



over the
rainbow



A GUIDE TO THE LAW FOR
LESBIANS AND GAY MEN
IN VICTORIA



FOURTH EDITION



www.over-the-rainbow.org

This website expands on the information in this booklet, providing links to relevant laws, legal cases and examples.

This publication is a joint project between the Victorian Gay and Lesbian Rights Lobby and the Law Institute of Victoria.

© Victorian Gay and Lesbian Rights Lobby and Law Institute of Victoria 2005

Originally researched and written by: Jennifer Lord & Lynn Buchanan

Originally designed by: Anne Donald, Social Change Media

Originally funded by: Victoria Law Foundation

The material contained in this book is a general guide to the law, current at November 2004. It should not be relied on as a substitute for professional legal advice.

ISBN 1 877037 84 2

To order more copies of this publication, contact Victoria Legal Aid on 9269 0223
or order online from the Legal Aid web site – www.legalaid.vic.gov.au



over the
rainbow



A GUIDE TO THE LAW FOR
LESBIANS AND GAY MEN
IN VICTORIA



contents

1. HOW THE LAW WORKS

'Rights' and the law	2
Where the law comes from	2
Legal recognition for gay couples	2
Transgender issues	3

2. TAKING ACTION

Inform yourself about your rights	4
Get legal advice	4
Make a Will	5
Make a legal agreement	6
Authorise others to act for you (power of attorney)	6

3. DISCRIMINATION

What is discrimination?	8
Grounds of discrimination	8
Exemptions	10
What you can do about discrimination	10
Discrimination due to gender identity	11
Discrimination at work	12
Young people and schools	13

4. VIOLENCE

Taking action against violence	14
Offences involving violence	14

5. DEALING WITH THE POLICE

Your rights and police powers	17
Reporting a crime to police	18
Complaints about police	18

6. PRIVACY AND CONFIDENTIALITY

Information privacy	20
Confidentiality	20
Disclosure	21
Coming out	21

7. HAVING SEX

Consenting to sex	22
Sexual harassment	22
Sexual behaviour in public	22

8. RELATIONSHIPS

Recognition and status of relationships	24
Domestic partner – two types	24
Immigration	26

9. PARENTS AND CHILDREN

Becoming a parent	28
Living with/parenting children	30
Separation and disputes	31
Anonymous sperm donor	32
Known sperm donor	32
Non-biological parent	34

10. PROPERTY

Owning property together	37
Separation and division of property	38

11. DEATH AND INHERITANCE

Make a Will!	40
Funeral arrangements	41
If there isn't a Will	41
Family provision – challenging a Will or intestacy	43
Death compensation	44

12. WORK AND MONEY

Employment	45
Superannuation	46
Taxation	48
Social security	48

13. HEALTH

Discrimination	50
Access to records	50
Authorising medical treatment	50
Hospital visiting	51
HIV/AIDS	52



1 how the law works

'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 has developed over time and often 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 Victoria.

LEGAL RECOGNITION FOR GAY COUPLES

In 2001 the Victorian Parliament passed the *Statute Law Amendment (Relationships) Act* and the *Statute Law Further Amendment (Relationships) Act*, giving same-sex couples legal recognition in a number of areas.

The main ones are:

- ★ 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' for autopsies and tissue donation,
- ★ disclosure of partner's health information,
- ★ protection from discrimination on the basis of marital status,
- ★ recognition as a parent of a non-biological child in some cases.

These Acts did not create new rights specific to gay men and lesbians – rather, they reduced previous discrimination.

Not all Victorian Acts have been amended in this way. A notable exception is that gay and lesbian couples don't yet have the right to adopt children, and may still face discrimination in the use of assisted reproductive technology in Victoria (see p.28).

Concept of domestic partner

These Acts created a new category of relationships, called 'domestic partner'. This covers all couples who aren't married, regardless of their gender. There are two definitions of 'domestic partner' – these are discussed in the Relationships section on p.24.

No effect on federal law

These Acts amended Victorian law only. They did not remove discrimination against people in same-sex relationships under federal law. Nor did they give lesbians and gay men the right to marry or affect the status of gay and lesbian parents under the *Family Law Act*, as these are federal laws.

TRANSGENDER ISSUES

This book deals primarily with the law as it affects gay men and lesbians. There is some discussion of the legal status of transgender people and the issues affecting them; however, the same laws don't always apply. See p.11 for further discussion.

Where to get help

The Good Tranny Guide website listing support groups, tranny friendly businesses etc. and giving medical and legal information
www.tgfolk.net/sites/gtg/index.html

Transgender Victoria
broad-based community group acting on behalf of all transgender people
9517 6613
<http://home.vicnet.net.au/~victrans/>

Seahorse Club of Victoria
social and support group
9513 8222
www.vicnet.net.au/~seahorse

Transgender Liberation and Care (TLC)
self help group for the transgender community
9517 1237
www.translib.org.au

Gender Identity Support Group
0421 209 608
www.gisg.org

The law reforms in Victoria have extended many rights to same-sex couples. But it is still important to understand how the law affects you as an individual and to plan ahead and take steps to safeguard your legal position as far as possible.

What to do

- ★ 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 the Victorian Gay and Lesbian Rights Lobby to find out what you can do to help reform our laws. As you will see from the information in this booklet, there are still many areas of law that discriminate against gay men and lesbians. We will

only achieve change by speaking out, lobbying and working together towards a fairer system.

Useful contacts

Victorian Gay and Lesbian Rights Lobby
0417 484 438
PO Box 2156, Fitzroy BC 3065
www.vglrl.org.au

Gay and Lesbian Switchboard
telephone counselling, referral and information
9827 8544
1800 184 527 (country callers)
13 14 50 Telephone Interpreter Service

ALSO Foundation
9827 4999
www.also.org.au

GET LEGAL ADVICE

You can get free legal advice from Victoria Legal Aid or a community legal centre, although further legal representation depends on means tests and other guidelines.

Some private solicitors offer a first appointment free of charge or at low cost – always ask about this. There are also legal centres and advice services that specialise in certain issues, e.g. HIV/AIDS.

The Law Institute's Dial-a-Law Referral Service, GayLawNet and the Gay and Lesbian Alliance have listings of gay-friendly lawyers.

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 p.10) or the Legal Ombudsman.

Always check costs with a lawyer before signing a contract with them. You can ring around to compare costs and services.

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 Victorian law. Changes to the law have given inheritance rights to same-sex couples.

Where to get help

GayLawNet
www.gaylawnet.com

Victoria Legal Aid
9269 0234
1800 677 402 (country callers)
www.legalaid.vic.gov.au

Law Institute of Victoria
Referral Service
9607 9550
Dial-a-Law
9602 5000
www.liv.asn.au

Federation of Community Legal Centres
for referral to your nearest centre
9654 2204

Women's Legal Service
telephone advice and referral
9642 0877
1800 133 302 (country callers)
9642 0334 (TTY)

Legal Ombudsman
for complaints about lawyers
9642 0655
1800 357 772 (country callers)
www.legalombudsman.vic.gov.au

That means that if you have been living with someone as a couple continuously for at least two years at the time of your death, that person is your 'domestic partner' and has the right to inherit your property.

If you are married, however, your spouse (i.e. person of the opposite sex) 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 is limited. Leaving it to them in your Will may be the only way they will benefit from your superannuation after you die (see Superannuation, p.46).

For more information about Wills (and funerals) and what happens if there isn't a Will, see p.40.

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 on p.37. You can also make a legal agreement about parenting arrangements (see p.35). 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, p.7).

You can appoint your same-sex 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 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. This is discussed in relation to medical decisions on p.51.

'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

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 is no longer valid if you lose legal capacity.

This is different from the types of powers of attorney you can give someone to cover future incapacity (these are listed below).

You must give someone these while you still have legal capacity. They can be cancelled by you at any time as long as you have capacity.

Enduring Power of Attorney

This is similar to a General Power of Attorney as it relates only to property and finances. Unlike a General Power of Attorney, it continues to operate even after you become legally incapacitated.

Enduring Power of Attorney (Medical Treatment)

This means the appointed person can make decisions about your health care, including consent to AND refusal of medical treatment. It can have conditions attached to it, e.g. what happens if you're on life support. To help your attorney, write down your views about possible medical procedures.

Enduring Guardian

This gives the appointed person power to make decisions about general lifestyle, day-to-day care and living arrangements. They can consent to medical treatment, but unlike an Enduring Power of Attorney (Medical Treatment), they CANNOT refuse medical treatment.

For a guide to powers of attorney and guardianship, see the *Take Control* kit published by Victoria Legal Aid and the Office of the Public Advocate.

This can be ordered from Victoria Legal Aid on 9269 0223 and is also available on the VLA website at www.legalaid.vic.gov.au

You may also need legal advice about what is best for your circumstances.

WHAT IS DISCRIMINATION?

Gay men and lesbians still face discrimination and harassment in a variety of situations. In a survey done by the Victorian Gay and Lesbian Rights Lobby, 84% of gay, lesbian or transgender respondents had experienced discrimination or harassment – for details of the survey report, *Enough is Enough*, see p.16.

There is both State and federal legislation making discrimination and harassment unlawful in certain areas and on certain grounds.

Sexual harassment

The *Equal Opportunity Act 1995* (Vic) and the *Sex Discrimination Act 1984* (Cth) both prohibit sexual harassment in the areas listed below. This means unwelcome conduct of a sexual nature which a reasonable person could have expected the other person to be offended, humiliated or intimidated by. It can include negative jokes and remarks about someone's sexuality, and applies regardless of the gender of the people involved.

Areas in which discrimination may be unlawful

The *Equal Opportunity Act* makes it unlawful to discriminate against someone in the following areas:

- ★ employment and paid work (see p.12 for more detail),
- ★ education,

- ★ provision of goods and services (including medical and legal services),
- ★ accommodation,
- ★ sport,
- ★ local government,
- ★ clubs and community service organisations (only those on Crown land or who receive government funding).

GROUNDINGS OF DISCRIMINATION

There are various grounds of discrimination in anti-discrimination legislation.

Sometimes people are discriminated against because of more than one attribute.

The *Equal Opportunity Act* makes it unlawful to discriminate on the basis of gender, age, physical features, pregnancy, status as a parent or carer, race, ethnicity and national origin, and religious and political beliefs.

The *Equal Opportunity Act* also makes discrimination on the following grounds unlawful:

Sexual orientation

Sexual orientation means 'homosexuality (including lesbianism), bisexuality or heterosexuality'.

Although this is a ground in the *Victorian Equal Opportunity Act*, there is no such ground in federal anti-discrimination legislation.

However, the Human Rights and Equal Opportunity Commission can investigate and conciliate a complaint of sexual preference discrimination in employment (see also p.12 in relation to the *Workplace Relations Act 1996* (Cth)).

Lawful sexual activity

Before the addition of 'sexual orientation' in 2000, this was the main ground used specifically by gay men and lesbians to complain about discrimination. There is no such ground in federal legislation.

Marital status

This comes under both Victorian and federal law.

Under the *Equal Opportunity Act 1995* (Vic), 'marital status' includes being a domestic partner, i.e. living together 'on a genuine domestic basis', regardless of gender.

You don't have to live together for a certain period of time to get protection from discrimination under this Act.

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

Good news

The Federal Court has ruled that denying a single woman access to assisted reproductive technology (ART) contravenes the *Sex Discrimination Act*. This decision was unsuccessfully challenged in the High Court (see p.28 for more details).

Impairment

Under the *Equal Opportunity Act* and the *Disability Discrimination Act 1992* (Cth) it is unlawful to discriminate against someone because they:

- ★ 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.

EXEMPTIONS

There are exemptions in the *Equal Opportunity Act*. These operate to allow some discrimination. They include:

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

You can contact:

Equal Opportunity Commission

9281 7100

1800 134 142 (country callers)

9281 7110 (TTY)

www.eoc.vic.gov.au

The commission can advise you of your legal options under Victorian law and can give you basic information about federal law. Your complaint will be dealt with confidentially. The commission is not a court or tribunal, but operates through conciliation.

You need to think about what outcome you want, for example, an apology, payment of compensation, an undertaking to employ or promote you or 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 DUE TO GENDER IDENTITY

Victoria has joined most other Australian States and Territories (except Queensland and Western Australia) in giving people protection against discrimination on the grounds of gender identity.

The *Equal Opportunity Act* makes it unlawful to discriminate against someone because of their gender identity. This includes cross-dressers, people who are intersex, and anyone

who has had, is undergoing or is planning to undergo a gender reassignment.

When a transgender person transitions in the workplace their employer is entitled to 'adequate notice'. 'Adequate' refers to what is needed to enable the employer to comply with the Act, for example, by reviewing policy and training staff. The Equal Opportunity Commission has prepared Guidelines for Employers to assist them (see their website at www.eoc.vic.gov.au).

LEGAL STATUS OF TRANSGENDER PEOPLE

Although transsexuality is legal, the legal status of transgender people in Victoria has not been clear until recent reforms.

Birth Certificates - The Victorian Government has changed the law so that, from 1 January 2005, birth certificates can be changed to reflect a person's affirmed/reassigned gender. This is only possible, however, when the person has undergone sex affirmation surgery.

Other forms of identification - Victorian drivers' licences don't state sex. The motor vehicle registry will change their records if you send them a letter from your doctor. You can also get the sex on your passport changed if you send a change of name registration and a letter from your doctor.

Marriage - In October 2001, the Family Court decided in a case that a post-operative female to male transsexual was legally a man for the purpose of marriage and was legally able to marry a woman. In this case, the couple had asked the court for a declaration that their marriage was valid - they had been able to marry in NSW because in that State an unmarried adult who has undergone sexual reassignment surgery can have their Birth Certificate changed to show their reassigned gender.

For more information, see *The Good Tranny Guide*, listed in 'Where to get help' on p.3.

DISCRIMINATION AT WORK

One of the most common forms of discrimination experienced by gay men, lesbians and transgender people is harassment in the workplace. This can take the form of jokes, snide remarks, put-downs, isolation and failing to use the transgender 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 at work. 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.

It is also a good idea to take notes yourself 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 Opportunity Commission Act 1986* (Cth).

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, tel. 8661 7777.

Union

You can talk to your union representative. Some unions are better than others in dealing with these issues. If you don't have any success with your union, contact the Women's and Equity Officer or UNITE at the Victorian Trades Hall Council, tel. 9662 3511.

UNITE is a trade union group providing support and resources for gay, lesbian, bisexual or transgender union members who are experiencing discrimination in the workplace.

Award or enterprise agreement

The one relevant to your job may have anti-discrimination provisions.

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.

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 p.14).



YOUNG PEOPLE & SCHOOLS

Schools have a responsibility to provide an environment free of harassment and bullying. All schools should have harassment and bullying policies.

If you are having trouble at school because of your sexuality or gender identity, talk to someone you can trust, such as a teacher or school counsellor.

If there is no one at school who can help, you can contact an outside agency for advice about what to do:

Action Centre

9654 4766

1800 013 952 (country callers)

Outreach

www.also.org.au/outreach/

Parents and Friends of Lesbians and Gays (PFLAG)

9827 8408

www.pflag.org.au

Context

Runs projects to support young gay, lesbian, bisexual and transgender people.

www.vicnet.net.au/~context

OutProud

Resource site for gay, lesbian, bisexual and transgender youth.

www.outproud.org/

If you believe your school has treated you in a discriminatory way because of your sexuality, you can also complain to the Equal Opportunity Commission.

TAKING ACTION AGAINST VIOLENCE

Violence includes threats, intimidation, being physically attacked, or having your property attacked.

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. (See p.18.)

Assistance for victims of violence

Victims can get access to free counselling through the Victims Support Agency (VSA). VSA can also advise you about other assistance. A person who has suffered injury as a result of crime can also get financial assistance from the Victims of Crime Assistance Tribunal for medical and counselling expenses and loss of earnings. People who have witnessed a crime and partners of people who die as a result of a crime can also qualify for assistance.

Victims of Crime Assistance Tribunal
9628 7855
1800 882 752 (country callers)
www.vocat.vic.gov.au

Victims Support Agency
Victims of Crime Helpline
1800 819 817
www.justice.vic.gov.au

Many lesbian, gay and transgender victims of violence do not report it to the police. The Victorian police have a Gay and Lesbian Liaison Officer who you can contact if you do not want to go to your local police (see p.18).

The Victorian police have begun keeping statistics of homophobic violence and harassment.

You may be able to take civil action against the perpetrator for damages. Get legal advice first (see p.4).

If the police have been violent towards you, you can make a formal complaint about this. (See Complaints about police, p.18.)

OFFENCES INVOLVING VIOLENCE

Common assault and other offences

Under common law, 'assault' is any action which is meant to make you fear immediate violence. Assault includes physical attack ('battery'), physical intimidation, and in some cases verbal threats.

There are also many offences under the *Crimes Act 1958* (Vic) and other Acts relating to violent behaviour – including personal injury, property damage, threats to seriously injure or kill someone, or to damage or destroy property.

Vilification

Verbal abuse (vilification) which does not cause a fear of violence is not an assault. However, abuse about sexuality or gender identity may accompany discriminatory acts (for instance, a refusal of service) or may be discrimination itself, which you can take action against (see Discrimination, p.8.)

Violence within relationships

The term 'family violence' or 'domestic violence' describes physical violence, threats, abuse, or emotional and psychological intimidation directed towards any person by their partner or any member of their family. This includes your same-sex partner or 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 violence by applying at your local Magistrates Court for an Intervention Order under the *Crimes (Family Violence) Act 1987* (Vic).

You can also report the violence to the police. The police can apply for an Intervention Order for you. They may also charge the person with a criminal offence.

For more information about applying for and responding to intervention orders, contact Victoria Legal Aid on 9269 0223 for a free booklet, also available on their website at www.legalaid.vic.gov.au

Where to get help

Domestic Violence and Incest
Resource Centre

9486 9866

9417 1255 (TTY)

www.dvirc.org.au

Women's Domestic Violence Crisis
Service (24 hours)

9373 0123

1800 015 188 (country callers)

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 an Intervention Order.

Sexual assault and rape

Sexual assault is when a person 'indecently assaults' another person. This covers sexual acts which don't involve penetration, such as touching breasts or buttocks without consent. (For meaning of consent, see p.22.)

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; and of anus or vagina by another person using 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.

Centres against Sexual Assault (CASA)

If you have been sexually assaulted, you can get help from a Centre against Sexual Assault. CASA services include counselling and support; information and referral; and advocacy. CASA counsellors can help you decide whether to report the assault to police.

Some CASAs have men as well as women working as counsellors. If your local CASA does not, and you wish to see a male counsellor, you can ask to be referred to another centre.

Contact your local CASA (listed under Centre for Sexual Assault in the White Pages) or call CASA House on 9344 2210. After hours phone 9349 1766 or 1800 806 292 or www.casa.org.au

Take action against violence

You can find out information about the extent of violence against lesbian, gay and transgender people in Victoria from *Enough is Enough*, a comprehensive report produced in 2000 by the Victorian Gay and Lesbian Rights Lobby.

Victorian Gay & Lesbian Rights Lobby
0417 484 438
PO Box 2156
Fitzroy BC 3065
www.vglrl.org.au

If you would like to take action against homophobic violence, contact:

Anti-Violence Project of Victoria (AVP)
c/- 6 Claremont Street
South Yarra 3141
9471 3440 or 0408 001 697
vicavp@yahoo.com
<http://au.geocities.com/vicavp/>

A booklet about sexual assault and the law is available from Victoria Legal Aid. Phone 9269 0223 for a free copy or download it from the website at www.legalaid.vic.gov.au



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, or they think you can give them information about an indictable (serious) offence. Withholding your correct name and address is an offence.

You have the right to ask for the name, rank, station and number of any officer who is asking for your name and address. You can also ask their reason for questioning you.

If you are driving, riding a bike, on public transport, or on licensed premises, you must always give the police your name and address when asked.

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

Answering police questions

At all times you have the right to remain silent and say 'no comment' after giving your name and address. Anything you say to the police at any time can be used by

them 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. If you believe you have been in custody for too long you can:

- ★ ask the police if you are going to be charged or released,
- ★ ask to phone a lawyer,
- ★ make a formal complaint later.

While in custody you have the right to telephone a friend or relative AND to telephone a lawyer in private.

Formal interviews with police

If you are being charged with an indictable (serious) offence, the police must tape-record the 'caution' and the formal interview. For a summary (minor) offence, interviews do not have to be tape-recorded and anything you say to police can be used as evidence.

If you are under 17, 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 if they believe you have committed an offence. You can refuse to take part in an identification parade or line-up or have your photo taken.

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. 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 with your consent or with a court order, and it must be done by a doctor.

Body samples

Police can only take body samples from you with your permission or with a court order. (However, if you are the driver of a car involved in an accident the police can have a doctor take a blood sample without your permission.) Always get legal advice before giving permission (see p.4).

For more information about police powers, contact Victoria Legal Aid on 9269 0223 for a free copy of *Police Powers – Your Rights*, also available on their website at www.legalaid.vic.gov.au

REPORTING A CRIME TO POLICE

Attempts are being made within Victoria Police to change attitudes towards the gay and lesbian community.

This includes improving police performance and encouraging members of the gay and lesbian 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.

COMPLAINTS ABOUT POLICE

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

See a lawyer, community legal centre or Victoria Legal Aid for advice first, especially if you have been charged with an offence (see p.4). If you have been injured you should see a doctor as soon as possible and also get photographs taken.

Good News

Victoria Police have appointed Gay & Lesbian Liaison Officers (GLLO) throughout the state. GLLOs provide advice, assistance and referral. The GLLO unit aims to build trust between police and the GLBT community. If you are worried about dealing with local police or not happy with police response, contact a liaison officer listed below.

State Co-Ordinator

Acting Sergeant Melinda Edwards
9247 6944 or 0409 534 154

Inner metropolitan & bayside Melb.

Senior Constable Scott Davis
9247 5346 or 0414 181 403

North West Melb. & North West Vic.

Constable Andrea Galbraith
5223 7839 or 0407 048 393

North East Melb. & North East Vic.

Senior Constable Lisa Keyte
9871 4188 or 0407 870 750

Mornington Peninsula, Frankston

Detective Senior Constable Deb Seymour
5986 0463

Greater Dandenong, Casey, Cardinia

Detective Senior Constable Deb Keogh
9767 7477

Darebin, Whittlesea

Senior Constable Sarah McKenzie
9409 8174

Greater Bendigo, Loddon, Macedon Ranges, Mt Alexander

Leading Senior Constable Alan Walker
5440 2510

Greater Shepparton, Campaspe, Moira

Senior Constable Deb Yeates
5820 5818 or Senior Constable Neil
Johnston 5820 5737

Mildura, Swan Hill, Gannawarra, Buloke

Senior Constable Roberta Barry
5036 4444

Baw Baw, Bass Coast, South Gippsland, La Trobe

Senior Constable Anthony Vanderzalm
5174 0900

Wellington, East Gippsland

Senior Constable Kate Sadler
5152 0504

Public Incident Resolution (PIR) process

This is the complaint process for 'customer service' problems, such as rudeness or lack of action. It is not suitable for allegations of misconduct or criminality. It does not involve a formal investigation. Instead, a senior officer works individually with you and the police officer you are complaining about, to reach an agreed resolution.

Ring the Customer Assistance Unit on 1300 363 101.

Formal investigation process

The police can conduct formal internal investigations into allegations of police misconduct or criminal behaviour. To make a formal complaint, contact the Victoria Police Ethical Standards Department on 1300 363 101.

Deputy Ombudsman (Police Complaints)

You can also make a complaint to the Deputy Ombudsman (Police Complaints) on 9613 6222 or 1800 806 314 (country callers).

Anti-discrimination proceedings

If you believe that the police have discriminated against you, you can lodge a complaint with the Equal Opportunity Commission (see Discrimination, p.10).

INFORMATION PRIVACY

The *Information Privacy Act 2000* (Vic) applies to both public sector and private organisations. The Act sets out guidelines for the collection and disclosure of personal information.

It also contains guidelines for the collection of 'sensitive information' – this includes information or an opinion about a person's sexual preferences or practices. Generally, 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 Records Act 2001* (Vic) contains Health Privacy Principles that relate specifically to health information. This is discussed further on p.50.

If someone has breached the *Information Privacy Act* you can complain to:

Victorian Privacy Commissioner
1300 666 444
enquiries@privacy.vic.gov.au
www.privacy.vic.gov.au

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.

A lawyer can break the confidence if they believe you may commit a crime or an act of fraud. 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, Victorian Branch, or Law Institute of Victoria) or the Health Services Commissioner (see p.50).

You can also take private legal action but you should get legal advice first as this will be costly and time consuming (see p.4).

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 p.8).

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

Under the *Health Act 1958* (Vic), for blood donations, you must answer questions about sexual activity in the past 12 months, including whether you have had male to male sex, had sex with a man you suspect of being bisexual or had sex with or worked as a sex worker. If you answer yes, current policy is that you will not be allowed to donate blood.

For sperm and tissue donations, you must answer the same questions about your own and your partner's sexual 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. This is discussed further in the Health section, p.52.

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. Get legal advice first. See p.8 and p.14.

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.

'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. Having sex with someone without their consent is an offence (see Sexual assault and rape, p.15).

Age of consent

In Victoria the law about under-age sex is the same for both men and women and for gay and heterosexual sex.

If you are:

- ★ *under 10* – no one is allowed to have sex with you (even if you consent),
- ★ *between the ages of 10 and 16* – a person is not allowed to have sex with you if they are more than two years older than you (even if you consent) unless they had reasonable grounds to believe that you were 16 or older at the time,

- ★ *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). Your consent is only a defence if they believed you were 18 or older.

Having sex with a young person in contravention of these age restrictions is an offence and can carry a significant jail sentence.

Having sex interstate

The age of consent for gay sex depends on what state you are in and what gender you are. This table shows the different ages for female to female sex, for male to male sex and for heterosexual sex.

	♀	♂	H
ACT and WA	16	16	16
NSW and NT	16	16	16
SA and TAS	17	17	17
QLD	16/18*	16/18*	16/18*

*Queensland law specifies an age of consent of 18 for anal sex and 16 for all other sexual activities. Some states, like Victoria, may allow sex at a younger age with conditions. For example, if your partner is no more than two years older than you. Check the law in that state.

SEXUAL HARASSMENT

'Sexual harassment' is unlawful in the workplace and some other areas (see Discrimination, p.8).

Sexual harassment in social situations or in public is not unlawful in Victoria, unless it is so persistent and intimidating that it is seen as 'stalking' or sexual assault (see p.15).

SEXUAL BEHAVIOUR IN PUBLIC

Behaving in an 'indecent, offensive or insulting manner' is an offence under the *Summary Offences Act 1966 (Vic)*.

This law penalises some public sexual activity, though not just expressions of affection. It applies equally to all people.

If you have sex in public, when and where someone could see you and take offence, you may be charged with 'offensive behaviour'. (See Beats, for more information).

If the police threatened to charge you with 'offensive behaviour in public' for holding hands or kissing, they would be unlawfully discriminating against you, since same-sex affection is now accepted. You could probably take action against the police for doing so. (See Discrimination, p.8 see also Complaints about police, p18).

BEATS

Most men using beats never encounter the police. If you do, however, they could charge you with 'offensive behaviour in public'.

The legal meaning of offensive behaviour was established by the Supreme Court in 1961. 'Offensive' means potentially offensive – no-one needs to have been offended. But to be illegal, 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 isn't legally offensive.

In a Northern Territory case in 1987, the Court of Appeal ruled that offensive behaviour has to be known or intended to be visible, rather than just seen by accident. A Victorian court may take the same approach.

The definition of a public place is very wide and would include public toilets. Behaviour that is concealed, however, even in a public place (e.g. inside a closed toilet cubicle), is not offensive. Closing the cubicle door doesn't turn a public place into a private place, but sex inside it would not be 'offensive behaviour in public'. The laws in other states are more strict and include offences such as 'wilful exposure'. It is best to know the local laws if using beats interstate.

RECOGNITION AND STATUS OF RELATIONSHIPS

There are many Acts of Parliament which refer to different types of relationships. Acts often have their own definitions of 'spouse', 'de facto spouse', 'next of kin', or 'dependant'.

These definitions are used to determine rights and responsibilities in areas like inheritance, workers compensation, superannuation, accident compensation, stamp duty liability and so on.

The Victorian *Statute Law Amendment (Relationships) Act 2001* and *Statute Law Further Amendment (Relationships) Act 2001* replaced the concept of 'de facto spouse' with the concept of 'domestic partner' for both same-sex and heterosexual couples in most Victorian Acts. This recognises 'the rights and responsibilities of partners in domestic relationships . . . irrespective of gender'.

Spouse

'Spouse' in most Victorian Acts is defined to be 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 and federal legislation controversially passed by the Howard Government in 2004 has made the definition of marriage under the *Marriage Act 1961* (Cth) 'the union of a man and a woman to the exclusion of all others...'

De facto spouse

Most definitions of de facto spouse refer to a man and woman living together on a 'genuine domestic basis'.

The term 'de facto spouse' has been replaced in most Victorian Acts by the new term 'domestic partner'.

Next of kin

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

The law reforms changed 'next of kin' in the *Coroner's Act 1985* (Vic) and the *Human Tissue Act 1982* (Vic). A 'domestic partner' has the same status as a spouse in the list of 'senior next of kin' who can object to an autopsy or approve tissue donation from a dead person.

Whether or not your same-sex partner can be legally considered your next of kin, there is nothing to stop you naming them as your next of kin if asked. For a discussion of next of kin status and medical treatment, see p.51.

DOMESTIC PARTNER – TWO TYPES

The new Act has created two definitions of 'domestic partner' which apply to different areas of the law:

1. Living together

The first definition covers couples who live together 'on a genuine domestic basis', regardless of gender. This is not

limited to adults (i.e. people 18 years or older).

This definition has been used to establish the rights of same-sex couples in relation to inheritance, property division on relationship breakdown, compensation schemes, State superannuation schemes and discrimination.

In relation to inheritance on intestacy (see p.41) and property division (see p.38), there is the additional requirement that to be a 'domestic partner' you have to have been living together for at least two years.

2. Not living together

The second definition covers couples where either or both partners provide

'personal or financial commitment and support of a domestic nature for the material benefit of the other' – whether or not they live together, and regardless of gender.

To be a person's 'domestic partner' under this definition, you must be an adult.

This broader definition of domestic partner has been used in amending some health-related legislation, criminal law legislation and business and consumer legislation.

In practice, this will mean that if you live with your partner, you will probably have 'domestic partner' rights under all laws mentioned. If you don't live together, then you will only have rights under the second set.

Determining who is a domestic partner

If a decision ever needs to be made about whether you meet the legal definition of a 'domestic partner', the relevant court or administrative body must take into account all the circumstances of your relationship, including any one or more of the following:

- ★ the length of your relationship,
- ★ the nature and extent of common residence,
- ★ whether or not you and your partner have a sexual relationship,
- ★ how financially dependent or interdependent you are on each other, and whether there are any arrangements between you for financial support,
- ★ your ownership, use and acquisition of property,
- ★ your degree of mutual commitment to a shared life,
- ★ the care of and support of children,
- ★ the reputation and public aspects of the relationship.

continued next page

continued from p.25

Someone who is paid to care for you and provide domestic support can't be your domestic partner, nor can someone who lives with you only because you are co-tenants.

You can support your claim to be in a domestic partnership by signing a Statutory Declaration with your partner. In the Statutory Declaration you should refer to all the above factors that are relevant to your relationship. A sample Statutory Declaration is on the Victorian Gay and Lesbian Rights Lobby website at www.vglrl.org.au

The Statutory Declaration is not a binding legal document, but it can provide evidence of your joint intentions and the state of your relationship. This would be considered by a court or administrative body if need be.

IMMIGRATION

Immigration is covered by federal law. It was one of the first areas of law to recognise same-sex relationships.

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— see www.dimia.gov.au/migration/family/partners/interdependent.htm

Generally they will first be granted a temporary visa for up to two years before being able to apply for a permanent visa. However, if they apply offshore and you have been together at least five years, they may get permanent residence immediately.

If the application is refused, in some cases you can appeal to the Migration Review Tribunal.

Good news

Australia is one of only four countries that have visas for same-sex couples (also UK, New Zealand and Netherlands).

Visa criteria

Immigration law is constantly changing. Always get legal advice (see p.4). The basic criteria for an interdependency visa currently are:

- ★ both people must be at least 18,
- ★ they must have a mutual commitment to a shared life to the exclusion of other interdependent relationships,
- ★ their relationship must be genuine and continuing,
- ★ 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 a costly medical condition that will over-use public resources.

For interdependent visas, the department will overlook a failure to pass the health test if the cost to the community is not ‘undue’. They estimate the cost of the person’s health care. Currently anything up to \$200,000 isn’t considered undue.

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. The fact that same-sex couples can not live together in that country will be taken into account in deciding whether to grant an interdependency visa.

Where to get help

Gay and Lesbian Immigration Task Force
02 9853 0345 www.glitf.org.au

Refugee Immigration Legal Centre
9483 1140 www.rilc.org.au

BECOMING A PARENT

Many lesbians and gay men are considering having children. Some options and their legal implications are discussed in this section.

Reproductive technologies

Victoria, South Australia and Western Australia have specific laws regulating reproductive technology. The *Infertility Treatment Act 1995 (Vic)* excludes single women and same-sex couples from using reproductive technology in Victoria. This has not been changed by the new law about domestic partners.

This means that to use reproductive services, particularly donor insemination, through a clinic you may have to go to another State or Territory such as New South Wales, the ACT or Tasmania. Clinics in Albury, Sydney, Hobart and Canberra are used to assisting women from Victoria.

On 28 July 2000 the Federal Court ruled that the *Infertility Treatment Act* contravenes the federal *Sex Discrimination Act*, by not allowing some women to use reproductive technologies on the basis of their marital status.

In April 2002 the High Court dismissed a challenge to this ruling. However the Victorian government has not amended the *Infertility Treatment Act* to allow access for single women and lesbians. The Infertility Treatment Authority, which administers the Act, has said that

reproductive technology services are open only to lesbians and single women who are medically infertile. Married or heterosexual de facto women can receive treatment even if they are not infertile. This means that a lesbian who is medically infertile is able to use IVF services in Victoria but donor insemination is generally not available.

There are rare forms of medical infertility for which donor insemination is a possible treatment, and woman with these forms can receive donor insemination in Victoria. Contact the Infertility Treatment Authority on 8601 5250 if you are unsure if you can access reproductive services in Victoria. The Fertility Access Rights (FAR) working group of the VGLRL is working to change the law to end discrimination. FAR believes that all women should have access to all forms of assisted reproductive technology regardless of their marital status or sexuality. Access to donor insemination should be provided on the basis of lack of access to fertile semen, rather than infertility of the woman. For more information, contact FAR on 0419 120 663.

Good news

In late 2002 the Attorney General asked the Victorian Law Reform Commission to look into the eligibility criteria for assisted reproduction and adoption. The commission has produced a consultation paper in 2003 and commissioned three papers on the child's perspective in 2004. *Continued next page*

Continued from p28

These are available on their website:
www.lawreform.vic.gov.au

The commission is expected to release a series of recommendations on law reform in this area in early 2005. These may lead to reform of the assisted reproduction and adoption legislation in Victoria.

Self-insemination

Under the *Infertility Treatment Act*, artificial insemination can only be done by an approved doctor or at a licensed hospital or infertility treatment clinic. The penalties specified in the Act are a maximum \$48,000 fine or four years' imprisonment or both. The terms of the *Infertility Treatment Act* may imply that self-insemination using a known sperm donor is illegal. Many people are using this alternative, and because these arrangements are private, the law is extremely difficult to enforce. There haven't been any prosecutions so far in Victoria.

Good news

The Infertility Treatment Authority has accepted legal advice that self-insemination by a woman at home is not illegal, that is, self-insemination does *not* breach the *Infertility Treatment Act*.

Health and safety in self insemination

Using fresh sperm for self-insemination can create health risks for the woman and prospective baby if the sperm carries infection that can be transmitted to the woman. Such infections include

chlamydia, gonorrhoea, Hepatitis B, syphilis, HIV and CMV (cytomegalovirus).

There are now two options to improve the safety of self-insemination. One is to use fresh sperm, but only after the known donor has been tested for all infections and has remained risk free for at least three months before the test. He would then need to remain safe during the whole period of the inseminations. The second is to have him tested and his sperm stored (frozen) at a clinic sperm bank. The sperm is not released until six months have passed and the donor has been re-tested and is infection-free. The sperm is then released to the woman for home insemination each month. This service is available only through Melbourne IVF in Victoria and only to women with a known donor. If you hope to use this service, you and your donor need a referral to Melbourne IVF from a doctor.

If you are considering either of these options you can also contact a support group (see p.36).

Surrogacy

Surrogacy arrangements are illegal in Victoria under the *Infertility Treatment Act*.

Adoption

Adoption is governed by State law (*Adoption Act* 1984). To adopt a child in Victoria you usually need to have been married or in a heterosexual de facto relationship for at least two years.

Adoption has not been changed by the new law relating to domestic partners.

This remains an area of law which discriminates against same-sex couples.

Single people can only adopt if there are special circumstances. Same-sex couples cannot adopt a child as a couple, although one of the couple may be able to do so as a single person.

Second-parent adoption

Under the *Adoption Act* a child legally becomes the child of the adoptive parent and the legal relationship with the birth parent is replaced. This means a non-biological parent can't adopt their same-sex partner's child without the birth parent giving up their parental status, i.e. a child can't have more than two parents legally. It is possible, however, for the Family Court to make a parenting order under the *Family Law Act* which gives legal recognition to your shared parental responsibilities (see p.35). All forms of adoption are being reviewed by the Victorian Law Reform Commission.

Fostering

Same-sex couples can become foster parents. Individual fostering agencies have their own policies and many are happy to support gay men and lesbians as foster parents. Check with the agency in your local area. For information about fostering, see the Foster Care Victoria website at <http://home.vicnet.net.au/~fcav/>

LIVING WITH/PARENTING CHILDREN

Gay men and lesbians 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.

Most of the law about parents and children is federal law and so is not affected by the Victorian law about domestic partners.

The information here is a guide and should not be relied on as legal advice.

Parental responsibility

The *Family Law Act 1975* (Cth) says that both parents of a child have equal responsibility for their care, welfare and development – regardless of whether they are married, separated or have never lived together. The term 'parents' means biological and adoptive parents.

The Act stresses children's rights and best interests, NOT parents' rights. Unless it is contrary to 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'?

Biological and adoptive parents automatically have parental responsibility.

Non-biological parents in same-sex relationships are not legally considered 'parents' under family law. Neither are sperm donors, even though there is a biological relationship with the child.

But there are practical steps that non-biological parents and known sperm donors can take to clarify their roles and strengthen their legal position. These issues are discussed on p.32–35.

Stop press

Under changes made to the *Children and Young Persons Act 1989 (Vic)* in 2001, the live-in domestic partner of child's biological parent is also considered a parent of the child.

This is only relevant to some State law issues (see p.34 for more detail). It does not affect the definition of parent under family law.

PARENTING ORDERS

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.
- ★ *Maintenance order* – not often used as most children are covered by the Child Support Scheme instead, but can be used for children over 18 who still need financial support.

Who can apply for a parenting order?

An application can be made by anyone who is 'concerned with the care, welfare and development of the child'. This includes a non-biological parent and 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,
- ★ the current living arrangements and likely effect on the child of a change,
- ★ the child's wishes – depending on their maturity.

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. The Family Court has dealt with a large number of applications for a parenting order by non-biological mothers. The majority have been granted without dispute.

SEPARATION AND DISPUTES

Disputes about children under the age of 18 are covered by the *Family Law Act*, which is a federal Act.

Property disputes between same-sex couples are NOT covered by the Family Law Act. See p.38 for a discussion of this.

Try to reach agreement first

Under the *Family Law Act* people are encouraged to reach agreement about what happens to children if the relationship breaks down.

This is particularly important for gay men and lesbians because of the uncertainty about the legal status of our relationships under federal law.

The Family Court has counselling and mediation services that can help you reach agreement.

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 a consent parenting order.

Get help from a lawyer (see p.4).

If you can't agree – residence and contact disputes

You can apply to the Family Court or the Federal Magistrates Service for a parenting order (see p.31).

If you can't agree – child support disputes

If the dispute is about financial support for children, it is dealt with by the Child

Support Agency. However, only 'parents' of the children can be ordered to pay child support under this scheme. A sperm donor is not recognised as a parent for the purpose of child support (see p.33).

ANONYMOUS SPERM DONOR

A sperm donor who donates sperm anonymously through a fertility treatment clinic is not recognised legally as the father of the child. This means he does not have any right to see the child, nor does he have to provide financial support.

In Victoria the child, once they turn 18, can find out who the sperm donor is through the donor register. This is not the case in all other states and territories. A condition of donating sperm is that donors must agree to the child being able to find out their identity. Donors can also find out information about the child if the child (or their parents if they are under 18) consents.

KNOWN SPERM DONOR

A known sperm donor is also not currently recognised legally as a parent of the child. However, he can apply for a parenting order.

Before you start trying to conceive, it is important for everyone involved to think through issues such as: the level of contact with the child, financial arrangements, decision-making about the child's upbringing, naming the child and so on.

It is strongly advisable that you sign a written agreement between the people involved. It isn't legally enforceable, but it is important evidence of your intentions.

This will be useful to refer back to if there are problems later on. The agreement should be reviewed as the child grows up.

Responsibility for child support

Two court cases (NSW Supreme Court in 1995 and Family Court in 1996) have decided that if a man isn't the married or de facto husband of the biological mother of a child conceived by artificial insemination, then he is not the child's 'parent' under the *Child Support (Assessment) Act* 1989 (Cth) – even if he is named on the Birth Certificate. Therefore he can't be ordered to pay child support by the Child Support Agency. This view was confirmed by the Family Court in a 2002 case.

Contact between donor and child

A known sperm donor can apply for parenting orders under the *Family Law Act* as a 'person concerned with the care, welfare and development of the child'. (See parenting orders p.31.) This might happen because:

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

In a Family Court case in 2002 the court recognised the right of a known sperm donor to have regular contact with the child. If a lesbian couple is not prepared to allow the possibility of the donor having contact with the child, they

should use an anonymous donor through a fertility clinic.

Should the donor be named on the Birth Certificate?

This depends on how the child is conceived and the wishes of everyone involved.

- ★ Anonymous donor - if you conceived through a donor program at a recognised clinic, get a letter from the clinic stating the donor was anonymous. This means the space for 'father' on the birth certificate is blank.
- ★ Known donor - if you know the name of the donor he must sign the birth registration form. He will be listed as father on the birth certificate unless you both write to the Registrar stating he is the donor and asking that he not be listed. The donor has to provide personal and contact details. This means the space for 'father' on the birth certificate is blank but the donor's details are kept on a register at Births, Deaths and Marriages. There is no option to list a donor as 'donor' on the form. If you do not know the donor's name you must give the Registrar of Births, Deaths and Marriages a Statutory Declaration stating why he is unknown. Note: While self-insemination is probably not illegal, insemination by a partner probably is illegal. Get legal advice. It is an offence to make a false or misleading statement in a birth registration form.

The Registrar may refuse to issue a birth certificate if you say you used a known donor but won't give his name.

Good news

A non-biological parent can be listed on the birth certificate as an 'informant', whether or not a donor is listed as father. The biological parent must write to the Registrar to ask for this. If there is a known donor, he has to agree to it.

Contact Births, Deaths and Marriages, 9613 5837 for more information.

Consequences of naming known donor on Birth Certificate

Naming a donor on the Birth Certificate does not make him legally a 'parent' under family law. However, it does have other consequences.

Paternity for inheritance purposes

Naming a known donor on the Birth Certificate establishes kinship.

This gives the child inheritance rights if the donor dies. See *Death and Inheritance*, p.40. (The same outcome can be achieved if the donor names the child as beneficiary in his Will.)

Social security

Centrelink policy is that the biological mother is not eligible for social security unless she first tries to get child support from the father named on the Birth Certificate, even though the law is clear that a donor is not liable for child support.

If Centrelink insist on this, even after you tell them it was self-insemination, you can appeal to an authorised review officer and then the Social Security Appeals Tribunal. Contact the Welfare Rights Unit for more information, see p.49.

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.

NON-BIOLOGICAL PARENT

Because a non-biological parent is not necessarily considered legally to be a parent, they may have limited rights in relation to the child's schooling and medical treatment. This would probably only arise if the school or hospital challenged their authority to make decisions.

New parental rights

Changes to the *Children and Young Persons Act 1989* (Vic) give parental status to a domestic partner who is living with the father or mother of a child. They give a domestic partner these rights of a parent:

- ★ to be present at any police interview of the child under 17,
- ★ to participate fully in and be informed of any criminal proceedings against the child in the Children's Court,
- ★ to be told if the child is in need of protection and taken into safe custody,
- ★ to apply for an interim (temporary) accommodation order for the child,
- ★ not to have the child removed from their care unless the court is satisfied that reasonable steps have already been taken to keep the child at home.

This relates to the Children's Court and not to parenting rights under the *Family Law Act*.

What to do

In Victoria, the non-biological parent cannot legally adopt their same-sex partner's child. However, there are steps you and your partner can take to clarify and strengthen the legal position of the non-biological parent:

1. Parenting agreement

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

- ★ your intention to share parenting,
- ★ how you will care for the child financially,
- ★ what the child's living arrangements will be
- ★ the role of the sperm donor.

This agreement is not legally binding, but it is important evidence of intention, which you might need if there are disputes later about what was agreed to. If you are self-inseminating using a known sperm donor, this is particularly important.

Get legal advice to help you draw up this agreement. The agreement should be signed by all people involved and 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 p.31). This allows a non-biological parent to have legally recognised

decision-making rights in relation to the child until the child is 18. This is not as secure as adoption, which is lifelong and allows for inheritance rights. However, it is currently the best option to provide legal rights and responsibilities to non-biological parents. Family Court orders can be changed if circumstances change.

You *must* serve a copy of the application on the sperm donor (if known). 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 p.31) – the court may ask a counsellor to prepare a family report to help them make a decision.

Getting a parenting order may be expensive as you have to pay court filing fees and you need a lawyer's help to prepare the documentation properly.

3. Make a Will

If the non-biological parent wants their child to inherit their property after they die, they must make a Will naming the child as a beneficiary (see p.42). This is because the law doesn't consider a non-biological parent to have a kinship relationship with the child.

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 isn't legally binding. If there is a dispute with other concerned people, 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 non-biological parent can apply to the Family Court for a parenting order as a 'person concerned with the care, welfare and development of the child' (see p.31). There have been very few cases, so it is hard to predict the outcome.

Child support

A non-biological parent who lives with the child 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, 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 (nor are they liable for child maintenance under the *Family Law Act*).

However, a non-biological parent can be responsible for child support under

common law equitable principles. The biological parent can take legal action in the Supreme Court of Victoria (an expensive option).

In a 1995 case the NSW Supreme Court said that because the non-biological mother 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.

Where to get help

Victoria Legal Aid's Child Support Service
9269 0408

1800 677 402 (country callers)

Child Support Agency

13 12 72

Centrelink Family Assistance Office

13 61 50

Family Court

8600 3800 (enquiries)

8600 3777 (Melbourne Registry)

9767 6200 (Dandenong Registry)

Talking Turkey: A Legal Guide to Self-Insemination

www.girl.org.au (follow links to Publications/Major Reports)

Prospective Lesbian Parents Support Group

<http://home.vicnet.au/~plpvic/>

Fertility Access Rights Lobby

0419 120 663

OWNING PROPERTY TOGETHER

The law categorises property into real estate, which means land or buildings, and personal property, which covers everything else.

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:

- ★ *a joint tenancy* – 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 p.38). If one of you dies, the survivor inherits the other person's share automatically;
- OR

- ★ *tenancy 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 p.40).

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.

Property agreement

You can make an agreement that details the financial and property arrangements between you. This should be done at the time of purchase and be signed by you both. It will create certainty for you now and it will be helpful if you separate and there is disagreement about who owns what.

Get legal help to write the agreement as a formal legal document called a Deed. This means it is a binding contract that can be enforced. Although this 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.

What to include in a property agreement:

- ★ financial contributions of each person – including deposit and mortgage arrangements,
- ★ ownership of any other property acquired by you and your partner during your relationship,
- ★ how each person will meet any financial obligations under the agreement,
- ★ what each person's share is,
- ★ if the property is sold, how the proceeds will be divided,
- ★ how disputes will be resolved if you separate.

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.

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. Domestic partners who are living together no longer have to pay stamp duty on the transfer of the title from one name into both names.

To get the stamp duty exemption, you and your partner must lodge a Statutory Declaration with the State Revenue Office to prove that you are 'domestic partners' (see p.25).

SEPARATION AND DIVISION OF PROPERTY

Who owns what

If you own property together and you have a property agreement, the agreement will make it clear what each person's share in the real estate is.

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.

If you're having trouble sorting out who gets what, make a list of your personal property, then talk about what each person gets.

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 mediation.

You can apply to the Victorian Supreme Court to have your property divided. Get legal advice before doing so.

Disputes about property between same-sex and heterosexual de facto couples are not covered by the *Family Law Act*.

This is likely to change for heterosexual de facto couples as the Victorian Government is referring its powers to make laws about property matters, after relationship breakdown to the Commonwealth. Unfortunately, the Commonwealth Government has indicated it will not change the *Family Law Act* to apply to same-sex couples. Until this changes it is unlikely that same-sex couples will have access to the Family Court for property matters.

Disputes between same-sex couples who have lived together as 'domestic partners' (see p.25) and who have split up after 8 November 2001 are covered by the *Property Law Act 1958* (Vic).

You must have lived together for at least two years, and (usually) must have lived together in Victoria for at least a third of your relationship.

You must apply to the court within two years of the relationship ending, although you may be able to apply outside this time limit on hardship grounds.

There is no standard legal formula for who gets what share. But a court will consider such factors as:

- ★ financial and non-financial contributions to the purchase, care and improvement of the property or to the financial resources of either partner,
- ★ contributions made as a homemaker or parent to the welfare of the other partner or the family if there is a child in the household,
- ★ any written agreement made by the couple.

The *Property Law Act* doesn't allow courts to consider future needs, only past contributions. The court can override the written agreement if they think it's fair to do so.

If your relationship ended before 8 November 2001 (or it has ended since then but you had been living together for less than two years) you can still take court action – but you would have to rely on common law principles of equity rather than the *Property Law Act*. This can be quite slow and expensive and the outcome can be unpredictable.

Stamp duty

If you separate after living together and want to transfer the ownership of real estate or a registered vehicle from one domestic partner to the other or from joint names into one name, you do not have to pay stamp duty (see p.36).



11 death and inheritance

MAKE A WILL!

It is important to make a Will. A Will must be in writing and must meet legal requirements, e.g. being signed and witnessed in a particular way. If your Will isn't drawn up properly, it may not be valid. It is worth getting a lawyer to do your Will and it's not that expensive.

Once you have made a Will, keep it in a safe place and make sure someone else knows where it is.

It is possible for someone to challenge the Will if they believe that they haven't been left what they should have been. This is discussed on p.43. If you are worried about this, tell your lawyer.

A Will is . . .

a legal document that sets out who gets your property when you die. This includes real estate, money in bank accounts, personal possessions, car etc.

You can change your Will as often as you like. It is a good idea to review and perhaps update your Will regularly to take account of changes in your life.

Who has the right to see a Will?

After you die, anyone named in your Will, your parents, children and next of kin (see p.24) have the right to see the Will and make a copy. A same-sex partner who is living with you at the time of your death has the right to see your Will and have a copy.

What to include in your Will:

- ★ *Executors* – You need to name someone as 'executor' (you can appoint more than one). This can be anyone, including a 'beneficiary' (someone you leave property to). The executor's job is to make sure your wishes are carried out. This means getting together the assets, paying off any debts, and then distributing the property to the beneficiaries, according to the terms of your Will.
- ★ *Property* – It's important to make provision for all your property – including real estate, money, shares, life insurance policies, superannuation benefits and personal property. This is because anything not specified in your Will or not validly allocated under your Will is dealt with under intestacy laws as if you died without a Will (see p.41).
- ★ *Children* – If you have children under 18, you can appoint someone to be their guardian if you die. This is called a 'testamentary guardian'. It is particularly important for a non-biological parent (see p.35).

FUNERAL ARRANGEMENTS

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

If you're going to include funeral details in your Will, make sure you tell someone, especially your executor.

The executor named in the Will has the right to make funeral arrangements. If there's no Will, then the next of kin has this right. If you have the right to arrange a funeral you can also decide where the person is buried.

As the next of kin could be a 'blood relative' and not a same-sex partner, this highlights the importance of making a Will naming your same-sex partner as executor – particularly if you think there will be any conflict with your other relatives.

IF THERE ISN'T A WILL

If someone dies without a valid Will, it is called an intestacy – the deceased person is said to have 'died intestate'. Their assets will be divided up according to a legal formula in the *Administration and Probate Act 1958* (Vic) (see 'Who inherits if there's no Will', p.43).

Position of same-sex partner

Same-sex partners have primary inheritance rights. This only applies to a 'domestic partner' who was living with the deceased person as a couple on a

genuine domestic basis at the time of the death – but they must have been living together for at least two years before death. This applies to a death after 8 November 2001.

A domestic partner who wasn't living with the deceased or who had been living with them for less than two years does not have primary inheritance rights, but has the option of a family provision claim (see p.43).

Time spent in a hospital or nursing home does not break the period that the partners are considered to have been living together.

If the deceased person had no children . . . their domestic partner inherits all their property – unless the deceased person also had a spouse, in which case the domestic partner may have to share their entitlement with the spouse (see 'If there is a same-sex domestic partner AND a spouse', p.42).

If the deceased person had children . . . their domestic partner (and spouse if there is one, see p.42) inherits the first \$100,000, the personal property and one-third of what's left (plus the right to acquire the deceased person's interest in their shared home within three months). The children inherit the remaining two-thirds in equal shares.

Property in joint names

If property is in joint names (as 'joint tenants', see p.37), the survivor automatically inherits it, regardless of

whether there's a Will. This applies also to joint bank accounts. Joint property is not subject to the intestacy rules.

Shared home owned solely by deceased

The surviving domestic partner has the right to acquire the deceased person's interest in their shared home at its value at the date of death. They have three months to decide.

Their share in the rest of the estate will be reduced by the value of the property or they may have to pay money to the estate if there is a difference.

Position of children

The biological and adopted children of a person who dies without a Will have inheritance rights.

The question of who is considered a biological child can be complicated in relation to same-sex relationships:

- ★ *anonymous sperm donor* – the child has no right to inherit from the father's estate.

- ★ *known sperm donor who's on the Birth Certificate as the father* – the child has inheritance rights.

- ★ *known sperm donor who's not on the Birth Certificate* – the child has no inheritance rights under intestacy laws, but can make a family provision claim (see p.43).

- ★ *non-biological parent* – the child has no inheritance rights under intestacy laws, but can make a family provision claim (see p.43).

If there is a same-sex domestic partner AND a spouse

If the deceased person had a spouse, the same-sex domestic partner may have to share their partner entitlement with the spouse, depending on how long the domestic partner had been living with the deceased person.

A divorced spouse is generally not entitled to anything – however, if a couple were separated, but not divorced, the separated spouse may inherit.

The *Administration and Probate Act* sets out a table for how the estate will be shared:

Period that domestic partner had lived with the deceased person before their death	Spouse's entitlement to partner share	Domestic partner's entitlement to partner share
less than 4 years	two-thirds	one-third
4 years or more, but less than 5 years	half	half
5 years or more, but less than 6 years	one-third	two-thirds
6 years or more	none	all

This highlights the importance of putting your affairs in order by making a Will.

Who inherits if there's no Will – in order of priority

1. Partner

'Partner' means a domestic partner or spouse (see table, p.42).

2. Children

If there is a partner, the children get part of the estate, depending on its size (see p.42). If there is no partner, the children get equal shares in the whole estate. For who are considered 'children', see p.42.

3. Other relatives

Grandchildren, parents, brothers and sisters, grandparents, nieces and nephews, uncles and aunts, great-grandparents, remoter next of kin, e.g. cousins, great-nephews, great-nieces.

3. No surviving relatives

If there are no surviving blood relatives, all the property goes to the State government.

FAMILY PROVISION – CHALLENGING A WILL OR INTESTACY

A Will can be challenged if it doesn't include someone 'for whom the deceased had responsibility to make [adequate] provision'.

A same-sex partner has the same rights as any other family member or spouse to challenge a Will or apply to inherit if there is no Will and they don't fit the definition of 'domestic partner' under the *Administration and Probate Act* (see p.41).

Claim by same-sex partner

It isn't essential to have been financially dependent on the deceased person to make a family provision claim. But to be successful, you would have to show that you had a moral and legal claim on the deceased for support. The court would consider a number of factors, including:

- ★ the nature and length of your relationship,
- ★ how many other people are also entitled to a share of the estate,
- ★ the financial resources of all those people,
- ★ the age of the applicant,
- ★ any physical or mental disability of the applicant,
- ★ the size of the estate.

The court is not concerned with creating equal shares – rather, they look at whether the deceased had an obligation to provide some financial support to you.

There have been no court decisions about same-sex couples since these provisions became law in 1998. However, a same-sex partner who has been living with the deceased person is generally in a good position to make a claim.

Claim by children

Once children turn 18 there is not necessarily any obligation on the part of a parent to support them.

Any child for whom the deceased had assumed some financial responsibility can apply. This means that the children of a known sperm donor and of a non-biological parent may be able to make a claim.

Claim by family

A relative of the deceased can challenge the Will. However, kinship alone is not enough for the claim to be successful – they would also have to show that the deceased ought to have made adequate provision for them in the Will.

The family of a person who dies without a Will can also make a claim against a same-sex partner who has primary inheritance rights under the *Administration and Probate Act*.

What to do

To make a claim you need to apply to the Victorian Supreme Court. These claims can take a long time and are expensive. The legal costs usually come out of the estate.

Get legal advice as soon as possible after the person's death if you are considering a claim, as it must be made within six months from when probate of the estate is granted.

Doing this after your loved one dies is stressful and will inevitably reduce the amount of money in the estate. It is much better for people to make a Will.

DEATH COMPENSATION

If someone dies as a result of a work injury, accident or crime, their close family members and dependants may be able to claim compensation.

Whether a same-sex partner is eligible depends on the particular area of law – for some kinds of compensation you have to have been financially dependent on the person who has died.

You may be able to make a common law claim for damages as well, e.g. if there has been negligence.

A person whose same-sex partner has been killed as a result of a crime is eligible for financial assistance without showing financial dependence (see p.14 for contact details).

To find out whether you are eligible for compensation, get legal advice.



EMPLOYMENT

Discrimination

Discrimination in the workplace is discussed on p.12.

Conditions of employment

Most employees in Victoria are entitled to the minimum conditions set out in the federal award that covers their occupation. They may get extra benefits from an enterprise agreement. Check both your award and any relevant agreement or individual contract to work out your entitlements. Some workplaces have much better agreements than others and do recognise same-sex relationships.

About 20% of the Victorian workforce are not covered by an award. They get the minimum conditions set out in Schedule 1A of the *Workplace Relations Act* 1996 (Cth) – these are less favourable than those set out in federal awards.

After negotiations between the State and federal governments, new legislation was passed in 2003 to give these workers the same minimum conditions as those on federal awards. From 1 January 2005 most federal awards will be declared Common Rule Awards which means that they will cover all employees in a particular industry.

For more information about this contact Job Watch on 9662 1933, your union or Wageline on 1300 363 264.

Employee benefits

Leave is a core entitlement of employees. Gay and lesbian employees do not always get the same benefits as other employees.

- ★ *Parental leave* – any woman who gives birth to a child is entitled to maternity leave, but her same-sex partner is not usually entitled to ‘paternity’ leave.
- ★ *Personal/carer's leave* – all federal awards provide for personal leave to care for sick family members, i.e. immediate family and household members (but not housemates) – this specifically includes same-sex partners. Employees not covered by a federal award (see above) are not entitled to this leave.
- ★ *Bereavement/compassionate leave* – gay men and lesbians are not entitled to special leave on the death of a same-sex partner, under federal awards or the *Workplace Relations Act*. However, the relevant enterprise agreement or individual contract may allow for this.

Some jobs carry other benefits, such as relocation expenses, travel for spouses or health insurance for family members. These extra benefits are not included in awards and they vary from job to job. You may be able to negotiate these conditions.

If you are covered by an award, you should ask about your entitlements. These may be more generous than you expect. Many unions are in the process

of renegotiating awards or enterprise agreements to remove discriminatory provisions and provide better conditions for lesbian and gay employees.

Where to get help

Trades Hall Council
Women's and Equity Officer
9659 3511

UNITE
support and resources for gay, lesbian,
bisexual or transgender union members
9659 3511

SUPERANNUATION

Superannuation is controlled by federal legislation, although State public sector superannuation schemes are often also controlled by their own separate Victorian Acts (see p.47 for Victorian reforms).

What superannuation death benefits can be paid?

Most superannuation funds pay lump sums on a member's death. However, some funds pay annuities and others, such as government funds, pay 'reversionary' pensions to surviving dependants.

Who can benefit from your super?

The only people who can receive money from your super after you die are:

- ★ your spouse (a legal or de facto spouse of the opposite sex only),

- ★ your children, including step-children and adopted children, but not the children of your same-sex partner,
- ★ your financial dependants,
- ★ your nominated preferred beneficiary (restrictions apply, see p.47),
- ★ your estate or,
- ★ someone who is deemed to be in an 'interdependency' relationship with you (see below).

In practice, this means that your same-sex partner can receive a pay-out from your super fund when you die if:

- ★ they qualify as having been in an 'interdependency' relationship with you or as your financial dependant, OR
- ★ they inherit from your estate, provided you have made a Will, OR
- ★ you nominate them as your preferred beneficiary and it is a binding nomination.

What is an interdependency relationship?

Since mid-2004 the definition of 'dependant' in federal superannuation laws has been extended to include a person who is in an 'interdependency' relationship. An interdependency relationship is a close personal relationship between two people, including same-sex partners. You have to live together and provide domestic, personal or financial support for the other person. This reform means that more same-sex partners are guaranteed to benefit from their partner's superannuation if the partner dies.

However, it does not include same-sex partners in the same category as heterosexual de facto or domestic partners.

Who is a financial dependant?

If you do not qualify as having an interdependency relationship, whether your superannuation fund will pay your partner benefits as a 'dependant' depends on how the fund trustees assess 'financial dependence'.

Financially dependent means wholly or partly dependent. Every case is different and each fund has its own way of working out whether financial dependence exists. Some funds are satisfied with an extremely low level of dependence. For example, in one case the payment of \$30 a week for board was enough for a finding that partial dependence existed.

Most of the big 'industry' funds adopt a sympathetic and sensible approach to death benefit claims.

Note that even if the fund trustees accept your same-sex partner as a 'dependant', other dependants, such as a former spouse or children, may also be entitled to claim some or all of the death benefit. Most reversionary pensions are only payable to surviving heterosexual spouses or children.

Good news for Victorian public sector employees

Legislative changes to a number of Victorian public sector superannuation schemes mean that your same-sex 'domestic partner' can benefit from your superannuation when you die, provided you were living together as a couple on a genuine domestic basis at that time. This is because, like a spouse, your partner is automatically considered to be your dependant, and no longer has to prove financial dependence. The changes affect members of the State Employees Retirement Benefits and the State Superannuation Schemes and of the schemes of the Country Fire Authority, the State Emergency Services, Parliament, and Transport services.

Status of your 'nominated preferred beneficiary'

You can nominate one or more preferred beneficiaries when joining your super fund. You can change these nominees at any time by writing to your fund. However, this is not necessarily binding on fund trustees. It depends on which fund you belong to.

Following a 1999 amendment to the federal superannuation laws, funds can choose to be bound by a member's nomination, but only if the nominees are:

- ★ a member's legal personal representative (i.e. the executor of their estate), and/or
- ★ dependants of the member.

There are a number of nomination and reporting requirements for binding nominations. Funds that agree to be bound by a member's nomination must follow the member's wishes even if there are competing claims from other non-nominated dependants, such as a former spouse. However, not many superannuation funds have adopted binding death benefit nominations – you can contact your fund and ask.

In funds where the trustees are not bound by a member's nominations, the trustees have a discretion as to whom to pay the benefit, although they may take the member's nominations into account.

Taxation

Superannuation death benefits paid to a deceased's dependants are tax-free up to a certain limit (currently over \$500,000). In contrast, death benefits paid to non-dependants (e.g. estate beneficiaries) are taxed at either 20% or 30%.

Therefore there can be significant tax savings if your surviving same-sex partner is recognised as a dependant (whether as a financial dependant or as having had an interdependency relationship), rather than inheriting your superannuation through your estate.

What to do

- ★ Nominate your same sex-partner as your beneficiary if you wish to maximise their entitlements.
- ★ Write to your fund to find out if they have binding death benefit nominations.
- ★ Update your nomination and your Will to reflect any changes in your circumstances.
- ★ Get financial advice on the implications for your partner of choosing between a once-off lump-sum and a pension on retirement and also the taxation implications of a death benefit pay-out.
- ★ If you are able to choose which super scheme you join, shop around and find out which funds will treat your nomination of beneficiaries as binding. Also consider which funds take the broadest view of the meaning of 'financial dependant'.

Where to get help

ATO Super Helpline

13 1020

www.ato.gov.au/super

Consumer Law Centre

9629 6300

Superannuation Complaints Tribunal

The tribunal deals with complaints from fund members or beneficiaries about unfair or unreasonable conduct or decisions. Before you lodge a complaint you must try to resolve the problem with the fund first. For more information, call 13 14 34.

TAXATION

Income taxation is covered by federal law. It does not recognise lesbian or gay couples.

The Australian Tax Office does not apply the dependent spouse rebate to a financially dependent same-sex partner. Nor are other tax concessions, such as the concession for superannuation contributions for a dependent spouse, available to same-sex couples.

SOCIAL SECURITY

Under the *Social Security Act 1991* (Cth), which is a federal law, a 'couple' means people of the opposite sex who are married or in a marriage-like relationship.

This means that your same-sex partner's income isn't taken into account by Centrelink when calculating your benefits.

A young person under the age of 16 is considered the dependent child of an adult who is responsible for their day-to-day care and welfare. In some cases a non-biological parent who has children living with them can get a supporting parent benefit. When you lodge your application you will be asked to provide details of your relationship with the child and you may be asked for supporting documentation. Each case is assessed on its merits.

If you are a student, you cannot prove 'independence' for Austudy by living in a same-sex relationship, unlike a heterosexual couple.

Where to get help

Welfare Rights Unit
9416 1111

DISCRIMINATION

It is unlawful to discriminate against someone because of their sexual orientation or marital status (including living in a same-sex relationship) when providing goods and services. This includes medical treatment and other health services. (See Discrimination, p.8.)

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:

Health Services Commissioner
8601 5200
1800 136 066 (country callers)
www.health.vic.gov.au

ACCESS TO RECORDS

Under the *Health Records Act 2001 (Vic)* a person has the right to access their own health information held by a health service provider (public or private) unless:

- ★ the access would pose a serious threat to the life or health of any person, or
- ★ the information was given in confidence by another person with a request that it not be communicated to the individual concerned.

If access is denied, you can complain to the Health Services Commissioner.

Disclosure to domestic partner

In general, your health information must not be disclosed unless you consent. New laws have given same-sex couples rights in this area.

If you become incapable of deciding whether to give consent, a health service provider can disclose health information about you to 'an immediate family member'.

Under the *Health Records Act*, this includes: a parent, child, sibling, spouse and domestic partner. In this context a domestic partner is someone who you are in a relationship with as a couple, whether you are living together or not.

AUTHORISING MEDICAL TREATMENT

The need for informed consent

Every person has a right to decide what should be done to their body. This is why hospitals and doctors must have consent for medical treatment, except in a life-threatening emergency.

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.

Right to refuse medical treatment

Everyone has a right to refuse treatment. In addition you can sign a Refusal of Treatment certificate for a specific condition. Your partner or next of kin cannot refuse treatment for you unless you have given them an Enduring Power of Attorney (Medical Treatment). (See p.7.)

Becoming incapable of consent – who can decide for you

If you become incapable of consenting to medical treatment, someone else will need to make treatment decisions for you. You can take charge of this process before becoming incapacitated by appointing an Enduring Power of Attorney (Medical Treatment) or an Enduring Guardian (see p.6–7).

Otherwise the law will determine who can make decisions for you.

Permanent incapacity

The *Guardianship and Administration Act 1986* (Vic) sets out who can consent to medical treatment on behalf of a 'disabled person'. That means a person who is incapable of giving informed consent to a proposed treatment or is unable to communicate their consent, regardless of whether this is a temporary or permanent state.

If no one has been formally appointed to consent to treatment for you, consent can be given by (in order): your domestic partner or spouse, your

primary carer, your nearest relative. In this context, your 'domestic partner' need not be living with you (see definitions, p.25).

If the hospital refuses to recognise you as the domestic partner, you can make a complaint about discrimination on the grounds of marital status with the Equal Opportunity Commission (see p.8).

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 same-sex partner.

If you are denied access to your partner in a public hospital, contact the Nurse Manager or the Patient Representative (employed as an advocate for patients). If unsuccessful, you can complain to the Health Services Commissioner (see p.50). Also, denying access may amount to unlawful discrimination (see p.8).

If you are acting as a sick person's Enduring Guardian or have their power of attorney you have automatic access to them in hospital. (See Authorise others to act for you, p.6.)

HIV/AIDS

Discrimination

It is unlawful to discriminate against someone on the basis of their actual or presumed HIV status, in employment, education, accommodation, the provision of goods and services, clubs and their membership, sport and local government (see p.9).

Disclosure of HIV status

You do not have a general legal obligation to tell people about your HIV status. However, you may need to disclose your status to sexual partners so that you don't place them unknowingly at risk, or to avoid committing an offence relating to transmission of HIV. (See p.54.)

At work

You do not have to tell anyone at work about your HIV status. Your employer has an obligation to provide you and your co-workers with a safe working environment by setting up work practices that prevent the occupational transmission of HIV.

Your co-workers have a right to accurate information about HIV transmission, but they do not have a right to know the HIV status of others.

It is unlawful for your employer to ask for information about your HIV status that could be used for discriminatory purposes.

If disclosure of your status has led to discrimination, you can complain to the Equal Opportunity Commission (see p.10).

Insurance

An insurance company can legally ask for information or an HIV test as part of their risk assessment. However, it may be discriminatory for them to refuse cover or reduce your cover on the basis of your status or your membership of a high-risk group (see also p.10).

Information about your HIV status must be kept confidential (see Privacy, p.53).

Health Insurance

Health insurance is available to same-sex couples, but this is at the discretion of the insurance provider. This does not provide legal recognition of the relationship. Always ask if your health insurance providers include same-sex couples in their products.

Doctor-patient confidentiality and reporting of information

HIV/AIDS is one of many infections which must be reported to the Department of Human Services to reduce the public health risk.

Information is recorded and passed to the department about HIV/AIDS tests and about each confirmed case of HIV/AIDS. Individuals are not named in these reports, which are coded using initials and date of birth.

In any follow-up by the department, the person who has tested HIV positive remains anonymous, and doctor-patient confidentiality is maintained.

Privacy

Under the *Health Act* a person who finds out, through providing you with any type of service, that you have been tested for HIV or that you are HIV positive must take reasonable steps to protect your privacy.

If they fail to do so, you can report this to the Department of Human Services, which may refer the matter to the relevant professional body. If your complaint is about a health service provider you can contact the Health Services Commissioner (see p.50).

Right to closed court hearings

Court and tribunal hearings can be closed if the court thinks that information about someone's HIV status will be disclosed during the hearing and that this could have a negative effect on them. The court can also restrict publication of information about the proceedings.

Anyone breaching such a court order can be prosecuted and fined under the *Health Act*.

Testing

If you decide to be tested for HIV/AIDS, the person testing you must make sure that you have been counselled by a qualified and trained person about the

possible results, and the medical and social consequences of being tested.

Your request for an HIV test and a blood sample will be passed on by your doctor to a testing service. Your request is coded so that you cannot be identified from it but the doctor can still link it to their records.

If the test results are positive, you must be given the results in person by a doctor or trained counsellor. They must give you information about the medical and social consequences of the virus.

State's powers

The Department of Human Services has the power to take action against individuals to limit the spread of HIV/AIDS and other infectious diseases.

If the department believes that a person has or is likely to contract an infectious disease and is likely to pass it on and that there is a serious risk to public health, the department can (in writing):

- ★ order the person to be examined and tested for the infection,
- ★ impose restrictions on the person's behaviour and movements,
- ★ isolate and detain the person.

If tests show the person has the infection, the department can also order counselling. Note that these powers apply to a wide range of infections. To date they have been used rarely in relation to HIV/AIDS.

Offences relating to transmission of HIV/AIDS

It is an offence under the *Health Act* to knowingly or recklessly infect another person with an infectious disease.

The maximum penalty for this offence is a \$20,000 fine. Note that the Department of Human Services is unlikely to charge a person with this offence except as a final sanction, and there have been few prosecutions under the *Health Act* to date.

It is a separate indictable (serious) offence under the *Crimes Act* to:

- ★ intentionally cause another person to be infected with HIV (maximum penalty 25 years jail),
- ★ recklessly engage in conduct that endangers another person's life (maximum penalty 10 years jail) or that places them in danger of serious injury (maximum penalty 5 years jail).

Where to get help

HIV/AIDS Legal Centre

free legal advice and referral to people affected by HIV/AIDS

9863 0444

1800 622 795 (country callers)

People Living with HIV/AIDS

9865 6772

www.gaynet.com.au/plwha

Victorian AIDS Council

Gay Men's Health Centre

9865 6700

www.vicaids.asn.au

AIDSline

9347 6099

1800 133 392 (country callers)

www.aidshep.org.au

Access Information Centre,

Alfred Hospital

9276 6993

www.accessinfo.org.au

Disability Discrimination Legal Service

advocacy for people with disabilities

9689 8011

1300 882 872 (country callers)

9689 8066 (TTY)

www.ddls.org.au

Positive Women

support and advocacy for women with

HIV/AIDS by women with HIV/AIDS

9276 6918

www.positivewomen.org.au

INFORM Victoria

online resource guide, includes health, counselling and support, finance, housing, transport, legal issues – also in print from HIV/AIDS agencies

www.inform.webcentral.com.au/



Victoria Legal Aid

www.legalaid.vic.gov.au



VICTORIAN
GAY AND LESBIAN
RIGHTS LOBBY



Law
Institute
Victoria


Victoria Law Foundation