

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 Benefits' (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 Acts which it found to be discriminatory and consequently in breach of Article 26 of the International Covenant on Civil and Political Rights, and potentially also Articles 2 and 3 of the Convention on the Rights of the Child.¹

2.4 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; and
- Recommendation 2: The federal government should amend the discriminatory laws identified by the HREOC inquiry to ensure that the best interests of children in same-sex and opposite-sex families are equally protected in the area of financial and work-related entitlements.²

2.5 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.

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 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.

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] 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.³

2.6 The first tranche of legislation, the Superannuation Bill, was introduced in the Senate on 16 June 2008. At that time, it was referred to the committee for inquiry and report by 30 September 2008, or after consideration of any related bill(s) that may be introduced to give effect to the recommendations of the HREOC *Same-sex: Same Entitlements* report, whichever is the sooner. The Senate subsequently extended the reporting date for the Superannuation Bill to 14 October 2008.⁴

Purpose and key provisions

Purpose of the Bill

2.7 The Bill represents the second tranche of reform for same-sex couples and their families. It was introduced in the House of Representatives on 4 September 2008, and in the second reading speech, the Attorney-General described the objectives of the Bill as follows:

This Bill removes discrimination against same-sex couples and their children in many of the laws that were identified by the Commission and the [whole-of-government] audit.

...

Removing discrimination is about making sure that same-sex couples and their families are recognised for all practical purposes and have the same entitlements as opposite-sex de facto couples.⁵

Structure of the Bill

2.8 The 179-page Bill comprises primarily 15 Schedules, each of which amends legislation within specific portfolio areas. A list of the legislation to be amended can be found in the Explanatory Memorandum.⁶

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

4 The committee has conducted a separate inquiry into the provisions of the Superannuation Bill, and will table that report concurrently with the committee's report into the provisions of the Bill.

5 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 4 September 2008, pp 4 & 6.

6 Explanatory Memorandum, pp 2-4.

Key provisions

2.9 The Attorney-General informed the Parliament that:

The amendments in the Bill recognise a same-sex partner and adopt a similar approach to that taken in the [Superannuation] Bill to recognise a child in a same-sex family.⁷

2.10 Accordingly, the Bill proposes to insert and expand a number of key definitions: 'de facto partner'; 'registered relationship'; 'de facto relationship'; 'child'; and 'parent'. These amendments are described below.

'De facto partner'

2.11 Schedule 2 Item 1 of the Bill proposes to insert a new definition of 'de facto partner' into the *Acts Interpretation Act 1901*. The new definition would read,

22A References to de facto partners

For the purposes of a provision of an Act that is a provision in which **de facto partner** has the meaning given by this Act, a person is the de facto partner of another person (whether of the same sex or a different sex) if:

(a) the person is in a registered relationship with the other person under section 22B; or

(b) the person is in a de facto relationship with the other person under section 22C.⁸

2.12 The Attorney-General stated that:

This definition will become the standard definition for most Commonwealth laws, and the laws that will be amended will, in most cases, pick up that definition.

It will provide a more consistent and uniform approach to defining who is a de facto partner across a range of Commonwealth laws.⁹

2.13 However, the Attorney-General acknowledged that the proposed new definition will not be used in all Acts being amended by the Bill (such as the *Social Security Act 1991*, the *Migration Act 1958*, and the *Veterans' Entitlements Act 1986*).

Given the specific issues that are dealt with by these acts, a slightly different approach to the definition of de facto partner or child is adopted.

The factors are generally similar but they do not refer to the new definition of de facto partner to be inserted in the Acts Interpretation Act that I outlined a little earlier.

7 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 4 September 2008, p. 4.

8 Proposed section 22A of the *Acts Interpretation Act 1901*

9 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 4 September 2008, p. 4.

Nonetheless, in relation to those acts, the bill amends the relevant provisions to ensure that same-sex couples and their families are recognised.¹⁰

2.14 Schedule 2 Item 1 of the Bill proposes also to define 'registered relationship' and 'de facto relationship'.

2.15 'Registered relationship' will mean,

22B Registered relationships

For the purposes of paragraph 22A(a), a person is in a **registered relationship** with another person if the relationship between the persons is registered under a prescribed law of a State or Territory as a prescribed kind of relationship.¹¹

2.16 The Attorney-General stated:

What this will mean is that couples who have registered their relationships under a state or territory law will not have to demonstrate the circumstances to satisfy the definition of de facto partner under most Commonwealth laws.

...

This will provide a significant incentive for couples to register their relationships under state or territory schemes.

...

It is also an incentive to States and Territories that do not have such schemes to develop their own. The federal government's position is that, should they do so, they should be consistent with the general principles that exist in the schemes in Victoria, Tasmania and the ACT.¹²

2.17 'De facto relationship' will mean,

22C De facto relationships

(1) For the purposes of paragraph 22A(b), a person is in a **de facto relationship** with another person if the persons:

(a) are not legally married to each other; and

(b) are not related by family (see subsection (6)); and

(c) have a relationship as a couple living together on a genuine domestic basis.¹³

10 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 4 September 2008, p. 4. The committee notes that neither the Superannuation Bill nor the *Family Law Act 1975* is affected by this amendment.

11 Proposed section 22B of the *Acts Interpretation Act 1901*

12 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 4 September 2008, p. 4.

13 Proposed section 22C of the *Acts Interpretation Act 1901*

2.18 The criteria for determining whether two persons have a 'relationship as a couple' are listed in proposed subsection 22C(2) of the *Acts Interpretation Act 1901*. These criteria include:

- (a) the duration of the relationship;
- (b) the nature and extent of their common residence;
- (c) whether a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (e) the ownership, use and acquisition of their property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children;
- (h) the reputation and public aspects of the relationship.¹⁴

2.19 No particular finding will be required for any one criterion, and allowance will also be made for circumstances in which one partner is legally married to someone else; is in a registered relationship; or the two persons are not 'living together on a genuine domestic basis' due to temporary absence, illness or infirmity.¹⁵

'Child' and 'parent'

2.20 The Bill proposes to insert a new definition of 'child' into the amended Acts. An example of the new definition reads,

child: without limiting who is a child of a person for the purposes of this Act, someone is the *child* of a person if he or she is the product of a relationship the person has or had as a couple with another person (whether of the same sex or a different sex). For this purpose, someone cannot be the product of a relationship unless he or she is the biological child of at least one of the persons in the relationship or was born to a woman in the relationship.¹⁶

2.21 The Explanatory Memorandum states that this amendment will expand the classes of children that may be taken to be a child of a couple. However, it does not replace the current definition of 'child' in any of the Acts, or provisions of Acts, to be amended.¹⁷ Each Act or provisions of an Act to be amended might therefore contain more than one definition of 'child'.

14 Proposed paragraphs 22C(2)(a)-(h) of the *Acts Interpretation Act 1901*

15 Proposed subsections 22C(2)-(5) of the *Acts Interpretation Act 1901*

16 Proposed addition to subsection 3(1) of the *Crimes Act 1914*

17 Explanatory Memorandum, p. 8. It states also that the amendment will extend recognition to children of opposite-sex relationships who are not already covered by existing statutory definitions. The committee notes that the removal of this discrimination is not an objective of the Bill.

2.22 The new definition of 'child' employs the key phrase 'product of the relationship'. During the inquiry into the provisions of the Superannuation Bill, this phrase was criticised for its lack of clarity, particularly in relation to children born through surrogacy arrangements or Artificial Reproduction Technology (ART), and in relation to the absence of an explicit requirement for consent to the conception.¹⁸

2.23 The Explanatory Memorandum asserts that consent to the procreation of a child is not an express requirement in the definition of 'child' as 'the term "product of the relationship" implies an element of joint endeavour.'¹⁹ This has consistently been the position of the Attorney-General's Department (the Department).

2.24 The Explanatory Memorandum provides six examples of the circumstances in which a child would be considered to be the 'product of the relationship' (Examples 1 – 6), and two examples of the circumstances in which a child would not be considered to be the 'product of the relationship' (Examples 7 – 9).²⁰

2.25 The Bill proposes to insert as a related amendment to the new definition of 'child' a new definition of 'parent'. An example of this amendment reads,

parent: without limiting who is a parent of a person for the purposes of this Act, someone is the *parent* of a person if the person is his or her child because of the definition of *child* in this subsection.²¹

2.26 According to the Explanatory Memorandum, this amendment will ensure that both members of a couple are recognised as the parents of a child where that child is the 'product of the relationship'. Again, the new definition is in addition to the current definition of 'parent' within the Acts or provisions of the Acts to be amended.²²

'Stepchild' and 'step-parent'

2.27 The Bill proposes to expand the current definition of 'stepchild' to include the child of an opposite-sex or same-sex de facto partner by a former relationship. An example of the new provision would read,

stepchild: without limiting who is a stepchild of a person for the purposes of this Act, someone is the *stepchild* of a person if he or she would be the

18 For example, see Same-Sex Relationships (Equal Treatment in Commonwealth Laws- Superannuation) Bill 2008, Professor Jenni Millbank, *Submission 8*, p. 2.

19 Explanatory Memorandum, p. 8. Also, see Same-Sex Relationships (Equal Treatment in Commonwealth Laws- Superannuation) Bill 2008, Attorney-General's Department, *Submission 38*, p. 2.

20 Explanatory Memorandum, pp 9-10.

21 Proposed addition to section 95 of the *Service and Execution of Process Act 1992*

22 Explanatory Memorandum, p. 11.

person's stepchild except that the person is not legally married to the person's de facto partner.²³

2.28 A complementary amendment is proposed to be made to the current definition of 'step-parent'. For example,

step-parent: without limiting who is a step-parent of a person for the purposes of this Act, someone who is a de facto partner of a parent of the person is the *step-parent* of the person if he or she would be the person's step-parent except that he or she is not legally married to the person's parent.²⁴

2.29 The Attorney-General told Parliament, 'It seems incredible that for almost 24 years it has been unlawful to discriminate against a person on the basis that they are or are not married'.²⁵ However, the objectives of the Bill do not include eliminating discrimination on the basis of marital status.

Commencement

2.30 Clause 2 of the Bill provides ultimately for the commencement of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*.

2.31 For some Acts, transitional, savings and application provisions will apply to ensure the smooth implementation of the amendments. Most amendments will commence the day after the Bill receives Royal Assent. Other amendments have a delayed commencement date either to await enactment of other legislation, or to provide lead time to agencies and individuals affected by the Bill.

23 Proposed addition to subsection 3 of the *Australian Citizenship Act 2007*

24 Proposed addition to subsection 3 of the *Seafarers Rehabilitation and Compensation Act 2002*

25 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 4 September 2008, p. 5.

All of the amendments are expected to come into effect by the middle of 2009.²⁶

26 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 4 September 2008, p. 6.