

TASMANIA

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**SAME-SEX MARRIAGE  
(DISSOLUTION AND ANNULMENT)  
BILL 2005**

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# **SAME-SEX MARRIAGE (DISSOLUTION AND ANNULMENT) BILL 2005**

*(Brought in by Nicholas James McKim MHA)*

## **A BILL FOR**

### **An Act providing for the dissolution and annulment of same-sex marriages.**

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

## **Part 1—Preliminary**

### **1 Short title**

This Act may be cited as the *Same-Sex Marriage (Dissolution & Annulment) Act 2005*.

### **2 Commencement**

This Act commences on a day to be proclaimed.

### **3 Interpretation**

(1) In this Act, and unless the contrary intention appears:

*appeal* includes an application for a re-hearing.

*applicant* includes a cross-applicant and, in relation to proceedings for dissolution of a same-sex marriage instituted before the commencement of this Act, includes a petitioner or cross-petitioner.

*approved same-sex marriage counselling organisation* has the meaning given by subsection 20(1).

***approved same-sex marriage mediation organisation*** has the meaning given by subsection 20(2).

***decree*** means decree, judgment or order, and includes a decree *nisi* and an order dismissing an application or refusing to make a decree or order.

***financial matters***, in relation to the parties to a same-sex marriage, means matters with respect to:

- (a) the maintenance of one of the parties; or
- (b) the property of those parties or of either of them.

***income tested pension, allowance or benefit*** means a pension, allowance or benefit prescribed, or included in a class of pensions, allowances or benefits prescribed, for the purposes of this definition.

***made***, in relation to a decree, being a judgment, means given.

***matrimonial cause*** means:

- (a) proceedings between the parties to a same-sex marriage, or by the parties to a same-sex marriage, for a decree of:
  - (i) dissolution of same-sex marriage; or
  - (ii) nullity of same-sex marriage; or
- (b) proceedings for a declaration as to the validity of a same-sex marriage or of the dissolution or annulment of a same-sex marriage by decree or otherwise.

***ordinarily resident*** includes habitually resident.

***proceedings*** means a proceeding in a court, whether between parties or not, and includes cross-proceedings or an incidental proceeding in the course of or in connection with a proceeding.

***proceedings for principal relief*** means proceedings under this Act of a kind referred to in paragraph (a) or (b) of the definition of ***matrimonial cause*** in this subsection.

***Registrar*** means in relation to the Supreme Court of Tasmania the Principal Registrar, a Registrar, or a Deputy Registrar of the Court;

***same-sex marriage*** has the same meaning as in the *Same-Sex Marriage Act 2005*.

***separation order*** means a decree, not being a decree of dissolution or nullity of same-sex marriage or for a judicial separation, having the effect of relieving a party to a same-sex marriage from any obligation to cohabit with the other party to the same-sex marriage.

#### **4 Act binds Crown**

This Act binds the Crown in right of Tasmania, and so far as the legislative power of Parliament permits, in all its other capacities.

## **Part 2 - Jurisdiction in matrimonial causes**

### **5 Jurisdiction in matrimonial causes**

- (1) Subject to this Part, a matrimonial cause may be instituted under this Act in the Supreme Court of Tasmania.
- (2) Proceedings for a decree of dissolution of a same-sex marriage may be instituted under this Act if that same-sex marriage took place in Tasmania pursuant to the *Same-Sex Marriage Act 2005*.
- (3) Proceedings of a kind referred to in the definition of *matrimonial cause* in subsection 3(1), other than proceedings for a decree of dissolution of same-sex marriage may be instituted under this Act if:
  - (a) in the case of proceedings between the parties to a same-sex marriage or proceedings of a kind referred to in paragraph (b) of that definition in relation to a same-sex marriage—either party to the same-sex marriage is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date; and
  - (b) in any other case—any party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date.
- (4) In subsection (3), *relevant date*, in relation to proceedings, means:
  - (a) if the application instituting the proceedings is filed in a court—the date on which the application is so filed; or
  - (b) in any other case—the date on which the application instituting the proceedings is made.

### **6 Principles to be applied by Supreme Court of Tasmania**

The Supreme Court of Tasmania shall, in the exercise of its jurisdiction under this Act, have regard to:

- (a) the need to promote, preserve and protect the institution of same-sex marriage as the union of two people of the same sex to the exclusion of all others voluntarily entered into for life;
- (b) the need to ensure safety from family violence; and
- (c) the means available for assisting parties to a same-sex marriage to consider reconciliation or the improvement of their relationship to each other.

## **7 Institution of proceedings**

- (1) Proceedings under this Act shall be instituted by application to the Supreme Court of Tasmania;
- (2) Proceedings under this Act for a decree of dissolution of same-sex marriage or nullity of same-sex marriage may be instituted by either party to the same-sex marriage or jointly by both parties to the same-sex marriage.
- (3) An application for dissolution of a same-sex marriage shall not, without the leave of the court granted under subsection (4), be filed within the period of 2 years after the date of the same-sex marriage unless there is filed with the application a certificate:
  - (a) stating that the parties to the same-sex marriage have considered a reconciliation, with the assistance of a counsellor or counselling organisation.
  - (b) signed by that person or on behalf of that organisation, as the case may be.
- (4) Notwithstanding subsection (3), if the court is satisfied that there are special circumstances by reason of which the hearing of an application for dissolution of a same-sex marriage should proceed notwithstanding that the parties have not considered a reconciliation with assistance of the kind referred to in subsection (3), the court may:
  - (a) if the application has not been filed—give leave for the application to be filed; or
  - (b) if the application has been filed—at any time before or during the hearing of the application, declare that it is so satisfied;and, where the court makes a declaration under paragraph (b), the application shall be deemed to have been duly filed and everything done pursuant to that application shall be as valid and effectual as if the court had, before the application was filed, given leave under paragraph (a) for the application to be filed.
- (5) Notwithstanding subsections (3) and (4), a respondent may, in an answer to an application, include an application for any decree or declaration under this Act.

## **Part 3—Dissolution and nullity of same-sex marriage**

### **8 Dissolution of same-sex marriage**

- (1) An application under this Act for a decree of dissolution of a same-sex marriage shall be based on the ground that the same-sex marriage has broken down irretrievably.
- (2) Subject to subsection (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and a decree of dissolution of the same-sex marriage shall be made, if, and only if, the court is satisfied that the parties

separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of same-sex marriage.

- (3) A decree of dissolution of same-sex marriage shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

## **9 Meaning of separation**

- (1) The parties to a same-sex marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties.
- (2) The parties to a same-sex marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.

## **10 Effect of resumption of cohabitation**

- (1) For the purposes of proceedings for a decree of dissolution of same-sex marriage, where, after the parties to the same-sex marriage separated, they resumed cohabitation on one occasion but, within a period of 3 months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the filing of the application, the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of living separately and apart.
- (2) For the purposes of subsection (1), a period of cohabitation shall be deemed to have continued during any interruption of the cohabitation that, in the opinion of the court, was not substantial.

## **11 Nullity of same-sex marriage**

An application under this Act for a decree of nullity of same-sex marriage shall be based on the ground that the same-sex marriage is void.

## **12 Court not to make decree of dissolution where application for decree of nullity before it**

Where both an application for a decree of nullity of a same-sex marriage and an application for a decree of dissolution of that same-sex marriage are before a court, the court shall not make a decree of dissolution of the same-sex marriage unless it has dismissed the application for a decree of nullity of the same-sex marriage.



### 13 Circumstances occurring before commencement of Act or outside Australia

A decree may be made, or refused, under this Part by reason of facts and circumstances notwithstanding that those facts and circumstances, or some of them, took place before the commencement of this Act or outside the State of Tasmania.

### 14 Decree *nisi* in first instance

A decree of dissolution of same-sex marriage under this Act shall, in the first instance, be a decree *nisi*.

### 15 When decree becomes absolute

- (1) Subject to this section, a decree *nisi* made under this Act becomes absolute by force of this section at the expiration of a period of 1 month from the making of the decree or from the making of an order under this section, whichever is the later.
- (2) Where a decree *nisi* has been made in any proceedings, the court of first instance (whether or not it made the decree), or the Full Court if an appeal has been instituted, may, either before or after it has disposed of the proceedings or appeal, and whether or not a previous order has been made under this subsection:
  - (a) having regard to the possibility of an appeal or further appeal, make an order extending the period at the expiration of which the decree *nisi* will become absolute; or
  - (b) if it is satisfied that there are special circumstances that justify its so doing, make an order reducing the period at the expiration of which the decree *nisi* will become absolute.
- (3) Where an appeal is instituted (whether or not it is the first appeal) before a decree *nisi* has become absolute, then, notwithstanding any order in force under subsection (2) at the time of the institution of the appeal but subject to any such order made after the institution of the appeal, the decree *nisi*, unless reversed or rescinded, becomes absolute by force of this section:
  - (a) at the expiration of a period of 1 month from the day on which the appeal is determined or discontinued; or
  - (b) on the day on which the decree would have become absolute under subsection (1) if no appeal had been instituted;whichever is the later.
- (4) A decree *nisi* shall not become absolute by force of this section where either of the parties to the same-sex marriage has died.
- (5) In this section, ***appeal***, in relation to a decree *nisi*, means:
  - (a) an appeal or application for a re-hearing relating to:

- (i) the decree *nisi*; or
    - (ii) an order under this section in relation to the proceedings in which the decree *nisi* was made; or
  - (b) an application under section 17 or 18 for rescission of the decree or an appeal or application for leave to appeal arising out of such an application.
- (6) For the purposes of this section, where an application for leave to appeal, or for a re-hearing, is granted, the application shall be deemed not to have been determined or discontinued so long as an appeal is pending.

## **16 Certificate as to decree absolute**

- (1) Where a decree *nisi* becomes absolute, the Registrar of the Supreme Court of Tasmania shall prepare and file with the Supreme Court of Tasmania Registry and with the Tasmanian Registrar of Births Deaths and Marriages a memorandum of the fact and of the date upon which the decree became absolute.
- (2) Where a decree *nisi* has become absolute, any person is entitled, on application to the Registrar of the court by which the decree was made, to receive a certificate signed by the Registrar that the decree *nisi* has become absolute.
- (3) A certificate given under subsection (2) is, in all courts and for all purposes, evidence of the matters specified in the certificate.
- (4) The regulations may provide for the establishment of central records of decrees made under this Act and for the notification of decrees to the Tasmanian Registrar of Births, Deaths and Marriages.

## **17 Rescission of decree *nisi* where parties reconciled**

Notwithstanding anything contained in this Part, where a decree *nisi* has been made in proceedings for a decree of dissolution of same-sex marriage, the court may, at any time before the decree becomes absolute, upon the application of the parties to the same-sex marriage, rescind the decree on the ground that the parties have become reconciled.

## **18 Rescission of decree *nisi* on ground of miscarriage of justice**

Where a decree *nisi* has been made but has not become absolute, the court by which the decree was made may, on the application of a party to the proceedings, or on the intervention of the Attorney-General, if it is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance, rescind the decree and, if it thinks fit, order that the proceedings be re-heard.

## **19 Same-Sex Re-marriage**

Where a decree of dissolution of same-sex marriage under this Act has become absolute, a party to the same-sex marriage may marry again.

## **20. Rules of Court**

The judges of the Court or a majority of them may make rules of court with respect to –

- (a) the way in which applications under this Act may be made to the Court; or
- (b) service on appropriate persons of copies of documents lodged with a registry of the Court under this Act.

## **21. Regulations**

The Governor may make regulations for the purposes of this Act except in respect of any matter for which rules of court may be made under section 20.

## **22. Administration of Act**

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Attorney-General; and
- (b) the department responsible to the Attorney-General in relation to the administration of this Act is the Department of Justice and Industrial Relations.