

資料文件

**《2010年婚姻法律程序與財產(修訂)條例草案》委員會**

背景

在2010年9月10日的法案委員會會議上，委員要求政府當局就條例草案擬稿多項條文向法案委員會提供進一步資料。

**新的第29AB條對再婚後提出申請的限制**

2. 條例草案新的第29AB(2)條訂明，“如一段婚姻在香港以外地方遭解除或廢止之後，婚姻的任何一方再婚，該方即再無權就該段婚姻提出申請”。英國《1984年婚姻和家事法律程序法令》(Matrimonial and Family Proceedings Act 1984) (“《1984年法令》”)第12(2)條亦載有類似條文。

3. 夾附於英國法律委員會《家庭法－外地離婚後的經濟濟助報告》(Report on “Family Law – Financial Relief after Foreign Divorce”) (“該報告”)<sup>1</sup>的條例草案擬稿的說明指出，有關的條款[相當於《1984年法令》第12(2)條]旨在阻止申請人再婚後根據條例草案提出申請，並與英格蘭及威爾斯離婚法律程序中的類似限制(《1973年

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<sup>1</sup> 法律委員會文件第117號

婚姻訴訟法令》(Matrimonial Causes Act 1973) (“《1973 年法令》”) 第 28(3)條)相符。

4. 根據《1973 年法令》終止向已再婚的前配偶定期付款，似乎是以法律委員會在 1969 年公布的《家庭法－與婚姻法律程序相關的經濟給養報告》(“Family Law – Report on Financial Provision in Matrimonial Proceedings”)內的建議為依據的<sup>2</sup>。當時考慮的其中一個問題，是應否在受款人再婚後永遠終止定期付款。法律委員會在 1969 年的報告內指出，諮詢結果顯示有關定期付款該在再婚後最終終止的意見，差不多獲得一致支持(包括各婦女團體的支持)<sup>3</sup>。

5. 1969 年的報告第 14 段進一步述明，“與第二任“丈夫”締結某種形式的婚姻的妻子，無權藉廢止第二段“婚姻”而恢復享有向首任丈夫索償的權利。如該段婚姻是在英格蘭遭廢止，則英國法院有權向第二任“丈夫”作出關於經濟給養的命令。法律委員會承認，如婚姻雙方是在外國離婚，而該外國法院沒有類似權力向第二任“丈夫”作出關於經濟給養的命令，致使該妻子沒有向任何一任丈夫索償的權利，這種情況是可能發生的。不過，法律委員會認為原則必須是，婚姻一方一旦締結另一段婚姻，便會喪失向其前配偶提出索償的任何權利。法律委員會進一步建議，“再婚”應包括外地婚姻或無效婚姻或可使無效的婚姻。

6. 《婚姻法律程序與財產條例》(第 192 章)(“該條例”)第 9 條，載有具類似《1973 年法令》第 28 條的效力的條文。該條例

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<sup>2</sup> 法律委員會報告第 25 號。

<sup>3</sup> 法律委員會 1969 年的報告第 25 號《與婚姻法律程序相關的經濟給養報告》第 7 頁第 14 段。

第 9(2)(a)及(b)條規定，假如一對配偶離婚後定期付款的受款人再婚，則法庭根據該條例第 4(1)(a)或(b)條命令的有保證或無保證定期付款便會終止。該條例第 9(4)條進一步限制任何已再婚的前配偶，不得針對先前婚姻的另一方提出經濟給養的申請。第 9(4)條與《1973 年法令》第 28(3)條相符。

7. 基於以上論述，禁制申請人向已與其離婚的前任配偶提出經濟濟助申請，看來可能是參考《1973 年法令》的條文而作出的，而該法令則以 1969 年法律委員會的報告為依據。但無論是在英格蘭或香港，都沒有建議這個情況應作出改變。

8. 在 2010 年第 1 季作出諮詢時，香港大律師公會也曾質疑是否需要保留有關條文，但司法機構則有不同意見。司法機構認為，在香港的“本地”離婚法律程序中，“再婚”一向是提出附屬濟助申請的自動禁制，情況與英格蘭一樣。司法機構認為這項禁制沒有理由不應適用於辦妥外地離婚後提出的經濟濟助申請。

9. 政府當局檢視有關條文的背景及被諮詢者的意見後，提出應該保留新的第 29AB(2)條。英國最高法院在 *Agbaje v Agbaje*<sup>4</sup> 一案的判詞指出，不應容許當事人利用英國法院較寬鬆批予經濟給養的取向。由於在香港提出離婚法律程序的當事人會受到同樣的限制，因此，無理由對在其他司法管轄區離婚但在香港尋求經濟濟助的當事人採取較寬鬆的取向。

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<sup>4</sup> [2010] UKSC 13。在立法會 CB(2)2228/09-10(01)號文件第 22 及 23 段引述了判詞的相關部分。

10. 禁制再婚一方提出經濟濟助申請，適用於“無效”或“可使無效”的婚姻。情況與在香港進行的離婚法律程序相似。《婚姻訴訟條例》(第 179 章)第 20 條就“無效”或“可使無效”的婚姻設下定義。該條文沒有就再婚應包括無效或可使無效的婚姻作出具體解釋。新的第 29AB(2)條與該條例第 9(4)條相符。除非有關事宜已獲充分討論，而各利益相關者之間亦達成共識，否則政府當局不建議修改現行條文。基於同樣的原因，我們建議新的第 29AB(2)條應予保留。

11. 我們的研究顯示，在部分其他司法管轄區，例如根據新西蘭《1980 年家事法律程序法令》(the Family Proceedings Act 1980 of New Zealand)第 70A 條的規定，再婚(包括“無效”或“可使無效”的婚姻)仍然構成針對前任配偶提出經濟濟助申請的禁制。我們認為，如果刪除新的第 29AB(2)條，或會鼓勵那些在其本土司法管轄區被限制提出由前任配偶提供經濟濟助申請的人士，轉而向香港法院提出經濟濟助申請。這並非引入該條例第 IIA 部的原意，亦可能導至香港法院的工作量增加。

## **根據新的第 29AC 條申請有關提出經濟濟助申請的許可**

### **I. 基於“充分理由”(substantial ground)提出申請**

12. 《條例草案》新的第 29AC 條規定，任何人提出經濟濟助申請前，必須取得法庭的許可。該條第(2)款訂明，法庭除非認為有充分理由提出該項命令申請，否則不會批予許可。第 29AC 條與《1984 年法令》第 13 條相似。

13. 《1984 年法令》第 13 條是根據法律委員會的建議而引入的。《1982 年報告》第 2.5 段述明：

“法院在聆訊許可申請時須考慮的問題是，申請人有沒有確立提出申請的充分理由。基本上這會涉及法院根據申請人沒有疑點的陳述，估計申請人有多大機會令法院信納作出經濟濟助命令是適當的。申請許可與聆訊正式申請的主要分別可分為兩方面。首先，法院一般只能就有關申請聽到一方的說法，並須單憑申請人提出的證據繼續處理申請；在聆訊正式申請時，法院則會聆聽雙方陳詞(除非答辯人決定不出庭)。第二，申請人在申請許可階段須承擔的責任，必然較聆訊正式申請時為輕。在第一階段，申請人只須令法院信納有“充分理由”提出申請；在最後階段，申請人必須令法院信納在整體情況下，作出有關命令是適當的。”

14. 立法會 CB(2)2228/09-10(01)號文件提述的不同個案，似乎支持在考慮是否有“充分理由”提出經濟濟助申請時，須顧及《1984 年法令》第 16 條條文這個觀點<sup>5</sup>。

15. 在 *Holmes v Holmes*<sup>6</sup> 一案中，上訴法院裁定，就《1984 年法令》第 13(1)條而言，在決定是否有充分理由提出經濟濟助申請時，須考慮該法令的條文。因此，假如在提出許可申請時，明顯可見即使批給許可，但由英格蘭及威爾斯的法院命令作出這項濟助並不恰當，因而有關的濟助申請不會獲得批准。若然如此，則法庭給予許可便非正確。

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<sup>5</sup> 請看 Halsbury 的《英國法律(Laws of England)》第 29(3)冊婚姻法律第 895 段註腳 4。

<sup>6</sup> [1989]3 All ER 786

16. 在 *Moore v Moore*<sup>7</sup> 一案中，上訴法院裁定，在考慮根據《1984年法令》第 III 部提出的申請時，須一併考慮第 13 及 16 條。法官在考慮申請人是否有“充分理由”提出申請時，應考慮第 16(2)條提述的所有事宜。上訴法院確認 *Jordan v Jordan*<sup>8</sup> 一案的裁決，也就是申請人無須證明存在困苦或不公平的情況以取得許可。

17. 關於“申請許可的適當涵蓋範圍及作用”這個問題，上訴法院已在 *Agbaje v Agbaje* [2009] EWCA Civ. 1 (第 29–30 段)作出討論。上訴法院認為，一如法律委員會所明確指出，申請許可作為“過濾措施”，旨在給予準答辯人(尤其是居住在外地的準答辯人)足夠的保障，無須為作出有力的抗辯而付出高昂費用。其用意是提供某程度的保障，防止任何一方有機會藉提出申請而向另一方施加不當的壓力，逼使另一方為免承擔就申請進行爭辯所需的費用而同意和解。

18. 上訴法院進一步裁定，法院規則訂明將責任加諸申請人身上，要求他全面和坦率地披露所有相關事宜。然後，法官的工作便是以《1984年法令》第 13(1)條為依據，考慮是否有充分理由作出命令。這相對於上訴法院一直以是否有真正而非憑空想像的成功機會作為門檻，則前者的門檻無疑較高。上訴法院補充，雖然這個門檻定得稍為高一點，但法院的主要任務始終是根據所得資料迅速評估成功機會，而且要牢記這項工作的目的是把證據薄弱的案件剔除。

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<sup>7</sup> [2007] EWCA Civ. 361、[2007] 2FLR 339，第 361 頁

<sup>8</sup> [2000] 1WLR 210

19. 上訴法院的裁定遭英國最高法院(“最高法院”)推翻，其判決書亦有提及申請許可這個問題(第 23-33 段)，但對於第 13(2)條的解釋，最高法院似乎並無異議。關於如何適當應用“充分理由”這個門檻，最高法院承認“充分”一詞可能不夠精確。最高法院進一步評述如下—

“就目前的情況來說，過濾機制的首要目的，是防止有人提出完全沒有理據的申索以欺壓或勒索前配偶。有關門檻並不高，但較在其他情況下採用的“須予審理的重要問題”或“有充分爭辯理據的個案”門檻為高。就此情況而言，‘充分’一詞最佳的表達方法可能是‘實質’……”(第 33 段)

20. 參照《1982 年報告》及有關案例，法律委員會似乎刻意設定較高的門檻，以過濾根據《1984 年法令》第 III 部提出的經濟濟助申請。由於根據第 III 部提出的申請可能會被濫用，藉以向另一方施加不當的壓力，因此採用這個方法為準答辯人提供足夠保障。前述的數宗案件也顯示，儘管根據第 13 條(等同於條例草案第 29AC 條)批予許可的門檻看來似乎很高，但舉證責任卻較根據第 16 條(相當於條例草案第 29AF 條)提出經濟濟助申請為輕。

21. 由於擬在該條例新增的第 IIA 部是以《1984 年法令》第 III 部為藍本，而根據新的第 29AB 條提出的申請是由單方面提出，政府當局認為新的第 29AC(2)條所訂的“充分理由”驗證應予保留，以保障答辯人的權益。政府當局亦認為，當香港法庭聆聽到相類的論點時，由英國最高法院及上訴法院審議的相關英國案件應是有用的參考。

## II. 外國法院就支付款項或轉讓財產作出的命令

22. 新的第 29AC(3)條訂明，“儘管境外主管當局已作出命令，規定婚姻的另一方向申請人或家庭子女支付款項或轉讓財產，或規定該另一方為該申請人或子女的利益而支付款項或轉讓財產，法庭仍可根據本條批予許可”。

23. 新的第 29AC(3)條與《1984 年法令》第 13(2)條相似。夾附於《1982 年報告》的條例草案擬稿的說明<sup>9</sup>指出，“本款清楚說明英格蘭及威爾斯以外任何地方作出的經濟給養或財產調整的命令，本身不會對根據本條文批予的許可構成禁制”。

24. 部分委員關注到，“支付款項或轉讓財產”這詞句是否足以涵蓋法院作出的任何經濟給養命令，而不論涉及的財產性質為何。

25. 根據該條例第 2(1)條，“財產”(property)是指“任何土地財產或非土地財產，任何在土地財產或非土地財產中的產業權或權益，任何金錢，任何可轉讓票據，《銀行業條例》(第 155 章)第 137B 條所指的任何訂明票據，任何債項或其他據法權產，以及任何其他不論是否在管有中的權利或權益。”

26. 根據《銀行業條例》(第 155 章)第 137B 條，“訂明票據”(prescribed instrument)的定義包括第 155 章附表 6 內指明的票據，當中包括任何下述權利或權益：(i)根據或就該等票據而直接或間接產生的權利或權益；以及(ii)可以書面文件、以帳簿記項形

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<sup>9</sup> 法律委員會文件第 117 號，見第 23 頁。



式記錄的資料，或以非可閱的形式記錄但能夠以可閱形式重現的資料予以證明的權利或權益。

27. 政府當局認為，鑑於“財產”的定義廣泛，新的第 29AC(3) 條的字眼應能涵蓋外地法院作出的經濟濟助命令所包括的任何財產。

28. 應注意的是，該條例第 6(1)(a)條亦訂明，在批予離婚判令時，香港的法庭可“命令婚姻的一方須將指明的財產轉讓給另一方或任何家庭子女……而此項財產乃本段最初所述的婚姻一方有權憑管有權或復歸權而享有的”。故此轉讓財產的概念在該條例中並非新概念。因此，政府當局認為不應修改新的第 29AC(3)條的字眼。

## **其他司法管轄區批予外地離婚判令訴訟人的經濟濟助**

### **I. 澳大利亞**

29. 澳大利亞並沒有在其法例中加入類似《1984年法令》第 III 部，專為處理外地離婚判令獲承認後提出的經濟濟助申請的特定部分或章節。根據《1975年家事法法令》(Family Law Act 1975)，“婚姻訴訟”的涵義廣泛，內容包括：

- 婚姻雙方就婚姻的任何一方的贍養費而進行的法律程序 (第 4(1)(c)條)；
- 婚姻雙方就雙方或其中一方的財產而進行的法律程序，包括按照澳大利亞承認為有效的海外司法管轄區法律就當

事人離婚或廢止該段婚姻或雙方合法分居所進行的法律程序(第 4(1)(ca)(iii)條)。

30. 《1975 年家事法法令》進一步訂明，“婚姻的一方”包括在澳大利亞或其他地方已因離婚而終止或廢止的婚姻的一方的人士(第 4(2)條)。若把第 4(1)條及(2)條合併理解，在澳大利亞以外地方已遭終止或廢止的婚姻的一方，可以提起法律程序，要求法院頒下配偶贍養令。同樣地，根據《1975 年家事法法令》，一段婚姻所生的子女的定義，包括“在澳大利亞或其他地方已因離婚而終止或廢止的婚姻所生的子女”(第 60F(2)(a)條)，因而一對配偶在本地離婚後申請子女贍養費事宜，似乎是許可的。

31. 家事法庭可就“婚姻訴訟”(matrimonial causes)行使司法管轄權，若(i)(就婚姻當事人之間的婚姻訴訟的)任何一方；或(ii)就其他情況，婚姻訴訟的任何一方；屬澳大利亞公民、通常居於澳大利亞或身在澳大利亞(第 39(4)條)。〔《1975 年家事法法令》的相關條文副本載於附件 1。〕

## II. 新西蘭

32. 跟澳大利亞一樣，《1980 年家事法律程序法令》(Family Proceedings Act 1980)(“《1980 年家事法令》”)並沒有專門處理在本地離婚後提出經濟給養申請的部分。在本地離婚後提出經濟給養申請，受該法令一般條文所規限。根據《1980 年家事法令》第 70(4)條，提述解除婚姻的命令，包括提述獲新西蘭承認的判令、命令或立法的成文法則。新西蘭法院要在贍養費法律程序行使司法管轄權，必須證明有關法律程序的任何一方在新西蘭居住或以新西蘭為居籍(第 4(a)條)。

33. 《1981年家事法令》似乎沒有特別就外地離婚後申請子女供養事宜作出規定。根據《1991年子女扶養法令》（“《1991年扶養法令》”），一名19歲以下、身為新西蘭公民或通常居於新西蘭、並非與婚姻的一方一同居住而又非經濟獨立的人士具備申請子女扶養的資格(第6(1)條)。子女扶養申請可向作為該名子女的父或母（根據《1991年子女扶養法令》第7條注釋）提出，被申請人是一名新西蘭公民或通常居於新西蘭，或其通常居住的國家已就執行扶養子女的安排與新西蘭簽訂相互協定。《1991年扶養法令》似乎並沒有對家長的婚姻狀況（無論在新西蘭或其他地方）作出提述。[《1980年家事法令》及《1991年扶養法令》的相關條文副本載於附件2。]

### III. 加拿大

34. 加拿大並無特定法例規管在外地離婚後提出的經濟濟助申請。關於《1985年離婚法令》(Divorce Act 1985)是否適切處理有關的問題，曾在 *Okmyansky v Okmyansky* [2007] ONCA 427 一案中論述。在該案中，一對配偶在前蘇聯結婚，及後於2004年獲俄羅斯法庭批准離婚。妻子根據該法令提出贍養申索，又根據《家事法令》要求分割財產。

35. 安大略省上訴法庭裁定，當事人在外地司法管轄區作出有效離婚判令後，根據《1985年離婚法令》提出的附帶濟助法律程序，安大略省的法院並無司法管轄權進行聆訊和作出裁定(第41段)。

#### IV. 新加坡

36. 2009年7月，新加坡法律改革委員會 (Law Reform Committee of Singapore)發表“法律改革委員會有關外地離婚或廢止婚姻後的附屬命令的報告”(“Report of The Law Reform Committee on Ancillary Orders after Foreign Divorce or Annulment”)。委員會建議仿效聯合王國所實施的法律改革(即《1984年法令》第III部)，擴大新加坡法院的附屬婚姻司法管轄權(第58段)。

37. 委員會建議三重保障，這些保障與《1984年法令》第III部所載的相似：

- (a) 婚姻雙方與新加坡有確實聯繫，以及
- (b) 有充分理由可要求法院行使其新權力，以便取得許可，展開法律程序；

若然符合關於司法管轄權的規定，則

- (c) 法院在作出經濟濟助的附屬命令之前，必須信納新加坡是適當作出命令的地點。

(第61段)

38. 該報告亦附有修訂《婦女約章》(Women’s Charter) (第353章)的條例草案擬稿。擬議的修訂與《1984年法令》第12(1)、13、14、15及16條類似。該報告建議，假如婚姻的其中一方以新加坡為其居籍，又或在緊接提出許可申請或離婚等生效的日期前一

年以新加坡為慣常居住地，新加坡法院應具有司法管轄權審理經濟濟助的申請。

律政司

法律政策科

2010年9月

**Family Law Act 1975 (Australia)**

....

**Section 4**

**Interpretation**

(1) In this Act, the standard Rules of Court and the related Federal Magistrates Rules, unless the contrary intention appears:

....

*"matrimonial cause"* means

(a) proceedings between the parties to a marriage, or by the parties to a marriage, for:

- (i) a divorce order in relation to the marriage; or
- (ii) a decree of nullity of marriage; or

(b) proceedings for a declaration as to the validity of:

- (i) a marriage; or
- (ii) a divorce; or
- (iii) the annulment of a marriage;

by decree or otherwise; or

(c) proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage; or

(caa) proceedings between:

- (i) a party to a marriage; and
- (ii) the bankruptcy trustee of a bankrupt party to the marriage;

with respect to the maintenance of the first-mentioned party; or

(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:

- (i) arising out of the marital relationship;
  - (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or
  - (iii) in relation to the divorce of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104; or
- (cb) proceedings between:
- (i) a party to a marriage; and
  - (ii) the bankruptcy trustee of a bankrupt party to the marriage;

with respect to any vested bankruptcy property in relation to the bankrupt party, being proceedings:

- (iii) arising out of the marital relationship; or
  - (iv) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between the parties to the marriage; or
  - (v) in relation to the divorce of the parties to the marriage, the annulment of the marriage or the legal separation of the parties to the marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104; or
- (d) proceedings between the parties to a marriage for the approval by a court of a maintenance agreement or for the revocation of such an approval or for the registration of a maintenance agreement; or
- (e) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship (other than proceedings under a law of a State or Territory prescribed for the purposes of section 114AB); or
- (ea) proceedings between:

- (i) the parties to a marriage; or
- (ii) if one of the parties to a marriage has died--the other party to the marriage and the legal personal representative of the deceased party to the marriage;

being proceedings:

- (iii) for the enforcement of, or otherwise in relation to, a maintenance agreement that has been approved under section 87 and the approval of which has not been revoked;
- (iv) in relation to a maintenance agreement the approval of which under section 87 has been revoked; or
- (v) with respect to the enforcement under this Act or the applicable Rules of Court of a maintenance agreement that is registered in a court under section 86 or an overseas maintenance agreement that is registered in a court under regulations made pursuant to section 89; or

(eaa) without limiting any of the preceding paragraphs, proceedings with respect to a financial agreement that are between any combination of:

- (i) the parties to that agreement; and
- (ii) the legal personal representatives of any of those parties who have died;

(including a combination consisting solely of parties or consisting solely of representatives); or

(eab) third party proceedings (as defined in section 4A) to set aside a financial agreement; or

(eb) proceedings with respect to the enforcement of a decree made under the law of an overseas jurisdiction in proceedings of a kind referred to in paragraph (c); or

(f) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs (a) to (eb), including proceedings of such a kind pending at, or completed before, the commencement of this Act.

••••



(2) A reference in this Act, the standard Rules of Court or the related Federal Magistrates Rules to a party to a marriage includes a reference to a person who was a party to a marriage that has been:

- (a) terminated by divorce (in Australia or elsewhere); or
- (b) annulled (in Australia or elsewhere); or
- (c) terminated by the death of one party to the marriage.

....

### **Section 39**

#### **Jurisdiction in matrimonial causes**

(1) Subject to this Part, a matrimonial cause may be instituted under this Act:

- (a) in the Family Court; or
- (b) in the Supreme Court of a State or a Territory.

(1A) Subject to this Part, a matrimonial cause (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of matrimonial cause in subsection 4(1)) may be instituted under this Act in the Federal Magistrates Court.

(2) Subject to this Part, a matrimonial cause (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of matrimonial cause in subsection 4(1)) may be instituted under this Act in a Court of summary jurisdiction of a State or Territory.

(3) Proceedings for a divorce order may be instituted under this Act if, at the date on which the application for the order is filed in a court, either party to the marriage:

- (a) is an Australian citizen;
- (b) is domiciled in Australia; or

- (c) is ordinarily resident in Australia and has been so resident for 1 year immediately preceding that date.

(4) Proceedings of a kind referred to in the definition of matrimonial cause in subsection 4(1), other than proceedings for a divorce order or proceedings referred to in paragraph (f) of that definition, may be instituted under this Act if:

- (a) in the case of proceedings between the parties to a marriage or proceedings of a kind referred to in paragraph (b) of that definition in relation to a marriage--either party to the marriage is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date; and
- (b) in any other case--any party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date.

(4A) In subsection (4), relevant date , in relation to proceedings, means:

- (a) if the application instituting the proceedings is filed in a court--the date on which the application is so filed; or
- (b) in any other case--the date on which the application instituting the proceedings is made.

(5) Subject to this Part and to section 111AA, the Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Family Court and on the Supreme Court of each Territory, with respect to matters arising under this Act in respect of which:

- (a) matrimonial causes are instituted under this Act; or
- (b) matrimonial causes are continued in accordance with section 9; or
- (d) proceedings are instituted under regulations made for the purposes of section 109, 110, 111, 111A or 111B or of paragraph 125(1)(f) or (g) or under Rules of Court made for the purposes of paragraph 123(1)(r); or
- (da) proceedings are instituted under Division 4 of Part XIII AA or under regulations made for the purposes of section 111CZ; or
- (e) proceedings are instituted under section 117A.

(5AA) Subject to this Part and to section 111AA, the Federal Magistrates Court has, and is taken always to have had, jurisdiction with respect to matters arising under this Act in respect of which matrimonial causes (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of matrimonial cause in subsection 4(1)) are instituted under this Act.

(5A) Subject to this Part and to section 111AA, the Federal Magistrates Court has jurisdiction with respect to matters arising under this Act in respect of which proceedings are instituted under:

- (a) regulations made for the purposes of section 109, 110, 111, 111A or 111B; or
- (b) regulations made for the purposes of paragraph 125(1)(f) or (g); or
- (c) section 117A; or
- (d) proceedings are instituted under Division 4 of Part XIII AA or under regulations made for the purposes of section 111CZ.

(6) Subject to this Part and to section 111AA, each court of summary jurisdiction of each State is invested with federal jurisdiction, and jurisdiction is conferred on each court of summary jurisdiction of each Territory, with respect to matters arising under this Act in respect of which:

- (a) matrimonial causes (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of matrimonial cause in subsection 4(1)) are instituted under this Act; or
- (b) matrimonial causes (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of matrimonial cause in subsection 4(1)) are continued in accordance with section 9; or
- (d) proceedings are instituted under:
  - (i) regulations made for the purposes of section 109, 110, 111, 111A or 111B; or
  - (ii) regulations made for the purposes of paragraph 125(1)(f) or (g); or

(iii) standard Rules of Court made for the purposes of paragraph 123(1)(r); or

(iv) Rules of Court made for the purposes of paragraph 87(1)(j) of the Federal Magistrates Act 1999 ; or

(da) proceedings are instituted under Division 4 of Part XIII AA or under regulations made for the purposes of section 111CZ; or

(e) proceedings are instituted under section 117A.

(7) The Governor-General may, by Proclamation, fix a day as the day on and after which proceedings in relation to matters arising under this Part may not be instituted in, or transferred to, a court of summary jurisdiction in a specified State or Territory.

(7AAA) Without limiting the generality of subsection (7), a Proclamation under that subsection may be expressed to apply only in relation to one or more of the following:

(a) proceedings of specified classes;

(b) the institution of proceedings in, or the transfer of proceedings to, a court of summary jurisdiction in a specified part of a State or Territory;

(c) the institution of proceedings in, or the transfer of proceedings to, a court of summary jurisdiction constituted in a specified way.

(7AA) A court of summary jurisdiction in a State or Territory shall not hear or determine proceedings under this Act instituted in or transferred to that court otherwise than in accordance with any Proclamation in force under subsection (7).

(7A) The Governor-General may, by Proclamation, declare that a Proclamation made under subsection (7) is revoked on and from a specified date and, on and after the specified date, this Act (including subsection (7)) has effect as if the revoked Proclamation had not been made, but without prejudice to the effect of the revoked Proclamation in respect of the jurisdiction of courts before the specified date.

(8) Jurisdiction with respect to a matter arising under this Act in respect of which a matrimonial cause is instituted under this Act is not conferred on a court of a Territory unless at least one of the parties to the proceedings is, at the date of the institution of the proceedings or the date of the transfer of

the proceedings to the court of the Territory, ordinarily resident in the Territory.

(9) The jurisdiction conferred on or invested in a court by this section includes jurisdiction with respect to matters arising under any law of the Commonwealth in respect of which proceedings are transferred to that court in accordance with this Act.

• • • •

### **Section 60F**

#### **Certain children are children of marriage etc.**

(1) A reference in this Act to a child of a marriage includes, subject to subsection (3), a reference to each of the following children:

- (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
- (b) a child of the husband and wife born before the marriage;
- (c) a child who is, under subsection 60H(1) or section 60HB, the child of the husband and wife.

(2) A reference in this Act to a child of a marriage includes a reference to a child of:

- (a) a marriage that has been terminated by divorce or annulled (in Australia or elsewhere); or
- (b) a marriage that has been terminated by the death of one party to the marriage.

(3) A child of a marriage who is adopted by a person who, before the adoption, is not a prescribed adopting parent ceases to be a child of that marriage for the purposes of this Act.

(4) The following provisions apply in relation to a child of a marriage who is adopted by a prescribed adopting parent:

- (a) if a court granted leave under section 60G for the adoption proceedings to be commenced--the child ceases to be a child of the marriage for the purposes of this Act;

(b) in any other case--the child continues to be a child of the marriage for the purposes of this Act.

(4A) To avoid doubt, for the purposes of this Act, a child of a marriage is a child of the husband and of the wife in the marriage.

(5) In this section:

"this Act" includes:

- (a) the standard Rules of Court; and
- (b) the related Federal Magistrates Rules.

**Family Proceedings Act 1980 (New Zealand)**

....

**Section 4**

**Jurisdiction of Courts**

Subject to sections 27, 29, 32, 37, and 48 of this Act, the High Court, District Courts, and Family Courts shall have jurisdiction in proceedings under this Act, only –

- (a) Where at the commencement of the proceedings, any party to the proceedings resides or is domiciled in New Zealand.
- (b) In the case of proceedings relating to a child, where at the commencement of the proceedings—
  - (i) Any party to the proceedings resides or is domiciled in New Zealand; or
  - (ii) The child resides in New Zealand.

....

**Section 70**

**Order for maintenance after marriage or civil union dissolved or de facto relationship ends**

- (1) A Family Court may make an order under subsection (2) -
  - (a) on or at any time after the making of an order dissolving a marriage or civil union:
  - (b) at any time after a de facto relationship ends.
- (2) The Court may do the following under this section:

- (a) order either party to the proceedings, or the personal representative of either party, to pay to the other party for such term as the Court thinks fit (but not exceeding the life of the other party) such periodical sum towards the maintenance of the other party as the Court thinks fit:
  - (b) make any other order referred to in section 69(1), either instead of or in addition to an order under paragraph (a).
- (3) Section 69(2) applies to an order under this section for the payment of a lump sum.
- (4) In this section, a reference to an order dissolving a marriage or civil union includes a reference to a decree or order or legislative enactment recognised in New Zealand by virtue of section 44, as if that decree or order or legislative enactment were an order of a court of competent jurisdiction in New Zealand.
- (5) This section is subject to sections 61, 70A, 70B, and 71.

### **Child Support Act 1991 (New Zealand)**

....

#### **Section 5**

##### **Children who qualify for child support**

A child qualifies for child support if he or she—

- (a) is under 19 years of age; and
- (b) is not living with another person in a marriage, civil union or de facto relationship; and
- (c) is not financially independent; and
- (d) is a New Zealand citizen or is ordinarily resident in New Zealand.



....

## **Section 6**

### **Parents by whom child support payable**

(1) Child support may be sought in respect of a qualifying child from any person—

- (a) who is a parent of the child within the meaning of section 7; and
- (b) who is a New Zealand citizen or is ordinarily resident in New Zealand or in a country with which New Zealand has entered into a reciprocal agreement for enforcement of child support.

(2) Notwithstanding subsection (1), where—

- (a) a child has been adopted under the Adoption Act 1955 or under an adoption to which section 17 of that Act applies; and
- (b) that adoption order has not been discharged,—

child support may not be sought in respect of the child in relation to any period after the time at which the final adoption order became effective from any person who was a parent of the child before that time unless that person is also a person who adopted the child.

## **Section 7**

### **Meaning of parent**

(1) For the purposes of this Act, a person is a parent of a child if—

- (a) the person's name is entered in the Register of Births pursuant to the Births, Deaths, Marriages, and Relationships Registration Act 1995, or is entered in a register of births or parentage information kept under the law of any overseas jurisdiction, as a parent of the child; or
- (b) the person is or was a party to a legal marriage and the child was conceived by or born to the person, or the other party to

the marriage, during the legal marriage; or

- (c) the person adopted the child under the Adoption Act 1955 or under an adoption to which section 17 of that Act applies and that adoption order has not been discharged; or
- (d) a New Zealand court, or a court or public authority of any overseas jurisdiction, has at any time found that the person is a parent of the child, and the finding has not been cancelled or set aside; or
- (e) the person has, at any time in any proceeding before any court in New Zealand, or before any court or public authority in an overseas jurisdiction, or in writing signed by the person, acknowledged that he or she is a parent of the child and a court has not made a finding of paternity of the child that is to the contrary of that acknowledgment; or
- (f) a court has, under the Family Proceedings Act 1980, made a paternity order against the person in respect of the child; or
- (g) the person is the natural mother of the child; or
- (h) the person has been declared to be a step-parent of the child by a Family Court under section 99; or
- (i) a New Zealand court, or a court or public authority of any overseas jurisdiction, has appointed the person to be a guardian of the child, or has declared the person to be a guardian of the child, by reason of being the father of the child, and that appointment has not been cancelled or set aside.

(2) Notwithstanding subsection (1), where the Commissioner is satisfied that a person—

- (a) is not, despite being a person to whom that subsection applies, a parent of a particular child; and
- (b) has not been declared to be a step-parent of that child under section 99,—

that person shall not be a parent of the child for the purposes of this Act.

(3) On being requested to make a determination under subsection (2), the Commissioner may require the production of such evidence as the Commissioner, in his or her discretion, considers appropriate.

(4) Where—

- (a) a child is conceived as a result of any AHR procedure to which Part 2 of the Status of Children Act 1969 applies; and
- (b) a person involved in that procedure is not the mother of the child, or a person who has the rights and liabilities of a parent of the child, in terms of that Act,—

that person shall not be a parent of the child for the purposes of this Act.

(5) [Repealed]