2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

SAME-SEX RELATIONSHIPS (EQUAL TREATMENT IN COMMONWEALTH LAWS — GENERAL LAW REFORM) BILL 2008

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by the authority of the Attorney-General, the Honourable Robert McClelland MP)
SAME-SEX RELATIONSHIPS (EQUAL TREATMENT IN COMMONWEALTH LAWS — GENERAL LAW REFORM) BILL 2008

GENERAL OUTLINE

1 The purpose of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 (the General Law Reform Bill) is to eliminate discrimination in a wide range of Commonwealth laws.

2 The Government amendments proposed to the General Law Reform Bill will:

- replace the concept of child as a ‘product of a relationship’ with ‘child of a person within the meaning of the Family Law Act 1975’

- remove amendments relating to concepts of ‘legal responsibility’ and ‘custody, care and control’ as a consequence of amendments to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Family Law Amendment Bill)

- remove the amendment inserting a definition of ‘de facto partner’ into the Acts Interpretation Act 1901 as a consequence of parliamentary amendments to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (the Superannuation Bill) which will insert this definition into the Acts Interpretation Act through that Bill

- amend the definition of ‘step-parent’ in subsection 4(1) of the Family Law Act to include a person who is, or has been, a de facto partner of a parent of the child

- replace the term ‘spouse’ in the Civil Aviation (Carrier’s Liability) Act 1959 with the phrase ‘spouse or de facto partner’

- amend provisions in the Child Support (Assessment) Act 1989 that relate to the concept of ‘parent’ to maintain consistency between that Act and the Family Law Act (as amended by the Family Law Amendment Bill)

- amend the definitions of ‘de facto relationship’ and ‘member of a couple’ in the Child Support (Assessment) Act to recognise both same and opposite-sex de facto relationships and registered relationships within the meaning of section 22B of the Acts Interpretation Act (as proposed to be amended by Government amendments to the Superannuation Bill), and


3 Acts affected by the proposed amendments to the General Law Reform Bill are:

- A New Tax System (Family Assistance) Act 1999
- Aboriginal Land Grant (Jervis Bay Territory) Act 1986
- Age Discrimination Act 2004
- Aged Care Act 1997
- Airports Act 1996
- Australian Citizenship Act 2007
• Australian Federal Police Act 1979
• Australian Postal Corporation Act 1989
• Bankruptcy Act 1966
• Broadcasting Services Act 1992
• Child Support (Assessment) Act 1989
• Child Support (Registration and Collection) Act 1988
• Civil Aviation (Carriers’ Liability) Act 1959
• Commonwealth Electoral Act 1918
• Corporations Act 2001
• Corporations (Aboriginal and Torres Strait Islander) Act 2006
• Crimes Act 1914
• Crimes (Superannuation Benefits) Act 1989
• Customs Act 1901
• Defence Force (Home Loans Assistance) Act 1990
• Defence (Parliamentary Candidates) Act 1969
• Defence Service Homes Act 1918
• Education Services for Overseas Students Act 2000
• Export Market Development Grants Act 1997
• Financial Sector (Shareholdings) Act 1998
• Foreign Acquisitions and Takeovers Act 1975
• Health Insurance Act 1973
• Higher Education Support Act 2003
• Immigration (Guardianship of Children) Act 1946
• Income Tax Assessment Act 1997
• Insurance Acquisitions and Takeovers Act 1991
• Life Insurance Act 1995
• Medibank Private Sale Act 2006
• Migration Act 1958
• Military Rehabilitation and Compensation Act 2004
• National Health Act 1953
• Navigation Act 1912
• Parliamentary Entitlements Act 1990
• Passenger Movement Charge Collection Act 1978
• Pooled Development Funds Act 1992
• Privacy Act 1988
• Proceeds of Crime Act 2002
• Royal Australian Air Force Veterans’ Residences Act 1953
• Safety, Rehabilitation and Compensation Act 1988
• Seafarers Rehabilitation and Compensation Act 1992
• Service and Execution of Process Act 1992
• Sex Discrimination Act 1984
• Social Security Act 1991
• Superannuation Act 1976
• Student Assistance Act 1973
• Telstra Corporation Act 1991
• Trade Representatives Act 1933
• Veterans’ Entitlements Act 1986
• Witness Protection Act 1994

Financial Impact Statement

4 There is estimated to be an ongoing financial impact for these measures.

Regulation Impact Statement

5 A regulation impact statement is not required. The Office of Best Practice Regulation has advised that no further analysis was required as the General Law Reform Bill will have little to no regulatory impact.
Key concepts and definitions

**Child**

6 In order to recognise children of same-sex couples, the General Law Reform Bill expands the classes of children that may be taken to be the child of a couple. The General Law Reform Bill provides that for the purposes of the Acts or provisions of Acts amended a child would be considered to be a person’s child where that child was the ‘product of the relationship’ the person has or had as a couple with another person. This was intended to ensure that children of same-sex couples were recognised across the range of Commonwealth laws amended. A number of submissions to the Senate Standing Committee on Legal and Constitutional Affairs’ inquiry into the General Law Reform Bill raised concerns about this definition.

7 Since the introduction of the General Law Reform Bill, Government amendments to the Family Law Amendment Bill, which amends the Family Law Act, have been passed by the Senate. The amendments to the Family Law Amendment Bill are intended to implement the bipartisan recommendation made by the Senate Standing Committee on Legal and Constitutional Affairs that the definition of ‘child of the de facto relationship’ and the parenting presumptions in section 60H of the Family Law Act be amended to allow children of same-sex relationships to be recognised as a child of the relationship for the purposes of the entire Family Law Act. The classes of children falling within the amended provisions of the Family Law Act are substantially equivalent to the classes of children that the Government intended to cover with the ‘product of a relationship’ definition in the General Law Reform Bill.

8 The definition of child in these amendments to the General Law Reform Bill therefore relies on the expanded meaning of child in the Family Law Act which will result from the amendments made by the Family Law Amendment Bill to Part VII of that Act. The meaning of ‘child’ in the Family Law Act will include children:

- born to a woman as the result of an artificial conception procedure while that woman was married to, or was a de facto partner of, another person (whether of the same or opposite-sex), and

- who are children of a person because of an order of a State or Territory court made under a State or Territory law prescribed for the purposes of section 60HB of the Family Law Act, giving effect to a surrogacy agreement.

9 This will ensure that the children of same-sex couples are recognised consistently across Commonwealth laws and responds to concerns raised in relation to the ‘product of the relationship’ definition of child contained in the General Law Reform Bill. This approach addresses the concerns of the Committee in relation to the definition of ‘child’ in the General Law Reform Bill. It is also consistent with the approach in proposed amendments to the Superannuation Bill.

10 In order to incorporate the Family Law Act concept of ‘child’, these amendments replace the ‘product of the relationship’ definition wherever it occurs with a reference to a child ‘within the meaning of the Family Law Act 1975’. The Government intends that this phrase should be interpreted to refer to all children who come within the meaning of ‘child’ in the Family Law Act, notwithstanding the fact that certain provisions of the Family Law Act do not apply in all States. In particular these definitions will extend to children in Western Australia despite the fact that subsection 69ZE(2) of the Family Law Act provides that Part VII of that Act does not apply in that State.
**Legal Responsibility**

11. The General Law Reform Bill amends a number of provisions relating to ‘legal responsibility’, ‘care, custody and control’ and related concepts as they relate to children. These amendments were intended to ensure that same-sex parents could come within provisions referring to these concepts where children within the ‘product of a relationship’ definition are in their care, and where there is no court order in place which is inconsistent with the person having legal responsibility.

12. The proposed amendments to the Family Law Act to recognise same-sex parents will have the result that same-sex parents will automatically be considered to have ‘parental responsibility’. This is because section 61C of the Family Law Act provides that each of a child’s parents has parental responsibility. Parental responsibility is defined in section 61B to include all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. The proposed amendments to the Family Law Act will therefore provide same-sex parents with a substantial degree of legal responsibility over their children.

13. As a result of these amendments to the Family Law Act, it is no longer necessary to include in the General Law Reform Bill any amendments deeming same-sex parents to have legal responsibility or custody, care and control for their children. Therefore, these amendments will remove any such amendments from the General Law Reform Bill.

**De facto partner**

14. The General Law Reform Bill inserts a definition of ‘de facto partner’ in the Acts Interpretation Act. The definition encompasses members of both same-sex and opposite-sex de facto relationships. This amendment is now being moved through parliamentary amendments to the Superannuation Bill to ensure that the Acts Interpretation Act definition of ‘de facto partner’ is in place when the Superannuation Bill commences. These amendments therefore remove the amendment to the Acts Interpretation Act from the General Law Reform Bill.

**Tracing rule**

15. In order to ensure that family relationships referred to in the Acts being amended include relationships that are traced through the child-parent relationship, the General Law Reform Bill inserts a tracing rule wherever terms such as ‘relative’, ‘brother’, ‘aunt’ and ‘grandparents’ are used in the Acts. Examples 1 and 2 below outline circumstances where the tracing rule can be used to determine a relationship.

Example 1

J is in a de facto relationship with S. During the relationship J and S decide that S will undergo an artificial conception procedure using donated gametes. The procedure takes place and S gives birth to H. Later, J and S decide to have another child – S will again undergo an artificial conception procedure using donated gametes, but from a different source. The procedure takes place and S gives birth to T. Both procedures comply with the requirements of section 60H of the Family Law Act, and J and S are therefore both the parents of each of the children. Whilst T is the child of J and S, he is not the biological sibling of H.

16. The use of the tracing rule in this instance will allow T to be considered to be H’s brother because the relationship is traced through the child–parent relationship that each child has with J.
and S. This will continue to be the case even if the relationship between J and S were to break down at a later time. Without the tracing rule, T will only be considered to be H’s half brother.

Example 2

J is in a de facto relationship with S. S has a brother T. During the relationship, J and S decide that J will undergo an artificial conception procedure using donated gametes. The procedure, which complies with the requirements of section 60H of the Family Law Act, takes place and J gives birth to H.

T will be considered to be H’s uncle in this instance because the relationship is traced through the child-parent relationship which arises because of section 60H of the Family Law Act. This will continue to be the case even if the relationship between J and S were to break down at a later time. Without the tracing rule, T will have no familial link to H and would not be considered to be T’s uncle.
NOTES ON AMENDMENTS

Amendment 1

18 This amendment removes Table Item 3 from Clause 2 of the General Law Reform Bill. Table Item 3 relates to the commencement date of Schedule 2, Part 1 – Amendment of the Acts Interpretation Act and is no longer required as a consequence of the omission of Part 1 by Amendment 7.

Amendments 2 - 6

19 These amendments remove Table Items 17, 18, 19, 20 and 21 from Clause 2 of the General Law Reform Bill. These table items relate to the commencement of certain items in Schedule 7 (Finance and Deregulation) of the General Law Reform Bill and are no longer required as a consequence of the omission of those items by Amendments 62 and 63.

Amendment 7

20 This amendment omits Schedule 2, Part 1 – Amendment of the Acts Interpretation Act. This amendment is now being moved as part of proposed amendments to the Superannuation Bill to ensure that the Acts Interpretation Act definition of ‘de facto partner’ is in place for when the Superannuation Bill commences.


21 These amendments remove references to the ‘product of the relationship’ definition of child from certain items and instead refer to a child within the meaning of the Family Law Act. This change in approach to the definition of ‘child’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Amendments 20, 29, 70, 72, 85, 101, 107

22 These amendments relate to the definition of ‘parent’. They remove references to whether the child is a ‘product of the relationship’ that a person has or had as a couple, and instead refer to whether they are the person’s child within the meaning of the Family Law Act. This change in approach to the definition of ‘child’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Amendments 12, 37, 41, 49, 51, 56, 57, 67, 76, 77, 80

23 These amendments remove provisions relating to legal responsibility or care, custody and control for children. This change in approach is described under ‘legal responsibility’ in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Amendment 15

24 This amendment inserts new Items 52A, 52B, and 52C into Schedule 2 (Attorney-General) of the General Law Reform Bill.

25 Item 52A amends the definition of ‘step-parent’ in subsection 4(1) of the Family Law Act. The current definition of ‘step-parent’ is someone who is or has been married to a parent of the
child, but is not a parent of the child. As same-sex couples cannot marry, the child of one member of the couple by a former relationship cannot be considered to be the other member of the couple’s stepchild. This is also the case for children of opposite-sex de facto partners by a former relationship. The current definition does not recognise that a de facto partner of a parent of a child may treat that child as a member of the family formed with the parent.

26 The proposed amendment will extend the existing concept of step-parent to include a person who is, or has been a de facto partner of a parent of the child and treats or treated the child as a member of the family formed with the parent. ‘De facto partner’ is given the meaning in section 60EA of the Family Law Act (as proposed to be amended by the Family Law Amendment Bill) which includes a person in a registered relationship.

27 The proposed amendment will mean that a court can find that a de facto step-parent has a duty to maintain a child and make a child maintenance order against the de facto step-parent under section 66M of the Family Law Act. This is a secondary duty subject to the primary duty of the parents of the child to maintain the child – see section 66D of the Family Law Act.

28 Item 52B amends paragraph 66M(3)(b) of the Family Law Act as a consequence of amendments to the definition of ‘step-parent’ by Item 52A. The amended provision requires the court to have regard to the length and circumstances of the marriage or relationship of the step-parent with the parent of the step-child in determining whether the step-parent has a duty to maintain the step-child.

29 Item 52C relates to the application of the proposed amendment to the definition of ‘step-parent’ to the Child Support (Registration and Collection) Act. The definition of ‘step-parent’ in the Child Support (Registration and Collection) Act currently has the same meaning as in the Family Law Act. This amendment provides that the proposed amendment of the Family Law Act definition of ‘step-parent’ in Amendment 15 affects the definition of ‘step-parent’ in the Child Support (Registration and Collection) Act only after 1 July 2009. This will align with the commencement of the amendments to that Act made by Amendment 39.

Amendments 24

30 This amendment omits the insertion of a subsection ‘(1)’, as a consequence of the omission of subsection 3(2) by Amendment 27.

Amendment 26

31 Amendment 26 omits a note referring to subsection 3(2) as a consequence of the omission of that subsection by Amendment 27.

Amendment 39

32 This amendment inserts new Items 22A - H, 22J and 22K into Schedule 6 (Families, Housing, Community Services and Indigenous Affairs) of the General Law Reform Bill.

33 Item 22A amends the definition of ‘member of a couple’ in subsection 5(1) of the Child Support (Assessment) Act. The current definition of ‘member of couple’ only covers married couples and opposite-sex de facto couples. The new definition will include a person who is living with another person, whether of the same-sex or opposite-sex, on a genuine domestic basis although not legally married to the other person. It will also capture a person who is in a ‘registered
relationship’ as defined by section 22B of the Acts Interpretation Act (as proposed to be amended 
by parliamentary amendments to the Superannuation Bill).

34 Item 22B amends the definition of ‘parent’ in subsection 5(1) of the Child Support 
(Assessment) Act to include a person who is a parent under sections 60H and 60HB of the Family 
Law Act (as proposed to be amended by the Family Law Amendment Bill). This will mean that in 
relation to children born as a result of an artificial conception procedure, female same-sex de facto 
couples would be recognised as the parents of a child born where the couple consent to the artificial 
conception procedure and one of them is the birth mother. Parents of children born under surrogacy 
arrangements where there is a court order giving effect to the arrangement are also recognised as a 
‘parent’ for the purposes of child support.

35 Items 22C and 22D insert a definition of ‘relative’ in the Child Support (Assessment) Act 
which gives effect to the ‘tracing rule’ as described in the Key Concepts and Definitions section of 
this Supplementary Explanatory Memorandum. This will ensure that same-sex parents and their 
families are recognised as relatives of the child.

36 Item 22E relates to paragraph 29(2)(d) of the Child Support (Assessment) Act which describes 
one of 8 fact situations in which the Registrar is to be satisfied that a person is a parent of a child. 
Paragraph 29(2)(d) currently provides that a parent is a parent for the purposes of this Act where 
that person executed an instrument under the law of the Commonwealth or a State or Territory or 
prescribed overseas jurisdiction acknowledging that the person is the ‘father or mother’ of the child. 
This paragraph is discriminatory as it may prevent the recognition of instruments executed legally 
by a co-father or co-mother in Australia or in an overseas jurisdiction. Item 22F amends this 
paragraph by replacing the phrase ‘the father or mother’ with the gender-neutral term ‘parent’.

37 Item 22F inserts a new fact situation in subsection 29(2), which lists fact situations in which 
the Registrar is to be satisfied that a person is a parent of a child. The new fact scenario will 
recognise a person who is a parent of a child under section 60H or section 60HB of the Family Law 
Act (as proposed to be amended by the Family Law Amendment Bill).

38 Items 22G and 22H relate to the definition of ‘de facto relationship’ as it applies to section 
163A of the Child Support (Assessment) Act. The current definition of ‘de facto relationship’ in 
subsection 163A(5) only applies to a relationship between a ‘man and a woman’. This definition is 
discriminatory as it does not recognise same-sex relationships.

39 Amendment 22G amends sub-paragraph 163A(2)(b)(v)(A) which exempts from duty child 
support agreements that relate to a child whose parents were:

- not married to each other, or
- not living with each other in a de facto relationship at the time the child was conceived. 

This provision deals with child support agreements that relate to a child conceived when there was 
no relationship – marriage or de facto – between the parents. Amendment 22GA will remove the 
phrase ‘not living with each other’ and provide instead that the parents were not in a de facto 
relationship with each other at the time the child was conceived. This reflects the amended 
definition of de facto relationship in subsection 163A(5) (as proposed to be amended by amendment 
22H). That is, for parents to not have been in a de facto relationship with each other at the time of 
conception, they were either not living together on a genuine domestic basis or not in a registered 
relationship.
40 Item 22H inserts a new definition of ‘de facto relationship’ which includes a relationship between two persons, whether of the same sex or of different sexes, who live with each other on a genuine domestic basis although they are not legally married. It also captures couples who are in a ‘registered relationship’ as defined by section 22B of the Acts Interpretation Act (as proposed to be amended by parliamentary amendments to the Superannuation Bill).

41 Items 22J and 22K insert a definition of ‘relative’ in the Child Support (Registration and Collection) Act which give effect to the ‘tracing rule’ as described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

42 Application provisions for amendments made by Schedule 2, Part 3 of the General Law Reform Bill will be provided for under regulations.

Amendment 58

43 This amendment omits the word ‘general’ from the heading of Part 2 of Schedule 7 (Finance and Deregulation) as a consequence of the removal of Parts 3 and 4 of Schedule 7 by Amendments 62 and 63.

Amendment 61

44 This amendment removes the words ‘(whether Part 2, 3 or 4)’ from Item 55 as a consequence of the omission of Parts 3 and 4 of Schedule 7 (Finance and Deregulation) by Amendments 62 and 63.

Amendments 62, 63

45 These amendments omit Parts 3 and 4 of Schedule 7 (Finance and Deregulation) respectively. Part 3 and Part 4 of Schedule 7 are no longer necessary as they related to the application of items in relation to the ‘product of the relationship’ definition of ‘child’. The amendments to the Superannuation Act which were to be effected by Part 3 and Part 4 are now effected by Items 53A and 54A which are to be included in the General Law Reform Bill by amendments 59 and 60 respectively.

Amendment 82

46 This amendment amends Item 7 of Schedule 10 (Immigration and Citizenship) to the General Law Reform Bill. Item 7 inserts a new section 8 into the Australian Citizenship Act to provide for recognition of children born to same and opposite-sex couples as a result of artificial conception procedures. As a consequence of the amendments to the Family Law Act to recognise children of same-sex de facto couples conceived through artificial conception procedures and surrogacy arrangements, this amendment inserts a revised section 8 which refers to the Family Law Act. The provision will apply equally to married couples and to same and opposite-sex de facto partners.

47 The revised section 8 inserted by this amendment will apply in cases in which someone is a child of a person under section 60H or 60HB of the Family Law Act. Where the child is also the child of the person’s spouse or de facto partner because of those sections, or is the biological child of the spouse or de facto partner, the child will be taken to be the child of the person and his or her spouse or de facto partner, and not the child of anyone else. As a consequence, gamete donors and surrogate mothers will not be considered to be parents for the purposes of the Australian Citizenship Act where the requirements of this section are satisfied. A child will only be able to claim citizenship by descent from the two parents recognised by this section.
Amendment 83

48 This amendment inserts a new Item 12A into the General Law Reform Bill. The new Item will insert a definition of ‘adoption’ into subsection 5(1) of the Migration Act to provide that adoption has the same meaning as in the Migration Regulations 1994.

49 In addition to the common law meaning of adoption, the migration visa programme currently recognises customary adoption in specific circumstances where formal adoption arrangements are not available or reasonably practicable under the law of the place where the arrangements were made and it occurs in accordance with the usual practice, or a recognised custom, in the culture or cultures of the adoptee and the adopter. Customary adoption is reflected in the definition of adoption in the Migration Regulations and does not sever the ties with the adoptee’s previous parents, as is the case for formal adoption. This amendment will ensure that a child who is recognised as having been customarily adopted for the purposes of the Migration Regulations through the migration visa programme will be recognised as a child of both the child’s previous parent/s and adoptive parent/s for the purposes of the Migration Act.

Amendment 84

50 This amendment amends the definition of ‘child’ in the Migration Act by removing the ‘product of the relationship’ definition of child in Item 20 of Schedule 10 (Immigration and Citizenship) to the General Law Reform Bill and instead referring to a child within the meaning of the Family Law Act, except where the child is an adopted child within the meaning of that Act. ‘Child’ within the meaning of the Family Law Act currently does not include a step-child or foster child.

51 A new paragraph (1)(b) is inserted to include as a person’s child someone who is the adopted child of a person within the meaning of the Migration Act. This will allow the Migration Act concept of adoption to apply rather than the Family Law Act concept (see Amendment 83 above).

52 The change in approach to the definition of ‘child’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Amendments 88, 89

53 These amendments make additional amendments to the Civil Aviation (Carrier’s Liability) Act to correct existing references to ‘spouse’ to read ‘spouse or de facto partner’ to ensure that the relevant provisions apply equally to same and opposite-sex couples.