



# Same-sex and de facto property rights in Australia, what will change as a result of legalising same-sex marriage?

*It's been the topic of water-cooler conversations all over the country in the recent weeks, so what does "legalising same-sex marriage" mean in Australia?*

By Nicola Ashford

## The call for change

On 22 May 2015 the Irish Republic voted by popular referendum to legalise same-sex marriage. The historic referendum has renewed calls to the Australian government to follow suit. Within a week of the Irish vote, opposition leader Bill Shorten had introduced a bill in the House of Representatives to legalise same-sex marriage.

Bill Shorten has announced that when the bill comes to a vote later this year, members of the Labour party will not be required to vote along party lines, placing pressure on Tony Abbott to permit the same for the Coalition. Political commentators predict same-sex marriage will be legal in Australia before the end of the year.

## The law as it currently is

To "legalise" gay marriage in Australia, the definition of marriage pursuant to the *Marriage Act 1961* (Cth) would have to be amended. The current definition of marriage in Australia is "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."

As the definition is contained in an act of parliament, and not in the Constitution, a referendum is not required to change it. A further act of parliament passed by a majority in both Houses of Parliament is required.

## Current rights for same-sex couples

Whilst the breakdown of a relationship is not something you often want to consider, it is important to know what your rights are if things don't work out as planned. In general terms, upon the breakdown of a "de facto" relationship

that has lasted for at least 2 years, parties to those relationships may apply to the Family Court for orders altering their rights in property.

Same-sex couples who are in "de facto" relationships have the same rights upon a breakup as their heterosexual counterparts who are in a "de facto" relationship (*for more information, see our website for the article "Are you in a de facto relationship?"*).

## What are the rights of de facto couples?

As the power to create law in relation to non-married couples is a state power, it is up to each state government to legislate with respect to non-married couples rights.

In all of the states and territories except for Western Australia, the governments elected to give that power to the Commonwealth government. Same-sex de facto couple rights in all states except for Western Australia are defined in the *Family Law Act 1975* (Cth).

The *Family Law Act 1975* (Cth) essentially provides that parties to de facto relationships (including same-sex) can obtain a property settlement upon the breakdown of their relationship, on the same principles that apply to married couples.

In Western Australia, de facto couple rights are defined in the *Family Court Act 1997* (WA).

## The difference in Western Australia

In WA, whilst the *Family Court Act* has imported the majority of the provisions of the *Family Law Act* to apply to de facto relationships, there are a handful

of areas where this has not occurred. Most importantly:

1. The superannuation entitlements of either party are not considered property available for division.
2. The Family Court has no jurisdiction to deal with the property of a party to a de facto relationship who has become a bankrupt.

## The effect of legalising same-sex marriage

So what does all of this mean? If same-sex marriage became legal in Australia, upon the breakdown of a gay marriage you would not have to satisfy the Court you had been in a "de facto" relationship for 2 years in order to apply for property settlement. Further, for Western Australian couples, your superannuation entitlements would be considered property available for division and if either party became bankrupt, the Court would still have jurisdiction to make orders with respect to property.

## Overseas same-sex marriages

If you are in a same-sex relationship and married your partner in an overseas ceremony, it is important to note that you are not considered married under Australian law. If your relationship breaks down, in order to apply to the Family Court with respect to property settlement you must satisfy the criteria of having been in a "de facto" relationship of at least 2 years duration.

## Further information

For further information on property entitlements on the breakdown of a de facto relationship contact Carr & Co at [contactus@carrco.com.au](mailto:contactus@carrco.com.au)