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Same-sex Couples and Their Families

Ghassan Kassisieh – Solicitor

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[34.10] Following significant reforms, equal rights and responsibilities have now been extended to same-sex couples and (most) same-sex parents across all federal and New South Wales laws.

Given these laws now extend to protect same-sex couples and their children in most areas, this chapter only addresses areas where particular considerations remain relevant. Otherwise, same-sex couples should assume they have the same rights and entitlements as other couples and families and can rely on the information provided in other chapters as to their substantive rights and entitlements.

Who is a partner?

[34.20] Australian law generally recognises two types of partners: *married spouses* and *de facto partners*. Most states and territories also provide for relationships to be registered under *relationship registry* or *civil partnership* schemes (referred to in this chapter 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 [34.30]). However, registration *may* assist in proving the existence of a relationship or provide some formal recognition to partners who do not wish 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 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 (eg, property division upon relationship breakdown). Whether the particular legislation uses the central definition or a specific definition, the de facto principles are similar.

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.

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 opposite-sex 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.

Specific de facto definitions in particular laws

Some laws include definitions of a de facto relationship which differ from the central de facto definitions. This includes taxation, migration, social security and family law. However, these definitions are similar in effect and tend to include similar considerations.

Some laws include additional time limitations or stipulations before a de facto relationship will be recognised. For example:

- NSW intestacy rules (which govern the distribution of property for those who die without a valid will) recognise a de facto or registered relationship in existence for a continuous period of two years or which resulted in the birth of a child (see [40.180] and [40.190]);
- the NSW victims' compensation scheme recognises a de facto or registered partner who cohabited with the victim for two years (see Chapter 39, Victims Support);
- former de facto partners can apply to the Family Court of Australia or Federal Circuit Court (the "*federal family courts*") for a property settlement upon the breakdown of their relationship where the aggregate length of their de facto relationship was at least two years, there is a child of the de facto relationship (see [34.70]), 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, South Australia, Tasmania or the ACT (see [24.350]);
- while there is generally no strict time limit before partners may be recognised as a "member of a couple" for social security purposes, Centrelink may recognise a person as independent for the purposes of Youth Allowance after 12 months of being in a de facto relationship or if a relationship is registered (see [36.300] and [36.90]);
- many visa categories require de facto relationships to exist for at least 12 months before a visa application is made, although that requirement can be waived in certain circumstances, such as where the relationship has been registered or there are compelling and compassionate circumstances for the grant of a visa (eg, if the couple have a child or it is dangerous for a same-sex couple to live together overseas) (see [28.80]).

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 same-sex partner, or same-sex couples, to prove the existence of their de facto relationship in some circumstances.

When proving the relationship may be necessary

Proving a relationship may be necessary when a couple, or one of the partners, wish to access entitlements or to assert rights. Same-sex couples can prove their relationship in the same way as other couples. Anti-discrimination laws may protect same-sex partners who are treated less favourably than a heterosexual couple in accessing their entitlements or asserting their rights in a range of areas, such as in employment, the provision of goods and services, and in government programs (see Chapter 17, Discrimination for more information).

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/or 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. Also many rights can simply be accessed by declaring you are in a de facto relationship on a prescribed government-issued form.

A relationship can also be demonstrated through many other kinds of evidence of cohabitation 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, South Australia, 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 civil union or registered partnership overseas can also use their civil union or registration certificate as persuasive evidence of a de facto relationship. There is no automatic recognition of foreign same-sex civil union or partnership schemes in NSW – although foreign same-sex marriages are now generally recognised (see [34.50]).

"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, South Australia and Victoria have introduced relationship registration schemes (the ACT has two in fact, a civil partnership *and* a civil union scheme). These schemes allow those who do not wish 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 (eg, allowing de facto partners to waive the general two-year length of relationship requirement before property division can be sought through the federal family courts).

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 $223 (or $407 if the couple also wish to have a ceremony performed at the registry).

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, South Australia, 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 (eg, 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 $82 (or $142 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.

Revocation of registered relationship on commencement of marriage equality

On 9 December 2017, the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) came into effect. From that date, same-sex marriages validly entered into overseas were recognised in Australia (subject to some general exceptions under the *Marriage Act 1961* (Cth)).

If one of the parties to a NSW registered relationship was already in a same-sex marriage on 9 December 2017, the registered relationship was automatically revoked immediately prior to the recognition of that marriage on 9 December 2017 (*Relationships Registration Act 2010* (NSW), s 10A).

This provision is intended to avoid any overlap in the period in which a same-sex marriage and registered relationship are recognised.

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 or Tasmania. At the time of writing, NSW had not updated its regulations to automatically recognise registered relationships from South Australia.

NSW does not automatically recognise registered carer relationships from Victoria or Tasmania 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, South Australia, 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] Marriage equality for same-sex couples

Getting married

On 9 December 2017, the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) came into effect. From that date, marriage became defined under the *Marriage Act 1961* (Cth) as "the union of 2 people to the exclusion of all others, voluntarily entered into for life" (s 5). Same-sex couples are now able to legally marry in Australia. For information on the procedure for getting married, see [24.30].

Foreign same-sex marriages

Same-sex couples who validly marry overseas (and those who were already married) are recognised in Australia as married from 9 December 2017, subject to some general exceptions under the *Marriage Act 1961* (Cth). For information on the recognition of foreign marriages, see [24.50].

Getting divorced

Same-sex couples who have married in Australia or who have married overseas (whether before or after 9 December 2017), can now access divorce proceedings in Australia in the same way as opposite-sex married couples. For information on the procedure for getting divorced, see [24.140].

These reforms address the dilemma previously faced by same-sex couples who had married overseas but who were unable to divorce because of the discrimination against same-sex married couples in Australian law and residency requirements for divorce in their country of marriage (see *C v Australia*, views of the United Nations Human Rights Committee, adopted 28 March 2017, CCPR/C/119/D/2216/2012).

Transitional provisions for certain family law matters

With the recognition of foreign same-sex marriages from 9 December 2017, transitional provisions in certain family law matters were included for spouses who had entered into same-sex marriages overseas prior to that date. For example:

- if those spouses were parties to a de facto proceeding before the federal family courts on 9 December 2017, those proceedings would now continue as proceedings between a married couple;
- if those spouses were parties to a Binding Financial Agreement under the laws applying to de facto partners on 9 December 2017, that agreement would remain valid and binding and would be treated as an agreement between a married couple.

For more information on marriage equality in Australia, see https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Pages/marriage-equality.aspx.

[34.55] Extinguishment of historical homosexual offences

The equal recognition of same-sex partners has come a long way in the 35 years since the decriminalisation of male homosexuality in NSW in 1984.

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, see 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 "close personal relationship" for the definition at [34.30]). 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.

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.

Who is a parent?

[34.60] Most same-sex families can expect to be treated equally under NSW and federal law. 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 v 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 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 [34.80]. The situation for single women who conceive a child through assisted means is more complex (see below).

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, a person is also recognised as a parent where they have given their consent to the adoption of a child by their married or de facto partner, even though they have not adopted the child themselves (*Family Law Act 1975* (Cth), ss 60F(1)(b), 60HA(1)(b)). For more information on this type of recognition, see [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 [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 whether their child was conceived through sexual intercourse or by assisted means.

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

In the recent case of *Masson v Parsons* [2019] HCA 21 (*Masson v Parsons*), the High Court agreed that a man who provided semen to his female friend (who was not married or in a de facto relationship at the time of conception) on the "express or implied understanding" that he would be the child's parent, would be registered on the birth certificate as her parent (as he was) and would support and care for her from birth as a parent (as he had done) could be recognised as a "parent" for the purposes of the *Family Law Act*. The High Court left open the question of whether a man who only provided his semen to a single woman to facilitate an "artificial conception procedure" could be recognised as a "parent" under the *Family Law Act*.

Absent provisions in the *Family Law Act* to the contrary, the High Court ruled that the question of whether a person qualifies under that Act as a parent is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of the word "parent" and the relevant facts and circumstances of the case at hand. One provision that applies to the contrary, however, is the parentage presumption in s 60H(1) which applies to women who conceive a child through assisted means with their consenting married or de facto partner. Where that presumption applies, the woman and her consenting married or de facto partner are recognised as legal parents (see [34.80]).

The High Court decision in *Masson v Parsons* raises the question of whether donor-dads and/or sperm donors may qualify as parents under federal, or even NSW, laws more generally. Many federal laws recognise a parent–child relationship if that child is otherwise recognised as the child of a person within the meaning of the *Family Law Act*. However, the High Court considered that a more restrictive definition of "parent" applied for the purposes of the child support regime in the *Child Support (Assessment) Act 1989* (Cth) (*Masson v Parsons* at [28]), meaning that the recognition of donor-dads and/or sperm donors may also be inconsistent.

The High Court has also suggested that NSW laws clarifying that a sperm donor is not a parent (see *Status of Children Act 1996* (NSW), ss 14(2), 14(3)) are inoperative to the extent they are inconsistent with federal family laws governing parentage where a woman who is not married or in a de facto relationship conceives a child through assisted means. The full impact of the decision, and any reform which may follow from it, are still unknown.

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 (eg, the authority to consent to medical treatment on behalf of a child or make decisions about a child's education or religion).

While legal parents generally have parental responsibility, their parental responsibility may be taken away from them and given to others (eg, where a child is fostered by another person) or equally shared with them and other people (eg, 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 [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.

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, or persons who have been granted "parental responsibility" under federal family court or NSW Children's Court orders, may lay claim to entitlements (or owe obligations to children) regardless of their legal relationship with the child.

Laws which recognise broader parent-child relationships than those who are otherwise recognised as legal parents through the effect of parentage presumptions, adoption or surrogacy parentage orders include:

- NSW family provisions laws (see [40.310]);
- NSW victims' compensation laws (see [39.60]);

- NSW guardianship laws governing who may give consent to medical or dental treatment on a behalf of a child (*Guardianship Act 1987* (NSW), s 33A(2); see also [16.550]);
- federal paid parental leave laws which may recognise the intended parents in a surrogacy arrangement even where those parents are not recognised under a surrogacy parentage order (see Paid parental leave and surrogacy arrangements at [34.170]);
- federal and NSW workers' compensation schemes which recognise "dependants" who are wholly or partly dependent on the deceased employee, including any person to whom the employee stood/stands in the position/place of a parent (see [3.570]; see also *Safety, Rehabilitation and Compensation Act 1988* (Cth), ss 4, 17(3), 17(4), 19(8));
- superannuation death benefits which may be distributed to financial "dependents" of members of regulated superannuation funds (see [37.260]);
- the Medicare and PBS Safety Net family thresholds which recognise as a "dependent child" (subject to certain qualifiers) a child in the custody, care and control of the person or their partner (*Health Insurance Act 1973* (Cth), s 10AA(1), 10AA(7); *National Health Act 1953* (Cth), s 84B(1), 84B(4));
- family assistance which recognises as an "FTB child" (subject to certain qualifiers) a child in respect of whom a person is legally responsible (*A New Tax System (Family Assistance) Act 1999* (Cth), s 22; see also [26.210]).

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 (eg, 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 (eg, 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 [34.110].

[34.80] Laws on parentage for lesbian co-mothers

New South Wales law

Lesbian married, 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 married, or in a de facto or registered relationship with each other, at the time of conception (see [34.30], [34.40] and [34.50])

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 (eg, 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*, s 14(1A)). Her consent is presumed, but can be rebutted by evidence.

The 2008 reforms which first introduced these parentage presumptions for lesbian co-mothers were wide-ranging in effect. In particular:

- the parentage presumptions covered lesbian families with children born prior to the reforms, and also extended to families which had separated (the only exception being to property interests which vested prior to the reforms) (*Status of Children Act*, Sch 2, cl 7);
- the parentage presumptions covered 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).

Since 15 June 2018, lesbian married spouses also have the benefit of a rebuttable presumption of parentage as a consequence of their marriage in respect of a child born or conceived during their marriage (*Status of Children Act*, s 9).

Birth certificates

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

For children born before the 2008 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, eg, *Maurice v Barry* [2010] FamCA 687 at [16]; *Dent v Rees* [2012] FMCAfam 1303).

Removal of donor from the birth certificate

AA v Registrar of Births Deaths and Marriages [2011] NSWDC 100 (*AA*) 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]; 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 parentage presumptions contained in the *Family Law Act 1975* (Cth).

The *Family Law Act 1975* also clarifies that, in respect of a child conceived by a lesbian married or 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 in respect of a child conceived through an "artificial conception procedure" (including IVF, donor insemination or self insemination), lesbian couples must have been married, or in a de facto or registered relationship, 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 federal definitions of 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.

Protecting the co-mother's legal status

In *Keaton v Aldridge* [2009] FMCAfam 92, the Court declined to find that a co-mother was a "parent" under the *Family Law Act 1975* (Cth) because the Court was not convinced that the mothers were in a de facto relationship at the time of the conception of the child. Whether a de facto relationship exists at all, and when it commenced if it did, can be contested between parties during the breakdown of a relationship.

Lesbian couples who are planning to conceive a child together using assisted means can take steps to protect the legal recognition of the co-mother by considering whether to marry or register their relationship prior to the conception of the child. If neither of those options appeal to you, making clear your intentions and collecting evidence of your relationship at the time of conception may be helpful in proving a de facto relationship existed at the time of conception (see Proving a de facto relationship at [34.30]). In the event of a breakdown of a relationship, parenting orders can also be sought through the federal family courts by any person who is concerned with the care, welfare and development of a child, regardless of their legal parental status (see Parental responsibility and parenting orders at [34.70]).

[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*, ss 60F(1)(b), 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, and since 15 June 2018, can now also do so as a married couple.

Same-sex couples are eligible to apply to adopt children who are known to them (eg, 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. For further information on the criteria for adoption by couples, step-parents and relatives, see [7.660]. For more information on the process and effect of adoption generally, see Chapter 7 at [7.580]. Specific information relevant to same-sex couples is also discussed further at [34.150].

Religious organisations

Four organisations facilitate adoption locally in NSW: DCJ and three non-government organisations, Barnardos, Family Spirit (a partnership between CatholicCare and Marist180) and Anglicare. The latter two are faith-based organisations.

A specific exemption is provided for faith-based adoption agencies under s 59A of the *Anti-Discrimination Act 1977* (NSW). Agencies such as Family Spirit 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 married de facto or registered partner at the time of conception are the legal parents of the child. Where the birth mother is not married or in a de facto or registered relationship at the time of conception, she will be the legal parent and there is uncertainty over whether the biological father may be recognised as a legal parent or whether she will be the sole legal parent (see Children conceived through assisted means by single women at [34.70]). 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 a consenting birth mother and her partner 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 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 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, eg, *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*, 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 [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, the legal situation 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 v 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 v Karnchanit* [2012] FamCa 502 at [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 woman who intends to have a child with the involvement of a gay male friend who will be a donor-dad or have some parental role.

Under such parenting models, the law automatically recognises some of the parents (under one of the four categories noted at [34.70]), but others may be left without formal 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 v 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 High Court and federal family courts have in some cases recognised the donor-dad as a parent (see Children conceived through assisted means by single women at [34.70]).

In all cases, a court will consider what is in the best interests of a child. While 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 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 (eg, 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) (see Functional definitions of "child" at [34.70]).

[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 limited cases, a same-sex de facto step-parent may have a secondary obligation to provide child support under s 66D of 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 have 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*, 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, while 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 married or 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* 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, 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, although the National Health and Medical Research Council's ethical guidelines on assisted reproductive technology advises clinics not to accept donations from donors who wish to

direct their donation only to particular ethnic or social groups. 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)).

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 must meet regulatory requirements and have policies and procedures in place to minimise the transmission of infectious diseases from the donor to the recipient or the person who would be born. These policies and procedures must be reviewed in light of new evidence. The new NHMRC guidelines remove the former outright prohibition on accepting donations from people at an increased risk of transmissible infections, which had a disproportionate impact on gay men at increased risk of HIV infection. The former guidelines were prescribed as part of the infection control standards which NSW clinics must abide by and regulations have not yet been amended to reflect the new guidelines (*Assisted Reproductive Technology Regulation 2014* (NSW), cl 8(b)).

Check with the clinic regarding their practices for screening sperm donors.

[34.150] Adoption

From 15 September 2010, same-sex de facto and registered partners became eligible to apply for adoption in NSW, and since 15 June 2018, can now also do so as married spouses. 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 [7.580] 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 2017–2018, there were only 8 adoptions in NSW of children not previously known to their adoptive partners, and 186 known adoptions (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 [7.700] for further information.

Intercountry adoption

In 2017–2018, there were 65 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 DCJ 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 June 2019, same-sex couples were only eligible to adopt children from South Africa and Columbia. 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. Columbia's intercountry adoption program has an emphasis on placing older children, sibling groups, and children with special needs, with restrictions on children under 6 being adopted unless one of the prospective partners is of Columbian descent.

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. No intercountry adoptions by single people were finalised in 2017–2018 (AIHW).

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 My Forever Family NSW website (www.myforeverfamily.org.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 in NSW in recent years, with 142 known carer adoptions in 2017–2018. 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. For couples who are undertaking surrogacy overseas, additional considerations apply regarding the granting of Australian citizenship by descent for children born through surrogacy arrangements.

Commercial surrogacy

Under the *Surrogacy Act*, 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 2019* (Cth), Sch 1, cl 2.38.7).

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 [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

While 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.

Children born overseas via surrogacy

To deal with the situation of children born overseas via surrogacy arrangements, the Department of Home Affairs has developed a practice of conferring Australian citizenship by descent on children born through surrogacy overseas where at least one of the intended parents is an eligible Australian citizen. The Department advises that it exercises extreme caution in such cases to ensure that citizenship provisions are not misused to circumvent adoption or child welfare laws.

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 (s 16). 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 approach to who is a "parent" in the area of citizenship does not confer legal parentage to the intended parent(s) more generally (see [34.100]).

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.

For the conferral of citizenship by descent, the Department advises that evidence of a biological relationship may not be sufficient in the absence of other supporting information. The Department expects full information to be provided about the surrogacy arrangement, including:

- evidence establishing the surrogate mother's identity and confirming that the child was not abducted or obtained via trafficking or other unlawful means. This includes providing certified copies of the surrogate mother's identity documents and evidence that she gave informed consent to the surrogacy arrangement;
- evidence of the surrogacy contract, which must itself be signed by the surrogate mother, the commissioning parents and the clinic overseeing the surrogacy.

The contract should state the surrogate mother's full name, address and age, that she gave informed consent to the surrogacy arrangement, what fertility procedures the surrogate mother and the commissioning parents undertook, the source of the genetic material for the embryo, and a schedule of fees for key milestones (such as confirmation of pregnancy, three-month scan) and any other tests or appointments.

The contract must also reference the surrogacy laws of the country where it took place and the country's laws relating to the commissioning parents' legal rights to the child (if applicable), and state how custody of the child will be transferred to the commissioning parents after the birth.

The Department advises that, in countries where there are no surrogacy laws or the laws are not clear, the application must be signed by the surrogate mother and her husband or partner, if she has one, who are the "responsible parents". The Department may also require the surrogate mother to attend an interview. A DNA test may also be required.

Some further exceptions and requirements to the conferral of citizenship by descent also generally apply. 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).

Citizenship will also 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.

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, while 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.

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 [34.170]). Many of the requirements for evidencing conferral of citizenship by descent would also evidence potential breaches of criminal law in NSW (eg, evidence of a commercial surrogacy agreement).

For more information, see https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/by-descent/international-surrogacy-arrangements.

Paid parental leave and surrogacy arrangements

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)). However, 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* (Cth), r 2.30).

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

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 also be payable to certain persons, including persons who are caring for a child born through a surrogacy arrangement (*Paid Parental Leave Act*, 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.

The decision-maker must also 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 (*Paid Parental Leave Rules 2010*, r 3A.14). The scheme does not require a surrogacy parentage order to have been granted to the person.

Contact points

[34.180] 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.communications.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.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

ACON (LGBTI Health and HIV/AIDS organisation)
www.acon.org.au
Coffs Harbour Outreach
ph: 6651 6017
Hunter
ph: 4962 7700 or 1800 063 060
Northern Rivers
ph: 6622 1555 or 1800 633 637
Port Macquarie Outreach
ph: 0418 904 116
Sydney
ph: 9206 2000 or 1800 063 060
Regional Outreach — Southern and Far West Regions
ph: 9206 2114 or 1800 063 060

Equality Australia
www.equalityaustralia.org.au

Communities and Justice, Department of – previously Department of Family and Community Services (FACS)
www.dcj.nsw.gov.au
Adoption Information Unit
ph: 1300 799 023 or 9716 3005
www.facs.nsw.gov.au/families/adoption
Child Protection Helpline
ph: 132 111

My Forever Family NSW
www.myforeverfamily.org.au/
ph: 1300 782 975

Gay and Lesbian Rights Lobby
www.glrl.org.au

HIV/AIDS Legal Centre (HALC)
www.halc.org.au
ph: 9206 2060

Inner City Legal Centre
(Provides a specialist gay, lesbian, transgender and intersex legal service)
www.iclc.org.au
ph: 9332 1966 or 1800 244 481 (toll free)

Twenty10 (incorporating the Gay and Lesbian Counselling Service NSW)
www.twenty10.org.au/
ph: 8594 9555 or 1800 184 527 (QLife)

Women's Legal Service NSW
www.wlsnsw.org.au/
ph: 8745 6988 or 1800 801 501

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