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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

LEGISLATION (GAY, LESBIAN AND TRANSGENDER) AMENDMENT BILL 2002

EXPLANATORY MEMORANDUM

**Circulated by
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LEGISLATION (GAY, LESBIAN AND TRANSGENDER) AMENDMENT BILL 2002

Outline

This Bill amends the *Legislation Act 2001*, the *Agents Act 1968*, the *Bail Act 1992*, the *Casino Control Act 1988*, the *Children and Young People Act 1999*, the *Civil Law (Wrongs) Act 2002*, the *Confiscation of Criminal Assets Act 2002*, the *Cooperatives Act 2002*, the *Coroners Act 1997*, the *Crimes Act 1900*, the *Crimes (Forensic Procedures) Act 2000*, the *Custodial Escorts Regulations 2002*, the *Dangerous Goods Act 1975*, the *Discrimination Act 1991*, the *Domestic Relationships Act 1994*, the *Drugs of Dependence Act 1989*, the *Firearms Act 1996*, the *First Home Owner Grant Act 2000*, the *Gaming and Racing Control Act 1999*, the *Guardianship and Management of Property Act 1991*, the *Health Records (Privacy and Access) Act 1997*, the *Land (Planning and Environment) Act 1991*, the *Land Titles Act 1925*, the *Legal Practitioners Act 1970*, the *Liquor Act 1975*, the *Mental Health (Treatment and Care) Act 1994*, the *Periodic Detention Act 1995*, the *Periodic Detention Regulations 1995*, the *Perpetuities and Accumulations Act 1985*, the *Pharmacy Act 1931*, the *Powers of Attorney Act 1956*, the *Protection Orders Act 2001*, the *Remand Centres Regulations 1976*, the *Sale of Motor Vehicles Act 1977*, the *Transplantation and Anatomy Act 1978*, the *Truck Act 1900* and the *Victims of Crime (Financial Assistance) Act 1983*.

The amendments address discrimination on the basis of sexual orientation or gender identity.

The amendments in relation to discrimination on the basis of sexual orientation replace current definitions such as *spouse* and *de facto spouse* with the more encompassing term of “domestic partner”. There are currently provisions in some ACT legislation that provide for the recognition of relationships between persons of the same sex. This legislation is also amended to achieve a greater consistency of terminology across legislation and a greater consistency of the degree of recognition of these types of relationships. Legislation not subject to amendments will continue to have its ordinary meaning, or meaning as defined by the specific piece of legislation.

Amendments that address discrimination on the basis of gender recognise that there is a need for those persons to whom gender identity is an issue to self-identify their sex. For example, some ACT legislation provides that a body search of a person must be conducted by a person of the same sex. Such a provision would have an ambiguous application to transgender persons. There is a need in such a circumstance for a person to be searched by a member of the same sex with which the transgender person identifies. This need has been addressed by creating an interpretative definition of transgender person.

Notes on Clauses

PART 1 PRELIMINARY

Clause 1 Name of Act

The Bill, once enacted, will be known as the *Legislation (Gay, Lesbian and Transgender) Amendment Act 2002*.

Clause 2 Commencement

This clause provides that the Act will commence on the day after notification.

PART 2 LEGISLATION ACT 2001

Clause 3 Act amended – pt 2

This part amends the *Legislation Act 2001* (the Legislation Act). Additional amendments to other Acts are contained in Part 3 of the Bill.

Clause 4 New Sections 169 and 169A

This clause inserts new sections into the Legislation Act. The Legislation Act does not currently contain provisions relating to the reference to “domestic partner” and “domestic partnership” or reference to “transgender people” in legislation. The purpose of this clause is to create consistent terms for use in all other legislation and statutory instruments.

A “domestic partner” is defined in new section 169 (1), as meaning a person who lives with another person in a domestic partnership, and includes a spouse.

A “domestic partnership” is defined in new section 169 (2) as two people, whether of the same or opposite sex, living together as a couple on a genuine domestic basis.

While some legislation currently recognises same sex relationships, the level of recognition and the terminology used to describe such a relationship is not consistent across ACT legislation. The effect of this definition is to create a single consistent term to be used in all ACT legislation.

A “transgender person” is defined in new section 169A, in relation to a person, as meaning a person who identifies themselves as a member of the opposite sex by living or seeking to live, as a member of that opposite sex; or a person who has identified themselves as a member of the opposite sex by living as a member of that opposite sex; or a person who is of indeterminate sex, that is a person whose gender was ambiguous at birth, and identifies as a member of a particular sex by living as a member of that sex whether or not the person is a recognised transgender person.

A “recognised transgender person” is defined in section 169A (3), in relation to a person, as meaning a person whose record of sex is altered under *the Births, Deaths and Marriages*

Registration Act 1997, part 4. The definition also recognises a person whose record of sex is altered in accordance with a corresponding provision of a law of a State or another Territory.

The definition in section 169A (1) (c) includes a person who is an intersex person. An intersex person is someone whose gender was ambiguous at birth – i.e. the person was born with sex chromosomes, external genitalia, or an internal reproductive system that are not considered ‘standard’ for either male or female.

Clause 5 Dictionary, part 1 – new definitions

The clause inserts the terms defined in clause 4 into the dictionary of the Legislation Act.

PART 3 OTHER AMENDMENTS

Clause 6 Other laws amended – sch 1

This schedule contains amendments to a number of Acts and Regulations.

SCHEDULE 1 OTHER LAWS AMENDED

PART 1.1 AGENTS ACT 1968

Clause 1.1 Section 64 (1)

This clause simply omits numbering of the section as a result of the omission of subsection (2) by clause 1.3.

Clause 1.2-1.3 Section 64 (1) (b); Section 64 (2)

The Agents Act 1986 (the Agents Act) currently contains references to *spouse* and references to, and definitions of *de facto spouse*. Section 64 of the Agents Act does not confer a benefit and as such, is not discriminatory in the sense that it treats a same sex partner unfavourably. The legislation is discriminatory in that it treats a same sex partner differently to an opposite sex partner.

The intention of the section is to prohibit a licensed agent from engaging as an auditor of a person where that person may have a potential conflict of interest because of their relationship to the licensed agent.

It is appropriate to expand the class of persons who may not be engaged to include a same sex partner to give better effect to the intention of the section. As such these clauses remove the reference and/or definitions of *spouse* and *de facto spouse* from the Agents Act and replaces the references with the inclusive new term *domestic partner*. This will eliminate any real or potential discriminatory effect the legislation may have. The term *domestic partner* is defined in the Legislation Act.

PART 1.2 BAIL ACT 1992

Clause 1.4-1.8 Section 3 (1), definition of *de facto spouse*; Section 3 (1), definition of *relative*, paragraph (b); Section 3 (1), definition of *relevant*

person, paragraph (a); Section 3 (1), definition of relevant person, paragraph (c) and Section 3 (1), definition of spouse

The *Bail Act 1992* (the Bail Act) currently contains a definition of *spouse* and *de facto spouse*. *De facto spouse* is used in the definition of relative, relevant person and spouse. The particular relevance of the definitions of *spouse* and *de facto spouse* for the purposes of the Act is in the regard that is had to a *relevant person*.

The definition of *relevant person* includes a spouse, a relative, and also someone who normally lives, or normally lived, in the same household as the original person (other than as a tenant or boarder). A same sex partner would be encompassed within this definition. The definition of relevant person is used in establishing who is a *protected person* for the purposes of section 8A of the Act.

Section 8A requires that an authorised officer must not grant bail to a person accused of a domestic violence offence unless satisfied that the accused poses no danger to a *protected person* during the period of bail.

While the fact that the definition of de facto spouse excludes a same sex partner is discriminatory in form, the overall effect in terms of protection for a same sex partner in the making of bail decisions is not discriminatory in substance as such a person would fall within the definition of a *relevant person* as “a person who normally lives, or normally lived, in the same household”.

Notwithstanding that the end effect is that a same sex partner would be regarded as a relevant person, there is no reason why such a person should not be included in the definition in the same way that a de facto spouse is included. The message that the current definition sends is discriminatory, even if the provision is not.

Where the Act is discriminatory is in its treatment of the relatives of a same sex partner. For example, a child of a de facto spouse of the accused would be a relevant person but a child of a same sex partner would not be a relevant person. Similarly, a parent of a de facto spouse would be a *relative* for the purposes of the Act, but a parent of a same sex partner would not be a *relative*. While, as noted above, the Act does not have a discriminatory application in substance as against a same sex partner, it does have a discriminatory application as against the relatives of a same sex partner.

Clauses 1.4-1.8 remove the definitions of *spouse* and *de facto spouse* from the Bail Act. Instead the inclusive new term of *domestic partner* is used to eliminate any form of discriminatory application. The term *domestic partner* is defined in the Legislation Act.

PART 1.3 CASINO CONTROL ACT 1988

Clause 1.9 New section 108 (5)

Section 108 (3) of the *Casino Control Act 1988* provides that a person shall not be searched except by a person of the same sex. This provision would have an ambiguous but not

necessarily discriminatory application where the person being searched is an intersex person. There is the issue of what person is of “the same sex” as an intersex person.

There is also the possibility of a discriminatory application to transgendered persons, depending on how, as an administrative matter, the inspector or police officer who is conducting the search decides on a person’s sex. That is, is sex determined for these purposes on the basis of physical appearance or gender identity?

The implicit policy presumption in this type of provision is that a person would feel most comfortable with a body search being conducted by a person of the same sex.

On the basis of this policy presumption, the clause inserts a definition of *same sex* in relation to a transgender person that recognises a person’s self-identified sex for the purposes of a search. *Same sex* is defined in section 108 (5), in relation to a transgender person, as meaning the same sex as the sex with which the transgender person identifies. *Transgender person* is defined in the Legislation Act.

PART 1.4 CHILDREN AND YOUNG PEOPLE ACT 1999

Clause 1.10 New section 400 (7)

Section 400 of the *Children and Young People Act 1999* requires that where a child or young person is to be searched under section 399 of the Act, then the search must be conducted by someone who is of the same sex as the child or young person; and may not be conducted in the presence or view of someone who is of the opposite sex to the child or young person being searched. As per clause 1.9 this provision would have an ambiguous but not necessarily discriminatory application where the child or young person being searched is an intersex person. The provision would also have a possible discriminatory application to a transgender person, depending on how, as an administrative matter, the police officer who is conducting the search decides on the person’s sex. *Transgender person* is defined in the Legislation Act.

This clause inserts a definition of *opposite sex* and *same sex*. These definitions are at section 400 (7). *Opposite sex* is defined in relation to a transgender person, as meaning a person of the opposite sex to the sex with which the transgender person identifies. *Same sex* is defined, in relation to a transgender person, as meaning the same sex as the sex with which the transgender person identifies.

PART 1.5 CIVIL LAW (WRONGS) ACT 2002

Clause 1.11-1.16 Section 20, definition of a member, paragraphs (a) and (b); Section 29, definition of family member, paragraphs (a) and (b); Section 29, definition of family member; Section 31 (1) (b), (c) and (d); Dictionary, note 2.

Sections 20, 29 and 31 of the *Civil Law (Wrongs) Act 2002* (the Wrongs Act) define a *member* of a deceased person’s family and a *family member*. The sections refer, among others, to (a) the spouse of a person or (b) a person (whether of the same sex or a different sex) who, immediately before the death, was living in a de facto marriage relationship with the person.

The use of the term *de facto marriage relationship* in the context of a same sex relationship is inherently contradictory. This clause substitutes the inclusive new term *domestic partner*. The term *domestic partner* is defined in the Legislation Act.

PART 1.6 CONFISCATION OF CRIMINAL ASSETS ACT 2002

Clauses 1.17-1.19

The *Confiscation of Criminal Assets Act 2002* (Confiscation of Criminal Assets Act) currently refers to the terms *domestic partner*, *domestic partnership* and *transgender person*. These clauses remove the definitions of these terms from the Confiscation of Criminal Assets Act. The effect of this is that the existing terms will rely on the new definitions in the Legislation Act.

PART 1.7 COOPERATIVES ACT 2002

Clauses 1.20-1.24 Section 155 (d); Section 232 (1), definition of *associate*; Section 276 (1) (b); Dictionary, definition of *spouse*

The *Cooperatives Act 2002* (the Cooperatives Act) refers to the term *spouse*. *Spouse* is defined in the dictionary to include *de facto spouse*. *De facto spouse* is not defined and therefore takes on its ordinary meaning of a person who lives with another as husband or wife, although not legally married to that person. The definition of spouse has implications for several sections of the Cooperatives Act. The relevant provisions do not confer a benefit and as such, are not discriminatory in the sense that they treat a same sex partner unfavourably. The legislation is discriminatory in that it treats a same sex partner differently to an opposite sex partner.

The relevant sections are all concerned with probity. Notwithstanding that the definition does not have a discriminatory effect, the clauses will replace all references to spouse with references to the inclusive new term *domestic partner*. The term *domestic partner* is defined in the Legislation Act.

PART 1.8 CORONERS ACT 1997

Clause 1.25-1.27 Section 3 (1), definition of *immediate family*; Section 3 (1), definition of *immediate family*, new note; Section 3 (1), definition of *spouse*

The *Coroners Act 1997* (the Coroners Act) currently uses the definition of *spouse* to determine who is part of the deceased's *immediate family*. "Spouse" in relation to a deceased person, includes a person who, at the time of death of the deceased, was (a) in a de facto marriage relationship with the deceased; or (b) in a relationship (whether or not with a person of the same or the opposite sex) in which one provided personal or financial commitment and support of a domestic nature for the material benefit of the other.

The current definition of *spouse* would be broad enough to cover a same sex partner of a deceased person, as they would fall within paragraph (b) of the definition. The fact that this provision is included in the definition of "spouse" indicates an intention to merely include a same sex partner equivalent of a de facto spouse. This intention is confirmed by the

Explanatory Memorandum for the *Coroners Bill 1997* which states that “[t]he intention is that a person in a relationship of a marital kind with the deceased prior to death is accorded access to the coronial process.” These clauses replace all references to *spouse* with the inclusive new term *domestic partner*. This will achieve consistency across ACT legislation.

While these clauses may have the effect of narrowing the definition of *immediate family* because of the breadth of paragraph (b) of the current definition of *spouse* in the Coroners Act, they will give effect to the original stated intention of that definition.

PART 1.9 CRIMES ACT 1900

Clause 1.28-1.37 Section 185, new definitions; Section 397 (1); Dictionary, note 2; Dictionary, definitions of *de facto spouse*; Dictionary, new definition of *domestic partner and opposite sex*; Dictionary, definition of *relative, paragraph (b)*; Dictionary, definition of *relevant person, paragraph (a)*; Dictionary, definition of *relevant person, paragraph (c)*; Dictionary, new definition of *same sex*; Dictionary, definition of *spouse*

The *Crimes Act 1900* (the Crimes Act) refers to *de facto spouse* which means a person of the opposite sex to the first mentioned person who is living with the first mentioned person as that person’s husband or wife although not legally married to the first mentioned person. *De facto spouse* is used in the definitions of *relative, relevant person* and *spouse*. These clauses replace all references to *spouse* and *de facto spouse* with the inclusive new term *domestic partner*. The term *domestic partner* is defined in the Legislation Act.

As per clause 1.9, the Crimes Act also contains provisions for the conduct of body searches, including strip searches. Definitions of *same sex* and *opposite sex* have been included to enable transgender persons to self-identify their sex. *Transgender person* is defined in the Legislation Act.

PART 1.10 CRIMES (FORENSIC PROCEDURES) ACT 2000

Clauses 1.38-1.44 Section 6, note; Section 17; Dictionary, note 2; Dictionary, definition of *opposite sex*; Dictionary, definition of *recognised transgender person*; Dictionary, definition of *same sex*; Dictionary, definition of *transgender person*

The *Crimes (Forensic Procedures) Act 2000* (Forensic Procedures Act) currently contains definitions of *opposite sex, recognised transgender person, same sex* and *transgender persons*. These terms will now be defined in the Legislation Act and the definitions of *recognised transgender person* and *transgender person* and are therefore omitted from the Forensic Procedures Act.

PART 1.11 CUSTODIAL ESCORTS REGULATIONS 2002

Clause 1.45 Regulations 6 (8), new definitions

As per clause 1.9, the *Custodial Escorts Regulations 2002* contain provisions for the conduct of body searches. Definitions of *same sex* and *opposite sex* have been included to enable transgender persons to self-identify their sex. *Transgender person* is defined in the Legislation Act.

PART 1.12 DANGEROUS GOODS ACT 1975

Clause 1.46-1.48 Section 42 (2) and Section 43 (3)

As per clause 1.9, the *Dangerous Goods Act 1975* contains provisions for the conduct of body searches. Section 42 (2) currently provides that a female may only be searched by another female. This is a very basic formulation of the search power. This paragraph has been amended to be more encompassing and to achieve consistency across legislation. The new provision provides that a search may be conducted by a person of the same sex as the person being searched. A definition of *same sex* has also been included which enables transgender persons to self-identify their sex.

PART 1.13 DISCRIMINATION ACT 1991

Clause 1.49-1.51 Section 4 (1), definitions of domestic partner and domestic partnership; Section 4 (1), definition of relationship status; Section 35, new note

The *Discrimination Act 1991* (Discrimination Act) currently refers to a *domestic partner*. This clause removes the definition of domestic partner from the Discrimination Act and relies on the definition in the Legislation Act.

PART 1.14 DOMESTIC RELATIONSHIPS ACT 1994

Clause 1.52-1.53 Section 3 (1), definition of *domestic relationship*; Section 3 (1), definition of *domestic relationship*, new note

The *Domestic Relationships Act 1994* (the Domestic Relationships Act) currently refers to the term *domestic relationship*. *Domestic relationship* is defined to mean a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a *de facto marriage*. *De facto marriage* is not defined.

The Domestic Relationships Act does not discriminate against persons in a same sex relationship. Such persons are clearly encompassed by the definition of *domestic relationship*. While the intention of the section is non-discriminatory, as per clause 1.11, the use of the term *de facto marriage* is inherently contradictory.

These clauses substitute references to *de facto marriage* with the inclusive new term *domestic partner*. The purpose of this is to achieve greater consistency of terminology across legislation. The term *domestic partner* is defined in the Legislation Act.

PART 1.15 DRUGS OF DEPENDENCE ACT 1989

Clause 1.54 New Section 189 (4)

Section 189 of the *Drugs of Dependence Act 1989* requires that where a police officer searches a person's clothing under the division, then the police officer must be of the same sex as the person whose clothing is being searched. As per clause 1.9 this provision would have an ambiguous but not necessarily discriminatory application where the person's whose clothing is being search is an intersex person. The provision would also have a possible discriminatory application to a transgender person, depending on how, as an administrative matter, the police officer who is conducting the search decides on the person's sex.

This clause inserts a definition of *same sex*. *Same sex* is defined, in relation to a transgender person, as meaning the same sex as the sex with which the transgender person identifies. *Transgender person* is defined in the Legislation Act.

PART 1.16 FIREARMS ACT 1996

Clause 1.55 New section 75 (3)

As per clause 1.9 the *Firearms Act 1996* contains provisions for the conduct of searches, including persons, vehicles and vessels. This clause inserts a definition of *same sex* to enable transgender persons to self-identify their sex. *Transgender person* is defined in the Legislation Act.

PART 1.17 FIRST HOME OWNER GRANT ACT 2000

Clause 1.56-1.57 Section 6 (1); Section 6 (1)

The *First Home Owner Grant Act 2000* (FHOG Act) refers to the term *de facto relationship*. The definition of *de facto relationship* for the purposes of determining who is a partner under the FHOG Act already takes account of same sex relationships. The definition of *de facto relationship* encompasses all of the elements of the new term *domestic partner* which is included in the Legislation Act. These clauses replace the reference to *de facto relationship* with the inclusive new term *domestic partner*. The purpose for this is to achieve a greater consistency of terminology across legislation.

PART 1.18 GAMBLING AND RACING CONTROL ACT 1999

Clause 1.58-1.59 Schedule 1, clause 2 (3) (a); Schedule 1, clause 2 (3) (a), new note
Schedule 1, clause 2 of the *Gambling and Racing Control Act 1999* (Gambling Act) relates to the appointment of ordinary members. Clause 2 provides that a person is not eligible to be appointed as an ordinary member if the person or the person's spouse has an interest in a business subject to a gaming law. The term *spouse* is not defined and hence it takes on its ordinary meaning which is a husband or wife of the person.

The provision is not discriminatory in that it does not exclude a person whose same sex partner has an interest in a gaming business from being eligible for appointment to the commission in exactly the same way as it also does not exclude from eligibility a person who has a de facto spouse with an interest in a gaming business. The intention of the provision is to avoid a potential conflict of interest in members of the commission. While the provision is not discriminatory against same sex couples, it is appropriate to expand the class of persons who may not be engaged to include a *domestic partner* to give better effect to the intention of the section. *Domestic partner* is defined in the Legislation Act. The reference to *spouse* has been omitted.

PART 1.19 GUARDIANSHIP AND MANAGEMENT OF PROPERTY ACT 1991

Clause 1.60-1.62 Section 10 (5) and 35 (1) (b); Dictionary, note 2; Dictionary, definition of spouse

The *Guardianship and Management of Property Act 1991* (GMP Act) refers to the term *spouse*. *Spouse* is defined in relation to a person, to include a person of the opposite sex to the person who is not legally married to the person but who lives with the person on a bona fide domestic basis. The term *spouse* is relied upon in section 10 and section 35 of the GMP Act.

The effect of the definition of *spouse* in its application to section 35 of the Act is that the presidential member of the tribunal is not required to give written notice of an inquiry to a same sex partner of a person in respect of whom the tribunal is to hold an inquiry. This is a clearly discriminatory outcome, as such a person would have just as much interest in the outcome of an inquiry as an opposite sex de facto partner.

The effect of the definition of *spouse* in its application to section 10 of the Act is less clear. Section 10(5) is essentially a clarifying provision, and it would be open to the tribunal to conclude that the interests of a same sex partner of a person are not likely to conflict with the interests of the person merely because of their relationship. While the outcome will not

necessarily be discriminatory, there is no reason for a same sex partner to not be included in this clarifying provision.

These clauses delete references to and the definition of *spouse* and replace them with the inclusive new term domestic partner. This will eliminate any real or potential discriminatory effect the legislation may have. The term *domestic partner* is defined in the Legislation Act.

PART 1.20 HEALTH RECORDS (PRIVACY AND ACCESS) ACT 1997

Clause 1.63-1.64 Section 4, definition of *immediate family member*, paragraph (a) (ii); Section 4, definition of *immediate family member*, paragraph (a), new note

The *Health Records (Privacy and Access) Act 1997* (the Health Records Act) refers to the term *immediate family member*. *Immediate family member* is currently defined to include, in paragraph (a)(ii) of the definition, “a spouse or de facto spouse of the consumer”. This definition is used in Principle 10(5) so that where there is an emergency and a consumer is unable to give or withhold consent to the disclosure of personal health information, the treating health service provider may discuss relevant personal health information with an *immediate family member* of the consumer to the extent that it is reasonable and necessary to do so for the proper treatment of the consumer.

Spouse and *de facto spouse* are not defined in the Health Records Act and thus assume their common law meaning, which provides for a heterosexual relationship. A close friend of the consumer who is a member of the same household as the consumer is also included as an *immediate family member* under paragraph (b) of the definition. A same sex partner would be encompassed within this definition.

The result is that while the fact that the definition of immediate family member is discriminatory in form in that a same sex partner is only recognised as “a close friend”, the overall effect is not discriminatory in substance because a medical practitioner is still permitted to disclose a person’s health records to such a person. Notwithstanding that the end effect is that a same sex partner would be regarded as a *relevant person*, there is no reason why such a person should not be recognised in the legislation in the same way that a *de facto spouse* is recognised. The message that the current definition sends is discriminatory, even if the overall effect is not.

The intention of this provision is to allow the treating health service provider to disclose an incompetent patient's medical details with those most intimately involved with his or her welfare. This intention is enhanced by the effect of these clauses, which replaces paragraph (a) (ii) with “a domestic partner of the consumer”. *Domestic Partner* is defined in the Legislation Act.

PART 1.21 LAND (PLANNING AND ENVIRONMENT) ACT 1991

Clause 1.65-1.67 Section 186D (5) (a); Section 186D (7); Dictionary, note 2

Section 186D of the *Land (Planning and Environment) Act 1991* relates to dealings with rural leases. Under section 186D (5), the Executive must give consent if the person taking title under the dealing is the lessee's partner or child. Section 186D(7) contains definitions for the section and includes *child*, *de facto relationship* and *partner*.

This provision does not discriminate against same sex relationships as the definition of *de facto relationship* is clearly intended to encompass both opposite sex and same sex relationships. While the intention of the section is non-discriminatory, the use of the

expression “like the relationship between a married couple” in the context of a same sex relationship or de facto relationship is inherently contradictory.

This clause deletes the reference to partner in paragraph (5) and replaces it with the inclusive new term *domestic partner*. The purpose of this is to achieve greater consistency across legislation. These clauses also replaces paragraph (7) now defining the child of a lessee, as including a child of the lessee’s *domestic partner*. The definitions of *de facto relationship* and *partner* have been deleted. *Domestic partner* is defined in the Legislation Act.

PART 1.22 LAND TITLES ACT 1925

Clauses 1.68-1.69 Section 79; Section 79, new note

Section 79 of the *Land Titles Act 1925* (Land Titles Act) provides a benefit to spouses, who, because of their relationship, may be interested in sharing property and transferring title to each other. The term *spouse* is not defined in the Land Titles Act and hence it takes on its ordinary meaning which is a husband or wife of the person. This section does not apply to de facto relationships and does not apply to same sex relationships, notwithstanding that the parties to these types of relationships may wish to make similar arrangements with respect to transfer of title on property.

These clauses delete the reference to the term *spouse* and replace it with the inclusive new term *domestic partner*. The effect of this eliminates any discriminatory application of the provision by expanding the current benefit enjoyed only by married couples to *domestic partners*. *Domestic partner* is defined in the Legislation Act.

PART 1.23 LEGAL PRACTITIONERS ACT 1970

Clause 1.70-1.73 Section 102 (1) (c); Section 102 (2) (b) (ii); Section 113 (2); Section 113 (2), new note

Section 102 of the *Legal Practitioners Act 1970* (Legal Practitioners Act) limits the class of people who can be engaged to conduct an audit of trust moneys and other moneys controlled by a solicitor. A natural person may not be engaged to conduct an audit if he or she is the spouse or de facto spouse of the solicitor by whom the records are kept. Similarly, a firm of auditors may not be engaged to conduct an audit where a member of the firm is the spouse of the solicitor by whom the records are kept.

While the "spouse or de facto spouse" exclusion is used in respect of a natural person, only "spouse" is used as an exclusion in respect of a firm of auditors. There is no apparent reason for the different approach. This provision does not confer a benefit and as such, is not discriminatory in the sense that it treats a same sex partner unfavourably. The legislation is discriminatory in that it treats a same sex partner differently to an opposite sex partner.

The intention of the section is to prohibit a solicitor from engaging as an auditor a person who may have a potential conflict of interest because of their relationship to the solicitor. These clauses replace the reference to the term *spouse or de facto spouse* and replace it with the inclusive new term *domestic partner*. The effect of this eliminates any discriminatory

application of the provision by expanding the class of persons who may not be engaged to include a same sex partner. The provision will also give better effect to the intention of the section. This should apply to both natural persons and a firm of auditors.

Domestic partner is defined in the Legislation Act.

PART 1.24 LIQUOR ACT 1975

Clause 1.74-1.76 Section 151, definition of *responsible adult*, paragraph (a); Section 151, definition of *responsible adult*, new note; Section 151, definition of *spouse*

Under Division 10.2 of the *Liquor Act 1975* (the Liquor Act) a person under the age of 18 is not permitted in a bar room on licensed premises except in the care of a *responsible adult*. The Liquor Act creates offences for both the underage person (section 56) and the licensee (section 57). Section 151 of the Liquor Act contains the definition of *responsible adult* and incorporates the term *spouse*. *Spouse* is defined to include a person living with the person as the person's husband or wife although not legally married to the person.

The effect of the definition of *spouse* is discriminatory because a person under the age of 18 may enter a bar-room in the care of an opposite sex partner who is an adult, but not in the care of a same sex partner who is an adult.

These clauses delete the reference to the term *spouse* and replace it with the inclusive new term *domestic partner*. *Domestic partner* is defined in the Legislation Act.

PART 1.25 MENTAL HEALTH (TREATMENT AND CARE) ACT 1994

Clause 1.77-1.79 Section 4, definition of *relative*; Section 4, definition of *relative*, new note; Section 4 definition of *spouse*

Section 4 of the *Mental Health (Treatment and Care) Act 1994* (the Mental Health Act) currently provides for the definition of *spouse*. *Spouse* is defined to include a person who is not legally married to the person but who lives with the person on a bona fide domestic basis. This definition is used in the definition of *relative* which includes a *spouse*.

The definition of *spouse* relies on common law precedent and does not stipulate the sex of the couple, but presumes it is a heterosexual relationship. This definition is relevant to section 19 (contact with other person) and section 42 (notification of certain persons about detention) of the Mental Health Act. The purpose of these sections is to provide access to those who have the closest relationship with the person. This should include a same sex partner. While the inclusion of "or friend" in the current provisions would allow a person to contact a same sex partner, such a partner is treated differently under the legislation. The legislation is discriminatory in form.

These clauses delete the reference to, and definition, of the term *spouse* and replace it with the inclusive new term *domestic partner*. *Domestic partner* is defined in the Legislation Act.

PART 1.26 PERIODIC DETENTION ACT 1995

Clause 1.80 Section 50 (7), new definitions

As per clause 1.9 the *Periodic Detention Act 1995* contains provisions for the conduct of body searches, including strip searches. Definitions of *same sex* and *opposite sex* have been

included to enable transgender persons to self-identify their sex. *Transgender person* is defined in the Legislation Act

PART 1.27 PERIODIC DETENTION REGULATIONS 1995

Clause 1.81-1.82 Schedule 2, clause 1; Schedule 2, Clause 1

Schedule 2, clause 1 of the *Periodic Detention Regulation 1995* relates to procedures for obtaining a sample of urine. The provision currently provides that the test be carried out by an officer who is of the same sex as the detainee who is required to give a urine sample for drug testing. As per clause 1.9 this provision would have an ambiguous but not necessarily discriminatory application where person is an intersex person. The provision would also have a possible discriminatory application to a transgender person, depending on how, as an administrative matter, the police officer who is conducting the search decides on the person's sex.

Definitions of *same sex* and *opposite sex* have been included to enable transgender persons to self-identify their sex. *Transgender person* is defined in the Legislation Act.

PART 1.28 PERPETUITIES AND ACCUMULATIONS ACT 1985

Clause 1.83-1.84 Section 14 (1) (c); Section 14 (1) (c), new note

Section 14 of the *Perpetuities and Accumulations Act 1985* (the Perpetuities Act) provides that the rule against perpetuities does not invalidate a fund established by a settlement for the benefit of certain persons and includes "spouses". The provision does not itself affect the way in which superannuation and other funds are established, it merely establishes that the rule against perpetuities does not invalidate that fund.

The term *spouse* is not defined and hence it takes on its ordinary meaning which is a husband or wife of the person. While the provision does not specifically include funds established for the benefit of either same sex partners or opposite sex de facto partners, these relationships may be picked up under the legislation as *dependents*, or *even persons selected or nominated for that purpose* (also included in section 14). The legislation is not discriminatory as it treats all unmarried couple relationships in the same way, whether they are opposite or same sex relationships.

The intention of the provision is to preserve particular types of funds from invalidity and it is consistent with the types of funds mentioned in section 14 to include funds established by a settlement for the benefit of domestic partners. These clauses delete the reference to the term spouse and replace it with *spouses*, *de facto spouses*, *domestic partners*. This provision has been widely drafted, using the inclusive new term *domestic partner* as well as *spouses* and *de facto spouses* because it operates on superannuation funds, which may be operated by the Commonwealth. Referring to all three terms preserves as wide an operation for the section as possible whilst eliminating any discriminatory application the provision may have.

PART 1.29 PHARMACY ACT 1931

Clause 1.85 Section 9A (2), definition of *specified relative*

Part 3 of the *Pharmacy Act 1931* deals with registration as a pharmacist. Section 9A specifies when a company is eligible for registration as a pharmacist. The provision includes

requirements that at all times each share in the company is beneficially owned by a registered pharmacist who is a director or employee of the company or a specified relative of such a person. A *specified relative* is defined in paragraph (2) as a “spouse, parent, child, grandchild or de facto spouse”.

The provision would have a discriminatory application to a company that was owned by a couple in a same sex relationship as such a company would not be eligible for registration as a pharmacist. In addition to including spouse and de facto spouse, the definition of *specified relative* also includes certain relatives of a pharmacist. The restriction of the type of relatives that may be *specified relatives* indicates an intention to limit the types of companies that may be registered as pharmacists to companies owned by close family members.

This clause deletes the reference to the terms *spouse* and *de facto spouse* and inserts a reference to the inclusive new term *domestic partner*. The effect of this eliminates any discriminatory application of the provision by expanding the current class of persons who may register a company as a pharmacist to include *domestic partners*. *Domestic partner* is defined in the Legislation Act.

PART 1.30 POWERS OF ATTORNEY ACT 1956

Clause 1.86 Section 2 (1), definition of *relative*, paragraph (b)

Section 2 (1) of the *Powers of Attorney Act 1956* (the Powers of Attorney Act) defines *relative*, in relation to a person as including, at paragraph (b), a person of the opposite sex to the first mentioned person who lives with that person as his or her spouse on a bona fide domestic basis, although not legally married to him or her. The definition of *relative* is relevant for section 12 (enduring powers of attorney) and section 13 (guardianship and consent to medical treatment under enduring power of attorney) of the Powers of Attorney Act.

Section 12 and section 13 of the Powers of Attorney Act provide that the signature of the donor of an enduring power of attorney, or a power to consent to medical treatment that is granted under an enduring power of attorney, must be witnessed by 2 persons, neither of whom is the donee of the power or a relative of the donee or the donor. The requirement relates to the need to establish an independent witness who can attest to the circumstances in which the power of attorney was signed.

This provision does not confer a benefit and as such, is not discriminatory in the sense that it treats a same sex partner unfavourably. The legislation is discriminatory in that it treats a same sex partner differently to an opposite sex partner. The intention of the sections is to protect the interests of the donor of a power of attorney.

This clause deletes the existing paragraph (b) and replaces it with a reference to the inclusive new term *domestic partner*. This amendment gives a better effect to the intention of sections 12 and 13. The term *domestic partner* is defined in the Legislation Act.

PART 1.31 PROTECTION ORDERS ACT 2001

Clause 1.87-1.94 **Section 23 (2), example; Dictionary, note 2; Dictionary, definition of *de facto spouse*; Dictionary, new definition of *domestic partner*; Dictionary, definition of *relative*, paragraph (b); Dictionary definition of *relevant person*, paragraph (a); Dictionary, definition of *relevant person*, paragraph (c); Dictionary, definition of *spouse***

The *Protection Orders Act 2001* (Protection Orders Act) relies on the definition of *relevant person*. The definition of *relevant person* is central to defining the types of relationships that are covered by the domestic violence provisions of the Act. For the Act, a person's behaviour is domestic violence if it causes physical injury to a relevant person etc.

Relevant person is defined in the dictionary as meaning (a) the *spouse* of the original person - *spouse* is further defined to include a "former spouse, de facto spouse and former de facto spouse" – or (b) a relative of the original person; or (c) a child of a spouse of the original person; or (d) someone who normally lives, or normally lived, in the same household as the original person (other than as a tenant or boarder).

The current definition of relevant person would only include a same sex partner if the partner "normally lives, or normally lived, in the same household as the original person". This inclusion, although slightly circuitous, would pick up same sex relationships. It does not include same sex non-cohabiting relationships, but this is consistent with the exclusion of heterosexual non-cohabiting relationships from the application of the domestic violence provisions of the Act.

While the inclusion of "a member of the same household" in the current provisions would bring a same sex partner under the domestic violence provisions of the Act, such a partner is treated differently under the legislation. The legislation is discriminatory in form.

Where the Act is discriminatory is in its treatment of the relatives of a same sex partner. For example, a child of a de facto spouse of the accused would be a relevant person but a child of a same sex partner would not be a relevant person. Similarly, a parent of a de facto spouse would be a *relative* for the purposes of the Act, but a parent of a same sex partner would not be a *relative*. While, as noted above, the Act does not have a discriminatory application in substance as against a same sex partner, it does have a discriminatory application as against the relatives of a same sex partner.

PART 1.32 REMAND CENTRES REGULATIONS 1976

Clause 1.95-1.98 **Regulation 7 (3); New Regulation 7 (8); New Regulation 10 (5A); Regulation 10**

Regulation 7 of the *Remand Centres Regulations 1976* (the Remand Centres Regulations) deals with detainee searches and provides for custodial officers to search detainees and their quarters. Regulation 7(3) provides that the search of a female detainee and her quarters shall be carried out by a female custodial officer. These clauses amend the provision to refer to a search being carried out by a custodial officer of the same sex. This expands the provision so

it relates to both sexes. A definition of *same sex* has also been included to enable transgender persons to self-identify their sex.

Regulation 10 relates to accommodation and subregulation (5) requires that sleeping quarters occupied by male detainees shall be segregated from sleeping quarters occupied by female detainees. These clauses insert new regulations to the effect that a transgender person is to be taken to be of the sex with which the transgender person identifies. *Transgender person* is defined in the Legislation Act.

PART 1.33 SALE OF MOTOR VEHICLES ACT 1977

Clause 1.99 Section 42 (b)

Section 42 of the *Sale of Motor Vehicles Act 1977* deals with the qualification of auditors. Paragraph (b) provides that a licensed dealer shall not engage a person as auditor or permit his or her accounting and other records relating to trust money to be audited by a person who is an employee of, or is the spouse of, the licensed dealer.

The term *spouse* is not defined and hence it takes on its ordinary meaning which is a husband or wife of the person. The legislation is not discriminatory as it treats all unmarried couple relationships in the same way, whether they are opposite or same sex relationships. The intention of the section is to prohibit a licensed dealer from engaging as an auditor a person where that person may have a conflict of interest because of their relationship to the licensed dealer. These clauses delete the reference to the term *spouse* and replace it with the inclusive new term *domestic partner*. The effect of this expands the class of persons who may not be engaged to include a *de facto spouse*, and a same sex partner and gives a better effect to the intention of the section.

PART 1.34 TRANSPLANTATION AND ANATOMY ACT 1978

Clause 1.100-1.102 Section 4 (1), definition of *next of kin*; Section 4 (1) definition of *senior available next of kin*; Section 26

The *Transplantation and Anatomy Act 1978* (the Transplantation Act) relies in the definition of *senior available next of kin*. The current definition includes references to *spouse* and *de facto spouse* neither of which are not universally defined in the Transplantation Act and hence assume their ordinary meaning.

The intention of the Transplantation Act is that the person who was most intimately involved with a deceased person should be consulted on the disposition of that person's remains. These clauses amend definitions of *next of kin* and *senior available next of kin* to be more encompassing and include *domestic relationships*.

The amendments also omit the special interpretative definition relating to *de facto spouse* in section 26 of the Act. This provision is expressed to be applicable for the purposes of part 3 of the Act, but does not actually have any application in part 3.

PART 1.35 TRUCK ACT 1900

Clause 1.103-1.104 Section 10 (1) (e); Section 10 (1) (e), new note

Section 10 of the *Truck Act 1900* (the Truck Act) deals with cases to which the Truck Act does not apply. Section 10(1)(e) provides that the Truck Act does not prevent any employer from advancing any money for the relief of a worker and his or her “spouse” or family in sickness, or from advancing any money to any member of the family of a worker by his or her order, nor from deducting or contracting to deduct any such sum or sums of money from the wages of the worker.

The term *spouse* is not defined and hence it takes on its ordinary meaning which is a husband or wife of the person. The provision is not discriminatory in that it treats a same sex partner the same as it treats a de facto spouse - neither is recognised under the Act.

The intention of section 10(4) is to ensure that the Act is not a barrier to an employer in advancing wages to a worker for the benefit of the worker or his or her dependents. These clauses delete the reference to the term *spouse* and replace it with the inclusive new term *domestic partner*. The purpose of this is to recognise both same sex relationships and de facto relationships as potential dependents for the purposes of the Truck Act. In effect the intention of the Truck Act is better served.

PART 1.36 VICTIMS OF CRIME (FINANCIAL ASSISTANCE) ACT 1983

Clause 1.105 Section 2, definition of *close family member*, paragraph (a)

In the *Victims of Crime (Financial Assistance) Act 1983* (the Victims of Crime Act), the definition of *close family member* is used for the purposes of determining whether a person is a *related victim* of a deceased primary victim, and therefore eligible for compensation under section 17 of the Act.

Close family member is defined to include a person who had a genuine personal relationship with the victim at the time of the victim's death, and who was, at that time, among other things the husband or wife of the victim.

A *related victim* also includes a person that had a close intimate personal relationship with the victim. While the effect is that a same sex or de facto partner will be regarded as a *related victim*, there is no reason why such a person should not be included in the definition of close family member.

This clause removes the reference to “husband or wife” from paragraph (a). Instead the inclusive new term of *domestic partner* is used to eliminate any form of real or perceived discriminatory application. The term *domestic partner* is defined in the Legislation Act.