

First print



New South Wales

Married Persons (Equality of Status) Bill 1996

Explanatory note

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

Overview of Bill

At common law married women are not legally capable of owning property, cannot sue their husbands in tort and generally do not have a legal identity that is independent from that of their husbands. The *Married Persons (Property and Torts) Act 1901* addressed these issues.

The objects of this Bill are:

- (a) to confirm (and extend) the equality of legal status of married persons established by the *Married Persons (Property and Torts) Act 1901*, and
- (b) to repeal the *Married Persons (Property and Torts) Act 1901*.

The proposed Act differs from the *Married Persons (Property and Torts) Act 1901* in the following respects:

- (a) it includes a general statement declaring that a married person has legal capacity as if the person was not married and enjoys a separate legal personality from his or her spouse, and
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- (b) it enables spouses to sue each other in tort generally rather than confining this right as is the case under the *Married Persons (Property and Torts) Act 1901*, and
- (c) it removes certain provisions that are now dealt with by other legislation (for example, competency and compellability of spouses as witnesses which are now covered by the *Evidence Act 1995*), and
- (d) it makes specific provision for the ownership of housekeeping payments, actions against a spouse in relation to fraudulent investments and abolishes the agent of necessity rule.

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 proclaimed.

Clause 3 provides that notes do not form part of the proposed Act.

Part 2 Equality of status

Division 1 General rule

Clause 4 provides for equality of legal status of married persons and that a married person has a separate legal personality from his or her spouse. This does not otherwise affect the position of a minor.

Division 2 Specific examples

Clause 5 provides that spouses may sue each other in tort. This overrides section 16 and expands sections 16A and 16B of the *Married Persons (Property and Torts) Act 1901*. Sections 16A and 16B provide that husband and wife can only sue each other in tort in limited circumstances.

Clause 6 provides that a married person can take criminal or civil action against his or her spouse for the protection of his or her property as if they were not married. This follows section 16A (1) of the *Married Persons (Property and Torts) Act 1901* and removes the restrictions contained in section 16A (3) and (4).

Clause 7 provides that neither a husband nor a wife has the authority to pledge the credit of his or her spouse for the purchase of necessaries. The presumption at common law that a wife has authority to pledge her husband's credit for maintenance has been abolished in other Australian jurisdictions.

Clause 8 provides that a married person, subject to any agreement to the contrary, is not liable for any debts incurred by his or her spouse before marriage. At common law a husband assumes the debts of his wife on marriage. Clause 8 follows section 17 (1) of the *Married Persons (Property and Torts) Act 1901* in relation to debts. The common law doctrine has also been abolished in other Australian jurisdictions.

Clause 9 provides that, unless a contrary intention is shown, a husband and wife are to be treated as two separate persons when receiving a gift or other disposition of property under an instrument. At common law a disposition to a husband and wife and a third party, for example, would be distributed with half going to the third party and the remaining half going to the husband and wife as if they were one person. Proposed clause 9 follows section 26 of the *Married Persons (Property and Torts) Act 1901*.

Clause 10 provides that an instrument is void to the extent that it restricts anticipation or alienation of property by a married woman. In NSW, section 149 (1) of the *Conveyancing Act 1919* (which will be repealed by the proposed Act) provides that a court can bind a married woman's interest in property subject to a restraint on anticipation or alienation if it is to her benefit. Restraint on anticipation or alienation has been abolished in other Australian jurisdictions.

Clause 11 provides that the specific provisions in Division 2 do not affect the generality of Division 1.

Division 3 Other matters

Clause 12 provides that housekeeping payments and allowances are taken to belong to a husband and wife as joint tenants. At common law household savings are presumed to belong to a wife. The *Married Persons (Property and Torts) Act 1901* makes no provision for this.

Clause 13 provides that a married person may apply to the Supreme Court to have money belonging to the person, which has been invested by his or her spouse without the consent of the married person, transferred back in to his or her name. This updates section 22 of the *Married Persons (Property and Torts) Act 1901*.

Part 3 Miscellaneous

Clause 14 is a regulation making power.

Clause 15 repeals certain Acts to the extent specified in Schedule 1.

Clause 16 is a formal provision giving effect to the amendment of the *Supreme Court Act 1970* set out in Schedule 2.

Clause 17 is a formal provision giving effect to Schedule 3, which contains savings and transitional provisions.

Clause 18 provides for the review of the Act by the Minister 5 years after its commencement.

Schedule 1 repeals the *Married Persons (Property and Torts) Act 1901* and certain provisions of the *Conveyancing Act 1919* and the *Wills, Probate and Administration Act 1898*.

Schedule 2 makes amendments to the *Supreme Court Act 1970*.

Schedule 3 contains savings and transitional provisions consequent on the enactment of the proposed Act.



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Married Persons (Equality of Status) Bill 1996

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New South Wales

Married Persons (Equality of Status) Bill 1996

No. , 1996

A Bill for

An Act to make further provision with regard to the equality of legal status of married persons; to repeal the *Married Persons (Property and Torts) Act 1901*; to amend consequentially the *Supreme Court Act 1970*; and for related purposes.

Clause 1 Married Persons (Equality of Status) Bill 1996

Part 1 Preliminary

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Married Persons (Equality of Status) Act 1996*.

2 Commencement

5

This Act commences on a day or days to be appointed by proclamation.

3 Notes

Notes in this Act do not form part of the Act.

Part 2 Equality of status

Division 1 General rule

4 Spouses have legal capacity as if they were not married

- (1) A married person:
 - (a) has legal capacity for all purposes and in all respects as if that person were unmarried, and 5
 - (b) has a legal personality that is independent, separate and distinct from that of the person's spouse.
- (2) This section does not affect any specific laws in relation to a minor. 10

Division 2 Specific examples

5 Spouses can sue each other in tort

A husband and wife each has a right of action in tort against the other as if they were not married.

6 Criminal and civil action in respect of spouse's property 15

A married person is entitled to civil and criminal redress against the person's spouse for the protection of his or her property as if that person were not married.

7 Married person has no authority to act as agent of necessity

A married person does not, by reason only of the person's status as a spouse, have the authority to pledge the credit of the other spouse for necessities or to act as agent for the other spouse for the purchase of necessities. 20

8 Married person not liable for debts of spouse incurred before marriage 25

Subject to any agreement to the contrary, a married person is not liable for any debt incurred by the person's spouse before their marriage.

9 Spouses as beneficiaries

A husband and wife are to be treated as two separate persons for the purposes of the construction of a will, trust, or other instrument in relation to a gift or other disposition of real or personal property to the husband and wife, unless a contrary intention appears. 5

10 Instruments restricting anticipation or alienation are void

An instrument executed after the commencement of this section is void to the extent that it purports to attach any restriction on anticipation or alienation to the enjoyment of property by a woman that could not have been attached to the enjoyment of property by a man. 10

11 Effect of Division

Nothing in this Division affects the generality of Division 1.

Division 3 Other matters 15

12 Housekeeping payments and allowances held as joint tenants

If a married person makes a payment or allowance to the person's spouse to pay their joint household expenses or for similar purposes, any property bought with the payment or allowance and any money not spent from the payment or allowance is, in the absence of any agreement to the contrary between the person and his or her spouse, taken to belong to the person and the person's spouse as joint tenants. 20

13 Fraudulent investment of spouse's money

- (1) If a married person invests money belonging to the person's spouse without obtaining the consent of the spouse, the spouse can apply to the Supreme Court to have the money transferred to him or her. 25
- (2) The Supreme Court has jurisdiction to order such a transfer and to make any ancillary orders. 30

Part 3 Miscellaneous

14 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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15 Repeals

The Acts listed in Schedule 1 are repealed to the extent specified in the Schedule.

16 Amendment of Supreme Court Act 1970 No 52

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Schedule 2 has effect.

17 Savings and transitional provisions

Schedule 3 has effect.

18 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

15

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

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Schedule 1 Repeals

(Section 15)

1.1 Married Persons (Property and Torts) Act 1901 No 45

The whole Act is repealed.

1.2 Conveyancing Act 1919 No 6

5

The following are repealed:

- (a) The words “but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence” in section 134.
- (b) The proviso to section 148 (1).
- (c) Sections 148 (2), 149, 150 and 151.

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1.3 Wills, Probate and Administration Act 1898 No 13

Section 5 (2) is repealed.

Married Persons (Equality of Status) Bill 1996

Amendment of Supreme Court Act 1970 No 52

Schedule 2

**Schedule 2 Amendment of Supreme Court Act
1970 No 52**

(Section 16)

Supreme Court Act 1970 No 52

Section 76 Costs

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Omit "*Married Persons (Property and Torts) Act 1901*" from section 76 (3).

Insert instead "*Married Persons (Equality of Status) Act 1996*".

Schedule 3 Savings and transitional provisions

(Section 17)

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts: 5
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day. 10
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or 15
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of this Act 20

2 Abolition of common law and dispositions not affected

- (1) The repeal or amendment of an Act by this Act does not revive any rule of the common law or equity abolished or otherwise affected by this Act. 25

- (2) Subsection (1) does not affect the generality of section 30 of the *Interpretation Act 1987*.

Note. Section 30 of the *Interpretation Act 1987* preserves certain rights, privileges, obligations and liabilities arising under a repealed Act.

3 Time of marriage irrelevant

5

A provision of this Act applies to married persons whether married before or after the commencement of the provision.



New South Wales

Married Persons (Equality of Status) Act 1996 No 96

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New South Wales

Married Persons (Equality of Status) Act 1996 No 96

Act No 96, 1996

An Act to make further provision with regard to the equality of legal status of married persons; to repeal the *Married Persons (Property and Torts) Act 1901*; to amend consequentially the *Supreme Court Act 1970*; and for related purposes. [Assented to 26 November 1996]

Section 1 Married Persons (Equality of Status) Act 1996 No 96

Part 1 Preliminary

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Married Persons (Equality of Status) Act 1996*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Notes

Notes in this Act do not form part of the Act.

Part 2 Equality of status

Division 1 General rule

4 Spouses have legal capacity as if they were not married

- (1) A married person:
 - (a) has legal capacity for all purposes and in all respects as if that person were unmarried, and
 - (b) has a legal personality that is independent, separate and distinct from that of the person's spouse.
- (2) This section does not affect any specific laws in relation to a minor.

Division 2 Specific examples

5 Spouses can sue each other in tort

A husband and wife each has a right of action in tort against the other as if they were not married.

6 Criminal and civil action in respect of spouse's property

A married person is entitled to civil and criminal redress against the person's spouse for the protection of his or her property as if that person were not married.

7 Married person has no authority to act as agent of necessity

A married person does not, by reason only of the person's status as a spouse, have the authority to pledge the credit of the other spouse for necessities or to act as agent for the other spouse for the purchase of necessities.

8 Married person not liable for debts of spouse incurred before marriage

Subject to any agreement to the contrary, a married person is not liable for any debt incurred by the person's spouse before their marriage.

9 Spouses as beneficiaries

A husband and wife are to be treated as two separate persons for the purposes of the construction of a will, trust, or other instrument in relation to a gift or other disposition of real or personal property to the husband and wife, unless a contrary intention appears.

10 Instruments restricting anticipation or alienation are void

An instrument executed after the commencement of this section is void to the extent that it purports to attach any restriction on anticipation or alienation to the enjoyment of property by a woman that could not have been attached to the enjoyment of property by a man.

11 Effect of Division

Nothing in this Division affects the generality of Division 1.

Division 3 Other matters

12 Housekeeping payments and allowances held as joint tenants

If a married person makes a payment or allowance to the person's spouse to pay their joint household expenses or for similar purposes, any property bought with the payment or allowance and any money not spent from the payment or allowance is, in the absence of any agreement to the contrary between the person and his or her spouse, taken to belong to the person and the person's spouse as joint tenants.

13 Fraudulent investment of spouse's money

- (1) If a married person invests money belonging to the person's spouse without obtaining the consent of the spouse, the spouse can apply to the Supreme Court to have the money transferred to him or her.
- (2) The Supreme Court has jurisdiction to order such a transfer and to make any ancillary orders.

Part 3 Miscellaneous

14 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

15 Repeals

The Acts listed in Schedule 1 are repealed to the extent specified in the Schedule.

16 Amendment of Supreme Court Act 1970 No 52

Schedule 2 has effect.

17 Savings and transitional provisions

Schedule 3 has effect.

18 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 Repeals

(Section 15)

1.1 Married Persons (Property and Torts) Act 1901 No 45

The whole Act is repealed.

1.2 Conveyancing Act 1919 No 6

The following are repealed:

- (a) The words “but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence” in section 134.
- (b) The proviso to section 148 (1).
- (c) Sections 148 (2), 149, 150 and 151.

1.3 Wills, Probate and Administration Act 1898 No 13

Section 5 (2) is repealed.

Married Persons (Equality of Status) Act 1996 No 96

Amendment of Supreme Court Act 1970 No 52

Schedule 2

**Schedule 2 Amendment of Supreme Court Act
1970 No 52**

(Section 16)

Supreme Court Act 1970 No 52

Section 76 Costs

Omit "*Married Persons (Property and Torts) Act 1901*" from section 76 (3).

Insert instead "*Married Persons (Equality of Status) Act 1996*".

Schedule 3 Savings and transitional provisions

(Section 17)

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of this Act

2 Abolition of common law and dispositions not affected

- (1) The repeal or amendment of an Act by this Act does not revive any rule of the common law or equity abolished or otherwise affected by this Act.

- (2) Subsection (1) does not affect the generality of section 30 of the *Interpretation Act 1987*.

Note. Section 30 of the *Interpretation Act 1987* preserves certain rights, privileges, obligations and liabilities arising under a repealed Act.

3 Time of marriage irrelevant

A provision of this Act applies to married persons whether married before or after the commencement of the provision.

[Minister's second reading speech made in—
Legislative Council on 17 October 1996
Legislative Assembly on 30 October 1996]

