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Miscellaneous Acts Amendment (Same Sex Relationships) Bill 2008

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MISCELLANEOUS ACTS AMENDMENT (SAME SEX RELATIONSHIPS) BILL 2008

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Bill introduced, and read a first time and ordered to be printed on motion by the Hon. John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, and Minister for Justice) [4.14 p.m.]: I move:

That this bill be now read a second time.

I am pleased to present the Miscellaneous Acts Amendment (Same Sex Relationships) Bill 2008 to the House. The bill makes amendments to a number of Acts, which will have far-reaching implications for same-sex lesbian couples who are raising children in our community. Specifically, the bill amends the law concerning parenting presumptions in the Status of Children Act 1996 that arise as the result of a fertilisation procedure. The amendments will mean that where a woman who is in a de facto relationship within the meaning of the Property (Relationships) Act 1984 with another woman and has undergone a fertilisation procedure as a result of which she becomes pregnant, the woman who becomes pregnant is presumed to be the mother of any child born as a result of the pregnancy, even if she did not provide the ovum used in the procedure, and the other woman is presumed to be a parent of any child born as a result of the pregnancy, including where she provided the ovum used in the fertilisation procedure, provided she consented to the procedure.

This presumption is generally retrospective, so that the new presumption extends to a fertilisation procedure undertaken, and a consent given before the commencement of the amendments. There are, however, some sensible limitations to the retrospective application of the new presumptions so that they will not affect the previous operation of any Act or other law, any will executed before the commencement of the provisions, or the vesting in possession or in interest of any property before the commencement. These limitations will generally provide certainty as to the legal effect of acts that occurred before the commencement of these new parenting presumptions. However, as the presumptions do not extend to wills made before their commencement, it would be prudent for parents to whom the new parenting presumptions apply to consider whether their wills adequately reflect their intentions with respect to any children of their relationship.

I note that these reforms to the parenting presumptions in the Status of Children Act reflect the commitment of the Government to ensuring that the law treats children in same-sex relationships as having the same rights and entitlements as children of other relationships. These reforms are especially important because they will ensure that the laws of intestacy will apply equally to the children of same-sex parents, where the parents die without making a will. While I would encourage all members of our community to make a will, and keep it up to date, the rules of intestacy are an important safeguard for preserving the inheritance rights of the families of those who may die without having done so.

A key motivation for the Government in enacting these new parenting presumptions is to ensure that lesbian same-sex parents can take parental responsibility for their children with respect to their health, education and general wellbeing in the same way as we expect all other parents to. Accordingly, the bill makes consequential amendments to the Births, Deaths and Marriages Registration Act 1995 to ensure that both parents can be noted on the child's birth certificate. This is an important measure, as it will enable both parents of a child conceived as a result of a fertilisation procedure provided to those in a lesbian same-sex de facto relationship to hold themselves out as the child's parents in circumstances where evidence of the parent-child relationship is demanded by our State's public institutions, such as hospitals and schools. It will also enable same-sex parents to engage with other authorities, such as sporting registration bodies, so often encountered by parents in the course of bringing up children.

The amendment to the Births, Deaths and Marriages Registration Act provides that an application can be made

to the Registrar of Births, Deaths and Marriages for the addition of registrable information about the identity of a woman who is presumed to be a parent under the new parenting presumptions in the Status of Children Act, even if the child was born before the commencement of the new provisions. In order to reflect the Government's policy that a child should only have two legal parents, the amendments to the Births, Deaths and Marriages Registration Act include transitional provisions addressing the addition of information about a second parent in circumstances where the child's birth certificate already details the existence of two parents, the birth mother, and a person who was represented to the registrar as being the father of the child. In such circumstances the registrar will only be able to add the registrable information arising out of the new parenting presumptions in the Status of Children Act if the already registered father consents to the removal of his details from the birth certificate, if the court authorises the removal, or in certain other circumstances provided for by regulation.

The Government emphasises here that these provisions, regarding the removal of a male's name from the birth certificate, only apply where the child was conceived through artificial fertilisation and the man is not entitled to be recognised as the parent. In some circumstances a man's name may have been put on the birth certificate as the father without him having parentage entitlements to justify this—for instance, if the man was the sperm donor and had no relationship with the birth mother, or the man was merely a friend of the birth mother who did not father the child but was named on the birth certificate for symbolic purposes. In these circumstances the provisions allowing his name to be removed can apply. They cannot apply where the child was conceived through sexual intercourse with the man named on the birth certificate. They cannot apply where the sperm donor was also the de facto partner or husband of the woman in the period around the birth, because there is a presumption under section 14 (1) (a) of the Status of Children Act 1996 that he would be the father. The circumstances provided for in the regulation will be similar to those in section 18 (b) of the Births, Deaths and Marriages Registration Act 1995. Section 18 provides:

The Registrar must not include registrable information about the identity of a child's parent in the Register unless:

(b) one parent of the child makes an application for the inclusion of the information and the other parent cannot join in the application because he or she is dead or cannot be found, or for some other reason.

In further recognition and equal treatment of same-sex lesbian de facto partners who are parents, the bill makes amendments to the Industrial Relations Act 1996 so that the parental leave entitlements available to male employees in connection with the birth of his child, or a child of his spouse or de facto partner, are extended to female employees in connection with the birth of her child or a child of her de facto partner following the pregnancy of her de facto partner. In this context, the female employee's child is presumed to be hers by virtue of the amendments to the parenting presumptions in the Status of Children Act. To accommodate the expansion of this type of parental leave, the term "paternity leave" is renamed "partner leave".

So that the expansion of these entitlements will have effect immediately the provisions are commenced, the expanded extended parental leave entitlements that arise by virtue of these amendments will be available to a female employee where the birth of the child of the employee or of the employee's de facto partner has taken place before such commencement. To qualify for such leave the newly entitled female employee will be required to provide an employer with written notice of intention to take specified leave, a medical certificate evidencing the birth of the child and a statutory declaration detailing particulars of any maternity leave taken by her partner and that the leave is sought in order to become the child's primary care giver. As is the case under the current paternity leave provisions, partner leave will not be available past the child's first birthday.

This package of reforms responds to the many representations made to the Government by same-sex parents about their feelings of social exclusion in their role as parents. It implements a number of recommendations in the recently released Law Reform Commission report entitled "Relationships" which relate to, as termed in the report, the recognition of the functional parent-child relationships. As these amendments reflect, the Government does not condone a legal structure that perpetuates this sense of social isolation, particularly when it is directed towards same-sex parents doing the sometimes joyous, sometimes difficult but always important task of raising the next generation of Australians. Same-sex parents are entitled to our support in the same way that all parents, regardless of their relationships status, are so entitled. These reforms reflect this support.

The bill makes a further major reform to the law in order to ensure the equal treatment of all same-sex couples in our community by amending the Anti-Discrimination Act 1977 to rename the "marital status" ground of discrimination the "marital and domestic status". The reform gives effect to the intent of recommendations of the New South Wales Law Reform Commission review of the Anti-Discrimination Act 1977 and accords with amendments that were made to the Anti-Discrimination Act in 2000. Those amendments incorporated the Property (Relationships) Act definition of "de facto relationship" so that people in such relationships would be able to seek redress against discrimination on the basis of a person's caring responsibilities in the workplace. The reform also addresses the intent of recommendations made by the Legislative Council's Standing Committee on Social Issues in its 1999 report on "Domestic Relationships: Issues for Reform."

This amendment to the Anti-Discrimination Act will ensure that people cannot be discriminated against on the basis of their de facto relationship, which is defined by reference to the Property (Relationships) Act. So it includes people in same-sex de facto relationships in the areas of public life concerning work, education,

provision of goods and services, accommodation and registered clubs. Further, the definitions of "relative" and "near relative" in the Anti-Discrimination Act have been amended to include de facto partners as defined by reference to de facto relationship within the meaning of the Property (Relationships) Act. The amendments to the Anti-Discrimination Act are an important reform, not only because they reflect the Government's commitment to protect people from discrimination arising out of their personal relationships generally, but because they may provide some protection to people who, pursuant to pecuniary interest disclosure rules in New South Wales statutes, disclose the fact that they live in a same-sex de facto relationship as a result of amendments made by this bill to such Acts.

Finally, schedule 3 to the bill represents the third tranche of the Government's progressive implementation of laws to ensure that people living in same-sex de facto relationships are treated equally for the purpose of all New South Wales Acts that accord rights and responsibilities to citizens based on their relationship status. Details of the impact of each proposed amendment in schedule 3 are set out in the explanatory note following each amendment. I commend the bill to the House.

Debate adjourned on motion by the Hon. Don Harwin and set down as an order of the day for a future day.

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