

Clause notes for *Acts Amendment (Lesbian and Gay Law Reform) Bill 2001*

PART 1 – PRELIMINARY

Clause 1 – Short title

Provides the short title.

Clause 2 - Commencement

Provides that commencement is by proclamation and that different parts can commence on different days.

PART 2 – AMENDMENTS TO THE *ADMINISTRATION ACT 1903*

Clause 3 - *Administration Act 1903* amended

This clause is self-explanatory.

Clause 4 - Section 12A amended

Section 12A of the Act deals with entitlements to participation and distribution of in testate estates and the clause amends "father" and "mother" to include "parents" and amends "paternity" to "parentage". The amendments are necessary due amendments to the *Artificial Conception Act 1985*, in Clause 26. The amendment also provides that the estates of all persons who died intestate as to the whole or any part thereof before the coming into operation of the amendments shall be distributed in accordance with the enactments and rule of law which would have applied to them as if the amendments had not been made.

PART 3 – AMENDMENTS TO THE *ADOPTION ACT 1994*

Clause 5 - *Adoption Act 1994*

This clause is self-explanatory

Clause 6 - Section 4 amended

This clause amends section 4(1) to delete the definition of “birth parents” and insert instead “birth parent”. It treats birth parent in the singular and adds to the definition a parent of a child or adoptee who is deemed a parent under the *Artificial Conception Act 1985*. The amendments are necessary because of the amendments to the *Artificial Conception Act 1985* in Clause 26.

The definition of step parent is amended by inserting after “married to” “or the de facto partner of.” The effect of this is to afford the same status to de facto couples as to married couples. The definition of “de facto partner is not included in the *Adoption Act* and will be interpreted in accordance the definition provided in the *Interpretation Act 1984*. De facto will include a same sex couple in a marriage like relationship.

Section 4 (2) is amended to remove the reference to a de facto relationship being a heterosexual relationship.

Clause 7 - Section 17 amended

This clause amends section 17 to include children conceived through artificial conception. Section 17(2) is amended so that in addition to a heterosexual partner, a same sex partner is not required to give consent unless they are already mentioned as a parent under section 17(1).

Clause 8 - Section 18 amended

This clause amends section 18 to delete the word “actually” as a qualifier to “married”. The Act currently uses the term “actually married” when referring to a married couple because the present definition of “married” includes reference to a heterosexual de facto couple.

Clause 9 - Section 21 amended

This clause amends Section 21 to include a person who is deemed a parent by virtue of the *Artificial Conception Act 1985* as a parent who should be notified of the intention of the other parent to relinquish a child for adoption.

Clause 10 - Section 26C amended

This clause amends section 26C(1)(a) to include an application to the court for a determination of parentage by a person who might be a parent under the *Artificial Conception Act 1985*.

There is a consequential amendment to section 26C(1)(b) to amend “man” to “person” because the deemed parent under the *Artificial Conception Act 1985* may not be a man.

Clause 11 - Section 27 amended

This clause amends section 27 in relation to step parent adoption to enable a same sex partner, the step parent in a relationship with the birth parent who has long term and day to day care of a child, to be considered the joint guardian for the child being adopted.

Clause 12 - Section 39 amended

This clause amends section 39 to enable a same sex couple, who have been together for three years, to be considered eligible to jointly adopt. Section 39(3) is amended to remove reference to de facto couples being heterosexual.

Clause 13 - Section 40 amended

This Clause is amended to include a reference to a de facto couple.

Clause 14 - Section 52 amended

This clause amends Section 52 to include a reference to a de facto relationship where an applicant supplies information about the stability of the relationship.

Clause 15 - Section 66 amended

Section 66 provides that a person who is married cannot be adopted. This clause amends Section 66 to include a reference to a de facto relationship in relation to who cannot be adopted.

Clause 16 - Section 67 amended

This clause specifies who may adopt. The change allows same sex couples to adopt.

Clause 17 - Section 68 amended

This Clause amends Section 68 to enable the Family Court to grant an order of adoption to same sex couples

Clause 18 - Section 75 amended

This clause amends Section 75 to include reference to a de facto relationship in a step parent adoption.

Clause 19 - Section 81 amended

This clause amends Section 81 to remove the qualifier “actually” to the term “married”

Clause 20 - Section 83 amended

This clause amends Section 83 to include reference to a de facto relationship in relation to parties to an adoption preventing the Director General releasing information about the adoption.

Clause 21 - Section 95 amended

This clause amends Section 95 to include reference to a de facto relationship and removes the qualifier “actually” to the term “married”

Clause 22 - Section 120 amended

This clause amends Section 120 to include reference to a de facto relationship and to remove the qualifier “actually” from the term “married”

PART 4 – AMENDMENTS TO THE ARTIFICIAL CONCEPTION ACT 1985

Clause 23 – *Artificial Conception Act 1985* amended

This clause is self-explanatory.

Clause 24 – Section 3 amended

This clause amends section 3 of the *Artificial Conception Act 1985* to ensure consistency with definitions in other legislation. It provides that the terminology of “de facto partner” and “de facto relationship” are used. Those terms are not defined in *the Artificial Conception Act 1985* and will therefore be interpreted in accordance with the amendment to the *Interpretation Act 1984*. Clause 28 also deletes the definition of “fertilization procedure” and replaces it with a definition of “artificial fertilisation procedure” that ensures consistency with the *Human Reproductive Technology Act 1991*.

Clause 25 – Section 5 amended

This clause amends section 5 to provide that where a woman undergoes an artificial fertilisation procedure and gives birth to a child as a result, she is the mother of the child, whether she provided the ovum or not. This removes any uncertainty as to who is the mother of the child if the artificial fertilisation procedure was not carried out with the consent of a partner of the woman.

Clause 26 – Section 6A inserted

This amendment inserts a new section, providing that where a woman undergoes an artificial fertilisation procedure with the consent of her same sex de facto partner the partner is a parent of any child born as a result. The consent of the partner is presumed, but the presumption is rebuttable. The new section is consistent with the provisions relating to a man who consents to his wife or de facto partner undergoing an artificial fertilisation procedure.

Clause 27 – Section 7 amended

This clause amends section 7 to clarify that a donor of genetic material used in an artificial fertilisation procedure is not a parent of a resulting child.

Clause 28 – References to “fertilization procedure” amended

This clause is a technical amendment consequential on the amendment to the definition of “fertilization procedure” in clause 24.

PART 5 – AMENDMENTS TO THE *BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT 1998*

Clause 29 – *Births, Deaths and Marriages Registration Act 1998* amended

This clause is self explanatory

Clause 30 - Section 18 amended

Section 18 provides for the registration of parentage details. It is amended as a consequence of the amendments to the *Artificial Conception Act 1985* to include a same sex partner who is deemed to be a parent under that Act to make a joint application as to the identity of the parents to be included on the register.

Clause 31 – Section 19 amended

Section 19 provides for application to be made for additional information to be added to the Register in relation to a birth registration and allows for a same sex partner who is deemed to be a parent under the amendments to the *Artificial Conception Act 1985* to be included in persons who may apply.

PART 6 – AMENDMENTS TO THE CREMATION ACT 1929

Clause 32 – *Cremation Act 1929* amended

This clause is self-explanatory.

Clause 33 – Section 13 amended

This amendment provides that a person with whom a deceased person has been in a de facto relationship immediately before his/her death, has an opportunity to object to the cremation of the deceased person.

PART 7 – AMENDMENTS TO THE CRIMINAL CODE

Clause 34 – The *Criminal Code* amended

This clause is self-explanatory

Clause 35 – Section 184 repealed and consequential amendment to the *Evidence Act 1906*

This clause repeals section 184, which proscribes “indecent practices between males in public”. Indecency in public is an offence in relation to acts by males and females under section 203. Therefore the section is discriminatory and unnecessary. There is a consequential amendment to Schedule 7 Part B of the *Evidence Act 1906* by deleting reference to section 184.

Clause 36 – Section 186 amended

This clause amends section 186 (1) which makes it an offence for an owner occupier to allow a female under 16 and a male under 21 to be on premises for the purposes of unlawful carnal knowledge. Reference to “male” and “female” and the differential in age in relation to males and females is deleted and is replaced by reference to a child under 16. Section 186 (2) which provides a defence to a charge of sexual penetration of a juvenile of either sex if there is reasonable but mistaken belief the child is over 16. The amendment limits the defence to persons who are not more than 5 years older than the child.

Clause 37 - Section 321A amended

This clause amends section 321A(7) which provides a defence to a charge of having a sexual relationship with a child under 16, by limiting the defence of reasonable but mistaken belief that the child is over 16 to persons who are not more than 5 years older than the child.

Clause 38 – Section 322A repealed and consequential amendments in *The Criminal Code* and the *Evidence Act 1906*

This clause repeals Section 322A that provides that it is an offence to sexually penetrate a male between the ages of 16 and 21. There are consequential amendments to Section 596 and the *Evidence Act 1906* to remove reference to Section 322A.

Clause 39 – Section 329 amended

This clause amends the definition of “de facto child” by deleting the definition of the partner of the offender and inserting “de facto partner”. This amendment ensures the definition is the same as that provided by the *Interpretation Act 1984*.

Clause 40 – Section 343 amended

This clause is amended to insert with reference to a defence to child stealing that a person is a parent under the *Artificial Conception Act 1985*.

Clause 41 – Section 716 amended

This clause amends Section 716 relating to the offence of unlawfully detaining a woman or girl against her will for immoral purposes, by deleting the reference to “father or mother” and inserting a reference to parent. The amendment has the effect of including a parent under the *Artificial Conception Act 1985*.

PART 8 – AMENDMENTS TO THE *EQUAL OPPORTUNITY ACT 1984*

Clause 42 - *Equal Opportunity Act 1984* amended

This clause is self-explanatory.

Clause 43 – Long title amended

Amends the long title to the Act to add the ground of sexual orientation.

Clause 44 – Section 3 amended

Amends the objects of the Act to add the ground of sexual orientation.

Clause 45 – Section 4 amended

This clause amends the interpretation clause of the Act by:

- Amending the definition of marital status by substituting “de facto partner” for de facto spouse. No definition of “de facto partner” is provided under the *Equal Opportunity Act* and will be interpreted in accordance with the definition provided in the *Interpretation Act 1984*.
- Amending the definition of “near relative” by substituting “de facto partner” for de facto spouse
- Amending the definition of “services” to include reference to superannuation
- Adding “sexual orientation” and defining the term to mean homosexuality, lesbianism and bisexuality

Clause 46 – Section 5 amended

This clause amends section 5 to refer to the new ground of sexual orientation. Section 5 provides that in order to prove unlawful discrimination the ground of discrimination does not have to be the sole or dominant reason for the unfair treatment.

Clause 47 – Section 29 replaced

This clause repeals section 29 which permitted discrimination on the ground of marital status in the employment of a married couple where a job was one of two, and substitutes a new section 29 that allows an employer to employ a couple but does not discriminate between married or de facto partners (including same sex).

Clause 48 – Section 34 amended and transitional provision

This clause repeals Section 34 that provided an exception for discrimination on the grounds of sex and marital status in the terms and conditions of superannuation. It extends an exception for discrimination based on actuarial or other data to marital status. The amendment corresponds with existing provisions of the *Sex Discrimination Act 1984* (Cth). It provides a lead in period of one year.

Clause 49 – Part IIB inserted

This clause inserts a new Part IIB adding the ground of discrimination on the ground of sexual orientation and inserts the following sections:

Section 35O (1) defines direct discrimination on the ground of sexual orientation This definition is consistent with the definitions of direct discrimination on other grounds Section 35O(2) defines direct discrimination to include discrimination against a person because of the sexual orientation of that person’s relative or associate. This is consistent with the grounds of race, impairment and age.

Section 35O(3) defines indirect discrimination on the ground of sexual orientation. This definition is consistent with the definition of indirect discrimination on other grounds.

Section 35P prohibits discrimination by an employer against a person on the ground of sexual orientation in relation to deciding who should be employed and the terms and conditions of employment including dismissal.

Section 35Q prohibits discrimination by a principal on the ground of sexual orientation in relation to deciding who should be appointed as a commission agent and the terms and conditions of appointment including termination.

Section 35Q prohibits discrimination by a principal on the ground of sexual orientation in deciding who should be employed and the terms and conditions of a contract worker. Subsection (2) provides an exception for a contract worker employed at the principal's place of residence for domestic duties.

Section 35S prohibits discrimination by a partnership of 6 or more people on the ground of sexual orientation in relation to who should be invited to join the partnership, the terms and conditions of the partnership offers and expulsion from the partnership.

Section 35T prohibits discrimination by an organization of employers or employees in relation to who is accepted for membership, the terms and conditions of membership and depriving a person of membership.

Section 35U prohibits discrimination by a body that can grant authorization or qualifications to a person for a profession, trade or business.

Section 35V prohibits discrimination orientation by an employment agency in relation to the provision of its services.

Section 35W prohibits discrimination by an education authority in relation to who is admitted as a pupil or the terms and conditions given to a student including expelling the student.

Section 35X prohibits discrimination in relation to access to places or vehicles, including refusing to allow the use of any facilities, the terms and conditions that use is granted and requiring a person to leave or cease using the place or vehicle.

Section 35Y prohibits discrimination in relation to the provision of goods services and facilities.

Section 35Z prohibits discrimination in relation to the provision of accommodation, including determining who is provided with accommodation and evicting a person from accommodation. Subsection (3)(a) provides an exception provides an exception occupied by the owner or near relative of the owner. Subsections 3(b) and (c) provide an exception in relation to accommodation provided by a religious, charitable or other voluntary body. These exceptions are consistent with other grounds under the Act.

Section 35ZA prohibits discrimination in relation to the disposal of land. Subsection (2) provides an exception for land that is disposed by gift or will. These exception is consistent with exceptions provided on other grounds.

Section 35ZB prohibits discrimination in relation to the membership of a club. Subsection (3) provides an exception where the club has as it's principal object the provision of benefits for persons of a particular sexual orientation. Subsection (4) sets out the criteria that have to be

considered when deciding if the exception applies. This exception is consistent with similar exceptions provided on the grounds of sex, race, impairment and age.

Section 35ZC provides that it is unlawful to require a person of a particular sexual orientation to provide information, which persons not of that sexual orientation would not be required to provide in the same circumstances.

Section 35ZD provides an exception for acts done to ensure that persons of a particular sexual orientation have equal opportunities and access to services and facilities to meet their special needs. This exception is consistent with a similar exception provided on other grounds.

Clause 50 – Section 67 amended

This clause extends the unlawful victimization provisions to include the new ground.

Clause 51 – Section 80 amended

This clause extends the Commissioner for Equal Opportunity’s powers under the Act to include reference to the new ground.

Clauses 52 and 53 – Sections 135 and 137 amended

These clauses extend the Tribunal’s powers to grant an exemption to the provisions of the Act to include the new ground.

Clauses 54 – Sections 140 amended

This clause extends the objects of Part IX relating the functions of the Director of Equal Opportunity in Public Employment to include reference to the new ground.

Clause 55 – Sections 146 amended

This clause provides for the new ground to be included in the Director’s annual report to Parliament.

Clause 56 – Consequential amendment to the Perth International Centre for Application of Solar Energy Act 1994.

This amendment is consequential to the amendment of the definition of “near relative” in Clause 45.

PART 9 – AMENDMENTS TO THE *FAMILY COURT ACT 1997*

Clause 57 – *Family Court Act 1997* amended

This clause is self-explanatory.

Clause 58 – Section 7 amended

This clause is consequential to changes to the *Artificial Conception Act 1984* provided for in clause 26, and amends the definition of a “relative” so that it includes a person who is a parent under the *Artificial Conception Act 1984*.

Clause 59 – Section 133 amended

This clause amends the description of what Division 8 of Part 5 of the *Family Court Act 1997* deals with, to include liability of a person who is a parent under the *Artificial Conception Act 1981* to pay child bearing expenses.

Clause 60 – Heading to Subdivision 2 amended

This amendment is self-explanatory and reflects the changes to Subdivision 2 of Division 8 of Part 5 of the *Family Court Act 1997* set out in clause 61.

Clause 61 – Section 135 amended

This amendment provides that a person who is the parent of a child under the *Artificial Conception Act 1981* has the same financial liabilities relating to the birth of the child as a father of a child.

Clause 62 – Section 136 amended

This is an amendment consequential to clause 61 and allows the Court to take into account the earning capacity of a person who is a parent under the *Artificial Conception Act 1981* in proceedings for that person to contribute to childbearing expenses.

Clause 63 – Section 141 amended

This is an amendment consequential to clause 61, and provides for orders to recite a finding that a person is a parent under the *Artificial Conception Act 1981*, and for the Court to make directions about the payment of unspent childbearing expenses paid by that parent.

PART 10 – AMENDMENTS TO THE *GUARDIANSHIP AND ADMINISTRATION ACT 1990*

Clause 64 - *Guardianship and Administration Act 1990* amended

This clause is self explanatory.

Clause 65 - Section 3 amended

This clause includes in the definition of "nearest relative" as used in the Act, "a de facto partner" as defined in the *Interpretation Act 1984*. Previously the definition of a "spouse" included both a legal spouse and a spouse who was not legally married to the first mentioned person but who lived with that person on a *bona fide* domestic basis.

Clause 66 - Section 119 amended

The clause now includes a "de facto partner" as defined in the *Interpretation Act 1984* when dealing with the issue of who may consent to medical and dental treatment.

Clause 67 - Schedule 2 amended

This clause makes the appropriate amendments to "husband" and "wife" to include "de facto partner".

PART 11 – AMENDMENTS TO THE *HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991*

Clause 68 – *Human Reproductive Technology Act 1991* amended

This clause is self-explanatory.

Clause 69 – Preamble amended

The Preamble is amended to reflect the amendments in clause 70 which will allow single and lesbian women to have access to in vitro fertilisation technology in certain circumstances.

Clause 70 – Section 23 amended

This amendment makes provisions that will allow a woman who is unable to conceive a child for medical reasons, or whose child is likely to be affected by a genetic abnormality or disease, to have access to in vitro fertilisation procedures. There is no restriction on whether the woman is married, single or in a de facto relationship with a person of the same or opposite sex.

Provision is also made for heterosexual couples to access in vitro fertilisation procedures where the woman is not infertile, but there are medical reasons preventing them conceiving a child, or their child is likely to be affected by a genetic abnormality or disease.

A fertile single woman, or a fertile woman in a same sex relationship, would not be able to access in vitro fertilisation procedures, but is able to use artificial insemination to attempt to achieve a pregnancy.

The amendment removes the requirement that a heterosexual de facto couple wishing to access in vitro fertilisation procedures must have been in a relationship for five out of the last six years. Although this requirement has been removed it is noted that the stability of the relationship is still a relevant consideration in section 23(e). Section 23(e) requires that an in vitro fertilisation procedure can not be provided without consideration of the welfare and interests of any child who may be born as a result of the procedure.

PART 12 – AMENDMENTS TO THE *HUMAN TISSUE AND TRANSPLANT ACT 1982*

Clause 71 – *Human Tissue and Transplant Act 1982* amended

This clause is self-explanatory.

Clause 72 – Section 3 amended

This clause amends the definition of “senior next of kin” and “next of kin”.

For a person (including a child) who is both married and living in a de facto relationship the highest priority is given to a legally married spouse or de facto partner who is living with the person as the person’s spouse or de facto partner. This is intended to make it clear that a current de facto partner or spouse would have priority over a previous de facto partner or spouse from whom the person is separated. For a person who is not both legally married and in a de facto relationship the same priority is given to a de facto partner as would be given to a legally married spouse.

PART 13 – AMENDMENTS TO THE *INHERITANCE (FAMILY AND DEPENDANTS PROVISION) ACT 1972*

Clause 73 - *Inheritance (Family and Dependants Provision) Act 1972* amended

This clause is self explanatory

Clause 74 - Section 4 amended

This clause amends section 4(1) to delete "adopted" from the relevant provision. See discussion regarding *Adoption Act 1994*. Section 4(4) is amended by deleting the relevant provisions to insert instead a parent and a child and any other relationship traced in any degree through that relationship, shall be recognised only if parentage is admitted by or established against the parent in the parent's lifetime. This is to include the wider definition of "parent" due to amendments to the *Artificial Conception Act 1985* and deals with the relationship between a parent and a child for the purposes of this Act.

Clause 75 - Section 7 amended

This clause amends sub-section 7(1)(a) and (b) to take into account a de facto partner as defined under the *Interpretation Act 1984*. This Act makes provision for the maintenance and support of the family and dependants of deceased persons out of the assets of the deceased's estates and for other purposes incidental thereto.

Clause 76 - Applications regarding the estates of persons who died before the commencement of this Part

This clause makes it clear that an application under the *Inheritance (Family and Dependants Provision) Act 1972* for provision of the estate of a person who died before the commencement of this Part is to be dealt with as if this amendment had not been made.

PART 14 – AMENDMENTS TO THE INTERPRETATION ACT 1984

Clause 77 - *Interpretation Act 1984* amended

This clause is self explanatory.

Clause 78 - Section 5 amended

This clause defines "parent" for the purposes of State law to include a person who is a parent within the meaning of the *Artificial Conception Act 1985* or: a person who is an "adopted parent" under the *Adoption Act 1994*.

PART 15 – LAW REFORM (DECRIMINALIZATION OF SODOMY) ACT 1989

Clause 79 – *Law Reform (Decriminalization of Sodomy) Act* repealed

This clause is self-explanatory

PART 16 – AMENDMENTS TO THE MEMBERS OF PARLIAMENT (FINANCIAL INTERESTS) ACT 1992

Clause 80 - *Members of Parliament (Financial Interests) Act 1992* amended

This clause is self-explanatory.

Clause 81 - Section 3 amended

This clause amends section 3 to take into account the definition of "parent" and "de facto partner" as defined in the *Artificial Conception Act 1985* and the *Interpretation Act 1984*.

PART 17 – AMENDMENTS TO THE PARLIAMENTARY SUPERANNUATION ACT 1970

Clause 82 - *Parliamentary Superannuation Act 1970* amended

This clause is self explanatory.

Clause 83 - Section 5 amended

This clause amends section 5 to include the appropriate definitions arising from the *Interpretation Act 1984* and thereby affecting payments under the parliamentary superannuation scheme.

Clause 84 - References to "widow" and "widows" replaced in certain provisions

This clause replaces "widow" and "widowers" to be consistent with the legislative scheme.

Clause 85 - Section 18 amended

This clause is self explanatory and consistent with the legislative scheme.

Clause 86 - Section 18A amended

This clause is self explanatory and consistent with the legislative scheme.

Clause 87 - Section 19 amended

This clause amends "her husband" relevantly to include the "the former member or member".

Clause 88 - Section 19A repealed

This clause repeals 19A which is now redundant.

Clause 89 - Section 23A amended

This clause is self explanatory and consistent with the legislative scheme.

PART 18 – AMENDMENTS TO THE *PUBLIC TRUSTEE ACT 1941*

Clause 90 - *Public Trustee Act 1941* amended

This clause is self explanatory.

Clause 91 - Section 10 amended

This clause includes a person who is married to or living as a de facto partner of the deceased immediately before the death of the deceased for the purposes of the Public Trustee's power to apply for orders for administration of the estate of a deceased person.

Clause 92 - Section 18 amended

This clause includes a parent of the infant for the purposes of section 18 which deals with the payment of distributive shares of infant children where the net income is below a nominated amount.

Clause 93 - Section 49 amended

Section 49(1)(n) is amended to include in the Public Trustee's general powers the payment of sums to, inter alia, the person, spouse or de facto partner for the person and for the education of the person's children, as the Public Trustee deems expedient and reasonable.

PART 19 – AMENDMENTS TO THE STATE SUPERANNUATION ACT 2000

Clause 94 - *State Superannuation Act 2000* amended

This clause is self explanatory.

Clause 95 – Section 28 amended

Section 28(3) to include "a de facto partner of that person". The amendment only affects West State Super. The main changes to definitions for all other schemes will need to occur in the State Superannuation Regulations 2001.