorce, this provides a more precise meaning than previously used.

Item 69: Section 52

81. This item amends the current provision to replace the phrase ‘a decree of dissolution of that marriage’ with ‘a divorce order in relation to that marriage’. This change is consonant with other changes to the Act relating to terminology.

Item 70: Section 52

82. This item amends the current provision to replace the phrase ‘a decree of dissolution of the marriage’ with ‘a divorce order in relation to the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 71: Section 54

83. This item repeals section 54. This removal is aimed at getting away from the legalistic terminology of ‘dissolution of marriage’ and ‘decree *nisi*’. To the extent that the repealed

provision sets out the interaction between these two concepts, its repeal has no effect on the substantive operation of the Act.

Item 72: Subsections 55(1) to (5)

84. This item repeals the current subsections and inserts substitutes. The purpose of replacing these provisions is not to change their operation but rather the terminology of those provisions. These changes replace the old legalistic terminology such as ‘dissolution of marriage’ and ‘decree *nisi*’ with ‘divorce’ and ‘divorce order’. This is consonant with other changes to the Act in regards to using more straightforward terminology regarding concepts and procedures relating to divorce under the Act.

Item 73: Subsection 55A(1)

85. This item amends the current provision to replace the phrase ‘a decree *nisi* of dissolution of marriage does not become absolute’ with ‘a divorce order in relation to a marriage does not take effect’. This change is consonant with other changes to the Act regarding terminology.

Item 74: Subparagraph 55A(1)(b)(ii)

86. This item amends the current provision to replace the phrase ‘the decree *nisi* should become absolute’ with ‘the divorce order should take effect’. This change is consonant with other changes to the Act regarding terminology.

Item 75: Subsection 55A(2)

87. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order in relation to a marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 76: Subsection 55A(4)

88. This item amends the current provision to replace the phrase ‘the decree *nisi* of dissolution of marriage’ with ‘the divorce order’. This change is consonant with other changes to the Act regarding terminology.

Item 77: Subsections 56(1) and (2)

89. This item amends the current subsections to replace ‘where a decree *nisi* becomes absolute’ with ‘if a divorce order takes effect’, and ‘decree’ with ‘order’ (wherever occurring).

Item 78: Sections 57 to 59

90. This item repeals the current sections and inserts substitutes. The purpose of replacing these provisions is not to change their operation but rather the terminology of those provisions. These changes replace the legalistic terminology such as ‘decree *nisi*’, ‘decree of dissolution of marriage’ and ‘decree absolute’, with ‘divorce order in relation to a marriage’ and ‘effect as a final order’.

91. In relation to section 57, the effect of the provision, which allows for the application by the parties for the divorce to be rescinded on the basis of reconciliation before the orders become final, remains the same.
92. In relation to section 58, the effect of the provision, which allows for the application by the parties (or Attorney-General), for the divorce to be rescinded on the basis of miscarriage of justice before the orders become final, remains the same.
93. In relation to section 59, the effect of the amended provision is that if a divorce order under the Act in relation to a marriage has taken effect, a party to the marriage may marry again, which is the same effect as the current provision.

Item 79: Paragraph 60F(2)(a)

94. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the word ‘dissolved’ with the phrase ‘terminated by divorce’. This change is consonant with other changes to the Act regarding terminology.

Item 80: Paragraph 69P(3)(d)

95. This item amends the current provision to replace the term ‘the dissolution of the marriage’ with ‘the divorce of the parties’ which is consonant with other changes to the Act regarding terminology.

Item 81: Subparagraph 69ZH(3)(b)(ii)

96. This item amends the current provision to replace the phrase ‘proceedings between those parties for principal relief’ with ‘divorce or validity of marriage proceedings between those parties’, which is consonant with other changes to the Act regarding terminology.

Item 82: Subparagraph 69ZH(3)(b)(iii)

97. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the term ‘a dissolution of that marriage’ with ‘the divorce of the parties’. Consonant with other changes to the Act regarding terminology, this change provides clarity of language relating to divorce.

Item 83: Paragraph 75(2)(g)

98. This item amends the current provision to replace the phrase ‘the marriage has been dissolved’ with ‘or divorced’, consonant with other changes to the Act regarding terminology.

Item 84: Paragraphs 79(1B)(a) and (b)

99. This item amends the current subparagraph (a) to replace the phrase ‘proceedings for principal relief’ with ‘divorce or validity of marriage proceedings’, consonant with other changes to the terminology in the Act.

100. This item repeals the current subparagraph (b) and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrases ‘that has been dissolved’ and ‘dissolution’ with ‘who have divorced’ and ‘divorce’.

Item 85: Paragraphs 79(1C)(a) and (b)

101. This item amends the current provision to replace the phrase ‘proceedings for principal relief’ with ‘divorce or validity of marriage proceedings’, consonant with other changes to the terminology in the Act.

102. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrases ‘that has been dissolved’ and ‘dissolution’ with ‘who have divorced’ and ‘divorce’.

Item 86: Paragraph 90(2)(a)

103. This item amends the current provision to replace ‘the dissolution or’ with ‘the termination of the marriage to which the maintenance agreement relates by divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 87: Paragraph 90(2)(b)

104. This item amends the current provision to replace ‘the dissolution or’ with ‘the termination of the marriage to which the maintenance agreement relates by divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 88: Paragraph 90(2)(d)

105. This item amends the current provision to replace ‘the dissolution or’ with ‘the termination of the marriage to which the maintenance agreement relates by divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 89: Paragraph 90(2)(e)

106. This item amends the current provision to replace ‘the dissolution or’ with ‘the termination of the marriage to which the maintenance agreement relates by divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 90: Paragraph 90B(2)(a)

107. This item amends the current provision to replace the phrase ‘the dissolution of the marriage’ with ‘divorce’.

Item 91: Subparagraph 90B(2)(b)(ii)

108. This item amends the current provision to replace the phrase ‘the dissolution of the marriage’ with ‘divorce’. This change is consonant with other changes to the Act regarding terminology.

Item 92: Subparagraph 90B(2)(b)(iii)

109. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘the dissolution of the’ with ‘divorce’.

Item 93: Subparagraph 90C(2)(b)(ii)

110. This item amends the current provision to replace the phrase ‘the dissolution of the marriage’ with ‘divorce’.

Item 94: Subparagraph 90C(2)(b)(iii)

111. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘the dissolution of the’ with ‘divorce’.

Item 95: Paragraph 90D(1)(a)

112. This item amends the current provision to replace ‘a decree *nisi* dissolving a marriage is made’ with ‘a divorce order is made in relation to a marriage (whether it has taken effect or not)’.

Item 96: Subparagraph 90MI(a)(i)

113. This item amends the current provision to replace the phrase ‘the decree absolute dissolving the marriage’ with ‘the divorce order that has terminated the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 97: Subsection 90MK(2) (subparagraph (a)(i) of the definition of *service time*)

114. This item amends the current provision to replace the phrase ‘the decree absolute dissolving the marriage’ with ‘the divorce order that has terminated the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 98: Subsection 91(1A)

115. This item amends the current provision to replace ‘a decree *nisi* has been made in any proceedings and before it has become absolute’ with ‘a divorce order had been made in any proceedings and before it has taken effect’. This change is consonant with other changes to the terminology in the Act.

Item 99: Subsection 92(1)

116. This item amends the current provision to replace the phrase ‘other than proceedings for principal relief’ with ‘(other than divorce or validity of marriage proceedings)’, which is consonant with other changes to the Act regarding terminology.

Item 100: Subsection 92(1A)

117. This item amends the current provision to replace the phrase ‘proceedings for principal relief’ with ‘divorce or validity of marriage proceedings’, which is consonant with other changes to the Act regarding terminology.

Item 101: Section 93

118. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage after the decree has become absolute’ with ‘a divorce order after the order has taken effect’. This change is consonant with other changes to the Act regarding terminology.

Item 102: Paragraph 98(1)(a)

119. This item amends the current provision to replace the phrase ‘proceedings for principal relief’ with ‘divorce or validity of marriage proceedings’. This change is consonant with other changes to the Act regarding terminology.

Item 103: Paragraph 98(1)(b)

120. This item amends the current provision to replace the phrase ‘other than proceedings for principal relief’ with ‘(other than divorce or validity of marriage proceedings)’. This change is consonant with other changes to the Act regarding terminology.

Item 104: Subsection 98A(1)

121. This item amends the current provision to replace the phrase ‘dissolution of marriage’ with ‘a divorce order in relation to a marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 105: Subsection 98A(2)

122. This item amends the current provision to replace the phrase ‘the dissolution of marriage’ with ‘a divorce order in relation to a marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 106: Subsection 98A(2A)

123. This item amends the current provision to replace the phrase ‘the dissolution of marriage’ with ‘the divorce order in relation to the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 107: Subsection 98A(4)

124. This item amends the current provision to replace the phrase ‘dissolution of the marriage’ with ‘the divorce order in relation to the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 108: Subsection 104(1) (definition of *applicant*)

125. This item amends the current provision to replace the phrase ‘the dissolution or’ with ‘a divorce or the’. This change is consonant with other changes to the Act relating to terminology.

Item 109: Subsection 104(1) (paragraph (a) of the definition of *applicant*)

126. This item amends the current provision to replace the term ‘dissolution’ with ‘divorce’. This is consonant with other changes to the Act relating to terminology.

Item 110: Subsection 104(1) (paragraph (b) of the definition of *applicant*)

127. This item amends the current provision to replace the term ‘dissolution’ with ‘divorce’. This is consonant with other changes to the Act relating to terminology.

Item 111: Subsection 104(1) (definition of *relevant date*)

128. This item amends the current provision to replace the phrase ‘the dissolution or’ with ‘a divorce or the’. This is consonant with other changes to the Act relating to terminology.

Item 112: Subsection 104(1) (definition of *relevant date*)

129. This item amends the current provision to replace the term ‘dissolution’ with ‘divorce’. This is consonant with other changes to the Act relating to terminology.

Item 113: Subsection 104(1) (definition of *respondent*)

130. This item amends the current provision to replace the phrase ‘the dissolution or’ with ‘a divorce or the’. This is consonant with other changes to the Act relating to terminology.

Item 114: Subsection 104(1) (definition of *respondent*)

131. This item amends the current provision to replace the term ‘dissolution’ with ‘divorce’. This is consonant with other changes to the Act relating to terminology.

Item 115: Subsection 104(3)

132. This item amends the current provision to replace the phrase ‘A dissolution or’ with ‘A divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 116: Paragraph 104(3)(f)

133. This item amends the current provision to replace the phrase ‘Any dissolution or’ with ‘divorce, the’. This change is consonant with other changes to the Act regarding terminology.

Item 117: Subsection 104(4)

134. This item amends the current provision to replace the phrase ‘A dissolution or’ with ‘A divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 118: Subsection 104(5)

135. This item amends the current provision to replace the phrase ‘Any dissolution or’ with ‘Any divorce or any’. This change is consonant with other changes to the Act regarding terminology.

Item 119: Subsection 104(7)

136. This item amends the current provision to replace the phrase ‘a dissolution or’ with ‘a divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 120: Paragraph 104(7)(a)

137. This item amends the current provision to replace the phrase ‘the dissolution’ (wherever occurring) with ‘the divorce’. This change is consonant with other changes to the Act regarding terminology.

Item 121: Paragraph 104(7)(b)

138. This item amends the current provision to replace the term ‘the dissolution’ with ‘the divorce’. This change is consonant with other changes to the Act regarding terminology.

Item 122: Subsection 104(8)

139. This item amends the current provision to replace the phrase ‘a dissolution or’ with ‘a divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 123: Subsection 104(9)

140. This item amends the current provision to replace the phrase ‘a dissolution or’ with ‘a divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 124: Subsection 104(9)

141. This item amends the current provision to replace the term ‘the dissolution’ with ‘the divorce’.

Item 125: Subsection 104(10)

142. This item amends the provision to replace the term ‘dissolutions’ with ‘divorces’. This change is consonant with other changes to the Act regarding terminology.

Item 126: Subsection 104A(2)

143. This item amends the current provision to replace the word ‘dissolution’ with the phrase ‘divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 127: Subsection 104A(3)

144. This item amends the current provision to replace the word ‘dissolution’ with the phrase ‘divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 128: Paragraph 123(1)(n)

145. This item amends the current provision to replace the phrase ‘dissolution of’ with ‘a divorce order in relation to’. This change is consonant with other changes to the Act regarding terminology.

Item 129: Transitional arrangements in relation to decrees nisi made before the commencement of this Part

146. This item inserts a new provision that deals with the consequences of terminology changes to this Act relating to decrees nisi. The effect of this provision is to make clear that a decree nisi for the dissolution of marriage has effect as if it were a divorce order, on the day which the decree nisi was made or became absolute.

Part 11 – Leave to appeal

Family Law Act 1975

Item 130: Subsections 94AA(1) to (2C)

147. This item repeals subsections 94AA(1) to (2C), and substitutes a table setting out the circumstances in which leave to appeal is required. The table replicates the information currently contained in the provision. The purpose of this exercise is to make clear what is currently in the Act.

148. The new subsection (2) restates the current law that an order by consent to dispose of an application for leave to appeal in any of the four circumstances set out in the table may be made by: a Full Court of the Family Court; a Judge of the Appeal Division; or another Judge if there is no Judge of the Appeal Division available.

149. The new subsection (2A) restates the law in relation to item 4 of the table (regarding appeals to the Family Court from the Federal Magistrates Court) which is that where an application for leave is dealt with by consent, it is dealt with by a single Judge.

Item 131: Application

150. The effect of this item is to make clear when the amendments to this Part, relating to applications for leave to appeal, come into operation for the purposes of the Act. Specifically, on or after the commencement of this Part.

Part 12 – Power to dismiss appeal

Family Law Act 1975

Item 132: After section 96

151. This item inserts a new section 96AA after section 96 of the Act. The item provides that if it appears to a court hearing an appeal under Part X of the Act that the notice of appeal does not

disclose proper grounds of appeal, the court may order that the proceedings on the appeal be stayed or dismissed.

Item 133: Application

152. The effect of this item is to make clear that amendments to this Part also applies to appeals that are initiated before or after this Part commences.

Part 13 – Appeals to High Court

Family Law Act 1975

Item 134: Section 95

153. This item repeals the current provision and inserts a substitute which retains a restricted right of appeal to the High Court from Family Court proceedings, based on special leave being granted by the High Court. The new provision removes the current avenue of appeal based on a certificate of a Full Court of the Family Court on the basis of public interest or an important question of law.

Item 135: Application

154. The amendment made by item 134 applies to appeals in relation to proceedings whether initiated before or after commencement of that item. The certificate provisions described in paragraph 152 (above) have very rarely been used.

Part 14 – Recovery of amounts paid under maintenance orders

Family Law Act 1975

Item 136: At the end of Division 7 of Part VII

155. This item adds a new Subdivision G - 'Recovery of amounts paid under maintenance orders', which inserts section 66X in the Act. The provision is intended to provide legislative support for the recovery of monies paid (or property or the value of property transferred) under child maintenance orders, where the payer has later discovered that he was not the child's parent. Currently, the position is that a person who is not a parent does not have standing to bring an application to recover monies paid under a child maintenance order. Effectively this means that such a person can only recover maintenance payments made in these circumstances by taking debt recovery action in a State court.

156. The provisions in section 66X will allow a person who has been found not to be a person who has a duty to support a child to recover, in proceedings under this section, in a court having jurisdiction under Part VII of the Act, any monies paid or property transferred (or the value of that property) in compliance by that person with a 'purported' order for the child's maintenance under the Act.

157. Subsection 66X(2) gives the Court a wide discretion, in cases to which the section applies, to determine what kind of order that it considers just and equitable to ensure that any monies paid or property transferred by the maintenance provider to another person under a purported child

maintenance order is repaid or restored to that maintenance provider. Paragraph 66X(2)(a) allows the Court to make orders for the repayment of money paid under a purported order made under paragraph 66P(1)(a) or (b). Paragraph 66X(2)(b) allows the court to make orders for the return of property transferred under a purported maintenance order made under paragraph 66(1)(c), or for the repayment of the value of that property relating to child maintenance. Proposed new subsection 66X(4) lists some of the kinds of orders the court may make under paragraph 66X(2)(b), without limiting the court's powers under that paragraph.

158. Subsection 66X(3) deals with the situation where the court has made an order for the transfer or settlement of property for the purpose of the provision of child support under an order under paragraph 66P(1)(c) and for some other purpose. In this case, the property (or value of the property) that can be the subject of an order under paragraph 66(2)(b) is the property (or value of that property) only to the extent that it represents child maintenance.

Part 15– Powers of judicial registrars

Family Law Act 1975

Item 142: Paragraph 26B(1A)(e)

159. Current section 26B deals with the powers that may be delegated to Judicial Registrars. Subsection (1) states that the Judges of the Court cannot delegate to Judicial Registrars powers to make what are called ‘excluded child orders’. This amendment makes clear that orders to vary a parenting order made under the new subsection 70NEB(1) added by Item 3, and the new paragraph 70NG(1)(b) dealing with the making of a further parenting order that compensates for contact or residence forgone as a result of the current contravention, and paragraph 70NG(1)(ba) which deals with any other order varying the order so contravened, are excluded from the definition of ‘excluded child order’. The effect of the change is to allow the Judges to delegate the power to make orders under these sections to Judicial Registrars.

Part 16 - Jurisdiction of Family Court of Western Australia

Bankruptcy Act 1966

Item 138 - After section 35A

160. The purpose of this amendment, inserting section 35B in the *Bankruptcy Act 1966* (Bankruptcy Act), is to confer on the Family Court of Western Australia the same jurisdiction in bankruptcy that is conferred on the Family Court of Australia under amendments in the Bankruptcy and Family Law Legislation Amendment Bill 2005, and under existing section 35A of the Bankruptcy Act.
161. Subsection 35B(1) clarifies that sections 27, 35 and 35A of the Bankruptcy Act apply to the Family Court of Western Australia as they apply to the Family Court of Australia. This means that the Family Court of Western Australia, as well as the Family Court under section 35 of the Bankruptcy Act, can exercise jurisdiction in bankruptcy in family law financial proceedings in relation to any matter connected with, or arising out of, the bankruptcy of a bankrupt party to those proceedings, and is not excluded from exercising that jurisdiction by the limitations of section 27 of that Act.
162. Subsection 35B(2) makes amendments consequential to subsection 35B(1), to extend references in paragraph 35A(f) to 'Family Court Judge' and 'Registrar of the Family Court' to also refer to a judge and registrar respectively of the Family Court of Western Australia.