

STATUS OF CHILDREN BILL 2012

EXPLANATORY MEMORANDUM

Overview of Bill

The objects of this Bill are to reform the law concerning the status of exnuptial children; to enact provisions relating to parentage presumptions and parentage testing procedures that are in conformity with model provisions accepted by States and Territories; to include in the proposed Act presumptions relating to artificial conception and related purposes.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name or short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on publication of notice of consent in the Gazette.

Clause 3 defines certain words and expressions used in the proposed Act such as ***bodily sample, fertilisation procedure, parentage testing procedure, prescribed court*** and ***prescribed overseas jurisdiction***.

Clause 4 provides that the proposed Act applies to persons regardless of whether they were born in Norfolk Island or before the commencement of the proposed section, whether they are minors or whether either of their parents was domiciled in Norfolk Island. However, the Act does not affect the rights or entitlements of a child under the *De Facto Relationships Act 2005*.

Part 2 Status of children and dispositions of property

Clause 5 ensures that, for the purposes of Norfolk Island law, an exnuptial child has the same legal status as a child born to a married couple.

Clause 6 provides that references in testamentary dispositions of property made on or after the commencement date by persons who die after that date are to be construed as including exnuptial children and persons claiming through exnuptial children unless a contrary intention appears in the disposition.

The proposed section also makes it clear that the rule of public policy that prevents a disposition in favour of an exnuptial child is abolished for dispositions to which the proposed section applies.

Clause 7 provides that certain dispositions made on or after the commencement date are to be construed as including exnuptial children.

Part 3 Establishing parentage

Division 1 Parentage presumptions

Clause 8 sets out four rebuttable presumptions arising from marriage. The first presumption is that a child born to a woman during a marriage is a child of the parties to that marriage (subclause (1)). The second presumption is that a child born to a woman within 44 weeks after her husband's death is a child of her deceased husband (subclause (2)). The third presumption is that a child born to a woman within 44 weeks of her purported marriage being annulled is a child of her purported husband (subclause (3)). The fourth presumption is that a child born to a woman after the dissolution of a marriage, but within 44 weeks after a period of resumed cohabitation (lasting not more than 3 months) following a separation, is a child of her former husband (subclause (4)).

Clause 9 sets out a rebuttable presumption that a child born to a woman who cohabited with a man to whom she was not married at any time during the period beginning not less than 44 weeks, but ending not less than 20 weeks, before the birth is the child of that man.

Clause 10 sets out a rebuttable presumption that a person is a child's parent if the person's name is entered as such in the Births Register or a register of births or parentage information of the Commonwealth, a State or Territory or a prescribed overseas jurisdiction.

Clause 11 sets out a presumption that a person is a child's parent if a prescribed court expressly or implicitly makes a finding to that effect and that finding is not altered, set aside or reversed. If the finding is made while the person is alive, the presumption is irrebuttable (subclause (2)). However, if the finding is made after the person dies, the presumption is rebuttable (subclause (3)).

Clause 12 sets out a rebuttable presumption that a man who has executed a paternity acknowledgment concerning a child under this enactment or another law of Norfolk Island, a law of the Commonwealth, a State or Territory or a prescribed overseas jurisdiction is the child's father.

Clause 13 sets out four irrebuttable presumptions arising out of the use of fertilisation procedures.

The first presumption is that a man who consents to his wife being artificially inseminated with another man's sperm is the father of any child born as a result of any pregnancy (subclause (1)(a)). The third presumption is that the man who provided the sperm for that insemination is not the father of any child born as a result of the pregnancy (subclause (3)). The third presumption is that if a woman becomes pregnant as a result of the use of another woman's ovum, she is taken to be the mother of any child born as a result of the pregnancy (subclause (1)(b)). The fourth (and related) presumption is that the woman who provided the ovum is not the mother of any child born as a result of the procedure (subclause (4)). Two further presumptions that may be rebutted (see clause 14) are that if a woman who is a defacto partner of another woman undergoes a fertilisation procedure to which the woman's partner has consented then that partner is presumed to be a parent of any child born of the pregnancy and the woman who has become pregnant is presumed to be the mother of any child borne of the pregnancy even if she did not provide the ovum used (subclause (2) and that in proceeding where it is relevant that subclause (2) applies the consent of a woman to the procedure leading to pregnancy of her de facto partner is presumed.

Clause 14 provides that rebuttable parentage presumptions (whether arising under the proposed Act or under some other Act or rule of law) are rebuttable on the balance of probabilities.

Clause 15 provides that if two or more rebuttable presumptions conflict and are not rebutted in any proceedings, the court is to apply the presumption that appears to the court to be the more or most likely to be correct.

Clause 16 provides for the resolution of conflicts between irrebuttable presumptions and between irrebuttable and rebuttable presumptions arising under the proposed division.

Clause 17 provides that a prosecutor cannot rely on a parentage presumption arising under the proposed Act to prove a criminal case.

Division 2 Acknowledgments of paternity

Clauses 18 provides that an instrument of acknowledgment of paternity has been executed if it is in a prescribed form, countersigned by the mother, witnessed by an authorised witness and has not been annulled.

The clause also provides that the instrument must within 14 days of its execution be sent to the Births Register, or a penalty may be imposed for failure to comply.

Clause 19 provides that a formal paternity acknowledgment can only be annulled by court order and provides for the class of persons who can apply for annulment and for its registration if an order is made.

Division 3 Declarations of parentage

Clauses 20 provides for the class of persons who may apply to the Supreme Court for a declaration of parentage under the clause.

Clause 21 provides for the annulment of a declaration of paternity under circumstances that new facts have arisen and could not have been previously disclosed by the exercise of reasonable diligence.

Division 4 Evidence of court findings and paternity acknowledgments

Clause 22 requires a court to admit evidence of a court finding or a paternity acknowledgment (or a copy the court considers authentic) for the purposes of establishing a presumption under proposed section 11 or 12.

Division 5 Hearings under divisions 2 and 3

Clause 23 requires hearings under proposed divisions 2 and 3 for a declaration of paternity or an order annulling such a declaration or an order annulling a formal paternity acknowledgment to be held in closed court.

Clause 24 makes it an offence to publish the identity of certain participants in any such hearing. The maximum penalty for such an offence is 10 penalty units.

Division 6 Parentage evidence

Clause 25 provides that the Supreme Court may make a parentage testing order in proceedings where a child's parentage is in issue, either of its own motion or on the application of certain persons.

Clause 26 enables the Court to make ancillary orders to facilitate a parentage testing procedure and to make orders as to the costs of the carrying out of any such procedure.

Clause 27 provides that a medical procedure or other act ordered by the Court under the proposed Part cannot be carried out on a child under 18 years of age without the consent of the child's guardian or parent. However, any failure or refusal to give consent will enable the Court to draw adverse inferences.

Clause 28 provides that a person who is 18 years or more of age and who fails to comply with a parentage testing order or any other order under the proposed Part is not liable to any penalty. However, any such failure will enable the Court to draw adverse inferences.

Clause 29 provides that if a guardian or parent consents to a medical procedure or other act being carried out on a child, then any person carrying out (or assisting in the carrying out) of the procedure or act is not liable to any criminal or civil action. However, persons who are negligent will not be able to rely on this immunity from action.

Clause 30 provides that a report on the carrying out of a medical procedure or act under an order made by the Court may be admitted into evidence if it is made in accordance with the regulations. The Court is also given power to order the person who made the report (or any other person who can give relevant evidence concerning the report) to give evidence.

Clause 31 makes it an offence for a person to personate another in, or proffer another child for, a medical procedure or other act ordered by the Court under the proposed Part. The maximum penalty for the offence is 5 penalty units.

Clause 32 makes it an offence for an unqualified person to take a bodily sample for a parentage testing order or an order under proposed section 26.

Only medical practitioners, registered nurses and other persons belonging to a class of persons prescribed by the regulations will be able to take such samples. The maximum penalty for the offence is 2 penalty units.

Clause 33 enables the Supreme Court to order that a child be separately represented in proceedings brought under the proposed division.

Part 4 Miscellaneous

Clause 34 provides that proceedings for an offence under the proposed Act are to be dealt with by the Court of Petty Sessions. It also makes clear that the Supreme Court will retain its powers to enforce its orders.

Clause 35 confers a general regulation-making power on the Administrator.

19 October 2012