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COMMUNITY LEGAL CENTRE

Same-sex Relationships

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INTRODUCTION

The changing face of relationships in contemporary society and the continuing expansion of human rights laws in the last twenty years have brought about several legislative attempts to provide greater parity to establish and set up a framework for the future development of the law in relation to same-sex relationships.

The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) (Same-sex Relationships Act) removed discrimination against same-sex de facto couples and their families in areas such as taxation, superannuation, social security and family assistance, the Pharmaceutical Benefits Scheme Safety Net and the Medicare Safety Net, aged care, veterans' entitlements, immigration, citizenship, child support and family law. Social security and family assistance legislation recognises all couples regardless the gender of a partner, and same-sex couples receive the same entitlements, are assessed in the same way and have the same obligations as opposite-sex couples.

Amendments to laws including the *Australian Federal Police Act 1979* (Cth), the *Bankruptcy Act 1966* (Cth), the *Family Law Act 1975* (Cth) (Family Law Act) and the *Witness Protection Act 1994* (Cth) mean a significant move towards addressing a previous failure to properly recognise the rights of parties to a same-sex relationship.

MARRIAGE EQUALITY

Marriage solemnised in Australia

Amendments to the *Marriage Act 1961* (Cth) (Marriage Act) redefined marriage as the union of two people to the exclusion of all others, voluntarily entered into for life (s 5 Marriage Act). The Marriage Act now provides same-sex couples with the same rights and responsibilities as heterosexual couples. This includes rights to marry, spousal benefits, hospital visitation and medical decision making, family law entitlements and responsibilities, property entitlements and rights to surrogacy and adoption.

Marriage solemnised in a foreign country

From 9 December 2017, the Marriage Act recognises any existing and any future same-sex marriages solemnised outside of Australia under the law of a foreign country. The amendments to the Marriage Act also acknowledge any same-sex marriage solemnised by a diplomatic or consular officer under the law of a foreign country before 9 December 2017 (pt 5A Marriage Act).

A couple whose foreign same-sex marriage that became recognised from 9 December 2017 cannot marry each other again in Australia. However, this does not exclude married couples having another ceremony in Australia such as a confirmation or renewal of vows.

MARRIAGE CELEBRANTS

Authorised celebrants within Australia who can solemnise a marriage fall into three categories:

- ministers of religion of recognised denominations
- marriage celebrants (including ministers of religion of non-recognised denominations and religious marriage celebrants)
- state and territory officers.

The Marriage Act includes certain amendments to provide protections for ministers of religion, religious marriage celebrants and bodies established for religious purposes to act in accordance with their religious beliefs (ss 47, 47A and 47B Marriage Act).

Vows within a civil marriage ceremony

Marrying couples in a civil ceremony may also make a personal choice about the terms they wish to use in their marriage vows that best reflect their relationship. The term 'husband' can refer to a male marriage partner and 'wife' to a female marriage partner, regardless of the gender or sex of the person saying the vows. The term 'spouse' may refer to a male, female, intersex, non-binary or transgender person. Couples may choose whether they use the terms 'husband', 'wife' or 'spouse' in their vows. This applies to a civil marriage ceremony only.

FAMILY LAW AND DIVORCE FOR SAME-SEX COUPLES MARRIED IN AUSTRALIA AND OVERSEAS

All same-sex married couples (including those married validly overseas before 9 December 2017) are automatically married couples for the purposes of the Family Law Act and the principles that apply in relation to divorce.

Under the Australian Family Law Act, there is a single ground for divorce—the irretrievable breakdown of marriage (s 48(1)), and the precondition to filing the application for divorce with the court is that the court must be satisfied that:

- the parties to the marriage have lived separately and apart for a continuous period of at least 12 months immediately prior to the application of the divorce

being filed (s 48(2)). It is possible for parties to be officially separated but remain living together (s 49)

- there is no reasonable likelihood of reconciliation between the parties (s 48(3)).

Same-sex divorces granted overseas under a foreign law prior to 9 December 2017 will be recognised in Australia. Same-sex divorces granted outside of Australia after 9 December 2017 will be recognised in Australia if they meet the requirements of the Family Law Act.

REGISTERING A RELATIONSHIP AS A CIVIL PARTNERSHIP

In Queensland, an adult (a person 18 years and older) is able to register their relationship as a civil partnership without a Civil Partnership Declaration ceremony. The *Civil Partnerships Act 2011* (Qld) (Civil Partnerships Act) provides for two adults, regardless of their sex or gender, to enter into a legally recognised civil partnership (s 4 Civil Partnerships Act). To be eligible to enter into a civil partnership (s 5 Civil Partnerships Act):

- both parties must be 18 years or older
- both parties must not be married or already in a civil partnership
- at least one party must live in Queensland
- the parties must not have any of the following relationships with their proposed civil partner:
 - lineal ancestor
 - lineal descendant
 - sister
 - half-sister
 - brother
 - half-brother.

When two people wish to enter into a civil partnership, they may apply to have their relationship registered with Births, Deaths and Marriages in Queensland.

The application must be in the approved form and accompanied by a statutory declaration made by each person stating that the person (s 7 Civil Partnerships Act):

- wishes to enter into a civil partnership with the other person

- is not married or already in a civil partnership
- believes that they do not have a prohibited relationship with their proposed civil partner.

Documents to prove the two persons' identity and age must also be provided.

The civil partnership will take effect as soon as it is formally registered with Births, Deaths and Marriages.

A civil partnership is terminated by the death or marriage of one of the parties (s 14 Civil Partnerships Act), or after the registrar registers the termination application under s 18 of the Civil Partnerships Act at the Registrar of Births, Deaths and Marriages (ss 15–19 Civil Partnerships Act).

The Queensland Government provides comprehensive information on how to register a civil partnership with or without a declaration ceremony, and how to obtain an optional certificate.

PROPERTY ENTITLEMENTS AND BINDING FINANCIAL AGREEMENTS FOR SAME-SEX COUPLES

Married same-sex couples and same-sex couples in a de facto relationship or civil partnership have their property entitlements dealt with under the provisions of the Family Law Act. Same-sex couples can jointly own property and have the same rights to property settlement as heterosexual, de facto or married couples in Queensland (for more information on property settlements see the Property Division when Couples Separate chapter).

This also means that parties to a marriage, de facto relationship or civil partnership can have their property matters resolved in either the Family Court of Australia or Federal Circuit Court of Australia.

Binding Financial Agreement

From 9 December 2017, if a same-sex couple had entered into a binding financial agreement under the de facto provisions of the Family Law Act, the agreement will continue to be valid and binding, and be treated under the same provisions of the Act that apply to married couples.

ESTATE PLANNING FOR SAME-SEX COUPLES

The legal effect of a marriage, a de facto relationship or civil partnership is a matter that should be given real consideration in relation to estate planning issues, and parties to a same-sex relationship should seek and obtain legal advice with respect to estate planning issues in light of the changes to the law.

Married same-sex couples and couples in a de facto relationship or civil partnership can leave property to each other in their will and can appoint each other in a power of attorney or statutory health authority. De facto couples and parties of a civil partnership are considered spouses under laws about wills, which are called intestacy rules. For example, if there is only one surviving spouse, the spouse is entitled to the whole of the residuary estate. If there is more than one surviving spouse, they are entitled to the whole of the residuary estate in accordance with s 36 of the *Succession Act 1981* (Qld) (Succession Act) (sch 2 pt 1 Succession Act) (for more information on wills see the Wills and Estates chapter).

Furthermore, under the Succession Act, a person can make an application for maintenance from the estate of a deceased person if they are that deceased person's spouse. Again, s 5AA of the Succession Act makes it clear that the definition of 'spouse' includes parties to a marriage, a de facto relationship or a civil partnership, and that the gender of the party is irrelevant.

In Queensland, the Succession Act provides that a will is automatically revoked by the marriage of the testator (s 14(1)). However, a will that is stated to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator (s 14(3)(a)).

SUPERANNUATION ENTITLEMENTS FOR SAME-SEX COUPLES

The Same-Sex Relationships Act amended laws relating to the government superannuation funds' recognition of same-sex relationships and affords parties of same-sex couples the same rights and responsibilities as parties of heterosexual couples. It constitutes a major change in the law in relation to the treatment of same-sex relationships and the children of same-sex relationships.

The *Superannuation Industry (Supervision) Act 1993* (Cth) also provides for a simpler regulation of superannuation funds in recognising same-sex relationships.

A number of Commonwealth civilian and military superannuation schemes, including the judicial pensions scheme, which provides death benefits, are also available to parties of same-sex couples and children of a same-sex relationship.

SURROGACY LAWS APPLICABLE TO SAME-SEX COUPLES

The *Surrogacy Act 2010* (Qld) (Surrogacy Act) decriminalises altruistic surrogacy by consenting adults in circumstances of medical or social needs (s 14). Same-sex couples are eligible to apply for a parentage order under the Surrogacy Act.

Commercial surrogacy remains illegal in Queensland (s 56 Surrogacy Act). Same-sex female parents of children born in Queensland are able to record the names of both the birth mother and the female parent on a child's birth certificate.

Subdivision 2A and s 20(a) of the *Status of Children Act 1978* (Qld) recognises female parents of children born through a fertilisation procedure such as:

- in vitro fertilisation
- assisted insemination
- self insemination.

The ability to register a surrogacy birth is now possible pursuant to a parentage order, which is lodged with the Childrens Court of Queensland. For more information on surrogacy in Queensland see the Surrogacy and In Vitro Fertilisation chapter.

ADOPTION LAWS APPLICABLE TO SAME-SEX COUPLES

The changes to the *Adoption Act 2009* (Qld) (Adoption Act) now allow same-sex couples to submit an expression of interest to adopt.

All adoptions in Queensland are managed by the Adoption Services of the Department of Families, Seniors, Disability Services and Child Safety. The adoption services administer adoption legislation and provide statutory services to:

- parents who consider adoption for their children
- children requiring adoptive placements
- people seeking to adopt children
- people seeking information about past adoption.

The adoption process in Queensland for same-sex couples is the same as it is for any other person who wishes to apply for adoption.

Adoption Services keep a formal register of people who have completed and lodged an expression of interest and meet the relevant eligibility requirements under the Adoption Act.

Same-sex relationships and intercountry adoptions

Each country has its own eligibility and requirements about who can adopt children.

Intercountry Adoption Australia has detailed information about the adoption programs that Australia participates in, a step-by-step guide for Australian families considering adopting a child from overseas and information of state contacts and support.

Can parties to a same-sex relationship apply to adopt their partner's child?

It is permissible for parties to a same-sex relationship to pursue adoption of their partner's child through the stepparent adoption process (pt 5 Adoption Act). A person in a same-sex relationship who wishes to adopt their partner's child will be required to undergo the same assessment for eligibility as a person in a heterosexual relationship (pt 5 div 1 Adoption Act).

Again, Adoption Services have specific information about the adoption process and post adoption support and services.

LEGAL NOTICES

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