

**2011**

**LEGISLATIVE ASSEMBLY  
FOR THE AUSTRALIAN CAPITAL TERRITORY**

**CIVIL UNIONS BILL 2011**

**EXPLANATORY STATEMENT**

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# Civil Unions Bill 2011

## Overview of Bill

The Civil Unions Bill 2011 will enable couples who are unable to marry under the Commonwealth *Marriage Act 1961* to enter into a legally recognised relationship. A civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as marriage.

Since Civil Partnerships are a type of domestic relationship, the Bill transfers the civil partnerships scheme to the *Domestic Relationships Act 1994*. New provisions in the Domestic Relationships Act will preserve the mechanism for two people, regardless of their sex, to enter a formally recognised relationship, known as a civil partnership. Since Civil Partnerships are a type of domestic relationship, it is appropriate that legal recognition for these relationships should continue to be expressed under this Act. The introduction of a new and separate Bill for couples who are excluded from the Commonwealth Marriage Act emphasises that these relationships bear the highest legal significance that the ACT Government can afford.

The Bill sets out eligibility to enter a civil union, a process for entering a civil union and a process for ending a civil union.

## Human rights assessment

The Civil Unions Bill enlivens rights protected under the *Human Rights Act 2004*, in particular, s 8 - the right to recognition and equality before the law. This bill promotes the right to recognition and equality before the law as it relates to marriage.

Section 8 of the *Human Rights Act 2004* (HRA) provides that

- 1) *Everyone has the right to recognition as a person before the law.*
- 2) *Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.*
- 3) *Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.*

The non-discrimination provisions in the HRA are founded on articles 2 (1) and 26 of the *International Covenant on Civil and Political Rights*. Article 3 of the Covenant is also relevant in that it places an obligation on States Parties to “ensure the equal rights of men and women to the enjoyment of all civil and political rights.”

The *Discrimination Act 1991* (ACT) also provides that it is unlawful to discriminate against a person on the grounds of sexuality or gender identity (s 7 (1) (b) and (c)).

There is little current case law relating to same-sex marriage. In *Joslin et al v new Zealand*<sup>1</sup>, the United National Human Rights Committee (UNHRC) held that the refusal of

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<sup>1</sup> Communication 902/1999, UN Doc CCPR/C/75/D/902/1999 (2002)

a marriage licence to a number of lesbian couples was not inconsistent with the Covenant. The decision was based on art. 23 (2) of the Covenant which specifically defines a right to marriage by using the term ‘men and women’, rather than in general terms. As the HRA contains no equivalent provision, this finding appears to have no application in the ACT. This is consistent with the approach taken in the *Islam* case<sup>2</sup> where Justice Penfold distinguished between the interpretation of s 18(5) as expressed in the HRA and art. 9(3) of the ICCPR on the basis of the differing constructions of those sections.

More recently, in *Minister of Home Affairs and another v Fourie and another*<sup>3</sup>, the Constitutional Court of South Africa held that there was a Constitutional right to same-sex marriage, particularly based in s 9 (1) of the Constitution of South Africa, which provides that “everyone is equal before the law and has the right to equal protection and benefit of the law” and s 9 (3) which prohibits discrimination, including on the ground of sexual orientation.

Same-sex marriage is also recognised in Canada where the traditional common law definition of marriage being between a man and a woman has been struck down by a number of courts. In *Halpern v Canada (Attorney General)*, the Court of Appeal for Ontario considered the question of whether the exclusion of same-sex couples from the common law definition of marriages as being between a man and a woman s 15 (1) of the *Canadian Charter of Rights and Freedoms* – equality before and under law and equal protection and benefit of law.

In *Halpern* the Court stated “Marriage is, without dispute, one of the most significant forms of personal relationships. ... Through the institution of marriage, individuals can publicly express their love and commitment to each other. ... public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships.”

The Court held that sexual orientation came under the protection in s 15 (1) of the Charter and that “the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage”, in violation of s 15 (1) of the Charter. The Court also held that that violation could not be justified as a reasonable infringement under s 1 of the Charter.

In its November 2009 communiqué, the Australian Council of Human Rights Agencies (ACHRA)<sup>4</sup> highlighted that the “absence of a right to civil marriage for same-sex couples ... [continues to] reinforce the different value placed on relationships between opposite-sex and same-sex couples.” ACHRA’s view was that “the principle of equality therefore requires that any formal relationship recognition available under federal law to opposite sex couples should also be available to same-sex couples. This includes civil marriage.”

In summary, the effect of this bill is to redress the discriminatory nature of the existing construct of marriage as it relates to people in relationships other than the traditional man-woman model, to the extent that is possible within the ACT.

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<sup>2</sup> *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147, at para. 315

<sup>3</sup> [2005] ZACC 19

<sup>4</sup> viewed at <http://www.hrc.act.gov.au/res/civil%20marriage.pdf>

## Outline of Provisions

### Part 1 - Preliminary

#### Clause 1 - Name of Act

This clause names the Act as the *Civil Unions Act 2011*.

#### Clause 2 - Commencement

This clause provides for commencement of the Act on the 7<sup>th</sup> day after its notification day.

#### Clause 3 - Dictionary

This clause says that the Dictionary is part of the Act.

#### Clause 4 - Notes

This clause says that notes in the Act are explanatory and not part of the Act.

#### Clause 5 – Offences against Act – application of Criminal Code etc

This clause says that other legislation including the Criminal Code applies in relation to offences against this Act.

### Part 2 Civil Unions

#### Division 2.1

##### Clause 6 – Civil unions - general

Clause 6 establishes the core elements of a civil union. Couples who cannot marry under the Commonwealth Marriage Act may enter a relationship that is to be treated in the same way as a marriage for all purposes under Territory law.

#### Division 2.2

##### Clause 7 – Eligibility criteria

Clause 7 sets out the eligibility criteria for entering into a civil union.

A person must be an adult to enter into a civil union.

A person may not enter a civil union if they are married or already in a civil partnership or civil union. The rights and obligations flowing from a civil union are premised on a primary relationship and this requirement recognises that there can only be one primary relationship at any given time. Similarly, where a person who is in a civil union subsequently marries, the civil union is automatically terminated.

Under the Constitution, the Act cannot legislate on the subject of marriage between a man and a woman. Eligibility for a civil union must therefore be restricted to couples who do not fit this description but who wish to enter into a formally recognised and legally binding relationship.

A person may not enter a civil union with a person with whom they are in a prohibited relationship. Clause 7(d) sets out prohibited relationships. This qualification reflects the incest offences specified in the *Crimes Act 1900* for the sexual component of any such

relationship. This qualification is also consistent with Commonwealth *Marriage Act 1961* requirements.

Further at least one member of the couple must live in the ACT.

## **Division 2.3 Entering into civil union**

### **Clause 8 – Notice of intention to enter into civil union**

Clause 8 requires the parties to a proposed civil union to give notice to a civil union celebrant of their intention to enter a civil union. The notice must be accompanied by a statutory declaration that goes to the eligibility requirements for entering a civil union. As soon as practicable after the notice is given, the authorised celebrant must give the parties a written notice about the nature and effect of a civil union. The intention of this notice is to ensure that the parties are aware of the solemn nature of the relationship they are creating.

### **Clause 9– How civil union is entered into**

Clause 9 sets out the formal process for entering a civil union. The parties must make a declaration that they intend to enter into a civil union and that they are doing so of their own free will. The clause also contains witnessing requirements.

### **Clause 10- When civil union has effect**

Clause 10 states that a civil union comes into effect when the parties to the civil union make a declaration under clause 9.

## **Division 2.4 Ending civil union**

### **Clause 11 – How civil union ends**

Clause 11 specifies when a civil union ends. A civil union will be automatically terminated on the death or marriage of one of the parties. A civil union may also be terminated by the parties or the Supreme Court under clauses 12 and 14.

### **Clause 12 – Ending civil union by parties**

Clause 12 sets out the procedure for the parties to a civil union to terminate the civil union. A civil union may be terminated by notice given to the registrar-general. If only one party is seeking to terminate the civil union, a copy of the termination notice must also be served personally on the other party. Requirements for personal service are specified in clause 24. A termination notice, unless it is withdrawn, takes effect 12 months after it has been given to the registrar-general.

### **Clause 13 – Order that termination notice not effective**

Clause 13 provides that the Supreme Court may make an order that a termination notice is not effective if it does not reflect, or no longer reflects, the intentions of the party or parties.

### **Clause 14 – Ending civil union by court order**

Clause 14 provides that a party to a civil union may also apply to the Supreme Court for an order terminating a civil union. This provision is included to cover situations where the party is unable to use the termination procedures in clause 12, for example where the whereabouts of other party is unknown.

## **Part 3 – Civil union celebrants**

### **Clause 15 - Registration of civil union celebrants**

Clause 15 allows a person to apply to the registrar-general to be registered as a civil union celebrant. The applicant must be an adult and have the relevant knowledge and skills to exercise the functions of a civil union celebrant under the Act.

The registrar-general must take into account the applicant's criminal history and their mental and physical capacity. They may also take into consideration anything else they consider relevant.

### **Clause 16 - Register of civil union celebrants**

Clause 16 mandates that a register be kept of civil union celebrants and the information that must be included on the register. It further outlines the process for public inspection of the register.

### **Clause 17 – Cancellation of registration**

Clause 17 says that the registrar-general may cancel a person's registration as a civil union celebrant if they do not meet the requirements in clause 15(3) or no longer meet these criteria.

## **Part 4 – Notification and review of decisions**

### **Clause 18 – Meaning of reviewable decision – pt 4**

Clause 18 defines a reviewable decision as a decision mentioned in schedule 1, column 3 under a provision of the Act mentioned in column 2 in relation to the decision.

### **Clause 19 – Reviewable decision notices**

Clause 19 says if the register-general makes a reviewable decision a notice must be provided to each entity mentioned in schedule 1, column 4.

### **Clause 20 – Applications for review**

Clause 20 says an entity mentioned in schedule 1, column 4 or any other person whose interests are affected by the decision may apply to ACAT for review of a reviewable decision.

## **Part 5 - Miscellaneous**

### **Clause 21 – Void civil unions**

Clause 21 sets out the circumstances in which a civil union will be void. These circumstances are linked to the eligibility to enter a civil union and circumstances where either of the parties did not freely enter into the civil union because of fraud, mistake, or incapacity.

### **Clause 22 – Noncompliance with certain requirements**

Clause 22 provides that a civil union is not invalid only because of a failure to comply with formalities. Nor is a civil union invalid because person who the parties gave notice to under section 8 was not a civil union celebrant, if either party believed when giving the notice that the person was a civil union celebrant.

**Clause 23 - Evidence of identity and age**

Clause 23 sets out the evidence of identity and age that is required for the notice under clause 8.

**Clause 24 – Personal service of termination and withdrawal notices**

Clause 24 sets out how the personal service requirement in clause 12 must be met.

**Clause 25 – If personal service impractical or impossible**

Clause 25 sets out the procedure to be followed if personal service is impractical or impossible.

**Clause 26 – Offences**

Clause 26 sets out offences for the Act. These offences are intended to maintain the integrity of civil unions. There are no strict liability offences.

**Clause 27 – Determination of fees**

Clause 27 provides that the Minister may determine fees for the Act. A determination is a disallowable instrument.

**Clause 28 – Approved forms**

Clause 28 provides that the registrar-general may approve forms for the Act.

**Clause 29 – Regulation-making power**

Clause 29 is a general regulation-making power.

**Clause 30 – Domestic Relationships Regulation 2011 - sch 2**

Clause 30 says that on the commencement of the clause the provisions set out in schedule 2 are taken to be a regulation made under the *Domestic Relationships Act 1994*.

**Clause 31 – Legislation amended – sch 3**

Clause 31 says that the Act amends the legislation in schedule 3.

**Clause 32 – Legislation repealed**

Clause 32 repeals the *Civil Partnerships Act 2008*, the *Civil Partnerships Regulation 2010* and all other legislative instruments under the Act.

**Part 6 Transitional****Clause 100 – Definitions – pt 6**

Clause 100 defines commencement day and repealed Act for the part.

**Clause 101- Existing civil partnerships**

Clause 101 provides that an application for a civil partnership entered into before the commencement day which has not been terminated is taken to be a civil partnership under the *Domestic Relationships Act 1994*.

**Clause 102 – Application for registration of civil partnership not decided before commencement day**

Clause 102 provides that an application for a civil partnership made before the commencement day which has not yet been decided is taken to be an application under the *Domestic Relationships Act 1994*.

**Clause 103- Declaration of civil partnerships not made before commencement day**

Clause 103 provides that section 8B of the repealed Act continues to apply for the declaration of a civil partnership where a notice of intention to enter into a civil partnership was given to a civil partnership notary before commencement and the declaration of partnership has not yet been made.

**Clause 104- Declared civil partnerships not registered before commencement day**

Clause 104 provides that section 8BA of the repealed Act continues to apply for the purpose of registering a declaration made before commencement but not yet registered.

**Clause 105 – Application for termination of civil partnership not decided before commencement day**

Clause 105 applies if an application for termination was given to the registrar-general before the commencement day and the civil union had not been terminated. The termination notice is taken to be a termination notice given under the *Domestic Relationships Act 1994*.

**Clause 106 - Applications made but not decided before commencement day**

Clause 106 provides that an application for a termination notice not decided before the commencement day may be decided under the repealed Act.

**Clause 107 – Existing civil partnership notaries**

Clause 107 says a civil partnership notary is taken to be a civil union celebrant.

**Clause 108 – Transitional regulations**

Clause 108 is a regulation making power to ensure effective transition to a civil union scheme.

**Clause 109 – Expiry – pt 6**

Clause 109 provides that part 6 expires 1 year after commencement.

**Schedule 1 – Reviewable decisions**

Schedule 1 relates to part 4 in relation to reviewable decisions.

**Schedule 2 – New Domestic Relationships Regulation 2011**

Schedule 2 sets out the New Domestic Relationships Regulation. The regulation prescribes matters as required under the Act.

**Schedule 3 – Consequential amendments**

Schedule 3 makes consequential amendments to include civil unions as a recognised relationship in the following Acts and Regulations:

- Administration and Probate Act 1929
- Adoption Act 1993
- Adoption Regulation 1993
- Births, Deaths and Marriages Registration Act 1997
- Births, Deaths and Marriages Registration Regulation 1998
- Civil Law (Wrongs) Act 2002
- Corrections Management Act 2007
- Crimes Act 1900
- Discrimination Act 1991



- Domestic Relationships Act 1994  
Amendments to *the Domestic Relationships Act 1994* will continue the civil partnerships registration scheme under that Act. Civil partnerships are a type of domestic relationship. Any couple can register a civil partnership under the Domestic Relationships Act. The amendments provide for a transitional period. Couples who have applied to register a civil partnership but whose registration is not complete at the time of commencement will be deemed to have registered under the Domestic Relationships Act 1994.
- Domestic Violence and Protection Orders Act 2008
- Duties Act 1999
- Evidence (Miscellaneous Provisions) Act 1991
- Family Provision Act 1969
- First Home Owner Grant Act 2000
- Guardianship and Management of Property Act 1991
- Instruments Act 1933
- Land Titles Act 1925
- Legislation Act 2001
- Married Persons Property Act 1986
- Parentage Act 2004
- Powers of Attorney Act 2006
- Rates Act 2004
- Sale of Motor Vehicles Act 1977
- Testamentary Guardianship Act 1984
- Wills Act 1968
- Witness Protection Act 1996

## **Dictionary**