

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter provides a brief background to the Bill, and then outlines its purpose and key provisions.

Background to the Bill

2.2 In May 2007, the Human Rights and Equal Opportunity Commission (HREOC) released its report titled *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefit*¹ (the HREOC *Same-Sex: Same Entitlements* report).

2.3 The primary finding of the HREOC *Same-Sex: Same Entitlements* report was that same-sex couples and their families cannot access the same financial and work-related entitlements as opposite-sex couples and their families. HREOC identified 58 Commonwealth statutes which it found to be discriminatory and consequently in breach of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).¹

2.4 Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²

2.5 HREOC stated that every time a same-sex couple or their family are denied entitlements and benefits available to opposite-sex couples and their families, there is a breach of the right to non-discrimination under Article 26 of the ICCPR. In some

1 Human Rights and Equal Opportunities Commission, *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, May 2007, Appendix 1.

2 United Nations, International Covenant on Civil and Political Rights, Article 26 (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966)

circumstances, that breach will also lead to breaches under the CRC and other international treaties.³

2.6 Article 2 of the CRC states:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

2.7 Article 3 of the CRC states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.⁴

2.8 HREOC made two recommendations aimed at promoting non-discrimination, equality under the law, and the best interests of the child:

- Recommendation 1: The federal government should amend the discriminatory laws identified by the HREOC inquiry to ensure that same-sex and opposite-sex couples enjoy the same financial and work-related entitlements.
- Recommendation 2: The federal government should amend the discriminatory laws identified by the HREOC inquiry to ensure that the

3 Human Rights and Equal Opportunities Commission, *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, May 2007, p. 376. The other international treaties which might be affected by discriminatory legislation are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Discrimination (Employment and Occupation) Convention (ILO 111).

4 United Nations, Convention on the Rights of the Child, Article 3(1)-(2) (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989)

best interests of children in same-sex and opposite-sex families are equally protected in the area of financial and work-related entitlements.⁵

2.9 On 30 April 2008, the Hon. Robert McClelland MP, Attorney-General (the Attorney-General), announced that legislation to remove same-sex discrimination from a wide range of Commonwealth laws would be introduced in the Winter Sittings of Parliament.

The changes will provide for equality of treatment under a wide range of Commonwealth laws between same-sex and opposite-sex de facto couples. Importantly the reforms will also ensure children are not disadvantaged because of the structure of their family...The changes do not alter marriage laws. They will make a practical difference to the everyday lives of a group of our fellow Australians who have suffered discrimination under Commonwealth laws for far too long.⁶

Purpose and key provisions

Purpose of the Bill

2.10 The Bill was introduced in the Senate on 16 June 2008. In the second reading speech, Senator the Hon. John Faulkner, Special Minister for State, described the overall objectives of the Bill as follows:

This bill marks the first step in removing discrimination against same-sex couples and their children in Acts governing Commonwealth (defined benefit) superannuation schemes and related Acts that have not moved with the times.

...

This bill will remedy these injustices by allowing same-sex couples and their children to access the benefits and entitlements they have been denied for so long...The bill also allows for the equal recognition of children who are the product of same-sex and opposite-sex relationships.⁷

2.11 The Bill represents the first tranche of reform for same-sex couples and their families, with the second tranche of reform contained in the General Law Reform Bill.

5 Human Rights and Equal Opportunities Commission, *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, May 2007, p. 382.

6 The Hon. Robert McClelland MP, Attorney-General, 'Rudd Government moves on same-sex discrimination', 30 April 2008.

7 Senator the Hon. John Faulkner, Special Minister for State, *Senate Hansard*, 16 June 2008, pp 2225 & 2224.

Structure of the Bill

2.12 The 36-page Bill comprises primarily Schedules 1 – 5, each of which amends the following specific legislation:

- Schedule 1 – Finance and Deregulation amends the *Parliamentary Contributory Superannuation Act 1948*; the *Superannuation Act 1922*; and the *Superannuation Act 1976*;
- Schedule 2 – Attorney-General's amends the *Federal Magistrates Act 1999*; the *Judges' Pensions Act 1968*; and the *Law Officers Act 1964*;
- Schedule 3 – Defence amends the *Defence Force Retirement and Death Benefits Act 1973*; and the *Defence Forces Retirement Benefits Act 1948*;
- Schedule 4 – Treasury amends the *Retirement Savings Accounts Act 1997*; the *Small Superannuation Accounts Act 1995*; the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*; the *Superannuation Industry (Supervision) Act 1993*; and the *Income Tax (Transitional Provisions) Act 1997*; and
- Schedule 5 – Prime Minister and Cabinet amends the *Governor-General Act 1974*,

(collectively called the affected Acts).

2.13 The Bill therefore covers several Commonwealth superannuation schemes:

- the Commonwealth Superannuation Scheme;
- the scheme under the *Superannuation Act 1922*;
- the Defence Force Retirement and Death Benefits Scheme;
- the Judges' Pensions Scheme;
- the Federal Magistrates Disability and Death Benefits Scheme;
- the Governor-General Pension Scheme; and
- the Parliamentary Contributory Superannuation Scheme.

2.14 The Public Sector Superannuation Scheme, which is established by the *Superannuation Act 1990*, is not amended by the Bill: the Explanatory Memorandum indicates that there are no discriminatory provisions within that principal Act.⁸ The Attorney-General's Department (the Department) added that any discriminatory legislative instruments, trust deeds and determinations of regulations will be progressively amended once principal Acts have been amended.⁹

8 Explanatory Memorandum, p. 5.

9 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 42.

Key provisions

2.15 In the HREOC *Same-Sex: Same Entitlements* report, the primary cause of discrimination against same-sex couples and their families was identified as the definitions used in legislation to describe a couple or family.¹⁰ Accordingly, the Bill focuses upon redefining a number of those definitions in the affected Acts.

2.16 Some of the new definitions proposed by the Bill are described below.

'Partner'

2.17 The Bill proposes to insert a new definition of 'partner' into most of the affected Acts. A typical example is:

A person is the partner of another person if the two persons have a relationship as a couple (whether the persons are the same sex or different sexes).¹¹

2.18 In other affected Acts, the Bill proposes instead to redefine 'spouse' by omitting 'as the husband or wife of the person' and substituting 'in a relationship as a couple (whether the persons are the same sex or different sexes)',¹² or by importing an alternate statutory definition.¹³

2.19 The new definition of 'partner' extends the range of persons who can be considered to be eligible for death benefits by including the same-sex partner of a scheme member or former scheme member. This amendment is related to other amendments in the Bill, which replace references to 'husband or wife' with references to 'partner'.¹⁴

'Couple relationship'

2.20 The Bill also proposes to replace the term 'marital relationship' with the new term 'couple relationship'. The new provisions will typically read,

10 Human Rights and Equal Opportunities Commission, *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, May 2007, p. 374.

11 This example is a proposed addition to subsection 4(1) of the *Parliamentary Contributory Act 1948*.

12 Proposed subsection 20(2) of the *Retirement Savings Accounts Act 1997*; proposed addition to section 4 of the *Small Superannuation Accounts Act 1995*; proposed subsection 54(3) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*; proposed addition to subsection 10(1) of the *Superannuation Industry (Supervision) Act 1993*

13 Proposed paragraphs 295-485A(2)(a) and 302-195A(2)(a) of the *Income Tax (Transitional Provisions) Act 1997*

14 Explanatory Memorandum, p. 6.

(1) For the purposes of this Act, a person had a couple relationship with another person at a particular time if the person ordinarily lived with that other person as that other person's partner on a permanent and bona fide domestic basis at that time.¹⁵

2.21 This amendment ensures that the definition of a relationship, for the purpose of the payment of death benefits, includes both opposite-sex and same-sex relationships.¹⁶ 'Permanent and bona fide domestic basis' is already defined in the affected Acts and is not changed by the Bill.¹⁷

'Child'

2.22 The Bill proposes to repeal and redefine the definition of 'child'. An example of the new term would be:

child, in relation to a person, means a child of the person, including:

- (a) an adopted child or an ex-nuptial child of the person; and
- (b) if, at any time, the person had a partner (whether the persons are the same sex or different sexes)-a child who is the product of the person's relationship with that partner.¹⁸

2.23 This new definition of 'child' will apply to the majority of the affected Acts. However, there are minor variations. One such example incorporates the new definition of 'couple relationship'.

child of a couple relationship, in relation to a couple relationship, means:

- (a) a child born of the couple relationship; or
- (b) a child adopted by the people in the couple relationship during the period of the relationship; or
- (c) a child who is the product of the couple relationship.¹⁹

15 Proposed addition to subsection 4B(1) of the *Parliamentary Contributory Superannuation Act 1948*. Also, see proposed addition to subsection 3(1) of the *Superannuation Act 1976*; and proposed addition to subsection 4(1) of the *Judges' Pensions Act 1968*

16 Explanatory Memorandum, p. 6.

17 For example, addition to subsection 4B(2) of the *Parliamentary Contributory Superannuation Act 1948*

18 Proposed subsection 19AA(5) of the *Parliamentary Contributory Superannuation Act 1948*

19 Proposed addition to subsection 4(1) of the *Judges' Pensions Act 1968*. Another variation is the importation of alternate statutory definitions: see proposed paragraphs 295-485A(2)(b) and 302-195A(2)(b) of the *Income Tax (Transitional Provisions) Act 1997*; and proposed section 4 of the *Small Superannuation Accounts Act 1995*

2.24 These new definitions of 'child' expand the class of children that may be deemed to include a child of the scheme member or former scheme member for the purposes of determining eligibility for benefits.²⁰ However, step-children do not appear to be included within the classes of children envisaged by the new definition of 'child'.

'Product of the relationship'

2.25 The Bill proposes to expand the indicia of a 'couple relationship' to include a child who was:

the product of the relationship between the persons.²¹

2.26 Most of the affected Acts will incorporate this amendment which is intended to assist in determining whether two persons had a 'couple relationship' where a relationship is of less than three years duration.²² This helps to establish whether a couple has been living together on a 'permanent and bona fide domestic basis'.

2.27 The new indicium 'product of relationship' would also be used in some of the affected Acts as an additional criterion for the definition of an eligible child.²³ Typically, this definition would read:

(7) A child cannot be the product of the relationship between two persons (whether the persons are the same sex or different sexes) for the purposes of this Act unless the child is the biological child of at least one of the persons or is born to a woman in the relationship.²⁴

2.28 The Explanatory Memorandum states only that this provision is relevant to the new definition of 'child'.²⁵ There is no further explanation of the provision within the Bill. However, the terminology suggests that a couple must consent to the 'production' of the child.

20 Explanatory Memorandum, p. 6.

21 This example is proposed addition to subparagraph 4B(4)(c)(iii) of the *Parliamentary Contributory Superannuation Act 1948*.

22 Explanatory Memorandum, p. 7.

23 Proposed subparagraph 9E(7)(c)(iii) of the *Federal Magistrates Act 1999*; proposed addition to subsection 4AA(2) of the *Judges' Pensions Act 1968*

24 Proposed addition to subsection 4(7) of the *Parliamentary Contributory Superannuation Scheme 1948*. The only Acts which do not include this provision are the *Small Superannuation Accounts Act 1995*; the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*; and the *Income Tax (Transitional Provisions) Act 1997*.

25 Explanatory Memorandum, p. 6.

Other provisions

2.29 In addition to the new definitions proposed by the Bill, there were two other provisions relevant to the committee's inquiry: registration of same-sex relationships; and the date of commencement for the Bill.

Registration of same-sex relationships

2.30 The Bill proposes to expand the indicia of a 'couple relationship' by inserting as an indicium the registration of a same-sex relationship on a state or territory relationship register. The typical provision would read:

(ba) the persons' relationship was registered under a law of a State or Territory prescribed for the purposes of paragraph 4AB(4)(ba) of the *Judges' Pension Act 1968*, as a kind of relationship prescribed for the purposes of that paragraph.²⁶

2.31 Senator Faulkner stated the objective of this amendment:

[This] will enable a relationship registered under prescribed State laws to be evidence of the existence of a same-sex relationship when considering who may be entitled to a death or pension benefits.²⁷

2.32 The amendment will be incorporated into several of the affected Acts, with the Attorney-General making the necessary regulations for application to other Commonwealth superannuation schemes. The amendment assumes that the states and territories have functional relationship registers.

Date of commencement

2.33 Schedules 1-3 and 5 of the Bill will commence on a day to be fixed by Proclamation. However, if any of the provisions do not commence within 6 months after receiving the Royal Assent, then they commence on the first day after expiration of that period. Schedule 4 of the Bill was intended to commence on 1 July 2008.

26 Proposed paragraph 4B(4)(ba) of the *Parliamentary Contributory Superannuation Act 1948*

27 Senator the Hon. John Faulkner, Special Minister for State, *Senate Hansard*, 16 June 2008, p. 2224. Also, see Attorney-General's Department, *Submission 38*, p. 4.