



UNDERSTANDING YOUR LEGAL RIGHTS

A GUIDE FOR LESBIANS AND GAY MEN IN NSW

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INTRODUCTION

Throughout Australia's history, the law has denied basic rights to lesbians and gay men. The last 25 years, however, have seen a number of changes to the law that have brought lesbian and gay rights closer to those enjoyed by heterosexuals.

As a result of these changes, lesbian and gay couples in NSW enjoy equal rights with heterosexual couples in many areas of public life. However, there are some areas of the law where gay men and lesbians are yet to enjoy the same rights as other couples in the community.

This booklet aims to help you understand your rights. It won't answer every question, but it will give you an idea of how to organise your affairs. Areas of the law where same sex couples don't have equal legal rights are highlighted.

We've taken every care to state the law correctly – but be aware that the law changes often. Please also be aware that laws vary across the states and

territories, and that this booklet only deals with the law in New South Wales and some areas of federal law.

This booklet is intended as a general guide only and no responsibility is accepted for anyone relying on it. If you are in doubt or you need more detailed advice, talk to a lawyer. For details about how to get further information or advice, refer to the 'Further information and contacts' section of this resource.

1. AGED CARE

Same sex couples are now treated equally to heterosexual couples in income and assets tests for entering aged care facilities as from 1 July 2009. Under the law, the home of a same sex couple is not counted in the assets test.

2. COMPENSATION

WORKERS' COMPENSATION

Same sex partners are recognised under Federal and NSW workers' compensation laws. This means that if your partner died in a work-related accident, you may be entitled to compensation. If you want to claim compensation in these circumstances, it is best to get legal advice.

MOTOR ACCIDENT COMPENSATION

Same sex partners are recognised under motor accident compensation laws. This means that you may be entitled to compensation if your partner is injured or killed in a motor accident. Once again, seek legal advice about how to make a claim.

2. DISCRIMINATION

PROTECTION FROM DISCRIMINATION

The Anti-Discrimination Act 1977 (NSW) makes it unlawful to discriminate against gay men and lesbians on the basis of their homosexuality in the areas of employment, public education, accommodation, the provision of goods and services, or by a registered club. Gay men and lesbians are also covered by the Act if they are discriminated against on the basis of disability (including where it is on the basis of your HIV/AIDS status), race, age, marital or domestic status (including same sex couples), sex (including pregnancy), transgender status or carers' responsibilities.

There are comparable Commonwealth laws which provide for substantive remedies for discrimination in similar areas on the grounds of sex, race, disability and age. The Human Rights and Equal Opportunity Commission Act provides limited remedies for discrimination against lesbians, gay men or transgender people.

Discrimination is when someone treats you less favourably because of a particular characteristic such as your sexuality or because you are HIV positive. For example, some employers might offer benefits (such as free health insurance or the right to accompany an employee on

work-related travel) to the partners of their employees. If these benefits are available to employees who are married or who are in a de facto relationship with someone of the opposite sex but they are not available to employees who are in a same sex relationship, then this may be considered discrimination on the basis of the employee's homosexuality. Similarly, homosexual discrimination may arise when benefits such as a 'family rate' are provided to those in opposite sex relationships but are not provided to those in same sex relationships.

Protection from harassment and sexual harassment

Discrimination can include harassment.

Harassment is generally regarded as behaviour which is not wanted and intimidates, humiliates or offends someone. For example, a manager calling a gay employee a 'faggot' may constitute harassment and hence be regarded as unlawful discriminatory conduct. Similarly, deliberately leaving someone out of meetings, isolating them or belittling them because they are lesbian or gay could also constitute harassment.

Sexual harassment is any unwanted behaviour of a sexual nature that in the circumstances a reasonable person would consider to be offensive, humiliating or intimidating. Sexual

harassment can be directed against women or men. Behaviours that could amount to sexual harassment include sexual touching, sexually explicit jokes, posters, screensavers, emails or other material. The Anti-Discrimination Act 1977 specifically makes sexual harassment unlawful.

Protection from vilification

The Anti-Discrimination Act also makes it unlawful to vilify someone because of their homosexuality, race, transgender or HIV/AIDS status.

Vilification is any public act that is likely to incite or encourage hatred, serious contempt, or severe ridicule of a person or a group of people. In general, an act will be 'public' if it is possible for someone other than those directly involved in the act to have seen, heard or read it. There is also a criminal offence of 'serious vilification' on the proscribed grounds which includes threatening or inciting physical harm.

What to do if you have been discriminated against or experienced vilification?

Get advice

If you are unsure if you have experienced discrimination, harassment or vilification, you could contact a community legal centre. These services are free and confidential. They can provide you with

information and help you to work out what to do next.

You may be able to make a complaint under NSW law (to the Anti Discrimination Board of NSW) or under Federal law (to the Australian Human Rights Commission). It is best to seek advice about which option would be best for you because there are differences in the process and in the amount of damages you could be awarded.

Consider talking to the person who is discriminating against you or harassing you

If you have experienced discrimination or harassment, you may be able to address the problem by talking to the person who is treating you unfairly if this feels appropriate and safe. Let the person know that what they are doing is against the law.

You may be able to ask someone to help you do this. For example if the discrimination or harassment is happening in your workplace, you could ask your union or a co-worker to support you. Or you could go to your boss or someone with more authority than the person discriminating against you. If the discrimination or harassment is happening in a service, you could ask to speak to the manager first and then approach the person with the manager's support.

Make a complaint to the NSW Anti-Discrimination Board

If you think you have been discriminated against, harassed or have experienced vilification, you can lodge a complaint in writing with the NSW Anti-Discrimination Board (ADB). Generally, you must lodge your complaint with the ADB within 12 months of the act of discrimination, harassment or vilification.

The complaint will be investigated and, where appropriate, the parties will be asked to try and conciliate (settle) the matter. If a matter can be conciliated, the outcome will depend upon what both parties are willing to offer and accept. If you are entering a conciliation process, the kinds of things you can ask for are a change in the discriminatory behaviour, financial compensation, the introduction of appropriate workplace training and/or policies and procedures, and/or an apology.

The ADB tries to conciliate complaints. It has no power to make findings or orders. If the complaint cannot be conciliated, and in some other circumstances, the complaint may be referred to a hearing in the Equal Opportunity Division of the Administrative Decisions Tribunal (ADT). If the complaint is referred to the ADT, the Tribunal has the power to decide the case and make orders that are binding on the parties.

Make a complaint to the Australian Human Rights Commission

Complaints of discrimination or harassment under federal anti-discrimination laws, for example on the grounds of race, sex, age or disability, can be made to the Australian Human Rights Commission (AHRC) and must be lodged within 12 months of the act of discrimination. There is no specific ground of 'sexuality' under federal law, although if you are discriminated against because of your sexuality in employment, you can complain to AHRC under the Human Rights and Equal Opportunity Commission Act.

Make a claim for unfair dismissal if relevant

If your employment has been terminated and you believe it was because of your homosexuality (or race, HIV or transgender status, etc) you may also have a claim for unfair dismissal. See the section on "Unfair dismissal" for more information. Please note that if you have been dismissed for a discriminatory reason, you can still make a complaint to the Anti-Discrimination Board if you are unable to lodge an unfair dismissal complaint.

Exceptions to anti-discrimination laws

Certain employers, for example private educational authorities and small

businesses of 5 or less employees, may in some instances be permitted in law to discriminate against employees on the basis of their homosexuality. There are also some general exemptions in the law that make it possible for voluntary and/or religious bodies to discriminate in certain circumstances. This doesn't mean that these groups will automatically discriminate against you but if they do, it may be lawful. Please telephone the ADB for advice in these circumstances.

4. EMPLOYMENT

Unfair dismissal

If your employment has been terminated in circumstances that you consider harsh, unjust or unreasonable, or if you have been threatened with dismissal, you may have a claim for unfair dismissal under state or federal unfair dismissal laws. You may also be able to claim if you were forced to resign, or a redundancy was not genuine.

If you believe that you were sacked because of your homosexuality, disability (which includes HIV status), transgender status, race, age or sex, you may have a claim under both unlawful termination laws and anti-discrimination laws.

What to do if you believe you have been dismissed unfairly

Unfair dismissal laws are complex and have recently changed so it is important to get advice from your union, Law Access NSW, a community legal centre or a private solicitor.

You will need to find out whether or not your employer is covered by the WorkChoices law. If your employer is covered by the WorkChoices law, unfair dismissal claims are lodged with the Australian Industrial Relations Commission (AIRC). If your employer is not covered by the WorkChoices law, unfair dismissal claims are lodged with the NSW Industrial Relations Commission (IRC). Claim forms can be obtained from the AIRC and IRC registries and from their websites.

Once a claim has been lodged, the emphasis is on getting the employer and employee to settle the claim in a conciliation hearing. If you have made a claim, you can seek reinstatement or monetary compensation from your employer, as well as a reference if you require one. If the matter can't be settled, your case will be referred to a formal hearing before the Commission.

In January 2010, WorkChoices will be replaced by Fair Work Australia. After this time, the laws in this area may change.

Leave entitlements at work

Same sex couples are now able to access parental leave, carer's leave and compassionate leave under state and federal law. Parents are entitled to parental leave if a child is born to them or their partner.

5. EVIDENCE

Under NSW law, same sex couples cannot be compelled to give evidence against their partner in certain legal proceedings. These provisions will soon commence under Federal law.

6. ILLNESS, INCAPACITY AND "PERSON RESPONSIBLE"

Under the Guardianship Act 1987, a same sex partner is considered to be the person responsible. They can make medical decisions for their partner if their partner becomes incapacitated and there is no order from the Guardianship Tribunal. There is no requirement under that Act about how long you must have lived together.

Appointing an Enduring Power of Attorney and an Enduring Guardian

Even if you think your relationship is covered by the Act, it is worth giving some thought to what would happen to you if you were to become physically or mentally incapacitated. You could consider making an Enduring Power of Attorney (EPA), pursuant to the Powers Of Attorney Act 2003 or the general law and appointing an Enduring Guardian under the Guardianship Act. These are simple documents but they must be prepared in the correct way (usually by a lawyer) and signed by you while you are of sound mind or they may be challenged in the Guardianship Tribunal or the Supreme Court.

An EPA authorises the holder ('Attorney') to manage your financial and legal affairs if you are incapacitated. An Enduring Guardian may make 'lifestyle' decisions on your behalf (for example, they may decide where you live, what health care and other kinds of personal services you receive, and they can consent to medical or dental treatment).

You may revoke an EPA or an Enduring Guardian appointment at any time while you are of sound mind. It is advisable to get a lawyer to help you with this.

If you do not make an EPA or appoint an Enduring Guardian, your biological family may be able to take legal action

to challenge your partner's right to make decisions. Taking these steps is the best way to ensure your partner is legally able to take care of you and make decisions on your behalf if you become incapacitated.

7. IMMIGRATION

If you were not born in Australia but you wish to remain here lawfully, you must hold a visa or other travel authority and comply with the Commonwealth Migration Act 1958 and the Migration Regulations 1994. If you want to live in Australia permanently, you must be either a citizen or a 'permanent resident' or an eligible New Zealand citizen.

If you wish to extend your stay in Australia, it is better to make a valid application for another visa before your current visa expires. If your visa has already expired, you may still be able to apply for another visa, but the subclasses of visas are limited, and you must demonstrate compelling reasons for being in the country unlawfully.

Immigration law changes rapidly. It is best to obtain advice from someone who has specific knowledge of current immigration law such as the Gay and Lesbian Immigration Task Force (see the end of this handbook for contact details) or a registered migration agent. Some lawyers are also registered migration agents.

APPLYING FOR A VISA ON THE BASIS OF YOUR RELATIONSHIP

If you are the same sex de facto partner / spouse ["partner"] of an Australian citizen, permanent resident or eligible New Zealand citizen, you can apply for a 'partner class' of visa (interdependency). Obtaining permanent residence as an interdependent partner is a two stage process, with a temporary interdependency visa being granted first, and then the permanent interdependency visa thereafter. An applicant will apply for both the temporary and permanent visas at the same time, in the one application.

To be eligible to apply for an interdependency visa, you must have lived with your partner (either in Australia or overseas) in a de facto spouse relationship for at least 12 months immediately prior to lodging your visa application.

The 12-month relationship requirement may be waived if one of the following situations applies:

- You are able to demonstrate compelling and compassionate circumstances, for example, if you have any children with your partner.

All the following circumstances apply:

- Your partner is, or was, the holder of a permanent humanitarian visa.

- Prior to their permanent humanitarian visa being granted, you were in a relationship with your partner that meets the requirements of a de facto spouse relationship.
- The department was informed of this before the permanent humanitarian visa was granted.

EVIDENCE OF YOUR RELATIONSHIP

You must also be able to provide evidence that supports your application and shows that your relationship is genuine and continuing, including: details of a joint bank account; bills such as telephone, gas, electricity, water that have both yours' and your partners' name on them; and/or a joint lease or ownership of property. You will also need statutory declarations confirming your relationship from friends and family.

You and your partner must each provide a statutory declaration regarding the history of your relationship, including:

- Details of how, when and where you first met
- Details of how your relationship developed
- When you decided to marry or to start a de facto spouse or interdependent relationship
- Details of domestic arrangements (how you support each other emotionally, financially and physically)

and when this level of commitment began), including things such as cooking, cleaning, shopping, household tasks, etc. You may also include social activities where you have been together as partners.

- Any periods of separation (when and why the separation occurred, for how long and how you maintained your relationship during the period of separation). You may include things such as phone contact, email contact, letters exchanged during periods of separation, and reasons as to why separation occurred.
- Your future plans together as a couple, such as for example, plans of purchasing joint property, setting up a business together, having children, etc.

The statutory declarations of you and your partner must be true and correct in content. Where possible, attach certified copies of any documents in support of your application, such as passports, birth certificates, etc. Where documents are not in English, they should be translated. If so, you should use a NAATI accredited translator to do so. See the end of this handbook for contact details.

In assessing a claimed interdependent relationship, the department usually looks at evidence of things such as:

- Living together as a couple on a full time and ongoing basis.
- Sharing financial and social commitments such as joint payment

of rent, mortgage payments, living expenses, etc.

- Having a joint home independent from others
- Any other evidence you believe will support your claim that your relationship is genuine and continuing.

Photographs can also help to show that your relationship is genuine, especially if they show you taking part in a family, or other significant, event, and the photographs are taken over an extended period time.

At times, the Department will conduct an interview of both the applicant and the sponsor to ascertain details of the relationship, and to assess whether the relationship is genuine.

WHERE TO APPLY

You can apply for an interdependency visa here in Australia or from overseas. However, if you apply from overseas, you may not be able to come back to Australia while your application is being processed. You may not be granted a visa if for example, you have an outstanding debt to the Australian Government.

CRITERIA

Advice should be sought as to what criteria must be satisfied. However, the main criterion on which your

application is assessed is whether your relationship is considered genuine and continuing. To be granted permanent residency you must also meet certain health, character and public interest criteria. For example, health criteria usually require you to be HIV negative. You can still apply if you are HIV positive, but you would also have to apply for the health criteria to be waived. This may be successful, but is a long and complicated process.

If your visa application is successful, you will usually be granted a provisional temporary visa that lasts for two years. At the end of this period, permanent residency will usually be granted provided you are still together with your Australian partner in a genuine, continuing and exclusive relationship. There are exceptions to having to wait the 2 year period before the permanent resident visa is granted, including the following circumstances:

- The sponsoring spouse has died and the relationship was genuine and one which would have lasted if the sponsor had not died;
- Where the relationship breaks down and there is relevant domestic or relevant family violence.

Advice should be sought on the evidence required to be provided to the Department and on any other grounds that may exist for permanent residence to be granted in circumstances of a breakdown of a relationship.

AUSTRALIAN VALUES STATEMENT

Any applicant aged 18 years or over, is required to sign an Australian values statement. This statement is included in the visa application form and it confirms that the applicant will respect the Australian way of life and obey Australian laws. Before signing this statement you are required to have read, or had explained to you, material made available by the Australian Government on life in Australia which is contained in the Life in Australia book.

BOOKLETS AND INFORMATION

The Department of Immigration and Multicultural Affairs has published a booklet called Partner Migration that sets out the criteria you have to meet to be eligible to apply for an interdependency visa. It costs around \$10 and is available from any office of the Department. You may also contact the Department directly for further information, or, check the MARA website for a list of migration agents. See the end of this handbook for contact details.

Migration laws will change on 1 July 2009, to recognise same sex couples under the category of 'de facto'. More information will be provided on this area soon.

8. MEDICARE AND PBS

MEDICARE SURCHARGE

The Medicare levy is determined based on your personal income. There is a reduced rate for a member of a couple who has a dependent spouse. Same sex couples are now eligible for this reduction.

The Medicare surcharge is an additional 1% charged on income above a specified amount if the individual does not have private health insurance for the tax year. There is a family surcharge threshold, which is double that of the individual threshold. This threshold is composed of family income which is the combined income of a couple. Same-sex couples and their children now fall into this category and can be assessed as a family.

MEDICARE SAFETY NET

Under the Health Insurance Act 1973, the Medicare Safety Net is calculated based on the 'out of pocket' medical expenses for an individual or a 'family unit'. Once an individual or family spends over a certain amount on 'out of pocket' expenses, Medicare refunds the Medicare benefit as well as 80% of the difference between the Medicare benefit and the actual cost of the medical service. Same sex couples and their children are now included in the definition of a 'family unit' and can pool expenses to reach the family threshold for the safety net or the extended safety net.

PHARMACEUTICAL BENEFITS SCHEME

Once an individual or a family spend more than a certain amount per year on certain prescription medicines, they are entitled to significant discounts on their medication for the remainder of that year. Medicines listed on the PBS are reduced to \$4.90 (for general patients) and zero (for concessional patients). Same-sex couples and their children are now able to pool expenses to reach the family threshold for the PBS safety-net.

9. PARENTING

In any legal process involving children, the best interests of the child are the most important consideration. If you are a 'legal parent' of a child, this brings with it a number of different responsibilities and obligations.

DONOR INSEMINATION

Many lesbians and gay men are choosing to have children either through informal donor insemination arrangements or through fertility clinics. While donor insemination is legally available to women through fertility clinics in NSW, not all fertility services provide donor sperm.

Self-insemination

In NSW, there is no law against self-insemination. However, there

are various health risks involved with informal donor insemination arrangements. The NSW Human Tissue Act 1983 states that donors must be tested for certain viruses or diseases. There are penalties for non-compliance with the Act. If you are planning to inseminate with donor sperm, it is important to obtain comprehensive information about the donor's compliance with the requirements of the Act.

Artificial Reproductive Technology

Lesbian and gay couples are able to access Assisted Reproductive Technology (ART) services in NSW. The new NSW Assisted Reproductive Technology Act 2007 will soon commence. It will allow anyone who donates eggs or sperm to put conditions on their use, for example, that they not be used by same sex couples. This means that they can specify that the donation is not used by people with particular characteristics. It is then up to the clinic whether they will accept the donation on these terms.

The legal status of the donor

Under the NSW Status of Children Act 1996, where a child is born as a result of a fertilization procedure using donor sperm, the donor is not considered to be the legal father of the child (unless conception was by sexual intercourse).

As such he should not be named as the father on the birth certificate.

Nevertheless some sperm donors do end up named as the father on the birth certificate. If the donor is named on the birth certificate, then government officials will assume that he is the legal father, for example, when applying for Centrelink benefits or when applying for a passport for the child. You will have to prove that he isn't the legal father by providing evidence of how the child was conceived. You can apply to the NSW Registry of Births Deaths and Marriages to remove the donor's name from the birth certificate.

A sperm donor is not a parent for legal purposes and is not liable for child support through the Child Support Agency. However he can apply to the Family Court for parenting orders as a person who has a concern for the 'care, welfare and development' of the child. The Court makes all decisions regarding children based on what is in the best interests of the child.

Written agreements between the parties involved in donor insemination arrangements are not legally enforceable in relation to the parenting or care arrangements for the children, but may be enforceable in relation to financial arrangements. However, agreements are still useful as evidence of the parties' intentions and may prevent disputes arising in the future.

RECOGNITION OF LESBIAN PARENTS

Changes to the NSW Status of Children Act 1996 mean that where a lesbian couple has a child through donor insemination and the co-mother (that is, the parent who is not the birth mother) consents, then both the birth mother and the co-mother (the non-biological mother) will be considered the child's legal parents. Donor insemination includes situations where the child is conceived through an IVF clinic, and through insemination at home. It does not include situations where the child is conceived by intercourse. Under the Births Deaths and Marriages Registration Act (NSW), a co-mother can be registered on the child's birth certificate as the other parent, as either a 'mother' or a 'parent'. Birth certificates of existing children can also be amended to include co-mothers as a parent.

New definitions under the Commonwealth Family Law Act 1975 mean that co-mothers are now given the status of 'legal parent', and have parental responsibility for the child. There is also a new definition of 'child of the relationship', which includes where the parents have made a joint decision to have a child. This child must be the biological child of at least one person in the relationship, or be the birth child of a woman in the relationship. Even if none of the genetic material used in the fertility procedure is sourced from either

parent, then the birth mother is still the mother for the purpose of parenting presumptions.

GAY DADS

The situation for gay male couples is more complex and the options are more limited than for lesbian couples. Apart from having children from a previous heterosexual relationship, the options include co-parenting with perhaps a single woman or lesbian couple, with conception occurring via donor insemination where one of the gay male couple is the sperm donor. It is then a matter for the parties to negotiate the parenting arrangements between them. If this option is considered, then it is recommended all parties have counselling to work out how the parenting arrangements are to work.

The other option for gay male couples is surrogacy. Currently there is no legislation in force governing surrogacy, so judge made law would apply. Once the NSW Assisted Reproductive Technology Act 2007 is commenced it will be clear that the law in NSW is that commercial surrogacy is illegal and that while altruistic surrogacy is not illegal, such arrangements are not legally enforceable.

The problem with surrogacy arrangements occurring in NSW is conferring parental responsibility upon

the gay male couple. If a woman agrees to act as a surrogate mother, she will be considered the legal parent of the child and there is no mechanism to surrender the child to the commissioning gay male couple if she later changes her mind and wishes to keep the child. If the child is surrendered to the gay male couple, they would then need to apply to the Family Court or Federal Magistrates Court for court orders that they have parental responsibility. This can be an expensive and lengthy process. Adoption is not an option in NSW because current law does not allow same sex parents to adopt.

Commercial surrogacy is legal in some places overseas, including the state of California and Canada. However, it is a very expensive process. If any form of surrogacy arrangement is considered, it is recommended you seek independent legal advice from a specialist in this area.

UNEQUAL

Under NSW law at the moment, two fathers cannot be recognized on a child's birth certificate. For a gay male couple to obtain parental responsibility for a child, they will have to apply for parenting orders.

Children from previous relationships conceived through intercourse. If a child of a previous relationship is conceived by way of sexual

intercourse, the parties involved are the legal parents of the child. This carries with it responsibilities such as making decisions about long term decisions for the child, and a responsibility to provide financial support. The parents' sexuality does not alter these responsibilities.

PARENTING ORDERS

Parenting orders are court orders from the Family Court or the Federal Magistrates Court, which outline who has parental responsibility for a child. A person concerned with the 'care, welfare and development' of the child can apply for these orders. This could include either of the same sex parents, a gamete donor, grandparents and other family members.

Parenting orders may be useful to establish a legal relationship for the child with a donor, for people who have entered a relationship where there is already a child, and for parenting arrangements including three or four parents. If all parties agree to the orders they would like, they can apply for consent orders, which is a simple process. More information about this is available in Talking Turkey (see further reading).

Parenting orders from the Family Court can grant shared 'parental responsibility' to the people involved. For example, you can seek joint parenting orders about who has

parental responsibility for the child and who the child lives with. These sorts of orders can provide protection for the co-mother if the relationship breaks up and there is a dispute, or if the birth mother dies. The orders can also be used as official documentation for schools and hospitals to provide evidence of equal parenting arrangements.

If joint parental responsibility has been granted and a relationship breaks up, the couple must continue to make significant decisions about the child jointly unless new orders are granted. If the parents and co-parent are separated consent in writing is required before either parent can take the child out of Australia.

PASSPORTS

If two parents are listed on a child's birth certificate, the Passport office will assume they need the consent of both parents to issue a passport for a child.

What if the biological parent dies?

If one of the legal parents of the child dies and there are no court orders in place about where the child lives, the child will be presumed to remain living with their other legal parent. A legal parent can also name a person in their will as the person they would like to look after a child (or children) after their

death. This is not legally binding, but the court may still consider the request as a factor when deciding where the child or children should live.

Parenting orders from the Family Court granting a co-parent residence or parental responsibility would mean that relatives or others could not remove the child from the co-parent without court orders.

What if the relationship breaks down and children are involved?

If you and your partner cannot agree about the children (including any children from a former heterosexual relationship if relevant), you can apply to the Family Court for parenting orders. Anyone with a legitimate concern about the care, welfare or development of the child can apply. Therefore, lesbian or gay co-parents, as well as biological parents, can make an application in court.

Orders can deal with:

- where and with whom the child will live.
- what contact the child will have with a parent, grandparent or any other person who may be important to the child.
- any other matters the court thinks should be clarified in the best interest of the child, for example where the child is to be educated.

In determining orders relating to children, the primary focus of the court is the best interests of the child or children. The court does not now openly discriminate against lesbian and gay parents in disputes before the court.

As with most matters of law, the detail and process can be quite complicated so it is best to get legal advice before you proceed. A lawyer can advise you about which court you need to apply to and can also help you prepare your case to show that your proposed arrangements are in the best interests of the children.

Child support and maintenance

From 1 July 2009, the Child Support Agency will recognize same sex couples. This means if a relationship breaks down, either parents would be able to pursue the other parent for child support.

If the child remains with the co-parent, she or he would be able to use the Child Support Agency to pursue child support from the biological mother.

UNEQUAL

Adoption

Under the current law in NSW, people in same sex relationships are not permitted to adopt as couples from NSW or internationally, but they may

apply to adopt as individuals. In reality, however lengthy waiting lists for adoption make it virtually impossible for individuals to adopt.

Second parent adoption is not possible in NSW, although it is now available in WA, the ACT and in limited circumstances in Tasmania. It is not necessary for you to adopt your partner's children to have a legally recognised role in their upbringing. This may be achieved by obtaining parenting orders from the Family Court by consent (see 'co-parenting' above).

10. PRIVACY

Information about your personal relationships and sexual orientation. In general, your sexuality and your relationships are your own business. In most situations, for example if you are applying for a job, you cannot be required to disclose details about your sexual relationships or your sexual orientation. Forcing you to provide this information could be unlawful discrimination.

However, there are some exceptions. For example, insurance companies may be able to discriminate on grounds of age, sex and/or disability when deciding whether to provide you with insurance if such discrimination is based on reasonable data. If you are applying for life insurance, you may be required to answer questions about your health, history and activities

(including your sexual relationships), so the insurer can assess the risk involved. They may also ask similar questions of your partner.

INFORMATION ABOUT YOUR HEALTH AND SEXUALITY

There are laws that protect the confidentiality of information about your health and sexuality. The Privacy and Personal Information and Protection Act 1998 safeguards all personal information held by NSW government agencies, particularly information about health and sexuality and the Health Records and Information Privacy Act 2002 protects the privacy of a person's health information held in both public and private sectors.

In New South Wales, the confidentiality of people who are HIV positive (or who have been tested for HIV) is protected by the Public Health Act 1991 (NSW) which makes it an offence to disclose a person's HIV status. However, you are required to disclose your HIV status in certain situations, for example if you are giving blood, joining the armed forces, or applying for certain types of insurance. If you are HIV positive, you are legally required to tell your prospective partner before having sex (Public Health Act).

The law around HIV/AIDS can be complex. For more information contact the HIV/AIDS Legal Centre (see Legal Information & Contacts).

12. RELATIONSHIP RECOGNITION AND PROPERTY RIGHTS

Same sex de facto couples are now treated the same as heterosexual de facto couples under NSW law, and will soon be treated equally under Federal law.

The definition of 'de facto' relationship is one where the partners are not legally married to each other and not related by family, but have a relationship as a couple living together on a genuine domestic basis.

All circumstances are taken into account, including:

- the duration of the relationship
- a common residence for the couple
- a sexual relationship
- financial dependence or interdependence
- ownership of property
- a mutual commitment to a shared life
- care of children
- performance of household duties
- reputation of relationship

UNEQUAL

Same sex couples are not able to get married under Australian law, and same sex marriages performed overseas are not recognised in Australia. NSW does not currently have civil unions or any other way to register or formally recognise same sex relationships.

Domestic relationship agreements

As a same sex couple, you can enter into an agreement with your partner about your financial relationship before you start living together as a de facto couple, or during the relationship. This is referred to as a 'domestic relationship agreement' under the NSW Property (Relationships) Act 1984, or a 'Part VIIIAB financial agreement' under the Commonwealth Family Law Act 1975. This agreement can set out how the finances of your partnership are dealt with during the course of your relationship, and if the relationship breaks down. For these agreements to become legally binding, both you and your partner must seek independent legal advice and attach a certificate of advice from the both lawyers to the agreement.

Dividing property when a relationship breaks up

If your relationship breaks down and: you have lived in a de facto

relationship with your partner for at least two years; and/or there is a child of the relationship; and/or one of you has made substantial contributions to the property, the process for dividing the property will be determined by the NSW Property (Relationships) Act 1984 . Any claim for property division should be made within 2 years of you separating from your partner.

However, from 1 March 2009 major amendments to the Commonwealth Family Law Act 1975 will come into effect. As a result property disputes between all de facto couples, including same sex couples will be dealt with in the Family Court pursuant to the changes to the Family Law Act.

Couples will be able to 'opt in' to the family law jurisdiction even if the relationship broke down prior to the commencement of the family law amendments. The Family Courts offers a cheaper and faster method, greater expertise, and will enable couples in dispute to access the superannuation splitting regime in the Family Law Act. To do this:

- there has to be no order already made under state law,
- they mustn't have already agreed on how the property will be divided,
- they need to make their request in writing after receiving legal advice.

Determining your entitlements and dividing property can be difficult so it

is best to seek legal advice. You can get free legal advice from NSW Legal Aid or from a community legal centre (although this is unlikely to extend to representation), or you can contact a private lawyer.

In most cases, couples will try to reach an agreement through a process of negotiation or mediation. This usually involves verifying what property exists and the financial circumstances of each of you, then working out a way of dividing the property so that you each receive the share to which you are entitled.

If you can reach an agreement, this agreement can become legally binding two ways. The first is by court orders, which can be done with the consent of both you and your partner. This is a relatively straightforward process and can be done most economically through a local court, although from 1 March 2009 it will usually be done via either the Family Court or Federal Magistrates Court. The other is for both of you to enter into a binding financial agreement. However, in some circumstances these agreements can be set aside by a court. A verbal or informal agreement is not advisable, as it is not legally binding.

If you and your partner cannot reach an agreement, you can start court action for orders to divide the property and ask the court to decide. Currently

this can be done through either the Supreme, District or Local Courts of New South Wales, depending on the value of the property. However, once changes to the law come into effect, proceedings must be commenced in the Family Court or Federal Magistrates Court, regardless of the amount of property involved. Even if you commence court action, you and your partner could settle before a court decision at any time.

Considerations in dividing property

When a court decides how to divide property between a separated couple, it will take into account what property each of the parties brought into the relationship, and contributions made during the relationship. Contributions can be financial, like mortgage payments or non-financial like doing renovation work and landscaping. Once the Family Court has jurisdiction, the rules relating to superannuation splitting in the Family Law Act will be available to same sex couples in property disputes.

When the changes to the law come into effect, there will also be a consideration of whether either party should be entitled to an additional percentage of the net assets over and above their contributions, for any other reason.

13. SEX AND AGE OF CONSENT

Consensual sex between women has never been illegal in NSW.

The age of consent is 16 years for lesbians, gay men and heterosexuals. This is the age at which it is legal to engage in sexual relations. The age of consent is 18 if there is a relationship of 'special care'. This includes situations where one person is a schoolteacher or in a position of authority in relation to the young person.

The laws relating to sex with those under the age of consent have also been amended to provide equal penalties for heterosexual and homosexual intercourse. If both parties are under the age of consent (i.e. under 16 years), they can still be charged with an offence, however this is not likely unless there is a significant difference in age.

14. SOCIAL SECURITY

The social security system will recognise same sex relationships from 1 July 2009. There is now an obligation on people applying for or currently receiving benefits to report their relationship to Centrelink. Centrelink have broad powers to investigate, and can access records held by other Government departments, as well as talking to your

neighbours and friends to determine whether you are in a relationship.

Centrelink will determine whether you are in a de facto relationship. If you are receiving Centrelink benefits and your partner is employed, their income and assets will be taken into account when Centrelink are determining the rate of benefits that you may be eligible for. This could affect your payments and rent assistance, as well as your eligibility for a Health Care Concession Card.

A couple who are both receiving benefits will be assessed as a couple rather than being assessed as two single people. This means that their combined income will drop. Lesbian mothers will no longer be eligible to receive single parent benefits if they are in a relationship.

For more information, contact your nearest Centrelink office or you can get advice from the Welfare Rights Centre (see the end of this booklet for contact details).

15. SUPERANNUATION

Payment of death benefit when a contributor to a superannuation fund dies. Under federal superannuation laws, same sex couples will soon be treated the same as heterosexual couples if one partner in a same sex relationship

dies and they are a contributor to a superannuation fund. Same sex couples will be able to access the same benefits and tax concessions as heterosexual couples. This includes Commonwealth Government employees.

Although the trustees of the superannuation fund usually make the final decision as to the payment of death benefits, some superannuation funds have rules allowing for members to make binding nominations of beneficiaries. You should seek written confirmation from your superannuation fund about whether it will follow your wishes if you direct that death benefits are to be paid to your partner.

If you believe that a trustee has been unfair or unreasonable in their distribution of the deceased's benefits, you can complain to the Superannuation Complaints Tribunal. (See the end of this handbook for contact details)

Contributing to a superannuation fund

Same sex couples will soon be able to split superannuation contributions with their partner, and receive a spouse tax rebate for superannuation contributions made on behalf of their partner.

16. TAXATION

Taxation laws will recognise same sex relationships from 1 July 2009. This means that gay and lesbian couples will be entitled to concessions offered to heterosexual couples, such as the dependent spouse rebate. They will also be entitled to access to the childcare rebate.

In relation to the Medicare levy and Medicare levy surcharge, same sex couples will be able to claim the same reductions that are available to heterosexual couples.

17. VETERAN'S ENTITLEMENTS

From 1 July 2009, same sex partners of veterans and their children will be able to access war widow(er) entitlements and death benefits, as well as other compensation and allowances.

18. VIOLENCE

Calling the police

If you have experienced any act of violence, this is assault and you can call the police. Ask to speak to a Police Gay and Lesbian Liaison Officer (GLLO).

Many (but not all) police stations now have GLLOs to improve the service police offer to gay and lesbian members of the community. For your information, it is a good idea to call your nearest police station and ask if there is GLLO working there. If not, enquire as to the nearest station that has one so if you need to call the police, you can contact them straight away. The Lesbian and Gay Anti-Violence Project can also provide you with more information about GLLOs (see the end of this booklet for contact details).

Protection from violence — apprehended violence orders

Apprehended Violence Orders (AVOs) are court orders designed to protect you from physical assault, stalking, harassment, intimidation or damage to property.

An AVO is a court order that stops someone from doing something or behaving in a certain way. You decide what it is you don't want the person to do. For example, you might ask that the AVO conditions prohibit the person from contacting you or approaching you at your home or your place of work. This is like a warning. If the person does any of the things the AVO says they are not to do, they have breached the AVO and this is a crime they can be arrested for.

Police can initiate an AVO for you or you can do it yourself by contacting your nearest local court and making an appointment with the chamber registrar. Police must apply for an AVO for people in certain circumstances (see apprehended domestic violence orders below). A provisional order can be made if you require immediate protection. However the provisional order will not protect you until the police have given it to the defendant.

The matter will be given a 'mention' date before the court. At that time the defendant will need to tell the court whether she or he will agree to the orders sought, or whether she or he intends to contest the orders. If she or he agrees, the orders will be made final on that day. If she or he wishes to defend it, the matter will be set down for a full hearing on another day. At the hearing, the final AVO will be made if the magistrate is satisfied that you are fearful of the defendant and that you have reasonable grounds to fear him/her. AVOs can be made for as long as is necessary to ensure your protection. They are usually made for one to two years.

There are two type of AVO — apprehended domestic violence orders (ADVO) and apprehended personal violence orders (APVO).

1. Apprehended domestic violence orders

If you have been assaulted by your same sex partner, or someone you are in a domestic relationship with, this is domestic violence. Domestic violence is a crime. You can call the police and he or she can be charged and prosecuted.

If you call the police to a domestic violence incident, one of the things they are required to do is apply for an ADVO on your behalf. The only reason for them not to do this is if you tell them you intend to apply for one yourself or they are satisfied that no criminal offence has occurred and you are not afraid for your safety.

You can apply for an ADVO yourself (without having called the police to an incident) by contacting your local court (see above). If you have any children in your care, they will be included on the AVO, unless there are good reasons not to.

For more information about domestic violence in gay and lesbian relationships visit <http://www.ssdv.acon.org.au/> or contact ACON (see the end of this booklet for contact details).

2. Apprehended personal violence orders

Apprehended Personal Violence Orders (APVOs) cover situations of harassment, intimidation or violence by people such as neighbours, work colleagues and other people with whom you have not had a 'domestic' relationship.

You can apply for an APVO through the police or the Chamber Registrar. Chamber Registrars have the discretion to refuse a complaint for an Apprehended Personal Violence Order (unless the complaint is made by a police officer). However, if the complaint discloses allegations of harassment relating to the person's race, religion, homosexuality, transgender status, HIV/AIDS or other disability, the chamber registrar should be more inclined to issue the complaint. The Chamber Registrar will have to consider a range of factors in exercising the discretion, including whether the matter can be resolved by way of mediation between the parties.

Compensation for acts of violence

If you have been the victim of an act of violence, you may be eligible to claim compensation from the Victims Compensation Tribunal (VCT) for any physical and/or psychological injury you have suffered as a result. A claim for compensation can be made even if the offender is unknown or has not been convicted of an offence, as long

as the VCT is satisfied that you were the victim of an act of violence.

Eligibility for compensation will depend on the type of injuries you sustained. For example, compensation is generally not awarded for minor injuries such as cuts and bruises. Larger amounts of compensation can be awarded for serious physical or psychological injuries. If you have been the victim of domestic violence or sexual assault, you only have to prove that you have suffered 'harm' as a result of the violence. The VCT has prepared a Schedule of Injuries that outlines which injuries can be compensated and how much compensation is payable for each injury. Eligibility for compensation for psychological injury will be determined by the circumstances of each case.

A claim for compensation could include a claim for actual loss of earnings and/or other expenses incurred as a direct result of the assault, such as damaged clothing. Victims of crime can also apply for free counselling with a psychologist approved by the VCT.

Applications for compensation must be lodged with the VCT within two years of the date of the incident, although the VCT may grant extensions of time in certain circumstances, especially in cases involving sexual assault or domestic violence. Applications for compensation must be supported

by documents such as medical reports, statutory declarations, police statements etc. and the VCT will use these to make a decision.

It is important that the act of violence is formally reported to the police as soon as possible, and that you assist the police in their investigation of the offence. If the incident is not reported to the police 'within a reasonable time', the VCT can refuse to make an award of compensation, or can reduce any award of compensation. It is also important to see a medical practitioner as soon as possible after the assault so any injuries (even minor injuries) can be documented.

If your partner dies as a result of an act of violence, you may be entitled to compensation as a 'family victim'.

19. WILLS, DEATH AND INHERITANCE

Making a will

The easiest and most sensible way to ensure your property is distributed according to your wishes is to make a will. It is essential to make a will if you want to be sure of providing for your partner after your death.

Even if your partner does not depend on you financially, a will provides a means of giving your partner any cherished belongings. You may also want to leave gifts of money

to friends, charities or lesbian or gay organisations. You can't do this effectively without a will.

In your will you must appoint an Executor, preferably someone you trust to carry out your wishes. You can appoint your partner as your Executor. If you don't know who to appoint, the Public Trustee will act as Executor for a fee. You can also direct how you would like to be buried or cremated and what sort of funeral service you would like, although these sorts of directions are not binding.

It is advisable to have your will prepared by a lawyer, as there are special rules as to how a will must be signed and witnessed. If these rules are not followed, your will may be invalid and your wishes may not be carried out. Having a will prepared by a lawyer is generally inexpensive. Some community legal centres may do it free of charge.

Could my will be contested?

In some instances, yes. Even if you make a will leaving your property to your partner, it is still possible that members of your biological family or other dependants could challenge this will after your death under the Family Provision Act 1982. This Act allows claims by spouses, ex-spouses, same-sex partners, children and even grandchildren and parents. If you anticipate a challenge to your will by a

family member, discuss this with your legal adviser when you make your will. Making a will, with the advice of a lawyer, is still the best way to make sure your wishes are followed.

There are likely to be further changes to NSW laws affecting wills and the rules of inheritance in 2009, in conjunction with the National Uniform Succession Laws Project.

If you die without a will

Under the rules of intestacy in the NSW Probate and Administration Act 1898 law, if you die without having made a will, your same sex partner is regarded as your spouse in the distribution of your estate.

If you and your partner have lived together continuously for the two years before your death, or if you had a child together, your partner would generally be entitled to inherit your estate. Your partner would automatically inherit if there were no other spouse and no-one contests your partner's entitlement.

If you and your partner have not lived together for two years, nor had a child together, your surviving husband or wife (if there is one) or children from a previous relationship would take precedence and be entitled to your estate instead of your partner.

If someone other than your current partner were entitled to inherit your estate, your partner could still make a claim under the NSW Family Provision Act 1982. To make a successful claim under this Act, your partner would need to demonstrate that you had both lived in the same household and that they deserved or needed a share of your estate compared to the claims of other relatives or beneficiaries. This is a discretionary process and the court decides between competing claims.

The rules about inheritance are quite complicated, so you should always seek legal advice. ■

FURTHER READING

- **The Law Handbook: your practical guide to the law in NSW (especially Chapter 38 ‘Same Sex Couples and Their Families’)**

11th edition 2009, Redfern Legal Centre Publishing.

- **Discrimination, Hot Topic 40, 2002**
- **Children and Families, Hot Topic 44, 2004**
- **Same-sex Families, Hot Topic 53, 2005**

Legal Information Access Centres

Available at your local library or contact LIAC on (02) 9273 1558 for a copy.

www.slsw.gov.au/liac

- **Talking Turkey: a Legal Guide for Lesbian Mothers and Sperm Donors in NSW 2009, Inner City Legal Centre**

Contact the Inner City Legal Centre on (02) 9332 1966 for a copy.

www.iclc.org.au/tt2009.pdf

- **HIV/AIDS Legal Guide 2nd edition 1993 – The Australian Federation of AIDS Associations The Federation Press.**

- **Gay and Lesbian Rights Lobby**

www.glr.org.au

FURTHER INFORMATION AND CONTACTS

Gay & Lesbian Organisations

Gay and Lesbian Rights Lobby

PO Box 304
Glebe NSW 2037
Tel: (02) 9571 5501
Email: info@glrl.org.au
www.glr.org.au

Gay and Lesbian Counselling Service of NSW

Counselling line (5.30pm – 10.30pm
7 days)
Tel: (02) 8594 9596
Toll free: 1800 184 527
Email: admin@glcsnsw.org.au
www.glcsnsw.org.au

Gay and Lesbian Immigration Task Force

PO Box 400
Darlinghurst NSW 1300
Email: info@glitf.org.au
www.glitf.org.au

ACON

9 Commonwealth St
Surry Hills NSW 2010
Tel: (02) 9206 2000
Toll free: 1800 063 060
Email: acon@acon.org.au
www.acon.org.au

Twenty 10

45 Bedford St
Newtown NSW 2042
Tel: 8594 9555
Toll free: 1800 65 2010
Email: info@twenty10.org.au
<http://twenty10.org.au>

Legal Advice & Information

Inner City Legal Centre (includes Gay and Lesbian Advice Service)

Lower Ground
50-52 Darlinghurst Rd
Kings Cross NSW 2011
Tel: 9332 1966
Email: inner_city@clc.net.au
www.iclc.org.au

LawAccess NSW

Tel: 1300 888 529
TTY: 1300 889 529
www.lawaccess.nsw.gov.au

HIV/AIDS Legal Centre

9 Commonwealth Street
Surry Hills NSW 2010
Tel: 9206 2060
Free call: 1800 063 060
Email: halc@halc.org.au
www.halc.org.au/

Women's Legal Resources Centre

PO Box 206,
Lidcombe NSW 1825.
Sydney Advice Line: 9749 5533
Rural Free Call Line: 1800 801 501
TTY: 1800 674 333
www.womenslegalnsw.asn.au

Legal Aid NSW

323 Castlereagh Street
Sydney NSW 2000
Tel: 9219 5000
TTY: 9219 5126
www.legalaid.nsw.gov.au

Legal Information Access Centre

State Library of NSW
Macquarie Street
Sydney NSW 2000
Tel: 9273 1558
Email: liac@sl.nsw.gov.au
www.liac.sl.nsw.gov.au

Property Rights

Australian Government - Family Relationships Online

Information sheet: Property division when de facto relationships break down - new Commonwealth law for separating de facto couples

<http://familyrelationships.gov.au/www/agd/familyrelonline.nsf/status973B1AA2E88C90B4CA25751A0006943D?OpenDocument>

Federal Attorney General's Department

Information sheet: New De Facto Property Regime

www.ag.gov.au/www/agd/agd.nsf/Page/Families_NewDeFactoPropertyRegime

Discrimination and Human Rights

Anti-Discrimination Board of NSW
Level 4

175-183 Castlereagh St
Sydney NSW 2000

Tel: 9268 5555

TTY: 9268 5522

www.lawlink.nsw.gov.au/adb

Australian Human Rights Commission

Level 8

Piccadilly Tower
133 Castlereagh St
Sydney NSW 2000

Tel: 9284 9600

Complaints line: 1300 656 419

TTY: 1800 620 241

www.hreoc.gov.au

Privacy NSW (Office of the Privacy Commissioner)

Justice Precinct Offices

160 Marsden St
Parramatta NSW 2150

Tel: 8688 8585

www.lawlink.nsw.gov.au/privacynsw

WILLS, INHERITANCE AND GUARDIANSHIP

Guardianship Tribunal

Level 3

2a Rowntree St
Balmain NSW 2041

Tel: 9556 7600

Toll free: 1800 463 928

TTY: 9556 7634

www.gt.nsw.gov.au

Office of the Public Guardian

Level 7

Justice Precinct Offices

160 Marsden St
Parramatta NSW 2150

Tel: 8688 2650

www.lawlink.nsw.gov.au/opg

Office of the Protective Commissioner

160 Marsden St
Parramatta NSW 2150

Tel: 8688 2600

Toll free: 1300 360 466

TTY: 1800 882 889

www.lawlink.nsw.gov.au/opc

Public Trustee

Level 6

19 O'Connell Street
Sydney NSW 2000

Tel: 9252 0523

www.pt.nsw.gov.au

Superannuation Complaints Tribunal

Level 15
31 Queen St
Melbourne VIC 3001
Tel: 1300 780 808
Email: info@sct.gov.au
www.sct.gov.au

VIOLENCE

Lesbian and Gay Anti-Violence Project

9 Commonwealth St
Surry Hills NSW 2010
Tel: 9206 2066
Email: avp@acon.org.au
<http://avp.acon.org.au>

Victims Compensation Tribunal

Level 1
160 Marsden St
Parramatta NSW 2150
Tel: 8688 5511
Toll free: 1800 069 054
TTY: 8688 5575
Email: vct@agd.nsw.gov.au
www.lawlink.nsw.gov.au/vct

Domestic Violence Counselling and Advice Line

Department of Community Services
Tel: 1800 656 463
TTY: 1800 671 442
Same Sex Domestic Violence website (ACON)
www.ssdv.acon.org.au

EMPLOYMENT AND UNFAIR DISMISSAL

Industrial Relations Commission (NSW)

Level 1
47 Bridge St
Sydney NSW 2000
Tel: 9258 0866
TTY: 9258 0877
www.lawlink.nsw.gov.au/irc

Australian Industrial Relations Commission

Level 8
Terrace Towers
80 William St
SYDNEY NSW 2000
Tel: 8374 6666
Email: aircinfo@airc.gov.au
www.airc.gov.au

Conflict Resolution

Community Justice Centres
Level 5
Parramatta Justice Precinct
160 Marsden St
Parramatta NSW 2150
Tel: 1800 990 777
TTY: 1800 671 964
Email: cjc_info@agd.nsw.gov.au
www.cjc.nsw.gov.au

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Disclaimer: While every effort has been made to ensure that the information in this booklet is as up to date and accurate as possible, it is not a substitute for legal advice. The law is complex and may change. Readers are advised to seek specific legal advice in relation to their particular situation.

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www.safetypartnership.nsw.gov.au



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