



The Impact of Australia's Same-Sex Marriage Legislation

Australia is the 26th country in the world to legalise same-sex marriage. Same-sex marriage in Australia has been legal since 9 December 2017. The legislation to allow same-sex marriage, the Marriage Amendment Act 2017, passed the Australian Parliament on 7 December 2017.

COMMENCEMENT OF SAME-SEX MARRIAGE

The law (being the *Marriage (Amendment) Act 2017*) came into effect on 9 December 2017, immediately recognising overseas same-sex marriages and allowing weddings in Australia to take place (after the compulsory one month “cooling-off” waiting period for anyone registering intention to get married after 8 December 2017) from 9 January 2018.

This one-month waiting period was waived for some couples. Those exceptional circumstances included a partner's terminal illness, and overseas relatives booking flights to Australia before the official start date for the new law was known. Civil celebrant Charles Foley has been campaigning for years to get Australia to drop the one-month waiting period, which is among the longest in the world. The federal government imposed it at the request of churches decades ago so parishioners would have time to say why they may object to some religious unions.

Since 9 January 2018, dozens of same-sex couples tied the knot in Australia, marking the first legal ceremonies of their kind in the country. Athletes Craig Burns and Luke Sullivan married at a midnight ceremony near the east coast of Tweed Heads.

THE COMMONWEALTH'S POWER

Under 51 (xxi) of the Constitution of Australia, Federal Government has the power to make laws relating to marriage. The High Court Australia confirmed that this power includes the power to make laws relating to same-sex marriage in *The Commonwealth v Australian Capital Territory* [2013] HCA 55.

MARRIAGE AMENDMENT BILL 2017

Senator Dean Smith, introduced the *Marriage Amendment Bill 2017* into the Senate. The bill amended Section 5 of the *Marriage Act 1961* (Cth). The bill omitted the words “man and a woman” and replaced it with the gender-neutral wording “two people”. This is so that the requirements of the Act apply equally to all marriages in Australia, regardless of their sex or gender.

The Bill also removed the ban on overseas same-sex marriages being recognised in Australia, including ones that occurred before the law change. Additionally, the bill included protections for religious celebrants, ministers of religion



and bodies established for a religious purpose, to not be obligated to perform or provide services and facilities to marriages for which they object.

Further, the bill confirmed that the requirements for a legally valid marriage otherwise remained the same under the *Marriage Act*, by introducing non-gendered language to ensure these requirements continue to apply equally to all marriages. It will continue to be the case that a marriage will be void if any of the following situations apply: one or both parties are already legally married, or the parties are in a 'prohibited relationship' (a prohibited relationship includes an adoptive parent-child relationship); one or both parties did not provide real consent; or one or both parties are not of marriageable age, which is generally 18 years of age or older.

IDENTIFYING RELIGIOUS CONSTRAINTS

Celebrants are divided into two different categories. There is a new class of "religious marriage celebrant" who can refuse to conduct a marriage ceremony if it is contrary to their religious beliefs. Additionally, Australian Defence Force chaplains are able to refuse to solemnise a marriage.

Celebrants have 90 days to decide whether they want to be registered as "religious marriage celebrants" and identify as such in any advertising.

Only existing celebrants will be allowed to do this. Anyone who becomes a celebrant after Saturday, December 9 2017 will be considered a "civil celebrant" and will not be allowed to refuse to marry gay couples. This is in recognition that celebrants are authorised to perform a function on behalf of the state and should be required to uphold Commonwealth law.

VOLUNTARY POSTAL SURVEY 2017

The passage of the law followed a voluntary postal survey of Australians eligible to vote in Federal Elections. The survey did not require legislative approval by the Parliament and despite being legally challenged, was upheld by the High Court as a legal survey. The survey involved every registered Australian voter on the Australian Electoral Commission Federal electoral rolls being sent a ballot paper by mail. The question on the ballot paper was a basic yes or no question asking voters "Should the law be changed to allow same-sex couples to marry?".

Of the eligible Australians who expressed a view on this question in the survey, 61.6% the respondents supported a change in the law to allow same-sex couples to marry.



PREVIOUS POSITION

Prior to this new law, same-sex marriage legislation had been rejected by the Federal Parliament on 22 occasions between September 2004 and May 2017. These failed attempts came after the Howard Liberal-National Coalition Government amended the law in August 2004 to exclude same-sex marriages, defining marriage as “between a Man and a Woman”. The Australian Capital Territory passed a same-sex marriage law in December 2013, though this was struck down by the High Court on the grounds that such law could only be introduced for the Commonwealth of Australia by the Federal Government.

OTHER RECOGNITIONS

Other types of recognition for same-sex couples are also available in Australia. Under Federal Law, same-sex couples can also be recognised as de facto relationships under the *Family Law Act 1975*, which provide most of the same rights and responsibilities afforded to married couples, although those rights may be difficult to asset and are not always recognised in practice. Although there is no national civil union or relationships register scheme in Australia, most states and territories have legislated for civil unions or domestic partnership registries. Such unions are recognised as de facto relationships under federal law.

WHAT DOES THE CHANGE MEAN FOR FAMILY LAW?

Property Settlement Matters

In 2008, a new addition to the *Family Law Act* gave the court the power to decide property settlement matters involving same sex couples who met the definition of living in a de facto relationship. That meant that same sex couples are treated in the same way as heterosexual de facto or married couples when it comes to the division of assets.

Now that same-sex marriage is legalised, there are some benefits in the way family law for same-sex unions is decided in court. For example, there is typically a two-year time limit on parties in a de facto relationship to bringing a property settlement application to the court. No such time limits apply to married couples (unless a divorce order has been made).

Parenting Matters

The legalisation of same-sex marriage has little impact on parenting matters. The *Family Law Act* already covers both married and de facto couples in both same-sex and heterosexual relationships in the same way. The focus of the Act remains on the best interests of the children involved and protecting these children from harm.



There may, however, be some differences in the area of artificially-conceived children through IVF procedures. Married couples in such circumstances are automatically legal parents to the child. De facto couples seeking legal parenthood must prove that a de facto relationship existed at the time of conception. Same-sex marriages will no longer be subjected to this extra layer of scrutiny.

Divorce

To apply for a divorce in Australia, married couples are required to satisfy the Court that the couple have been separated for at least 12 months, and there is no reasonable likelihood of resuming married life.

As those in same-sex relationships prior to the recent amendments to the *Marriage Act* were unable to marry, they also could not divorce. Legalising same-sex marriage will allow already married same-sex couples to divorce following 12 months' separation; as heterosexual married couples are currently able=.

It is expected that divorces figures will rise with the introduction of same-sex marriage.

Automatic Inheritance Rights

Marriage equality will allow same-sex couples to have the benefit of rights to their partner's estate and superannuation in the event of the death of their partner. When a person dies leaving no Will, the surviving spouse must prove existence of the relationship by, in the case of married couples, producing their Marriage Certificate.

Maintenance Orders

If a party to a pre-commencement same-sex marriage has previously had a maintenance order made in their favour, that agreement will cease to be in effect from 9 December 2017. Generally, a maintenance agreement in a person's favour will cease when that person gets married; however because same-sex marriages were not previously recognised in Australia, they did not previously cause a maintenance agreement to cease.

The agreements will cease from 9 December 2017, instead of the date that the pre-commencement same-sex marriage was solemnised, to avoid imposing retrospective obligations to pay back maintenance payments.

Binding Financial Agreements

If a pre-commencement same-sex marriage couple have made a Binding Financial Agreement (either under the Commonwealth or Western Australia law applicable to de facto couples), the agreement will continue to be valid and binding. From 9 December 2017, however, the agreement will be treated as an agreement made under the provisions in the *Family Law Act* that relate to binding financial agreements between married couples.

From 9 December 2017, the agreement will be interpreted as an agreement made under the provisions relating to agreements between married couples as if any 'necessary changes' had been made.