

EQUALITY RULES

A GUIDE TO EQUALITY FOR GAY MEN,
LESBIANS AND BISEXUALS UNDER WA LAW

ABOUT EQUALITY RULES

EQUALITY RULES IS A JOINT PROJECT OF GAY AND LESBIAN EQUALITY (WA) INC. AND GAY AND LESBIAN COMMUNITY SERVICES OF WESTERN AUSTRALIA INC. THE AIM IS TO PRODUCE INFORMATION TO EXPLAIN RECENT CHANGES TO THE LAW THAT AFFECT NON-HETEROSEXUAL PEOPLE.

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4. This booklet is intended to provide users with a guide to the law and procedure as it affects people dealing with Family Law issues. It reflects the law current at the date of publication or amendment. Although every effort has been made to ensure the accuracy and correctness of the information, no responsibility for any loss or damage arising from errors or omissions or from changes to the law which have not been updated by the authors is accepted.
5. The information contained in this booklet is not intended to be a substitute for professional legal advice.

FEEDBACK

Please provide any comments about this publication to Gay & Lesbian Equality WA Inc, or to order more more copies.

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community services**
of western australia (inc)

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LESBIANS AND BISEXUALS UNDER WA LAW

September 2003

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01 ABOUT THE LAW

'RIGHTS' AND THE LAW

There is much debate in Australia about rights and their legal recognition. Although the Constitution does not contain any explicit statement of the rights of citizens as in a Bill of Rights, many rights have gradually become part of our law.

Laws change over time, as society's values change and as a result of social and political movements claiming rights.

This book does not focus on the debates about rights. Rather, it aims to explain the existing law, how it affects you and what you can do to strengthen your legal position.

WHERE THE LAW COMES FROM

There are two main sources of law in Australia:

- *Legislation or Acts of Parliament.*

This is made by both the State Parliament and the Commonwealth (Federal) Parliament. There are also regulations made in conjunction with Acts of Parliament.

- *Common law.*

This is made by judges in court when deciding cases. It evolves by judges adapting and applying the decisions of previous similar cases and relies on principles of 'fairness' and 'reasonableness'.

State and federal law

Some areas of law are federal and some are state. Federal laws apply throughout Australia. State law applies only in the state where it is made. This publication concentrates on the state and federal law that applies in Western Australia.

LEGAL RECOGNITION FOR ALL COUPLES

In 2002 and 2003 the Western Australian Parliament passed laws giving same-sex attracted individuals and all long-term couples legal recognition in a number of areas.

The main ones are:

- anti-discrimination protection
- inheritance rights,
- stamp duty exemption,
- a system for property division if you split up,
- accident and workers compensation if your partner dies,
- partner's state superannuation,
- recognition as 'next of kin',
- protection from discrimination on the basis of marital status,
- access to adoption
- access to reproductive technology
- recognition as a parent of a non-biological child in some cases.

These laws do not create new rights specific to gay men, lesbians and bisexuals – rather, they remove previous discrimination. The law now recognises de facto partnerships regardless of the gender or sexuality of the people involved. This includes transgender and intersex people.

Concept of 'de facto partner'

These laws create a common definition for de facto relationships, called 'de facto partner'. This covers most long-term couples of any sex or gender that aren't married. This includes transgender and intersex people. Many laws were changed by the law reform Act to provide this common definition in WA state laws only. More information on who is considered de facto can be found in the Relationships section. In this booklet de facto partner usually means a de facto couple of any sex or gender when talking about WA state law.



No effect on federal law

These Acts amend WA law only. They do not change federal or commonwealth law. For example, they do not give people of the same sex the right to marry, as this is federal law. A recent court decision suggests that in some cases a person who has had a gender reassignment can marry someone of the opposite sex.

Gender Identity

The law is traditionally based on the notion of two sexes only - male and female. This has left many transgender and intersex people in legal limbo or having to fit uncomfortably into one of these two sexes. The law is changing slowly to be gender neutral and only in isolated cases e.g. WA's new laws for de facto couples.

There is discussion in this booklet of the legal status of transgender people and their relationships under the law. However, in explaining the law as it stands the booklet sometimes focuses on traditional terms that rely on the notion of only two sexes e.g. – same sex/opposite sex or homosexual/heterosexual or gay/straight. The producers of this book do not

wish to offend people with non-traditional gender identities and we have avoided this terminology wherever possible. However, in the interests of plain language we use the term ‘transgender’ generally to include people with non-traditional gender identities

WHERE TO GET HELP OR MORE INFO

International Foundation for Androgynous Studies (IFAS)

PO Box 1066 Nedlands 6909
NEDLANDS WA 6907
(08) 9487 0482

www.ifas.org.au

TransWest: The Transgender Association of WA

PO Box 1944
Subiaco WA 6904

Chameleon Society of WA (Inc.) (for cross-dressers and transsexuals)

PO Box 367
Vic Park WA 6979
0418 908 839

chameleonswa@email.com
www.chameleonswa.com

Gay & Lesbian Community Services of WA (Inc.)

Room 2, City West Lotteries House
2 Delhi Street
West Perth WA 6005
Counselling and Information line:
(08) 9420 7201 or 1800 184 527

admin@glcs.org.au
www.glcs.org.au

Freedom Centre

(08) 9228 0354

info@freedom.org.au
www.freedom.org.au

TransCommunityWA

Check www.equalityrules.info for contact details

02 TAKING ACTION

WHAT YOU CAN DO

There are some simple steps people can take to make the most of the law.

- Inform yourself about your rights.
- Get legal advice on your financial and parenting arrangements.
- Make a Will.
- Formalise your property arrangements with a legal agreement.
- Make a power of attorney.

INFORM YOURSELF ABOUT YOUR RIGHTS

The first and most important step is to find out how you are affected by legal issues in your own life. This book is a good starting point, but you may need to use other resources as well.

There are many useful Internet sites, publications and organisations that can give you information. Some are listed in this book. You might also want to get in touch with groups such as Gay and Lesbian Equality to find out what you can do to help reform our laws. We will only achieve change by speaking out and working towards a fairer system.

GET LEGAL ADVICE

You can get free or cheap legal advice or information from Legal Aid WA on 1300 650 579

WHERE TO GET HELP

Legal Aid WA

Information Line: 1300 650 579
TTY: 1800 241 216

www.legalaid.wa.gov.au

Community Legal Centres Association

for referral to your nearest centre
(08) 9221 9322

Law Society of WA

Referral Service
(08) 9322 4911

www.lawsocietywa.asn.au

or a community legal centre. Further legal representation or complex advice may depend on a means test and other guidelines.

Some private solicitors offer a first appointment free of charge or at low cost – always ask about this.

The Law Society's Law Access has listings of lawyers who specialise in particular areas of law – (08) 9322 4911.

Gay and Lesbian Community Services' Counselling and Information line has a list of gay-friendly lawyers – (08) 9420 7201.

The role of a lawyer is to explain your legal position, give you options, and advise you on the best course of action.

- They must act on your instructions.
- You do not have to take their advice.
- Make sure you ask questions if there's anything you don't understand.
- If you encounter discrimination from a lawyer, you can complain to the Equal Opportunity Commission (see the Discrimination section) or the Legal Practitioner's Complaints Committee.
- Always check costs with a lawyer before signing a contract with them. You can ring around to compare costs and services.

Gay & Lesbian Community Services

for a list of gay friendly lawyers
Counselling and Info Line – (08) 9420 7201
or 1800 184 527

www.glcs.org.au

Legal Practitioners Complaints Committee

for complaints about lawyers
(08) 9461 2299

Telephone Interpreter Service

13 14 50

MAKE A WILL

Everyone over the age of 18 should have a Will. Even though you may not think you own very much, everyone has personal possessions that they might want their partner or close friends to have.

Making a Will is the best way to ensure that your property goes to the people of your choice.

If you die without a Will your property will be divided up according to a formula in WA law. Changes to the law have given inheritance rights to all couples no matter what sex the people are.

That means that if you have been living with someone as a de facto partner at the time of your death, that person has the right to inherit your property. For the legal definition of 'de facto partner' see the Relationships section.

If you are married your spouse may also have some inheritance rights.

If you want to keep control over who inherits your property, you must make a Will.

Despite the new law, your partner's right to a share of your superannuation may be limited. Leaving it to them in your Will may be the only way they will benefit from your superannuation after you die (see the Work and Money section).

For more information about Wills (and funerals) and what happens if there isn't a Will, see the Death and Inheritance section.

MAKE A LEGAL AGREEMENT

You can formalise property ownership or financial arrangements between you and your partner by making a property agreement. (It is also important to keep financial records and receipts.)

This will help avoid future problems if your relationship breaks down. This is discussed further in the Property section. You can also

make a legal agreement about parenting arrangements (see the Parenting section). It is important to get legal advice about these issues.

AUTHORISE OTHERS TO ACT FOR YOU (POWER OF ATTORNEY)

Your 'legal capacity' to make decisions for yourself can be affected by illness or injury. You can protect your interests in the long term by appointing someone now who will have the power to make important decisions for you if you ever become legally incapacitated (see Types of Powers of Attorney below).

You can appoint your partner or a friend or anyone else you choose. The person you appoint should be someone reliable who you trust. Before giving someone a power of attorney, discuss it thoroughly with the person you intend to appoint. Your attorney (or guardian) must act 'in your best interests'. To help them do this you should talk about what you would want in various situations.

If you don't authorise someone to act for you in the future and you become legally incapacitated, decisions will be made for you by someone you haven't chosen. This could be your 'next of kin' (possibly, but not necessarily, your partner) or a guardian appointed by the state government. This is discussed in relation to medical decisions (see the Health section).

'LEGAL CAPACITY'

When a person makes any financial or legal decision or transaction, they must have the legal capacity to do so. 'Capacity' means that they have to understand the consequences of a decision, be able to take responsibility for making a choice, and be able to make a choice based on the risks and benefits for them. For example, a person might lose legal capacity if they were in a coma or had dementia.

TYPES OF POWERS OF ATTORNEY

• *Power of Attorney*

A general power of attorney enables someone to act on your behalf in relation to property and finances. This is the sort of power of attorney you would use to allow someone to operate your bank account while you are overseas. It must be given when you have legal capacity to make decisions and is no longer valid if you lose legal capacity.

• *Enduring Power of Attorney*

An enduring power of attorney is a legal document in which one person gives another the legal authority to make financial and legal decisions on their behalf. A person can only make an enduring power of attorney whilst they are still capable of making those legal and financial decisions for themselves. It does not apply to consent to medical treatment.

An enduring power of attorney must be signed while a person still has legal capacity. It will remain effective even though they may later suffer loss of capacity due to disability or illness. Once capacity is lost through disability or illness, an enduring power of attorney cannot be signed or revoked. You can cancel them at any time as long as you have capacity.

• *Guardianship and Administration*

If someone loses or doesn't have the capacity to make decisions and no enduring power of attorney exists then the Guardianship and Administration Board can appoint a guardian or administrator. This gives the appointed person power to make decisions about general lifestyle, day-to-day care and living arrangements. It can also allow the guardian to consent to medical treatment on the person's behalf.

FOR MORE INFO

Department of Justice website

for a kit, forms and info on enduring powers of attorney and guardianship and administration

www.justice.wa.gov.au

Public Trust Office

for enduring powers of attorney

(08) 9222 6777

Freecall (non-metro): 1800 642 777

Guardianship and Administration Board

for guardianship orders

(08) 9278 7350

Freecall: 1800 191 009

Office of the Public Advocate

for information on both enduring powers of attorney and guardianship

(08) 9278 7300

Freecall: 1800 807 437

03 DISCRIMINATION

People who are attracted to the same sex or do not conform with gender stereotypes still face discrimination and harassment in a variety of situations.

There is both state and federal legislation making discrimination and harassment unlawful in certain areas and on certain grounds. Both the federal and state laws may cover your circumstances. The legislation is not identical so before making a claim you should seek legal advice about whether your circumstances fit within the law. You should also find out whether you should bring a claim to the Equal Opportunity Commission (WA) or the Human Rights and Equal Opportunity Commission (Commonwealth) or some other place.

Time limits apply in most cases so you should get advice as early as possible.

WHAT IS DISCRIMINATION?

Discrimination occurs where, because of a characteristic covered by the legislation (such as sexuality, or disability) one person treats another less favourably than they would treat a person who didn't have that characteristic.

Not all adverse treatment is discrimination, and not all discrimination is against the law. Discrimination is unlawful when

- it happens because of an attribute or "ground" covered by the law; and
- it happens in an area of public life covered by the legislation; and
- it is not covered by an exception or exemption.

Grounds Of Discrimination

There are various grounds of discrimination in anti-discrimination legislation. Sometimes people are discriminated against because of

more than one attribute. The attributes include sexuality (including presumed sexuality), gender, marital status (including being single or in a de facto couple of any sex), age, physical features, pregnancy, status as a parent or carer, race, ethnicity and national origin, and religious and political beliefs.

SEXUAL HARASSMENT

The Equal Opportunity Act 1984 (WA) and the Sex Discrimination Act (Cth) prohibit sexual harassment in some areas. In some cases, such as sexual assaults, sexual harassment can also be a crime.

What is sexual harassment?

Sexual harassment means unwelcome conduct of a sexual nature (including an unwelcome sexual advance or request for sexual favours). Sexual conduct includes making a statement of a sexual nature concerning a person – whether the statement is written or spoken and whether it is made to the person directly, or in their presence. It can include negative jokes and remarks about someone's sexuality, or unwanted advances by someone of the same or a different sex.

Under the Equal Opportunity Act, the person being harassed must have reasonable grounds for believing that they would be disadvantaged if they rejected the conduct, or they must actually reject the conduct and be disadvantaged as a result. Under the Sex Discrimination Act the conduct must happen in circumstances where a reasonable person would have anticipated the person being harassed would be offended, humiliated or intimidated.

When is sexual harassment unlawful?

Sexual harassment can be unlawful in connection with a variety of areas of public life. Some of the areas in which it is unlawful are employment (including contract or commission

agent work and harassment by employment agents), education, accommodation, and the provision of goods, services or facilities.

SEXUAL ORIENTATION AND DISCRIMINATION

The not so good news...

Discrimination on the grounds of sexuality is not covered in the federal anti-discrimination legislation. However, the Human Rights and Equal Opportunity Commission can investigate and conciliate a complaint of sexual preference discrimination in employment. It is also unlawful under the Workplace Relations Act 1996 (Cth) to dismiss someone because of their sexual preference, or for reasons which include their sexual preference. There are some exceptions to this relating to the inherent requirements of a job, and staff of religious organisations.

The good news...

The Equal Opportunity Act (WA) makes it unlawful to discriminate against someone on the basis of their sexual orientation in some areas of public life. Sexual orientation means homosexuality, lesbianism, bisexuality or heterosexuality. The Act covers discrimination on the basis of a person's actual sexual orientation or discriminating against someone because their sexuality was presumed.

Sexuality discrimination is unlawful in the following areas:

- employment, including contract for service, casual, commission agents, contract workers, partnerships of 6 or more persons, membership of employee or employer organisations, qualifying bodies, and employment agencies
- discrimination by an educational authority in the area of education
- access to places and vehicles

- provision of goods, services, or facilities
- in the area of accommodation
- disposal of land
- membership of a club
- application forms (requiring information about a particular sexual orientation).

Watch this space...

On 4 September 2003, the United Nations Human Rights Committee found that the federal government violated article 26 of the International Covenant on Civil and Political Rights in refusing a pension to a man who had been in a same sex couple. The man had applied for the pension as the dependent of his partner - a war veteran - but it was denied because he was not considered a "member of a couple" under the law. The United Nations has asked the federal government to address this discrimination. (Case No. 941/2000: Young v. Australia)

Article 26 of the Covenant...

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Marital status

Under the federal Sex Discrimination Act 1984 (Cth) discrimination on the basis of 'marital status' doesn't include being in a same sex couple. However, you can complain about discrimination on the basis of your 'single' (i.e. unmarried) status.

Under the Western Australian legislation, it is unlawful to discriminate against someone

because of their marital status. Marital status includes, among other things, being single, a de facto partner or married. De facto partners include partners of any sex. The areas in which discrimination on the ground of marital status is unlawful are similar to those for sexuality – but not identical.

Impairment

Under the Equal Opportunity Act (WA) and the Disability Discrimination Act 1992 (Cth) it is unlawful to discriminate against someone who has an impairment. This can include people who:

- have HIV/AIDS,
- are thought or presumed to have HIV/AIDS,
- may have HIV/AIDS in the future,
- are a carer of someone with AIDS.

Discrimination is allowed if it is 'reasonably necessary' to protect the health, safety or property of any person or the public generally. At work, the employer must consider whether the person can fulfil the 'inherent requirements' of the job, i.e. what is necessary to get the basic job done.

Gender History

It is unlawful under the Equal Opportunity Act (WA) to discriminate against a "gender reassigned person" (i.e. a person who has undergone a gender reassignment procedure and has been issued with a recognition certificate) on the ground of that person's gender history. The areas of public life covered are similar to those covered in relation to sexuality discrimination. A person has a "gender history" if they identify as, or seek to live as a member of a sex which was not their sex at birth.

EXCEPTIONS AND EXEMPTIONS

There are specific exceptions to the times when discrimination is unlawful under each ground. For example, it is not unlawful to do something which aims to ensure that people of a particular sexual orientation have equal opportunities afforded to them or to ensure persons of a particular sexual orientation access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare.

Insurance

Insurance companies can impose different terms or refuse cover to someone on the ground of impairment if it can be supported by statistical data, e.g. smokers are more likely to become ill or die. It may be reasonable to treat someone with HIV differently. It is not reasonable to assume that all gay men pose a greater insurance risk.

Religious beliefs or principles

Discrimination is allowed if it is based on genuine religious beliefs or principles. This includes the actions of religious bodies or schools.

Small business

An employer who employs no more than the equivalent of five full-time employees (not including family members) can discriminate when hiring staff, but not once you are employed.

What You Can Do About Discrimination

Contact the *Equal Opportunity Commission*. The Enquiry Unit can be contacted by telephone on (08) 9216 3934 or toll free on 1800 198 149 or TTY (08) 9216 3936 on each week day, or by email eoc@equalityrules.info.

The Commission can advise you of your legal options under both state and federal law. Your complaint will be dealt with confidentially. The commission is not a court or tribunal, it operates through conciliation. You need to think about what outcome you want. This can include things like an apology, payment of compensation, an undertaking to employ or promote you or to provide accommodation (depending on the case), or a policy change.

Discrimination can be difficult to prove. Nevertheless, changes often occur because someone has made a complaint, and you may help someone else, even if it doesn't improve your situation.

If you are victimised because you have complained, you can make another complaint to the commission about that.

DISCRIMINATION AT WORK

One of the most common forms of discrimination experienced by gay men, lesbians, bisexuals and transgender people is harassment in the workplace. This can take the form of jokes, snide remarks, put-downs, isolation or failing to use a gender re-assigned person's preferred name and pronouns. This can affect work performance, chances of promotion and access to other benefits such as training and professional development.

You can complain about discrimination in your workplace. If you are worried about the confidentiality of your complaint in the workplace, discuss the problem first with the Equal Opportunity Commission. They can advise you of your options. If you think you may be experiencing discrimination or harassment, make sure you consult a doctor, counsellor or similar professional. Apart from helping you to cope, any notes taken may become important evidence in a legal case. Also, it is a good idea to take notes about what is happening. Notes taken around the time of the incidents can be valuable evidence.

What to do

Anti-discrimination legislation

You can make a complaint under the Equal Opportunity Act or the Human Rights and Equal

WHERE TO GET HELP OR MORE INFO

WA Equal Opportunity Commission

Commissioner for Equal Opportunity
Level 2, Hartleys Building
141 St George's Terrace
Perth WA 6000

(08) 9216 3900

www.equalopportunity.wa.gov.au
eoc@equalopportunity.wa.gov.au

Australian Human Rights and Equal Opportunity Commission

Telephone: (02) 9284 9600
Complaints Infoline: 1300 656 419
Privacy Hotline: 1300 363 992
General enquiries and publications: 1300 369 711

www.hreoc.gov.au

United Nations

www.un.org



Opportunity Commission Act 1986 (Cth). There are time limits to making a complaint, so you should get advice promptly.

Workplace Relations Act

Under this federal Act it is unlawful to dismiss an employee because of their sexual preference. You only have 21 days to lodge a complaint with the Australian Industrial Relations Commission, (08) 9464 5172.

You may also have a claim under WA unlawful dismissal legislation. You only have 28 days to lodge a complaint with the WA Industrial Relations Commission telephone (08) 9420 4444.

Union

You can talk to your union representative.

Award or enterprise agreement

The award or agreement relevant to your job may have anti-discrimination provisions similar to the Equal Opportunity Commission.

Workplace policies may also prohibit discrimination and harassment.

WorkCover

If the harassment is causing you stress and you need to take time off work, you may be able to make a WorkCover claim. See your doctor to start the process. Get advice about the applicable time limits.

Professional association

If you or the person you are complaining about are members of a professional association, you can talk to that association.

Police

If you have been physically assaulted or threatened, you can complain to the police (see the Violence section).

04 VIOLENCE

Lesbians, gay men, bisexual and transgender people may not report violence to the police or other organisations for many reasons, including not wanting to 'out' themselves, fear of homophobic responses from police officers or their report not being taken seriously.

Violent behaviour is unlawful and you can take action, no matter who it's coming from. Whether it's 'gay bashing', sexual assault, domestic violence or vandalism, it's an offence and you can report it to the police.

You may also be able to take civil action against the perpetrator for damages. Get legal advice first.

If the police have been violent towards you, you can make a formal complaint.

WHAT IS ASSAULT?

An assault is when a person *strikes, touches, moves, or applies force* to you (directly or indirectly) without your consent. This includes hitting and spitting.

Assault can also include *threats* to harm you made in circumstances that make you fear for your safety. You can report an assault to the police.

There is no time limit for making a report to the police about an assault. However, the sooner you report it, the easier it is for the police to charge the person.

SEXUAL ASSAULT AND RAPE

Sexual assault is when a person 'indecently assaults' another person. This covers sexual acts that don't involve penetration, such as touching breasts or buttocks without consent. (For meaning of consent, see the Sex and Sexual Offences section).

Rape is an act of sexual penetration without consent. Sexual penetration includes penetration of a person's mouth, anus or vagina by another person's penis, an object or another part of the body. It is also rape when one person forces another to penetrate them.

Reported sexual assaults or rapes are usually referred to special police units with expertise in this area. However, there are procedures all police must follow which are designed to support and protect the victim and their rights. For many sexual assault victims, reporting the crime to the police is a difficult decision to make. There is no time limit on reporting these crimes, although reporting immediately may help police to collect necessary evidence. You can get assistance for this from the Sexual Assault Resource Centre.

SEXUAL ASSAULT RESOURCE CENTRE (SARC)

If you have been sexually assaulted, you can get help from the Sexual Assault Resource Centre. SARC services include counselling and support; information and referral; and the collection of medical and other evidence of the assault. SARC counsellors can help you decide whether to report the assault to police.

SARC generally has women working as counsellors. If you wish to see a male counsellor, you can ask to be referred to a male counsellor familiar with sexual assault issues.

Contact SARC (crisis line 24 hours) on
(08) 9340 1828 or 1800 199 888
(Freecall - state wide)

Other rural sexual assault assistance services can be found in:

Geraldton - (08) 9964 1833 (crisis 24 hour) or
1800 016 789 (Freecall)

Port Hedland - (08) 9172 5044 (crisis 24 hour)

Kalgoorlie - 1800 688 922 (crisis 24 hour)

Mandurah - (08) 9535 8263

VIOLENCE WITHIN RELATIONSHIPS

The term 'family violence' or 'domestic violence' describes physical and sexual violence, threats, abuse, or emotional and psychological intimidation directed towards any person by their partner or any member of their family.

This also includes any person you have had an intimate relationship with – you don't have to be living with them.

You can take action to protect yourself from family or domestic violence by applying for a Restraining Order (see the info below – Restraining Orders). You can also report the violence to the police. The police can apply for a Restraining Order for you. They may also charge the person with a criminal offence. You can get more information and support from the Domestic Violence Resource and Referral Service – (08) 9226 2366 or Legal Aid 1300 650 579.

STALKING

'Stalking' includes repeatedly following someone, telephoning them or sending messages, loitering near their house or workplace, watching someone and any other repeated behaviour that makes someone fear for their safety. If you are being stalked, you can call the police. You can also apply for a Restraining Order (see the info below: Restraining Orders – if threats or violence continue).

REPORTING AN ASSAULT TO POLICE

Things to consider before reporting an assault to police.

• ***Disclosing personal information***

When you make a report to the police and the police charge the person two things might happen:

1. If the person admits the assault ("pleads guilty") then the person will be convicted and given a penalty or
2. If the person does not admit the assault

("pleads not guilty") then the matter will go to trial. It is likely that the police will need you to give detailed evidence in court about the assault. You may have to answer questions about your personal life – if this is relevant to the assault.

• ***Privacy***

Be aware that courtrooms are generally open to the public and the media. This may mean parts of your private life, including your sexuality, could become public. However, the courts are very busy and many cases go unnoticed.

• ***You cannot withdraw charges***

Once you have made a complaint and a person has been charged, you cannot "withdraw the charges". Only the police can decide not to continue. It is important that you bear this in mind if you have any doubts about making a complaint. Be sure that you intend to follow it through and have the support you need when you decide to make a complaint.

What do you need to make a report?

To make a report the police will need:

1. The facts and circumstances of the assault. When you report an assault to the police you will be required to make a statement. The statement should include all the relevant facts and circumstances involved in the "commission of the offence".
2. Your name and contact details. You will need to provide your name and contact details so the police can contact you.
3. Names of any witnesses and any evidence. If you don't have any witnesses, you can still make a complaint to the police. Many assaults occur between two people when there is no one else around. Keep medical

records and photographs of any injuries you have sustained as a result of the assault.

Where do I make a report?

To report an assault contact:

- your local police station; or
- if you don't want to make a report to your local police station, contact the Community policing or diversity Officer at your local Police District office. They should be trained in sexuality and gender issues.

When reporting an assault to the police you need to give as much detail as possible about when and where the assault took place, and naming or describing the offender. This can be difficult to do. You may wish to take someone with you for support.

What if the police don't help me, don't take me seriously or are homophobic?

If you have any problems with how the police have handled your complaint or any other matter, talk with the Diversity Officer at your local police district office (these officers are trained in gay & lesbian liaison issues). You can also make a complaint to the Sergeant in Charge of the particular police station and the Commissioner of Police. If you don't get a satisfactory result, you can complain to the Ombudsman. See the section Dealing with Police.

RESTRAINING ORDERS - IF THREATS OR ASSAULTS CONTINUE

If you are afraid that the assaults and/or threatening behaviour may continue, you may want to think about getting a Restraining Order.

A Restraining Order is a court order designed to protect someone from threatening behaviour or violence. A Restraining Order can stop

someone from acting in an offensive way, keep from within a certain distance of you, stay away from your home and place of work, stop them from communicating with you, and any other order that is necessary to protect you. For more information and assistance with applications:

- call the Legal Aid Information Line on 1300 650 579 or visit their web site www.legalaid.wa.gov.au
- visit the Department of Justice web site at www.justice.wa.gov.au
- In emergencies, police can apply for a Restraining Order on your behalf 24 hours a day.

ASSISTANCE FOR VICTIMS OF VIOLENCE

The Department of Justice's Victim Support Service offers a number of services for victims of crime including:

- providing information and support on the status of police investigations and in court proceedings
- helping write a victim impact statement
- providing counselling and support and referral to other appropriate services
- helping you understand your rights within the criminal justice system
- helping with inquiries about criminal injuries compensation claims.

The Department of Justice also offers mediation between victims and offenders through the Victim Offender Mediation Unit, coronial counselling through the Coroner's Court and comprehensive information on restraining orders and compensation. Contact the Victim Support Service on (08) 9425 2850 or 1800 818 988 (outside metro only)

WHAT ABOUT COMPENSATION?

If you have been injured or suffered loss as a result of a criminal offence, you may be able to:

- claim a compensation payment from the Government;
- bring a civil claim against the offender;
- ask a court to give you a compensation or restitution order against the offender.

Time limits apply to making these claims so you should get legal advice as soon as possible.

Legal Aid WA has a pamphlet "Compensation for Victims of Crime". It has more information about compensation. You can get a copy at www.legalaid.wa.gov.au or by calling 1300 650 579. The Department of Justice also has information at www.justice.wa.gov.au

WHERE TO GET HELP OR MORE INFO

Apart from the police in emergencies, for more information and advice contact:

- Legal Aid's Information Line 1300 650 579 or TTY 1800 241 216
- Sexual Assault Resource Centre (SARC) (08) 9340 1828 or 1800 199 888
- Crisis Care (08) 9223 1111 or 1800 199 008

If your enquiry relates to **assaults and/or threats by a partner or family member** or domestic violence you can also contact:

- Legal Aid's Domestic Violence Legal Unit - (08) 9261 6254
- Domestic Violence Resource and Referral Centre - (08) 9226 2366
- Gay and Lesbian Community Services' Counselling and Info Line - (08) 9420 7201 or 1800 184 527

05

DEALING WITH THE POLICE

When dealing with the police it is important to know your rights and to assert them calmly and politely.

It is also important to avoid confrontation with the police, as this may often work against you. Be realistic in the circumstances.

YOUR RIGHTS AND POLICE POWERS

Being stopped by police

The police have the right to ask for your name and address if they believe 'on reasonable grounds' you are about to break or have broken the law. Therefore you should provide your name and address if asked. Refusing or giving an incorrect name and address is an offence.

If police want you to go with them for questioning, you can refuse unless they are arresting you.

Answering police questions

In most circumstances you are legally obliged to give the police your name and address, but other than that you have the ***right to remain silent***. You can refuse to answer questions asked by police whether you have been stopped in the street, been taken to the station for questioning or been arrested. ***You can refuse to answer any questions or sign any statements until you have spoken to a lawyer.***

There are some circumstances where you must answer questions asked by police:

- If you are driving, you must:
 - give your name and address and the name and address of the owner of the vehicle
 - show your driver's licence or, if you don't have it on you, take it to a police station within 48 hours

- take a breath test if they ask you to (it is an offence to refuse);

- Police may ask you your name, address, date of birth and ask you to show evidence of your age if you are in a pub or on licensed premises.
- Under the Misuse of Drugs Act the police may ask you to give information about the manufacture, sale or supply of prohibited drugs and plants. Failure to cooperate may be an offence.

Police can use anything you say to them at any time in deciding whether to arrest you or charge you with something. There is no such thing as 'off the record'.

If police arrest you

Police can only arrest you if they have reasonable grounds to believe you have broken the law. They must tell you at the time what you are being arrested for. You must be 'cautioned' by the police before they question you formally. This means telling you your rights in relation to questioning and evidence.

After arresting you, the police can only hold you in custody for a 'reasonable time' without charging you. What is 'reasonable' depends on the seriousness of the crime and the circumstances. While in custody you can ask to telephone a friend or relative or a lawyer in private. This is not a legal right.

Formal interviews with police

Generally, you have a right to remain silent (see above). If you make a written statement explaining your version of events or if the police prepare a written record of the interview then this will probably be used against you in court. The police will ask you to sign the record of interview and the statement. You do not have to sign.

If you do sign you should read the statement carefully and correct any mistakes. Even if you do not sign the record of interview it can be used as evidence in court. You should ask for a copy of the written record of interview and your statement and show them to your lawyer. Anything you say to the police can also be used in court.

If you are under 18, an independent adult person must be present during the interview. This can be your parent, family member, friend or other person independent from the police.

Physical evidence Fingerprints and other ID

The police can take your fingerprints or photograph if you have been arrested.

Body searches

A police officer of your gender can do a pat-down search or a strip search for safety reasons or to get evidence while you are in custody. In regard to transgender or intersex people your 'legal' gender would determine the gender of the police officer legally allowed to body search you. This should be done with respect for your privacy and dignity. A physical examination or an internal search of your body can only be done by a doctor.

Body samples

Police can only take body samples from you if you have been charged with an offence and it is related to the crime. (However, if you are the driver of a car police can demand a breath or blood test.)

Other searches

Police can search your house if they have a warrant, but also without a warrant in certain circumstances. They can usually also search your car.

RAILWAY POLICE AND TRANSIT GUARDS

Railway police have powers similar to police officers. They can arrest you or give you infringement notices for being drunk, trespassing, acting violently, offensively or in a way that puts others in danger.

Railway police can remove you from the train for getting in the way of other passengers, destroying property, causing a disturbance, not paying correct fares, having an invalid ticket or failing to give your name and address.

Transit guards are not police. They do not have police powers but will call railway police when needed. Transit guards have the power to check you have a valid ticket, have paid the correct fare and can issue fines and infringement notices.

REPORTING A CRIME TO POLICE

The WA Police Service are attempting to improve attitudes towards the gay, lesbian, bisexual and transgender community.

This includes improving police performance and encouraging members of the community to seek help from the police. If you are the victim of a crime, it is important to report it to the police. You can also complain about actions the police have taken (see below).

The WA Police Service has trained Diversity Officers in each district to improve communication between minority groups and the police. This police officer can also liaise between victims of crime and investigating officers. If you want to report a crime but are worried about dealing with your local police, or if you have reported a crime but are not happy with the response, you can contact the Diversity Officer in your district.

For more information about police powers contact Legal Aid WA's information Line on 1300 650 579 or visit www.legalaid.wa.gov.au

COMPLAINTS ABOUT POLICE

There are two ways to make a complaint about the police. You should make your complaint as soon as possible after the incident.

Where possible you should first try and resolve a problem by contacting the police. This may be through contacting the relevant officer, the officer in charge of the police station or even the Commissioner of Police in writing.

Alternatively you may wish to make a complaint to the Ombudsman about the conduct of a police officer. It is helpful if you know the relevant officer's full name and/or regimental number. To make a complaint you should notify the Ombudsman in writing about your complaint. The Ombudsman usually asks the police to investigate the complaint first. The police will prepare a report and pass their findings to the Ombudsman for review. If the Ombudsman approves the report the police will write to you.

If you are unhappy with the findings in the police report, you can go back to the Ombudsman and ask for the police report to be reviewed. The Ombudsman will then decide whether the police investigation was conducted effectively and efficiently. If not, the Ombudsman can take over the investigation.

Any complaint should set out in detail everything that you say happened. Names and contact details for any witnesses to the event should also be provided. Copies of any medical reports and photographs should be provided as well. Make sure you keep a copy of your complaint for your own records.

The Ombudsman can be contacted on (08) 9220 7555 or 1800 117 000 (Freecall outside the metropolitan area) A telephone interpreter service is available on request.

Anti-Discrimination

If you believe that the police have discriminated against you, you may be able to lodge a complaint with the Equal Opportunity Commission (see the Discrimination section).

06

PRIVACY AND CONFIDENTIALITY

INFORMATION PRIVACY

In general, your sexuality and your relationships are your own business. In most situations - job applications for example - you are not required to disclose your sexual orientation or details about your sexual relationships. Forcing you to provide this information could be unlawful discrimination.

There are some exceptions. For example, insurance companies may be able to discriminate in the terms of insurance on grounds of age, sex and disability where the discrimination is based on reliable research about increased risk for some groups of people. If you are applying for life insurance, you may have to answer questions about your health, history and activities (including your sexual relationships), so that the insurer can assess the risk involved. They may also ask similar questions of your partner.

The Commonwealth Privacy Act gives you rights in relation to how your personal information is handled by government and many private sector organisations.

You can:

- know why your personal information is being collected and how it will be used;
- ask for access to your records, including your health information;
- take up opportunities to stop receiving direct marketing material;
- correct inaccurate information about you;
- know which organisations will be given your personal information;
- ensure organisations only use your information for purposes they have told you about;

- find out what information an organisation holds on you and how they manage it.

If you think your privacy rights have been infringed you should attempt to resolve the matter with the organisation in question if possible. Write a letter or email to the organisation, explain the situation and what you would like to see happen. Give the organisation an opportunity to rectify the situation, 30 days is a reasonable time frame in which they should respond to your initial enquiry.

If you are not satisfied with the outcome you can complain to the Office of the Federal Privacy Commissioner. For more information on your rights and complaints go to www.privacy.gov.au

'SENSITIVE INFORMATION'

There are specific guidelines that relate to 'sensitive information' – this includes information or opinions about a person's sexuality or sexual practices. Organisations must not collect sensitive information unless:

- the individual has consented
- the collection is required under law or
- the individual is legally incapable of giving consent and the collection is 'necessary to prevent or lessen a serious and imminent threat to the life or health of any individual'.

In addition, the Health Privacy Principles relate specifically to your health information. This is discussed in the Health section.

CONFIDENTIALITY

There are particular professional relationships that create a legal duty of confidentiality – the main examples are the relationship between a doctor and patient, or a lawyer and client.

Anything you tell your doctor or lawyer, or any

knowledge they have about your sexuality, gender identity, health, medical status, financial affairs etc. is confidential and should not be disclosed to anyone without your consent. However, a doctor can break this confidence if they believe you're endangering someone else by your actions or endangering your own life. If you believe your doctor or lawyer has failed in their obligation to maintain confidentiality, you can complain to the relevant professional body (i.e. Australian Medical Association, Legal Practice Board) or the Office of Health Review (see the Health section).

You can also take private legal action but you should get legal advice first as this will be costly and time consuming.

DISCLOSURE

There is no legal obligation to disclose your sexuality in most situations, although there may be health reasons why you should tell your doctor something about your sexual practices.

If you are being required to disclose your sexuality or if you are discriminated against because of a disclosure, you may be able to make a complaint of discrimination (see the Discrimination section).

However, disclosure is required if you wish to donate blood, organs or sperm.

Under health laws for blood donations, you must answer questions about your health, sexual activity and other personal details in the past 12 months. This includes whether you have had male-to-male sex, had sex with a man you suspect of being bisexual, had sex with or worked as a sex worker, used injecting drugs or been in prison. If you answer yes, current policy is that you will probably not be allowed to donate blood.

For sperm and tissue donations, you must answer similar questions about your own and your partner's sexual and other activity for the past five years. If you answer yes, this does not automatically disqualify you from making the donation but clinics may be reluctant to accept it.

There are severe penalties, including fines or imprisonment, for making a false statement.

HIV status

The issue of confidentiality and disclosure is complicated in relation to HIV. Generally, your HIV status is your own business in regard to personal relationships. Sometimes you may have to disclose your HIV status to some organisations in some circumstances.

The WA AIDS council can be contacted for further information (08) 9482 0000.

COMING OUT

Coming out is less of a legal issue than a social and practical one. It can be an enormous relief to be able to be open and truthful about our lives and who we are. It is up to you to choose who you come out to and when.

Remember, it is very difficult to control the flow of information once you start coming out. Think carefully about who you tell and make it clear whether you want your sexuality or gender identity to be common knowledge. Even if you ask someone to keep it confidential, it would be extremely difficult to enforce any legal obligation. If you experience discrimination or violence because you have come out, you can take legal action (see the Discrimination and Violence sections). Assistance with making decisions about coming out can be sought from Gay and Lesbian Community Services' Counselling and Info Line on (08) 9420 7201 or 1800 184 527 (Freecall).

07

SEX AND SEXUAL OFFENCES

CONSENTING TO SEX

Who you have sex with is a matter of personal choice, regardless of gender. Gay sex is not against the law.

If you want to have sex with someone, you both have to agree (consent) and the law places some restrictions on the age of sexual partners (see below).

'CONSENT'

Consent means 'free agreement'. A failure to say no cannot be taken as consent.

It is not 'free agreement' if the person has sex because they are afraid, asleep, unconscious, or too drunk or drug affected to agree freely, or they don't understand what is happening. Consent can also be withdrawn at any time. Having sex with someone without his or her consent is an offence (see Sexual Assault and Rape).

Age of consent

Generally in Western Australia the age that someone can legally consent to sex is 16.

The law about under-age sex is the same for all. It doesn't matter what sexes and genders the people are. If you are:

- under 10 – no one is allowed to have sex with you (even if you consent) see Sexual Assault and Rape in the Violence section);
- between the ages of 10 and 16 – a person is not allowed to have sex with you.

However, if you gave consent AND they are no more than 3 years older than you AND believed you were 16 or older at the time, then they may have a defence to the crime;

- aged 16 or 17 – a person is not allowed to have sex with you if you are under their care, supervision or authority (even if you consent).

Having sex with a young person in contravention of these age restrictions is an offence and can carry a significant jail sentence. (see Sexual Assault and Rape in the Violence section)

WHAT DOES THE LAW MEAN BY SEX?

Generally, the law around sex is there to stop sexual violence or protect young or other vulnerable people from being taken advantage of. The law can define sex and sexual activity very broadly depending on the relevant law. Sometimes sex can specifically mean penetrative sex (i.e. a penis or other object going into a vagina, anus or other part of a body). Other times sexual activity may mean fondling, viewing pornography or taking photos.

Having sex interstate

The age of consent for gay sex is different in the various states and territories of Australia and is often based on 2 genders only - male and female. The following table summarises the various ages but most states have a higher age of consent in relation to people under your care, supervision or authority.

AGES OF CONSENT IN AUSTRALIA

State/Territory	Gay sex	Lesbian sex	Straight sex
Western Australia	16	16	16
Northern Territory	18*	16	16
South Australia	17	17	17
Tasmania	17	17	17
Victoria	16	16	16
ACT	16	16	16
New South Wales	16	16	16
Queensland	16 (18 for anal sex)	16 (18 for anal sex)	16 (18 for anal sex)

* NB – The Northern Territory Government has recently said it will change the law to equalise the age of consent to 16 for all.

SEXUAL HARASSMENT

'Sexual harassment' is unlawful in the workplace and some other areas (see the Discrimination section).

Sexual harassment in social situations or in public is not unlawful in Western Australia, unless it is so persistent and intimidating that it is seen as 'stalking' or sexual assault (see the Violence section).

BEATS & SEX IN PUBLIC PLACES

'Indecent acts in a public place' are an offence under the WA Criminal Code.

To determine what is either acceptable or indecent sexual behaviour in public the police and courts consider general community standards. What is indecent covers more extreme sexual behaviour than just expressions of sexuality or affection. It should be applied equally to all people and if the police charged you with an 'indecent act in public' for holding hands or kissing, they may be unlawfully discriminating against you, since this behaviour is generally accepted. You could probably complain or take action against the police on this basis (see the Discrimination section and Complaints About Police in the Dealing with Police section).

If you have sex in public, you may be charged with committing an indecent act. Men using beats can be charged with 'indecent acts in a public place'. To prove the offence, the police have to show that what happened was both 'indecent' and in 'public'.

'Indecent' means potentially indecent – an actual person does not need to have been offended by your actions. But to be indecent,

the behaviour also has to be easily seen – if it 'cannot be seen without the observer having to take abnormal or unusual action to observe it', it may not be indecent.

The definition of a public place is very wide and would include public toilets. Closing the cubicle door doesn't necessarily turn a public place into a private place.

DISCRIMINATORY LAW GONE!!

There used to be a specific offence for "gross indecency between males in public". Men who had sex at beats were often charged with this. This offence no longer exists as it was considered discriminatory, but there is still the general offence of committing an indecent act in public (or, in some cases, in private). This means that if you have sex at beats, you could still be charged with a criminal offence.

08

RELATIONSHIP RECOGNITION

There are many federal laws that refer to different types of relationships. Acts often have their own definitions of 'spouse', 'de facto spouse', 'next of kin', or 'dependant'. State law generally has a single 'de facto partner' or 'de facto relationship' definition.

These definitions are used to determine rights and responsibilities in areas like Centrelink benefits, superannuation, inheritances, and so on.

WESTERN AUSTRALIAN STATE LAWS – "DE FACTO PARTNERS"

For the purposes of Western Australian laws – such as the Family Court Act (WA), the Inheritance Act and the Equal Opportunity Act – the legal terms used to recognise couples in relationships are "de facto partner" and "de facto relationship". These terms are defined by the Interpretation Act (WA) 1984. Wherever a written law of the State Government refers to a de facto relationship, it means a relationship (other than a legal marriage) between 2 people who live together in a marriage-like relationship. Where a written law refers to a "de facto partner" it means a person who lives or has lived in a de facto relationship with the other person.

The definition applies to all couples. It makes no difference what sex or gender the people are. This includes gay, lesbian, bisexual, transgender and intersex people. The definition still applies if one or both of the people is married to someone else, or in another de facto relationship.

What is a de facto relationship?

In deciding whether a de facto relationship exists, the law sets out a number of factors –

- the length of the relationship;
- whether the people have resided together;

- the nature and extent of common residence;
- whether there is, or has been, a sexual relationship between them;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- the ownership, use and acquisition of their property (including property they own individually);
- the degree of mutual commitment by them to a shared life;
- whether they care for and support children;
- the reputation, and public aspects, of the relationship between them.

Whether or not a particular relationship is a "de facto relationship" will be judged on the particular circumstances of that relationship. In 2003, a review of Western Australian laws gave people in de facto relationships an equal standing with married people in most cases.

The rights and responsibilities you may have as a de facto partner are defined under the various pieces of State legislation – for example, a de facto partner may be able to challenge a will, or object to a post mortem as senior next of kin.

Family law and Relationship Break Ups

A mix of WA state law and federal law covers what happens when a relationship ends and if you cannot agree. This covers the care of children (see Children and Relationships section) and the split of property and assets (see the Property and Relationships section). You should always get legal advice if you have separated - or are thinking about separating - from your de facto partner. You may have certain rights and obligations around the future care of children or property and assets.

Next of kin

Although next of kin is sometimes defined in legislation, it is a common law term that has traditionally meant the closest relative by blood or marriage.

The recent law reforms included changes to 'senior next of kin' and 'senior available next of kin' under:

- the Coroners Act 1996 (WA) – which governs objections to post mortems,
- the Cremation Act – which covers objections to cremation; and
- the Human Tissue and Transplant Act 1982 (WA) – which governs consent to organ donation after death.

De facto partners of any sex are included in the definitions of next of kin in each Act. If a person has a spouse and a de facto partner, priority is usually given to the person with whom the deceased was living. A de facto partner will generally have priority over other family members.

For a discussion of next of kin status and medical treatment see the Health section of this booklet

COMMONWEALTH / FEDERAL LAWS

Different federal – such as the laws applying to Centrelink entitlements, taxation, most superannuation legislation and immigration laws – have different definitions that apply to relationships.

Some laws refer to a "spouse" as being a legally married (heterosexual) spouse. If there is no definition in legislation, then the law assumes a "spouse" to be a legally married spouse. Same-sex couples cannot be legally married under the Marriage Act 1961 (Cth). Some laws include de facto partners, or people living in a marriage-like relationship. In most cases under federal law, this will mean only heterosexual relationships.

Immigration

Immigration is covered by federal law. It is one of the few areas of federal law to recognise all relationships of any sex.

Since 1991 an Australian citizen, permanent resident or eligible New Zealand citizen has been able to use an interdependency visa to bring their same-sex partner into Australia.

However, there is a limited quota for interdependency visas each year.

Interdependency visas

Your partner can apply for an interdependency visa from outside or within Australia. Generally they will first be granted a temporary visa for up to two years before their application for a permanent visa will be considered. If you have been in the relationship with your partner for five years or more at the time of application, there are provisions in some cases, to waive the two-year wait period before a permanent visa is granted. If the application is refused, get advice about your appeal rights. If you leave a relationship because of domestic violence, or if your partner dies after you enter Australia, you may be able to continue with your permanent visa application.

Visa criteria

Immigration law is constantly changing. Always get legal advice. The basic criteria for an interdependency visa currently are:

- both people must be at least 18 at the time of the application;
- their relationship must be "genuine and continuing";
- they must have a mutual commitment to a shared life to the exclusion of other interdependent relationships;

- they must live together, or not be living apart on a permanent basis;
- the relationship must have existed for at least 12 months (unless there are compelling and compassionate reasons why the visa should be granted).

All visa applicants must also meet standard health criteria and public interest criteria, such as being 'of good character' and not being a risk to national security.

How to prove your relationship

You don't have to have lived together continuously for 12 months. The permanency and genuine nature of the relationship are more important than permanency of living arrangements.

The sorts of things that could be used as evidence are:

- photographs of you and your partner together – in different locations, and different seasons;
- letters or emails – to and from each other and from other people referring to your partner or your relationship;
- travel documents – showing you were in the same place at the same time;
- legal documents showing joint finances and commitment – e.g. lease, mortgage, property title, Will, power of attorney, joint bank account, utility bills in joint names;

- envelopes with both names at the same address and dated postmarks;
- at least four statutory declarations from other people who can confirm the nature of your relationship.

Health test waiver

Of particular relevance to people who are HIV positive is the health test. This test is to prevent people coming into Australia with what the government considers a costly medical condition that will over-use public resources. A positive HIV result will not necessarily result in the rejection of a visa application, but the result may be reported to a relevant commonwealth or state health agency.

Refugees

Sexuality is an accepted ground of refugee status if the person has a genuine and reasonable fear that they would be harmed in their country because of their sexuality. However, the fact that homosexuality is a crime punishable by imprisonment or other penalty in their country is not a sufficient ground for refugee status unless there is evidence that the law has been or will be enforced.

WHERE TO GET HELP

Gay and Lesbian Immigration Task Force

(08) 9306 1126

www.glitf-wa.tripod.com

Refugee Immigration Legal Centre

(03) 9483 1144

Legal Aid WA Information Line

1300 650 579

TTY 1800 241 216

www.legalaid.wa.gov.au

09 PARENTING

BECOMING A PARENT

Many people in same sex and alternative relationships consider having children. Some options and their legal implications are discussed in this section. It is most important that all parties concerned - those considering becoming parents and those considering being a donor - *get legal advice before the child is conceived*. The way a child is conceived can make an important difference to the parents' rights and responsibilities.

Reproductive technologies

In Western Australia, the provision of reproductive technology is covered by the Human Reproductive Technology Act 1991 (WA). The Act permits the use of reproductive technology (such as IVF and artificial insemination) by any woman - whether single, married or in a de facto relationship with somebody of any sex.

Artificial insemination services are available to all women, whether or not they are medically infertile.

Assisted reproductive technology (such as IVF) is only available to women who demonstrate that they are medically infertile, either by an infertility evaluation, or where attempts by artificial insemination or other methods have failed. It is also available to a woman whose child would otherwise be likely to be affected by a genetic abnormality or disease.

Self-insemination

Under the Human Reproductive Technology Act 1991 (WA) it is an offence for a person to cause or permit an "artificial fertilisation procedure" to be carried out except under a license. The penalties specified in the Act include a fine or imprisonment. Many people are using self-

insemination at home using a sperm donor as an alternative but because these arrangements are private the law is extremely difficult to enforce. The conception method can also determine who the law says the child's parents are. You should seek legal advice before using this method of conception.

There are also risks for both the woman and the baby in not getting adequate health advice, e.g. risk of infection. A doctor can advise you about appropriate timing, pre-pregnancy testing and testing of the donor for potential transmissible infections. If you are considering this option you can also contact a support group (see Where to get help).

Adoption

Adoption law is State law (Adoption Act 1984 (WA)). Singles and couples of any sexuality or gender are permitted to adopt in Western Australia. They are assessed under the same terms as other singles and couples. For couples you normally have to have been in the relationship for at least three years, and not married to or in a de facto relationship with any other person during that time. Step-parent adoptions are available to de facto couples where one member of the couple is the child's birth parent.

When an adoption order is made, the child becomes a child of the adoptive parents, and is no longer a child of his or her birth parents. A non-biological parent usually can't adopt their partner's child without the birth parent's consent. If the non birth mother of a child is recognised as a parent under the Artificial Conception Act, she cannot adopt the child (as she is already a parent). The Adoption Act also recognises her status as the child's parent and so her consent to adopting the baby out will ordinarily be required.

THE GOOD NEWS...

Adoptive parents automatically have parental responsibility for a child. Where an adoption order is made under the Adoption Act in favour of a same sex couple for example, the child will have two mothers...or two fathers.

The Birth Mother's Partner

Where the partner of the child's birth mother is defined as a parent of the child, then in Western Australia they have all of the rights and responsibilities of parents that arise under WA laws (see below for information on some relevant federal laws). Where the co-parent is not considered legally to be the child's parent (under the Artificial Conception Act (WA) - see above), they may have limited rights. See discussion below on co-parenting

SPERM DONORS

Anonymous Sperm Donor

A sperm donor who donates sperm anonymously through a fertility treatment clinic is not recognised legally as a parent of the child. At present, if the sperm donation has been done through a clinic, the child will not be able to find out who the donor is. They will have access only to non-identifying information. It has been suggested that a change to the law in this area should be considered. Keep informed

Known Sperm Donor

The legal position of a known sperm donor is not clear-cut. However, he has the right to apply for a parenting order (see below).

Before you start trying to conceive, it is very important for everyone involved to think through and discuss issues such as: the level of contact with the child, financial arrangements, decision-making about the child's upbringing, what will happen in the event of a breakdown in the relationship between the relevant adults and so on.

You will also have to decide whether to name the donor as a parent on the Birth Certificate (see below).

It may be a good idea to make a written agreement between the people involved. It isn't legally enforceable, but it is evidence of your intentions. This may be useful if there are problems later on. The agreement should be reviewed as the child grows up.

Known Donor can apply for a parenting order

A known sperm donor of the child can apply for a parenting order as a 'person concerned with the care, welfare and development of the child' OR where it is relevant, as the child's parent. (See below for an explanation of parenting orders.) This might happen because:

- the lesbian parents want the donor to have recognised decision-making responsibility, e.g. in relation to medical decisions, or
- the donor is in dispute with the lesbian parents about involvement and contact with the child.

Should we name the known donor on the Birth Certificate?

Both "parents" are expected to sign a birth registration form. In some cases, the "parents" will be the child's birth mother and her de facto partner. In other cases, the "parents" may be the birth mother and the known donor. If the donor is to be named on the child's Birth Certificate, he must sign the registration form. Consider this carefully as there are some legal consequences (see below). Get legal advice about whether the donor or de facto partner is a parent or not.

If you decide not to name the donor, you may have to give the Registrar of Births, Deaths and Marriages a statutory declaration either saying that the father is unknown or explaining the

circumstances. (As self-insemination may be illegal under the Human Reproductive Technology Act, you may need legal advice on this.) Note that it is an offence under the Births, Deaths and Marriages Registration Act 1998 to make a false or misleading statement in a birth registration form.

The Registrar may refuse to issue a Birth Certificate if you say that you have used a known donor, but not through a clinic, and you do not wish to give the donor's name. If you have conceived through a donor program run by a clinic, you can give the Registrar a letter from the clinic to prove that there is no legal father.

For more information, contact the Registry of Births, Deaths and Marriages on (08) 9264 1555.

Consequences of naming the known donor as the father on Birth Certificate

As a parent on the birth certificate a known donor will probably be liable for child support. This will only be needed if you cannot agree on financial support.

• Paternity for inheritance purposes

Naming a known donor on the Birth Certificate automatically establishes kinship. The same outcome can be achieved if the donor names the child as beneficiary in his Will.

See the Death and Inheritance section for information about inheritance rights.

• Social security

Centrelink policy is that the biological mother is not eligible for social security benefits unless she first tries to get child support from the father named on the Birth Certificate. If they insist on this, even after you tell them that the child was conceived through artificial conception, you can appeal to an authorised review officer and then the Social Security

Appeals Tribunal. Alternatively, if you are the donor and an application for child support is accepted by the Agency, you may lodge an appeal in the Family Court.

Note that it is an offence under the Social Security Act to make a false or misleading statement.

• Passport

A father registered on the Birth Certificate is required to give his consent (by signing the application) before the child can get a passport.

LIVING WITH OR PARENTING CHILDREN

Gay men, lesbians, bisexuals and transgender people live with and parent children in many situations. Legal rights and responsibilities in relation to those children can be complex, particularly if they are conceived using reproductive technology or self-insemination.

This is a new area of law that is still developing and many of the issues haven't been fully tested in court. The law in Western Australia is a complex mix of state and federal laws. The following information should not be relied on as legal advice about your particular case.

Parental responsibility

The Family Court Act 1997 (WA) applies in WA where the parents of a child were never married. The Act says that both parents of a child have responsibility for their care, welfare and development – regardless of whether they are married, separated or have never lived together. The term 'parent' is used throughout the Act, and includes a person who is a parent under the Artificial Conception Act. The Act stresses children's rights and best interests, NOT parents' rights. The interests of the child are "paramount" in the Family Court's decisions about parenting and contact arrangements. Unless it is not in their best interests, children

have a right to know and be cared for by their parents and a right to have regular contact with their parents and other 'significant' people.

Who is considered a 'parent'?

If a woman has a child using reproductive technology then under Western Australian law, the parents of a child are defined in part in the Artificial Conception Act 1985 (WA). Under federal laws (such as the Child Support Act, and the Family Law Act) a non birth mother may not be recognised as a parent.

Mothers: Where a woman who is in a de facto relationship with another woman undergoes, with her partner's consent, an artificial fertilisation procedure, both women are defined as a child's parents. For the purposes of federal laws (such as the Child Support Act, and the Family Law Act which applies to children outside of Western Australia), the non birth mother may not be recognised as a parent.

Donors / Fathers: With sperm donors, it depends on the situation as discussed above. Where a man (who is not the woman's partner) donates sperm used in an artificial fertilisation procedure in a clinic, he is not the father of the child. If a known donor is named on the birth certificate then he is considered a parent.

The law in this area is quite technical – the definition applies only if the women are in a "de facto relationship" (see the Relationships section) and if the method of conception meets the definition of "artificial conception procedures" in the Human Reproductive Technology Act. However, there are practical steps that birth mothers, non-biological parents and known sperm donors can take to clarify their roles and strengthen their legal position. These issues are discussed above and below.

Co-Parenting – caring for your partner's children

The following discussion applies where the co-parent is not a legal parent of the child. There are

steps you and your partner can take to clarify and strengthen the legal position of the co-parent.

1. Parenting agreement

You can make an agreement that sets out such things as:

- intention to share parenting,
- how you will care for the child financially,
- the role of the sperm donor.

This agreement is not legally binding, but it is evidence of intention. The agreement should be reviewed as the child grows up.

2. Parenting order

You can formalise your agreement and give the non-biological parent 'parental responsibilities' through a parenting order made by the Family Court (see Court Orders below). This allows a non-biological parent to have legally recognised decision-making rights in relation to the child. Family Court orders can be changed if circumstances change. You will be required to serve a copy of the application on the donor if he is a parent of the child (and in some cases, even if he is not). It may help your case if you include an affidavit from him saying that he supports the application. The court will consider whether you are in a stable and committed relationship and whether it is in the child's 'best interests' (see Court Orders below). The court may ask a counsellor to prepare a family report to help them make a decision.

3. Make a Will

If the birth mother's partner wants their child to inherit their property after they die, the partner must make a Will naming the child as a beneficiary if they are not the child's parent. This is because the law doesn't consider the co-parent to have a kinship relationship with the child. They should get advice and have the Will drafted properly, to avoid it being challenged in Court. (see Death and Inheritance section)

4. Testamentary guardianship

The biological parent can name the other parent as guardian of the child in their Will. This means that if the biological parent dies, there are clear instructions about who should have responsibility for the child. Although this is important, it will only have effect if no other person has parental responsibility for the child at the time of the biological mother's death.

If there is a dispute about guardianship, the Family Court can be asked to make a parenting order. The court would consider the child's best interests and look at:

- the previous relationships between the child and the relevant adults, including what kind of role they've had in the child's life,
- what the biological parent wanted,
- what the child wants, if they are old enough.

Dispute with the biological parent

If a couple separates, a co-parent can apply to the Family Court for a parenting order as a 'person concerned with the care, welfare and development of the child' or as a parent, where this is the case. There have been very few cases, so it is hard to predict the outcome. Get legal advice.

SEPARATION AND DISPUTES

The Family Court Act (a WA law) covers disputes in relation to children under the age of 18 whose parents were never married. The Family Court Act in some cases also covers property disputes between couples in same sex de facto relationships.

Try to reach agreement first

Under the Family Court Act people are encouraged to reach agreement about what happens to children if the relationship breaks

down. The Family Court has counselling and mediation services that can help you reach agreement. Legal Aid also runs a mediation program, and private mediation services are available. An agreement can be made informally, with no court involvement. If you want your agreement to be legally binding, you can ask the Family Court to make consent orders.

You'll need help from a lawyer to do this.

If you can't agree – residence and contact disputes

You can apply to the Family Court for a parenting order (see below).

If you can't agree – financial support for children

Watch This Space...

There are several possible places where financial support for a child may be dealt with. The law is complex and largely untested. You should always seek legal advice.

- Child Support

In cases heard in the Eastern States, the Family Court decided that:

- in a case of artificial insemination conducted at home, a non biological mother and sperm donor (who was not married to, or a de facto partner of the birth mother) were not recognised as parents of the child – irrespective of their private agreement. The donor was not liable for child support; and

- in a 2003 case where a child was conceived by sexual intercourse between the sperm donor and the child's lesbian birth mother, the donor was liable for child support even though the lesbian couple had agreed that he would have no contact with,

or be financially responsible for the child. (In some cases, a mother may be required by law to apply for child support even if she does not wish to).

A non-biological parent with whom the child lives after separation can apply for child support payments from the biological parent through the Child Support Agency. But if the child lives with the biological parent, it would seem the non biological parent can't be ordered to pay Child Support by the Agency because they aren't considered to be a 'parent' legally under this federal law.

There are technical differences between the law in WA and elsewhere in Australia that may mean these cases don't directly apply. Get Legal advice

• **Child maintenance**

Under the WA Family Court Act, where the Child Support Act (Cth) doesn't otherwise apply, the "parents" of a child may be required to pay child maintenance. This legislation is untested.

• **Civil courts**

It may also be possible for both donors and non-biological parents to sue (or be sued as) a person who agrees to financially support a child before it is born, but then backs away from this agreement. In a 1995 case the NSW Supreme Court said that because the non-biological mother agreed to support the children, was involved in the act of conception and was a parent to the children, she must continue to support them even though the mothers had split up. In this case it was significant that the non-biological mother had the financial capacity to do so.

This is an expensive option, and has not been tested in the Supreme Court of Western Australia.

COURT ORDERS - PARENTING

There are four types of parenting order:

- Residence order – who the child will live with.
- Contact order – what contact the child will have with a parent or other significant person.
- Specific issues order – any other aspect of day-to-day or long-term parental responsibility, e.g. religion, medical treatment, education, extra-curricular activities.
- Child Maintenance order.

Who can apply for a parenting order?

An application can be made by a child's parents, or anyone 'concerned with the care, welfare and development of the child'. This can include the mother's partner, or a known sperm donor.

How the court makes its decision

The court's decision is based on 'the best interests of the child'. The factors a court must consider include:

- the child's relationship with each parent and any other significant adult (e.g. who has been the primary carer?),
- the capacity of each parent to provide for the financial, emotional and intellectual needs of the child,
- any family violence affecting the child,
- significant cultural issues – including the need to maintain ties with a child's cultural heritage;
- the current living arrangements and likely effect on the child of a change,
- the child's wishes – depending on their maturity.

Given the diversity of families that might be created through artificial insemination and that the law is so new outcomes are difficult to predict.

Relevance of parent's sexual orientation

A parent's sexual orientation is not relevant unless the court believes in the particular case that it will affect the best interests of the child. The court is more concerned about who the primary carer has been and what the child's relationship with each parent has been. However, judges vary and sometimes the sexual orientation of a parent becomes a factor. If your sexual orientation becomes an issue in the Family Court, you should get advice about how to present evidence to the Court about it.

WHERE TO GET HELP OR MORE INFO

Legal Aid WA

Child Support Legal Unit 9261 6222
Information line 1300 650 579
Mediation service (conferencing) 1300 650 579

www.legalaid.wa.gov.au

Child Support Agency

13 12 72

Centrelink Family Assistance Office

13 61 50

Family Court of WA

(08) 9224 8222 (enquiries)

www.familycourt.wa.gov.au

Lesbian Maybe Baby Australia

Information for gay men and lesbians wanting to become parents

www.clubs.yahoo.com/clubs/lesbianmay-bebabyaustralia

WA Reproductive Technology Council

<http://wwwvet.murdoch.edu.au/RTC/rtchome.html>

189 Royal Street East Perth WA 6004
Tel 9222 4307

Family Planning WA Telephone Information Service

70 Roe Street Northbridge WA 6865
(08) 9227 6177 or 1800 198 205 (country callers)

Genesis Inc (Infertility) Infertility support group

PO Box 1469 Morley Business Centre
MORLEY 6943
(08) 9375 7572

Donor Conception Support Group

National: PO Box 53 Georges Hall NSW 2198
(08) 9313 8259

Alternative Families Australia Web

resources for gay, lesbian, transgendered and bisexual parents

www.alternativefamilies.bizland.com

Talking Turkey: A Legal Guide to Self-Insemination

www.girl.org.au (follow links to Discussion papers/Parenting and families)

10

PROPERTY AND RELATIONSHIPS

The law categorises property into:

- real estate - which means land or buildings and
- personal property - which covers everything else.

OWNING PROPERTY TOGETHER

Real estate

If you buy real estate with your partner, you can both have your names on the property title. You need to decide whether you will own the property:

- as joint tenants– this means that you both own the whole property. It can only be sold as a whole and if you separate you'll need to reach agreement about how it is divided up (see below). If one of you dies, the survivor owns both shares of the land automatically, whether or not the person who died had a Will.

OR

- as tenants in common – this means that you own separate shares in the property, which could be 50/50 or an unequal percentage. You can each deal separately with your share by selling it to someone else. If one of you dies, their share is passed on according to their Will or the rules of intestacy (see Death and Inheritance section).

If one partner already owns property and the other buys in later

Sometimes one partner moves into a house the other person already owns and they decide they want to own the house jointly. De facto partners of two years or more no longer have to pay normal stamp duty on the transfer of the title from one name into both names in some circumstances. Further information is available on the Department of Treasury and Finance web

site: <http://www.dtf.wa.gov.au> (follow the link to the Office of State Revenue).

Bank accounts

You can open a joint bank account. This means that the money in it will be jointly owned by you both. If one dies, the other automatically owns all the money in the account. This is helpful if the person dies without a Will.

Personal Property

Personal property is often a more difficult area. This is partly because ownership of personal property is more difficult to prove. One way is to look at whose name is on the purchase document or receipt. Nevertheless, this isn't conclusive as it may have been a joint purchase.

SEPARATION AND DIVISION OF PROPERTY – WHO GETS WHAT

Property agreements

You can make an agreement that details the financial and property arrangements between you. This can be done at the time the property is purchased. Get legal help to write the agreement as whether or not it will stand up in court will depend on the way it is written, the processes you go through before signing it, and the circumstances of your relationship. You may have to pay stamp duty on the agreement.

Although making an agreement will cost you money, it may save you money in legal fees in the long run if there is a dispute later. The agreement should be reviewed every few years or so and updated to reflect any changed circumstances.

In any case, keep detailed records of the financial contributions you make, not only to the purchase, but also to maintenance and repairs. If you want a court to enforce the agreement, it's important to show good faith by doing what you

agree to, e.g. if you say you will make certain payments in return for a share of property, then you should make those payments.

Personal Property

If you're having trouble sorting out who gets what, make a list of your personal property, then talk about what each person gets. You may choose to go through any disputed items, alternating between each of you picking one item at a time. This allows you to focus on personal as well as monetary value.

Disputes

If you can't agree on what should happen with your shared property (either because you don't have a property agreement or because one person doesn't want to stick to the agreement), you will need to negotiate a settlement. You may need legal help or choose to go to mediation.

• De facto relationships ending after 1 December 2002

If you are in a de facto relationship (see Relationships section for a definition), and you separated after 1 December 2002, you may be able to apply to the Family Court (WA) to have your property divided.

Ordinarily, you will need to have been in a de facto relationship for at least two years, AND one or both of you must be a resident in Western Australia on the day the application is made AND both of you must normally have resided in Western Australia for at least one third of the duration of your relationship.

In some cases the court can waive the two-year requirement – such as

- where a child of the de facto relationship who is under the age of 18 years, or the partner looking after the child would otherwise suffer serious injustice, or

- where the partner applying to the court has made substantial contributions to the property, or the family (that is, the family made up of the de facto partners and any child of theirs) and would suffer serious injustice.

You should seek legal advice before making an application to the court and before settling your financial issues. There is no standard legal formula for who gets what share, but the Family Court takes into account more than just financial contributions to the property. Some of the other things taken into account include:

1. non financial contributions to the property;
2. contributions made to the family unit;
3. the income, property and financial resources of each of the parties, and their capacity for employment;
4. whether either partner has the care and control of a child of the relationship under the age of 18 years;
5. if either party is later living with someone else, the financial circumstances relating to why they are living together;
6. the need to protect one party's role as a parent;
7. the duration of the relationship and the extent to which it may have affected the earning capacity of one of the partners;
8. the terms of any "financial agreement" (that is, a financial agreement made under the Family Court Act).

Stamp duty - If you have a maintenance agreement or Family Court order that says you need to transfer the ownership of real estate or a registered vehicle then you do not have to pay normal rates of stamp duty.

• **De facto relationships ending before 1 December 2002**

If your relationship ended before 1 December 2002 (or it has ended since then but you had been living together for less than two years and none of the exceptions listed above apply) you can still take court action – but you would have to rely on normal rules of property ownership, contract law and common law principles of equity. This can be quite slow and expensive and the outcome can be unpredictable. It is best to get legal advice about your particular situation.

Partner maintenance

Some de facto partners may be entitled to financial support from their partner after separation.

A de facto partner is liable to maintain the other de facto partner, only where the partner seeking maintenance is unable to support himself or herself adequately

- (a) because they have the care and control of a child of the de facto relationship who has not attained the age of 18 years;
- (b) by reason of age or physical or mental incapacity for appropriate employment;
- (c) for any other reason.

If a person satisfies these criteria, their partner will be required to support them to the extent that they are reasonably able to do so.

The factors that the court looks at in determining financial support include those listed at points 3 to 8 above.

DON'T DELAY - TIME LIMITS

The time limit for making an application to the Family Court for property settlement or partner maintenance is 12 months from when the relationship ended. This can be extended by the court on the ground of hardship, but extensions of time are not easy to get.

The time limit for couples separating before 1 December 2002 to make an application to other courts varies depending on the nature of your claim. You should seek advice as early as possible, as in most cases the court is not able to extend the time limit.

WHERE TO GET HELP OR MORE INFO

Family Court of WA

(08) 9224 8222 (enquiries)

www.familycourt.wa.gov.au

Relationships Australia (WA)

For mediation and relationship counselling

1300 364 277

Legal Aid WA

Information line 1300 650 579

Mediation service (conferencing) 1300 650 579

www.legalaid.wa.gov.au

11 WORK AND MONEY

EMPLOYMENT

Conditions of Employment

A State Award, Federal Award, order, Federal or State Workplace Agreement, Employer-Employee Agreement or a written contract of employment may cover the conditions of your job. You need to check both your award and any individual contract or agreement to work out your entitlements. Some agreements or contracts may have better conditions or entitlements and may recognise relationships between people of any sex.

Employees in Western Australia are entitled to minimum conditions of employment as set out in the Minimum Conditions of Employment Act 1993 (WA) ("the Act").

The minimum conditions cover all employers and employees, on State Awards, State Enterprise Agreements, Employer-Employee Agreements and Contracts of Employment.

If a provision in an arrangement or agreement says it excludes the minimum conditions, you should get legal advice to determine its effect on your entitlements.

Important Note: The Minimum Conditions of Employment Act 1993 (WA) does not apply to Federal Awards, Federal Certified Agreements or to Federal Workplace Agreements. If a Federal Award, Federal Certified Agreement or a Federal Workplace Agreement covers your employment, you need to check both to work out your entitlements.

Employee Benefits

Leave is a core entitlement of employees. New laws mean employees in a de facto relationship can now get the same benefits as other employees.

- Parental Leave – An employee who is in a relationship with somebody of any sex is

entitled to take parental leave for the birth of a child. This also includes the adoption of a child by the employee and their partner.

- Personal/carer's leave – Employees are entitled to take carer's leave to care for a partner, member of the family or household who is sick or injured.
- Bereavement Leave – All employees are entitled to take special leave on the death of their partner.
- Some jobs may offer other entitlements, such as relocation expenses, travel for partners or health benefits. These extra benefits are not covered by the Act and you need to check your employment arrangement or agreement. You may be able to negotiate these extra benefits with your employer. Employers must not discriminate in offering these benefits to one group of employees and not another.

State Workplace Agreements

State Workplace Agreements are currently being phased out. All State Workplace Agreements will cease by 14 September 2003. This means you will usually be covered by one of the other awards, contracts, or agreements outlined above. If you were employed under a State Workplace Agreement you should find out your new conditions of employment. Employees who had a state workplace agreement but are covered by a Federal Award will not be entitled to the minimum conditions and protections contained in the State Act (outlined above). Upon the expiry of their workplace agreement the Federal Award applies.

WHERE TO GET HELP

Union

Contact your union first if you are a member.

Department of Consumer and Employment Protection

Wageline

Federal and State Awards

1300 655 266

www.docep.wa.gov.au

Employment Law Centre

(08) 9271 7899 or 1300 130 956

Department of Employment and Workplace Relations

Wagenet

Federal Awards and Agreements

www.dewr.gov.au

Office of the Employment Advocate

Australian Workplace Agreements (Federal)

1300 366 632

www.oea.gov.au

Termination of Employment

If your employment has been terminated because of your sexual preference you may have an unlawful or unfair dismissal claim and a discrimination claim. Employers must abide by various pieces of industrial legislation as well as anti-discrimination laws.

If your employment is terminated and you think you have a case, get legal advice urgently to know what your options are. There are time limits for these types of claims. (See the Discrimination section)

Unlawful Terminations

Federal law makes it unlawful for an employer to sack you on the grounds of sexual preference. Most employees can make a claim based on an alleged termination on the ground of sexual preference. Some classes of employees are excluded and you will need to check to see if you fall into one of these categories.

A claim for unlawful termination is lodged in the Australian Industrial Relations Commission.

Unfair Dismissal

A claim for unfair dismissal can be made in either the Western Australian Industrial Relations Commission or the Australian Industrial Relations Commission depending on your

circumstances. A claim for unfair dismissal is made on the basis that your dismissal was harsh, unfair or oppressive. If you believe that you were sacked because of your sexual preference or gender history this may be considered harsh, unfair or oppressive.

You should seek legal advice as to where you should lodge your claim.

Time Limits

You must lodge an unlawful termination form in the Australian Industrial Relations Commission within 21 days after the day of the dismissal.

You must lodge an unfair dismissal form:

- in the Australian Industrial Relations Commission within *21 days* after the day of the dismissal;
- in the Western Australian Industrial Relations Commission within *28 days* after the day of the dismissal.

In some circumstances the time limits can be extended and if you are outside these time limits you should seek legal advice immediately.

Lodge your claim if you are unable to get advice before the time limit expires. It can be withdrawn later.

Discrimination

Recent changes to the law have now made it unlawful to discriminate against a person on the ground of their sexual orientation or gender history in the workplace. Discrimination in employment is unlawful and includes contract for service, casual employment, commission agents, contract workers, partnerships of 6 or more persons, membership of employee or employer organisations, qualifying bodies, and employment agencies.

If you believe that you were sacked because of your sexual preference you may have a claim for discrimination. A claim for discrimination is lodged in the West Australian Equal Opportunity Commission.

Your complaint must be lodged within 12 months of the last act of discrimination. In some circumstances you may be permitted to lodge your complaint outside of the time limit. (see Discrimination section)

You should seek legal advice about your claim.

SUPERANNUATION

Superannuation is controlled and administered by federal legislation. State public sector superannuation is governed by separate state legislation.

What superannuation death benefits can be paid?

Superannuation funds can pay lump sums, annuities or reversionary pensions on the

member's death to surviving dependents.

Who can benefit from your superannuation?

The following list includes people who may benefit from your superannuation after you die:

- Your spouse (or de facto spouse of the opposite sex only – see exception below if you are a State Public Sector employee);
- Your children;
- Your dependents;
- Your nominated beneficiary (including your partner of any sex);
- Your estate.

You need to check the terms of your superannuation policy and seek specialised advice about the benefits and the persons who can benefit upon your death. Different types of funds have different rules about payments of death benefits.

Tax on Super

Superannuation death benefits are taxable.

State Public Sector Employees

Changes to the law mean that your partner of any sex can benefit from your superannuation when you die. Death benefits are generally paid to the executor or administrator of the deceased's estate. However, some schemes will permit payment of a sum to a spouse, de facto partner (of any sex), relative or dependant in order to

WHERE TO GET HELP

Union

Contact your union first if you are a member.

Department of Consumer and Employment Protection

Wageline

1300 655 266

www.docep.wa.gov.au

Equal Opportunity Commission Information and Assistance

1800 198 149

www.equalopportunity.wa.gov.au

Legal Aid

1300 650 579

www.legalaid.wa.gov.au



relieve or avoid hardship. Certain requirements are required to be met before a payment can be made. You should contact your superannuation fund, check your policy and seek specialised advice about the benefits and the persons who can benefit upon your death.

Where to get help

ATO Super Helpline: 13 10 20

www.ato.gov.au/super

SUPERANNUATION COMPLAINTS TRIBUNAL

The Tribunal is an independent body established to assist members or beneficiaries to resolve complaints about unreasonable or unfair decisions or conduct of a Trustee. You must try to resolve the problem with the fund before lodging a formal complaint with the Tribunal. There are time limits for lodging a complaint with the Tribunal. For further information call 1300 884 114.

LIFE INSURANCE

Life insurance is covered by federal law and only recognises opposite sex couples. However, some companies do still recognise couples of any sex.

Generally, you need what is called probate or administration (see the Death and Inheritance section for an explanation of these terms) to allow money from a policy to be distributed. There are exceptions to this. You need to check the terms of your life insurance policy and seek

specialised advice about the benefits and the persons who can benefit upon your death.

TAXATION

Income taxation is covered by Federal law and only recognises opposite sex couples.

The dependent spouse rebate is only available to opposite sex partners. This is also true for any other tax concession, such as the concession for superannuation contributions for a dependent spouse.

SOCIAL SECURITY

The Social Security Act 1991 is a federal law and requires that a person must be in a relationship with a person of the opposite sex and be married or in a marriage-like relationship to be a member of a couple.

This means that when Centrelink calculates your benefits, it will only take your partner's income into account if they are the opposite sex.

If you have a person under the age of 16 living with you, even if you are not the biological parent, you may be able to get a supporting parent benefit. You will need to provide the necessary details of your relationship with the child and provide supporting documentation if requested. Each case is assessed on its merits.

If you are a student, living in a same-sex relationship is not proof of "independence" for youth allowance, unlike a heterosexual relationship.

WHERE TO GET HELP

Welfare Rights & Advocacy Centre
(08) 9328 1751

www.wraswa.org.au

Community Legal & Advocacy Centre (Fremantle)

(08) 9432-9790

Sussex St Community Legal Service (East Victoria Park)

(08) 9470-2676

PRIVACY OF YOUR HEALTH INFORMATION

Your health information should not be disclosed to any other party, including your de facto partner, without your consent. Health information can be conveyed between doctors treating you, where the health information is expressly related to a treatment process that you are engaged in.

Sometimes a health care provider may be required to release your information. Examples of where this may occur are:

- reporting a notifiable disease (eg HIV) under the Health Act 1911;
- where it is in the public interest to do so.

If a breach of confidentiality has occurred you may choose to do one of the following:

- contact the Patient Representative (employed as an advocate for patients);
- make a complaint to the health care provider;
- make a complaint to the Office of Health Review;
- if a private or commonwealth health service provider is involved complain to the Federal Privacy Commissioner. However, the Commissioner will require you to complain to the health service provider first. Complaints to the Commissioner must be made within 12 months of the breach;
- consult a lawyer as breach of confidence may provide a basis for legal action.

Involvement in health decision making when you de facto partner is hospitalised

Every patient has a right to confidentiality. It is usual, however, with the patient's consent, for partners to be informed about health care decisions for their de facto spouse in hospital.

If you believe that you are being excluded without good reason or your confidentiality has

been breached you may choose to do one of the following:

- contact the Patient Representative;
- make a complaint to the health care provider;
- make a complaint to the Equal Opportunity Commission (See Discrimination section).

Your partner, as a patient, may also choose to make a complaint to the Office of Health Review.

HOSPITAL VISITING

Restrictions on hospital visiting vary with the seriousness of the illness. Decisions about who can visit are a matter of hospital policy.

The approach varies from hospital to hospital and ward to ward. In practice, few hospital staff will deny access to a partner. If you are being denied access to your partner in a public hospital you can contact

- Nurse Manager or
- the Patient Representative

Your partner may wish to complain to the Office of Health Review. Denying access may amount to unlawful discrimination (See Discrimination section).

Access To Your Health Information

State Government health care providers

The health care provider may provide you with the information you want following a verbal or written request.

The Freedom of Information Act 1992 (WA) provides an avenue for obtaining your records from State Government agencies.

If you are unable to access the information you require by request you can complete a Freedom of Information application. This should be available from the service provider.

In some situations the Act permits information to be withheld. If you are refused information there is

an appeal process. Contact the Freedom of Information Commissioner.

Private health service providers and commonwealth agencies

The health care provider should provide you with access to your own health records.

The Federal Privacy Act 1988 provides that

- you should be able to have access to information held by private health providers about you on request. There may be exceptions to this. For example if it is believed that having the information would create a serious risk to your health.
- if you are refused access to your information you can complain to the service provider. If the issue is not resolved the Federal Privacy Commissioner can investigate the complaint if you notify them within 12 months of the refusal.

The Commonwealth Freedom of Information Act provides an avenue for accessing information from Commonwealth Government Agencies. Requests should be made in writing to the relevant Minister or Agency.

Consent To Medical Treatment

Any individual may consent or withhold consent to medical treatment. To be valid, consent must be given freely, and should be 'informed'. This means you must have a full understanding of what is being proposed. 'Informed consent' can only be given by someone who is capable of forming that understanding.

Consent may not be given or withheld on another person's behalf, including a de facto partner's behalf, unless a guardian has been appointed.

Next Of Kin

A person is free to decide who they wish to be their next of kin for the purposes of health care services. The next of kin must be respected as such by health care providers and involved in decision making as agreed by the patient.

A partner of any sex can be appointed as a next of kin. (see the Relationships section)

DISCRIMINATION

Sexual Orientation

It is unlawful to discriminate against someone on the basis of their sexual orientation when providing goods and services. This includes medical treatment and other health services. (See the Discrimination section)

HIV/AIDS

It is unlawful to discriminate against someone on the basis of their HIV status, in employment, education, accommodation, the provision of goods and services, clubs and their membership and sport. (See the Discrimination section)

Health Complaints Process

If you are unhappy with how you have been treated by a medical practitioner, a hospital or other health service provider, you can make a complaint to the Office of Health Review.

WHERE TO GET HELP OR MORE INFO

The Office of Health Review

Level 12, St Martin's Tower
44 St Georges Terrace Perth WA 6000

(08) 9323 0600

Office of the Information Commissioner

Level 21 Exchange Plaza
2 The Esplanade Perth WA 6000

(08) 9220 7888

Country callers 1800 621 244

Office of the Public Advocate

Level 1 Hyatt Centre 30 Terrace Road
East Perth WA 6004

(08) 9278 7300

Country Callers 1800 807 437

Office of the Federal Privacy Commissioner

Hotline 1300 363 992

www.privacy.gov.au

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DEATH AND INHERITANCE

There are many legal issues that can arise following the death of a partner. It is not possible to cover all the possibilities in a publication like this. The following information is an outline of some of the main issues that may arise following the death of a partner.

WILLS

A Will is one of the most important documents you will ever sign. A badly written Will often leads to delays and disputes. The most important reason for making a Will is to make sure that, after your death, your property is distributed in the way you would have wished it to be.

If you do not leave a Will, there are laws that cover how your property will be distributed.

There are legal requirements for making a Will. If these requirements are not met your Will may not be valid. Where possible it is best to obtain the services of a solicitor rather than drafting your own Will.

Some of the issues you will need to consider are

- Who will be the executor? The executor's role is to make sure your wishes are carried out. They will list and value your assets, pay debts and make sure your estate is distributed to the beneficiaries according to the terms of your Will.
- Property. Your Will should deal with all your property. This may include real estate, money, shares, superannuation and personal property. Anything you do not cover in your Will is divided among your relatives according to law.
- If you have children under 18 you may wish to appoint someone to be their guardian after your death. Not all such appointments are effective. Get legal advice.

If there is a Will

When a person dies and leaves a Will, the executor named in the Will must apply to Supreme Court for a grant of probate. A grant of probate is a decision by the Probate Division of the Supreme Court that the Will is properly made and was intended by the testator to be their last Will and Testament. The application is made on a standard form ("Common Form"), and this is available from the Probate Division of the Supreme Court.

Who has the right to see a Will

Once there has been a grant of probate you can get a copy of the Will from the probate registry at the Supreme Court.

If there has not been a grant of probate or the person who has the Will is refusing to let you see it, you should seek legal advice.

If there isn't a Will.

When a person dies without leaving a Will they are said to have died intestate.

If a person dies intestate the Administration Act 1903 (WA) sets out how their assets will be divided. Following changes to Western Australian law de facto partners of any sex now have inheritance rights under the Administration Act.

De facto partners wishing to claim under the Administration Act 1903 and the Inheritance (Family and Dependants Provision) Act 1972 will need to establish that their relationship was a de facto relationship. (see the Relationships section).

A person who has lived as a de facto partner with the deceased for at least two years immediately before the death is now entitled to a share in the estate in certain circumstances. This may be the case even if there is a husband or wife or possibly another de facto who is also entitled to a share.

If your partner dies intestate, you should seek legal advice about your rights.

A person who has lived as a de facto partner with the deceased for less than two years may have a claim under the Inheritance (Family and Dependents Provision) Act 1972. See below.

FUNERAL ARRANGEMENTS

The executor of a Will has the right to make funeral arrangements. If you have the right to arrange a funeral then you can also decide where the person is buried.

You can specify in your Will what sort of funeral you want, but this is not legally binding. More importantly, it will have no practical effect if the funeral is held before the Will is read. Make sure your executor knows what funeral details you have included in your Will.

Property In Joint Names

If you own property together as 'joint tenants' (see Property section for a definition) the surviving person automatically inherits whether or not there is a Will.

If you own property together as 'tenants in common' (see Property section for a definition) the deceased can leave their share of the property to anyone in their Will.

Shared home owned wholly by the deceased.

Following the death of your partner you may wish to remain in the home that you shared.

If the home was your ordinary place of residence and you are entitled to a share of the estate, you may have the right to acquire your deceased partner's interest in the shared home. Your share in the estate may be reduced by the value of the home or you may have to pay money to the estate if there is a difference.

You must take certain legal steps before 12 months from the date of the first grant of

administration. (Extensions may be granted in some circumstances).

De facto partners in this situation should get legal advice.

CHILDREN

The legal position of any children may be complicated if their parents were not married and one of the parents dies. In some cases children may be required to prove their relationship to the Probate Office. Get legal advice.

CHALLENGING A WILL OR INTESTACY

The Supreme Court can change the way a Will or the Administration Act distributes property if it decides that your needs are not properly looked after. This power comes from the Inheritance (Family and Dependents Provision) Act 1972.

The Act lists who can make a claim. As a de facto partner you can make an application if:

- you were living as the de facto partner of the deceased person immediately before the death; or
- you were receiving or entitled to receive maintenance from the deceased as a former de facto of the deceased as a result of a court order, agreement or otherwise.

The court will look at whether the Will or Administration Act provides adequately for:

- proper maintenance
- support
- education, or
- advancement in life.

The court will consider a number of factors including:

- how any changes will affect other people entitled to a share in the estate

- the sort of property involved and its value
- the ages of surviving dependants
- the way you acted towards the deceased and your relationship in general.

You must apply to the Supreme Court within 6 months of;

- the grant of probate of the Will; or
- the grant of Letters of Administration.

In some circumstances the time for making an application may be extended.

You will require legal assistance to challenge a Will in the Supreme Court.

A family member of the deceased can challenge a Will or Administration Act provision. This may affect your rights. If an application is made to the court, a summons and a copy of the documents filed will usually be given to each person whose rights will be affected under the Will or Administration Act. If you receive a summons you should get legal advice about your rights.

DEATH COMPENSATION.

In some situations it may be possible to obtain compensation following the death of a partner. Some of the Western Australian Acts that allow for compensation following the death of a de facto partner of any sex are discussed below. If your partner dies and you believe you have a right to compensation you should seek legal advice.

- The Fatal Accidents Act 1959 (WA): Where a person's death is caused by negligence or fault, family members may, in certain circumstances, be entitled to sue for the death of that person. A de facto partner of the deceased who was living with the deceased for at least two years immediately before the death is entitled to claim under this Act.

Claims must be made within 12 months of death. (Extensions may be granted in some circumstances).

- The Worker's Compensation and Rehabilitation Act 1981 (WA) : When a worker dies as a result of an injury or illness related to their work, surviving dependants including de facto partners may have a claim under the Act.
- The Criminal Injuries Compensation Act 1985 (WA): Close relatives of someone who dies as a result of an offence may have a claim for loss. A de facto partner who was living with the deceased in a relationship for at least two years immediately before the death is a close relative under the Act.

NOTES



Gay & Lesbian Equality (WA) Inc. (GALE) is Western Australia's peak gay and lesbian human rights lobby group.

GALE is currently involved in forming a coalition with other state lobby groups to tackle federal laws that deny gay and lesbian people equal rights. Please join GALE or make a donation to the fighting fund for this and other gay and lesbian reform issues.

PO Box 420 Northbridge WA

Phone (08) 9487 0862 Email galewa@galewa.asn.au Web www.galewa.asn.au



**gay and lesbian
community services**
of western australia (inc)

Gay and Lesbian Community Service of WA (Inc) is a charitable organisation dedicated to serving the gay and lesbian community in Western Australia.

Counselling and Information Line (08) 9420 7201

WA Country 1800 184 527 Email admin@glcs.org.au Web www.glcs.org.au

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Web www.slatergordon.com.au Email perth@slatergordon.com.au

The Law Can Be A Queer Thing

There are new laws that affect people of all sexualities and genders. Whether you are single or in a relationship you now have new legal rights and obligations. LEGAL AID WA's free telephone Information Line can explain the law around:

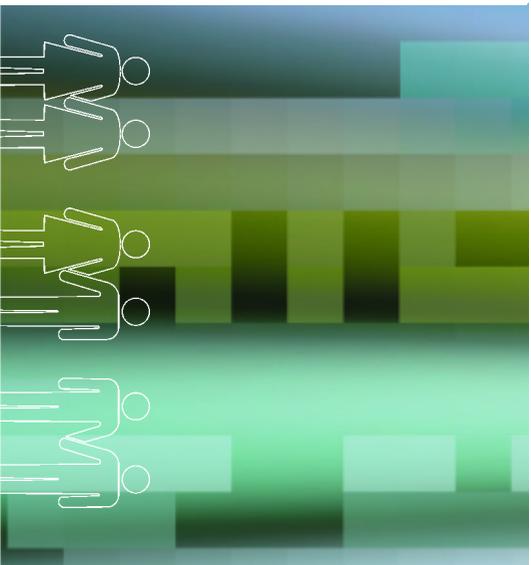
- Discrimination
- De facto relationships
- Sexual & violent offences
- Parenting and family law
- Age of consent
- Other legal enquiries

LEGAL AID INFORMATION LINE

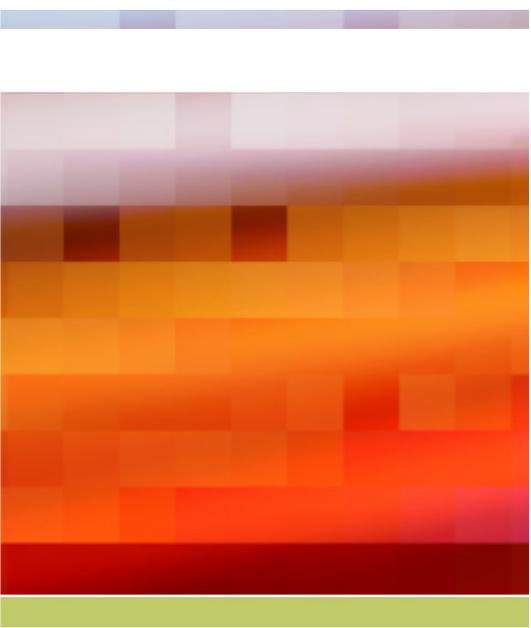
1300 650 579
TTY 1800 241 216

www.legalaid.wa.gov.au





The information in this booklet should be used as a guide only. As with any new laws the way courts, police and government departments interpret the law will change and develop over time. It should also be remembered that Parliament regularly changes the law and readers should check our web site www.equalityrules.info or other sites for updates.



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