

TASMANIA

SAME-SEX MARRIAGE BILL 2005

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(This page is part of the document and is required for numbering purposes.)

SAME-SEX MARRIAGE BILL 2005

(Brought in by Nicholas James McKim MHA)

A BILL FOR

An Act providing for marriage between adults of the same sex.

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 Act 2005*.

2 Commencement

This Act commences on a day to be proclaimed.

3 Interpretation

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

adult means a person who has attained the age of 18 years.

authorized celebrant means any person who is an authorised celebrant under the *Same Sex Marriage (Celebrant and Registration) Act 2005*.

minister of religion has the same meaning as in the *Same Sex Marriage (Celebrant and Registration) Act 2005*.

same-sex marriage means the lawful union of two people of the same sex to the exclusion of all others, voluntarily entered into for life.

same-sex marriage celebrant has the same meaning as in the *Same Sex Marriage (Celebrant and Registration) Act 2005*.

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 - Same-sex marriageable age

5 Application of Part

The whole of this Part applies, notwithstanding any common law rule of private international law, in relation to same-sex marriages.

6 Same-sex marriageable age

A person is of same-sex marriageable age if the person has attained the age of 18 years.

Part 3—Void same-sex marriages

7 Grounds on which same-sex marriages are void

- (1) A same-sex marriage is void where:
 - (a) either of the parties was, at the time of the same-sex marriage, lawfully married to some other person;
 - (b) the parties are within a prohibited relationship;
 - (c) by reason of section 16 the same-sex marriage is not a valid same-sex marriage;
 - (d) the consent of either of the parties was not a real consent because:
 - (i) it was obtained by duress or fraud;

- (ii) that party was mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
- (iii) that party was mentally incapable of understanding the nature and effect of the same-sex marriage ceremony; or
- (e) either of the parties was not of same-sex marriageable age;

and not otherwise.

- (2) Same-sex marriages of parties within a prohibited relationship are same-sex marriages:
 - (a) between a person and an ancestor or descendant of the person; or
 - (b) between siblings of the same sex (whether of the whole blood or the half-blood).
- (3) Any relationship specified in subsection (2) includes a relationship traced through, or to, a person who is or was an adopted child, and, for that purpose, the relationship between an adopted child and the adoptive parent, or each of the adoptive parents, of the child, shall be deemed to be or to have been the natural relationship of child and parent.
- (4) Nothing in subsection (3) makes it lawful for a person to marry a person whom the first-mentioned person could not lawfully have married if that subsection had not been enacted.
- (5) For the purposes of this section:
 - (a) a person who has at any time been adopted by another person shall be deemed to remain the adopted child of that other person notwithstanding that any order by which the adoption was effected has been annulled, cancelled or discharged or that the adoption has for any other reason ceased to be effective; and
 - (b) a person who has been adopted on more than one occasion shall be deemed to be the adopted child of each person by whom he or she has been adopted.
- (6) For the purposes of this section:

adopted, in relation to a child, means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.

ancestor, in relation to a person, means any person from whom the first-mentioned person is descended including a parent of the first-mentioned person.

Part 4—Solemnization of same-sex marriages in Tasmania

8 Application of Part

This Part applies to and in relation to all same-sex marriages solemnized, or intended to be solemnized, in Tasmania.

9 Same-sex marriages to be solemnized by authorised celebrant

- (1) A same-sex marriage shall be solemnized by or in the presence of an authorized celebrant who is authorized to solemnize same-sex marriages at the place where the same-sex marriage takes place.

10. Ministers of religion not bound to solemnize same-sex marriage etc.

- (2) Nothing in this Part:
 - (a) imposes an obligation on an authorized celebrant, being a minister of religion, to solemnize any same-sex marriage; or
 - (b) prevents such an authorized celebrant from making it a condition of his or her solemnizing a same-sex marriage that:
 - (i) longer notice of intention to marry than that required by this Act is given; or
 - (ii) requirements additional to those provided by this Act are observed.

11 Notice to be given and declaration made

- (1) Subject to this section, a same-sex marriage shall not be solemnized unless:
 - (a) notice in writing of the intended same-sex marriage has been given in accordance with this section and has been received by the authorized celebrant solemnizing the same-sex marriage not earlier than 18 months before the date of the same-sex marriage and not later than 1 month before the date of the same-sex marriage;

- (b) there has been produced to that authorized celebrant, in respect of each of the parties:
 - (i) an official certificate, or an official extract of an entry in an official register, showing the date and place of birth of the party; or
 - (ii) a statutory declaration made by the party or a parent of the party stating that, for reasons specified in the declaration, it is impracticable to obtain such a certificate or extract and stating, to the best of the declarant's knowledge and belief and as accurately as the declarant has been able to ascertain, when and where the party was born; or
 - (iii) a passport issued by a government of an overseas country, showing the date and place of birth of the party; and
 - (c) each of the parties has made and subscribed before that authorized celebrant a declaration, in accordance with the prescribed form, as to:
 - (i) the party's conjugal status;
 - (ii) the party's belief that there is no legal impediment to the same-sex marriage; and
 - (iii) such other matters as are prescribed.
- (2) A notice under subsection (1):
- (a) shall be in accordance with the prescribed form and contain such particulars in relation to the parties as are indicated in the prescribed form; and
 - (b) must be signed by each of the parties; and
 - (c) must be signed in the presence of:
 - (i) an authorised celebrant; or
 - (ii) a Commissioner for Declarations under the *Oaths Act 2001*;
- (3) However, if the signature of a party to an intended same-sex marriage cannot conveniently be obtained at the time when it is desired to give notice under this section, a notice duly signed by the other party and otherwise complying with the provisions of this section shall, if it is signed by the first-mentioned party in the presence of an authorized celebrant before the same-sex marriage is solemnized, be deemed to have been a sufficient notice.

- (4) Where a party to an intended same-sex marriage is unable, after reasonable inquiry, to ascertain all of the particulars in relation to that party required to be contained in a notice under this section, the failure to include in the notice such of those particulars as the party is unable to ascertain does not make the notice ineffective for the purposes of this section if, at any time before the same-sex marriage is solemnized, that party furnishes to the authorized celebrant solemnizing the same-sex marriage a statutory declaration as to that party's inability to ascertain the particulars not included in the notice and the reason for that inability.
- (5) An authorized celebrant shall, as soon as practicable after receiving the notice referred to in subsection (1), give to the parties a document in the prescribed form outlining the obligations and consequences of same-sex marriage and indicating the availability of same-sex marriage education and counselling.
- (6) Where, by reason of the death, absence or illness of an authorized celebrant to whom a notice of intention to marry has been given, or for any other reason, it is impracticable for that person to solemnize the same-sex marriage, the same-sex marriage may be solemnized by any authorized celebrant who has possession of the notice.
- (7) The declarations of the parties required by subsection (1) shall both be written on the one paper and on the same side of that paper.
- (8) An authorized celebrant shall not solemnize a same-sex marriage:
 - (a) unless the authorized celebrant has satisfied himself or herself that the parties are the parties referred to in the notice given under this section in relation to the same-sex marriage; or
 - (b) if the authorized celebrant has reason to believe that:
 - (i) a notice given under this section; or
 - (ii) a declaration made and subscribed under this section, or a statutory declaration made for the purposes of this section;in relation to the same-sex marriage, contains a false statement or an error or is defective.
- (9) An authorized celebrant may permit an error in a notice under this section to be corrected in his or her presence by either of the parties at any time before the

same-sex marriage to which it relates has been solemnized and may treat the corrected notice as having been originally given in its corrected form.

- (10) Where the declaration made by a party under subsection (1) states that that party is a divorced person or a widow or widower, an authorized celebrant shall not solemnize the same-sex marriage unless there is produced to him or her evidence of that party's divorce, or of the death of that party's spouse, as the case requires.

12 Same-sex marriage may be solemnized on any day etc.

A same-sex marriage may be solemnized on any day, at any time and at any place.

13 Witnesses

A same-sex marriage shall not be solemnized unless at least 2 persons who are, or appear to the person solemnizing the same-sex marriage to be, over the age of 18 years are present as witnesses.

14 Form of ceremony

- (1) Where a same-sex marriage is solemnized by or in the presence of an authorized celebrant, being a minister of religion, it may be solemnized according to any form and ceremony recognized as sufficient for the purpose by the religious body or organization of which he or she is a minister.
- (2) Where a same-sex marriage is solemnized by or in the presence of an authorized celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorized celebrant and the witnesses, the words:
 "I call upon the persons here present to witness that I, A.B. (*or* C.D.), take thee, C.D. (*or* A.B.), to be my lawful wedded wife (*or* husband *or* spouse)";
or words to that effect.

15 Certain authorised celebrants to explain nature of same-sex marriage relationship

Before a same-sex marriage is solemnized by or in the presence of an authorized celebrant, not being a minister of religion of a recognized denomination, the authorized celebrant shall say to the parties, in the presence of the witnesses, the words:

“I am duly authorized by law to solemnize same-sex marriages according to law.

“Before you are joined in same-sex marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.

“Same-sex marriage, according to law in Tasmania , is the lawful union of two persons to the exclusion of all others, voluntarily entered into for life.”;

or words to that effect.

16 Certain same-sex marriages not solemnized in accordance with this Part to be invalid

- (1) Subject to this section, a same-sex marriage solemnized otherwise than in accordance with the preceding provisions of this Part is not a valid same-sex marriage.
- (2) A same-sex marriage is not invalid by reason of all or any of the following:
 - (a) failure to give the notice required by section 11, or a false statement, defect or error in such a notice;
 - (b) failure of the parties, or either of them, to make or subscribe a declaration as required by section 11, or a false statement, defect or error in such a declaration;
 - (c) failure to produce to the authorized celebrant a certificate or extract of an entry or a statutory declaration as required by section 11, or a false statement, defect or error in such a statutory declaration;

- (d) failure to comply with any other requirement of section 11, or any contravention of that section;
 - (e) failure to comply with the requirements of sections 13 or 14;
- (3) A same-sex marriage is not invalid by reason that the person solemnizing it was not authorized by this Act to do so, if either party to the same-sex marriage, at the time the same-sex marriage was solemnized, believed that that person was lawfully authorized to solemnize it, and in such a case the form and ceremony of the same-sex marriage shall be deemed to have been sufficient if they were such as to show an intention on the part of each of the parties to become thereby the lawfully wedded spouse of the other.

Part 5 —Offences

17 Bigamy

- (1) A person who is married shall not go through a form or ceremony of same-sex marriage with any person.
- Penalty: Imprisonment for 5 years.
- (2) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that:
- (a) at the time of the alleged offence, the defendant believed that his or her spouse was dead; and
 - (b) the defendant's spouse had been absent from the defendant for such time and in such circumstances as to provide, at the time of the alleged offence, reasonable grounds for presuming that the defendant's spouse was dead.
- (3) For the purposes of subsection (2), proof by a defendant that the defendant's spouse had been continually absent from the defendant for the period of 7 years immediately preceding the date of the alleged offence and that, at the time of the alleged offence, the defendant had no reason to believe that the defendant's spouse had been alive at any time within that period is sufficient proof of the matters referred to in paragraph (2)(b).

- (4) To avoid doubt, section 14 of the *Criminal Code* (mistake of fact) does not apply in relation to the matters mentioned in subsections (2) and (3).
- (5) A person shall not go through a form or ceremony of same-sex marriage with a person who is married, knowing, or having reasonable grounds to believe, that the latter person is married.

Penalty: Imprisonment for 5 years.
- (6) It is not an offence against this section for a person to go through a form or ceremony of same-sex marriage with that person's own spouse.
- (7) In a prosecution for an offence against this section, the spouse of the accused person is a competent and compellable witness for either the prosecution or the defence.
- (8) In a prosecution for an offence against this section, the fact that, at the time of the alleged offence, a person was married shall not be taken to have been proved if the only evidence of the fact is the evidence of the other party to the alleged same-sex marriage.

Part 6—Miscellaneous

18 Second same-sex marriage ceremonies

- (1) Except in accordance with this section:
 - (a) persons who are already legally married to each other shall not go through a form or ceremony of same-sex marriage with each other; and
 - (b) a person who is authorized by this Act to solemnize same-sex marriages shall not purport to solemnize a same-sex marriage between persons who inform the first-mentioned person that they are already legally married to each other or whom the first-mentioned person knows or has reason to believe to be already legally married to each other.
- (2) Where:

- (a) 2 persons have gone through a form or ceremony of same-sex marriage with each other, whether before or after the commencement of this Act; and
- (b) there is a doubt:
 - (i) whether those persons are legally married to each other;
 - (ii) where the form or ceremony of same-sex marriage took place outside Australia, whether the same-sex marriage would be recognized as valid by a court in Australia; or
 - (iii) whether their same-sex marriage could be proved in legal proceedings;

those persons may, subject to this section, go through a form or ceremony of same-sex marriage with each other as if they had not previously gone through a form or ceremony of same-sex marriage with each other.

- (3) Where 2 persons wish to go through a form or ceremony of same-sex marriage with each other in pursuance of subsection (2), they shall furnish to the person by whom, or in whose presence, the form or ceremony is to take place or be performed:
 - (a) a statutory declaration by them stating that they have previously gone through a form or ceremony of same-sex marriage with each other and specifying the date on which, the place at which and the circumstances in which they went through that form or ceremony; and
 - (b) a certificate by a barrister or solicitor, being a certificate endorsed on the statutory declaration, that, on the facts stated in the declaration, there is, in his or her opinion, a doubt as to one of the matters specified in paragraph (2)(b).
- (4) The person by whom or in whose presence a form or ceremony of same-sex marriage takes place or is performed in pursuance of subsection (2) shall make an endorsement in accordance with the regulations on each certificate issued in respect of it.
- (5) A same-sex marriage which takes place after the commencement of this subsection in pursuance of subsection (2) is not invalid by reason of any failure to comply with the requirements of subsection (3) or (4).

- (6) Nothing in this Act shall be taken to prevent 2 persons who are already legally married to each other from going through a religious ceremony of same-sex marriage with each other in Australia where those persons have:
- (a) produced to the person by whom or in whose presence the ceremony is to be performed a certificate of their existing same-sex marriage; and
 - (b) furnished to that person a statement in writing, signed by them and witnessed by that person, that:
 - (i) they have previously gone through a form or ceremony of same-sex marriage with each other;
 - (ii) they are the parties mentioned in the certificate of same-sex marriage produced with the statement; and
 - (iii) they have no reason to believe that they are not legally married to each other or, if their same-sex marriage took place outside Australia, they have no reason to believe that it would not be recognized as valid in Australia.

19 Regulations

The Governor may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.