



Family Law implications of the recognition of same-sex marriages

12 December 2017

On 9 December 2017, the *Marriage Act 1961* (Cth) was amended to redefine marriage as the 'union of 2 people to the exclusion of all others, voluntarily entered into for life'. The right to marry under Australian law is no longer determined by sex or gender. Upon commencement, same-sex couples who are married, either in Australia or overseas, will be recognised as married for the purposes of the *Family Law Act 1975* (Cth).

This fact sheet provides information on the implications for people involved in family law matters. In particular it provides information relevant to same-sex couples who married under a foreign law prior to 9 December 2017 (pre-commencement same-sex marriages).

This fact sheet does not constitute legal advice. If you need advice on your specific situation, you should talk to a lawyer.

Access to Australia's divorce system

From 9 December 2017, access to Australia's divorce regime will not be determined by the gender of the parties to the marriage. Same-sex married couples, (including those who married overseas prior to the commencement of the reforms) will be treated the same as other married couples, and will be able to divorce under Australian law if they meet the other requirements for divorce under the *Family Law Act 1975*.

Under the Family Law Act there is a single ground for divorce: irretrievable breakdown of marriage. To meet this condition, a court needs to be satisfied that the parties to the marriage have lived separately and apart for at least 12 months prior to the application for divorce being filed, and that there is no reasonable likelihood of reconciliation between the parties. It is intended that, when calculating the 12 month period, couples in a pre-commencement same-sex marriage will be able to include periods before 9 December 2017, provided they were married at the time and there has been no resumption of cohabitation longer than 3 months.

Pending Proceedings

If a pre-commencement same-sex married couple currently has proceedings before the family law courts (in the de facto jurisdiction), those proceedings will continue as if the originating application for the proceedings was an application for proceedings between a married couple. Anything validly done for the purposes of proceedings before 9 December 2017 will continue to be valid for the proceedings, and will be treated as if it was done under the provisions of the Family Law Act that relate to married couples.

Western Australia

The same applies to couples from Western Australia, however proceedings commenced in Western Australia will move from the State de facto jurisdiction of the *Family Court Act 1997* (WA), to the Commonwealth matrimonial jurisdiction of the Family Law Act. In most cases, proceedings can continue to be heard in the same court. However, if the case is on appeal to the Supreme Court of Western Australia, the court may decide

to transfer the proceedings to the Full Court of the Family Court. The Supreme Court may make this decision either on its own motion, or you may file an application requesting it do so. If the Supreme Court does not choose to transfer your proceedings, it may continue to hear the proceedings.

The state provisions under the *Family Court Act 1997* (WA) relating to de facto couples, and the Commonwealth de facto and matrimonial provisions under the Family Law Act, are similar but not identical. The biggest difference is that under the Commonwealth Family Law Act, the Court can split superannuation payments and interests as part of a property settlement. More information on superannuation splitting is available on the Attorney General's Department website at:

<https://www.ag.gov.au/FamiliesAndMarriage/Families/SuperSplitting>.

Binding Financial Agreements

If a pre-commencement same-sex marriage couple have made a binding financial agreement (either under the Commonwealth or Western Australian law applicable to de facto couples), the agreement will continue to be valid and binding. However, from 9 December 2017, 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. These 'necessary changes' are only changes that would ensure the agreement would continue to operate on the terms originally agreed, but as an agreement between a married couple. 'Necessary changes' is not intended to make any substantive changes to the agreement.

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 maintenance agreements 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.