



Same-Sex Relationships (Equal Treatment in Commonwealth Laws— General Law Reform) Bill 2008

Mary Anne Neilsen, Kirsty Magarey and Elibritt Karlsen
Law and Bills Digest Section

Peter Yeend and Dale Daniels
Social Policy Section

Laura Rayner
Foreign Affairs, Defence & Security Section

Contents

Purpose	6
Committee consideration	6
Background	6
Submissions to the Senate Inquiry	8
Coalition/Minor Party policy position/commitments	9
Coalition	9
The Minor Parties	10
Issues, pros and cons	10
Marriage	10
Same-sex marriage	11
Registered Relationships	12
Interdependent Relationships	14
Children	17
Discrimination	19
Social security and aged care issues	19
Main Provisions	21
Key terms used throughout the Bill	21
De facto partners	21

Registered relationship	22
De facto relationships	22
Child	23
Parent.	24
Stepchild	24
Step-parent	24
Family relationships, related by family, or relatives.	24
Schedule 1—Agriculture, Fisheries and Forestry amendments	25
<i>Australian Meat and Live-stock Industry Act 1997</i>	25
<i>Farm Household Support Act 1992</i>	25
Schedule 2—Attorney-General	25
Amendments to the <i>Acts Interpretation Act 1901</i>	25
<i>Administrative Decisions (Judicial Review) Act 1977</i>	26
<i>Age Discrimination Act 2004</i>	26
<i>Australian Federal Police Act 1979</i>	26
<i>Bankruptcy Act 1966</i>	27
<i>Crimes Act 1914</i>	27
<i>Crimes (Superannuation Benefits) Act 1989</i>	27
<i>Customs Act 1901</i>	28
<i>High Court Justices (Long Leave Payments) Act 1979 and Judges (Long Leave Payments) Act 1979</i>	28
<i>Passenger Movement Charge Collection Act 1978</i>	28
<i>Proceeds of Crime Act 2002</i>	28
<i>Service and Execution of Process Act 1992</i>	29
<i>Sex Discrimination Act 1984</i>	29
<i>Witness Protection Act 1994</i>	31
Regulations	31
Schedule 3—Broadband, Communications and the Digital Economy amendments	31
<i>Australian Postal Corporation Act 1989</i>	31
<i>Broadcasting Services Act 1992</i>	32
<i>Telstra Corporation Act 1991</i>	32
Schedule 4—Defence	33
Background	33
<i>Defence Force (Home Loans Assistance) Act 1990</i>	33
<i>Defence (Parliamentary Candidates) Act 1969</i>	34
<i>Royal Australian Air Force Veterans' Residences Act 1953</i>	35

<i>War Gratuity Act 1945</i>	36
What's not in the Schedule	36
Schedule 5—Education, Employment and Workplace Relations.	37
<i>Education Services for Overseas Students Act 2000</i>	37
<i>Higher Education Support Act 2003</i>	38
<i>Judicial and Statutory Officers (Remuneration and Allowances) Act 1984</i>	38
<i>Safety, Rehabilitation and Compensation Act 1988</i>	39
<i>Seafarers Rehabilitation and Compensation Act 1992</i>	39
<i>Student Assistance Act 1973</i>	40
Schedule 6—Families, Housing, Community Services and Indigenous Affairs	40
Part 1	40
<i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>	40
<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>	40
Part 2	41
<i>A New Tax System (Family Assistance) Act 1999</i>	41
<i>A New Tax System (Family Assistance) (Administration) Act 1999</i>	41
<i>Social Security Act 1991</i>	41
Amendments to the definition of 'member of a couple'	41
The consequences of that change	43
Amendments to definitions of parent and child	44
Other minor changes.	44
Schedule 7—Finance and Deregulation amendments.	44
Part 1—General amendments.	44
<i>Commonwealth Electoral Act 1918</i>	44
<i>Medibank Private Sale Act 2006</i>	45
<i>Members of Parliament (Life Gold Pass) Act 2002</i>	45
<i>Parliamentary Entitlements Act 1990</i>	47
Definition of spouse	47
Definition of dependent child.	47
<i>Superannuation Act 1976</i>	48
Schedule 8 – Foreign Affairs and Trade	48
<i>Australian Passports Act 2005</i>	48
<i>Export Market Development Grants Act 1997</i>	48
<i>Trade Representatives Act 1933</i>	49
Schedule 9—Health and Ageing amendments.	49
Part 1—Amendments commencing on the day after Royal Assent	49

Part 2—Amendments commencing on 1 January 2009	50
<i>Health Insurance Act 1973</i> (The HIA)	50
<i>National Health Act 1953</i> (the NHA)	50
Part 3—Amendments commencing on 1 July 2009	51
<i>Aged Care Act 1997</i> (the ACA)	51
Schedule 10—Immigration and Citizenship	51
<i>Australian Citizenship Act 2007</i>	52
<i>Migration Act 1958</i>	54
Marital relationships	54
De facto relationships	55
Familial relationships	57
<i>Immigration (Education) Act 1971</i>	58
<i>Immigration (Guardianship of Children) Act 1946</i>	58
Schedule 11—Infrastructure, Transport, Regional Development and Local Government	59
<i>Civil Aviation (Carriers' Liability) Act 1959</i>	59
<i>Airports Act 1996</i>	59
<i>Navigation Act 1912</i>	60
Schedule 12—Innovation, Industry, Science and Research.	61
<i>Pooled Development Funds Act 1992</i>	61
Schedule 13—Prime Minister and Cabinet amendments	61
<i>Privacy Act 1988</i>	61
Schedule 14—Treasury amendments	62
Part 1—Amendment of tax laws.	62
Tax legislation in general.	62
HREOC Report on tax legislation	63
Definitions of family relationships for tax legislation.	63
Definition of spouse	64
Definition of child.	64
Definition of parent.	65
Definition of 'relative'	65
Medicare Levy Surcharge	65
Fringe Benefits	66
Medicare Levy	67
Transfer of property at family breakdown—tax implications for same-sex relationships.	68

CGT roll-over and family breakdown	69
Application dates of tax legislation amendments	70
Part 2—Amendment of market regulation laws	70
<i>Financial Sector (Shareholdings) Act 1998</i>	70
<i>Foreign Acquisitions and Takeovers Act 1975</i>	71
<i>Insurance Acquisitions and Takeovers Act 1991</i>	71
<i>Life Insurance Act 1995</i>	71
Part 3—Amendment of the <i>Corporations Act 2001</i>	72
Schedule 15—Veterans’ Affairs amendments	73
Introduction	73
<i>Defence Service Homes Act 1918</i>	73
<i>Military Rehabilitation and Compensation Act 2004</i>	73
<i>Veterans’ Entitlements Act 1986</i>	74
Concluding comment.	76

Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008

Date introduced: 4 September 2008

House: House of Representatives

Portfolio: Attorney-General

Commencement: Various dates as set out in clause 2. Further detail on commencement is provided under the Main Provisions section of the Digest.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of this Bill is to eliminate discrimination against same-sex couples and the children of same-sex relationships in a wide range of Commonwealth laws. The Bill will amend 68 Commonwealth laws. The Digest provides analysis of all 68 laws under the heading Main Provisions.

Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 14 October 2008 ('the Senate inquiry'). Details of the inquiry are at: http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/info.htm

The Digest draws on submissions and evidence given to the Senate inquiry.

Background

This Bill is part of a broader project seeking to remove Commonwealth statutory provisions which discriminate between same-sex couples and heterosexual couples. Other Bills which have been introduced to the Parliament seeking to make similar amendments are the

- Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (the Family Law Amendment Bill)

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (the Superannuation Bill) and the
- Evidence Amendment Bill 2008.

These Bills all include provisions designed to treat same-sex relationships in a similar manner to married and de facto relationships and/or to give greater legal recognition to the parent-child aspect of these relationships.¹

In May 2007 the Human Rights and Equal Opportunity Commission (HREOC) published a significant report: *Same Sex: Same Entitlements* ('the Report' or 'the HREOC Report').² This Report identified 58 Federal laws that breached the human rights of members of same-sex couples, and in some cases the rights of children. It concluded that

At least 20 000 couples in Australia experience systematic discrimination on a daily basis.... This discrimination breaches human rights. And it can be stopped. All it takes is a few changes to the definitions in some federal laws.³

The general response to the HREOC Report was positive, with various indications showing public support for the Report's recommendations.⁴

After the 2007 election the Attorney-General's Department undertook an audit of Commonwealth laws to identify provisions that discriminate against people in relationships (taking account of the HREOC Report). The focus of the Commission's report had been on financial and work-related legislation that discriminates against same-sex couples and their children. The Department's audit also covered other areas of life in Australia.

-
1. See generally the Senate Legal and Constitutional Affairs Committee web-site: http://www.aph.gov.au/senate/committee/legcon_ctte/inquiries.htm accessed 18 August 2008. For ease of reference references which simply give a Submission number were given to this Committee of inquiry.
 2. The Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements – National Inquiry into Discrimination against People in Same Sex Relationships: Financial and Work Related Entitlements and Benefits*, Canberra, May 2007, http://www.hreoc.gov.au/human_rights/samesex/index.html
 3. *ibid.*, p. 9.
 4. For example, Misha Schubert, 'Public backs gay unions, equality', *The Age*, 21 June 2007, p. 3; AAP, 'No justice for gays' *The Australian*, 22 June 2007, p. 9; Rachel Nickless, 'Same-Sex couples, 2nd-class citizens', *Australian Financial Review*, 22 June 2007, p. 30; A Galaxy Poll, commissioned by GetUp!, found 71% of Australians agreed that 'same-sex partners should have the same legal rights as those in heterosexual de facto relationships' Galaxy Poll June 16-17 2007 <http://beta.getup.org.au/files/media/equalityforsamesexcouples.pdf> accessed 8 October 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The audit confirmed the findings of the HREOC Report – identifying further federal legislation that discriminates against same-sex couples and their children, particularly in the areas of taxation, social security, superannuation, workplace laws and education assistance.⁵

The audit has not been publicly released, which has been a source of concern by some contributors to the Senate Inquiry,⁶ however in answer to a question from Senator Hanson-Young the Attorney-General's Department has provided a list of the results along with an account of which discriminatory provisions are not intended to be changed and why.⁷

The Bills Digest for the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008 (the [Superannuation Digest](#)) contains further historical detail looking at the background to the Bills in the Parliament prior to the 2007 election.⁸ This Digest presents a telescoped view of the matter. The shorter version is also appropriate because this Bill has excited fewer passions than the first (Superannuation) Bill. The novelty of the provisions and the question of how quickly the Bill should be passed attracted significant press attention at the time, whereas the more detailed nature of the current Bill does not seem to have caused the same degree of interest.

Submissions to the Senate Inquiry

The submissions to the Senate inquiry have been fewer on this occasion. A significant majority have supported the Bill (both from organisations and individuals) and expressed a desire to have the Bill passed quickly. There were, however, 6 408 signatories to an open letter from FamilyVoice Australia, expressing serious concerns regarding the Bill, on the grounds that it would undermine the unique position of marriage and would not benefit children.⁹ There were also a wide variety of submissions which, while sympathetic to the Bill's aim, had a range of suggestions for improvement. Further details are provided below.

-
5. The Hon. Robert McClland MP, Attorney General, Answer in writing to Question No. 34, House of Representatives, *Debates*, 13 May 2008, p. 2620.
 6. See for instance the Australian Council for Equality, op. cit.
 7. Attorney-General's Department - Answers to Questions on Notice, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/add01.pdf accessed on 8 October 2008.
 8. Les Neilsen and Kirsty Magarey, Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008, Bills Digest No. 20, <http://www.aph.gov.au/library/pubs/BD/2008-09/09bd020.pdf> accessed on 8 October 2008.
 9. FamilyVoice Australia, Submission No. 4a, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub04a.pdf accessed on 8 October 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

One of the difficulties faced by those making submissions was, once again, the shortness of time available for consideration of the Bill's provisions. It is a significant and lengthy Bill with far-reaching ramifications, and a number of submissions made the point that in the time frame they had been unable to consider matters appropriately. The Law Council of Australia simply commented that it 'regrets that due to the short time frame for making submissions on the Bill it has been unable to provide more detailed comments,' but that it maybe be able to consider definitional issues 'in a more reasonable time frame.'¹⁰

Similarly the Tasmanian Gay & Lesbian Rights Group commented:

We believe we could have provided the inquiry with more relevant information if there had been more time available. The short duration of this inquiry was quite inadequate for the important issues at stake.¹¹

While Professor Parkinson was even more terse on the matter:

It is, in my view, unreasonable to expect the Senate Committee to sort out the mess being created by this Bill. The time being given to the inquiry is too short, and the problems too major.¹²

The debates on the Bill have focussed heavily on the language used in the Bill. There are also more specific concerns regarding the Bill's operation and the matters covered in the accompanying material. Details on substantive matters raised in the submissions are provided below.

Coalition/Minor Party policy position/commitments

Coalition

As explored in the Superannuation Digest, the Coalition seems to have two strands of thinking on these matters, one of which is more enthusiastic and supportive of the changes and the other of which has reservations, particularly with respect to the impact on the standing of marriage. The official position of the Coalition articulated in proposed amendments to the Bill(s) has been to affirm the importance of marriage and to seek to avoid discrimination on the basis of sexuality, to recognise the rights of children living in

10. Law Council of Australia, Submission No. 21, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub21.pdf accessed 8 October 2008.

11. Tasmanian Gay & Lesbian Rights Group, Submission No. 13, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub13.pdf accessed 8 October 2008.

12. Professor Parkinson, Submission No. 1, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub01.pdf accessed 8 October 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

same-sex households, and to seek to have the rights and status of people in interdependent relationships other than same-sex relationships recognised and protected.

The Minor Parties

The Greens strongly support the proposed changes and would go further than other parliamentary parties as they also support same-sex marriage.

Family First specifies its support for heterosexual relationships in its statement on 'Family' and is recorded by the Australian Christian Lobby as being opposed to laws which give particular recognition to same-sex couples: 'Family First will not give same-sex couples any special rights not available to other Australians.' The web-site goes on to comment 'Marriage is the ideal – it is the best form of relationship society can aspire to – and Family First is passionate about protecting marriage, strengthening marriage and promoting marriage.'¹³ In South Australia the Family First party has supported amendments to superannuation legislation to include 'interdependent relationships'.¹⁴ On the related Superannuation Bill Senator Fielding is reported to be considering his position, while Senator Xenophon is reported as being broadly in support of the Bill's intentions.¹⁵

Issues, pros and cons

Marriage

Despite the seemingly broad based support for the inclusion of same-sex couples into our legislative framework, the question as to whether these provisions will undermine marriage is nevertheless posed by some.¹⁶ The question stems from a concern that the Bill may not preserve the particular position of significance given to marriage.

-
13. These quotes are contained in a Family First response to questions posed by the Australian Christian Lobby as part of the 'National Church Life Survey,' reported at <http://australiavotes.org> accessed on 2 June 2008. See also Senator Fielding's speech on the disallowance of the ACT's civil unions legislation, Senate, *Debates*, 15 June 06, p. 39.
 14. The Bill under discussion was the South Australian Statutes Amendment (Equal Superannuation Entitlements For Same Sex Couples) Bill (2003), and for a transcript of a speech in which a Member of the Party (the Hon. A.L. Evans) supports the amendments see: http://www.familyfirst.org.au/sa/ps_equal_super_same_sex_couples.php
 15. Dan Harrison, 'Hurdles linger for same-sex bill', *The Age*, 5 September 2008, <http://www.theage.com.au/national/hurdles-linger-for-samesex-couple-bills-20080904-49y2.html> accessed 6 September 2008.
 16. Mr Robert spoke on the matter in the House commenting on 'some disturbing trends in the way the Rudd Labor government is treating the institution and indeed the foundation of marriage...', House of Representatives, *Debates*, 17 September 2008, p.101. See also the Superannuation Bill Second Reading Speeches of Messrs Robert, Morrison, Andrews and Katter and Mrs Vale.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

At this point in history, marriage has been given a uniquely privileged economic position. If the status of marriage derives from the unique or exclusive nature of its privileged economic position then the Bill could be seen to lower the status of marriage by distributing these privileges more broadly, rendering them no longer unique to marriage. (It should be noted this is a process which is already well underway through the recognition of de facto relationships.) However not everyone regards marriage as deriving its significance from its economic position.

Marriage can be seen as having significance in the moral or religious sphere as well as the legal or economic sphere. As a result of this multi-faceted existence a change to the unique treatment of a married person in one sphere need not affect the significance of marriage in another sphere.

The submissions which support heterosexual marriage frequently talk of studies which show that marriage relationships are longer lasting than de facto or same-sex relationships, also that children flourish more under heterosexual parenting arrangements and that

No matter how intense they may appear to be, same-sex relationships cannot be considered the equivalent of marriage. They confer none of the unique benefits of marriage and family on Australian society.¹⁷

Same-sex marriage

The submissions to the inquiry on this Bill have frequently raised a different question with respect to marriage and same-sex relationships. Many of the submissions argued that marriage should be open to same-sex couples. The Human Rights Law Resource Centre explores the international jurisprudence in these areas and concludes that it would be appropriate to allow same-sex people to marry, or failing that to establish a national register of relationships.¹⁸ Similarly the NSW Council for Civil Liberties,¹⁹ the NSW Young Lawyers²⁰ and Liberty Victoria²¹ all argue that marriage should be an available

-
17. FamilyVoice Australia (formerly Festival of Light Australia), Submission No. 4, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub04.pdf accessed 8 October 2008.
 18. Human Rights Law Resource Centre, Submission No. 14, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub14.pdf accessed on 8 October 2008.
 19. NSW Council for Civil Liberties, Submission No. 20, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub20.pdf accessed on 8 October 2008.
 20. NSW Young Lawyers, Submission No. 22, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub22.pdf accessed on 8 October 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

option to same-sex couples, while the Coming Out Proud Program argues that without access to marriage same-sex couples will have fewer incentives to participate fully with society's rules:

What is supposed to be a long awaited removal of discrimination and injustice against same sex relationships seems to have turned into a cynical move to raise additional revenue from a section of the community that has been discriminated and vilified against for such a long time without equity in what is for many same sex couples the most important ability to solemnise and have recognised by the community their relationship. Raising revenue on the basis of 'de facto' same sex relationships is a cruel insult...

Without the recognition of same sex marriage in the legislation same sex couples will continue to be cynical of a tax imposition without the equality granted to heterosexual couples. Without this equality there will be a strong tension and avoidance of the negative tax and financial implications of the new legislation leading to social disobedience.²²

Registered Relationships

The Bill allows a same-sex couple to be recognised as being in a de facto relationship if they have a registered relationship under State or Territory law. This Bill strengthens these provisions over the Superannuation Bill which only recognised registration as indicative of being in a de facto relationship. The Explanatory Memorandum of this Bill also stipulates that only same-sex and heterosexual registered relationships will be given recognition under the Bill's provisions.²³

The modification of the provisions being applied indicates that the government is improving the drafting being used in these Bills as matters progress. As well as tightening the treatment of which laws will be prescribed it would also seem that the government has heeded the calls made to have registered relationships treated in the way they now are being treated (i.e. as definitive of a de facto relationship). Wayne Morgan, Judy Harrison and Miranda Stewart all called for changes along the lines taken in the current Bill,

-
21. Liberty Victoria, Submission No. 31, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub31.pdf accessed on 8 October 2008.
 22. State Steering Committee of the Coming Out Proud Program Tasmania, Submission No. 2, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub02.pdf
 23. The Explanatory Memorandum states that provisions of state and territory laws that provide for registration of 'caring' and 'interdependent' relationships will not be prescribed for the purposes of the definition of 'registered relationships' in the Acts Interpretation Act, Explanatory Memorandum, p. 6.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

suggesting that the changed approach would promote certainty, reduce dispute, save legal costs and court time. It would also be more dignified and less intrusive.²⁴

Another recurring issue raised in the submissions for this inquiry is the proposition that registered relationships should not be defined as a sub-category of de facto relationships since there has been a decision taken to formalise and publicly acknowledge the relationship. It has been proposed that, rather than being grouped with de facto relationships, registered relationships should be in a category of their own, just as marriage is.

For some of the submissions supporting same-sex marriage the ‘next best’ solution is the creation of a national register of relationships. Many other submissions which did not discuss same-sex marriage supported the establishment by the Commonwealth of a national register of relationships.²⁵

Only some of the States/Territories have this facility available to same-sex couples so there will be many same-sex couples who do not receive the benefits of the Commonwealth’s definitional usage (which would include the ease and rapidity of establishing one’s relationship status). While submissions have called on the Commonwealth to take a hand, the Commonwealth Attorney-General has stated that the federal Government strongly supports and indeed thinks it would be a good thing if states and territories would agree upon a uniform system of registration of same sex relationships; indeed close personal relationships, along the lines of the Tasmanian or Victorian models.²⁶

24. Judy Harrison, Submission No. 16, to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry Into The Family Law Amendment (De Facto Financial Matters And Other Measures) Bill 2008, p. 2,

http://www.aph.gov.au/senate/committee/legcon_ctte/family_law/submissions/sub_16.pdf

Professor Stewart, Submission to the Senate Inquiry no. 37,

http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub_37.pdf

Wayne Morgan, Submission no. j59, p. 3,

http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/subj59.pdf accessed on 3 October 2008.

25. See for instance Lesbian and Gay Solidarity (LGS) Melbourne, Submission No. 8; Gay and Lesbian Rights Lobby (NSW), Submission No. 18; Law Institute of Victoria, Submission No. 32; Kevin Boreham, Lecturer, ANU College of Law, Submission No. 36, and all of these can be viewed at

http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sublist.htm

26. The Hon Robert McClelland, Attorney-General, *Transcript of conference*, Parliament House, 30 April 2008, p. 5.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

However there are currently constitutional limitations on the Commonwealth's capacity to generally regulate interdependent relationships, but a referral of State power²⁷ could allow for what Mr Morgan refers to as the ideal situation whereby the Commonwealth regulates all 'intimate relationships (both conjugal and interdependent).'²⁸ He argues this would provide a 'rational and logical basis on which to achieve national uniformity'.

A thought-provoking honours thesis has also been submitted to the Senate Inquiry exploring the benefits of a more general and universal relationships register at a Commonwealth level.²⁹

Finally Professor Stewart argued, as does the Australian Coalition for Equality³⁰ that the legislation should allow for the recognition of relationships registered overseas in appropriate legislative frameworks.³¹

Interdependent Relationships

As mentioned above the Coalition has suggested that not only same-sex relationships should be covered but the Bill should also cover interdependent relationships. There have been objections to this on the grounds that it lessens the status of same-sex relationships, and that the issues raised by the discussion of interdependency are too complex and inappropriate to be conducted in this context.

An interdependency relationship is one where two people:

- have a close personal relationship, and
- they live together, and

27. Such as has recently been done for de facto property law matters under the Family Law Act.

28. Wayne Morgan, Submission no. j59, p. 3, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/subj59.pdf accessed on 3 September 2008.

29. Kate Whitehouse - Honours Thesis: 'A Political Trophy or an Essential Human Right? The Federal Recognition of Same-Sex Relationships', http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/add01.pdf

30. They suggest a modification of the Bill which would allow Parliament to prescribe appropriate international civil unions as recognised registered relationships for the purposes of Federal law, Australian Coalition for Equality, Submission No. 19, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub19.pdf accessed on 8 October 2008.

31. Professor Stewart, Submission to the Senate Inquiry no. 37, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub_37.pdf

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- one or each of them provides the other with financial support, and
- one or each of them provides the other with domestic support and personal care.³²

Those in such a relationship are classed as ‘death-benefit dependents’ in relation to the deceased superannuation benefits and can also access taxation concessions.³³ The classic example of an interdependency relationship is given as two sisters living together and supporting each other but not satisfying the criteria for a ‘couple relationship’.

There is a critique of the interdependency provisions that identifies an inequality of treatment for same-sex couples who must establish interdependency on the death of one of the partners as compared with the treatment of opposite-sex relationships.³⁴ The HREOC Report also argued that the application of the interdependency provisions in relation to accessing superannuation death benefits entailed unequal treatment of surviving partners of same and opposite-sex couples.³⁵

The fact that all four categories itemised above must generally be satisfied is identified as problematic. A traditional understanding of a ‘relationship’ would generally allow for a couple to live apart for a time, or to financially independent of each other, but this would create difficulties with satisfying the cumulative criteria. There is apparently some scope in the relevant Regulations for the criteria of ‘domestic support and personal care’ to be less significant when the other three criteria are established,³⁶ however one commentator points out that it may therefore be more difficult for the ‘happy and healthy’ to establish an interdependency relationship than those who are not.³⁷

Certainly HREOC has indicated a view that to extend interdependency coverage under this suite of legislation is inappropriate:

32. Section 10A *Superannuation Industry (Supervision) Act 1993* and section 302-200 *Income Tax Assessment Act 1997*.

33. Section 302-195 *Income Tax Assessment Act 1997*.

34. Miranda Stewart, ‘Are you two interdependent – Family, property and same-sex couples in Australia’s superannuation regime’, *Sydney Law Review*, vol. 28(3), Sydney, September 2006, pp. 437–476.

35. The Human Rights and Equal Opportunity Commission, op. cit., pp. 63 and following.

36. Regulations have been made under the Income Tax Assessment Acts, Regulation 302-200.02, as cited by Miranda Stewart, ‘Tax and same sex couples: Still waiting for a fair go’, *Taxation in Australia*, vol. 42, No. 9, April 2008, p. 531 and p. 534.

37. Miranda Stewart, ‘Tax and same sex couples: Still waiting for a fair go’, *ibid.*, p. 531.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Coverage for interdependent relationships is bad policy - firstly because it diminishes the regard in which a same-sex relationship is held, and secondly, because the broader group of people in interdependent relationships is much harder to define.³⁸

The debates on this topic have been a little confused, because the question of recognition for interdependent relationships has been equated with treating same-sex couple as interdependent couples. There is no need for the recognition of interdependency to mean that same-sex couples are treated the same as interdependent couples. It may be important to give recognition to interdependent relationships, and for this to happen sooner rather than later, but this does not mean that same-sex relationships need to operate under the same definitions.

Interdependent relationships may face the same need for recognition however, as HREOC has identified, it may be that the breadth of relationships that satisfy the interdependency criteria need to have the additional bureaucratic parameters imposed, whereas the nature of same-sex relationships as being akin to a ‘conjugal’ relationships, may obviate the need for the additional criteria.³⁹

Wayne Morgan and Miranda Stewart, both leading academics in the area, have argued that recognition of interdependent relationships is a legitimate and important issue to consider, however members of same-sex relationships do not ‘fit’ the interdependence criteria and they should be treated in a distinct manner. There is no need for the recognition of forms of interdependency to render the recognition of same-sex relationships more complex.

In the Second Reading Speech for this Bill Mr McClelland comments that such relationships are:

...difficult to define. There is a lack of reliable data on the number of relationships, dependency and interdependency are a matter of degree and determining where to draw the line would be difficult, and recognising interdependent relationships may not be appropriate in all situations.... While the position of some interdependent relationships such as carers may need to be closely considered by the government,

38. HREOC, ‘Delaying Same Sex Bill will unnecessarily continue discrimination and distress’, *media release*, 4 June 2008, http://www.humanrights.gov.au/about/media/media_releases/2008/65_08.html accessed 19 June, 2008.

39. Wayne Morgan uses this term ‘conjugal’ in his submission to the Senate Inquiry, pointing out that ‘[t]he reality of social life in modern Australia is that same-sex couples form conjugal relationships in the same way that heterosexual couples do.’ Submission no. j59, p. 6, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/s_ubj59.pdf accessed on 3 September 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

this bill, which seeks to remove discrimination against same-sex couples and their families, is not the vehicle to address those concerns.⁴⁰

Children

The issue that has emerged as the most contentious is the definition of children as a ‘product of the relationship’. The use of the phrase has been criticised on legal grounds and has struck many contributors to the debate as offensive. The term ‘product’ is traditionally associated with a manufacturing process or a commodity, although Professor Stewart points to a definition which relies on the concept of a product being ‘a result of an action or process’.⁴¹ Professor Stewart goes on to recommend that the Explanatory Memorandum should include further examples or explanation about a requirement of consent in the non-biological partner and the timing of this consent, asking is it ‘at the date of conception? Or Birth?’⁴²

The use of the term ‘product’ could be remedied by a revised approach to the drafting.⁴³ However both Professors Parkinson and Millbank have expressed confusion or concern as to what, exactly, the legislative drafting intends to achieve.

Professor Parkinson observes:

As a professor of law, I have very little idea what the Government intends by the language it has chosen to cover children who have a connection with a same-sex relationship. I can only offer, at best, some possible interpretations. It is at least clear from the Bill that the Government only intends to include children who have a biological connection with at least one of the partners.

While Professor Millbank has more detailed concerns:

I am deeply concerned that the new category of child as a “product of the relationship” will cause confusion and uncertainty to such an extent that it may not ultimately help the families it is intended to benefit. The definition contains a fundamental contradiction: it reflects state and territory parentage presumptions for [assisted reproductive technology] families (without however articulating them with the same precision) at the same time as it contradicts them by granting ad hoc

40. The Hon Robert McClelland, ‘Second Reading Speech: Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008’, *Hansard*, 24 September 2008, p. 18.

41. Professor Stewart refers to the Oxford English Dictionary, p. 6 of her Submission to the Senate Inquiry, *ibid.*

42. *ibid.*

43. For example ‘the relevant child of the relationship’ might avoid the use of the word product, (which has offended), but would rely on legislative definitions to give the phrase greater form.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

coverage of commissioning parents in surrogacy arrangements, without actually according them parental status. Prioritising the genetic link over the legal relationship in certain circumstances runs counter to the prevailing trend and may have unintended consequences for the majority of families formed with the use of donor gametes who are not surrogacy families. In short the same definition pulls in opposite directions to achieve different aims.⁴⁴

The introduction of an entirely novel legal concept seems bound to create some difficulties, if not with the drafting choices, then also with the actual concepts involved.

The pre-existing definitions which incorporate adopted children and other categories will remain, with the changes aimed to incorporate children specifically born into same-sex relationships. Professor Millbank, an expert in different forms of family, makes the suggestion that the legislation should have provisions that are more flexible:

[Recommendation 3] Allows for these formal categories of parent to be augmented by a form of flexible purposive recognition as needed according to context.

It has always been the case that certain areas of law have broader familial categories that extend beyond legal or biological parent-child relationships. Such categories include “child of the household”, “dependant” or “loco parentis”. These definitions occur in specific contexts in which the legislative purpose is served by a broad rather than narrow approach.

Such a flexible approach is very useful to augment, rather than replace, the clear categories of parent-child relationship outlined above.⁴⁵

In relation to this debate about the definition of a child, it is of note that the Government has more recently announced their intention to amend the Family Law Amendment Bill that would deal specifically with how children are recognised for the purposes of that Act. At the hearings held by the Senate inquiry an officer from the Attorney-General’s Department told the Committee that in the light of those amendments the Government would be considering whether there are ways to adopt those amendments or bring them across to other Bills that are currently dealing with same-sex reform.⁴⁶ This would avoid the current incompatibilities between the definitions used in the Family Law Act and the Bill.

44. Professor Jenni Millbank, Submission No. 8, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/s_UB08.pdf accessed on 18 August 2008.

45. Professor Jenni Millbank, Submission No. 8, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/s_UB08.pdf accessed on 18 August 2008.

46. Mr Peter Arnaudo, Assistant Secretary, Attorney-General’s Department, Senate Standing Committee on Legal and Constitutional Affairs, *Committee Hansard*, 23 September 2008, p. 45.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Discrimination

There are amendments made to the *Sex Discrimination Act 1984* (the SDA) which are discussed below in the Main Provisions. These amendments do not in any way reflect a substantive insertion of anti-discrimination principles covering same-sex issues. Nor is there any active proposal to cover issues of sexuality within the pre-existing anti-discrimination legislation. This has led to some concerns being expressed, for instance the Australian Human Rights Law Resource Centre points out that HREOC (as it then was) had recommended the enactment of ‘sexuality discrimination’ legislation along the lines of the SDA and the Centre recommended to the Senate Committee that it engage government to draft new legislation. It was particularly concerned to have legislative protections which would protect workers from discrimination based on sexuality in employment.⁴⁷

The submission from the Lesbian and Gay Solidarity (Melbourne) comments

LGS believes that if this Bill passes into law, it will in no way reduce homophobic discrimination but simply increase the impact on same-sex age pensioners, people who are HIV-positive and lesbian mothers, all who share their lives with another of the same sex.... It’s a great pity that the federal government does not state explicitly in this Bill that it is illegal to discriminate against lesbian, gay, and transgender people especially in the provision of any aged care service whether in the home or in an institution either public or private.⁴⁸

Other groups, such as the Gay and Lesbian Rights Lobby (based in NSW), also support ‘the enactment of federal discrimination legislation to protect from discrimination on the basis of sexual orientation and gender identity.’⁴⁹

Social security and aged care issues

Some of the more telling submissions come from agencies who work in the welfare field. These agencies are acutely conscious that some of the most significant economic impacts of the Bill will be experienced by members of same-sex couples who will have their access to welfare payments limited (see Main Provisions *Social Security Act 1991* below). They identify that in the experience of those concerned there will be something ironic

47. Human Rights Law Resource Centre, Submission no. 14, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub14.pdf accessed on 8 October 2008.

48. Lesbian and Gay Solidarity, Submission no. 8, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub08.pdf accessed on 8 October 2008.

49. Gay and Lesbian Rights Lobby, Submission no. 18, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub18.pdf accessed on 8 October 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

about having discriminatory measures, which may have been in place all their life, reversed, simultaneously with a resultant cut back in welfare support.

The effect will be more acute in the case of members of same-sex couples who are aged. Having potentially been excluded throughout their lives from a range of tax rebates, concessions, being ineligible for employment rights such as carer's leave and suffering from the range of 'systemic discrimination' identified by HREOC there will be a great irony in having their aged pensions cut back on the basis of their sudden equality after they have ended their economically productive life without having had the various benefits offered to members of a couple. The proposed changes are focussed on formal equality, however substantive equality may not be effected in some cases.

The problem is summarised by the Northern Rivers Community Legal Centre in a section called 'The need to Grandfather the Centrelink changes':

The first concern was that there is a very limited period of time for couples prepare for their changed financial circumstances. This was seen as particularly problematic for couples reaching retirement age in the next few years. This is the generation that felt the full force of homophobic prejudice and lawful discrimination. Often members of this generation were precluded from achieving financial security, as many professions were closed to them and they risked dismissal from most jobs if their sexuality became known. Due to social pressures, many gays and lesbians were unable to form long-term relationships, thus reducing their financial capacity and resilience.⁵⁰

This submission went on to tell the story of a teacher who was approaching retirement age, had taught in a sympathetic but not well paying school for the sake of avoiding homophobia and was in a same-sex relationship with a woman who had been sacked from her position with a religious organisation when she 'came out', had suffered social ostracism, and was now reliant on the disability pension because of her resultant 'ongoing mental health issues'.

The proposal that these women's welfare payments should be cut back at this stage of their lives as a result of the Bill's changes is challenging. The submissions that deal with these issues recognise that it's important to ensure that equality is, eventually, complete, but for the aged in particular it may be difficult to rectify the economic damages that have occurred through a myriad of provisions which have excluded them over a long period – from being excluded from the flexibility of the medicare levy surcharge to being barred from various employment opportunities.

50. Northern Rivers Community Legal Centre, Submission no. 3, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub03.pdf accessed on 8 October 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

To cater for this difficulty a number of submission recommend either a 5 year period during which adjustments can be made before the Centrelink changes apply to same-sex couples, or an optional application, or, in the case of older people the National Welfare Rights Network, a recommendation that older same-sex couples be exempted from these provisions, much as women have had a staggered entry into a retirement age which will be the same as a man's.

The problem is not simply historical. It is well-documented that homophobia exists in our communities at the present time and this Bill will not immediately remedy such attitudes and the consequential problems.⁵¹ There are many agencies who are identifying difficulties that will be experienced by members of same-sex couples who receive welfare benefits, both on the grounds of privacy and people's understanding of the rules. A frequent recommendation concerned the need for adequate training and the need to apply the new rules with sensitivity.

Main Provisions

Key terms used throughout the Bill

This section provides an explanation of the key standard definitions used in the Bill. They are referred to as the 'standard definitions' throughout the Digest.

The standard definitions fall into two categories. The first is those definitions that are to be inserted into the *Acts Interpretation Act 1901* (AIA) and applied in the relevant legislation as required, namely 'de facto partner' 'de facto relationship' and 'registered relationship'. The other category consisting of definitions such as 'child' and 'parent' are not included in the AIA and instead are to be set out in each relevant Act. Some of these commonly used definitions are slightly modified or extended to fit the particular piece of legislation.

De facto partners

Proposed section 22A of the AIA (**item 1, Schedule 2**) provides that a person is the de facto partner of another person where:

- the person is in a registered relationship with the other person under section 22B, or
- the person is in a de facto relationship with the other person under section 22C.

51. See for instance Chapter 17 of HREOC's Same-Sex Same Entitlements Report, op. cit. and also see generally <http://en.wikipedia.org/wiki/Homophobia> accessed 8 October 2008 or historically, 'Homophobia as an Issue of Sex Discrimination: Lesbian and Gay Equality and the Systemic Effects of Forced Invisibility', Murdoch University Electronic Journal of Law, Volume 3, Number 3 (September 1996) <http://www.murdoch.edu.au/elaw/issues/v3n3/kendall.html> accessed 8 October 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Significantly, a de facto partner can be of the same sex or a different sex.

The meaning of ‘de facto partner’ in the AIA is only to be applied in legislation that specifically draws on the AIA definition.

Registered relationship

Under **proposed section 22B** of the AIA (**item 1, Schedule 2**) 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. The Explanatory Memorandum states that provisions of state and territory laws that provide for registration of ‘caring’ and ‘interdependent’ relationships will not be prescribed for the purposes of this definition in the AIA.⁵²

De facto relationships

Under **proposed section 22C** of the AIA (**item 1, Schedule 2**) a person is in a de facto relationship with another person if the persons:

- are not legally married to each other; and
- are not related by family;⁵³ and
- have a relationship as a couple living together on a genuine domestic basis.

In determining whether two persons have a relationship as a couple, all the circumstances of their relationship are to be taken into account, including any or all of the following:

- 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

52. Explanatory Memorandum, p. 6.

53. Two persons are ‘related by family’ if: one is the child of the other; or one is another descendant of the other or they have a parent in common. Relationships in these categories established by adoption are also ‘related by family’ (**proposed subsection 22C(6)**).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- g) the care and support of children
- h) the reputation and public aspects of the relationship.

No particular finding is required in relation to any one of these circumstances in deciding whether the persons have a de facto relationship. The decision maker therefore has a significant discretion.

Two people can still be living in a de facto relationship despite a temporary absence from each other or an absence due to illness or infirmity (**proposed subsection 22C(4)**).

A de facto relationship can also exist between two people where one partner is legally married to someone else or, or is in a registered relationship with someone else or is in another de facto relationship, (**proposed subsection 22C(5)**).

Child

The Bill uses a new expanded definition of child.⁵⁴ It provides that someone will be considered to be a person's child where the child is the product of a relationship (either opposite-sex or same-sex). To be a product of the relationship, the child must be either the biological child of at least one of the persons in the relationship or must be born to a woman in the relationship.

The use of the term 'product of the relationship', is designed to encompass children who are the result of a same-sex couple deciding to have children by artificial conception using donated gametes for one or both of the genetic parents. It also caters for situations where the mother carries a child whose genetic material has been donated and does not come from the mother.

The definition is inclusive, meaning that the pre-existing definitions which incorporate adopted children and other categories of children will remain, with the changes aimed to incorporate children specifically born into same-sex relationships and children of *all* de facto relationships conceived through surrogacy arrangements.

The Explanatory Memorandum provides a range of examples.

The definition of 'child' has been one of the most controversial aspects of this Bill. The reader is referred above to the Background section and the heading *Children* for further comment.

54. For example **items 11, 34, 61 and 95** in Schedule 2)

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Parent

The commonly used definition of parent provides that someone is a parent of a person if the person is his or her child because of the definition of child referred to above.⁵⁵ This definition is inclusive and does not limit who can be a parent of a person for the purposes of the Act to be amended.

Stepchild

The definition commonly used in the Bill states that a stepchild includes a child who would be the stepchild of a person who is the de facto partner of a parent of the child except that the person is not legally married to the person's de facto partner.⁵⁶ The definition is inclusive meaning it does not exclude pre-existing definitions which apply to stepchildren of a husband or wife by a former union. This expanded definition is designed to ensure that stepchildren of both opposite-sex and same-sex de facto relationships are recognised for the purposes of the relevant legislation.

Step-parent

The definition of step-parent provides that someone is a step-parent of a person if the person is his or her stepchild because of the definition of stepchild referred to above.⁵⁷ This definition is inclusive and does not limit or exclude existing meanings of a step-parent.

Family relationships, related by family, or relatives

Many of the amendments refer to a person's family, relatives, or family relationships. There are a range of definitions used to encompass family relationships involving same-sex couples.

In one of the more commonly used definitions 'family relationships' are defined to include:

- relationships between de facto partners (as defined in the AIA)
- relationships of child and parent that arise from the standard definition of child, and
- relationships traced through either of these types of relationships.

55. For example **items 7** and **44** in Schedule 2.

56. For example see **item 18** in Schedule 2.

57. For example see **items 7** and **12** in Schedule 11 and **item 34** in Schedule 5.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The definition is not exclusive but rather extends existing meanings of family relationships.

Schedule 1—Agriculture, Fisheries and Forestry amendments

Commencement: The day after Royal Assent.

Australian Meat and Live-stock Industry Act 1997

The *Australian Meat and Live-stock Industry Act 1997* (the AMLI Act) provides the structural arrangements of the red meat and livestock industry.

Item 1 amends the definition of ‘associate’ in section 3 of the AMLI Act. The existing definition currently provides that an associate includes the subject person’s spouse or de facto spouse. Currently there is no definition of spouse or de facto spouse. The proposed amendment provides that an associate includes a person’s spouse or ‘de facto partner’. The standard definition of de facto partner in the AIA is relied on.

The purpose of the amendment is to broaden the definition of associate to include same-sex partners. Its effect is relevant to section 25A of the AMLI Act. Under section 25A if the Secretary refuses to grant or renew a licence to a person or suspends or cancels an existing licence, he or she can also take action in relation to the licence of an associate of a person against whom such action was taken— an associate will now include same-sex partners.

Farm Household Support Act 1992

The *Farm Household Support Act 1992* (the FHS Act) regulates the provision of income support and advice to farmers who may not have a long term productive, sustainable and profitable future in the sector.

The amendments in **items 2** and **3** would broaden the definitions of ‘armed services widow’ and ‘armed services widower’ so that they include same-sex and opposite sex de facto couples as well as married couples. The amendments would affect subsections 12(3) and (4) of the FHS Act which exclude armed services widows and widowers from receiving farm household support and other relief payments in certain circumstances.

Schedule 2—Attorney-General

Commencement: Most amendments commence the day after Royal Assent.

Amendments to the *Acts Interpretation Act 1901*

Item 1 inserts definitions of ‘de facto partners’, ‘registered relationships’, and ‘de facto relationships’ into the Acts Interpretation Act (AIA). The definitions are the basis for

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

many of the amendments to other legislation contained in the Bill. For further discussion see the ‘Key terms used throughout the Bill’ section above.

Administrative Decisions (Judicial Review) Act 1977

The *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) establishes procedures for judicial review of administrative decisions. Schedule 2 to the ADJR Act lists classes of decisions which are exempt from the requirement under section 13 to provide a written statement of reasons for a decision. Paragraph (d) of the Schedule provides for a number of exemptions from section 13 for certain decisions made under the *Migration Act 1958*. **Item 2** is a minor technical amendment. It amends **paragraph (d)** to ensure that the terms ‘enter Australia’, ‘spouse’, ‘de facto partner’ and ‘relative’ have the same meaning as in the Migration Act.⁵⁸

Age Discrimination Act 2004

The *Age Discrimination Act 2004* prohibits discrimination on the basis of age. The amendments in the Bill affect section 29. This section establishes that it is unlawful to discriminate on the grounds of age when a person is offering to provide accommodation to another person, except where the accommodation that person is offering is being resided in by that person or their near relatives. **Items 4-8** extend who is to be considered a ‘near relative’ to encompass same-sex couples and the children of such relationships. The amendments draw on the standard definitions of ‘child’, ‘de facto partner’, ‘parent’, and the tracing rule for relatives.

Australian Federal Police Act 1979

The *Australian Federal Police Act 1979* allows, amongst other things for the restraint of the property of an AFP employee convicted of a corruption offence, where that person has been paid a Commonwealth funded superannuation benefit. The property that may be restrained includes property that is subject to the effective control of the person. In determining whether or not property is subject to the effective control of a person, a court may have regard to, among other things, the *family relationships* between persons having an interest in the property and other persons. **Item 9** inserts into section 42F a definition of *family relationship* to include the following:

- relationships between de facto partners
- relationships of child and parent, and
- relationships traced through these types of relationships.

The standard definitions of child and de facto partner are relied on.

58. See under Schedule 9 below for amendments to the Migration Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Bankruptcy Act 1966

The *Bankruptcy Act 1966* sets out the law relating to the administration of personal insolvencies in Australia.

The proposed amendments in the Bill will expand who is considered to be a ‘related entity’, ‘close relative’ and a ‘family member’ of a bankrupt under the Bankruptcy Act for the purpose of dealing with a bankrupt’s estate. Amongst other things the amendments:

- insert standard definitions of ‘child’ (**item 11**), ‘de facto partner’ (**item 13**), ‘parent’ (**item 15**), ‘step child’ (**item 18**),
- remove the definition of ‘de facto spouse’ (**item 14**), and
- insert the standard tracing rule for families (**item 19, proposed subsection 5(6)**).

Crimes Act 1914

A number of provisions in the *Crimes Act 1914* refer to terms such as parent or relative. For example, the rules for conduct of a strip search in section 3ZI provide, among other things, that a strip search of a person who is at least 10 years of age but under 18 years of age must be conducted in the presence of a parent or guardian.

The effect of the amendments made by **items 34 to 40** of this Schedule is to expand the definition of who is a parent or relative for the relevant provisions in the Crimes Act. For example **item 34** inserts the standard definition of ‘child’ into subsection 3(1) and **item 35**, the standard definition of ‘de facto partner’. **Item 38** inserts a tracing rule into section 3 that will allow the relatives of a person to be traced through the definitions of ‘child’ and ‘de facto partner’. The definition of ‘parent’ is to be repealed and replaced with the standard definition (**items 40 and 36**).

Crimes (Superannuation Benefits) Act 1989

The Crimes (Superannuation Benefits) Act allows, amongst other things, for the restraint of the property of a Commonwealth employee convicted of a corruption offence where that person has been paid a Commonwealth funded superannuation benefit. The property that may be restrained includes property that is subject to the effective control of the person. In determining whether or not a property is subject to the effective control of a person, a court may have regard to, among other things, the *family relationships* between persons having an interest in the property and other persons. The amendments will broaden the meaning of family relationships to encompass same-sex couples and the children of such relationships.

The amendments essentially replicate the amendments to the *Australian Federal Police Act 1979* referred to above.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Customs Act 1901

The *Customs Act 1901* contains several references to a person's family relationships. These relationships can be taken into account for purposes such as valuing of goods, establishing effective control of goods and issues regarding persons being detained by a Customs officer. The amendments in the Bill are designed to expand the types of family relationships to include same-sex couples and their children. **Items 43** and **44** insert the standard definitions of 'child' and 'parent' into subsection 4(1) of the Customs Act. **Item 45** inserts **proposed section 4AAA**. It defines members of a person's family for the purposes of the Customs Act to be traced through the definitions of child and de facto partner.

High Court Justices (Long Leave Payments) Act 1979 and Judges (Long Leave Payments) Act 1979

The *High Court Justices (Long Leave Payments) Act 1979* makes provision for payments in lieu of long leave on the retirement or death of Justices of the High Court. The effect of **item 53** is to allow that on the death of a Justice payments of unpaid leave could be made to de facto partners (as well as to a surviving spouse). Where a Justice leaves more than one surviving spouse or de facto partner the Attorney-General has the discretion to distribute the amount between them (**item 54, proposed subsection 5(2A)**) The standard definition of de facto partner is relied on.

Items 57–60 would make equivalent amendments to the *Judges (Long Leave Payments) Act 1979* that will affect surviving spouses and de facto partners of deceased Federal Court and Family Court judges.

Passenger Movement Charge Collection Act 1978

The *Passenger Movement Charge Collection Act 1978* is an Act relating to the passenger movement charge imposed on people leaving Australia.

The amendments in this Schedule repeal the existing definition of 'child' and replace it with the standard definition of 'child' (**item 61**); insert the standard definition of 'de facto partner' (**item 62**); repeal and replace the definition of 'spouse' so as to include de facto partners (**item 63**); and insert the standard definition of 'step child' (**item 64**).

The amendments effect the operation of section 5 and will expand the range of exemptions from the passenger movement charge.

Proceeds of Crime Act 2002

The *Proceeds of Crime Act 2002* provides a scheme to trace, restrain and confiscate the proceeds of crimes against Commonwealth laws. The proposed amendments to this Act

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

are similar to those for other legislation under this portfolio. They include insertion of the standard definitions of ‘child’, ‘family relationships’, ‘de facto partner’ and ‘parent’.

Service and Execution of Process Act 1992

Items 73 to 75 insert standard definitions of child, parent and family into the *Service and Execution of Process Act 1992*. This Act enables process commencing civil and criminal proceedings in state and territory courts to be served throughout Australia. It also establishes procedures by which judgements given by a court in one State or Territory may be enforced in another State or Territory.

Sex Discrimination Act 1984

The *Sex Discrimination Act 1984* (the SDA) prohibits discrimination on the basis of sex, marital status or pregnancy discrimination in various areas of public life. It also prohibits discrimination on the basis of family responsibilities in the case of dismissal from employment.

Items 76 through to 81 insert the standard definitions of ‘parent’, ‘child’, ‘de facto partner’, ‘spouse’, ‘stepchild’ and the ‘tracing rule’ into subsection 4A(2) and (3) of the SDA (the definition section which specifically applies to the meaning of *family responsibilities*).

Item 82 articulates the international instruments that the Commonwealth is relying on to attract constitutional power under the external affairs power. These are the

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958 (ILO 111), and
- Convention on the Rights of the Child (CRC).

The status of same-sex discrimination is accepted by many as being well established in international law, and the submission from the Human Rights Law Resource Centre thoroughly explores these issues.⁵⁹ However it is not yet fully established in the international arena as a fully fledged area of prohibited discrimination. The sexual-preference ground has not been explicitly articulated in the international field and while general principles of anti-discrimination and human rights may cover the area the decision

59. Human Rights Law Resource Centre, Submission no. 14, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub14.pdf accessed 8 October 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

which incorporated sexual preference into ‘sex’ will not necessarily be followed in the future.⁶⁰ The Explanatory Memorandum implicitly reflects this limited status in the international arena when it repeatedly comments on the international provisions that ‘Discrimination on the ground of sexual preference is considered to be prohibited by these provisions.’

Items 83 and 84 insert provisions designed to enable State and Territory anti-discrimination laws to operate as fully as possible.

The provisions being inserted into the SDA will have a limited impact and certainly do not reflect any intention to comprehensively prohibit same-sex discrimination in and of itself.

The Australian Human Rights Commission (formerly HREOC, now AHRC), and the Australian Human Rights Law Centre both comment to the effect that they are disappointed that the Bill only proposes to remove discrimination against same-sex couples on the ground of family responsibilities, not on the grounds of marital status or sexuality. Specifically AHRC says

The Commission is disappointed that the amendments to the [SDA] only remove discrimination against same-sex couples in relation to family responsibilities discrimination and not marital status discrimination.⁶¹

Along with various submissions from the Senate Inquiry (which go further in recommending comprehensive anti-discrimination legislation)⁶² the Commission recommends

The [SDA] should be amended to replace the protected ground of ‘marital status’ with ‘couple status’. The definition of ‘de facto spouse’ should be replaced with the new

60. In *Toonen v Australia*, Communication No. 488/1992, the UN Human Rights Committee considered the specific issue of discrimination on the basis of sexual orientation. The Human Rights Committee considered sexual orientation to be a prohibited ground of discrimination within Articles 2(1) and 26 of the ICCPR because it fell within the field of discrimination on the basis of ‘sex’. While *Young v Australia*, Communication No. 941/2000, confirmed that discrimination on the grounds of sexual preference was not considered acceptable by the Committee, the rationale/jurisprudence was not on the same grounds.

61. Australian Human Rights Commission, Submission no. 12, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub12.pdf accessed on 12 October 2008.

62. See for instance the Australian Coalition for Equality http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub19.pdf and the Human Rights Law Resource Centre, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub14.pdf

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

definition of ‘de facto partner’, which this Bill inserts into the *Acts Interpretation Act 1901 (Cth)*.⁶³

The Bill does not change the primary definition of de facto in the legislation (that definition is contained in section 4). By leaving the traditional definition of de facto unchanged (contrary to other legislation being modified by the Bill) the SDA will not apply its marital status discrimination provisions to same-sex couples directly.

Witness Protection Act 1994

The *Witness Protection Act 1994* establishes a National Witness Protection Program operated by the Australian Federal Police.

Item 85 inserts a definition of a ‘parent’ into section 3 of the Witness Protection Act. It relies on the standard definitions of ‘parent’ and ‘child’ set out above and in the usual way will extend the range of persons who can be considered a child or parent of a person under the Witness Protection Act.

Regulations

Item 86 provides that the Governor-General may make regulations of a transitional nature in relation to any of the amendments in the Bill.

Schedule 3—Broadband, Communications and the Digital Economy amendments

Commencement: The day after Royal Assent.

Australian Postal Corporation Act 1989

The *Australian Postal Corporations Act 1989* (the APC Act) establishes Australia Post and regulates a range of matters, including its operations, and dealings with postal articles and their contents.

The effect of **item 2** is to insert **proposed subsection 90K(6)** to expand the meaning of ‘next of kin’ to include:

- the de facto partner of the person within the meaning of the AIA
- a child of the person, according to the standard definition of a child, and
- anyone else who would be a relative of the person because of either of these.

63. Australian Human Rights Commission, Submission no. 12, http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub12.pdf accessed on 12 October 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The amendment has effect on section 90K which deals with the disclosing of information or documents by Australia Post employees in specific circumstances.

Broadcasting Services Act 1992

The *Broadcasting Services Act 1992* sets out different categories of broadcasting services, datacasting services and online services, and the regulatory framework under which they must operate.

The effect of the amendments is to expand the meaning of ‘associate’ in subsection 6(1) to include same-sex partners and their families. The definition of ‘associate’ defines who is an ‘associate’ in relation to a person’s control of a licence or a newspaper, or control of a company in relation to a licence or a newspaper for the purposes of the Broadcasting Services Act. The current meaning of associate includes the person’s spouse (including a *de facto* spouse) or a parent, child, brother or sister of the person; or a partner of the person or, if a partner of the person is a natural person, a spouse or a child of a partner of the person.

Item 8 inserts a definition of ‘spouse’ into subsection 6(1) and provides that a spouse includes a *de facto* partner within the meaning of the AIA. **Items 6, 7** and **9** insert the standard definitions of ‘child’, ‘parent’, and the standard tracing rule into subsection 6(1) of the Act. **Item 3** removes the phrase ‘including a *de facto* spouse’ from the definition of ‘associate’. These amendments are for the purposes of broadening the definition of ‘associate’ to include same-sex *de facto* partners and their families.

Item 10 is a transitional provision, postponing the effect of the amendments for six months after commencement. The Explanatory Memorandum states that the broadening of the meaning of ‘associate’ may have serious implications for ownership and control of certain licences, newspapers and companies. A six month moratorium is considered an appropriate period of time to enable affected parties to implement measures to ensure compliance with the Broadcasting Services Act as amended.⁶⁴

Telstra Corporation Act 1991

The *Telstra Corporation Act 1991* regulates a range of matters relating to the operations of Telstra Corporation Limited, its ownership (including the imposition of restrictions on foreign ownership), certain employee entitlements, and transitional arrangements stemming from the sale of the Commonwealth’s equity interest in Telstra.

The effect of the amendments is to expand the meaning of ‘associate’ in clause 5 of the Schedule of the Telstra Corporation Act so that the term ‘relative’ would include same-sex partners and their families. The definition of ‘associate’ defines who is an ‘associate’ for the purposes of the ownership restriction provisions in the Act. An associate includes a

64. Explanatory Memorandum, p. 43.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

relative of a person, and a *relative* currently means the person's spouse; or another person who, although not legally married to the person, lives with the person on a *bona fide* domestic basis as the husband or wife of the person; or a parent or remoter lineal ancestor of the person; or a son, daughter or remoter issue of the person; or a brother or sister.

The amendments (**items 12–17**) remove the reference to a non-marital domestic relationship and replace it with the standard definition of de facto partner; remove references to 'son', 'daughter' and replace with the term 'child'; insert the standard definitions of 'child', 'parent', and insert the standard family relationships tracing rule.

Item 18 is a transitional provision, postponing the effect of the amendments until six months after commencement.

Schedule 4—Defence

Commencement: The day after Royal Assent.

Background

This Schedule deals with instances where entitlements are specified in defence and defence related legislation and where there is a consequent need to amend legislation to include same-sex partnerships.

Defence Force (Home Loans Assistance) Act 1990

The *Defence Force (Home Loans Assistance) Act 1990* provides for the payment of a subsidy on home loan interest for members and former members of the Australian Defence Force who served in the ADF prior to July 2008. Currently the subsidy may be passed to the surviving widow or widower of a member or former member in receipt of the subsidy.

Item 2 repeals the section 3 definition of a child as being the child, stepchild or legally adopted child of the person, and being under 16 or a student. The new definition does not limit who is to be considered a child of a person for the purposes of the Act. The Bill substitutes a definition which, while encompassing the previous definition, expands it to also include a child who is the product of a relationship the person has or had as a couple with another person, whether that person is of the same-sex or of a different sex. At the end of section 3, **item 9** of the Bill adds a rider to this subparagraph, explaining that someone (i.e. a child) 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.

Item 3 inserts a reference to the *Acts Interpretation Act 1901* definition of 'de facto partner' which replaces the definition of 'spouse', repealed by **item 5**. 'De facto partner'

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

has an extended meaning to include couples in a same-sex relationship as well as opposite sex relationships outside marriage.

Item 4 inserts a definition of parent which does not limit who is to be considered a parent of a person for the purposes of the Act. A parent is a parent of a person if his or her child falls under the definition of child as defined in item 2.

Item 6 inserts a new definition of ‘surviving spouse or de facto partner’ into section 3 of the Act.

Item 7 and **item 8** repeals the definition of widow and widower to allow for the substitution of ‘surviving spouse or de facto partner’ in relevant sections of the Act.

Item 9: see **Item 2**

Item 12 substitutes a **new section 8** of the Act which deals with the possibility that a deceased person might have multiple spouses and de facto partners. In this circumstance, **new subsection 8(1)** deems the partner who was living with the deceased immediately before death to be the surviving spouse or de facto partner. This will not exclude a partner who was not living with the deceased because of illness or a temporary absence (**new subsection 8(2)**).

Item 16 provides that amendments to sections 10 and 12 apply only to scheme members who die on or after the commencement of the amendments.

Item 22 provides that amendments to sections 14, 15, 17 and 18 will only apply to scheme members who die on or after the commencement of these amendments.

Item 23 inserts ‘de facto partner’ into existing paragraph 20(2)(d) to extend the payment of a subsidy to an opposite or same-sex de facto partner after the commencing day. **Item 24** is a complicated and confusingly worded application provision. It seeks to ensure that a member in a same-sex relationship who is entitled to the subsidy prior to commencement does not become disqualified as a consequence of the amendment.⁶⁵

Item 35 is an application provision which is aimed at ensuring that couples who are not currently recognised under the Act are not required to repay the subsidy for the period following the conversion of a joint tenancy into a tenancy in common and before the commencement of these amendments.

Defence (Parliamentary Candidates) Act 1969

The *Defence (Parliamentary Candidates) Act 1969* allows Members of the Defence Force who desire to become candidates for election as Members of the Parliament of Australia or

65. For further details see the Explanatory Memorandum, p. 50.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

of a state or of certain other legislative or advisory bodies to apply to be discharged, terminated or transferred to the Reserves. The Act provides for the costs of removal for such members of the ADF and their family back to the member's place of enlistment.

Section 16 of the current Act deals with entitlements of an ADF member who intends to stand for election to the Commonwealth or to a state parliament. Under this section the ADF member who will be discharged, terminated or transferred to the Reserves, is entitled to have the Commonwealth pay for his/her travel back to the place of enlistment with members of the family and household effects. The amendments provide definitions of those persons who are substantially or wholly dependent on the ADF member and who are thus entitled to removal at Commonwealth expense.

The current Act defines the member of a family simply in terms of dependency on the member of the defence force. The amendments in **item 47** keep the reference to 'wholly or substantially' dependent, but also insert definitions of members of a family to include a de facto partner and to broaden the definition of a child, without limiting who can be taken to be a member of a family. The amendments also allow for circumstances in which these definitions can create family linkages which flow from these broader definitions and which might not otherwise not be recognised; for instance, if the non-biological parent of a child has another child of his/her own, then the two children will be recognised as siblings for the purposes of this section.

Royal Australian Air Force Veterans' Residences Act 1953

The *Royal Australian Air Force Veterans' Residences Act 1953* establishes a Trust to administer a fund which provides accommodation for eligible persons in necessitous circumstances.

Item 48 inserts the *Acts Interpretation Act 1901* definition of 'de facto partner' into that part of section 2 of the Act which deals with the definition of 'eligible person', expanding the definition of eligible person beyond the current confines of those who are legally married or who are the widow or widower of an eligible person, to include same-sex partnerships.

Item 49 adds 'or' to the end of paragraphs (a), (b) and (c) to ensure that each circumstance is regarded as a separate alternative.

Item 50 repeals and replaces paragraphs (d), (e) and (f) of the definition of 'eligible person' in section 2. **New paragraphs (d)** and **(e)** substitute 'surviving spouse or de facto partner' for 'widow' or 'widower'. **New paragraphs (e)** and **(f)** continue the recognition of situations where a parent was dependent on a deceased former member, but expand this to include a de facto partner of a parent in certain circumstance.

Item 51 inserts a definition of parent which does not limit who can be considered a parent for the purposes of the Act, but includes the situation where a child is the product of a

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

relationship the person had as a couple or with a third person. However, the child has to be the biological child of at least one of the persons or the third person, or was born to a woman in the relationship.

Item 52 inserts a definition of ‘surviving spouse or de facto partner’ into section 2 which limits a surviving spouse or de facto partner to someone who was in such relationship with a deceased person immediately before the deceased’s death.

Item 53 is an application provision which provides that these amendments will apply to a person defined as eligible in paragraphs (a), (b) or (c) of section 2 who dies on or after the commencement of the amendments in this Schedule.

War Gratuity Act 1945

This Act is listed at the beginning of Schedule 4 of the Explanatory Memorandum, but no further reference is made to it.⁶⁶ It does not appear in Schedule 4 of the Bill itself.

What’s not in the Schedule

The HREOC Report, recommended that the *Defence Act 1903* be amended to include definitions of ‘child’, de facto partner’, ‘de facto relationship’. ‘dependant’ and to amend the definition of ‘member of a family’ to eliminate discrimination against same-sex couples and their children in financial and work-related entitlements areas.⁶⁷ However, this Bill does not include any amendments to the *Defence Act 1903*. Access to the day-to-day entitlements which ease the burden of service life for ADF members with dependants, i.e. for couples and families, are not specified in legislation such as the *Defence Act 1903*, rather they exist at the level of defence instructions and in the [ADF Pay and Conditions Manual](#) (PACMAN).

Gay and lesbian citizens have been able to serve in the Australian Defence Force (ADF) openly since 1992, however, their partners were not recognised and had no access to entitlements until 2005. On 1 December 2005 an amended [Defence Instruction \(General\) PERS 53–1 Recognition of interdependent partnerships](#) (DI(G) PERS 53–1) was issued under the authority of the Chief of the Defence Force (CDF) and the Acting Secretary of the Department of Defence. Defence Instructions (General) are issued by the Secretary and CDF by virtue of the powers vested in them under the *Defence Act 1903*, Subsection 9A(1). The previous version of DI(G) PERS 53–1 had related to the recognition of opposite-sex de facto marriages.

The amended DI(G) PERS 53–1 detailed the extension of certain conditions of service entitlements to ADF members in recognised interdependent relationships, including same-

66. See Explanatory Memorandum, p. 46. The *War Gratuity Act 1946* is also not listed in the Defence portfolio list at page 2 of the Explanatory Memorandum.

67. The Human Rights and Equal Opportunity Commission, op. cit., p.392.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

sex couples. Under this instruction an ADF member who seeks recognition by the ADF of an interdependent partnership:

must prove that his/her partner is a person who lives in a common household with the member in a bona fide, domestic interdependent partnership, although not legally married to the member. Where the interdependent partnership is recognised by the appropriate Service authority, a member may be eligible for financial entitlements and conditions of service which apply to a member with dependents as defined in PACMAN.⁶⁸

The concept of interdependent partners has been integrated into [PACMAN's definition](#) of dependants of ADF members, and both opposite sex and same-sex couples are now eligible for entitlements such as housing, moving and leave allowances. However, access to such entitlements rests on recognition of the interdependent relationship by the 'Approving Authority', at the level of Commanding Officers, or even Warrant Officer Class One (for recruiting applicants), as outlined in the DI(G), and is not specified in legislation. The DI(G) specifies that the burden of proof of the existence of an interdependent partnership lies with the member, and requires a member to provide the Approving Authority with a statutory declaration and four separate items of documentary evidence that an interdependent relationship exists. It has been pointed out that 'this is in contrast to all other federal laws that recognise de facto relationships without the need for any formal step to register the relationship'.⁶⁹ The DI(G) requires the Approving Authority to provide the member with an explanation of why an application has been rejected, but does not specifically refer to an avenue of appeal.

Schedule 5—Education, Employment and Workplace Relations

Commencement: The day after Royal Assent.

Education Services for Overseas Students Act 2000

The focus of the *Education Services for Overseas Students Act 2000* (ESOS Act) is on the regulation of providers of education services to overseas students. Registered providers

68. Department of Defence, [Defence Instruction \(General\) PERS 53–1 Recognition of interdependent partnerships](#), 1 December 2005.

69. Jenni Millbank, 'Areas of Federal law that exclude same-sex couples and their children', Human Rights and Equal Opportunity Commission Inquiry Research Paper, September 2006, p. 15. Available at: http://www.humanrights.gov.au/human_rights/samesex/inquiry/docs/Same_Sex_ResearchPaper200609.pdf The requirement to provide a statutory declaration and four items of documentary evidence had applied to the recognition of opposite-sex de facto relationships since 2002 in the previous version of the DI(G). Before that the requirement was for 15 items of supporting evidence. ('De facto deal', Army: the soldier's newspaper, 11 April 2002).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

and in some cases their associates are subject to a number of obligations. An associate is defined in subsection 6(1) of the Act and can include the provider's spouse or de facto spouse; children and parents of the provider; children and parents of the spouse or the de facto spouse; and siblings of the provider.

Items 1 to 5 in the Schedule amends the term 'associate' by replacing the term 'de facto spouse' with 'de facto partner'; by inserting the standard definitions of child, de facto partner and parent and amending the definition so that the term 'siblings' can be traced through the definitions of 'parent' and 'child'. The overall effect of these amendments is to broaden providers' associates to include de facto same-sex partners and their families.

Higher Education Support Act 2003

The *Higher Education Support Act 2003* (the HES Act) provides for the Commonwealth to give financial support for higher education through grants and other payments principally made to higher education providers and through financial assistance to students.

Of relevance to this Bill is the definition of 'overseas student'. Amongst other things, the definition states that an overseas student *does not* include a New Zealand citizen, or a diplomatic or consular representative of New Zealand, a member of the staff of such a representative or the spouse or dependent relative of such a representative. The Bill proposes the standard definitional amendments that will add that an 'overseas student' does not include de facto partners of New Zealand consular representatives and their dependent relatives.

Judicial and Statutory Officers (Remuneration and Allowances) Act 1984

The *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984* (the JSO Act) provides for the remuneration and allowances payable to the holders of certain judicial and statutory offices.

Subsection 4(4A) of the JSO Act deals with travelling allowances that are payable to Justices of the High Court if their spouses accompany them. There is no definition of spouse in the legislation and it is therefore unlikely that a same-sex partner would qualify as a spouse in the absence of a definition.⁷⁰

Item 10 inserts **proposed subsection 4(4B)** into the JSO Act. It provides that 'spouse' includes a de facto partner of a person within the meaning of the definition in the Acts Interpretation Act. The expanded meaning of spouse would have the effect of allowing a

⁷⁰. The HREOC Report did however point out that there are also travel entitlements for judicial and statutory office holders provided by Determination 2004/03 of the Remuneration Tribunal which would cover same-sex partners. The Human Rights and Equal Opportunity Commission, *op. cit.*, paragraph 6.4.3.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Justice of the High Court to claim a travelling allowance from the Commonwealth for a same-sex partner.

Safety, Rehabilitation and Compensation Act 1988

The main federal workers' compensation scheme, Comcare is administered under the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). This Act establishes a scheme of rehabilitation and compensation for employees of the Commonwealth, Commonwealth authorities and licensed private sector corporations who are injured in the course of their employment.

The HREOC Report identified significant discriminatory issues in regard to same-sex couples under the SRC Act. For example the report noted that a same-sex partner is denied access to lump sum death benefits which are available to an opposite-sex partner. Also, a same-sex partner is not automatically counted for the purposes of calculating the amount of compensation payable upon an employee's incapacitation. A child of a same-sex couple can generally access death benefits and will usually be counted in compensation calculations. However, the child of a birth mother or birth father will be assumed to have those rights, whereas the child of a lesbian co-mother or gay co-father will need to prove those rights.

The proposed amendments in the Bill insert the relevant standard definitions which would have the effect of providing equal access to compensation for same-sex partners of an employee and for their families. **Item 12** inserts the standard definition of 'de facto partner' into subsection 4(1) and **item 16** extends the meaning of 'spouse' of an employee or deceased employee to include a de facto partner of the employee whether of the same or opposite sex. **Items 11, 15, 17, 18** insert the key definitions of 'child', 'stepchild', 'stepparent'. The definition of 'prescribed' person' and 'dependant' are also amended to reflect the inclusion of same-sex partners and their families, and to remove outdated and gender specific language (such as illegitimate relationships, son, daughter).

Seafarers Rehabilitation and Compensation Act 1992

The *Seafarers Rehabilitation and Compensation Act 1988* (the Seafarers Act) establishes an industry specific scheme of rehabilitation and compensation for seafaring employees who are injured in the course of their employment. The HREOC Report notes that, like the SRC Act, there are significant discriminatory issues for same-sex couples under the Seafarers Act. For example the report noted that a same-sex partner is denied access to lump sum death benefits which are available to an opposite-sex partner.

The amendments (**items 27 to 39**) essentially replicate the amendments to the SRC Act. They include inserting the relevant standard definitions and amending definitions of 'spouse', 'dependant and 'prescribed person'. They have the effect of providing equal access to compensation for same-sex partners of an employee and for their families.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Student Assistance Act 1973

The *Student Assistance Act 1973* provides for the entitlement to various forms of student assistance benefits and recovery of student assistance debts.

Item 40 inserts the standard definition of ‘child’ into subsection 43B(5) of the Act and **item 41** amends paragraph (a) of the definition of ‘parent’ in subsection 43B(5) by inserting part of the standard definition of ‘parent’. The effect is to extend who can be considered to be the parent of a person for the purposes of waiving a debt incurred as a result of overpayment of an entitlement paid under the Act.

Schedule 6—Families, Housing, Community Services and Indigenous Affairs

Part 1

Commencement: The day after Royal Assent.

Aboriginal Land Grant (Jervis Bay Territory) Act 1986

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (the Land Grant Act) provides for the grant of land in the Jervis Bay Territory to the Wreck Bay Aboriginal Community and for the establishment of the Wreck Bay Aboriginal Community Council.

The amendments to the Land Grant Act are necessary because under the current provisions of section 37 of the Act, the definitions of ‘child’, ‘parent’, ‘relative’ and ‘spouse’ mean that the operation of the Act is confined to opposite-sex relationships.

Item 3 is the most significant amendment. It inserts into subsection 38(1) a new definition of ‘spouse’ to include a de facto partner of the person within the meaning of the Acts Interpretation Act. Other amendments include insertion of the standard definitions of ‘child’ and ‘parent’ and clarification on the meaning of family relationships (**items 1, 2 and 4**). The main effect of these new definitions is to expand the meaning of ‘relative’ in section 37 to include same-sex couples and their families as relatives of registered members of the Wreck Bay Aboriginal Community Council. Its effect would, for example have an impact on section 42 which provides that where a registered member of the Council has the benefit of a lease of Aboriginal Land for use for domestic purposes, that benefit is capable of transmission, by will or under a law relating to intestacy, to a *relative* of the member.

Corporations (Aboriginal and Torres Strait Islander) Act 2006

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) is an Act establishing a special regime of incorporation for Aboriginal and Torres Strait Islander peoples that takes account of the special risks and requirements of the Indigenous corporate sector.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 10 is the most significant amendment. It inserts into section 700-1 a new definition of ‘spouse’ to include a de facto partner of the person within the meaning of the Acts Interpretation Act. This definition further impacts on the meaning of ‘related parties’ and ‘controlling entities’ in section 293-1. Other amendments include insertion of the standard definitions of ‘child’ and ‘parent’ and clarification on the meaning of family relationships (**items 6, 7 and 9**).

By including same-sex partners and their families within these definitions, the amendments would, amongst other things, have the effect of further limiting the range of people who can receive benefits from companies. For example under section 284-1 of the CATSI Act related parties of a corporation must not receive financial benefits from the corporation without members’ approval. The amendments would mean that company office holders’ same-sex partners and their families would also be subject to this provision.

Part 2

Commencement: 1 July 2009.

A New Tax System (Family Assistance) Act 1999

Items 11 to 20 all introduce the concepts of ‘relationship child’ and ‘relationship parent’ into the Act. The definition of these terms is the same as that used in the SSA as amended by this Bill.

A New Tax System (Family Assistance) (Administration) Act 1999

Items 21 to 22 introduce the concepts of ‘relationship child’ and ‘relationship parent’ into the Act. The definition of these terms is the same as that used in the SSA as amended by this Bill.

Social Security Act 1991

Amendments to the definition of ‘member of a couple’

Item 24 amends the existing definition of ‘member of a couple’ to include couple relationships registered under the law of a State or Territory.

Item 25 amends the existing definition of ‘member of a couple’ to include same-sex couples.

Item 26 omits the term ‘marriage-like’ and replaces it with the term ‘de facto’.

These changes to the SSA relate to determining who should be regarded as a member of a couple for determining eligibility for and the rate of payment of income support payments. Presently the legislation explicitly defines a member of a couple as someone living with a

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

member of the opposite sex who is in a marriage like relationship with that person. The present criteria for determining if the relationship is marriage like are set out at length in section 4(3) of the SSA.

4.(3) In forming an opinion about the relationship between 2 people for the purposes of paragraph (2)(a) or subparagraph (2)(b)(iii), the Secretary is to have regard to all the circumstances of the relationship including, in particular, the following matters:

(a) the financial aspects of the relationship, including:

- (i) any joint ownership of real estate or other major assets and any joint liabilities; and
- (ii) any significant pooling of financial resources especially in relation to major financial commitments; and
- (iii) any legal obligations owed by one person in respect of the other person; and
- (iv) the basis of any sharing of day-to-day household expenses;

(b) the nature of the household, including:

- (i) any joint responsibility for providing care or support of children; and
- (ii) the living arrangements of the people; and
- (iii) the basis on which responsibility for housework is distributed;

(c) the social aspects of the relationship, including:

- (i) whether the people hold themselves out as married to each other; and
- (ii) the assessment of friends and regular associates of the people about the nature of their relationship; and
- (iii) the basis on which the people make plans for, or engage in, joint social activities;

(d) any sexual relationship between the people;

(e) the nature of the people's commitment to each other, including:

- (i) the length of the relationship; and
- (ii) the nature of any companionship and emotional support that the people provide to each other; and
- (iii) whether the people consider that the relationship is likely to continue indefinitely; and
- (iv) whether the people see their relationship as a marriage-like relationship.

Item 30 amends **subparagraph 4(3)(c)(i)** to read:

whether the people hold themselves out as married to or in a de facto relationship with each other.

Item 31 amends **subparagraph 4(3)(e)(iv)** to read:

whether the people see their relationship as a marriage-like relationship or a de facto relationship.

The Bill basically changes the requirement that the members of a couple need to be of the opposite sex and replaces the term 'marriage-like' with the term 'de facto'. Similar

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

wording in sections concerned with rate determination will also change to be consistent with the new definition.

The consequences of that change

There are four main consequences of this change for same-sex couples:

- Presently same-sex couples are treated as single people. They are paid at the higher single rate of payment of whichever income support payment they receive. The amendments will mean that they will only be eligible for the lower partnered rate of payment. The single pension rate is currently \$546.80 per fortnight compared to the partnered rate of \$456.80. Similarly the single allowance rate is \$437.10 per fortnight compared to the partnered rate of \$394.40.
- For means testing purposes the income and assets of both partners are taken into account. So if for example only one partner is unemployed or retired they may not qualify for income support because the income of their working partner is too high for them to be eligible for a payment.
- Certain payments are only available for single people. For example Parenting Payment Single (PPS) (the old Sole Parent Pension) is only available to single people who are caring for dependant children. Two parents in a same-sex relationship have been able to both receive PPS up until now. After the amendments take effect they will cease to be eligible for PPS and will have to test their eligibility for another payment such as Newstart Allowance or Parenting Payment Partnered. They will only be eligible for the partnered rate of that alternative payment.
- Family Tax Benefit part B is paid to all sole parents with an income of less than \$150,000 per annum. Couples only receive it subject to an income test on the income of the lower earning partner. Treating same-sex couples as couples will mean that certain people paid as sole parents will now be paid as members of a couple and receive less or no Family Tax Benefit part B. The rate of Family Tax Benefit part A may also be reduced for some same-sex couples when the income of both partners is taken into account under the income test for that payment.

All of these consequences relate to reduced income support for some same-sex couples. The only advantage to them is access to bereavement payments in the event of one partner passing away. That is why the main savings from the Bill are in the DEEWR and FHCSIA portfolios which are responsible for most income support payments. While it should be noted that the new arrangements will be treating same-sex couples in exactly the same way that all opposite sex couples are treated, there have been concerns raised to the Senate inquiry on the impact of these provisions. For further discussion the reader is referred to the section of the Digest called *Social security and aged care issues*.

Other items provide for consequential amendments to other sections of the SSA that flow from these new definitions.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Amendments to definitions of parent and child

Item 35 inserts a definition of child into **subsection 5(1)**. This definition is used in conjunction with the definitions of ‘relationship parent’ and ‘relationship child’ (see item 47) in **new subsection 5(25)** to recognise the parent-child relationship with the person who was the same-sex partner of a child’s biological parent when the child was born.

Item 47 inserts **new subsection 5(25)** which provides definitions of ‘relationship child’ and ‘relationship parent’.

Other items provide for consequential amendments to other sections of the SSA that flow from these new definitions.

Other minor changes

Some items such as **item 51** replace gender specific language with gender neutral language in certain sections that refer to parents and children.

Some items such as **item 34** deal with prohibited relationships by inserting a definition consistent with the *Marriage Act 1961*.

Items 42 and 43 insert into **subsection 5(1)** expanded definitions of ‘step child’ and ‘step parent’ for the purposes of the SSA to include the relationship between a de facto partner of a child’s parent and the child. Currently this relationship is only recognised where the members of the couple are legally married.

Schedule 7—Finance and Deregulation amendments

Commencement: Various dates: **items 1–7** commence three months after Royal Assent; **items 8 to 55** commence the day after Royal Assent; Part 3 commences the day after Royal Assent, however it does not commence at all if Schedule 1 of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* commences on or before this Act receives Royal Assent.

Part 1—General amendments

Commonwealth Electoral Act 1918

The *Commonwealth Electoral Act 1918* (the Electoral Act) establishes the machinery and regulations for federal elections.

Items 1 and 2 insert the standard definitions of ‘child’ and ‘de facto partner’ into subsection 4(1) and **items 3, 5 and 7** insert **proposed subsections 4(11) and 104(11)** to broaden the meaning of next of kin and family to include same-sex family relationships.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The amendments have a relatively minor effect but would for example allow a person to make a request for their address not to be shown on the electoral roll where it would place the personal safety of their same-sex partner at risk (**proposed subsection 104(11)**).

Medibank Private Sale Act 2006

The *Medibank Private Sale Act 2006* (the MPS Act) allows the sale of the Commonwealth's equity in Medibank Private Limited. The Act has provisions which anticipate a broad range of sale schemes that may be chosen to affect the sale of Medibank Private.

The amendments in the Bill mainly affect Part 4 of the MPS Act that deals with restrictions on ownership. It is directed at preventing an 'unacceptable ownership situation' pertaining to Medibank Private. Essentially, this means that one person cannot hold a stake of more than 15% of Medibank Private.

The amendments in **items 8–14** essentially expand the meaning of 'relative' for the purposes of the ownership provisions to include same-sex partners and their families. The amendments rely on the standard definitions of 'child', 'parent', 'de facto partner' and the standard tracing rule for family relationships.

Item 15 is a transitional provision, providing that the amendments do not take effect until 6 months after Royal Assent in certain circumstances.⁷¹

Members of Parliament (Life Gold Pass) Act 2002

The *Members of Parliament (Life Gold Pass) Act 2002* (the Life Gold Pass Act) sets out the domestic travel arrangements for Life Gold Pass Holders (ie former Prime Ministers, former Senators or Members) and their spouses. The Act provides a specified number of free domestic air trips per year for qualifying members, their spouse, or their widow/widower. Qualifying periods for a Life Gold Pass are determined by the Remuneration Tribunal.⁷²

The Life Gold Pass Act currently only provides entitlements to a Life Gold Pass holder's, legally married spouse. The amendments in **items 16–48** will extend the travel entitlements for spouses to include the de facto partners (both opposite sex and same-sex partners) of Life Gold Pass holders. Generally, this is achieved by retaining the term 'spouse' in the Life Gold Pass Act for married couples and adding the term de facto partner, as defined in the Acts Interpretation Act, wherever the term 'spouse' occurs.⁷³

71. For further details see the Explanatory Memorandum, paragraphs 557–561, p. 97.

72. Explanatory Memorandum, paragraph 562.

73. For further details see the Explanatory Memorandum, paragraph 563, p. 98.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 17 inserts a definition of ‘de facto partner’ into section 4 of the Life Gold Pass Act, which provides that a ‘de facto partner’ includes a de facto partner within the meaning of the standard definition of ‘de facto partner’ in the Acts Interpretation Act.

Item 18 inserts a definition of ‘surviving spouse or de facto partner’ into section 4 of the Life Gold Pass Act. This term replaces the terms ‘widow’ and ‘widower’, the definitions of which are deleted by **items 19** and **20**. A ‘surviving spouse or de facto partner’ of a deceased Life Gold Pass holder means a spouse or de facto partner of the person immediately before the Life Gold Pass holder died who:

- a) was named in a nomination in force under section 9B; or
- b) in circumstances where a sitting Senator or Member who qualifies for the issue of a Life Gold Pass dies while in office and does not have a valid nomination under section 9B of the Life Gold Pass Act, the surviving spouse or de facto partner will be the person nominated previously by the Senator or Member for the purposes of other travel entitlements administered by the Department of Finance, or
- c) where different people are named in a nominations in force under paragraphs (a) and (b) then the most recent nomination in force applies.

Item 24 inserts provisions dealing with the nomination process for travel entitlements for spouses and de facto partners under the Act. **Proposed section 9A** provides that in order for the spouse or de facto partner to be entitled to domestic return trips under the Act there must be a nomination in force under section 9B in relation to a person’s spouse or de facto partner. Only one spouse or de facto partner of a person may be nominated at any time.

Proposed subsection 9B(2) sets out the requirements for a valid nomination, namely, that it is in writing, names the spouse or de facto partner and specifies the date of effect for the nomination. A nomination is in force from the start day until the day the Life Gold Pass holder revokes the nomination in writing, or the day before the Life Gold Pass holder nominates another person as his or her spouse or de facto partner, whichever is the earlier.

Item 42 replaces subsection 14(2) of the Act, which deals with the formula for calculating an entitlement to domestic return trips where an entitlement does not exist for an entire financial year. The formula has not changed and is now in **proposed subsection 14(2A)** of the Act. However, **proposed subsection 14(2)** provides that where there is more than one spouse or de facto partner in a financial year, the entitlement for the second (or subsequent) spouse or de facto partner is limited to the lower amount of either the pro-rated amount or the total number of trips less any trips taken by the former spouse or de facto partner. The Explanatory Memorandum provides examples.⁷⁴

74. Explanatory Memorandum, paragraph 582, p. 101.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Parliamentary Entitlements Act 1990

The *Parliamentary Entitlements Act 1990* sets out an entitlements framework available to members of federal Parliament and their partners. However, as the HREOC Report noted, a partner will only have access to those entitlements if he or she qualifies as a ‘spouse’ under the Act. The existing definition of ‘spouse’ does not allow for a same-sex partner.⁷⁵ The HREOC Report noted that a same-sex partner is currently excluded under the Act from the following range of travel entitlements available to a ‘spouse’:

- for overseas travel, a member may downgrade the class of travel and use the difference in cost to offset the fare of an accompanying spouse
- the cost of travel for a spouse accompanying a Senior Officer travelling on official business either overseas or within Australia
- the cost of travel for a spouse accompanying a member travelling overseas, if the Prime Minister approves
- the cost of travel for a spouse accompanying an Opposition Office Holder or Presiding Officer travelling in Australia
- the cost of charter transport for a spouse accompanying the leader of a minority party.⁷⁶

Definition of spouse

Item 51 replaces the definition of ‘spouse’ in section 3 of the *Parliamentary Entitlements Act* with a new definition that provides that a ‘spouse’ includes a de facto partner of a member within the meaning of the standard definition of ‘de facto partner’ in the *Acts Interpretation Act*.

Definition of dependent child

The *Parliamentary Entitlements Act* also provides travel entitlements in Australia for each dependent child of a Senior Officer i.e. for a Minister, an Opposition Office Holder, or a Presiding Officer⁷⁷

Item 52 inserts **proposed subsections 3(2)** and **3(3)** into the *Parliamentary Entitlements Act* to extend the range of persons aged under 16 who are taken to be the ‘dependent

75. Note that there are also travel entitlements for partners of members of parliament which are set out in specific determinations made by the Remuneration Tribunal. The HREOC Report noted that at least one of those determinations does not extend the benefits to same-sex partners. The Human Rights and Equal Opportunity Commission, op. cit., p. 129.

76. The Human Rights and Equal Opportunity Commission, op. cit., pp. 129-130.

77. (see Part 2 of Schedule 1 of the Act).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

child’ of a Senior Officer. It inserts part of the standard definition of ‘child’ — the purpose being to provide that a child who is aged under 16 of a non-biological same-sex parent who is a Senior Officer can be recognised as the ‘dependent child’ of that Officer.

Superannuation Act 1976

The *Superannuation Act 1976* establishes the superannuation scheme, known as the Commonwealth Superannuation Scheme (CSS). The Superannuation Act specifies the circumstances where a CSS member is required or permitted to make contributions. The circumstances include where a member is on a period of unpaid maternity or parental leave.

The main amendments are in **items 54** and **57**. They insert into section 51A a reference to ‘de facto partner’ within the meaning of the Acts Interpretation Act and broaden the meaning of child to incorporate elements of the standard definition of child. Their effect is that a CSS member who is on unpaid maternity or parental leave related to the birth of a child of their de facto partner is not required to pay superannuation contributions during the leave but may elect to do so.

Schedule 8 – Foreign Affairs and Trade

Australian Passports Act 2005

The Australian Passport Act relates to the issuance and administration of Australian passports.

Item 1 makes a minor amendment to subsection 53(3) of the Australian Passports Act which is a miscellaneous provision relating to the name of the person to whom an Australian travel document (Australian passport or a travel-related document) is to be issued. **Proposed paragraph 53(3)(ca)** expands the list to include the name on a certificate, entry or record relating to the registration of a person’s relationship with another person. This proposed amendment will create parity between certificates of registration of a person’s relationship with that of birth certificates, citizenship certificates, marriage certificates and change of name certificates issued by a Registrar of births, deaths and marriages, for the purposes of the Australian Passport Act.

Export Market Development Grants Act 1997

The Export Market Development Grants Act governs an assistance scheme under which various Australian exporters are partially reimbursed expenses associated with the promotion of their products. The determination of whether a person is a ‘relative’ under

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

the Export Market Development Grants Act ‘is relevant to the assessment of allowable expenses for overseas marketing visits’.⁷⁸

Items 7, 8, 10 and 12 insert the commonly used definitions of ‘child’, ‘de facto partner’ ‘parent’, and the tracing rule for relatives into **proposed section 107** (definitions) of the Export Market Development Grants Act while **items 4 and 9** remove the term ‘de facto spouse’. ‘Relative’ currently includes the spouse of an individual and any individual who is, or is a spouse of, a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of that individual. Under the proposed amendment, relationships to an individual can also be traced to or through another individual who is:

- a de facto partner of the first individual
- an ex-nuptial or adoptive child of the first individual, or
- related to the first individual because of the definitions of ‘child’ and ‘parent’.

Trade Representatives Act 1933

The Trade Representatives Act relates to the appointment of Trade Representatives for the Commonwealth and for other purposes.

Item 14 expands the meaning of ‘members of a person’s family’ for the purposes of Ministerial determinations relating to conditions of service for Trade Representatives or an Officer appointed by a Trade Representative. The new definition in **proposed subsection 11(11)** is inclusive and incorporates the commonly used definition of ‘de facto partner’ (as defined in AIA), relationships of child and parent (that arise from the standard definition of ‘child’) and relationships traced through either of these types of relationships.

Commencement: Part 1 (changes to the *Australian Passports Act 2005*) commence on 1 July 2009. All other provisions commence the day after Royal Assent.

Schedule 9—Health and Ageing amendments

This Schedule contains amendments to Acts in the Health and Ageing portfolio to treat same-sex couples and their children in the same manner as heterosexual couples and their children.

Part 1—Amendments commencing on the day after Royal Assent

The two Acts which would be modified from the day after Royal Assent, the *Prohibition of Human Cloning for Reproduction Act 2002* and the *Research Involving Human Embryos Act 2002* regulate the use of human embryos and prohibit cloning. The definition of a spouse would be changed in both Acts to the standard definition and this

78. Explanatory Memorandum, p.109, para 621.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

would incorporate same-sex partners into the category of people who are authorised to consent to dealings with excess embryos.

Part 2—Amendments commencing on 1 January 2009

Health Insurance Act 1973 (The HIA)

The HIA covers Medicare, safety net entitlements and the rules governing services that attract a Medicare benefit.

Item 3 changes the definition of which deals an ‘Australian resident’. The definition makes reference to ‘another person’ who is the ‘spouse, parent or child’ of the person and who is an Australian citizen or someone who holds a permanent visa. The reference to ‘spouse, parent or child’ will be updated to reflect the same meaning to be given to the words in the *Migration Act 1958* (see discussion below).

Item 4 inserts new provisions regarding the definition of a child which stipulate that the ‘product of a relationship’ must be the biological child of at least one person in the relationship or be born to a woman in the relationship. This will affect the standard definition of the ‘product of the relationship’ to be inserted into **items 6** (definition of a dependent child), **8** (definition of a child covered by Part IIBA of the HIA which ‘creates civil penalty provisions and offences involving benefits and threats related to requests for pathology and diagnostic imaging services’) and **14** (the Australian Childhood Immunisation Register).

Item 5 inserts a new definition of who can be part of a registered family. The current provision stipulates that you can not be simultaneously treated as a member of more than one registered family, however the new definition stipulates that if you fall within the definition of a dependent child in relation to more than one registered family you can be simultaneously treated as a member of more than one registered family.

Item 7 replaces part of the definition of ‘spouse’ and clarifies that to meet the definition of a spouse the couple must not be living on a permanent basis, separately and apart from each other.

Items 12 and **13** insert standard definitions of ‘step-child’ and the tracing rules into section Part IIBA of the HIA (see above).

National Health Act 1953 (the NHA)

The NHA governs pharmaceutical, sickness and hospital benefits, and medical and dental services. The proposed amendments extend certain benefits to same-sex de facto partners and their dependent children:

- the Pharmaceutical Benefits Scheme (PBS) safety net entitlements as a family

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- certain concessional beneficiary entitlements for dependents, and
- provisions applicable to the spouse and children of members of a friendly society.

The proposed amendments would also clarify the following matters (as articulated by the Explanatory Memorandum):

- where ‘child and ‘parent’ are defined for certain provisions in the NHA, ‘child’ includes an adoptive child, a stepchild, and someone who would be a stepchild of a person except that the person is not legally married to their de facto partner
- a dependent child of a person’s spouse can be a member of the person’s PBS safety net family, and
- where the National Health Act sets out criteria for persons dependant on a concessional beneficiary, a child can be ‘dependant’ if the concessional beneficiary has the whole or substantial care and control of the child and the child is not otherwise a dependent child under the criteria.

Part 3—Amendments commencing on 1 July 2009

The changes to the *Aged Care Act 1997* are not proposed to come into operation for some time after passage of the Bill. In part this delay is due to the need to rearrange financial matters and raises issues for aged same-sex couples discussed above in the Background section above (‘Access to Social Security’).

Aged Care Act 1997 (the ACA)

The ACA provides for the funding, delivery of, and access to aged care. The proposed amendments would ensure that members of a same-sex de facto relationship who enter permanent residential aged care are treated in the same way as heterosexual couples.

This will mean that the new definition of children, parents and partner will be applied for the purposes of income and assets testing. The amount of a person’s aged care fees and accommodation costs are based on the value of his or her income and assets (assets being assessed at 50% of a couple’s combined assets and income at half the couple’s combined ordinary income).

Item 39 would ensure that when an aged care facility is subject to sanctions the Secretary, when considering who to contact and who is ‘concerned for the safety, health and well-being of a care recipient’, will incorporate individuals connected to the aged care resident through same-sex connections as well as the traditional ‘next of kin’.

Schedule 10—Immigration and Citizenship

The Minister for Immigration and Citizenship administers four pieces of primary legislation:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- *Migration Act 1958*;
- *Australian Citizenship Act 2007*;
- *Immigration (Education) Act 1971*;
- *Immigration (Guardianship of Children) Act 1946*.

Though the HREOC Report only recommended amendment to the Migration Regulations 1994,⁷⁹ all four pieces of legislation listed above are amended by the Bill to eliminate discrimination against same-sex couples and their children.

Australian Citizenship Act 2007

The Australian Citizenship Act outlines how non-citizens can acquire Australian citizenship, the circumstances in which it may cease and other related matters.

Items 1 and 4 insert the standard definitions of ‘child’ and ‘stepchild’ respectively into section 3 of the Australian Citizenship Act. As the existing definition of ‘child’ under the Australian Citizenship Act includes an adopted child, a step-child and an ex-nuptial child, the new definition proposed in the Bill similarly expressly includes such children as well as those that are the product of a relationship between persons of the same or different sex. **Item 3** inserts the commonly used definition of ‘de facto partner’ as defined in the AIA. These amendments will extend the range of persons who can be considered a child, stepchild and de facto partner for the purposes of the Australian Citizenship Act.

The commonly used definition of ‘parent’ is *not* to be inserted by the proposed amendments.⁸⁰ The term ‘responsible parent’ is defined in section 6 of the Australian Citizenship Act. Amongst other things, it provides that ‘the person is a parent of the child except where, because of orders made under the *Family Law Act 1975*, the person no longer has any *parental responsibility* for the child’ (emphasis added).⁸¹ Where previously

79. The Human Rights and Equal Opportunity Commission, *op. cit.*, p. 350. The Explanatory Memorandum indicates that complementary changes will be made to the Migration Regulations to reflect some of the changes made in the Migration Act by this Bill: Explanatory Memorandum, p.134, para 761.

80. This may affect eligibility for Australian Citizenship. For example ‘In the case of a child born as a result of surrogacy arrangements, it is a requirement for registration of citizenship by descent that there be a genetic link between a parent and the child in question and that that parent be recognised on the birth certificate... It is possible for a birth certificate to be issued where neither parent has a genetic link to the child but their names are included on the child’s birth certificate. If there is no genetic link with either parent, then in spite of the fact that the birth certificate is in their names, they should be requested to seek an adoption order and sponsor the child for an adoption visa: Department of Immigration and Citizenship, Australian Citizenship Instructions (ACIs), as at 1 July 2008.

81. Subsection 6(1)(a) of the Citizenship Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

the expression ‘parental responsibility’ took its meaning from the Family Law Act, **items 5 and 6** provide that the term will specifically have the same meaning as in Part VII of the Family Law Act. The Explanatory Memorandum explains that this amendment ‘prevents the Family Law Act meanings of ‘parent’ and ‘child’ from overriding the Citizenship Act definitions of these terms’.⁸² For further information on the definitions in the Family Law Act, the reader is referred to the discussion on the definition of ‘child’ in the Background section above.

‘Parental responsibility’ in relation to a child for the purposes of Part VII of the Family Law Act ‘means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children’.⁸³ According to the Explanatory Memorandum, this definition will now include parents in a de facto relationship who had a child through an artificial conception procedure.⁸⁴ This expanded definition is important in the context of the Australian Citizenship Act because the child of a ‘responsible parent’ may lose their Australian citizenship if the responsible parent ceases to be a citizen and the child does not have another responsible parent who is an Australian citizen.⁸⁵

Item 7 amends the way in which children born as a result of artificial conception procedures are dealt with under the Australian Citizenship Act. Where previously such children were only recognised if born to a married couple, **proposed section 8** recognises children born to de facto couples. However, children of both married and de facto relationships born as a result of artificial conception procedures will, under the proposed amendments only be considered the child of the woman and husband or de facto partner and *not* anyone else.⁸⁶ According to the Explanatory Memorandum, ‘this ensures that gamete donors are not considered to be parents for the purposes of the Citizenship Act’.⁸⁷

Item 11 amends subsection 22(10) to amongst other things limit eligibility for exercise of the minister’s discretion in relation to the residence requirement for the grant of citizenship to surviving spouses or de facto partners of Australian citizens who have *not* become partnered to another person after that person’s death.

82. Explanatory Memorandum, p.132, para 745.

83. Section 61 of the Family Law Act.

84. Explanatory Memorandum, p.133, para 752.

85. Section 36 of the Australian Citizenship Act. The term ‘responsible parent’ is also used in subsection 25(4) (cancellation of child’s approval) and subsections 28(3) and (4) (day citizenship begins) of the Australian Citizenship Act.

86. Proposed paragraph 8(2)(b).

87. Explanatory Memorandum, p.132, para 747.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Migration Act 1958

The purpose of the Migration Act is to regulate, in the national interest, the coming into, and presence in Australia of non-citizens.⁸⁸ Presently, the Migration Regulations 1994 contain definitions of various familial relationships such as ‘spouse’, ‘de facto partner’ and ‘parent’ which are used, amongst other things when assessing eligibility for the grant of visas. This Bill proposes to amend such definitions and transfer them into the Migration Act while at the same time expressly preserving the ability of the Migration Regulations to make provision in relation to the determination of the definitions.⁸⁹

Marital relationships

The term ‘spouse’ is not defined in the Migration Act but is defined in the Migration Regulations. They provide that a person is the spouse of another person if the 2 persons are *either* in a ‘married relationship’ (as defined) or in a ‘de facto relationship’ (as defined).⁹⁰

Presently, subregulation 1.15(1A) provides that persons are in a ‘married relationship’ if:

- they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and
- they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
- the relationship between them is genuine and continuing; and
- they either live together; or do not live separately and apart on a permanent basis.

The substance of this definition of ‘spouse’ will not change under the proposed amendments. Under the proposed definition any marriage between persons of the same-sex (whether entered into overseas or otherwise) will continue to *not* be recognised in Australia pursuant to the *Marriage Act 1961* (the Marriage Act) and consequently the Migration Act.⁹¹

88. Subsection 4(1) of the Migration Act.

89. See proposed subsections 5CA (2), 5CB(3), and 5F(3).

90. Reg 1.03 states that ‘spouse’ has the meaning set out in reg 1.15A.

91. Section 12 of the Migration Act provides that ‘For the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act, Part VA (Recognition of foreign marriages) of the *Marriage Act 1961* applies as if section 88E of that Act were omitted.’ Subsection 88E (1) of the *Marriage Act 1961* states that ‘subject to subsection (2), a marriage solemnized in a foreign country that would be recognized as valid under the common law rules of private international law but is not required by the provisions of this Part apart from this subsection to be recognized as valid shall be recognized in Australia as valid, and the operation of this subsection shall not be limited by any implication arising

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 21 will incorporate the definition of ‘spouse’ into section 5 of the Migration Act (the interpretation section). Importantly, the proposed definition of ‘spouse’ to be inserted into the Migration Act no longer includes persons in a de facto relationship which means that opposite-sex de facto relationships will no longer be considered to be ‘spousal’ in nature (for the purposes of the Migration Act).⁹² These amendments run counter to the recommendations made in the HREOC Report to retain the term ‘spouse’ to include those in a de-facto relationship.⁹³ However, to do so would remove the distinction between persons in a de facto relationship and those in a married (*de jure*) relationship - contrary to the Government’s view that marriage should only be between a man and a woman.⁹⁴

De facto relationships

Though the term ‘de facto partner’ or ‘de facto relationship’ are not defined in the Migration Act, the Migration Regulations define the term ‘de facto relationship’.

The proposed amendments do not incorporate the commonly used definitions of ‘de facto partner’, or ‘de facto relationship’ into the Migration Act (**item 20**). Instead, the proposed definition of ‘de facto relationship’ largely reflects the current definition of ‘de facto relationship’ in the Migration Regulations, with the notable exception that the new definition will expressly include persons in a same-sex relationship.

Though it is not clear whether a new de facto visa subclass will be created to do away with the term ‘interdependency’,⁹⁵ it appears the range of interdependency visas currently available are capable of accommodating persons in a de facto relationship (whether of the same or opposite sex).⁹⁶ Notwithstanding, there remain some concerns as to disparity between the ‘spouse’ visas and ‘interdependency’ visas. For example, the difference in the

from any other provision of this Part’. Note that section 88EA of the *Marriage Act 1961* provides that ‘a union solemnised in a foreign country between a man and another man; or a woman and another woman; must not be recognised as a marriage in Australia.’

92. Consequential amendments proposed in the Bill remove the term ‘de facto spouse’ from the Migration Act and replaces it with ‘de facto partner’ (see **items 55 and 75**).
93. The Human Rights and Equal Opportunity Commission, op. cit., p. 350.
94. As reflected in proposed subsection 5F(2). See also The Hon Robert McClelland, Attorney-General, ‘Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008’, House of Representatives, *Debates*, 24 September 2008, p. 15.
95. As **items 50, 51 and 54** remove of the term ‘interdependency’ from the Migration Act altogether.
96. Such as Subclass 110 of the Partner (Migrant) (Class BC), Subclass 310 of the Partner (Provisional) (Class UF), Subclass 826 of the Partner (Temporary) (Class UK) and Subclass 814 of the Partner (Residence) (Class BS).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

cost of visas, as highlighted in the HREOC Report⁹⁷ and the number of visas granted each year.⁹⁸

Another issue raised in the HREOC Report was the difficulty persons in a same-sex relationship have in proving to the Minister that they are in a genuine interdependency relationship, as compared with persons who are married and have a marriage certificate to submit as evidence of their relationship.⁹⁹ Under the commonly used definition of ‘de facto partner’ a deed of relationship (which evidences that a relationship has been registered) largely negates the need to demonstrate the circumstances to satisfy a definition of de facto partner.¹⁰⁰ However, the new definition of ‘de facto partner’ to be inserted into the Migration Act does *not* contain a provision expressly recognising such registrations for migration purposes.¹⁰¹ This may affect persons in an opposite or same-sex de facto relationship, residing in Australia that may be applying for a partner visa or are seeking to be included in the visa application of their de facto partner. Though such persons are not prohibited from registering their relationship under a State or Territory scheme,¹⁰² under this Bill, such registration will *not* have the express recognition under the Migration Act, as it will under other Commonwealth legislation.¹⁰³

97. The Human Rights and Equal Opportunity Commission, *op. cit.*, pp.345–346.

98. Spouse visas (subclass 309/100 and 820/801) are currently exempt from visa capping under sections 39 and 85 of the Migration Act. See: Department of Immigration and Citizenship, ‘Fact Sheet 21 - Managing the Migration Program’ <http://www.immi.gov.au/media/fact-sheets/21managing.htm>, accessed on 1 October 2008.

99. The Human Rights and Equal Opportunity Commission, *op. cit.*, p. 346.

100. The Hon Robert McClelland, Attorney- General, ‘Second reading speech: Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008’, House of Representatives, *Debates*, 4 September 2008, p. 7150.

101. Migration Regulation 1.15A(3) presently prescribes 19 aspects of a relationship that *must* be examined by the Minister in forming an opinion as to whether two persons are in a de facto relationship in relation to an application for various partner visas. In comparison, subsection 4(3) of Tasmania’s *Relationships Act 2003* lists only nine aspects of a relationship that *may* be relevant in a particular case in determining whether two persons are in a ‘significant relationship’. These factors closely resemble the list of eight factors that *may* be relevant in determining whether two people are in a de facto relationship for the purposes of the AIA.

102. For example, registration of a ‘significant relationship’ pursuant to Tasmania’s *Relationships Act 2003* is not limited to Australian citizens or permanent residents.

103. For example, though the Australian Citizenship Act applies largely to migrants, it adopts the commonly used definition of ‘de facto partner’ set out in the AIA rather than the more restrictive definition contained in **proposed section 5CB** of the Migration Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Though the definition of ‘member of the family unit’ will not be amended,¹⁰⁴ **item 25** amends existing subsection 83(1) to provide that de facto partners are to be included in any visa granted to their partner. Importantly, this amendment will enable persons in a same-sex relationship to migrate to Australia together, where previously such a right was reserved for persons in an opposite-sex spousal (including de-facto) relationship. This amendment is in keeping with HREOC’s recommendations.¹⁰⁵

Familial relationships

The term ‘parent’ is currently defined in the Migration Regulations.¹⁰⁶ The definition states that the term includes an adoptive parent and a step-parent. Therefore, a parent-child relationship can arise through:

- a biological relationship (where the child is the natural child of its parent)
- an adoptive relationship or
- a step-relationship.¹⁰⁷

Item 18 inserts the standard definition of ‘parent’ into section 5 of the Migration Act (the interpretation section). It provides that someone is the parent of a person if the person is his or her *child* as defined. **Item 20** inserts **proposed section 5CA** into the Migration Act which contains the standard definition of ‘child of a person’. However, in addition the Bill makes specific provision for persons who may end up with more than two parents. **Proposed subsection 5CA(2)** enables the Regulations to specify that a person will *not* be recognised as the child of another person, if the person would be the child of more than two persons for the purposes of the Migration Act. Importantly, such a scenario may not be too uncommon, as emphasised by HREOC,

... it is important to understand that gay and lesbian parenting arrangements often involve more than two people in the place of a parent. Where a male sperm donor is an active parent along with a lesbian couple, the recognition of parental status beyond

104. **Item 17** inserts a definition of ‘member of the same family unit’ into subsection 5(1) of the Migration Act while **items 22 and 23** make amendments to paragraph 36(2)(b) and 48A(2) of the Migration Act. These amendments essentially remove an inconsistency between the Migration Act and the Migration Regulations relating to the grant of protection visas.

105. The Human Rights and Equal Opportunity Commission, op. cit., p. 350.

106. Migration Regulation 1.03.

107. Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM3), as at 19 September 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

the lesbian couple may be appropriate. Similarly, it may be important to recognise the status of a birth mother to a gay couple.¹⁰⁸

Item 21 inserts a definition of ‘relationships and family members’ to accommodate the new definition of ‘child’. This definition adopts one of the more commonly used definitions to include:

- relationships between de facto partners (as defined in the Migration Act)
- relationships of child and parent that arise from the standard definition of child, and
- relationships traced through either of these types of relationships.

Immigration (Education) Act 1971

The *Immigration (Education) Act 1971* relates to the provision of English courses, English tuition and citizenship courses to immigrants and certain other persons.

Items 77 and 78 insert definitions of ‘child’ and ‘parent’ respectively into section 3 of the *Immigration (Education) Act*. Though the definitions rely on the standard definitions, both terms have the same meaning as in the Migration Act, as discussed above. This amendment will extend the range of persons who can be considered a child or parent of a person under the *Immigration (Education) Act*.

Immigration (Guardianship of Children) Act 1946

The *Immigration (Guardianship of Children) Act* governs the legal guardianship of minors (persons under the age of 18 years) who arrive in Australia unaccompanied.

Items 79 and 80 insert standard definitions of ‘parent’ and ‘relative’ respectively into section 4 of the *Immigration (Guardianship of Children) Act*. The definition of ‘relative’ includes:

- a parent of the person
- a step-parent or de facto partner (as defined in the AIA *not* the Migration Act) of the person
- a relative of the person traced through either of these types of relationships.

Commencement: Parts 2 and 3 (changes to the *Migration Act 1958* and the *Immigration (Education) Act 1971*) commence on 1 July 2009. All other provisions commence on a day to be fixed by Proclamation or six months after the day of the Royal Assent whichever is the sooner.

108. HREOC, Submission No. 34, Senate Legal and Constitutional Affairs Committee, ‘Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008’, 2008, pp. 18–19.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Schedule 11—Infrastructure, Transport, Regional Development and Local Government

Commencement: Generally the day after Royal Assent, although commencement of the carriers' liability amendments are tied to commencement of the Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008.

Civil Aviation (Carriers' Liability) Act 1959

The *Civil Aviation (Carriers' Liability) Act 1959* (the CACL Act) implements various international agreements setting out the liability of an air carrier for the death, injury or delay of a passenger.

The HREOC Report noted that the current lack of definitions of spouse, de facto spouse, child, parent, step-parent, and step-child in this Act would affect the provisions dealing with liability of an air carrier and the relatives of passengers in airline crashes.

The amendments are divided into three Parts which is required because of the additional ramifications of the recent amendments to the Act resulting from the 1999 Montreal Convention on carriers liability which has not yet come into force for Australia internationally.

Item 1 replaces the term 'de facto spouse' with 'de facto partner' in the definition of 'family member' at subsection 5(2) with the effect of expanding the range of persons to be considered a family member under the Act to include the same-sex partner of a passenger. The standard definition of 'de facto partner' is relied on. **Item 2** inserts the standard tracing rule regarding family relationships into subsection 5(2) with the effect of expanding the definition of 'family member'. **Items 3 to 7** insert the standard definitions of 'child' 'de facto partner', 'parent', 'step-child', 'step-parent' into subsection 5(1) with the effect of extending who can be considered a 'family member' of a passenger.

Items 8 to 14 are alternative amendments that would apply if the Montreal Convention comes into force for Australia at a date later than Royal Assent of this Bill.

Generally the amendments to the CACL Act in this Schedule would allow an air crash victims' same-sex partner and their family to enforce liability against the air carrier in accordance with the provisions of the Act.

Airports Act 1996

The *Airports Act 1996* sets up a system for regulating leased Federal airports and amongst other things limits ownership of airport-operator companies. The proposed amendments in the Bill affect the ownership provisions, particularly the meaning of 'associate' as set out in the definitions section in the Schedule of the Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Items 16–17 amend clause 2 of the Schedule to insert standard definitions of ‘child’ and ‘parent’ and **items 18** to 21 amend the definition of relative in clause 2 to include the standard definition of ‘de facto partner’; replace references to son and daughter with the term child; and insert the standard family tracing note.

The effect of these amendments is that in the context of the ownership provisions of the Airports Act, same-sex partners and their families are now included in the definition of ‘relative’ and therefore will broaden the meaning of an ‘associate’.¹⁰⁹

The amendments take effect six months after Royal Assent (**item 22**).

Navigation Act 1912

The *Navigation Act 1912* provides the legislative scheme for many of the Commonwealth’s responsibilities for maritime matters including ship safety and the employment and conditions of service of seafarers. The proposed amendments to this Act broaden the meaning of families so that any rights and responsibilities that affect the married spouses of seaman and their families will equally affect de facto same-sex and opposite sex partners and their families.

Items 23–28 insert the standard definitions of ‘child’, ‘de facto partner, parent’, ‘stepchild’, as well as clarifying the meaning of ‘members of a person’s family’.

Items 29–30 amend section 70 of the Navigation Act. This provision provides that a seaman may make allotments from his or her wages to certain persons, including grandparents, parents, wife, husband, brother, sister, child or grandchild. The effect of the amendments is to extend this payment facility to a seaman’s same-sex or opposite sex partner and related family.

Item 32 amends subparagraph 156(1)(b)(i) of the Navigation Act. This provision provides that in certain circumstances the property of a deceased seaman may be paid or delivered to his or her widow, widower or child. **Item 32** would remove the terms ‘widow’ or ‘widower’ and extend this entitlement to de facto partners of deceased sailors. The standard definition of child inserted by **item 23** (above) would also extend it to children of same-sex partners.

Items 34 and **35** amend section 157 of the Navigation Act. The provision provides that in certain circumstances the Australian Maritime Safety Authority may refuse to pay or deliver property of a deceased sailor to a person claiming under a sailor’s will, if they are not related ‘by blood or marriage’. The amendments repeal these words and replace them with the words ‘relative of the testator’. A relative of the testator includes:

109. Under clause 5 of the Schedule to the Airports Act an ‘associate’ is defined to include a relative of the person.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- the de facto partner of the testator as defined in the Acts Interpretation Act
- a child of the testator according to the standard definition of child, and
- anyone else who would be a relative of the person because of these relationships.

Items 37 to 39 amend section 158, the provision relating to creditors' claims on the property of a deceased seaman. The amendments remove references to 'widow' and 'widower' and replace with references to 'the married partners and de facto partners of deceased sailors' and broaden the meaning of 'next of kin' to include children and relatives according to the standard definition of child.

Schedule 12—Innovation, Industry, Science and Research

Pooled Development Funds Act 1992

Commencement: The day after Royal Assent.

Schedule 12 contains amendments to the *Pooled Development Funds Act 1992* to remove differential treatment of same-sex couples and their children. This Act establishes a scheme under which companies providing capital to small and medium sized Australian companies can become pooled development funds (PDFs), which entitles those companies to more competitive tax treatment.

The HREOC Report noted that under the current Act there is no definition of child or parent and that the definition of 'de facto spouse' excludes a same-sex partner. These omissions have an effect on the definition of 'associate' and therefore on the operation of section 31. Section 31 provides that a person together with *associates* of the person must not hold more than 30% of the issued shares in a PDF.

The amendments insert the standard definitions of 'child', 'parent', and 'de facto partner' and amend the definition of 'associate' appropriately. The effect of the amendments is to extend the range of persons who can be considered an associate of a person who is a shareholder in a PDF to include same-sex partners and their families.

Schedule 13—Prime Minister and Cabinet amendments

Commencement: 1 July 2009

Privacy Act 1988

The *Privacy Act 1988* regulates the collection, holding, use, disclosure, correction and transfer of personal information of individuals by Commonwealth agencies and by private sector organisations. Central to the Act are privacy principles (Information Privacy Principles and National Privacy Principles) that agencies and organisations must adhere to.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The Privacy Act contains several references to the term ‘family’.¹¹⁰ The Act does not define the meaning of family and therefore the term would take its ordinary meaning which may not extend to same-sex partners and their families. **Item 1** inserts in **proposed subsection 6(10)** a definition to extend the ordinary meaning of the term ‘family’ to include a de facto partner, a child of the person and anyone else that is considered to fall within this category when the de facto partner or child is recognised as ‘a member of the family’. The standard definitions of child and de facto partner are relied on.

The remaining amendments to the Privacy Act (**items 2-7**) affect one of the National Privacy Principles that deal with disclosure of personal information. Specifically subclause 2.4 of Schedule 3 of the Privacy Act deals with disclosure by a health service provider of health information about an individual to a *person responsible* for the individual. Subclause 2.5 defines the meaning of ‘person responsible’ to include amongst other things a parent, child or sibling, spouse or de facto spouse, a relative or guardian. The amendments in the Bill replace the term ‘de facto spouse’ with the term ‘de facto partner’; insert the standard definitions of ‘de facto partner’ and ‘step child’; and expand the existing definitions of child, parent and relative to include the standard definitions. The effect of the amendments is that same-sex de facto couples and their families would be included in the meaning of ‘a person responsible’ for the purposes of disclosure of health information.

Schedule 14—Treasury amendments

Commencement: The day after Royal Assent.

Part 1—Amendment of tax laws

The analysis relating to the tax legislation does not follow the order of the items numbers but rather is set out according to themes.

Tax legislation in general

There are two principal pieces of federal income tax legislation, the *Income Tax Assessment Act 1936* (Cth) (ITAA36) and the *Income Tax Assessment Act 1997* (ITAA1997). This legislation covers a variety of issues related to personal income taxation, including how to assess tax liability and various income deductions and tax offsets. In addition, the federal government assesses fringe benefits tax on employers under the *Fringe Benefits Tax Assessment Act 1986* and goods and services tax under *A New Tax System (Goods and Services Tax) Act 1999* and related legislation.

110. Specifically in subsection 6(1), section 6D and section 16E.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

HREOC Report on tax legislation

The HREOC Report noted that under existing tax legislation same-sex couples are not eligible for a range of rebates and tax concessions available to opposite-sex couples. This means same-sex couples may end up paying more tax than opposite-sex couples because tax legislation does not recognise their relationship. The report further notes that some children raised by same-sex couples are not recognised as the children of both members of that couple for the purposes of tax law. This may also mean that same-sex parents and their children may miss out on tax benefits intended to help families.

The problem arises as a result of the definitions of ‘spouse’ and ‘child’ in the relevant taxation legislation. The definition of ‘spouse’ excludes a person in a same-sex couple. The definition of ‘child’ does not encompass a child born to a lesbian co-mother or gay co-father.

The proposed amendments in Schedule 14 of the Bill are aimed at addressing this issue of differential treatment of same-sex couples and their families.

Definitions of family relationships for tax legislation

Items 90–95 of Schedule 14 are central to the amendments to the tax legislation. They insert into the ITAA97 standard definitions that are to be generally relied on through all parts of the tax legislation that deals with family relationships.

Item 90 inserts **proposed Subdivision 960-J** into the ITAA97 to define certain family relationships for the purposes of the tax legislation.

The two objects of the Subdivision are to ensure that, where the Subdivision applies:

- the same consequences flow from the relationship two people have as an unmarried couple as from a marriage, if their relationship is registered in a State or Territory relationship register or if they live together on a genuine domestic basis, and
- anyone who is defined to be an individual’s child by section 995-1(1) is treated in the same way as if he or she were the individual’s natural child (**proposed section 960-252**).

Proposed section 960-255 of the ITAA97 provides for the recognition of these family relationships. **Proposed subsection 960-255(1)** provides recognition to relationships traced through relationships between couples. If one individual is the *spouse* of another individual (as newly defined in subsection 995-1(1) below), the couple will be considered to be members of each other’s family.

Proposed subsection 960-255(2) provides recognition to relationships involving children. It recognises as relatives of a child the relatives of a person who is the parent of a child as

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

a result of adoption, a step-relationship, or because the child is the product of a relationship the person had as a couple with another person.

These tracing rules are to apply in other tax Acts (including the ITAA36 and the FBT Assessment Act) where definitions of child, parent, relative or spouse would be relevant (**proposed subsection 960-255(3)**).

Definition of spouse

Spouse is currently defined in subsection 995-1(1) of the ITAA97 to include a person who, although not legally married to the person, lives with the person on a genuine domestic basis as the person's husband or wife. **Item 95** repeals and replaces the definition to expand the ordinary meaning of 'spouse' to include:

- another individual (whether of the same or opposite sex) with whom the individual is in a registered relationship as set out in new section 22B of the Acts Interpretation Act,
- another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple.

It is of interest that the drafter considered it important to add the qualification of both same and opposite sex relationships to one part of this definition but not to the other. This is in contrast to the definition of 'de facto relationship' inserted into other parts of the tax legislation where in some cases the qualifier is there for both parts of the definition (see for example **item 36**).¹¹¹

Definition of child

The meaning of 'child' of a person is currently defined and expanded in subsection 995-1(1) of the ITAA97 to include the person's adopted child, step-child, or ex-nuptial child. **Item 91** repeals and replaces this definition. The new definition of child preserves these existing categories of recognised children and adds:

- a child of the individual's spouse
- someone who is the product of a relationship the individual has or had as a couple with another individual (whether of the same sex or different sex). A person cannot be a product of a relationship unless they are biologically related to at least one of the people in that relationship, or are born to a woman in the relationship.

The definition provides recognition of children of all de facto relationships (both opposite sex and same-sex) and is closely based on the standard definition of child as set out in other Schedules of the Bill.

111. However it is consistent with **item 1, subsections 7(1) and (1A)** in the Medicare Levy Surcharge Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Definition of parent

Item 92 inserts a definition of ‘parent’ into subsection 995-1(1) of the ITAA97. The definition provides that someone is the parent of anyone who is their ‘child’ (as newly defined).

Definition of ‘relative’

The existing definition of relative in subsection 995-1(1) of the ITAA97 remains, but will be affected by virtue of the new definitions of spouse, child and parent. Also, **item 94** inserts a note at the end of the definition of relative referring the reader to the possibility that section 960-255 of that Act, which provides rules for determining when certain family relationships are recognised, may affect it.

Medicare Levy Surcharge

The *A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Act 1999* imposes a Medicare levy surcharge of 1 per cent of income on taxpayers where their income exceeds a certain threshold and they do not have private patient hospital insurance. The Act also requires the value of a taxpayer’s fringe benefits to be included as income for determining liability for the Medicare levy surcharge. HREOC in its report noted the following inequity:

For the 2005-2006 tax year, the surcharge threshold was \$50 000 for an individual and \$100 000 for a family. The family threshold increases by \$1500 for each dependent child when there is more than one. The family threshold is met by a person’s taxable income plus the taxable income of a spouse.¹¹²

The HREOC Report noted that a same-sex couple can be disadvantaged in relation to the Medicare levy surcharge because taxpayers who are in same-sex relationships are assessed under the individual rate rather than the rate for families. For example, if one partner in a same-sex couple was earning \$40 000 and the other \$59 000 the latter partner would be required to pay a surcharge of \$590 because \$59 000 is over the \$50 000 individual threshold. However, an opposite-sex couple in the same situation would not pay any surcharge because the joint income of the two partners (\$99 000) is under the family threshold of \$100 000.¹¹³

Existing subsection 7(1) of the Medicare Levy Surcharge Act expands the ordinary meaning of ‘married’ for the purposes of the Act to include opposite-sex de facto couples

112. The Human Rights and Equal Opportunity Commission, op. cit., paragraph 8.9.2.

113. J Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children', Inquiry Research Paper, September 2006, available at: <http://www.humanrights.gov.au/samesex/index.html>, p. 43, footnote 219 in the Human Rights and Equal Opportunity Commission, op. cit., paragraph 8.9.2.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

who have lived together as husband and wife on a bona fide domestic basis, although not legally married to each other.

Item 1 repeals and replaces **subsection 7(1)** to expand this definition to include de facto same-sex couples. **New subsection 7(1)** states that for the purposes of the Act, the use of the term married is extended so that it applies to two persons (*whether of the same or opposite sex*) as if they were married to each other for a period if:

- their relationship was a prescribed registered relationship for that period as set out in new section 22B of the Acts Interpretation Act,¹¹⁴ or
- they lived together in a relationship as a couple on a genuine domestic basis for the period, although not legally married to each other.

This essentially replicates the definition of ‘spouse’ as described above.

Item 1 also inserts **proposed subsection 7(1A)** to qualify this definition. For the purposes of the Act, someone who is legally married or in a registered relationship is treated as not being legally married or in that registered relationship if they are living in a genuine domestic relationship with someone else.

Fringe Benefits

The *Fringe Benefits Tax Assessment Act 1986* provides for the assessment of the amount of tax payable by an employer for benefits provided to its employees and their associates.

The HREOC Report noted several issues regarding discriminatory treatment in relation to same-sex relationships and fringe benefits tax (FBT).

For example, FBT is assessed on an employer who provides benefits such as loans, free housing or other benefits to an employee or his or her ‘associates’. Under the existing Act a same-sex partner is not an ‘associate’. An ‘associate’ includes a ‘spouse’, ‘relative’, or ‘child’. The FBT Assessment Act defines all these terms by reference to the ITAA97. This means that under the existing legislation a same-sex partner and his or her relations would not be included when considering liability for FBT.

Another example of discriminatory treatment is that same-sex partners are not covered by a range of FBT exemptions available to a ‘spouse’. For example, FBT is not payable on the provision of accommodation, residential fuel and meals to a residential employee during a period of accommodation for a ‘spouse’ or ‘child’¹¹⁵.

The changes required to remove this discriminatory treatment are done mainly through the amendments to the ITAA97 described above under the heading *Family relationships in tax*

114. See above at p. 21 and p. 12 of the Digest.

115. FBT Assessment Act, sections 58, 58T, 58U.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

legislation. For example the definition of ‘associate’ will have a new meaning because of the insertion of the new definitions of ‘spouse’ and ‘child’ in the ITAA97 which broaden the meaning of these terms to encompass same-sex couples and their families.

The amendments to the FBT Assessment Act are therefore minor. **Items 3 to 5** are linking amendments. They point to definitions of ‘parent’ and ‘relative’ in the ITAA97 that may affect the meaning of these terms under the FBT Assessment Act.

Medicare Levy

The Medicare levy is a tax imposed upon personal incomes to fund the Medicare scheme. The Medicare levy is 1.5% of an individual’s taxable income.¹¹⁶ However, at low levels of income the levy may reduce according to either individual or family income.

The HREOC Report noted that it may be harder for a same-sex family to get an exemption. A taxpayer in a same-sex relationship can only receive an exemption if his or her income is under the individual income threshold exemption. This may be an advantage or disadvantage to a same-sex couple – depending on the income levels of each member of the couple.

Part VIIB of the ITAA36 relates to the Medicare levy and the Medicare levy surcharge. Existing subsection 251R(2) provides a definition of de facto relationship for the purposes of imposition of the levy. **Item 33** repeals the existing definition and replaces it with a definition that is inclusive of same-sex de facto relationships. **Proposed subsection 251R(2)** will provide that Part VIIB and any Act imposing the Medicare levy will apply to two persons (whether of the same or opposite sex) as if they were married if:

- their relationship is registered under a law of a State or Territory prescribed for the purposes of subsection 22B of the Acts Interpretation Act, or
- they lived together in a relationship as a couple on a genuine domestic basis, although not legally married to each other.

The definition is qualified to the extent that someone who is legally married or in a registered relationship is treated as not being legally married or in that registered relationship if they are living in a genuine domestic relationship with someone else. In other words only one relationship will be recognised during any period (**proposed subsection 251R(2A)**).

The definition of ‘dependant’ does not require amendment as same-sex couples and their families will automatically be included by virtue of the new definitions of ‘spouse’ and ‘child’ to be inserted into the ITAA97.

116. Medicare Levy Act, section 6.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Transfer of property at family breakdown—tax implications for same-sex relationships

Many of the proposed amendments in Schedule 14 of the Bill relate to provisions dealing with tax implications on the transfer of property on the breakdown of family relationships.

Following a family breakdown the transfer of property to a spouse or child may attract favourable tax treatment.¹¹⁷ Further, income earned on property held for the benefit of a child after a relationship breakdown may also be eligible for favourable treatment.

The HREOC Report highlighted that these concessions are not available to same-sex families. As it noted, favourable capital gains tax treatment is available for transfer of property to a ‘spouse’ or ‘former spouse’ following a relationship breakdown. However, a transfer to a same-sex partner is not a transfer to a ‘spouse’ so same-sex couples do not enjoy these benefits.

The burden of this discrimination is described in a recent decision of the Administrative Appeals Tribunal quoted in the HREOC Report.

In The Roll-over Relief Claimant and Commissioner of Taxation the applicant and her partner faced a bill for capital gains tax of \$19 262 and \$22 780 respectively on relationship breakdown. An opposite-sex couple in the same situation would pay no capital gains tax on this property transfer.¹¹⁸

Favourable tax treatment is also available for income earned on property that has been transferred to a child, or a trustee on behalf of a child, if such a transfer is ‘the result of a family breakdown’.¹¹⁹ Without this favourable tax treatment, the income would be taxable at a penalty rate.

Under paragraph 102AGA(2)(a) of the ITAA36 a family breakdown occurs when:

a person ceases to live with another person as the spouse of that person on a genuine domestic basis (whether or not legally married to that person).

Since a same-sex partner is not a ‘spouse’ this provision does not cover a separating same-sex couple.

The effect of the family breakdown provision is that a same-sex couple transferring property to a child (or a trustee on behalf of a child) when their relationship breaks down

117. As explained by Miranda Stewart: Effectively, the tax on any capital gain in the assets transferred to the spouse is deferred and the gain is taxable only on the subsequent disposal of those assets by the spouse. Miranda Stewart, Submission to HREOC inquiry 266.

118. The Human Rights and Equal Opportunity Commission, *op. cit.*, paragraph 8.10.1.

119. ITAA36, subparagraph 102AE(2)(b)(viii).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

will be taxed at the top marginal rate. An opposite-sex couple in the same situation will be taxed at normal marginal rates, which usually are much lower.

Item 15 repeals the definition of ‘de facto marriage’ in section 102AAB of the ITAA36, a special definitions section relating to trusts. The concept of ‘de facto marriage’ extends to opposite-sex couples who have lived together as husband and wife on a bona fide domestic basis, although not legally married to each other. **Item 16** inserts a definition of ‘de facto relationship’ into this section. It replicates the current definition of ‘de facto marriage’ but applies it equally to same-sex and opposite sex relationships and extends it to cover relationships registered under prescribed state or territory laws.

Items 21– 28 make amendments to **section 102AGA** of the ITAA36 which is the provision that defines the meaning of the transfer of property as the result of a family breakdown for taxation purposes. They are essentially consequential amendments resulting from the amended definitions of ‘spouse’ and ‘parent’ in the ITAA97 and reflect the inclusion of same-sex couples and their families in any provisions dealing with family.

Subdivision 272–D of Schedule 2F of the ITAA36 deals with family trusts. Subsection 272-90(2A) provides that certain former family members are members of a person’s family group in relation to conferral of a present entitlement to, or a distribution of, income or capital of a company, partnership or trust, upon or to the person. **Items 51– 54** amend **subsection 272-90(2A)** to broaden the range of people and to avoid differential treatment for same- sex de facto families including former or deceased partners and step children.

Section 272–140 contains relevant definitions for the purposes of the provisions dealing with family trusts. **Item 56** repeals the definition of ‘breakdown in the marriage’ and **item 57** inserts a definition of ‘breakdown in the marriage or relationship’. The definition provides that there is a breakdown in the marriage or relationship of an individual if the individual is living with another individual in a genuine domestic relationship as a couple (whether the individuals are of the same or opposite sex, and whether legally married or not) and ceases to do so.

CGT roll-over and family breakdown

Section 126-5 of the ITAA97 provides a capital gains tax (CGT) roll-over in certain circumstances where assets are transferred from an individual to his or her spouse or former spouse under a court order relating to the breakdown of their relationship. Under the existing law, a CGT roll-over is available in particular circumstances including: if there is a court order under the *Family Law Act 1975* or a corresponding foreign law or a court order under a state or territory law or foreign law relating to marriage or de facto marriage breakdowns (which only applies to opposite sex de facto breakdowns).

Items 71–74 amend this provision with the effect of extending the provision to cover transfers of assets because of a court order under the *Family Law Act 1975* or under a state

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

or territory law, or foreign law relating to breakdowns in a relationship between *spouses*. Because of the new definition of spouse this will extend the provision to cover breakdowns in same-sex relationships. The amendments also extend the provision to cover state or territory laws relating to marriage breakdowns.

Items 75–78 make similar amendments to **section 126-15** of the ITAA97. The section currently provides a CGT roll-over if assets are transferred from a company or trustee as a result of the breakdown of a family relationship.

Items 80–83 make similar amendments to **section 126-140** of the ITAA97. The section currently provides a CGT roll-over in certain circumstances involving the transfer of an interest in a small superannuation fund as a result of the breakdown of a family relationship.

Application dates of tax legislation amendments

The amendments to the tax laws have various application dates. The amendment of the Medicare Levy Surcharge Act, the ITAA36 and the ITAA97 would apply from the 2009–2010 year of income and subsequent years (**items 2, 58 and 96** respectively). The amendments which affect the FBT Assessment Act would apply in relation to the FBT year starting on 1 April 2009 and subsequent years (**item 6**).

Part 2—Amendment of market regulation laws

Financial Sector (Shareholdings) Act 1998

The Financial Sector (Shareholdings) Act enables the government to regulate merger and acquisition activities concerning financial sector companies. Under Part 2 of the Act, the term ‘associate’ is used to determine a person’s stake in a financial sector company (which includes shareholdings of the person’s associates), or whether a person has practical control of a financial sector company (which includes the control or influence of the person’s associates).

Under existing clause 4 of Schedule 1¹²⁰ of the Act, the term ‘associate’ includes a ‘relative’ of the person. The term ‘relative’ is defined in clause 2 to include the person’s spouse, parent, son or daughter and another person who, although not legally married to the person, lives with the person on a bona fide domestic basis as the husband or wife of the person. These terms do not include same-sex partners and their children.

Items 98 and 99 would insert standard definitions of ‘child’ and ‘parent’ into clause 2 of Schedule 1 of the Act. **Items 100–102** amend the definition of ‘relative’ in clause 2 to insert the standard definition of de facto partner, insert a standard tracing rule for

120. The term ‘clause’ is used to describe provisions in a ‘schedule’ attached to an Act, rather than in the Act itself.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

determining when certain family relationships are recognised; and remove references to ‘son’ and ‘daughter’ and replacing them with the term ‘child’.

The effect of these amendments is to broaden the meaning of relative to include same-sex couples and their families. This would in turn broaden the definition of ‘associate’ and as a result, same-sex partners and their children will be subject to the same statutory limits in regard to company ownership as opposite-sex partners, their children and relatives.

Foreign Acquisitions and Takeovers Act 1975

The amendments to the *Foreign Acquisitions and Takeovers Act 1975* (the Act) affect the meaning of ‘associate’. Under the Act if a foreign person alone or together with any associates is in a position to control not less than 15 per cent of the voting power or issued shares of a corporation they are subject to the Act and required to seek approval from the Treasurer for any acquisition beyond this level.

Items 108–110 insert into the definition of ‘associate’ in section 6 the standard definition of ‘de facto partner’, remove references to son or daughter; insert the term ‘child’ with its standard definition; and the standard tracing rule regarding certain family relationships.

The effect of these amendments is to broaden the meaning of ‘associates’ to include both same-sex and opposite sex de facto partners and their families. As a result, same-sex partners and their children will be subject to the same statutory limits in regard to company ownership as opposite-sex partners, their children and relatives.

Insurance Acquisitions and Takeovers Act 1991

The amendments to the Insurance Acquisitions and Takeovers Act affect the meaning of ‘associate’. The term ‘associate’ is used in the Act to determine the level of a person’s acquisition in relation to an insurance company (which includes the acquisitions of the person’s associates), or a person’s influence over directors of an insurance company (which includes the influence or control of the person’s associates).

The amendments essentially replicate the amendments to the Financial Sector Shareholdings) Act discussed above. **Items 112 to 118** amend the definition of ‘relative’ to include same-sex partners and their families. This in turn broadens the definition of associate and as a result same-sex partners and their families would be subject to the same statutory limits in regard to insurance company ownership as opposite-sex partners and their families.

Life Insurance Act 1995

The amendments to the Life Insurance Act affect provisions which refer to spouse and other family members.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Section 204 of the Life Insurance Act provides that the rights or interests of a person under his or her life policy, or a life insurance policy of his or her *spouse*, is not liable to be used in discharging a debt owed by the person. The existing definition of spouse includes opposite sex de facto couples but not same-sex de facto couples. **Item 120** would insert the words ‘or de facto partner’ after ‘spouse’ in this section with the effect of allowing same-sex couples to have the protection afforded by this provision. The standard definition of ‘de facto partner’ is inserted by **item 126** and the existing definition of spouse is removed by **item 128**.

Sections 211 and 212 of the Life Insurance Act currently allows an insurance company to make payment under certain life policies to the *spouse, father, mother or other relatives* of the deceased, without requiring a letter of probate or administration, where the amount payable under the life policy is under \$50 000. The use of the term spouse currently would prevent payments to be made to a same-sex partner of a deceased person or their children.

Items 121 to 124 would amend these two provisions by inserting the terms ‘de facto partner’, and ‘parent’; removing the words ‘father’ and ‘mother’; and inserting the standard tracing rule for families. The standard definitions of ‘child’, ‘de facto partner’ and ‘parent’ inserted by **items 125 to 127** would also be relied on.

The effect of these amendments is that life insurance companies would be permitted to make payments to the same-sex partner of a deceased person or their children where the total amount payable is under \$50 000. They would only apply to life policies of individuals who die on or after the date of Royal Assent (**item 129**).

Part 3—Amendment of the *Corporations Act 2001*

The Corporations Act forms part of a national regulatory framework for corporations and the securities and futures sectors in Australia.

The effect of the amendments would be to remove differential treatment of same-sex couples from the Corporations Act. **Item 143** is the most significant amendment. It inserts into section 9 a new definition of spouse to include a de facto partner of the person within the meaning of the Acts Interpretation Act. This definition further impacts on the meaning of ‘close associate’, ‘immediate family member’ and ‘related entity’. Other amendments include insertion of the standard definitions of ‘child’ and ‘parent’ and clarification on the meaning of family relationships.

By including same-sex partners and their families within these definitions, the amendments would, amongst other things, have the effect of further limiting the range of people who can receive benefits from companies. For example under section 200D of the Corporations Act, directors and other office holders of companies and their spouses and relatives must not receive certain benefits from the company. The amendments would mean that office holders’ same-sex partners and their families would also be subject to this provision.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Schedule 15—Veterans' Affairs amendments

Introduction

The amendments presented in Schedule 15 propose to amend the *Veterans Entitlements Act 1986* (VEA), the *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Defence Service Homes Act 1917* (DSHA) to remove the differential treatment of same-sex couples in these acts. Hitherto, the VEA has been very much like the *Social Security Act 1991* (SSA) in regarding persons in a partner-like relationship as only applying to persons of the opposite sex.

Defence Service Homes Act 1918

Item 1 proposes to insert a definition of 'de facto partner' into subsection 4(1) of the DSHA that refers to the definition of de facto partner in the *Acts Interpretation Act 1901* (AIA). Section 4 in the DSHA is the interpretation section setting out the definitions of terms used in the Act. Currently, subsection 4(1) of the DSHA does not contain a definition of 'de facto partner'.

Item 2 proposes to add after the word 'married' in the definition of 'dependent parent' in subsection 4(1) the words 'and did not have a de facto partner'. This definition will broaden the application of 'dependent parent' in the DSHA to include cases where the deceased person was not either married or in a de facto relationship.

Item 6 inserts a definition of 'parent' into subsection 4(1) of the DSHA which is consistent with recognising same-sex relationships.

Item 7 proposes to delete the current definition of 'widow' in subsection 4(1) and **item 8** proposes a replacement definition of 'widow'. The replacement definition of 'widow' uses the new term 'de facto partner'. **Item 10** does the same as **items 7** and **8**, but in reference to the definition of 'widower' in subsection 4(1), using the new term 'de facto partner'.

Items 9 and **11** detail that these new definitions of 'widow' and 'widower' proposed to be inserted into the DSHA are to apply from 1 July 2009.

Items 12 to **32** make consequential amendments to various sections and parts of the DSHA replacing terms such as 'wife' and 'husband' with 'spouse or de facto partner'.

Military Rehabilitation and Compensation Act 2004

Item 34 proposes to insert a definition of 'child' into section 5 of the MRCA, being the definitions section of the act. This 'child' definition is consistent with the child definition used in this Bill, to be applied to various Acts amended by the Bill. Likewise **item 35**

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

proposes to insert a definition of ‘parent’ into section 5 of the MRCA, being the definition of parent that hangs off the child definition in **item 34**.

Item 36 proposes to delete references to a person of the opposite sex in the partner definition in section 5 of the MRCA. This will allow persons of the same-sex, who are living with another person of the same-sex on a genuine domestic basis, to be considered as partnered. Under the current wording only persons of opposite sex can be regarded as partnered.

Item 39 inserts a new definition of ‘stepchild’ into section 5 of the MRCA and this definition is consistent with other definitions of ‘stepchild’ in the Bill. Likewise **item 40** does the same inserting a new definition of ‘step-parent’.

Items 42, 44 and 45 present amendments to replace gender specific language such as ‘son’ or ‘daughter’ with non-gender specific language such as ‘child’.

Item 43 proposes to replace section 16 of the MRCA – the adoptive relationships definition section with a **new section 16** encompassing broader definitions of adoptive relationships for the purposes of the MRCA.

Veterans’ Entitlements Act 1986

Item 52 proposes to amend the definition of ‘widow’ in subsection 5E(1) of the VEA to remove references to a ‘widow living with a man’ to a widow living with a person’. Broadly the changes will de-genderise the terms ‘widow’ and ‘widower’ in the VEA. In other Acts, the Bill removes terms like ‘widow’ and ‘widower’ but this is more difficult within the VEA because of the existence of the War Widow’s/er’s Pension in the VEA and the extensive use of these terms in the VEA. This will mean that a widow will be able to include a woman who was living with another person of the same-sex, not just a woman living with a man. **Item 53** does likewise but for the definition of ‘widower’ living with another person of the same sex, not just living with a woman.

Items 54 to 56 amend the definition of ‘member of a couple’ in the VEA to include persons of the same-sex.

Item 60 deletes the current definition of a ‘parent’ in subsection 5F(1) of the VEA and refers to the new broader definition of ‘parent’ in section 10A to be inserted by **proposed item 73**.

Item 61 proposes to insert a new definition of ‘step child’ into subsection 5F(1) to provide for a child to be the step-child of non-married parents. **Item 62** proposes to insert a definition of ‘step-parent’ into subsection 5F(1) and encompasses a person who is the de facto partner of a parent of a child.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Paragraph 5G(1A)(b) of the VEA encompasses the consideration of a persons family relationships in Australia to aid in determining if the person is resident in Australia. **Item 63** inserts new sub-sections 5G(1AB) to include what will be a family relationship.

Items 64 and **65** propose to amend the current gender specific definitions in the VEA like ‘father’, ‘mother’, ‘son’ and substitute other non-gender specific definitions like ‘parent’, ‘child’ and ‘brother or sister of the person’.

Item 69 proposes to amend paragraph 5R(5)(b) of the VEA which refers to definitions of illness separated couples. There are definitions of illness separated couples and non-illness separated couples used in the VEA. Illness separated couples commonly refers to where one of a couple goes into hospital for a prolonged period or goes to reside at another address to seek medical treatment. They are still regarded as a couple. It can also refer to where one of a couple goes into a nursing home – again they are still regarded as a couple but each can be paid the single rate as they are living apart on a long-term basis. Non-illness separated couples can be terminology that can be used to refer to separated couples who have separated for other reasons, commonly relationship breakdown. References to the ‘matrimonial’ home are replaced with references to ‘their’ home. This amendment has the intention that such illness separated couples are still regarded as couples and not deemed to be separated.

Item 70 proposes to amend definitions in section 10 of the VEA which refer to the definition of a child of a veteran or other person to replace gender specific terms like ‘father’, ‘mother’ and ‘woman’.

Item 73 proposes to insert a new definition of ‘parent of a person’ into section 10 of the VEA. The definition proposed is quite broad and makes no gender requirements but does require the child to be a biological child of one of the persons in the relationship or was born to a woman of the relationship. This definition therefore will include same-sex parental relationships and is consistent with the standard definitions applied throughout the Bill.

Items 74 to **76** proposes to amend references in the VEA to ‘marriage-like and ‘married to’ to ‘de facto’.

Items 77 and **78** propose amendments to the compensation provisions in the VEA in Division 5A. The term ‘the spouse’ is to be replaced with the term ‘partner or non-illness separated spouse’ thereby applying the compensation provisions to all situations of same-sex or opposite sex de facto relationships.

Items 81 to **84** propose amendments to the VEA in reference to partner service pension. A former partner of a service pensioner can continue to receive partner service pension even though separated from the former service pensioner partner. Service pension stops if they move into a marriage-like relationship but currently this only applies where the new partner is a person of the opposite sex. The amendments in **items 81** to **84** will provide for

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

the cessation of qualification to partner service pension where the person moves into a marriage-like relationship with a person of the same or opposite sex.

Items 86 to 89 proposes amendments similar to those presented in **items 81 to 84** but in reference to a partner service pension being received after the death of the service pensioner. A former partner of a service pensioner can receive partner service pension after the death of their service pensioner partner. However, they cease to qualify if they enter a marriage-like relationship. Currently, this only refers to a marriage-like relationship with a person of the opposite sex, so the amendments proposed in **items 86 to 89** will provide for the cessation of qualification to partner service pension where the person moves into a marriage-like relationship with a person of the same or opposite sex.

Items 90 to 95 propose amendments to the definitions of ‘child’ and ‘relatives’ in various sections in the VEA. The amendments will align these definitions with the standard definitions applied throughout the Bill.

Item 96 is a savings provision proposed to be inserted into the VEA with reference to the proposed amendments to **subsections 38(2A) and 38(3A)** of the VEA (**Items 81 to 84** of Schedule 15 of this Bill), which refers to qualification to partner service pension. The savings provision is to apply the proposed amendments in respect of qualification to partner service pension from 1 July 2009 onwards.

Concluding comment

Contrary to the HREOC Report suggestion that ‘All it takes is a few changes to the definitions in some federal laws’, the Bill is long and complex and has raised many serious issues. The Government has foreshadowed that it will introduce further amendments and it will be interesting to see how these address concerns. The time frame for consideration of the Bill has perhaps not been commensurate with the complexity of the issues.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

© Copyright Commonwealth of Australia

This work is copyright. Except to the extent of uses permitted by the *Copyright Act 1968*, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

This work has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Feedback is welcome and may be provided to: web.library@aph.gov.au. Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Entry Point for referral.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2438.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.