



Précis Paper

Legal Implications of Marriage on Same-Sex Couples

A discussion of the recent legislative changes that have occurred as a result of the 2017 plebiscite, which returned a majority yes vote to the question of whether Australia should legislate for same-sex marriage

Discussion Includes

- Background
- What changes were made?
- Impact of the new legislative changes upon succession law, specifically estate planning
- Divorce
- Custody of children

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Legal Implications of Marriage on Same-Sex Couples

1. In this edition of BenchTV, Anna Hacker (National Manager, Estate Planning - Australian Unity Trustees Legal Services, Melbourne) and Catherine Elversson (Senior Lawyer, Estate Planning - Australian Unity Trustees Legal Services, Sydney) discuss the recent legislative changes that have occurred as a result of the 2017 plebiscite, which returned a majority yes vote to the question of whether Australia should legislate for same-sex marriage. .

Background

2. In 2017, the government held a plebiscite to allow Australians to vote on whether Australia should have same-sex marriage laws.
3. The plebiscite required a yes or no response to the question:
Should the law be changed to allow same-sex couples to marry?
4. The results came through and approximately 62% of all registered voters were in favour. The Parliament acted quickly, the Bill was given Royal Assent, and on 9 December 2017 the *Marriage Act* was amended to legalis./e same-sex marriage.

What changes were made?

5. There were a few changes that immediately impacted legislation in Australia. The key change was to the *Marriage Act 1961* (Cth) itself. It changed the definition of marriage from being between 'a man and a woman' to 'two people'.
6. There were a number of changes to other pieces of legislation, including:
 - *Family Law Act 1975* (Cth)
 - *Sex Discrimination Act 1984* (Cth)
 - *Migration Act 1958* (Cth)
 - *Australian Defence Force Cover Act 2015* (Cth)
7. These changes really only related to the *Marriage Act* itself, and all of these pieces of legislation are federal. There is a flow-on effect to some state-based legislation, especially that which relates to registration of births, deaths and marriages.
8. From 9 December, there was an immediate change to the way in which marriage was defined by marriage celebrants.

9. Another change that took immediate effect is that people now no longer have to define themselves as either a wife or husband, and have instead the option of calling themselves 'partner'.
10. The Notice of Intention to Marry changed straightaway.
11. So a lot of the immediate changes have been administrative.
12. Previously, transgender people had to divorce their current spouse before they could change their sex. So the changes to the *Marriage Act* have indirectly remedied this old injustice by allowing transgender people to go through the sex change process without also having to divorce their spouse.
13. But the Registry of Births Deaths & Marriages and any relevant legislation is mandated by the states.
14. The Federal Government has given the states 12 months to make all necessary changes to their legislation.
15. There are many members of the community who are likely to protest against the changes by refusing service to same-sex couples. The concern was that a Minister of religion, for example, would be forced to marry a same-sex couple when they might not want to, and/or it is against their religion.
16. There is an exemption for Ministers of religion and marriage celebrants - who are defined as religious marriage celebrants - to refuse to marry same-sex couples. Such exemptions are not seen as discrimination according to our discrimination law, and this particular exemption *only* applies to Ministers of religion or religious marriage celebrants.
17. There is no way that other people can discriminate against same-sex couples by refusing to make a cake, or to arrange flowers etc., on the basis of their gender and/or sexual orientation. This has never changed.
18. Interestingly, at the time of the passing of the legislation, if someone was a celebrant, they could choose to become a religious marriage celebrant. People who became a celebrant after the passing of the legislation, however, were not given the option to choose.

Impact of the new legislative changes upon succession law, specifically estate planning

19. The reality is, there has not been a huge impact in this area as yet, *except for* the things that can invalidate a document.
20. The most important change or impact in the area of wills is where a person's will can be potentially invalidated when he or she gets married to another person of the same sex.

21. It differs from state to state, but in most states, same-sex marriage will invalidate any will. It means that people need to make sure that their documents are up to date.
22. Some states have powers of attorney invalidated by same-sex marriage too. So it is not a change in the legislation, it is more so a change in having to talk to individual clients about these matters which have the potential to invalidate their estate planning documents.
23. There has also been a huge impact upon intestacy laws. Again, the laws of intestacy have not been changed, but a practical change has occurred, whereby instead of a person having to prove that they were in a same-sex relationship, they can now just use their marriage certificate as proof of their relationship.
24. With a marriage certificate comes a presumption of a relationship. A de facto couple always had the same rights, but they had to prove that a relationship existed between them.
25. We can anticipate that there will be a lot of complexity in the area of foreign marriages, particularly in relation to:
 - the way in which they are recognised, and
 - when they are recognised
26. There has been quite a bit of discussion about whether same-sex couples who married overseas prior to 9 December 2017 would be deemed as having married on the date on which the ceremony overseas took place, or indeed on 9 December (the date on which same-sex marriage became legally recognised in Australia). This will give rise to a whole host of other complexities, relating to, for example, social security payments etc.
27. In order for a de facto relationship to be determined to exist between two people, those two people must have been living in the same house. The legislation across Australia relating to intestacy or estate and wills usually requires a de facto relationship to be found to exist between two people, and those two people to have lived together for at least 2 years prior to the death of one of them.
28. Members of a married couple can live in separate houses. Members of a domestic relationship, however, must live in the same house.
29. As of the 9th, suddenly the grounds upon which to challenge estates, which were not previously available to members of same-sex relationships, are now open to those who wish to pursue such challenges. This could potentially open the floodgates to estate planning litigation, with proceedings potentially being able to be brought retrospectively.

30. It is strongly advised that members of a same-sex relationship, at least during this time of uncertainty in the law, redo any documents that might relevantly be affected by the recent legislative changes.
31. In other words, it would be much simpler and cheaper to just redo any relevant documents than to find oneself the subject of a test case.
32. Another legal complexity is likely to arise in relation to binding death benefit nominations. A binding death benefit nomination from a retail fund generally lapses after 3 years, and has to be redone. Sometimes the original deed of the retail fund contains a lot more detail about how a nomination can be invalidated, and sometimes, it includes marriage.
33. The problem with this is that such detail is often not communicated on the form itself. There is a lot of flexibility available to trustees of funds to find something that invalidates a deed.
34. It is really important for lawyers therefore to read not just the trust deeds of self-managed super funds, but also those of retail funds, which is not something a lot of lawyers do.

Divorce

35. In estate planning law, one of the first and most frequently asked questions of clients by their lawyers is whether or not the marriage is still legally valid.
36. Interestingly, same-sex couples who married overseas before the 9th could not divorce in Australia. Instead, they could potentially move back to the country in which they were married to divorce. So a really important legislative change has been made to allow same-sex couples who married overseas to be able to divorce in Australia.
37. This has many knock-on effects, probably the most significant of which is the simplification of the ability of same-sex couples to access family court in terms of obtaining a property settlement following separation.
38. Estate planning and succession law is very much concerned with confirming that there was in fact a relationship. The advantage of being married is that the relationship does not have to be confirmed in the first place, which streamlines the whole court process generally, and the process of achieving property settlement is made much simpler.
39. It is important to bear in mind that though it takes 12 months to divorce, property settlement can commence before divorce is official.

Custody of children

40. Some countries allow for more than two parents to be registered on a birth certificate. We can foresee that changes will naturally occur in relation to custody of children as a

consequence of the legislative changes – and perhaps we will see a similar thing adopted in Australia.

41. We will also see the rights of LGBTQI people change more generally as a consequence of the recent same-sex marriage legislation.
42. The legislation is really just the first step in achieving overall equality for LGBTQI people in the law.

BIOGRAPHY

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Anna Hacker was admitted to practice in 2006 and is an Accredited Specialist in Wills & Estates. Anna has considerable experience in the field of succession law. She has worked in both private practice and in the trustee company industry. She is a member of the Law Institute of Victoria, Society of Trust and Estate Practitioners, a previous committee member of Business Professional Women and currently on the board of Probus Women's Housing.

Catherine Elversson

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Catherine was admitted to practice in Victoria in 2007 and has practiced in Victoria, Queensland and New South Wales as a commercial lawyer, specialising in estate planning. She has a broad range of experience, having worked in law firms, private banking and trustee companies. Catherine prides herself on helping demystify complex estate planning for her clients. She is a member of the Law Society of NSW and Society of Trust Estate Practitioners.

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