

[Act 1996 No 76]



New South Wales

## Status of Children Bill 1996

### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

#### Overview of Bill

The objects of this Bill are:

- (a) to re-enact provisions presently contained in the *Children (Equality of Status) Act 1976* concerning the status of exnuptial children and to repeal consequentially the *Children (Equality of Status) Act 1976*, and
  - (b) to enact provisions relating to parentage presumptions and parentage testing procedures that are in conformity with model provisions agreed on by the Standing Committee of Attorneys-General in October 1992, and
  - (c) to include in the proposed Act presumptions relating to artificial conception and to repeal consequentially the *Artificial Conception Act 1984*, and
  - (d) to amend consequentially the *Adoption of Children Act 1965*, the *Adoption Information Act 1990*, the *De Facto Relationships Act 1984* and the *Superannuation Act 1916*.
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## Outline of provisions

### **Part 1 Preliminary**

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**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 the State or before the commencement of the proposed section, whether they are minors or whether either of their parents was domiciled in the State. However, the Act does not affect the operation of sections 35 and 36 of the *Adoption of Children Act 1965*, which deal with the status of persons who are subject to adoption orders.

### **Part 2 Status of children and dispositions of property**

**Clause 5** ensures that, for the purposes of New South Wales law, an exnuptial child has the same legal status as a child born to a married couple. The proposed section re-enacts in substance section 6 of the *Children (Equality of Status) Act 1976*.

**Clause 6** provides that references in certain dispositions of property made on or after 1 July 1977 to children and other relatives are to be construed as including exnuptial children and persons claiming through exnuptial children unless a contrary intention appears in the disposition. The relevance of 1 July 1977 is that it is the date on which the *Children (Equality of Status) Act 1976* commenced. Section 7 of that Act is substantially re-enacted by the proposed section.

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 before 1 July 1977 are to be construed as if neither the *Children (Equality of Status) Act 1976* or the proposed Act had been enacted. This preserves the effect of section 8 of the *Children (Equality of Status) Act 1976*.

**Clause 8** ensures that exnuptial children and their relatives can claim on the intestacy of a person who died on or after 1 July 1977. Section 9 of the *Children (Equality of Status) Act 1976* is re-enacted in substance by the proposed section.

### **Part 3     Establishing parentage**

#### **Division 1     Parentage presumptions**

**Clause 9** 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 10** 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 11** sets out a rebuttable presumption that a person is a child's parent if the person's name is entered as such in a register of births or parentage information of the Commonwealth, a State (including the Births, Deaths and Marriages Register) or Territory or a prescribed overseas jurisdiction.

**Clause 12** 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 13** sets out a rebuttable presumption that a man who has executed a paternity acknowledgment concerning a child under a law of the Commonwealth, a State or Territory or a prescribed overseas jurisdiction is the child's father.

**Clause 14** 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 second (and related) 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 (2)).

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 (3)).

**Clause 15** 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 16** 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 17** provides for the resolution of conflicts between irrebuttable presumptions and between irrebuttable and rebuttable presumptions arising under the proposed Division.

**Clause 18** 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 19** and **20** re-enact in clearer language provisions presently contained in section 11 of the *Children (Equality of Status) Act 1976* concerning the making of paternity acknowledgments and the annulment of such acknowledgments by the Supreme Court.

### **Division 3      Declarations of parentage**

**Clauses 21** and **22** both re-enact in clearer language, and consolidate, provisions presently contained in sections 13 and 15 of the *Children (Equality of Status) Act 1976* concerning the making of declarations of paternity and maternity by the Supreme Court and the annulment of such declarations.

### **Division 4      Evidence of court findings and paternity acknowledgments**

**Clause 23** re-enacts (with appropriate modifications) section 17 of the *Children (Equality of Status) Act 1976* in clearer language. The proposed section 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 12 or 13.

### **Division 5      Hearings under Divisions 2 and 3**

**Clauses 24** and **25** re-enact section 16 (with appropriate modifications) of the *Children (Equality of Status) Act 1976* in clearer language. Proposed section 24 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. Proposed section 25 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 (currently, \$1000).

### **Division 6      Parentage evidence**

**Clause 26** 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 27** 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 28** 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 29** 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 30** 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 31** 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 32** 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 (currently, \$500).

**Clause 33** makes it an offence for an unqualified person to take a bodily sample for a parentage testing order or an order under proposed section 27. 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 (currently, \$200).

**Clause 34** enables the Supreme Court to order that a child be separately represented in proceedings brought under the proposed Division.

#### **Part 4      Miscellaneous**

**Clause 35** provides that proceedings for an offence under the proposed Act are to be dealt with by a Local Court constituted by a single Magistrate. It also makes clear that the Supreme Court will retain its powers to enforce its orders.

**Clause 36** confers a general regulation-making power on the Governor.

**Clause 37** repeals the *Children (Equality of Status) Act 1976* and the *Artificial Conception Act 1984*.

**Clause 38** is a formal provision giving effect to proposed Schedule 1 containing consequential amendments to various Acts.

**Clause 39** is a formal provision giving effect to proposed Schedule 2 containing provisions of a savings and transitional nature.

**Clause 40** provides that the Minister is to conduct a review of the operation of the proposed Act 5 years after its enactment.

## **Schedules**

**Schedule 1** amends consequentially the *Adoption of Children Act 1965*, the *Adoption Information Act 1990*, the *De Facto Relationships Act 1984* and the *Superannuation Act 1916*.

**Schedule 2** contains provisions of a savings and transitional nature.