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# QB Webinar: Same Sex Marriage Legislation Implications

## **Practical terms and implications of the new same sex marriage legislation**

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# Introduction

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# 1. Introduction

- **8 December 2017** - Federal parliament enacted the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* relating to the definition of marriage and the protection of religious freedoms.
- **9 January 2018** - these amendments came into effect allowing same sex marriage in Australia.
- The new legislation contains practical terms and has many implications for denominational bodies, ministers, and celebrants.



## ***2. Marriage Amendment (Definition and Religious Freedoms) Act 2017***

- **2A - Objects of this Act**

The objects of this Act are to create a legal framework:

- (a) to allow civil celebrants to solemnise marriage, understood as the union of 2 people to the exclusion of all others, voluntarily entered into for life; and
- (b) to allow ministers of religion to solemnise marriage, respecting the doctrines, tenets and beliefs of their religion, the views of their religious community or their own religious beliefs; and
- (c) to allow equal access to marriage while protecting religious freedom in relation to marriage.

- **Subsection 5(1) *Marriage Act 1961* - definition of “marriage”:**

- “Marriage means the union of 2 people to the exclusion of all others, voluntarily entered into for life”.
- “a man and a woman” amended to “2 people”.



## 2. Marriage Amendment (Definition and Religious Freedoms) Act 2017

- Authorised Celebrants – new category of “Religious marriage celebrants” (RMC).
  - Marriage celebrants who were registered as a minister of religion with current registration as at 8 December 2017 have been **automatically** identified as an RMC on the Register of Marriage Celebrants.
  - Civil celebrants who also qualify as a “minister of religion” can also apply to be identified as an RMC on the basis of their personal religious beliefs.
    - “Minister of Religion” – characteristics considered in Taxation Ruling 92/17 in relation to fringe benefits tax exemptions.
    - Likely to include Pastors who have been called by local churches but may not be registered – consider the characteristics on a case by case basis.
  - Same protections available to RMCs as all Ministers of Religion under the Act.



## 2. *Marriage Amendment (Definition and Religious Freedoms) Act 2017*

- **New section 47 - Ministers of religion may refuse to solemnise marriages:**
  - (3) A minister of religion may refuse to solemnise a marriage despite anything in this Part, if any of the following applies:
    - (a) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation;
    - (b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion;
    - (c) the minister's religious beliefs do not allow the minister to solemnise the marriage.

*Grounds for refusal not limited by this section*

- (4) This section does not limit the grounds on which a minister of religion may refuse to solemnise a marriage.



## 2. *Marriage Amendment (Definition and Religious Freedoms) Act 2017*

**47(a)** - the refusal conforms to the **doctrines, tenets or beliefs** of the religion of the minister's religious body or religious organisation;

OR

**47(b)** - the refusal is necessary to avoid injury to the **religious susceptibilities** of adherents of that religion;

- Relevant cases from anti-discrimination space:
  - *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (“CYC case”);
  - *OV and OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (“Wesley Mission case”).
  - Application for leave to appeal the CYC case to the High Court refused – some differing points of view remain unresolved.



## 2. Marriage Amendment (Definition and Religious Freedoms) Act 2017

- CYC Case (2014 Victorian Court of Appeal)
  - Complainant ran a project for suicide prevention (same sex youths).
  - Sought to book the CYC (Brethren Movement) campsite.
  - Was CYC a “religious body”?
    - Majority (2 of 3) said No, it did not exist for religious purposes.
    - Secular resort - no explicit religious connection (aspirational only to manage the facilities in a Christian spirit and make attendees aware of this).
  - Had a “doctrine” been breached?
    - Difference between “doctrine” and “beliefs”.
    - Doctrine – set out in Trust Deed – CYC relied on Plenary inspiration.
    - Subsequently (during the appeal) sought to argue that sexuality and sexual activity were also doctrine, but this was rejected.
    - View on homosexuality was not a doctrine – but was an application of the doctrine – more akin to a belief.
    - Importantly, Christianity does not impose beliefs on non-Christians – the action taken did not conform with the doctrine.



## 2. Marriage Amendment (Definition and Religious Freedoms) Act 2017

- CYC Case (2014 Victorian Court of Appeal) (continued)
  - Injury to adherents?
    - Affront to reasonable expectations of church members?
    - Premises were not church premises.
    - Insufficient connection between CYC and Church.
    - “Wholly unsurprising that no steps have ever been taken by CYC to prevent its camps being attended by persons in same sex relationships”.
  - Leave to Appeal to High Court
    - Not persuaded that the interests of the administration of justice, either generally or in this particular case, require a grant of special leave to appeal. Special leave to appeal refused with costs.
  - Does “Beliefs” really help?
    - Queensland anti-discrimination legislation – Doctrine only (not include beliefs) – but Wesley Mission suggests broader meaning.
    - *Sex Discrimination Act* and *Marriage Act 1961* – Extends to Doctrines, Tenets and Beliefs.
    - Maxwell P - The belief was a rule of “private morality only, and only applied to the sexual practices of adherents – therefore is was not “necessary” to avoid causing offence.



## 2. Marriage Amendment (Definition and Religious Freedoms) Act 2017

### Wesley Mission Case (2010 NSW Court of Appeal):

- Same Sex Couple that sought to become foster carers through Wesley Mission – application was rejected.
- NSW Legislation – any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion OR is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.
- **At first instance:**
  - Religion was “Christianity” – not Wesley Mission. Broad view regarding sexuality.
  - Doctrine – principle taught by the religion, in relation to an issue of real significance to the faithful. It must have a source in significant religious texts or oral traditions regarded as authority.
  - “Monogamous heterosexual partnership within marriage is both the norm and ideal of the family” - not a “doctrine” of Christianity.
  - Avoid injury to adherents (all or significant majority of the adherents) – Christians have diverse views regarding sexuality.
- **On appeal to Appeal Panel:**
  - Definition of religion was too narrow – it should be Wesleyanism.
  - What is “religion”? Broader interpretation accepted (religion was Wesleyan).
- **On Appeal to Court of Appeal:**
  - Doctrine – not uncontroversial to use definition “creed or body of teachings proclaimed by ecclesiastical authorities to be true”.
  - Religion – Wesleyan – focus on their doctrine and adherents.
- **Remitted for re-hearing:**
  - Doctrine – “particular moral or religious principles taught or advocated” (can include sexuality).
  - No need to consider if there might be injury to adherents (two limbs to the defence - first limb was made out).
  - Complaint dismissed.



## *2. Marriage Amendment (Definition and Religious Freedoms) Act 2017*

### **47(c) - the minister's religious beliefs do not allow the minister to solemnise the marriage;**

- Refers to the minister's personal religious beliefs, rather than the doctrines, tenets and beliefs of the denomination.
- We anticipate that this will be the easiest defence to rely on in the event that objection on the basis of "doctrines, tenets and beliefs" or "religious susceptibilities" fail.



## ***2. Marriage Amendment (Definition and Religious Freedoms) Act 2017***

- **47A Religious marriage celebrants may refuse to solemnise marriages**

- (1) A religious marriage celebrant may refuse to solemnise a marriage despite anything in this Part, if the celebrant's religious beliefs do not allow the celebrant to solemnise the marriage.

*Grounds for refusal not limited by this section*

- (2) This section does not limit the grounds on which a religious marriage celebrant may refuse to solemnise a marriage.



## 2. Marriage Amendment (Definition and Religious Freedoms) Act 2017

- **47B Bodies established for religious purposes may refuse to make facilities available or provide goods or services**
  - (1) A body established for religious purposes may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if the refusal:
    - (a) conforms to the doctrines, tenets or beliefs of the religion of the body; or
    - (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.
  - (2) Subsection (1) applies to facilities made available, and goods and services provided, whether for payment or not.
  - (3) This section does not limit the grounds on which a body established for religious purposes may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage.
  - (4) To avoid doubt, a reference to a **body established for religious purposes** has the same meaning in this section as it has in section 37 of the *Sex Discrimination Act 1984*.
  - (5) For the purposes of subsection (1), a purpose is **reasonably incidental** to the solemnisation of marriage if it is intrinsic to, or directly associated with, the solemnisation of the marriage.



## 2. *Marriage Amendment (Definition and Religious Freedoms) Act 2017*

- **“Body established for religious purposes”**
  - Undefined in legislation but it is clear that a Church is a body established for religious purposes.
  - The position for related entities such as schools or care arms is less clear - section 47B refers to a provision (section 37) of the *Sex Discrimination Act* which excludes by implication religious educational institutions. (CYC decision) also supports this approach.
  - Assume the exemption available under section 47B will not apply to a Church’s separately incorporated entities, such as schools and care arms.
  
- **“Purpose is reasonably incidental to the solemnisation of marriage”**
  - intrinsic to, or directly associated with, the solemnisation of the marriage.
  - For example, hire of a facility for a same-sex marriage ceremony to be performed is intrinsic to the solemnisation of marriage and would be covered by this exemption.
  - “Reasonably incidental” to the solemnisation of a marriage:
    - Reception venue? Probably.
    - Photography venue? Probably.



## 2. *Marriage Amendment (Definition and Religious Freedoms) Act 2017*

- **Conforms to the doctrines, tenets or beliefs of the religion of the body, or is necessary to avoid injury to the religious susceptibilities of adherents to that religion:**
  - draws from ‘religious sensitivities’ exemptions available under the *Sex Discrimination Act*.
  - competing judicial views on what amounts to a ‘doctrine’ – Wesley Mission case and CYC case.
  - the legislation does extend to “tenets and beliefs”.



## 2. *Marriage Amendment (Definition and Religious Freedoms) Act 2017*

- **Part 2 Amendment of *Sex Discrimination Act 1984*:**

- **63 Subsection 40(2A) replaced with:**

(2A) A minister of religion (as defined in subsection 5(1) of the *Marriage Act 1961*) may refuse to solemnise a marriage despite anything in Division 1 or 2, as applying by reference to section 5A, 5B, 5C or 6, if any of the circumstances mentioned in paragraph 47(3)(a), (b) or (c) of the *Marriage Act 1961* apply.

(2AA) A religious marriage celebrant (as defined in subsection 5(1) of the *Marriage Act 1961*) may refuse to solemnise a marriage despite anything in Division 1 or 2, as applying by reference to section 5A, 5B, 5C or 6, if:

- (a) the identification of the person as a religious marriage celebrant on the register of marriage celebrants has not been removed at the time the marriage is solemnised; and
- (b) the circumstances mentioned in subsection 47A(1) of the *Marriage Act 1961* apply.



### 3. *Practical Implications*

- **Ensure that the doctrines, tenets and beliefs of denomination are set out in Policy and Positional Statements (this has been done by QB through Assembly Statements).**
- For unregistered pastors who seek registration as civil celebrants, must apply to also be registered as a “Religious Marriage Celebrant”.
- Churches are **not required** to make premises or facilities within their control available for the solemnisation of same-sex marriages, or celebrations associated with same-sex weddings.
  - However, be aware that this exemption is unlikely to apply to associated entities unless there is significant control over the premises or facilities by the Church.
  - Link any associated entities closely (ministry, mission and beliefs)
  - Note the CYC Decision - CYC was not closely associated with Church, carried out secular activities
  - Check your public communications, websites etc
  - Ensure a consistent approach is maintained across the denomination

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THURSDAY

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