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Same-sex Couples and their Families

Ghassan Kassisieh Solicitor

Contents

[34.10] Following significant reforms, equal rights and responsibilities have now been extended to same-sex de facto couples and (most) same-sex parents across almost all federal, state and territory laws throughout Australia. There are also several relationship registry and civil partnership schemes providing formal recognition for couples unable or unwilling to marry, although their recognition under various laws differ.

The legal recognition of partners and parents is the starting point for access to a raft of government benefits and entitlements which are afforded to couples and families. Legal recognition also underpins how the law interacts with people's lives, particularly in times of crisis, such as at the death of a partner or the breakdown of a relationship.

Depending on the substantive area of law, either NSW or federal (or both) laws may apply to same-sex couples and their children. This chapter discusses the principal definitions under both these laws, and rights and responsibilities which flow through in some key areas.

For couples in NSW, marriage is now the only substantial area of law which treats same-sex couples unequally.

Who is a partner?

[34.20] Australian law generally recognises two types of partners: *married spouses* and *de facto partners*. In recent years, some states and territories have also provided for relationships to be registered under *relationship registry* or *civil partnership* schemes (herein referred to as, "*registered* partners").

For most legal purposes, all recognised partners generally have the same rights and responsibilities. The only significant difference is how a person gets to be recognised as married, or in a registered or de facto relationship.

De facto recognition simply comes about through showing that partners share their lives together in a committed relationship. Married partners require a formal "opt in" process – the process of getting married, with witnesses, a certificate and an authorised celebrant.

The situation in relation to registered partners varies from state to state. In NSW, the relationships registry is an opt-in scheme. Couples who do not register may still be recognised as de facto partners if they meet the de facto definition (see De facto relationships at [34.30]). However, registration *may* assist in proving the existence of a relationship or provide some formal recognition to partners who are unable or unwilling to marry. In many cases, registered partners are treated in the same way as de facto partners.

[34.30] De facto relationships

Same-sex cohabiting couples are recognised as de facto partners across all significant NSW and federal laws.

De facto partners have essentially the same rights and entitlements as married partners across almost all laws in Australia.

Both NSW and federal law have a *central definition* of "de facto relationship" which is almost identical. These definitions are located in one statute and cross-referenced by other statutes in that jurisdiction. However, some NSW and federal statutes also have *specific definitions* of a "de facto partner" and "de facto relationship" relevant to only one area of law (for example, property division upon relationship breakdown). Whether the particular legislation uses the central definition or a specific definition, the de facto principles are similar. Throughout this chapter, assume that the central definition is the one in use, unless noted otherwise.

The central de facto definitions

In NSW, the central de facto definition is located in s 21C of the *Interpretation Act 1987* (NSW). In federal law, the central definition is contained in s 2F of the *Acts Interpretation Act 1901* (Cth).

Under both definitions, a "de facto relationship" is defined as a relationship between two persons who "have a relationship as a couple living together" and who are not married to one another or related by family.

Cohabitation

Overall, the requirement to "live together" has been broadly and flexibly interpreted by courts over the years. So, for example, couples physically separated (even for lengthy periods) due to external factors (such as work, poor health, incarceration or family commitments) have been held to meet the definition.

The federal de facto definition specifically states that those who are not living together because of illness or infirmity, or who are temporarily absent from each other can still be found to be in a de facto relationship.

It is the nature and quality of the relationship, rather than the quantity of time a couple spends together, which is generally important.

Duration

Generally, there is no requirement that a couple live together for a certain length of time. Only a few areas of law require couples to have lived together for a period of time, and in most cases, time limits can be waived in certain circumstances.

This chapter notes the few areas where there are durational requirements, in every other instance assume that there are none.

Indicia of a de facto relationship

The essential element of a de facto relationship is being a committed couple. If there is uncertainty over the existence or length of a relationship in a court case – for example, if one partner dies and their family contests the inheritance – the court can look at a range of factors that are the same for heterosexual and same-sex relationships.

In all cases, the factors are only a guide to the issues to be considered and the court must take "all the circumstances of the relationship into account".

These factors are:

- the duration of the relationship
- the nature and extent of common residence
- whether or not a sexual relationship exists
- the degree of financial dependence or interdependence, and any arrangements for financial support
- the ownership, use or acquisition of property
- the degree of mutual commitment to a shared life
- the care and support of children
- the reputation and public aspects of the relationship.

In NSW, the "performance of household duties" is listed as an additional factor.

Importantly, both NSW and federal law explicitly state that no single factor from the list above is necessary for establishing the existence of a de facto relationship. The individual circumstances of the case will determine what consideration and weight is given (if any) to the above factors.

Polyamorous and extra-marital relationships

A person can be in a de facto relationship with someone even if they are married or in a registered relationship with someone else. Under the federal central de facto definition, a person can also be in a de facto relationship if they are in a de facto relationship with someone else.

The courts recognise that de facto relationships, like marriages, come in different forms. A primary relationship with a mutual commitment to a shared life is the key.

Proving a de facto relationship

There is no need to officially record or register a de facto relationship to be granted legal rights. De facto recognition simply comes about from the *fact* that a couple live together in a committed relationship. Nonetheless, it may be necessary for a lesbian or gay man, or same-sex couple to

prove the existence of their de facto relationship in some circumstances.

When proving the relationship may be necessary

Although same-sex couples have been recognised as de facto partners in NSW law since 1999 and comprehensively in federal law since 2008, there are still many people who do not know this. Unfortunately, this includes some people in positions of authority in places such as hospitals or government agencies. It may be necessary to assert relationship rights in such circumstances.

Proving a de facto relationship may also be an issue when partners break up or when one partner dies. For example, one partner may claim that the relationship was much briefer than it was, or that it ended earlier, even though the parties still continued to live together. Another situation that is still common (though becoming less so) is where a couple are closeted; one partner dies without a will and their family denies that the relationship existed and claims the inheritance.

How to prove a de facto relationship

Couples do not need a court order or to register their relationship to prove that their relationship exists. Couples simply need to show how their relationship fits the definition and indicia of a de facto relationship.

There are many forms of documentation that can be used to prove a de facto relationship. If a couple is still together, a *statutory declaration* or affidavit from both partners stating when they got together, when they began to live together, and that they are in a committed relationship is usually sufficient.

A relationship can also be demonstrated through many other kinds of evidence of co-habitation and commitment, including jointly purchased property or names on leases, joint bank accounts, shared purchases of furniture or household items, and listing each other on documents such as superannuation beneficiary nomination forms and wills. Photographs of shared holidays or even joint invitations to social events can also be used.

Couples who have *registered* their relationships in NSW, Victoria, Queensland, the ACT or Tasmania, or who have entered a civil union in the ACT, can use their certificate of registration as conclusive proof of a de facto relationship under most federal law. However, under NSW law, a registered relationship may not necessarily qualify as conclusive proof of a de facto relationship (although it is likely to be persuasive evidence). Each law needs to be considered separately. This is because some laws require the parties to be living together in order to qualify as de factos, even if they have registered their relationship (which does not require cohabitation).

Couples who have entered into a same-sex marriage, civil union or registered partnership overseas can also use their certificate of marriage, union or registration as persuasive evidence of a de facto relationship. With some exceptions in Tasmania and the ACT, there is no automatic recognition of foreign same-sex marriages and relationship schemes in Australia.

'*Close personal relationships*'

Some limited rights have been given to people in non-couple relationships in NSW since 1999. This category is called "close personal relationships" and covers people who live together if one provides the other with "domestic support and personal care". This does not cover flatmates or paid carers.

Relatively few cases have been brought under this category. However, in a 2010 case, the NSW Court of Appeal refused to disturb the trial court finding that former (heterosexual) de facto partners who continued to live together were, at least, in a close personal relationship (if not a continuing de facto one) (*Burgess v Moss* [2010] NSWCA 139). In this relationship, the female partner provided the male partner with some meals, the male partner financially supported the two of them, and they attended some social occasions together.

[34.40] Relationship registration schemes

NSW, Queensland, Tasmania, the ACT and Victoria have introduced relationship registration schemes (the ACT has two in fact, a civil partnership *and* a civil union scheme).

A relationship registration scheme is also currently before the South Australian parliament. These schemes allow those who are unable or unwilling to marry a mechanism to formally recognise their relationship.

In NSW, there is no difference between the legal rights granted to registered and de facto partners. Registration may make de facto status easier to prove or quicken access to some entitlements in a few areas (for example, allowing de facto partners to waive the general two-year length of relationship requirement before property division can be sought through the Family Court, or Federal Circuit Court (the "federal family courts"), see Property division on separation at [34.250]).

There is no federal civil union scheme in Australia, although state and territory schemes are recognised under most federal laws.

The NSW relationships registry

Under the *Relationships Register Act 2010* (NSW), two adults who are in "a relationship as a couple" can register if:

- at least one of the partners lives in NSW
- neither partner is married, in a registered relationship or in "a relationship as a couple" with anyone else, and
- the partners are not related by family.

To register, a couple must lodge an application with the NSW Registry of Births, Deaths and Marriages in the prescribed form (this can now be done by mail or by attending a Service NSW centre). There is a 28-day cooling off period in which either partner can change their mind. At the time of writing, the fee for registering a relationship was $213.

The effect of registration

Upon registration, the partners are generally recognised as "de facto partners" under NSW and federal law. They are also recognised under similar schemes in Victoria, Queensland, Tasmania and the ACT.

Registration generally gives registered partners conclusive proof of their relationship status. However, not all laws in NSW automatically recognise registration as conclusive proof of de facto status. In NSW, if a law incorporates the definition of a "de facto *partner*" from s 21C(1) of the *Interpretation Act*, then registered relationships are automatically recognised. If the law only incorporates the definition of a "de facto *relationship*" from s 21C(2) of the *Interpretation Act*, then the parties must live together to be recognised. In such cases, a registration certificate is likely to be persuasive evidence of a de facto relationship, but not conclusive.

Similarly, some federal law (including migration, family law and the *Fair Work Act 2009* (Cth)) does not recognise registration as conclusive proof of a de facto relationship, although it will be considered as one (likely persuasive) factor.

Registration may also allow couples to bypass certain waiting periods before de facto recognition would otherwise come into effect (for example, in the federal migration and property division regime, provided the couple otherwise satisfy the de facto definition). However, this is not generally the case under NSW law.

Couples who do not live together

Perhaps the key benefit of the scheme is that it is open to couples who do not live together. This allows couples who may not otherwise fit the definition of a de facto relationship to be recognised under some laws, although some laws continue to require a couple to live together in order to be recognised (such as property division upon the breakdown of a relationship).

Ending a relationship and void relationships

A registered relationship ends if:

- either partner dies or gets married
- a court revokes the registration, or
- the couple or either of the partners lodge an application to revoke the registration.

An application to revoke the registration can be made to the NSW Registry of Births, Deaths and Marriages in the prescribed form. At the time of writing, the fee for revoking a registration was $80 (or $133 if you also require a revocation certificate). There is a 90-day cooling off period before a revocation will take effect.

Registrations are void if:

- at the time of registration, the registration was prohibited (eg, the partners were

related by family, one partner was in a relationship with someone else etc)
- the consent to the registration was obtained by fraud, duress or other improper means, or
- either party was mentally incapable of understanding the nature and effect of registration.

A court may order that a registered relationship is void for any of the above reasons in any proceeding in which the question arises.

Mutual recognition of schemes

Historically, a key problem with registration schemes has been a lack of mutual recognition by other jurisdictions. This situation has changed somewhat in recent years, but improvements remain patchy.

NSW recognises couples who have registered their relationship or entered a civil partnership/union in Victoria, Queensland, the ACT (civil unions only) or Tasmania. However, NSW does not automatically recognise registered carer relationships from Victoria or Tasmania, ACT civil partnerships or any overseas civil partnerships (such as the UK or New Zealand schemes).

NSW registered relationships are recognised under most federal law, in Victoria, Queensland, Tasmania and in the ACT. Since 31 January 2013, NSW registered relationships have also been recognised in the UK as a civil partnership.

In Australian states or territories with no schemes, or whose schemes do not recognise interstate schemes, evidence of registration can be used to help prove the existence of a de facto relationship.

[34.50] Same-sex couples and marriage

Under the *Marriage Act 1961* (Cth), a marriage is defined as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" (s 5). Same-sex couples are not able to enter into a legally valid marriage in Australia.

Section 88EA of the *Marriage Act* explicitly prevents the recognition of overseas "unions between (a) a man and another man; or (b) a woman and another woman" from being recognised as marriages in Australia.

This means that marriages, civil unions or civil partnerships between two people of the same sex which have been validly formalised overseas cannot be recognised as marriages in Australia. However, such unions can be used as proof to establish the existence of a de facto relationship in Australia.

Who is a parent?

[34.60] Most same-sex families can expect to be treated equally under NSW and federal law. A growing number of states, including NSW, now provide adoption equality for same-sex couples. However, gaps remain for some families, particularly those with children born through commercial surrogacy arrangements or where there are certain co-parenting arrangements (especially involving more than two parents).

[34.70] Legal parentage and other types of parental recognition

Legal parents

Legal parentage is the recognition of a person as the *legal* parent of a child.

Who is a legal parent?

A person is automatically recognised as the legal parent of a child in the following circumstances:

- *if the child is conceived through intercourse*: the legal parents are the biological mother and father, regardless of the parents' intentions at the time of conception (*ND & BM* (2003) 31 Fam LR 22)
- *if the child is conceived in a couple through assisted means (IVF, donor insemination or self insemination)*: the birth mother is recognised as the legal mother regardless of her genetic relationship to the child. The birth mother's married or male or female de facto/registered partner is recognised as the second parent, so long as that partner consented to the conception procedure at the time of conception. For more information on this type of recognition, see Laws on parentage for lesbian co-mothers at [34.80].

Legal parentage can be transferred to others in certain circumstances:

- *adoption*: if a child is legally adopted, the adoptive parent(s) become the legal parents of the child. The relinquishing parent(s) lose their parental status. Under some areas of federal law only, a person is also recognised as a parent where they have given their consent to the adoption of a child by their de facto partner, even though they have not adopted the child themselves (*Family Law Act 1975* (Cth), s 60HA(1)(b)). For more information on this type of recognition, see Adoption at [34.90]
- *under a surrogacy transfer of parentage scheme*: intending parent(s) who have a child through a non-commercial surrogacy arrangement (ie generally speaking, where a woman carries the child for the intending parents and is not paid anything above reasonable expenses), can also apply for a *surrogacy parentage order* which transfers legal parental status from the surrogate mother and her partner (if any) to the intended parent(s). For more information, see Surrogacy parentage orders at [34.100].

Wherever this chapter refers to *legal* parents, it is referring to people recognised as parents under adoption or surrogacy parentage orders or who are recognised by law as parents because they conceived the child through sexual intercourse or by assisted means. Only a maximum of two people can be recognised as legal parents of a child.

Legal parents are entitled to appear on the child's birth certificate, whether they are biologically related to the child or not.

Children conceived through assisted means by single women

Unfortunately, recent decisions of the federal family courts have been inconsistent on who will be recognised as a legal parent where a single woman has conceived a child through assisted means (such as IVF, donor insemination or self insemination).

The birth mother (including a surrogate mother) is always recognised as a legal parent, regardless of her biological relationship with the child.

Under NSW law, the birth mother is the sole legal parent if she is not in a married or de facto relationship at the time of conception. Persons who have donated their sperm or eggs are not legal parents, regardless of their intended role in the life of the future child (*Status of Children Act 1996* (NSW), s 14(2) and 14(3)). This position applies to all children conceived through assisted means, including under surrogacy arrangements.

Under federal law, the situation is more uncertain. Several judges of the federal family courts have followed the legal position in NSW that an egg or sperm donor is not a legal parent unless he or she was the partner of the birth mother at the time of conception. However, other judges have been prepared to recognise donor-dads (who would otherwise be treated as sperm donors under NSW law) as legal parents under the *Family Law Act* if the mother was single at the time of conception and there was an intention that the donor-dad would be a parent. In an uncontested case before the Federal Circuit Court, one judge has declared a donor-dad (who would not be recognised as a parent under NSW law) as a legal parent for child support purposes

under the *Child Support (Assessment) Act 1989* (Cth)) (*Bateman & Kavan* [2014] FCCA 2521).

At the time of writing, there was an appeal pending before the Full Court of the Family Court, which may finally resolve this uncertainty.

Parental responsibility and parenting orders

A separate (but often related) issue is the concept of "parental responsibility". Parental responsibility is the recognition that a certain person has powers, duties and responsibilities in relation to a child or is authorised to make decisions about the child's care, welfare and development (for example, the authority to consent to medical treatment on behalf of a child or make decisions about a child's education or religion).

Whilst *legal* parents generally have parental responsibility, their parental responsibility may be taken away from them and given to others (for example, where a child is fostered by another person) or equally shared with them and other people (for example, if a court order awards "shared parental responsibility" to another person who is not a *legal* parent).

Parenting orders from the federal family courts

The federal family courts can award "parental responsibility" in relation to a child (under 18 years) to *any* person provided that person has a "concern in the care, welfare and development" of the child (*Family Law Act*, s 65C). The court can order that parental responsibility be shared between parents, be held by only one parent, or be held by other adults, jointly or individually. As discussed further in this chapter, this has relevance for gay and lesbian parents who do not have legal parentage (see Other diverse family forms at [34.110]).

Parenting orders can be made with the consent of the parties or, in the absence of consent, on the application of one party, so long as that party is a legal parent or otherwise establishes the "care, welfare and development" threshold. Parenting orders are operative until they are altered by the court or until the child marries, enters a de facto relationship or turns 18 (s 65H(2)).

Parenting orders from the court can also include matters such as:

- where a child lives
- who they spend time with
- specific or general areas of parental authority (such as decisions concerning medical care or education).

While any person with an interest in the care, welfare and development of a child can apply to the court for orders, there are a number of provisions under the *Family Law Act* that grant extra recognition and rights to *legal* parents, such as:

- legal parents have equal parental responsibility for children in the absence of orders
- the court must consider as a primary factor in any decision-making the benefit to a child of a meaningful relationship with both legal parents
- unless rebutted by evidence, there is a presumption in favour of shared parental responsibility in parenting orders
- once shared parental responsibility is ordered, the court must consider whether the child should have equal time with each parent or, if this is not possible or in the child's best interests, must consider substantial and significant time with each parent
- legal parents can enter into a parenting agreement that displaces earlier court orders.

Generally only legal parents have responsibility for child support (see Child support at [34.240]).

Functional definitions of a "child"

Many individual pieces of legislation grant rights and entitlements to people who are caring for children, regardless of the person's parental status. For example, many entitlements are based on whether a child lives in a person's household or upon whom a child financially depends. In this way, step-parents, donor-dads, grandparents, aunts and uncles etc may lay claim to entitlements regardless of their legal relationship with the child.

Some gay and lesbian families face uncertainty

Despite the reforms which have taken place over recent years, legal gaps and uncertainties remain for gay and lesbian families which take less conventional forms. For example:

- children conceived through commercial surrogacy arrangements
- children in co-parenting arrangements where more than two people are intended to be equal co-parents (for example, a lesbian couple and donor-dad, or a lesbian and gay couple raising a child equally together)
- children in co-parenting arrangements between persons who are not in a relationship (for example, a single heterosexual woman and single gay man who intend to be co-parents) (see however, Children conceived through assisted means by single women at [34.70]).

These families largely rely on broad functional definitions in the law for their recognition, or otherwise may apply to the federal family courts for orders granting them parental responsibility. For more information, see Other diverse family forms at [34.110].

Parent–child terminology

In this chapter specific terminology is used to describe parent–child relationships. This terminology is useful as it clearly reflects how the law recognises (and does not recognise) significant adults in children's lives. However, many same-sex parents would not use this terminology to describe their roles as mothers or fathers.

- *Birth mother* – a woman who gives birth to a child, whether or not the child is conceived using her egg
- *Co-mother* – the female partner of the birth mother who jointly plans to have and raise a baby with her partner from birth
- *Biological father* – a man who conceives a child with a woman through sexual intercourse
- *Donor-dad* – a man who provides sperm for the conception of a child born through assisted means, with the intention of being an involved parental figure or significant carer
- *Donor* – a person who provides sperm or an egg to help conceive a child, whether or not they are known to the child, without the intention of being a parent
- *Step-parents/step-mother/step-father* – a new partner to an existing parent, who takes on a parenting role.

[34.80] Laws on parentage for lesbian co-mothers

New South Wales law

Lesbian de facto and registered couples who jointly conceive and plan a pregnancy through assisted means are automatically recognised as legal parents under parentage presumptions in NSW law.

For both parents to be recognised as legal parents to a child, lesbian couples:

- must have conceived through a "fertilisation procedure" (including IVF, donor insemination or self insemination)
- must have been in a de facto or registered relationship with each other at the time of conception (see De facto relationships at [34.30] and Relationship registration schemes at [34.40])

and the co-mother:

- must have consented to the "fertilisation procedure" which led to her partner's pregnancy at the time at which it was undertaken (for example, consent at the time of the insemination attempt for donor insemination, or at the time of the embryo transfer for IVF) (*Status of Children Act 1996* (NSW), s 14(1A)). Her consent is presumed, but can be rebutted by evidence.

The 2008 reforms introducing this recognition was wide-ranging in effect. In particular:

- it covers lesbian families with children born prior to the reforms, and also extends to families which have since separated (the only exception being to property interests which vested prior to the reforms) (*Status of Children Act*, Sch 2, cl 7)
- it covers children conceived and born outside of NSW (although only births in NSW can be amended on the NSW birth register)
- a new birth certificate is not necessary to be recognised as a parent (although it is handy evidence).

Birth certificates

The NSW Registry of Births, Deaths and Marriages will register both women as parents in the birth registry and on the birth certificate.

For children born before the reforms came into effect (22 September 2008), mothers can apply to have the birth register amended and a new birth certificate issued with both mothers listed. To have the birth certificate amended, mothers should contact the NSW Births, Deaths and Marriages Registry.

If only the birth mother is listed on the registry, with no father listed, the consent of both mothers is required for the amendment to be made, accompanied by a statutory declaration of the circumstances of conception (*Births, Deaths and Marriages Act 1997* (NSW), Sch 3, cl 17(4)(a)). The NSW Births, Deaths and Marriages Registry website has a form which can be used for making this application.

If the child's donor is named as a "father" on the birth certificate, the donor's name can be removed with his consent or through a court order (Sch 3, cl 17(4)(b)).

It is important to note, that even if a donor is listed on the birth certificate, this does not make him a legal parent where the child was conceived through assisted means (*Status of Children Act*, s 14(2)). However, it may make it more difficult for the co-mother to assert her parental rights under the new laws if a donor remains on the birth certificate.

If the birth mother and the co-mother cannot agree to change the birth certificate, a court order would also be required to include the co-mother.

Court orders can be sought from the District Court (*Births, Deaths and Marriages Act*, s 19). The federal family courts have also been willing to make orders requiring the inclusion of the co-mother's details on the birth register and certificate (see for example, *Maurice & Barry* [2010] FamCA 687 at [16] and *Dent & Rees* [2012] FMCAfam 1303).

Removal of donor from the birth certificate

AA v Registrar of Births Deaths and Marriages [2011] NSWDC 100 was the first case in NSW to test the lesbian parentage and birth certificate rules.

In AA, a lesbian co-mother wished to have herself listed on her daughter's birth certificate and on the birth register, reflecting her legal parental status following the NSW reforms in 2008.

The sperm donor, who had ongoing involvement with the child, was listed as the child's father and did not consent to having his name removed.

Finding that the co-mother satisfied the three requirements under the irrebuttable parentage presumption, the District Court ordered that the sperm donor's name be removed and the co-mother be registered as the true legal parent of the child.

Despite the media controversy and emotion surrounding the decision, the case merely applied a long-held principle under NSW law that a sperm donor is not a legal parent and has neither the rights nor responsibilities of a parent, notwithstanding any contrary intention of the parties.

However, where a parenting dispute arises in families with more than two parents, a donor-dad is not without recourse. Parenting orders can be sought through the federal family courts by any person who is concerned with the care, welfare and development of a child. Parenting orders can deal with where a child will live, time spent with the child and issues concerning general and specific areas of parental responsibility (see Parental responsibility and parenting orders at [34.70] and Co-parenting arrangements at [34.110]).

Federal law

The same kind of recognition afforded to lesbian mothers in NSW is also available in federal law under the *Family Law Act 1975* (Cth) (s 60H(1)).

The *Family Law Act 1975* also clarifies that, in respect of a child conceived by a lesbian de facto couple, a sperm or egg donor is not a legal parent of the child (*Family Law Act*, s 60H(1)(d)).

Like NSW law, to be recognised as parents, lesbian couples:

- must have conceived their child through an "artificial conception procedure" (including IVF, donor insemination or self insemination)

- must have lived together in a de facto relationship (within the meaning of s 4AA of the *Family Law Act*) at the time of conception

and the co-mother:

- must have consented to her partner's conception procedure at the time of conception (*Family Law Act*, s 60H(1)).

Most importantly, these provisions cover not only the *Family Law Act*, but are reflected throughout all federal laws that define parent–child relationships. Lesbian couples who are recognised as legal parents in federal law have the same entitlements, obligations and benefits as heterosexual families, including in areas of family law and child support.

[34.90] Adoption

Adoption is a process whereby the rights of existing legal parent(s) are transferred to new parent(s). Once an adoption occurs, the adoptive parent(s) are for all purposes treated as the legal parents of that child (*Adoption Act 2000* (NSW), s 95). This is the case under federal law also, regardless of whether a couple adopts the child together, or either one of the partners adopts the child with the consent of the other (*Family Law Act*, s 60AH(1)(b)).

Since 15 September 2010, same-sex de facto and registered partners have been eligible to apply as a couple for adoption in NSW. Same-sex couples are eligible to apply to adopt children who are known to them (for example, step-children, foster children or the children of relatives) as well as children who are relinquished by other parents in NSW or overseas ("unknown" adoption). Same-sex couples must satisfy all the requirements for adoption in the same way as other couples and individuals. See Chapter 7 at [7.660], Who can adopt a child for further information on the criteria for adoption by couples, step-parents and relatives. Specific information relevant to same-sex couples is discussed further at [34.150]. Chapter 7 at [7.580], Adoption also contains information on the process and effect of adoption generally.

Religious organisations

Four organisations facilitate adoption locally in NSW: FACS and three non-government organisations, Barnardos, CatholicCare and Anglicare. The latter two are faith-based organisations.

A specific exemption is provided for faith-based adoption agencies under the *Anti-Discrimination Act 1977* (NSW) (s 59A). Agencies such as CatholicCare and Anglicare are therefore permitted to exclude gay, lesbian and transgender persons from their adoption programs but are not allowed to discriminate against a gay, lesbian or transgender child who is placed for adoption.

Barnardos however, actively recruits same-sex couples for its foster care programs.

First same-sex adoption in NSW

On 6 December 2010, the NSW Supreme Court made the first adoption order in favour of "Mr Jones and Mr Smith", a same-sex couple who had fostered two children, William and Jane, for several years through Barnardos (real names not used) (*Re William and Jane* [2010] NSWSC 1435).

In making the adoption order, Justice Palmer said that a court must not impose any special test for same-sex couples or apply an especially cautious approach. The primary concern was to be satisfied that adoptive parents, regardless of their sexual orientation, have stable, supportive and balanced family and social relationships, conducive to a child's wellbeing and development.

[34.100] Surrogacy parentage orders

For children born through surrogacy arrangements in NSW, regardless of the intentions of the parties, the status quo under NSW law is that the birth (surrogate) mother and her partner (if any) are the legal parent(s) of the child. With the exception of certain financial provisions (such as obligations to pay costs associated with a pregnancy), surrogacy arrangements are not enforceable and do not transfer legal parentage.

The *Surrogacy Act 2010* (NSW) provides a mechanism by which consenting birth

mothers and their partners (if any) can transfer their parental status to the intended parent(s) of a child born via a non-commercial surrogacy arrangement.

A non-commercial arrangement is one which does not involve giving a fee, reward or other material benefit or advantage to any person (including the birth mother), although certain specified reasonable costs associated with the pregnancy and surrogacy arrangement can be reimbursed to the birth mother (s 9).

Applying for a parentage order

In order to transfer the parental status of the birth (surrogate) mother and her partner (if any) to the intended parent(s), the intended parent(s) must apply for a *surrogacy parentage order*.

Intended parent(s) who want to apply for parentage orders must satisfy several requirements, many of which are mandatory.

Applications must be made to the Supreme Court of NSW. Applications can be made by one intended parent, or a couple jointly (unless leave is granted to bring a sole application under certain limited circumstances) (s 14). The application must be accompanied by an independent counsellor's report (s 17).

Unless the court is satisfied that exceptional circumstances exist, applications must be made between 30 days and six months after the child's birth.

Mandatory criteria

Before granting a parentage order, the court must be satisfied that doing so would be in the best interests of the child (s 22).

The court must also be satisfied that:

- the surrogacy was non-commercial (s 23)
- the surrogacy arrangement was agreed to before conception (although the arrangement can be varied) (s 24)
- the child is under 18, and if of sufficient maturity, has had the opportunity to express his or her wishes (s 26)
- the birth mother and her partner (if any) freely consent to the parentage orders, unless they cannot be located, die or lose capacity to consent (s 31), and
- the intended parent(s):
  - were either married, in a de facto or registered relationship (including same-sex couples) or a single person at the time of entering into the arrangement (s 25)
  - were at least 18 years before making the arrangement (s 28).

If the intended parent(s) are between 18 and 25 years, they must also demonstrate their maturity (s 29).

Additional criteria

There are also other requirements which must be satisfied, but these can be waived by a court in exceptional circumstances (s 18(2)). These include:

- the child must be living with the intended parent(s) in NSW (ss 32–33)
- the child's birth must be registered and certain aspects of the arrangement must be registered on the donor registry (ss 37–38), and
- unless the child was born prior to the commencement of the Act:
  - the birth mother must be at least 25 years when the arrangement is entered into (but in no case can she be less than 18 years) (s 27)
  - there must be a social or medical need for the surrogacy (male same-sex couples automatically satisfy this condition) (s 30)
  - the surrogacy agreement must be in writing (s 34)
  - all parties must have had the counselling and independent legal advice specified by the law (ss 35–36).

Same-sex couples have been granted surrogacy parentage orders by the Supreme Court of NSW in the same way as heterosexual couples (see for example *MM and KF* [2012] NSWSC 445).

Legal effect of a parentage order

A surrogacy parentage order is similar to an adoption order, in that, once it is made, the parental status of the surrogate mother and her partner (if any) is relinquished and transferred to the intended parent(s) of the child (s 39). That is, the intended parent(s) become the only legal parents of the child

and are treated as such under all NSW and federal law (*Surrogacy Act*, s 39; *Family Law Act*, s 60HB).

A birth certificate is re-issued naming the intended parent(s), although the child has rights to access their original birth records once they are 18 years of age, or earlier, with the consent of the persons with "parental responsibility" for the child (this will usually be the intended parent(s)) (*Surrogacy Act*, s 55).

[34.110] Other diverse family forms

Today, many gay and lesbian family forms find full and equal recognition under the law. However, there are some gay and lesbian families which do not fit conventional legal forms and may rely on less obvious legal paths for their, at least partial, recognition. These include:

- families formed through commercial surrogacy arrangements, and
- families with more complex co-parenting arrangements.

Commercial surrogacy

The legal position of commercial surrogacy in NSW is fraught. It is illegal in most states and territories to enter a commercial surrogacy arrangement, although that has only been the case in NSW since 1 January 2010 with the commencement of the *Assisted Reproductive Technology Act 2007* (NSW). With the commencement of the *Surrogacy Act 2010* (NSW), since 1 March 2011, it has also become a criminal offence for persons *"ordinarily resident"* or living in NSW to go anywhere else and engage in commercial surrogacy (see Surrogacy at [34.170]).

There is currently no transfer of parentage mechanism available in NSW for the intended parent(s) of a child conceived through commercial surrogacy, whether domestically or internationally. The surrogate mother and her partner remain the legal parents. If the surrogate mother is single, she is the only legal parent (although the situation under Commonwealth law is more uncertain) (see Children conceived through assisted means by single women at [34.70]).

However, intended parent(s) can apply to the federal family courts for parenting orders to grant them both parental responsibility (*Re Mark* (2003) 31 Fam LR 162). Parenting orders can be made in favour of *anyone* concerned with the care, welfare or development of a child (*Family Law Act*, s 65C). The surrogate mother and her partner must be notified of any application and will remain the legal parents (although stripped of all parental responsibility) if an order were made. If the surrogate mother is single, she still must be notified of any application but the question of parentage is more complicated (see Children conceived through assisted means by single women at [34.70]).

For children born under commercial surrogacy arrangements after the relevant criminalisation dates in NSW, the situation is precarious. In Family Court proceedings, there is a general duty on parties to give full and frank disclosure of all information relevant to the case to the court and each other (*Family Court Rules 2004* (Cth), r 13.01).

In a 2011 Queensland case, although the Family Court granted parental responsibility to a (heterosexual) couple following an overseas commercial surrogacy arrangement, it referred the decision to the DPP for consideration of whether criminal prosecution should be instituted against the parents (see *Dudley & Chedi* [2011] FamCA 502). (Queensland has similar criminalisation provisions to NSW.)

However, in a 2012 Queensland case, a different judge of the Family Court granted the (heterosexual) couple a certificate under s 128 of the *Evidence Act 1995* (Cth) to prevent their evidence (on the commercial nature of their surrogacy arrangement) from being used against them in other proceedings (see *Ellison & Karnchanit* [2012] FamCa 502 at para 3).

Co-parenting arrangements

There are circumstances where families have more than two parents or where the parents are not themselves in an intimate relationship. Some examples of co-parenting arrangements include:

- a lesbian couple who intend to have a child with the full involvement of the

donor-dad, who may or may not have a partner of his own, or
- a single heterosexual woman who intends to have a child with the full involvement of a gay male friend who will be a donor-dad.

Under such parenting models, the law automatically recognises some of the parents (under one of the four categories noted in Legal parents at [34.70]), but others are likely left without formal recognition. No more than two persons can be recognised as *legal* parents, although steps can be taken, either with the consent of all the parties, or if they disagree, on the application of one party, for some types of recognition.

Parenting orders can be awarded by the federal family courts granting parental responsibility to any person who has a concern in the care, welfare and development of a child (see Parental responsibility and parenting orders at [34.70]).

In *Wilson & Roberts* [2010] FamCA 734, the Family Court granted *four* persons the right to be heard in an application for parenting orders; two women (who were the legal parents) and two men (one of whom was the donor). In that case, the Family Court granted the mothers parental responsibility, but set out orders giving the donor-dad and his partner time with the child.

In cases where a single woman has conceived a child through assisted means, the federal family courts have in some cases recognised the donor-dad as a parent (see Children conceived through assisted means by single women in [34.70]).

In all cases, a court will consider what is in the best interests of a child. Whilst a co-parenting agreement might be taken into account, it will not be followed unless it is in the best interests of a child.

Other practical measures can also be taken to protect a child's rights in a co-parenting family. For example:

- make a will protecting the child's right to inherit
- name the child as a beneficiary of superannuation interests
- ensure child care centres and/or schools are informed of the parenting arrangements
- persons with parental responsibility can always authorise non-recognised parents to act on their behalf (such as picking up children from school)
- agreements to pay child support upon the breakdown of the familial relationship can be drawn up (for example, as part of a pre-conception co-parenting agreement) and may be enforceable
- check to see whether definitions of a "child" in individual legislation are broad enough to capture the parenting arrangement (many practical entitlements flow through on the basis that a child is part of a person's household or is otherwise dependent upon a person).

[34.120] Step-parents

Unless a formal adoption has occurred, a step-parent is not recognised as a *legal* parent.

However since 2008, an inclusive step-parent definition has applied in some areas of federal law (such as the definition of a "dependant" in superannuation and workers' compensation entitlements) which is intended to broadly cover familial relationships. This definition ensures that there is no legal barrier to a same-sex de facto or registered partner being recognised as a step-parent.

Step-parents do not generally have child support obligations. However, in very limited cases, a same-sex de facto step-parent may have a secondary obligation to provide child support under the *Family Law Act*.

Becoming a parent

[34.130] Lesbians and gay men who are considering becoming parents have a range of options available to them, including assisted reproductive technology, fostering, adoption or surrogacy. The law in this area is complex and evolving and prior legal advice is recommended. Some options (such as adoption) are now easier than before, however other options (including donor insemination and surrogacy) are becoming more restrictive.

[34.140] Assisted reproductive technology and home insemination

"Assisted reproductive technology" (ART) refers to a range of fertility treatments such as IVF and donor insemination. It is also common for insemination to be done at home via informal means.

Intentions about family form

Lesbians who are contemplating conception using donor sperm may choose to conceive with a known or unknown donor. However, tighter regulations which emphasise the child's right to have access to information concerning their biological heritage has removed the possibility for lesbians to choose an entirely unknown donor if using regulated ART treatment.

Donor details must now be registered on the NSW donor registry, giving a child the ability to access information once they turn 18 (*Assisted Reproductive Technology Act 2007* (NSW), s 37(1)).

While it is common for birth mothers and co-mothers to share parenting, there is much greater variety in the roles taken by known donors in lesbian-led families.

For example, there may be an intention:

- that the mother and her partner and the donor-dad and his partner will all parent the child equally, or
- more often, that the mother and co-mother will be the primary parents but the donor-dad will have regular or semi-regular contact with the child, or
- that the donor will have no contact, or limited contact, with the child.

Importantly, whilst it may be considered, the intention of the parties has no consequence for who is recognised as the legal parents of a child born to a lesbian de facto couple, and does not determine what a court may order regarding time with the child through a parenting order.

Written agreements with known donors

Because of this wide range of possibilities, and the scope for misunderstandings and changing expectations, it is advisable for mothers and known donors (and their partners, if relevant) to have some form of written agreement. Such agreements are not binding, but they can be very helpful in making sure that expectations are clear, thus avoiding later disputes.

Agreements can cover both practical and emotional issues, including:

- who will be at the birth
- what surname the child will have
- who will have contact with the child
- how the parties will refer to each other, and themselves, when speaking to the child.

Access to fertility services

The *Assisted Reproductive Technology Act 2007* (NSW) does not restrict the eligibility of lesbians and single heterosexual women to access fertility treatment. Under federal and state anti-discrimination law, it would likely be unlawful for a fertility clinic to refuse to treat a lesbian couple on the basis of their sexual orientation.

However, in practice, a range of informal clinic practices, the ability of donors to "direct" their donation towards particular women or classes of women (s 19(b)), limitations on the number of families per donor (s 27(1)), storage limits on donated gametes and embryos and an overall

shortage of donor sperm may mean that not all fertility services are equally accessible to lesbians.

Cost, too, may be a barrier.

Medicare rebates are not available where the fertility service is not "clinically relevant" (*Health Insurance Act 1973* (Cth), ss 3 and 20(1)). A "clinically relevant service" is one which is generally accepted in the medical profession as being necessary for the appropriate treatment of the patient to whom it is rendered (s 3).

In practice, this provision has been interpreted to exclude lesbians and single women from accessing Medicare rebates where their infertility is deemed "social" rather than "medical". Lesbians may nonetheless be eligible for Medicare rebates associated with some fertility services if the reason for their infertility may be regarded as "clinical".

The correctness of this interpretation, especially in light of 2013 amendments to the *Sex Discrimination Act 1984* (Cth) which prohibits discrimination on the basis of sexual orientation, has not been recently tested.

Access to donor sperm

There is a shortage of donor sperm in NSW and elsewhere in Australia. Some clinics are importing sperm from overseas donors, which has reportedly reduced waiting times. Some providers also treat lesbians who have a known donor.

The *Assisted Reproductive Technology Act* allows donors to attach conditions as to how their sperm or egg donation can be used (s 17(1)). It is therefore lawful for donors to specify that their donation only be used for a particular woman or class of women. This allows donors to specifically mark their donation for the use of "lesbian women" or, more likely, only for the use of "married couples" or "heterosexual couples". Further, a single donor's gametes can only be used for the conception of a child by a maximum of five women (including the donor's own spouse or former spouses) (s 27(1)).

Although donors are not legal parents (and do not have the rights or responsibilities of parents) under NSW law, donors (including known donors) must consent to their identity being released to offspring who request it from the age of 18. Donor details (including for overseas donors) must be listed on a central register.

Restrictions on gay sperm donors

The National Health and Medical Research Council's (NHMRC) ethical guidelines on assisted reproductive technology provide that clinics should not accept donations from people at an increased risk of transmissible infections. The guidelines (which are currently under review) are prescribed as part of the infection control standards which NSW clinics must abide by (*Assisted Reproductive Technology Regulation 2014* (NSW), cl 8(b)).

As gay men are at increased risk of HIV infection, they may be turned away from becoming sperm donors. However, some clinics have simply met the Guidelines by requiring more extended testing procedures for gay men. If in doubt, check with the clinic.

[34.150] Adoption

From 15 September 2010, same-sex de facto and registered partners became eligible to apply for adoption in NSW. There is also no legal barrier to individual lesbians and gay men adopting as "single" parents (*Adoption Act 2000* (NSW), s 27).

However in reality, relinquishing parent preferences, few children being placed for adoption and overseas law may mean few opportunities for gay and lesbian couples and individual applicants.

See Chapter 7 at [7.580], Adoption for information on the adoption process and requirements generally.

Local adoption

There are very few children available for local adoption in Australia. The majority of adoptions in Australia are in respect of children known to their adoptive parents, such as adoption by step-parents or carers. In 2014-15, there were only 56 adoptions in Australia of children not previously known to their adoptive parents (Australian Institute of Health and Welfare (AIHW)).

Parents giving up their child are involved in the placement process, and their wishes may determine that a child goes to a

heterosexual couple. See Chapter 7 at [7.700], Consents to adoption for further information.

Intercountry adoption

In 2014-15, there were 83 intercountry adoptions in Australia (AIHW). Intercountry adoptions mean that the adoption must comply with the requirements of both Australia and the home country of the child (the sending country).

The process of assessment is costly and complex. Adoptions must normally be completed in Australia and approved by FACS for the child to be permitted to enter Australia. The exception is where the parents have lived for over a year in another country, if the purpose of their stay is not to evade adoption laws, in which case they may complete the adoption in that country. Known as "expatriate adoption", parents are required to obtain an adoption visa to bring their child back to Australia and strict criteria apply. For more information on expatriate adoption, see www.border.gov.au/Trav/Life/Adoption-of-children.

Under Australia's intercountry adoption program, as of May 2016, same-sex couples were only eligible to adopt children from South Africa. South Africa's intercountry adoption program focuses on the placement of children with complex medical and health conditions, such as HIV positive children, children born to HIV positive mothers and children with developmental delays.

A small number of sending countries allow an individual applicant to adopt, usually in relation to children who are older or have special needs. Individual applicants generally have lower priority and may face longer waiting times. In respect of NSW residents, at the time of writing: China considers single female applicants for children with special needs; Colombia considers single applicants for older children or children with special needs; Hong Kong considers single applicants (although not preferred); the Philippines may consider single applicants; Taiwan considers single applicants for children with very complex special needs; and Thailand considers single female applicants for children with special needs.

See the Commonwealth's Intercountry Adoption Australia website (www.intercountryadoption.gov.au) for up-to-date information on the requirements of various sending countries.

[34.160] Foster care

There is a much greater need for foster carers than for adoptive parents in Australia, particularly for older children and sibling groups.

There is no legal barrier to individual lesbians or gay men, or same-sex couples, from becoming foster carers in NSW. Foster parents from Aboriginal and a diverse range of cultural backgrounds are particularly encouraged.

Prospective carers must first be assessed by a non-government provider of foster care services. The Fostering NSW website (www.fosteringnsw.com.au) has a list of providers. If found eligible, prospective carers must undergo a training process. If a child is placed, foster parents are given ongoing training and support, as well as financial assistance.

Different agencies list various eligibility criteria (such as the ability to give a child their own room).

Several non-government providers, such as Barnados, the Benevolent Society and Uniting, have a history of treating same-sex couples equally and encouraging applications from them. Others, such as Wesley Dalmar and CatholicCare, are openly hostile to lesbians and gay men as foster parents. In protracted legal proceedings, Wesley Dalmar strenuously defended its right to refuse an application from a same-sex couple on the basis of a religious exemption under the *Anti-Discrimination Act 1977* (NSW) (see *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155).

Adoption by foster carers

Foster carers provide emergency, respite, short-term and long-term care. Sometimes a child is adopted by their foster parent and there has been an increasing push to facilitate the earlier adoption of children who have little prospect of being reunited with their birth family.

The number of children in out-of-home care who have had adoption orders made in respect of them has increased from 30 in 2008/09 to 89 in 2014. Since 2010, this has included same-sex couples (see *Re William and Jane* [2010] NSWSC 1435).

[34.170] Surrogacy

Gay men may wish to form their own family, rather than co-parent in conjunction with a lesbian couple. Non-commercial surrogacy is one way to do this, although commercial surrogacy (whether in NSW or overseas) is now criminalised for people who are "*ordinarily resident*" or living in NSW.

Commercial surrogacy

Under the *Surrogacy Act 2010* (NSW), commercial surrogacy is defined as surrogacy which involves the provision of a fee, reward or other material benefit or advantage to a person as part of the surrogacy agreement (s 9). Strict extra-territorial provisions criminalise commercial surrogacy and advertising in respect of commercial surrogacy in NSW.

It is a criminal offence for a person *"ordinarily resident or domiciled"* in NSW to:

- enter into, or offer to enter into, a commercial surrogacy arrangement anywhere in the world (s 8)
- publish any advertisement, statement, notice or other material anywhere in the world that:
  - states or implies that a person is willing to enter into, or arrange, a commercial surrogacy arrangement
  - seeks a person willing to act as a surrogate mother, or states or implies that a person is willing to act as a surrogate mother, under a commercial surrogacy arrangement
  - is intended, or is likely, to induce a person to act as a surrogate mother under a commercial surrogacy arrangement (s 10(1)).

The maximum penalty is $110,000 or two years' imprisonment (or both) for an individual found guilty of any of the above offences.

Because of the breadth of term *"ordinarily resident or domiciled"* in NSW, it is arguable that even moving overseas or interstate for a few months would not be enough to avoid the criminal provisions.

Non-commercial surrogacy

Non-commercial surrogacy (also known as altruistic surrogacy) remains an option for gay men who wish to have children. However, fertility treatment associated with surrogacy is unlikely to be recoverable through Medicare (*Health Insurance (General Medical Services Table) Regulation 2016*, Sch 1, cl 2.37.7).

Non-commercial surrogacy and reimbursable costs

Non-commercial surrogacy is a surrogacy arrangement which involves no fee or payment, although certain reasonable expenses can be reimbursed to the birth (surrogate) mother as strictly prescribed by the *Surrogacy Act*.

The prescribed expenses are the "reasonable costs" associated with:

- becoming or trying to become pregnant (including medical, travel or accommodation costs)
- a pregnancy or birth (including pre- and post-natal medical, travel or accommodation costs; additional premiums paid for health, disability or life insurance policies because of the surrogacy arrangement; medical costs for the child of the arrangement and certain lost earnings resulting from the birth or pregnancy), or
- entering into or giving effect to the surrogacy arrangement (including counselling, legal advice, and travel and accommodation costs associated with any parentage order proceedings) (s 7).

In all cases, the birth mother's costs must be reasonable, actually incurred and verified by receipts or other documentation (s 7(5)).

Because of the numerous criteria which must be satisfied for the Supreme Court to grant the intended parent(s) a surrogacy parentage order which recognises them as the *legal* parents, those intending to enter a non-commercial surrogacy agreement should seek legal advice to ensure they can satisfy the criteria. Otherwise the intended parent(s) may find that, upon the birth of a child, there is no legal mechanism allowing the birth (surrogate) mother and her partner (if any) to transfer their parental status. The criteria includes that the birth mother be at least 25 years old, that the arrangement must have been made in writing before the conception occurred, and that certain counselling and independent legal advice provisions are satisfied (see Surrogacy parentage orders at [34.100]).

Surrogacy agreements

Surrogacy arrangements are not enforceable contracts, although obligations to reimburse the mother for her reasonable costs are enforceable (s 6). In relation to other matters such as relinquishment, it is not possible to enter into a binding surrogacy agreement anywhere in Australia, or to enforce an agreement that has broken down.

Any dispute about a child born through surrogacy where the parties do not consent to the transfer of parentage will be determined by the federal family courts considering the child's best interests, not the terms of any agreement.

Advertising restrictions

Whilst non-commercial surrogacy itself is not illegal, publishing an advertisement, statement, notice or other material is illegal if a fee has been paid and the publication:

- states or implies that a person is willing to enter into, or arrange, a surrogacy arrangement
- seeks a person willing to act as a surrogate mother, or states or implies that a person is willing to act as a surrogate mother, or
- is intended, or is likely, to induce a person to act as a surrogate mother (s 10).

Maximum penalties are $1,100 for an individual.

If a partner or parent dies

[34.180] When a person who is in a legally recognised relationship dies, their partner has certain rights.

Surviving same-sex de facto partners have the same rights as opposite sex de facto partners when it comes to matters such as inheritance, funerals and other death-related rights.

A surviving same-sex de facto partner can:

- make decisions about organ donation and post-mortem examinations
- request a coroner's inquest
- if there is no will and no executor, make decisions about funeral arrangements.

See Chapter 40, Wills, Estates and Funerals for more about the rights of surviving partners and children.

[34.190] The estate

If there is a will

If a person dies leaving a valid will, their property is generally distributed according to their wishes as expressed in the will, unless a family provision claim applies.

If there is no will

If a person dies *intestate* (without a valid will), their property is distributed under the laws of intestacy set out in Ch 4 of the *Succession Act 2006* (NSW).

Under these rules a surviving "domestic partner" is usually entitled to a significant proportion of the estate, including a shared home. Often, they inherit the entire estate. Other relatives such as parents, children, brothers and sisters, even aunts and uncles, may also receive a share.

Under the *Succession Act*, a "domestic partnership" refers to a *registered* relationship, or a de facto relationship that:

- has been in existence for a continuous period of two years, or
- resulted in the birth of a child.

Children jointly conceived by lesbian couples through assisted conception, adopted by same-sex couples or recognised under a surrogacy parentage order are recognised (*Succession Act*, ss 109, 109A; *Status of Children Act 1996* (NSW), s 14) (see Legal parentage and other types of parental recognition at [34.70]).

Family provision claims

The *Succession Act* allows people who are not properly provided for (either because there was no will or because the will did not leave them adequate provision) to apply to the court for a share of the estate under "family provision" rules.

The court makes its decision on the basis of the merits of the case and the need of the applicant and any other beneficiaries.

A surviving spouse or de facto partner, including a same-sex de facto or registered partner, has an automatic right to apply under this law.

Children are also automatically entitled to apply. The Act incorporates (s 57(2)) a broad definition of child including children:

- jointly conceived via assisted conception by a lesbian couple
- adopted by same-sex couples or recognised under a surrogacy parentage order, or
- for whose long-term welfare the deceased had "parental responsibility" (which should include where the federal family courts or NSW Children's Court has granted parental responsibility).

Furthermore, partners or children who would be ineligible under the definitions above may still bring a claim if they can show that they were dependent upon the deceased and were a member of their household (s 57(1)(e)).

[34.200] Victims' compensation

The *Victims Rights and Support Act 2013* (NSW) established a scheme for victims of violent crime. Under the Act, immediate family members of a person who has died as a result of an act of violence may be eligible for up to $18,000 in compensation for some immediate needs (such as for crime-scene clean up), funeral expenses and justice-related expenses (such as expenses related to criminal or coronial proceedings) (s 29). Each financially-dependent immediate family member of a homicide victim is entitled to a recognition payment of $15,000, whilst each non-dependent parent, step-parent and guardian of a homicide victim is entitled to $7,500 (s 36).

For child victims of violence, up to $30,000 in compensation may be provided to a parent, step-parent or guardian to cover economic loss directly resulting from the act of violence (s 27). This includes, up to certain monetary limits, compensation for lost earnings, medical and dental expenses, justice-related expenses and expenses incurred from clothes or personal effects being lost or damaged in the violence.

Family definitions under the Act are inclusive and include same-sex de facto and *registered* partners who have cohabited with the victim for two years.

As *legal* parents, step-parents and guardians of children are recognised by the Act, most forms of same-sex families benefit from the protection provided by the Act including:

- lesbian families formed through assisted conception
- families formed by adoption or where parents have been recognised under a surrogacy parentage order
- step/blended families, or
- families in which a child has a guardian (which should include persons who have been granted "parental responsibility" by the federal family courts or NSW Children's Court) (s 22(3)).

See Chapter 39, Victims Support for further information on the Victims Support Scheme

Incapacity and medical decision-making

[34.210] When a person is incapable of giving consent to their own medical and dental treatment, the *Guardianship Act 1987* (NSW) provides the legal basis for another person close to them to give this consent (see Chapter 16, Disability Law).

The Act sets out who can make such decisions (the *person responsible*). This is usually done without the need for a legal guardian to be appointed.

[34.220] The "person responsible"

Except in relation to a child, the hierarchy specified in the Act for deciding who is the person responsible is as follows:

1. someone who has been appointed as a guardian
2. a spouse or de facto partner (see below)
3. someone who "has care" of the person
4. a "close friend or relative".

Spouses and de facto partners

Spouses and de facto partners – including same-sex de facto and registered partners – qualify as long as there is a "close and continuing" relationship. Partners do not need to have lived together for any particular length of time under these provisions (or at all, if the relationship is registered), as long as the relationship is ongoing and close.

It is still fairly common for some medical and nursing staff to be unaware of the changes to the law recognising same-sex couples. If this happens it can usually be corrected by contacting the medical administrator, or getting legal assistance.

Same-sex partners who do not live together

A same-sex partner who does not live with the person in need of guardianship may become a person responsible under the "close friend or relative" category. However, other friends and relatives may also be eligible, and this can cause problems if there are disputes or families do not recognise a gay or lesbian partner. Same-sex couples who do not live together may want to consider appointing their partner as their enduring guardian or registering their relationship. Registration of a relationship enables a partner to be automatically recognised as a "de facto partner" in the *Guardianship Act*, and have a higher priority than those falling in the "close friend or relative" category.

Children

The "person responsible" for a child is the person or people who have "parental responsibility" for that child (s 33A(2)). This includes:

- lesbian mothers with children born through assisted conception
- same-sex parents with adopted children or children recognised under a surrogacy parentage order
- same-sex parents with a federal family courts or Children's Court order awarding them parental responsibility (for example, gay dads through surrogacy or authorised foster carers).

[34.230] Appointment of a guardian

The *Guardianship Act* provides for a formal process of review before the Guardianship Division of NCAT and allows for the appointment of a guardian or a financial manager to make necessary decisions on the incapacitated person's behalf (see Chapter 16, Disability Law).

Relationship breakdown

[34.240] This is a brief summary of family law as it pertains to same-sex couples and families. See Chapter 24, Family Law for further information on child and property related issues on the breakdown of a de facto relationship.

[34.250] Parenting disputes

The federal family courts deal with all disputes arising in relation to children following the breakdown of a relationship. This includes where the child will live and who the child will spend time with. The primary consideration in any application before the court is what is in the best interests of the child.

Whilst the court can hear applications from anyone concerned in the care, welfare or development of a child, *legal* parents are also entitled to certain additional considerations (such as whether it is possible to grant each parent equal time, or substantial and significant time, with the child) (see also Parental responsibility and parenting orders at [34.70]).

Legal parents include:

- adoptive parents (or the partner of an adoptive parent who consented to the adoption)
- lesbian mothers with children born through assisted conception
- parents recognised under surrogacy parentage orders (see Legal parentage and other types of parental recognition at [34.70]).

Child support

Persons who are recognised as the legal parents of a child are liable to pay child support (see Legal parentage and other types of parental recognition at [34.70]).

The Child Support Scheme is the main avenue for pursuing child support from a same-sex partner after separation.

Where parents cannot agree on their own, a parent can approach Child Support for an administrative determination of the liability of each parent in accordance with a set formula.

Because sperm donors are not legal parents, they are generally not liable for child support under the *Child Support (Assessment) Act 1989* (Cth) (see however Children conceived by single women through assisted means at [34.70]).

In limited circumstances, a non-parent carer can pursue child support from a parent where a child is in their care.

[34.260] Property division on separation

When a relationship ends, disputes can arise about the division of property. Most people divide their property without going to court, and avoid the time, expense and stress involved. However, some couples need the help of a property division regime or even the decision of a court.

Under the *Family Law Act 1975* (Cth) same-sex de facto couples living in NSW can go to the federal family courts for division of their property.

Although the Act has its own de facto relationship definition (s 4AA), the definition is in effect the same as the definition in the *Acts Interpretation Act 1901* (see The central de facto definitions at [34.30]).

The *Family Law Act* definition does not explicitly say that temporary separations do not otherwise terminate a de facto relationship, although previous cases suggest that a court is likely to apply the definition flexibly to accommodate the vagaries of relationship life (such as temporary absences for reasons of work, infirmity or incarceration).

Former de facto partners can apply to the federal family courts for a property settlement where:

- the aggregate length of the de facto relationship is at least two years

- there is a "child of the de facto relationship" (see below)
- one party has made substantial financial or non-financial contributions and serious injustice would result from not making an order in relation to property, or
- the de facto relationship is or was registered in NSW, Victoria, Queensland, Tasmania or the ACT.

A child is a "child of the de facto relationship" if the child is:

- adopted by both de facto partners
- adopted by either of the partners with the consent of the other
- conceived through assisted means by a lesbian couple, or
- born through surrogacy and the parents have undergone a transfer of parentage process under state law (s 60HB) (see Legal parentage and other types of parental recognition at [34.70]).

Property division under the Family Law Act

The federal family courts can make an order to divide property by taking into account financial contributions made to property, non-financial contributions made to property (for example, such as renovation labour) and contributions made to the welfare of the family (including homemaker and parenting contributions) (s 90SM).

The federal family courts must also consider "future needs" factors (s 90SM(4)(d)–(g)). The most important of these considerations are:

- the impact of any property settlement on the earning capacity of each party
- any relevant factors relating to the parties' future needs, including their age, health needs, future employment prospects, parenting responsibilities, commitments to other dependants, child support obligations and what each party requires for a reasonable standing of living.

This is particularly important for couples who have raised children together, because of the likelihood that one partner will have taken substantial time out of the workforce. In cases before the Family Court a typical result concerning a relationship of 15 or 20 years' duration with children, where the primary caregiver had taken time out of the workforce, would involve a needs adjustment of around 5–15% of the value of property to take account of lost earning capacity.

Making a property claim

To make a claim under the federal family law system, a partner must prove their contribution. This can be done in regard to a property in joint names or property that is solely in the name of the other partner.

This is usually done through written evidence such as records of mortgage payments, although this is not essential.

Non-financial contributions are also included and can be proven with written or oral testimony.

Partner maintenance

Partner maintenance may be granted if a former de facto partner is unable to support themselves adequately and the other partner is reasonably able to provide it (*Family Law Act*, s 90SF). In reality, maintenance has been very rarely awarded.

Relationships not covered by the federal family law system

The federal family law system does not cover:

- de facto couples who separated prior to 1 March 2009 and who do not otherwise opt to use the federal system
- domestic carer relationships (where one, or each, person gives another domestic support and personal care)
- couples who do not otherwise meet the de facto definition, such as those who do not live together.

The NSW property division regime under the *Property (Relationships) Act 1984* (NSW) may assist the first two categories of relationship, although an application to waive the two-year time limitation will need to made to the Supreme Court in the former case.

Partners who did not live together before the breakdown of their relationship may have recourse to the Equity Division of the NSW Supreme Court. This is a costly and complex option.

[34.270] Property agreements

Couples who wish to protect their property from a possible claim by a partner after break-up, avoid court intervention or simply make decisions about property division in advance, can do so with a property agreement. If executed correctly, such agreements are binding and only in rare circumstances will the courts overturn them.

De facto couples are able to make *binding financial agreements* under the *Family Law Act*. Binding financial agreements can be made before, during or after a relationship and can cover matters relating to property, financial resources or maintenance. They can also cover matters incidental or ancillary to property, financial resources or maintenance issues (ss 90UB, 90UC, 90UD).

To be legally binding, financial agreements under the *Family Law Act* must be in writing, and parties must have had separate advice from their own independent lawyer about the effect of the agreement and its advantages and disadvantages (s 90UJ).

Agreements properly executed under the NSW *Property (Relationships) Act* prior to the commencement of the federal system in 2009 remain enforceable.

Tax on relationship breakdown

Same-sex de facto couples who separate have the same tax rules apply to them as married spouses and heterosexual de facto partners. This includes exemptions from some tax liabilities for property transferred (or maintenance paid) as a result of a relationship breakdown where this follows the terms of a court order or binding financial agreement.

Employment and financial issues

[34.280] Workplace rights and benefits

Most Australian workplaces are now regulated under the *Fair Work Act 2009* (Cth). The *Fair Work Act* guarantees minimum employment conditions which are relevant to couples and families, such as:

- personal/carer's leave
- compassionate leave
- a right to request flexible working arrangements
- parental and adoption leave.

The *Fair Work Act* defines a "de facto partner" as "a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes)" (s 12).

The Act also recognises most children living in same-sex families, including:

- adopted children
- step-children
- children conceived through assisted means by a lesbian couple
- children recognised under a surrogacy parentage order.

In some cases, rights also extend to other children, such as children who are part of the employee's household or children over whom the employee has responsibility (such as those who have been granted "parental responsibility" by a federal family court or Children's Court order). So for example, if the child is a member of the employee's household, rights such as carer's and compassionate leave are guaranteed. An employee with "responsibility" for a child under school age, or a child under 18 who has a disability, can also claim the right to request a flexible workplace arrangement.

See Chapter 22 Employment at [22.90], The National Employment Standards for more information.

Paid parental leave

Paid parental leave

Under the *Paid Parental Leave Act 2010* (Cth), working parents of newborn or adopted

children who meet the eligibility requirements of the scheme are entitled to 18 weeks of paid parental leave at the minimum wage (currently $657 a week before tax). The entitlement is also subject to other tests, such as a work test and an income test.

Usually a birth mother or an adoptive parent who is eligible under the scheme has the primary entitlement to paid parental leave (referred to as the "primary claimant") (s 54(1)). A primary carer of a child born through a surrogacy arrangement may also have a primary claim to paid parental leave where he or she meets the general eligibility requirements of the scheme and:

- s/he became, or will become, the child's primary carer before the child's first birthday
- s/he has, or is likely to continue to have, care of the child for at least 26 weeks
- the decision-maker is satisfied reasonably that it is in the best interests of the child for the person to care for the child. In determining whether it is in the best interests of the child, the decision-maker must consider all relevant matters including whether the person intends to be the long-term primary carer of the child and whether the surrogate birth mother has relinquished care of the child (*Paid Parental Leave Rules 2010*, r 2.30).

The Act does not require a surrogacy parentage order to have been granted to the person.

In addition to primary claims, secondary claims can also be made in certain circumstances by:

- partners of the primary claimant
- other parents of the child and their partners who are not the primary claimant (s 54(2)).

The definition of "partner" is taken from the *Social Security Act 1991* (Cth) and includes married, de facto and registered partners who are a "member of a couple" for social security purposes. This definition recognises same-sex couples in the same way as opposite-sex couples (see Member of a couple at [34.350]).

Under the *Paid Parental Leave Act*, "parent" includes:

- adoptive parents
- lesbian mothers with children born through assisted conception
- parents recognised under a surrogacy parentage order (s 6).

Thus, subject to general eligibility requirements, most lesbian and gay parents who are caring for newborns or very young children are accommodated by the scheme.

Dad and partner pay

For those who meet the general eligibility requirements, a payment of up to two weeks' pay at the minimum wage (known as "dad and partner pay") may be payable to:

- biological fathers
- partners (including same-sex de facto and registered partners) of a child's birth mother
- adoptive parents
- certain others, including persons who are caring for a child born through a surrogacy arrangement (s 115DD).

For persons who are caring for a child born through a surrogacy arrangement to be eligible, they must:

- have become, or will become, the child's carer before the child's first birthday
- have, or be likely to continue to have, care of the child for at least 26 weeks

and the decision-maker must be satisfied reasonably that it is in the best interests of the child for the person to care for the child. Similar factors must be considered as described above for paid parental leave. The scheme does not require a surrogacy parentage order to have been granted to the person.

Partner benefits that are not guaranteed

Numerous employment-related benefits and entitlements are linked to couple or family relationships. These include forms of leave beyond the minimum entitlements guaranteed under the law.

Some benefits provide for the cost of an accompanying partner, such as:

- remote locality entitlements
- relocation allowances
- overseas living allowances

- work-related travel costs.

Some employers also provide or subsidise the cost of housing, loans, health insurance, education or employer products for the families of employees.

If benefits are denied

Whether the denial of a benefit to a member of a same-sex couple can be challenged as unlawful depends on the source of the benefit. If benefits are made available under a policy or employment contract, it is possible that denying them to same-sex couples can be challenged as discrimination on the basis of sexual orientation.

Making a complaint

The starting point for making a complaint may be to speak with the human resources department at your workplace or ask for help from a worker's union.

Formal complaints may be made:

- under the *Sex Discrimination Act 1984* (Cth) – most private sector employees or Commonwealth government employees can lodge complaints about discrimination on the basis of sexual orientation to the Australian Human Rights Commission. If a complaint is not resolved by conciliation at the Commission, a complaint can be lodged with the Federal Circuit Court or Federal Court.
- under the *Anti-Discrimination Act 1977* (NSW) – state government employees (and most private sector employees also) can make a complaint of discrimination on the basis of homosexuality to the NSW Anti-Discrimination Board. If not resolved, a complaint can be made to the Equal Opportunities Division of the NCAT.
- under the *Fair Work Act 2009* (Cth) – general protection provisions under the *Fair Work Act* allow most employees under the national system to make a complaint to the Fair Work Commission if their employer has taken "adverse action" against them on the basis of sexual preference.

Discrimination law is complex and choosing the right forum at the outset is important as it may prevent your ability to go down a different route later. Speak to a lawyer or community legal centre before you proceed.

See Chapter 22, Employment and Chapter 17, Discrimination for more information on discrimination and challenging unfair treatment in the workplace.

Public sector employees

Since 2008, federal public servants with same-sex de facto partners have been eligible for a variety of entitlements which were previously denied, including:

- partner entitlements under superannuation and workers' compensation schemes
- travel and leave entitlements for same-sex partners of members of parliament, judicial and statutory office holders.

Reforms in NSW law throughout the 1990s and 2000s have also afforded NSW public servants with same-sex partners equal entitlements.

[34.290] Workers' compensation

The Commonwealth scheme

The *Safety, Rehabilitation and Compensation Act 1988* (Cth) covers workplace safety, workers' compensation and rehabilitation services in relation to injury, illness and death that occur in the course of employment. The Act covers:

- most federal government employees (except those covered by their own statute, such as members of the defence forces)
- private sector companies licensed to self-insure under the scheme, and
- employees of federal government business agencies.

Who is a dependant?

Compensation may be payable to an employee's "dependants" for work-related injuries which cause serious injury or death to an employee. This includes a lump sum payment of up to $528,433.70 (as at 1 July 2016) for "dependants" who are wholly or partly dependent on the deceased employee

(s 17(3) and 17(4)). Incapacitated employees may also be entitled to additional weekly payments for a spouse (including de facto partner), child or other select family members who are dependent on them (s 19(8)).

The definition of a "dependant" is broad and includes:

- a same-sex de facto or registered partner (see The central de facto definitions at [34.30])
- a child or step-child of the employee (including where the employee or their partner are recognised as legal parents (see Legal parentage and other types of parental recognition at [34.70]))
- any person to "whom the employee stood in the position of a parent" or "who stood in the position of a parent to the employee".

Accordingly, same-sex couples and families are covered by the scheme.

The NSW scheme

Under the *Workers Compensation Act 1987* (NSW), if an employee's death results from a work-caused injury, dependants may be entitled to lump sum compensation of $760,000 (as at September 2016) (s 25(1)(a)) as well as reasonable funeral expenses up to $15,000. In addition, the deceased's dependant children under 16 years (or under 21 years if studying fully time) may be entitled to weekly payments of $136.10 per child (as at September 2016) (s 25(1)(b)).

Who is a dependant?

"Dependant" is defined by the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) to include de facto and registered partners. The central NSW de facto definition applies (see The central de facto definitions at [34.30]).

The Act broadly recognises dependants to whom the employee "stands in the place of a parent". This would cover any person upon whom a child is partly or wholly dependent, regardless of their legal status as a parent.

See Chapter 3 at [3.340], Workers' compensation for further information about the NSW scheme.

[34.300] Superannuation

The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth) extended equal entitlements to same-sex de facto and registered partners and their children in superannuation (and related income tax) laws. Many of the changes to superannuation were effectively backdated to 1 July 2008.

Same-sex de facto and registered couples and their children benefit equally under superannuation (and related income tax) law including in respect of the following:

- the payment of benefits on the death of a member (see below)
- *superannuation spouse tax offset*: an offset of up to $540 per year for super contributions made on behalf a same-sex de facto or registered partner with no or little income (*Income Tax Assessment Act 1997* (Cth), s 290-230)
- the splitting of superannuation contributions or assets with a same-sex de facto or registered partner who is under 55 years, or under 64 years if not permanently retired, or as part of the property division on the breakdown of a relationship (*Superannuation Industry (Supervision) Regulations 1994* (Cth), reg 6.44; *Family Law Act 1975* (Cth), Pt VIIIB).

See also Chapter 37, Superannuation for further information on superannuation generally.

Private superannuation funds

Payments of benefits upon the death of a member

Under the *Superannuation Industry (Supervision) Act 1993* (Cth) and associated regulations, and subject to the terms of the particular superannuation fund trust deed, a trustee must pay death benefits to:

- a dependant (see Who is a dependant for the purposes of superannuation? below), or
- the deceased person's estate.

If more than one dependant is located, the trustee may allocate the death benefit between them in a way the trustee considers fair and reasonable. However, it is illegal for a person who exercises a discretion in

relation to the payment of a superannuation benefit to discriminate against a person on the basis of their sexual orientation (*Sex Discrimination Act 1984* (Cth), s 14(4)).

Who is a dependant for the purposes of superannuation?

Under the *Superannuation Industry (Supervision) Act 1993* (Cth), the term "dependant" includes:

- a spouse (including a same-sex de facto or registered partner)
- a child
- a person who was in an "interdependency relationship" with the deceased fund member
- a financial dependant.

The definition of "spouse"

"Spouse" is defined to include a registered partner or a person who lives with another person "on a genuine domestic basis in a relationship as a couple" (s 10).

The definition of "child"

"Child" is defined to include most children and step-children with same-sex parents, including adopted children of the couple or either partner, children born to lesbian de facto or registered couples through assisted conception, and children recognised under a surrogacy parentage transfer order. If not recognised automatically, other children (such as foster children or children born through surrogacy overseas or in other states) can nevertheless claim under the ordinary meaning of "dependant" if they can establish financial dependence on the fund member at the date of death. Alternatively, these children may be able to establish that they were in an "interdependency relationship" with the member of the fund.

"Interdependency relationship"

An "interdependency relationship" is defined in s 10A of the *Superannuation Industry (Supervision) Act 1993* as two persons who live together *and* "have a close personal relationship" *and* "one or each of them provides the other with financial support" *and* "one or each of them provides the other with domestic support and personal care". Although initially intended to cover same-sex partners prior to the 2008 reforms, this concept has also been used to recognise parent-child relationships where the child still lives at home.

The *Superannuation Industry (Supervision) Regulations 1994* prescribe factors that must be taken into account in determining the existence of an "interdependency relationship" (reg 1.04AAAA). These factors include the duration of the relationship, the degree of commitment to a shared life, the degree of emotional support, and the ownership and use or acquisition of property. However, none of these factors conclusively establish an "interdependency relationship".

Note that the interdependency category does not apply to a number of older government superannuation schemes.

Nominated beneficiaries

Lesbians and gay men may nominate their partner or child as the preferred beneficiary of their fund's death benefits. Usually, this nomination indicates the member's wishes but does not bind the trustee of the fund. The trustee of each superannuation fund decides the payment of benefits based on the terms of the trust deed.

Some superannuation funds also allow a member to make a binding nomination, which if validly made, generally remains effective for three years unless renewed.

NSW government employees

The *Superannuation Legislation Amendment (Same Sex Partners) Act 2000* (NSW) changed a number of older NSW public service schemes to recognise same-sex partners so that pensions can revert to same-sex partners on the death of the contributor.

If in doubt, check with your scheme.

Federal government and defence employees

Eligible federal government and defence force employees are covered under specific Commonwealth schemes depending on when they commenced their employment. The schemes are administered by the Commonwealth Superannuation Corporation (CSC).

The principal schemes are:

- Commonwealth Superannuation Scheme (closed to new members since 1 July 1990) (*Superannuation Act 1976* (Cth))
- Public Sector Superannuation Scheme (closed to new members since 1 July 2005) (*Superannuation Act 1990* (Cth))
- Public Sector Superannuation Accumulation Plan (PSSAP) (since July 2005) (*Superannuation Act 2005* (Cth))
- Defence Force Retirement and Death Benefits Scheme (defence only – closed to

new members on 1 October 1991) (*Defence Force Retirement and Death Benefits Act 1973* (Cth))
- Military Super (defence only – since 1991) (*Military Superannuation and Benefits Act 1991* (Cth)).

Under all schemes, benefits may be payable to eligible spouses and children on the death of a member. The amount of benefit may also be impacted by the number of eligible children.

Under the PSSAP, the trust deed gives "dependant" the same meaning as the *Superannuation Industry (Supervision) Act 1993*. This means that since 1 January 2009, a "spouse" has also included a same-sex de facto or registered partner. However, before this time, a same-sex partner could still qualify under the "interdependency relationship" category. Children are also broadly recognised. See Who is a dependant for the purposes of superannuation? above.

Under the remaining schemes, a same-sex partner who was ordinarily living with the member on a permanent and bona fide domestic basis for a continuous period of at least three years at the time of death will qualify. Temporary absences or absences for special circumstances (for example, illness or infirmity) which otherwise prevent a couple from living together are ignored. Partners of less than three years may still qualify if the CSC is satisfied that the couple was otherwise ordinarily living together on a permanent and bona fide domestic basis. CSC will consider all the relevant evidence including whether:
- the partner was wholly or substantially dependent upon the member
- the relationship was registered
- there were children of the relationship
- the couple jointly owned a home which was their usual residence.

Generally speaking, the definition of "child" is broad and includes a child of the member or their spouse, including a child born through assisted means to a lesbian de facto couple, a child recognised under a surrogacy parentage order, an adopted child, foster child, step-child or a ward. However, additional requirements on eligibility for children may be imposed (such as age, employment or study status, residence and/or dependency). For more information, see www.csc.gov.au.

If a person would have been eligible for a benefit under any of the above schemes between 1 July 2008 and 1 January 2009 but for the discrimination against same-sex couples and their children, that person can apply to the Minister for Finance for a "replacement" payment to be made. This concession was made by the government due to Senate delays in the passage of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth), which postponed the intended commencement date of 1 July 2008 (ss 4–6).

Income tax treatment of superannuation death benefits

Benefits paid to a dependant

Lump sum death benefits paid directly to a qualifying dependant, or to an estate where it is clearly specified that they are to be passed directly to a dependant, are exempt from income tax.

ATO Interpretative Decision 2011/83 confirms that a lump sum superannuation death benefit paid to a former same-sex de facto or registered partner will be tax free, even if the relationship broke down prior to the 2008-2009 tax year (ie, when the 2008 same-sex reforms took effect).

Death benefits paid to a non-dependant, or paid to a deceased estate but not specifically directed to a dependant, attract tax for the recipient.

Superannuation pensions

It is possible in many funds for a member to specify that on their death a superannuation pension they receive will automatically "revert" to a nominated person. Since 1 July 2008, trust deeds have been able to recognise same-sex de facto or registered partners. Consult your fund to ensure your trust deed has been updated in line with the 2008 same-sex reforms.

See Chapter 37, Superannuation for more information.

Health care costs

[34.310] Medicare

The Medicare levy and surcharge

The *Medicare Levy Act 1986* (Cth) determines the levy imposed on personal incomes to fund the Medicare scheme. This levy is composed of two elements: the general levy and the surcharge.

The Medicare levy is 2% of a person's taxable income, but is reduced for low income individuals, certain government benefit recipients and people who maintain dependants.

The Medicare surcharge is an additional 1 to 1.5% charged on income above set amounts, if the taxpayer and their dependants do not have appropriate private health insurance for the tax year. There are tiered family surcharge thresholds which combine the relevant income of spouses, plus an extra $1,500 of income for each dependant child after the first child.

In calculating the Medicare levy and surcharge, as well as any reductions or exemptions, same-sex de facto or registered couples and their children are treated in the same way as opposite sex families.

Generally speaking, the definition of "child" is broad and includes adopted children, step-children, or a child recognised as the child of the person under the parentage rules in the *Family Law Act* (*Income Tax Assessment Act 1997* (Cth), s 995-1(1); *Income Tax Assessment Act 1936* (Cth), s 6(1) imports the definition of "child" in the *Income Tax Assessment Act 1997*). This includes children born to lesbian de facto couples through assisted conception or children recognised under a surrogacy parentage transfer order. However, depending on the purpose for which a child is being considered, additional requirements may be applicable (such as age and study status). For more information, see www.ato.gov.au/Individuals/Medicare-levy.

The Medicare safety nets

Medicare sets a schedule of fees for different medical services. (However, doctors and hospitals can, and often do, charge more than these fees.)

In the Medicare scheme, there can be payment "gaps" between:

- the scheduled fee and the lower amount that Medicare refunds, and/or
- the scheduled fee and the higher actual cost of the service.

The "safety net"

Medicare usually pays 100% of the scheduled fee for GP services, but only 85% of the scheduled fee for other medical services.

Once an individual or family has spent over a certain amount on the gap between the scheduled fee and the Medicare refund, the entire scheduled fee is refunded. In 2016, the threshold amount for the "safety net" is $447.40 – both for individuals and families.

The "extended safety net"

The *Health Insurance Act 1973* (Cth) provides an "extended safety net" for individuals and families who have spent over a set amount on certain medical expenses in a calendar year. The extended safety net generally refunds 80% of the difference between the actual (out-of-pocket) cost of the service and the scheduled fee once the threshold is reached.

In 2016, the threshold was:

- $2,030, or
- $647.90 for Commonwealth concession card holders and families eligible for Family Tax Benefit A.

Note that reforms are mooted in this area which could restrict entitlements for everyone.

Same-sex couples qualify for the safety nets as a family

Same-sex de facto and registered couples, and the "dependent child" of either or both partners, are recognised as members of one

family. The definition of "dependent child" in the *Health Insurance Act* is broad and includes a full-time student (between 16 and 24 years) who is at least partially dependent, or a child under 16 and in the custody, care and control of the person or their partner (s 10AA(7)). This means that adults with an order of parental responsibility in their favour qualify in addition to legal parents and step-parents (see Legal parentage and other types of parental recognition at [34.70]).

Same-sex families must register to pool health expenses and meet the thresholds together as a family. Forms for registration are available at www.humanservices.gov.au/customer/services/medicare/medicare-safety-net.

[34.320] Pharmaceutical Benefits Scheme

Same-sex de facto and registered couples, and the "dependent child" of either or both partners, have the same entitlements to benefits under the *National Health Act 1953* (Cth) which includes the Pharmaceutical Benefits Scheme. This includes the ability to meet the PBS Safety Net threshold as a family (s 84B(1)).

The definition of "dependent child" under the Act is the same as for the Medicare safety net. This means that adults with an order of parental responsibility in their favour qualify in addition to *legal* parents and step-parents (see Legal parentage and other types of parental recognition at [34.70]).

Pharmaceutical Benefits Scheme concessions

Once an individual or family spend more than a certain amount per year on prescription medicines, they are entitled to a PBS Safety Net card. As at 2016, the threshold amount of family prescription expenses was $1,475.50, after which any further prescription medicine cost $6.20 per script rather than the standard $38.30.

For concession card holders, the threshold amount of family prescription expenses was $372, after which the cost per script dropped from $6.20 to zero.

Forms for refunds and to apply for a Safety Net card are available at www.humanservices.gov.au/customer/services/medicare/pharmaceutical-benefits-scheme-pbs-safety-net.

[34.330] Private health insurance

Private health insurance funds may offer insurance for families at a reduced rate. A refusal by an insurer to extend such terms to same-sex families would likely be unlawful discrimination under federal and state anti-discrimination law (see also *NIB Health Funds Ltd v Hope* (unreported, NSWSC, McInerney J, 15 November 1996)).

Social security

[34.340] Social security is one of the few areas where ending discrimination against same-sex couples has had some disadvantages as well as advantages. This is because eligibility for some payments (as well as the actual amount of payment) is calculated on whether a person is living as a "member of a couple".

On 1 July 2009, the definition of a couple changed for the purposes of social security. Same-sex couples who are in a de facto relationship or registered relationship (and are not separated) are required to declare to Centrelink they are a member of a couple.

This section sets out a summary of some key issues in social security pertaining to same-sex couples and families. The rules for family assistance and other payments change considerably over time. For up-to-date information about social security payments, see www.humanservices.gov.au. See also Chap-

ter 36, Social Security Entitlements for general information on the social security system.

[34.350] "Member of a couple"

Since 1 July 2009, a "member of a couple" for social security purposes has included:

- a person who is legally married or in a registered relationship with another person and not living separately and apart from that other person
- a person in a de facto relationship with another person (regardless of the gender of the partners) (*Social Security Act 1991* (Cth), s 4(2)).

(However, a different assessment applies to eligibility for Youth Allowance, see Relationship-based benefits at [34.370]).

To determine whether a same-sex couple satisfies the definition of a "de facto relationship" under the *Social Security Act*, Centrelink is to have regard to all the circumstances of the relationship including:

- the financial aspects of the relationship (such as the joint ownership of property, the significant pooling of financial resources and the sharing of day-to-day household expenses)
- the nature of the household (including joint responsibility for the care of children and the division of housework)
- the social aspects of the relationship (including whether the couple hold themselves out to family and friends as a couple)
- any sexual relationship between the people
- the nature of the commitment (including the length of the relationship and whether the people see themselves as de facto partners) (s 4(3)).

Separated "under one roof"

De facto couples who have separated can also use the list of criteria to establish that they are *no longer* in a de facto relationship. Centrelink should not form the opinion that a person is in a de facto relationship if the partners are "living separately and apart on a permanent or indefinite basis" (s 4(3A)). Evidence may include the separation of bedrooms, proceedings for division of property, an end to a joint social life and/or presenting oneself as single or separated to others.

Similar evidence can also be used to show that registered partners have separated.

Appeals

Recipients who have been determined by Centrelink to be a member of a couple, but who do not agree with that determination, have the right to appeal the Centrelink decision. Contact the Welfare Rights Network for free specialised advice in relation to social security law.

[34.360] Assessment and payment as a couple

Since 1 July 2009, same-sex couples in de facto relationships and registered relationships (who have not otherwise separated) have been assessed as a "member of a couple" and received the partnered rate in the same way as opposite-sex couples. This has been the case for couples who applied for a benefit after 1 July 2009, as well as those already on benefits.

Since 1 July 2009, same-sex couples on Centrelink payments have been required to declare their relationship status (and changes to their relationship status) to Centrelink.

Income and assets tests

A partner's income and assets are taken into account in determining eligibility for social security benefits. Since 1 July 2009, income and assets tests have applied in the same way for same-sex couples as they do for opposite-sex couples.

Benefits at a partnered rate

Many benefits are paid at a "partnered" rate to people who are members of a couple. This is less than twice the single rate, on the assumption that a couple pools expenses and can live more inexpensively than is possible for two separate individuals.

Previously, the exclusion of same-sex couples from the definition of "partner" and

"member of a couple" allowed both members to legitimately claim the individual rate. Since 1 July 2009 however, same-sex couples in de facto and registered relationships have also been paid at the partnered rate.

Benefits paid at a partnered rate to members of a couple include:
- Newstart Allowance
- Austudy
- Youth Allowance
- age and disability support pensions.

However, couples on certain payments, such as the age and disability support pensions, who have been separated due to ill-health may be entitled to individual rates of payment.

Section 24 discretion

At the time of the 2008 reforms, there was considerable controversy over whether same-sex couples would be given sufficient time to adjust to the social security changes. No grandfathering provisions were built into the same-sex reforms.

At the time, s 24 of the *Social Security Act* was thought to possibly provide a remedy for couples in special circumstances who experienced financial hardship as a result of the reforms. Section 24 provides a discretion allowing a member of a couple to be treated as if they were an individual for social security purposes if special reasons and financial hardship are shown to exist.

Case law since that time suggests that s 24 has been narrowly construed and has not provided same-sex couples experiencing financial hardship with much relief. For example, in 2011, the Administrative Appeals Tribunal reversed a decision made by the Social Security Appeals Tribunal in favour of an older same-sex couple, one of whom suffered extremely poor health. The AAT said that it did not consider the couple faced the level of financial hardship which warranted an exercise of the discretion and did not find any other special reason existed to exercise the discretion (*Wilson v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 554). If unsure, contact the Welfare Rights Network for free specialist legal advice.

[34.370] Relationship-based benefits

Some social security benefits derive from the initial recognition of a couple relationship.

Since 1 July 2009, same-sex couples who are in a de facto or registered relationship have been eligible for relationship-based benefits in the same way as opposite-sex couples.

Some benefits and implications from this recognition include:
- eligibility for bereavement allowances and payments if a partner dies
- being recognised as "independent" for Youth Allowance purposes if in a de facto relationship for 12 months, or in a registered relationship (s 1067C)
- in determining eligibility for Youth Allowance; considerations can be given to a same-sex partner's circumstances in determining whether a person is unable to accept an offer of work because it would be unreasonably difficult for them to commute to it (s 541D(1A))
- if a social security pension is not payable because the recipient is in jail or psychiatric confinement on a criminal charge, the payment may be redirected to certain dependents of the person, such as a same-sex de facto or registered partner (s 1159).

[34.380] Family assistance

Family tax benefit

Despite its name, the Family Tax Benefit (FTB) is not linked to the tax system but is paid as a direct form of support to families with children, as either an annual or a fortnightly sum. It is income tested.

There are two kinds of assistance (FTB A and FTB B). FTB A is a support payment paid to low and middle-income families, whilst FTB B is an extra payment made to sole parent families and families with one main income. Both benefits are paid on a per-child basis and vary in amount depending on the age of the children and the family income. Other supplements may also apply. Since 1 July 2009, same-sex couples in de facto and registered relationships have been

treated as members of a couple for the purposes of family tax benefits. Family income under the scheme is the combined income of both members of the couple. Accordingly, eligibility requirements are assessed in the same way for same-sex and opposite-sex couples.

Who is a "FTB child"?

Payments are made for each "FTB child", defined as:

- a child under 16 in the care of a person who is legally responsible for them, or
- a child aged 16-17 in the care of a person who is legally responsible for them, or aged 18-19 in the care of a person, where the child is undertaking full-time education or training leading to a Year 12 or equivalent qualification (or is otherwise exempt from this requirement) (*A New Tax System (Family Assistance) Act 1999* (Cth), s 22).

The definition of a "FTB child" is broad and includes:

- the child of lesbian de facto couples born through assisted means
- adopted children of same-sex couples
- children living with adults who have a court order granting them parental responsibility
- children recognised under a surrogacy parentage order.

However, a child cannot be recognised as a FTB child unless the person has care of the child for at least 35% of the time (s 25).

Childcare benefit

The Act provides a childcare benefit for approved and registered childcare. This benefit is distinct from the childcare rebate (see below) and is subject to an income test.

The childcare benefit may be paid directly to the childcare centre or reimbursed to the parent as a lump sum at the end of the year. Since 1 July 2009, same-sex de facto and registered couples have been assessed in the same way as opposite-sex couples for the benefit.

Among other requirements, entitlement depends on a child being a "FTB child" or a "regular care child" (meaning the person has care between 14% to 35% of the time) of the individual or their partner.

Childcare rebate

In addition to the child care benefit, there is a rebate of 50% of approved childcare fees for each child, up to a cap of $7,500 per child. To be eligible for the child rebate, a person must meet the eligibility for the child care benefit (even if your income is too high to receive the benefit) and both partners must satisfy a work, study or training test (unless exempted). The rebate is not income tested.

The child care rebate can be paid directly to the child care service or to the payer on a fortnightly, quarterly or annual basis.

Taxation

[34.390] Same-sex de facto and registered partners and their children are recognised in the same way as opposite-sex couples and families under the Commonwealth income tax regime: the *Income Tax Assessment Act 1936* (Cth) (1936 Act) and *Income Tax Assessment Act 1997* (Cth) (1997 Act). To access many of the associated tax benefits, same-sex couples can simply declare their relationship in their tax return.

The NSW state government also levies various taxes, such as stamp duty and land tax. Same-sex couples are treated in the same way as opposite-sex couples for NSW tax purposes.

[34.400] Income tax

Definitions

The definition of a "spouse" for Commonwealth income tax purposes includes same-sex couples who:

- live with each other "on a genuine domestic basis in a relationship as a couple", or
- have registered their relationship under a state-based registration scheme (1997 Act, s 995-1(1)).

The definition of a "child" includes a child of the taxpayer or their spouse, including:

- an adopted child
- a step-child
- a child born to a lesbian de facto couple through assisted means and recognised by parentage rules under the *Family Law Act*, or
- a child born through surrogacy and recognised under a surrogacy parentage order as a child of the individual (1997 Act, s 995-1(1)).

Treatment of same-sex couples

Same-sex "spouses" are treated in the same way as opposite-sex couples for tax purposes.

Same-sex couples may therefore be entitled to a range of tax benefits including:

- dependent (invalid and carer) tax offsets (may apply where a taxpayer contributes to the maintenance of their spouse, parent, child over 16 and/or sibling over 16, or the parent, child over 16 and/or sibling over 16 of their spouse, who is unable to work due to invalidity or carer obligations (1997 Act, s 61-10))
- superannuation offset for contributions made on behalf of a low-income or non-working spouse
- tax exemption for periodic maintenance payments from a spouse or former spouse (1997 Act, s 51-50)
- tax benefits that may apply for transfers of income earned on or assets transferred to a trust for a child under 18 as a result of family breakdown (1936 Act, s 102AGA)
- medical expenses offset (may apply in relation to certain medical expenses over a threshold paid by or on behalf of a spouse, a child under 21 and certain other dependants (1936 Act, s 159P)) (note: this offset is being phased out)
- dependent spouse offset.

Tax benefits which are calculated at familial rates include same-sex families, including:

- the low income aged persons and pensioners tax rebate (1936 Act, s 160AAAA)
- the private health insurance tax offset (1997 Act, s 61-205)
- zone rebates for people living in rural and remote areas, the overseas defence force rebate and the civilian UN force (1936 Act, ss 23AB(7), 79A, 79B).

Most tax rebates and offsets are phased out when the taxpayer and/or their spouse earns income above a certain amount.

Some entitlements are also based on the combined income of a taxpayer and their spouse.

Integrity (anti-avoidance) provisions

A range of "integrity" or anti-avoidance provisions in the income tax law refer to the spouse or family of a taxpayer. For example, a taxpayer is not entitled to deduct a payment to a "relative" that exceeds a "reasonable" amount (1997 Act, s 26-35). A "relative" includes a taxpayer's same-sex de facto or registered partner and certain extended family members of the person or their partner (including parents, grandparents, brothers, sisters, in-laws etc) (1997 Act, ss 960-255, 995-1).

Similarly, a same-sex partner will be included as an "associate" of a taxpayer for anti-avoidance purposes.

The general income tax anti-avoidance rule and rules against tax evasion apply to same-sex couples in the same way as opposite-sex couples.

[34.410] Capital gains tax

Transfers of assets to a same-sex spouse or former spouse under a court order or maintenance agreement can be made free of any immediate tax liability under capital gains tax rollover concessions (1997 Act, s 126-5). Effectively, any capital gain on assets transferred to a spouse is taxable only on disposal by the spouse.

[34.420] Stamp duty

Certain stamp duty exemptions and concessions are available to de facto couples who have lived together for two years and transfer ownership in their principal residence from one partner to both (*Duties Act 1997* (NSW), ss 104A–104C).

There is also an exemption from stamp duty for property transferred at the end of a relationship to one party, or to a party's child, in accordance with a court order or a separation agreement (s 68).

For the purposes of this Act, the registration of a relationship can be used as evidence of a de facto relationship, but is not conclusive proof. Like de facto couples, registered partners must live together for at least two years to qualify for the exemptions.

Immigration

[34.430] There are a range of visas which allow persons to travel to, live and/or work in Australia. For visas relying on particular familial relationships, most same-sex couples and families will be eligible in the same way as opposite-sex couples and families provided they satisfy standard visa requirements and the familial definitions set out below.

See Chapter 28, Immigration and Refugee Law for further information about Australia's immigration laws.

[34.440] Same-sex de facto partners

The de facto definition in the *Migration Act 1958* (Cth) and associated regulations recognises same-sex de facto partners in the same way as opposite-sex de facto partners. This includes recognition for partner visas which allow same-sex de facto partners of Australian citizens or permanent residents (or certain New Zealand citizens) to come and live, or remain, in Australia.

Two persons are in a de facto relationship if they are not married (for the purposes of Australian law) or related by family and:

- have a mutual commitment to a shared life to the exclusion of all others
- have a genuine and continuing relationship
- live together, or do not live separately and apart on a permanent basis (*Migration Act 1958* (Cth), s 5CB).

In determining whether two persons are in a de facto relationship, consideration is given to a range of criteria, such as the financial and social aspects of the relationship, the nature of the household and the nature of the persons' commitment to each other (*Migration Regulations 1994* (Cth), reg 1.09A).

For most visa categories, a de facto relationship must exist for at least 12 months before a visa application is made. However, the one year relationship requirement can be waived in certain circumstances, such as where the relationship has been registered under a recognised state or territory scheme (see Relationship registration schemes at [34.40]) or there are compelling and compassionate circumstances for the grant of a visa (for example, if the couple have a child or it is dangerous for a same-sex couple to live together overseas).

[34.450] Children of same-sex couples

For the purposes of migration law, the definition of a "child" includes adopted children of same-sex couples as well as children born through assisted means to lesbian de facto couples or recognised under a surrogacy parentage order (s 5CA).

Children born overseas through surrogacy

To deal with the situation of children born overseas via surrogacy arrangements, the Department of Immigration and Border Protection recognises a broader range of persons as "parents" than otherwise generally recognised for the purposes of conferring Australian citizenship by descent. This has

seen the Department process applications for citizenship by descent on behalf of children born through surrogacy overseas where at least one of the intended parents is an eligible Australian citizen.

The *Australian Citizenship Act 2007* (Cth) provides that if, at the time of birth, a child born overseas had a "parent" who was an Australian citizen, then the child is eligible for Australian citizenship by descent, although some exceptions and further requirements apply (s 16). For example, if the Australian citizen parent themselves became an Australian citizen by descent or by adoption under the Hague Convention or a bilateral arrangement, then that parent must have spent at least two years lawfully in Australia (except for stateless applicants). Further, citizenship will be refused where:

(1) the decision-maker is not satisfied of the identity of the child
(2) the child is aged 18 years or older and the decision-maker is not satisfied that the person is of good character, or
(3) the child does not meet national security requirements.

The latter two are unlikely to be an issue in the circumstances of an infant born under an overseas surrogacy arrangement.

Citizenship is not automatic and an application must be made by a "responsible parent" if the child is under 16 years. A "responsible parent" includes a person who has guardianship or custody of the child, jointly or otherwise, under an Australian law or a foreign law, whether because of adoption, operation of law, an order of a court or otherwise.

The Department advises that, depending on the laws in the country where the child was born, an application may require the birth mother's consent. The application also requires all the necessary documents and evidence to be included, including a surrogacy contract signed by all parties. A DNA test may also be required.

For the purpose of citizenship by descent, whether a parent-child relationship exists is a question of fact to be determined with regard to all the relevant circumstances (see *H v Minister for Immigration and Citizenship* [2010] FCAFC 119). The conduct of a person in relation to the child and his or her surrogate mother, at or around the time of the child's birth, is therefore important.

In practice, the Department has placed emphasis on the biological relationship between a child and his or her biological parent (usually the sperm donor father); even where the conception has taken place through assisted means and the biological parent may not otherwise be recognised as a legal parent for other purposes.

Where a biological nexus does not exist, the Department considers evidence as to whether the child was, at the time of their birth, recognised *as a matter of fact* as the child of the Australian citizen. The Department looks at evidence such as the existence of a formal pre-conception surrogacy agreement, whether the Australian citizen has provided care (including emotional, domestic or financial) to the unborn child and/or the surrogate mother prior to or at birth, and whether the Australian citizen has been recognised prior to or at the time of birth as the child's parent socially (for example, by the Australian citizen's family) and/or by the foreign country in which the surrogacy took place (such as on the child's birth certificate or through a lawful transfer of parental rights mechanism at birth).

The conferral of citizenship by descent negates the need for the child to obtain a visa, as the child is recognised as an Australian and his or her parents may obtain an Australian passport for him or her. However, whilst Australian citizenship may allow the child to enter Australia, it is not a guarantee that the child will be permitted by local authorities to leave the country of birth and the intended parent(s) should exercise great caution in countries such as Thailand and India.

The approach to who is a "parent" in the area of citizenship should be considered unique and does not confer legal parentage to the intended parent(s) more generally (see Surrogacy parentage orders at [34.100]).

Absent a conferral of citizenship to a child, the Department advises that a child visa (subclass 101) may be available if at

least one of the parents is an Australian citizen or permanent resident and that person is a "parent" by virtue of a biological relationship with the child. Absent a biological nexus, the visa options available are extremely limited, especially for same-sex couples.

The situation for children born through commercial surrogacy overseas remains vexed, as overseas commercial surrogacy is illegal in NSW (see Surrogacy at [34.170]).

For more information see www.border.gov.au/Trav/Citi/pathways-processes/application-options/descent and the Department of Immigration and Border Protection fact sheet on international surrogacy arrangements at www.border.gov.au/about/corporate/information/fact-sheets/36a-surrogacy.

Refugees on the basis of sexual orientation and transgender identity

Australia accepts refugees fleeing from persecution on the basis of their sexual orientation or gender identity or intersex status.

To be accepted as a refugee on this basis, asylum seekers have to demonstrate a well-founded fear of persecution and that their country of origin cannot provide them protection. Fear of persecution can include fear of serious harm by the State or agents of the State (such as the police) as well as fear of serious harm from non-State sources (such as family) if the State is unable or unwilling to provide protection.

However, even overt discrimination may not be enough to satisfy the definition of "persecution", which requires a serious threat of harm and systemic and discriminatory conduct (s 5J).

A person who has been found to be a refugee is able to include a same-sex de facto partner in their application, in the same way as an opposite-sex partner.

Criminal matters

[34.460] Consensual and safer sex

The age of consent in NSW is 16 for both heterosexual and homosexual sex, unless one of the persons is in a position of special care in respect of the other person (eg a coach, teacher etc.), in which case the other person must be at least 18 years.

Failing to notify a sexual partner, before sex, of a sexually transmitted infection you know you have (including HIV), and without taking reasonable precautions to prevent transmission of that condition, is an offence under s 79 of the *Public Health Act 2010* (NSW). Intentionally or recklessly infecting a person with HIV could, in some circumstances, also amount to an offence. For more information, see Criminal and public health offences at [26.230].

Extinguishment of historical homosexual offences

In 2014, the *Criminal Records Act 1991* (NSW) was amended to allow for the extinguishment of criminal convictions for certain historical homosexual offences. Extinguishment effectively clears a person's criminal history and the person is then no longer required to disclose that conviction ever existed for any purpose (s 19F).

An application for extinguishment can be made to the NSW Department of Justice for free by completing a simple form available here: www.justice.nsw.gov.au/Pages/legal-info-services/Historical-homosexual-offences.aspx.

The applicant must provide their name, date of birth, contact details and, if known, the person's name and address at the time of conviction, and the time when and court where the conviction was made. If the convicted person is deceased, an application can be made posthumously by their personal legal representative, or their spouse, de facto partner, parent, child or a person with whom they were in a close personal relationship (see [34.30] for the definition of

"close personal relationship"). The NSW Department of Justice may search police and/or court records, so applicants who do not have all the relevant details are still encouraged to apply.

A conviction may be extinguished if the Department of Justice is satisfied that:

- the sexual activity resulting in the conviction was consensual
- the persons involved were over the current age of consent (16 years, or 18 if one person was in a position of special care in respect of the other person)
- the conviction was recorded for one of the eligible historical offences (including buggery, attempted buggery, indecent assault on a male, an act of indecency with another male and homosexual intercourse with a male over the relevant age). A full list of the eligible historical offences is available on the website listed above.

[34.470] Giving evidence against a partner, parent or child

The spouse, de facto partner, parent or child of a defendant in a criminal proceeding can object to giving evidence as a witness for the prosecution in most criminal matters (*Evidence Act 1995* (NSW) and (Cth), s 18). Courts will then determine whether the objection will be sustained.

Same-sex partners (even those who do not live together) qualify as de facto partners and the definition of a "child" is broad, including a child who is living with the person as if they were a member of the person's family (Dictionary, Pt 2, cll 10-11).

[34.480] Domestic violence

Apprehended personal violence orders (APVOs) are available to someone who fears violence at the hands of a known person (such as a neighbour or co-worker).

Apprehended domestic violence orders (ADVOs) are available to those who fear violence from persons such as a partner or former partner, a relative, carer or members of the same household (see Apprehended violence orders in Chapter 19, Domestic Violence).

The Inner City Legal Centre's Safe Relationships Project provides court assistance to persons in same-sex relationships or who are transgender or intersex and wish to apply for an ADVO or APVO. See also, Chapter 19, Domestic Violence for more information.

Contact points

[34.490] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.relayservice.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online see www.tisnational.gov.au.

See also Contact points for Chapter 24, Family Law.

ACON (LGBTI Health and HIV/AIDS organisation)

www.acon.org.au

Coffs Harbour Outreach

ph: 6651 6017

Hunter

ph: 4962 7700

Northern Rivers

ph: 6622 1555

Port Macquarie Outreach

ph: 6584 0943

Sydney

ph: 9206 2000 or 1800 063 060 (9283 2088 for hearing impaired)

Regional Outreach — Southern and Far West Regions

ph: 9206 2114 or 1800 063 060

Adoption and Permanent Care Services

See Family and Community Services, Department of

Anti-Discrimination Board of NSW

www.antidiscrimination.justice.nsw.gov.au

ph: 1800 670 812 (rural and regional areas only)

(TTY numbers available online)

Newcastle Office

ph: 4903 5300

Sydney Office

ph: 9268 5544

Wollongong Office

ph: 4267 6200

Family and Community Services, Department of

www.community.nsw.gov.au

Central Office

ph: 9377 6000 or 9716 2222

Adoption and Permanent Care Services

www.community.nsw.gov.au/adoption

Child Protection Helpline

ph: 132 111

For a list of the department's regional offices and other services see Contact points in Chapter 7, Children and Young People.

Fostering NSW

www.fosteringnsw.com.au

ph: 1800 236 783

Gay and Lesbian Counselling Service

www.glcsnsw.org.au

ph: 1800 184 527 or 8594 9596

Gay and Lesbian Immigration Task Force

www.glitf.org.au

ph: 9283 4031

Gay and Lesbian Rights Lobby

www.glrl.org.au

ph: 9571 5501

HIV/AIDS Legal Centre (HALC)

www.halc.org.au

ph: 9206 2060

Human Services, Department of (including Centrelink, Medicare and Child Support)

www.humanservices.gov.au

Inner City Legal Centre

(Provides a specialist gay, lesbian, transgender and intersex legal service and domestic violence court assistance program)

www.iclc.org.au

ph: 9332 1966 or 1800 244 481 (toll free)

Pride in Diversity

www.prideindiversity.com.au

ph: 9206 2139

Relationships Australia (NSW)

www.relationships.org.au

ph: 1300 364 277

For a full list of locations where Relationships Australia's services are available see Contact points in Chapter 26, Family Law.

Welfare Rights Network

www.welfarerights.org.au

Welfare Rights Centre (Sydney)

ph: 9211 5300 or 1800 226 028 (for people outside the Sydney metropolitan area)

Illawarra Legal Centre (Wollongong)

ph: 4276 1939

Women's Legal Resources Centre

www.womenslegalnsw.asn.au

ph: 8745 6988 or 1800 801 501 (free call in rural areas)

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