

## ***Same Sex Marriage Bill 2013***

### **Explanatory Memorandum**

#### **1. Overview of Bill**

The Bill is divided into 8 Parts, which in turn may have two or more divisions. The Part headings are: Preliminary; Same-sex marriage; Authorised celebrants; Miscellaneous; *Births, Deaths and Marriages Registration Act 1998* amended; *Family Court Act 1997* amended; *Interpretation Act 1984* amended; Other Acts amended. The content of each part is set out in more detail below.

The main object of the Bill is to provide for same-sex marriage between adults; the authorisation of celebrants to solemnise same-sex marriages; consequential amendments to other legislation; and related purposes.

#### **2. Summary of substantive provisions**

##### **Part 1 – Preliminary**

###### **Clause 1 Short Title**

This clause provides the short title of the *Same Sex Marriage Act 2013*.

###### **Clause 2 Commencement**

This clause specifies that clauses 1 and 2 come into operation on the day on which the Act receives the Royal Assent and the rest of the Act on the day that is 28 days after that day.

###### **Clause 3 Terms used**

This clause defines certain terms that are used in the Act.

##### **Part 2 – Same-sex marriage**

###### ***Division 1 – Same-sex marriage eligibility***

###### **Clause 4: Application of Division**

This Clause confirms that the provisions in this Bill apply to same-sex marriages notwithstanding any common law rule of private international law applying elsewhere to same-sex marriages.

###### **Clause 5: Same-sex marriage eligibility**

This clause provides that a person is eligible to be in a same sex marriage if neither person is same-sex married or married under Commonwealth law, they are not in a prohibited relationship and they are of same sex marriageable age if the person is 18 years old. 2

## ***Division 2 – Void same-sex marriages***

### **Clause 6: Grounds on which same-sex marriages are void**

Subclause (1) defines ‘adopted’ and ‘ancestor’ for the purpose of this clause.

Subclause (2) provides for the circumstances in which same-sex marriages are void. These include reasons such as when:

- one party to a same-sex marriage is already lawfully married (whether under this Bill or any other Act dealing with marriage) to another person at the time of his or her same-sex marriage; or
- the parties are within a prohibited relationship which means by virtue of subclause (3) a relationship between a person and an ancestor or descendant of that person or between siblings (whether whole or half-blood).

Subclauses (4) to (6) deal with adoptive relationships placing the adopted child in the same position as a natural child for the purpose of prohibited relationships.

## ***Division 3 – Solemnisation of same-sex marriages in Western Australia***

### **Clause 7: Application of Division**

Division 3 applies to all same-sex marriages solemnised or intended to be solemnised in Western Australia.

### **Clause 8: Same-sex marriages to be solemnised by authorised celebrants**

This clause provides that same-sex marriages must be solemnised by authorised celebrants. The authorisation and registration of celebrants is dealt with in Part 3 of the Bill.

### **Clause 9: Ministers of religion not bound to solemnise same-sex marriage etc.**

This clause provides that nothing in this part obliges a minister for religion to solemnise a same-sex marriage or to solemnise such a same sex marriage subject to conditions in addition to those set out in this Act.

### **Clause 10: Notice to be given and declarations made**

Subclause (1) provides that a same-sex marriage must not be solemnised unless:

- a notice in writing of the intended same-sex marriage to be given and received by the celebrant not earlier than 18 months or later than 1 month before the same-sex marriage takes place; and
- the conditions set out in subclause (1)(b) have been satisfied; and
- each of the parties has made a declaration before the celebrant as to the party’s conjugal status and belief that no impediment exists to the same-sex marriage.

Subclauses (2) – (7) set out the requirements that must be satisfied in order for a same-sex marriage to be solemnised, including the requirements in relation to a notice of intention to 3

Same sex marry, and the obligations that must be fulfilled by the celebrant after receiving the notice of intention to same sex marry.

#### **Clause 11: Solemnisation of same-sex marriages**

Subclause (1) provides that a same-sex marriage may be solemnised by any authorised celebrant who has possession of the notice of intention to same sex marry if it is impracticable for the authorised celebrant to whom the notice was given to solemnise the same sex marriage for any reason.

Subclause (2) provides that the authorised celebrant must not solemnise a same-sex marriage unless satisfied that the parties are the parties specified in the notice of intention to same sex marry and there is no reason to believe that any document in relation to the same sex marriage is false or defective.

#### **Clause 12: When and where the same-sex marriage may be solemnised**

This clause specifies that a same-sex marriage may be solemnised on any day, at any time and in any place.

#### **Clause 13: Witnesses**

This clause requires that a same-sex marriage must not be solemnised unless at least two persons who have or appear to the authorised celebrant to have reached 18 years old are present as witnesses.

#### **Clause 14: Form of ceremony**

This clause provides for certain formalities to be included in the form of a ceremony to be used by an authorised celebrant to solemnise a same-sex marriage.

Subclause (1) provides that if a ceremony is conducted by an authorised celebrant who is a minister of religion, the ceremony may be conducted as required by the religion to which the minister belongs.

Subclause (2) provides for the form of words that must be spoken by the parties to a same-sex marriage if the ceremony is conducted by an authorised celebrant who is not a minister of religion.

#### **Clause 15: Authorised celebrants to explain nature of same-sex marriage relationship**

This clause specifies the words that must be spoken by an authorised celebrant who is not a minister of religion before a same-sex marriage is solemnised.

#### **Clause 16: Certain same-sex marriages not solemnised in accordance with this Division are invalid**

Subclause (1) specifies that, subject to the exceptions in subclause (2), a same-sex marriage solemnised other than in accordance with this Division is not valid. 4

Subclause (2) provides that a same-sex marriage is not invalid by reason of the matters specified in the subclause.

Subclause (3) provides that a same-sex marriage is not invalid if the person solemnising it was not authorised to do so if either party believed that the celebrant was lawfully authorised to solemnise the

marriage. Under subclause (4), the form and ceremony of the same-sex marriage under subclause (3) is taken to be sufficient if it reflects the intention of both parties to the ceremony to be married.

#### **Clause 17: Authorised celebrant to retain notices and declarations**

The authorised celebrant must keep the documents relating to the same sex marriage until the requirements of clause 18 have been fulfilled.

#### **Clause 18: Same-sex marriage certificates**

Clause 18 regulates the formalities in relation to same-sex marriage certificates, including the preparation, number, form, content, timing and signing requirements in relation to those certificates.

### ***Division 4 – Offences***

#### **Clause 19: Bigamy**

Subclause (1) prohibits persons who are already legally married going through a second form or ceremony of same-sex marriage, and specifies the penalty that applies.

Subclauses (2) – (7) set out the defences and other terms that apply in relation to subclause (1).

### ***Division 5 – Second ceremonies***

#### **Clause 20: Second same-sex marriage ceremonies**

Clause 20 sets out the circumstances in which 2 people who are already legally married to each other may go through another form or ceremony of same-sex marriage.

### **Part 3 – Authorised celebrants**

#### ***Division 1 – Same-sex marriage celebrants***

#### **Clauses 21 – 25**

These clauses set out the requirement for registration of same-sex marriage celebrants, the information that must be recorded on the register that is to be kept in relation to registered same-sex marriage celebrants, the cancellation of registration of same-sex marriage celebrants, and the ability of persons affected by certain decisions to apply to the State Administrative Tribunal to review those decisions. 5

### ***Division 2 – Public service officers***

#### **Clause 26: Authorisation of public service officers**

The Registrar of Births, Deaths and Marriages or other officers so authorised by the Minister may solemnise same-sex marriages in Western Australia.

### **Part 4 – Miscellaneous**

#### **Clause 27: False statement or documents**

Clause 27 provides that any person who knowingly makes a false or misleading statement in a document under this Act is guilty of an offence for which the penalty is a fine of \$10,000.

#### **Clause 28: Interpreters at same-sex marriage ceremonies**

This clause provides for the use of interpreters in connection with same-sex marriage ceremonies, and specifies the responsibilities of such interpreters.

#### **Clause 29: Regulations**

This clause provides that the Governor may make regulations prescribing all matters that are required, permitted, necessary or convenient to be prescribed for giving effect to the Act.

### **Part 5 – *Births, Deaths and Marriages Registration Act 1998* amended**

#### **Clauses 30 – 35**

These clauses set out the amendments to consequential amendments to be made to the *Births, Deaths and Marriages Registration Act 1998*, including (clause 35) the insertion of a provision regarding the registration of same-sex marriages.

### **Part 6 – *Family Court Act 1997* amended**

This part sets out the consequential amendments to be made to the *Family Court Act 1997*, including the insertion of a new Part 5B in clause 44.

#### **Clause 44: Part 5B inserted**

Clause 44 provides that the following provisions will be inserted into the *Family Court Act 1997* as clauses 206A – 206O.

206A defines the terms *dissolution order, dissolution proceeding and nullity declaration*. 6

206B sets out the principles to be applied by the Family Court in the exercise of its jurisdiction in relation to same-sex marriages.

206C provides that one or both parties to a same-sex marriage may apply to the Family Court for a dissolution order, a nullity declaration or a declaration as to the validity of a same-sex marriage.

206D sets out the additional requirements that must be satisfied in relation to an application for a dissolution order.

206E provides that a dissolution order must only be made if the same-sex marriage has broken down irretrievably, and the grounds on which that condition may be established.

206F sets out the meaning of “separation”.

206G sets out the effect of the parties to a same-sex marriage resuming cohabitation after they have separated.

206H provides that if the Family Court is satisfied that a same-sex marriage is void under the *Same Sex Marriage Act 2013*, it must make a declaration that the same sex marriage is nullified.

206I provides if an application for a nullity declaration and for a dissolution order are before it concurrently, the Family Court must not make a dissolution order unless it has dismissed the application for a nullity declaration .

206J sets out various matters in relation to an appeal against a dissolution order, and how this affects when a dissolution order will take effect.

206K provides that the Registrar must prepare and file with the Family Court and the Registrar of Births, Deaths and Marriages a memorandum of a dissolution order when it takes effect, and a certificate signed by the Registrar to this effect is evidence in all courts and for all purposes of the matters in the certificate.

206L and 206M provide that the Family Court may rescind a dissolution order (provided it has not yet taken effect) if the parties are reconciled, or if there has been a miscarriage of justice.

206N provides that a party to a same-sex marriage may re-marry after a dissolution order has taken effect.

206O provides that the provisions in Part 5A of the *Family Court Act* (apart from clause 205Z relating to conditions that need to be satisfied before the Court makes a decision about a de facto relationship) apply to a same-sex marriage as if the same-sex marriage were a de facto partnership. 7

## **Part 7 – Interpretation Act 1984 amended**

This part amends the Interpretation Act 1984 by the insertion of the following definitions:

**husband**, in relation to a male person in a same-sex marriage, to mean the person to whom the male person is same sex married, and **wife** has a corresponding definition in relation to female persons.

**marriage** to include same-sex marriage.

## **Part 8 – Other Acts amended**

This part deals with miscellaneous changes to other Acts including the *Duties Act 2008*, the *Guardianship and Administration Act 1990*, the *Oaths, Affidavits and Statutory Declarations Act 2005*, the *Stamp Act 1921*, the *State Administrative Tribunal Act 2004*, and the *Wills Act 1970*.