

**2003**

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL  
TERRITORY**

**SEXUALITY DISCRIMINATION  
LEGISLATION AMENDMENT BILL 2003**

**EXPLANATORY STATEMENT**

Circulated by authority of the  
Attorney General  
Mr Jon Stanhope MLA

## SEXUALITY DISCRIMINATION LEGISLATION AMENDMENT BILL 2003

### Overview of Bill

This Bill amends the *Administration and Probate Act 1929*, the *Births, Deaths and Marriages Registration Regulations 1998*, the *Casino Control Act 1988*, the *Credit Act 1985*, the *Debits Tax Act 1997*, the *Duties Act 1999*, the *Family Provision Act 1969*, the *Instruments Act 1933*, the *Land (Planning and Environment) Act 1991*, the *Married Persons Property Act 1986*, the *Nature Conservation Act 1980*, the *NRMA-ACT Road Safety Trust Act 1992*, the *Public Trustee Act 1985*, the *Rates and Land Rent (Relief) Act 1970*, the *Supreme Court Act 1933*, the *Transplantation and Anatomy Act 1978*, the *Trustee Act 1925*, the *Trustee Companies Act 1947*, the *Workers' Compensation Act 1951*, the *Crimes Act 1900*, the *Disability Services Act 1991*, the *Evidence Act 1971*, the *Evidence (Miscellaneous Provisions) Act 1991*, the *Magistrates Court Act 1930* and the *Public Baths and Public Bathing Act 1956*.

The main purpose of this Bill is to remove discrimination relating to sexuality and relationship status. In this respect, the Bill is concerned with the right to equality before the law.

The Bill amends the *Discrimination Act 1991* to provide additional protection from discrimination on the grounds of sexuality. The amendments in the Bill will make it unlawful to vilify a person on the grounds of sexuality, transsexuality or HIV/AIDS status. The Bill also creates an offence of serious vilification on the same grounds.

In addition, the Bill contains an amendment to the *Crimes Act 1900* to address the issue of the availability of the defence of provocation in the case of a non-violent homosexual advance.

The Bill also amends the *Disability Services Act 1991* to recognise sexuality as an area where a person with a disability might face additional disadvantage for the purposes of the design and administration of programs and services under that Act.

## **Notes on Clauses**

### **Clause 1 Name of Act**

The Bill, once enacted, will be known as the Sexuality Discrimination Legislation Amendment Act 2003.

### **Clause 2 Commencement**

This clause provides that the Act will commence on a day to be fixed by written notice of the Minister.

### **Clause 3 Acts and regulations amended – sch 1 and sch 2**

This clause provides for amendments to various Acts and regulations as set out in the two schedules to the Bill.

## **SCHEDULE 1 DOMESTIC PARTNERS**

### **PART 1.1 ADMINISTRATION AND PROBATE ACT 1929**

#### **Amendment 1.1 Section 44, definition of *eligible partner***

This amendment standardises the language in the definition of *eligible partner* in the *Administration and Probate Act 1929* so that it refers to a *domestic partner* consistently with general definition of this term in the *Legislation Act 2001*. This amendment does not alter the meaning of the definition.

#### **Amendment 1.2 Section 44, definition of *legal spouse***

This amendment omits the definition of *legal spouse* as this definition is no longer necessary once the extended definition of *spouse* is omitted by Amendment 1.4. Where the term *spouse* is used in the Act, it will have its ordinary meaning.

#### **Amendment 1.3 Section 44, new definition of *partner***

This new definition of *partner* replaces the current term *spouse*. The term *partner* is preferred to *spouse* which is currently defined to mean both a legal spouse and an eligible partner. The meaning of *spouse* (for example in the definition of *eligible partner*) thus reverts to its ordinary meaning of husband or wife.

#### **Amendment 1.4 Section 44, definition of *spouse***

This amendment omits the definition of *spouse* as it is replaced by the definition of more generic term *partner*.

#### **Amendment 1.5 Section 45A**

The amendment substitutes a new section 45A. Section 45A is concerned with determining the distribution of an intestate estate where there is both a spouse and an eligible partner. This amendment is intended to only change the language of the section so that it is consistent with other ACT legislation. It does not change the effect of the section.

**Amendment 1.6 Section 49BA (1) (a)**

This amendment substitutes the term *partner* for *spouse* consistently with the changes to the defined terms for the Act made by Amendments 1.3 and 1.4. The amendment should be read with Amendment 1.7.

**Amendment 1.7 Section 49BA (3) and (4)**

This amendment, in combination with Amendment 1.6, restructures existing section 49BA so that the meaning is clearer. Section 49BA(3)(b) currently provides that the section does not apply to a spouse of a person entitled to a share in an intestate estate if the spouse is entitled to a share in the estate. This is intended to avoid the double application of the section to the spouse in the capacity of *spouse* as well as in the capacity of ‘entitled person’. However, this intention is not made very clear. Ambiguity arises because a ‘spouse’ is also a ‘person’ for the purposes of section 49BA(1), and the disapplication of section 49BA(1) by section 49BA(3)(b) to someone only in his or her capacity of ‘spouse’ (and not that of ‘entitled person’) is not made clear. By building the ‘disapplication’ into the definition of the entitled person’s *partner* (ie in the proposed defined term *unentitled partner*) the intention of section 49BA(3)(b) is clarified. Consequently, only the effect of section 49BA(3)(a) is preserved in new section 49BA(3). The intended effect of subsection 49BA(3)(b) is provided for in the proposed new definition of *unentitled partner* in new subsection 49BA(4).

**Amendment 1.8 Further amendments, mentions of *spouse* etc**

These amendments replace references to *spouse* with references to *partner* consistently with consistently with the changes to the defined terms for the Act made by Amendments 1.3 and 1.4.

**PART 1.2 BIRTHS, DEATHS AND MARRIAGES REGISTRATION REGULATIONS 1988****Amendment 1.9 New regulation 5(ia) and note**

This amendment inserts a new information item about ‘whether or not the parents of the child are in a domestic partnership’ into the particulars about a birth that the registrar-general may enter into the register kept under the Act. This amendment is complementary to existing regulation 5(j) which prescribes as a particular “if the parents of the child are married—the date and place of marriage”.

**Amendment 1.10 Regulation 5**

This amendment provides for the renumbering of the section on republication of the regulations.

**Amendment 1.11 Regulation 9 (f) and (g)**

This amendment provides for the inclusion of information about domestic partnerships of a deceased person in the notification that is required to be given by a

funeral director under section 37 of the Act. The regulations currently require information about any marriage of the deceased to be included in the register.

### **PART 1.3 CASINO CONTROL ACT 1988**

#### **Amendment 1.12 New section 3E**

This amendment notes that the Criminal Code applies to offences in section 68 of the Act. Section 68 is substantively amended by Amendment 1.13.

#### **Amendment 1.13 Section 68**

This amendment substitutes a new section 68. The section currently provides that a child must not enter or remain in a casino except in the company of a parent or a spouse who is an adult. The redrafted offences expand this exception to include a domestic partner other than a spouse of the child. *Domestic partner* is defined in the *Legislation Act 2001*. The provision is also redrafted in line with current drafting practice.

### **PART 1.4 CREDIT ACT 1985**

#### **Amendment 1.14 Section 5 (1), definitions of *commission charge* and *guarantor*, paragraph (a)**

This amendment amends the definition of *commission charge* and *guarantor* by substituting reference to the broader term *domestic partner* in place of *spouse*.

#### **Amendment 1.15 Section 5 (1), definitions of *commission charge* and *guarantor*, new notes**

This amendment inserts a new note that *domestic partner* is defined in the *Legislation Act 2001*.

### **PART 1.5 DEBITS TAX ACT 1997**

#### **Amendment 1.16 Section 16 (1), definition of *pensioner*, paragraph (e)**

This amendment is intended to address the fact that certain persons who are in the same situation as a pensioner are excluded from eligibility for rebates for debits tax paid because of the reliance on relevant Commonwealth legislation to determine who is a pensioner. The Commonwealth legislation fails to recognise same sex partners in the same way as it recognises opposite sex partners. This amendment is intended to expand the definition of *pensioner* so that it includes a person who, but for the fact that they are or were in a same sex relationship, would fall within the definition of a pensioner.

### **PART 1.6 DUTIES ACT 1999**

#### **Amendment 1.17 Section 72**

This amendment redrafts the section so that it refers to a transfer of dutiable property to a partner rather than a spouse. This amendment standardises the language used in

the section but does not alter the effect of the section. This amendment should be read with Amendments 1.21 and 1.23.

**Amendment 1.18 Sections 74B (1) (b), 115H (1) (b) and 213 (1) (b)**

This amendment substitutes references to *wives* with references to the new term *partners*. This amendment does not alter the effect of the amended provisions.

**Amendment 1.19 Sections 74B (1) (b), 115H (1) (b) and 213 (1) (b), new notes**

This amendment inserts a new note that *partner* is a defined term in the dictionary to the Act.

**Amendments 1.20 – 1.23 Dictionary**

These amendments to the dictionary to the Act substitute a new term *partner* for the current term *spouse*. *Spouse* is currently defined to have an extended meaning that encompasses a much broader range of relationships than the marriage relationship. It includes a person who is in a domestic relationship within the meaning of the *Domestic Relationships Act 1994* with the person. The term *partner* is a more appropriate term to cover this broad range of relationships.

**PART 1.7 FAMILY PROVISION ACT 1969**

**Amendment 1.24 Section 4 (1), definitions of *domestic partner*, *domestic relationship*, *eligible partner*, *legal spouse* and *spouse***

This amendment omits the definitions of *domestic partner*, *domestic relationship*, *eligible partner*, *legal spouse*, and *spouse*. It is no longer necessary to define these terms consequent to the amendments to section 7 of the Act.

**Amendment 1.25 Section 7 (1) (a) and (b)**

This amendment substitutes the two new paragraphs which standardise the language used in the Act. The amendment does not change the effect of the section, simply the way it is expressed. In particular, the amended paragraph 7(1)(b) does not use the term *domestic partner* which is used in the existing provision as meaning a person in a *domestic relationship* within the meaning of the *Domestic Relationships Act 1994*, rather than the meaning given to *domestic partner* under the *Legislation Act 2001*.

**Amendment 1.26 Section 7 (4) (b)**

This amendment substitutes the more general term *partner* for *spouse*.

**Amendment 1.27 New section 7 (9)**

This amendment inserts two new definitions for section 7. The definition is included at the end of the section rather than in the interpretation section as the defined terms are only used in section 7. *Spouse* is currently defined to have an extended meaning that encompasses a much broader range of relationships than the marriage relationship. The term *partner* is a more appropriate term to cover this broad range of relationships.

## **PART 1.8 INSTRUMENTS ACT 1933**

### **Amendments 1.28 – 1.29 Section 12 (1)**

These amendments extend the operation of this section so that it protects the household furniture of domestic partners in the same way that it protects the household furniture of a married couple.

### **Amendment 1.30 Section 12(2)**

This amendment recasts section 12(2) consequent on the amendments to section 12(1) so that it refers to domestic partners in the same way that it currently refers to a husband or wife.

## **PART 1.9 LAND (PLANNING AND ENVIRONMENT) ACT 1991**

### **Amendment 1.31 Section 180 (1) (b)**

This amendment expands the exceptions to the restriction on the transfer or assignment of a lease over Territory land that contains a building and development provision to include a transfer or assignment pursuant to a termination agreement under the *Domestic Relationships Act 1994*. The Act currently only provides an exception for a transfer or assignment made under the *Family Law Act 1975* (Cwlth). The *Family Law Act 1975* only provides for property settlement on the dissolution of a marriage. This amendment affords other relationships the same treatment as marriage for the purposes of the section.

## **PART 1.10 MARRIED PERSONS PROPERTY ACT 1986**

### **Amendment 1.32 Section 4(2)**

This amendment extends the operation of the presumption about authority to pledge a spouse's credit to include all domestic partners. Currently, the presumption is only expressed to apply to a spouse living with their husband or wife, or a person who is living with another person of the opposite sex as the spouse of that other person on a bona fide domestic basis although not married to that other person.

## **PART 1.11 NATURE CONSERVATION ACT 1980**

### **Amendments 1.33 – 1.35**

These amendments remove the restriction in the section that only pensioners may apply for an extension of time to pay an infringement notice. Similarly to Amendment 1.16, these amendments are intended to address the fact that certain persons who are in the same situation as a pensioner are excluded from being able to apply for an extension of time under the section because of the reliance on relevant Commonwealth legislation to determine who is a pensioner. The Commonwealth legislation fails to recognise same sex partners in the same way as it recognises opposite sex partners. Rather than expand the definition of pensioner as in Amendment 1.16, these amendments simply omit the reference to pensioners so that any person may apply for an extension of time to pay an infringement notice.

## **PART 1.12 NRMA–ACT ROAD SAFETY TRUST ACT 1992**

### **Amendment 1.36 Section 2, definition of *deed of trust*, paragraph (a)**

This amendment provides that the deed of trust referred to in the Act means the deed of trust as modified in its effect by new section 4.

### **Amendment 1.37 New section 4**

This amendment provides that the deed of trust has effect as if references to a person's spouse were references to a domestic partner. The provisions of the deed of trust that refer to a person's spouse are concerned with probity and those probity intentions are more fully served by referencing all domestic partners on the same basis as a spouse.

## **PART 1.13 PUBLIC TRUSTEE ACT 1985**

### **Amendments 1.38 – 1.39**

These amendments insert a new definition of *domestic partner* for part 5 of the Act. The new definition is necessary because of the amendment to sections 38 and 39.

### **Amendment 1.40 Section 38 (1) (e)**

This amendment extends the power of the public trustee as manager of property to include applying the property, or any moneys received by the public trustee as manager of the property, for the maintenance, education, advancement or benefit of any domestic partner of the owner of the property, not just a spouse.

### **Amendment 1.41 Section 39 (2) (b)**

This amendment, similarly to Amendment 1.40, extends the range of people who may make an application in relation to property of which the public trustee is manager to include any domestic partner, not just a spouse.

### **Amendment 1.42 Section 39 (5) (d)**

This amendment extends the matters to which a court must have regard in determining an application under the section to include consideration of the interests of any domestic partner, not just a spouse.

### **Amendment 1.43 Section 39 (6) (c) (iii)**

This amendment extends the matters to which the public trustee must have regard in considering whether it is necessary or desirable to sell the property to include consideration of the interests of a domestic partner.

## **PART 1.14 RATES AND LAND RENT (RELIEF) ACT 1970**

### **Amendments 1.44 – 1.45**

These amendments to the interpretation section for the Act substitute a new term *partner* for the current term *domestic partner*. *Partner* is defined to include a spouse



or a person who is in a domestic relationship within the meaning of the *Domestic Relationships Act 1994* with the person. The term *partner* is used to avoid confusion with the term *domestic partner* as defined in the *Legislation Act 2001*.

#### **Amendments 1.46 – 1.47**

These amendments to the definition of *pensioner* are intended to address the fact that certain persons who are in the same situation as a pensioner are excluded from eligibility to defer the payment of land rent or rates or to apply for a rebate because of the reliance on relevant Commonwealth legislation to determine who is a pensioner. The Commonwealth legislation fails to recognise same sex partners in the same way as it recognises opposite sex partners. This amendment is intended to expand the definition of *pensioner* so that it includes a person who, but for the fact that they are or were in a same sex relationship, would fall within the definition of a pensioner.

#### **Amendment 1.48 Section 3 (1) (c)**

This amendment substitutes references to the new term *partner* for references to ‘spouse or domestic partner’. This amendment does not alter the effect of the amended provision.

#### **Amendment 1.49 Section 21A (1), definition for *eligible person*, paragraphs (b) and (c)**

This amendment substitutes references to the new term *partner* for references to ‘spouse or domestic partner’ in the definition of *eligible person*. This amendment does not alter the effect of the amended provision.

### **PART 1.15 SUPREME COURT ACT 1933**

#### **Amendment 1.50 Section 37U (2)**

This amendment is made as consequence of Amendment 1.52 and clarifies that the broad entitlement to the same remuneration, allowances and entitlements as judges of the Federal Court are entitled is to be read as subject to the modifications made by section 37U(3).

#### **Amendments 1.51 – 1.52**

These amendments ensure that the applied provisions of the *Judges’ Pensions Act 1968* (Cwlth) and the *Judges (Long Leave Payments) Act 1979* (Cwlth) recognise any domestic partner of a resident judge on the same basis as a spouse.

#### **Amendment 1.53 Section 37U (3)**

This amendment inserts new notes for the section.

## **PART 1.16 TRANSPLANTATION AND ANATOMY ACT 1978**

### **Amendment 1.54 Section 4 (1), definition of *child*, paragraph (b)**

This amendment amends the definition of child to exclude from that definition a child who is in a domestic relationship, in the same way that a married child is currently excluded. The effect of this amendment is to treat a domestic partner of a deceased child in the same way as a spouse of a deceased married child – ie. such a person will be able to make decisions about donations of organs, autopsies etc.

## **PART 1.17 TRUSTEE ACT 1925**

### **Amendment 1.55 Section 45 (6) (a) and (b)**

This amendment amends section 45(6) to provide for income to be held on trust for application for the maintenance and support of any domestic partner of a principal beneficiary in the same way as is currently provided in respect of a spouse.

### **Amendment 1.56 Section 45(6), new note**

This amendment inserts a new note for the section referring to the definition of *domestic partner* in the *Legislation Act 2001*.

### **Amendment 1.57 New section 45 (10), (11) and (12)**

This amendment inserts a transitional provision consequent to the amendment of section 45(6). The transitional provision is intended to avoid any retrospective changes to the purposes for which income on a trust that has failed or determined may be applied.

## **PART 1.18 TRUSTEE COMPANIES ACT 1947**

### **Amendment 1.58 Section 21 (1)**

This amendment allows any domestic partner who is entitled to, or interested in, any estate that comes into the possession, or under the control, of a trustee company to apply to the Supreme Court to obtain an order requiring the trustee company to render an account for the property or assets of the estate on the same basis as a husband or wife may currently do so.

### **Amendment 1.59 Section 21 (1), new note**

This amendment inserts a new note for the section referring to the definition of *domestic partner* in the *Legislation Act 2001*.

## **PART 1.19 WORKERS COMPENSATION ACT 1951**

### **Amendment 1.60 Section 163 (4)**

This amendment omits ‘or the person’s spouse’ from the self-incrimination provision. The provision currently provides that a person is obliged to give the information whether or not it would incriminate the person or his or her spouse. However, at

common law, the privilege against self-incrimination has never extended to the incrimination of the relevant person's spouse and hence the reference to the person's spouse is omitted.

**Amendment 1.61 Dictionary, definition of *child***

This amendment to the definition of *child*, of a worker, treats a child who is in a domestic partnership consistently with a married child. The amended definition means that a child who is a domestic partnership cannot be regarded as a dependent of the worker for the purposes of the Act.

**Amendment 1.62 Dictionary, new definition of *domestic partner***

This amendment inserts a new definition of *domestic partner*, of a worker who has died. This term replaces the term *spouse*. *Spouse*, in relation to an injured or deceased worker, is currently defined in the dictionary to include a person of the opposite sex to the worker who lives, or, in relation to a deceased worker, lived immediately before the worker's death, with the worker as the worker's spouse on a genuine domestic basis although not legally married to the worker. This definition is used in the definition of *member of the family*.

**Amendment 1.63 Dictionary, definition of *member of the family***

This amendment substitutes the broader term *domestic partner* for *spouse* in the definition of *member of the family*, in relation to a worker. This definition is used in the Act in section 9 (Who is not a *worker*?) and section 77 (Death benefits).

**Amendment 1.64 Dictionary, definition of *member of the family*, new note**

This amendment inserts a new note for the section referring to the definition of *domestic partner*.

**Amendment 1.65 Dictionary, definition of *spouse***

This amendment omits the definition *spouse* which is no longer required due to the use of the broader term *domestic partner*.

**SCHEDULE 2 MISCELLANEOUS**

**PART 2.1 CRIMES ACT 1900**

**Amendment 2.1 New section 13 (2A)**

This amendment modifies the application of the defence of provocation. Provocation is a specific defence to murder. The intention of the amendment is to remove the availability of the defence of provocation where the provoking act was a non-violent sexual advance by the deceased towards the person accused of murder.

New section 13(2A)(a) provides that a non-violent sexual advance towards the accused by the deceased is not to be taken, by itself, to be conduct which could have induced an ordinary person in the position of the accused to have so far lost

self-control as to have formed an intent to kill the deceased, or to be recklessly indifferent to the probability of causing the deceased's death.

New section 13(2A)(b) modifies the general application of section 13(2A)(a) by providing that such conduct may be taken into account with other conduct of the deceased in deciding whether the act or omission causing death occurred under provocation. This provision is intended to preserve the availability of provocation where the non-violent sexual advance is an act that follows from a previous history of other provoking conduct. It is not intended to exclude the availability of the defence in cases where, for example, the accused may claim a previous history of violence from the deceased, but the 'final straw' incident that provoked the accused to kill the deceased consisted only of a non-violent sexual advance.

#### **Amendment 2.2      Section 13**

This amendment provides for the renumbering of the section on republication of the Act.

### **PART 2.2      DISABILITY SERVICES ACT 1991**

#### **Amendment 2.3      Schedule 2, clause 5**

This amendment includes 'sexuality' in the list of matters where people with disabilities may face additional disadvantage. Under the Act, programs and services should be designed and administered so as to meet the needs of people with disabilities who may experience additional disadvantage.

### **PART 2.3      DISCRIMINATION ACT 1991**

#### **Amendment 2.4      New section 2**

This amendment notes that the Criminal Code applies to the new offence in part 6 of the Act.

#### **Amendment 2.5      Part 6 heading and section 65 heading**

This amendment inserts a new heading for the part to reflect its expanded coverage.

#### **Amendment 2.6      Section 65, new definition**

The definition of *HIV/AIDS status* is used in new section 66 and new section 67.

#### **Amendment 2.7      Sections 66 and 67**

This amendment expands the existing provisions relating to unlawful racial vilification and serious racial vilification so that the provisions also cover vilification on the grounds of sexuality, transsexuality or HIV/AIDS status. The serious vilification offence is also redrafted consistently with the Criminal Code to specify the elements of the offence.

## **Amendments 2.8- 2.9      Dictionary**

The signpost definitions of *HIV/AIDS status* and *public act* inserted by these amendments are used in the amendments to part 6 of the Act made by Amendment 2.7.

## **PART 2.4      EVIDENCE ACT 1971**

### **Amendment 2.10      Sections 54, 57 and 74**

This amendment repeals sections of the Act relating to self-incrimination and compellability of spouses in civil proceedings. While these sections are still in the *Evidence Act 1971*, they no longer have any effect because of the operation of the *Evidence Act 1995* (Cwlth).

This amendment should be read in conjunction with amendment to the *Evidence (Miscellaneous Provisions) Act 1991* made by Amendment 2.11.

## **PART 2.5      EVIDENCE (MISCELLANEOUS PROVISIONS) ACT 1991**

### **Amendment 2.11      New division 4.7**

This amendment inserts a new division in the Act to provide for how a person may object to giving evidence or evidence relating to a communication between the person and the defendant in criminal proceedings on the grounds of a *family objection*.

A *family objection* is an objection on the grounds that there is a likelihood that harm would or might be caused to a person or the relationship between the person and the defendant if the person gives the evidence. The division is essentially the same in effect as sections 18, 19 and 20 of the Commonwealth *Evidence Act 1995*, but recognises a broader range of persons who may make an objection by referencing the more inclusive term *domestic partner*, rather than only *spouse* and *de facto spouse*.

### **Amendment 2.12      Sections 74 and 75**

This amendment provides for the renumbering of the Act when it is next republished.

### **Amendment 2.13      Dictionary, new definition of *family objection***

This amendment inserts a signpost definition for *family objection*.

## **PART 2.6      MAGISTRATES COURT ACT 1930**

### **Amendment 2.14      Section 58**

This amendment omits section 58 as these matters are now provided for by new division 4.7 of the *Evidence (Miscellaneous Provisions) Act 1991*.

**PART 2.7 PUBLIC BATHS AND PUBLIC BATHING ACT 1956****Amendment 2.15 Sections 18 and 30**

This amendment omits section 18 (Segregation of sexes in public baths) and section 30 (Segregation of the sexes in a public bathing convenience). These provisions both create offences in respect of the use of sex segregated facilities. The offences are outdated and no longer appropriate.